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Best interests of the child: legal and social analysis of shared custody in Peru

Interés superior del niño: análisis jurídico y social frente a la tenencia compartida en el Perú

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Abstract
The research aimed to analyze the legal and social approaches that ensure that shared custody of children effectively responds to the best interests of the child under Peruvian law. To this end, a qualitative methodology was employed based on a documentary review of the systematic legal literature on the topic, utilizing document, content, and summary analysis techniques to extract and synthesize relevant information. Sources were selected from indexed databases and relevant case law. In addition, judicial and prosecutorial experts were consulted, providing valuable information based on their experience to address the problem at hand. The results demonstrate that the principle of the best interests of the child is a cross-cutting principle in the protection of children's rights, constituting not only a legal principle but also a right and a procedural rule. Law No. 31590, which regulates shared custody, aims to guarantee responsible and balanced parenting, harmonizing the custody regime with this principle. In conclusion, the study highlights that the best interests of the child must guide every decision affecting them to ensure their overall well-being. Furthermore, Law No. 31590 represents a significant regulatory advance by establishing shared custody as a general rule, promoting parental co-responsibility and strengthening family ties, which are essential for the child's social and emotional development.

Keywords: interest, best interests, child, custody.

Resumen
La investigación tuvo como objetivo analizar los enfoques jurídicos y sociales que aseguran que la tenencia compartida de los hijos responda efectivamente al interés superior del niño en la legislación peruana. Para ello, se empleó una metodología cualitativa basada en el examen documental de la literatura jurídica sistemática sobre el tema, utilizando técnicas de análisis documental, de contenido y de resumen para extraer y sintetizar la información relevante. Las fuentes se seleccionaron de bases de datos indexadas y jurisprudencia pertinente. Además, se contó con la opinión de expertos judiciales y fiscales, quienes aportaron información valiosa desde su experiencia para abordar la problemática planteada. Los resultados evidencian que el principio del interés superior del niño es un eje transversal en la protección de los derechos de la infancia, constituyéndose no solo como un principio jurídico, sino también como un derecho y una norma procedimental. La Ley N° 31590, que regula la tenencia compartida, tiene como propósito garantizar una crianza corresponsable y equilibrada, armonizando el régimen de custodia con dicho principio. En conclusión, el estudio resalta que la aplicación del interés superior del niño debe orientar toda decisión que le afecte para asegurar su bienestar integral. Asimismo, la Ley N.º 31590 representa un avance normativo significativo al establecer la tenencia compartida como regla general, promoviendo la corresponsabilidad parental y fortaleciendo los vínculos familiares, fundamentales para el desarrollo social y emocional del menor.

Palabras clave: interés, superior, niño, tenencia.

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Introduction

The best interests of the child is a fundamental legal institution in the field of childhood, not only due to its broad interpretation in resolving conflicts involving minors but also because this guiding principle requires various state entities to prioritize the respect for the rights of children and adolescents, as well as to ensure their full enjoyment.

Initially regulated in the Declaration of the Rights of the Child of 1959, this principle establishes that individuals in this developmental stage should enjoy special protection, opportunities, and services that allow them to develop healthily—mentally, physically, morally, spiritually, and socially—under conditions of dignity and freedom. Subsequently, the Convention on the Rights of the Child (CRC) of 1989 reaffirmed this principle, stipulating in Article 3 that all measures adopted by institutions concerning children must primarily consider their best interests. Thus, the principle acquires a mandatory character, and the rights recognized therein are strictly binding for the States Parties (Valencia, 2018).

In line with this, General Comment No. 14 from the Committee on the Rights of the Child clarified that the best interests of the child is not only a principle but also a right and a procedural norm, guiding that among the different possible normative interpretations, the one ensuring the most effective protection of the child's interests should be adopted.

Therefore, the term “best interests” must be understood as the acknowledgment of the authentic and true power of the child to claim the satisfaction of their rights, which primarily reinforces the rights of children (Grossman, 1998).

In Peruvian legislation, this principle is enshrined in the Code of Children and Adolescents (Código de los Niños y Adolescentes, 2000), in its Preliminary Title IX, which establishes that respect for children's rights must be a primary consideration in measures adopted by institutions regarding minors. Additionally, Law No. 30466 regulates and sets parameters for the proper application of this principle, emphasizing its universal, indivisible, and interdependent nature, recognizing children as holders of rights.

In the context of shared custody, the principle of the best interests of the child plays a central role, as its invocation is essential for judges to ensure that judicial decisions effectively respond to the minor's welfare, not only during the process, hearings, and procedures but also in the adoption of resolutions themselves. This principle legitimizes the shared custody model, demanding that its application fosters the strengthening of emotional and relational bonds between children and both parents, thereby promoting a comprehensive and balanced development in emotional, social, and psychological spheres.

Thus, shared custody, in accordance with this principle, must ensure equitable participation of both parents in parenting processes, promoting an environment of mutual respect, cooperation, and commitment to responsible parenting. Consequently, this model should be conceived as a shared responsibility in the upbringing and support of the minor during their development and growth. As noted by Vega (2023), in potential custody controversies, the judge must guide their decisions by prioritizing respect for children's rights, ensuring stability and quality in family relationships as essential elements for harmonious development.

In Peru, child custody has undergone significant procedural reform with the enactment of Law No. 31590, which responds to social changes in family dynamics. According to Ampuero et al. (2024), this regulation seeks to balance the responsibility and participation of parents in the comprehensive development of their children, emerging as a response to the need for equitable parenting. However, it is essential that in practice, this regulation genuinely benefits the best interests of the child, which requires analyzing and understanding the particular context of each family, considering the diversity of their configurations, so that judicial decisions primarily respond to the physical and emotional well-being of the minor rather than merely to the wishes of the parents.

Based on the above, the legal problem posed is: How can it be ensured that shared custody effectively responds to the best interests of the child, both in the legal and social context?

The justification for this study is based on the extensive existing legal literature—articles, studies, books, and jurisprudence—and the practical need to verify that shared custody adheres to the guiding principle of the best interests of the child. Socially, the research will provide solutions to the posed problem and contribute to knowledge in the field.

Consequently, the general objective focused on analyzing the legal and social dimensions that ensure the effective implementation of shared custody, in accordance with the best interests of the child. To achieve this, its application was examined within the national and supranational legal framework, as well as the social factors influencing its practice and the effects this institution generates on the comprehensive well-being of the minor.

Finally, the hypothesis posits that shared custody effectively responds to the best interests of the child when there is an appropriate application of the legal framework that aligns with the social context of children and adolescents.

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Methodology

The topics addressed were developed following a qualitative legal approach, characterized by the collection of data without numerical measurement (Hernández et al., 2014). Based on this foundation, a rigorous analysis of the applicable regulatory framework was conducted, employing the technique of documentary review. This technique involved a systematic and detailed examination of specialized literature on family matters, including doctrines, scientific articles from indexed databases, academic journals, and relevant jurisprudential sources.

Additionally, the opinions of experts in the field were incorporated, enriching the study's perspective with their judicial and prosecutorial experience. To interpret and systematize the content of the norms, legal analysis, hermeneutic, and dogmatic methods were used (Rojas, 2019), allowing for optimal practical application of the findings.

Thanks to this methodological approach, a robust argumentative foundation was constructed, aimed at formulating pertinent legal responses to the identified issues. The research design was both descriptive and dogmatic in nature (Hernández et al., 2014). Complementary techniques included content analysis, data extraction, and summarization (Ñaupas et al., 2018).

Results

The best interests of the child: nature and scope

The principle of the best interests of the child initially developed legally in the Declaration of the Rights of the Child of 1959, which establishes that children should enjoy special protection, as well as opportunities and services that allow them to develop normally and healthily, in conditions of dignity and freedom.

Subsequently, in 1989, this principle was incorporated into the Convention on the Rights of the Child (CRC), which in Article 3 states that all measures adopted by institutions regarding children must primarily consider their best interests. Thus, its application becomes mandatory in any process involving minors, and compliance with this principle is fundamental for States Parties (Valencia, 2018).

Similarly, the Committee on the Rights of the Child expanded on this topic through General Comment No. 14, which emphasizes that the best interests of the child are not only a principle but also a right and a procedural norm. This condition allows for the selection of the interpretation that most effectively satisfies the child's interests among various possible normative interpretations. Furthermore, decisions based on this principle must include the reasoning of the judge and the criteria by which they weigh children's interests.

Advisory Opinion OC-17/2002 also addresses this aspect, noting in paragraphs 54 and 60 that children possess the same rights as any human being, in addition to special rights derived from their particular condition, which require adequate care to ensure the prevalence of their best interests.

From these postulates, it can be highlighted that the best interests of the child, as established in international regulations, serve a protective function; that is, they act as a mechanism for safeguarding children's rights, including equality, autonomy, freedom of expression, the right to a family, and the right not to be separated from it, compliance with which is a requirement for justice systems (Cillero, 1994).

Moreover, the Inter-American Court of Human Rights (IACHR), through its diverse jurisprudence on childhood, has underscored the nature, scope, and importance of this principle. For example, in the case of "Street Children" vs. Guatemala, paragraph 196 establishes that children should not be subject to discrimination, nor deprived of their family environment or the right to an adequate standard of living.

In the ruling of the case González and others ("Campo Algodonero") vs. Mexico, paragraph 408 emphasizes the primacy of the best interests of the child, conceived as the requirement to ensure full respect for all children's rights. This priority is a state obligation that guides the interpretation of other rights recognized in the Convention.

Similarly, the case of Fornerón and daughter vs. Argentina stresses in paragraph 138 that the state must adopt protective measures that children, adolescents, and minors require due to their special condition. Likewise, the ruling in the case of Pacheco Tineo Family vs. Bolivia, in foundation 219, reaffirms that the CRC imposes on the state the obligation to respect and guarantee the rights recognized in international instruments in favor of children.

Consistently, in the case of Velis Franco and others vs. Guatemala, foundation 133 determines that the responsibility to adopt special protective measures lies not only with the state but also with the family, community, and society.

Finally, in the jurisprudence of the case Rochac Hernández and others vs. El Salvador (paragraph 107), it is recognized that the norms contained in the Convention are part of the corpus iuris of childhood. Similarly, in the cases of Atala Riffo and Niñas vs. Chile (paragraph 109) and Ramírez Escobar and others vs. Guatemala (item

153), it is noted that in situations of care and custody of minors, an assessment based on specific parental behaviors is necessary.

From the above, it can be inferred that the IACHR has developed a solid and coherent line of jurisprudence that reaffirms the centrality of the principle of the best interests of the child as an essential foundation in the protection of children's rights. Through various cases, it has established that children and adolescents have the right not only to the same human rights as any person but also to special protections derived from their status as developing individuals. This configuration generates obligations for the state to guarantee a suitable family environment, free from discrimination, ensuring a dignified standard of living for the child; an environment where the best interests of the child must guide all decisions and measures affecting them, implying reinforced protection of their fundamental rights. Similarly, this responsibility also falls on the family and society. This position aligns with Santamaría (2018), who argues that preserving the best interests of the child means protecting their integrity and dignity.

In this same vein, from an international legal perspective, the principle enshrined in the CRC arises to provide comprehensive protection for children's rights through regulations that ensure their adequate and optimal development during childhood, safeguarding the economic, emotional, and physical aspects that affect them (Ysla et al., 2023).

Additionally, Legerén (2014) points out that the establishment of this principle obliges the consideration of the child's interests as a primary concern, which is an unavoidable task for states that must be reflected in general and specific decisions involving children.

At the national level, the Peruvian Code of Children and Adolescents (CNA) incorporates the principle of the best interests of the child in its Preliminary Title, section IX, echoing the supranational mandate that respect for children's rights must be a "primary consideration" that no entity, community, or state can overlook.

Sangay and León (2023) reaffirm that this internal regulation seeks to guarantee minors and adolescents the protection, guardianship, and safeguarding of essential rights for their comprehensive development, also recognizing the obligations of both parents and the family unit, as well as the community, highlighting the importance of its application by society and the various involved entities.

Therefore, it is understood that this principle, as a legal guarantee, must be regarded as a public obligation aimed at ensuring the effectiveness of children's individual subjective rights (Freedman, 2005).

Complementarily, Herencia (2021) argues that within the Peruvian legal framework, through Regulation No. 30466, the best interests of the child maintain an abstract character, the content of which must be defined through interpretation in each specific case. This ensures that children are protected in their rights, including the opportunity to express their opinions and feelings, which must be considered according to their age and maturity in decisions affecting them.

In agreement, Paulette et al. (2020) state that this guiding norm imposes an unavoidable obligation on authorities to prioritize children's rights, respecting them and making decisions oriented toward their protection. Thus, it constitutes an essential safeguard and a superior criterion in any circumstance.

Finally, regarding its universal importance, Blanco (2023) contends that the best interests of the child are fundamental when making any decision that affects their vital development, being unavoidable and mandatory in all areas pertinent to them. Complementarily, Acosta (2017) notes that this principle should be understood as a guarantee and procedural guideline that prevails over other rights or considerations, while López (2015) points out that its true aim is to ensure the child's well-being.

Shared custody

This institution is based on the equality of rights that should prevail between both parents, primarily grounded in the principle of the best interests of the child. Through this principle, the child's right to receive love and care from their parents is recognized (Arrieta, 2012). Thus, shared custody allows for understanding that this arrangement offers significant advantages compared to the sole custody regime that predominated before the implementation of Law No. 31590. Under that system, only one parent had custody of the child, while the other had only visitation rights. However, this new approach, rooted in the best interests of the child, benefits both the minor and the adolescent by allowing them to enjoy the presence and support of both parents during their physical and emotional development.

Consequently, shared custody prioritizes the exercise of parental authority, which generally provides greater protection for the child's interests, fostering a balanced and optimal relationship between the child and both parents, while ensuring a more complete respect for the principle of equality (Gonzales, 2022). Additionally, within co-parenting, separated parents jointly assume the maintenance and basic needs of their children (Fernández, 2014).

The child's right to have a family

According to Castillo (2023), it is a fundamental right of children and adolescents to have a family, and family separation should only be considered an exceptional measure, valid only when it is the only way to ensure their well-being. The author emphasizes that minors possess fundamental rights that require a special approach from the family, the State, and society. Furthermore, to ensure the observance and protection of these rights, it is necessary to consider national and international regulations. In this regard, both frameworks agree that matters related to parental authority are not strictly limited to a parent's right but are much more complex, as they aim to ensure that the holder fulfills the functions derived from that right. Therefore, he argues that the best interests of the child is a principle that permeates the entire legal system, and in the event of potential conflicts between the rights of children and those of parents—such as in custody matters—the actions of authorities must be guided by the priority protection of children's rights, giving the best interests the most relevant consideration.

Complementarily, Santamaría (2018) underscores that the Convention on the Rights of the Child recognizes as a fundamental right the ability to maintain bonds and active coexistence with family members, particularly with parents, from whom children should receive the majority of their influences, as well as with extended family.

The best interests of the child in relation to shared custody

The implementation of Peruvian Law No. 31590, which establishes shared custody as the general rule, represents a procedural reform in the Code of Children and Adolescents (CNA). This regulation was created to adapt to new family dynamics. In this context, shared custody emerges as a response to parents' demands for an equitable distribution of parental responsibilities and a co-responsible participation in child-rearing (Ampuero et al., 2024). This model promotes the child's right to remain in contact with both parents after separation or divorce, without altering their lifestyle and routine.

Thus, it can be inferred that this framework is beneficial for the minor, as both parents maintain constant contact and a relationship with their children, jointly ensuring their health and well-being. In this way, they help mitigate the negative impact that separation and the deterioration of parental relationships could have on the child.

In this regard, the procedural reform aims to strengthen family bonds and promote the integral development of the minor. Therefore, this legal framework represents a significant advancement, as it modifies the former preference for granting custody to one parent and establishes that custody should be shared, reserving exclusive grants only for duly justified exceptional cases. Additionally, the legislation stipulates that co-parenting should preferably be agreed upon through conciliation, and only if consensus is not reached should judicial recourse to a family judge be sought.

Ampuero et al. (2024) also point out that shared custody operates effectively under the principle of the best interests of the child when there is a mutual willingness of the parents to maintain effective communication and cooperation to fulfill custody and obligations arising from parental authority. Conversely, in situations of severe conflict and breakdown of mutual respect, custody should be evaluated on a case-by-case basis to avoid decisions that could harm the minor.

Even though Law No. 31590 constitutes a significant procedural advance, it is crucial that the competent authorities consider each custody request primarily in light of what most favors respect for and the comprehensive protection of children's rights, i.e., the proper "invocation of their best interests." This requires a thorough understanding of the family's reality and dynamics, the environment in which custody will be exercised, and evaluating each situation not only from the legal system but also with support from the social sphere, integrating multidisciplinary teams of social workers and psychologists. Indeed, as Torres (2023) asserts, healthy development in the child must be promoted, with the supreme goal always being their dignity, which must be prioritized by the State.

In the context of Peruvian jurisprudence, this issue has been addressed in various rulings. For instance, in Cassation No. 4811-2021-Lima Norte, section 4.6 states that the family is the natural and fundamental nucleus of society, a space where every individual receives protection, forms their identity, and obtains their first experiences; it also recognizes their protection according to international instruments. Similarly, Cassation No. 1440-2018-Callao, in foundations 10 and 11, establishes that custody is an attribute of parental authority and a basic family legal relationship; it also implies a mutual right-duty between parent and child, being essential for the integral development of the minor. Furthermore, Cassation No. 4081-2019-Arequipa, in paragraph 3.6, asserts that custody is a right of the parents that must be harmonized with the best interests of the child to ensure a conducive environment for their development.

Likewise, Supreme Ruling No. 3767-2015-Cusco, in paragraphs 8 and 9, acknowledges the possibility of promoting shared custody when parents, despite being separated, continue to exercise it for the benefit of their

children. However, it emphasizes that in cases of blatant parental alienation, this modality should not be granted. In the same vein, the Constitutional Court of Peru, through STC No. 01665-2014-PHC/TC, in its foundation 16, maintains that any decision involving a minor must be made with them as a subject of rights.

Finally, from the semi-structured interviews conducted with experts, the following results were obtained:

Table 1
Results from expert interviews

Categories	Results
Legal aspects of shared custody	**Interviewee 1** (Family Prosecutor): It is regulated in the CNA, and its amendment indicated in Law No. 31590 guarantees that the child has the right to interact with both parents, promoting the well-being and development of the minor. **Interviewee 2** (Family Prosecutor): It is provided for in the CNA, in Article 81.
Social aspects	**Interviewee 1**: It is important for the child's social development, generating greater emotional bonding with the parents, who, in turn, assume the care of the children through good communication. **Interviewee 2**: It is very beneficial for the child, generating greater emotional bonding with both parents.
Psychological aspects	**Interviewee 1**: It has a positive impact on the child's emotional development. **Interviewee 2**: It is of great importance in the child's emotional development.
Changes in the judicial system	**Interviewee 1**: Monitoring by a multidisciplinary team. Conduct events aimed at parents about the benefits of shared custody. **Interviewee 2**: Monitoring by a multidisciplinary team. A special hearing should be convened to listen to the child after the issuance of the custody judgment or conciliation.

Note. This table presents the responses obtained from the interviews with experts

Both Interviewee 1 and Interviewee 2 indicated the existence of legal regulation regarding shared custody, emphasizing the principle of the best interests of the child. They noted that this regulation has emerged with the fundamental purpose of promoting the child's well-being by facilitating the continuity of a strong emotional bond with both parents, which positively impacts their overall development, both physical and emotional.

Discussion

The results affirm, from the conventional perspective of the Convention on the Rights of the Child (CRC), that the principle of the best interests of the child serves as a transversal axis in the protection of children's rights. This principle not only constitutes a legal foundation but is also recognized as a right and a procedural norm. According to Valencia (2018), this reflects a progressive strengthening of the protective approach toward childhood, a stance that aligns with Legerén (2014), who argues that this orientation is directed toward the comprehensive protection of children, in accordance with Santamaría (2018), who emphasizes its purpose of safeguarding children's integrity and dignity.

Supporting this assertion, the eight jurisprudences from the Inter-American Court of Human Rights (IACHR) cited are decisive in consolidating the best interests of the child as an essential guide in adopting measures related to childhood. These rulings reaffirmed that children and adolescents not only enjoy the same rights as adults but also, due to their particular condition as developing individuals, require enhanced protection. This protection imposes on States the duty to implement concrete, effective, and differentiated actions that ensure their overall well-being, a position also reflected in Advisory Opinion OC-17/2002, which underscores that, in

addition to being holders of the same rights as adults, children possess special rights derived from their condition, justifying the need for differentiated and adequate protection.

In this context, shared custody, established as the general rule in Peruvian Law No. 31590, assumes particular relevance. Indeed, its invocation is indispensable in this regulatory advance, as authors such as Paulette et al. (2020) and Blanco (2023) highlight that this norm imposes the obligation to guarantee children's rights in any decision affecting them. Regarding shared custody, Arrieta (2012) asserts that the minor has the right to receive love and care from both parents, and González (2022) points out that this relationship should be balanced, requiring a deep understanding of each event in the child's life dynamics and their family.

Additionally, the Peruvian jurisprudence cited in the results reaffirms that the family is the fundamental nucleus of society and that its protection is supported internationally. With respect to custody, the rulings emphasize that it constitutes a favorable measure for children, provided that there are no conflict situations or harmful behaviors toward the minor. Custody is recognized as a right-duty derived from parental authority, aimed at promoting the child's comprehensive development. This position converges with the opinions of judicial and prosecutorial experts in Peru, who agree that shared custody should prioritize the best interests of the child. Both Interviewee 1 and Interviewee 2 expressed that shared custody generates a beneficial impact on the social and emotional development of the minor by fostering strong emotional bonds with both parents, who are active participants in their growth.

Finally, the findings indicate that, although shared custody represents a significant advancement in parental co-responsibility, there is a strong consensus—from doctrine, current regulations, jurisprudence, and specialized opinions—that its practical application must prioritize the guarantee of the best interests of the child. Therefore, a careful and contextualized analysis of each particular case is required before making a ruling, always keeping the child's overall well-being at the center.

Conclusions

The study highlights that Peruvian legislation incorporates, as a fundamental consideration, the need to prioritize the best interests of the child in any process involving them, fully guaranteeing their rights and avoiding any behavior that may jeopardize their well-being.

Regarding Law No. 31590, its implementation represents a significant advancement within the Peruvian legal framework by establishing shared custody as the general norm. This legal change seeks to balance the responsibilities of both parents in raising their children, promoting equitable roles that protect and support the child during their growth and development.

Therefore, it is emphasized that, in practice, the application of the principle of the best interests of the child is essential as a guarantee for the effective protection of their rights, particularly highlighting the importance of strengthening their family ties and fostering their comprehensive development, both emotional and in conditions that permanently ensure their well-being.

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