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The Iachr and the New Parameters for the Protection of Rights of a Family Nature

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ABSTRACT: *The text develops jurisprudential cases of the IACHR that deal with issues of a family nature, in which the application of the "Law of the State party" of the Convention is mainly evaluated against the scope of the American Convention, decreeing that these have been breached by said States.As a consequence of this situation, it is that the main problem is observed: the Law is in a negative gap facing the development of the social conditions in which families develop and therefore the need arises to positively value the postulates of the IACHR for its applicability in national jurisdictional practice in matters of the specialty of Family Law.*

KEYWORDS: *Family, human rights, international law and protection of human rights*

I. INTRODUCTION

Over the last forty years, throughout the Latin American region, changes in the social, economic, cultural, and political spheres have been so complex and varied that they have practically affected all spheres of daily life for the human person.These changes have influenced in a very particular way in the field of the development of the Family and the specialty of Family Law itself, and therefore our intervention.

In this context, we consider that changes of a social, cultural, economic and political nature have been reflected in a highly specific context: the contradiction of "social events" vis-à-vis "normative regulation" and as a result of this situation , The jurisdictional systems of the region have acted in a "traditional" way, generating the necessary intervention of an instance of supra-national order: in this way, the intervention of the Inter-American System for the Protection of Human Rights with the Inter -American Commission on Human Rights and the Inter-American Court of For the last ten years, Human Rights have been special and particular in the area of protection of rights linked to the development of the family as an institution.

To do this, in this paper, we will initially analyze the contradiction that is generated in the jurisdictional field in the member states of the Organization of American States when analyzing the "formality" of the legislation when it is evaluated based on the conditions that expose the parts of a socio-family conflict that is judicialized.

II. THE CONTRADICTION OF LAW WITH SOCIAL REALITY

In the field of Family Law specialty, one main character is observed: (formal) legislation has been overwhelmingly overcome by social reality (realism).

The complementation of a series of factors of social evolution, normative development, criteria of interpretation and execution of jurisdictional measures, among others, are some of the factors that have intervened in the current configuration of new family law [1], practically throughout the American region.

In this process of evolution, the concept of family has undergone changes in the interpretation of its legal nature, since the essence of the legal institution has remained unchanged since the origins of humanity.From the interpretation of the social problems that have affected the development of the family, it is currently possible to locate three main thematic axes:

a) Protection of the bond and family relationships as a result of family conflict or from a family in crisis.[1]

b) The analysis of new forms of family relationships, in order to establish mechanisms for regulation, protection, and limitation of rights between the parties.

c) The analysis of the mechanisms of family division in the procedural field in order to determine the rights/obligations to be assigned to the members of the same and of the measures of prevention and limitation of situations of family violence.

However, part of the problem of this discipline is linked more to the very conception of law as a social institution, since there is a misinterpretation of the intersection between law (as a political element), morality and law.

Thus, the society that creates a type of right will not necessarily do so on the basis of the need for social needs, nor will it do so on the basis of what society understands to be valid, legitimate or socially acceptable. For this reason, the level of intervention of the Inter-American Court of Human Rights regarding the evaluation of the regulations of countries such as Argentina, Chile or Bolivia allows us to maintain that there is a new perception of Family Law in the field of Conventional Law in the region.In this situation, it is convenient to develop some concepts that seem to acquire a particular interpretation in the field of the specialty.

III. The Intersection between Law, Morals, and Politics, in the Family Law. the Moral Bases of the Political Creation of the

Like any social product, the law is a result of the political interaction that is materialized with the approval of the laws, which has social morality as its primary element.

We cannot ignore the philosophical, conceptual and procedural connection that exists between law and morality, particularly because the second justifies and interprets the first [2], establishing itself as the limit of said relationship, the fact that in law translated into law, It seeks to satisfy the broadest and most recognized moral principles in the social sphere.Whoever denies this relationship, implicitly tries to decouple the processes of social configuration of admissibility of certain values that are translated in a very special and referential way in family law.

The treatment of divorce (such as divorce sanction), social ambiguity in the face of the development of rights on

the basis of equality and civil union, the particular treatment of presumptions regarding filiation, among other topics, are the political translation of the (majority) social opinion that is represented in law.

Keep in mind that these elements under evaluation have provoked reactions of a social and even political nature in countries such as Colombia, Chile, Mexico, and Peru, and therefore allow us to maintain that throughout the region the problem of the configuration of a new Right of Family is important in light of the cases resolved by the Inter-American Court of Human Rights, thus generating a special "specialty" in the field of Conventional Law, alluding to the American Convention on Human Rights or "Pact of San José".

The most objective example in this regard occurred in Chile, when it was only in March 2004 that the legislative reform regulating divorce was approved, a situation that determined that country, like the last on the continent to regulate this situation of crisis and family division. [3]

Faced with the collapse of the "social system" based on the morality imposed on the law regulating individual rights, the possibility of establishing divorce through regulations was practically an extremely complicated element to resolve in the Chilean reality, until the levels of breaking the law, they forced a change of mind. The rates of adultery, infidelity and critical situations against the "traditional family" practically broke the traditional Family Law in Chile and therefore the reaction of "social solution" was the determination of divorce, only in 2004.

Being the dramatic example and compared to what apparently occurs in the rest of the legal field, we mustpoint out that in Family Law it is where the relationship between morality, law, and politics becomes more visible since the expression of the social collective usually it is reflected in the field of legislation [4], suffice it to note that this specialty has not necessarily evolved in line with social demands, conditions, and needs in the region.

Thus, for example, the recognition of coexistence, concubinage, new forms of matrimonial relationships, new areas of protection for situations stemming from a family in crisis, among others, are examples of what implies a late recognition of what society in practice it had been developing, but without the legitimacy that collective morality assigns.

Therefore, there is an intrinsic connection between law and politics, which serves as a bridge between law and morality, whereby the law (law) that is the result of democratic politics is allowed to express presumably valid moral principles in the matter. intersubjective, and thus serve as an epistemic reason to believe that underlying it justify actions and decisions.

But such a connection between law and morality through democratic politics is contingent on the law satisfying minimum moral requirements that give epistemic value to democracy and that are not determined through the political process but through individual reflection. in moral matters.

An example that could materialize the above is translated into the fact of limiting marital unions between individuals who have ties of affinity, not only because the law prevents it, but also because there is a moral foundation that supports the regulatory environment.

Iv. The Formalism of Legislation in Family Law

In order to prove our position that justifies the ambiguous relationship between morality, law, and politics, we will analyze the problems that arise in the jurisdictional field, particularly in the field of filiation, in three specific aspects:

a) The recognition of the biological child conceived with a married woman.

b) The discriminatory paternal presumption is of the child conceived in marriage, particularly in the assignment of pejorative conditions to the mother.

c) The criminalization of the alteration of the marital affiliation of a minor.

As can be seen, the historical monitoring of the norm that regulates the presumption of pater is in the region, causes three problems of relative judicial incidence, since the law ignores the situations of reality, mainly because there is a moral assessment that limits the regulatory deregulation of various legal situations.

We must at this point out that the majority of the Civil Codes in the region respond to a historical basis determined by the Civil Code of Napoleon of 1804, which in reality is a development of the Corpus Iuris Civilis of Justinian.

The traditional perspective of the morality of society, mainly in Latin America, due to the influence of the Germanic Roman legal system that essentially extends the formal pattern of the law[5]evidences a historical gap when transmitting in the jurisdictional field-proven situations of interpersonal relationships with an impact on Family Law, and according to our position, this is evidenced with greater relevance, when aspects related to the filiation of a minor are analyzed if the minor is married to a subject who is not his biological father.

The negative perspective, even criminalized if we look at the case of Peru, just to give an example, where we see the Penal Code in article 145, sanctions the alteration or modification of the marital affiliation of a minor.

Such disproportion of the punitive norm only responds to the perspective of the attention of social interests in the field of morality, which is evidenced by the absence of the typical elements in the configuration of a criminal offense, such as fraud.

We contradict this position, based on the two alternatives affected regarding the “affectation” of the legal asset, with the following questions: (i) Does the biological parent, by criminal objective, affect the identity of his minor child, conceived with a married woman?

Being the negative alternative, the scope of the criminal law is disproportionate and our position is evident, in the fact that currently there are no judicial rulings on the matter, as binding jurisprudence.

In the second area (ii), it could contradict Reyna Alfaro's thesis on the matter, who defines the institution as a behavior that damages the family marital status, in general, and the affectation of the legal affiliation, other than the biological one, in concrete[6]. At this point, we only make a reference to the Peruvian case, but it should be noted that this reality is very similar to that observed throughout the region.

Therefore, the objection to this criminal definition starts from objective logical reasoning: Is a formal truth preponderant to a material truth? Is there any effect on legal affiliation in criminological terms?

As can be seen, the moral parameters will not be alien to the materialization of special legislation for Family Law, which will require a development perspective that is more unrelated to moral parameters, and closer to the needs of society.

Given that the budding problem could be solved in the jurisdictional field, we must also bear in mind that the judge in multiple situations will be placed in a situation in which he must stick to the binding of the law, at the risk of committing prevarication.

V. Our Position in Cases in Which the Formality of the Legislation is Questioned by the Social Facts Analyzed in a Case Judicialized in a Member State of the Oas

Our intention is to try to propose solutions to existing situations in the jurisdictional field where formal normative elements are contrasted with factual situations with the incidence in the specialty of Family Law.

For this purpose, we consider first of all that the scope of regulatory regulation of certain principles, which guarantee the viability and sustainability of the judicial process itself, cannot be denatured and / or made more flexible, by assigning to these a condition of legal certainty , whose reference they are a priority for the jurisdictional system itself.

Eventually and only in a special and conjunctural context, the jurisprudential doctrine that develops in the specialty may constitute procedural references that would be useful to complex and complicated cases in which the formality of the law would be questioned by the facts evaluated in the judicial file.

In this detailed context, we consider that it is important to detail some referential cases of the IACHR in the case of the development of Conventional Law in the specialty of Family Law and we conclude that we are in a new stage of this discipline.

VI. The Referential Cases of the Iachr

In this point, we will analyze the cases related to the Family Law field that the IACHR has developed, based on its date of issue in judgment.

a) Gelman case vs. Uruguay

This case deals with the international responsibility of the State for the forced disappearance of María Claudia García Iruretagoyena de Gelman, as well as the suppression and replacement of the identity of María Macarena Gelman García.

We must point out that although it is a case against Uruguay, the events occurred in 1973 when 19-year-old María Claudia García Iruretagoyena de Gelman was detained with her husband by Argentine and Uruguayan military personnel in the midst of the "Plan Condor" operations.

As a result of the pregnancy, a girl was born who was "delivered to a family in a basket", the family of the Uruguayan Angel Tauriño who raised the child with his family.

In the context of the consequences of all the processes and events related to the time of the military dictatorship that was involved in the Condor Plan, Uruguay in 1986 decreed an Expiry Law of the Punitive Claim of the State, in order to generate an amnesty in relation to crimes committed during the time in question.

In the area of the protection of rights related to the subject matter that we raise, we can point out that the IACHR

determines that an affectation of the Gelman family's rights of a family nature has indeed been generated and that this generated a level of connection with the area of the responsibilities of the State that are complemented with the effects of constitutional and criminal order carried out.

At this point, the right to the development of family identity is an extremely important element in the judgment, since the State carried out deliberate actions that negatively conditioned this right: that of developing a personality within the scope of a family.

b) Artavia Murillo et al. Case Costa Rica.

It is an interesting case linked to the analysis of Assisted Reproduction Treatments that were suppressed in Costa Rica by means of a law since 2000.

Arbitrary interference on the rights to private and family life (raising a family) with the use of elements of technology were the main elements to raise the violation of Human Rights against Costa Rica, finding international responsibility by the State, to be affected the intimate sphere of people.

The foundation that the Inter-American Commission in a first stage is fundamental for the support of the position of the Inter-American Court when it is detailed:

- The decision to have biological children belongs to the most intimate sphere of private and family life and the way in which such a decision is made is part of the autonomy and identity of a person, both in their individual and couple dimensions.
- Living together and the possibility of procreation is part of the right to start a family.
- Using IVF to combat infertility is also closely linked with enjoying the benefits of scientific progress.

In this sense, the IACHR, according to the development of technology in the use of the satisfaction of interests and rights of people and the right of a family, could not help questioning the position of Costa Rica in a limitation that affected a desire not to only legally protected but also in the natural sphere: that of having a family.

c) Atala Riffo case and girls vs. Chile.

A highly complex issue in a national reality as traditional as is the case of Chile, where local justice determined that "sexual orientation" was a determining factor in establishing rights and obligations, in this case against the rights of the mother. about his three daughters.

Beyond the evaluation of the conditions and characteristics of each parent against the counterpart and in favor of the development of the rights and upbringing of the daughters, the Chilean justice system determined that the condition of Mrs. Karen Atala Riffo implied a negative condition for the psychosocial development of the daughters he had fathered together with their father, who was finally assigned as the parent with tenure.

In objective terms, for Chilean justice the condition of homosexuality was an objective limit that conditioned the figure of the mother against the father; the argument that was finally rejected by the Inter-American Court of Human Rights.

The arguments of affectation to the rights of equality and non-discrimination (between parents), the affectation for social discrimination, the analysis of a “normal and traditional” family in a national context (the Chilean) were elements that allowed to point out in the IACHR that the condition of homosexuality should not be judged against the personal conditions that all parents develop in front of their children and that this condition cannot

empower a national court to determine the possession of the procreated children in favor of the counterpart.

Keep in mind that under these conditions, it is not that the possession of the three girls has been granted in favor of the father because he was a "better parent" but because the mother was a lesbian and said condition generated discriminatory treatment by the Chilean jurisdictions.

d) Fornerón and daughter vs. Argentina.

An extremely important case, in which the criterion of "equality" between parents (father and mother) is analyzed, whom the Argentine judicial system judges differently, assigning superior values and elements to the mother compared to the father, even without taking into account the autonomous conditions of each position in the development of a judicial process.

The seriousness of the case is that in this case, the "daughter" of Mr. Fornerón was practically conditioned in life by his own mother and despite the procedural and material actions of the plaintiff, the Argentine State did not execute any effective action to materialize the right to this city to raise and have his daughter in his custody and thus guarantee to both an environment in which the right to live in a family environment could be developed.

Even the sphere goes beyond the sphere of Family Law and borders the criminal sphere when it is observed that the mother "sold" the daughter and the Argentine State did not act in accordance with the provisions of the American Convention (Articles 19 and 35, on the rights of the child), making the seriousness of state inaction the reason for the IACHR's intervention.

e) Case of the Pacheco Tineo Family vs. the Plurinational State of Bolivia.

This is the case of a Peruvian family made up of Rumaldo Juan Pacheco and Fredesvinda Tineo and their children Frida Edith, Juana Guadalupe and Juan Ricardo (Chilean)

In Peru, the parents of the family were initially accused of being suspected terrorists and as a result of these circumstances, they decided to migrate from the country. For the year 2001, they choose to return to the country where an arrest warrants still existed and for which they choose to migrate illegally to Bolivia, crossing the border.

The family was destined for Chile, but it had to go through Bolivia and the migratory entities of that country choose to execute individual detention procedures (against Rumaldo and Fredesvinda) and not against the family's children.

The refugee requests were raised but were rejected after the detention situations of Messrs. Rumaldo and Fredesvinda were modified.

Bolivia argues that it does not grant Mr. Rumaldo refugee status because this right was granted to him on a previous occasion and the administrative procedure that generated the voluntary repatriation was not fulfilled because instead of returning to Peru, the family chose to go to Chile.

In this area, after evaluating the facts, the IACHR observes that Bolivia did not comply with protecting the children of a family that posed a condition of refuge and with which the damage extended to the entire family, beyond the fact that at the individual level they had observed more Human Rights violations.

f) Duke vs. Colombia.

This is a case in which the procedure for accessing a survivor's pension raised by Mr. Ángel Duque (widower) before the administrative bodies of a said area in Colombia is evaluated. The reason (which follows) is because Mr. Duque's partner was of the same sex (Jhon Oscar Jiménez) with whom he had lived for almost ten years.

At this particular point, in the case of the analysis of this text, the important thing is to develop the aspect of rights that corresponds to Mr. Duque at the individual level as a result of his status as a widower, which was conditioned for the enjoyment of rights, mainly to life because he is a carrier of HIV.

VII. The Categories of Rights to be Guarded

In view of the jurisprudential development of the cases in question, we must set out our position, which starts from the explanation that the IACHR, in essence, does not "develop dogmatic or applicative aspects of Family Law" but rather makes an assessment of individual rights with a projection in the field of the development of family relationships and therefore its incidence for our objectives in this work.

Under this criterion, we can detail that three levels of "guardianship" arise that can be developed based on the jurisprudence evaluated:

1. THE PROTECTION OF RIGHTS OF INDIVIDUAL ORDER.

In all the cases evaluated, the infringement of rights to the complaining parties or victims has been fully accredited and when it has been cases in which a "child or children" has participated, the specific description that rights have been affected is observed. protected by the American Convention that develops specific aspects that the states parties must develop in their jurisdictions in favor of children and adolescents.

In this way, the IACHR mainly observes the infringement of rights at the individual level and when it comes to underage "victims", the position is much firmer against the offending State because access to the effective protection of rights is much more complex. for these people and the negative impact extends to the family as a whole.

2. THE PROTECTION OF RIGHTS OF A COLLECTIVE AND FAMILY NATURE.

Developed based on the previous point, in which it tries to analyze that in cases of "families", the affectation to psychological development and a familiar environment creates an affectation that goes beyond the individual sphere and is of a collective nature the damage caused by the action or inaction of the State.

Thus, we can see that the cases of Fornerón and vs. Argentina develop the "inaction" of the State in the protection of these rights, different from the case of Artavia Murillo et al. Costa Rica, where the State executed through legislation a "direct action" to limit rights.

3. THE REGULATION AND OBLIGATION TO PROTECT DIFFUSE NATURE RIGHTS.

Beyond being able to evaluate theoretical and procedural issues in the field of Family Law, the IACHR develops a very broad position that positively impacts the development of Family Law from a perspective of the development of Conventional Law, since very Contrary in their own content, this is how we see cases from extremely weak jurisprudential development points of view (Duque vs. Colombia case) to extremely demanding positions against the offending State (Fornerón and Daugther vs. Argentina case)

This positive impact translates into the scope of the development of a "family nature law" in the area of protection of diffuse rights since the Jurisdictional Systems of the States parties to the OAS do not usually apply

objective criteria of protection when analyzing cases linked to:

a) The evaluation of the "Gender" position between the spouses: Atala Riffo case and girls vs. Chile.

b) The evaluation of individual rights based on homosexuality in the context of family relationships: Case Duque vs. Colombia.

c) The evaluation of the rights of a "vulnerable group" against an administrative procedure that expresses the will of the State: Case of the Pacheco Tineo Family vs. Bolivia.

d) The evaluation of the "action" and "inaction" of the courts in the protection of individual rights of a family nature in the development of a process that ultimately affects effective judicial protection: Fornerón and daughter vs. Argentina and Artavia Murillo et al. Costa Rica.

Issues that being "broad" allow the development of more rigorous procedural and procedural mechanisms in the development of a process in the national jurisdiction that is not usually taken into account in the Family specialty and with which it is expected that national judges should modify their traditional criteria of evaluation and interpretation of the law of the specialty when analyzing specific cases, mainly in those circumstances in which the facts exceed the normative fields.

In this way, this "diffuse" condition would allow any citizen, affected by the evaluation criteria of any jurisdictional body, to demand the applicability of specific cases developed by the IACHR in the process of their own judicial process.

Conclusion

One of the great limits in the development of conflicts of a socio-family nature in the field of Jurisdictional Systems in the States parties to the OAS is the applicability of legislation that has been overcome in time, a product of a material reality that It has transformed social reality in a particular way in each country on the continent.

This characteristic, which is practically uniform throughout the American region, allows us to consider the convenience of applying criteria developed by the IACHR's jurisdiction in the area of protection of the rights of family nature since these are applied in a triple dimension: individually, collectively and diffusely.

However, beyond these scopes, the true change in the applicability of the scopes of the American Convention must be observed in the access to justice in the lower jurisdictions in an effective way, since all "delay" in the defense of a right is irreparable, materially and morally, because the family is destroyed internally.

That "damage" is finally what allows us to have family law and cannot be interpreted in function of the scope of the Law, but must be interpreted in function of the objectives of interpersonal relationships that make up family relationships, because this is what determines reality itself.

Continue with a traditional criterion, generate more damage not only at the individual level but also at the collective level and with which the "family" as the nucleus for the formation of the political community is weakened and that is why the State's illegitimacy towards families arises because their jurisdictional bodies are not specified in the process of a process in which rights and obligations of a family nature are evaluated.

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