Inter-American Children and their Rights: A Critical Discourse Analysis of Judicial Decisions of the Inter-American Court of Human Rights

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Abstract

This article focuses on the influence of courts and the ACHR in the social construction of childhood and children’s rights. Using critical discourse analysis, it explores the meanings and understandings of childhood and children’s rights that emerge from the judgments of the Inter-American Court of Human Rights on family care, custody, adoption, deprivation of liberty and detention conditions. From this analysis, I argue that the IACHR constructs a normative notion of the child according to which she is understood as being between the categories of human being, human becoming, subject of rights and object of protection and a concept of children’s rights according to which these are primarily thought of as their right to receive special measures of protection. The tensions between this complex view on childhood and a paternalistic approach to children’s rights reveals the need for a children’s rights specific international human rights law instrument for the Inter-American human rights system.

Keywords

Inter-American Court of Human Rights – American Convention on Human Rights – critical discourse analysis – social construction of childhood and children’s rights – juvenile justice – children in family care – child protection – children as rights holders
1 Introduction

Social studies of childhood have given special attention to the experiences of children in traditional contexts such as the family and the school (Prout and James, 2015) and the literature and advocacy regarding children’s rights have drawn upon the United Nations Convention on the Rights of the Child (CRC) as their reference point and dominant framework (Verhellen, 2015). Substantial knowledge has been built in relation to these areas but, at the same time, this prioritisation has left other settings understudied. This article is centred on one of these comparatively overlooked contexts. It is focused on the influence of a “non-traditional setting” – the courts – and a “non-dominant framework” – the American Convention on Human Rights (ACHR) – on the social construction of childhood and children’s rights. In this sense, the objective is to contribute to the body of literature that discusses the role of judicial decisions in constructing, de- and re-constructing what it means to be a child and the content of her rights.

This article focuses on the study of judicial decisions of the Inter-American Court of Human Rights (IACHR) which is an autonomous judicial institution whose purpose is the interpretation and application of the ACHR and other treaties concerning the protection of human rights on the American continent. As such, the IACHR is part of an international structure of cooperation that has been created to address the challenges that face children in the region and to promote their human rights. In doing so, these institutions shape regional understanding of childhood and children’s rights. Indeed, the Inter-American Commission on Human Rights (2008) has argued that the current challenge of the IACHR is the development of regional standards towards a comprehensive approach to the human rights of children. There is no children’s rights specific international human rights law instrument within the Inter-American human rights system. Therefore, the development of regional standards is certainly challenging for the Inter-American Court because it must be constructed from Article 19 of the ACHR that recognises the rights of the child in a restricted manner: ‘Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state’.

This article is structured as follows. First, the meaning and implications of adopting a social constructionist approach to childhood and children’s rights and the role of courts in such processes are analysed in order to situate this research theoretically. Then, the article turns to the methodology designed in order to address the following research questions: (a) What discourses on the image, competence and rights of children are reflected in the judicial decisions of the Inter-American Court of Human Rights regarding cases on child law and
child justice?; (b) How have these discourses contested and established relations of hegemony through time?; and (c) What constructions of childhood and children’s rights have these judicial discourses informed? Drawing on critical discourse analysis (CDA), the conditions and processes behind the production of judicial decisions of the IACHR are analysed as part of the context of these legal discourses. Thirdly, the findings of the research are presented. From these, I argue that the normative notion of the child – which is described in this article as the “Inter-American child” and involves a representation of the child as a regional and abstracted subject who can be repeated across diverse social and cultural spaces (Hopkins and Sriprakash, 2016) – that emerges from the judicial decisions of the IACHR is not easily classified within the dichotomic categories discussed by the social studies of childhood. On the contrary, this contextual construction belongs to what Prout (2011) terms the “excluded middle” because the child is understood as both a human being and a human becoming and also as both a subject of rights and an object of protection. On the other hand, the notion of children’s rights constructed by the Inter-American Court understands the rights of the child mainly as her entitlement to receive special measures of protection, undermining her participation and provision rights and, consequently, the indivisibility, interdependence and equal value of children’s human rights. This normative notion of the child and her rights is recontextualised when the IACHR analyses cases where children interact with the family or prison. These institutions are represented by the Inter-American Court as the primary context for the protection of children and the exercise of their rights. The tensions between the complex notion of the Inter-American child and the restricted construction of children’s rights question the relevance of Article 19 of the ACHR as a legal framework capable of adequately addressing contemporary challenges regarding children and their rights in the region. Accordingly, I conclude that it is time to consider the adoption of a children’s rights specific international human rights law instrument for the Inter-American human rights system.

2 The Social Constructionist Approach to Childhood and Children’s Rights

This article has adopted a social constructionist ontological stance in relation to childhood but also to children’s rights. Accordingly, this section reviews the literature regarding the social construction of these categories and the role of courts in this process.
2.1 The Social Construction of Childhoods

According to this approach, childhood is understood as the social construction of a particular historical and cultural setting (Jenks, 1982). As such, childhood constitutes discursive formations where different types of children are constructed and a variety of childhoods are revealed (Prout and James, 2015). Exploring this idea, Brown Rosier (2009) has highlighted that while some children are seen as “innocent” – vulnerable to the dangerous aspects of social life and dependent on family care – others are viewed as “highly culpable villains” – whose bad behaviour is the result of their irresponsible personal choices and a negligent style of child-rearing. These contrasting views tend to inform opposed public responses: a protective stance for the former and punitive solutions for the latter.

Law has certainly reproduced this differential treatment, developing two separate frameworks: child law – as a subcategory of family law that addresses the coupling of the child with her family (Monk, 2008) – and child justice – understood as the norms, mechanisms and institutions built to deal with children alleged as, accused of or recognised as having infringed criminal law (UN Committee on the Rights of the Child, 2019). In the former, children were firstly seen as little more than the property of the father. Consequently, family law disputes about children were grounded in the rights of parents regarding the orderly transmission of possessions between them, the child being one of their properties (Freeman, 2001). However, the judicial construction of childhood in the context of child law has moved from picturing children as properties or “social problems” to see them as “participants in the social process” (Freeman, 2001). In this regard, Cantwell (2015) argues that children are currently not only thought of as vulnerable beings in need of protection, but increasingly also as members of the family and community who must be consulted in decisions about them.

On the other hand, Monk (2008) argues that child justice has been constructed in terms of a tension between the conflicting discourses of welfare and justice, which are emphasised depending on whether children are portrayed as “innocent”, “dependent” and “vulnerable” or as “knowing”, “morally culpable” and “evil”. Monk states that the emphasis on justice – individual responsibility and punishment – has come to dominate legal and policy responses in child justice in recent years; this as the result of moral panics about those children who seem to fail what the psychological model of child development presents as the “individualistic” and “naturalistic” socialisation process and, as a consequence, are seen as “deviants” and “school failures” (Prout and James, 2015). Particularly problematic in this context is the situation of child prisoners who, according to Goldson and Kilkelly (2013), are typically drawn from the poorest,
most disadvantaged and structurally vulnerable sections of their respective populations and are regularly exposed to unsuitable treatment and conditions. Indeed, Goldson and Kilkelly recommend the abolition of child imprisonment because, irrespective of reform efforts dressed up in human rights rhetoric, penal custody remains an unsuitable environment for children.

Judges play an important role in the process of reinforcing or questioning these contrasting views and, ultimately, constructing, de- and re-constructing contemporary knowledge about childhoods. But judicial decisions do not represent a coherent and unified construction of the child. On the contrary, courts are sites of struggle between competing and often conflicting discursive understandings of childhood, which legitimise a particular construction of the child, under a significant claim to truth, influencing the existing social order (Monk, 2008). In this context, this article contributes to the body of literature that analyses how judicial decisions contribute to give meaning, develop and reconfigure the social institution of childhood and to shape and define what it means to be a child (Buckley, 2014; Peleg, 2019).

2.2 The Social Construction of Children’s Rights

This article not only examines the role of courts in the social construction of childhoods, but also their role in the social construction of children’s rights. This perspective views the rights of children as shaped within a certain historical, cultural and social setting, therefore, very different constructions of children’s rights can exist, and even co-exist, depending on these contexts (Reynaert et al., 2012). Accordingly, there exists no transcendental knowledge of children’s rights and no construction of such rights is natural (Gregg, 2012). Following this perspective, this article engages with what Reynaert et al. (2012) describe as a critical approach to children’s rights: engaging with the questions of what children’s rights mean in a specific situation and how they are dominantly constructed. In this sense, this article contributes to a better understanding of the processes of social construction of children’s rights beyond the universal approach of the UNCRC, which has been the reference point and dominant framework for the majority of the literature and advocacy regarding children’s rights (Verhellen, 2015).

In order to identify the contextual understandings of children’s rights within the Inter-American Court, this article focuses on what Hanson (2012) has described as the key issues to identify different approaches to children’s rights. In particular, this article analyses the “childhood image”, the “debate on competence” and the “rights of children”.

The childhood image refers to a repeated and generalised representation of children (Holland, 2004). In this respect, Hanson (2012) suggests focussing on
whether children are considered “unfinished” human beings maturing towards an optimal end state – “human becomings” – or social actors capable of having views of their own – “human beings”. According to Peleg (2019), the former approach has prevailed in the legal treatment of children, emphasising children as passive actors, in need of protection and the negative other of adult qualities. However, Tobin (2013) argues that the emergence of the social studies of childhood and the idea of children’s rights have challenged the human becomings paradigm. Indeed, Verhellen (2015) argues that this new image of the child as an individual with her own rights, and as competent to exercise these rights independently, has become one of the foundations of the UNCRC which has codified a new discourse of children as “subject of rights”. Prout (2011) challenges the theoretical framework of the beings versus becomings debate, arguing that these categories are made to be mutually exclusive, ignoring what he calls the “excluded middle”. According to this view, childhood is a complex phenomenon not readily reducible to one end or the other of a polar separation (8). Therefore, it is necessary to pay attention to the spaces between opposites where variants of childhood are being constructed. Similarly, Freeman (2010) explains that this binary ignores change and assumes that children have to be one or the other, rather than appreciating that conceiving children as beings does not preclude them also being considered as becomings.

The debate on competence relates to the question of whether children are considered rational and mature for consequential reasoning and able to take well-founded decisions as to what is in their interests (Hanson, 2012). Freeman (2010) argues that this debate is dominated by a conventional binary assumption where competency is seen as an adult characteristic. In this view, children must prove that they are competent while this is assumed in the case of adults (Vanobbergen, 2015). In the field of children’s rights, this debate has played a central role (Verhellen, 2015). Indeed, capacity for reasoning and autonomy has historically been linked with the very entitlement to have rights. In so doing, the “will theory” denies rights to children because they are assumed to lack the competence to exercise them (Tobin, 2013). In response, interest theorists argue that the entitlement to rights does not depend on the capacity to exercise them but on the value of children as human beings (Tobin, 2013). Nevertheless, considering children as rights-holders does not necessarily mean that they enjoy rights in the same way as adults. Indeed, comparing children and adults as autonomous rights-holders embodies a difference that is both procedural – who claims – and substantive – what is claimed (Hollingsworth, 2013).

This is connected with the third key issue which considers the questions of what rights children have and what kind of rights they should have
(Hanson, 2012). On one hand, advocates of “special rights” for children emphasise the need of recognising equal value to their separate interests (Vanobbergen, 2015) and of adopting explicit measures to ensure that children can enjoy their human rights (Verhellen, 2015). On the other hand, those promoting “equal rights” argue that, ‘children and adults should have the same basic rights’ (Purdy, 1994: 223). This debate demonstrates that although children’s rights are increasingly being understood as their human rights (Verhellen, 2015), the relationship between these categories is characterised by tension, leading them to grow apart conceptually (Reynaert et al., 2015). This is reflected in the fact that, instead of following the main categorisation that human rights actors are familiar with – civil and political rights, on the one hand, and economic, social and cultural rights, on the other –, the dominant categorisation in the field of children’s rights is the “three Ps”: rights to protection, provision and participation (Reynaert et al., 2015).

Ultimately, the social constructionist approach rejects those notions of childhood and children’s rights that are presented as natural or objective and highlights the relevance of context. This is particularly relevant for this article because it looks into a setting that goes beyond traditional contexts for the social studies of childhood and dominant frameworks regarding children’s rights debates. Indeed, the study of the judicial decisions of the Inter-American Court opens a space to analyse how categories that are discussed by the social studies of childhood are understood and how children’s rights are interpreted in a context dominated by the ACHR rather than the UN CRC. Accordingly, the methodology of this research has been designed with the objective of identifying and connecting regional meanings with theoretical knowledge from the social studies of childhood and the field of children’s rights.

### 3 Methodology

Given the relevance of discourse in the construction of knowledge and meaning about childhood and children’s rights, critical discourse analysis is used to address the following research questions: (a) What discourses on the image, competence and rights of children are reflected in the judicial decisions of the Inter-American Court of Human Rights regarding cases on child law and child justice?; (b) How have these discourses contested and established relations of hegemony through time?; and (c) What constructions of childhood and children’s rights have these judicial discourses informed?

This methodological approach is underpinned by the transdisciplinary nature of this form of critical social analysis (Fairclough, 2018), where language
is understood as a means of social construction (Machin and Mayr, 2012) and discourse represents, creates, reproduces and changes social reality, knowledge, identities and subjects (Reisigl, 2018). In this sense, CDA is particularly appropriate to analyse how childhood and children’s rights are socially constructed through legal discourse.

3.1 **Context**

Childhood and children’s rights as discursive categories will always depend on context (Vanobbergen, 2015). To the extent discourse is socially constitutive but also socially constituted, text and context are generally understood to be in a mutually reflexive relationship where text influences context and *vice versa* (Flowerdew, 2018). In fact, discourse is frequently conceived within CDA as “text in context” (Reisigl, 2018) which means that texts are embedded in their context of production, distribution and reception and that they are properly approached in their context of use (Flowerdew and Richardson, 2018). Therefore, it becomes relevant to analyse the conditions and processes behind the production of judicial decisions of the IACHR.

3.1.1 **The Inter-American Court of Human Rights**

According to the American Convention on Human Rights (1969) and the Statute (1979) and Rules of procedure (2000) of the Inter-American Court, this is an autonomous judicial institution whose purpose is the interpretation and application of the ACHR and other treaties concerning the protection of human rights in the American States. The role of interpretation – or “advisory jurisdiction” – is exercised through advisory opinions and the role of application – or “adjudicatory jurisdiction” – is exercised through judgments that are final and not subject to appeal. The Inter-American Court is composed of seven judges who deliberate privately and must provide the reasons behind their decisions. Any judge is entitled to have her dissenting or concurring separate opinion attached to the judgment or advisory opinion when it does not represent the unanimous decision. The judgments, advisory opinions and separate opinions are published and delivered in public session.

There is no children’s rights specific international human rights law instrument within the Inter-American system. Nevertheless, Article 19 of the ACHR recognises the rights of the child in the following terms: ‘Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state’. From this legal framework, the Inter-American Commission on Human Rights (2008) has identified three historical stages in the implementation of children’s rights in the Inter-American human rights system. First, before the adoption of the UNCRC,
the jurisprudence of the Court was dominated by decisions on cases regarding the rights of children to life and personal liberty in the context of systematic human rights violations. Secondly, since the adoption of the UNCRC, the jurisprudence of the Court has been marked by a substantive development of Article 19 of the ACHR. The third and current stage is characterised by the need to develop regional standards towards a comprehensive approach on the human rights of children.

3.2 Data Generation and Analysis

The starting point of the data generation was the Advisory opinion OC-17: Juridical condition and human rights of the child (AO-17) – adopted in August 2002 – because it is considered by the Inter-American Commission on Human Rights (2008) as a milestone in the third and current stage of evolution of Inter-American standards on the human rights of the child. Therefore, the dataset of this research is comprised by this advisory opinion and judgments of the Inter-American Court regarding Article 19 of the ACHR – in the context of child law and child justice – adopted after the AO-17.

The judgments were collected from the online databases of the Inter-American Court and, as suggested by Sormunen (2016), broad index words were used in order to obtain the most comprehensive sample. The result is four judgments in the context of child law and three regarding child justice adopted between August 2002 and June 2020. The former specifically refer to family care, custody and adoption. Adoption is included because it is generally considered as a form of family care (Cantwell, 2015). The latter judgments refer to deprivation of liberty and detention conditions. Consequently, child prisoners are a focus of attention for this research (table 1).

The original texts of the judgments and advisory opinion are in Spanish and they are translated into English by the IACHR. Both versions were analysed in order to compare concepts and meanings, excluding the judgment in the case of Ramírez et al. v. Guatemala which was only available in Spanish. The texts were analysed using qualitative coding in order to examine, separate, synthesise and compare the data and develop theories from it (Charmaz, 2014).

4 The Inter-American Child and her Rights

The Inter-American Court of Human Rights constructs a normative notion of childhood that is not easily categorised in some of the theoretical dichotomies that are discussed in the sociology of childhood. Indeed, the idea of the child constructed by the IACHR belongs to the excluded middle presented by
Prout (2011) because she is understood as both a human being and a human becoming and also as both a subject of rights and an object of protection.

4.1 The Child as Both a Human Being and a Human Becoming
The Inter-American Court recognises that children have the possibility for "self-determination and to freely choose the circumstances and options regarding their existence" (Gelman v. Uruguay: 47). Therefore, their wishes and opinions must be taken into account in any decision that affects their life, regardless of third-party interests or interference (Fornerón v. Argentina).

In this sense, the IACHR recognises the notion of the child as a human being where she is conceived as a unique individual who can be understood only by listening to her voice (Henaghan, 2012) and who is appreciated for her present being (Vanobbergen, 2015).

Nevertheless, the Inter-American Court states, at the same time, that the decision maker must seriously consider the views of the child when she is capable of forming her own views in a reasonable and independent manner and ensuring that it does not harm her genuine interests (Atala v. Chile). In this sense, the IACHR argues that competence is acquired with adulthood:

Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake...
legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent.

_AO-17: 54_

Judge García reinforces this distinction noting that, ‘the child is not qualified – let us consider, especially, the youngest children – to conduct a personal action such as an experienced or at least a mature adult could conduct’ (AO-17: 114). Indeed, García represents adulthood as the borderline with the autonomous exercise of rights. This reinforces what Freeman (2010) describes as a conventional binary assumption because this construction sees competency as a characteristic of adults which children acquire as they reach or get closer to adulthood. A consequence of this discourse is that it delineates what Jenks (1982) describes as a singular mode of rationality which is embodied in the naturally mature, rational and competent adult. Therefore, the Inter-American child is constructed as someone who must prove “reasonableness”, “maturity” and “autonomy” in her decision-making, which is assumed as fulfilled in the case of adults.

At this point, the child is not only understood by the IACHR as a human being but also as a human becoming because she is seen as a person developing towards an optimal end state that is embodied in the competent adult (Hanson, 2012). This representation is also reflected in the particular relevance and meaning that the Inter-American Court confers on the development of the child. Indeed, it argues that, ‘the ultimate objective of protection of children in international instruments is the harmonious development of their personality’ (AO-17: 57). Accordingly, the IACHR emphasises the obligation of States to ‘ensure the children’s normal growth and development so essential to their future’ (Juvenile v. Paraguay: 96). In this respect, Judge Cançado notes the value of children for representing the future of the world:

_AO-17: 84_

A world which does not take care of its children, which destroys the enchantment of their infancy within them, which puts a premature end to their childhood, and which subjects them to all sorts of deprivations and humiliations, effectively has no future.

The discourse of the Inter-American Court regarding the development of the child concurs with what Peleg (2013) has described as the usual perception of the term. This approach understands development in psychosocial terms, focusing on the process of transformation from child to adult. Peleg explains that this perception resonates with the conception of children as becoming
and leads to a narrow interpretation of their right to development, which is then seen primarily as their right to become an adult, emphasising their future and overlooking their agency. At this point, it can be argued that the IACHR embraces a “naturalistic” view where the child is understood largely in terms of biological and cognitive development through the concept of “maturation” (Jenks, 1982).

The process of becoming an adult is not only the result of natural growth according to the Inter-American Court, but it is also the outcome of education. Indeed, it states that, ‘it is mainly through education that the vulnerability of children is gradually overcome’ (AO-17: 66). This approach reinforces the importance of socialisation which is seen, by the psychological model of child development, as the process through which the “asocial” child – seen as a passive representative of the future generation – transforms into a social adult (Prout and James, 2015). In this process, the school and the family are conceived as the “socialising agents”. In this regard, the IACHR does not only highlight the importance of schooling in socialising the child, but it also emphasises the relevance of the family in this process. Indeed, the Inter-American Court states, regarding the child prisoners in *Mendoza v. Argentina*, that ‘most of them came from broken families, which resulted in flawed models for the development of their behavior and identity’ (25). In other words, their socialisation has failed, according to the psychological model, which places them into the category of “deviants” (Prout and James, 2015). This discourse resonates with the contrasting view of children presented by Brown Rosier (2009), where child prisoners are thought of as those whose bad behaviour is the result of a negligent style of child-rearing.

4.2 *The Child as Both a Subject of Rights and an Object of Protection*

The Inter-American Court understands that children are ‘all subjects of rights, entitled to inalienable and inherent rights of the human person’ (AO-17: 54). In the words of Judge Cançado:

The fact that the children do not enjoy full legal capacity to act, and that they therefore have to exercise their rights by means of other persons, does not deprive them of their juridical condition of subjects or [sic] right.

AO-17: 99

But children, ‘in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights’ (AO-17: 66). As a consequence, ‘children exercise their rights in a progressive manner as they develop a greater
degree of independence and personal autonomy’ (*Atala v. Chile*). Therefore, the IACHR recognises that the child is the bearer of the inalienable and inherent rights of the human person, although she lacks adequate means effectively and autonomously to exercise those rights, given her “immaturity” and “vulnerability”. This discourse reflects the interests theory of rights according to which children’s rights are morally grounded in the human condition of the child who has interests to protect through rights, even before she develops the will to exercise them (Freeman, 1992). In this theory, the limitations of the child in exercising her rights do not constitute a reason for denying such entitlements (O’Neill, 1992).

In recognition of her human condition, the IACHR acknowledges that the child has, on the one hand, the same human rights as all human beings. Indeed, it states that, ‘true and full protection of children entails their broad enjoyment of all their rights, including their economic, social, and cultural rights’ (*AO-17*: 80). In this regard, Judge García emphasises the “unified idea” of human rights arguing that:

All of them [are] significant, enforceable, mutually complementary and conditioned ... They are all, simultaneously, the protective shield of the human being: they are mutually enforced, conditioned, and perfected, and it is therefore necessary to pay equal attention to all of them.

*AO-17*: 116

Through such discourse, the Inter-American Court engages with concepts and principles of international human rights law such as the indivisibility, interdependence and equal value of human rights (Freeman, 2010) and follows the main categorisation of human rights – civil and political rights, on the one hand, and economic, social and cultural rights, on the other – instead of the “three Ps” which has been described as the dominant categorisation of children’s rights by Reynaert *et al.* (2015).

On the other hand, the IACHR recognises that, ‘children have the same rights as all human beings – minors or adults – and also special rights derived from their condition’ (*AO-17*: 57). In *Mendoza v. Argentina*, the Inter-American Court explains that:

Children are bearers of all the rights established in the American Convention, in addition to the special measures of protection provided for in Article 19 of this instrument, which must be defined according to the particular circumstances of each specific case (49).
The content and scope of the special measures of protection must be established according to ‘a very comprehensive international corpus juris for the protection of the child (which the Convention on the Rights of the Child and the American Convention are part of [sic]), which should be used as a source of law’ (Ao-17: 48). In this corpus juris, the UNCRC is seen as ‘a broad international consensus (opinio iuris communis) in favor of the principles and institutions set forth in that instrument, which reflects current developments of this matter’ (Ao-17: 50).

The need to adopt special measures of protection emerges from an image of the child as someone who is “weak”, “immature” and “inexperienced”:

The preamble of the Convention on the Rights of the Child establishes that children require “special care,” and Article 19 of the American Convention states that they must receive “special measures of protection.” In both cases, the need to adopt these measures or care originates from the specific situation of children, taking into account their weakness, immaturity or inexperience.

Ao-17: 59

In this discourse, safeguarding children is a fundamental value of democratic societies (Ao-17) and, according to Judge Cançado, the rationale behind the corpus juris of the human rights of the child (Ao-17).

4.2.1 The Right of the Child to be Protected

The Inter-American Court understands the special rights of the child primarily as her right to the special measures of protection provided in Article 19 of the ACHR, whose content and scope must be defined according to the particular circumstances of each case and considering the international corpus juris for the protection of the child. Therefore, the right of every child to be protected is granted paramount importance. This approach to children’s special rights reflects what Hanson (2012) has described as a paternalistic view where children’s rights are limited to the right to be protected and, as a consequence, children are conceived as those who mainly need special treatment and different rights which are intended to preserve their future well-being. This discourse compromises the unified idea of children’s human rights because it does not pay the same attention or recognises equal value to the rights of the child. On the contrary, it emphasises protection over participation and provision rights.

This construction of the IACHR embraces a discourse of obligations where the right of the child to be protected is ‘accompanied by specific duties of the family, society, and the State’ (Ao-17: 57). In fact, the IACHR argues that, ‘given
their immaturity and vulnerability, they require protection to ensure the exercise of their rights within the family, in society and with respect to the State’ (Ao-17: 68). In this discourse, the family is seen as the primary and natural focus responsible for the protection of the child. Therefore, the role of the State is to ‘safeguard the prevailing role of the family in the protection of the child’ (Ao-17: 66), to ‘support the family in performing its natural function of providing protection to the children who are members of the family’ (Ao-17: 57) and ‘favor, in the broadest manner, the development and strengthening of the family nucleus’ (Ao-17: 60).

The approach of the IACHR is similar to the perspective embraced by the Declarations of the Rights of the Child adopted by both the League of Nations and the United Nations. These instruments emphasise the protection of the child (Freeman, 2010) and the duties of adults in this respect (Wells, 2015). In this sense, the Inter-American Court explains that representations of the child as an object of protection correspond to the historical moment in which the ACHR was adopted, recognising the tensions between this approach and the notion of the child as a rights holder:

With respect to the aforementioned Article 19 of the American Convention, it is worth highlighting that when it was drafted there was a concern for ensuring due protection of children, by means of State mechanisms directed toward this end. Today, this precept requires a dynamic interpretation that responds to the new circumstances on which it will be projected and one that addresses the needs of the child as a true legal person, and not just as an object of protection.

Ao-17: 50

4.3 Constructing the Inter-American Child and her Rights within the Excluded Middle

The Inter-American Court is ultimately a place of struggle between discursive understandings of the child where she is understood as a human becoming – the negative other of adult qualities and a passive actor in need of protection (Peleg, 2019) – but also as a human being – an unique individual who can only be understood by listening to her views when making decisions about her (Henaghan, 2012). The notion of the child constructed by the IACHR is characterised therefore by a tension between a rights-based model – where children are seen in terms of their independent legal status and entitlement to rights (Tobin, 2012) – and a child-saving discourse – which represents the child as principally in need of protection and special consideration (Wells, 2015).

The Inter-American Court recognises these competing discourses when it notes that the concern for ensuring due protection of children was the dominant
view when the ACHR was drafted, while the preoccupation for addressing the needs of children as true legal persons reflects the current development of this matter as embodied in the UNCRC. The Court tries to solve this tension, arguing that the ACHR is a living instrument that must be interpreted, ‘hand in hand with evolving times and current living conditions’ (Atala v. Chile: 29). Nevertheless, at the end, the Inter-American child is constructed by the IACHR within the excluded middle. In the words of Judge García:

The protective and guarantee-based approaches are not opposed to each other. The real opposition is between protective and punitive approaches, at one level of consideration, and between the approach based on guarantees and arbitrariness, at the other level. Ultimately, where there seems to be contradiction, a synthesis, a meeting-ground or consensus may arise dialectically.

AO-17: 112

In this sense, the discourse of the Inter-American Court constructs the child as a complex phenomenon that is not easily reducible to one end or the other of epistemic opposites. On the contrary, the Inter-American child is understood between the notions of human being, human becoming, subject of rights and object of protection.

5 The Inter-American Childhoods and Children’s Rights

Constructing childhood within the excluded middle involves understanding the child as someone who belongs to a complex web of interdependencies (Prout, 2011). This has been characteristic of the discourse of the Inter-American Court. Indeed, children in child law are constructed as dependent of the family and children in child justice, especially those deprived of their liberty, as dependent of the State.

5.1 Children and their Rights within a Family Environment

The Inter-American Court pays special attention to the analysis of family structures and the scope of this category. This has also been a focus of attention to Latin American sociologists of childhood (Wells, 2015). Milanich (2009) explains that defining the boundaries of the family has broad cultural meanings and important social and legal consequences in Latin America to the extent it delineates who belongs but also who is “the other”, which has historically shaped social hierarchies and, as a consequence, legalised inequality in the region. The IACHR has a contradictory discourse in this respect. On the
one hand, it states that, ‘the American Convention does not define a limited concept of family, nor does it only protect a traditional model’ (Atala v. Chile: 47). In fact, the Inter-American Court stresses that the imposition of a single concept of family may entail arbitrary interference with the private life of its members (Atala v. Chile). However, on the other hand, the IACHR constructs a restricted meaning of family. This is reflected, first, in the dissenting opinion of Judge Pérez on Atala v. Chile who argues that the fact that there are currently many different concepts of family, ‘does not necessarily mean that each and every one of these must correspond to what the American Convention understands by family ... Nor does it mean to say that all States Party must recognize all the concepts or models of family’ (11). Secondly, the Inter-American Court characterises the adoptive family as a form of permanent alternative care and a measure of protection that is a substitute for a family environment (Ramírez v. Guatemala). This contrasts with Cantwell (2015) who argues that adoption is generally considered as a form of living in a permanent family, not in alternative care.

Children living in a family environment are conceived as strongly dependent on what the IACHR describes as the natural and fundamental element of society, especially regarding their protection and exercise of rights. In fact, the family is considered, ‘the primary context for children’s development and exercise of their rights’ (AO-17: 79). In relation to the former, the protection of children and the satisfaction of their needs are understood as the natural functions of the family and the primary responsibilities that naturally fall to parents (AO-17). In its earlier judgments, the Inter-American Court characterises this relationship of protection between children and parents in terms of “appropriation” and “possession” of the former (Fornerón v. Argentina). This reinforces both a proprietary model – where children make sense as the property of the father (Freeman, 2001) – and an invisible rights approach – where the debate is not primarily conceptualised in terms of children’s rights but as a vision of children as an extension and possession of their parents (Tobin, 2009; 2012). Judicial decisions adopted from this perspective may not be inconsistent with a rights approach in terms of outcomes for the child, but this discourse certainly strengthens the construction of children as objects of protection. Nonetheless, in its last judgment, the IACHR promotes a comprehensive approach where children must be integrally protected by the family, society and the state who, at the same time, must recognise the dignity and autonomy of children as subjects of rights (Ramírez v. Guatemala).

But the notion of the family and its rights constructed by the Inter-American Court limits the idea of children as autonomous rights holders.
On one hand, the IACHR states that children exercise their rights within the family, representing it as the primary context for the exercise of children’s rights. For this reason, ‘the separation of a child from his or her next of kin implies, necessarily, a threat to the exercise of the child’s liberty’ (Gelman v. Uruguay: 47). On the other hand, the Inter-American Court states that the family also has rights and powers, although ‘recognition of the authority of the family does not mean that the family can arbitrarily control the child, in a manner that would entail damage to the minor’s health and development’ (AO-17: 79). Such discourse reinforces the right of the adults of the family to make decisions regarding their children immune from external scrutiny (Schoeman, 1980). Moreover, this takes into consideration the network of relationships within which children live, which may be beneficial for their well-being according to Herring and Foster (2012). However, at the same time, it could become difficult for children to exercise their rights and to express their separate interests within an environment dominated by adults who exercise authority over them. In such a context, children can hardly challenge the construction of their best interests as a product of the imagination of adults (Liebel, 2018). In fact, the Inter-American Court, at first, references the European Court of Human Rights to argue that ‘in certain cases the authorities have very broad powers to decide what is in the best interest of the child’ (AO-17: 62). However, the IACHR later highlights the direct relationship between the best interests of the child and her right to be heard arguing that, ‘a correct implementation of the best interest of the child is not possible without respecting her/his right to be heard’ (Ramírez v. Guatemala: 58). The Inter-American Court also argues, in Ramírez v. Guatemala, that ‘decisions must show that the best interest of the child has been a primary consideration’ (63) which means that ‘it has maximum priority and it is not at the same level than the other considerations’ (73). This maximum priority given to the best interests of children, in detriment of other family interests, is the way in which courts frequently, but not consistently, act according to Eekelaar (2015). The term, “best interest of the child” is referred to as the “interés superior del niño” in Spanish. Therefore, it can be argued that this maximum priority may also be a consequence of referring to the term as the superior – and not the best – interests of the child. This certainly can be a mechanism for balancing the rights of children with those of the family. Although, at the same time, this perspective may lead to what Moyo (2012) has described as a narrow judicial construction of the best interest of the child which reflects an individualistic and “bossy” image of children.
5.2 *Children and their Rights in the Context of Deprivation of their Liberty*

According to the Inter-American Court, children are deprived of their liberty when they are subjected to restrictions to their liberty that goes beyond the rules that a family would impose in order to protect their wellbeing (*Ramírez v. Guatemala*). These restrictions create a special relationship and interaction of subordination between children and prisons where the ‘State is in a special position of guarantor, because prison authorities exercise strong control or command over the persons in their custody, especially if they are minors’ (*Mendoza v. Argentina*: 63). Given this special position, Judge García argues that prisons ‘fit within the category of “total institutions,” where existence is subject to a meticulous and comprehensive regime. The area of freedom is drastically reduced in the hands of the State’ (*Bulacio v. Argentina*: 79).

The Inter-American Court has used different terms to define the objective of prisons in this relationship. First, it mentions that ‘the objective of measures adopted must be to re-educate and re-socialize the minor’ (*AO-17*– 70). Then, the *IACHR* states that the purpose is the rehabilitation and reform of the child successfully to re-join society, find her place in mainstream society and carry forward her life plans (*Juvenile v. Paraguay*). Later, it states that the objectives are the re-socialisation, social rehabilitation and reintegration of the child into society (*Mendoza v. Argentina*). Additionally, prisons are constructed as the primary context for the protection of child prisoners and the exercise of their rights. As explained in *Juvenile v. Paraguay*:

Typically the State can be rigorous in regulating what the prisoner’s rights and obligations are, and determines what the circumstances of the internment will be; the inmate is prevented from satisfying, on his own, certain basic needs that are essential if one is to live with dignity (92).

Child prisoners are represented by the Inter-American Court, not only as the result of “broken-families”, as already discussed, but also as “school failures” to the extent they are pictured as those who have abandoned their primary and secondary studies (*Mendoza v. Argentina*). Within this context, education is conceived as of fundamental importance. Indeed, education is presented as a mechanism that enables child prisoners to develop the appropriate skills and abilities for their autonomy, inclusion in the workforce and social integration and rehabilitation (*Mendoza v. Argentina*). Moreover, Judge Cançado argues that education is a form of human emancipation that allows children to realise that they are the subject of rights and to develop their capacity for criminal responsibility (*AO-17*). The *IACHR* highlights the relevance of this process of
re-socialisation through education because children deprived of their liberty usually come from marginalised sectors of society (Juvenile v. Paraguay) and are characterised by the ‘weakness, the lack of knowledge, and the defenselessness that minors naturally have under those circumstances’ (Bulacio v. Argentina: 51). Consequently, Judge Garcia argues that child prisoners ‘neither have nor ever had reasonable expectations and conditions for a decent life’ (AO-17: 115). This discourse concurs with Lieefard (2015), who states that children in contact with the criminal justice system belong to the most stigmatised children in society. This also resonates with Pilotti (1999), who argues that families living in poverty have been historically exposed to a direct and intrusive State intervention in Latin America and their children have been portrayed as “small enemies” that must be contained.

Along with education, the Inter-American Court highlights the importance of health care in the process of re-socialising child prisoners. In fact, regular medical supervision is deemed essential to ‘ensure the children’s normal growth and development so essential to their future’ (Juvenile v. Paraguay: 96). According to Judge Cançado, this goes beyond law because, ‘the necessity to secure the right to create and develop their project of life [is] an undeniable question of justice’ (AO-17: 101). Nevertheless, Foucault (1975, 1991) argues that excessive emphasis on education and health care may reflect the reproduction of a form of “examinatory justice” and exercise of the “power of normalisation” that medicalise and educationalise prisons. According to this view, the prisons serve the interests of the dominant social class, depriving of their liberty and rehabilitating those “deviants” who belong to the “strangeness” of the lower depths of society. In other words, the emphasis on re-socialising children from their deviant behaviour through education and health care may reinforce a form of social control. This is a relevant issue in Latin America where discourses of social control have been historically imposed behind a façade of social justice (Pilotti, 1999), in order to “domesticate” the lower-class family (Milanich, 2009) and as a response to the moral panic caused by the assumption of the living conditions of the poor as a result of their supposed irresponsible lifestyle (Grugel and Peruzzotti, 2010; Vergara, 2015).

The Inter-American Court acknowledges the failure of prisons in performing their role. Indeed, it recognises that another common pattern of child prisoners is that they have had their first contact with the criminal justice system at an early age, spending much of their childhood in juvenile institutions (Mendoza v. Argentina). But instead of being protected, re-socialised and rehabilitated, they have been exposed to ‘conditions highly prejudicial to their development and made them vulnerable to others who, as adults, could prey upon them’ (Juvenile v. Paraguay: 96). This illustrates the fact that children, as
argued by Goldson and Kilkelly (2013), are frequently exposed to unsuitable treatment and conditions in prisons that are hardly a suitable environment for them. At this point, the ontological situation of child prisoners is problematic because, on the one hand, their rights are not being realised – as a result of their condition of subjects of rights – and, on the other hand, they are not being protected – as a consequence of their situation as objects of protection. Moreover, the IACHR recently advocated that, ‘States must distinguish between the proceedings and treatment given to children who need attention and protection from those given to children in conflict with the law’ (Ramírez v. Guatemala: 111). Thus, the Inter-American Court refers only to children in the family context as those who need attention and protection. This discourse may problematically reinforce what Vergara (2015) describes as two different trajectories that children experience in Latin America. In this, the wealthiest children enjoy protection and a more private childhood – in which the family and the school are the main socialising institutions – whilst the poorest children are exposed to a daily struggle for survival, exclusion from schools and the repressive intervention of the criminal justice system.

6 Conclusions

The Inter-American Court of Human Rights constructs the notion of the child as someone who finds herself between the categories of human being, human becoming, the subject of rights and the object of protection and children’s rights primarily as the special right of children to receive special measures of protection. This right to protection is understood in relation to the obligations for adults that it creates. This normative construction of childhood and children’s rights is recontextualised in environments where children interact with the family or the prison. In fact, child prisoners are understood as having a special subordinate interaction vis-à-vis the prisons, whose purpose is to re-socialise children given the failure of the family and the schools. Nevertheless, the prisons also fail in performing that role, and frequently also their role of guarantor, which endangers the status of child prisoners as rights holders and recipients of protection. For their part, children living in a family environment are increasingly being understood as family members who must be listened to. But such interests are expressed in a setting that is thought as the primary context for the protection of children and exercise of their rights although it is dominated by adults. As a result, children’s rights are balanced against the rights of the family which is granted authority and power over children.
These discourses demonstrate that the Inter-American child is not reducible to one end or the other of dichotomised oppositions and a variety of childhoods co-exist with this normative notion. These regional constructions are complex, changing and sensitive to the context in which they emerge. They interact with a restricted notion of children’s rights that takes into account the needs of children as human becomings and recipients of protection but overlooks their interests as human beings and rights holders. This tension reveals the limitations of Article 19 of the ACHR as the main legal instrument of an international structure of cooperation that has been created to realise the human rights of children. It is certainly challenging for the Inter-American Court to construct a comprehensive regional approach to these rights from such a paternalistic legal framework. Therefore, it becomes necessary to consider the adoption of a children’s rights specific international human rights law instrument for the Inter-American human rights system. An instrument that is capable of meeting the needs of children as objects of protection and human becomings, but that is also capable of addressing their interests as human beings and subjects of rights who belong to a complex web of interdependencies.

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