



Rocío Comas

Gender Invisibility and the Best Interests of the Child in the Administration of Justice: Analysis of the Request for House Arrest by Ana María Fernández

Master's Degree Programme in Human Rights and
Democratisation in Latin America and the Caribbean



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Gender and the best interests of the child in the administration of Justice:
Case Analysis in Argentina

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“The system of signatures reverses the relation of the visible to the invisible. Resemblance was the invisible form of that which, from the depths of the world, made things visible; but in order that this form may be brought out into the light in its turn there must be a visible figure that will draw it out from its profound invisibility”.

Michel Foucault

Keywords: Gender, best interests of the child, house arrest.

Abstract: This study looks at the application of house arrest in case law after the reform of Law No. 24,660 on the enforcement of deprivation of freedom in Argentina. This change increases the number of cases in which confinement is moderated, such as when pregnant women and/or mothers of children under the age of five are involved. This study analyses Ana María Fernández's request for house arrest by interpreting the arguments made by judicial officers using three main tools: gender perspective, the best interests of the child and the hermeneutics of human rights.

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Introduction

The number of women in prison has grown steadily over recent years. According to the Federal Penitentiary Service of Argentina, the female population in federal prisons in 1990 was 298, while in 2013 it was 2,839, which means it has increased about tenfold.¹ Of these, 9 out of 10 are mothers, heads of single parent household and have on average two to three children under 18 years of age.²

In this respect, women who are incarcerated stop occupying a central role in the daily care of their families and this inevitably affects the lives of their closest relatives. Children³ who can no longer live with their mothers suffer from side effects such as separation from their brothers, being moved to different households, institutionalisation or placement in foster families, irregular contact with the mother and family, increased economic vulnerability, assuming the role of caregiver for younger siblings, effects on health, depression and suicide attempts, among other consequences.⁴

To avoid breaking the bond between mother and child, there are currently two alternatives. The first is provided by the national Law of Enforcement of Deprivation of Freedom No. 24,660,⁵ whose Art. 195 states that mothers can keep their children up to four years of age with them in the prison unit.⁶ The second option is provided by Law No. 26,472, which amended Art. 32 of the aforementioned Law No. 24.660, Art. 10 of the Criminal Code and Art. 502 of the National

¹ Latest year recorded by the National Statistics System on Execution of sentence (SNEEP) under the Ministry of Justice and Human Rights, Annual Report 2013 [cited 7 July 2015]. Available from: <http://www.jus.gob.ar/media/2736750/Informe%20SNEEP%20ARGENTINA%202013.pdf>. However, it should be noted that SNEEP does not provide information on all persons in conflict with criminal law deprived of their freedom in the country, since it does not account for those held in detention centres such as Police Stations, Prefectures and Gendarmeries, among others.

² Centre for Legal and Social Studies (CELS), Public Ministry of Defence of the Nation, Criminal Attorney General's Office, *Mujeres en Prisión. Los alcances del castigo* (Women in prison. The scope of punishment) (Buenos Aires: Siglo Veintiuno Editores, 2011), p. 199.

³ In order to simplify the writing of this paper the term child is used in the sense of the Inter-American Court of Human Rights, "The term child covers (...) boys, girls and adolescents", I/A Court H.R., Advisory Opinion No. 17/2002, Legal Status and Human Rights of the child, Series A No. 17 of 28 August 2002, note 45. In accordance with this, one of the parties involved in the case is certainly a child.

⁴ Centre for Legal and Social Studies (CELS), Public Ministry of Defence of the Nation, Criminal Attorney General's Office, *op. cit.*, pp. 199-200; Oliver Robertson, *Collateral convicts: Children of incarcerated parents, recommendations and good practice from the United Nations Committee on the Rights of the Child on the Day of General Discussion 2011*, Publications on Refugees and Human Rights (Quaker United Nations Office: August 2012), p. 2.

⁵ Art. 75, para. 12 of Argentina's Constitution states that Congress shall dictate on criminal matters, and therefore the execution of sentences, on an exclusive basis. Also, Art. 228 of Law 24,660 establishes a deadline of one year for the provinces to have their regulations comply with national law, i.e. compliance is expected. In turn, Art. 229 makes express mention of the scope of Congress as complementary to the National Criminal Code.

⁶ Law No. 24,660, Art. 195: The convict may keep her children under four years of age. When it is deemed justified, a nursery will be organised by qualified personnel.

Criminal Procedure Code, by which the Enforcement Judge or authorised judge may grant the benefit of home detention⁷ to pregnant women and mothers of children under five.⁸

This new approach, which allows eligibility for house arrest by extending the cases referred to specifically in Art. 32 of the already mentioned Law No. 24,660, starts from the hypothesis that prison is not an appropriate place for a woman who is going to give birth nor for the situation where she is the mother of a child under the age of five.⁹ It also implies the questioning of the possibility for mothers to raise their children under four in a prison unit as provided for them in Art. 195 of the aforementioned enforcement law. For this reason, with this new law it is expected that the mother will go out rather than stay in with the child in these establishments.¹⁰ Nevertheless, in the Federal Prison System there prevails a large number of women who are pregnant or with children deprived of their freedom, and also mothers who decided not to keep their children with them. It is therefore necessary to reflect on the actual eligibility for measures alternative to deprivation of freedom such as house arrest. We will take as a paradigmatic example the case of Ana María Fernández, it being the only ruling on house arrest determined by the Supreme Court of Argentina in relation to gender perspective and the best interests of the child.¹¹

Without going into an exhaustive description of the case's development, we will consider as its main axes the way the courts intervening in the case of Ana Maria Fernandez applied the new form of house arrest, and their approach in relation to the best interests of the child and gender perspective.¹² We will then see not only that the best interests principle as a way to gain effective eligibility for the institution of house arrest is put into question, but also the

⁷ Hereinafter, the terms house arrest, home detention, arrest and institution will be used interchangeably.

⁸ Law No. 26,472 – passed on 17 December 2008 and enacted on 12 January 2008 – amended, among others, Art. 32 of Law No. 24,660: The enforcement judge or competent court may order the fulfilment of the sentence as house arrest: f) for the mother of a child under five (5) years of age (...); Art. 10 of the Criminal Code: at the discretion of the judge, the following may serve the sentence of imprisonment as house arrest: (...) e) Pregnant women; f) Mothers of children under five (5) years of age or of a dependent disabled person; and Art. 502 of the National Criminal Procedure Code: The enforcement or competent judge, when appropriate, may assign the monitoring of the measure to a Parole Board or a qualified social service, if the former does not exist. In no case will the responsibility for the person rest with law enforcement or security agencies.

⁹ Criminal Attorney General's Office, *Annual Report 2012*, p. 404 [cited 10 July 2015]. Available from: <http://www.ppn.gov.ar/sites/default/files/Informe%20Anual%202012%20completo.pdf>.

¹⁰ *Ibid.*, p. 404.

¹¹ National Supreme Court of Justice, Ana María Fernández, Case No. 17,156, 18 June 2013. Hereinafter, the terms Court, Supreme Court, High Court or NSCJ will be used interchangeably.

¹² In the conceptual framework of gender perspective based on four elements (institutional, symbolic, subjective and normative) are included sexual orientation and gender identity. The category under analysis will be discussed in Chapter I, 2.: The mother and gender perspective.

questioning of the maternal bond in relation to the concept of gender identity and sexual orientation.¹³

This work is divided into three chapters, followed by some final thoughts and a glossary that defines gender-related terms.

The first chapter introduces the theoretical framework, focused on the child, the mother and the law, in order to connect them to the case study. This means that the best interests of the child shall be defined in a sense as a legal principle of protection and in another as interpretive guidance. At the same time, regarding the mother we will study gender perspective in relation to identity and sexual orientation. We will attempt to build bridges between the different disciplines of legal and social sciences for a more expansive approach to the concept of gender. We will also identify patterns within the law and in its enforcement by judicial officers.

In the second chapter we will take a look at the international commitments of the Argentine State with regard to the rights of the child and mother in a context of confinement. We will identify hermeneutical interpretation criteria that will provide greater clarity to the analysis of international and national standards for the protection of human rights, such as the *pro homine*, non-discrimination and teleological interpretation principles. Next, we will define the term constitutional block to understand the hierarchy of the sources of law in the Argentine legal system. Then, we will identify in the national system those laws that for reasons of specificity protect the rights of children (best interests), mothers (gender identity and sexual orientation) and their maternal bond.

In the third chapter, we will analyse chronologically the legal application of the institution of house arrest in the Ana María Fernández case, including the Oral Criminal Court of first instance, the Court of Appeals of second instance and the National Supreme Court of Justice. By means of tools such as the best interests of the child and gender perspective, we will identify

¹³ Homosexuality/lesbianism are understood as an identity and sexuality category. Sexual orientation and gender identity occur through the relationship between identification and desire. Queer theory is a conceptual framework in which gender and sexuality converge. See C Fonseca Hernández and M L Quintero Soto, *La Teoría Queer. La de-construcción de las sexualidades periféricas* (Queer Theory. The deconstruction of peripheral sexualities) *Sociológica*, year 24, issue 69, January-April 2009, pp. 43-60. At the same time, gender identity is understood as an, “internal and individual experience of gender as felt deeply by each person, which may or may not correspond to the assigned sex at birth. Other expressions of gender are expressed such as dress, speech patterns and mannerisms. Sexual orientation is the ability of each person to feel a deep emotional, emotional and sexual attraction to individuals of a different gender or the same gender or more than one gender, as well as the ability to maintain intimate and sexual relations with these people”. See *Sexual orientation and gender identity in the international right of human rights*, United Nations High Commissioner (2013), p. 3 [cited 13 July 2015]. Available from: <http://acnudh.org/2013/11/orientacion-sexual-e-identidad-de-genero-en-el-right-internacional-de-los-rights-humanos/>. These concepts will be explored in more detail in Chapter I, 2.: The mother and gender perspective.

the arguments both for denying house arrest eligibility to Fernández and for granting it; so as to then explain what kinds of limitations¹⁴ occur in their application, and whether they are substantiated by an interpretation commensurate to the protection of human rights provided both nationally and internationally.

¹⁴ It should be mentioned that this research work was written in the Spanish language, which does not justify lack of objectivity toward the language used for the production of social and cultural meanings. But it should be noted that the Spanish language is imbued with meaning production control. George Orwell, in his novel *1984*, put it this way, “Don’t you see that the whole aim of Newspeak is to narrow the range of thought? In the end we shall make thoughtcrime literally impossible (...) Every year fewer and fewer words, and the range of consciousness always a little smaller. Even now, of course, there’s no reason or excuse for committing thoughtcrime. It’s merely a question of self-discipline, reality-control.” George Orwell, *1984*, p. 32 [cited 13 July 2015]. Available from: http://antroposmoderno.com/word/George_Orwell-1984.pdf. Similarly, it should be noted that the Spanish language has also been penetrated by the domination of power, “knowing how to speak and how to listen requires looking at women and hearing their voices, which remind the guardians of language that Castilian, unlike some other languages, expresses the genders and whether he or she who exists, talks, names, creates, enjoys and transcends is a woman or a man (...) The universal man is not a linguistic, but philosophical and political construction that subsumes the woman category in the man category, making all its human specificity contents disappear. It is inbuilt in history, mythologies, religions, through domination policies and its daily ideologies. The processes that betray the plurality of Castilian are named in this patriarchal culture language”, presentation by Marcela Lagarde at the Women's Conference, *Future vision of women and families in the national development. Women and the family at the end of the millennium* (Tegucigalpa, Honduras: 5 July 1996) [cited 13 July 2015]. Available from: http://sidoc.puntos.org.ni/isis_sidoc/documentos/02154/02154_00.pdf.

CHAPTER I: Theoretical framework of the best interests of the child and gender perspective

1. The best interests of the child

They are understood as a source of law with a normative mandate which state bodies are obliged to apply. Their understanding is vital for the proper interpretation and application of the Convention on the Rights of the Child¹⁵, i.e. it is necessary to define what is meant by best interests.

Philip Alston refers to them as a lens through which all other rights can be seen.¹⁶ A lens understood as a principle of protection¹⁷ by Art. 3 of the CRC, and which in the CRC's other articles works as an interpretive guidance to resolve potential conflicts arising between the rights of the child protected by the CRC.¹⁸ In other words, it works simultaneously as a principle and as a right in itself, by which the other rights must be seen and interpreted.

At the same time, it is understood as the fulfilment of all the rights of the child, where its primary function is to illuminate the conscience of the judge or authority so they will make a correct decision, namely that which best protects the satisfaction of his/her rights. The exercise of authority must be guided and limited by the children's rights which the law recognises. In turn, the best interests of the child can solve conflicts between rights, by resorting to prioritising some rights over others.

According to Miguel Bruñol:

With the explicit recognition of a catalogue of rights, programmed expressions of “best interests of the child” are overcome and it can be said that the best interests of the child are the fulfilment of his/her rights. The content of the principle is the rights themselves; interests and rights, in this case, are identified with each other. All “best interests” become mediated by referring strictly to the “declared right”; conversely, only what is considered to be a right can be “best interests”.¹⁹

¹⁵ CRC will be used hereinafter.

¹⁶ Philip Alston, *The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights*, International Journal of Law, Policy and the Family, Vol. 8, No. 1, p. 5.

¹⁷ CRC Art. 3, para. 1 provides that, “in all measures concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, a primary consideration that shall be addressed shall be the best interests of the child”. This will be further expanded in Chapter II.

¹⁸ CRC, Art. 9, paras. 1, 3; Art. 18, para.1; Art. 21; Art. 37; Art. 40, para. 2.

¹⁹ Miguel Cillero Bruñol, *El interés superior del niño en el marco de la Convención Internacional sobre los derechos del niño* (The best interests of the child within the framework of the International Convention on the rights of the child) (1998), p. 1 [cited 15 June 2015]. Available from: http://www.iin.oea.org/el_interes_superior.pdf.

Legally speaking, correct application of a principle requires an analysis of the affected rights and those that may be affected by the resolution of a particular authority. That is, not only should one take the decision that satisfies the greatest possible number of rights, but its relevance to other rights should also be considered. However, the discretionary nature of the judiciary and also the State has led to criticism over the scope of best interests.²⁰

In this regard, it marks them as:

A vague, indeterminate guideline subject to multiple interpretations, both of a legal and psychosocial nature, which would constitute a kind of excuse to make decisions on the fringe of recognised rights due to some ethereal extralegal type best interests. There are those who complain that the Convention acknowledges them, because protection by best interests would allow a wide margin to the discretion of the authority and weaken the effective protection of the rights enshrined in the Convention itself.²¹

For this reason, to avoid some degree of discretionality on the part of state authorities in their interpretation and application, they are defined by the paradigm of comprehensive protection.²² Freedman notes that the principle of the best interests of the child involves the binding together of two concepts: as a legal principle of protection, and as interpretive guidance.

1.1 Legal principle of protection

The foundation as a legal principle of protection²³ that can be deduced for best interests is seen by Ferrajoli as an obligation for public authorities to ensure the effectiveness of individual subjective rights.²⁴ That is to say that the authorities do not have to be inspired for a correct application, for a preexistent obligation limits detrimental actions toward these rights by means of principles of protection. Based on this theory, we induce that a duty by the State exists to guarantee the effective enjoyment by children of their subjective rights.

The problem then lies in the difficulty of resolving them by prioritising certain rights over others in case of a given conflict. For this reason, Freedman's interesting interpretation of rights states that the CRC does not allow limitations, and thus reaches the idea that there is:

²⁰ Diego Freedman, *Funciones normativas del interés superior del niño* (Regulatory functions of the best interests of the child), *Jura Gentium, Journal of Philosophy of International Law and Global Politics*, 2005, p. 1 [cited 15 June 2015]. Available from: <http://www.juragendum.org/topics/latina/es/interes.htm>.

²¹ Cillero Bruñol, *op. cit.*, p. 71.

²² Freedman, *op. cit.*, p. 1.

²³ CRC, Art. 4: States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.

²⁴ Luigi Ferrajoli, *Los fundamentos de los derechos fundamentales* (The foundations of fundamental rights) (Spain: Trotta, 2001) p. 45.

A "hard core" of rights of the child under the Convention, which would be a clear limit to the activity of the state thus preventing discretionary action. This core would include the right to life, nationality and identity, freedom of thought and conscience/consciousness, health, education, an adequate standard of living, to carry out the activities appropriate to his/her age (recreational, cultural, etc.) and the guarantees of criminal law and criminal procedure.²⁵

This means that neither judicial nor state authorities can discretionally set aside hard core rights. In relation to this, and in the same order of ideas, Freedman claims that the State is obliged to prioritise the course of public policies that will guarantee the hard core of the protected rights of the CRC.²⁶

1.2 Interpretive Guidance

Best interests also act as an interpretive guidance when conflicts between rights of the child arise. The doctrine states that in such cases the best interests of the child function as a systematic criterion of interpretation:

The rights of the child should be systematically interpreted so that as a whole they may ensure adequate protection to the rights to life, survival and development of the child. It allows the resolution of conflicts between rights considered under the Convention. The principle implies that the rights of the child are exercised in the context of a social life in which all children have rights and which also can produce situations that make incompatible the joint exercise of two or more rights enshrined in the Convention for the same child.²⁷

Freedman also believes that the CRC, while establishing that best interests do give a right to the individual child, is also considering that certain rights prevail over others which thus suffer a limitation. This is what he calls the hard core of the Convention.²⁸ Therefore, the best interests of the child function as a way to limit the discretionality of the State, being a tool that allows, when there is a dispute between two rights protected by the CRC, to clarify the prioritisation of the rights that are part of the hard core over those that do not enjoy such a status.

²⁵ Freedman, *op. cit.*, p. 2.

²⁶ *Ibid.*, p. 3.

²⁷ Cillero Bruñol, *op. cit.*, p. 81.

²⁸ Freedman, *op. cit.*, p. 3.

Therefore, Freedman concludes that the best interests of the child are a legal principle of protection that imposes on the State the duty to prioritise hard core rights over others, and in that same order of ideas, to design and implement public policies with the aforementioned hierarchy. At the same time, they work as a method of resolving conflicts between the rights that belong to the hard core and those that don't. This way, the limitation of the discretionary power of the state is guaranteed.²⁹

We will now turn to the analysis of gender perspective in relation to women, who are also mothers, it being the other intervening part of our case study. In this regard, as anticipated in the introduction, different disciplines will be applied to analyse gender category, to then relate it to the law and its application by the judicial authorities.

2. The mother and gender perspective

The social behaviour of human beings is shaped according to sets of rules and principles that change from one place to another. These rules define what a man is and what a woman is, what the influences are that affect the way we perceive what corresponds to the masculine and feminine and what is socially acceptable and appropriate for each gender. From the premise that “one is not born but becomes”, we will attempt to unravel gender inequalities, working with different approaches from the perspective of Sociology, Anthropology, Philosophy and the Law.³⁰

The science of Sociology focuses on social structures, and therefore analyses gender perspective from the ideological constructions determined by institutions such as the family, the Church and the State.³¹ It is characterised by inequality that is interactive, relational and hierarchical. As for Social Anthropology, with a view on culture, it proposes that the construction of the gender perspective is based on the daily ritual of each society forming structures and power relations.³² From the perspective of Philosophy, we discern the construction of sexual and gender identities, as well as their symbolic character in the determination of customs, practices and ways of thinking, feeling, doing and being in a society traversed by differentiation. In the field of Law, gender connotes juridical norms that define

²⁹ Ibid., p. 3.

³⁰ The four disciplines were chosen because they match Joan Scott's conceptualisation of gender perspective, as will be discussed below.

³¹ Pierre Bourdieu, *La dominación masculina* (Masculine Domination) (Barcelona: Anagrama, 2000), p. 1.

³² Françoise Héritier, *Masculino/Femenino. El pensamiento de la diferencia* (Masculine/Feminine. The thought of difference) (Barcelona: Ariel, 1996) p. 21.

behaviours, responsibilities, duties and rights of women and men in the fulfilment of a specific role in society.

2.1 Gender as a category of analysis

Simone de Beauvoir was the first to use the term gender in 1949, by which she posed a great challenge to the biological conception of human being-man/woman, saying that a woman is not born, but is made:

We are not born women, we make ourselves into women. There is no biological, psychological or economic fate that determines the role a human being plays in society; that which this indeterminate being, between a man and a eunuch, which is considered feminine, produces is civilisation as a whole.³³

With this statement one can argue that the meaning of being a woman is the result of a social construction, and that it does not derive from certain naturally feminine features. The difference between sexes worked as a basis on which ideas, norms and values were impressed that formed the concept of being a woman.

It was in 1968 that Robert Stoller established the conceptual difference between sex and gender. As to the former, it was defined in relation to a biological fact, while the latter term depended on the significance that each society attributed to that fact. Starting in the nineteen-eighties, the concept of gender became even more complex. Joan Scott defines it this way, “gender is a constitutive element of social relations based on the differences between the sexes and gender is a primary form of significant power relationships”³⁴.

According to the first claim, gender is defined by an interrelation of the following four elements: i) the institutional establishment referred to the family, family relationships, education and politics ii) the symbolic element, multiple representations that are sometimes contradictory; iii) the subjective in relation to the construction of identity; and iv) the regulatory element expressing interpretations of symbols based on educational, religious, scientific, legal and political doctrines that argue categorically the meaning of male and female. As for the second claim, Scott reveals that gender is a field where, by distinguishing feminine and masculine, power and domination of the public were legitimised.

³³ Simone De Beauvoir, *El Segundo Sexo* (The Second Sex) (México: Alianza/Siglo xxi, 1989), p. 240.

³⁴ Joan Scott, *El género. La construcción cultural de la diferencia sexual* (Gender. The cultural construction of sexual difference) compiled by Marta Lamas (México: Gender Studies University Programme, UNAM, 2003), pp. 289-292.

Having stated the four elements that constitute the category of gender, the next concepts are organised according to the model developed by Joan Scott in the preceding paragraph. For this reason, we will begin by analysing the institutional element first, followed by the symbolic, the subjective and finally the regulatory.

2.1.1 Male domination as an institutional element

According to Bourdieu, it is necessary to investigate the historical principles responsible for the production and reproduction of gender relations and sexual division structures:

The order of things is not a natural order against which nothing can be done, but a mental construct, a world view with which man satisfies his thirst for domination. A view that women themselves have assumed as victims, unconsciously accepting their role of inferiority.³⁵

In other words, the forms or ideas that people have of the world are constructions divided in a bipolar manner that tend to become second nature. This is based on the arbitrariness of the division of things and activities in accordance with the feminine and masculine. Thus, based on the biological difference between the sexes, more specifically between the sexual organs, such differentiation is naturally justified by means of the domination of men over women.

Following this order of ideas, those who are dominated apply the same patterns of domination to the conception of the sexual division of labour (high/low, hard/soft, dry/wet) that makes them conceive a negative form of their own sex. From the beginning, such structures are imposed on women in order for them to assume the role of being dominated due to the social and historical construction of their bodies, a male-centered view of the world from which the division of gender is organised, marking the conception of the hierarchy of social essences.

Bourdieu questions heterosexuality as the natural and hierarchical way of relating to each other:

History should be devoted primarily to describing and analysing the social reconstruction always recommended by the principles of vision and division of gender generators and, more broadly, of the different categories of sexual practices (heterosexuals and homosexuals in particular), as heterosexuality is socially constructed and socially constituted as the universal pattern of any normal sexual practice.³⁶

For this reason, Bourdieu states that to fully understand the status of women and the relationship between the sexes, one should start from the analysis of the structures that produce and

³⁵ Bourdieu, *op. cit.*, p. 1.

³⁶ *Ibid.*, p. 106.

reproduce them and perpetuate the order and the transformations of these mechanisms. Male domination is historically manifested in the subjective and objective structures. Thus the need arises to analyse what stays hidden within the changes.

The perpetuation of control and the maintenance of the order of the sexes has been assured through the ongoing work of three main bodies: Family, Church and State. They operate so that control and order are perpetuated while operating jointly on the unconscious structures. The family, says Bourdieu, is the one that assumes the lead role in the reproduction of the male-centered domination and view, “the Family imposes the early experience of the sexual division of labour and the legitimate representation of that division, secured by the law and inscribed in language”.³⁷

With regard to the Church, characterised by deep antifeminism ready to condemn all kinds of female offenses to decency (as in the use of garments, for example) and marking its role as a “notorious reproducer of a pessimistic view of women and femininity, it explicitly inculcates a pro-family moral entirely dominated by patriarchal values, especially by the dogma of the natural inferiority of women”.³⁸

As a third institution marked by male domination we find the role of the State “which has resorted to ratifying and increasing the prescriptions and proscriptions of private patriarchy with those of a public patriarchy, inscribed in all institutions responsible for managing and regulating the daily existence of the household”.³⁹

Bourdieu maintains that, without considering the extremes of paternalism and authoritarianism that are at the basis of the view that transforms the patriarchal family into a natural model of social order by principle, the most moderate States have imprinted on family law, especially the rules on the marital status of persons, all the principles of the androcentric domination system.

At the same time, beyond the habitual behaviours of people and the law that tends not to transform the orders given on the real family, which is heterosexual, legitimate and reproduction oriented and where ways of relating are organised in a traditional way, there appear new types of families, as well as new models of sexuality that contribute to rethinking and breaking with the established order. This results in the expansion of the worldview on what

³⁷ Ibid., pp. 106-107.

³⁸ Ibid., pp. 106-107.

³⁹ Ibid., pp. 106-107.

is or is not traditionally correct in sexual matters.⁴⁰ Bourdieu considers sexuality to be a historical invention that took shape progressively as the different fields were being divided.

In this vein, Bourdieu states:

The emergence of sexuality as such is also inseparable from the development of a set of areas and agents in competition with the monopoly of legitimate definition of sexual practices and discourses at the religious, legal and bureaucratic level, and capable of imposing that definition in practice, especially through families and familialism.⁴¹

He proposes to take a turn toward the structural analysis of asymmetric relations of domination to transcend appearances and propose policies and mutual collective work between women and men. All individuals are called upon to break away from dichotomous and asymmetric structures that are sealed and understood as natural in our bodies. The possibility of this mission depends on the full recognition of one's own structures of domination whose strength prevents them from being easily dismantled.⁴²

2.1.2 The difference between the sexes as a symbolic element

Anthropologist Françoise Héritier establishes the other unfailingly negative binary system of opposites, where this relationship unfolds naturally, in which one side is positive and the other inevitably negative: hot/cold, high/low, large/small, masculine/feminine. She ascribes this statement to and places it at the very emergence of thought in men, where the closest observable things were the body and the environment in which it was immersed, “the human body, rather than the observation of constants, the placement of organs, elementary functions and bodily fluids, presents a remarkable and certainly scandalous feature; the difference of the sexes and their distinct reproductive roles”.⁴³

This text discusses sex relationships through systems of representation without getting involved in sex and gender categories. The social construction of gender, Héritier argues, is a general order based on the sexual division of labour (together with incest prohibition and the form recognised as a union), and is one of the three pillars of society and the family.⁴⁴ This social construction also functions as an artifact of a particular order, a result of the manipulation

⁴⁰ Ibid., p. 102.

⁴¹ Ibid., p. 129.

⁴² Ibid., p. 141.

⁴³ Héritier, *op. cit.*, pp. 17-19.

⁴⁴ Lévi Strauss, Claude, “*La famille, Annales de l’université d’Abidjan* (The family, Annals of the University of Abidjan) series F, T III, 1971”. Héritier, *op. cit.*, pp. 17-19.

process by means of concrete symbols that affect individuals. This construction goes along with the first.⁴⁵

Héritier starts from the hypothesis that the valence of the sexes is given universally, and there is no flaw on the part of women (fragility, pregnancy, breast-feeding) except in terms of control over reproduction by those who do not have this particular power.⁴⁶ It is the very need of the male to dominate the reproductive capacity of the female, to establish alliances with his peers and to be certain of his paternity in order to transfer his inheritance.

One should not neglect, when it comes to sex categories, all representations relating to procreation, the formation of the embryo, the respective contributions of the parents and, therefore, the representations of the bodily fluids: blood, sperm, milk, saliva, lymph, tears, sweat, etc.

Besides that, we can observe strict correlations between these representations and the more abstract data above all of kinship and alliances. Bodily fluids are everywhere observational data subjected to intellectual grinding, but they are not reducible in all places to the same elemental core inseparable from its fluid nature, which can spill out and project out of the body.⁴⁷

Héritier also reflects on the idea of Aristotle explaining the origin of the natural weakness of woman, which is due to her frigidity and humidity. A true reflection of this is the loss of blood substance experienced by women, who lack the ability to oppose this process. On the other hand, man also loses blood but in a voluntarily manner. Examples of this are hunting, war or competition. This means that the loss of substance does not occur in the same way between women and men:

It is in this inequality – the controllable versus the uncontrollable, what is desired against what is suffered – that the matrix of the differential valence of the sexes may be found, which would also therefore be inscribed in the body, the physiological functions, or more exactly would come from the observation of this physiological function.⁴⁸

This is how, naturally (anatomically and physiologically) there is a differentiation of the sexes. From the same observations of the collected data, abstract notions emerge such as identical vs. different, where other conceptual oppositions are used such as the asymmetric classifications

⁴⁵ Ibid., p. 20.

⁴⁶ Ibid., p. 24.

⁴⁷ Ibid., p. 25.

⁴⁸ Ibid., p. 25.

that end in an attribution of value. A conceptual relationship that is subjectively oriented may translate into an inequality in practice. The universal imposition of the differential valence of the sexes is a response to one's own needs, when it comes to building a social dimension and the different rules that allow it to function:

A fourth pillar, so obvious as to have been overlooked, should be added to Claude Lévi-Strauss's prohibition of incest, sexual division of labour and recognised form of sexual union. This fourth pillar, which is absolutely indispensable for explaining the operation of the three others, which also do not account for more than the masculine/feminine relation, may also be seen as the rope that binds together the three pillars of the social tripod and is the differential valence of the sexes.⁴⁹

Héritier clarifies that binary positions should be understood as “cultural signs and not as bearers of a universal sense. The meaning lies in the very existence of these oppositions and not their content; such is the language of the social and power game”⁵⁰. In other words, this hierarchy of ideas is not set by nature but it is from the sense of our own data collection that certain values are imposed and prevail over others. Fertility then, is what differentiates man from woman, and the domination of the former is “fundamentally in the control and appropriation of a woman's fertility at the time she is fertile”⁵¹.

In Héritier's thinking, the implicit attribution of values (positive/negative) on the main binary categories (male/female, high/low, etc.) works positively for men and consequently negatively for women.⁵²

2.1.3 Feminism and the subversion of identity as a subjective element

Judith Butler raises the question of gender identities, of what is properly understood as masculine and feminine, and states that there is no original behind this doubleness of terms. Then, through the appropriation of certain standards and codes, it is shown that heterocentric thinking settles in structures with weak sediment. The rules, understood as gestures and actions, unfold before the birth of the subject itself, and are conceived according to Butler through a symbolic order, namely language; a code that translates meanings and determines the origin of the subjective perception of people's bodies. From the moment of birth, one is called “a baby boy” and another “a baby girl”. She claims that these are performative utterances, which are far

⁴⁹ Ibid., p. 26.

⁵⁰ Ibid., p. 221.

⁵¹ Ibid., p. 227.

⁵² Ibid., p. 291.

from actual reality because they lack a description as much as they respond to imposed regulations. She sees them rather as ritualised invocations or citations of normative heterosexuality.

She argues that sex, understood as the natural basis of gender – a concept rooted in culture –, is the effect of a conception that occurs within a particular social system already imbued with gender rules, that is, by the logic of binarism. She considers first that sexual difference is hailed and upheld for material reasons. However, we cannot avoid the fact that the difference transcends the material and is marked by the interjection of discursive practices that interpret it.⁵³ She adds that the category of sex is regulated from the start:

"Sex" not only functions as a standard, but is also part of a regulatory practice that produces the bodies it governs, that is, whose regulatory force is manifested as a kind of productive power, the power to produce, demarcate, circumscribe and differentiate the bodies it controls; in such a way that "sex" is a regulatory ideal whose materialisation is imposed and achieved (or not) through certain extremely regulated practices.

In other words, "sex" is an ideal construction that necessarily materialises over time. It is not a simple reality or a static condition of a body, but a process by which regulatory rules materialise "sex" and achieve such materialisation through their forced reiteration.⁵⁴

As Butler puts it, sexual identity is the result of discursive and theatrical gender practices, "gender itself is a piece of cultural fiction, a performative effect of repeated acts without origin or essence"⁵⁵. This does not mean that she denies sex as such, but that there is an obstruction to direct access to the materiality of the body defectively reached through speeches, practices and

⁵³ Judith Butler, *Cuerpos que importan. Sobre los límites materiales y discursivos del sexo* (Bodies That Matter: On the Discursive Limits of "Sex") (Buenos Aires: Paidós, 2002), p 17.

⁵⁴ *Ibid.*, p. 18.

⁵⁵ Judith Butler, *El género en disputa* (Gender Trouble) (México: Paidós, 2001), p. 172.

standards. The idea of the existence of a natural sex systemised by an order of opposite concepts (woman/man) is a device⁵⁶ by which gender has stabilised within a heterosexual matrix.⁵⁷

Thus, gender is not the expression of an inner being or analysis of one's sex that occurred before gender. That is, one has to take it as a category of a certain instability that has been built over time through a repetition of acts. The identification of the self as a constant is the result of the world's perspective on how to look at styles, movements and gestures, "the appearance of substance is precisely that, a constructed identity, a performative realisation where the mundane public, including the actors themselves, comes to believe and act in the mode of that belief"⁵⁸. Therefore, the construction of an identity model is reflected only in a particular social time. This is why Butler believes that the institution of gender is the result of a discontinuous mechanical production of acts.

The need for reiterating certain behaviours suggests to her that the process of materialisation is incomplete, i.e. that the bodies are still reluctant to some extent toward their imposed materialisation. Right there, in the instability, is a margin that can be exploited for rematerialisation, where the regulatory force can go in the opposite direction and consequently cause restructurings that challenge the hegemony of the regulatory rules.

Talking about gender performativity implies that the behaviour of the individuals is affected by social norms beyond their control:

Not as a singular and deliberate act, but rather, as the reiterative and referential practice by which discourse produces the effects it names. The regulatory rules of "sex" act in a performative way to establish the materiality of bodies and, more specifically, to materialise the sex of the body, to materialise sexual difference in order to consolidate the heterosexual imperative.⁵⁹

⁵⁶ "The device is to be understood as follows, "That which I'm trying to repair with this name is (...) a resolutely heterogeneous group that comprises speeches, institutions, architectural authorisations, regulatory decisions, laws, administrative measures, scientific statements and philosophical, moral and philanthropic propositions. Anyway, between what is said and not said, here are the elements of the device. The device itself is the network that we extend among these elements. (...) By device I mean a sort, shall we say, of training that, at some point time, had to respond to an emergency as its main function. Thus, the device has a dominant strategic role (...) I said that the device had an essentially strategic nature; this means that there is a certain manipulation of power relations, whether to develop them toward this or that direction, or to block, stabilise and use them. Thus, the device is always part of a power play, but is also linked to a limit or the limits of knowledge, which give birth to it but, first and foremost, condition it. This is the device: strategies of power relations maintaining types of knowledge, and maintained by them". See Foucault, *Dits et écrits*, vol. iii, pp. 229 ff." Giorgio Agamben, *¿Qué es un dispositivo?* (What is a device?), *Sociológica*, year 26, issue 73, May-August 2011, pp. 249-264.

⁵⁷ Butler 2002, *op. cit.*, p. 20.

⁵⁸ *Ibid.*, p. 20.

⁵⁹ *Ibid.*, p. 18.

Performativity entails the mandatoriness of the repetition of rules whose existence does not depend on the subject, but has a prior temporality thereto, and therefore it cannot, generally speaking, voluntarily change its direction. The fixed nature of the body, its superficiality, is fully material and she insists that:

Materiality should be reconceived as the effect of power, as the most productive effect of power. And there will be no way of interpreting gender as a cultural construction imposed on the surface of matter, understood either as “the body” or as its given sex.

Rather, once “sex” itself is understood in its regulation, the materiality of the body can no longer be conceived independently of the materiality of this regulatory standard.

“Sex” is thus not simply something one possesses or a static description of what one is: it will be one of the standards through which this “one” can become viable, that standard which qualifies a body for life within the sphere of cultural intelligibility.⁶⁰

That is to say, there is an inexorable link between the regulation of what is meant by sex and what is meant by its materiality in itself. The matter of people’s bodies cannot be separated from the regulatory rules that govern their materialisation and construct the meaning of sex, not as a given corporal difference, “but as a cultural norm that governs the materialisation of bodies”⁶¹. In other words, one’s perception of the sexes is affected early on and depends on what the norm wants to set as the standard identity through a system of rewards and punishments. Performativity of gender is a social practice, that is, a constant and consistent practice in which the regulation of gender is negotiated, since the subject does not carry out any type of behaviour that pleases him or her but is forced to act by a generic legislation that promotes and legitimises or penalises and excludes.

There is a matrix of exclusion by which the subject is conditioned at the time of adopting a particular identity (also influenced by the discursive means used by heteronormativity), which allows him or her to adopt certain identifications and exclude others. Thus, some subjects are formed while at the same time others are excluded, those who are called abject beings, i.e. the non-subjects that form the universe outside the field of the subjects:

Abjection designates here precisely those “unlivable” and “uninhabitable” zones of social life which, however, are densely populated by those who have no part in

⁶⁰ Ibid., p. 19.

⁶¹ Ibid., p. 20.

the hierarchy of the subjects, but whose condition of living under the sign of the “unlivable” is necessary to circumscribe the sphere of the subjects.

This zone of uninhabitability will be a site of feared identifications against which – and by virtue of which – the field of the subject will circumscribe his/her own claim to autonomy and life.

In this sense, then, the subject is constituted through the force of exclusion and abjection, a force that produces a constitutive outside of the subject, an abject outside which, after all, is “inside” the subject as his/her own foundational repudiation.⁶²

This generates the rejection of the subjects that are part of the identity that imposes heteronormativity, and consequently those abject or delegitimised bodies that fail to be considered bodies pose a threat to their order. These areas of exclusion, by becoming the outside of the world, of humanity, of what is legitimate, limit their own existence to representing themselves as a danger to such boundaries, as this indicates the opportunity of restructurings and changes.⁶³

By defining herself as *queer*, Butler reverses the performative force using the language that governs that which is different. At the same time, she proposes a space of recodification while questioning the language of words and their performative effects, through resistance to the dominant discourses:

I suggest that this strategy is essential to create the kind of community where it is not so difficult to survive with AIDS, where *queer* lives become legible, valued, worthy of support, where passions, wounds, sorrows and aspirations are recognised without setting the terms of this recognition in any other conceptual order of lifelessness and rigid exclusion.⁶⁴

She calls for a radical resignification in relation to the symbolic world and for diverting at the same time the chain of quotations in order to expand a way of thinking that considers a body valued and valuable.

2.1.4 Gender and Law as a normative element

Law as a legal science is imbued with language. It is also referred to as a symbolic universe, i.e. a world of signs and meanings whose regulatory scope depends on how they are specifically

⁶² Ibid., p. 20.

⁶³ Ibid., p. 26.

⁶⁴ Ibid., p. 47.

understood and practiced.⁶⁵ It does not only consist of laws but it is also a reflection of the values, myths, dogmas, imaginaries, and ideologies of a society. At the same time, these components that are part of law are transformed into assumptions that guarantee and legitimise its existence. Law is also understood as the result of a process of social construction permeated with speeches, subjectivities and power relations.

Also, a legal system consists of rules understood as signs whose interpretation is not entirely accurate or unambiguous. Rules, in turn, reflect the conflict of certain actors prioritising certain principles over others.⁶⁶ The impact of the law is not so much related to the symbolic reason of the principle but rather with the way it has been applied and interpreted by legal operators. In this sense, within the legal sciences the role of women is contemplated in relation to the role it has occupied in history until the present day.

In this direction, Tamar Pitch argues that a woman, understood as a subject of rights, does not have full control of her body:

The body of a woman, unlike the body of a man, has always been a contentious space subjected to the public, legal, ethical and political discourses, as well as medical practices, educational interventions, rules, disciplines and controls. Put another way, it has been, still is, subjected to the law and the right of others, as a non-autonomous body, subject to heteronomous powers: marital, legal, moral, religious and sanitary.⁶⁷

This means that the freedom of a woman is analysed in close connection with her body. The female body has been for many years, and until now, treated as an object rather than a subject of rights. And for this reason, the proposal to achieve real and effective freedom for women is part even today of “a struggle for the liberation of women's bodies”⁶⁸. This freedom for women becomes a two-way paradigm:

In that such freedom is immunity of the body against constrictions, harassments and discriminations; as a woman is the paradigm of the other and therefore her oppression-discrimination are paradigmatic of all inequalities that persist today under the guise of equal rights.⁶⁹

⁶⁵ Tamar Pitch, *Un derecho para dos. La construcción jurídica de género, sexo y sexualidad* (A Right for Two: The Legal Construction of Gender, Sex and Sexuality) (Madrid: Trotta, 2003), p. 16.

⁶⁶ *Ibid.*, p. 235.

⁶⁷ *Ibid.*, p. 12.

⁶⁸ *Ibid.*, p. 15.

⁶⁹ *Ibid.*, p. 15.

2.1.4.1 The effectiveness of the law in the protection of the interests of women

In the nineteenth and much of the twentieth century, criminal law contributed to the attribution and reproduction of a certain meaning to the social being of women. In some way a woman is understood as a person subject to guardianship without responsibility for her actions and in some other way, social control is deployed over women's sexuality along with certain stereotypes about their sexuality.⁷⁰

In the nineteen seventies, many studies addressed the latent discrimination in criminal law and the sentences handed down by the judges. In the eighties, the idea emerged that gender parity in the legal sense does not imply material equality of men and women before the law. And this suggests that justice at a formal level is not a *sine qua non* condition of the existence of equal justice on the material plane, seeing as how the rules for all society have been applied to groups with great social inequalities. The criminalised woman then, should “face jurisdictional and institutionalised practices deeply marked by patriarchal relations”⁷¹. This is confirmed in socio-legal and criminological studies that were done showing further marginalisation and discrimination suffered by women in conflict with criminal law.⁷² In Bodelón’s own words:

In both cases, there is a common element, the fact that the criminal justice system tends to consolidate the gender structure and reproduce the elements that cause sexual discrimination. Therefore, from the perspective of criminalised women, it should be affirmed that not only criminal law does not help resolve the conflicts under consideration, but also that its application causes further discrimination.⁷³

What was termed feminist legal theory arose in the eighties. It consisted in the study analysing the relationship between gender and law. In turn, this theory draws from other disciplines such as anthropology, sociology and economics. Through it, one attempts to see the limitations of regulatory reforms in relation to their policies. It so happened that ten years earlier, part of the feminist movement had turned its fight to legal reforms such as employment policies, family law and criminal law. After ten years, these reforms appeared to have peaked and doubts began to be raised about the real effectiveness of legislative reforms. This caused the feminist

⁷⁰ Encarna Bodelón, *El cuestionamiento de la eficacia del derecho en relación a la protección de los intereses de las mujeres* (Questioning the effectiveness of the law in relation to the protection of the interests of women) (Delito y Sociedad, Social Science Journal of the University of Buenos Aires), p. 126.

⁷¹ *Ibid.*, p. 127.

⁷² Ann Lloyd, *Doubly deviant, doubly damned. Society's treatment of violent women* (Penguin Books: 1995). Especially significant are the studies of women in prison and their treatment before the criminal courts by Mary Eaton, *Justice for Women? Family, Court and Social Control* (London: Open University Press, 1986).

⁷³ Bodelón, *op. cit.*, pp.127-128.

movements to change the focus of their debate and begin to see that the reasons for the obstructions to changes were to be found in some characteristics of modern legal doctrine and political structures.⁷⁴ Coming to see the fact that the law was permeated by the difference between the sexes caused certain practices of criminal justice to be taken into account:

Sexism could be preached in the rule as much as in its application. The Criminal Code or the practices of the penal system were sexist to the extent in which a different application of the rule on the basis of sex would be proposed (for example, the fact that the courts assessed the same sexual behaviour differently depending on whether it was by a man or a woman).⁷⁵

In the same way that sexism is denounced in criminal law, they were trying to analyse in which way justice analysed the same behaviour and how it was assessed whether the individual who engaged in it was a man or a woman, and if that involved a different treatment.

In the eighties, Gelsthorpe conducted a study where she analysed how juvenile courts worked in cases of women in conflict with criminal law.⁷⁶ Gelsthorpe not only analysed the sentences handed down by the courts, but also the complex day to day activities of a court and the different instances of the criminal justice system. Dealing with these behaviours can reveal the criteria of normality used to judge girls and boys. According to her, “the problem is that, in practice, the courts ignored or overlooked different circumstances, and also generalised men and women by means of prototypes. And thus”, she concludes, “existing discriminations are reinforced”⁷⁷. The legal idea of masculinity is not limited to the idea of men before the law, but it extends to the existence of certain characteristics associated with masculinity in a cultural sense. This statement suggests that the law does not discriminate by its uneven application between man and woman, as in appearance objective and neutral criteria are applied, but because when the veil is removed it reflects a set of values that are male.⁷⁸

During the nineties, studies that had begun by denouncing the sexist application of criminal law now focused in a slightly more complex way on the analysis of the form in which discrimination occurs. Mary Eaton's work is focused on the activity of the courts.⁷⁹ She analyses the treatment received by women and concludes that judges tend to support their arguments on family type considerations. She claims that the courts reproduce the relations between sexes, considering

⁷⁴ Ibid., p. 129.

⁷⁵ Ibid., p. 130.

⁷⁶ Loraine Gelsthorpe, *Sexism and the Female Offender* (Vermont: Gower Publishing Company, 1989).

⁷⁷ Bodelón, *op. cit.*, p. 130.

⁷⁸ Ibid., p. 130.

⁷⁹ Eaton, *op. cit.*

women not as subjects but in function of said family relationships. The routine operation of the courts becomes the focus of analysis:

We illustrate how the various legal operators incorporate stereotypes and judgments about the gender divide into their daily activities. These family references allude to issues such as family responsibility, work, relationship with the family, family unity, etc. They reinforce a traditional concept of family both for men and women.⁸⁰

Following this order of ideas, a condition is created by which strengthening the traditional family model consolidates family relationships where women are at a distinct disadvantage. The reproduction of the division of genders is due more to the systematic and routine application of certain criteria of normality than to the unequal application of a criterion. After analysing the category of gender through the interrelation of the four elements, which somehow attempts to avoid the ambiguity of the term,⁸¹ we will now go on with Chapter II, which deals with the regulations covering the rights of children and women.

⁸⁰ Bodelón, *op. cit.*, p. 131.

⁸¹ Joan Scott noted in this regard that the confusion in the use of the words sex and gender is part of the “difficulty of representing people’s bodies as complete social artefacts within the opposition between nature and culture”. See Joan Scott, *Género e historia* (Gender and History) (México: Fondo de Cultura Económica, Autonomous University of Mexico, 2008), p. 246. Bourdieu denounces it as, “the relative dehistoricisation and eternalisation of sexual division structures and the corresponding principles of division”, Bourdieu, *op. cit.*, p. 8.

CHAPTER II: International and national legislation on the rights of children and women

In this section we will focus on international and national legislation. We will start with the concept of human rights and their use as a hermeneutic tool for the interpretation of the various sources of law. We will then discuss the development of children rights, the notion of *Corpus Juris* and the principles derived from the Convention on the Rights of the Child. Next, we will analyse the particular situation experienced by a mother and her child when deprived of freedom and then select those rules that protect sexual orientation and gender identity. Finally, we will take on those national laws that protect the parties in our case study, likewise interpreted under the concept of constitutional block. The emphasis of this chapter will then be on international standards in the universal system and the inter-American regional systems as well as the African system for some particular points.⁸²

1. International regulations

Legal sciences, understood as rules of coexistence within a society, have not always recognised the capacity to enjoy human rights for some of its members. This does not mean that people, by the mere fact that they exist, have not been able to enjoy freedom, for example, but it was not exercised equally by all, nor was it recognised as a right in itself.⁸³

For this reason, before starting to delve into the next chapter, it is necessary to define what is meant by human rights, and we define it as “the right to have rights”. It is the dual power of word and action that produces effects on the life of a community. However, this right has been taken from those excluded from humanity as such. Arendt argues that the conflict is not in the loss of freedom, but in seeing it as natural that some individuals are not in a condition to fight for it. To this end, she focuses on the indissoluble relationship of the individual with the political community to which he or she belongs. The public sphere is what takes advantage of the freedom that was created:

Equality, in contrast to everything that is involved in mere existence, is not given to us, but is the result of human organisation, while it is guided by the principle of

⁸² The international systems for protection of human rights coexist with each other, both the universal and regional (inter-American, African and European). “This means that the different systems feed and complement each other as regards the development of international standards of human rights”. See the Inter-American Commission on Human Rights, *Children and their Rights in the Inter-American System of Human Rights* (second edition), Chapter I, para. 52.

⁸³ Mónica Pinto, *Temas de derechos humanos* (Human rights issues) (Buenos Aires: Del Puerto, 2009), p. 1.

justice. We are not born equal; we become equal as members of a group on the strength of our decision to grant each other equal rights.⁸⁴

In other words, people who live outside the law lose their character of being equals. That is to say that the existence of human rights, as it is created legislation, involves granting equality guided by what is right, i.e. there is an intrinsic and relational relationship between equality and human organisation in a society. In the opposite sense, those who do not question these rules lack the equality achieved and concretised by those who have decided to organise themselves in a society.

It is therefore essential to understand law for its deconstructable character and the role it plays in the context of social change, “the role of law (...) depends on a balance of forces within the framework of social conflict. In the hands of dominant groups, it constitutes a mechanism for preservation and renewal of their interests and purposes; in the hands of groups that are dominated, a mechanism of defense and political contestation”⁸⁵. For this reason, it is necessary to think of law in a form that can make it accessible, through criticism but not absolute rejection, to unveil its system of codes and interpretations and achieve a better understanding of its functionality.

1.1 The hermeneutics of human rights

The vastness of legal sources of human rights, both internal as well as international, makes it of vital importance to indicate the scope of protected rights and the obligations assumed by States. Such a need arises because in certain similar cases, regulations overlap and therefore can produce dissimilar solutions.

Legal sources, such as the declarations of human rights understood as common law and universal and regional treaties, are adopted by States and integrated into their domestic legislation, which also contains, among other provisions, the protection of human rights.

According to Mónica Pinto:

Without prejudice to the autonomy of each legal system to determine the modes of integration, to establish the hierarchy of their rules and, therefore, identify the criteria to solve and overcome any conflicts that may arise, the plurality of sources

⁸⁴ Hannah Arendt, *Los orígenes del totalitarismo* (The Origins of Totalitarianism) (Madrid: Taurus, 1998), p. 251.

⁸⁵ E Mari et al., *Materiales para una teoría crítica del derecho* (Materials for a critical theory of the law) (Buenos Aires: Lexis Nexis, 2006), p. 152.

imposes (the need to develop specific criteria that result in) compatibilisation with respect to the scope of protected rights and obligations assumed by States.⁸⁶

Overall, the treaties on human rights state that none of their provisions allow a greater limitation of protected rights than that established, or the reduction of the enjoyment and exercise of any other right recognised in another international or internal standard, nor the limitation or exclusion of the effect that common law rules may have in matters of human rights.⁸⁷

At the same time, a series of principles of international law and principles of international law on human rights are used to bring greater clarity to the interpretation of the rules relating to international law on human rights. Firstly, the *pro homine* principle should be mentioned, understood as:

A hermeneutical criterion that informs all law with regard to human rights, under which we should turn to the broadest rule, or the most extensive interpretation when it comes to recognising protected rights and, conversely, to the most restricted standard or interpretation when it comes to establishing permanent restrictions on the exercise of the rights or their extraordinary suspension. This principle coincides with the fundamental feature of the right of human rights, that is, always be in favour of man.⁸⁸

In other words, in cases where a dilemma presents itself on the implementation of legal sources in relation to the protection of human rights, the interpretation of the rules should rely on their substantive weight rather than formalistic criteria that violate the effective exercise thereof.

The second general principle for the correct interpretation and application of standards that protect human rights is that of non-discrimination. We should clarify that it is a right in itself, and at the same time it is understood as a condition to exercise all protected rights:

Discrimination is understood as any distinction, exclusion, restriction or preference based on race, colour, sex, language, religion, public opinions or any other opinion, national or social origin, economic status, birth or other social condition whose purpose or effect is nullifying or diminishing the recognition, enjoyment or

⁸⁶ “Mónica Pinto, *El principio pro homine. Criterios de hermenéutica y pautas para la regulación de los rights humanos* (The *pro homine* principle. Hermeneutical criteria and guidelines for the regulation of human rights)”. Compiled by M Abregú and C Courtis, *La aplicación de los tratados sobre rights humanos por los tribunales locales* (The implementation of human rights treaties by local courts) (Buenos Aires, Centre for Legal and Social Studies: Del Puerto, 1997), p. 163.

⁸⁷ See International Covenant on Civil and Political Rights, Art. 5; American Convention on Human Rights, Art. 29; Convention against Torture, Art. 1.1; Convention on the Rights of the Child, Art. 41; International Covenant on Economic, Social and Cultural Rights, Art. 5.

⁸⁸ Pinto1997, *op. cit.*, p. 163.

exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other sphere.⁸⁹

The principle of non-discrimination is closely related to the notion of equality. Everyone, without distinction, has the right to enjoy all human rights, including the rights to equality before the law and the right to be protected against any possible discrimination on various grounds.

At the same time, we distinguish as a third tool the so-called teleological interpretation arising from Art. 31 of the Vienna Convention on the Law of Treaties of 1969,⁹⁰ “a treaty should be interpreted in good faith in accordance with the common meaning to be given to the terms of the treaty in their context and taking into account its object and purpose”⁹¹. In this regard, Pinto points out that as far as what pertains the protection of human rights, the latter part of the fragment of the aforementioned article is considered to be fundamental, i.e. the object and purpose of the rules on this subject.⁹²

In order to assess how best to address the needs and rights of a child and mother deprived of freedom, we will now review those most salient rights previously identified as the most relevant in these circumstances.

1.2 Legal precedents on the rights of the child and the notion of *Corpus Juris*

The positivisation of the standards occurred around the year 1919, when the International Labour Organisation⁹³ developed a series of conventions on labour standards for working children; just a short time earlier than when the Geneva Declaration on the Rights of the Child was adopted by the League of Nations in 1924, in which the rights of children were generally recognised. They were further developed in 1959 through the United Nations Declaration on

⁸⁹ Pinto 2009, *op. cit.*, p. 85.

⁹⁰ The Vienna Convention on the Law of Treaties was signed on 23 May 1969, approved in Argentina by law 19,865 on October 3, 1972, and entered into force on January 27, 1980.

⁹¹ Vienna Convention on the law of treaties of 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force on 27 January 1980.

⁹² “In this perspective, Art. 31.1 of the Vienna Convention on the Law of Treaties leads one to adopt the interpretation that best fits the requirements of the protection of fundamental rights of human beings. If we also remember that the legal interest protected by these instruments is not, at least directly, that of the States parties, but of human beings, we have a tendency to apply treaties in the sense that best ensures the comprehensive protection of any victims of human rights violations. This circumstance gives the interpretation and application of the treaty provisions permanent expansion dynamics”. “Pedro Nikken, *Bases de la progresividad en el régimen internacional de protección de los rights humanos, en Rights humanos en las Américas. Homenaje a la memoria de Carlos A. Dunshee de Abranches* (Bases of progressivity in the international regime of human rights protection. Human Rights in the Americas. Tribute to the memory of Carlos A. Dunshee de Abranches) (Washington: IACHR, 1984)”. Pinto 2009, *op. cit.*, p. 84.

⁹³ The acronym ILO will be used hereinafter.

the Rights of the Child. The requirements were of a protectionist kind, i.e. that the child “was not in a position to exercise his/her own rights; it was the adults who exercised them for the child and by doing so were subject to certain obligations. Thus, it could be said that a child had a special legal status due to his/her inability to exercise his/her rights”⁹⁴.

With the approval of the Convention on the Rights of the Child⁹⁵ in the year 1989, there was an expansion in the recognition of the child as an active subject of rights.⁹⁶ The Convention encompasses rights such as that to life, as well as civil, political, economic, social and cultural rights. However, it is necessary to mention the observation made by the Committee on the Rights of the Child⁹⁷ insofar as it is not the only tool for the protection of the rights of the child but it “reflects a holistic perspective on early childhood development based on the principles of indivisibility and interdependence of all human rights”⁹⁸. At the same time, it is necessary to acknowledge that the States involved assumed the obligation to respect and guarantee all rights covered by the CRC within their respective jurisdictions, without any discrimination and regardless of the procedural status of the parents.

In this vein, and according to the statement by the Committee on the Rights of the Child in the preceding paragraph, for the sake of further exploration of the international normative analysis

⁹⁴ French delegate to the Human Rights Commission in 1959, as quoted in Philip Verrman, *The rights of the child and the changing image of childhood* (Dordrecht: Nijhoff/Kluwer Academic Publishers, 1992), p. 164.

⁹⁵ The Convention on the Rights of the Child (hereinafter CRC or Convention) was adopted by the Assembly of the United Nations on 20 November 1989, approved in Argentina by Law 23,849 on 27 September 1990, and entered into force on 2 September 1990.

⁹⁶ “In this respect, the idea that children are subjects of international law does not begin with the Convention on the Rights of the Child. This treaty is, to date, its most accomplished and complete expression, a milestone in a long legal and cultural process, an example of a continuum in the history of the legal protection of children more than an example of rupture (beyond what is related to the increased enforceability implied by the treaty as a conventional standard as compared to unconventional standards)”. Mary Beloff, *Fortalezas y debilidades del litigio estratégico para el fortalecimiento de los estándares internacionales y regionales de protección a la niñez en América Latina* (Strengths and weaknesses of the strategic litigation for the strengthening of international and regional standards to protect children in Latin America). *Defensa Pública: garantía de acceso a la justicia* (Public Defender: access to justice guarantee) (Public Defender's Office, s.l., La Ley, 2008), p. 360.

⁹⁷ “The Committee on the Rights of the Child was created as a supervisory body, composed of independent experts that monitor the implementation of the Convention. It consists of ten members who are four years in office and hold sessions three times a year in Geneva. All States Parties must submit periodic reports to the Committee on how the rights are exercised. Initially, States must submit a report two years after joining the Convention and then every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of concluding observations. The Committee also publishes its interpretation of the content of the human rights provisions in the form of general comments on thematic issues and organises days of general discussion”. Arts. 43, 44 and 45 of the CRC, Office of the High Commissioner for Human Rights [cited 4 July 2015]. Available from: <http://www2.ohchr.org/spanish/bodies/crc/>. See Pinto 2009, *op. cit.*, pp. 121-124 for more information.

⁹⁸ United Nations Committee on the Rights of the Child, *Day of Discussion: Implementing Child Rights in Early Childhood*, 17 September 2004, para. 1.

of Human Rights, we introduce the concept of *Corpus Juris*⁹⁹ implemented by the Inter-American Court of Human Rights and recognized as:

A set of international instruments of different legal content and effects (treaties, agreements, resolutions and declarations); as well as the decisions adopted by international bodies. Their dynamic evolution has had a positive impact on International Law, as far as affirming and developing its ability to regulate relations between States and human beings under their respective jurisdictions.¹⁰⁰

The concept of *Corpus Juris* applied to children means the recognition of a set of fundamental rules linked to the goal of protecting the human rights of the child. The IACHR recognised it through the legal application of merging instruments of protection such as the Convention on the Rights of the Child and the American Convention and reflects it as follows, “part of a very comprehensive international *Corpus Juris* for the protection of children that must serve this Court to determine the content and scope of the general arrangement as defined in Article 19 of the American Convention”¹⁰¹.

In turn, the IACHR stated that the concept of *Corpus Juris* is the result of an evolutionary development of the international right of human rights whose protection core is the child understood as a subject of rights. That is, the scope encompassed by the Court to exercise its protection is not only limited to Art. 19 of the American Convention¹⁰² but also includes, among others,¹⁰³ the provisions included in the declarations on the Rights of the Child of 1924 and 1959 and in the Convention on the Rights of the Child of 1989, not to mention those international instruments on human rights that have general scope.

This way, with the introduction of the aforementioned concept, it is permitted to use tools of law and legal interpretation adopted even outside the inter-American system of human rights protection. It is therefore feasible to consider not only the actual text of the CRC but also

⁹⁹ “*Corpus juris* is a simple and eloquent Latin expression that refers not only to standards, treaties and declarations, but also to the interpretations that have been made on them”. Beloff, *op. cit.*

¹⁰⁰ I/A Court H.R., *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*. Advisory Opinion OC-16/99 of 1 October 1999. Series A No. 16, para. 115.

¹⁰¹ I/A Court H.R., *Juridical Condition and Human Rights of the Child*. Advisory Opinion OC-17/02 of 28 August 2002. Series A No. 17 paras. 37 and 53 and *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*. Judgment of 19 November 1999. Series C No. 63, para. 194.

¹⁰² The American Convention (hereinafter ACHR) was signed in the city of San Jose, Costa Rica on 22 November 1969, entered into force on 18 July 1978 and approved by Argentina through Law No. 23,054 on 1 March 1984. Art. 19 states that every child has the right to the measures of protection that his status as a minor requires from his family, society and the State.

¹⁰³ For purposes of interpretation, the I/A Court H.R. also takes into account the following: the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985), the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules, 1990) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines, 1990), in addition to international human rights instruments of general application.

decisions made by the Committee on the Rights of the Child to interpret the content and scope of the rights recognised in Art. 19 of the ACHR. For this reason, it is understood that the *Corpus Juris* is of fundamental importance,¹⁰⁴ for it extends the system of regional protection through the incorporation of principles adopted by the CRC such as the principles of non-discrimination, development and survival and best interests.¹⁰⁵

The prospect, then, introduced by the concept of *Corpus Juris*, generates an expansion and advance that demonstrate the existence of a common legal framework in the International Right of Human Rights that protect the child which in turn generates interdependent ties at the international level between different systems concerned with childhood, such as the universal and inter-American systems.¹⁰⁶ For this reason, we will now delve briefly into those general principles which the Committee on the Rights of the Child has underscored and in turn summarise the CRC: i) the right to life, survival and development; ii) the best interests of the child; iii) participation; iv) and non-discrimination.¹⁰⁷

1.3 General principles of the Convention of the Right of the Child

1.3.1 The child's right to life, survival and development

Firstly, in order to define what is meant by child, the CRC established it in Art. 1 as a “human being under eighteen years of age”¹⁰⁸. The first right is enshrined in Art. 6.1 of the International

¹⁰⁴ Inter-American Commission on Human Rights, *Children and Their Rights in the Inter-American System for Protection of Human Rights* (second edition), Ch. I, para. 44.

¹⁰⁵ It is necessary to mention one of the first occasions on which the Commission referred to the principle of best interests of the child, “in all cases involving decisions affecting the life, freedom, physical or moral integrity, development, education, health or other rights of minors, such decisions are taken in the light of what is the most advantageous benefit to the child”. See IACHR, *Annual Report 1997*, Ch. VII, OAS/Ser.L/V/II.98. Recommendations to Member States regarding areas where measures for the full observance of human rights should be adopted in accordance with the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights.

¹⁰⁶ By way of illustrating the interaction between the Inter-American system and the Universal System with regard to children, it has taken place in the following areas: i) substantial development through the implementation of the *Corpus Juris* which allows the systems to influence each other for a greater scope of protection; ii) evidence: the probative value of decisions between the two systems, e.g. in individual petitions in the Inter-American system when a particular situation, which is indicated by the Committee on the Rights of the Child through the issuance of concluding observations aimed at the country involved, is submitted as a means of evidence; iii) monitoring and assessment of general situations: in the case of the universal system, the Committee on the Rights of the Child assesses the situation of the countries that ratified the CRC, whereas the Commission of the Inter-American system can assess the States that are part of the ACHR and those that have not ratified this instrument but are part of the OAS. Inter-American Commission on Human Rights, *Children and Their Rights in the Inter-American System for Protection of Human Rights* (second edition), Ch. I, para. 52.

¹⁰⁷ Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, pp. 3-5.

¹⁰⁸ Among the reservations and statements made by Argentina when it ratified the CRC, the following was formulated, “in relation to Art. 1 of the Convention on the Rights of the Child, the Argentine Republic declares that child must be interpreted as every human being from the moment of conception to 18 years of age” [cited 4 July 2015]. Available from: <http://www.unicef.org/argentina/spanish/7.-Convencionsobrelosrights.pdf>.

Covenant on Civil and Political Rights,¹⁰⁹ as well as in Art. 6 of the CRC. The right of children to life, survival and development is recognised. The right to life has a fundamental value, such that without its respect and guarantee the other rights would lose the sense of existence. The State is obliged to protect the life of the child and ensure both his/her growth and survival.

The right to development¹¹⁰ should be defined as prescribed by the Committee on the Rights of the Child, in a similar way as it is defined in Art. 1 of the UN Declaration on the Right to Development of 1986;¹¹¹ this is expressed as “growing up in a healthy and safe manner, free from fears and wants, and developing his or her personality, talents and mental and physical abilities to their full potential according to their capacities of development”¹¹².

1.3.2 The best interests of the child

The principle of best interests may be seen embodied in various international instruments. For example, Art. 5b of the Convention on the Elimination of All Forms of Discrimination Against Women¹¹³ states that in, “the upbringing and development of their children (...) the best interests of the children will be the primordial consideration in all cases”. Along these lines, Art. 16 of the same set of regulations establishes the prevalence of best interests with regard to marriage and family relations.

In the CRC, the principle of best interests is found in Art. 3.1, “in all measures concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, a primary consideration that will be addressed will be the best interests of the child”. With this, we seek to emphasise the importance of the rights of the child at the time, for example, when the judge evaluates what rights to prioritise over others. The rights of the child are, in turn, subject to the rights and interests of others. The tension coming from the reproach of certain behaviours on the part of society does not indicate

¹⁰⁹ The International Covenant on Civil and Political Rights (hereinafter ICCPR) was adopted by the United Nations General Assembly on 16 December 1966, approved in Argentina through Law 23,313 on 17 April 1986, and entered into force on 23 March 1976, A/RES /2200A (XXI).

¹¹⁰ Art. 18 of the CRC is directly related to the right to development; it expresses the primary role of parents in the care and development of children: States Parties shall make the best efforts to ensure recognition of the principle that both parents have common responsibilities with regard to the upbringing and development of the child. The parents or, where applicable, the legal guardians will be primarily responsible for the upbringing and development of the child. The best interests of the child shall be their basic concern.

¹¹¹ *Article 6 - The right to life, survival and development*, (Leiden: Nijhoff, 2005), p. 2.

¹¹² *Ibid.*, p. 2.

¹¹³ The International Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW) was adopted by the United Nations General Assembly on 18 December 1979, approved in Argentina through Law No. 23,179 on 8 May 1981, and entered into force on 3 September 1981, A/RES/34/180.

that the rights of the child, a purpose of which is to preserve the maternal bond, can be annulled.

As per Art. 3.2 of the CRC:

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

This part of the article requires the State to ensure the care and protection of children, without neglecting the rights and duties of their parents. Art. 3.3 states the following:

States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by the competent authorities, particularly in the areas of safety, health, the number and suitability of their staff and competent supervision.

This part of the article of the CRC obliges States to ensure the proper functioning of the facilities intended for child care.

1.3.3 Participation and non-discrimination

The principle of child participation is enshrined in Art. 12 of the CRC and stipulates that the State must ensure that the child can be heard, if he is in a condition to express his opinions in situations that affect him, in a free manner depending on his age and maturity. It is interesting to note the peculiarity of Art. 12 of the CRC through the interpretation by the Committee on the Rights of the Child, which observes in General Comment 5 that active participation is also one of the four principles of the CRC,¹¹⁴ an autonomous right.¹¹⁵ The Committee points out that at the core of this principle and right lies that which has brought forth a new social contract, where children are not only recognised as subjects of rights but also as participants in any situation liable to affect their rights.¹¹⁶

As for the principle of non-discrimination, we will mention briefly that it is enshrined in Art. 2 of the CRC and stipulates that the State must take all appropriate measures to ensure that the child is protected from all forms of discrimination and punishment. As for Art. 2.2, the State

¹¹⁴ Committee on the Rights of the Child, General Comment No. 5, CRC/GC/2003/5, p. 4.

¹¹⁵ Committee on the Rights of the Child, Final Recommendations, *Day of General Discussion on the Right of the Child to be heard*, September 2006.

¹¹⁶ Committee on the Rights of the Child, Preamble of the Final Recommendations, *Day of General Discussion on the Right of the Child to be heard*, September 2006.

party is obliged to ensure that no child is discriminated against because of the actions of his/her parents.¹¹⁷

1.4 Children and mothers deprived of their freedom

As mentioned above, the rights of the child have been set forth through the enactment of regional and international treaties for his/her protection, respect and guarantee. However, situations where children deserve even greater protection do occur, such as the moment in which the mother is deprived of her freedom, consequently producing either separation or partial rupture of the bond, or the child having to stay in a prison unit. These are the cases where the aforementioned principles play a key role in the decisions of the respective courts. The best interests, as a principle, will depend on visible factors such as the facilities available for the child's development, proper nutrition for his/her age, skills of prison staff, effective access by staff specialised in child care and the proximity of the jail with regard to family visits, among others.

Children affected by these circumstances may suffer side effects resulting in problems such as loss of contact with the mother, thus being prevented from being raised by her, loss of income and stability and their own reaction when faced with these problems. The negative impacts caused by the separation from and imprisonment of a parent, have provided the arguments for measures to address this issue. A good specific legislative regulation is, in the African regional system, the African Charter on the Rights and Welfare of the Child,¹¹⁸ which states that “a sentence without confinement will always be considered first when sentencing (...) mothers”.

An essential point to consider is the role of the family as a reference and sense of belonging. The purpose and use of the courts to sentence a parent with a penalty that deprives them of their freedom must be viewed in a broader sense, i.e. principles such as the best interests of the child

¹¹⁷ The principle of non-discrimination is rooted in other international instruments, but to avoid its repetition, refer to Chapter II, The hermeneutics of human rights; and Sexual orientation and gender identity.

¹¹⁸ Art. 30 of the African Charter on the Rights and Welfare of the Child provides the following: children of imprisoned mothers: 1. States Parties to the present Charter shall undertake to provide special treatment for pregnant women and mothers of infants and toddlers who have been accused or found guilty of violating criminal law and shall, in particular: (a) ensure that a sentence without imprisonment is always considered first when sentencing these mothers; (b) establish and promote measures alternative to institutional confinement for the treatment of these mothers; (c) establish special alternative institutions to accommodate these mothers; (d) ensure that no mother will be imprisoned with her child; (e) ensure that no death sentence is imposed on these mothers; (f) the essential objectives of the prison system will be to reform, integrate the mother to her family and her social rehabilitation. The Charter provides the specificity of this group. States are required to always consider sentences that avoid imprisonment as a first option and promote alternatives to moderate imprisonment.

have to be taken into account to avoid imparting a double penalty. For this reason, we are now going to expound on the particularities that directly affect a mother and a son cohabiting in an institution while deprived of their freedom.

1.4.1 The decision of depriving a mother of her freedom

Under the CRC, States are obliged to look out for the best interests of the child, therefore, in order to decide on the incarceration of a mother, judges must consider the impact that such imprisonment will have on her children. The Human Rights Council recognised the following through Resolution 7/29 of 2008 on the rights of the child:

We call upon all States to pay attention to the impact that the arrest and imprisonment of a parent will have on his/her children and, in particular, to give priority to measures without deprivation of freedom in sentencing or deciding on preventive measures for a person who is the sole or primary caregiver of a child, consistent with the need to protect the community and child.¹¹⁹

At the United Nations Congress on Crime Prevention and Criminal Justice, States expressed that the use of imprisonment for mothers with children should be restricted and that a special effort should be made to avoid it.¹²⁰ The UN office against Drugs and Crimes observed that, “pregnant women and nursing mothers have particular problems related to their status and should not be imprisoned unless exceptional circumstances exist”¹²¹.

Courts base their arguments on limited principles that have been established through case law and any existing trend in national instruments. Complex cases based on the welfare of children provide ample room for the judiciary to interpret ill-defined concepts and apply them to the particular case under study.

1.4.2 Pre and post partum mothers

Both during pregnancy and the breast-feeding period, women are specially protected by various international instruments as described below. The International Covenant on Economic, Social

¹¹⁹ Human Rights Council on the Rights of the Child, A/HRC/7/29, para. 31.

¹²⁰ Report on the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc.A/Conf.144/28/Rev. 1 (1990), p. 164. The Special Rapporteur on Prisons and Conditions of Detention in Africa stated that, “Prison is not a safe place for pregnant women, babies and toddlers and separating babies and infants from their mothers is not recommended. However, it is possible to find solutions so that these women are not imprisoned: posting bail for women in custody, sentences without imprisonment or prompt release or conditional release, probation and suspended sentences for convicted female prisoners”. V Chirwa, *Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa: Prisons in Malawi* (17-28 June 2001), p. 36.

¹²¹ UN Office on Drugs and Crime and the Organization for Security and Co-operation in Europe, *Criminal Justice Assessment Toolkit, Non-Custodial and Custodial Measures: 1. The Prison System* (2006), p. 27.

and Cultural Rights¹²² provides in Art. 10 for the special care of mothers starting with the conception of and after giving birth to a child,¹²³ while Art. 12 recognises for all people the right to enjoy the highest level of physical and mental health.¹²⁴ It is also established that the measures to be taken by the State include the healthy development of children. Likewise, the Human Rights Committee, a monitoring body in charge for interpreting the ICCPR,¹²⁵ in its General Comment 28 on the equality of rights between women and men states that:

Pregnant women who are deprived of their freedom must receive humane treatment and their inherent dignity must be respected at all times and in particular during the birth and care for their newborns. States Parties should report on what facilities they have to be able to ensure this and what forms of medical and health care they offer for these mothers and their children.¹²⁶

Children who are only a few months old require regular checkups. Breast-feeding women have special nutritional and health needs, which are not usually fully satisfied in a prison.¹²⁷

1.4.3 The right of the child and mother to have a family

¹²² The International Covenant of Economic, Social and Cultural Rights (hereinafter ICESCR) was adopted by the United Nations General Assembly on 16 December 1966, approved in Argentina through Law 23,313 on 17 April 1986, and entered into force on 3 January 1976, A/RES/2200 (XXI).

¹²³ ICESCR Art. 10: The States Parties to the present Covenant recognise that: 2. Special protection should be accorded to mothers during a reasonable period of time before and after delivery.

¹²⁴ ICESCR Art. 12: 1. 2. a) The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Among the measures to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall be included those necessary for: reducing stillbirths and infant mortality and the healthy development of the children.

¹²⁵ The Human Rights Committee is “the independent expert body responsible for overseeing the ICCPR for its States parties. All States Parties must submit periodic reports to the Committee on how they exercise the rights. Initially, States must submit a report one year after joining the Covenant and then as long as the Committee so requests every four years. The Committee examines each report and addresses its concerns and recommendations in the form of concluding observations. In addition, Art. 41 of the Covenant states that the Committee should consider inter-State complaints. It also has competence to examine individual complaints regarding alleged violations of the Covenant Protocol by the States parties. The Committee meets in Geneva or New York and normally holds three sessions per year. The Committee also publishes its interpretation of the content of human rights provisions in the form of general comments on thematic issues or its methods of work”. Office of the High Commissioner for Human Rights [cited 4 July 2015]. Available from: <http://www2.ohchr.org/spanish/bodies/hrc/>

¹²⁶ UN Doc. HRI/GEN/1/Rev.7, 2004, para. 15, pp. 209-210.

¹²⁷ Along the same lines, the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by means of Resolution 19 on criminal justice management and sentencing policy development around, requested limiting the use of imprisonment for certain categories, including pregnant women and mothers of young children. Report on the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc.A/Conf.144/28/Rev. 1 (1990), p. 164.

The concept of family has been subject to changes in relation to factors such as historical times and geographic locations.¹²⁸ In this sense, the Universal Declaration of Human Rights¹²⁹ defines it in Art. 16.3 as the “natural and fundamental group unit of society and is entitled to protection by society and the State”.

Also Art. 10 of the ICESCR and Art. 17 of the ICCPR grant it the same protection.¹³⁰ As for the CEDAW, its Art. 16 provides that:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure equal conditions between men and women: (...) (c) The same rights and responsibilities during marriage and in case of its dissolution.

It is well established that women deprived of their freedom will experience greater emotional distress arising out of concern for their children, reflected in emotional states such as anger, anxiety, sadness, depression, shame, guilt, low self esteem and a sense of loss.¹³¹ Art. 25.2 of the UDHR establishes the importance of protecting motherhood and childhood as far as special care and assistance.¹³² Also Art. 24 of the ICCPR and Art. 10 of the ICESCR express the importance of the family in relation to its constitution and care.¹³³

¹²⁸ “The nuclear family was the most common unit in the pre-industrial era and still remains the basic unit of social organisation in most modern industrialized societies. However, the modern family has changed with respect to its most traditional form, in terms of functions, composition, life cycle and the role of parents”. Nowadays it is defined as follows, “The family is also considered as the first nucleus of solidarity within society, transcending the figure of legal, social and economic unit. The family is a community of love and solidarity”. Encyclopaedia Britannica in Spanish, *Family: Concepts, Types and Evolution* (2009) p. 6. Similarly, General Recommendation No. 21 of the CEDAW Committee provides that, “The form and concept of family vary from one State to another and even from one region to another in the same State. Whatever form it takes and whatever the legal system, religion, custom or tradition in the country, the treatment of women in the family both before the law and in private must accord with the principles of equality and justice for all people, as required by Article 2 of the Convention” (1994), para. 13; CEDAW Committee General Recommendation No. 19 states that, “Violence against women, which impairs or nullifies the enjoyment of their human rights and fundamental freedoms by virtue of international law or of the various human rights conventions constitutes discrimination, as defined by Art. 1 of the Convention. These rights and freedoms include: (...) (f) The right to equality in the family” (1992), para. 7.

¹²⁹ The Universal Declaration of Human Rights (hereinafter, UDHR or Universal Declaration) was adopted by the United Nations General Assembly with resolution 217 A (III) on 10 December 1948, in Paris.

¹³⁰ ICESCR, Art. 10: The States Parties to the present Covenant recognise that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

ICCPR, Art. 17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

¹³¹ E Stanley and S Byrne, *Mothers in prison: Coping with separation from children*. Paper presented at the Women in Corrections. Staff and Clients Conference (Adelaide: 31 October - 1 November 2000), p. 3.

¹³² Universal Declaration of Human Rights, Art. 25: (2) Motherhood and childhood are entitled to special care and assistance. All children [...] shall enjoy the same social protection.

¹³³ ICCPR, Art. 24: 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. ICESCR, Art. 10: The States Parties to the present Covenant recognise that: 1. The widest possible protection and assistance should be accorded to the family, which

The right of the family to privacy without state intervention is referred to in Arts. 17, 23 and 24 of the ICCPR.¹³⁴ A sentence depriving of freedom one of the parents, who are primarily responsible for the obligation to protect the child's care, directly affects the effective protection of the rights provided by the Covenant.

Likewise, in Art. 9 of the CRC, one cannot ignore the importance of the care the child deserves with respect to the parents. In the first of its four paragraphs, the State is obliged to ensure the bonding of the child with his family and that he is not separated against her will (except in cases where separation is due to the child's best interests). In the second paragraph, it seeks the intervention of the parties in cases where there is a risk of separation. In relation to the third paragraph, in the case that the separation of the child from the parents does occur, the state must ensure the maintenance of regular contacts with them (always for the sake of the child's best interests). And for the last paragraph, the State, as it is responsible for the separation, will provide the child with the information necessary to determine the whereabouts of his or her parent(s).¹³⁵

The right of the child to be cared for and be accompanied by his/her mother is universally recognized by various international and regional instruments. The importance of the mother's care for her child is captured in turn in the Inter-American regional system by means of Art. 19

is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.

¹³⁴ ICCPR, Art. 17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks. Art. 23: 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. Art. 24: 1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.

¹³⁵ CRC, Art. 9: 1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence. 2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. 3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

of the American Convention on Human Rights¹³⁶ on the right of the child to be part of a family and Art. 16 of the Additional Protocol to the Convention.¹³⁷ On the right of breast-feeding, it is specifically referred to in Art. 15 of the aforementioned Protocol and the obligation is stated “to guarantee adequate nutrition for children at the nursing stage and during school attendance years”.¹³⁸

1.4.4 Alternatives without deprivation of freedom for women with children

When applying a penalty involving deprivation of freedom, judicial officers should consider how this will impact on women, and in particular the situation of women with children. Prison should be used as a last resort. In the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules),¹³⁹ States assumed the obligation to avoid unnecessary use of imprisonment by implementing a series of measures ranging from preventive to post-sentence. The Rules can be useful when they can serve as a manual on different types of alternatives without deprivation of freedom that should be made effective, such as: conditional release, suspended or postponed sentences, probation, community orders, bail and restorative justice processes.¹⁴⁰ House arrest is one of the measures provided for by the aforementioned Rules.

1.5 Sexual orientation and gender identity

LGBTIQ people¹⁴¹ (Lesbian, Gay, Bisexual, Trans – referring to transvestites, transsexuals and transgender –, Intersexual and Queer) are protected by international human rights, including the UDHR and international treaties. However, over the years they have been victims of

¹³⁶ Art. 19 has been referred to in this Chapter II, 1.2 Legal precedents on the rights of the child and the notion of *Corpus Juris*.

¹³⁷ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” was adopted by the General Assembly in San Salvador on 17 November 1988, approved in Argentina through Law No. 24,658 on 19 June 1996, and entered into force on 16 November 1999. Art. 16 establishes the following: Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

¹³⁸ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, Art. 15.

¹³⁹ The Tokyo Rules were adopted by the United Nations General Assembly with resolution 45/110 on 14 December 1990.

¹⁴⁰ United Nations Standard Minimum Rules for Non-custodial Measures.

¹⁴¹ LGBTIQ is an acronym used as a collective term for Lesbian, Gay, Bisexual, Trans (including transvestites, transsexuals and transgenders), Intersex and Queer people.

violations of their rights.¹⁴² Because of this, after nearly twenty-five years the worldview on LGBTIQ people has begun to transform and therefore it is necessary that both States and society become aware of this change.

For LGBTIQ people, the protection of human rights is based on two fundamental principles: equality and non-discrimination. Sexual orientation and gender identity, like race, sex, colour or religion are not permissible grounds for establishing differences or distinctions. In this sense, the initial words of the UDHR report that “all human beings are born free and equal in dignity and rights”. That is, their protection does not require the creation of new rights or the granting of special rights but it is necessary that the universal guarantee of non-discrimination should be fulfilled in the enjoyment of all other rights.¹⁴³

The ban on discrimination based on sexual orientation and gender identity is covered in Art. 2 of the UDHR,¹⁴⁴ Art. 2 of the ICESCR and Art. 2.1 of the ICCPR, which require each State to respect and ensure the rights set out in the instruments, including all individuals within its territory and subject to its jurisdiction. Regarding equality, Art. 26 of the ICCPR and Art. 7 of the UDHR similarly express that:

All are equal before the law and are entitled without any discrimination to equal protection by the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.¹⁴⁵

These articles do not specify sexual orientation categories nor gender identity, but these can be subsumed in the part that mentions any other distinction or any other social status. This means that the set of options that may become liable of discrimination is in some way open to the inclusion of other assumptions that are not expressly detailed.

¹⁴² On 17 May 1990, the General Assembly of the World Health Organization (WHO) approved the 10th revision of the International Statistical Classification of Diseases and Related Health Problems, in which it was recognised that sexual orientation is not a disorder. This is now the official date of the International Day Against Homophobia, Transphobia and Biphobia.

¹⁴³ This is what United Nations Secretary General Ban Ki-moon had to say in New York in a speech on the equality of LGBTI people while calling for anti-discrimination measures, “as men and women of conscience, we reject discrimination in general and in particular that based on sexual orientation and gender identity (...) where there is tension between cultural attitudes and universal human rights, the rights should prevail”. United Nations. *Libres & Iguales, Igualdad y no discriminación* (Free and equal, equality and non-discrimination), p. 2 [cited 17 June 2015]. Available from: https://unfe.org/system/unfe-21-UN_Fact_Sheets_-_Spanish_v1c.pdf.

¹⁴⁴ Universal Declaration of Human Rights, Art. 2: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

¹⁴⁵ Universal Declaration of Human Rights, Art. 7.

The UN bodies created under treaties have maintained over time that differentiations in relation to sexual orientation and gender identity are prohibited basis and go against the precepts of international law.¹⁴⁶ In the *Toonen v. Australia* case,¹⁴⁷ the Human Rights Committee established that the concept of sex stipulated in Art. 2 and Art. 26 of the Covenant includes the term sexual orientation. Starting from this case, the Human Rights Committee requested States parties to “guarantee to all persons equal rights in the Covenant, regardless of their sexual orientation”¹⁴⁸.

The general comments issued by the Committee of Economic, Social and Cultural Rights relating to various areas, such as the right to work, water and health, have established that the guarantee of non-discrimination of the Covenant also includes sexual orientation.¹⁴⁹ Along these lines, the Committee on the Rights of the Child considered including sexual orientation¹⁵⁰ and gender identity¹⁵¹ in Art. 2. In this regard, the Committee against Torture stated the following in its concluding observations, “the Committee believes that, in particular, the rules on good morals can give discretionary powers to the police and judges that, along with prejudices and discriminatory attitudes, can result in abuses against this group of the population”¹⁵².

In this same vein, the CEDAW Committee stated that:

Discrimination against women on the grounds of sex and gender is joined indivisibly with other factors that affect women, such as race, ethnicity, religion or creed, health, status, age, class, caste, orientation and gender identity (...) States

¹⁴⁶ International law defines discrimination as “any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”. Human Rights Committee, General Comment No. 18, para. 7; and Committee on Economic, Social and Cultural Rights, General Comment No. 20, para. 7. See also the International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1; Convention on the Elimination of All Forms of Discrimination Against Women, Art. 1; and Convention on the Rights of Persons with Disabilities, Art. 2.

¹⁴⁷ CCPR/C/USA/CO/3, para. 25.

¹⁴⁸ CCPR/C/USA/CO/3, para. 25.

¹⁴⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 20 *Non-discrimination in economic, social and cultural rights*, para. 32; No. 19 *The right to social security*, para. 29; No. 18 *The right to work*, para. 12 b); No. 15 *The right to water*, para. 13; No. 14 *The right to the highest attainable standard of health*, para. 18.

¹⁵⁰ Committee on the Rights of the Child, General Comment No. 4 *Adolescent health and development in the context of the Convention on the Rights of the Child*, para. 6 and General Comment No. 3 *HIV/AIDS and the rights of the child*, para. 8.

¹⁵¹ Committee on the Rights of the Child, General Comment No. 13 *The right of the child to freedom from all forms of violence*, para. 60 and 72 g) (in which it is emphasised that States parties should address discrimination against vulnerable or marginalised children, including lesbian, gay or transgender).

¹⁵² CAT/C/CRI/CO/2, para. 11.

Parties must recognize and prohibit in their legal instruments such crisscrossing forms of discrimination and their combined negative impact on affected women.¹⁵³

The Council on Human Rights also approved, in June 2011, the first United Nations resolution on sexual orientation and gender identity and this led to the drafting of an official report called Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.¹⁵⁴

Moreover, the Yogyakarta Principles¹⁵⁵ are a useful tool for the proper application of international law on human rights relating to sexual orientation and gender identity. They ratify binding international standards for compliance by States. They do not create new rights, but they are the enunciation of pre-existing rights. Each of the principles is accompanied by recommendations for States. At the same time, this set of principles attributes responsibility to all stakeholders to promote and protect human rights, i.e. they are intended not only for States, but also the media, NGOs and national institutions on human rights, among others.

The first principle affirms the equality of human beings in relation to their dignity and rights.¹⁵⁶ In direct connection to the first, the second principle prohibits discrimination on grounds of sexual orientation or gender identity and at the same time includes other criteria such as race, age and religion.¹⁵⁷ Related to the previous principle is the right to receive a fair trial:

Everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law, in the determination of their rights and

¹⁵³ The Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (on the Core Obligations of States Parties under Article 2) para. 18. In General Recommendation No. 27, the Committee also stated that “discrimination experienced by older women is often multidimensional, with the age factor compounding other forms of discrimination based on gender, ethnic origin, disability, poverty levels, sexual orientation and gender identity, migrant status, marital and family status, literacy and other grounds”, para. 13.

¹⁵⁴ The report was prepared by the Office of the High Commissioner for Human Rights, A/HRC/19/41.

¹⁵⁵ The Principles were held in Yogyakarta, Indonesia at Gadjah Mada University from 6 to 9 November 2006. They were developed and adopted unanimously by a group of human rights experts from different geographical areas.

¹⁵⁶ Yogyakarta Principle 1.: All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

¹⁵⁷ Yogyakarta Principle 2.: Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

obligations in a suit at law and of any criminal charge against them, without prejudice or discrimination on the basis of sexual orientation or gender identity.¹⁵⁸

Principle 3 requires recognition as a person before the law for everyone including persons of diverse sexual orientation and gender identity, understood as an essential part of their personality and one of the most basic aspects of self-determination, dignity and freedom.¹⁵⁹

Principles 19 to 21 point to the importance of the freedom to express one's identity and sexuality without state intervention, including the expression of identity through "speech, deportment, dress, bodily characteristics, choice of name or any other means"¹⁶⁰. Principle 24 is based on the right to form a family, and emphasises the existence of diversity in the family configurations that can be formed.¹⁶¹

The Inter-American Human Rights System¹⁶² echoes the recognition of issues related to sexual orientation and gender identity in the Case of Atala Riffo v. Chile.¹⁶³ Among the arguments used by the court, some were identified as the potential risk or harm that the sexual orientation of her eldest daughter could bring to the girls. The sentence was based primarily on the best interests of the child over other rights belonging to her parents. Thus, the father obtained custody of the daughters, and at the same time this meant that the court ignored the rights of the

¹⁵⁸ Yogyakarta Principle 8.

¹⁵⁹ Yogyakarta Principle 3.: Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

¹⁶⁰ Yogyakarta Principle 19.

¹⁶¹ Yogyakarta Principle 24.: Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.

¹⁶² The American Declaration of the Rights and Duties of Man precedes the UDHR and marks the beginning of the Inter-American system of human rights, which was adopted by the Organisation of American States (OAS) in Colombia, in 1948. The American Convention on Human Rights –which was adopted in 1969 and entered into force in 1978 –is currently the cornerstone of the Inter-American Human Rights System. Twenty-five of the 35 OAS countries have ratified and are parties to the Convention.

¹⁶³ "The facts of this case started in 2002 when Karen Atala Riffo decided to end her marriage to Ricardo Jaime López Allendes, with whom he had three daughters, M, V and R. As part of the actual separation, they established by mutual agreement that Karen Atala Riffo would keep the custody and care of the three girls in the city of Villarrica. In November 2002, Mrs Emma de Ramón, the life partner of Mrs Atala, began to live in the same house with her and her three daughters. In January 2003, the father of the three girls filed a petition for custody before the Juvenile Court of Villarrica. In October 2003, the Juvenile Court of Villarrica denied custody. In March 2004, the Temuco Court of Appeals upheld the judgment. In May 2004, the Fourth Courtroom of the Supreme Court of Chile upheld the appeal presented by Ricardo Jaime López Allendes and granted him final custody". From the data sheet of Atala Riffo and Daughters vs. Chile [cited 6 July 2015]. Available from: http://www.corteidh.or.cr/cf/jurisprudencia/ficha.cfm?nId_Ficha=196&lang=es.

mother, as well as the right of the minors to be heard. The Inter-American Court of Human Rights¹⁶⁴ indicated that:

In cases of care and custody of minors (...) speculations, assumptions, stereotypes or generalised considerations of personal characteristics of the parents or cultural preferences with respect to certain traditional concepts of the family cannot be admissible (...) that a determination from unfounded and stereotyped presumptions regarding parental capacity and suitability to guarantee and promote the welfare and development of the child is not adequate to ensure the legitimate aim of protecting the best interests of the child.

The ruling reveals that the best interests of the child cannot be understood as a mere legal formality, but that their realisation should illuminate interpretations that are reflected in real facts without affecting the rights of third parties. Consequently, the Court found that the mother had to adapt her life to a traditional conception, i.e. more in keeping with the social role of a woman as a mother, according to which society expects of her. By taking primary responsibility for raising their daughters, women should then give up an essential aspect of their own identity. This logic cannot serve as an appropriate measure affecting a protected right as is guaranteed by the full exercise of human rights without discrimination. The Court concluded that not having a family like their heterosexual peers would result in the potential situation that they would be discriminated against and ignored, thus affecting their development. The court could not prove these conjectures, nor was there a thorough reasonableness test, which would have enabled a ruling based on international standards.

2. National legislation

This section will discuss the relevance of international treaties in relation to other legal sources through an analysis of the constitutional block. It will also include the study of national laws protecting the rights of children, mothers and their maternal bond. Two laws will be analysed according to their degree of protection of rights and case study specificity: the expansion of the

¹⁶⁴ The Inter-American Court of Human Rights (hereinafter, I/A Court H.R.) was established by the American Convention on Human Rights entered into force on 18 July 1978; together with the Inter-American Commission on Human Rights, it makes up the two bodies whose function is to ensure compliance with the obligations under the Convention. At the same time, the I/A Court H.R., “is an autonomous judicial institution that seeks the application and interpretation of the American Convention on Human Rights, composed of seven judges, nationals of member states of the OAS, even if they are third with respect to the American Convention on Human Rights, chosen personally by the States parties to the Convention during the progress of the ordinary sessions of the General Assembly of the OAS. The mandate is for six years and one may be reappointed once”. Pinto 2009, *op. cit.*, p 147.

criteria of the institution of house arrest within the law enforcing imprisonment, along with its parliamentary debate, and gender identity law.

2.1 Constitutional block

After the constitutional reform of 1994, the new paragraph 22 was added to Art. 75, stating that “treaties and concordats have a higher status than laws”, meaning that, approved and signed with the procedure required by the regulatory body (approved by Congress by a vote of two-thirds of all the members of each House), they shall enjoy constitutional status.¹⁶⁵ Therefore, the constitutional block consists in prioritising treaties over the law; placing them at the same level as the Constitution. As Bidart Campos understands it, “the assignment of constitutional status, more than defining a priority over laws, means that treaties are at the same level as the Constitution; they share supremacy and spearhead our legal system along with it”¹⁶⁶.

Regarding the implementation of human rights instruments in the domestic jurisdiction of the State party, in accordance with the Vienna Convention¹⁶⁷ on the right of treaties, which establishes in Art. 27 the primacy of international law over the internal law of the State Party, each State assumes the obligation to adopt measures guaranteeing the exercise and enjoyment of the protected rights. An example of this, prior to the reform of the Constitution, is when Argentina’s National Supreme Court of Justice, on July 7, 1992, in the *Ekmekdjian v. Sofovich* case argued that “when the Nation ratifies a treaty it signed with another State, it commits internationally to having its administrative and legal bodies apply it to cases considered by that treaty, provided it contains enough concrete descriptions of such factual circumstances that

¹⁶⁵ Constitution of the Argentine Nation, Art. 75, para. 22: To approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognised herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress.

¹⁶⁶ G Bidart Campos, *Tratado elemental de right constitucional argentino* (Elementary Treatise of Argentine constitutional law) (Buenos Aires: Ediar, Vol. III, 1995), p. 276. He reinforces this concept in para. 22, establishing that no article of the first part of the Constitution is repealed and that these articles should be thought of as complementary to the rights and guarantees recognised by it.

¹⁶⁷ Approved by Law 19,865 on 3 October 1972 and became effective on 27 January 1980.

enable immediate implementation”¹⁶⁸. The Court in this case made an interpretation of Art. 27 of the 1969 Vienna Convention, which stipulates that the State party may not invoke its internal law to exempt itself from the breaching of a conventional rule.

The newly established constitutional hierarchy implies equality between the rules of the Constitution and the international instruments that were introduced into the regulatory body by paragraph 22 of Art. 75. And this leads one to think that both courts of first and second instance as well as the National Supreme Court of Justice should take into account the aforementioned rules in order to decide on a particular case, in light of the powers that the Constitution stipulates for them in Arts. 116 and 117.¹⁶⁹

It is necessary to emphasise the NSCJ’s interpretation of the *ius cogens* norm¹⁷⁰ in cases like Cabrera, W. J. E. vs. Joint Technical Commission of Salta Grande, where it defined it as “a peremptory norm of General International Law, accepted and recognised by the international community of States”¹⁷¹. It thus follows the terminology used in Art. 53 of the Vienna Convention on the Law of Treaties of 1969.¹⁷² As anticipated at the beginning of Chapter II, we are now going to analyse those laws that protect the parties in the case under study.

2.2 The Law Enforcing Deprivation of Freedom No. 24,660 and its amending Law No. 26,472

¹⁶⁸ Law 1992-C:547.

¹⁶⁹ Constitution of Argentina, Sec. 116: The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, with the exception made in Section 75, subsection 12, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more provinces, between one province and the inhabitants of another province, between the inhabitants of different provinces, and between one province or the inhabitants thereof against a foreign state or citizen. Sec. 117: In the aforementioned cases the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction.

¹⁷⁰ “Ius cogens” may be described as “consisting of a set of international standards called “mandatory”, gathered together in their scope with the feature of non-derogability or unavailability (whether its existence comes from treaties or customary laws - of the people). “Ius cogens” cannot be bypassed by rules opposing or different from a treaty and, therefore, using the design of a pyramid, we can say that the pyramid of international law is headed by “ius cogens” (...) After the 1994 reform, treaties with constitutional status coincide with our constitution; so that no problem arises, given the similar contents of both and their equally shared priority in internal law”.

Bidart Campos, *op. cit.*, anonymous company, electronic document.

¹⁷¹ NSCJ, 05/10/1983 – Cabrera, Washington Julio Efraín vs. Comisión Técnica Mixta de Salta Grande, regarding dismissal – Rulings 305: 2150.

¹⁷² Vienna Convention of 1969 on the Law of Treaties, Art. 53.: Treaties conflicting with a peremptory norm of general international law (“jus cogens”). A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

With the enactment of Law No. 26,472¹⁷³ – amending Law No. 24,660, the Penal Code and the Penal Procedure Code –, the criteria for home detention eligibility were expanded. Until December 2008, the institution, according to the previous Art. 33 of Law No. 24,660, was considered only for “a condemned person over 70 or suffering from a terminal illness may fulfil the sentence under house arrest (...) based on reasonably justified medical, psychological and social reports”. Meaning that the law did not take into account situations beyond the only case referred to. Among other reasons for the expansion,¹⁷⁴ there was the urgent legal reform regarding the disparate solutions presented in cases of request for arrest by mothers deprived of freedom together with their children. In the face of the limitations imposed by the rule, there were different approaches to this issue.¹⁷⁵

Due to the discrepancy in the solutions given by the courts to the legal vacuum produced by Art. 33 of the aforementioned law, the criteria were expanded. The enforcement or competent judge, at present, may grant house arrest in the following cases: i) sick convicts when the deprivation of freedom in the prison facility prevents recovery or adequate treatment of their condition and accommodation in a hospital is not suitable; ii) convicts suffering from a terminal illness; iii) disabled convicts when the deprivation of freedom in the prison facility is inadequate for their condition; iv) convicts over 70; v) pregnant women; vi) mothers of children under 5 or who are disabled.

2.2.1 Origin of the reform

¹⁷³ Law No. 26,472 was enacted on 17 December 2008 and promulgated on 12 January [cited 21 June 2015]. Available from: <http://infoleg.mecon.gov.ar/infolegInternet/anexos/145000-149999/149566/norma.htm>.

¹⁷⁴ One of the issues which resulted in jurisprudential discrepancies and was therefore one of the grounds for legal reform was the situation of persons with (non-terminal) disabilities under permanent treatment. In “Ricardo N. Peralta on appeal with court of appeals” [J 22.6243], on 30/08/2002, Courtroom II of the National Court of Criminal Appeals (Case 3880) decided to overturn the decision of the Court of Criminal Enforcement No. 2 which granted house arrest to a patient with serious neurological sequelae, because his condition was not provided for in Art. 33 of Law No. 24,660.

¹⁷⁵ “Adriana T. Abregu, appeal with criminal court of appeals” Case 6667 (resolved on 29/8/2006), Courtroom IV of the National Court of Criminal Appeals decided to overturn the decision of the Oral Court of San Martín No. 3 and grant the benefit to the accused (mother of four children). In a contrary argument, dated 6 July 2007, Abeledo Perrot No. 35050950; the National Court of Criminal and Economic Appeals decided to deny house arrest in Díaz de Almirón, I. S, because the only mode of support being granting it (mother of 3 children and one 3-year-old grandchild) is not sufficient reason as safeguarding children can be achieved by other means. Abeledo Perrot No. 1/70040269-1. For a complete compilation of case law on the topic existing prior to the extension of the criteria for house arrest, see Public Ministry of Defence/Unicef, *Mujeres presas. La situación de las mujeres embarazadas o con hijos/as menores de edad. Limitaciones al encarcelamiento* (Imprisoned women. The situation of pregnant women and women parenting minors. Limitations to imprisonment) (Buenos Aires: DGN/UNICEF, 2008).

The modification of the law was the result of the development of a project by members of parliament Diana B. Conti¹⁷⁶ and Marcela V. Rodriguez, who on 7 November 2007 won the preliminary approval of the National House of Representatives. MP Rosario M. Romero said at the meeting¹⁷⁷ that the project was continuously demanded by criminal execution judges and state authorities responsible for the execution of the sentence. The MP explained that the purpose was to expand the cases, for humanitarian reasons, where eligibility for home detention is considered. Out of a total of 138 MPs present, there were 130 approvals, with 6 abstentions and 2 votes against.

In relation to prison conditions, MP Marcela Rodríguez stated the following:

as all treaties and the Constitution itself indicate, prisons cannot be places of torture or degrading treatment nor can they be overcrowded. We all know about the existing problems of overcrowding and failing to provide minimum health conditions. This does not mean eliminating criminal sanctions for these people if indeed they deserve them; all this means is that the interest of society cannot prevail over the rights to life, health, integrity or dignity of the convicted or accused. Even less so can we have children in conditions of imprisonment, when this violates all rights covered by the International Convention on the Rights of the Child.¹⁷⁸

On 17 December 2008, one year after its processing and approval by the House of Representatives, at the 21st meeting of the Senate of that same year, Senator de la Pampa said the project aimed to:

Extend the benefit to four vulnerable groups not covered so far: pregnant women; mothers of children younger than 5 years or with a dependent disabled person; disabled people, when incarcerated in a prison inappropriate to their condition and involving shameful, inhuman or cruel treatment; and sick convicts being treated for an illness when the conditions of confinement prevent recovery, provided that accommodation in a hospital is not suitable.¹⁷⁹

The senator reaffirmed the prevailing importance of caring for children, “I think the objective we are seeking in expanding the importance of home detention is an essential issue, which is the care of children and, undoubtedly, adapting our legislation to the international agreements”.

¹⁷⁶ The initial draft of the MP Conti was published through parliamentary process 3 of 3/3/2006, record 0269-D-2006.

¹⁷⁷ 22nd meeting of the 14th ordinary session, for the treatment of the project included in the agenda of day 1261.

¹⁷⁸ Sergio Delgado, *La modificación de la detención domiciliaria* (The modification of house arrest) (RDP 2009-5-804, 2009), p. 2.

¹⁷⁹ *Ibid.*, p. 2.

Along the same lines, MP Paola R. Spatola stated, “as MP Rodríguez indicated in support of her project, what we are doing is putting between quotation marks what has been established by the various international conventions to which our country adhered”.

MP Alberto J. Beccani said the following:

When the commission analysed the various existing projects and tried to reconcile them, the first discussion that arose was whether it should include the word ‘may’ or ‘shall’ as the option for the judge. Finally, the criterion prevailed to keep the word ‘may’, so the judge would be given an option and not an obligation.¹⁸⁰

In addition, MP M. Rosario Romero specified that the criterion put forward by the Criminal Law Committee, which she chaired, was the power of the judge to decide over the granting or refusal of house arrest, not an obligation. This means that the MPs responsible for developing the project made it clear that eligibility for the institution is not automatic if a person fits within any of the cases.

MP Alicia M. Cornelli intervened in the debate by contributing a hermeneutical guideline:

I believe that the project we are dealing with is worthy of consideration if the judge takes into account the measures for protecting society, the important interests of the victims, the rehabilitation needs of prisoners and, above all, respect for human rights, because obviously he who administers justice from the State should not measure offenders with the same yardstick.

From the parliamentary debate it can be deduced that the spirit of the reform is the protection of a collective that somehow has a higher degree of vulnerability in relation to other people in prisons. Therefore, humanitarian reasons were considered to expand the legal framework, as well as the protection of the child¹⁸¹ and the maternal bond in his/her first few years of life. For this reason it is understood that house arrest is a tool that judicial authorities should use to reconcile the objectives of criminal policy and those that serve to protect human rights.

2.3 Gender Identity Law No. 26,743

¹⁸⁰ Ibid., p. 3.

¹⁸¹ Law No. 26,061 was enacted on 28 September 2005 and promulgated on 21 October 2005; in Art. 3, it provides for the best interests of the child as “maximum satisfaction, comprehensive and simultaneous of the rights and guarantees recognised by this law”. Respect for the following is emphasised, i) Their status as subjects of law; ii) The right of children and adolescents to be heard and have their views taken into account; iii) Respect for the full personal development of their rights in their family, social and cultural environments; iv) Their age, maturity, judgment and other personal conditions; v) The balance between the rights and guarantees of children and adolescents and the demands of the common good; vi) Their centre of life (the place where children and adolescents have spent in legitimate conditions most of their existence).

The approval and enactment of the law¹⁸² was the result of a historical struggle promoted both by civil society and LGBTI¹⁸³ organisations, which achieved the recognition of the free expression of gender as a human right and of equal and non-discriminatory treatment.¹⁸⁴ The law guarantees the free development of individuals according to their gender identity without it having to correspond with their sex at birth and full recognition of their identity right.¹⁸⁵

Gender identity is defined in Art. 2 as follows:

Gender identity is understood as internally and individually experienced by a person, which may or may not correspond with the sex assigned at birth, including one's physical experience of the body. This may involve the modification of bodily appearance or functions by pharmacological, surgical or other means, provided it is freely chosen. It also includes other expressions of gender, such as dress, speech patterns and mannerisms.¹⁸⁶

The emergence of this concept introduces a new paradigm in which the identity and expression of a person is expressed through a multiplicity of life experiences. With this new law, a variety of identities become visible that until then had not been taken into account, and therefore people not identified with the man/woman formula were made invisible by not being understood as subjects of law.

Art. 13 of the law establishes the right to freedom from discrimination based on gender identity and is in line with Art. 16 of the Argentine Constitution¹⁸⁷ and Art. 1 of Law No. 23,592 on acts

¹⁸² The gender identity law was enacted on 9 May 2012, promulgated on 23 May 2012 and promoted in the Official Gazette on 24 May 2012.

¹⁸³ Among them, CHA, the LGBT Argentina Federation, 100% Diversity, National Front for Gender Identity, Lesmadres and Association of Transvestites, Transsexuals and Transgenders of Argentina. Clarín, *Paso clave en la ley de identidad de género* (Key step in the gender identity law), 9 November 2011. Available from: http://www.clarin.com/sociedad/Paso-clave-ley-identidad-genero_0_587941314.html

¹⁸⁴ Pedro Paradiso Sottile, Secretary and Coordinator of the Legal Department of the CHA, emphasised the great step towards equal rights and non-discrimination meant by the promulgation of the gender identity law, "It is an act of justice and reparation, a cry for freedom and dignity in the face of years of complicit silence, exclusion and discrimination people suffer based on their self-perceived gender identity and its various expressions. With the promulgation of this law, Argentina complies with its national and international obligations and responsibilities and goes back to the forefront on the path to full global citizenship, where the human rights of all people are respected and ensured without any discrimination" [cited 22 June 2015]. See: <http://www.cha.org.ar/ley-de-identidad-de-genero-ley-no-26-743-promulgada-y-publicada-en-el-boletin-oficial-el-24-de-mayo-de-2012/>.

¹⁸⁵ Law No. 26,743, Art. 1: Right to gender identity. All persons have the right, a) To the recognition of their gender identity; b) To the free development of their person according to their gender identity; c) To be treated according to their gender identity and, particularly, to be identified that way in the documents proving their identity in terms of the first name/s, image and sex recorded there.

¹⁸⁶ Law No. 26,743, Art. 2.

¹⁸⁷ National Constitution, Art. 16: The Argentine Nation admits neither blood nor birth prerogatives: there are neither personal privileges nor titles of nobility. All its inhabitants are equal before the law, and admissible to employment without any other requirement than their ability. Equality is the basis of taxation and public burdens.

of discrimination.¹⁸⁸ It provides that any rule, regulation or procedure must respect the human right to gender identity and that no rule, regulation or procedure may limit, restrict, exclude or suppress the exercise of such right. The interpretation and application of the rules should always be in favour of the right to gender identity. In other words, it states that self-perceived identity cannot be grounds for discrimination by the State or individuals against the exercise and enjoyment of people's rights.

However, the law of gender identity has suffered criticism,¹⁸⁹ for example, in terms of social control by the State through the male/female identity classification. It is a law, in synthesis, which makes diversity visible and is clearly heading in the direction of a new paradigm in the interpretation of people's bodies.

¹⁸⁸ Law No. 23,592, enacted on 3 August 1998 and promulgated on 23 August 1988, Art. 1: anyone who arbitrarily impedes, obstructs, restricts or in any way impairs the full exercise on an equal basis of the fundamental rights and guarantees recognised in the Constitution shall be obliged, at the request of the victim, to set aside or cease realising the discriminatory act and repair the moral and material damage caused. For the purposes of this Article, we shall pay special attention to certain discriminatory acts or omissions on grounds such as race, religion, nationality, ideology, political or union opinion, sex, economic status, social status or physical characteristics.

¹⁸⁹ Marlene Wayar, a trans activist of the National Front for the Gender Identity Law, in a remark made to Soy Journal stated, "Every comrade who changes their ID will be unsubscribing from a trans identity for a State that will read her like that which they say identifies her as "man" and "woman". Whoever else we propose, and especially in the political arena, we must continue demanding a way for the State to read us. It's as simple as if I die and my tombstone matches the data that currently appear in my ID, I would be a man and my identity will be seriously compromised; if I change my ID and both my tombstone and it contain the new data Marlene Wayar female, they would be violating my transvestite (trans) identity in no less a serious way". M Wayar, *Qué pasó con la T?* (What happened to the T?), (Página 12, 11 May 2012) [cited 22 June 2015]. Available from: <http://www.pagina12.com.ar/diario/suplementos/soy/1-2436-2012-05-14.html>.

CHAPTER III: Analysis of the Ana María Fernández case

In this chapter we will discuss the case of house arrest promoted in defence of Ana María Fernández. The selection criterion, as anticipated in the introduction, is that it is the only case of house arrest that has been processed by Argentina's National Supreme Court of Justice related both to gender and the best interests of the child. In connection to this, it is important to note that the Supreme Court is not only the last instance of appeal nationwide but is also the highest body of the judiciary. Consequently, its decisions have an impact of political and institutional importance.¹⁹⁰

In order to have a visual understanding of the case, we propose approaching it through the use of an organisational pattern derived from the atom.¹⁹¹ We are going to use this model to show how the components of the case under analysis actually work. The nucleus of an atom is

¹⁹⁰ Along these lines, Bidart Campos argues that, "in the tripartite government that organises our constitutional law of power, the Court also rules, as it shares with the power of the state the functions by which this power is externalised and exercised. And the part containing one of them, which is administration of justice (...) The Court rules, in the sense that it integrates the triangular structure of government, but it does not support or fight men or ideas that occupy the government at any given time. The Court takes the other government departments impersonally, like bodies-institutions and not like physical bodies-people. In this scientific concept of politics, the Court is as political as the executive branch and Congress; all govern, and to govern is to deploy politics over power. (...)" Thus, it should be recalled that the Court, a) develops the constitutional doctrine in various fields, as its judgments display the interpretation and application of the Constitution; b) holds the ultimate judicial review on constitutionality, including when a provincial law disagrees with the constitution; this sort of judicial "intervention" of the Court assigns to it an important role in the design of state policies, depending on the matter the constitutionality of whose contents it judges over; c) acts as a custodian of the rights system; d) monitors that international treaties are not violated, either by action or omission, to safeguard the international responsibility of the state that has incorporated our internal law; e) tends to arrange harmoniously federal and provincial powers to avoid conflict between each other; f) integrates regulatory gaps in the constitution and infraconstitutional law, and grants content and development to rules that require completion due to their generality and openness; g) controls the correct application of the law, especially when it takes over the arbitrary sentences handed down by lower federal or local courts; h) exercises, according to what we said, a "power" of the state, shared by the government according to its competence; i.e. it is both "court" and "power". See Bidart Campos, *op. cit.*, anonymous company, electronic document.

¹⁹¹ To support the atom composition model, Nietzsche calls the metaphor a way of thinking about the universe. Meaning that the universe is thinkable because of it and at the same time that the territory of human meaning is metaphorical. The similarity builds relationships distinguishable within that which is identifiable and this procedure will be the source of the productivity of language, "the extraordinary productivity of the intellect is a life of images". Friedrich Nietzsche, *El libro del filósofo seguido de Retórica y lenguaje* (The book of the philosopher followed by Rhetoric and language) (Madrid: Taurus, 1974), p. 37. "This instinct that drives the formation of metaphors, this basic instinct of man, that at no time can be dispensed with, because in that case the whole man would have been dispensed with", Nietzsche, *op. cit.*, p. 98. The metaphorical creation that derives from the impulse and instinct of the human being is the necessary condition of his existence. The discovery of the similarities is the product of the union of a feeling and a visual image by means of analogy. "All the words and closets of the self are opened: all wants to become word, all becoming wants to learn to speak in metaphor". Nietzsche, *Así habló Zaratustra* (Thus Spoke Zarathustra) (Madrid: Alianza, 1985), p. 259. "Our senses imitate nature constantly portraying it. Imitation presupposes a reception and then continued transposition of the received image to a thousand metaphors, all effective, the Analog". Nietzsche, *op. cit.*, p. 69. It is therefore a model that reveals ways of thinking starting from the unfolding of the meaning of an original intuition given in a metaphor that is also original.

composed of positively charged protons (the *Corpus Juris* of child protection) joined with neutrally charged neutrons (the law applied by the court) and negatively charged electrons (the right to sexual orientation and gender identity). Electrons also orbit the atomic nucleus within a normative matrix.¹⁹² After having completed the representative diagram of the atom, we will return to its treatment in our final considerations.

Before beginning to analyse the Ana María Fernández house arrest case that motivated this research, we should not fail to mention the main reason that led to her imprisonment, which does not concern, as we will see, the case under analysis but her current criminal procedural situation.¹⁹³ *A posteriori*, we will analyse chronologically the judgments given by the courts that were in charge of the request for house arrest. In the last part of this chapter, we will examine the causes for gender invisibility on the part of the judicial authorities in the case study through the various disciplines discussed in Chapter I.

1. Legal precedents: the Cromañón case

The following information was taken from court proceedings.¹⁹⁴ On the day of 30 December 2004, during an appearance by the band Callejeros in the dance club República Cromañón located in the Federal Capital, at around 10:50 PM, a person who was attending the concert exploded a pyrotechnic device, which upon impact with the roof of the place caused a fire outbreak. This led to the burning of the fabric that covered the ceiling. Thick smoke coming from the burning material covered the inside of the premises and in response, people who had been attending the event headed precipitously toward the exits. Three factors converged to result in a fatal outcome: the excessive numbers of people present (four times the authorised number); the escape routes being locked (with wire padlock) and the power outage that occurred

¹⁹² The atom (from the Greek meaning indivisible) is composed of three fundamental particles: electron (negative charge), proton (positive charge) and neutron (neutral charge). Protons and neutrons (called nucleons) form the nucleus of the atom (most of the atomic mass is concentrated) and their union is achieved through nuclear power, while the electrons remain in orbit around the nucleus of the atom through the electromagnetic force. The nuclear force tends to be generally stronger than the electromagnetic force. A nuclear reaction is produced by bombarding the nucleus with a nuclear projectile. Nuclear fission, in turn, causes the release of energy and neutrons. For every neutron absorbed to produce a fission more than two neutrons are emitted, and this makes it possible for a chain reaction to occur. See M Alonso and E J Finn, *Física* (Physics) (Buenos Aires: Addison-Wesley Iberoamericana), pp. 7, 874, 897.

¹⁹³ In this regard, the 20 business days deadline set by Courtroom IV in the last hearing will be reached on 14 July 2015. See Télam, *Se realiza una audiencia clave para revisar condenas por Cromañón* (A key hearing is held to review Cromañón convictions), 15 June 2015; Clarín, *Familiares de Cromañón reclaman una resolución final en la causa* (Cromañón relatives demand a final decision on the case), 14 July 2015.

¹⁹⁴ National Supreme Court of Justice, *Ana María Fernández*, Case No. 17,156, 18 June 2013; Attorney General's Office, *Ana María Fernández*, Case No. 17,156, 29 May 2013.

at the site. This led to the inability for many to leave the place in time. As a result, a total of 193 people lost their lives and 1432 were injured.¹⁹⁵

Specifically in relation to the trial of Ana María Fernández, we can report that on 19 August 2009, she was convicted for being the perpetrator of the crime of dereliction of duty by a public official and sentenced to two years in prison and four years special disqualification (Arts. 29 paragraph 3, 45 and 258 in the final part of the Penal Code and 403 and 531 of the NCCP). The August 2009 ruling was appealed and Courtroom III of the Federal Court of Criminal Appeals ruled that the officer knew about the irregular situation in the bowling alley and therefore was sentenced for the crime of “omission of public official duties in concurrence with the offense of culpable fire followed by death”¹⁹⁶.

Following the Courtroom III judgment, on 29 April 2011, the Oral Criminal Court No. 24 resolved to condemn Fernández to the sentence of three years and six months in prison for perpetrating the crime of omission of public official duties in concurrence with culpable fire followed by death.¹⁹⁷ The sentence was appealed and again confirmed by Courtroom III on 17 October 2012.¹⁹⁸

On 15 November of that same year, Fernández’s defence asked the Oral Court No. 24 to have the prison sentence imposed in the form of house arrest. On 21 December, the request was denied and therefore Ana María Fernández made herself available to the court and entered with her son to the Unit No. 31 of Ezeiza Federal Penitentiary Complex. Simultaneously, on 20 December 2012, Courtroom III denied the appeal filed by the defence and ordered the immediate enforcement of the sentence.¹⁹⁹ Ana María Fernández’s defence filed a complaint appeal before the Court, which was granted.²⁰⁰

¹⁹⁵ It should be mentioned that these figures did not include post Cromañón deaths; for more information, see: *Cromañón, el drama que no se termina. Sociedad* (Cromañón, the drama that does not end. Society), (Página 12, 9 February 2015) [cited 13 July 2015]. Available from: <http://www.pagina12.com.ar/diario/sociedad/3-265746-2015-02-09.html>.

¹⁹⁶ *Todos condenados por el incendio de Cromañón* (Everyone convicted for the Cromañón fire) (Página 12, 21 April 2011) [cited 13 July 2015]. Available from: <http://www.pagina12.com.ar/diario/elpais/1-166689-2011-04-21.html>.

¹⁹⁷ As resolved by Courtroom III of the Federal Court of Criminal Appeal in case No. 11,684, *Omar Emir Chabán and others, appeal with court of appeals* (Arts. 12, 26, para. 3, 45, 54, 249 and 189, para. 2 of the Criminal Code and 403, 530 and 531 of the National Criminal Procedural Code, 20/4/2011).

¹⁹⁸ National Legal News Agency, Infojus Noticias, *Cromañón: los puntos emblemáticos del proceso judicial* (Cromañón: the emblematic points in the judicial process) (28 December 2013) [cited 13 July 2015]. Available from: <http://www.infojusnoticias.gov.ar/nacionales/cromanon-los-puntos-emblematicos-del-proceso-judicial-2758.html>.

¹⁹⁹ La Nación, *Cromañón: los 14 condenados a prisión* (Cromañón: the 14 who were sentenced to prison) (21 December 2012) [cited 24 June 2015]. Available from: <http://www.lanacion.com.ar/1539141-cromanon-los-14-condenados-a-prision>.

²⁰⁰ Supreme Court of Argentina, appeal motion: *Omar Emir Chabán and others*, Case No. 11,684 (5 August 2014).

On August 5th, 2014, the Supreme Court of Justice requested the appointment of a new courtroom to review the guilty verdict handed down by the revision Court.²⁰¹ Therefore, Oral Court No. 24 annulled the house arrest that had been granted to Fernández and authorised her immediate release.²⁰² A day later, it became effective through Oral Court No. 24.²⁰³ According to the ruling of the aforementioned Court, the following was stated:

The verdict of guilty ordered by Courtroom III of the Federal Court of Criminal Appeals has lost validity in relation to the accused who were granted an extraordinary appeal, until it is reviewed by another courtroom or this same court of appeals. Therefore, given the suspensive nature of pending appeals, the procedural situation of non-imprisonment of these people convicted by a non-final judgment shall be made retroactive to the way it stood until 20 December 2012.²⁰⁴

The three judges of Courtroom IV shall decide whether to confirm, revoke or modify the penalties imposed by Courtroom III of Appeals.²⁰⁵ With their decision they shall apply the double conformity principle as required by the Supreme Court of Justice.²⁰⁶ This means that the judgment of conviction for Ana María Fernández is not final, and consequently, it is still unknown if she and her child shall remain free.²⁰⁷

²⁰¹ “The Supreme Court, in the C.11/2013.XLIX record filed by the Fernández defence, decided to grant the complaint and upheld the extraordinary appeal, ordering the transfer of proceedings to the Federal Court of Criminal Appeals for a new courtroom to review the conviction sentence (see sheet 73,910/911)”, Oral Criminal Court No. 24, *Case No 11,684 Emir Omar Chaban and others, extraordinary appeal* (6 August 2014).

²⁰² National Legal News Agency, Infojus Noticias, *Cromañon: los puntos emblemáticos del proceso judicial* (Cromañon: the emblematic points in the judicial process) (28 December 2013) [cited 4 July 2015]. Available from: <http://www.infojusnoticias.gov.ar/nacionales/cromanon-los-puntos-emblematicos-del-proceso-judicial-2758.html>.

²⁰³ *Orden de liberación para Callejeros y otros imputados* (Order of release for Callejeros and other defendants) (Página 12, 6 August 2014) [cited 24 June 2015]. Available from: <http://www.pagina12.com.ar/diario/ultimas/20-252373-2014-08-06.html>.

²⁰⁴ National Legal News Agency, Infojus Noticias, *En un fallo inédito liberaron a los músicos de Callejeros* (Callejeros musicians freed in unprecedented ruling) (28 December 2013). Available from: <http://www.infojusnoticias.gov.ar/nacionales/en-un-fallo-inedito-liberaron-a-los-musicos-de-callejeros-5132.html>

²⁰⁵ La Nación, *En marzo, audiencia en Casación* (Court of Appeals hearing in March) (30 December 2014) [cited 13 July 2015]. Available from: <http://www.lanacion.com.ar/1756308-en-marzo-audiencia-en-la-casacion>.

²⁰⁶ In the Cromañon case, the new doctrine of the National Supreme Court of Justice was applied by which, in the trials that led to a judgment of conviction in the Court of Appeals –based on a prosecution appeal against an earlier acquittal –, the accused has the right to have this judgment reviewed by other judges of the same Court of Criminal Appeals with a full and comprehensive review of the judgment ensuring thereby the constitutional status right to appeal. It also emerges from the American Convention on Human Rights in its Art. 8, para. 2, ap. H) and Art. 14, para. 5 of the International Covenant on Civil and Political Rights. See also National Supreme Court of Justice, *Felicia Duarte, appeal with court of appeals XLVIII* (5 August 2014).

²⁰⁷ In regard to this, it should be noted that Unit 31 of Ezeiza has undergone changes since Ana María Fernández was granted house arrest. By means of Federal Penitentiary Service resolution No. 557/14 DNSPF, people detained for crimes committed in the last Argentine civic-military dictatorship were moved for reasons of overpopulation, housing them temporarily in Unit 31, until a specific residence is built in the Federal Prison Complex I of Ezeiza. Consequently, living space available to mothers and children has been reduced in Unit 31 and restrictions on accessing benefits and services have come up. For more information, see the *Annual Report 2014* of the Criminal

2. Case presentation and development

This section will discuss significant argumentative fragments in order to understand the different forms of interpretation exercised by the judicial authorities in relation to the application of Art. 32, para. F of Law No. 26,472. We will focus mainly on the grounds that supported the courts deciding on granting or denial. The arguments will be analysed through the use of tools such as gender and the best interests of the child. As a complement, we will also look at the international and national regulations selected in Chapter II. For the reader's better understanding, we will now proceed by recounting the path taken by the request for house arrest through the various judiciary instances.

As appears from the proceedings,²⁰⁸ the request for house arrest was filed with Oral Criminal Court No. 24 in defence of Ana María Fernández on 15 November 2012.

The Court ruled against the request on 21 December of the same year and made the conviction effective, and thus imprisonment. The defence appealed with the court of criminal appeals against the ruling of the Oral Court No. 24. The Court granted the appeal. The Trade Courtroom of the Court of Appeals again decided to deny the appeal with costs. This ruling led to the filing of two extraordinary appeals by the Fernández defence and the representative of the minor, whose denials by Courtroom III led to the submission of the complaints to the Supreme Court of Justice. On June 18th, 2013, the High Court upheld the complaints submitted, declared the extraordinary appeals to be applicable and set aside the original ruling. Finally, Courtroom III, composed of the judges Hornos, Borinsky and Madueño, took cognisance of the appeal filed by the defence and decided to grant the request for house arrest.

2.1 Oral Criminal Court No. 24

The request for house arrest filed by Fernández's defence was denied by the Court of first instance as mentioned in the previous section. We selected the following among the arguments for its denial:

Thus, Art. 32 of the Law enforcing the sentence of freedom deprivation (which the defence considers applicable to Fernández under Art. 1) produces a tension between the general principle of compliance with the prison sentence in a facility (see Arts.

Attorney General's Office, pp. 337-338 [cited 13 July 2015]. Available from: http://www.ppn.gov.ar/sites/default/files/INFORME%20ANUAL%20PPN%202014_0.pdf.

²⁰⁸ National Supreme Court of Justice, *Ana María Fernández*, Case No. 17,156 (18 June 2013).

5 and 6 of the Criminal Code) and the best interests of the child not to see his basic rights affected as regards bonding with the mother in the first months and years of his life, expressly recognised by the International Treaty invoked.²⁰⁹

The Court argued that there was a conflict between the punitive purpose decreed in the conviction (Arts. 5 and 6 of the PC) and the best interests of the child referred to in the CRC. Namely, that by justifying the denial of arrest, the court prioritised the interest of the State to enforce a sentence to the detriment of constitutional provisions and international treaties that protect the best interests of the child and the maternal bond. In this vein, the Court compared them as follows, “in this way, when there are conflicts between rights and interests of equal regulatory status”. The constitutional status of international treaties is expressly referred to in Art. 75, para. 22 of the Constitution of Argentina.²¹⁰

Specifically, the Convention on the Rights of the Child has had constitutional status since 1994, which means that, “it shares with the Constitution the same supremacy and therefore stands at the apex of our legal system”²¹¹. It also means that “by occupying this top position, infra-constitutional law bears the same consequences arising from the Constitution: laws, rights, regulations of the executive power (...), and sentences must apply it”²¹². For this reason, the National Constitution, by recognising international treaties pertaining to human rights with a status equivalent to it – constitutional block –, obliges the public authorities to impede the violation of treaties, whether by action or omission.²¹³ Along these lines, a treaty such as “the Convention on the Rights of the Child imposes guidelines, criteria, standards for direct application, disposal of incompatible laws, interpretation of existing laws in the light of the

²⁰⁹ Oral Criminal Court No. 24 of the Federal Capital, house arrest in favour of Ana María Fernández, Case No. 2517 (21 December 2012).

²¹⁰ See Chapter II, Constitutional block.

²¹¹ Bidart Campos, *Constitución, Tratados y Normas Infraconstitucionales en relación con la Convención sobre los Rights del Niño* (Constitution, treaties and infraconstitutional norms in relation to the Convention on the Rights of the Child), pp. 35-37. *Derecho, El Derecho y los Chicos* (Law, Law and the Children) compiled by María del Carmen Bianchi (Buenos Aires: Espacio, 1995).

²¹² Ibid.

²¹³ On the interpretation of international treaties and law not written in the internal law, Bidart Campos states, “Regardless of the status a treaty has in our internal law, we should make clear that, a) its interpretation and application by the courts of Argentina is mandatory in accordance with international law, as cases should be sentenced insofar as applicable under that same treaty; b) violation of treaty occurs both when an internal standard is applied that is incompatible or contrary to it and when it is simply not applied; c) any breach of a treaty –for action or omission –by our courts generates international responsibility for our state, and this even though the disapplication of an infraconstitutional status treaty is sustained by its unconstitutionality”. See Bidart Campos, *op. cit.*, anonymous company, electronic document.

treaty, etc.”²¹⁴ and this implies understanding them as legal norms, the law, mandatory, binding and directly applicable.²¹⁵

Law No. 26,472, which expanded the legal criteria of eligibility for the institution of arrest, had as its main foundation, besides an unobjectionable humanitarian approach, the drive to consider certain groups deserving of special protection due to their greater degree of vulnerability as compared to others within the prison collective. This includes the situation of a pregnant woman or mother with dependent children under five.²¹⁶ In other words, given the humanitarian reasons to emphasise and protect certain cases, that the principle of the best interests of the child is in conflict with the execution of the sentence of the mother should not interfere. The end purpose of the reform of the law is to remedy situations such as those presented in these cases, as it is about preserving the physical and mental health of children through the permanence of the maternal bond. By taking into account the child's age (less than five), the law ensures the protection of his/her time of development in a healthy environment, far distant from the current prison reality.²¹⁷

It is also important to mention that the institution of house arrest is equivalent to the execution of the sentence,²¹⁸ as it is precisely a form intended as an alternative to the execution of a custodial sentence.²¹⁹ It is a special form that enables compliance with a penalty outside the

²¹⁴ Bidart Campos 1995, Germán. *op. cit.*

²¹⁵ *Ibid.*, pp. 35-37.

²¹⁶ For the reader's better understanding, see the parliamentary debate of Law No. 26,472 in Chapter II.

²¹⁷ Ana María Fernández and her son were housed in Hall 16 of the Federal Detention Centre for women, better known as Ezeiza's Unit 31. According to the progress report submitted by the Criminal Attorney General's Office (Opinion of the Attorney General of 29 May 2013), Hall 16 has virtually no natural light, has no round the clock paediatric care and requests for medical consultations are handled with days of delay. The walls are damp and the bathrooms are flooded. Mothers hold their children in their arms to bathe them in order to avoid contact with insects since fumigations are not effective. The report concludes that the hall is almost equal to ordinary detention. By the same talking, the research developed by the Centre for Legal and Social Studies (CELS), the Criminal Attorney General's Office and the Public Ministry of Defence reported that, “it is an establishment no different than the rest in relation to its infrastructure, size and safety conditions. The same garden is located away from the housing halls”. For more information, see CELS, Public Ministry of Defence and Criminal Attorney General's Office, *op. cit.*, pp. 52-54.

²¹⁸ Case No. 14210, Guillermo Aldo Sáenz, appeal with court of appeals, vote of Judge González Palazzo and with the agreement of Judge Diez Ojeda (30 August 2011). Courtroom IV of the FCCA stated that, “Notwithstanding this, always with the understanding that what is at issue is the legal ground of a moderate detention regime, but which does not deprive the judgment of its effects and cannot be likened to a conditional execution of the sentence. Meaning that the custodial sentence remains intact with only its form of compliance having changed, in line with the particular characteristics of the case”.

²¹⁹ A Lopez and R Machado, *Análisis del Régimen de Ejecución Penal. Ley N° 24.660. Ejecución de la Pena Privativa de la libertad. Comentarios. Jurisprudencia. Concordancias. Decretos reglamentarios* (Analysis of the Criminal Enforcement Regime. Law No. 24,660. Execution of freedom depriving Sentence. Comments. Jurisprudence. Concordances. Regulatory decrees) (Buenos Aires: Fabián J. Di Plácido, 2004), p. 150.

prison environment.²²⁰ In other words, it means that there is no effect on the punitive power of the State, as what is being changed is the physical place of enforcement of the sentence and not the penalty itself.²²¹ It is clear from its name and its location in the legislation that it is an alternative for special situations where the prison walls are replaced by home confinement. It is ultimately an attenuated execution of confinement that still involves the deprivation of freedom, which should dispel the tension brought up by the court between the interests of the State and the protected rights of the child.²²²

In line with this, the Court, in expressing that the principle of best interests is not unlimited and, “like any substantial right, its competition with other values that the law also protects must be taken into account”, equated best interests with the social interest to punish the mother. By using the *pro homine* principle, this apparent dispute is also dispelled,²²³ in that the (constitutional) principle should prevail that best guarantees the protection of the human rights of the child. In this case, the correct interpretation would be to prioritise the best interests of the child over the interest of society that every crime be punished.²²⁴

The Court also emphasised that:

The criterion does not indicate that the best interests of the child (Art. 3 of the CRC), which we purport to safeguard, cannot be satisfied other than with the maternal presence in the home. On the contrary, through the social report found on page 140

²²⁰ Diego Freedman, *Prisión domiciliaria en la Argentina: algunas ideas para su adaptación a los estándares internacionales* (House arrest in Argentina: some ideas for its adaptation to international standards). *Revista de Derecho Penal y Procesal Penal* (Journal of Criminal Law and Criminal Procedure, Vol. 6, 2010), p. 1919.

²²¹ Virginia Sansone, *Nueva legislación argentina sobre prisión domiciliaria para madres de hijos menores de edad* (New Argentine house arrest legislation for mothers of minor children). *Revista de Derecho Penal y Procesal Penal* (Journal of Criminal Law and Criminal Procedure, Vol. 5, 2010), p. 834.

²²² “Home detention (...) should not be conceived as a benefit granted at the discretion of the court, on the contrary, the judges are obliged to grant it whenever the criteria for its legal ground are met or conditions are confirmed to exist that make fulfilling a preventive detention or sentence in a prison establishment unfeasible”. See P Gimol and D Freedman, *Hijas e hijos de mujeres privadas de libertad. Estándares internacionales de rights humanos aplicables* (Daughters and sons of women prisoners. Applicable international human rights standards). *Mujeres privadas de libertad: limitaciones al encarcelamiento de las mujeres embarazadas o con hijos/as menores de edad* (Women deprived of freedom: limitations on the imprisonment of pregnant women or women with minor children) (Buenos Aires: Public Defender's Office Institutional Communication, 2009), p. 21.

²²³ See Chapter II, The *pro homine* principle.

²²⁴ “In conclusion, I would like to reiterate that while the punishment of mothers remains the central and unchanging idea, however much the best interests of the child are talked about, this will continue to be subordinated to the demands of prison law. Patch measures will continue to be proposed (more comfortable prisons for mothers, third level dependent units for mothers, etc.) and we will continue without paying attention to the root of the problem: the disproportionate punishment that the state imposes on these women. And, I say, all this to protect us... from whom?”, Jorge Kent, *La criminalidad femenina ¿Madres e hijos en prisión? La degradante complejidad de una atribulada problemática* (Female criminality Mothers and children in prison? The degrading complexity of a troubled problematic) (Buenos Aires: Editorial AD-HOC, 2007), p. 17.

and the remaining records found on the case, it is corroborated that the family group of the child can continue to provide care and assistance as necessary.²²⁵

With this, the Court inferred that the family group could replace the maternal bond between the mother and her seven months old son, who, by the way, were fully in the breastfeeding period.²²⁶ To shed light on this affirmation, Art. 9 of the CRC obliges States to ensure “that children not be separated from their parents against their will, except when, subject to judicial review, the competent authorities determine, in accordance with the law and procedures, that such separation is necessary in the best interests of the child”²²⁷, which is not true in the case under study. At the same time, the rule of Art. 9 of the CRC should be interpreted in the light of the Bangkok Rules.²²⁸ As a premise, the Rules, after considering “the impact on children from the arrest and imprisonment of their parents”, establish a framework of interpretation where the preference goes to imposing alternative sentences to prison in the case of pregnant women or mothers with dependent children, and only resorting to imprisonment in cases where the offense is serious or violent or if the mother herself is a danger to her child.²²⁹

In this regard, the Court considering the replacement of the maternal bond with the family group, so as to justify the denial of the request for arrest, would be interpreting Arts. 10 of the PC and 32 of Law No. 24,660 restrictively, as this justifies the rupture in order to satisfy a state interest. Without detracting from the protection that the family group can give, the maternal bond is essential in the early years of life development, both psycho-physically and emotionally.

²²⁵ Oral Criminal Court No. 24, house arrest in favour of Ana Maria Fernandez, Case No. 2517 (21 December 2012), p. 2.

²²⁶ The World Health Organization (WHO) states that breastfeeding is the normal way of providing young infants with the nutrients they need for healthy growth and development. WHO also recommends exclusive breastfeeding up to 6 months of age, with continued breastfeeding along with appropriate complementary foods up to two years of age or beyond [cited 13 July 2015]. Available from: <http://www.who.int/topics/breastfeeding/en/>. See also WHO, *Up to what age can a baby stay well nourished by just being breastfed?* (July 2013) [cited 13 July 2015]. Available from: <http://www.who.int/features/qa/21/en>. Regarding the importance of breastfeeding for the mother, the WHO stated that, “breastfeeding contributes to the health and well-being of mothers; it helps to space children, reduces the risk of ovarian cancer and breast cancer (...) and is safe for the environment” [cited 13 July 2015]. Available from: http://www.who.int/nutrition/topics/exclusive_breastfeeding/en/.

²²⁷ Art. 9 of the CRC states that the separation of the child from his/her parents should be used in exceptional cases and subject to judicial review determining that such separation was justified for the best interests of the child, and by way of example states that, “(...) such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence”.

²²⁸ The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures of freedom for Women Offenders (the Bangkok Rules) were approved during the sixty-fifth session of the General Assembly on 16 March 2011.

²²⁹ Bangkok Rules (A/RES/65/229), Rule 64: Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

Especially in cases such as in our case study, where the permanence of the bond is a necessary condition for the child to be breast-fed by the mother.²³⁰

As a last point, before denying the request for house arrest, the Court stated the following:

There is no sign in this case of any circumstances of exceptional magnitude which demonstrate a need that can be satisfied only with the maternal presence at home and not with the support of the family environment, because as pointed out by the Prosecutor in his opinion, there is another mother who can take care of the child and also an extended family that meets the care needs that may be required by the minor.²³¹

With the arguments it put forward,²³² the Court seems to have assessed a determining factor regarding Fernández's gender identity and sexual orientation, which is certainly inconsistent with international and national standards as will be shown below.

First, it is necessary to emphasise the way in which the Court referred to the maternal bond as if it could be replaced. As already noted, the relationship of a mother with her child is necessary and irreplaceable, and has therefore been protected by various provisions both international and national. With regard to the phrase "other mother", the Court assessed that Fernández married another woman, which would guarantee another mother in the home. According to this logic,

²³⁰ Breastfeeding is covered in the following articles of international instruments: UDHR, Art. 25: (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection; CEDAW, Art. 5: States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases. For more on this subject, see Chapter II, 1.4.2 Pre and postpartum mothers.

²³¹ Oral Criminal Court No. 24, house arrest in favour of Ana María Fernández, Case No. 2517 (21 December 2012).

²³² "A sentence is not the mere automatic application of a general rule. Subsuming a case to be judged within the existing legal order is not making a syllogism. Application involves interpretation –of the rule and the case – and even when the judge in "his" interpretation perhaps should abide by the mandatory interpretation of a higher judicial body (...) because he never ceases to interpret to be able to apply the general rule to the case. Two sentence requirements arise out of it all: a) its motivation; b) its foundation. It is usually said that the sentence is motivated by the facts of the case, and is based on the applicable right. The foundation and the motivation –reasoned and reasonably exposed by the judge –explain why the case settles as it does. Meaning why the decision is what it is, and where it finds support (...) The lack of a minimum foundation or a capricious or dogmatic, unsustainable or insufficient foundation constitute a flaw that typifies one of the arbitrary sentencing cases". See Bidart Campos, *Manual de la Constitución reformada, Tomo III, La motivación y la fundamentación* (Manual of the amended Constitution, Volume III, Motivation and foundation), points 10 to 12 [cited 7 July 2015]. Available from: <http://alumnos-ucalp-info-y-material.webnode.com.ar/material-libros-pdf/>.

the bond of the child with his parents would vary depending on there being a union between a woman and a man or between a woman and a woman.

In this case, if one of the mothers is deprived of her freedom, the other mother would easily replace her in that role. On the other hand, if Ana Maria Fernandez's partner had been male, the line of reasoning on replaceable bodies would not have arisen and perhaps, if the deduction may be allowed, the granting of house arrest would not have been hampered by the recognition of the heterosexual family. The sexual orientation of a person does not enable the Court to the restriction of a right, which therefore is a violation of Arts. 2 and 7 of the UDHR, Art. 2 of the ICESCR and Arts. 2.1 and 26 of the ICCPR.²³³

Precisely the *Corpus Juris*, as it expands and protects the rights of the child holistically, serves to interpret the content and scope of Art. 19 of the ACHR, which states that the child has the right to be protected by his family, society and the State. In this sense, the best interests of the child and non-discrimination are incorporated as principles adopted by the CRC. As for the best interests of the child, the State is obliged to ensure his care and protection without neglecting the rights and duties of the parents. As for the principle of non-discrimination, it provides that the State should take all appropriate measures to ensure that no child is affected by discrimination.

In addition, Art. 16.3 the UDHR defines the family as a natural and fundamental element that deserves state protection. Art. 16 of the CEDAW provides that the State should take all measures to eliminate discrimination against women in connection to marriage and family relations, and should ensure conditions of equality between men and women.²³⁴ And by this the family is understood as a nucleus of love and solidarity that transcends its role as a legal, social and economic unit.

The circumstance of the civil status of Ana María Fernández and therefore her sexual orientation and gender identity cannot be considered a fact that should be noted by the court. Nor should it be a reason to affect protected rights, such as the maternal bond, or the effective eligibility for house arrest.

2.2 Trade Courtroom of the Federal Court of Criminal Appeals

²³³ See Chapter II, 1.5 Sexual orientation and gender identity.

²³⁴ See Chapter III, 1.4.3 The right of the child and mother to have a family.

In the second instance, with the joint majority vote of the members of the Courtroom (Judges Liliana E. Catucci and Eduardo R. Riggi) and the dissent of Judge Angela E. Ledesma, it was decided to deny the appeal presented by the defence of Ana María Fernández with the following arguments:

Indeed, the records added to the file indicate that the child Aguad Fernández is not in distress or lacks material or moral safety. Illustrative in this regard is the socio-environmental report provided on page 140 as it notes that parenting, child care and parental attention are the responsibility of both members of the couple.²³⁵

Similar justifications had been put forward by the Court of First Instance as far as the restrictive interpretation of the institution of house arrest. However, we should note the assessment made by the Court of Appeals on the situation of the child, who is not in a situation of neglect or lack of moral or material safety thanks to the fact that since the mother has a partner (as from the socio-environmental report), the former can be replaced in the raising of, care and attention for the child. This means that the FCCA would seem to have created an exceptionality with respect to the law of arrest, in that its granting will depend on whether the mother deprived of her freedom has a partner who can fill her role, and by the same token, if indeed the child did not have the opportunity to remain united with a person not deprived of freedom, one would need to prove that he is in a situation of neglect and material insecurity. This last point is unlikely because the child in this case was at the time 7 months old and, before the hypothetical case raised by the Court, the role of parenting, care and attention would be supplied by the State through the institutionalisation of the child.²³⁶ The reasoning put forward becomes reduced to Law No. 26,472 in a form almost unfeasible to protect the individuals under its protection.

The spirit of the aforementioned law takes into account *a priori* situations, meaning that a situation that was the initial driver for its enactment need not be proven.²³⁷ At the same time, one should add in the analogous reasoning of the lower court, which expressed the replaceable nature of the mother above the family group, or, in the words of the court, the other member of the couple.

In the following section, the Court stated:

²³⁵ Trade Courtroom of the Federal Court of Criminal Appeals, Case No. 33/12-Trade Courtroom- Ana María Fernández, appeal with court of appeals, 10 January 2013.

²³⁶ CRC Art. 20.3. The Committee on the Rights of the Child made several decisions on alternative care in an institution as a last resort measure; see General Comment No. 13, *The right of the child to freedom from all forms of violence*, CRC/C/GC/13 (18 April 2011), para. 47 d) iii); and General Comment No. 3, *HIV/AIDS and the Rights of the Child*, Doc. CRC/GC/2003/3 (2003), paras. 34 and 35.

²³⁷ Please refer to the discussion on the end purpose of the expansion of the law in Chapter III, pp. 57-58. See also Chapter II for the parliamentary debate over Law No. 26,472.

It can be concluded therefore in the same vein that, although it would be desirable that no situations occur like that motivating the intervention of this Court in the present case, the existing legal provisions contain reasonable and sufficient tools to make it possible for the legal consequences of the deprivation of freedom suffered by mothers, because of criminal proceedings against them, not to fall back on and be sustained by their minor children, in any way whatsoever that would compromise their best interests.²³⁸

The argument of the FCCA would seem to be coincident with the spirit of Law No. 26,742, however, interpreted restrictively, it argues for the opposite outcome to the best interests of the child and the maternal bond. As for what is meant by “the legal provisions contain reasonable and sufficient tools”, the Court may have used the concept of *Corpus Juris* as a common legal framework of international law on human rights that protect the child and the maternal bond. Along the same lines, the preamble of the CRC recognises that “for the full and harmonious development of his personality, the child should grow within the family”. Indeed, Art. 7.1 of the Convention recognises the right of the child to “know his parents and to be taken care of by them”. In turn, Art. 8.1 provides that “the parents shall be concerned (...) with the primary responsibility for the child’s upbringing and development”. This recognizes the family as having a primary status as far as the care of the parents for the upbringing and development of the child.

The State, for its part, is obliged to ensure, “the survival and development of the child to the maximum extent possible”²³⁹. This is also recognised by Art. 14a, para. three, of the Argentine Constitution, obliging the State to ensure “full protection of the family”²⁴⁰.

The best interests of the child as per Art. 3.1 of the CRC should be used by judicial authorities as the central concept for interpreting cases such as the one under study. In this regard, the I/A Court H.R., which should serve the judges as a guide in making decisions,²⁴¹ stated that “the child must remain in his household, unless there are determining reasons, based on the child’s best interests, to separate him or her from the family”²⁴².

²³⁸ Trade Courtroom of the Federal Court of Criminal Appeals, Case No. 33/12-Trade Courtroom- Ana María Fernández, appeal with court of appeals (10 January 2013).

²³⁹ CRC Art. 6.2.

²⁴⁰ Argentina Constitution, Sec. 14a, third para.: The State shall grant the benefits of social security, which shall be of an integral nature and may not be waived. In particular, the laws shall establish: compulsory social insurance, which shall be in charge of national or provincial entities with financial and economic autonomy, administered by the interested parties with State participation, with no overlapping of contributions; adjustable retirements and pensions; full family protection; protection of homestead; family allowances and access to a worthy housing.

²⁴¹ Supreme Court of Argentina, Rulings 314:514.

²⁴² I/A Court H.R., Advisory Opinion No. 17/2002 of 28 August 2002, para. 77, p. 67.

Accordingly, the I/A Court H.R. stated that “the State is obliged not only to decide on and directly implement measures to protect children, but also to favour in the most expansive way the development and strength of the family nucleus”.²⁴³ Also, this same body established that the protection of children by international instruments has as its ultimate objective the harmonious development of their personality and the enjoyment of rights that have been recognised to them, and it is the duty of the State to adopt measures to encourage their development in their own environment while at the same time supporting the family, which naturally have children in their care.²⁴⁴ This means that in light of the reasoning given by the I/A Court H.R., the most favourable solution for the child would have been to preserve the bond with the mother through the granting of the institution of house arrest.

We should also comment on “legal provisions contain reasonable and sufficient tools” as stated by the FCCA; the I/A Court H.R. understood that the best interests of the child are a limit on the discretionality of the State’s courts in as far as speculative or imaginary distinctions should not be made about personal characteristics of a mother as referred to traditional concepts of the family.²⁴⁵ It follows that all state, social or family decision involving any limitation on the exercise of any right should take into account the best interests of the child and comply strictly with the provisions governing this matter. In this regard, the State is obliged to use the principle of best interests for the correct interpretation of the rights of the Convention, which in this specific case, would have been the permanence of the maternal bond through house arrest.²⁴⁶

The Supreme Court of justice also understood the best interest principle as having a dual functionality: as a guideline for deciding on conflicts of interest and as a criterion for the

²⁴³ I/A Court H.R., Advisory Opinion No. 17/2002 of 28 August 2002, para. 66, p. 64.

²⁴⁴ I/A Court H.R., Advisory Opinion No. 17/2002 of 28 August 2002, para. 53, p. 60.

²⁴⁵ I/A Court H.R., *Atala Riffo and Daughters vs. Chile*, Judgment of 24 February 2012 (Merits, Reparations and Costs), recital 109. As regards the limits on the discretion of the judicial authorities in relation to the invocation of the best interests of the child, the I/A Court H.R. expressed that, “It should be based on the evaluation of specific parental behaviours and their negative impact on the welfare and development of the child according to the case and real and proven damage or risks, not speculative or imaginary ones. Therefore, speculations, assumptions, stereotypes or generalised considerations of personal characteristics of one's parents or cultural preferences for certain traditional concepts of family cannot be admissible”. Recital 151, on the other hand, “girls and boys cannot be discriminated against because of their conditions and that prohibition also extends to the conditions of their parents or relatives”. Thus, the invocation of best interests cannot be used to justify discrimination against the mother because of her sexual orientation.

²⁴⁶ I/A Court H.R., *Yean and Bosico vs. Dominican Republic*, Judgment of September 8, 2009 (Preliminary Objections, Merits, Reparations and Costs), recital 134: “This Court has indicated as particularly serious cases in which children are the victims of human rights violations. The prevalence of the best interests of the child should be understood as the need to satisfy all the rights of minors, which obliges the State and affects the interpretation of all other rights of the Convention when the case refers to minors. The State should pay particular attention to the needs and rights of the alleged victims in consideration of their status as girls, as women who belong to a group in a vulnerable situation”.

institutional intervention meant to protect it.²⁴⁷ At another time, the Court also defined it as “an objective parameter for resolving conflicts in which children are involved, taking into consideration the solution that is most beneficial to them”²⁴⁸. For this reason, the Court of Appeals seems to have had enough tools to prevent affecting the rights of the child – preserving the maternal bond – and decided to reject the solution that protected him better.

In this regard, it should be noted that in the case under analysis it would be unreasonable to argue that the best interests of the child would not be affected by the force of regulations that provide these types of situations, as in this case his best interests were affected from the moment that the mother was deprived of freedom, and there are no legal remedies that can reverse this situation, which can however be attenuated through the granting of house arrest. For this reason, the court, in accordance with the *Corpus Juris* of protection and the *pro homine* principle, should have focused its arguments on those that best protect human rights and, conversely, on the least restrictive to the exercise of such rights.

Next, the court noted the following:

On the other hand, the decision to keep the baby is within the mother’s options, bearing in mind that her partner is not prevented from taking over to the extent of her possibilities. These alternatives do not affect the integrity of the rights of the child in a negative way.²⁴⁹

²⁴⁷ National Supreme Court of Justice, “S., C about adoption”, 2 August 2005, vote of the judges Carlos Fayt, Raúl E. Zaffaroni and Carmen Argibay, recital 5, stated regarding the best interests of the child that, “they point to two basic purposes, which are to become a decision guideline when faced with a conflict of interest, and to be a criterion for institutional interventions to protect the child. The principle therefore provides an objective parameter that solves the problems of children in the sense that the decision is defined by what is of greatest benefit to them (...) The child has therefore a right to special protection that will prevail as the primary consideration in any judicial matter, so that, in any conflict of interests of equal weight, the moral and material interests of the children shall take precedence over any other circumstances that may arise in any actual case.

²⁴⁸ National Supreme Court of Justice, “S., V. c/ M., D. A., about precautionary measures”, 3 April 2001, vote of the judges Antonio Boggiano and Adolfo Vázquez arguing that, “the 'special protection' contained in the preamble of the convention, as well as the primary attention to the interests of the child provided in its Art. 3 –directed to the courts, administrative authorities and legislative bodies –provides an objective parameter for resolving conflicts where minors are involved, taking into consideration which solution is most beneficial to the child. This indicates that there is a marked presumption in favour of the minor for being a weak interest compared to others, even if we consider the latter to be no less important”.

²⁴⁹ Trade Courtroom of the Federal Court of Criminal Appeals, Case No. 33/12-Trade Courtroom- Ana María Fernández, appeal with court of appeals, 10 January 2013.

The arguments put forward by the Court of Appeals report that the mother was given two alternatives to decide over the fate of her son:²⁵⁰ interrupting the maternal bond by replacing her with her partner or preserving the relationship with her son in the prison unit.²⁵¹

Thus, the Court granted the mother the option to choose, to the extent of her possibilities, what was best for the integrity of the child. As for the first alternative that Fernández had, the detriment to the integrity of the rights of the child was not maintaining the maternal bond and suggesting that she would be replaced by her partner.²⁵² In this respect, the State is obliged not only to protect the child's life, but also his development and survival, according to Art. 6 of the ICCPR and Art. 6 of the CRC. One can understand the reasoning of the Court as pursuant to Arts. 3 and 18 of the CRC, where the primary role of the parents is established as regards the care and development of children.

But in this particular case, the role of the parent was undermined by her detention; for this reason, granting her the decision for cohabitation with the child or the disruption of the mother-child bond are options that denote the restrictive character of the institution of arrest. If granting home detention is considered without it being thought of as exceptional, the alternatives given by the Court would not be feasible because the place of residence of the parent would have been more suited to the best interests of the child and the bond with his mother.

²⁵⁰ In a similar fashion, “the first option involves deprivation of the freedom of a child being subjected to the harmful consequences of an institutionalisation process, only to ensure contact with his/her mother. Let's consider the fact that for these criteria there exist measures less restrictive of freedom for the child, such as home detention which ensure both the serving of the sentence and mother-child contact”, Adrián Rubén Alderete Lobo, *La expulsión anticipada de mujeres extranjeras* (Early expulsion of foreign women), Chapter VIII. *Violencia de género. Estrategias de litigio para las mujeres privadas de libertad* (Gender violence. Litigation strategies for women in prison), (Buenos Aires: British Embassy, Defender General's Office, 2012), p. 265.

²⁵¹ Law No. 24,660, Art. 195: a female convict may retain her young children under four years of age. When it is justified, a nursery will be organised by qualified personnel.

²⁵² The Mental Health department of the Criminal Attorney General's Office prepared a document through which it stated its position on the case under study, “the vulnerability and uncertainty plus the systematic mortification of the self lead to a degree of psychic tension expressed through discomfort. Discomfort in and with one's body and social ties. (...) why force the cutting of a bond that is being made by a woman exclusively dedicated to her child. Why ignore this woman's role as a mother, which from our field of knowledge we will name as the expression of a desire not anonymous but singled out. A desire to use one' body to procreate, give birth to and raise children. One could say that it is by this decision that Ana becomes a mother. (...) Prison or the daily cutting of the bond between a mother and her son in his early years of life brings significant scars. We refer to the fact that going through with this situation, either by way of distancing the baby from his mother or through the alternative of living with her in prison, can happen in an event that is registered as a mark on the psyche entailing adverse effects on the baby (...) Children around eight months of life show responses to strangers who could be summarised as angst, what is known as “the anguish of the eight month”. Without going into theoretical discussions we shall say that the perception of an unfamiliar face does not match the mnemonic imprint of the mother's face. The child transits for a reasonable time through the differentiation of the mother's face, ascribing a unique place to it among all other human faces, which would point to the framework of a “relationship” (called a libidinal object relationship in psychology). His response to the unknown shows the registration of the absence of the known, his mother”, Graduate Liliana Martínez [cited 1 July 2015]. Available from: <http://www.ppn.gov.ar/sites/default/files/Ana%20Fern%C3%A1ndez%20Salud%20mental.pdf>.

In relation to the entitlement that Art. 195 of the enforcement law gives to the mother, numerous studies confirm that the prisonisation of children has negative effects on their development.²⁵³ Regardless of the facilities that a penitentiary unit may provide,²⁵⁴ as already mentioned, a prison is not an environment conducive to raising a 7-month-old child.²⁵⁵ It does not seem to be a viable alternative, considering the possibility of requesting house arrest, which provides precisely for such cases.

The option for the mother to preserve the maternal bond inevitably means that the child will lose his freedom. This goes against the principle that punishment may not be transferred,²⁵⁶ i.e. the conviction of a family member cannot affect his closest relatives. However, the child's freedom will be affected if the mother chooses to retain the maternal bond. The two solutions arbitrated by the Court seem to affect the above principle, as well as the *pro homine* and non-discrimination principles.

In this piece of argument, another possible point that should be mentioned is the timeliness with which the new expansion of the institution of house arrest over the already existing Law No. 24,660 was enacted. Given the humanitarian conditions affecting imprisoned mothers with their children, the legislature decided to extend the criteria to avoid such situations.²⁵⁷ Therefore, the house arrest law is a step forward in relation to cohabitation as permitted by Art. 195, that is, there is a progressive increase in rights in place of a setback.²⁵⁸

²⁵³ “Psychological studies show that the deprivation of freedom impacts negatively on the psychosocial development of the child, both directly, from having to adapt to an abnormal environment, rigid schedules, space and experience limitations, and indirectly, through the influence of the mother, who usually shows an absence of responsibility, panic attacks, substance abuse, lack of prospects, etc.”, Jesus Valverde Molina, *Incidencia psicológica de la privación de libertad en los niños* (Psychological impact of detention on children) Primeras Jornadas Nacionales sobre Mujeres, niños y jóvenes en prisión (First National Days about Women, children and young people in prison) (Almería, 21 to 23 November 1990). For more information, see the Centre for Legal and Social Studies (CELS), Public Ministry of National Defence and Criminal Attorney General's Office, *op. cit.*, pp. 199-200; Quaker United Nations Office, *op. cit.*, p. 2.

²⁵⁴ The prison situation of hall 16 Unit 31 at Ezeiza where Ana Maria and her son were staying is reflected in the report by the CA discussed in this Chapter, 2.1 Oral Criminal Court No. 24, above.

²⁵⁵ The Functional Unit for Minors under 16 that represented the child in the arrest request case submitted a report by the National Directorate for Integral Promotion and Protection of the National Secretariat for Children, Youth and Family, in which the social worker concluded that, “from a psychological point of view any disruption of the maternal bond, which is currently developing properly, could be detrimental to the mental and physical development of the child” and that, “for him to serve his sentence in the home environment is considered desirable”.

²⁵⁶ Eugenio Raúl Zaffaroni, *Derecho Penal, Parte General* (Criminal Law, General Part) (Buenos Aires: Sociedad Anónima Editora, Comercial, Industrial y Financiera, second edition, 2002), p. 131.

²⁵⁷ The rationale behind the extension of house arrest is humane treatment in the execution of sentencing which in the Argentine legal system has its basis in international instruments recognised in Art. 75, para. 22 of the NC: ICCPR, Art. 10; American Declaration of the Rights of Man, XXV; ACHR, Art. 5.2.

²⁵⁸ The protection of human rights is reflected in a regime susceptible to enlargement. In this regard, “Most human rights treaties include a clause whereby no conventional arrangement may undermine the broader protection that other international or internal rules about rights can provide”. Along the same lines, “The escalation, as we understand it here, which indicates the “appearance” or recognition of human rights has expanded in a gradual and

This is how we should think of the principle of legality, inasmuch as it cannot be set back in relation to its application as the rights have been previously recognised and established by international law with constitutional status, so that the extension of criteria cannot reduce the expectations of a mother deprived of her freedom.²⁵⁹ Although the institution of house arrest is seen as progress compared to the situation of mothers and children in prison, it is still too limited in relation to its actual application.²⁶⁰ Along these lines, the I/A Court H.R. stated that “if the American Convention and another international treaty are applicable to the same situation, the rule most favourable to the human person should prevail”.

In other words, the Court of Appeals seems not to have used a correct point of view to protect the best interests of the child while contradicting Arts. 3 and 6 of the CRC. That is, in the case under study, the mother son relationship was not assessed in pursuit of the best interests of the child, as the decision was made to deny house arrest and give the mother two alternatives, to raise her son in a prison unit or to be deprived from being able to carry out the upbringing and development of the child as guaranteed by the CRC. In this instance, we can discern a restrictive interpretation in relation to the institution of house arrest being thought of as exceptional, the invisibility of gender and the partial understanding of the best interests of the child.

2.3 National Supreme Court of Justice

irreversible way, and also that the number and vigour of the means of protection have also grown in a progressive and equally irreversible way, because in matters of human rights all regressivity is illegitimate”, Pedro Nikken, *La protección de los derechos humanos: haciendo efectiva la progresividad de los derechos económicos, sociales y culturales* (The protection of human rights: making effective the progressive development of economic, social and cultural rights) (Revista IIDH Journal, Vol. 52, 2010), pp.72-73.

²⁵⁹ The principle of legality is enshrined in Art. 18 of the Constitution: No inhabitant of the Nation may be punished without prior trial based on a law in force prior to the offense, or tried by special commissions, or removed from the jurisdiction of the judges designated by the law in force prior to the offense; and Art. 19:

No inhabitant of the Nation shall be compelled to do what the law does not order, or be deprived of what it does not forbid.

²⁶⁰ Among the negative factors of the institution of house arrest, it should be noted that, “Our focus should be on the ways in which imprisonment acts as a guarantor of subsistence for female detainees and their children, and the fact that house arrest will preclude them from going out to work. This problem points out the absence of the State once the woman agrees to house arrest. Just as the State is absent in post-penitentiary assistance, so it is in the compliance of such measures by not providing access to work, education, health, etc. for women under arrest and their children. This has the potential to cause detained women to fail to seek alternative measures to imprisonment – as recounted by some testimonies we collected – due to not being able to do without the meagre income they get from working behind bars, which is in many cases vital to the sustenance of their homes”, Criminal Attorney General's Office, *Annual Report 2009*, p. 290. Similarly, the Criminal Attorney General reported that, “the discrimination underlying the arguments of the judiciary in rejecting house arrest requests is worrisome. The social status of women applicants remains the backbone of the judicial foundations that hinder eligibility for the institution. This way, women are immersed again in a dangerous marginal zone since the judiciary denies them the full exercise of their maternity because of their socioeconomic origins”, Criminal Attorney General's Office, *Annual Report 2013*, p. 310. See also Criminal Attorney General's Office, *Annual Report 2012*, pp. 404-409; Criminal Attorney General's Office, *Annual Report 2014*, pp. 334-336.

The Supreme Court set aside the judgment of the Trade Courtroom of the Court of Criminal Appeals, which had confirmed the denial of arrest previously resolved by the Oral Criminal Court No. 24. The pronouncement made by the High Court was offset by the opinion of the Attorney General, who embraced a broad view on the original sources of the institution.

Regarding the background of the extraordinary appeal lodged by the Fernández defence, based on Art. 14, para. 3 of Law 48, it called into question the interpretation of the rules of the National Constitution, of the human rights treaties and the decision of the reviewing instance contrary to the right appealed by the defence.²⁶¹ By the same talking, the decision of the Court of Appeals was understood as a final judgment in the terms of the aforementioned article provoking a burden to be placed on the child that could not be repaired due to the impossibility of exercising the rights invoked by the defence. The Court considered in turn, that the rule of Art. 14 of Law 48 (issues discussed that refer to the examination of common right) admits exceptions by means of the doctrine of arbitrariness,²⁶² “because if the judgments are based on arguments that give it only apparent basis, and do not therefore provide a definite answer to the proposals made by the defence within their rights, the judicial act may be set aside”²⁶³.

Regarding the arguments made by the High Court, the following was stated:

Indeed, according to the vote of the majority, the lower court not only failed to address the grievance raised by the party that the decision to deny house arrest was based on an understanding contrary to the constitutional principle that prohibits any discriminatory treatment, but it also limited itself to analysing the proposal focusing on whether the welfare of the child was affected by the situation of imprisonment of the mother and, based on its negative opinion, denied the possibility of house arrest.²⁶⁴

Therefore, the High Court argued that there had been an omission by the reviewing instance as far as the basis of the denial, which was oriented on an assessment that goes against the

²⁶¹ Law 48, Art. 14, para. 3: When the intelligence of any provision of the Constitution or a Treaty or Act of Congress, or a commission exercised on behalf of the national authority is challenged and the decision is against the validity of the title, right, privilege or exemption on which that provision is based and is the subject of litigation.

²⁶² The doctrine has established that, “(...) (5) A special appeal is not properly a criminal appeal. Its scope extends only to the Constitution and federal laws, but not to any legal or right related matter, the reason why it is usually characterized as a constitutional, federal, limited or partial appeal. However, the extension of the special appeal to cases of arbitrary sentencing and institutional gravity determines its operation in matters which, at least directly, are resolved on the basis of the interpretation of the facts and not necessarily the right”, Gregorio Badeni, *Tratado de Derecho Constitucional* (Constitutional Law Treaty), (Buenos Aires: La Ley, Vol. II, second edition), pp. 1230-1231.

²⁶³ NSCJ, *Ana María Fernández, Case No. 17,156*, 18 June 2013.

²⁶⁴ NSCJ, *Ana María Fernández, Case No. 17,156*, 18 June 2013.

constitutional principle that prohibits all discriminatory treatment, whereas the Court noted that the argumentative weight for the denial of the request for arrest was attributed to the fact that the mother was deprived of freedom, and whether that condition in any way affected the welfare of the child. In other words, the Court introduced a grievance for which there has been no feasible treatment while also showing a limited view as far as the approach used with regard to the best interests of the child and the institution of house arrest.

The arguments of the High Court appear to make observations regarding the interpretation criteria of the reviewing instance, and more specifically, on the general principles of international law on human rights, which provide clear interpretative guidelines when it comes to our case study. These were discussed in the previous chapter, but they bear repeating: *pro homine*, non-discrimination and teleological interpretation. Thus, the Court of Appeals ignored the accusation of the defence that the principle of non-discrimination was not respected. Non-discrimination should be used as the tool that illuminates the application of human rights standards. At the same time, it must be taken as a necessary condition for the exercise of all protected rights and not be used in a contrary manner, i.e. being the reason by which protected rights are affected (denying the arrest) such as the maternal bond and the best interests of the child.

What's more, it can be seen that the Court based its arguments in relation to the teleological interpretation of the end purpose of the law, which in this case were the humanitarian reasons to avoid having mothers with children in prison, as is well known, remedied by the institution of house arrest, and not in its reverse version as to the need to prove that the welfare of the child is affected by the imprisonment of his mother.

The High Court stated that:

The case analysis was omitted, even more without reason, from another no less important perspective, which is that of determining whether the change sought in the Fernández arrest situation, which clearly appears more beneficial for the daily life and development of the child, could thwart the conclusion of due process that the accused is subjected to, and possibly found the denial on this basis.

In this section, the High Court noted that the failure to consider the granting of house arrest based on the principle of the best interests of the child – which is inextricably linked to the *pro homine* principle – could potentially affect the conclusion of due process and thus justify the denial of home detention.

This way, the High Court argued that the Court of Appeals did not justify its grounds for its denial of house arrest either, in relation to the effective conclusion of Fernández's due process,

and then confirmed that the mother's place of residence is clearly more beneficial for the child – in accordance with his best interests – and of course the mother as well.

Lastly, the Court stated:

Under such conditions, it should be noted that, having ignored leading fundamentals intimately connected with the resolution of the case, which have a direct and immediate link with the guarantees of defence at trial and due process, the sentence lacks sufficient support and, therefore, it may be set aside as a valid jurisdictional act in terms of the doctrine of arbitrariness.

In this section, the Court recognised the importance of having omitted relevant arguments on the fate of the house arrest, meaning the denying of it. In other words, the charge of the defence was ignored as to the breach of the principle of non-discrimination, about the restrictive interpretation of house arrest, and whether its granting would have impeded the course of justice in relation to her charges in the main case.

However, the mere fact of naming ignored arguments was just an indication, not a full and in-depth treatment of the contested issues. If we analyse the pronouncement from the perspective of the doctrine, the Supreme Court had two alternatives regarding the opinion of the judgment: either to decide solely on the validity of the disputed ruling and, after accepting the grievances raised, order the remanding of the proceedings to the lower court for a new sentencing in compliance with the doctrine set by it, or, when certain situations are in place, such as in our case study, to rule on the root of the matter by regulating factual and legal aspects not pertaining to federal law.²⁶⁵

According to the Supreme Court, “although the contested judgment is not a final sentence, it should be equated to it because, given its nature and consequences, it could cause harm impossible to subsequently repair or that could only be repaired belatedly, derived from the thwarting of the rights invoked”. Therefore, the High Court was of the opinion that the irremediableness of the consequences of the case constituted a serious factor. For this reason, it would be interesting to investigate the reasons why the National Supreme Court of Justice of Argentina failed to rule on the root of the issue,²⁶⁶ effectively limiting its pronouncement to remanding the matter back to the lower court for new sentencing.

²⁶⁵ “(...) (7) However, when it comes to the simple execution of a judgment, or because of the importance and seriousness of the interests involved, or when the passing of time generates irreparable harm to the rights recognised in court, or if the appeal was caused by the failure of the lower court to comply with the order issued by the Court in a previous special appeal in the same court case, the High Court may rule on the merits by regulating aspects of fact and not of federal law”, Badeni, *op. cit.*, pp. 1231-1232.

²⁶⁶ Interestingly, the day the ruling was issued is 18 June 2013, one year and twenty-five days, to be exact, from when the gender law was enacted (23 May 2012).

2.3.1 Attorney General's Office

We will now turn our attention to the opinion of the Attorney General.²⁶⁷ The pronouncement issued over the granting of the request for house arrest was based almost entirely on the best interests of the child. In the words of the Attorney General:

The question at issue is to determine the criteria that, in light of the applicable federal law, should guide the interpretation of the judge at the time of granting or denying the request for house arrest in the case of mothers with young children. For reasons that I am going to explain, I understand that the appellant has good reason to claim that the denial of house arrest violated B.F.A.'s (Fernández's child's) rights and guarantees – particularly his right to have his “best interests” protected – because the most adequate measures were not taken to protect his right to personal freedom and to develop in an appropriate environment and under the care of his parents.²⁶⁸

The Attorney General's assessment that the denial of house arrest affected the rights and guarantees of the child appears to be correct. To this end, it should be added that the rights and guarantees of the mother also suffered from the distinction made in the previous instances. Therefore, we should mention another of the criteria that should guide the interpretation of the judge at the time of granting or denying house arrest in a case such as the one under study, namely, the principle of non-discrimination.

Ground for discrimination such as distinction or restriction based on reasons of sex or any other social characteristic or status aimed at detracting from the enjoyment or exercise of human rights in any sphere is a configuration that corresponds to the Ana María Fernández case. Her gender identity and sexual orientation were included in the assessments of the courts of first

²⁶⁷ With the reform of the Constitution in 1994, Art. 120 introduced the Public Ministry and defined it as an independent body whose function is to promote the implementation of Justice in defence of legality and the general interests of society in coordination with the other authorities of the Republic. The re-enacted Law No. 27,148, in Art. 1 (in addition to the function delegated by the NC) establishes its mission is to ensure the effective enforcement of the National Constitution and international human rights of which the Republic is a party. In addition, Law No. 24,946 organised the Public Ministry through the realisation of guidelines established by Art. 120 of the NC. The Public Ministry comprises two branches: the Public Ministry of Defence chaired by the National Defender General and the Public Prosecutor chaired by the Attorney General's Office. The Attorney General has a dual function: she is a Prosecutor directing opinions to the Supreme Court and she is the maximum head of all prosecutors, coordinating their actions and establishing Public Ministry criminal policy and prosecution guidelines. Institutional Coordination Secretariat of the Office of the Attorney General, *Apuntes sobre el sistema judicial y el Ministerio Público Fiscal de la República Argentina* (Notes on the judiciary and the Public Prosecutor of the Argentina Republic) [cited 2 July 2015]. Available from: <https://www.mpf.gov.ar/Institucional/CoordinacionI/Documentos/Apuntes.pdf>.

²⁶⁸ Attorney General's Office, *Ana María Fernández, Case No. 17,516*, 29 May 2013.

and second instance, which negatively affected the mother and son's exercise of their rights through the denial of house arrest. The non-discrimination principle proclaims that everyone without distinction has a right to the enjoyment of all human rights, including the rights to equality before the law and the right to protection from any possible discrimination on various grounds.²⁶⁹

Similarly, we should emphasise the final nature of the opinion on how rights are affected through discrimination based on gender identity and sexual orientation expressed in the following way, "it indicates that the sexual orientation of the mother was one of the reasons that justified the denial of home detention".

Indeed, the only paragraph devoted to this factor would seem to point to the importance given to a treatment of discrimination based on sexual orientation and gender identity. The function conferred by Art. 120 of the Constitution to the Attorney General is to "promote the implementation of justice in defence of the legality of the general interests of society". This means that the greater part of the opinion was based on the best interests of the child but, without taking away from that, it seems that it is more convenient to hold onto concepts that are more visible to society than to those that do not reflect it such as the sexual orientation and gender identity of a couple united in marriage. It would seem that discrimination based on sexual orientation and gender identity has not yet come to be considered a general interest of society. Another point to be emphasised is the assessment found in the opinion that the courts involved in the case had a restrictive interpretation of the institution of house arrest. In fact, both the Oral Court of first instance and the revision Court provided that only based on a certified situation of neglect would house arrest be granted. In their own words:

The criterion should be the opposite. The court should have considered that the granting of house arrest is the solution that best protects B.F.A.'s rights and only if it deemed that exceptional circumstances existed showing that his best interests were better protected if he stayed in prison with his mother, or separating from her, reject this method of having the sentence fulfilled.²⁷⁰

In other words, the opinion called for a broader approach as the exceptionality must be based on how the best interests of the child are affected and that factor should be the reason for granting the arrest and not the opposite. Regarding gender, it was not interpreted as a

²⁶⁹ The principle of non-discrimination is discussed in Chapter II, 1.1 The hermeneutics of human rights.

²⁷⁰ Attorney General's Office, *Ana María Fernández*, Case No. 17,516, 29 May 2013.

determining factor and therefore the pronouncements was based on the best interests of the child without analysing the discrimination suffered by his mother.

2.4 Courtroom III of the Federal Court of Criminal Appeals

It does not appear from the recounting of the arguments issued by the Court based on which the request for house arrest was denied that the first judge that put them forward considered discrimination as a determinant of the rejection. As a matter of fact, he attributed to it the defect of not offering a satisfactory answer to the complaint, as apparent legal grounds were used. The judge also added that for reasons such as the guarantees of due process and defence at trial, the judgment lacked sufficient support and was therefore to be set aside. In that sense, he focused his analysis on the best interests of the child as shown below.

Judge Gustavo M. Hornos said:

The judicial decision must be upheld in the purpose of protection underlying the rule, prioritising at all times the subjective and objective characteristics of the case, in pursuit of the guiding principle of the best interests of the child. This last aspect represents, then, a guideline for interpretation that cannot be ignored.²⁷¹

As pointed out by the magistrate, the judgment should have been based on the spirit of the law through which it was enacted, taking the best interests of the child as a guideline for interpretation.

As for the prioritising of subjective and objective characteristics that must be present at all times, we need to emphasize those value judgments made by the courts on Fernández's private life, which, as discussed above, assessed personal characteristics of the person that had nothing to do with the case. This, in turn, did not meet the best interests of the child, but had a directly opposite effect with the denial of house arrest eligibility.

Therefore, we need to add to that statement the principle of non-discrimination, which is at the basis of the interpretation of actual eligibility for the institution of house arrest. Because this principle was not taken into account, a process like in our case study is delayed, where not only the three possible instances intervene, but the case is back again as this opportunity for sentence revision.

The judge also said:

²⁷¹ Again proceedings were filed before the FCCA, Courtroom III –made up of Drs Hornos, Borisky and Madueño – granted house arrest. FCCA, Courtroom III, "F., A.M.", 12/07/2013. Abeledo Perrot No. AR/JUR/27979/2013.

As I said earlier, the law does not establish that, just because some of the criteria provided by the article are met, the execution of the sentence should automatically be fulfilled through home detention, but that it makes it subject to judicial assessment. However, it is not an option left to the discretion of the judge, as any decision granting or denying this form of execution should be based on the purposes of sentence execution and protection underlying the aforementioned legislation, and in the consideration of the particular circumstances of each case.

The argument of the magistrate would seem correct in that law No. 26,472 is not imperative in relation to its mandatory application, i.e. it has not been freed from automatic connection to a case by which to determine eligibility for it. But it is a power of the judge to grant or deny it. This entails that the arguments should be based on the purpose of executing the sentence and on the protection underlying the aforementioned legislation. In this case study, the courts of first and second instance based their denials on arguments other than the partial understanding of the best interests of the child, involving the sexual orientation of the mother, thereby breaking with the non-discrimination and *pro homine* principles.

He also noted that:

Therefore, in these cases, the analysis of the best interests of the child in terms of Art. 3.1 of the CRC must be properly integrated with elements that allow judges to assess the best interest of the child, as a core and emerging issue within the cluster of problems that arise when a member of the family is deprived of freedom.

To the best interests of the child, understood as one of the principles within the protection concept of *Corpus Juris* – a core issue –, should be added two more principles that summarise the CRC, which are that of non-discrimination and the child's right to life, survival and development. In our case study, these two principles are closely related and are directly dependent on the mother and her bond with the child. This, in turn, should be understood in the words of the Court when it assessed the best interests in relation to “a family member deprived of freedom” who incidentally is united in matrimony with another member of the same sex.

The decision for denial should then be based on the spirit of the enforcement law, which is the resocialisation of the person, and not on sexual orientation and gender identity. Not only should the best interests of the child be analysed but also the discrimination suffered by his mother and her partner, understood to be the family of the child. And he finished the sentence as follows, “ultimately, striking a balance between the interests and values at stake, I propose the perspective that turns out to be the most valuable to the best interests of the child (...) I judge that it corresponds to granting the benefit requested”.

Judge Mariano H Borinsky based his argument on the omission that arrest could thwart the conclusion of due process of the trial, and that denial could be established on that basis. The discrimination treatment was iteratively omitted as a determinant factor of the arbitrary denial of arrest.

About the treatment that was carried out in the new review of the house arrest request case, it can be made clear that it was indeed granted in the best interests of the child, and there was no visible address to the assessment of the sexual orientation of the mother resulting in the infringement of her and her child's rights.

3. Possible causes of gender invisibility

After the case study analysis, we are able to elucidate two argumentative ways put forward by the courts in regard to gender invisibility: by action and omission. We will now provide a brief explanation of these conceptualisations.²⁷²

Gender invisibility by action occurs when the judicial authorities, of first and second instance in this particular case, resolve not to grant house arrest due to the distinction made in relation to sexual orientation and gender identity, and an unfavourable situation is created as a collateral effect, i.e. the maternal bond and house arrest eligibility rights being affected. Invisibility by action is better known as discrimination. As for the second connotation about the invisibility of gender, it is done by omission and occurs when judicial authorities are aware of the restriction based on sexual orientation and gender identity but still decide not to make it visible. Invisibility by omission is invisibilisation in itself.

We will now turn to the two arguments for which interpretations can be made as to the causes of invisibility. We will try and make a brief tour of the different disciplines²⁷³ that were discussed in Chapter I to understand the reasons why the judicial officers opted not to make gender visible.

Answers may be found in the field of sociology, if one takes into account the social construction of heterosexuality that has been converted into universal law and for this reason whatever is outside this law is taken as not normal, not the subject of rights and threatening. The

²⁷² According to the Royal Spanish Academy, Invisibility is the quality of the invisible. The invisible is that which cannot be seen or that shuns being seen. That which cannot be seen is a physical body, a measurable object lacking light that makes it visible or that the observer cannot see. Invisibility then, depends, inter alia, on light and an observer to become properly visible.

²⁷³ Gender perspective understood as the interplay of four elements. See Chapter I, 2. The mother and gender perspective.

heterosexuality that causes a woman and a man to unite is the authorised symbol that expels those connections that are not part of the opposite binary system and gives it an order of priority, where the masculine side is predominant. Constructed social structures such as the church, the family and the State perpetuate this asymmetry and leave no room for any objections.²⁷⁴

Also in anthropology, generalised patterns of behaviour among people can be seen to be caused by the universal imposition of different values for the sexes, which is the product of the social construction that allows it to operate with certain rules while forcing one not to practice others, as the union of two people of the same sex may be. These values are based on the analysis of bodily fluids and the role they play in reproduction, where there are indeed differences, but some are understood to be more dominant than others due to the man's desire of domination over the woman's control of the reproduction process.²⁷⁵

Philosophy can also be used as a source in order to gain better understanding, if you can see that people live in a world that works thanks to a particular matrix produced by means of a standard that regulates the materialisation of people's bodies. The matrix that legitimises certain identities over others produces the exclusion of individuals that do not fit the standard. The excluded individuals are needed to define and limit the subject of that which is not the standard, and at the same time they pose a threat to the order itself, which shows them that one can go against the regulatory standard. Faced with this imminent threat, individuals disqualify, reject or ignore forms of identity that are not recognised by the heterosexual matrix. The standard is claimed to be neutral, but it is revealed as a form of domination that is functional to the heterosexual matrix and legitimises the individuals who identify with the patterns imposed against those who question and assert their identity outside of it.²⁷⁶

A bridge is then built between law and the other disciplines defined as the executive arm of the heteronormative matrix,²⁷⁷ which produces fictions that legitimise practices in society and culture. It produces the segregation of the authorised identities, i.e. an opposite polarity. Also, law, as a legal science, is supposed to be objective, fair and neutral but it hides power, domination and exclusion structures behind its veil. Judicial officers, as persons subject to and operators of the law, are immersed in the world of symbolic norms expressing religious, political and legal ideologies that define certain patterns.

²⁷⁴ Concepts taken from Bourdieu, *op. cit.*

²⁷⁵ Concepts taken from Héritier, *op. cit.*

²⁷⁶ Concepts taken from Butler 2002, *op. cit.*, p. 26.

²⁷⁷ Heteronormativity is the social, political and economic regime imposed by patriarchy and heterosexual practices through various medical, artistic, educational, religious, legal, etc. mechanisms, and through various institutions presenting heterosexuality as necessary for society to function.

Legal sciences are in turn the battlefield that some people use to prioritise certain values over others. In the field of law, women have been defined in relation to their bodies and therefore they are dominated based on their sexuality. In criminal cases, as in our case study, there is a tendency to strengthen the gender structure, thereby creating greater vulnerability for women. Judges tend to view women not as individuals, but in terms of family relationships that reinforce the traditional concept of family.²⁷⁸

Perhaps the fundamentals of the patterns observed in the Ana María Fernández case elude the perception of the person.²⁷⁹ That is not to say that the disciplines we discussed have not provided some light on such behaviours. It is in any case possible to recognise that the behavioural patterns of human beings are not left to chance nor are they exercised with absolute freedom. For this reason, it is interesting to understand certain practices deployed in a place of power such as that of Justice.

²⁷⁸ Concepts taken from Bodelón, *op. cit.*

²⁷⁹ Immanuel Kant in *Groundwork for the Metaphysic of Morals* seeks to discern the essence of morality and proposes a behaviour guide for the free and independent individual within a moral community governed by universal laws. The laws were formulated under the unconditional imperative guiding moral actions. *A priori* was the way their mandatoriness was discovered using reason while discarding experience. It points out a categorical imperative like, “work according to a key principle that can become at the same time a universal law”; “work according to key principles that can at the same time hold themselves as objects, like universal natural laws” and “work with respect for every rational being –yourself and the others –so that your key principle is worth at the same time as an end in itself”. This means that human beings are independent because they generate moral law (provided the ability exists, through reason, to freely legislate without being bound to a law other than their own). See Immanuel Kant, *Fundamentación de la metafísica de las costumbres* (*Groundwork for the Metaphysic of Morals*) (Madrid: Espasa-Calpe, 1983), pp. 96-97.

CHAPTER IV: Final thoughts

Based on the analysis of the Ana María Fernández case, we made the following observations on the application of the institution of house arrest by the judicial officers involved, and their treatment in relation to the best interests of the child and gender perspective. For a better understanding, in this final chapter we will use the same methodology as in Chapter III, i.e. our final reflections will be based on a brief chronological recapitulation of the arguments put forward. Finally, we will try to outline specific considerations for the application of house arrest, gender perspective and the best interests of the child.

Both the Oral Criminal Court No. 24 of First Instance and the Trade Courtroom of the Federal Court of Criminal Appeals (without taking into account Dr Ledesma's dissent) used a restrictive approach with regard to the institution of house arrest. They interpreted the alternative measure for execution of the sentence as an exceptionality and not as a generality to the rule. Meaning that the Court and the Courtroom opted that the child had to be in a situation of risk or neglect for the granting and not for his best interests. This argument does not need verification, as we have shown through the parliamentary debate for Law No. 26,472 that the humanitarian reasons to have children in prison with their mothers are recognised *a priori*.

At the same time, we should consider that the spirit of the law is in the best interests of the child and that means it should not be a mere source of inspiration for the authorities in their decisions but that they are required to use it and also limit it when it affects rights protected by the discretionality of apparent legal grounds. The aforementioned rule seeks to prevent the separation of the child from his mother and cannot be replaced unless there is an exceptional and well-founded reason. That is, the Court and the Courtroom provided a partial interpretation of the best interests of the child.

As for the assessment made by the Court on the sexual orientation and gender identity of the mother, a decisive factor for the denial was that the existence of another mother who could replace her was considered and this resulted in a differential treatment both for her and the child. The consequence was their rights being affected.

The Trade Courtroom of the Court of Appeals used similar arguments that denoted the confirmation of the first instance ruling, as discussed above.

As for the arguments put forward by the National Supreme Court of Justice, with regard to home detention eligibility, it failed to address the discrimination suffered by Ana María Fernández with regard to her sexual orientation and gender identity and requested a further

review of the sentence for apparent legal grounds unrelated to the requests by the defence. It mentioned discrimination in only one paragraph, in relation to the lack of grounds by the Court of Appeals regarding the charge by the defence. In this respect the High Court omitted its treatment and this did not allow the degree of discretionality of the judicial authorities as for the granting or denial of the institution to be clarified. Also, just reporting discriminatory behaviour does not allow one to completely understand whether the assessment of sexual orientation and gender identity was a determining factor in the denial of home detention. Following up on this, the Court referred the case to the Federal Court for review.

Finally, Courtroom III of the Federal Court of Criminal Appeals upheld the house arrest of Ana María Fernández and failed to address, again, the discrimination reported (but not analysed) by the High Court and to argue based on the best interests of the child.

Our case study was developed with the aim of trying to understand the legal application of house arrest and the interrelations between gender perspectives and the best interests of the child. We elucidated how gender invisibility was an essential reason why eligibility for the institution was blocked. In turn, the best interests of the child was the tool that the judicial officers used as a protective umbrella in granting arrest. This means that the courts did not address the best interests of the child in key with the permanence of the maternal bond and gender visibility. Meaning that given the facts of the case, they preferred to argue based on the best interests of the child and not mention the invisibility by action suffered in the instances prior to the granting of the request.

On the effective eligibility for home detention, as the Attorney General opined, it has to be taken as the rule and not the exception. Not to mention that the alternative measure of deprivation of freedom being analysed is a partial solution and has still a long way to go. The progressivity achieved so far is by no means a limit to continue looking for better standards that protect human rights, in this case, of children and mothers deprived of freedom.

We need to consider the determining factor that resulted in the conclusion of the case, which was gender invisibility. The *Corpus Juris* that protects the child safeguards the right to have a family, which is not necessarily made up of two opposite sexes, but transcends that in its definition as a union of love and solidarity. The child thought of in a traditional family should be observed without concepts based on a binary pillar of generic sex that polarises opposites and relates them asymmetrically. The familiar reproductive perception should not be the determining reason that compels people to join together. People relate and connect in multiple ways that do not necessarily go hand in hand with the prevailing regulations whose basic axis is reproduction and domination of some beings over others. Freedom of choice on sexual

orientation and gender identity is a human right deserving of equal treatment, which is to say that all human rights should be understood to be inherent in every person in a universal, indivisible and interdependent manner.

To this end, it should be noted that, in the current postmodern times, ethnic, sexual and gender categories are no longer enough to thoroughly describe an individual. Categories such as nation, class and family have started to mutate and even disintegrate to some extent, which causes uncertainty and insecurity, even if these conceptualisations are in some way fictional. Traditionally conceived human relationships have begun to undergo transformations such as new ways to reproduce. However, legal sciences conceived many years ago still preserve ancient conceptions of the roles of human beings in society.

In order to interpret and understand a category such as gender it is necessary to come to terms with its complexity made of multiple connecting dimensions reflecting the relations between the sexes. The different disciplines can be used as potential focal points to provide some light on these transformations. Therefore, besides the four elements defining the concept of gender, other sciences should be employed to expand our understanding of this category. For this reason, it is imperative to listen to the biological sciences, which somehow have been silenced by asymmetric and dual conceptualisations produced by the observers of this subject.

Sociology meanwhile is establishing a way to undermine structures that perpetrate asymmetry between sexes by fully recognising the domination over the bodies of people that still exists today. Anthropology, in turn, points to the fact that binary distinctions were built as cultural signs devoid of universality and hence the need to transform the way of gathering data in order to limit the imposition of certain values over others.

In philosophy, the idea arises of rematerialising bodies for the purpose of generating new interactions questioning the hegemony of the established standards by recoding language to resist dominant discourses. The law facilitates such changes in order to limit gender invisibilisation practices and prevent difference from becoming inequality. This approach coincides with the idea of fighting back by means of a paradigm shift undermining structures of domination on which the traditional dual vision is based. This way, the law can be used as a tool to make a multiplicity of identities understood that have historically been ignored as legal subjects; with laws that promote and assert new ways of being that modify cognitive and interpretive structures connected to a dichotomous base that divides reality into opposites.

Society has conferred to law a discourse of truth that translates into relations of power, knowledge and inequality. Law is also understood as a matrix reproducing identities that have been segregated into a duality, because it knows no other code or manual of operation.

This translates into control over the bodies of people understood as full administration of desires and pleasures. Its deconstruction is complex because it has been programmed and perceived as natural and normal.

Along the same lines, according to Nietzsche's metaphorical plea, in order to understand the maternal bond between the child (protons-*Corpus Juris* protecting child positively charged) and his mother (electrons-sexual orientation and gender identity negatively charged) it is necessary to change the very composition of the case study (atom) for a solution consistent with the protection of the human rights of the parties through the transformation of the heteronormative matrix (different atomic element).

For this reason, we believe that for a correct analysis of the institution of house arrest, it should definitely be seen through the lens of the best interests of the child together with a mother deprived of freedom (regardless of sexual orientation and gender identity) forming and producing in turn a transformation of the traditional concept of family. Light and the observer are the architects responsible for visibility. In turn, love and solidarity define the concept of family. Therefore, to illuminate the resolution of a case such as the one under study, it is necessary to include the families that are still today peripheral within the *Corpus Juris* of child protection.

List of abbreviations and acronyms

AC	Argentine Constitution
ACHR	American Convention on Human Rights
CA	Criminal Attorney General's Office
CCPR	Convention on Civil and Political Rights
CELS	Centre for Legal and Social Studies
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
FCCA	Federal Court of Criminal Appeals
IACHR	Inter-American Commission on Human Rights
I/A Court H.R.	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
LGTBIQ	Lesbian, Gay, Bisexual, Trans, Intersexual and Queer
NC	(National) Constitution of Argentina
NCCP	National Code of Criminal Procedure
NSCJ	National Supreme Court of Justice
OAS	Organisation of American States
PC	Penal Code
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organization

Glossary

Bisexuality: The ability of a person to feel profound emotional and sexual attraction to people of a different gender from one's own or also of the same gender as well as the ability to maintain intimate and sexual relations with these people.

Gay: Male homosexual who feels emotional and sexual attraction to other males and is not attracted to the opposite sex.

Gender: Refers to the socially constructed identities, functions and attributes of women and men, and the social and cultural meaning attributed to these biological differences.

Heterosexuality: Refers to the ability of a person to feel a profound emotional and sexual attraction to individuals of a different gender and the ability to maintain intimate and sexual relations with these people.

Heteronormativity: The social, political and economic regime imposed by the patriarchy and heterosexual practices through various medical, artistic, educational, religious, legal, etc. mechanisms, and through various institutions presenting heterosexuality as necessary for the functioning of society.

Homosexuality: The ability of a person to feel a deep emotional and sexual attraction to people of the same gender and the ability to maintain intimate and sexual relations with these people. The term lesbian is generally used to refer to female homosexuality and gay to refer to male homosexuality.

Gender identity: The internal and individual experience of gender as each person experiences it deeply, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions such as clothing, speech patterns and mannerisms.

Intersex: Includes people who possess male and female genetic characteristics and have been defined as all those situations where the sexed body of an individual varies from the standard male or female corporeality culturally in force. An intersex person can be identified as a man, woman or neither.

Lesbian: A homosexual woman who feels emotionally and sexually attracted to other women and is not attracted to the opposite sex.

LGBTIQ: An acronym that refers to lesbian, gay, bisexual, transgender, bisexual, intersex and queer. This terminology is associated with social movements and can be found under several forms: LGTB, LGBT, GLBT, LGTTTBIQ. The last in the list refers to transsexuals, transgenders and transvestites.

Sexual orientation: Refers to the ability of each person to feel a deep emotional and sexual attraction to people of a different gender from one's own, or of the same gender or more than one gender, as well as the ability to maintain intimate and sexual relationships with these people. It is a complex concept whose forms change over time and differ across different cultures.

Patriarchy: Dominance of men over women in institutionalized power relations and naturalised by an order of things. The male model is adult, heterosexual, white and upper middle class.

Queer theory: The development of sexual dissidence and deconstruction of stigmatised identities that through resignification seeks to reaffirm that a different sexual option is a human right. *Queer* as a noun is understood as homosexual. As a verb it expresses the concept of destabilising, disrupting, ruining. As an adjective it is defined as weird, twisted, strange. Its antonym is *straight*, which means, right, rector, heterosexual.

Sex: Refers to the biological differences between men and women based on their phenotypic and genetic characteristics.

Transsexuals: People who feel and understand themselves as belonging to the gender opposite to that socially and culturally assigned to their biological sex and opt for medical intervention – hormonal, surgical or both – to adapt their physical-biological appearance to their mental, spiritual and social reality.

Transgender: A term used to describe the different variants of gender identity, whose common denominator is the nonconformity between the biological sex of the person and the gender identity traditionally assigned to it. A trans person can construct their gender identity regardless of surgical interventions or treatments. Transgenderism refers exclusively to the gender identity of the individual.

Transvestites: Those who express their gender identity –whether permanently or transiently – using clothing and attitudes of the opposite gender socially and culturally assigned to their biological sex. This may or may not include the modification of one's body.

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The Tokio Rules were adopted by the General Assembly with resolution 45/110, 14 December 1990.

Regulations

International Instruments

Convention on the Rights of the Child, adopted by the General Assembly with resolution 44/25, 20 November 1989. In force since 2 September 1990.

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the General Assembly with resolution 34/180, 18 December 1979. In force since 3 September 1981.

Vienna Convention on the Law of Treaties of 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, went into force on 27 January 1980.

American Declaration of the Rights and Duties of Man, approved by the Organisation of American States (OAS) in Colombia, in 1948.

Universal Declaration of Human Rights, adopted by the General Assembly with resolution 217 A (III), 10 December 1948.

International Covenant on Civil and Political Rights (ICCPR), adopted by the General Assembly with resolution 2200 A (XXI), 16 December 1966. In force since 23 March 1976.

International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the General Assembly with resolution 2200 A (XXI), del 16 de diciembre de 1966. In force since 3 January 1976.

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), fue adoptado adopted by the General

Assembly in San Salvador on 17 November 1988, enacted in Argentina with Law No 24,658 of 19 June 1996, and its entry into force was on 16 November 1999.

National Regulations

National Constitution

Law No. 23,692

Law No. 24,660

Law No. 26,061

Law No. 26,472

Law No. 26,743