

Child Protection in Violent Contexts in Different Normative Systems From an Occidental Perspective

Guillermina V. García Viazzi, Buenos Aires University, Argentina

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Abstract

This study aims to examine the approaches and solutions proposed by various regulatory systems about child abuse and mistreatment. The focus is on the legal systems of the United States of America and Argentina, which have taken different stances on the Convention on the Rights of the Child. Two real legal cases, one from California State and another from La Pampa Province, are used as examples. The analysis of these specific cases was carried out through the comparison of the legislation applied in the matter by both countries, taking into account the consequences suffered by the children and the legal protection that professionals or public officials have in the intervention of these cases, in order to understand what are the legal gaps and/or adaptation of procedures necessary for effective child protection. Additionally, the paper suggests a comprehensive therapeutic approach to trauma that considers the difficulties and complexities of these cases, including the needs of vulnerable populations and the limitations of the healthcare system, to find a more holistic and effective solution to child abuse and mistreatment.

Keywords: Child Protection, Violence, Child Abuse and Neglect, Child Mistreatment, Normative System

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Introduction

It is important to define clearly what we understand by child mistreatment and how to measure it, if we want to address the abuse and neglect problem locally, and around the world. This is a fact whether we focus on the legal or the political aspects, on the responsive practices, or applied research. This broader search allows us to embrace the problem universally and adapt cultural differences as well as regulations. The definition allows us to see differences between communities: how they have changed over time, how they have been legally codified, regulating the governance of societies, and finally how we have achieved the desired objective, reducing the incidence of abuse (Williams, M & Week E. G, 2014).

In 1999, the World Health Organization formally defined child abuse for preventive purposes, understanding it as: All forms of physical and/or emotional abuse, sexual abuse, negligence, commercial treatment or other types of exploitation, generating real or potential damage to the child's health, survival, development or dignity in the context of a relationship of responsibility, trust or power (Williams, M & Week E. G, 2014).

The global perspective on this problem has been achieved by the International Society for the Prevention of Child Abuse and Neglect (ISPCAN). A global consensus has been emerging about what abuse and neglect are, but yet differences remain. The most common behaviors considered neglect and abuse in most parts of the world, have been physical abuse by parents or caregivers, and sexual abuse, defined as incest, sexual touching, and pornography. In contrast to previous years, in 2008, three types of maltreatment showed differences in the investigations, these being: 1) failure to provide medical care based on religious beliefs, 2) substance use by parents, and 3) physical discipline. It is important to take into account that although these types of abuse can be found separately, in general a combination of them appears (Williams, M & Week E. G, 2014).

Despite the progress in definitions, the achievement of global consensus on the matter, and the development of regulations in different countries, the protection of children around the world is taken on as an arduous task and not always possible.

Comparative Law

In the great contemporary legal systems, Rene David and Camille Jauffret-Spinozi refer to the ancient precedents that could be evoked in relation to comparative law. Some have considered comparative law as a branch of legal sociology, and although reservations can be made about this statement, the points of contact between both disciplines are due to the need of comparative law to consider law as a determining factor in human behavior, and how people consider it as a factor of social order. It could be thought that this situation is repeated in different countries where a comparable level of development has been reached, leaving aside the fact that for a long time, the law was taught in universities, and on the other hand, there were the rules of the law that were applied in the courts to solve disputes. However, in the West, the law is far from explaining all the realities of social life, since there are many elements of religious, political and social order that influence the way individuals act, beyond the legal text (David, R. & Jauffret-Spinozi, C., 2010).

Within the sources of the law, the different legal systems assign a different function to the law, the custom, the jurisprudence, the doctrine and the equity. For this reason, it is important to consider when studying a foreign law, the local conception of the relationships between the

different sources, thus varying the reasoning methods. If the right has a religious or sacred value, no legislator can modify its rules, while in another, a law can be a model that is modified according to custom. So that the comparative law can fulfill its functions, lawyers are required not only to limit themselves to the study of national law, but also to appeal to the comparative method. In our world, each State has its own law, and various rights apply within it. Also, some non-state communities have their own law, for example, Canon law, Muslim law, Hindu law and Jewish law. There is also an international law with the purpose of regulating relations between states and the international trade. Each right forms a system, uses certain concepts, sets the rules into categories, and uses certain techniques to formulate the rules and interpretation methods, linking the system to a social order conception for its application and functioning (David, R. & Jauffret-Spinosi, C., 2010).

Argentina and Roman-Germanic Law

The Argentine law system comes from the Roman-Germanic family, which brings together the countries whose legal system was formed on the basis of the Roman Law system. In these countries, the rules of the law are conceived as norms of conduct closely linked to concerns of justice and morality. The essential task would be to determine what those rules are. The legal system, like other regulatory systems, normatively qualifies certain behaviors in certain circumstances, regulating the behaviors of the individuals that make up a social group, thus contributing to a harmonious coexistence, anticipating in advance the way in which conflicts of interest that may arise must be solved (Alchourrón & Bulygin, 2021).

Since the 19th century, in the Roman-Germanic family, the law has a major function, for that reason the countries belonging to it have adopted the formula of codes. This family of legal systems was created to regulate relations between citizens, while other disciplines were developed with less perfection from the principles of "civil law", which was for a long time the legal reference by excellence (David, R. & Jauffret-Spinosi, C., 2010).

United States of America and the Common Law

The law of the United States of America comes from the Common Law, one of the great systems of law in the world in parallel with civil rights. As with the Roman-Germanic family, the expansion of English law did not happen without having the Common Law certain alterations, to adjust to the conditions of each country where the system was received (David, R. & Jauffret-Spinosi, C., 2010).

The first colonies founded in the territory of the United States of America date from the 17th century, where the common law of England was applied as long as the rules were appropriate to the conditions of life prevailing in the colonies. For this reason, the system based on the common law had its particularities, but always conserving in a general way the concepts, the ways of reasoning, and the theory of the sources of English law. The particularities were given by the geographical differences between the two countries, as well as the traditional history of England and the search for a homeland in the populations that came to form a new way of life on the continental mass (David, R. & Jauffret-Spinosi, C., 2010).

The Tenth Amendment of the United States Constitution in 1791 stated unambiguously: "The powers that the Constitution does not delegate to the United States, and that it does not prohibit the federal entities from exercising, are reserved to each of the federal entities respectively or to the people". This postulate has never been abandoned. The legislative competence of these

federative entities is the general rule and the competence of the federal authorities is the exception, so this exception must be mentioned in the express text of the Constitution. The sources of the law in this country are jurisprudence and legislation. The formation of the jury is guaranteed by the seventh amendment of the constitution at the federal level, in civil and criminal matters, and all citizens can demand that their dispute be resolved by a jury as long as it exceeds twenty dollars, and when it cannot be resolved by an Equity procedure (the parallel system to the common law that came to resolve by written procedure issues that were presented as insufficient). The rule of stare decisis, refers to the rule of precedent, where each federative entity from its Supreme Court of Justice has the power to reverse its jurisprudence, adapting the interpretation of the constitution to the various currents of thought and the economic needs of the modern world, giving stability to American political institutions. The Constitution of the United States is a Roman type law, whose primary purpose is not to settle controversies, but to provide general rules of law for organization, and to govern the conduct of rulers and administrators (David, R. & Jauffret-Spinosi, C., 2010).

Regulations Related to Child Abuse Cases in Both Countries

The Convention on the Rights of the Child (CRC) is the international treaty adopted by the General Assembly of the United Nations on November 20th of 1989, which recognizes all persons under the age of 18 as subjects with full rights.

The national law number 23.849 approved the Convention on the Rights of the Child in 1990 in Argentina. At the same time, the national law number 26.061 for the Comprehensive Protection of Boys, Girls and Adolescents of the year 2005 establishes in its 2nd article, the mandatory application of the Convention on the Rights of the Child, declaring in its 3rd article, the concept of the Best Interest of the Child for the purpose of respecting his status as a subject of right, the right to be heard and take into account their opinions, the right to personal development in the family, social and cultural sphere, respecting their age, maturity degree, discernment ability, and other personal conditions, as well as respecting their center of life where they have spent most of their existence. The 9th article refers to respect of children's dignity and protection of their personal integrity. In this sense, it establishes that children and adolescents should not be subjected to violent, discriminatory, vexatious, humiliating or intimidating treatment; not to be economically exploited, subjected to torture, abuse, negligence, sexual exploitation, kidnapping or trafficking for any purpose or any other form of cruel or degrading treatment. For this reason, children and adolescents have the right to their physical, sexual, mental, and moral integrity. The law adds that people who become aware of situations that threaten children and adolescents in any of the previously mentioned ways must notify the local authority for the application of this law. At the same time, the law number 23.849 in its 9th article states in its first paragraph that: States Parties shall ensure that the child is not separated from its parents against their will, except when, subject to judicial review, the competent authorities determine, in accordance with the law and applicable procedures, that such separation is necessary in the best interests of the child. Such a determination may be necessary for example, in cases where the child is abused or neglected by the parents or where the parents live apart, and a decision must be made as to the child's place of residence. On the other hand, the law number 24.417 for Protection against Family Violence in the city of Buenos Aires (law number 1918 in La Pampa province, etc), sets the concepts of protection against violence and establishes in its 4th article the precautionary measures that the judge may adopt, upon becoming aware of the facts that motivated the complaint, arranging the duration of these measures according to the background of the case, calling a hearing within 48 hours after precautionary measures have been taken. In this sense, it is also important to mention the law

number 26.485 of 2009 for Comprehensive Protection of Women, which seeks to prevent, punish and eradicate violence, also due to the damage done on the maternity capacity, in the cases of abused women. The enunciated laws mark some of the procedures that must be carried out from the civil jurisdiction, and from interdependent organizations for children and adolescents protection purposes, beyond the processes that may arise through the criminal jurisdiction in response to complaints made, such as the statement that could be taken from children and adolescents through the Gesell Chamber, and forensic psychological interviews.

In the United States of America, and resulting from the historical State's conformation, as well as from the difference in normative systems that come from different law families, the processes, the parties involved, and the sources of the law used to resolve controversies, as the approach of the cases are presented in a different way. First of all, the United States of America did not adhere to the Convention on the Rights of the Child adopted by the General Assembly of the United Nations in New York on November 20 of 1989. In this sense, we can consider a judicial ruling of the Supreme Court of the State of California regarding a child abuse case dated November 30, 2015. "B.H., a Minor, etc., Plaintiff and Appellant, v. COUNTY OF SAN BERNARDINO et al., Defendants and Respondents. No. S213066". Bearing in mind in the first place that the higher law that unifies all of the United States is the National Constitution with all its amendments, and that at the national level the Supreme Courts of Justice address those issues that have to do with federal rights, while the other issues are addressed from the federative entities. There is evidence of child protection in a particular way, taking into account the codes that govern the federative entities with their own particularities. The CANRA (Child Abuse and Neglect Reporting Act) is California's child abuse and neglect reporting law. This law emanates from the penal code in its part 4, title 1, chapter 2, which aims to prevent crimes and detain criminals, establishing the obligations that people have in an investigation, to do everything necessary to protect and prevent the child's psychological damage, defining in the section the concepts of child, abuse, and negligence. At the same time, it defines who is obliged to report known incidents, as well as differentiating the investigations that arise from what is reported as false, unsubstantiated and inconclusive. The law establishes a meticulous detail of what must be reported and to which agencies (which are specified in certain sections of the code) and what must be investigated. The law establishes the need for a first telephone or fax communication and later within 36 hours the case follow-up. It refers to the concept of reasonable suspicion, which does not imply a certainty of the abusive acts or a requirement for medical attention, focusing on the responsibilities of the officers who take notice of the facts without enunciating the child as a subject of law.

Brief Development of the State of California's Judgment

In the judgment mentioned, of the plaintiff and the appellant against the State of California, more particularly against the County of San Bernardino, the facts detailed are the following: An anonymous citizen called a 911 operator to report an incident of suspected child abuse during the child (2-years-old) visit to his father. The operator who answers the call relayed the information to the sheriff of the department of San Bernardino. The deputy bailiff came out to investigate the report. The officer determined that there was an ongoing custody dispute between the parents, and that the child was not a victim of abuse, and that there was no need for further investigation.

Neither the sheriff's department nor the officer cross-checked the information reported by 911 with the County Child Welfare Agency. Approximately 3 weeks later, the boy suffered extensive head injuries while visiting his father. The child, through a guardian ad litem, sued

the county and the deputy sheriff, among others, for failing to report initial allegations of child abuse to the Child Welfare Agency, in violation of CANRA, based on reasonable suspicion. The Trial Court granted the defendants' request for summary judgment and concluded that there was no obligation to cross-report and that the defendants were immune from liability. The Court of Appeal affirmed the trial court's ruling.

From the case it appears that: When emergency personnel were called, they responded and transported the plaintiff (child) to Loma Linda University Medical Center. The Plaintiff, unconscious and suffering from seizures, was treated for severe head trauma and was given a craniectomy, in which a portion of the skull is removed to relieve pressure on the brain caused by swelling. The Plaintiff suffered subdural hematoma, cerebral edema, and subfalcine herniation caused by intracranial pressure. A consulting pediatrician forensic determined that the injuries had been caused by child abuse, most likely the "Shaken Baby Syndrome."

Analysis

The facts analyzed deal with the responsibility of the operators, according to CANRA, but beyond the obligations of the officers, it is alleged that the immunity is given because according to the experience of the investigator, and the subjective discretionary determination, there had been no child abuse, and therefore there was no responsibility to act, even when the facts and pediatrician opinion indicated otherwise. Throughout the jurisprudence, different parts of the California Penal Code are mentioned, as different rulings of the federal entity, which at the same time would contemplate procedural differences from one county to another.

La Pampa Province Case

In Argentina, more particularly in Santa Rosa city, province of La Pampa, in the months of December of 2022, hundreds of witnesses statements were taken for the death of Lucio Dupuy (November 26, 2021) in the Court of Hearings of that city, behind closed doors because the victim was a child, where a crime of sexual integrity was being debated, due to the level of evidence seriousness and the high sensitivity of the case, leaving the process development under strict confidentiality as well as the first instance file. The 5-year-old boy, who was tortured and abused by his mother and a same-sex partner, had hits, bites, and burns. The autopsy determined that death was caused by internal bleeding. The child had lived through a judicial process before the Covid-19 pandemic, which included visitation regimes, family disputes and a final agreement that gave the mother and her partner the possibility of having him permanently after having been under the custody of some uncles in General Pico City. From the information shared, the child would have attended at least 5 times in a period of three months due to polytrauma at different centers in the province, without registering any reports by professionals in the healthcare system, nor of the authorities of the kindergarten where the child had attended.

Analysis

In Argentina, professionals and/or public officials who become aware of these acts of violence or violation of rights have the legal obligation to report them. Unlike in the United States of America, in Argentina there is no law that protects professionals who intervene in cases of violence, so immunity from liability cannot be claimed. As the result of the homicide, the

mother and the couple were sentenced to life imprisonment, also a law project (Lucio Law) was approved in the National Congress. It proposes national training for civil servants and/or public officials to know how to proceed in these circumstances and the creation of a free line that allows anonymous complaints to be made, since in certain circumstances, professionals from the education system wanting to intervene, have been attacked by relatives of the victim. However, it can be seen in the healthcare system, there is reluctance when it comes to intervene in these cases. As if the professionals said I did not study medicine or psychology to be involved in legal proceedings for complex issues of the context. This is particularly evident in cases of rape, when it does not fall within the protocol and a legal doctor cannot be called because several days have passed. It is worth wondering if the existence of a law in Argentina that gives immunity to professionals would change this position, but what we can see from the California case is that immunity does not necessarily guarantee greater efficiency from professionals, nor does it prevent harm to children and adolescents. Specialization in the subject would seem to be a way of selecting professionals with a vocation for this type of assistance, putting the emphasis in communication, in the follow-ups, speeding up the intervention as established in the General Observation N°14 of the Convention on the Rights of the Child.

Approach

Being in Argentina, in the Family Violence Unit at General Children Hospital “Dr. Pedro de Elizalde” the approach is centered on the safeguard for adherence to the Convention on the Rights of the Child. Professional action within the public healthcare system must be carried out without overlapping with judicial processes to avoid re-victimizations. The assistances can be given in cases of spontaneous demand, inter consultation between the different services at the hospital or due to judicial request. Whether an orientation is expected, a psychodiagnosis that can last approximately 8 sessions seeing the child must be done, or a treatment is necessary. The sessions are with the children, but it is necessary to interview the related or cohabiting relatives to work with the entire family system, since the events that are being reported can be isolated or long-standing chronic situations that tend to be repeated from one generation to another. The therapeutic interventions depending on the theoretical conceptions have a greater or less standardization. In cases of violence, communication procedures are followed, psychoeducation is carried out, and work is done with different members of the family. The interdisciplinary approach contemplates in the case analysis both protective factors and vulnerabilities. Some frequent variables that appear in the histories of these families are, physical illness, mental illness, substance abuse, problems with the law, child language disorders, abusive situations between siblings, housing problems, migration, lack of social and family network, illiteracy and orphan hood. The configuration of variables will give rise to the complexity of the cases that could demand a longer treatment.

Although the judicial system intervenes by giving the legal framework to the procedures, the Boys, Girls and Adolescents Rights Council is the one that must promote, protect and guarantee the rights, but many times they do not work in connection with the different agents, avoiding the reinforcement of therapeutic achievements and/or in many cases reaching them, being the interventions and the child protection interrupted. Children and adolescents would not appear in this way neither as subjects of rights nor as beings to be protected. It is worth wondering if this is due to issues related to lack of budget or ideological differences when it comes to acting, where public officials would not agree with the law that gave life to the convention in Argentina, or due to ignorance of the cases that are treated.

Conclusion

The California ruling referred to, does not mention the definitions of the California codes whether there was abuse/neglect by the parents. It only mentions what the forensic pediatrician determines as a syndrome. The child is named the plaintiff. The California Penal Code defines abuse as... “any person who knowingly inflicts cruel or inhuman corporal punishment on a child or injury resulting in a traumatic condition is guilty of a felony and shall be punishable by imprisonment...”, so that physical punishment is to a certain degree accepted as the way in which parents must discipline the child. Beyond the normative and/or procedural differences, as well as the intervening agents where in the United States of America the police have direct action in these matters, and the difference in considering children as beings to be protected instead of considering them as subjects of rights, the systems with more or less material/professional resources in both countries, several times fail to protect children. There are severe consequences for them, as stated in the above ruling, and sometimes, even death, as happened in Argentina with the case of Lucio Dupuy occurred in the city of Santa Rosa, being the mother and her partner implicated, and having witnesses of the mistreatment to which the child was subjected.

What seems to be clear is the need for an interdependent approach among agents and professionals interdisciplinary work, in a non-compartmental way, but synergistic to enhance the resources of the healthcare system. Reinforcing communication between services to avoid the procrastination of actions. The professional should seek to analyze each case, observing what the family needs are from their perspective and from ours. Contemplating in the approach to trauma when basic needs may not be satisfied in cases of poverty. Also, when there are urgent physical and/or mental health issues to assist to, and due to the same marginal reality, they are not covered. When language disorders slow down interventions making difficult to find evidence, and the reports more complex. Moreover, when children are in foster care waiting for a family, even having suffered failed adoptions processes. Furthermore, when building a network is a priority as well as an individual psychological session in migratory situations, and when as professionals from our culture do not come to understand what does not become disruptive to the psyche of the other, because protective factors that we do not know make the other a more resilient being than ourselves. Knowing that not all the cases will be fulfilled, but with the conviction that the interdisciplinary intervention can be an open window for our children where they can see another reality, so far, the results have shown that when institutions stick together in the goal achievement, the children get better in terms of symptoms and in their psychophysical development.

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Contact email: ggarciaviazzi@gmail.com