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TRADITIONAL ORDER OF SURNAMES
(ORDEN TRADICIONAL DE LOS APELLIDOS)

CASE: *Amparo en Revisión 208/2016*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

DECISION ISSUED BY: First Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: October 19, 2016

KEY WORDS: right to equal treatment and non-discrimination, right to a name, right to private and family life, unconstitutionality of the traditional order of surnames.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 208/2016*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of October 9, 2016, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2022-01/AR208-2016.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo en Revisión 208/2016*, Mexico.

SUMMARY OF THE *AMPARO EN REVISION* 208/2016

BACKGROUND: A couple married and from this union their daughters A and B were born. The mother and father went to a civil registry court to register the minors. In doing so, they requested that the surnames of the minors be registered as M P (paternal surname of the mother first and paternal surname of the father second) instead of the traditional order. The Civil Registry authorities refused and, given the state of health of their daughters and the need to register them within 6 months of their birth, the parents had no choice but to agree to register their daughters in accordance with article 58 of Mexico City's Civil Code. However, the parents initiated an *amparo* lawsuit to challenge this refusal. In deciding, a federal judge in Mexico City granted the *amparo* on the grounds that Article 58 was unconstitutional. The authorities in question filed *recursos de revisión* against that decision, which were heard by the Mexico's Supreme Court of Justice (this Court), after exercising its authority to assert jurisdiction.

ISSUE PRESENTED TO THE COURT: Whether article 58 of Mexico City's Civil Code limits the right to private and family life, in its dimension of the right of parents to decide the name of their children.

HOLDING: The challenged decision was modified and the *amparo* was granted to the parents and their daughters A and B for the following reasons. From a literal interpretation of the challenged rule, this Court found that article 58 represented a limitation on the decision of the parents to determine the order of the surnames of their children, given that it established that the paternal surname must be registered first and the maternal surname second. In this regard, the Court recognized that this decision is protected by the right to private and family life, so it continued to examine whether, in this specific case, there was a constitutional justification for the legislative measure to require parents to register their children with the paternal surname first and the maternal surname second. Although it was determined that the establishment of the order of surnames was intended to give greater legal certainty to family relations, the chosen order in which the paternal surname is privileged perpetuates discriminatory conceptions and practices against women, since it recognizes their secondary role to men in the family, an unacceptable purpose from the point of view of the right to equal treatment. Therefore, this Court determined that both the "paternal and

maternal" normative portion of article 58, and the refusal of the responsible authorities to register the minors with the surnames in the order desired by their parents were unconstitutional. Consequently, the *amparo* was granted and the issuance of new birth certificates for A and B was ordered, so that the surnames appear in the order desired by the parents, i.e., the paternal surname of the mother first and the paternal surname of the father second.

VOTE: The First Chamber of the Supreme Court decided this case by a three-vote majority of justices Norma Lucía Piña Hernández (reserved the right to issue a concurrent opinion), Arturo Zaldívar Lelo de Larrea and José Ramón Cossío Díaz (reserved the right to issue a concurrent opinion). Justice Jorge Mario Pardo Rebolledo voted against (reserved the right to issue a dissenting opinion). Justice Alfredo Gutiérrez Ortiz Mena was absent.

The vote may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=1949>

31

EXTRACT FROM THE AMPARO EN REVISION 208/2016

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 19, 2016, issues the following decision.

BACKGROUND

- p.1-2 Ms. X and Mr. Y (the parents) married and, from that union, their daughters A and B were born. Because of their weight, the minors were classified as premature.
- p.2 The parents went to the civil registry court to register the minors. When doing so, they requested that the surnames of the minors be registered as M P (paternal surname of the mother first and paternal surname of the father second) instead of P M (paternal surname of the father first and paternal surname of the mother second). The Civil Registry authorities verbally refused and, given the state of health of their daughters and the need to register them within 6 months of their birth, the parents had no choice but to agree to register their daughters in accordance with article 58 of Mexico City's Civil Code.
- p.2-3 As a result, the parents, in their own right and on behalf of their daughters, filed an *amparo* lawsuit arguing that the right to a name and the right to equal treatment had been violated. The district court ruled in favor of the parents.
- p.4 The Mayor and the Legislative Assembly of Mexico City, as well as Judge 42 of the Civil Registry, filed *recursos de revisión*. In deciding, the Collegiate Circuit Court referred the matter to this Court. Finally, this Court decided to assert jurisdiction.

STUDY OF THE MERITS

- p.14 This Court observed that parents have the right to decide the order of their children's surnames, and that this decision cannot be limited by reasons of gender. In this regard, it will first evaluate whether the challenged norm limits the right to private and family life - in its dimension of the right of parents to decide the name of their children - and then review whether such a limit is justified.
- I. **Analysis of the impact of the challenged law on the *prima facie* content of the right to a name in relation to private and family life**

- p.14 As mentioned, the constitutionality review will be conducted in two stages. The first will determine whether the challenged law limits the fundamental right in question. At this stage of the analysis, it is necessary to resort to the interpretation of the regulations. On the one hand, the challenged legal provision must be interpreted in order to determine the scope of the prohibition or obligation it establishes. On the other hand, the constitutional provision containing the fundamental right in question must also be interpreted in order to determine the scope or *prima facie* content of that right.
- p.15 Once this is done, it must be determined whether or not the challenged rule limits the scope of *prima facie* protection of the mentioned right. If the conclusion is negative, the examination should end at this stage with the declaration that the challenged law is constitutional. On the other hand, if the conclusion is positive, it should be passed to another level of analysis, in which it will be determined if the limits established by the measure are constitutional.
- This Court finds that a literal interpretation of article 58 establishes that the paternal surname must be registered first and the maternal surname second. This is because the norm establishes one option over another without specifying that it can be altered or agreed otherwise.
- p.15-16 Therefore, this Court will analyze the constitutionality of the norm that limits the decision of parents to determine the order of their children's surnames. As will be explained below, the Court considers that this decision is protected, at least *prima facie*, by the right to a name regarding private and family life.

A) Right to a name regarding private and family life

- p.16 Protection of family is recognized in article 4 of the Constitution, as well as in article 17 of the American Convention on Human Rights. Similarly, in the field of human rights, it has been established that the family is the natural and fundamental element of society and that it deserves the widest protection. This is set forth in articles 10 of the International Covenant on Economic, Social and Cultural Rights and 23 of the International Covenant on Civil and Political Rights. In addition, article 8 of the Convention on the Rights of the Child asks States parties to respect and preserve the child's family relations.

A series of rights emerge from this broad protection of the family, among them, respect for private and family life, which is expressly understood as a human right in articles 12.1 and 11.2 of the Universal Declaration of Human Rights.

p.17 This right is also found in article 16 of the Constitution, which prohibits arbitrary interference in the family and was recently recognized by the First Chamber of this Court in the *Amparo Directo en Revision* 3859/2014. That case concerned whether a father, who had not lost parental authority over his child, had the right to participate in the process of adoption of his child, and the Court determined that he was protected by the right to private and family life, as a human right.

Regarding the relationships or decisions protected by the right to private and family life, this Court considers that family is a sociological concept, and therefore, the family as a social reality should be constitutionally protected, as held by the Plenary of this Court in the *Accion de Inconstitucionalidad 2/2010*. Thus, rather than a legal creation, family originates in human relations, corresponding to a social design that is different in each culture. For this reason, precedents of this Court have established that the basis of the family group is in the pursuit of affection, support, loyalty, and solidarity.

p.17-18 These duties of support and mutual respect lead to various obligations and rights, which include decisions or activities that are protected by the right to private and family life. This means that certain decisions concern only the family and the State cannot intervene in them unjustifiably.

p.18 One of the most important decisions for the nuclear family, particularly for parents, is to determine the name of their children. Indeed, through the name, composed of the first name and the surnames that accompany it, a sense of identity and belonging to the family is created.

Moreover, the choice of a child's name by the parents is a personal and emotional moment, which is why it is circumscribed in their private sphere. No one else cares how their children will be named. Indeed, the choice of the name of the children generates a special bond between them and their parents.

p.18 Thus, it can be said that parents have the right to name their children without arbitrary interference from the State. This right not only involves choosing the personal name of their children but establishing the order of their surnames.

p.21 The First Chamber of this Court developed the content of the right to a name in the *Amparo Directo en Revision* 2424/2011. The Court pointed out that the name constitutes a basic and essential element of the identity of each person, without which they cannot be recognized by society. It also stressed that the choice of name is governed by the principle of free will and, consequently, must be freely chosen by the person themselves or their parents or guardians, according to the time of registration. This choice cannot be subject to any kind of illegal or illegitimate restriction. However, it may be subject to State regulation, provided that the essential content of the right is not infringed.

Having established that the decision of parents to decide the order of their children's surnames is protected by the right to private and family life regarding the right to a name, this Court examines whether and to what extent the State can limit it.

II. Analysis of proportionality in the broad sense of the challenged law

p.22 At this stage of the analysis, this Court examines whether in this specific case there is a constitutional justification for the rule to limit the *prima facie* content of the right. This exercise involves establishing whether the legislative intervention pursues a constitutionally valid purpose and, if this stage of scrutiny is overcome, whether the measure then overcomes a strict analysis of suitability, necessity, and proportionality.

It should be kept in mind that the norm whose constitutionality is analyzed in this case requires parents to register their children with the paternal surname first and the maternal surname second. Thus, it is analyzed whether the purpose pursued by the rule is constitutionally valid.

A) The constitutionality of the aims pursued by the law

At this stage, it is necessary to identify the purposes pursued with the challenged law in order to determine whether they are constitutionally valid. This presumes that not just any purpose can justify the limitation of a fundamental right. Indeed, the aims that may justify legislative intervention in the exercise of fundamental rights are very diverse in nature: values, interests, assets, or principles that the State can legitimately pursue. Thus, it must be determined what purpose is

pursued by establishing that the paternal surname of the person who is registered must be stated first, followed by the maternal one.

p.23 To identify the aims pursued by the measure, it is useful to look to the statement of purpose and other documents that inform the legislative process. However, the purpose of a provision is not limited to the so-called "intention of the legislator" but can be deduced from the relevant legal and factual circumstances in each specific case.

a) Purpose of the challenged law

p.23-24 The statement of purpose of the reform to article 58 of Mexico City's Civil Code indicated that the intention was to modernize and simplify the regulatory framework of the Civil Registry, in order to provide greater legal certainty in the registration and proof of the various facts and registration acts. Thus, the rule was changed from not specifying a certain order of surnames to establishing that the surnames would be in the order of paternal and maternal. Indeed, the previous provision established that: The birth certificate shall be drawn up with the assistance of two witnesses. It will contain the day, time and place of birth, the sex of the person presented, the name and surnames that correspond to that person. The current provision indicates that: The birth certificate will contain the day, time and place of birth, the sex of the person presented, the proper name or names and the paternal and maternal surnames that correspond to that person.

p.24 From the above it can be seen that establishing the order of the surnames was intended to give greater legal certainty to family relations. This alone could be a constitutionally valid aim. However, the legislator did not establish either order, but the order in which the position of the male in the family is privileged. Indeed, historically, the maintenance or prevalence of certain surnames has sought to perpetuate power relations.

p.26 This practice endorses a tradition that sought to grant greater status to the man, since it was understood that he was the head of the family and that his surname was the one that should be transmitted from generation to generation. Such a purpose is not only not protected by the Constitution but is constitutionally prohibited.

b) Unconstitutionality of the purposes pursued by the law

- p.26-27 As this Court explained, traditionally the order and use of surnames has denoted a position of power and status. Thus, it can be argued that the privilege of the paternal surname seeks to maintain discriminatory conceptions and practices against women. This purpose is unacceptable from the point of view of the right to gender equality, which is recognized in article 4 of the Constitution, and articles 1 of the Convention on the Elimination of All Forms of Discrimination Against Women; 3 of the International Covenant on Civil and Political Rights; 1 of the American Convention on Human Rights, in general, and specifically, in 6 of the Belem do Pará Convention.
- p. 27 The constitutional recognition of this right was aimed at reaffirming the equal value and dignity of women with respect to men, and therefore they have the right to participate in all social, labor and family relations in conditions of equality. Thus, roles, customs and prejudices should not serve as a pretext to deny the exercise of any right. On the contrary, the right to equal treatment requires that appropriate measures be taken to eliminate stereotypes and practices regarding the roles of men and women, which arise from models of inferiority of one sex regarding the other, or from gender roles, which are not necessarily defined by sex.
- This Court specifies that a gender stereotype refers to a preconception of attributes or characteristics possessed or roles that are or should be performed by men and women respectively.
- p.28 The naming system is an institution through which members of a family are named and given identity. Thus, the impossibility of registering the maternal surname in the first place implies considering that women have a secondary position in relation to the fathers of their children. Such a conception is contrary to the right to equal treatment since family relations must take place on an equal footing. Thus, the naming system currently in force reiterates a tradition based on a discriminatory practice, in which women were conceived as a member of the man's family, since it was the man who preserved the property and surname of the family.

In this regard, the prohibition established in article 58 of Mexico City's Civil Code perpetuates a purpose that is unconstitutional, since it seeks to reinforce a prejudice that discriminates against and diminishes the role of women in the family.

On this basis, it is unnecessary to carry out the following steps of the proportionality test, since the suitability, necessity and proportionality of a measure that pursues an unconstitutional purpose cannot be analyzed. It does not matter that the measure achieves its purpose to some degree, or that there is no less harmful means to achieve that end if it is contrary to the Constitution.

p.29 Thus, this Court determines that it is not justified to limit the right of parents to decide the order of the surnames of their children based on prejudices or measures that seek to perpetuate the situation of superiority of men in family relations. Consequently, the "paternal and maternal" text of article 58 of Mexico City's Civil Code is unconstitutional.

p.29-30 Finally, this Court considers that the unconstitutionality of the article cannot be reconciled with the values protected by the Constitution through a consistent interpretation, this is because the discriminatory message transmitted by the rule will continue to emanate from the text as long as it is not altered, as this Court warned in the *Amparo en Revision* 152/2013. Therefore, the "paternal and maternal" normative portion contained in the first paragraph of article 58 of Mexico City's Civil Code must be declared unconstitutional.

c) Unconstitutionality of the act being challenged

p.30 Since the part of article 58 of Mexico City's Civil Code that supports the act is unconstitutional, the refusal of the responsible authorities to register minors with the surnames in the order desired by their parents also becomes unconstitutional. This is in accordance with the provisions of article 78 of the current Amparo Law.

p.30-31 Consequently, pursuant to article 77 of the same Law, it is concluded that the authorities of the Civil Registry must issue new birth certificates to minors A and B, so that the surnames appear in the order desired by the parents, i.e., the paternal surname of the mother first and the paternal surname of the father second.

p.31 On the other hand, this Court considers it unnecessary to leave open the right of the girls to choose the order of their surnames, as determined by the District Judge, because as explained throughout this decision, it is a right of parents to determine the name of their children in light of the right to private and family life. In this regard, a newborn's right to a name is protected through their parents. However, this does not mean that the minors cannot take legal action with regard to their right to a name in the future.

DECISION

Since article 58 of Mexico City's Civil Code is considered unconstitutional, the Supreme Court modifies the challenged decision and, consequently, grants the *amparo* to Ms. X and Mr. Y, as well as their minor daughters A and B, against the authorities and acts specified in the decision.