Chapter 19
Same-Sex Couples Before the Inter-American System of Human Rights

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Abstract This chapter explores the protection granted to the rights of lesbian, gay, transsexual, bisexual and inter-sex persons (LGTBI) in the Inter-American system of human rights protection. It takes into consideration all the measures adopted in such a framework to combat violence and discrimination against LGTBI individuals, paying special attention to the adoption of precautionary measures and the establishment of a Special Unit charged with consultative and monitoring powers in the field of sexual orientation, gender identity and gender expression. A thorough analysis is devoted to cases brought before the Inter-American Commission on Human Rights and to the case-law of the Inter-American Court on Human Rights. The analysis highlights that important legal development have been taking place on a continent where violence suffered by homosexuals is still very significant and where cultural suspicion and ostracism toward them is still widely practiced.

19.1 Introduction

The recognition of and respect for the rights of lesbian, gay, transsexual, bisexual and inter-sex persons (further referred as LGTBI),[1] have only periodically received consideration in the Inter-American system of human rights protection in the past.[2]

[1] This is the acronym usually adopted by the Inter-American Commission on Human Rights.

[2] In its 1999 Annual Report to the OAS General Assembly (OEA/Ser.L/V/II.106, Doc. 6 rev., April 13, 1999), the Commission condemned the arbitrary arrests of homosexuals in Ecuador in the context of a state of emergency (see Chapter IV, para. 46). In the Annual Reports of 2005 and 2006 the Commission limited itself to acknowledging that no improvements had been recorded with respect to the material and legal inequality faced by groups traditionally subjected to discrimination, such as homosexuals (see OEA/Ser.L/V/II.124, Doc. 5, 27 February 2006, Introduction, para. 3; OEA/Ser.L/V/II.127, Doc. 4 rev. 1, 3 March 2007, Introduction, para. 5). In its 1983 Country

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Only in recent years have the Inter-American Commission on Human Rights (further referred as IACHR) and the Organization of American States (further referred as OAS) General Assembly paid more attention to them.

Since 2008, IACHR Annual Reports to the OAS General Assembly,[3] as well as IACHR Country Reports,[4] have denounced systemic problems faced by LGTBI persons in the Americas, in particular the high rate of violence against them and the widespread impunity granted to perpetrators (being either State organs or private individuals).[5] But also the continuing criminalization of LGTBI sexual behavior,[6] the arbitrary arrest and detention of LGTBI individuals, their summary trials[7] and the widespread discrimination they suffer in the access to health and education services, in the labor sector as well as in political participation, have been frequently denounced. The data collected in the Reports mentioned above show how intolerance and violence towards individuals because of their sexual orientation still represents a serious problem in the framework of several civil societies of the American States.

Report on the situation of human rights in Cuba, the Commission denounced, among other things, that homosexuals were conscripted into forced labor for the Government (see OEA/Ser.L/V/II.61, Doc. 29 rev. 1, 4 October 1983, Chapter VII, para. 27). In the 1993 Country Report on the situation of human rights in Colombia, IACHR reported that homosexuals had been victims of social cleansing in the past decade (see OEA/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, Chapter VII). A similar conclusion was reached in the 2001 Country Report concerning the situation of human rights in Guatemala (see OEA/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001, Chapter V, paras 32 and 41).

[3] IACHR is entitled to adopt such reports under Art. 41, lett. g, of the American Convention.

[4] They are adopted according to Art. 18, letter (c), of the IACHR Statute.

[5] Serious concern was expressed by the Commission concerning the increase in the number of assaults by the police and armed forces against LGTBI persons in Venezuela and Honduras (see IACHR, 2011 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II., Doc. 5, rev. 1, 7 March 2011, Chapter IV, paras 390–392 and 522–525).

[6] "The Commission was disturbed to find that one of the most serious problems in the region when defending the rights of LGTBI persons is that in some countries of the hemisphere, any sexual orientation other than a heterosexual one continues to be criminalized as offenses labeled "sodomy" (or "buggery"), "gross indecency", "unnatural crimes" and so on. While during the follow-up period the Commission was pleased to learn that some countries like Nicaragua had decriminalized homosexuality, it nonetheless observes that in many Caribbean countries crimes of this kind are still on the books, with the result that the right of association for purposes of promoting and defending the rights of LGTBI persons is prohibited, the argument being that their organizations and activities are "illegal." Laws criminalizing behavior based on non-heterosexual orientation have been adopted in Antigua and Barbuda, in the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago: see the Second Report on the Situation of Human Rights Defenders in Americas, OEA/Ser.L/V/II, Doc. 66, 31 December 2011, para. 334.

[7] IACHR, 2011 Annual Report, para. 272 concerning the LGTBI situation in Cuba. The Commission particularly stigmatizes the use of the legal concept of "pre-delictive dangerousness" to convict and sentence young Cuban homosexuals to prison.

Taking into account such an alarming record of violence, the OAS General Assembly has approved four resolutions,[8] under the single title of “Human Rights, Sexual Orientation and Gender Identity”, which condemn discrimination, acts of violence and other human rights violations committed against individuals by reason of their sexual orientation, and which urge States to adopt the necessary measures to prevent, punish, and eradicate such practices, to investigate them, to ensure due judicial protection for victims and to bring the perpetrators to justice. The General Assembly has also urged States to ensure adequate protection of LGTBI defenders, and has requested that IACHR pay particular attention to the LGTBI situation.[9]

19.2 Measures Adopted to Combat Violence and Discrimination Against LGTBI Individuals

Except for the recommendations of the General Assembly cited above and those contained in IACHR Annual and Country Reports,[10] the most significant measures adopted in the framework of the Inter-American system of human rights protection are two. The first is the adoption of precautionary measures, and the second is the establishment of a Special Unit within IACHR devoted entirely to dealing with LGTBI protection.

[8] See the Resolutions No. 2435 (XXXVIII-0/08), No. 2504 (XXXIX-0/09), No. 2600 (XL-0/10), and No. 2653 (XLI-0/11).

[9] On same-sex couples in Mexico, Central and South America see the chapter by Cabrales Lucio in this volume.

[10] In its reports the Commission does not ignore the opportunity to urge States to take measures to prevent and respond to human rights abuses against LGTBI, including the adoption of public policy measures as well as amendments to the laws to bring them in keeping with the American Convention on Human Rights. The Commission also constantly monitors those States that have made progress in this field in order to grant that such improvements (especially law reforms and judgments in favor of LGTBI persons’ rights) are being concretely applied. See IACHR, 2001 Annual Report, paras 143–145, concerning Colombia in which the Commission notes that observance of the rights of LGTBI has improved since 1980, when homosexuality was decriminalized through a reform of the Criminal Code. It also takes note that between 2007 and 2008 Colombia’s Constitutional Court granted same-sex couples the same pension benefits, social security benefits and property rights that heterosexual couples enjoy. Moreover, in 2009 the Constitutional Court decided to amend provisions that appeared in several laws in order to provide same-sex civil unions the same rights that cohabiting heterosexual unions enjoy. However, the Commission denounces that although the Colombian Constitution and Colombia’s laws recognize the rights of LGTBI persons and provide for a number of remedies, access to those remedies and their effectiveness are limited in practice by the discrimination that LGTBI persons have traditionally experienced.

19.2.1 Precautionary Measures

According to the Rules of Procedure of IACHR[11] (Art. 25), in serious and urgent situations, the Commission may, on its own initiative or at the request of a party, request that a State adopt precautionary measures to prevent irreparable harm to persons or to the subject matter of the proceedings in connection with a pending petition or case (para. 1), as well as to persons under the jurisdiction of the State concerned, independently of any pending petition or case (para. 2). As clarified by the Rules of procedure, the measures may also be of a collective nature to prevent irreparable harm to persons due to their association with an organization, a group or a community with identified or identifiable members (para. 3) Pasqualucci (2003).

Several times the Commission has granted precautionary measures in favor of individuals of homosexual orientation, their defenders and, more generally, of members of associations or groups representing them.[12] In each case the Commission has taken into account the fact that such individuals have suffered aggressions, attacks, threats of death and harassment on account of their sexual orientation.

Usually the State is asked to adopt measures necessary to ensure their lives, to investigate the facts that gave rise to the adoption of the precautionary measures, and to inform the Commission about the measures adopted to respond to facts that placed the beneficiaries of the measures at risk. In one case the Commission even asked Honduras to immediately release individuals who had been arbitrary detained because of their sexual orientation and to be informed of others whose whereabouts were unknown.[13]

IACHR makes use of various tools to monitor the outcome of the precautionary measures. In particular, it convenes work meetings during IACHR's sessions or follow-up meetings during its on-site visits or those of Country *Rapporteurs*. It is not easy to estimate to what extent the precautionary measures the Commission has ordered for LGTBI individuals have been applied by the Contracting States. Data collected by the Commission refers in general to all the precautionary measures ordered by it (not just those in favor of LGTBI individuals). It provides conflicting answers. If on the one hand the Commission has recently welcomed the Contracting States' positive response to the precautionary measures it had wholeheartedly

[11] Rules of Procedure of the Inter-American Commission on Human Rights, approved by the Commission at its 137th regular period of session held from 28th October to 13th November 2009 and modified on 2nd September 2011 (available at http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp).

[12] Many precautionary measures have been granted in 2012: a detailed list is at http://www.oas.org/en/iachr/decisions/precautionary.asp.

[13] See Honduras: Amplification of Precautionary Measures, PM 196-09.

ordered,[14] on the other hand the Commission's practice has recorded the national authorities' failure to implement the precautionary measures.[15]

19.2.2 IACHR Special Unit

Following the General Assembly recommendations already mentioned, IACHR included in its Strategic Plan the Plan of Action 4.6.i, through which it specifically committed itself to pay attention to the rights of LGTBI persons, and to prioritize petitions alleging discrimination based on sexual orientation. In November 2011, IACHR decided to create a specialized Unit within its Executive Secretariat in order to carry out this commitment.

The Special Unit has started working recently; it is too early to evaluate the impact of its activity in protecting LGTBI's rights. Its mandate is ambitious and the monitoring role it is expected to perform is significant. The Unit's mandate consists of (a) processing petitions and cases, and providing advice to IACHR with respect to requests for precautionary measures and submission of requests for provisional measures before the Inter-American Court that are related to sexual orientation, gender identity and gender expression; (b) providing technical assistance to OAS Member States and OAS political organs on this area; (c) and preparing reports and evidence-based studies that can establish the extent of discrimination and violence towards members of these communities, and containing recommendations addressed to OAS Member States concerning their legislation, public policy, and judicial interpretation of rights of LGTBI persons.

19.3 Case Law of the Inter-American Court on Human Rights Concerning LGTBI Individuals

In 1999, for the first time, a lesbian reported to IACHR the violation of her rights, as protected by the American Convention, because of her sexual orientation. But prior to 2012, no petitions were brought before the Inter-American Court—among those IACHR had declared admissible—that concerned discriminations or the denial of rights each individual is entitled to according to the American Convention because of sexual identity.

[14] IACHR, 2011 Annual Report, Chapter III, para. 25.

[15] See, for instance, the Country Report adopted in 2009 concerning Honduras (Honduras: Human Rights and the *Coup d'État*, OEA/Ser.L/V/II, Doc. 55, 30th December 2009, paras 39–41). It is reported that during its on-site visit and thereafter, the Commission was informed that when some beneficiaries of the precautionary measures asked the competent authorities to implement them, they become the targets of attacks and threats. Other beneficiaries were forced to sign documents waiving the protection granted under the precautionary measures.

19.3.1 Cases Brought Before IACHR

The first case in which the Commission dealt with an alleged discrimination suffered by the petitioner because of her sexual orientation is the *Giraldo* case.[16]

The petitioner alleged that her honor and her right to equal protection before the law as granted in Art. 11(1) and 24 respectively had been violated by the Colombian prison authorities' decision not to authorize the exercise of her right to intimate visits of her same sex-partner. In particular, the petitioner argued that in the Colombian legislation there were no provisions allowing a distinction to be made between the right of a heterosexual prisoner to intimate visits and that of a homosexual. She argued, therefore, that the penitentiary authorities engaged in discriminatory treatment that was not authorized by domestic law.

In its decision on the admissibility of the case the Commission found that the claim was referred to facts that could have involved a *prima facie* violation of Article 11(2) of the American Convention,[17] in so far as they could have constituted an arbitrary or abusive interference with the petitioner's private life. The petition never reached the merits phase, in which the Commission could have determined what constituted an arbitrary or abusive interference with an individual's private life.[18]

Afterwards, in 2001, the Commission received another petition concerning the alleged violation of rights granted by the Convention suffered by an individual because of his sexual orientation (case *Pérez Meza v. Paraguay*).[19] The petitioner had asked the Paraguayan authorities to recognize his *de facto* marriage with a deceased individual of the same sex. Such recognition would have enabled their partnership to guarantee him rights similar to those of marriage. In so doing, the petitioner sought to prevent the seizure of the couple's common goods by the heirs of the deceased. The Commission declared the petition inadmissible, among other reasons, because the petitioner had failed to exhaust internal remedies. Before the national tribunals the petitioner had only requested the recognition of his union with a partner of the same-sex as a *de facto* marriage without claiming that the domestic law was discriminatory against homosexuals because it did not allow the recognition of unions between same-sex partners as a *de facto* marriage.

In 2010 the Commission declared admissible a petition concerning the alleged violation of the right to equality before the law established in Art. 24 of the

[16] Report No. 71/99, Case 11.656, *Giraldo v. Colombia*, 4th May 1999.

[17] "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."

[18] It is presumed that the petitioner had desisted from her petition according to Art. 41 of IACHR's Rules of Procedures. Had she not done so the Commission would have had to initiate the petition on the merits (see Art. 36(2) of the Rules of Procedures).

[19] Report No. 96/01, Petition 19/99, *Pérez Meza v. Paraguay*, 10th October 2001.

American Convention in connection with Art. 1(1) of the same treaty[20] against the Ecuadorian State for the discharge of an officer of the Military Police of the Ecuadorian Armed Forces who had been accused of engaging in homosexual conduct in the workplace.[21] The alleged violation of such provisions was denounced on the basis of two different reasons. Firstly, it was argued that the State had adopted a discriminatory policy in sanctioning only homosexual acts as professional misconduct. Secondly, it was claimed that the Ecuadorian Armed Forces maintained a discriminatory policy in regard to heterosexuals and homosexual relationships within a military facility. While Art. 87 of the Rules of Military Discipline condemned engagement in "illegitimate sexual acts within military facilities" as a maximum sanction of 30-day suspension,[22] Art. 117 of the same Rules expressly established that the members of the Armed Forces who were surprised in acts of homosexuality on duty or off duty were subject to the provision of Art. 87(i) of the Law on Personnel of the Armed Forces, which sanctioned such behaviour as grounds for discharge. The Commission declared the petition admissible in regard to the argument put forth in relation to Article 24 (in conjunction with Art. 1(1)), but it has not adopted a merits report yet.

Recently, in 2011, the Commission declared admissible the petition brought before it by the *Comisión Colombiana de Juristas and Germán Humberto Rincón Perfetti* on behalf of Mr. Duque.[23] They alleged the responsibility of Colombia for Mr. Duque's inability to gain access to the pension of his deceased partner because the provision that regulated the right to social security excluded same-sex couples from that benefit. The petitioners alleged that the State was responsible for violating several rights protected by the Convention, among which the right to equality before the law (Art. 24) in conjunction with Art. 1(1) of the American Convention. The Commission declared the petition admissible,[24] but it has not adopted the merits report yet. The Commission's decisions on the merits concerning the last two cases, and perhaps the Court's judgments, are expected to shed light on that topic Vitucci (2012), pp. 61–73.

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[20] According to it, "[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[21] Report No. 1/10, Petition 2723-02, *Homero Flor Freire v. Ecuador*, 15th March 2010.

[22] In the petitioners' view the terms "unlawful sexual acts" were referred to sexual relationships between heterosexual individuals in the absence of or outside of marriage.

[23] Report No. 150/11, Petition 123-05, Admissibility, *Duque v. Colombia*, November 2, 2011.

[24] It is worth noting that the Commission applied Art. 46(2)(a), of the Convention concerning the exception to the rule of the prior exhaustion of domestic remedies, concluding that Colombian domestic law did not provide for appropriate remedies to protect the right of a homosexual to succeed in the pension of his deceased partner.

19.3.2 The Court Judgment in Atala Riffo and Daughters v. Chile

In September 2010 the Inter-American Commission on Human Rights filed an application with the Inter-American Court on Human Rights (further referred also as IACtHR or the Court) in the case *Atala Riffo and daughters v. Chile*[25] concerning the alleged discriminatory treatment Ms Atala and her children had suffered due to Ms Atala's sexual orientation. The petition also concerned the arbitrary interference in the private and family life of Ms Atala and in the family life of her daughters still due to Ms Atala's sexual orientation.[26] Such violations occurred within the framework of a legal process for the custody of three children following the dissolution of the marriage between Mr. Lopéz Allende and Ms Atala.

In particular, the petitioners claimed the discriminatory treatment and the abusive interference in their private and family lives by the Juvenile Court of Villarica and the Supreme Court of Chile, which had granted custody of the girls to the father. In particular, the Supreme Court had founded its conclusion on Art. 225 of the Chilean Civil Code. It provides that, when parents live separately, the personal care of the children falls to the mother. But the provision admits that in exceptional circumstances, when necessary to protect the interests of the child, whether because of mistreatment, neglect, or *another just cause*, the judge may transfer the care of the child to the other parent. In the case at stake, the Supreme Court, taking into account the best interest of the three daughters, had declared that a 'justified cause' existed that made it essential to grant custody to the father.

The IACtHR adopted its judgment the 24th February 2012,[27] substantially upholding the Commission's conclusions and even going beyond it.

19.3.2.1 General Remarks

The judgment surely represents the most significant measure so far adopted to protect homosexuals' rights in the framework of the Inter-American system of human rights protection. It is not an exaggeration to say that the judgment is of historical reach on a continent where violence suffered by homosexuals is still very significant and where cultural suspicion and ostracism toward them is still widely practiced.

The seriousness of the situation might partially explain the approach the Court has followed. The Court has widely referred to the European Court of Human Rights' jurisprudence as well as to the reports and communications so far adopted

[25] IACHR, *Application before the Inter-American Court of Human Rights in the Case of Karen Atala and daughters* (Case 12.502) *against the State of Chile*, 17th September 2010.

[26] The case was referred to the Inter-American Court because IACHR concluded that the State had not complied with the recommendations contained in its Merits Report No. 139/09.

[27] IACtHR, *Atala Riffo and Daughters v. Chile*, judgment of 24th February 2012.

by the human rights treaty-based monitoring bodies in the matter of sexual orientation, in order to justify an evolutionary interpretation of the American Convention. This has prompted the Court to declare the responsibility of Chile for the infringement of the right of the family life that had been established between the same-sex couple and Ms Atala's daughters. The Court might not have obtained the same result had it stated that the Convention imposed on the Contracting States the obligation to protect family life on the grounds of an investigation concerning the level of protection the Contracting States' legal orders guaranteed to same-sex couples.

This approach results in a certain uniformity among different international tribunals' jurisprudence, in such a way as to facilitate (treaty) interpretations otherwise difficult to justify. It is a desirable outcome when international tribunals are called upon to interpret and apply human rights treaties. Nevertheless, questions concerning the efficacy of such a method are left open if it is not associated with the enhancement of those laws (although still few) of the Contracting States which provide for protection to same-sex couples.

Given the impact this judgment may have it is appropriate to devote to it a thorough analysis in the context of this study.

19.3.2.2 Violation of the Right of an Equal Treatment Before the Law

The Inter-American Court has established that the Chilean State had violated the right to the equal treatment before the law contained in Article 24 of the American Convention, in conjunction with Art. 1(1) of the same treaty, toward Ms Atala and her daughters.

To reach such a conclusion, the Court, for the first time, held that sexual orientation is one of the grounds for discrimination covered by the category "any other social condition" provided in Art. 1(1). It consequently concluded that no domestic regulation, decision, or practice of the State Parties may diminish or restrict, in any way whatsoever, the rights of a person on the basis of her/his sexual orientation.[28]

The Court, although in a hasty and rather unclear way, endorsed the Commission's opinion, according to which sexual orientation is also a suspect category of distinction. In its Report on the *Atala* case, the Commission, following the Court's previous case law, had repeated that in order to exclude the discriminatory nature of a specific action, a Contracting State had to prove that it was reasonable and objective, that is to say that it pursued a legitimate goal, and was a fitting means for attaining that legitimate goal—that, in short, a logical means-to-end relationship existed between the goal sought and the distinction made—, that no alternatives existed and that it was proportional. Moreover, in the Commission's opinion, in deciding whether an action had been based on certain suspect justifications (sexual

[28] *Ibidem*, para. 91.

orientation included), a *consensus* existed that the test used to quantify the reasonableness of the discriminatory treatment had to be particularly strict. Thus, in the Commission's opinion, only "weighty reasons" could be invoked as a justification. As the Commission's Report itself had recalled, this strict analysis served to guarantee that the distinction was not based on prejudices or stereotypes.[29]

The consequence which the Commission and the Court inferred by this reasoning is that an action based on a suspect category of distinction is presumed to be incompatible with the American Convention. They consequently concluded that the defendant State had to prove that *weighty reasons* existed to justify that conduct based on sexual orientation issues was not discriminatory.[30]

On this assumption the Court examined whether the justification given by the State for the custody decision (that is, the protection of the children's best interest from the alleged damage the girls might have suffered as a consequence of their mother's sexual orientation) Feria Tinta (2008) could have justified the treatment granted to the petitioners. It concluded negatively. In the Court's opinion, the protection of the best interests of the child is more than a legitimate goal: it is an imperative.[31] Nevertheless, it found that the State had not proved that Ms. Atala's cohabitation with her partner had a negative effect on the girls' best interest. That conclusion was based on a *real and concrete harm test* the Court has not always applied in the same scrupulous way.

The Court decided that the determination of whether the child's best interest was being threatened, in cases involving the care and custody of minors, had to be based on an assessment of specific parental behavior and its negative impact on the well-being and development of the child. In the Court's view such an evaluation had to take into account any real and proven damage or risk to the child's well-being, and none that were merely speculative or imaginary.[32]

The Court used such a test to verify whether the decision to deprive Ms Atala of the custody of her daughters was in keeping with the aim of protecting the well-being of the children. Among other things, having excluded the appropriateness of the measure under examination (as mentioned below), the Court also indirectly denied that it was based on rigorous and weighty reasons.

The Court rebutted three of the four threats the State claimed for the children's development, applying the *real and concrete damage test* rigorously.

Concerning the alleged social discrimination they might have suffered within their social environment due to their mother's cohabiting with a partner of the same sex, and the confusion of sexual roles they might have been affected by due to their living with their mother and her partner, it held that the custody decision had been

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[29] IACHR, *Application before the IACtHR in the Case of Karen Atala*, paras 86 and 88.

[30] IACtHR, *Atala Riffo and Daughters v. Chile*, paras 124–125.

[31] *Ibidem*, para. 108.

[32] "Speculations, assumptions, stereotypes, or generalized considerations regarding the parents' personal characteristics, or cultural preferences regarding the family's traditional concepts are not admissible": *ibidem*, para. 109.

based only on *potential and abstract risks* and on the application of a *speculative and imaginative damage test*. In other words, in the Court's view the Chilean judicial organs at stake had not made an assessment of specific parental behavior and its negative impact on the well-being and development of the children. Rather, they had based their decisions on stereotypes associated with the preconception that children raised by homosexual couples would necessarily have difficulties.[33] For this reason, the Court concluded that the judicial decisions regarding custody had not defined in a specific and concrete manner the connection of causality between the mother's behavior and its alleged impact on the children's development. In the Court's opinion, these were sufficient grounds for concluding in favor of a lack of appropriateness between the goal sought (the protection of the girls) and the measure adopted (their custody to the father). On such grounds the Court concluded that those decisions constituted discriminatory treatment against Ms. Atala and her daughters.[34]

As far as the other alleged prejudice the children might have suffered is concerned, namely the damage due to the fact that the mother had put her own interests before those of her daughters in deciding to live with a same-sex partner, the Court acknowledged that no evidence had been found of any harm caused to the three girls. Thus, it established that the differences prohibited under the Convention were not restricted to homosexuality *per se*, but also included its expressions, such as the petitioner's decision to live together with her partner.[35] The IACtHR also found that both sexual orientation and its exercise were relevant aspects of an individual's private life.[36] On the basis of such arguments it concluded that it was not reasonable to require Ms. Atala to put her life and family projects on hold in order to protect her daughters.[37]

The Court's approach was less punctual when it dealt with the claim concerning the prejudice the children might have suffered because of their living in a non-traditional family. The Court mainly followed an abstract and theoretical reasoning, instead of the *real and concrete harm test*, in order to rebut such a claim. It limited itself to stating that the claim reflected a stereotyped perception of

[33] *Ibidem*, paras 115–131. What the Court has to say about the argument that the child's best interest might be affected by the risk of rejection by society is very effective: "[the] potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid "harm" for the purposes of determining the child's best interest. If the judges who analyze such cases confirm the existence of social discrimination, it is completely inadmissible to legitimize that discrimination with the argument of protecting the child's best interest": para. 121.

[34] *Ibidem*, paras 122 and 131–132.

[35] *Ibidem*, para. 133.

[36] *Ibidem*, paras 133–139.

[37] *Ibidem*, paras 139–140. The Court went beyond what was necessary when it stated that "to require the mother to limit her lifestyle options implies using a "traditional" concept of women's social role as mothers, according to which it is socially expected that women bear the main responsibility for their children's upbringing and that in pursuit of this she should have given precedence to raising her children, renouncing an essential aspect of her identity": para. 140.

the concept of family, which had no basis in the Convention. It did not analyze whether the State had demonstrated that the well-being of the girls was at risk because of their living in a non-traditional family.[38]

19.3.2.3 Violation of the Right to a Private and Family Life

The Court judgment is not very innovative when it states that an individual's sexual orientation is part of his/her private life.[39] In its case law on sexual rapes the Court had already asserted that the concept of private life was a wide-ranging term, which could not be defined exhaustively, but included, among others, the sexual life of an individual.[40] I don't want to deny the relevance of such a conclusion. It should not be forgotten that this is the first time that the Court has found that interference occurring in the private life of a petitioner because of his/her sexual identity was not legitimate. To be precise, the Court judged it inappropriate and disproportionate for achieving the legitimate goal of protecting the best interests of the three girls. In the Court's opinion, the Chilean domestic courts should have limited themselves to examining the parental behavior towards the daughters without exposing and scrutinizing Ms. Atala's sexual orientation.[41]

The fact remains that such a conclusion would have been foreseeable if the Court's previous jurisprudence above-mentioned had been taken into account. Rather, what is surprising is that the Court had adopted a *standard test* to justify an interference in the right to privacy on the basis of the sexual identity of an individual while rigorous and weighty reasons had been sought in order to justify a different treatment given on the basis of sexual orientation considerations. Moreover, since the reason given by the Chilean courts for interfering in Ms. Atala's private life was the same one used to justify the discriminatory treatment, namely the best interests of the three girls, it also appears not completely justifiable that the Court expressly excluded the condition that the State, in order to evaluate whether its interference in the private life of Ms Atala was legitimate, had to adduce real and concrete evidence showing that there was a real threat to the well-being of the girls.[42]

Rather, the Court's conclusion regarding the alleged violation of the petitioners' family rights is really innovative, even if it also raises some criticism.

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[38] *Ibidem*, para. 145.

[39] *Ibidem*, para. 165.

[40] IACtHR, *Rosendo Cantú* et al. *v. Mexico*, judgment of 31st August 2010, para. 119, and IACtHR, *Fernández Ortega* et al. *v. Mexico. Preliminary Objection*, *Merits*, *Reparations*, *and Costs*, judgment of 30th August 2010, para. 129.

[41] IACtHR, *Atala Riffo and Daughters v. Chile*, paras 164–166.

[42] The Court also ruled that the disciplinary investigation carried out by the Chilean judicial authority against Ms. Atala had been performed in such a way as to violate her privacy and discriminate against her on the grounds of her sexual orientation: *ibidem*, paras 225–230.

The Inter-American Commission had been more prudent than the Court in its avoidance of taking a stand on the nature of the family relationship on the notion of family in the case law of IACtHR Quiroga CM (2009), pp. 557–572 between the petitioners and the same-sex partner of Ms Atala. The Commission had stated that the right to a private life also included Ms Atala's right to develop family relationships on the basis of that identity, even if it was not accepted or tolerated by a majority within Chilean society.[43]

Since the decision to deprive Ms Atala of the custody of her daughters was based on her sexual orientation, the Commission had concluded that such a decision also abusively impinged on her family life plans with a partner of the same sex. In this way, the Commission had only indirectly asserted that under Art. 11(2) of the Convention cohabitation with a same-sex partner was a form of family relationship. Only at a later time, and in a distinct section of its Report, had the Commission established that another family—comprising Ms Atala and her daughters—had been created following the dissolution of the marriage with the petitioner's husband. Thus, it had found that Art. 11(2) had been violated also because the decision to separate the girls from their mother had impinged on their rights to develop a relationship with their family members.[44] It may be asserted that, in dealing with such violations of Art. 11(2) separately, the Commission carefully avoided qualifying the relationship between Ms Atala, her same-sex partner and her daughters as a family relationship.

On the contrary, the Court did not hesitate to consider the relationship between Ms Atala, her daughters and her same-sex partner as a family unit.[45] Thus, it came to the conclusion that the decision to separate the girls from their family environment was in violation of Art. 11(2) and 17(1) of the Convention in regard to all the petitioners.[46] While the first Article, as already seen, protects individuals from arbitrary or abusive interference in a person's family life, the second one protects the family unit, obliging States which are parties to the Convention to adopt measures that protect the family.[47]

[43] IACHR, *Application before the IACtHR in the Case of Karen Atala*, para. 116.

[44] *Ibidem*, para. 122.

[45] IACtHR, *Atala Riffo and Daughters v. Chile*, paras 176–177.

[46] *Ibidem*, para. 178.

[47] In his *partially dissenting opinion* annexed to the judgment, Judge Alberto Pérez Pérez criticized the Court's choice to rule that Art. 17(1) had been violated. The Judge seems to hold that only the notion of family in Art. 11(2) should encompass families composed by same-sex partners, while he did not consider it prudent to do the same in regard to Art. 17. In his opinion this could be taken as an implicit pronouncement on the interpretation of different provisions of Art. 17(18 and 24). He states that Art. 17 could be interpreted in a way that presupposes that the family is based on a heterosexual marriage or *de facto* union: para. 18. It is not totally clear which risks the Judge wanted to exclude. Maybe that the door was open to an interpretation of Art. 17(2)—the provision protecting the right to marry—in the sense that it imposes an obligation to Contracting States to grant this right also to same-sex partners. Whatever the Judge's opinion may be, it does not seem reasonable to assume that under the Inter-American Convention two notions of family may exist, the one protected, pursuant to Art. 17, and the other in accordance with Art. 11(2). This is so mostly because, according to Art. 27(2) of the Convention, States are not allowed to depart from

The questionable point is the way in which the Inter-American Court reached such conclusion; it followed an approach different from the one adopted by the European Court of Human Rights (further referred as ECtHR).

In the *Schalk and Kopf* case[48] the ECtHR, modifying its previous case law, which only accepted that the emotional and sexual relationships of a same-sex couple constituted "private life" for the purposes of Art. 8 of the European Convention on Human Rights (further referred as ECHR), had established that a cohabiting same-sex couple living in a stable *de facto* partnership fell within the notion of 'family life' according to the same Article. In order to justify such a conclusion, the Court had inquired into the existence of a *consensus* among the Contracting parties of the ECHR, seeking the adoption by a majority of them of legislation granting to same-sex couples a legal recognition of their unions in order to assert that Art. 8 of the European Convention covered the right to family of same-sex couples.[49]

The Inter-American Court did not look for such a *consensus*. To be precise, it did not attempt to check whether a *consensus* in favor of the recognition that stable unions between same-sex individuals as families could be said to be formed among the States Parties to the Inter-American Convention. It only recalled the opinion of various human rights organs created by treaties, which state that there is no single model for a family, but many variations of it. Among them, it mainly made reference to the judgments of the ECtHR in the case of *Schalk and Kopf v. Austria*, and in the case of *X, Y and Z v. The United Kingdom*.[50]

It is not completely clear why the Inter-American Court has not substantially followed the method indicated by the ECtHR. At first glance it might be supposed that it did not agree with it.[51] But the approach followed by the Inter-American Court might also be partially explained by taking into account the fact that the Court was aware of not having been able to prove the existence of such a *consensus*. It is necessary to remember that in several Contracting States of the American Convention, national legislations either discriminate against LGTBI individuals or

the rights protected under Art. 17. The adoption of two different notions of family would tend to suggest that the heterosexual family (married or *de facto*) may receive greater protection than the other.

[48] *Schalk and Kopf v. Austria*, judgment of 24th June 2010, paras 92–95. See the chapter by Pustorino in this volume.

[49] *Ibidem*, paras 27–34.

[50] ECHR, *X, Y and Z v. The United Kingdom*, judgment of 22nd April 1997. See the chapters by Crisafulli and Pustorino in this volume.

[51] One might be under such an impression after reading the part of the judgment where the Court is asked to judge whether the custody decision was apt to protect Ms Atala's daughters from the social discrimination they might have suffered because of the mother's sexual orientation. Indeed, the Court states: "While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. States are internationally compelled to adopt the measures necessary "to make effective" the rights established in the Convention, as stipulated in Art. 2 of said Inter-American instrument" (para. 119).

criminalize their sexual behavior. The framework at stake might have convinced the Court it was not useful to search for a *consensus* of this kind. On the contrary, an effort to determine whether the legal recognition of same-sex unions is granted in at least some Contracting States would have been important. An analysis of the legal status and rights recognized for homosexuals in the Contracting States of the American Convention would have enabled the Court to justify its decision on the evolution of social behavior and cultural sensitivity in the Contracting States, if it had determined that at least in some States LGTBI's rights had been receiving protection and recognition.[52]

Furthermore, one may wonder whether the reference to the ECtHR's judgments already quoted was appropriate in justifying the conclusion that between Ms Atala, her partner and her children a family life existed.

Indeed, in the case of *X, Y and Z v. The United Kingdom*, the ECtHR had considered that a *de facto* family tie linked the three applicants (a transsexual, his female partner and a child that was born by means of artificial insemination from the latter).[53] But this does not seem a legitimate basis for justifying the conclusion that, *mutatis mutandis*, a family relationship was established between Ms Atala, her partner and the three girls. In its jurisprudence on transsexuals, the ECtHR took stands not always in keeping with its jurisprudence on same-sex couples. For instance, while it expressly recognized the existence of an obligation by the Contracting States to grant transsexuals the right to marry,[54] it clearly excluded that such an obligation should exist towards same-sex couples.[55]

[52] The quest for a *consensus* among the Contracting States would have been expected. Indeed scattered references to internal legislations and case law of national judges of the Contracting States appear in the judgment (especially in the footnotes). See, for instance, para. 19, which quotes the Constitution of Ecuador as recognizing the stable union between same-sex individuals as a family union. See also footnote No. 113, where the Court recalls that the Constitutions of Bolivia and Ecuador explicitly prohibit discrimination based on sexual orientation and that the national legislations of Argentina and Uruguay grant homosexuals the same rights as heterosexuals. Several references to the case law of the Contracting States' national courts are also made in the judgment. For instance, in footnote No. 114 the Court recalls that the Constitutional Court of Colombia declared unconstitutional a provision that considered homosexuality in the armed forces as a disciplinary infraction. In paragraph 136 of the judgment the Court also quotes the judgment of the Supreme Court of Justice of Mexico, which considered sexual orientation as an expression, among others, of the free development of an individual's personality. See the chapter by Cabrales Lucio in this volume.

[53] ECHR, *X, Y and Z v. The United Kingdom*, para. 37.

[54] Since the cases *Christine Goodwin v. The United Kingdom*, judgment of 11th July 2002, paras 100–104 and *I. v. The United Kingdom*, judgment of 11th July 2002, paras 80–84, the Court held that individuals who had undergone operations to perform sex change and entertained an emotional relationship with a person of the opposite biological (or chromosomal) sex—identical to their original sex—also had the right to marry under Art. 12 of the Convention. In the Court's opinion, the law of a Contracting State which had allowed them to marry only persons of opposite biological sex seriously jeopardized their right to marriage.

[55] See ECHR, *Schalk and Kopf v. Austria*, paras 27 and 58 and, more recently, *Gas and Dubois v. France*, judgment of 15th March, 2012, para. 66.

Even the reference to the *Schalk and Kopf* case does not seem to be an appropriate basis for justifying the conclusion reached by the IACtHR. The reference to this judgment is only relevant for arguing that between Ms Atala and her partner a family life existed. On the contrary, it is not appropriate to conclude that a family life could also be said to exist between them and Ms Atala's daughters. It would have been more appropriate for the Inter-American Court to have made reference to the decision on the admissibility adopted by the European Court in the *Gas and Dubois v. France* case.[56] Here the European Court has qualified as family life, under Art. 8, not only the relationship between two women who had concluded a *pacte civil de solidarité*, but also the relationship between them and the biological daughter of one of them, born by artificial insemination during their relationship. The European Court observed that both women had wanted the child, and that

> [l]es requérantes élèvent A. depuis sa naissance, et s'en occupent conjointement et activement, comme l'ont reconnu les juridictions nationales. Dans ces conditions, la Cour estime que les relations entre les requérantes et A. s'analysent en une "vie familiale" au sens de l'article 8 de la Convention.[57]

19.3.2.4 Reparations

As far as the reparation measures granted by the IACtHR are concerned, it is worth noting that they have not been limited to requiring the State to pay monetary compensation for pecuniary and non-pecuniary damages suffered by the petitioners. It has also obliged the State to provide for medical and psychological or psychiatric care, free of charge, through its specialized public health institutions, to hold a public act of acknowledgment of international responsibility with regard to the facts of this case, and finally to continue to implement permanent education programs and training courses directed at public officials, and particularly judicial officials at all levels of the Judicial Branch. Such redress is definitely in keeping with the Inter-American Court case law on reparations. It goes without saying that the measures ordered, especially those of general scope, play an important role in promoting an inclusive and non-discriminatory culture. The role the Court can play in this regard is incisive and goes far beyond the redress of the specific case under its examination Burgorgue-Larsen, Ubeda de Torres (2010).

Nevertheless, it is not unreasonable to wonder whether in the case at stake the Court could have asked the State of Chile to make the custody decision null and void and to re-open the custody proceedings as a form of reparation despite the fact that neither the Commission nor the petitioners' representatives had asked the Court for such a measure Antkowiak (2008).

[56] *Gas and Dubois v. France*, *Decision on the Admissibility*, 31st August, 2010.

[57] *Ibidem* p. 12. Surprisingly, the Court did not repeat this assertion in its merits judgment.

In its previous jurisprudence, the Court did not hesitate to order the responsible State to grant retrials,[58] even specifying in certain cases how the national law should have been applied. It has also obliged the State to abstain from executing death sentences.[59] Furthermore, it has asked the State to nullify its criminal convictions[60] and to expunge criminal records.[61] Finally, it has even ordered the cancellation of fines already imposed.[62]

The answer to that question may vary, depending on whether one believes that in this way the Court would have substantially taken a stand in favor of the mother, determining indirectly that she would have offered the three girls a better home or, on the contrary, whether one may believe that the Court would have only asked the Chilean judicial organs to decide on the custody of the girls on the grounds of real facts (that is to say, the existence of a real risk to the detriment of the three girls, due to their cohabiting with a same sex couple), and not on prejudices and stereotypes.

In the first case, it is obvious that the Court, due to its subsidiary nature, would not have had the competence to issue a decision that was, essentially, a ruling on the custody of the three girls.

Nevertheless, it does not seem unreasonable to maintain that, had the Court asked Chile to re-open the custody proceedings by taking into account its international obligation not to discriminate on the grounds of the petitioner's sexual identity, it would not have acted as a "fourth instance" court, nor would it have overreached its subsidiary and complementary role with regard to the Chilean national courts.

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[59] *Ibidem*, *Fermin-Ramirez v. Guatemala*, para. 130, lett. c.

[60] IACtHR, *Herrera-Ulloa v. Costa Rica*, 2nd July 2004, para. 195.

[61] IACtHR, *Acosta-Calderon v. Ecuador*, 24th June 2005, para. 165; IACHR, *Cantoral-Benavides v. Peru*, 3rd December 2001, para. 78.

[62] E.g., IACtHR, *Berenson-Mejia v. Peru*, 25th November 2004, para. 239; IACtHR, *Suarez-Rosero v. Ecuador*, 20th January 1999, para. 76.

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