

SEXUAL ORIENTATION AND PARENTHOOD: A COMPARATIVE ANALYSIS OF THE CASE LAW OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

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1. INTRODUCTION

Same-sex parenthood is one of the most discussed issues in Western legal systems. It is still perceived as a contradiction in terms because gay and lesbian people have been historically portrayed as pedophiles, moral degenerates or criminals¹. Discrimination against same-sex parenthood has been nourished by prejudices according to which homosexual persons have been considered totally unable to bring up minors, or even as dangerous for children. It was a real taboo that affected societies during history and is strictly connected with male supremacy². However, “the content of taboo[s] and the range of prohibited marriages has altered with the changing structures of societies and changing patterns of family relationships”³.

A huge role in fighting discrimination based upon sexual orientation is played by International conventions and agreements⁴. In this sense, the American Convention on Human Rights (hereinafter ACHR) declares at Article 1(1) the protection of individuals from “any discrimination for reasons of (...) sex (...) or any other social conditions”. The vagueness of the text of Article 1(1) allows to include in the area of its protection other rights or social interests not completely determined at the time of approval of the ACHR itself. A clear example is the case of sexual orientation. Only recently sexual orientation has been considered as personal characteristic because it is innate or inherent to the person⁵. Indeed, even if there is not a widely shared definition of sexual discrimination, it is accepted that it covers discrimination based on sex and sexual orientation⁶.

The Inter-American Court of Human Rights (hereinafter IACtHR) decided only one case related to sexual orientation and parenthood. It is the “*Atala Riffo and daughters v. Chile*” case, published on 24 February 2012. By contrast, the European Court of Human Rights (hereinafter ECtHR) case law on this topic is wider and is related to the several aspects of parent-child relationship, especially on the arguments related to the connection between the “traditional family” and same-sex filiation, adoption and in vitro fertilization. How does the IACtHR's only decision influence the perception of sexual orientation in parenthood?

In order to answer this question, this article is organised as follows. Firstly, it specifies the ECtHR's case law about sexual orientation and discrimination. Secondly, it describes the facts related to the *Atala Riffo v. Chile* case. Thirdly, it shows the proceeding before of the IACtHR. Fourthly, it focuses on the influence of the ECtHR case law in the *Atala Riffo v. Chile* case. Fifthly, it analyses

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¹ S. A. Law, “Homosexuality and the Social Meaning of Gender”, *Wisconsin Law Review*, (1988), p. 190; C. J. Rosky, “Like Father, Like Son: Homosexuality, Parenthood, and the Gender Homophobia”, 20 *Yale Journal of Law & Feminism*, (2009), p. 266-267; International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Case Book*, (International Commission of Jurist, Geneva, 2011), p. 253.

² C. W. Christensen, “Legal Ordering of Family Values: The Case of Gay and Lesbian Families”, 18 *Cardozo Law Review*, (1997), p. 1388; C. Sunstein, “Homosexuality and the Constitution”, 70 *Indiana Law Journal* (1994), p. 16.

³ A. M. Glendon, *The Transformation of Family Law, State, Law, and Family in The United States and Western Europe*, (Chicago, The University of Chicago Press Books, 1989), p. 58.

⁴ Articles 2 and 7 of the Universal Declaration of Human Rights of 10 December 1948 and Articles 4, 24 and 26 of the International Covenant on Civil and Political Rights of 16 December 1966 and Article 14 of the European Convention of Human Rights of . E. Michaelstaedt, “Safeguarding the Rights of Sexual Minorities: The Incremental and Legal Approaches to Enforcing International Human Rights Obligations”, 9 *Chicago Journal of International Law*, (2008), 359.

⁵ IACtHR, (Judgement) 24 February 2012, *Atala Riffo v. Chile*, para. 87; ECtHR, (Judgment) 13 July 2007, Case No 72/05/07 *Clift v. United Kingdom*, para 57.

⁶ M. Thomas, “Teetering on the Brink of Equality: Sexual Orientation and International Constitutional Protection”, 17 *Boston College Third World Law Journal*, (1997), p. 367.

the specific measures ordered by the IACtHR in the enforcement of its decision, and lastly, it draws some conclusions on the impact of the *Atala Riffo v. Chile* decision on Chilean society.

2. THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW ABOUT SEXUAL ORIENTATION AND DISCRIMINATION

The arguments related to “traditional family” or similar were already treated by the ECtHR in its case law. According to the recent case law of the ECtHR, it is possible to argue that the provisions of the European Convention of Human Rights and Fundamental Freedoms constitute a kind of European common law in the field of fundamental rights. Despite the presence of the margin of appreciation, State Parties to the Convention could not escape the implementation of this “lowest common denominator”. For the purpose of this research it is useful to check how the principles are developed in the field of non-discrimination, best interests of the child, and protection of family life with regard to rainbow families.

2.1 NON-DISCRIMINATION.

Concerning the parent-child relationship the ECtHR⁷ stated that making a distinction based on considerations regarding the applicant’s sexual orientation is not acceptable under Articles 8 and 14 of the European Convention of Human Rights (hereinafter ECHR) and violates the reasonable relationship of proportionality existing between the means employed and the aim pursued. More recently, the ECtHR justified the refusal of parental responsibility for a MtF (Male to Female) transsexual father not on discriminatory grounds, as the father argued in the proceedings before the Spanish judicial authorities of the highest grade, but in the best interest of the child, which is the priority in the protection of legal interests⁸.

Discrimination for rainbow families involves several aspects of family life, such as the payment of the child's maintenance. The ECtHR considered that sexual orientation is the only point of difference between the plaintiff's same-sex relationship and the situation of an absent parent involved in a new relationship with a partner of the opposite sex, in relation to the burden of maintenance for the children⁹.

Adoption regards the possibility to insert a child declared adoptable into a family. In 2002 the ECtHR¹⁰ made reference to the lack of a shared social and cultural consensus on the recognition of the right to adopt to homosexual people among the States which subscribe to the European Convention of Human Rights, leaving them a wide margin of appreciation. Some years later, in 2008, the ECtHR¹¹ stated a prominent decision relating to a request for adoption by a French female homosexual person.¹² French authorities denied her claim because of her sexual orientation and justified it with the lack of the male parental role. The ECtHR affirms that because sexual behavior concerns very intimate and personal choices, “where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights

⁷ ECtHR (Judgment), 21 December 1999, App. No. 33290/96, *Salgueiro da Silva Mouta v. Portugal*. A. R. Reeves, “Sexual Identity as a Fundamental Human Right”, 15 *Buffalo Human Rights Law Review*, (2009), p. 233.

⁸ ECtHR, (Judgment), 30 November 2010, App. No. Appl. No. 35159/09, *P. V. v. Spain*, para 36.

⁹ ECtHR (Judgment), 28 September, 2010, App. n. 37060/06, *J. M. v. United Kingdom*. S. A. Cooper, “Review of the Concurrent Debates about the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States”, 5 *Phoenix Law Review*, (2011-2012).

¹⁰ ECtHR (Judgment), 26 February 2002, App. No. 36515/97, *Frettè v. France*. In this case, the Strasbourg Court said that there had been no violation of either Article 8 and Article 14 ECHR because French Social Services described Mr. Fretté positively, but emphasized that he was not ready to organise his new life around a child and the related responsibilities.

¹¹ ECtHR (Judgment), 22 January 2008, App. N. 43546/02, *E. B. v. France*.

¹² In French law it is possible for unmarried people to adopt children. Those children can assume the legal status of natural children of the adoptive parent (J. Hauser, D. Huet-Weiller, “Fondation et vie de la famille”, in J. Ghestin, (ed.) *Traité de droit civil. La famille, sous la direction de Jacques Ghestin*, (L.G.D.J, Paris, 1993), p. 659.

falling within Article 8 of the ECHR.”¹³ Both the *Fretté v. France* and *E. B. v. France* cases do not concern the right to be parents, but the right to be evaluated to determine suitability for adoption. The last issue faced by the ECtHR is step-parent adoption claimed by a same-sex couple¹⁴. Although the condition for the adoption was verified by the judges, they rejected the instance of the lesbian couple because the adoption was deemed contrary to the best interest of the child as it transferred parental authority to the adopter, depriving the child's biological mother of the same. However, the French law does not assimilate the *Pacte Civil de Solidarité* (hereinafter PACS) to marriage¹⁵, because the PACS establishes the relationship and the inheritance but has no bearing on the provisions relating to adoption and parental rights. In this case, the Court stated that there would be a discrimination against the same-sex couple if a PACS concluded by a heterosexual couple had allowed it to access this “simple adoption”, but as this is not true, the claim by the applicants was rejected. Nevertheless, the dissenting opinion of Judge Villiger is completely acceptable. According to him, the balancing of interest has to be focused only on the best interest of the child, and not on the legal concept of marriage and its conceptual comparison to the PACS or even the discrimination between homosexual and heterosexual couples. Children do not suffer discrimination based on legal categories of such kind¹⁶.

The last relevant case decided by the ECtHR is *X and others v. Austria*¹⁷. This case concerns a female same-sex couple who wanted to adopt the biological child of one of the partners, but this was not allowed to same-sex couples because of Article 182(2) of the ABGB (the Austrian Civil Code), which consented second parent adoption only to opposite-sex couples. According to the ECtHR's decision the legal exclusion of same-sex couples from second parent adoption constitutes discrimination contrary to Articles 8 and 14 ECHR. In the X case, the turning point is related to legal recognition of the relationship among the parents. Allowing second-parent adoption only to heterosexual de facto partners represented an unjustified discrimination to children involved in a family composed of same-sex partnership¹⁸.

2.2 BEST INTEREST OF THE CHILD.

The most recurrent enforcement of the best interest of the child by the ECtHR is related to Article 8 of the ECHR in consideration of the respect of the family life principle. The ECtHR stated that: “the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront”¹⁹. However, the scientific, legal, moral and social approach changes over the years, and the ECtHR reflects this change in two landmark decisions: *E. B. v. France* and *Shalk and Kopf v. Austria*²⁰. On one hand, the Strasbourg judges stressed the “undoubted personal qualities and an aptitude for bringing up children”, which were assuredly in the child's best interest, a key notion in the relevant international instruments²¹. On the other hand, the *Shalk and Kopf v. Austria* decision reflects the shifting of the “scientific, legal, moral and social” paradigm and applies the concept of family life guaranteed by art. 8 ECHR by extending it

¹³ E. Burlison, “International Human Rights Law, Co-Parent Adoption, and the Recognition of Gay and Lesbian Families”, 55 *Loyola Law Review*, (2009), p. 798.

¹⁴ See ECtHR (Judgment), 15 March 2012, App. No. 25951/07, *Gas and Dubois v. France*.

¹⁵ After the Gas and Dubois decision, the French Parliament approved a new law allowing same-sex couples to marry and to adopt minor children. It is the “*loi n° 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*”. Even the French Conseil Constitutionnel confirmed the constitutionality of the new law (Conseil Constitutionnel, 17 May 2013, n. 669).

¹⁶ ECtHR (Judgment), 15 March 2012, App. No. 25951/07, *Gas and Dubois v. France*, dissenting opinion of Judge Villiger, para

¹⁷ ECtHR (Judgment), 19 February 2013, App. n. 19010/07, *X and others v. Austria*.

¹⁸ *Adoptionsrechts-Änderungsgesetz 2013 – AdRÄG 2013*, by which the Austrian legal system has conformed with ECtHR's decision. It was approved by the Austrian Parliament on 4th July 2013 and enforced on 1st August 2013.

¹⁹ ECtHR (Judgment), 22 April 1997, Application n. 21830/93, *X. Y. and Z v. United Kingdom*, para. 47.

²⁰ ECtHR (Judgment) 24 June 2010, App. No. 30141/04, *Schalk and Kopf v. Austria*.

²¹ ECtHR (Judgment), 22 January 2008, App. N. 43546/02, *E. B. v. France*, para. 95-96.

to same-sex families.

Finally, in order to protect the best interest of the child, the ECtHR states the necessity of evaluating the individual situation of each person involved in the specific situation. The Court affirmed that the decision of limiting the right of access to the child by the transsexual parent MtF was based not on alleged discrimination founded on her transsexuality, but on her emotional instability that could hurt the child.

2.3 FAMILY LIFE.

The ECtHR believes firmly that the right to found a family is to be extended to *de facto* families, including the protection of family life, as it would be difficult to imagine²² that the right to found a family could include the right to live together²³. Even with the *Salgueiro da Silva Mouta v. Portugal* decision the ECtHR recognized the existence of the right to protection of family life between an LGBTI parent and her or his child. In a case related to a transsexual person (MtF), and “(a)s regards the connection between the right to marry and the right to found a family, the Court has already held that the inability of any couple to conceive or parent a child cannot be regarded as per se removing the right to marry”²⁴. Accordingly, “(a) child born out of such a relationship is *ipso jure* part of that “family” unit from the moment and by the very fact of his birth”²⁵. Scholars²⁶ stress that the ECtHR has changed its jurisprudence on the recognition of the protection of family life, stating that discrimination based solely on sexual orientation of the couple, same-sex or different-sex, married or not, is no longer justifiable, unless the application of the principle of margin of appreciation attests strong and convincing reasons to be regarded as legitimate.

3. THE CASE DECIDED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS: *ATALA RIFFO AND DAUGHTERS V. CHILE*

The case was raised in 2003 by Mr Lopez Allendes, the former husband of a Chilean woman, Ms Atala Riffo. Ms Atala Riffo married him in 1993 in a second marriage. The couple had three daughters in 1994, 1998 and 1999, and in 2002 they decided to live as a separated *de facto* couple. Besides, the couple agreed that Ms Atala Riffo maintained the care and custody of the three girls and they could visit their father weekly at his home. Some months later, Ms De Ramon, Ms Atala Riffo's same-sex partner, began living with her and her children. In consequence of this, the father filed a custody suit arguing that “The physical and emotional development of the girls was seriously at risk”²⁷ because of the mother's same-sex relationship and he founded his claim on three specific elements. The first one is about the capacity of the mother of taking care of the children, the second one is that the mother's choice has altered the fundamental values of the family. The third one is related to the supposed risk of contracting sexually transmitted diseases due to the sexual behaviour of the lesbian couple. The mother responded to the custody suit that her sexual identity has “nothing to do with her function and role as a mother”. The Juvenile Court ordered a discovery that stated in favour of the father because the mother, according to her sexual choice, gave preference “to her personal interest and well-being over the emotional well-being and social development of her daughters”. Then, the Juvenile Court affirmed that the father presents himself more oriented to the best interest of the children to grant them a heterosexual environment, putting “great importance” in

²² ECtHR (Judgment), 18 December 1986, App. No. 9697/82 *Johnston v. Ireland*, para 74.

²³ ECtHR (Judgment), 28 May 1985, App. No.9214/80 9473/81 9474/81, *Abdulaziz, Cabales and Balkandali v. United Kingdom*, para 62.

²⁴ ECtHR (Judgment) 24 June 2010, App. No. 30141/04, *Schalk and Kopf v. Austria*, para. 47.

²⁵ ECtHR (Judgment) 24 June 2010, App. No. 30141/04, *Schalk and Kopf v. Austria*, para. 91.

²⁶ A. Schuster, “L'abbandono del dualismo eteronormativo della famiglia”, in A. Schuster (ed.) *Omogenitorialità*, (Mimesis Edizioni, Milano, 2011), p. 55; T. E. Lagrand, “Mutual Recognition of Same-Sex Marriages from an EU Immigration Law Perspective”, in *Equality and Justice. Sexual Orientation and Gender Identity in XXI Century*, in A. Schuster (ed.), (Forum Editrice Universitaria Udinese, Udine), 2011, p. 249.

²⁷ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 31.

a “traditional society”²⁸. After that, Ms Atala Riffo delivered the daughters to their father and recused the regular judge of the juvenile court for incompatibility since the issues presented in his decision were based on stereotypes and did not accept pluralism within society²⁹. Because of the disqualification of the previous judge, his decision was overturned. In the new decision, the Acting Judge of the Juvenile Court granted to the mother the custody of the children and stated that the mother's sexual orientation is not an impediment for “responsible motherhood” because: 1. the ability to care for or and love children is unrelated to sexual identity, 2. homosexuality is not a psychiatric pathology, 3. the presence of the mother's partner at the girl's home is not harmful to their well-being, 4. the educational and social reports affirmed that there was no evidence of “any type of mistreatment of the girls”³⁰ by their mother; 5. relating to the girls' risk of contracting sexually transmitted diseases, the medical certificates of Ms Atala Riffo and her partner confirm their healthy condition. 6. In addition, the judge verified the harmonious family context. 7. Concerning the “potential discrimination” suffered by the girls, the court considered that the decision must be founded on facts “and not mere suppositions of fears”³¹. 8. Lastly, the Juvenile Court stated the right of the daughter to participate in proceedings.

However, the children were not allowed to return to the custody of their mother because the father obtained a preliminary injunction maintaining his custody. This injunction was confirmed later by the Court of Appeal. Indeed, the father filed a “remedy of complaint” to the Supreme Court of Justice of Chile asking that the girls remain in his custody since the decision of the Court of Appeal committed an abuse because it ignored that the sexual behaviour of the mother and her partner produced confusion and interference with the development of the children's sexual identity.

The Supreme Court, with a 3-2 majority decision, granted permanent custody to him. According to the Chilean Supreme Court the best interest of the child principle has to be interpreted as follows: 1. regarding the deterioration of the social, educational and family environment of the daughters since the mother began to cohabit with her same-sex partner, 2. regarding the witnesses of the house maids referring the confusion on sexuality and the attitudes of the children, 3. regarding to the fact that Ms Atala Riffo put her own interest before those of her daughters cohabitating with another woman as same-sex partner, 4. the potential confusion over sexual role caused in them by the absence of paternal role replaced by a female gender partner, 5. finally the Chilean Supreme judges wrote that the girls could be “in a situation of risk that placed them in a vulnerable position in their social environment (...) from that of their school companion and acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development”³².

4. THE PROCEEDING IN FRONT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Before of the Inter-american court of Human Rights, the claimant, Ms Atala Riffo, claimed that she suffered discrimination and arbitrary interference in her private life, “and particularly the expression of [her sexual] orientation in her lifestyle, were allegedly the main grounds for the decisions taken to remove custody of her daughters”³³. On the other hand, the Chilean State affirms that the purpose of the custody is not founded on the “disqualification” of the mother, but it is focused to determine who between the mother and the father offered the best condition to ensure the well-being of the three girls. According to the Chilean Supreme Court the decision is based on “the higher interest of the child”, within this context the sexual orientation of the mother “was considered, among other circumstances, in the measure that its expression had specific adverse effects on the girl's well-being”. Indeed, the mother had “an intensely self-centered attitude and personal characteristic that

²⁸ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 42.

²⁹ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 44.

³⁰ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 46.

³¹ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 48.

³² IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 57.

³³ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 59.

made it difficult for her to adequately exercise a maternal role, circumstances that led to the conclusion that [she] did not offer a suitable environment for the development of her daughters”³⁴. During the hearings the Court met the psychiatrist who listened to the daughters and who stated that the oldest two daughters expressed freely their views on the case concerning them. The court considered the two oldest daughter as victims, while the youngest is not allowed to officially participate in the proceedings because she is not in the same situation as her sisters.

The Court divided its legal reasoning into four main issues: 1. the scope of the right to equality and non-discrimination protected by Articles 24 ACHR, 2. sexual orientation as protected by Article 1(1) ACHR, 3. whether in the Chilean decision there was a difference in treatment based on sexual orientation, 4. whether this difference constitutes discrimination and eventually how the Chilean judges justified such difference in treatment.

Points 1 and 2 should be treated together because the expression “without any discrimination” acknowledged by Article 1(1)ACHR is strictly connected with the rights protected by Article 24 “to (be) equal before the law”. The discrimination forbidden by Article 24 could be realised by law or de facto with regard “to all laws approved by the State and their application”. In this framework the IACtHR explicitly refers to the Article 14 of the ECHR and to the case law of the ECtHR.

The most important point of the IACtHR decision lies on para. 92. At this point the Court affirms that the lack of shared consensus regarding sexual orientation as a prohibited category for discrimination should be not considered as a “valid argument to deny or restrict” the human rights of sexual minorities in perpetuating or reproducing “the historical and structural discrimination that these minorities have suffered”³⁵.

The analysis of the Court is concentrated on the context, on the arguments and on the language used by the national authorities. Specifically, about sexual orientation, the IACtHR specifies that in the *Atala Riffo v. Chile* case the discriminatory treatment regarded two different facts in the custody hearing. On the one hand the judgment issued in the remedy of complaint, and on the other hand the ruling on temporary custody. Under the first aspect, about the custody proceeding the national authorities stated that Ms Atala Riffo “was not capable of looking after and taking care of [the three girls, given that] her new choice of sexual life together with her lesbian relationship with another woman, [were] having [...] harmful consequences in looking after and protecting [...] the overall development of these girls”³⁶.

It is clear how the whole custody process has been focused on Ms Atala Riffo's choice to cohabit with a same-sex partner. Indeed, the Chilean Supreme Court had invoked this circumstance as grounds for its judgement because of: a) the deterioration of social, family and educational environment of the girls, b) the alleged risk for their harmonious development, c) the absence of the paternal model replaced by the same-sex partner of the mother, d) the alleged “vulnerable position in their social environment”, e) the risk of “social discrimination”, f) the fact that Ms Atala Riffo put her own interest before those of her children when she openly expressed her sexual orientation”. This last argument mainly led the decision of the Juvenile Court of Villarrica in the provisional custody ruling. In fact, Ms Atala Riffo privileged her personal interest “in the context of a heterosexual and traditional society”, whereas the father offered “more favorable arguments” in the girls' best interest. Neither circumstance was based on concrete juridical or factual elements about “specific parental behaviors and their negative impact on the well-being” of the children, but only on traditional prejudice purported to the “children's best interest”. However, the child's best interest cannot be used to justify any kind of discrimination against the parents based on their sexual orientation³⁷. The same argument became relevant in order to criticise the allegation of the Supreme Court of Chile about the “social discrimination” suffered by the daughters because of the sexual

³⁴ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 62.

³⁵ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 92.

³⁶ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 96.

³⁷ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 109.

behaviour of their mother. According to the IACtHR, the national judges described it as “conditional and abstract”, as the “the girls could be subject to social discrimination” and “that clearly their unique family environment differs significantly from that of their school companions and acquaintances in the neighborhood where they live, exposing them to ostracism and discrimination, which would also affect their personal development”³⁸.

The Inter-American Court refused this reconstruction alleging that “the parent's situation cannot be used as legal grounds for a decision”. Especially for the case of the alleged confusion about sexual roles, the Court underlined that the burden of proof is inverted. This means that is duty of the national authorities proving that their decision does not have “a discriminatory purpose or effect”³⁹. This is related overall to cases such as *Atala Riffo v. Chile*, as “the determination of harm must be supported by technical evidence and reports from experts and researchers in order to reach conclusions that do not result in discriminatory decisions”⁴⁰.

Finally, the IACtHR concluded that the Chilean national judges neither applied a strict scrutiny test nor substantiated the specific harm suffered by Ms Atala Riffo's children after the cohabitation of their mother with her same-sex partner. Indeed, according to the Inter-American judges, “the fact of the girls living with their mother and her partner did not deprive them of a father, since the purpose of the custody hearing did not imply that the father would have lost contact with them”⁴¹.

In this sense, how the case law of the European Court of Human Rights could have influenced this specific decision of the Inter-American Court of Human Rights should be investigated.

5. THE INFLUENCE OF THE ECtHR IN THE *ATALA RIFFO v. CHILE* CASE

The turning point of the *Atala Riffo V. Chile* decision is related to the mother's capacity to take care and raise her daughters despite her involvement in a same-sex relationship. It is specifically focused on the parent-child relationship. The Chilean courts justified granting the custody of her children exclusively to the father because he could provide a family environment respectful of the traditions of Chilean society and family⁴².

Although Judge Pérez Pérez underlined in his “(p)artially dissenting opinion”, that the citations of the ECtHR's case law “does not imply that the Inter-American Court should take these as required precedents”, still it has a “persuasive value”. Indeed, the submentioned European case law has a “great importance” because of the similarity between the functions of both the Courts⁴³, and because the wide jurisprudence elaborated by the ECtHR.

The ECtHR case law shows two relevant cases on this kind of discrimination that were explicitly referred to in this case: *Salgueiro da Silva Mouta v. Portugal*⁴⁴ and *Karner v. Austria*⁴⁵.

The *Salgueiro da Silva Mouta v. Portugal* case concerns the custody of a child to a parent in a divorce proceeding. In 1983 Mr Salgueiro da Silva Mouta married a woman, and they had a

³⁸ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 110.

³⁹ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 124. On this point the Inter-American judges referred to the ECtHR decision *E. B. v. France*, para. 74. Other relevant decisions on discrimination cases, not related to same-sex parenthood, are: ECtHR (Judgment) 18 April 2000, App. No. 57325/00, *D. H. et al v. Czech Republic*; ECtHR, (Judgment), 16 March 2010, App. No. 15766/03, *Oršuš and Others v. Croatia*; ECtHR (Judgment), 18 February 2009, App. No., 55707/00, *Andrejeva v. Latvia*, ECtHR, (Judgment), 2 November 2010, App. No. 3976/05, *Şerife Yiğit v. Turkey*; ECtHR (Judgment), 8 December 2009, App. No. 49151/07, *Muñoz Díaz v. Spain*; ECtHR (Judgment), 27 September 2011, App. No., 29032/04, *M. and C. v. Romania*; ECtHR (Judgment), 15 December 2003, App. No. 64927/01, *Palau-Martinez v. France*; ECtHR (Judgment), 23 June 1993, App. No. 12875/87, *Hoffmann v. Austria*; ECtHR (Judgment), 11 December 1995, App. No. 21627/93, 21826/93, 21974/93, *Laskey, Jaggard and Brown v. The United Kingdom*.

⁴⁰ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para 124.

⁴¹ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para 131.

⁴² IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para 140.

⁴³ Partially dissenting opinion of Judge Alberto Pérez Pérez in the judgment of IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para 17.

⁴⁴ ECtHR (Judgment), 21 December 1999, App. No. 33290/96, *Salgueiro da Silva Mouta v. Portugal*.

⁴⁵ ECtHR (Judgment), 24 July 2003, App. No. 40016/98, *Karner v. Austria*.

daughter in 1987. The couple separated in 1990 and divorced in 1993. The husband, who was homosexual, moved in with another man. In 1991, after the separation, they signed an agreement awarding parental responsibility to the mother with the father retaining visitation rights with the child. But the mother subsequently would not allow the father to visit his daughter. For three years the fight for custody of his daughter was extremely strong: first the mother accused her former husband's partner of abusing the child, then she abducted her daughter. After an investigation, the Lisbon Family Affairs Court awarded parental responsibility to the father and dismissed the mother's allegations of sexual abuse as unfounded. However, the Lisbon Court of Appeal reversed the lower court decision and awarded parental responsibility to the mother⁴⁶. In that decision Portuguese judges stated that “(t)he child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations”⁴⁷.

The father appealed to the Strasbourg Judges because Portuguese judicial authorities had violated his rights to respect for privacy and family life, and the European Commission of Human Rights observed that the Court of Appeal, in reversing the decision of the Lisbon Family Affairs Court, awarding parental responsibility to the mother rather than the father”, “introduced a new factor, namely that the applicant was a homosexual and was living with another man”⁴⁸. Furthermore, “(t)he Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the Convention (...).The Court cannot therefore find that a reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14”⁴⁹.

The *Karner v. Austria* case is not strictly related to family law, but to the succession in a tenancy contract by the surviving same-sex partner of the lease holder. One of the turning points of this decision, submitted by the Austrian Government, was the protection of the traditional family unit. In that case the ECtHR stated that: “the aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. [...] as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people”⁵⁰.

Indeed, the concept of the traditional family is severely criticized by both the Courts, ECtHR and IACtHR, because of its preservation of abstract and vague patterns of cultural traditions, only useful to justify prejudice and therefore discrimination. According to *Salgueiro da Silva Mouta v. Portugal* case, the specific and concrete checking of the actual condition of the family life, guaranteed by both ECtHR and IACtHR, is the key element in evaluation of the best interest of the child and eventually for his or her parental custody.

6. SPECIFIC MEASURES ORDERED BY THE IACtHR IN THE ENFORCEMENT OF ITS

⁴⁶ A. R. Reeves, “Sexual Identity as a Fundamental Human Right”, 15 Buffalo Human Rights Law Review, (2009), p. 233.

⁴⁷ ECtHR (Judgment), 21 December 1999, App. No. 33290/96, *Salgueiro da Silva Mouta v. Portugal*.

⁴⁸ ECtHR (Judgment), 21 December 1999, App. No. 33290/96, *Salgueiro da Silva Mouta v. Portugal*.

⁴⁹ ECtHR (Judgment), 21 December 1999, App. No. 33290/96, *Salgueiro da Silva Mouta v. Portugal*.

⁵⁰ ECtHR (Judgment, *Karner v. Austria* mentioned by the IACtHR, (Judgment) 24 February 2012, *Atala Riffó and Daughters v. Chile*, para 140.

DECISION

One of the most relevant differences between the ECtHR and IACtHR is related to the enforcement of their decisions⁵¹. On the one hand, in the ECtHR system the Committee of Minister is appointed to verify the execution of the ECtHR's decisions, normally the payment of the compensation stated by the ECtHR itself⁵². No similar provision exists for the IACtHR⁵³. In the American system, the enforcement of the IACtHR's decision related to the payment of compensatory damages is expected of the domestic courts, while the enforcement of other policy actions stated by the IACtHR, such as governmental reforms or policy measures, are under the responsibility of the defendant state⁵⁴.

The IACtHR stressed that its judgments represent “per se” a form of reparation⁵⁵, but in the *Atala Riffo* case, the IACtHR previewed different specific remedies for redressing the damage caused to the parties. The Court awarded to Ms Atala Riffo and her daughters, the direct victims of the sexual discrimination, but not to other members of their family, the compensation for pecuniary and non-pecuniary damages. Concerning pecuniary damages, the parties claimed the compensation for the expenses related to a) “psychiatric and therapeutic care”, drugs included, for an estimated cost of 62,205 USD; b) transportation expenses, because Ms Atala Riffo's children live in Temuco (the father's hometown) for 38,752 USD, calculated bearing in mind the age of the youngest girl; c) loss of future earnings because Ms Atala Riffo could not properly dispose of her property, since her time is spent making regular visits to her children. The damages have been calculated at a sum of 96,600 USD. On the contrary, and ironically, the Chilean State affirms that in the *Salgueiro da Silva Mouta v. Portugal* case, the ECtHR “did not grant any compensation” because the declaration of the existence of a violation constituted in itself a fair reparation for the damages alleged. The IACtHR has established that there must exist a causal nexus between the facts submitted by the parties and analysed by itself. The IACtHR affirms that there is a lack of evidence related to Ms Atala Riffo management of her own properties and about the asserted costs of transportation. However, the IACtHR noted that the claimants needed health care before and after the beginning of the custody process, but the IACtHR cannot exactly determine which parts of her medical treatment were precisely related to the damage suffered because of the discrimination. So, following a criterion of equity, the IACtHR awarded to the claimant the sum of 10,000 USD to cover the cost incurred for medical and psychological care.

Regarding the non-pecuniary loss, the Court recognised that the discrimination suffered by Ms Atala Riffo and her children “gave rise to different kinds of damage in the victim's daily life, different levels of stigma and stress”. These circumstances were confirmed by the experts who conducted the psychological evaluation of Ms Atala Riffo and her children. The claimants demanded the sum of 100,000 USD each, but the IACtHR, following the equity principle, recognized 20,000 USD to the mother and 10,000 USD to each child.

Among the other measures, the IACtHR refused to implement an “obligation to investigate and enforce legal consequences for the officials responsible” because it is not specified which matter would be in consideration⁵⁶. Regarding rehabilitation, as an adequate measure of reparation, the IACtHR ordered the State to provide to Ms Atala Riffo and her daughters appropriate, free and immediate medical and psychological care for up to four years. Furthermore, as an adequate measure of satisfaction, the Court orders the publication of an excerpt of the judgment in some

⁵¹ See S. A. Huneeus, “Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights”, *Cornell International Law Journal*, 44 (2011), No. 3.

⁵² M. Burnstein, *The Will to Enforce: An Examination of the Political Constraints Upon a Regional Court of Human Rights*, 24 *Berkeley Journal of International Law*, (2006), p. 434, n. 58.

⁵³ L. Shaver, *The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?* 9 *Washington University Global Studies Law Review*, (2010), p. 663.

⁵⁴ Burnstein, *supra*, n. 52.

⁵⁵ IACtHR (Judgment), 19 January 1995, *Neira Alegria et al v Peru*, para 56 and IACtHR, *Fontevicchia and D'Amico v. Argentina*, , para. 102.

⁵⁶ IACtHR, (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para 250.

relevant Chilean newspapers, its summary, written by the Court, in the Official Gazette and the entire decision on the Government website for a period of a year. To acknowledge the public act of international liability, the IACtHR affirmed that in certain cases, such as this one, it is justified that the State recognizes its responsibility related to the violation of human rights with an official act⁵⁷. In this circumstance, the State shall guarantee the participation of those victims, and the organisations representing the victims, in national and international proceedings in which they wish to participate. One of the most important reparation measures is the implementation of training programs for public officials to prevent discrimination issues. The Court ordered the State to organize educational programs on “i) human rights, sexual orientation and non-discrimination; ii) protection of the rights of the LGBTI community and iii) discrimination, overcoming gender stereotypes of LGBTI persons and homophobia”. These courses are intended for public officials at every level of national public administration, specifically for judicial officials. Lastly, the IACtHR emphasizes the role of the rule of law in applying the requested policies in the national system. Under this perspective, the national judges are required to undertake a mandatory “Convention control” between domestic law and the American Convention in the context of specific competences and regulations following the interpretation of the American Convention done by the IACtHR itself.

7. CONCLUSIONS

The specific peculiarities of the enforcement of IACtHR's decisions focus both on the reparation of human rights violations and cultural change. This approach is quite divergent from that of ECtHR, but it represents a real turning point regarding South America's specific issues concerning mass crimes caused by past dictatorships⁵⁸, or current fights of indigenous people⁵⁹ to live in their ancestral land in a intact environment, or even other minorities, such as people with a same-sex sexual orientation.

The specific measures stated by the IACtHR to Chile clearly show how the Court itself would have a punchy political role in the national civil society and also in developing new standards in international human rights law⁶⁰. It is demonstrated by the nature of the measures of full redress, organised to improve the spread and dissemination of the role of human rights in modern society. This could be achieved especially by the cultural change of the judiciary, recipients of a specific training program ordered by the Court, who have the first and most important role in the enforcement of human rights in the national legal system.

⁵⁷ On 14th December 2012 the Chilean Foreign Office (*Ministerio de Relaciones Exteriores*) delivered a formal statement to recognize its international liability: “*Acto público de reconocimiento de responsabilidad internacional del Estado de Chile*”, <http://www.senado.cl/prontus_senado/site/artic/20121213/pags/20121213190453.html>

⁵⁸ L. Shaver, *supra* n. 53, p. 670.

⁵⁹ IACtHR, 17 June 2005, *Yakye Axa Indigenous Community v. Paraguay*.

⁶⁰ D. Rodríguez-Pinzón, C. Martín, “The Inter-American human rights system: selected examples of its supervisory work,” in *Research Handbook on International Human Rights Law* (Eds. S. Joseph, A. McBeth), (Elgar, Cheltenham, 2010), p. 376.