Revue générale de droit

Parental Rights for Lesbian, Gay, Bisexual and Transsexual Persons: A Comparison Between the European and Inter-American Systems of Human Rights

Les droits parentaux pour les personnes lesbiennes, gaies, bisexuelles et transsexuelles : une comparaison entre les systèmes européen et interaméricain des droits de l'homme

Jolane T Lauzon

Volume 49, Special Issue, 2019

Le rôle du Canada à l'égard de la protection des droits de la personne au sein des Amériques
Canada's Role in Protecting Human Rights in the Americas
El papel de Canadá en la protección de los derechos humanos en las Américas

URI: https://id.erudit.org/iderudit/1055490ar
DOI: https://doi.org/10.7202/1055490ar

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Publisher(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (print)
2292-2512 (digital)

Explore this journal

Cite this article

Lauzon, J. T. (2019). Parental Rights for Lesbian, Gay, Bisexual and Transsexual Persons: A Comparison Between the European and Inter-American Systems of Human Rights. *Revue générale de droit*, *49*, 207–235. https://doi.org/10.7202/1055490ar

Article abstract

This article addresses the question of parental rights for lesbian, gay, bisexual and transsexual persons (LGBT). Through an analysis of the relevant jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights, it will look at the right to a family, the right to privacy and the right to non-discrimination, since these rights are the ones that are always invoked by the petitioners. More precisely, this article will look at the question of adoption for homosexual individuals and same-sex couples, as well as the issue of children custody rights.

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ABSTRACT

This article addresses the question of parental rights for lesbian, gay, bisexual and transsexual persons (LGBT). Through an analysis of the relevant jurisprudence of the Inter-American Court of Human Rights and the European Court of Human Rights, it will look at the right to a family, the right to privacy and the right to non-discrimination, since these rights are the ones that are always invoked by the petitioners. More precisely, this article will look at the question of adoption for homosexual individuals and same-sex couples, as well as the issue of children custody rights.

KEY-WORDS:

LGBT rights, parental rights, Inter-American System of Human Rights, European System of Human Rights, family, privacy, non-discrimination, equality.

RÉSUMÉ

Le présent article s'intéresse à la protection des droits parentaux des personnes lesbiennes, gaies, bisexuelles et transsexuelles (LGBT). Les décisions pertinentes issues de la Cour interaméricaine des droits de l'homme et de la Cour européenne des droits de l'homme seront analysées, plus particulièrement en ce qui a trait aux droits à la

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famille, à la vie privée et à la non-discrimination, puisque ce sont ces droits qui sont évoqués par les pétitionnaires. Plus précisément, cet article mettra l'accent sur les questions liées à l'adoption par des personnes homosexuelles et des couples de même sexe, ainsi que sur les droits de garde des enfants.

MOTS-CLÉS :

Droits LGBT, droits parentaux, système interaméricain des droits de l'homme, système européen des droits de l'homme, famille, vie privée, non-discrimination, égalité.

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INTRODUCTION

While the European Court of Human Rights (ECtHR or European Court) has been addressing the rights of lesbian, gay, bisexual and transsexual (LGBT) persons since 1981, the Inter-American Court of Human Rights (IACtHR or Inter-American Court) only rendered its first decision on the matter in 2012. Consequently, the ECtHR has had time to publish more than 50 cases on sexual minority,[1] while the IACtHR has issued only 3 decisions.[2] One of the repercussions of this considerable difference in numbers is that the ECtHR has had time to address a plethora of issues regarding sexual orientation, ranging from the decriminalization of same-sex intimacy to the recognition of same-sex couples and the use of violence by public officials against members of the LGBT community. Out of all the international human rights bodies, the European Court's developments "with respect to sexual orientation discrimination […] have been the most remarkable."[3] Indeed, it was able to look at some issues over a long period of time, which means that it had to assess how the law had evolved and, sometimes, to overturn its decisions in light of the formation of a new consensus among the European Member States.

However, these 37 years of jurisprudence in the field of LGBT rights do not mean that all issues have been addressed and even less that those that have been addressed have all been resolved. Some questions are still very polemical and the Court has had to deal with a quick evolution but has also had to face heated opposition. One of these issues is the question of parental rights, such as adoption by homosexual individuals or couples, which "ha[ve] spurred controversy and strong feelings in many countries."[4]

In this context, this paper will compare how parental rights have been addressed by both the ECtHR and the IACtHR. As this is a broad issue that could include a multitude of sub-topics such as assisted reproduction, transnational adoption and access to surrogacy, this

1. Dominic McGoldrick, "The Development and Status of Sexual Orientation Discrimination Under International Human Rights Law" (2016) 16:4 Human Rights L Rev 613 at 635.

2. *Atala Riffo and Daughters v Chile* (2012), Inter-Am Ct HR (Ser C) No 239 [*Atala*]; *Duque v Colombia* (2016), Inter-Am Ct HR (Ser C) No 310; *Flor Freire v Ecuador* (2016), Inter-Am Ct HR (Ser C) No 315.

3. McGoldrick, *supra* note 1 at 633.

4. David Langlet, "Unfolding from Nonexistence: The Dynamic but Contested Evolution of LGBT—Human Rights" (2010) 55 Sc and Stud L 339 at 355.

topic will be narrowed to two main points: adoption within the boundary of a same country and child custody.

Within the body of case law developed by the IACtHR, only one decision is relevant: *Atala Riffo and Daughters v Chile*,[5] published in 2012 as the first case on LGBT rights ever heard by the Inter-American Court. The IACtHR also recently published an advisory opinion on "gender identity, equality and non-discrimination with regard to same-sex couples," which addresses, among others, the scope of the protection afforded to same-sex couples in family matters.[6] Unsurprisingly, the European Court has published many decisions on the questions of child custody and adoption by homosexual individuals or couples. The most significant decision on custody rights for homosexual parents is the 1999 case *Salgueiro da Silva Mouta v Portugal*.[7] On the other hand, many decisions address the question of adoption, but *EB v France*[8] and *X and Others v Austria*[9] will be heavily relied on as they have both been considered groundbreaking, distinguishing from and even overturning previous cases of the European Court. Furthermore, in order to bring to light the significant changes brought by these two decisions, it will also be necessary to examine the cases *Fretté v France*[10] and *Gas and Dubois v France*.[11]

One common aspect among all these cases is that all the victims claimed that they had suffered a violation of the same rights: the right to privacy, the right to a family and the right to non-discrimination. In that respect, after offering a short summary of these relevant cases, this paper will analyze and compare how the ECtHR and the IACtHR have assessed these three rights. Throughout this analysis, it will also explore how the concept of the best interest of the child was applied by both

5. *Atala*, *supra* note 2.

6. *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)* (2017), Advisory Opinion OC-24/17, Inter-Am Ct HR (Ser A) No 24 [Advisory Opinion OC-24/17].

7. *Salgueiro da Silva Mouta v Portugal*, No 33290/96, [1999] IX ECHR 309, 31 EHRR 1065 [*da Silva*].

8. *EB v France*, No 43546/02, [2008] ECHR 55, 47 EHRR 21 [*EB*].

9. *X and Others v Austria*, No 19010/07, [2013] II ECHR 1 [*X and Others*].

10. *Fretté v France*, No 36515/97, [2002] I ECHR 343, 38 EHRR 21 [*Fretté*].

11. *Gas and Dubois v France*, No 25951/07, [2012] II ECHR 245 [*Gas and Dubois*].

courts. Additionally, it will provide a short portrait of the influence of the margin of appreciation in the determination of these cases. Finally, throughout this comparative work, it will be shown that if the Inter-American Court has been greatly influenced by the jurisprudence of the European Court, it has also truly developed its own approach, setting aside some of the European Court's findings.

I. OVERVIEW OF THE CASES

A. The Inter-American Court of Human Rights

1. Atala Riffo and Daughters v Chile *(2012) and the Right to Child Custody*

This case discusses the right of a lesbian mother to obtain the custody of her daughters. Mrs Atala Riffo was married to Mr Lopez Allendes, with whom she had three daughters. When they dissolved their marriage, it was established that Mrs Atala would have the custody of the children. A few months after the separation, Mrs Atala began a homosexual relationship with Mrs De Ramon, who moved in with her and the children.[12] Mr Lopez Allendes then sought to obtain the custody of the children. A legal saga followed and the case went up to the Supreme Court of Justice of Chile, which awarded the custody to Mr Lopez Allendes, because Mrs Atala's relationship with a woman could have an adverse effect on the best interest of the daughters.[13] The Supreme Court heavily relied on the sexual orientation of Mrs Atala in its judgment. According to the Supreme Court, "the girls could be the target of social discrimination;"[14] Mrs Atala "put her own interests before those of her daughters when she chose to begin to live with a same-sex partner,"[15] and her sexuality could pose "a risk to the integral development of the children."[16]

12. *Atala*, *supra* note 2 at para 30.
13. *Ibid* at para 57, quoting the ruling of the Supreme Court of Justice, 31 May 2004 (Chile).
14. *Ibid* at para 56.
15. *Ibid*.
16. *Ibid* at para 123.

After the case was referred by the Inter-American Commission on Human Rights (IACHR or Inter-American Commission), the IACtHR found unanimously a violation of Article 24 (right to equal protection),[17] in conjunction with Articles 19 (rights of the child)[18] and 1.1 (obligation to respect rights)[19] of the *American Convention on Human Rights* (ACHR or *American Convention*) as well as a violation of Articles 11(2) (right to privacy)[20] and 17(1) (rights of the family)[21] in conjunction with Article 1(1) of the ACHR to the detriment of Mrs Atala and her daughters.[22]

In its lengthy decision, the Court importantly recognized that "sexual orientation" was a ground of discrimination included in "any other social status" of Article 1(1) of the ACHR.[23] It also accepted that there is no specific model of the family, rejecting the argument that the traditional family, meaning a family with heterosexual parents, had to be preferred.[24] It furthermore rejected the State's argument that the difference in treatment of Mrs Atala could be justified by the best interest of the child.[25] Finally, the Court refused to rely on the doctrine of consensus and on the margin of appreciation in its decision.[26]

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17. *American Convention on Human Rights*, 21 November 1969, 1144 UNTS 123, art 24 (entered into force 18 July 1978): "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law." [*American Convention*].

18. *Ibid*, art 19: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

19. *Ibid*, art 1(1):
    The 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.

20. *Ibid*, art 11(2): "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."

21. *Ibid*, art 17(1): "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

22. *Atala*, *supra* note 2 at para 314.

23. *Ibid* at paras 83–99.

24. *Ibid* at para 172.

25. *Ibid* at paras 109–11.

26. *Ibid*, see partially dissenting opinion of Judge Pérez Pérez, where he suggests using it to analyze the right to same-sex marriage in future cases.

B. The European Court of Human Rights

1. Salgueiro da Silva Mouta v Portugal *(1999) and the Right to Child Custody*

This unanimous decision was issued in 1999 by the European Court's fourth section Chamber. The facts are quite similar to the facts in *Atala*. Mr da Silva Mouta had a daughter with his wife in 1987. Three years later, the couple divorced and Mr da Silva Mouta started a relationship with another man. His ex-wife then refused to allow Mr da Silva Mouta any right to contact his daughter. In this context, he sought to obtain the full parental responsibility of his daughter. While the first instance court granted the custody to Mr da Silva Mouta, the Appeal Court reversed the decision and stated that:

> [I]t cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development [. . .]. The 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.[27]

Before the ECtHR, Mr da Silva Mouta argued that this decision amounted to a violation of his right to a family and privacy (Article 8 of the *European Convention of Human Rights* (ECHR or *European Convention*)), in conjunction with his right not to be discriminated against (Article 14 of the ECHR).[28] The ECtHR recognized unanimously that the Lisbon Court of Appeal had treated the applicant differently from his ex-wife, in reason of his homosexuality. The State of Portugal was arguing that the aim sought was the protection of the child's best interest. The European Court rejected this argument, stating that removing the child's custody to Mr da Silva Mouta was not proportional with the aim pursued.[29] However, the ECtHR did not provide more details as to its reasoning in regards to Article 8. It did not specify if it found a violation of the right to a family, to privacy or to both.

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27. *da Silva*, *supra* note 7 at 322, referring to the decision of the Lisbon Court of Appeal.

28. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Eur TS 5, art 14 (entered into force 3 September 1953) [*European Convention*]: Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

29. *da Silva*, *supra* note 7 at para 36.

Moreover, "the Court [did] not consider it necessary to rule on the allegation of a violation of Article 8 taken alone."[30]

2. EB v France *(2008)*, X and Others v Austria *(2013)* and the Right to Adoption for Homosexual Individuals and Couples

In the landmark decision *X and Others v Austria*,[31] the ECtHR took the time to define the three possible types of adoption available to homosexual people: 1) individual adoption, where the homosexual individual is single and wishes to adopt on his or her own; 2) second-parent adoption, where a same-sex partner wishes to adopt the child of his or her partner; 3) joint adoption, where a same-sex couple wishes to adopt a child together.[32] While the individual and the joint adoptions lead to the creation of a family unit, the second-parent adoption simply allows for the legal recognition of a pre-existing family unit.[33]

Despite its profuse jurisprudence on LGBT rights, the European Court has only had the chance to rule on two types of situations so far: individual adoption and second-parent adoption. More interestingly, it relied heavily on the margin of appreciation afforded to the Member States, which led it to overturn one of its decisions and to strongly distinguish with another one.

In *EB v France*, rendered in 2008 by the Grand Chamber, the ECtHR had to examine the petition of a French homosexual woman who had made a request to adopt a child. She was in a relationship with a woman but had decided to make the request on her own. The French authorities refused her request, arguing that a child would miss the necessary presence of a father. They also added that the role of the petitioner's partner in the adoption process was not clear. This decision was at odds with the French *Civil Code*, which allowed adoption by any person over 28 years of age. Once again, the Court had to

30. *Ibid* at para 37.

31. *X and Others*, *supra* note 9 at para 100.

32. Nadia Melehi, "The Right to Family Life Free From Discrimination on the Basis of Sexual Orientation: The European and Inter-American Perspectives" (2014) 29:4 Am U Intl L Rev 945 at 969; Tim Amos & Joe Rainer, "Parenthood for Same-Sex Couples in the European Union: Key Challenges" in Katharina Boele-Woelki & Angelika Fochs, eds, *Same-Sex Relationships and Beyond: Gender Matters in the EU*, 3rd ed (Cambridge, UK: Intersentia, 2017) 79 at 84.

33. Amos & Rainer, *supra* note 32 at 84.

determine if the French authorities had violated Articles 8 and 14 of the *European Convention*.

In *Fretté v France*, rendered in 2002, the ECtHR's Chamber had addressed a very similar issue regarding an adoption request made by a homosexual individual and had found no violation of Article 14, taken in conjunction with Article 8. The decision was held by four votes to three:

> Taking account of the broad margin of appreciation to be left to States in this area and to the need to protect children's best interests to achieve the desired balance, the Chamber considered that the refusal to authorize adoption had not infringed the principle of proportionality and that, accordingly, the justification given by the Government appeared objective and reasonable and the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention.[34]

Overturning its decision in *Fretté*, the European Court's Grand Chamber found in *EB* that "[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8."[35] It then found that the decision of the French authorities was contrary to Articles 14 and 8 and avoided mentioning the question of the European consensus.[36] The decision was adopted by a vote of ten to seven judges.

In *X and Others v Austria*, issued by the Grand Chamber in 2013, the Court looked at the question of second-parent adoption. A woman, mother of a son, was in a same-sex relationship with another woman. The three of them lived together. In order to obtain legal recognition of their family unit, the second woman tried to adopt the child of her partner, "without severing the relationship with the child's mother."[37] The applicants were prevented from obtaining recognition of their family unit by the first and second instance courts of Austria since the law only made available second-parent adoption to heterosexual couples. Despite this clear distinction, the Austrian Supreme Court

34. *EB*, *supra* note 8 at para 70, referring to *Fretté*, *supra* note 10 at paras 42–43.

35. *EB*, *supra* note 8 at para 91.

36. Melehi, *supra* note 32 at 964.

37. *X and Others*, *supra* note 9 at para 11.

found that this did not amount to discrimination against homosexual couples. The applicants then brought their case to the European Court, where they sought to establish a violation of Articles 8 and 14 of the ECHR.

For the first time in an adoption matter, the European Court started by recognizing that the three applicants' situation fell within the notion of family life.[38] It then proceeded to distinguish the facts from the case *Gas and Dubois v France*, rendered in 2012. In this case, decided by the fifth section Chamber in a vote of six against one, the ECtHR had found that the French law allowing only married couples to adopt did not discriminate same-sex couples, even if same-sex marriage was not legal for them yet.[39] It considered that unmarried same-sex couples could not be compared to married heterosexual couples.

Since the Austrian law did not create a distinction based on marriage, but solely on sexual orientation, the European Court found that it had to be distinguished from the French law in *Gas and Dubois*[40]. While reaffirming that the margin of appreciation[41] was very narrow in cases of distinction based on sexual orientation, the Court found that Austria had failed to find a proportional and objective aim to justify the distinction between same-sex and different-sex couples in matters of second-parent adoption. The protection of the traditional family and of the best interest of the child could not justify such a prohibition.[42] The European Court concluded, by a ten to seven vote, that there had been a violation of Article 14, in conjunction with Article 8.[43]

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38. *Ibid* at para 95.

39. *Gas and Dubois*, *supra* note 11 at para 69; *X and Others*, *supra* note 9 at para 104; see also Amos & Rainer, *supra* note 32 at 81: Tim Amos and Joe Rainer understand that the ECtHR accepts indirect discriminatory effects of a law, but rejects direct discriminatory outcomes.

40. *X and Others*, *supra* note 9 at para 131.

41. As defined by the Open Society Foundations, "Margin of Appreciation" (2012), online:<//www.opensocietyfoundations.org/sites/default/files/echr-reform-margin-of-appreciation.pdf>:

> The margin of appreciation is a doctrine that the European Court of Human Rights has developed when considering whether a Member State has breached the Convention. It means that a Member State is permitted a degree of discretion, subject to Strasbourg supervision, when it takes legislative, administrative or judicial action in the area of a Convention right. The doctrine allows the Court to take into account the fact that the Convention will be interpreted differently in different Member States, given their divergent legal and cultural traditions. As the Council of Europe has observed, the margin of appreciation gives the Court the necessary flexibility to balance the sovereignty of Member States with their obligations under the Convention.

42. *X and Others*, *supra* note 9 at para 151.

43. *Ibid* at para 47.

II. THE RIGHT TO PRIVACY

A. In the European System

At the core of parental rights issues for members of the LGBT community are two very close rights: the right to privacy and the right to a family life. In Europe, these two rights have often been addressed simultaneously by the ECtHR and we can suppose that this is partly due to the fact that both rights are protected by the same article:

> **Article 8**
>
> **Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

However, it is not because the article contains both rights that the ECtHR automatically recognized a violation of both. In fact, the ECtHR has been very resistant in recognizing a violation of the right to a family life in cases involving same-sex couples and homoparental situations.[44] On the other hand, the ECtHR promptly recognized that discrimination based on sexual orientation almost always involved a violation to the victim's right to privacy.[45] Indeed, in its first case on the matter, *Dudgeon v United Kingdom*, the ECtHR ruled that sexual orientation constitutes "a most intimate aspect of private life. Accordingly, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of Article 8 (2)."[46] Following this seminal decision,[47] the ECtHR ruled on the right to privacy in a multitude of cases involving sexual orientation,

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44. In *EB v France*, it found a violation of Article 8, but only for the right to privacy. In matters of adoption, it finally recognized a violation of the right to a family in 2013, in *X and Others v Austria*. In matters of custody rights, it did recognize it in *da Silva*, *supra* note 7.

45. Already in its first case on LGBT rights in 1981, the Court relied on the right to privacy in *Dudgeon v UK* (1981), 45 ECHR (Ser A), 4 EHRR 149.

46. *Ibid* at para 52.

47. McGoldrick, *supra* note 1 at 634.

such as gender identification, sexual life, the choice of a name,[48] etc. This evolution led to the very broad definition of private life given by the ECtHR in *Niemietz v Germany* in 1992: "the notion of 'private life' within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to establish and develop relationships with other human beings."[49]

As it will be further explained, the right to privacy is also seen as a right that has strongly evolved since the adoption of the *European Convention* and for which the margin of appreciation is often evoked. When interpreting Article 8, the European Court thus admits that it must take into account that the *European Convention* is a living instrument and that developments are taking place in society. This includes "the fact that there is not just one way or one choice when it comes to leading one's family or private life."[50]

In every of our three European cases, *da Silva Mouta*, *EB* and *X and Others*, the ECtHR found a violation to the right to private life. However, this right was tackled differently in every case. For instance, in *da Silva Mouta* (1999), the European Court recognized unanimously a violation of Article 8 in conjunction with Article 14 of the ECHR. This joint analysis is partly due to the fact that Article 14 of the ECHR has "no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded"[51] by the provisions of the *European Convention*. The Court thus found that Mr da Silva Mouta had been discriminated in the enjoyment of the rights safeguarded by Article 8 on the basis of his sexual orientation. It must be noted, however, that most of the analysis was based on the discrimination test of Article 14, rather than on the substantive violation of the right to private life. Despite this very superficial examination of Article 8, the European Court refused to consider a violation of the right to privacy on its own. In this context, this case provides limited insight as to the true impact of the right to a private life in the context of a custody claim.

In *EB v France* (2008), the European Court only recognized a violation to the right to private life, but refused to recognize a violation to the

48. *Burghartz v Switzerland* (1994), 280-B ECHR (Ser A), 18 EHRR 101 at para 24.

49. *EB*, *supra* note 8 at para 43, referring to *Niemietz v Germany* (1992), 251-B ECHR (Ser A), 16 EHRR 97 at para 29.

50. *X and Others*, *supra* note 9 at para 139.

51. *Sahin v Germany*, No 30943/96, [2003] VIII ECHR 63, 38 EHRR 736 at para 85, referred to in *EB*, *supra* note 8 at para 47.

right to family life. It determined that the matter in dispute related not to the right to adopt a child, but to the authorization process needed to adopt.[52] The ECtHR carefully pointed out that the *European Convention* was silent on the question of adoption. However, it also specified that France had a specific legislation on the question, where some individuals and couples were granted the right to adopt a child. In this context, "the Court consider[ed] that the facts of this case undoubtedly [fell] within the ambit of Article 8 of the Convention."[53] Without relying on the consensus doctrine as it had in *Fretté,*[54] the ECtHR found a violation, by a vote of ten to seven, of Article 8 in conjunction with Article 14. Once again, it did not find a violation of Article 8 on its own.

Finally, if *X and Others v Austria* has been a seminal case on many aspects, especially regarding the recognition of a violation to the right to family life, it did not bring any light on the impact of the right to private life in cases involving parental rights for homosexual individuals and couples.

B. In the Inter-American System

The IACHR, on the other hand, secures the right to privacy and the rights of the family in two different articles:

> **Article 11**
>
> **Right to Privacy**
>
> 1. Everyone has the right to have his honor respected and his dignity recognized.
>
> 2. 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.
>
> 3. Everyone has the right to the protection of the law against such interference or attacks.
>
> **Article 17**
>
> **Rights of the Family**
>
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

52. *EB*, *supra* note 8 at para 44.
53. *Ibid* at para 49.
54. Melehi, *supra* note 32 at 964.

In *Atala Riffo v Chile* (2012), the IACtHR provided a great insight on the application of both rights in relation to discrimination based on sexual orientation. The Court started by recognizing that "the scope of the right to non-discrimination due to sexual orientation is not limited to the fact of being a homosexual *per se*, but includes its expression and the ensuing consequences in a person's life project,"[55] which is a relevant aspect of private life.

In order to determine the scope of protection of the right to a private life, the Inter-American Court heavily relied on the jurisprudence on the European Court. It accepted, among others, that the right to a private life includes "the right to establish and maintain relationships with other individuals [and that it] extends to the public and professional spheres."[56] The Court also relied on some of the high courts of its Member States[57] to determine that the right to private life includes sexual relationships and the emotional life shared with a spouse. This finding led the Court to state that Mrs. Atala had the right to adopt a "conduct associated with the expression of [her] homosexuality."[58]

Unlike the European Court, the Inter-American Court also proceeded to analyze the right to private life on its own.[59] It first determined that the importance given to Mrs Atala's sexual orientation by the Chilean courts represented an interference with her right to private life. It then found that the State had a legitimate goal, which was the protection of the children's best interest, but concluded that it was "not reasonable to expect Mrs Atala to put her own life on hold to protect her children, as no evidence existed to suggest that her lifestyle change would damage her children."[60] The Court unanimously concluded that the national courts' reasoning represented a breach of Mrs Atala's right to private life.[61]

This conclusion is enlightening since the European Court never took the time, in the three cases we are relying on, to conduct a full analysis

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55. *Atala*, *supra* note 2 at para 133.

56. *Ibid* at para 135.

57. Colombia and Mexico, see *Atala*, *supra* note 2 at paras 136–37.

58. *Ibid* at para 139.

59. As explained earlier, the ECtHR looked at the right to private life in conjunction with Article 14 of the ECHR (non-discrimination) in the three cases analyzed. This led the ECtHR to conduct the test for non-discrimination but not for the right to private life.

60. Melehi, *supra* note 32 at 982; *Atala*, *supra* note 2 at para 139.

61. *Atala*, *supra* note 2 at para 166.

of the right to private life as a stand-alone right. It could thus be said that while relying heavily on the jurisprudence of the European Court, the Inter-American Court also brought the analysis further on this matter.

III. THE RIGHT TO A FAMILY

A. In the European System

As previously mentioned, if the right to private life has always been recognized in cases involving sexual orientation, the right to family life was much more controversial. For the longest time, the European Court refused to acknowledge that same-sex couples constituted a family and that their efforts to become parents or to obtain recognition of their family unit also fell in the ambit of family life. It is only in 2010, in the decision *Schalk and Kopf v Austria*, that the Court finally held that it was "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8."[62] On the same occasion, the Court also added that same-sex couples "are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."[63] This decision opened the door for the case *X and Others* (2013), where the Court found for the first time a violation to the right to family life in a context of homoparental adoption, in a vote of eleven to six. Indeed, in this case, where a lesbian couple lived with the biological child of one of the partners, the Court did not hesitate to state "that the relationship between all three applicants amounts to family life within the meaning of Article 8 of the Convention."[64]

Interestingly, the European Court had also had the opportunity to recognize that the relationship between a lesbian couple and a child conceived using means of assisted reproduction constituted "family life" within the meaning of Article 8 in the case *Gas and Dubois v France* (2012).[65] However, it had surprisingly concluded, in a vote of

62. *Schalk and Kopf v Austria*, No 30141/04, [2010] IV ECHR 409 at para 94 [*Schalk and Kopf*], as referred to by Sarah Lucy Cooper, "Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights" (2011) 12 German LJ 1746 at 1746.

63. *Schalk and Kopf*, *supra* note 62 at para 99.

64. *X and Others*, *supra* note 9 at para 96.

65. *Gas and Dubois v France* (dec), No 25951/07 (31 August 2010) ECHR at para 12-3.

six to one, that the impossibility of the non-biological mother to adopt the child did not constitute a violation of Article 8.

Before *Gas and Dubois* and *X and Others*, the Court had avoided referring to the right to family life, even in cases of adoption. Indeed, in *EB v France*, where a lesbian woman wanted to adopt a child on her own, the Court had put the emphasis on the fact that:

> [T]he provisions of Article 8 do not guarantee either the right to found a family or the right to adopt […].The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family […], or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father […], or the relationship that arises from a genuine marriage, even if family life has not yet been fully established […], or the relationship that arises from a lawful and genuine adoption.[66]

As explained in the first section of this paper, the Court still found a violation of the right to private life in conjunction with the plaintiff's right not to be discriminated against in the *EB* case. However, it did not find a violation of her right to a family life.

In cases of adoption, the right to family life is thus an ambiguous one. In fact, the ECtHR is open to recognizing a family unit when it already exists, such as in *Gas and Dubois* and in *X and Others*. Indeed, these two cases entailed a homosexual couple where one partner was trying to adopt the child of the other one. As Nadia Melehi summarizes it, the "adoption would merely mean a legal recognition of a factual situation of a family unit."[67] This is also illustrated by the case *da Silva Mouta*, where the Court did not hesitate to state that the decision of the Portuguese Court of Appeal to grant the custody of the child to the mother "constitute[d] an interference with the applicant's right to respect for his family life."[68] This is due to the fact that the relationship between a parent and his/her child automatically falls within the ambit of the right to family life. Moreover, the Court recognizes that a child born out of a homosexual relationship "is *ipso jure* part of that 'family' unit from the moment and by the very fact of his birth."[69] The Court

66. *EB*, *supra* note 8 at para 41 [our emphasis].
67. Melehi, *supra* note 32 at 967.
68. *da Silva*, *supra* note 7 at para 22.
69. *Schalk and Kopf*, *supra* note 62 at para 91.

thus rejects the argument that a family unit must only refer to the traditional concept of family.

On the other hand, the Court does not recognize that the desire to become a family, for instance in cases of requests for adoption of an unknown child, such as in *Fretté* and *EB v France*, open the door to a violation of the right to family life. This is due to the fact that the right to family life, as interpreted by the Court, does not entail the right to found a family. Rather, the ECtHR prohibits "discriminating against a prospective adopter on the grounds of sexual orientation and refusing his or her application for an adoption order on this basis."[70]

B. In the Inter-American System

As for the right to private life, the IACtHR heavily relied on the jurisprudence of the ECtHR to determine the scope of the right to a family. It however put the emphasis on the fact that, "unlike the *European Convention* […], the *American Convention* contains two provisions that protect family life in a complementary manner,"[71] which are Articles 11(2) and 17. According to the Inter-American Court, these articles require the States to favour the development of the family while protecting children.[72] Agreeing with the European Court, the Inter-American Court first found that same-sex couples living together constituted a family unit and that if they had children, they were also included in the family unit.[73]

Since the State of Chile was arguing that the children had the right to a normal and traditional family, the Inter-American Court insisted on the fact that the "concept of family life is not limited only to marriage and must encompass other *de facto* family ties in which the parties live together outside of marriage."[74] It also considered the case *da Silva Mouta v Portugal* and agreed with the European Court that removing a child from the custody of a homosexual parent in order to ensure that he/she lives in a traditional family is not reasonable or proportional with the protection of the best interest of the child.[75] This

70. *Ibid*.
71. *Atala*, *supra* note 2 at para 175; Advisory Opinion OC-24/17, *supra* note 6 at para 174.
72. *Atala*, *supra* note 2 at para 169.
73. *Ibid* at paras 173–74; see also Advisory Opinion OC-24/17, *supra* note 6 at para 192.
74. *Atala*, *supra* note 2 at para 142.
75. *Ibid* at para 143; *da Silva*, *supra* note 7 at paras 34–36.

led the Court to reject the argument that only the traditional family had to be protected.[76]

Going even further than the European Court had in *da Silva Mouta*, the IACtHR recognized that Mrs Atala, her partner, and the children were part of a new family unit.[77] In *da Silva Mouta*, the Court "[had] focused on the relationship between the daughter and her father as the family unit, [but] it left open whether the same family ties existed between the daughter and her father's new life partner."[78]

On that aspect, it can thus be said that the Inter-American Court and the European Court agree, even if the former went a bit further in the recognition of the family unit.[79] However, the Inter-American Court never had the opportunity to rule on the question of adoption by homosexual couples or individuals. In this context, if it agrees with the European Court as to the recognition of *de facto* families, it is not known if it would, like the ECtHR, avoid making a ruling on the right to a family for individuals wishing to adopt a child.

Nevertheless, a few important elements could influence the Court when it will have to rule on this question. First, unlike the *European Convention*, the *American Convention* contains a paragraph that specifically targets the right to *raise* a family:

> 17(2) The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention.[80]

Second, the Inter-American Court itself recognized that the expression "to raise a family" amounted to the right to found a family in its decision *Artavilla Murillo v Costa Rica*.[81] Third, the Inter-American Court concluded in this same decision that the prohibition of *in vitro* fertilization by the State of Costa Rica amounted to a violation, among others,

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76. McGoldrick, *supra* note 1 at 642.

77. *Atala*, *supra* note 2 at para 142.

78. Melehi, *supra* note 32 at 985, referring to *da Silva*, *supra* note 7 at para 14.

79. Álvaro Paúl, "Examining *Atala-Riffo and Daughters v Chile*, the First Inter-American Case on Sexual Orientation, and Some of Its Implications" (2014) 7:1-2 Inter-American & European Human Rights J 54 at 71.

80. *American Convention*, *supra* note 17, art 17(2) [our emphasis].

81. *Artavia Murillo et al ("in vitro fertilization") v Costa Rica* (2012), Inter-Am Ct HR (Ser C) No 257 at 145.

to the right to found a family. Finally, the *American Declaration on the Rights and Duties of Man* (ADRDM) also establishes in its Article VI that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefore."

Of course, one cannot presuppose what would be the conclusion of the Inter-American Court if it had to rule on the question of adoption by homosexual couples or individuals. Nevertheless, Article 17(2) of the ACHR, Article VI of the ADRDM and the decision *Artavilla Murillo* clearly contradict the assertions made by the European Court in *EB v France* when it stated that Article 8 of the ECHR does not safeguard the mere desire to found a family.[82]

Much more could be said on the possible impact of the *Artavilla Murillo* decision on the question of adoption by homosexual couples and individuals, however, this goes beyond the scope of the current comparison. For the time being, let us just conclude in saying that the IACtHR could probably have tools to its disposal to adopt a broader approach than the European Court in matters of adoption if it wished to do so.

IV. THE RIGHT TO NON-DISCRIMINATION

A. In the European System

In every case involving parental rights for members of the LGBT community, the right to non-discrimination has been central to the analysis of the European Court. As a matter of fact, in our three cases, the Court has examined the alleged violation of Article 8 in conjunction with Article 14 of the ECHR. Interestingly, the Court's analysis of what constitutes discrimination based on sexual orientation in matters of parental rights has greatly evolved throughout the years. The doctrine of consensus, the margin of appreciation, as well as the protection of the best interest of the child have been deeply influential in the reasoning of the Court.

The Court applies a two-pronged test when analyzing if a violation of Article 14 of the ECHR occurred. First, it determines if a difference in treatment of persons in relevantly similar situations took place. Second, it analyzes the justification given for the difference in treatment. If the

82. *EB*, *supra* note 8 at para 42.

justification is objective and reasonable, meaning that it pursues a legitimate aim and that there is a reasonable relationship of proportionality between the means employed and the aim sought, the difference will not amount to discrimination.[83] Even if it has not always been the case, it is now clear that "differences based on sexual orientation require particularly serious reasons by way of justification, or […] particularly convincing and weighty reasons."[84] This also impacts the margin of appreciation allowed to the Member States, which is narrow.[85]

In the past 15 years, however, the Court has struggled with the issue of adoption by same-sex couples and homosexual individuals in regards to the right to non-discrimination. Indeed, there has been a lot of *volte-face*, uncertainties and distinguishing and the most recent decisions, by their narrow outcome,[86] still show a lot of hesitation by the Court on this matter. This hesitation is well illustrated by the comparison between *Fretté v France* and *EB v France*. Both decisions relate to a request for single-parent adoption made by a homosexual individual. They were respectively rendered by the Court in 2002 and in 2008. Surprisingly, the conclusions were totally different and the Court overruled *Fretté* in the *EB* decision.

In *Fretté*, the Court found that there was indeed a difference in treatment between single homosexual individuals and single heterosexual individuals in relation to adoption requests. However, the Court stated that "there is no doubt that the decisions to reject the applicant's application for authorization pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure."[87] The Court thus agreed with France that the best interest of the child was a legitimate and reasonable justification for the difference in treatment. Furthermore, it determined that there was no consensus throughout Europe on the question of homosexual adoption. In this context, the Court found that since there was no common ground on the matter, "a wide margin of appreciation must be left to

83. *X and Others*, *supra* note 9 at para 98.

84. *Ibid* at para 99.

85. *Ibid*; McGoldrick, *supra* note 1 at 635.

86. Junko Nozawa, "Drawing the Line: Same-Sex Adoption and the Jurisprudence of the ECtHR on the Application of the European Consensus Standard Under Article 14" (2013) 29:7 M Utrecht J Intl & European L 66 at 71.

87. *Fretté*, *supra* note 10 at para 38.

the authorities of each State."[88] The Court's Chamber, in a four to three vote, found no violation of Article 14.

Six years later, the Court's Grand Chamber departed completely from this decision in a very similar case. In *EB v France*, the French authorities had refused the applicant's adoption request mainly because of the absence of a paternal role model. The Court, in a ten to seven vote, determined that this represented a difference in treatment based on sexual orientation since "[t]he influence of the applicant's avowed homosexuality […] was a decisive factor leading"[89] to the refusal of her request. Instead of relying on the broad margin of appreciation granted to States in matter of homosexual adoption as it had in *Fretté*, the Court repeated what it had been stating since 1999, namely that "[w]here sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify the difference in treatment."[90]

Interestingly, the Court completely avoided discussing the question of consensus among Member States. It also rejected the State's argument that the best interest of the child needed to be protected, especially since the French authorities had recognized that the applicant would make a good mother.[91] As Nadia Melehi asks: "Can we then presume that European consensus exists on this point now?"[92] The answer is unclear. Also, one can ask: What has changed between 2002 and 2008 that can justify such a turnaround? According to Junko Nozawa, the answer is "not much,"[93] or, more precisely, nothing that would explain why the Court took a new approach, rejecting the arguments it had previously accepted.

The two main decisions on second-parent adoption also highlight the peculiar evolution of the Court's reasoning in regards to the discrimination faced by homosexual couples. The 2012 decision *Gas and Dubois v France* and the 2013 decision *X and Others v Austria* create a

88. *Ibid* at para 41.

89. *EB*, *supra* note 8 at para 89.

90. *Ibid* at para 91, referring to *Smith and Grady v UK*, No 33985/96 and 33986/96, [1999] VI ECHR 45, 29 EHRR 493 at para 83.

91. For instance, the French authorities had pointed out that "[o]n account of her personality and her occupation, Ms B is a good listener, is broad-minded and cultured, and is emotionally receptive. We also appreciated her clear-sighted approach to analysing problems and her child-raising and emotional capacities." *EB*, *supra* note 8 at para 10.

92. Melehi, *supra* note 32 at 964.

93. Nozawa, *supra* note 86 at 71.

surprising distinction between indirect and direct discrimination. In *Gas and Dubois*, a lesbian couple had had a child by means of assisted reproduction. One of them was thus the biological mother of the child, while the other woman wanted to be permitted to adopt the child through an adoption order. The request was refused since France considered that this would mean transferring the parental rights from the biological mother to the adoptive mother, since it was impossible for a child to have same-sex parents.[94] Indeed, the French legislation only permitted second-parent adoption for married couples and, at the time, only heterosexual couples could get married.

When the Court applied the discrimination test developed under Article 14 of the ECHR, it concluded that the applicants' situation as a same-sex couple living in a civil partnership was not comparable to a married heterosexual couple.[95] Since their situation was not sufficiently similar in the Court's opinion, the difference in treatment could not amount to discrimination. The Court's Chamber came to that conclusion in a six to one vote. Yet, it could have been argued that homosexual couples were prevented from getting married while heterosexual couples were free to choose between civil partnership and marriage.[96] As Tim Amos and Joe Rainer explain it, the Court's decision preserved "the indirect discrimination loophole"[97] found in the French legislation.

In *X and Others v Austria*, the outcome was different for similar facts. This was also the case of a lesbian couple with a child. One partner was the biological parent of the child and the other partner wished to adopt the child. Yet, the most relevant distinction between this case and *Gas and Dubois* is the fact that the Austrian law permitted second-parent adoption by non-married heterosexual couples. In this context, the Grand Chamber found in a ten to seven vote that there was a difference in treatment between unmarried same-sex couples and unmarried heterosexual couples and that the aim sought by the State — the best interest of the child — was not reasonable, as a *de facto* family already existed between the applicants.[98]

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94. *Gas and Dubois*, *supra* note 11 at para 62.
95. *Ibid* at para 68.
96. *Ibid* at para 73.
97. Amos & Rainer, *supra* note 32 at 87.
98. *X and Others*, *supra* note 9 at paras 45–46.

It is relevant to point out that the Court carefully restricted the application of its judgment in affirming that:

> Although the present case may be seen against the background of the wider debate on same-sex couples' parental rights, the Court is not called upon to rule on the issue of second-parent adoption by same-sex couples as such, let alone on the question of adoption by same-sex couples in general. What it has to decide is a narrowly defined issue of alleged discrimination between unmarried different-sex couples and same-sex couples in respect of second-parent adoption.[99]

It can thus be seen that the European Court's approach in regards to adoption by homosexual individuals rests a very narrow one. The ECtHR's most valuable tool in analyzing these cases is Article 14 and the discrimination test developed in the jurisprudence. In fact, "for a State to prohibit same-sex step-child adoption and remain Convention-compliant, it must exclude the right for all couples in the same legal category of relationship."[100] It is thus a pure exercise of comparison. However, the European Court has not applied the test to prevent occurrences of indirect discrimination, as shown in the case *Gas and Dubois*.

For matters of child custody, the European Court does not face the same uncertainties. Indeed, since the unanimous decision of *da Silva Mouta* (1999), the jurisprudence of the Court is clear: a State cannot base its decision to remove the custody of a child from a parent simply because of the parent's sexual orientation. Also the Court could not accept Portugal's argument as to the beneficial aspect of the traditional family for a child.[101]

B. In the Inter-American System

It is in the decision *Atala Riffo v Chile* that the Court had for the first time the opportunity to rule on the issue of sexual orientation as being included in Article 1(1) of the *Inter-American Convention*. The IACtHR started its analysis of the right to equality and non-discrimination by stating that these principles had now "entered the

99. *Ibid* at para 134 [our emphasis].

100. Amos & Rainer, *supra* note 32 at 87.

101. *da Silva*, *supra* note 7 at paras 34–36.

realm of *jus cogens*."[102] It then found that sexual orientation was a prohibited ground of discrimination included in "any other social ground" of Article 1(1) of the *Inter-American Convention*. The Court pointed out that the *Inter-American Convention* was a living instrument, that it had to be interpreted using a *pro homine* approach, and that it had to take into account the evolution of contemporary international law.[103] Furthermore, the Court found that the inclusion of sexual orientation within Article 1(1) of the ACHR was consistent with the jurisprudence of the European Court.[104]

The State of Chile tried to argue that when its Supreme Court issued its decision, there was no consensus in the region as to the inclusion of sexual orientation as a prohibited ground in Article 1(1). The Court firmly rejected this argument:

> [T]he Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered. The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the *American Convention*.[105]

The IACtHR then proceeded to state that Mrs Atala had suffered a difference in treatment since the Chilean Supreme Court heavily relied on her sexual orientation to determine that the father of the children would be best suited to obtain their custody.[106]

As had been argued by many countries in Europe in similar situations, the State of Chile explained that this difference in treatment

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102. *Atala*, *supra* note 2 at para 79, referring to *Juridical Condition and Right of the Undocumented Migrants* (2003), Advisory Opinion OC-18/03, Inter-Am Ct HR (Ser A) No 18 at para 101.

103. *Ibid* at para 85; see also Advisory Opinion OC-24/17, *supra* note 6 at paras 68, 187, 194–95.

104. The IACtHR heavily relied on the decision *da Silva*, *supra*, note 7; see also *Atala*, *supra* note 2 at para 87.

105. *Atala*, *supra* note 2 at para 92.

106. *Ibid* at paras 94–99.

was justified by the best interest of the children involved. The Inter-American Court recognized that it was, *a priori*, a legitimate aim. It however stressed that "the mere reference to this purpose, without specific proof of the risks or damage to the girls that could result from the mother's sexual orientation, cannot serve as a suitable measure to restrict a protected right."[107] The Court also stressed that the State's argument was based on mere stereotypes, not true information on the capacity of homosexual individuals to enjoy parental rights.[108]

In its ruling, the Chilean Supreme Court had explained that the protection of the right of the child was based on four arguments:

> i) the alleged social discrimination suffered by the three girls due to Mrs. Atala's expression of her sexual orientation; ii) the girls' alleged confusion regarding sexual roles as a consequence of their mother cohabiting with a partner of the same sex; iii) the alleged priority Mrs. Atala gave to her personal life over the interests of her three daughters, and iv) the right of the girls to live in the bosom of a family with a father and a mother.[109]

The Inter-American Court analyzed each of the justifications adopted by the Supreme Court of Chile in order to determine if they could truly protect the best interest of the daughters.[110] It rejected every justification. For instance, the IACtHR found that States could not justify a difference in treatment because of a possibility of social discrimination. Rather, "States must help to promote social progress."[111] As for the alleged priority that Mrs Atala gave to her personal life, the IACtHR found that the scope of the prohibition to discriminate based on sexual orientation also encompasses the right to express one's sexual orientation and to live accordingly.[112] Finally, as previously noted, the Court rejected the argument that the *Inter-American Convention* shall be used to protect the traditional concept of family.[113] It thus found, unanimously, that the State of Chile had violated

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107. *Ibid* at para 110.
108. *Ibid* at para 111.
109. *Ibid* at para 113.
110. *Ibid* at para 114.
111. *Ibid* at para 120.
112. *Ibid* at para 134.
113. *Ibid* at paras 142–43: it referred again to *da Silva*, *supra* note 7.

Mrs Atala's right to equality enshrined in Article 24, in conjunction with Article 1(1) of the ACHR.[114]

At that point, the IACtHR's analysis can be said to be quite similar and congruent with the European Court's current views, the main difference being that the Inter-American Court refuses to rely on the consensus doctrine and the margin of appreciation. Nevertheless, the Inter-American Court innovated when came the time to look at the discrimination endured by the daughters. Indeed, if the best interest of the child is almost always considered by the European Court in cases involving parental rights, it is usually as a justification by States to prevent homosexual individuals and couples to enjoy these rights. As a matter of facts, the European Court never looked at these questions from the perspective of the children themselves. Yet, they are the most affected by any legal issue that relates to custody or adoption.[115]

Since the Inter-American Court had already concluded that Mrs Atala's right to equality had been breached, it proceeded to analyze if the Supreme Court's decision resulted in discrimination against the three daughters.[116] Referring to the UN Committee on the Rights of the Child, the Court recognized that "children may suffer the consequences of discrimination against their parents, for example if they are born out of wedlock or in other circumstances that deviate from traditional values."[117] Moreover, the expert Robert Wintemute stated that when children are being discriminated because of their parents' sexual orientation, it can never be said to be done in their best interest.[118] The Court also recognized that "the discriminatory treatment against the mother had repercussions for the girls, since it was used as grounds to decide that they should not continue to live with their mother."[119] The Court concluded unanimously that the three daughters' right to non-discrimination had been breached.

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114. *Ibid* at para 146.

115. Loveday Hodson, "Ties That Bind: Towards a Child-Centered Approach to Lesbian, Gay, Bi-Sexual and Transgender Families Under the ECHR" (2012) 20:4 Intl J Child Rts 501 at 517, 522.

116. It used Article 19 of the *European Convention*, *supra* note 28 to address the question: "Every minor has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State."

117. *Atala*, *supra* note 2 at para 151, quoting the UN Committee on the Rights of the Child, *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, 40th Sess, CRC/C/GC/7/Rev1 (2006) at para 12.

118. *Atala*, *supra* note 2 at para 153.

119. *Ibid* at para 155.

In conclusion, the IACtHR provided a broad evaluation of the scope of "sexual orientation" as included in Article 1(1) of the ACHR via "any other social status." An example of the Court's commitment to the recognition of this new ground is its statement that "any regulation, decision, or practice of domestic legislation, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on their sexual orientation."[120] On the other hand, this decision still represents the only ruling of the Inter-American Court on the matter of parental rights for LGBT people. We will thus have to wait to know how the Court will rule on the question of adoption. Yet, one can notice that the Court referred to the question of adoption on multiple occasions in its decision, acknowledging a decision rendered by the Mexico's Supreme Court on the matter and discussing some decisions of the European Court.[121] As Álvaro Paúl puts it, "as a result, the judgment's broad declarations are not self-explanatory. It will be necessary for the IACtHR to decide new LGBTQ cases clarifying the extent of this judgment."[122]

CONCLUSION

LGBT rights have evolved incredibly in the past decade. If the European Court can definitely be seen as *avant-gardiste*, the Inter-American Court has just followed suit. Nevertheless, it remains a controversial area and parental rights for LGBT people can probably be seen as the most controversial issues among them all. Indeed, the lack of consensus among European States has pushed the European Court towards a path of extreme prudence. First, the Court has always minimized the scope of its decisions on matters of adoption for same-sex couples and individuals, stating that it was not ruling on same-sex adoption *per se*, but rather on the question of alleged discrimination.[123] As previously explained, this led the European Court to adopt an inconsistent set of cases, and it even allowed for indirect discrimination to take place in the case of *Gas and Dubois v France*. Second, this prudence has also led the European Court to an unpredictable usage of the margin of appreciation, sometimes stating that a wide margin was to be applied in matters of adoption, such as in *Fretté v France*, sometimes

120. *Ibid* at para 91; see also Advisory Opinion OC-24/17, *supra* note 6 at para 199.

121. *Ibid* at para 146.

122. Paúl, *supra* note 79 at 70.

123. *X and Others*, *supra* note 9 at para 134.

avoiding the topic altogether, as in *EB v France*. This inconsistency pushed the Court to overrule the former decision only six years after it was rendered. Third, the judges' votes in cases of same-sex adoption also show the hesitation of the European Court. For example, in *X and Others v Austria* and *EB v France*, the final vote was ten to seven judges in favour of finding a violation of Articles 8 and 14. This is far from a consensus.

On the Inter-American side, the fact that only one decision regarding parental rights was rendered avoids any possibility of contradiction. Furthermore, since the IACtHR's ruling in *Atala* is quite recent, it had the opportunity to rely on the abundant jurisprudence of the European Court on matters involving sexual orientation. However, the Inter-American Court categorically refused to rely on the margin of appreciation or on the consensus doctrine. On the contrary, the Inter-American Court believed that the lack of consensus within the Americas should militate for a better protection to be given to sexual minorities. Judge Pérez Pérez nevertheless suggested taking the opposite approach in its partially dissenting opinion. Due to the lack of consensus regarding same-sex marriage and family units involving same-sex couples throughout the Americas, he would recommend the adoption of the margin of appreciation in later cases.[124]

Finally, the Inter-American Court also showed less openness towards the argument of the best interest of the child as a legitimate aim for a different treatment based on sexual orientation. In fact, it went the opposite way and used the best interest of the child to conclude that the daughters had themselves been discriminated against by the State of Chile. Indeed, the Inter-American Court agreed in *Atala* that "discrimination based on […] the sexual orientation of the child's parent is never in the best interest of the child."[125]

In light of the above analysis, one can only hope that both Courts will have the opportunity to rule on other cases regarding same-sex adoptions in order to clarify the existing jurisprudence. The Courts owe this clarification, not only to sexual minorities, but above all to the children who are growing up in families without legal recognition.

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124. Partially dissenting opinion of Judge Pérez Pérez in *Atala*, *supra* note 2.

125. *Ibid* at para 153.

ANNEX – SUMMARY CHART

System	**European System**					**Inter-American System**
Issues	**Custody Rights**	**Single-Parent Adoption**		**Second-Parent Adoption**		**Custody Rights**
Cases	*da Silva Mouta v Portugal* (1999) Chamber	*Fretté v France* (2002) Chamber	*EB v France* (2008) Grand Chamber	*Gas and Dubois v France* (2012) Chamber	*X and Others v Austria* (2013) Grand Chamber	*Atala Riffo v Chile* (2012)
Violation to right to privacy?	Yes (unanimous)	No (4 to 3)	Yes (10 to 7)	No (6 to 1)	Yes (10 to 7)	Yes (unanimous)
Violation to right to family life?	Yes (unanimous)	No (4 to 3)	No (not mentioned)	No (but recognized that a lesbian couple and a child constituted a family)	Yes (10 to 7)	Yes (unanimous)
Violation to right to non-discrimination?	Yes (unanimous)	No (4 to 3)	Yes (10 to 7)	No (6 to 1)	Yes (10 to 7)	Yes (unanimous)