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## I. INTRODUCTION

Picture a female judge who is married with two young girls in the state of Louisiana. This female judge and her husband have decided to legally separate and file for divorce. In the custody agreement, both parties mutually agree that the mother would maintain custody of the girls, with a weekly visitation schedule with the father. After this agreement, the mother entered into a serious relationship with another woman, and the other woman eventually moved in with the judge and her children. The father then filed for an injunction in a Louisiana state court for the mother to lose custody rights of their children because he felt that the girls' emotional development was at risk. How would the state court in Louisiana decide? Does the father have a claim against the mother of his children?

Traditional definitions of family stem from two conflicting areas: the law and the culture of the area.[1] One major conflict is between those who defend the family as a unique organization based on heterosexuality, and those that believe a family can be diverse and not based solely on heterosexuality.[2] In the United States, the

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[1] *See* Juan Marco Vaggione, *Chapter 7 Families Beyond Heteronormativity*, *in* GENDER AND SEXUALITY IN LATIN AMERICA - CASES AND DECISIONS 233 (Cristina Motta &Macarena Saez eds., 2013). *See* Juan Marco Vaggione, *Chapter 7 Families Beyond Heteronormativity*, *in* GENDER AND SEXUALITY IN LATIN AMERICA - CASES AND DECISIONS 233 (Cristina Motta &Macarena Saez eds., 24 IUS GENTIUM 233 (2013).

[2] *Id*. at 233.

changing image of the family has undergone a slow transformation. However, it is clear that it is unconstitutional to include a parent's sexual orientation in child custody disputes.[3] On the other hand, in South America, the Catholic Church continues to be the main political opposition to passing laws and the expression of public policies favorable to sexual and reproductive rights.[4] For example, the Chilean Supreme Court took Karen Atala's, a prominent judge, children away simply because she was a homosexual.[5] Therefore, in South America, LGBTQ rights are moving at a much slower pace than in the United States.[6]

In the absence of laws that prohibit discrimination on the basis of sexual orientation or gender identity, LGBTQ parents, like Karen Atala, who share children with a heterosexual parent, may remain at risk of losing custody battles.[7] Throughout the 21st century, the Supreme Court has ruled on landmark decisions giving homosexuals the same constitutional rights as heterosexuals.[8] For instance, in *Lawrence v. Texas*, the Court "held that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional, as applied to adult males who had engaged in a consensual act of sodomy in privacy of home."[9] Scholars have argued that *Lawrence* "brings traditionally neglected constitutional principles into family law to shield gay parents from the biases they typically face in this area."[10]

Additionally, in *Obergefell v. Hodges*, the Court condemned discrimination against LGBTQ individuals because the discrimination

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[3] *See generally* Matt Larsen, *Lawrence v. Texas and Family Law: Gay Parents' Constitutional Rights in Child Custody Proceedings,* 60 N.Y.U. ANN. SURV. AM. L. 53 (2004); (discussing *Lawrence v. Texas,* 539 U.S. 558 (2003)).

[4] Vaggione, *supra* note 1.

[5] Larry Rohter, *Lesbian Judge Fights Chilean Court for Taking Her Children*, N.Y. TIMES (July 20, 2006), http://www.nytimes.com/2006/07/20/world/americas/20chile.html.

[6] *See id.*

[7] *See* Douglas E. Abrams, Naomi R. Cahn, Catherine J. Ross, David D. Meyer & Linda C. McClain, *Adoption, in* CONTEMPORARY FAMILY LAW, 383 (4th ed. 2015).

[8] Amisha Padnani & Celina Fang, *Same-Sex Marriage: Landmark Decisions and Precedents,* N.Y. TIMES (June 26, 2015), https://www.nytimes.com/interactive/2015/06/26/us/samesex-marriage-landmarks.html

[9] *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

[10] Larsen, *supra* note 3 at 55.

was referenced as an "unjustified inequality within our most fundamental institutions that once went unnoticed and unchallenged."[11] Not only did the ruling in *Obergefell* address the marital rights of same- sex couples, it also implicated other areas of family law with LGBTQ orientation.[12]

This article will conduct a comparative analysis of LGBTQ rights between the United States and South America. Specifically, regarding the progression of homosexual rights of child custody in the United States and South America throughout the last decade. Part II will discuss the landmark American Supreme Court cases that have changed the way the country now looks at LGBTQ rights, particularly in custody disputes, while also explaining the role of the Inter-American Court of Human Rights. Part III will address Judge Karen Atala's pivotal case in the Inter-American Court of Human Rights and how her case has become the symbol of a human rights violation. Finally, Part IV will present an argument regarding the impact of Judge Atala's case in Chile and will also explain the comparison of LGBTQ rights in Chile throughout the last decade to such rights in the United States.

## II. PRIOR LAW AND PERSPECTIVE

### *A. Best Interest Standard in the United States*

In child custody disputes in the United States, courts weigh various factors in determining the child's "best interests" under statutes or common law.[13] Under the Uniform Marriage and Divorce Act, the court determines custody in accordance with the best interest of the child.[14] In doing so, the Act states that:

> The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of

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[11] *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

[12] Autumn L. Bernhardt, *The Profound and Intimate Power of the Obergefell Decision: Equal Dignity As A Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 2 (2016).

[13] UNIF. MARIAGE & DIVORCE ACT § 402 (amended 1973).

[14] *Id*.

> the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.[15]

The gender of a parent's new partner or partners may or may not make a difference to the court's evaluation of harm to the child depending on jurisdiction and the judge.[16] In custody issues involving LGBTQ biological parents, courts generally rely on two doctrinal approaches in determining custody rights: the nexus approach and the *per se* approach.[17] Adopted by at least 50% of the states, the nexus approach only considers a parent's homosexuality when determining custody if the parent's sexual orientation is shown to harm the child.[18] As recently as 2007, at least half of the states, as well as the District of Columbia, took the view that a parent's sexual orientation could be a factor in the best interest analysis but could not determine the outcome absent a showing of harm to the children.[19] The *per se* approach, only adopted in a minority of jurisdictions, assigns the greatest significance to a parent's sexual orientation.[20] Under the *per se* approach, courts presume that a LGBTQ biological parent's sexual orientation is adverse to the best interests of the child and will deny custody to such a parent even if there is no evidence that the parent's sexual orientation has had any effect on the child.[21]

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15 *Id*.

16 Abrams, *supra* note 7, at 837.

17 Ada Orakwusi, *Child Custody*, *Visitation and Termination of Parental Rights*, 8 GEO. J. GENDER & L. 619, 634 (2007).

18 *Id.*; see also *Maxwell v. Maxwell*, 382 S.W.3d 892 (Ky. Ct. App. 2012) (holding that because the best interest factors allowed consideration of a parent's misconduct but did not mention sexual orientation it was reversible error for a judge to award custody to the father based on the mother's sexual orientation in the absence of a showing that the children were harmed by it or that it interfered with their relationship with their mother.).

19 *Id.* at 634-35.

20 *Id.*

21 *Id.*; *see also Scott v. Scott*, 665 So. 2d 760, 766 (La. Ct. App. 1995) (holding that a change in custody from mother to father was warranted because of mother's homosexual relationship. In assessing whether a parent's sexual lifestyle is a cause for removing or denying custody, the court must consider: (1) whether the children were aware of the illicit relationship, (2) whether sex play occurred

## *B. Cases in the United States*

### 1. Lawrence v. Texas

In *Lawrence v. Texas*, two men, the petitioners, were arrested, charged, and convicted of violating a Texas statute making it a crime to engage in oral or anal sex with a person of the same sex, even in the privacy of their own home.[22] Petitioners appealed a decision of the Court of Appeals in Texas that upheld a state law that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct.[23] In a divided opinion, after hearing the case en banc, the Supreme Court rejected the affirmed convictions from the lower court using *Bowers v. Hardwick* as their support.[24] In *Bowers v. Hardwick*, the Court upheld a Georgia statute prohibiting private, consensual sodomy between both homosexual and heterosexual couples.[25] In a 6-3 opinion, the Court, in *Lawrence,* held that the Texas statute making a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause[26] and overturned *Bowers*.[27] In the majority opinion, Justice Kennedy concluded that the issue in *Bowers*, **"**demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply the right to have sexual intercourse.**"**[28] Kennedy went on further to discuss that the court in *Bowers* ruled the way it did to make a broader stance on the immorality of homosexual conduct seen through religious beliefs and respect for the traditional family.[29] He argued that is not the issue at stake,

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in their presence, (3) whether the conduct was notorious and brought embarrassment to the children, and (4) what effect the conduct has on the family home life.).

[22] *Lawrence v. Texas,* 539 U.S. 558, 563 (2003).

[23] *Id.*

[24] *Id.* at 564.

[25] *Id*. at 566.

[26] *Id. at 558; see* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.") (emphasis added).

[27] *See* Lawrence, 539 U.S. 558 at 578.

[28] *Id.* at 567.

[29] *Id.* at 571.

and that "[o]ur obligation is to define liberty for all, not to mandate our own moral code."[30] The Court also went on to reason that when homosexual conduct is made a criminal offense under state law, this leaves homosexuals subject to discrimination publicly and privately.[31] The majority concluded that the petitioners have a right under the Due Process Clause to engage in conduct without government intervention.[32] In her concurrence, Justice O'Connor based her conclusion on a breach of the Equal Protection Clause,[33] rather than the Due Process Clause because the Texas statute in this case made sodomy illegal only between individuals of the same sex, not individuals of opposite sex. O'Connor therefore concluded that Texas treated the same action differently solely based on sex.[34]

Justice Scalia, in his dissent, stated that nowhere in the majority opinion does it state that homosexual sodomy is a fundamental right under the Due Process Clause.[35] Also, if homosexual sodomy was a fundamental right, the majority's reasoning of the Texas' statute does not reach the standard of review of strict scrutiny.[36] Scalia also argued that if a state law prohibits homosexual sodomy, then the majority of the people believe that it is a legitimate state interest, and therefore the Texas' statute is constitutional under the rational basis test.[37]

2. United States v. Windsor

In *United States v. Windsor,* the court held that the Defense of Marriage Act (DOMA) was unconstitutional because its definition

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[30] *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 844, 850 (1992)).

[31] *Id.* at 575.

[32] *Lawrence,* 539 U.S. at 578.

[33] *Id.* at 579 (O'Connor, J., concurring); *see* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*.") (emphasis added).

[34] *Id.* at 581.

[35] *Id*. at 587.

[36] *Id.* at 586 (Scalia, J., dissenting).

[37] *Id.* at 589.

of marriage deprived married same-sex couples rights equal to that of married opposite-sex couples.[38] In *Windsor*, two women residing in New York were married in Ontario, Canada.[39] New York State recognized the Ontario marriage as valid through the "full faith and credit" clause of the Constitution.[40] When one of the women died, the other left her entire estate to the surviving spouse.[41] The surviving spouse sought to claim the estate tax exemption for the surviving spouse.[42] However, the DOMA defined marriage to be a "union between one man and one woman" and the definition of spouse referred only to a "person of the opposite sex who is a husband or wife."[43] The district court and the court of appeals both held that the provision was unconstitutional.[44]

In a 5-4 decision, Justice Kennedy wrote for the majority expressing that marriage is a province of the state, and if a state enacts a law that confers marriage rights on same-sex couples, but these couples cannot benefit from federal rights and privileges that are enjoyed by opposite sex couples, then the state and federal government are creating two different marriage regimes.[45] Kennedy stated that "DOMA writes inequality into the entire United States Code, " and that "this places same-sex couples in an unstable position of being in a second-tier marriage," and same-sex marriage is not deeply rooted in this Nation's history and tradition.[46] Three justices, Roberts, Scalia, and Alito, wrote dissents in *Windsor*.[47] Justice Scalia, stated that the majority opinion allows the government to regulate social and sexual norms, i.e. same-sex marriage.[48] While, Justice Alito discussed that DOMA is constitutional because nowhere in the

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38 *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

39 *Id.* at 2682.

40 *Id.* at 2683; *see* U.S. Const. amend. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

41 *Id.* at 2702 (Scalia J., dissenting).

42 *Id*.

43 *See id.* at 2683 (citing 1 U.S.C. § 7).

44 *Id.* at 2682.

45 *Windsor*, 133 S. Ct. at 2694.

46 *Id.* at 2707 (Scalia J., dissenting).

47 *See generally Windsor*, 133 S. Ct. 2675.

48 *Id.* at 2698-2714 (Scalia. J., dissenting).

Constitution does it guarantee the right to same-sex marriage.[49] He reasoned that although the issue of same-sex marriage is an issue of public policy, substantive due process protects "fundamental rights . . . deeply rooted in this nation's history" and that the right to same-sex marriage is not deeply rooted in this Nation's history and tradition.[50]

3. *Obergefell v. Hodges*, The Changing of American History

In *Obergefell v. Hodges*, the Supreme Court held under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that same-sex couples have a fundamental right to marry.[51] The petitioners were fourteen same-sex couples, including two men whose same-sex partners were deceased.[52] Laws of Michigan, Kentucky, Ohio, and Tennessee were held invalid in their respective district courts to the extent they excluded same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.[53] The Court of Appeals combined the cases and reversed, concluding that the states were not constitutionally obligated to recognize or legalize same-sex marriage.[54] In a 5-4 decision, Justice Kennedy wrote for the majority and reasoned four principles as to why marriage is a fundamental right under the Constitution: 1) marriage is vital to the concept of individual autonomy;[55] 2) Marriage supports a two-person union different from anything because of its importance to the committed individuals;[56] 3) Marriage protects children and families, and therefore heightens the importance of childrearing, procreating, and education;[57] and 4) Marriage is the keystone of social order.[58] Kennedy eloquently stated that, "[i]f rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that

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49 *Id.* at 2714 (Alito, J., dissenting).
50 *Id.* at 2714-15.
51 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).
52 *Id. at* 2593.
53 *Id.*
54 *Id.*
55 *Id*. at 2599.
56 *Id.*
57 *Obergefell*, 135 S. Ct. at 2600.
58 *Id.* at 2601.

approach, both with respect to the right to marry and the rights of gays and lesbians."[59] Because same-sex couples can exercise the fundamental right to marry in all states, the court concluded that there was no lawful basis for a state to refuse to recognize a lawful same-sex marriage performed in another state on the ground of its same-sex character.[60]

In this highly-contested case, all four dissenting judges wrote separate dissents. In his dissent, Chief Justice Roberts explained that even though the majority made strong arguments for the inherent fairness regarding same-sex marriage,that it is still up to the individual states to decide.[61] In a statutory approach, he discussed that the Constitution does not formally define marriage, and because of this, the fundamental right to marry does not mean that a state can change its definition of marriage.[62] In another dissent, Justice Scalia argued that "[t]he Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie."[63] He reasoned that the majority departed from legal Fourteenth Amendment jurisprudence to create a policy where none exists in the Constitution.[64] Justice Thomas also argued that the majority's decision threatens the religious liberty of our country by legislating from the bench rather than allowing the state legislatures rule on this issue.[65] And finally, Justice Alito wrote, "[t]oday's decision shows that decades of attempts to restrain this Court's abuse of its authority have failed."[66]

### *C. Chile- Culture and Politics*

In 1990, after seventeen years of brutal repression, the Chilean people ousted General Augusto Pinochet Ugarte's military dictatorship and ushered in a new era of cultural and political debate.[67]

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[59] *Id.* at 2602.
[60] *Id.* at 2607-08.
[61] *Id.* at 2611 (Roberts, C.J., dissenting).
[62] *Id.*
[63] *Obergefell*, 135 S. Ct. at 2630 n. 22 (Scalia, J. dissenting).
[64] *Id.* at 2628 (Scalia, J. dissenting).
[65] *Id.* at 2638 (Thomas, J., dissenting).
[66] *Id.* at 2643 (Alito, J., dissenting).
[67] Sarah R. Hamilton, *The Status of Women in Chile: Violations of Human Rights and Recourse Under International Law*, 25 WOMEN'S RTS. L. REP. 111 (2004).

While the dictatorship liberalized Chile's economy, its social policies and disregard for human rights prevented the country from fully joining the ranks of modern Western nations.[68] Due to the powerful influence of conservative religious factions within the government, Chilean laws do not protect significant human rights for thousands of Chilean women and they also do not reflect the predominant social values of the general population.[69] The single greatest barrier to Chilean social liberalization is the Catholic Church, which wields tremendous political power and is arch-conservative on women's issues.[70] Many high-ranking conservative politicians, particularly those who profited under the dictatorship, support Church policies and are often members of backward-looking Catholic organizations like Opus Dei and the Legionaries of Christ.[71]

Since its independence, Chile has had ten constitutions;[72] however, only three of them are especially important, in view of their common characteristics and duration: the 1833, 1925 and 1980 Constitutions.[73] They adopted and consolidated a unitary state, with a presidential system and the same separation of powers (President, Congress and Judiciary).[74] But the 1833 and 1925 Constitutions formed part of a period wherein the influence of the classical European continental tradition was very strong, which is why those constitutions were seen as political instruments without direct legal value.[75] Chapter III of the 1980 Constitution contains a long list of

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[68] *See generally* Press Release, Committee on the Elimination of Discrimination Against Women ("CEDAW"), Chile Ending 'Gender Order' Based on Exclusion, Violence Against Women, Women's Anti-Discrimination Committee Told U.N. Press Release WOM/1144 (June 22, 1999), available at http://www.un.org/News/Press/docs/1999/19990622.wom1144.html [hereinafter CEDAW, Press Release 1144].

[69] Sarah R. Hamilton, *The Status of Women in Chile: Violations of Human Rights and Recourse Under International Law*, 25 WOMEN'S RTS. L. REP. 111, 112 (2004).

[70] *Id.*

[71] *Id.*

[72] These laws are enacted to interpret the Constitution. Article 66 of the Chilean Constitution required three-fifths of the senators and deputies.

[73] José Ignacio Martínez Estay, *Chapter 4 the Impact of the Jurisprudence Inter-American Court of Human Rights on the Chilean Constitutional System*, 16 IUS GENTIUM 63, 67 (2012).

[74] *Id*.

[75] *Id.* at 68.

rights and liberties (Article 19), and includes a special mechanism to protect them before courts of law called *recurso de proteción*.[76] Because of this, judges play a vital role because the Chilean Constitution is now enforceable before courts of law.[77]

### *D. Inter-American Court on Human Rights*

In 1969, the Organization of American States adopted the American Convention on Human Rights.[78] The Convention created the Inter-American Court on Human Rights, which was then established in 1979 with headquarters in San Jose, Costa Rica.[79] The Court meets in regular and special sessions several times a year to examine allegations of human rights violations in the Western hemisphere.[80] Its determination of human rights stems from three documents: the Organization of American States Charter, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights.[81]

The Inter-American Court was charged with three main functions: first, to render binding decisions on contentious cases; second, to make binding decisions on provisional measures in situations of extreme gravity and urgency to avoid irreparable damage; and third, to issue advisory opinions on human rights issues.[82] To accomplish these goals, the Court has jurisdiction over the countries of the Americas that have both ratified the American Convention on Human Rights and have explicitly consented to the Court's jurisdiction.[83] All the countries in Latin America that have ratified the Convention have accepted jurisdiction of the court.[84] However, the

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[76] Protection resource; Martínez Estay, *supra* note 65 at 68.

[77] *Id*.

[78] *Introduction*, ORG. OF THE AM. STATES, http://www.oas.org/en/iachr/mandate/Basics/intro.asp#_ftnref1.

[79] *Id.*

[80] *See generally What is the IACHR?,* Org. of Am. States, http://www.oas.org/en/iachr/mandate/what.asp (last visited January 23, 2016).

[81] *Basic Documents in the Inter-American System,* Org. of Am. States, http://www.oas.org/en/iachr/mandate/Basics/intro.asp (last visited January 23, 2016).

[82] Judge Diego García-Sayán, *The Role of the Inter-American Court of Human Rights in the Americas,* 19 U.C. DAVIS J. INT'L L. & POL'Y 103, 104 (2012).

[83] *Id.*

[84] *Id.*

United States, Canada, and some Anglo-speaking countries in the Caribbean are part of the Organization of the American States, but are not parties of the Convention, and therefore have not accepted jurisdiction of the Court.[85] There are currently 24 countries that are parties to the American Convention and 21 of those countries have accepted the jurisdiction of the Court.[86] The jurisprudence of the Court has become a source of guidance and doctrinal orientation for many decisions in national courts.[87] Some countries have laws in their constitutions that place a ruling by the Inter-American Court of Human Rights above their own courts.[88]

By filing a petition before the Inter-American Commission on Human Rights ("Commission"), victims of alleged human rights violations can try to obtain relief through the hearing process. Once the petition is filed, the Commission investigates the alleged violation and decides on its admissibility.[89] An Admissibility Report is approved if the petition meets the admissibility requirements set forth in Articles 46 and 47 of the American Convention on Human Rights, in accordance with the procedure established in Articles 30 to 36 of the Commission's Rules of Procedure.[90] When an admissibility report is adopted, the petition is registered as a case and a proceeding on the merits begins.[91] The adoption of an admissibility report does not constitute a prejudgment on the merits of the matter.[92] Once the case has been deemed admissible, the Commission then issues a report, which generally contains recommendations.[93] If the government that the report is directed at does not implement these recommendations, the Commission can refer the case to the Inter-

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[85] *Id.* at 105.

[86] *Id.*

[87] *Id.* at 108.

[88] Larry Rohter, *Lesbian Judge Fights Chilean Court for Taking Her Children*, N.Y. TIMES (July 20, 2006), http://www.nytimes.com/2006/07/20/world/americas/20chile.html.

[89] *What is the IACHR?,* Org. of Am. States, http://www.oas.org/en/iachr/mandate/what.asp (last visited January 23, 2017).

[90] Admissibility Reports, Org. of Am. States, http://www.oas.org/en/iachr/decisions/admissibilities.asp (last visited February 9, 2018).

[91] *Id.*

[92] *Id.*

[93] García-Sayán, *supra* note 82 at 104.

American Court on Human Rights.[94] The Commission is the body that presents the cases to the Inter-American Court when domestic remedies have been exhausted and the process at the Commission was unsuccessful.[95]

The Court today hears a variety of different issues.[96] As a result of authoritarian regimes and military dictatorships, the Court's first cases mostly dealt with disappearances, torture, or extrajudicial killings.[97] The Court has also decided cases about amnesties and self-amnesties that include major human rights violations.[98] Some decisions from the Court have led to changes in legal provisions in Costa Rica, Guatemala, and Peru regarding due process in administrative and judicial proceedings.[99]

### *E. The American Convention*

The American Convention on Human Rights, also known as the Pact of San José, is an international human rights agreement.[100] It was adopted in many countries in the Western Hemisphere on November 22, 1969. [101] The bodies responsible for overseeing compliance with the Convention are the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights, both of which are institutions of the Organization of American States (OAS).[102] Article 11, Section 2, the Right to Privacy, of the American Convention states that "no one may be the object of arbitrary or

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94 *Id.*

95 *Id.*

96 *Id.* at 106.

97 *Id.*

98 *Id.*; *e.g.* Alexandra Huneeus, Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights, in Cultures of legality: Judicialization and Political Activism in Latin America, at 118 (Javier Couso et al. eds., 2010); Theresa Blackman, Inter-American Court to Hold Special Sessions in Barbados Next Week, Caribbean News Now (Oct. 7, 2011), available at http://www.caribbeannewsnow.com/headline-Inter-American-court-to-hold-special-sessions-in-Barbados-next-week-8195.html.

99 *Id.* at 107 (citing generally Judge Diego García-Sayán, *The Inter-American Court and Constitutionalism in Latin American*, 89 Tex. L. Rev. 1835 (2011)).

100 American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143.

101 *Id.*

102 Basic Documents in the Inter-American System, IACHR, http://www.oas.org/en/iachr/mandate/basic_documents.asp.

abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation."[103]

Article 17, Section 1, the Rights of the Family, states "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state."[104]

### *F. Marta Lucía Álvarez Giraldo v. Colombia*

Prior to Judge Atala's case, the Commission found that discrimination on the basis of sexual orientation violated human rights.[105] The Petitioner, Marta Lucía Álvarez Giraldo ("Giraldo"), an inmate at a women's prison in Colombia, was denied her right to intimate visits with her same-sex partner because of her sexual orientation.[106] The Ombudsman for the town where the prison was located, appealed the prison director's decision denying Giraldo visits with her partner to a criminal court, which upheld the director's decision.[107] The court in Colombia refused to review the case.[108]

The Petitioner appealed to the Inter-American Commission on Human Rights, asserting that the prison authorities' refusal to permit her right to intimate visit violated Articles 5, 11, and 24 of the American Convention on Human Rights.[109] These articles protect the right to humane treatment, privacy, and equal protection.[110] Giraldo also alleged that the relevant Colombian legislation did not limit the right to intimate visits based on sexual orientation.[111] The Colombian State did not challenge admissibility of the case, but sought to justify its refusal as to the merits of the case on the grounds of security, discipline and morality in penitentiary institutions.[112] The Commission reached out to the parties with a goal of reaching a friendly

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[103] American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143.

[104] *Id*.

[105] *See generally* Marta Lucia Álvarez Giraldo v. Colombia, Case 11.656, Inter-Am. Comm'n H.R., Report No. 71/99, OEA/Ser.L/V/II.106, doc. 3 (1999).

[106] *Id.* at ¶ 2.

[107] *Id.* at ¶ 8.

[108] *Id.* at ¶ 9.

[109] *Id.* at ¶ 1.

[110] *Id*.

[111] *Id.* at ¶ 10.

[112] *Id.* at ¶ 11.

settlement on the matter;[113] however, the State rejected the possibility of a friendly settlement.[114]

## III. KAREN ATALA AND DAUGHTERS V. STATE OF CHILE

### *A. Procedural History*

On March 29, 1993, Karen Atala married Ricardo Jaime López Allende.[115] The couple had three daughters, M., V., and R., who were born in 1994, 1998, and 1999, respectively.[116] Atala also had a son from a previous marriage.[117] In March 2002, Atala and Allende decided to end their marriage.[118] As part of the dissolution of their marriage, they established, by mutual consent, that Atala would maintain the custody of the three girls, with a weekly visitation schedule at the home of their father.[119] In November of 2002, Emma de Ramón, the partner of Atala, moved in and started living with the three daughters and the eldest son.[120]

The father of the three girls filed a custody suit with the Juvenile Court of Villarrica on January 14, 2003, claiming that the "the physical and emotional development [of the girls] was seriously at risk" if they continued to live in the care of their mother.[121] López argued that Ms. Atala "[was] not capable of watching over and caring for [the three girls, given that] her new sexual lifestyle choice, together with her cohabiting in a lesbian relationship with another woman, [were] producing [ . . . ] harmful consequences for the development of these minors" because the mother had not shown any concern for the care and protecting the development of the girls.[122] In addition,

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[113] Marta Lucia Álvarez Giraldo v. Colombia, Case 11.656, Inter-Am. Comm'n H.R., Report No. 71/99, OEA/Ser.L/V/II.106, doc. 3, ¶ 5 (1999).

[114] *Id*.

[115] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 30 (Feb. 24, 2012).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 31 (Feb. 24, 2012).

[122] *Id*.

López argued that "[to] treat as normal, within the legal order, partners of the same sex [leads] to distort the meaning of a human couple, man and woman, and therefore, alters the natural meaning of the family, [ . . . ] since it affects the fundamental values of the family, as the core unit of society;" therefore, Atala's sexual choice disrupts the healthy, fair, and normal coexistence to which the three children have a right.[123] López finally argued that it is also necessary to take into account "all of the consequences of a biological nature that would be implied for minors living with a lesbian couple," in terms of diseases given the sexual practices of a lesbian couple, the girls would be under risk of contracting sexually transmitted diseases, such as herpes and AIDS.[124] Because Atala was so widely known in the Chilean community, numerous media organizations covered the custody suit, including newspapers with national circulation such as *Las Últimas Noticias* and *La Cuerta*.[125]

On May 13, 2003, even though there was no evidence to presume the legal incompetence of the mother, the Juvenile Court of Villarica granted provisional custody of the girls to the father and regulated the mother's visits.[126] The Juvenile Court reasoned that Atala altered the normal family routine of her daughters and instead gave "preference to her personal interests and well-being over the emotional well-being and social development of her daughters."[127] On May 8, 2003, in compliance with the decision of the Juvenile Court of Villarrica, Atala brought her three daughters to their father.[128] In response to the Juvenile Court's decision, Atala sought to prevent the Regular Judge of the Juvenile Court of Villarica from continuing to hear the case based on grounds of incompatibility.[129] The Regular Judge of the Judge of the Juvenile Court of Villarica declared "sufficient grounds" for incompatibility and granted Atala's request.[130]

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123 *Id*.
124 *Id*.
125 *Id*. at ¶ 34.
126 *Id.* at ¶ 41.
127 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 41 (Feb. 24, 2012).
128 *Id.* at ¶ 42.
129 *Id.*
130 *Id.* at ¶ 43.

Given that the Regular judge was disqualified from hearing the case, on October 29, 2003, the Acting Judge of the Juvenile Court of Villarica rejected López's petition for custody.[131] The Judge concluded that the existing evidence established that Atala's sexual orientation was not an impediment to carrying out responsible motherhood, that there was no psychiatric pathology that would prevent her from exercising her role as a mother, and that there were no indications that would allow for the presumption of any grounds for incapacity on the part of the mother to take on the personal care of the minors.[132]

### *B. The Appeal*

Then on November 11, 2003, López filed an appeal against the court's decision and a petition for a temporary injunction against Atala, arguing that complying with the lower court's decision would mean "a radical and violent change in the girls' current status quo."[133] Thereafter, on November 24, 2003, the Court of Appeals of Temuco granted the injunction.[134]

### *C. Supreme Court of Justice of Chile*

"On May 31, 2004, the Fourth Chamber of Chile's Supreme Court of Justice, in a split three-to-two decision, admitted the complaint appeal and granted permanent custody to the father."[135] The Court concluded that "the potential confusion over sexual roles that could be caused in [the girls] by the absence from the home of a male father and his replacement by another person of the female gender poses a risk to the integral development of the children from which they must be protected."[136] "The Court also deemed the girls to be in a 'situation of risk' that placed them in a vulnerable position in their social environment," because their family environment dif-

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131 *Id.* at ¶ 44.
132 *Id*.
133 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 50 (Feb. 24, 2012).
134 *Id.* at ¶ 51.
135 *Id.* at ¶ 54.
136 *Id.* ¶ 56.

fers significantly from that of their friends, "exposing them to ostracism and discrimination, which would also affect their personal development."[137]

In dissent, the two judges argued that depriving the mother of custody of her daughters solely on her sexual choice imposes an illegal, "unnamed sanction" on the daughters and on their mother, in addition to being discriminatory.[138] Furthermore, the dissent argued that, "a judge cannot change the general rule of where to place the care of the children based on arbitrary judgments or unjustified, frivolous or ambiguous grounds, but rather only when a restrictive examination of the legal standard and the accompanying evidence shows an 'essential' interest of the child."[139]

### *D. The Inter-American Court of Human Rights: Case of Atala Riffo and Daughters v. Chile*

Then, on November 4, 2004, Karen Atala and her attorneys filed a petition to the Inter-American Commission on Human Rights alleging that the state of Chile violated "the right to personal integrity (Article 5(1)); the right to a fair trial (Article 8); the right to protection of the honor and dignity (11(1)); the right to privacy (Article 11(2)); the rights to protection of the family (Article 17(1) and 17(4)); the rights of the child (Article 19); the right to equal protection (Article 24); and the right to judicial protection (Article 25)" in the American Convention on Human Rights, "in conjunction with violation of the obligations to guarantee rights and to give domestic legal effect to rights set forth in Articles 1(1) and 2 of the American Convention; and Articles 2, 5, 9 (2) and (3), 12, and 16 of the United Nations Convention on the Rights of the Child" (hereinafter, the "Convention on the Rights of the Child"). [140]

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[137] *Id.* ¶ 57.

[138] *Id.* ¶ 58 n.76.

[139] *Id.* ¶ 58.

[140] Atala v. Chile, Petition 1271-04, Inter-Am. Comm'n H.R., Report No. 42/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1, ¶¶ 1-2 (2008); Organization of American States, American Convention on Human Rights, Nov. 22 1969, O.A.S.T.S. No. 36, 144 U.N.T.S. 123; G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

Atala's initial petition was submitted before the Inter-American Commission on November 24, 2004 by Atala,[141] and was approved by the Report on Merits on December 18, 2009.[142] The Inter-American Commission on Human Rights concluded that the state of Chile "did violate the right of Atala to live free from discrimination as provided in Article 24 of the American Convention . . . ."[143] Also, the Commission required the Chilean government to "hold an act of public acknowledgement" and "implement education programs and training courses" regarding this issue.[144] On September 17, 2010, the Inter-American Commission on Human Rights filed a claim against the Republic of Chile in relation to Karen Atala Riffo's case.[145]

The Inter-American Commission on Human Rights held that the state of Chile had not complied with the recommendation made in the Report on Merits, and decided to submit the case to the jurisdiction of the Inter-American Court.[146] The Court's role, however, was not to issue a ruling on the custody of the three girls because that is a matter reserved exclusively for Chile's domestic courts[147] The case concerned the alleged international responsibility "for the discriminatory treatment and arbitrary interference in the private life suffered by Atala due to her sexual orientation" by the State.[148] "The case also concern[ed] the court's alleged failure to take into account the best interest of the girls, whose custody and care were determined without their opinions and on the basis of sexual discrimination . . . ."[149] "The Commission requested the Court to declare Chile in violation of Articles 11 (Right to Privacy), 17(1) and 17(4)

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[141] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 1 (Feb. 24, 2012).

[142] Atala Riffo and Daughters v. Chile, Case 12.502, Inter-Am Comm'n H.R., Report No. 139/09, ¶ 23 (2010).

[143] *Id.*.

[144] *Id.* ¶ 24.

[145] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 1 (Feb. 24, 2012).

[146] Atala Riffo and Daughters v. Chile, Case 12.502, Inter-Am Comm'n H.R., Report No. 139/09, ¶ 38 (2010).

[147] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 66 (Feb. 24, 2012).

[148] *Id*.

[149] *Id*.

(Rights of the Family), 19 (Rights of the Child), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the Convention . . . ."[150]

The Commission argued that Atala's sexual orientation, particularly the expression of that orientation in her lifestyle, was the main ground for the decision" to take away her custody of her daughters.[151] "[T]he State argued that there was compelling evidence that showed that Atala had an intensely self-centered attitude and personal characteristics that made it difficult for her to adequately exercise a maternal role, circumstances that led to the conclusion that the mother did not offer a suitable environment for the development of the daughters."[152]

I. The Right to Equality and the Prohibition of Discrimination

In regards to equality and discrimination, Chile argued that when the Member States signed the American Convention, they gave their consent to a number of human rights violations in mind, and not to others that had not existed at the time.[153] Chile further argued that when it signed the Convention, sexual orientation was not a suspect category; therefore, it had not violated the Convention.[154] In response, the Supreme Court of Chile reasoned that the American Convention does not give an explicit definition of the term "discrimination."[155]

In a truly landmark decision, the Court reasoned that the term "or another social condition" leaves open the opportunity to include other categories that had not been explicitly indicated.[156] Therefore, the Court should construe the term "or another social condition" in the light most favorable for the human being and "in the light of the evolution of fundamental rights in contemporary international law."[157] The Court thus reasoned that the State discriminated in the

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150 *Id*.

151 *Id*. at ¶ 59.

152 *Id.* at ¶ 62.

153 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 74 (Feb. 24, 2012).

154 *Id.* at ¶ 85.

155 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 81 (Feb. 27, 2012).

156 *Id.* at ¶ 85.

157 *Id.*

respect of a right contained in the Convention, and therefore failed to comply with its obligation under the Convention.[158]

The Court also pointed out that even though the Inter-American Court has not recognized sexual orientation as "another condition" of discrimination, the European Convention on Human Rights had in the *Case of Salgueiro da Silva Mouta v. Portugal*[159] and again reiterated this notion in the *Case of Clift v. United Kingdom*.[160] The Court stated that the State's argument that some countries do not respect the rights of sexual minorities is not an effective legal argument to repeat that discrimination in Chile.[161] They stated that the Court cannot abstain from issuing a decision merely because the rights of sexual minorities are a controversial issue in some countries, and must "refer solely and exclusively to the stipulations of the international obligations arising from the sovereign decision by the States to adhere" to the Convention.[162]

II. Difference in Treatment Based on Sexual Orientation

The Court reasoned that discriminatory treatment occurred because the custody process focused on Atala's sexual orientation as well as on the alleged effect that her partner could have on the three girls.[163] Therefore these discriminatory considerations were central to the discussion in the main judicial decisions made during the proceeding.[164] The Court stated that the arguments and the language used showed a link between the judgment and the fact that Atala was living with her homosexual partner. This connection indicates that the Supreme Court of Chile allotted significant weight to Atala's sexual orientation.[165]

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158 *Id.* at ¶ 82.

159 *Id.* at ¶ 87 (citing Salgueiro da Dilva Mouta v. Portugal (No. 33290/96), 1999-IX Eur. Ct. H.R. 309).

160 *Id.* (citing Case of Clift v. United Kingdom, App. 7205/07 Eur. Ct. H.R., No. 1106, ¶ 57 (2010)).

161 *Id.* at ¶ 92.

162 *Id.*

163 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 96 (Feb. 27, 2012).

164 *Id.*

165 *Id.* at ¶ 97.

III. The Child's Best Interest

The State argued that it was in the girls' best interest to not live with their mother, and alleged that the girls had suffered due to their mother's sexual orientation.[166] The Commission indicated that the Supreme Court and the Juvenile Court of Villarica based their decisions on "assumptions of risk derived from prejudices and erroneous stereotypes" of a certain social group and, therefore, the judges' decisions were based on their "stereotyped conceptions of the nature and effects of relationships between people of the same sex."[167]

The Court reiterated that the regulating principle on children's rights is derived from "the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential."[168] The Court added that cases regarding the determination of a child's best interest involve the custody and care of children whose parent's behavior negatively impact the child's well-being, and is not "speculative or imaginary." Additionally, the Court noted that "assumptions, stereotypes, or generalized considerations" involving parents' personal interests are not admissible as risks.[169] The Inter-American Court concluded that the State attempted to allege the children's risk or damage because of Atala's sexual orientation without any proof or physical evidence of the children's harm.[170] In an integral development of the law, the Court therefore held that the child's best interest cannot be used to justify discrimination against the parents based on their sexual orientation and therefore cannot be taken into consideration as a component in a custody case.[171]

IV. Right to Private Life

The Commission held that the State's intrusion into Atala's private life was "arbitrary," since the custody decision was based on discriminatory prejudices focused on her sexual orientation and also interfered with Atala's freedom to make her own decisions of her

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166 *Id.* at ¶ 41.
167 *Id.* at ¶ 101.
168 *Id.* at ¶ 108.
169 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 109 (Feb. 27, 2012).
170 *Id.* at ¶ 110.
171 *Id.*

personal life.[172] The Court has held in the past that the realm of privacy is "exempt and immune from abusive or arbitrary intrusion or aggression by third parties or by public authorities."[173] The Court also noted that the justification that the State gave for interfering into Atala's private life was that it was in the best interest of the three girls.[174] Even though the Court acknowledged that serving the best interest of the three girls was a legitimate goal of the state, the Court promulgated that domestic courts should have been limited themselves to examining parental behavior, including aspects of Atala's private life, but that domestic courts should not have exposed and scrutinized Atala's sexual orientation.[175]

## V. Right to Family Life

One of the main points deliberated in the judgment of the Supreme Court of Chile and the decision of the Juvenile Court of Villarica was the fact of Atala's cohabitation with her lesbian partner. [176] The Inter-American Court found it essential to examine the domestic court's violation of the right to family alleged by the Commission and the representatives.[177] The European Court of Human Rights has reasoned that "a cohabiting same-sex couple living in a stable de facto partnerships, falls within the notion of 'family life,' just as the relationship of a different-sex couple in the same situation would," and that it is unnatural to maintain the view that a same-sex couple cannot enjoy family life in the same way as a different-sex couple for the purposes of Article 6 of the European Convention.[178]

The Court noted that, in the domestic trials, there had been evidence of a close relationship between Atala, De Ramón, Atala's older son, and the three girls.[179] In a public hearing before the Inter-

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[172] *Id.* at ¶ 156.

[173] At *Id.* at ¶ 161 (citing Case of the Ituango Massacres v. Columbia, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 148 ¶ 194 (Jul. 01, 2006).

[174] *Id.* at ¶ 166.

[175] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 166 (Feb. 27, 2012).

[176] *Id.* at ¶ 168.

[177] *Id.*

[178] *Id.* at ¶ 174 (citing Case Schalk and Kopf v. Austria, App. 30141/04 Eur. Ct. H.R., No. 158, ¶ 94 (2010)).

[179] *Id.* at ¶ 176.

American Court, Atala stated that, "we were an absolutely normal family . . . [a] boy, three girls, a cat, a male dog, a female dog, a house, we had projects as a family . . . [w]e had dreams of a family."[180] It was clear that Atala, her partner, and the children comprised a family unit under the Articles 11(2) and 17(1) of the American Convention, because the family had a close personal and emotional relationship, involving frequent contact.[181] Because of this determination, the Court concluded that the domestic courts violated Convention when the State arbitrarily interfered with Atala's family life and separated the children in an "unjustified manner" from their family environment.[182]

VI. Right to Judicial Protection

The Commission concluded that the Supreme Court of Chile and the Juvenile Court of Villarica had violated Article 8(1) and Article 25 of the American Convention because those decisions had not given Atala a fair impartiality by considering her sexual orientation as the primary factor in her fitness as a mother.[183] At the same time, the Commission concluded that the State had not violated the judicial guarantees established in the Convention, because there was no evidence that indicating a situation in which the judges were shown to have partiality.[184]

VII. Right of the Children

The Commission noted that the Supreme Court of Chile "made no efforts to hear the girls."[185] Article 8(1) of the American Convention protects every persons' rights to be heard, including children, in proceedings in which their rights are being determined.[186] This right must also be interpreted in relation to Article 12 of the Convention on Rights of the Child, which includes particular situations

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[180] *Id.*

[181] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 177 (Feb. 27, 2012).

[182] *Id.* at ¶ 178.

[183] *Id.* at ¶ 179.

[184] *Id.* at ¶ 190-92.

[185] *Id.* at ¶ 193.

[186] *Id.* at ¶ 196.

in which a child can be heard, according to his/her age and maturity, after ensuring that it does not harm his general well-being.[187]

The Commission determined that the Juvenile Court of Villarica did comply with the child's right to be heard, because it clearly stated that the views of the three girls were taken into account.[188] However, the Court held that the Supreme Court of Justice of Chile did not mention the wishes expressed by the girls in the complaint or in the ruling of the Supreme Court.[189]

## VIII. Reparations

Testimony given by psychiatrists in the Commission's case showed that Atala and her daughters suffered as a result of this human rights violation.[190] As such, the Court ordered the State to provide Atala and her daughters "appropriate and effective medical and psychological care" for four years.[191] The Court also ordered that the State shall publish, within six months from the notification of the judgment, the official summary of the judgment written by the Inter-American Court, once only, in the Official Gazette, in a newspaper of broad national circulation and that the entire Judgment shall be posted on a government website for a period of one year.[192]

The Court also believed that the State must publicly acknowledge its international responsibility.[193] Therefore, the Court ordered the State to openly announce the human rights violation in the manner of a public ceremony, which was to be discussed with the victims' representative in advance.[194] The Inter-American Court emphasized that the State needed to guarantee that an event like this would not happen again and that the reparations towards the State should have a "transformative" purpose to promote structural

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[187] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 196 (Feb. 27, 2012).

[188] *Id.* at ¶ 203.

[189] *Id.* at ¶ 204.

[190] *Id.* at ¶ 253.

[191] *Id.* at ¶ 254.

[192] *Id.* at ¶ 259.

[193] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 260 (Feb. 27, 2012).

[194] *Id.* at ¶ 263.

changes and to dismantle certain stereotypes and practices that propagate discrimination toward LGBTQ groups.[195] The Court ordered the State to implement educational programs and training courses in: i) human rights, sexual orientation and non-discrimination; ii) protection of the rights of the LGBTQ community; and iii) discrimination, overcoming gender stereotypes of LGBTQ persons and homophobia.[196] The Court ordered that these courses be directed toward public officials at the regional, national, and judicial levels.[197]

## IX. Compensation for Pecuniary and Non-Pecuniary Damages

The Court found that Atala and the girls' medical expenses from the emotional and psychological trauma from the case could not be precisely determined.[198] However, the Court found that the future medical expenses should be covered through the implementation of the rehabilitation measure for medical and psychological care already ordered. Additionally, the Court ordered that the State pay $10,000 USD to cover the medical costs already incurred.[199]

The Court reasoned that the violations alleged in the case had led to different types of damage in the victims' lives, as well as different levels of stigma and distress.[200] The Court noted that, in a public hearing, Atala stated that she felt "profoundly humiliated, exposed, as if she had been stripped down naked and thrown into the public square."[201] Atala also declared in that hearing that, because of this case, her reputation, personal activities, and her social and family relationships were all affected.[202] As a result, the Inter-American Court granted non-pecuniary damages of $20,000 USD to Atala, and $10,000 USD to each daughter.[203]

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195 *Id.* at ¶ 267.
196 *Id.* at ¶ 271.
197 *Id.*
198 *Id.* at ¶ 294.
199 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 294 (Feb. 27, 2012).
200 *Id.* at ¶ 299.
201 *Id.* at ¶ 298.
202 *Id.*
203 *Id.* at ¶ 299.

As for costs and expenses, the Court must assess the expenses incurred in the domestic and international level for the case.[204] Taking into account both parties' arguments, the Inter-American court ordered the State to pay $12,000 USD to the victim, Atala, for costs and expenses incurred throughout the trial.

## *E. Analysis*

### I. Impact of Inter-American Court on Human Rights in South America

The Inter-American Court of Human Rights has had a major impact in alleviating discriminatory conduct against homosexuals in South America. Because the Inter-American Court provides a long list of detailed actions that a State must abide by to resolve a violation, rather than just awarding monetary compensation, it remains unique from other international bodies. For example, all the of the remedies the Inter-American Court on Human Rights awards are "remedies of government" because they require a State to act in a certain manner and to change its previous practice.[205] The Inter-American Court is "the only international human rights body with binding powers that has consistently ordered equitable remedies in conjunction with compensation."[206] Also, after the Court issues a reparatory ruling, the Court continuously monitors a State's compliance. In the Court's reparations orders, frequently, a State reports its compliance efforts within a set period.[207]

An issue with the Inter-American Court on Human Rights occurs when its decisions clash with the decisions of a State's national court. This leads to confrontation between national and international

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[204] Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 304 (Feb. 27, 2012).

[205] Alexandra R. Harrington, *Internalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System*, 26 TEMP. INT'L & COMP. L.J. 1, 21 (2012).

[206] Thomas Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUMBIA J. TRANSNAT'L L. 351, 355 (2008).

[207] James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 781 (2008).

courts. The question is which court is judicially superior: if the international court is understood to be judicially superior, then the interpretation by an international court is superior to its national counterpart. In Chile, the Constitution does not explicitly enunciate the hierarchy of the various international treaties on human rights, but rather states that all international treaties are subject to the Constitution.[208] Further, the Chilean constitutional system gives treaties the same legal status as ordinary laws.[209] As such, it is possible to appeal against treaties that deal with human rights since they are judicially inferior to the Constitution.[210] That is why they can be reviewed in order to determine whether they are in accordance with the Constitution.[211]

Another issue arises when an international court declares a human rights violation that goes against a State's culture and history. For states to listen and cooperate, the "Inter-American Court must make itself matter to local state actors beyond the foreign ministry to achieve greater implementation of its rulings."[212] This can mean years of overseeing how state actors carry out detailed injunctive orders until it deems there has been full compliance.[213] Out of 285 cases in the Inter-American Court, only 33 percent of them complied with the Court's orders.[214] Additionally, if three branches of the state government are involved— the executive, the public prosecutor, and the judiciary— compliance drops even further to 2 percent.[215] Therefore, strict oversight over state actors is essential in resolving human rights violations.

Compliance with the Inter-American Court's orders is crucial for many reasons. First, the Court mostly hears high-profile cases of

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[208] José Ignacio Martínez Estay, *Chapter 4, The Impact of the Jurisprudence Inter-American Court of Human Rights on the Chilean Constitutional System*, 16 IUS GENTIUM 63, 69 (2012).

[209] *Id.* at 70.

[210] *Id.*

[211] *Id.*

[212] Alexandrea Huneeus, *Courts Resisting Courts: Lessons from the Inter-American's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 496 (2011).

[213] *See* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 DUKE L.J. 1265*, 1266-68 (1983).

[214] Huneeus, *supra* note 212, at 509.

[215] *Id.* at 510.

egregious state violations of fundamental rights,[216] like that of the case of Karen Atala. Also, many of these cases affect not just a single victim, but groups of victims.[217] For example, in Karen Atala's case, even though she solely brought action against the State of Chile for declining the right to custody of her children on the basis of sexual orientation, her case provides precedence for all homosexuals in custody disputes throughout Chile. Also, remediation and reparations in politically prominent cases are not only ways of seeking justice, but also ones that gain attention at the national and international levels.[218] And finally, as in Atala's case, the Court frequently issues "non-repetition measures," ordering the state to make structural changes to assure that similar injuries do not occur.[219]

In most cases, however, the Inter-American Court continues to confront problems in achieving important and long-lasting implementation of its orders.[220] Lack of political will, along with the powerful position of the armed forces and police in various Latin American countries, inhibits the Court's efforts in prompting states to punish the offenders.[221] On top of that, even if a country's supreme court or national government is receptive to Inter-American jurisprudence, local government and authorities that are actually responsible for the daily implementation usually resist the Court's order, slowing down the advancement of human rights locally.[222]

It has been an ongoing debate as to how to make Latin American countries comply with Inter-American Court orders. Some scholars believe that the best way to ensure that a State complies with Inter-American Court decisions is to use media attention and public support.[223] Past events indicate that advancement of human rights in many Latin American countries is most likely to occur when positive media coverage, public support, and/or international pressure can be brought to bear on a given issue.[224] Others believe that the

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216 *Id.* at *506*.
217 *Id.*
218 *Id.*
219 *Id.*
220 Cavallaro, *supra* note 207, at 788.
221 *Id.*
222 *Id.*
223 *Id.* at 789.
224 *Id.* at 792.

Court should be more mindful of national high courts, and less quick to impose its judgment on that of a Supreme Court.[225]

## II. LGBTQ Rights in the United States

Despite decades of research that have consistently shown sexual orientation is not a relevant factor in terms of a person's ability to parent or in terms of the psychological adjustment of children,[226] to this day, some parents in the United States still lose custody of their children due to their sexual orientation. While societal prejudice associated with homosexuality may prove to be a source of distress for children of homosexual parents, the degree of stress is not correlated to the amount of responsibility a homosexual parent has for a child. [227] It is more about responsibility assigned to the parents, not necessarily time. [228] The American Law Institute has even stated that considering homosexuality as a negative factor in determining child custody may reinforce the stigma of that status, making the child's acceptance of the parent more difficult.[229]

In the past, many parents lost custody of their children simply because they were LGBTQ even in the absence of any evidence that their sexual orientation had harmed the children. For example, in *Scott*, the court ordered the transfer of custody of sons from their lesbian mother to their heterosexual father based on the childrens' purported confusion about gender roles while in their mother's custody.[230] Simply put, being LGBTQ in and of itself was sufficient for the court in *Scott* to deny child custody, this reasoning is known as the *per se* test.[231]

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225 Huneeus, *supra* note 212, at 526-27.

226 Marcus C. Tye, *Lesbian, Gay, Bisexual, and Transgender Parents: Special Considerations for the Custody and Adoption Evaluator*, 41 FAM. CT. REV. 92, 95 (2003).

227 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.12 cmt. e (AM. LAW INST. 2002).

228 *Id.*

229 *Id.*

230 *Scott v. Scott*, 665 So. 2d 760, 766-67 (La. Ct. App. 1995).

231 Orakwusi, *supra* note 17, at 635.

Many commentators and advocators believe that the *per se* test cannot withstand constitutional scrutiny after the decision in *Lawrence*.[232] In *Lawrence*, the U.S. Supreme Court held that adults have a protected liberty interest in private, adult, consensual, noncommercial, intimate sexual conduct.[233] Commentators believe that (1) *Lawrence* struck down all remaining statutes criminalizing private, adult consensual conduct; and (2) that, as a result, courts can no longer rely on sodomy statutes to support their claims that LGBTQ parents are engaging in criminal conduct, and therefore, use this to deny the LGTBQ parent custody of children.[234] Additionally, *Lawrence* arguably limits the extent to which a court can rely on societal disapproval of LGTBQ people as a basis for limiting their custodial rights.[235] Finally, some commentators believe that it would be impermissible to deny or restrict a parent's custody because the parent is engaging in constitutionally protected conduct.[236]

Even though the majority rule today is that sexual orientation cannot be considered unless there is evidence that it has resulted in harm to the child, there are a few outliers. Even post-*Lawrence*, courts have relied on a parent's sexual orientation in denying that parent custody.[237] For example, in a 2012 Kentucky case, *Maxwell v. Maxwell*, a lesbian mother was successful in overturning a custody award to the heterosexual father; however, her ability to live with her partner remained an issue on remand, thereby demonstrating the limits on the lower court applications of *Lawrence*.[238] Fortunately, courts in the vast majority of states now apply the nexus approach rule, where a parent's sexual orientation cannot be taken into

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[232] Nancy D. Polikoff, *Custody Rights of Lesbian and Gay Parents Redux: The Irrelevance of Constitutional Principles*, 60 UCLA L. REV. DISCOURSE 226, 228 (2013).

[233] *Lawrence v. Texas,* 539 U.S. 558, 574–75 (2003).

[234] COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 1.5 (2014).

[235] See e.g., Polikoff, *supra* note 232, at 228 (explaining that, even after *Lawrence*, "it might be harder for a court to use a parent's sexual orientation as a basis for denying or restricting custody or visitation").

[236] Joslin, *supra* note 234.

[237] Polikoff, *supra* note 232, at 229.

[238] *See* Maxwell v. Maxwell, 382 S.W.3d 892, 898-900 (Ky. Ct. App. 2010).

account in making a custody decision unless the parent's sexual orientation has directly harmed the child.[239]

## III. Comparing LGTBQ Rights in the United States and Chile

The ruling in *Lawrence* is a general constitutional precedent, having little to do directly with child custody rights of LGBTQ parents. However, Justice Kennedy's opinion in *Lawrence* articulates general principles that framed the country's view on LGBTQ rights in the United States in the early 2000s. Further, the cases of *Windsor* and *Obergefell* were both highly contested, ending in a 5-4 decision in favor for LGBTQ rights.[240] On the other hand, in the Atala's case, the Supreme Court of Justice of Chile ruled in only a 3-2 decision.[241] So the difference between the current law on LGBTQ rights in either country is only one Supreme Court Justice's opinion. As discussed, in South America, the Catholic Church continues to be the main political opponent to passing laws and expressing public policies favorable to sexual and reproductive rights.[242] But if that is the answer to why Atala lost her children in the Chilean Supreme Court, can we say that is also why *Obergefell* was so highly debated, and legalized same-sex marriage by only one vote? In his dissenting opinion in *Obergefell*, Justice Scalia stated that it was severe for the Court to endorse a practice which is contrary to the religious beliefs of many of our citizens.[243] Justice Alito argued that marriage is a religious right, not a political one, and that the majority was threatening "the religious liberty our Nation has long sought to protect."[244] As seen in the words of Justices Scalia and Alito, religion clearly played a vital role in their dissenting arguments in *Obergefell*. In fact, a majority of the justices on the bench today are Catholics.[245] In closing, jurisprudence pertaining to LGBTQ rights is not that far ahead of

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239 Orakwusi, *supra* note 17, at 634-35.

240 *See generally Windsor*, 133 S. Ct. 2675; *Obergefell*, 135 S. Ct. 2584.

241 Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 54 (Feb. 27, 2012).

242 Vaggione *supra* note 1, at 233.

243 *Obergefell*, 135 S. Ct. at 2630 (Scalia, J., dissenting).

244 *Id.* at 2638 (Alito, J., dissenting).

245 Elizabeth Dias, *How Scalia's Faith Reshaped the Supreme Court*, TIME (Feb. 13, 2016), http://time.com/4220768/antonin-scalia-dead-catholic-legacy/.

the Chilean Supreme Court. In fact, they are only one justice's opinion ahead.

## IV. CONCLUSION

In conclusion, there is still a lot that has to be done across the world in terms of LGBTQ custody rights. Even though the United States has come far in the last 50 years with cases like *Lawrence* and *Obergefell*, the country still has a long way to go to reach total equality in terms of LGBTQ custody rights.

LGBTQ child custody has progressed even slower in South America. So slowly that the Inter-American Court of Human Rights has had to step in to try and fix the problem. One reason for Chile's slow progress is due to political impasse, while others blame it on the dominant role of the Catholic Church that is so deeply entrenched in Chilean society and politics. The Inter-American Court ruled on its first case related to discrimination on the basis of sexual orientation on December 18, 2009.[246] The Chilean Supreme Court took a prominent judge's children away just on the basis that she was homosexual.[247] The court held that the children were in "a situation of risk" whose "pernicious consequences" would "damage their psychic development" and make them "objects of social discrimination."[248] She eventually brought her case to Inter-American Court in the Inter-American Commission on Human Rights.[249] The Inter-American Court, located in Washington D.C., concluded that the Chilean Supreme Court must pay Atala and her children over $60,000 in damages.[250] The daughters are currently living with

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[246] Rosa M. Celorio, *The Case of Karen Atala and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women*, 15 CUNY L. REV. 335, 340 (2012).

[247] Larry Rohter, *Lesbian Judge Fights Chilean Court for Taking Her Children*, N.Y. TIMES (July 20, 2006), http://www.nytimes.com/2006/07/20/world/americas/20chile.html.

[248] *Id.*

[249] *Id.*

[250] Simon Romero, *Chile: Landmark Gay Rights Ruling,* N.Y. TIMES (March 21, 2012), http://www.nytimes.com/2012/03/22/world/americas/chile-landmark-gay-rights-ruling.html.

Atala and her partner, Emma de Ramon.[251] The Inter-American Court's decision in *Atala v. Chile* advanced a series of human rights principles that are paramount for international and national courts to consider when issuing custody decisions with long-lasting effects on children and the parents involved, while incorporating human rights and the principle of non-discrimination. The Court held that discrimination in regards to sexual orientation cannot be used to determine a child's best interest, as this can harm both the child and the parent. The Inter-American Court also skillfully referred to the standard of harm that must be applied in cases that could result in the removal of children from the custody of either parent. The Court reasoned that the harm needs to be real and proven, not speculative and based on stereotypes, to be a determining factor in custody decisions. Lastly, the Court advanced the analysis related to the content of the children's right to be heard in legal processes to be heard in legal processes that concern them. The case of Karen Atala changed the definition of a family for the Inter-American Court, which will hopefully be incorporated into Chilean law and culture.

However, even though the United States, in *Obergefell*, has legalized same-sex marriage, the United States and South America are very familiar in their roots and culture. The dissents in *Obergefell* and *Windsor* have very similar wording to the majority's opinion in Atala's case. In fact, one could say that the difference between LGBTQ rights in the United States and Chile is just one vote.

Another issue hindering the progression of human rights in South America, including Chile, is that the Latin American countries are failing to enforce the policies and orders of the Inter-American Court. Some argue that the supreme courts are implementing the Inter-American orders, however the local governments do not, slowing down the implementation of the Inter-American orders. On the other hand, perhaps Atala's case had nothing to do with LGBT rights. Perhaps, instead, it was an issue of gender rights. Either way, the Inter-American Court must find new ways and policies to implement their orders to speed up the process of equal human rights.

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[251] Jill Langlois, *Karen Atala: Lesbian Judge Wins Landmark Custody Case in Chile*, PUBLIC RADIO INTERNATIONAL (March 24, 2012), http://www.pri.org/stories/2012-03-24/karen-atala-lesbian-judge-wins-landmark-custody-case-chile.