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I. INTRODUCTION

Throughout (modern) history, sexual minorities have been treated differently and discriminated against by state actors. For example, seventy-eight states worldwide have criminalized sexual relations between consenting same-sex partners.[1] After the May 2013 promulgation of a law permitting same-sex couples to marry and jointly adopt children, a social divide in France emerged and numerous demonstrations of those opposing such freedom took place.[2]

1. LUCAS PAOLI ITABORAHY, STATE SPONSORED HOMOPHOBIA (2012), *available at* http://www.aidsfreeworld.org/PlanetAIDS/~/media/796515F2D74A4158AC599504E042F4A8.pdf; INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION, ilga.org (last visited May 10, 2014) (providing a distribution of these states over the world).

2. *See* Henry Chu & Devorah Lauter, *France's Same-Sex Marriage Law Exposes a Deep Social Divide*, L.A. TIMES (July 15, 2013), http://articles.latimes.com/2013/jul/15/world/la-fg-france-same-sex-marriage-20130716 (describing the bitter divide drawn between supporters and detractors of gay marriage in France by the French government's "marriage for all" law); *see also* François Béguin, *"Mariage pour tous": Bertinotti estime "qui'il faut que revienne le temps de l'apaisement"*, LE MONDE (Apr. 23, 2013),

These examples demonstrate that sexual minorities are confronted with differential treatment by state actors and private individuals within their private as well as family lives.

On numerous occasions, the regional human rights monitoring bodies of the European and Inter-American region, the European Court of Human Rights ("ECtHR" or "European Court"), and Inter-American Court of Human Rights ("IACtHR" or "Inter-American Court"), have dealt with the issue of sexual orientation discrimination within the sphere of family life. The ECtHR has done so throughout the years in various cases on subjects ranging from marriage and custody to adoption,[3] while the IACtHR asserted itself for the first time in 2012 on discrimination on the basis of sexual orientation in *Atala Riffo and Daughters v. Chile*.[4] There, the IACtHR found a violation of the right to family life based on the discrimination of a lesbian woman in a custody case before Chilean courts.[5] The national court did not award her custody over her three daughters for it found it not to be in the children's best interests to live with their mother and her lesbian partner based on her sexual orientation.[6] To what extent have these regional human rights systems of Europe and the Americas developed a right to family life, free from discrimination on the basis of sexual orientation?

The interpretation of the term family differs from country to country and might even be different within the territory of one state;[7] it is

http://www.lemonde.fr/societe/article/2013/04/23/mariage-pour-tous-il-faut-que-revienne-le-temps-de-l-apaisement_3164821_3224.html (interviewing Dominique Bertinotti, a member of the Socialist party in France and a staunch supporter of the "marriage for all" act, about the strong opposition the act received within the French government).

3. *See, e.g.*, Mata Estevez v. Spain, App. No. 56501/00, 2001 Eur. Comm'n H.R. 2 (2001), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22334 (holding that a surviving spouse of a same-sex marriage was not entitled to a surviving spouse pension); *see also* Simpson v. United Kingdom, App. No. 11716/85, Eur. Comm'n H.R. ¶ 4 (1986), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-596 (finding that the State did not violate the plaintiff's rights in throwing her out of her house after her same-sex partner died).

4. Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 72–93 (Feb. 27, 2012).

5. *Id.* ¶ 178.

6. *Id.* ¶ 55–57.

7. U.N. Human Rights Committee, *General Comment No. 19: Protection of the Family, the Right to Marriage and Equality of Spouses* art. 23, ¶ 2, U.N. Doc.

essentially a social concept. Therefore how both the European and the Inter-American human right systems interpret the concept of family and whom it includes poses an interesting study.

Within the scope of family life, this article will focus on the relationship between a child and parent of a different sexual orientation. To what extent does a right to family through adoption free from discrimination on the basis of sexual orientation exist within the regional human rights systems? Furthermore, to what degree do the systems permit the right to maintain family life through custody free from discrimination for reasons of sexual orientation?

The scope of this article will be limited to the right to family life of homosexual, lesbian, and bisexuals and will not discuss transgender issues. The definition of sexual orientation used derives from the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*.[8] This document, formulated by a group of human rights experts and initiated by a coalition of non-governmental human right organizations, contains basic principles of human rights as specifically applied to issues of sexual orientation.[9] The Yogyakarta Principles define sexual orientation as "*each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender*."[10]

First, this article will set out the concept of discrimination.[11] Thereafter, it will examine regional human rights treaties on whether they deal with discrimination on the basis of sexual orientation.[12] Finally, this article will take a closer look at the ECtHR's and Inter-American Court's case law on issues of sexual orientation relating to

HRI/GEN/1/Rev.9 (Vol. 1) (July 27, 1990) [General Comment No. 19].

8. THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6 n.1 (2007), *available at* http://www.yogyakartaprinciples.org/principles_en.pdf [hereinafter THE YOGYAKARTA PRINCIPLES].

9. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 232–37 (2008) (discussing the process of developing the Yogyakarta Principles).

10. THE YOGYAKARTA PRINCIPLES, *supra* note 8, at 6 n.1 (emphasis added).

11. *See* discussion *infra* Part II.A.

12. *See* discussion *infra* Part II.B.

the right to family life, especially in custody and adoption cases, after which a conclusion shall be drawn.[13]

II. DISCRIMINATION BASED ON SEXUAL ORIENTATION: PROHIBITED IN REGIONAL HUMAN RIGHTS TREATIES?

Where can a legal basis be found for a prohibition of discrimination on the basis of sexual orientation in general and specifically in connection to the right to family life? Do the regional human rights treaties of Europe and the Americas contain a provision providing for the prohibition of discrimination on the basis of sexual orientation?

A. DEFINITION OF DISCRIMINATION

First, however, what does discrimination entail? In its essence, discrimination amounts to differential treatment "without an objective and reasonable justification" of persons in similar situations.[14] This unequal treatment can either have the purpose or effect[15] of making distinctions on various grounds based on characteristics that are an indispensable component of a person's identity.[16] Discrimination takes place when people are treated differently for characteristics that they cannot change or can change only at the cost of their dignity; such characteristics include race, gender, or ethnic origin.[17] The prohibition of discrimination works together with the idea that all human beings are equal and therefore merit equal treatment.[18]

Discrimination can be either direct or indirect.[19] We speak of direct discrimination when the following conditions are fulfilled: 1) a person is treated unequally to someone else in similar circumstances because

13. *See* discussion *infra* Part III. IV, V.

14. WALTER KÄLIN & JÖRG KÜNZLI, THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION 345 (2009).

15. *See* Daniel Moeckli, *Equality and Non-Discrimination*, *in* INTERNATIONAL HUMAN RIGHTS LAW 189 (Daniel Moeckli et al. eds., 2010) (noting that under international human rights law, there is no requirement that discriminatory differential treatment be based on an intention or purpose).

16. KÄLIN & KÜNZLI, *supra* note 14, at 345.

17. *Id.*

18. Moeckli, *supra* note 15, at 189.

19. KÄLIN & JÖRG KÜNZLI, *supra* note 14, at 351.

of the existence of a distinction, limitation, exclusion, or preference;[20] 2) this treatment is unfavorable and disadvantageous for this person compared to others in similar situations;[21] 3) the treatment is based on a prohibited ground as found in the human rights conventions or jurisprudence of their treaty bodies and international courts, connected to a person's core identity;[22] and 4) this treatment cannot be justified.[23] No discrimination takes place if a distinction is justified, pursues a legitimate aim under the conventions, and is proportionate—that is, to be justified, the discrimination must be suitable, necessary, and reasonable to achieve that aim.[24] Such distinctions are not made on a prohibited ground but rather on the basis of the legitimate aim they pursue.[25]

Indirect discrimination occurs when a neutral measure that does not make any prohibited distinction, in its practical application, disadvantages exclusively or disproportionately a group with characteristics classified as a critical distinction, which again cannot be justified on serious and objective grounds.[26]

B. DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN THE REGIONAL HUMAN RIGHTS TREATIES

Then, do the regional human right treaties contain provisions prohibiting such discrimination on the basis of sexual orientation, a basis of which we can describe as an unalterable characteristic of a person's identity given the Yogyakarta Principles' definition?

1. European Convention on Human Rights[27]

Within the region of the Council of Europe, the European Convention of Human Rights ("ECHR") guarantees the prohibition of discrimination with regards to the enjoyment of the rights provided for

20. *Id.*
21. *Id.* at 351–52.
22. *Id.* at 352.
23. *Id.*
24. *Id.* at 353.
25. *Id.*
26. *Id.* at 355 (citing to principles espoused in the Human Rights Committee's decision in *Althammer et al. v. Austria*).
27. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, Europ. T.S. 5; 213 U.N.T.S. 221 [hereinafter ECHR].

in Article 14 of the treaty.[28] This provision states that such enjoyment shall be secured without discrimination on *any ground such as* sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.[29]

Given the language of Article 14, a link between this prohibition and the right to family life under this regional human rights system is necessary. In Article 8(1) defines the right to respect for one's private and family life, his home, and his correspondence, while the second paragraph allows public authority to interfere insofar as the interference occurs in accordance with the law and is necessary in a democratic society.[30] Furthermore, Article 12 ensures the right of men and women of a marriageable age to marry and to found a family, according to the national laws.[31]

2. American Convention on Human Rights[32]

Article 1 of the 1969 American Convention on Human Rights ("ACHR") ensures to all persons subject to the jurisdiction of the state parties "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*."[33]

Article 11 of the ACHR mirrors Article 8 of the ECHR and ensures the right protected by law to privacy and family life by safeguarding against arbitrary interference with private life, family, home, or correspondence, "or of unlawful attacks on honor or reputation."[34]

Article 17 describes the rights of family, and calls the family the "natural and fundamental group unit of society," which is entitled to protection by society and the state; as such, it recognizes the right to marry and raise a family if the conditions under domestic law are satisfied, "insofar as such conditions do not affect the principle of

28. *Id.* art. 14.
29. *Id.*
30. *Id.* art. 8.
31. *Id.* art. 12.
32. American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].
33. *Id.* art. 1 (emphasis added).
34. *Id.* art. 11; ECHR, *supra* note 27, art. 8.

nondiscrimination."[35] Article 17 also ensures the equality of spouses as to the rights and responsibilities to marriage and its dissolution.[36] In case of dissolution, the protection of any children involved shall be solely based on their best interests.[37]

Article 30 provides that the rights under the Convention can be restricted when so provided in laws for reasons of "general interest" insofar as these restrictions are in accordance with the purpose for which they have been established.[38]

The provisions on discrimination of both the ECHR and ACHR contain essentially the same bases on which no distinctions can be made; however, sexual orientation is not expressly one of them. Yet, the prohibition clauses described leave room for interpretation. Article 14 of the ECHR prohibits discrimination on any ground and enlists examples of such grounds, while Article 1 of the ACHR rules out discrimination on any other social condition than those enumerated.[39] In the following section, we shall see whether the issue of sexual orientation discrimination in the right to family life has nonetheless been dealt with in these systems.

III. THE RIGHT TO FAMILY LIFE FREE FROM DISCRIMINATION ON SEXUAL ORIENTATION: ECTHR

A. INTRODUCTION

Article 19 of the ECHR established the ECtHR ("European Court") "to ensure the observance of the engagements undertaken by the contracting parties."[40] The European Court is comprised of judges equal in amount to the number of contracting parties.[41] Its principle role is to judge applications brought by individuals[42] as well as states[43] on violations of the convention and its protocols.[44] Article 46 compels

35. ACHR, *supra* note 32, art. 17(2).
36. *Id.* art. 17(4).
37. *Id.*
38. *Id.* art. 30.
39. ECHR, *supra* note 27; ACHR, *supra* note 32.
40. ECHR, *supra* note 27, art. 19.
41. *Id.* art. 20.
42. *Id.* art. 34.
43. *Id.* art. 33.
44. ROBIN C A WHITE & CLARE OVEY, THE EUROPEAN CONVENTION 20 (5th

state parties to abide by the final decision taken by the European Court in the cases brought against them.[45]

Article 14 contains an accessory prohibition of discrimination on any ground in relation to the enjoyment of the rights guaranteed by the Convention and its protocols.[46] Once the European Court finds itself confronted with an application under Article 14, it first examines whether this claim falls within the scope of one of the articles of the Convention.[47] With regards to issues of discrimination on the basis of sexual orientation in violation of the right to family life, and in particular in adoption and custody cases, the question is then whether such claims fall within Article 8. It is therefore necessary to look at the definition of family as used within the ECHR system of human rights protection. What constitutes a family under the ECHR and who will find their family life protected by the Convention? This article next examines how the European Court has dealt with claims under Article 14 of discrimination on grounds of sexuality in connection to Article 8's protection of the family life.

1. Definition of Family in the European System of Human Rights Protection

Article 8 of the ECHR guarantees the right to private and to family life.[48] In the *Peck* case,[49] the European Court recognized that the definition of private life is broad and contains elements such as gender identification, name, sexual orientation, and sexual life.[50] Private life includes the right to establish and develop relationships with others and the outside world; there is a "zone of interaction" that falls within the scope of private life.[51] The right to family life is more specific and protects the specific relationship between those constituting a family.[52] Then, who is seen as part of a family deserving of protection of his family life from discrimination under Article 8 in conjunction with

ed. 2010).

45. ECHR, *supra* note 27, art. 46.

46. *Id.* art. 14; WHITE & OVEY, *supra* note 44, at 546.

47. WHITE & OVEY, *supra* note 44, at 547.

48. ECHR, *supra* note 27, art. 8.

49. Peck v. United Kingdom, App. No. 44647/98, Eur. Ct. H.R. ¶ 57 (2003), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60898.

50. *Id.*

51. *Id.*

52. *Id.*

Article 14?

Family life exists primarily in the relationships between a husband and a wife on the one hand, and the parent and the child on the other.[53] The "existence . . . of family life is a question of fact," however,[54] and the European Court has increasingly taken account of social changes.[55] Family life extends further than formal relationships and the family based on marriage,[56] and it can include potential or planned relationships, as well as those family ties that are more social than biological.[57]

As to the relation between a child and its parents, whether married or not and living together or not, family life exists from the moment the child is born.[58] Only in very exceptional situations can this bond between child and parent be severed as to end family life.[59]

Further, relationships between siblings, grandparents, and grandchildren and between uncles and nephews are within the scope of family life.[60] However, "[t]he more remote the relationship," depending on the actual circumstances of the relationship, the softer the state's obligation of protection.[61]

When determining if a relationship between unmarried adults constitutes family life, a number of factors are important: "whether the couple lives together, the length of their relationship and whether they have demonstrated their commitment to each other by having children

53. *See generally* DAVID JOHN HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 371–76 (2d ed. 2009) (exploring the jurisprudential development of the notion of "family life").

54. WHITE & OVEY, *supra* note 44, at 335.

55. HARRIS ET AL., *supra* note 53, at 371–72.

56. *Id.*

57. *Id.* at 372.

58. *Id.*; Berrehab v. The Netherlands, App. No. 10730/84, Eur. Comm'n H.R. ¶ 21 (1988), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57438; Keegan v. Ireland, App. No. 16969/90, Eur. Comm'n H.R. ¶ 44 (1994), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57881.

59. HARRIS ET AL., *supra* note 53, at 373 (noting violence towards the child as an example through which the relationship may be severed); *see also* Gül v. Switzerland, App. No. 23218/94, Eur. Comm'n H.R. ¶¶ 32–33 (1996), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57975 (finding that the family life bond still existed even after a father left his son for years and lived far away but then returned and sought contact).

60. HARRIS ET AL., *supra* note 53, at 374.

61. *Id.*

together or by any other means."[62]

Thus, a hierarchy of relationships within the right to family life seems to exist. On the first plane, we have the traditional family of a husband, wife, and children, followed by non-married heterosexual couples raising children, and then more removed family relations at the lowest level.[63] What is the place of relationships between two people of the same sex?

In its earlier case law, the European Court decided that same-sex relations did not fall within the scope of article 8.[64] In *X., Y. and Z. v. United Kingdom*,[65] for example, the European Court stated that such relationships only fall within the sphere of private life.[66] In *Mata-Estevez v. Spain*,[67] the European Court did not find a violation of the right to family life because the relationship between the applicant and his deceased partner did not fall within the scope of this right.[68] The interference in this case fell within the claimant's private life under Article 8,[69] and was justified under the legitimate aim of protecting the traditional family.[70]

In *Simpson v. United Kingdom*,[71] the applicant's tenancy rights were viewed from the protection of the applicant's home and not her family life. Such interference again was legitimate for the protection of the

62. Al-Nashif v. Bulgaria, App. No. 50963/99, Eur. Comm'n H.R. ¶ 112 (2002), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60522; X., Y., and Z. v. United Kingdom, App. No. 21830/93, Eur. Comm'n H.R. ¶ 36–37 (1997), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58032; *see also* Kroon v. Netherlands, App. No. 18535/91, Eur. Comm'n H.R. ¶ 30 (1994), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57904.

63. WHITE & OVEY, *supra* note 44, at 337.

64. Sarah Lucy Cooper, *Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the ECtHR Jurisprudence on LGTB Rights*, 12 GERMAN L.J. 1746, 1746–47 (2011) (discussing the evolution of the right to family life for same-sex couples under the ECtHR case law).

65. *X., Y., and Z.*, App. No. 21830/93, ¶ 36–37.

66. Cooper, *supra* note 64, at 1756.

67. Mata Estevez v. Spain, App. No. 56501/00, 2001 Eur. Comm'n H.R. (2001), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-22334.

68. Cooper, *supra* note 64, at 1757.

69. *Id.* at 1756–57.

70. *Id.* at 1757.

71. Simpson v. United Kingdom, App. No. 11716/85, Eur. Comm'n H.R. (1986), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-596.

traditional family.[72]

A change can be perceived in the European Court's case law in *Karner v. Austria*.[73] The applicant complained of a violation with respect to his private, family life, and home under Article 8.[74] After the death of his partner he could not exercise his tenancy rights since he did not qualify as a "life companion" on the basis of his sexual orientation.[75] The European Court did not find it necessary to examine the case from a private or family life point of view because the complaint clearly fell within the scope of the right to respect for his home.[76] Although the protection of the traditional family was a legitimate aim,[77] the European Court found no reason to exclude same-sex couples from the term "life companion."[78]

Further development is shown in *Burden v. United Kingdom*,[79] where the European Court appeared to put homosexual civil partners on the same level with married couples by comparing it to the relationship of two siblings sharing a home together.[80] Then, in *Kozak v. Poland*,[81] the European Court suggested that same-sex relationships might constitute family life.[82] Polish tenancy law excluding same-sex partners from "de facto marital cohabitation" was found to violate

72. *Id.* ¶¶ 3, 7 (admitting that the applicant was treated differently because of her sexual orientation, but that the family, defined as a heterosexual couple, deserves special protection); Cooper, *supra* note 64, at 1757.

73. Karner v. Austria, App. No. 40016/98, Eur. Comm'n H.R. ¶¶ 30, 40–41 (2003), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263 (finding that the applicant's case fell within the scope of Article 8's protection of family life).

74. *Id.* ¶ 30.

75. Cooper, *supra* note 64, at 1757–58.

76. *See Karner*, App. No. 40016/98, Eur. Comm'n H.R. ¶ 33.

77. *Id.* ¶ 40.

78. *Id.* ¶¶ 41–42.

79. Burden v. United Kingdom, App. No. 13378/05, Eur. Comm'n H.R. (2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-86146.

80. Cooper, *supra* note 64, at 1759 (referring to *Burden v. United Kingdom* in which the European Court differentiated the relationship between siblings, who are connected by blood, and married couples and homosexual civil partners, who choose to live together).

81. Kozak v. Poland, App. No. 13102/02, Eur. Comm'n H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97597.

82. *Id.* ¶¶ 98–99 (explaining that respect for family life must account for developments and changes in perception in society, including the rights of sexual minorities); Cooper, *supra* note 64, at 1760.

Articles 8 and 14 because this exclusion was not necessary for the protection of the traditional family.[83] The Court held that respect for one's family life "must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life."[84] Finally, in *Schalk and Kopf v. Austria*,[85] the Court found the same-sex relationship of the applicants to be within the scope of family life.[86]

Regarding the question of what qualifies as a family life as protected under Article 8 in custody cases, a child born into a traditional family of married heterosexual parents shares family life with both his parents and vice versa. Since *Schalk* and *Kopf v. Austria*, a same-sex relationship itself also constitutes family life between the partners. Discrimination on the basis of sexual orientation in connection to one's family life and in particular in adoption and custody cases, therefore, may fall within the scope of Article 8's protection of family life and possibly make an additional violation of Article 14.

B. CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Does a right to family life free from discrimination on the basis of sexual orientation exist in the European Court case law? How has it dealt with complaints of differential treatment in custody cases because of their subsequent same-sex relationships in particular?

1. Sexual Orientation Discrimination and the Right to Marry and Found a Family: Schalk and Kopf v. Austria

In *Schalk and Kopf v. Austria*, the European Court found for the first time that same-sex relationships fall within the scope of Article 8. It was also the first case in which the European Court dealt with the question of whether the institution of marriage under the ECHR was

83. Cooper, *supra* note 64, at 1760; *see Kozak*, App. No. 13102/02, Eur. Comm'n H.R. ¶ 99.

84. *Id.* ¶ 98.

85. Schalk and Kopf v. Austria, App. No. 301141/04, Eur. Comm'n H.R. (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99605.

86. *Id.* ¶ 94.

open to same-sex couples.[87] The applicants were in a same-sex relationship, which they wanted to have recognized before the law as marriage, but Austrian law did not allow this.[88] They claimed this law violated Article 12 and Article 8 in conjunction with Article 14.[89]

With regards to the right to marriage and to create a family protected by Article 12, the European Court states that this article does not force the contracting parties to grant same-sex couples the right to marry.[90] The applicants interpreted the Convention as a "living instrument" and argued that Article 12 was intended to oblige state parties to open the institution of marriage to same-sex couples; but the European Court did not follow this interpretation because no European consensus yet exists on this subject.[91] Although the European Court accepts that the right to marriage does not have to be limited to heterosexual couples, each individual state to must decide on the possibility for same-sex relationships to be recognized with marriage.[92]

With regards to the violation of Article 14 in conjunction with Article 8, the European Court found that an evolution had taken place in recent years and that the relationship between two same sex partners would be protected under the right to family life.[93] The European Court further concluded that "same-sex couples are just as capable as [heterosexual] couples of entering into committed stable relationships" and thus are similarly in need of legal recognition and protection of their relationships.[94] However, the European Court found that neither Article 8 nor Article 12, read in combination with Article 14, impose the positive obligation for state parties to legally recognize a right to marry for same-sex couples.[95]

Moreover, with no European consensus recognizing such relationships by other means such as partnerships, it was therefore up to the states to decide if and when to recognize these relationships.[96]

87. *Id.* ¶ 50.
88. *Id.* ¶¶ 7–9.
89. *Id.* ¶¶ 39, 65.
90. *Id.* ¶ 63.
91. *Id.* ¶¶ 57–58.
92. *Id.* ¶¶ 61–62.
93. *Id.* ¶ 94.
94. *Id.* ¶ 99.
95. *Id.* ¶ 101.
96. *Id.* ¶¶ 105–06.

2. Sexual Orientation Discrimination in Custody Cases: Salgueiro da Silva Mouta v. Portugal

The European Court has dealt with discrimination on the basis of sexual orientation in custody decisions and in one case in particular: *Salgueiro da Silva Mouta v. Portugal*.[97] The applicant married C.D.S. in 1983 and on November 2, 1987 the couple had a daughter, M.[98] In April 1990, the applicant separated from his wife to live with a man, L.G.C.[99] During the divorce proceedings, the applicant signed for C.D.S. to have custody over their child.[100] Eventually he sought an order to obtain custody over his daughter, which was granted to him by the Lisbon Family Affairs Court.[101] On appeal this decision was repealed using the following reasoning:

> 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 . . . . [I]t is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature.[102]

The applicant claimed that this decision violated Article 8 on the basis of family life alone and in conjunction with Article 14 because the decision to award custody to his ex-wife was based solely on the ground of his sexual orientation.[103]

The European Court first found that the issue of parental responsibility fell within the scope of Article 8 and that there was an interference with the applicant's family life.[104] The European Court went on to state that in the enjoyment of the rights of the Convention, Article 14 affords protection against differential treatment, without an objective and reasonable justification, of persons in the same situation and that the applicant was indeed treated differently on the basis of his

97. Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, Eur. Comm'n H.R. (1999), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58404.
98. *Id.* ¶ 9.
99. *Id.*
100. *Id.* ¶ 10.
101. *Id.* ¶¶ 11–12.
102. *Id.* ¶ 14.
103. *Id.* ¶ 21.
104. *Id.* ¶ 22.

sexual orientation.[105] The European Court held that sexual orientation as a basis of discrimination is prohibited by Article 14 since the words "any ground such as" suggest that the list therein is not exhaustive.[106] This difference in treatment is discriminatory if there is no objective and reasonable justification, if it does not pursue a legitimate aim, or if there is no proportionality between the aim and the differential treatment.[107] The European Court found the legitimate aim was the protection and best interests of the child.[108] However, Article 8 in conjunction with Article 14 was violated because the difference in treatment was not proportionate to this aim; the applicant's homosexuality was the decisive factor in awarding custody and it should not have been.[109]

The European Court extended the prohibition of discrimination under Article 14 to include the prohibited ground of sexual orientation because the list in Article 14 is not exhaustive. Further, the European Court accepted that custody decisions fall within the scope of family life since the applicant was the biological parent of the child. However, the European Court did not examine the question of whether family life existed between the father, his new partner, and the child as one unit.

3. Sexual Orientation Discrimination and Adoption

While in custody cases, the right to family life between a child and one of his parents of different sexual orientation already exists in principle, this is different for the right to family life established through adoption between a child and his adoptive parent(s). How has the European Court dealt with cases where an application for adoption was denied on the basis of the sexual orientation of the adoptive parent?

105. *Id.* ¶¶ 26–28.

106. *Id.* ¶ 28; *see also* Engel and others v. The Netherlands, App. No. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, Eur. Comm'n H.R. ¶ 72 (1976), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57479.

107. *See Salgueiro da Silva Mouta*, App. No. 33290/96, Eur. Comm'n H.R. ¶ 29.

108. *Id.* ¶ 30.

109. *Id.* ¶ 35.

a. Fretté v. France[110]

The applicant was a single homosexual man applying for prior authorization to adopt a child in October 1991.[111] The Paris Social Services Department denied his application in 1993 and stated that it was questionable whether his particular circumstances as a homosexual man would allow him to be entrusted with a child.[112] The highest court, the *Conseil d'Etat*, found that the application should be denied for "it emerges that Mr Fretté, regard being had to his lifestyle and despite his undoubted personal qualities and aptitude for bringing up children, did not provide the requisite safeguards—from a child-rearing, psychological and family perspective—for adopting a child."[113]

The applicant complained that his application had been implicitly rejected on the basis of his sexual orientation alone and that this violated his right to non-discrimination under Article 14 in conjunction with his right to private and prospective family life under Article 8.[114] The European Court noted, on the one hand, that Article 8 does not guarantee the right to adopt nor does it safeguard the mere desire of founding a family; the right to family life presupposes an existing family.[115] However, the European Court found the issue to be within the scope of Article 8 because French domestic law authorized *all* single people to apply for adoption under prior authorization.[116]

There was a difference in treatment based on the applicant's sexual orientation, which was the decisive factor in the rejection of his application.[117] The legitimate aim pursued again lay in the protection of the health and rights of the children involved in the subsequent adoption.[118] Moreover, the European Court found that the contracting parties have a wide margin of appreciation on this topic because no European consensus on social issues concerning adoption by single

110. Fretté v. France, App. No. 36515/97, Eur. Comm'n H.R. (2002), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60168.
111. *Id.* ¶ 9.
112. *Id.*
113. *Id.* ¶ 16.
114. *Id.* ¶¶ 26, 28.
115. *Id.* ¶ 32.
116. *Id.* ¶¶ 32–33.
117. *Id.*
118. *Id.* ¶ 38.

gay people exists, and thus national authorities have a better grip of the needs of its society.[119] Based on this argument, the Court found that France had stayed within this margin by limiting the right to adoption in the interests of the child because scientific research was divided on the consequences of adoption by homosexual persons—either single or a couple—and there were more adoptive parents than children in need of adoption.[120]

b. E.B. v. France[121]

This case deals with a similar situation: the applicant was a lesbian woman, living with her partner, applying to the Jura Social Services Department for authorization to adopt a child.[122] Her authorization was refused for the lack of a paternal role model and because the role of her partner in the adoption remained unclear.[123] The Nancy Administrative Court of Appeal ("Nancy Court") held that the applicant, due to her lifestyle, could not provide the necessary safeguards for adopting a child based on the reasons given by the Jura Social Services Department.[124] On appeal from this judgment, the *Conseil D'Etat* agreed with the Nancy Court and held that the reasons given were satisfactory to reject the application; even though the Nancy Court's reference to her lifestyle referred to her sexual orientation, this was one of the factors that had to be taken into account when deciding on her application.[125]

Before the European Court, the applicant complained that her right to private life under Article 8 in conjunction with Article 14 was violated because of discrimination on the basis of her sexual orientation.[126] The European Court first found that the complaint fell within the scope of Article 8.[127] The European Court then referred to

119. *Id.* ¶ 41.
120. *Id.* ¶¶ 42–43.
121. E.B. v. France, App. No. 43546/02, Eur. Comm'n H.R. (2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-84571.
122. *Id.* ¶ 9.
123. *Id.* ¶ 17.
124. *Id.* ¶ 24 (highlighting the applicant's lifestyle and the lack of a paternal role model, among other reasons).
125. *Id.* ¶ 25.
126. *Id.* ¶ 32.
127. *Id.* ¶ 49 (explaining that Article 8 governs because the French legislation permits all single persons to apply for authorization to adopt).

the *Fretté* case and found that the cases differed on certain points. In this case, the domestic courts had not explicitly referred to the applicant's sexual orientation; rather, they considered her qualities as an adoptive mother and her living situation.[128] The European Court then discussed the two reasons given by the domestic court for the rejection. The European Court agreed that, in principle, the absence of a paternal role model was a legitimate issue to consider; however, since the issue concerned the adoption by a single person, this consideration may nullify the right to adopt by single persons and, in this case, might have led to arbitrary refusal on the basis of sexual orientation.[129]

The European Court also concluded that the involvement of her partner in the adoption was a legitimate point to consider for, if an applicant has already set up a home with someone, that person's attitude and role in the household affects the child to be adopted. Therefore, this reason could not be regarded as discriminatory on the basis of sexual orientation and only dealt with investigation upon the *de facto* situation in the household.[130]

However, these two main grounds are interrelated and need to be taken together. Even though the domestic courts ascertained that the refusal was not based on the applicant's sexual orientation, the European Court found that this was nonetheless the decisive ground for the decision in an implicit manner. The European Court therefore found a difference in treatment that in cases of sexual orientation can only be justified by particularly convincing and weighty reasons.[131]

Because the French law offers the possibility for single persons to adopt a child, this possibility is also open for homosexuals and so the government could not rely on the reasons it put forward. Further, the domestic law did not mention the necessity of a role model of the other sex, which would not be dependent on the sexual orientation of the adoptive single parent.[132] The European Court ultimately found that the rejection breached Article 14 read in conjunction with Article 8.[133]

In *Fretté*, the European Court found no violation of Article 8's right

128. *Id.* ¶ 71.
129. *Id.* ¶ 73.
130. *Id.* ¶¶ 76–78.
131. *Id.* ¶ 91.
132. *Id.* ¶¶ 94–95.
133. *Id.* ¶ 98.

to family or private life because France stayed within the margin of appreciation accorded to states given the lack of a European majority on the adoption by single gay people. Because scientific research was not clear on the effects of this parental situation on children, it was up to the state parties to identify the needs in their own society. It is noteworthy that in *E.B.* the European Court did not mention the European consensus and concluded that France violated the right to private life by rejecting the application to adopt by a lesbian woman because France did not have convincing and weighty reasons for the differential treatment. Can we then presume that European consensus exists on this point now?

c. Gas and Dubois v. France[134]

This case concerns adoption but within the sphere of a *de facto* family life situation. The applicants, Gas and Dubois, were a lesbian couple who had lived together since 1989.[135] On September 21, 2000, Dubois gave birth to a daughter, A, conceived by means of medically-assisted procreation with an anonymous donor.[136] The couple entered into a registered partnership on April 15, 2002.[137] In 2006 Gas applied to adopt the child of her partner to which Dubois had consented. This adoption was rejected because it ran counter to the best interests of the child and the partner's intentions. The application was not denied because the pair was not deemed fit to raise the child but because of legal implications—namely, the biological mother would lose her parental rights over A.[138]

Before the European Court, the couple complained that their different treatment on the basis of their sexual orientation violated Article 14 in connection with the right to private and family life protected by Article 8.[139] In its admissibility decision of August 31, 2010, the European Court found that the fact that A was wished for by both partners, that she was raised by both, and that both partners were jointly and actively involved in her upbringing, made the relationship

134. Gas and Dubois v. France, App. No. 25951/07, Eur. Comm'n H.R. (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572.
135. *Id.* ¶ 9.
136. *Id.*
137. *Id.* ¶ 10
138. *Id.* ¶¶ 11–13.
139. *Id.* ¶ 34.

between the applicants amount to family life within Article 8.[140] Therefore, the complaint fell within the scope of a Convention right and the claim under Article 14 could be examined. This case was the first time the European Court recognized that the relationship between same-sex partners and a child constituted family life under the ECHR.[141]

In the decision on the merits, the European Court contrasted the case with *E.B. v. France*.[142] Under this case, the applicants could not share parental responsibility over the child of one of the partners because an exception only existed for married couples.[143] The national courts argued that this meant that the biological mother would lose her parental rights over her daughter once Gas adopted her and this was not in the best interest of the child.[144] The applicants argued that this was discrimination on the basis of their sexual orientation because they were treated differently from heterosexual couples, either married or not.[145]

With regards to married couples, the European Court referred to *Schalk and Kopf v. Austria* and recalled that the ECHR does not oblige state parties to open access to the institute of marriage to same-sex couples.[146] Once a state decides to legally recognize same-sex couples in any form, it has a certain margin of appreciation with regards to this status.[147] According to the European Court, a married couple adopting the spouse's child cannot be compared to that of an unmarried same-sex couple wanting to do the same because of the social, personal, and legal consequences that come with marriage.[148]

Regarding unmarried heterosexual couples in registered

140. Gas and Dubois v. France, Admissibility Decision, App. No. 25951/07, Eur. Comm'n H.R. 12 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103948.

141. Paul Johnson, *Adoption, Homosexuality and the European Court on Human Rights:* Gas and Dubois v. France, 75 MOD. L. REV. 1136, 1139 (2012).

142. *Gas and Dubois*, App. No. 25951/07, Eur. Comm'n H.R. ¶ 61 (noting that in *E.B.*, the French law allowed single persons to adopt a child and the French government did not offer sufficiently weighty or convincing reasons other than the applicant's personal situation to deny her application for adoption).

143. *Id.* ¶ 62.

144. *Id.*

145. *Id.* ¶ 64.

146. *Id.* ¶ 66.

147. *Id.*

148. *Id.* ¶ 68.

partnerships, the European Court held that these were comparable but did not find a violation because these couples were similarly unable to adopt the child of their partner.[149] It did not matter that heterosexual couples can circumvent this obstacle by marrying because the ECHR does not guarantee a right to marry for same-sex couples.[150]

It is noteworthy that, on the one hand, the European Court recognized that the applicants and their daughter constituted a family, while on the other hand the applicants' situation did not equate the family situation of a married heterosexual person wanting to adopt his or her spouse's child. At the same time, the claimants' situation was deemed comparable to that of a heterosexual couple in a registered partnership, but the situations still differed in that heterosexual couples can circumvent the domestic law on adoption by marrying, an option that is not available to same-sex couples. Are these situations indeed comparable?

Even though the domestic court proceedings discussed the best interests of the child, the European Court did not assess this question. According to the concurring opinion of Judge Costa, such an investigation would require the European Court to act as a "fourth instance," leaving states a margin of appreciation in organizing the institution of family, marriage, and relationships between adults and children to better uphold the right under the ECHR.[151] In Judge Viller's dissenting opinion, he disagreed and made clear that, in his view, shared parenting is in the best interest of the child and that there could be no legal justification for depriving a child of the full legal protection of joint parenting on the basis of his parents' sexual orientation.[152] Here also lies a difference with the *E.B. v. France* decision, in which the ECtHR scrutinized the way that the domestic courts came to conclude what would be in the best interest of the child.

It is also significant that the European Court again referred to a (non-existing) European consensus on the issue of same-sex adoption, which it did not mention in *E.B. v. France* and where it found that a single homosexual should be able to adopt a child in the same way as

149. *Id.* ¶ 69.

150. *Id.* ¶¶ 70–71 (referring to the findings in *Schalk and Kopf* in which the European Court determined that neither Article 12 nor Article 14 in conjunction with Article 8 obligates state parties to grant same-sex couples access to marriage).

151. Johnson, supra note 141, at 1143.

152. *Id.* at 1144–45.

a single heterosexual—free from discrimination on the basis of sexual orientation.[153] This is noteworthy for in cases such as *Gas and Dubois*, where family life between the child and the adoptive parent already *de facto* existed before adoption even took place, adoption would merely mean a legal recognition of a factual situation of a family unit. Whereas in *Fretté* and *E.B.*, the adoptive parent was unfamiliar with the child to be adopted and the situation seems more precarious. The decision on adoption in cases placing a child in a new environment is more radical than allowing the child to remain with the partner of one of his parents in an already *de facto* family life. In the latter case, it would be easier for European consensus to exist.

Johnson claims that the *Gas and Dubois* decision shows that the European Court takes a "heteronormative" approach to marriage.[154] This judgment seems to protect the traditional sense of a family: even though it views the relationship between the claimants and the daughter as constituting family life, whether to legally recognize such relationships is left to the states. In that sense this decision is similar to that of *Schalk and Kopf v. Austria*; a family life *de facto* exists but it is up to the states in their margin of appreciation to decide if and how to legally recognize such relationships.

d. X. and Others v. Austria[155]

The most recent case before the European Court dealing with sexual orientation discrimination within the sphere of family life, *X. and others v. Austria*, concerns the application of a lesbian couple and the biological son of one of them, born in 1995, all of whom had been living together as a *de facto* family since the boy was around five years old.[156] On February 17, 2005, the first applicant concluded an agreement with the second applicant, the son, to adopt him and create a legal bond between them without severing the relationship between him and the third applicant, his biological mother.[157] However, aware that Article 182(2) of the Austrian Civil Code excluded this possibility, they asked the Austrian Constitutional Court to declare this

153. *See id.* at 1137 n.3.
154. *Id.* at 1146.
155. X. v. Austria, App. No. 19010/07, Eur. Ct. H.R. (2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116735.
156. *Id.* ¶¶ 9–10.
157. *Id.* ¶ 11.

law unconstitutional for discriminating against them on the basis of their sexual orientation.[158] The Constitutional Court declined to do so and stated that it was up to the relevant district court to determine the legality of the adoption agreement under Article 182(2).[159]

In the subsequent procedure, the applicants explained that they intended "to obtain legal recognition of their *de facto* family" with the adoption agreement and that the first applicant would, in that sense, substitute for the biological father.[160] The domestic courts, including the Supreme Court, held that the Austrian Civil Code did not provide for such a form of adoption and that the adoption by the first applicant would sever the bond between the child and his biological mother, not that between the child and his biological father.[161] The domestic courts also stated that the protection of the traditional family falls within the margin of appreciation accorded to state parties by the ECHR and that the Austrian Civil Code stays within that margin by ensuring that a child has a different-sex couple as parents due to the biological need for contact with both a female and male parent while growing up.[162]

These facts are similar to those in *Gas and Dubois*, but the applicants rushed to distinguish their case by claiming a violation of Article 14 in conjunction with Article 8 on the basis that they were "automatically excluded from any chance of adoption" on account of their sexual orientation since Austrian Civil Law only allowed for second-parent adoption for married and unmarried different-sex couples.[163]

The European Court first confirmed that the applicants indeed formed a *de facto* family and their complaint therefore fell within the "family life" sphere defined by Article 8(2).[164] The Court then outlined three possible situations with respect to adoption by homosexual people: i) an individual may apply for adoption by himself (individual adoption); ii) a "partner in a same-sex couple may wish to adopt the other partner's child" so that both partners gain legally recognized parental status (second-parent adoption); and iii) "a same-sex couple

158. *Id.* ¶ 12.
159. *Id.* ¶ 13.
160. *Id.* ¶ 14.
161. *Id.* ¶ 15.
162. *Id.* ¶ 18.
163. *Id.* ¶¶ 58, 63–66.
164. *Id.* ¶¶ 95–97.

may wish to adopt a child jointly" (joint adoption).[165]

As in *Gas and Dubois*, the European Court held that the applicants' situation was not comparable to that of a married different-sex couple.[166] The Court then concluded that the applicant's situation was comparable to that of an unmarried different-sex couple agreeing to second-parent adoption, which the applicants and the government argued.[167] Examining the Austrian Civil Code, the European Court found that while it looked neutral, Article 182(2) made second-parent adoption in a same-sex relationship legally impossible because adoptive parents replace the same-sex biological parent, but the biological ties in different-sex adoptions are not severed.[168] This differential treatment was also recognized by the domestic courts, which held that the desired effect of the adoption agreement was in principle impossible to attain and on that basis did not thoroughly examine the circumstances of the case.[169] The European Court therefore found a differential treatment, which concerned all members of the *de facto* family based on the sexual orientation of the same-sex parents.[170]

The legitimate aims sought by this differential treatment consisted of protection of the traditional family and the best interest of the child involved.[171] Citing its judgment in *Karner*, the European Court referred to the concept of the ECHR as a living instrument which forces the state parties to account for social changes and changing perceptions with regards to social, civil status and relationships, including freedom in one's private and family life.[172] According to the European Court, the Austrian government did not bring forth any evidence on the capabilities of same-sex couples to foresee a child's needs and conceded that same-sex couples might indeed be just as

165. *Id.* ¶ 100.

166. *Id.* ¶¶ 105–09 (reiterating its argument that the ECHR does not obligate state parties to open access to marriage and concluding that the applicants' situation was not akin to that of a married couple seeking second-parent adoption).

167. *Id.* ¶¶ 111–12.

168. *Id.* ¶ 114.

169. *Id.* ¶ 123.

170. *Id.* ¶ 130.

171. *See id.* ¶ 137 (stating that one of the legitimate aims sought by the Austrian legislature was to ensure that children had a relationship with both a male and female parent-figure as they were growing up).

172. *Id.* ¶ 139.

suitable adoptive parents as different-sex couples.[173] Nevertheless, the Austrian government wished to avoid a situation where a child had two mothers or two fathers for legal purposes.[174] Ultimately, the European Court considered this legislation inconsistent with its purported aim; under Austrian law, a child may be adopted through individual adoption by a homosexual living with a registered partner who approves of this adoption.[175] Therefore, the Austrian Civil Code makes it possible for a child to grow up with two equal sex parents, though it does not offer legal recognition of this family life.[176] This is peculiar, as noted above, and now recognized by the European Court, because individual and joint adoption are more radical in that these forms of adoption create a legal bond between a child and his or her parent(s) whereas before there was not even a *de facto* family life.[177]

As to the margin of appreciation, which state parties have under Article 8 on issues of adoption, the European Court argued that this margin is narrow when it concerns discrimination on the basis of sexual orientation.[178] The European Court limited itself to examining those state parties allowing second-parent adoption by unmarried couples; this confined the Court to ten member states of which six have opened this possibility for both different- as well as same-sex couples, while four have taken the same approach as Austria.[179] Given the small number of examples, the European Court decided that no conclusion could be drawn on the existence of a European consensus on second-parent adoption.[180] The Court's analysis of the 2008 European Convention on the Adoption of Children—which has a low number of ratifications except for Austria—drew a similar conclusion.[181] The European Court at the same time explained that its Article 7(2) extends the possibility to adopt to "different-sex couples *and* same-sex couples who are living together in a stable relationship,"

173. *Id.* ¶ 142.
174. *Id.*
175. *See id.* ¶ 40 (stating that if one party of a registered partnership wants to adopt a child under Article 181, section 1, sub-paragraph 2 of the Civil Code, his partner must consent).
176. *Id.* ¶ 144.
177. *Id.* ¶ 146.
178. *Id.* ¶ 148.
179. *Id.* ¶ 149.
180. *Id.*
181. *Id.* ¶ 150.

which indicates that state parties are not free to treat different- and same-sex couples in a stable relationship differently.[182]

In conclusion, the European Court found that excluding unmarried, same-sex couples from second-parent adoption while allowing unmarried different-sex couples to adopt was not necessary or proportionate to the aim of protecting the traditional family or the best interest of the child.[183] The distinction therefore constitutes discrimination in the sense that the applicants' adoption agreement were not examined in a meaningful way following the best interest of the child involved, "given that it was in any case legally impossible."[184] This constituted a violation of Article 14 in conjunction with Article 8.[185]

The dissenting opinion, rather than answering the same narrow question as the majority, examined the substantive issue of whether the applicants should have been granted the second-parent adoption under these circumstances.[186] For example, the best interests of the child, a factor disregarded by the majority, did not indicate that adoption was necessary because the child involved could count on his relationships with his biological mother and father,[187] the latter of which could not be severed lightly.[188]

The dissent showed that there is no European consensus on the subject of second-parent adoption by unmarried same-sex couples.[189] While the majority opinion only used a small control group of ten state parties, the majority of state parties to the ECHR do not allow for second-parent adoption by unmarried couples, either hetero- or homosexual.[190]

182. *Id.*
183. *Id.* ¶ 146.
184. *Id.* ¶ 152.
185. *Id.* ¶ 153.
186. *Id.* ¶¶ 7–11 (Casadevall, J., Ziemele, J., Kovler, J., Jočienė, J., Šikuta, J., de Gaetano, J., and Sicilianos, J., dissenting in part); Stijn Smet, X. and Others v. Austria *(Part II): A Narrow Ruling on a Narrow Issue*, STRASBOURG OBSERVERS BLOG (Mar. 6, 2013), *available at* http://strasbourgobservers.com/2013/03/06/x-and-others-v-austria-part-ii-a-narrow-ruling-on-a-narrow-issue/.
187. *X.*, App. No. 19010/07, Eur. Ct. H.R. ¶ 8 (dissenting opinion).
188. *See id.* (asserting that in the case at hand the child has always had a family).
189. *See* Smet, *supra* note 186 (demonstrating that no European consensus exists on the issue as six out of ten Council of Europe member states have opted for one approach while four have opted for an opposite approach).
190. *X.*, App. No. 19010/07, Eur. Ct. H.R. ¶¶ 14–15 (dissenting opinion).

Despite this lack of consensus, the majority decision, in the opinion of the dissenting judges, imposed a social change upon state parties which has not yet naturally evolved and seems to take the "living instrument" doctrine to a new level.[191]

The question is therefore what the Grand Chamber's majority decision requires of the Austrian government. The judgment stresses on numerous occasions that "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" and that the judgment focuses on the question whether the applicants were discriminated against on the basis of their sexual orientation because of the impossibility to have their adoption agreement recognized.[192] Thus, for the individual case at hand, a meaningful re-examination by the domestic courts of the adoption agreement seems necessary in order to examine the best interest of the child. However, such a re-examination of the case seems futile where Article 182(2) of the Austrian Civil Code has not been modified to comply with this decision. Therefore, the Grand Chamber's decision in *X. and others v. Austria* implies that once a state party opens up second-parent adoption for unmarried different-sex couples, it should also do so for same-sex couples. Does the Grand Chamber's judgment take the living instrument doctrine to a new level pushing for a social change that has not yet evolved across the Council of Europe region?

Both *Gas and Dubois* and *X. and others v. Austria* concern a lesbian couple in which one of the partners wished to adopt the other partner's child; both attempts were deemed impossible under the states' laws given the same legal implication—namely that the adoptive mother would not replace the biological father but the mother. In the first case, the domestic courts submitted that such an adoption would, for this reason, not be in the best interest of the child, while the Austrian domestic courts in the latter case did not reach that level of examination, but instead at first glance pronounced the adoption legally impossible.[193] The European Court itself, in both cases, did not examine the best interest for that would imply, as concurring Judge

191. *See id.* ¶ 23 (dissenting opinion).
192. *Id.* ¶¶ 134, 149.
193. *Id.* ¶ 13; Gas and Dubois v. France, App. No. 25951/07, Eur. Comm'n H.R. ¶ 62 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572.

Costa in *Gas and Dubois* stated that the European Court should be a court of "fourth instance."[194] This is echoed in how, in *X. and Others v. Austria*, the European Court emphasized that it was not called upon to examine the possibility of second-parent adoption in general.[195]

In both cases, the European Court further recognized that the lesbian couples along with their respective children formed a *de facto* family unit which is protected by the right to family life under Article 8. In *Gas* and *Dubois*, the European Court left it up to the state parties if and how to legally recognize such a family within their margin of appreciation and held that the applicants were not in a situation comparable to that of a married heterosexual couple.[196] Given that, under French law in force at that time, second-parent adoption was only open for married couples, the applicants had not been discriminated against when compared to unmarried heterosexual couples.[197] The principal difference between the cases therefore lies in the fact that under the Austrian Civil Code, second-parent adoption was available to unmarried heterosexual couples, but not to unmarried same-sex couples. With the judgment in *X. and Others v. Austria,* the European Court made clear that once the institution of second-parent adoption is opened for unmarried couples, it should be so for different-sex as well as same-sex couples.[198] Not only can same-sex couples and their children form a *de facto* family, the possibility of second-parent adoption should be open and legally recognize such a family when this possibility exists for unmarried heterosexual couples.

IV. THE RIGHT TO FAMILY LIFE FREE FROM DISCRIMINATION ON SEXUAL ORIENTATION: ACTHR

The Organization of American States ("OAS"),[199] established under

194. *Gas and Dubois*, App. No. 25951/07, Eur. Comm'n H.R. at 22 (Costa, J., concurring).

195. *X.*, App. No. 19010/07, Eur. Ct. H.R ¶ 134.

196. *Id.* ¶¶ 58–60.

197. *Id.* ¶¶ 68–69.

198. *See X.*, App. No. 19010/07, Eur. Ct. H.R ¶¶ 135–36 (noting that once a State has voluntarily decided to permit adoption by a single homosexual it then has an obligation under Article 14 to ensure that this right is not accorded in a discriminatory manner).

199. *See* Charter of the Organization of American States, Apr. 30, 1948, 199 U.N.T.S. 3, Protocol of Amend. Feb. 23, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847

the OAS Charter of the Organization of American States in 1948, is an organization comparable to the Council of Europe and promotes and protects human rights in the Americas.[200]

The Inter-American human rights system distinguishes itself from other regional human right protection schemes because it consists of two different instruments.[201] On the one side, its Charter system is based on the OAS Charter and the American Declaration on the Rights of Duties of Man; on the other side, the ACHR offers human rights protection in those OAS Members States which are party to it.[202] The Inter-American Commission on Human Rights ("Inter-American Commission") is a central organ in both systems and receives communications from individuals claiming violation of either the Declaration or the ACHR.[203] Also, under Article 45(1) of the ACHR, state parties can accept the competence of the Commission to receive and examine inter-state complaints.[204]

The Inter-American Court was established as a judicial organ under the ACHR and as such only has jurisdiction over inter-state and individual complaints against state parties to the Convention that have explicitly accepted this jurisdiction by a declaration.[205] Further, it has the competency to give advisory opinions to state parties requesting an interpretation of the Convention or other human right instruments in the Americas or on the compatibility of its national legislation with such instruments.[206] Certain organs of the OAS are in the position to ask the court for the same advisory opinions on the interpretation of the Convention and other regional instruments.[207]

For a case to come before the Inter-American Court, a certain

[hereinafter OAS Charter]; *Member States*, ORG. AM. STS., http://www.oas.org/en/member_states/default.asp (last visited Mar. 17, 2014) (providing a list of all OAS member States).

200. JAVAID REHMAN, INTERNATIONAL HUMAN RIGHTS LAW 271 (2d ed. 2010).

201. *Id.* at 272.

202. *Id.*

203. *See* ACHR, *supra* note 32, arts. 33(a), 44; OAS Charter, *supra* note 199, art. 106.

204. ACHR, *supra* note 32, art. 45(1).

205. *See id.* art. 62 (specifying that such a declaration can be made in general (paragraph 1) or for a specific period of time or for specific case(s) (paragraph 2)); Jo Pasqualucci, *The Americas*, *in* INTERNATIONAL HUMAN RIGHTS LAW 433, 442 (Daniel Moeckli et al. eds., 2010).

206. ACHR, *supra* note 32, art. 64.

207. *Id.* art. 64(1).

procedure needs to be followed.[208] According to Article 48(1), the Inter-American Commission examines a complaint, decides on its admissibility, and tries to work toward a friendly settlement between the parties.[209] If a friendly settlement is not reached, the Inter-American Commission draws up a report to send to the relevant state party, making proposals and recommendations as it sees fit.[210] Following this report, both the Inter-American Commission and the state party concerned can refer the case to the Inter-American Court within a term of three months.[211] The individual applicant does not have standing to bring a case before the Court; but once the case has been submitted, the individual is no longer represented by the Inter-American Commission and represents himself.[212]

This article is limited to the Inter-American Court for it has recently pronounced itself on the right to family life in custody decisions where one of the parents is discriminated on the basis of his sexual orientation in the ground-breaking case *Atala Riffo y Niñas v. Chile*.[213]

Once the issues are before the Court, how does the Inter-American Court deal with the right to family life as described in Articles 11 and 17 of the ACHR in connection to the prohibition of discrimination in Article 1(1)? Which social entities constitute a family under the Inter-American human rights system, deserving of protection? And how has the Inter-American Court ruled on cases of discrimination on the basis of sexual orientation in connection to family life, particularly in custody cases?

A. DEFINITION OF FAMILY IN THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION

Neither the Inter-American Commission nor the Inter-American Court have said much about the scope of the term family in the context of same-sex relationships under Article 11.[214] Article VI of the

208. *Id.* art. 61(2).
209. *Id.* art. 48(1).
210. *Id.* art. 50.
211. *Id.* art. 51(1).
212. *Id*. art. 61.
213. Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 27, 2012).
214. *See* Loveday Hodson, *Family Values: The Recognition of Same-Sex Relationships in International Law*, 22 NETH. Q. HUM. RTS. 33, 43–44 (2004)

American Declaration[215] establishes that "[e]very person has the right to establish a family . . . and to receive protection" and Article 15 of the San Salvador Protocol uses similar wording.[216] Davidson submits that this language seems broader than that of Article 17 of the ACHR[217] and that it possibly suggests that single parent and same-sex parent families are protected under family life.[218] Nevertheless, the traditional concept of family seems supported in this regional human rights system as well.[219]

It is telling that the Inter-American Commission in *Marta Lucía Álvarez Giraldo v. Colombia*[220] found the application admissible on the grounds of a possible violation of the right to private life under Article 11(2) of the ACHR.[221] The case concerned a lesbian prisoner who was not allowed to have intimate visits with her partner; such visits would have been possible if she were heterosexual.[222] Rather than interpret this issue as a violation of the right to family life, the Inter-American Commission chose to frame the issue within private life, as seen in the earlier cases before the European Court.[223]

However, with the recent judgment of the Inter-American Court in the case of *Atala Riffo y Niñas v. Chile*,[224] the case law has evolved. It

(explaining that the two treaty-monitoring bodies have been preoccupied with extreme rights' violations, like disappearances).

215. American Declaration on the Rights and Duties of Man, art. 6, adopted May 2, 1948, by the Ninth International Conference of American States, Bogota, Columbia, *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17, OEA/ser. L./V/II.7I doc. 6 rev I (1987).

216. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 15, 1988 O.A.S.T.S. No. 69 (1988), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82 doc.6 rev.1, art. 10(1), at 67 (1992).

217. Scott Davidson, *Civil and Political Rights Protections*, *in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 271, 273 (D. Harris & S. Livingstone eds., 1998).

218. *Id.*

219. *Id.*

220. Giraldo v. Colombia, Case 11.656, Inter-Am Comm'n H.R., Report No. 71/99 (1999), *available at* http://www.cidh.org/annualrep/99eng/admissible/colombia11656.htm#_ftn1.

221. *Id.* ¶¶ 21–23.

222. *Id.* ¶¶ 6–8.

223. Hodson, *supra* note 214, at 44.

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

was the first case under the ACHR in which the Inter-American Court found discrimination on the basis of sexual orientation prohibited by the ACHR.[225] Furthermore, the Inter-American Court criticized Chile for its narrow, stereotyped interpretation of the concept of family under the ACHR.[226]

B. INTER-AMERICAN CASE LAW: *ATALA RIFFO Y NIÑAS V. CHILE*

1. Facts of the Case

The facts of the case are parallel to those in *Salgueiro da Silva Mouta v. Portugal*,[227] as discussed under the ECHR system.

Ms. Karen Atala Riffo married Ricardo Jaime Lópes Allendes in 1993 and together they had three daughters, M., V., and R., born in 1994, 1998, and 1999, respectively.[228] In March 2002, they separated and ended their marriage but they mutually agreed that Atala would maintain the care and custody of the children.[229] In November 2002, Ms. Emma de Ramón, Ms. Atala's new partner, moved into her house to live with the three daughters and Atala's son from a former marriage.[230]

The father of the daughters thereupon filed a custody suit with the Juvenile Court of Villarica.[231] On appeal, the Supreme Court of Chile granted the father permanent custody.[232] The Supreme Court based its decision on the best interests of the children and concluded that, Atala could not retain custody because she had put her own interests over those of her children by choosing to live with her lesbian partner.[233] These living arrangements would potentially confuse the daughters

225. HUMAN RIGHTS WATCH, CHILE: GAY RIGHTS RULING A LEAP FORWARD (2012), *available at* http://www.hrw.org/news/2012/03/23/chile-gay-rights-ruling-leap-forward.

226. *Atala Riffo*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 145.

227. Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, Eur. Comm'n H.R. (1999), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58404.

228. *Atala Riffo*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 30.

229. *Id.*

230. *Id.*

231. *Id.* ¶ 31.

232. *Id.* ¶ 54.

233. *Id.* ¶¶ 55–56.

since a male father was absent from the home and replaced by another female.[234] Further, their development would be at risk because their vulnerable position would open them up to discrimination and ostracism.[235] It was therefore preferable that the children grew up "within the bosom of a family that is structured normally and appreciated in the social environment, according to the proper traditional model."[236]

2. Violation of Articles 1(1) and 24 of the ACHR: Discrimination on the Basis of Sexual Orientation

2.1 Inclusion of Discrimination on the Basis of Sexual Orientation Under the ACHR

After setting out the facts of the case, the Inter-American Court first assessed the complaint of violations of Articles 1(1) and 24 of ACHR.

The Inter-American Court explained that it interprets the ACHR as a living instrument, paying attention to "evolving times and current living conditions."[237] When interpreting "any other social condition" as written in Article 1(1), it must follow the most favorable interpretation to the protection of the rights under the ACHR.[238]

Moreover, the list of prohibited distinctions in Article 1(1) is illustrative and the words "another social condition" allow for more criteria under the most favorable protection principle.[239] The Inter-American Court listed European and universal case law in which treaty bodies have included sexual orientation as a basis upon which no discrimination is allowed.[240]

The Inter-American Court then concluded that, under the ACHR, discrimination for reasons of sexual orientation is prohibited and state parties may not restrict or diminish the enjoyment of the rights therein on the basis of a person's sexual orientation.[241] The fact that in some

234. *See id.* ¶ 56 (asserting that testimony from those close to the children stated that the children had adopted games and attitudes reflecting confusion about the sexuality of their mother).
235. *Id.* ¶¶ 54–57.
236. *Id.* ¶ 57.
237. *Id.* ¶ 83.
238. *Id.* ¶ 84.
239. *Id.* ¶ 85.
240. *Id.* ¶¶ 87–90.
241. *Id.* ¶ 91.

countries no consensus appears to exist with regards to the full respect for the rights of sexual minorities cannot mean that discrimination for reasons of sexual orientation is allowed, nor can the fact that discrimination on sexual orientation is viewed as a controversial issue.[242]

In that sense, the Inter-American Court appears to take a different approach than the European Court which seems to account for the gradual recognition of the rights under the ECHR free from discrimination on sexual orientation on European consensus. In *Fretté*, for example, a European consensus did not yet exist on the issue of single parent adoption by homosexuals, so the recognition of the rights of sexual minorities fell within the margin of appreciation of the state parties.[243] The same can be said for its judgment in *Gas and Dubois* where again the European Court referred to European consensus and the margin of appreciation.[244] The European Court seemed to take the same approach again in *X. and others v. Austria* where it explained away the lack of European consensus as inconclusive and therefore accepted only a narrow margin of appreciation.[245] The Inter-American Court, conversely, does not pay heed to how acceptance of gay rights is not a fact throughout the region of the Americas.[246]

a. Difference in Treatment Based on Sexual Orientation and Its Justification

The Inter-American Court first examined whether Atala suffered from treatment differing from that of her former husband.[247] It cited *E.B. v. France*, explaining that it is not necessary for a decision to be based solely and fundamentally on the person's sexual orientation to

242. *Id.* ¶¶ 91–92.

243. *See* Fretté v. France, App. No. 36515/97, Eur. Comm'n H.R. ¶ 36 (2002), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60168 (recognizing the "total" lack of consensus regarding single-parent homosexual adoption among European Union States).

244. Gas and Dubois v. France, App. No. 25951/07, Eur. Comm'n H.R. ¶¶ 59–60 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572.

245. *X.*, App. No. 19010/07, Eur. Ct. H.R. ¶ 148.

246. *See Atala Riffo*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 93 (deciding, after evaluating European case law and the lack of a European consensus, that "a right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation").

247. *Id.* ¶ 95.

amount to a difference in treatment; it is sufficient that this circumstance is taken into account.[248]

The Inter-American Court then looked into whether Atala was treated differently from her ex-husband during the custody proceedings and found that the fact that these proceedings were instigated by a complaint of her abilities to take care of the children on the basis of her sexual orientation, her sexual orientation was a central discussion in the judgment.[249] The Supreme Court's reasoning for the decision, as set out earlier, reflects this: the living arrangements would damage the development of the girls because of possible discrimination for their mother's sexuality and would cause confusion with regards to sexual roles; further, by expressing her sexuality, Atala had chosen her own interests over that of her children.[250] The sexual orientation of the applicant therefore played a significant role in the custody proceedings, while the same could not be said for the sexuality of her former husband.[251]

As to the provisional custody ruling, the Juvenile Court argued that Atala chose her own interests over that of her daughters and that, in a heterosexual and traditional society, the children were better suited to grow up with the father.[252] Therefore, it also based its arguments on the parties' sexual orientation.

The next question that the Inter-American Court answered was whether this differential treatment served a legitimate purpose. This question was answered easily: the difference in treatment amounted to the protection of the best interest of the children involved.[253]

The Inter-American Court, contrary to the European Court in *Gas and Dubois v. France*, then scrutinized the domestic court's approach in assessing the best interest of the children involved. The Inter-American Court held that the best interest of the children requires assessing the specific parental behaviors and their impact upon the children, as well as the proven and real risks of damage to the

248. *Id.* ¶ 94 n.115.
249. *Id.* ¶ 96.
250. *Id.* ¶ 97.
251. *Id.*
252. *Id.* ¶ 98.
253. *Id.* ¶¶ 99, 114.

children's wellbeing.[254] Mere speculations, fears, prejudices, and stereotypes are not sufficient to infringe on the mother's right to be free of discrimination.[255]

Even though the Inter-American Court here did not explicitly mention these terms, as did the European Court, it examined whether the differential treatment was proportional to the aim of protecting the best interest of the child.[256] Were the children's interests actually served by the difference in treatment in this particular case?

With regard to the argument of the fear of social discrimination of the children, the Inter-American Court ruled that this argument did not fulfil the purpose of protecting the children's best interests.[257] The discrimination and ostracism of the daughters for the sexual orientation of their mother, as described, was conditional and abstract; the Inter-American Court saw it more as a possibility rather than a reality based on facts that had already taken place.[258] Even if discrimination on the basis of sexual orientation is common in society, a state cannot justify its own discriminatory treatment with such a fact.[259] States should fight such unequal treatment because of their obligation under Article 2 of the ACHR to make its rights effective for everyone and promote social progress.[260]

In principle, the best interest of the child is an important factor when it might be affected by the rejection of society; however a potential social stigma on the basis of the parent's sexual orientation cannot be considered a valid harm for the purposes of determining those best interests. Such social discrimination cannot be legitimized by arguing that it is in the child's best interest for the state to discriminate on this same basis.[261]

As to the confusion of sexual roles, the same reasoning held that the state needs to prove that the decision is based on clear, specific, and

254. *Id.* ¶¶ 107–09.
255. *Id.* ¶ 109.
256. *See id.* ¶¶ 143–44 (citing cases from the European Court that assessed the proportionality between the measure taken and the purpose sought).
257. *Id.* ¶ 122.
258. *Id.* ¶ 118.
259. *Id.* ¶ 119.
260. *Id.* ¶¶ 119–20.
261. *Id.* ¶ 121.

real harm to the children's development.[262] The Inter-American Court went on to mention scientific research that shows that living with same-sex parents does not per se affect a child's emotional and psychological development and that, essentially, one's sexual orientation does not affect the ability to raise a child.[263] The Inter-American Court concludes that the Chilean Supreme Court merely based its argument again on possibilities without providing evidence that proved that the parents' sexual orientation had a negative effect on the children's development and wellbeing.[264] This differs from the *Fretté* case where the European Court concluded that scientific research differed on the consequences of adoption by homosexual persons, and therefore it was up to state parties to decide on the adequacy of adoption by homosexual persons.[265]

Discussing the alleged privilege of her own interests over those of her children, the Court made clear that the right to be free from discrimination on one's sexual orientation also includes the expression of sexual orientation.[266] This freedom is linked to the right to self-determination and to make one's own choices as to lifestyle; in that sense, it is linked to the right to private life under Article 11 of the ACHR. It was therefore not reasonable to expect Ms. 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.[267] To require this of her would impose traditional family notions that the mother needs to take care of the children without fulfilling her own identity. The Inter-American Court therefore found that this argument could not protect the best interest of the children involved.[268]

Lastly, the Inter-American Court delved deeper into the concept of the normal and traditional family. It confirmed that the ACHR does not define a limited concept of family nor does it restrict itself to traditional families.[269] Family encompasses not only marriage but also

262. *Id.* ¶ 127.
263. *Id.* ¶¶ 128–29.
264. *Id.* ¶ 130.
265. Fretté v. France, App. No. 36515/97, Eur. Comm'n H.R. ¶¶ 42–43 (2002), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60168.
266. *Atala Riffo*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 133.
267. *Id.* ¶ 139.
268. *Id.* ¶¶ 139–40.
269. *Id.* ¶ 142.

de facto family ties.[270] The Inter-American Court then concluded that the Chilean Supreme Court used a limited and stereotyped concept of family when it said that the children need to grow up in a normally structured family within its social environment for which there is no place under the convention.[271]

Taking all these arguments together, the Inter-American Court found violations of Article 24 and Article 1(1) of the ACHR for discriminatory treatment on the basis of sexual orientation that cannot be justified on the grounds of the legitimate aim of protecting the children.[272]

It is noteworthy that the Inter-American Court came to these violations of Articles 1(1) and 24 even before it examined whether the complaint fell within the scope of one of the provisions of the ACHR. This is striking especially considering that Article 1(1) prohibits discrimination in the enjoyment of the rights and freedoms given by the ACHR. Would it then not need to establish first if and which rights are involved?

b. Violation of Article 11 (2) in Conjunction with Article 17: The Right to Family Life

The Inter-American Court next considered whether the rights to private life and family life under Articles 11 and 17 of the ACHR were violated by the national court's decision on custody.

First, the Inter-American Court discussed the scope of private life under Article 11, which includes one's sex life and the right to establish and develop relationships with others.[273] However, it is not an absolute right and interference is allowed insofar as it is provided for by law, pursues a legitimate aim, and is suitable, necessary, and proportional to achieve that aim.[274]

Chile's interference with Atala's private life needed to fulfil these requirements because it concerned her sexual orientation. The Inter-American Court decided that Chile violated Article 11(2) in

270. *See id.* ¶¶ 143–44 (referring to *Salguiero da Mouta Silva v. Portugal* and *Karner v. Austria* to illustrate that international case law is consistent on this point).
271. *Id.* ¶ 145.
272. *Id.* ¶ 146.
273. *Id.* ¶ 162.
274. *Id.* ¶ 164.

conjunction with Article 1(1) since the interference with Atala's private life could not be justified as being in the best interest of the children involved because the examination into her private life was unsuitable and disproportionate.[275] Upon its decision on permanent custody, the Chilean Supreme Court should have restricted itself to examining parental behavior without exposing and scrutinizing the parties' sexual orientation.[276]

Subsequently, the Inter-American Court linked the right to be free from arbitrary interference in one's family life protected by Article 11(2) to Article 17's right to protection of the family and the right to live in a family.[277] The right protected under Article 11(2) is implicitly part of the right under Article 17 to protection of the family.[278] After analyzing other treaty monitoring bodies, the Inter-American Court concluded that there is not one single concept of family.[279] The Inter-American Court then discussed the case law on the right to family life under Article 8 of the European Court, which adopts a broad concept of family that includes same-sex relationships.[280] In the Inter-American system, the right to family life is complementarily protected by both Article 11(2) as well as Article 17.[281]

Applying these dual protections to the current case, the Inter-American Court established that from November 2002 to May 2003 there was a close relationship between the daughters and Atala's new partner as in any normal family.[282] It concluded that a new family unit was formed between the girls, the son from a former marriage, the mother, and her new partner, protected under Articles 11(2) and 17; it existed without prejudice to the other family unit composed of the daughters and their father.[283] Therefore, the Inter-American Court found violations of both Articles in conjunction with Article 1(1) of the ACHR because the custody decisions of the Supreme Court and the Juvenile Court were not in the best interest of the children and

275. *Id.* ¶ 166.
276. *Id.* ¶¶ 165–67.
277. *Id.* ¶ 169.
278. *Id.* ¶¶ 169–70.
279. *Id.* ¶ 172.
280. *Id.* ¶¶ 172–74.
281. *Id.* ¶ 175.
282. *Id.* ¶ 176.
283. *Id.* ¶¶ 176–77.

separated the daughters from this new family environment.[284]

It is remarkable that compared to the ECtHR in *Salguiero*, the Inter-American Court explicitly mentions that the new lesbian partner is part of the family unit as protected by the relevant convention. While the European Court in *Salguiero* focused on the relationship between the daughter and her father as the family unit, it left open whether the same family ties existed between the daughter and her father's new life partner.[285] Conversely, the Inter-American Court in *Atala Riffo* left no such doubt and held that *de facto* family ties can form themselves between the children of one parent and his new same-sex partner; it concludes that the new family as a unit requires protection.[286] The European Court, in the latter admissibility decision in *Gas and Dubois* and its judgment in *X. and others v. Austria*, has recognized that the situation of one same-sex partner, his biological child, and the other partner constitutes a family as to be protected under the treaty.[287]

V. CONCLUSION

To what extent now have the regional human rights systems of Europe and the Americas developed a right to family life, free from discrimination on the basis of sexual orientation?

The provisions on discrimination of the regional systems of human rights in Europe and the Americas do not expressly contain sexual orientation as a prohibited ground for differential treatment. The wording of Article 14 of the ECHR and Article 1(1) of the ACHR however, leave enough room for their supervising courts to extend the scope of the right to be free from discrimination with the prohibited ground of sexual orientation.

284. *Id.* ¶ 178.

285. Salgueiro da Silva Mouta v. Portugal, App. No. 33290/96, Eur. Comm'n H.R. ¶ 14 (1999), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58404.

286. *See Atala Riffo*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 142.

287. *See* X. v. Austria, App. No. 19010/07, Eur. Ct. H.R. ¶ 95 (2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-116735 (recognizing that the relationship of a cohabitating same-sex couple living in a stable *de facto* relationship falls within the notion of "family life"); Gas and Dubois v. France, App. No. 25951/07, Eur. Comm'n H.R. ¶ 37 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109572.

Linking this prohibition of discrimination on the basis of sexual orientation to the right to family life under the regional human rights treaties, how have the regional human rights courts handled questions of parenting by gay parents? Specifically, how do they see issues of adoption and custody decisions in connection to discrimination on the basis of sexual orientation?

The European Court has recognized that the relationship between same-sex partners constitutes family life in its *Schalk and Kopf v. Austria* decision, even though the state parties have a margin of appreciation regarding if and how they legally recognize such a relationship. From the *Salgueiro* case we can conclude that the European Court views the relationship between a biological parent in a same-sex relationship and his child as to constitute family life, though it did not clarify whether the newly created situation of a same-sex couple living with one of the pair's biological child constituted a new family unit protected under the ECHR. In its admissibility decision in *Gas and Dubois* analyzing adoption by the same-sex partner of the biological child of the other partner, the European Court decided that a *de facto* family existed between the same-sex couple and the child. This was also the case in *X. and others v. Austria* where the European Court further held that if this form of adoption is available to unmarried heterosexual couples, then it should also be open to unmarried homosexual partners as a form of obtaining legal recognition of the *de facto* family.

The Inter-American Court in *Atala* also explicitly recognized that situations of a same-sex couples living together with the biological child(ren) of either of them creates a new family unit, but decided that the family life continues to exist between the child and the other biological parent. The concept of family under both systems then reaches beyond the traditional family and adapts to social changes.

Both regional courts have therefore made clear that a difference in treatment concerning issues of family life cannot serve a legitimate aim or be proportionate one if it is based on sexual orientation in a decisive manner.

Interestingly, both the European Court, in *Fretté* and *E.B.*, and the Inter-American Court, in *Atala*, scrutinized the domestic court cases to determine what was in the best interests of the children. Yet, in the *Gas and Dubois* case, the European Court ignored the issue of the best

interests of the child, even though it was a big part of the domestic proceedings. There, the European Court solely addressed whether the situation was comparable to married or unmarried heterosexual couples. Since neither was the case, there was no differential treatment and no need to determine whether such treatment could be justified. The same can be said for *X. and others v. Austria*, where the European Court found unmarried same-sex and different-sex couples were comparable, the latter of which was eligible for second-parent adoption while the former was not.

Finally, in *Atala*, the Inter-American Court found that the lack of consensus within some countries on the full respect of rights for sexual minorities was an invalid basis to restrict their human rights. This seems to conflict with the European Court decisions in *Gas and Dubois* and *Fretté*, where the European Court looked at the existence of European consensus on the issue of gay parenting and found that, because no such consensus existed, states have a margin of appreciation in legally recognizing the *de facto* relationship between a child and his same-sex parents. The reasoning of the European Court in *X. and others v. Austria* seems closer to that of the Inter-American Court since the European Court was inconclusive on whether European consensus existed with respect to second-parent adoption by unmarried couples, while, objectively, it could be stated no European consensus, in fact exists. This conclusion would have allowed for a wider margin of appreciation. Instead, a narrow margin of appreciation was left to state parties in favor of the right to family life of same-sex couples and their *de facto* families, irrespective of the position of state parties to the Convention regarding these rights. Does this mean that the European approach is moving away from favoring the traditional family towards a more encompassing concept and toward the Inter-American Court where the rights of sexual minorities prevail?