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In the Right Direction: Family Diversity in the Inter-American System of Human Rights

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In the Right Direction: Family Diversity in the Inter-American System of Human Rights

Macarena Saez†

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I. Introduction

Legal systems have traditionally treated Family Law as different from other legal areas because of its attachment to culture.¹ For a long time, the law was not the space to intervene in the intimate affairs of the family, leaving women and children mostly outside the scope of legal protection. A clear example of this legal void was domestic violence, a concept that did not exist and a space which legal systems consistently claimed too intimate for public intervention.² Judges have too often interpreted the rights to privacy and family as sanctuary spaces, where governments should not intervene, even to the detriment of some families and some family members.³ Since its origins, modern international human rights law included the right to family as inherent to each individual.⁴ This

¹ Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 754 (2010).

² See Reva B. Siegel, *Civil Rights Reform in Historical Perspective: Regulating Marital Violence*, in REDEFINING EQUALITY 29, 29–30 (Neal Devins & Davison M. Douglas eds., 1997); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2118 (1996). In the continental legal system, under the influence of the Napoleonic Code, many countries gave husbands legal power over their wives. Italy was the first country to eliminate this power in 1865, but it maintained the husband as head of the household. France only eliminated this power in 1938. See WHITNEY CHADWICK & TIRZA TRUE LATIMER, *Becoming Modern: Gender and Sexual Identity after World War I*, in THE MODERN WOMAN REVISITED: PARIS BETWEEN WARS 3, 16 n.16 (2003). One of the last countries to remove the power of the husband over the wife in Latin America was Chile in 1989. See Law No. 18.802, 23, MAYO 23, 1989, DIARIO OFICIAL [D.O.] (Chile).

³ Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2170–71 (1996) (“The criminal justice system regulated marital violence in this “therapeutic” framework for much of the twentieth century. There was no formal immunity rule as in tort law, but the criminal justice system developed a set of formal procedures for handling marital violence—which it justified in the discourse of affective privacy—that provided informal immunity for the conduct in many circumstances.”).

⁴ See G.A. Res. 217 A (III), Universal Declaration of Human Rights, at 73–74 (Dec. 10, 1948) (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the

recognition, however, was not designed to protect individuals from abuses within the family, and for many years it was not conducive to the recognition of families outside the heterosexual married family.

Human rights systems have no specific definition of what type of family they protect or how to define the family that they intend to protect.⁵ Countries who subscribe to human rights instruments have their own specific visions of the family, and these visions sometimes clash with the rights these same instruments intend to protect.⁶ Even though regional and international treaties refer to the family as a unit, shielded from arbitrary state and private intervention, courts and treaty bodies created by those instruments have slowly recognized that the family is a space where human rights violations often occur. This realization came through several cases in areas such as adoption, reproductive rights, custody, and violence. Additionally, human rights adjudicative bodies have also started to think of the right to family outside biology and marriage, recognizing non-heterosexual and gender non-conforming individuals' right to family.

This Article argues that the Inter-American System of Human Rights (IASHR) has contributed to a family system that embraces gender equality and non-heterosexual and gender non-conforming families. It argues that the system had, from its inception, an expansive idea of the family that included associations outside marriage. This was the basis for a robust development of the concepts of equality and non-discrimination by the Inter-American Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). Although the IACtHR has only decided a handful of cases related to the non-heterosexual family, its rich case law on equality and the right to family is favorable to

right to the protection of the law against such interference or attacks. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. . . . The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”).

⁵ See, e.g., Human Rights Council Res. 29/22, U.N. Doc. A/HRC/RES/29/22, at 1–5 (July 3, 2015) (highlighting the UN’s protection of the family without specifically defining “family”).

⁶ See, e.g., *Maria Eugenia Morales de Sierra v. Guatemala*, Case 11.625, Inter-Am. Comm’n H.R., Report No. 28/98, OEA/Ser.L/V/II.95, doc. 7 rev. at 144 (1997) (demonstrating Guatemala had subscribed the ACHR and yet its definition of the family gave the husband authority over the wife when it came to work outside the household).

family diversity, including marriage equality. The IASHR, however, must be careful not to fall into the trap of privileging the married family after so much progress towards family diversity. This risk is more apparent after the IACtHR issued a 2017 Advisory Opinion regarding trans rights and same-sex couples that focused heavily on the regulation of marriage.⁷

Part II of this Article analyzes the origins and historical developments of the American Declaration of Human Rights (ADHR) and the American Convention of Human Rights (ACHR) vis-à-vis the family.⁸ It argues that from its origins the ADHR and the ACHR had the intention to treat married and unmarried families equally. This section also analyzes the jurisprudence in the area of children's rights and equality within the family. Part III describes the development of the (IASHR) jurisprudence on the rights of lesbians, gays, bisexuals, trans, and intersex (LGBTI) individuals, arguing that its focus on family diversity has been instrumental for the development of the right to equality and non-discrimination. This section analyzes the Advisory Opinion AO-24/17⁹ on trans rights and the rights of same-sex couples, arguing that although favorable to LGBTI rights, it missed the opportunity to stress the need for strong protection of trans individuals and family diversity beyond marriage. Part IV presents some reflections about the risks of focusing too heavily on marriage equality to the detriment of the most common set of family associations in Latin America: the unmarried family.

⁷ See State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017) [hereinafter *Advisory Opinion OC-24/17*].

⁸ See Organization of American States, American Declaration on the Rights and Duties of Man, O.A.S. G.A. Res. XXX, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948) [hereinafter ADHR], available at <http://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf> [<https://perma.cc/UFG9-AZ8K>]; see also Organization of American States, American Convention on Human Rights, "Pact of San Jose," Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR], available at <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm> [<https://perma.cc/5ZLC-9Y5W>].

⁹ *Advisory Opinion AO-24/17*, supra note 7.

II. Family Diversity as a Human Right

The Inter-American system of Human Rights (ISHR) started to take shape in 1945 at the Inter-American Conference on Problems of War and Peace, also known as the Chapultepec Conference.¹⁰ At that time, concepts such as “gender” and “sexuality” were foreign to legal systems and had not entered the realm of international human rights.¹¹ It is no accident that the first human rights instrument in the Americas was called “American Declaration of the Rights and Duties of *Man*.”¹² Although the American Declaration of Human Rights included the prohibition of discrimination on the basis of sex, there were no women drafters.¹³ Women had their own international processes in place through the Inter-American Commission of Women (CIM), which was created in the 1920s with the task of studying the situation of women in the region.¹⁴ Its main interest was to advance women’s suffrage.¹⁵ The CIM has been at the forefront of advancing women’s rights, including the drafting of the Belem do Para Convention.¹⁶ Despite its great contributions, the CIM has functioned on a separate track from the IASHR, which took many years to introduce women’s issues into its analysis and cases and even more time to think of sexuality in terms of human rights protections.

¹⁰ Robert K. Goldman, *History and Action: the Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights*, 31 HUM. RTS. Q. 856, 858 (2009) (“The American states began shaping an incipient regional program for the protection of human rights at the Inter-American Conference on Problems of War and Peace, the so-called Chapultepec Conference, convened in 1945 to consider the postwar directions of the Inter-American system.”).

¹¹ Terrell Carver, *Gender*, in POLITICAL CONCEPTS 169 (Richard Bellamy and Andrew Mason eds., 2003) (“gender” as a concept was only adopted into political theory in the 1970s).

¹² ADHR, *supra* note 8 (emphasis added).

¹³ *See id.* art. 2 (“All persons are equal before the law and have the rights and duties established in this Declaration, without discrimination as to race, sex, language, creed or any other factor.”).

¹⁴ ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, COMISIÓN INTERAMERICANA DE MUJERES, *A Brief History of the Inter-American Commission of Women* 1, 1 [http://www.oas.org/en/cim/docs/BriefHistory\[EN\].pdf](http://www.oas.org/en/cim/docs/BriefHistory[EN].pdf) [<https://perma.cc/E6XD-7MAJ>].

¹⁵ *Id.* at 4–5 (explaining the “Hemispheric Struggle for Women’s Suffrage” and CIM’s first goal in extending the vote to women).

¹⁶ *Id.* at 7 (highlighting that in April 1994, a “Special Assembly of CIM delegates” approved a draft of the Inter-American Convention on Women and Violence that was adopted by the General Assembly in Pará, Brazil in June 1994).

A. *The Family in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights*

The American Declaration of the Rights and Duties of Man was adopted in Bogotá, Colombia by the Ninth International Conference of American States in 1948.¹⁷ It was the first instrument in the region aimed at guaranteeing the protection of human rights.¹⁸ These events took place two months before the adoption of the Universal Declaration of Human Rights.¹⁹ Both declarations provided a framework that, for the next couple of decades, allowed the drafting of binding instruments at universal and regional levels.

Even though the drafting of the American Declaration took place almost simultaneously as the drafting of the Universal Declaration, both documents showed important differences in their treatment of the family. Whereas the Universal Declaration focused on the right to marry, the American Declaration was silent on the topic of marriage and focused exclusively on the right to form a family.²⁰

The first Committee Draft of the Universal Declaration stated in Article 13: “Everyone has the right to contract marriage in accordance with the laws of the State.”²¹ It is surprising this statement passed as a right of any kind. The Article openly recognized this right was subject to unrestricted government control.²² Country delegates, including the Inter-American Juridical Committee representing the Americas, suggested the first addendum to the first Draft, which included an opening paragraph on autonomy in family formation and a separate reference to marriage based on equality of husband and wife.²³

¹⁷ ADHR, *supra* note 8.

¹⁸ Goldman, *supra* note 10, at 859–60.

¹⁹ *Id.* at 859.

²⁰ *See* ADHR, *supra* note 8, art. 6 (specifying only the right to a family and its protection, with no mention of marriage).

²¹ Comm’n on Hum. Rts. Drafting Comm., Draft Outline of International Bill of Rights, U.N. Doc. E/CN.4/AC.1/3, at 6 (1947), http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/3 [<https://perma.cc/9A47-5Q85>].

²² *See id.* (emphasizing the language in Article 13 of the right to marriage as “in accordance with the laws of the State”).

²³ Comm’n on Hum. Rts. Drafting Comm., Addendum to Draft Outline of International Bill of Rights, U.N. Doc. E/CN.4/AC.1/3/Add.1 at 98 (1947),

The Delegates did not adopt this text.²⁴ By the Drafting Committee's Second Session, the draft of Article 13 was more specific. It had more content, although again, the emphasis was on marriage, with the reference to the family still reading as an accessory to marriage.²⁵ While maintaining its emphasis on protecting marriage, the final version of what became Article 16 of the Universal Declaration included a reference to the family as the basic structure of society:

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.²⁶

The American Declaration, unlike the Universal Declaration, focused exclusively on protecting the family:

Article V. Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.²⁷

Article VI. Every person has the right to establish a family, the basic element of society, and to receive protection therefore.²⁸

Both declarations recognized, as part of the basic human rights canon, the right to form a family. According to Johannes Morsink, the Universal Declaration's emphasis on marriage seems to have

http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/3/Add.1
[<https://perma.cc/7LG5-KT7X>] ("Every person has the right to be free from interference in his family relations. . . . [i]t is the duty of the State to respect and to protect the reciprocal rights of husband and wife on their mutual relations.").

²⁴ Comm'n on Hum. Rts. Drafting Comm., Report of the Drafting Committee to the Commission on Human Rights, E/CN.4/95 at 8 (1948)
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/95
[<https://perma.cc/7BS8-5ULE>].

²⁵ *Id.*

²⁶ See UDHR, *supra* note 4.

²⁷ *Id.* art. 5.

²⁸ ADHR, *supra* note 8, art. 6.

had at least three motivations.²⁹ First, an opposition to Nazi ideas that denied interracial marriage;³⁰ second, a discussion about the role of marriage in family formation;³¹ and third, the need for compromise about the place of divorce in the Declaration.³² Divorce was a point of conflict between groups with strong Christian beliefs and delegations representing secular interests.³³ While the first group viewed marriage as an institution without dissolution, the second group considered it important to treat marriage as a secular institution subject to divorce laws.³⁴

The recognition of family units formed outside marriage was a point of disagreement. The Lebanese delegate's proposal illustrates the tension: "The family deriving from marriage is the natural and fundamental group unit of society. It is endowed by the Creator with inalienable rights antecedent to all positive law"³⁵ Similarly, the representative of the Union of Soviet Socialist Republics "thought there was no purpose in laying down that the family was based on marriage because it could hardly be based upon anything else."³⁶ Although no delegate was advocating for a broad interpretation of the family outside marriage, some were concerned with guaranteeing equal treatment of children born within or outside marriage, indirectly recognizing the existence of the family outside marriage.³⁷ In line with the lack of representation of sexual diversity at the time, the drafters did not have a family outside heterosexual norms in mind. According to Morsink, however, at least one delegate, from Uruguay, stated that omitting references to marriage

29 JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, ORIGINS, DRAFTING AND INTENT* (1999).

30 *See id.* at 88 ("The stipulation that 'marriage shall be entered into only with the free and full consent of the intending spouses' was meant to cut out the role of both religion and the state and stands in clear contrast to Hitler's pronouncements in *Mein Kampf*, where he denied that marriage was 'the holiest of human rights.'").

31 *See id.* at 254.

32 *See id.* at 121–122.

33 *See id.* at 121–125.

34 *See id.*

35 MORSINK, *supra* note 29, at 284.

36 *See* U.N. Economic and Social Council, 2nd Sess., 38th mtg. at 11, U.N. Doc. E/CN.4/AC.1/SR.38 (May 18, 1948), <http://hr-travaux.law.virginia.edu/document/iccpr/ecn4ac1sr38/nid-1689> [<https://perma.cc/33JA-V5B7>].

37 *Id.* at 10.

could provide protection to those “whose sexual inclination is not heterosexual.”³⁸

Contrary to the drafting of the Universal Declaration, the drafters of the American Declaration did not discuss the right to marriage.³⁹ Additionally, the American Declaration included a special protection for pregnant women and children consistent with labor protections at the time of drafting.⁴⁰

B. The Family in the American Convention of Human Rights

The American Convention of Human Rights (ACHR) was adopted in 1969, and it entered into force in 1978.⁴¹ The Convention resembled the International Covenant on Civil and Political Rights (ICCPR) that had been drafted three years earlier, and the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights (ECHR), drafted in 1950 and in force since 1953.⁴²

The ACHR, similar to the ICCPR and the ECHR, refers to the family in two dimensions. The first dimension is within the right to privacy and reflects the traditional idea of the family as shielded from state intervention. The ACHR states in Article 11.2 that “[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.”⁴³ This Article is

³⁸ MORSINK, *supra* note 29, at 256.

³⁹ Alvaro Paúl, *Los Trabajos Preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y del Origen Remoto de la Corte Interamericana*, XXV (2017), available at <https://biblio.juridicas.unam.mx/bjv/detalle-libro/4660-los-trabajos-preparatorios-de-la-declaracion-americana-de-los-derechos-y-deberes-del-hombre-y-el-origen-remoto-de-la-corte-interamericana> [<https://perma.cc/6TB6-Y4KZ>].

⁴⁰ See, e.g., Elizabeth Hutchison, “*La Defensa de las “Hijas del Pueblo,”*” in *DISCIPLINA Y DESACATO: CONSTRUCCION DE IDENTIDAD EN CHILE, SIGLOS XIX Y XX* 266 (Lorena Godoy et al. eds., 1995); see also FERNANDO ORTIZ LETELIER, *EL MOVIMIENTO OBRERO EN CHILE (1891-1919)* 147 (2005).

⁴¹ Cecilia Medina Quiroga, *Los 40 años de la Convención Americana sobre Derechos Humanos a la luz de cierta jurisprudencia de la Corte Interamericana*, ANUARIO DE DERECHOS HUMANOS 15 (2009), <http://repositorio.uchile.cl/bitstream/handle/2250/126735/los-40-anos-de-la-convencion-americana-sobre-derechos-humanos-a-la-luz-de-cierta-jurisprudencia-de-la-Corte-Internacional.pdf?sequence=1&isAllowed=y> [<https://perma.cc/7GF9-M7UG>].

⁴² *Id.* at 16.

⁴³ ACHR, *supra* note 8, at art. 11.2.

similar to ICCPR's Article 17.⁴⁴ The second dimension refers to the right to form a family.⁴⁵ Article 17 of the ACHR and Article 23 of the ICCPR are very similar. Both texts recognized the family as the natural and fundamental unit in society with no mention of marriage.⁴⁶ Both referred to the right of men and women to marry and form a family.⁴⁷ The ACHR uses, in English, the sentence "to raise a family" while the ICCPR uses "to found a family." Both documents in Spanish, however, use the same sentence "a fundar una familia."⁴⁸ The ACHR, however, added paragraphs that resulted in a more robust protection to the family and the basis for case law strengthening the protection of families outside the heterosexual married couple.⁴⁹

The ACHR, added two elements not included in the ICCPR. First, it conditioned legal regulations for the celebration of marriage to the principle of non-discrimination, and it provided a condition of equality within marriage to get the protection of the Convention.⁵⁰ It also covered more types of families than the text of the ICCPR.⁵¹ Additionally, the American Convention protects the right of women and men to marry and the right to found a family under the conditions set forth in their own countries.⁵² These rights, however, are protected as long as those conditions do not go against the Convention's principle of non-discrimination. Under the ACHR children also have the same right to family, regardless of their parents' marital status.⁵³ The ACHR, therefore, since its origins, formally protects some family connection outside of the traditionally married family.

Regarding underage marriage, the Convention did not expressly

⁴⁴ See International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [<https://perma.cc/42LX-KDQP>].

⁴⁵ ACHR, *supra* note 8, at art. 17.

⁴⁶ See *id.*; see ICCPR, *supra* note 44, at art. 23.

⁴⁷ See ACHR, *supra* note 8; see ICCPR, *supra* note 44.

⁴⁸ ACHR, *supra* note 8, at art 17.

⁴⁹ See *id.*

⁵⁰ See *id.*; see Maria Eugenia Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, at 7-8 (Jan. 19, 2001).

⁵¹ See ACHR, *supra* note 8, at art. 17.

⁵² See *id.* at art. 17.4.

⁵³ See *id.* at art. 17.5.

prohibit it, even though the third paragraph of Article 17 states that marriage could only occur if the parties freely consented to it.⁵⁴ This position followed the legal framework of the majority of countries in Latin America and the world.⁵⁵ The focus on the prohibition of underage marriage came some years later, and thanks to other human rights instruments, the international human rights community is pushing for eliminating underage marriage.⁵⁶

Despite its shortcomings, since its origins the ACHR subordinated marriage regulations and the right to raise a family to the principle of non-discrimination. This is a key element for the progressive inclusion and equality of treatment of non-heterosexual families in the region.

The most important innovation of the American Convention was the right of children, born out of wedlock, to equal treatment.⁵⁷ Consistently throughout history, Latin America and the Caribbean have had low marriage rates and high rates of children born out of wedlock.⁵⁸ Unlike the ICCPR and the ECHR, the ACHR clarified

⁵⁴ *See id.* art. 17.

⁵⁵ ROCÍO ROSERO GARCÉS & CECILIA VALDIVIESO VEGA, REFORMING THE LEGISLATION ON THE AGE OF MARRIAGE: SUCCESSFUL EXPERIENCES AND LESSONS LEARNED FROM LATIN AMERICA AND THE CARIBBEAN 7 (2016), <http://onusidalac.org/1/images/2016/onu-matrimonio-infantil-2016.pdf> [<https://perma.cc/AXH3-G99G>] (stating 30% of women between the ages of 20 and 49 in Latin America and the Caribbean were married or entered into a union before the age of 18, while 18% married before the age of 15).

⁵⁶ *See* Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) art. 16.2, Dec. 18, 1979, 1249 U.N.T.S. 20378 (Sept. 3, 1981), available at <https://www.ohchr.org/documents/professionalinterest/cedaw.pdf> [<https://perma.cc/A3K6-CJFC>]; Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations*, art. 36 (1994), available at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38_\(SUPP\)_4733_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/A_49_38_(SUPP)_4733_E.pdf) [<https://perma.cc/VT3U-CRAN>]; Convention on the Elimination of All Forms of Discrimination Against Women and Convention on the Rights of the Child, *Joint General Recommendation/General Comment No. 31*, U.N. Doc. CEDAW/C/GC/31-CRC/C/GC/18 (Nov. 14, 2014) (stating that in exceptional cases judicial authorities may approve marriage by minors, provided that they have reached 16 years).

⁵⁷ *See* THOMAS BUERGENTHAL & ROBERT NORRIS, HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM 14 (1982).

⁵⁸ Nina Milanich, *To Make All Children Equal is a Change in the Power Structures of Society: The Politics of Family Law in Twentieth Century Chile and Latin America*, 33 LAW AND HIST. REV. 767, 774 (2015) (“By the turn of the twentieth century, Latin America had the lowest marriage rates and highest illegitimacy rates in the world”) (citing GÖRAN THERBORN, BETWEEN SEX AND POWER: FAMILY IN THE WORLD, 1900–2000 156 (2004)).

that treating legitimate and illegitimate children differently violated the right to family.⁵⁹ Many years passed before the right to equal treatment between legitimate and illegitimate children became the general rule in the region.⁶⁰ The American Convention, however, recognized children's equality, regardless of parents' civil status, as a basic human right. The ECHR, on the contrary, had no similar provision, and it recognized this right through case law in 1979.⁶¹

Article 15 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" complements Article 17 of the Convention.⁶² Additionally, Article 15 states that the family is the foundation of society and that "everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation."⁶³ Once more, the right to marry is not mentioned, even though it links the right to family to local legislations, indirectly creating restrictions to unmarried families.

C. The Family Through the Jurisprudence of the Inter-American System of Human Rights

The IACtHR has a rich jurisprudence on the right to privacy involving the family.⁶⁴ Several of the IACtHR's decisions provided

⁵⁹ ACHR, *supra* note 8, at art. 17.

⁶⁰ For a historical account on regulation of illegitimacy in Latin America, see Milanich, *supra* note 58, at 774 (citing THERBORN, *supra* note 58).

⁶¹ *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R. (June 13, 1979), available at <https://www.refworld.org/cases,ECHR,3ae6b7014.html> [<https://perma.cc/PY8M-C8ZL>].

⁶² See Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" art. 15, Nov. 17, 1988, O.A.S.T.S. No. 69, available at [https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20\(Protocol%20of%20San%20Salvador\).pdf](https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20(Protocol%20of%20San%20Salvador).pdf) [<https://perma.cc/9NUK-YSHH>].

⁶³ *Id.*

⁶⁴ See, e.g., Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, (Nov. 19, 1999); Case of the Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130 (Sept. 8, 2005); Case of the "Mapiripán Massacre" v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134 (Sept. 15, 2005), http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf

content to the definition of the family unit protected under the ACHR. Outside the scope of LGBTI rights, there are at least two areas in which the IACtHR has contributed to shaping family law institutions in the region. The richest area of development and perhaps one of the least analyzed is children's rights. The IACtHR has also decided several cases related to justice within the family and cases related to gender equality and the family.

1. Children's Rights

The most notable actions by the IACtHR in this area are the Advisory Opinion 17 (OC-17/2002) on children's rights, and cases of children separated from their families.⁶⁵ OC-17/2002 was a groundbreaking opinion on children's rights issued by the IACtHR in 2002 at the request of the Inter-American Commission on Human Rights.⁶⁶ The IACHR asked the Court to interpret Articles 8 and 25 of the American Convention, "with the aim of determining whether the special measures set forth in Article 19 of that same Convention establish[ed] 'limits to the good judgment and discretion of the States with respect to children'"⁶⁷

[<https://perma.cc/HD8L-YNX4>]; Case of the Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148 (July 1, 2006), http://www.corteidh.or.cr/docs/casos/articulos/seriec_148_ing.pdf [<https://perma.cc/XYU7-K5FM>]; Case of Tristán Donoso v. Panamá, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 193 (Jan. 27, 2009), http://www.corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf [<https://perma.cc/6RLQ-P5FY>]; Case of Escher et al. v. Brazil, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 208 (July 6, 2009), http://www.corteidh.or.cr/docs/casos/articulos/seriec_200_ing.pdf [<https://perma.cc/9Z66-B4YY>]; Case of Chitay Nech et al. v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212 (May 25, 2010), http://www.corteidh.or.cr/docs/casos/articulos/seriec_212_ing.pdf [<https://perma.cc/EJL9-N3UK>]; Rosendo Cantú et al. v. México, Preliminary Objections, Merits, Reparations, and Cost, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, (Aug. 31, 2010), http://www.corteidh.or.cr/docs/casos/articulos/seriec_216_ing.pdf [<https://perma.cc/3FFB-BPE4>]; Case Gelman v. Uruguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 (Feb. 24, 2011), http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf [<https://perma.cc/UB6V-HUQ8>].

⁶⁵ Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02, Inter-Am. Ct. H.R. (ser. A) No. 17 (Aug. 28, 2002) [hereinafter *Advisory Opinion OC-17/02*], available at http://www.corteidh.or.cr/docs/opiniones/seriea_17_ing.pdf [<https://perma.cc/4363-2V3G>].

⁶⁶ *Id.* at ¶ 1.

⁶⁷ *Id.*

Several interpretations came out of OC-17/2002 with major implications for the family that would later develop through case law. In this Opinion, the IACtHR indicated that it was a state's obligation "to support the family in performing its natural function of providing protection to the children who are members of the family."⁶⁸ This mandate does not explain the type of family to be protected or define "members of the family."⁶⁹ OC-17/02 refers to the family "as a natural and fundamental component of society."⁷⁰ It also states that "the child must remain in his or her household, unless there are determining reasons, based on the child's best interests, to decide to separate him or her from the family."⁷¹ This statement, however, did not shed light on the type of association that the Court considered a family unit. In 2012, the first case on sexual orientation, *Atala Riffo and Daughters v. Chile (Atala)*,⁷² the IACtHR broadly interpreted the family unit protected by the ACHR, including unmarried and non-heterosexual families.⁷³

Other IACtHR decisions reinforce the protection of the single-parent family formed outside marriage. In *Forneron and Daughter v. Argentina*,⁷⁴ the Court stated that being a single parent was not an impediment to raising a family.⁷⁵ It stated that "[t]here is nothing to indicate that single-parent families cannot provide children with care, support and affection. Every day, the reality shows that not every family has a maternal or paternal figure, and this does not prevent the family from providing the necessary well-being for a child's development."⁷⁶

⁶⁸ *Id.* ¶ 53.

⁶⁹ *See id.*

⁷⁰ *Id.* ¶ 66.

⁷¹ *See Advisory Opinion OC-17/02, supra* note 65, ¶ 77.

⁷² *Atala Riffo and Daughters v. Chile (Atala v. Chile)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 239, (Feb. 24, 2012), http://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf [<https://perma.cc/F2QJ-MR3H>].

⁷³ *See infra* Section III.A.

⁷⁴ *Forneron and Daughter v. Argentina (Forneron v. Argentina)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 242, (Apr. 27, 2012), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_242_ing.pdf [<https://perma.cc/DCD2-N5QS>].

⁷⁵ *See id.* ¶ 96.

⁷⁶ *Id.* ¶ 98.

2. *Fighting Patriarchal Family Structures*

The ACHR is the first line of defense against the patriarchal family. Article 17.4 states that countries must take measures to ensure equality of rights between spouses in marriage.⁷⁷ Outside marriage, however, there is no express mandate for families to enforce principles of equality and non-discrimination within the family.⁷⁸ Thus, the family could be, and often is, a space for human rights violations. There is, however, enough case law from the IACtHR and reports from the IACHR to state that the Inter-American system has contributed to understandings of the family based on equality among its members. These understandings of equality within the family do not derive from Article 17 of the ACHR, but from the right to equal protection recognized in Article 24, and the Obligation to Respect Rights of Article 1.1.⁷⁹ If a family structure affects the right to equality of its members, or affects any other right recognized by the ACHR or other international instruments, a State Party may be violating its international obligations.⁸⁰ Equality within the family, however, requires fighting structural inequalities that affect women beyond the confines of the household, including the pervasive use of sexual violence against women as an instrument of subordination.

The IACHR started functioning in 1959 and in 1965 the OAS expanded its mandate to include review of individual petitions.⁸¹ The IACHR reviewed its first petitions in 1967.⁸² Even though women were mentioned as victims in some of the cases, and there

⁷⁷ ACHR, *supra* note 8, at art. 17.4.

⁷⁸ *Id.*

⁷⁹ *Id.* at art. 1.1, art. 24.

⁸⁰ *Id.* at pmb1.

⁸¹ Organization of American States, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, Final Act, Aug. 12-18, 1959, Doc. OEA/Ser. C/VIII, <http://www.oas.org/council/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf> [<https://perma.cc/86ZC-EAGU>]; OAS, Eighth Meeting of Consultation of Ministers of Foreign Affairs, Punta del Este, Uruguay, Final Act, Jan. 22-31, 1962, Doc. OEA/Ser.C/II.8, <http://www.oas.org/consejo/meetings%20OF%20consultation/actas/acta%208.pdf> [<https://perma.cc/LU8Y-FD6J>].

⁸² ORGANIZATION OF AMERICAN STATES, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS STRATEGIC PLAN 2011-2015 37, <https://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf> [<https://perma.cc/K2QR-HMJ2>].

were issues that today would be considered gender-specific, for many years the human rights narrative did not include issues of gender and sexuality. By the late 1990s, there was some acknowledgment that governments could be responsible for sexual violence, but it took until the 2000s for the system to hold governments accountable for human rights violations against women.⁸³ *Loayza Tamayo v. Peru*⁸⁴ illustrates how difficult it was for the IACtHR to understand rape as a human rights violation.⁸⁵ In that case, the claimant was a woman who had been illegally detained and tortured by the intelligence police of Peru in 1993.⁸⁶ This torture included several instances of rape.⁸⁷ The Court decided the case in 1997 and despite having the same evidence about the acts of torture, including her repeated rape, the Court reached the conclusion that “after examination of the file and, *given the nature of this fact*, the accusation [of rape] could not be substantiated.⁸⁸ However, the other facts alleged, such as incommunicado detention, . . . blows and maltreatment, . . . all constitute forms of cruel, inhuman or degrading treatment”⁸⁹

The IACtHR had the same evidence for all the harms suffered by Loayza (witness testimonies and the victim’s account), but found them credible in the case of gender-neutral harms and not credible, “given the nature of [the] fact,” when it came to rape.⁹⁰ The IACtHR did not explain what the nature of the fact was, even though the use of rape as an instrument of torture against women was well known then, even though less analyzed and theorized than now.⁹¹

⁸³ Raquel Martin de Mejía v. Perú, Case 10.970, Inter-Am. Commission H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7, at 168 (1996), *available at* <http://hrlibrary.umn.edu/cases/1996/peru5-96.htm> [https://perma.cc/D8PP-JVUN] (acknowledging that rape could be a form of torture).

⁸⁴ *Loayza-Tamayo v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, (Sept. 17, 1997), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_33_ing.pdf [https://perma.cc/DK3D-24F4].

⁸⁵ *Id.*

⁸⁶ *Id.* ¶ 3.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* ¶ 58 (emphasis added).

⁹⁰ *See Loayza-Tamayo v. Peru*, at *id.*

⁹¹ *See* Patricia Palacios Zuloaga, *The Path to Gender Justice in the Inter-American Court of Human Rights*, 17 TEX. J. WOMEN & L. 227, 236 (2008).

Two of the first reports on merits issued by the Inter-American Commission specific to women's harms were *Maria Eugenia Morales de Sierra v. Guatemala*⁹² and *Maria da Penha v. Brazil*,⁹³ both occurred in 2001. The first case was a challenge to Guatemala's Civil Code, which gave a husband the right to authorize or deny his wife permission to work outside the house when he provided enough income and had "sufficiently justified reasons."⁹⁴ Guatemala's Constitutional Court had found the legal provision constitutional, based on the need to protect "the wife in her role as mother, and protect the children."⁹⁵ The IACHR stated that the legal consequence of the provision was "to deny married women their legal autonomy."⁹⁶

The second case conceptualized domestic violence as a human rights violation and the IACHR, for the first time, used the Inter-American Convention on The Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para).⁹⁷ The result in *Maria da Penha v. Brazil*⁹⁸ marks the moment when the IASHR started to develop human rights standards regarding violence and discrimination against women.⁹⁹ It also initiated the practice of holding governments accountable for the lack of effective response to gender-based violence. The case triggered the passing of a new domestic violence statute in Brazil named after the petitioner in the case.¹⁰⁰

After these cases, which marked the first time the Inter-

⁹² *Maria Eugenia Morales De Sierra Guatemala v. Guatemala (Morales v. Guatemala)*, Inter-Am. Commission H.R., Report No. 28/98, OEA/Ser.L/V/II.98, doc. 6 rev. (2001).

⁹³ *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEASer.L/V/II.111, doc. 20 rev 704 (2001).

⁹⁴ *See Morales v. Guatemala*, ¶ 28.

⁹⁵ *Id.* ¶ 35.

⁹⁶ *Id.* ¶ 38.

⁹⁷ Paula Spieler, *The Maria da Penha Case and the Inter-American Commission on Human Rights: Contributions to the Debate on Domestic Violence Against Women in Brazil*, 18 IND. J. OF GLOB. LEGAL STUD., 1, 122 (2011).

⁹⁸ *See Maria da Penha v. Brazil*.

⁹⁹ *See id.*

¹⁰⁰ On August 7, 2006, Brazil passed Law 11.340, better known as "ley Maria da Penha." *See* Pablo Uchoa, *Maria da Penha: The woman who changed Brazil's domestic violence laws*, BBC BRASIL (Sept. 22, 2016), <https://www.bbc.com/news/magazine-37429051> [<https://perma.cc/JRV9-4LRG>].

American system analyzed human rights thinking of harms suffered specifically by women, both the Commission and the Court developed a nuanced understanding of the role that gender stereotypes play in human rights violations. In *González et al. (“Cotton Field”) v. Mexico*,¹⁰¹ the IACtHR not only referred to the structural issue of violence against women but also introduced the concept of gender stereotyping in the Inter-American system.¹⁰² In that decision, the IACtHR talked about inequality between men and women and referred to the problem of subordination of women.¹⁰³ It also stated that “[t]he creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women.”¹⁰⁴ After *Cotton Field* the Inter-American system has often analyzed the role that gender stereotypes play in cases of violence and discrimination against women.¹⁰⁵

The Inter-American Commission came to a similar conclusion in *Jessica Lenahan (Gonzalez) et al. v. United States*.¹⁰⁶ There, the obligation to take measures to prevent domestic violence derived from the American Declaration, but the reasoning in both Merits Reports was very similar.¹⁰⁷

These reports were the beginning of a new era in the relationship between the family and human rights. They confirmed there is no area of human behavior shielded from a human rights framework.¹⁰⁸ They also clarified that international obligations required more than just the commitment to do no harm from countries.¹⁰⁹ This is instrumental for gender equality, especially within the family, as it

¹⁰¹ *González et al. v. Mexico (“Cotton Field”)*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 205 (Nov. 16, 2009).

¹⁰² *Id.* ¶¶ 401–402.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See e.g.*, *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012); *see also Atala Riffo and Daughters v. Chile (Atala v. Chile)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

¹⁰⁶ *Lenahan (Gonzalez) et al. v. United States*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 80/11 (July 21, 2011).

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*; *see also González et al. v. Mexico (“Cotton Field”)*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) 205 (Nov. 16, 2009).

¹⁰⁹ *See id.*

forces countries to face domestic violence as not a private problem, but a structural issue partly due to impunity and an ineffective response by the justice system. Although even at a slower pace than the IASHR, the European system has responded in a similar manner to domestic violence, with its first decision on the topic in 2008.¹¹⁰

III. LGBTI Rights Enter the Inter-American System of Human Rights

In the 1980s and 1990s, the European system of Human Rights analyzed cases regarding both sexual orientation¹¹¹ and gender identity (SOGI).¹¹² The IASHR, on the contrary, did not decide any cases related to violence or discrimination based on SOGI until 2010, when the IACHR issued its report against Chile for the discrimination of Judge Karen Atala and her daughters based on her sexual orientation.¹¹³ Two years later, the IACtHR decided in favor of Judge Atala, declaring sexual orientation and gender identity protected categories under the ACHR.¹¹⁴ The rights of LGBTI individuals became a core part of the system in 2011, when the IACHR created a special unit to strengthen the Commission's capacity to protect LGBTI rights.¹¹⁵ In 2014, the IACHR created a Rapporteurship on LGBTI right.¹¹⁶

¹¹⁰ See *Bevacqua and S. v. Bulgaria*, App. No. 71127/01, 2008 Y.B. Eur. Conv. on H.R. 44 (Eur. Ct. H.R.).

¹¹¹ See *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 149 (ser. B) (1982); *Norris v. Ireland*, 13 Eur. Ct. H.R. 186 (1988); *Modinos v. Cyprus*, 259 EUR. CT. OF HUM RTS. (ser. A) (1993). See *Homosexuality: Criminal Aspects Factsheet*, EUROPEAN COURT OF HUMAN RIGHTS (2014), https://www.echr.coe.int/Documents/FS_Homosexuality_ENG.pdf [<https://perma.cc/5UVS-4MSN>].

¹¹² Regarding gender identity, the first case was *Rees v. United Kingdom* and it was decided against the plaintiff in 1986. The first successful case for a plaintiff on issues of gender identity came in 2002, in *Goodwin v. United Kingdom*. See *Gender Identity Issues Factsheet*, EUROPEAN COURT OF HUMAN RIGHTS (2018), https://www.echr.coe.int/Documents/FS_Gender_identity_ENG.pdf [<https://perma.cc/9CS2-UN58>]; see also *Sexual Orientation Issues Factsheet*, EUR. CT. OF HUM RTS. (2018), https://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf [<https://perma.cc/39LY-T4BN>].

¹¹³ *Atala Riffo and Daughters v. Chile (Atala v. Chile)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 239, (Feb. 24, 2012).

¹¹⁴ *Id.*

¹¹⁵ See *Rapporteurship on the Rights of LGBTI Persons*, ORGANIZATION OF AMERICAN STATES (2011), <http://www.oas.org/en/iachr/lgtbi/default.asp> [<https://perma.cc/FG84-M4FQ>].

¹¹⁶ See *id.*

A. The First Cases on LGBT Rights and the Family

*Atala*¹¹⁷ is the groundbreaking case on sexual orientation before the Inter-American system. The decision indirectly contributed to developing a new understanding of the family from an Inter-American human rights framework. It was not about Judge Atala and her right to be with her children but about the children and their right to be with *their* mother, and not with a mother that fit imposed standards of motherhood.¹¹⁸ This reasoning is not just about same-sex couples, but non-traditional families in general. Its reasoning can also extend to protecting the rights of parents who do not fit the stereotypical roles of mother and father from gender, socio-economic, cultural, and religious perspectives. One of the main problems of the best interest of the child principle is that it invites judges to compare a child's reality with an ideal scenario that few are in position to provide.¹¹⁹ Thus, single parents in low socio-economic environments are measured against an unrealistic standard. Equally, a mother that does not fit the ideal preconceived notions of motherhood may suffer from discrimination—hidden under the malleable principle of the best interest of the child.

In *Atala*, the Supreme Court of Chile (SCC) used the best interest of the child principle to discriminate against a mother who did not fit the majority of the SCC justices' definition of the "good mother."¹²⁰ In 2002, Ms. Atala separated from her husband and assumed her sexual orientation.¹²¹ The husband and Ms. Atala agreed that she would live with their three young children, and he would visit them regularly.¹²² This arrangement lasted until Ms. Atala fell in love with a woman who moved into Ms. Atala's house.¹²³ The father filed for custody of the three girls.¹²⁴ According to the Supreme Court's decision, the father argued that "the decision adopted by the mother following her homosexual tendency harms

¹¹⁷ See *Atala v. Chile*, (ser. C) No. 239.

¹¹⁸ See *id.*

¹¹⁹ See e.g., Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 71–72 (2014).

¹²⁰ See *Atala v. Chile*, (ser. C) No. 239.

¹²¹ *Id.* ¶ 30.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* ¶ 31.

the psychical integral development and social environment of the three minors; that the interest of her daughters makes necessary to preempt the pernicious consequences that being raised under the care of a homosexual partner will trigger.”¹²⁵ The claim was not that Ms. Atala or her partner were directly harming the girls. The argument was simply that a lesbian woman had to choose between being a mother and being lesbian, as if motherhood was essentially heterosexual.¹²⁶ This argument resonated with the lower court judge who granted an injunction to give temporary custody of the girls to the husband, stating that “the [father] offers more favorable arguments on behalf of the best interest of the girls, which in the context of a heterosexual and traditional society take on great importance.”¹²⁷

Ms. Atala eventually won the custody battle, but the Supreme Court overturned the final decision through an extraordinary writ using similar arguments as the lower court against Ms. Atala.¹²⁸ The Court’s decision to separate the girls from their mother did not relate to anything Ms. Atala or her partner had done to the children. The Supreme Court punished Ms. Atala for not conforming to the specific behavior these judges assigned to the “good mother.” The SCC stated that by living with a lesbian partner, Ms. Atala had chosen her own desires over the well-being of her daughters.¹²⁹ In the Supreme Court Justices’ opinion, Ms. Atala would have been a “good mother” by living alone or living with a male partner.¹³⁰ For this arbitrary opinion to be legal, they used the principle of the best interest of the child as a shield.

In *Atala*, the IACtHR reinforced important principles against the patriarchal family. First, it confirmed that the ACHR protects not only the married family but also *de facto* family ties.¹³¹ Second, it stated that the “the girls’ alleged need to grow up in a ‘normally structured family that is appreciated within its social environment,’ and not in an ‘exceptional family,’ reflects a limited, stereotyped perception of the concept of family, which has no basis in the

¹²⁵ *Id.* ¶ 53.

¹²⁶ *Atala v. Chile*, (ser. C) No. 239, at *id.*

¹²⁷ *Id.* ¶ 141.

¹²⁸ *See id.*

¹²⁹ *Id.* ¶ 56.

¹³⁰ *Id.* ¶ 141.

¹³¹ *Id.* ¶ 142.

Convention, since there is no specific model of family.”¹³² Third, it provided content against the best interest of the child principle, rejecting the idea that each person using this principle could define what is best for children according to their own opinions.¹³³ The IACtHR stated that:

[T]he determination of the child’s best interest in cases involving the care and custody of minors must be based on an assessment of specific parental behaviors and their negative impact on the well-being and development of the child, or of any real and proven damage or risks to the child’s well-being and not those that are speculative or imaginary. Therefore, speculations, assumptions, stereotypes, or generalized considerations regarding the parents’ personal characteristics or cultural preferences regarding the family’s traditional concepts are not admissible.¹³⁴

It is interesting to note that the first cases on sexual orientation before the European and Universal systems of human rights were about anti-sodomy statutes.¹³⁵ Without dismissing the obstacles faced by the litigants in these cases, they were challenging anti-sodomy statutes that both the UK and Australia were rarely enforcing and in places where people did not actively persecute same-sex couples.¹³⁶ The Human Rights Committee and the ECHR decided these cases focusing primarily on the right to privacy, providing a small opening for gradual changes in both systems.¹³⁷ The IASHR, instead, had to analyze whether sexual orientation was a protected category under the ACHR by delving into a family law case where sexual orientation was the fundamental factor used to decide the custody of three young children.¹³⁸ Privacy would not be enough to argue this case since it required an analysis of the

¹³² See *Atala v. Chile*, (ser. C) No. 239, ¶ 145.

¹³³ *Id.* ¶ 110.

¹³⁴ *Id.*

¹³⁵ *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 149 (ser. B) (1982); *Toonen v. Australia*, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

¹³⁶ Giulia Dondoli, *LGBTI Activism Influencing Foreign Legislation*, 16 MELB. J. INT’L L. 124, 131–34 (2015).

¹³⁷ See *id.* at 133.

¹³⁸ See *Atala Riffo and Daughters v. Chile (Atala v. Chile)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 239, (Feb. 24, 2012).

international law principle of the best interest of the child.¹³⁹ The fact that very young children were at the center of the dispute did not make things easier. This was a difficult “first case” because it touched on the family, a sphere often considered outside the reach of legal systems.¹⁴⁰ Fortunately, the IACtHR understood that courts cannot use the best interest of the child as a tool to discriminate against parents based on their sexual orientation.¹⁴¹ Instead of a small opening for gradual change, *Atala* created a wide opening for sexual orientation human rights litigation. The decision left the door open to expand the right to family to associations formed outside the legal marriage, both by heterosexual and same-sex partners. The *Atala* case had a domino effect in Latin America, with local courts citing it as justification for their own decisions regarding different issues related to sexual orientation and gender identity, including marriage equality and second parent adoption of same-sex couples.¹⁴²

B. The Next Cases: More on the Family and More on Discrimination

Before 2004, when the *Atala* case started, there were two submissions related to sexual orientation. The first petition regarding sexual orientation was submitted in 1999, but did not have a Merits Report until 2014.¹⁴³ Marta Lucía Álvarez Giraldo, a lesbian woman serving a long prison sentence in Colombia, filed a

¹³⁹ See *id.* ¶ 107.

¹⁴⁰ See Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 754 (2010).

¹⁴¹ *Atala v. Chile*, (ser. C) No. 239, ¶ 110.

¹⁴² See Corte Constitucional [C.C.] [Constitutional Court], noviembre 4, 2015, Sentencia C-683/15, (¶ 8.1.1) (Colom.); Corte Constitucional [C.C.] [Constitutional Court], febrero 18, 2015, Sentencia C-071/15, (n.284) (Colomb.); Corte Constitucional [C.C.] [Constitutional Court], abril 28, 2016, Sentencia SU214/16, (nn.117 & 164) (Colomb.); Corte Constitucional [C.C.] [Constitutional Court], agosto 28, 2014, Sentencia SU617/14 (¶ 13) (Colomb.); Corte Suprema de Justicia de la Nación [SCJN], Amparo en Revisión 581/2012, Página 49 (Mex.); Corte Suprema de Justicia de la Nación [SCJN], Amparo en Revisión 704/2014, Página 75 (Mex.); Corte Suprema de Justicia de la Nación [SCJN], Amparo en Revisión 735/2014; Página 24 (Mex.); Supreme Court of Justice of Costa Rica, Constitutional Chamber, Exp: 15-013971-0007-CO, Res. N° 2018012782, Aug. 8, 2018.

¹⁴³ *Marta Lucia Alvarez Giraldo v. Colombia*, Case 11.656, Inter-Am. Comm’n H.R., Report No. 71/99, OEA/Ser.L/V/II.106, doc. 3 (1999).

petition in 1996 arguing that Colombia discriminated against lesbian inmates by denying them the right to intimate visits that heterosexual inmates enjoyed.¹⁴⁴ From the Merits Report, it seems that the case was inactive until 2009.¹⁴⁵ In 2014, the IACHR Merits Report concluded that Colombia violated Ms. Alvarez' rights and discriminated against her on the basis of her sexual orientation.¹⁴⁶ Although the IACHR did not elaborate on the concept of family in its Merits Report, it was clear that it did not see Ms. Alvarez' denial of intimate visits just as a violation of privacy. The IACHR stated that the right to intimate visits was an essential requirement to ensure the integrity and freedom of inmates and, as a consequence, the protection of the right to family.¹⁴⁷ This case reinforced the idea in *Atala* that the right to family is not tied to heterosexuality or legal marriage.

In 2002, the IACHR received a petition against Ecuador for the military discharge of Homero Flor Freire, based on accusations of engaging in homosexual acts, prohibited by the Ecuadorian military.¹⁴⁸ The IACtHR issued a decision against Ecuador in 2016. Mr. Flor Freire argued that he had not engaged in "homosexual conduct."¹⁴⁹ The Court, relying on the standards developed in *Atala*, used the case to expand on the concept of anti-discrimination to include discrimination for the perceived sexual orientation.¹⁵⁰ It also reinforced the prohibition of treating sexual acts between individuals of the same sex different to acts between individuals of different sex.¹⁵¹ Equality of treatment should apply in all contexts, including the military.¹⁵²

In 2005, the IACHR received a third petition regarding sexual orientation and the family.¹⁵³ In this case, Angel Alberto Duque

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ¶ 12.

¹⁴⁶ *Id.* ¶ 180.

¹⁴⁷ *Id.* ¶ 194.

¹⁴⁸ Flor Freire v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R., (ser. C) No. 315 (Aug. 31, 2016).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* ¶¶ 102–103.

¹⁵¹ *Id.* ¶¶ 116–117.

¹⁵² *Id.* ¶¶ 118–119.

¹⁵³ *See* Ángel Alberto Duque v. Colombia, Case 12,841, Inter-Am. Comm'n H.R., Report No. 5/14 (2014).

claimed that Colombia had denied him a survivor's pension because his deceased partner was a man.¹⁵⁴ *Angel Alberto Duque v. Colombia*¹⁵⁵ became the second case on sexual orientation to reach the IACtHR, and Duque obtained a favorable decision.¹⁵⁶ By then, it was undeniable that the ACHR protected the family—including those formed by same-sex partners.

In 2012, right after the IACtHR issued its *Atala* decision, six same-sex couples supported by an LGBT organization in Chile filed a petition arguing discrimination due to the lack of marriage equality in Chile.¹⁵⁷ The case ended with a friendly settlement in which the government of Chile promised to advance in the recognition of LGBTI rights, supporting a bill on marriage equality.¹⁵⁸ By 2018, the system had not reviewed the merits of any cases on marriage equality.

Except for the case of Mr. Flor Freire, which expanded the concept of equality to include discrimination for the perceived sexual orientation, the cases reviewed by the IASHR have focused on the right to family diversity.¹⁵⁹ The advantage of this line of cases is that it forced the system to develop a strong anti-discrimination standard, instead of confining LGBTI rights to the narrower field of privacy. The disadvantage is that the system has not focused its case law on issues of violence against LGBTI people, especially trans people. The IACHR received its first case on violence based on SOGI in 2009.¹⁶⁰ The case of *Azul Rojas Marin* refers to one of the most common forms of violence against trans people: police brutality, including sexual violence against a person targeted for her gender identity.¹⁶¹ The development of standards to protect individuals from violence based on SOGI is beyond the

¹⁵⁴ *Id.* ¶ 1.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* ¶ 102.

¹⁵⁷ Press Release, Inter-American Court of Human Rights, Friendly Settlement before the IACHR Furthers Progress on Marriage Equality in Chile (Feb. 2, 2017), *available at* http://www.oas.org/en/iachr/media_center/preleases/2017/009.asp [<https://perma.cc/899R-6WLT>].

¹⁵⁸ *Id.*

¹⁵⁹ *See* Homero Flor Freire v. Ecuador, Case 12,743, Inter-Am. Comm'n H.R., Report No. 81/13 (2013).

¹⁶⁰ Luis Alberto Rojas Marin v. Peru, Case 446-09, Inter-Am. Comm'n H.R., Report No. 99/14, OEA/Ser.L/V/II.153, doc. 15 ¶ 1 (2014).

¹⁶¹ *See id.*

scope of this Article. There can be, however, no right to family when people live their lives with the constant fear of being the target of violence due to their actual or perceived sexual orientation and gender identity.

C. The IACtHR Advisory Opinion on LGBTI Rights

On May 2016, Costa Rica requested the IACtHR to issue an Advisory Opinion (AO) regarding the interpretation and reach of Articles 11.2 (protection of privacy and the family), 18 (right to a legal name), and 24 (equality) in relation to Article 1 (obligation to respect rights and principle of non-discrimination) of the ACHR.¹⁶² Specifically, Costa Rica requested the IACtHR to elaborate on: (1) the protection those rights provide to individuals based on their gender identity; (2) the compatibility of a specific provision of the Costa Rican Civil Code with the ACHR when individuals requested a change of legal name based on their gender identity; and (3) the protection of the ACHR to property rights (*derechos de propiedades*) derived from a same-sex relationship.¹⁶³

Based on these three main issues, Costa Rica requested the IACtHR to answer five specific questions.¹⁶⁴ Three questions related to gender identity and access to a procedure to change the legal name and the last two related to the recognition of property rights derived of same-sex relations.¹⁶⁵

1. Trans Rights and the Family

The Costa Rican government's questions regarding the protection of trans individuals were not related to the trans family.¹⁶⁶ They targeted the most basic problem trans individuals face around the world. When trans individuals cannot change their legal name and identity cards according to their self-perceived gender identity, they are forced to out themselves as trans and are exposed to violence and discrimination.¹⁶⁷ Trans people have difficulty

¹⁶² *Advisory Opinion OC-24/17, supra* note 7.

¹⁶³ *Id.* ¶ 1.

¹⁶⁴ *Id.* ¶ 3.

¹⁶⁵ *Id.*

¹⁶⁶ *See id.*

¹⁶⁷ INTER-AMERICAN COMM'N HUMAN RIGHTS, VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PERSONS IN THE AMERICAS 34, OAS Doc. OAS/Ser.L/V/II.rev.1, doc. 36 (Nov. 12, 2015).

securing employment or have their political rights violated because their physical appearance does not match their legal identity.¹⁶⁸ Lack of access to the legal identity that matches a person's gender identity also has an impact in family formation and the protection of trans children.¹⁶⁹ An accessible, easy, and fast legal name change process is the starting point to the recognition of trans individuals as citizens and also as family members.

In the AO, the IACtHR analyzed the right to a person's gender identity under the ACHR. It stated that the right to identity encompasses several rights and it relates to dignity, privacy, and autonomy.¹⁷⁰ The IACtHR added that gender identity is linked to the concept of liberty and self-determination.¹⁷¹ One of the most important elements of the AO is the recognition of gender identity as "the internal and individual gender experience as each individual feels it, which can correspond or not with the assigned sex at birth."¹⁷² The recognition of gender identity as an essential aspect of an individual's autonomy puts all models of medicalization and pathologization of gender identity at odds with the ACHR and should be a strong incentive for countries to end harmful practices against trans individuals.¹⁷³ The IACtHR stated that requiring medical exams or certifications "contributes to perpetuating prejudices associated to the binary construction of the masculine and feminine gender."¹⁷⁴

The right to have and to change one's legal name, therefore, is directly tied to the right to one's identity.¹⁷⁵ Governments must have procedures in place that do not hinder a person's right to his or her

¹⁶⁸ Council of Eur. Comm'n Human Rights, *Human Rights and Gender Identity*, Doc. No. CommDH/IssuePaper(2009)2, at 7 (July 29, 2009).

¹⁶⁹ For general challenges, see Shannon Price Minter, *Transgender Family Law*, 56 FAM. CT. REV. 410 (2018); see also, Katherine A. Kuvalanka et al., *An Exploratory Study of Custody Challenges Experienced by Affirming Mothers of Transgender and Gender-Nonconforming Children*, 57 FAM. CT. REV. 54, 56 (2019) (examining how courts have taken custody away from parents who support the child's gender identity)

¹⁷⁰ *Advisory Opinion AO-24/17*, supra note 7, ¶ 90.

¹⁷¹ *Id.* ¶ 93.

¹⁷² *Id.* ¶ 101.f.

¹⁷³ See Emma Inch, *Changing Minds: The Psycho-Pathologization of Trans People*, 45 INT'L J. OF MENTAL HEALTH 193, 193–204 (2016) (discussing how pathologization of trans people has been extremely harmful).

¹⁷⁴ *Advisory Opinion AO-24/17*, supra note 7, ¶ 130; INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, supra note 167, ¶ 419.

¹⁷⁵ *Id.*

legal name.¹⁷⁶ These processes, according to the IACtHR, must be based exclusively on the free and informed consent of the person who requests the change of their legal name.¹⁷⁷ The IACtHR also stated that these procedures should be expeditious and, if possible, free of charge.¹⁷⁸

The IACtHR also referred to child's right to change their legal name to match their gender identity.¹⁷⁹ Consistent with its case law, the Court stated that children are entitled to the same rights as adults under the ACHR.¹⁸⁰ The Court stated that children have a right to progressive autonomy, and that all children's rights must be protected by using the best interest of the child as a paramount consideration.¹⁸¹ The IACtHR understands the role that parents play in the development of children. The legal system, however, must respect the progressive autonomy of children and promote judicial bypass mechanisms when parents disagree with their child's desire to change her legal name.¹⁸²

Prior to AO-24/17, Costa Rican law categorically did not allow legal name changes based on gender identity.¹⁸³ According to civil society organizations, transgender individuals are systematically mistreated and discriminated against when attempting to change their legal names.¹⁸⁴ Soon after the AO was issued, the Supreme

¹⁷⁶ *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 115; see INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 167, at 270.

¹⁷⁷ See *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 127; see INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 167, at 270.

¹⁷⁸ See *Advisory Opinion AO-24/17*, *supra* note 7, at 62; see INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 167, at 272.

¹⁷⁹ *Advisory Opinion AO-24/17*, *supra* note 7, at 64–68; see INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *supra* note 167, at 279–80.

¹⁸⁰ *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 149; see Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 66 (Aug. 19, 2014).

¹⁸¹ *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 154.

¹⁸² *Id.* ¶ 156.

¹⁸³ See OUTRIGHT ACTION INTERNATIONAL ET AL., MAPPING TRANS RIGHTS IN COLOMBIA 1, 11 n.19 (2016), available at https://www.outrightinternational.org/sites/default/files/TransRpt_Colombia_En.pdf [<https://perma.cc/J9H5-PX5C>].

¹⁸⁴ See Fabiola Pomareda, *Transgender Cost Ricans Fight Discrimination Over Name-Change Rights*, TICO TIMES (Sept. 6, 2014), <http://www.ticotimes.net/2014/09/06/transgender-costa-ricans-fight-discrimination-over-name-change-rights> [<https://perma.cc/8Z4J-3P7D>].

Tribunal of Elections (*Tribunal Supremo de Elecciones*),¹⁸⁵ in charge of regulating the Identification Registry, informed Costa Ricans that they would have access to an easy administrative process for the change of a legal name.¹⁸⁶ In less than a year after the release of the AO, more than 300 people had changed their legal name to coincide with their gender identity.¹⁸⁷

2. *Same-Sex Families: From Patrimonial Rights to Full Recognition*

The last two questions Costa Rica issued to the IACtHR related to the recognition of patrimonial rights derived from same-sex relations.¹⁸⁸ The IACtHR pointed out that Costa Rica had not specified the type of same-sex relations that it was aiming to protect through its questions, so the Court took the opportunity to reinforce the recognition by the ACHR of non-heterosexual relationships.¹⁸⁹ It stated, “in general terms, the rights derived from affective relations between couples, are usually subject to and protected by the Convention through the institute of the family and family life.”¹⁹⁰

Even though the questions were specific to property rights, the IACtHR considered that it could not answer without elaborating on “whether affectionate relations between individuals of the same sex could be considered as ‘family’ in the terms of the Convention.”¹⁹¹ This section of the AO-24/17 refers several times to *Atala*,¹⁹² however, that decision did not establish a specific concept of the family. This was the opportunity for the IACtHR to expand on the family as a concept that changes throughout time.¹⁹³ The Court used an unfortunate example to illustrate this evolution by referring to the differentiated treatment of legitimate and illegitimate

¹⁸⁵ See Jess Márquez Gaspar, *The Advisory Opinion in Costa Rica, Almost One Year Later*, INTO (Nov. 27, 2018), <https://www.intomore.com/impact/the-advisory-opinion-in-costa-rica-almost-one-year-later> [<https://perma.cc/YG44-J9U3>].

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Advisory Opinion AO-24/17*, *supra* note 7, at 3–5.

¹⁸⁹ *Id.* ¶ 173.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* ¶ 175.

¹⁹² *Id.* ¶¶ 173–174.

¹⁹³ *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 177.

children,¹⁹⁴ a distinction that the Inter-American system has rejected since its origins.¹⁹⁵ The IACtHR gave a better example, citing a prior Advisory Opinion on the rights of migrant children.¹⁹⁶ It stated that families can include not only parents and children but also the extended family and individuals who care for children without having biological ties.¹⁹⁷ This statement recognizes the reality of Latin America, a region in which marriage has been scattered and families are socially conceived in more complex and porous ways than what legal systems usually recognize.¹⁹⁸

The IACtHR explained the meaning of Article 17.2 of the ACHR refers to the right of a man and a woman to get married and have a family.¹⁹⁹ It stated that such definition “would not be formulating a restrictive definition of how marriage must be understood or how a family must be founded. For this Court, Article 17.2 would only be establishing an expressed conventional protection of one particular form of marriage.”²⁰⁰ For the Court “this would not necessarily mean this may be the only type of family protected by the American Convention.”²⁰¹

The IACtHR used this Opinion to set specific guidance for future decisions on family associations. It started with an analysis of the type of protections that would be acceptable under the ACHR, and ended with a very specific statement that anything short of marriage equality would be unacceptable under the ACHR.²⁰² First, The IACtHR stated that the ACHR required countries to recognize families formed by same-sex couples.²⁰³ The Court could have ended its analysis here and encouraged countries to provide equal protection and rights to married and unmarried families. Instead,

¹⁹⁴ *See id.*

¹⁹⁵ *See id.* at Part I, Sections B, C.1.

¹⁹⁶ *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 178 (citing Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶ 66 (Aug. 19, 2014)).

¹⁹⁷ *Id.*

¹⁹⁸ *See* Albert Esteve & Elizabeth Florez-Paredes, *Families in Latin America Dimensions, Diverging Trends, and Paradoxes*, in *UNEQUAL FAMILY LIVES: CAUSES AND CONSEQUENCES IN EUROPE AND THE AMERICAS* 40–64 (Naomi R. Cahn et al. eds., 2018).

¹⁹⁹ *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 182.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See id.* ¶ 197 and ¶ 224.

²⁰³ *See id.* ¶ 199.

the Court analyzed the status of marriage and other models of formal recognition of same-sex couples around the region. It concluded that extending marriage to same-sex couples would be the simplest and most efficient way of ensuring rights to same-sex couples.²⁰⁴ From that conclusion, the Court goes on to state that it would actually be discriminatory to deny the protection of marriage to same-sex couples.²⁰⁵ Furthermore, the Court stated that countries must change their regulations and expand the right to marriage to same-sex couples.²⁰⁶ In the meantime, the IACtHR stated, as a transitory measure same-sex couples who don't have access to legal marriage should be afforded the same rights of married couples.²⁰⁷

3. *The Role of Advisory Opinions and the Impact of AO-24/17 in Latin America: A Word of Caution*

Article 64.1 of the ACHR states that “member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.”²⁰⁸ Advisory Opinions (AOs) are “designed to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process.”²⁰⁹ The advisory role of the IACtHR can be very influential in allowing the Court to provide general interpretations of international law.²¹⁰ Though non-binding even for the country requesting the Court's opinion, AOs are a great source of consistency and uniformity in the interpretation of the rights protected.²¹¹

In this case, with no obligation to do so, Costa Rica decided to follow the guidance of the Court.²¹² Even though AOs trigger no

²⁰⁴ *Advisory Opinion AO-24/17*, *supra* note 7, ¶ 218.

²⁰⁵ *Id.* ¶ 224.

²⁰⁶ *Id.* ¶¶ 226, 228.

²⁰⁷ *Id.* ¶ 227.

²⁰⁸ ACHR, *supra* note 8, at art. 64.1.

²⁰⁹ Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of American Convention on Human Rights), Advisory Opinion OC-3/83, Inter.-Am. Ct. H.R. (ser. A) No.3, ¶ 43 (Sept. 8, 1983).

²¹⁰ JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 37 (2013).

²¹¹ *Id.* at 48.

²¹² See Sofia C. Chinchilla & Esteban Oviedo, *Gobierno reconocerá el matrimonio gay al acatar en su totalidad criterio de Corte IDH*, LA NACIÓN (Jan. 9, 2018) (translation),

legal obligations, the Supreme Court of Costa Rica interpreted the Opinion as binding for Costa Rica.²¹³ This was an important gain for the government of Costa Rica, who requested the Opinion of the Court while pushing for more protections for LGBTI individuals in the country.²¹⁴ The Opinion gave the government international support to advance in this area.²¹⁵

Despite its non-binding effect, once AO-24/17 was issued, media outlets around the region announced that the IACtHR had ordered all countries in the region to expand marriage to same-sex couples.²¹⁶ News outlets mentioned that the Court referred to trans rights, but the talk of the town was marriage equality.²¹⁷ The opportunity to focus on trans adults and children's rights was gone. Marriage equality took all of the attention.

The Court's Opinion was issued a few weeks before Costa Rica's presidential election.²¹⁸ Until then, the electoral process was moving with few controversies, with 13 candidates running to become the frontrunners in a second round.²¹⁹ Among the candidates, an evangelical preacher had reached no more than 2% of popularity among voters.²²⁰ The IACtHR's AO, however,

<https://translate.google.com/translate?sl=es&tl=en&u=https%3A%2F%2Fwww.nacion.com%2Fel-pais%2Fpolitica%2Fgobierno-aplicara-en-su-totalidad-criterio-de%2FPFAZZRTUOBCV3NNZBR3SR5WBM%2Fstory%2F> [<https://perma.cc/F3BB-HTK5>].

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Costa Rica pide opinión a CorteIDH sobre identidad de género y uniones gays*, CONTACTO HOY: EDICIÓN MUNDIAL (May 16, 2017), <https://contactohoy.com.mx/costa-rica-pide-opinion-a-corteidh-sobre-identidad-de-genero-y-uniones-gais/> [<https://perma.cc/V4D8-AX4M>].

²¹⁶ *See, e.g., Chinchilla & Oviedo, supra note 212; see also Inter-American Human Rights Court Backs same-sex marriage*, BBC NEWS (Jan. 10, 2018), <https://www.bbc.com/news/world-latin-america-42633891> [<https://perma.cc/LWH8-CBFV>] (“The judges said that governments ‘must recognize and guarantee all the rights that are derived from a family bond between people of the same sex.’”).

²¹⁷ *See* Sofía C. Chinchilla & Natasha Cambronero, *Corte Interamericana Ordena Abrir el Matrimonio Gay a Costa Rica*, LA NACIÓN (Jan. 9, 2018), <https://www.nacion.com/el-pais/politica/corte-interamericana-notifica-a-costa-rica/LRJB6DWNHOFGBXSDNIVYSEDA/story/> [<https://perma.cc/4CKD-2AK5>] (referring to the trans rights portion of the AO in the second part of the note); *see also* BBC NEWS, *supra* note 216 (mentioning the right of trans people to change their legal name).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

changed the course of the election and marriage equality became the battlefield for deciding the presidential election.²²¹ Fabricio Alvarado, an evangelical preacher and singer, whose wife was also an evangelical pastor, went from being a candidate with no chance to win, to the frontrunner for the presidency on a platform that rejected AO-24/17 and marriage equality.²²² Fabricio Alvarado won the majority in the first round of the presidential election with 24.7% of the votes, followed by moderate center-left candidate Carlos Alvarado with 21.74% of the votes.²²³ As part of his platform, Fabricio Alvarado promised to call a referendum for the withdrawal of Costa Rica from the Inter-American System of Human Rights.²²⁴

After weeks of tension, the country backed Carlos Alvarado, the candidate who ran on a moderate political platform and respect for human rights.²²⁵ Carlos Alvarado obtained more than 60% of the popular vote, and Fabricio Alvarado captured 39.2% of the ballots.²²⁶ As stated in *The Washington Post*, however, “Fabricio Alvarado’s surprising rise highlighted the growing power of socially conservative and evangelical voters in the small Central American country.”²²⁷

Parallel to the backlash that AO 24/17 had on the Costa Rican presidential election, Costa Rican courts were deciding challenges to the Costa Rican legislation regarding marriage equality.²²⁸ The

²²¹ *Id.* See also *Gay Marriage Question Could Define Costa Rican Election*, AP NEWS (Mar. 29, 2018), <https://www.apnews.com/35f59ca59a7d4e8892dc839a9674e863> [http://perma.cc/DZ8B-LQ99].

²²² *Costa Rica poll goes into runoff as evangelical leads*, BBC NEWS (Feb. 5, 2018), <https://www.bbc.com/news/world-latin-america-42938510> [http://perma.cc/32VM-NHEX].

²²³ *Id.*

²²⁴ Aarón Sequeira, *Fabricio Alvarado sometería a referendo salida del país de la Convención de Derechos Humanos*, LA NACIÓN (Feb. 14, 2018), <https://www.nacion.com/el-pais/politica/fabricio-alvarado-someteria-a-referendo-salida-del/IUY2BX4RK5DCND3IV3C5JL2L7A/story/> [https://perma.cc/R2F3-KAKE].

²²⁵ Joshua Partlow, *Costa Rican Voters Back Ruling-Party Candidate in Resounding Snub to Foes of Same-Sex Marriage*, WASH. POST (Apr. 2, 2018), https://www.washingtonpost.com/world/the_americas/presidential-race-in-costa-rica-may-hinge-on-same-sex-marriage/2018/04/01/c0f2acd6-7077-41fa-8520-8db24b723c9f_story.html?noredirect=on&utm_term=.23427e12757c [http://perma.cc/73CY-58CZ].

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Press Release, Org. of American States, IACHR Welcomes Supreme Court

Supreme Tribunal of Elections sent the issue to the Constitutional Chamber of the Costa Rican Supreme Court. On August 8, 2018, the Supreme Court issued its first decision on marriage equality, ordering Congress to regulate marriage equality within a timeframe of 18 months.²²⁹ This is similar to the Constitutional Court of Colombia's 2016 decision that led to chaos on marriage regulation for two years.²³⁰ The decision of the Costa Rican Supreme Court relied on international human rights law, citing *Atala*²³¹ and AO-24/17.²³² It declared both the lack of regulation on same-sex marriage and lack of recognition of *de facto* same-sex couples unconstitutional.²³³ However, the decision, similar to the IACtHR's AO 24/17, does not state that *de facto* couples should be entitled to the same treatment and protection as married couples.

IV. Conclusion

Since its origins, the IASHR has focused on protecting the most vulnerable groups. It advanced the protection of the non-traditional families through the recognition of equality between children born in and outside marriage. The drafters of the ACHR seem to have had a broader idea of the family than the drafters of the ECHR and the UDHR. The IASHR's case law has strengthened the protection of women's rights, advanced gender equality and even mandated countries to incorporate gender perspectives into their trainings for judges and police forces. Likewise, the system has been at the forefront of recognizing equality and family diversity based on sexual orientation and gender identity through a strong and

Decision on Equal Marriage in Costa Rica (Aug. 14, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/181.asp [<http://perma.cc/G5WJ-QNQY>].

²²⁹ *Id.*

²³⁰ Sunnivié Brydum, *Breaking: Marriage Equality Comes to Colombia*, THE ADVOCATE (Apr. 7, 2016), <https://www.advocate.com/world/2016/4/07/marriage-equality-comes-colombia> [<http://perma.cc/QE3W-G6MK>].

²³¹ Supreme Court of Costa Rica, Constitutional Chamber, Resolution 12782, August 8, 2018, at 9, 30, 35 [hereinafter Resolution 12782], available at <https://nexuspj.poder-judicial.go.cr/document/sen-1-0007-875801> [<https://perma.cc/8B2B-RF6R>] (*Atala Riffo and Daughters v. Chile (Atala v. Chile)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 239, (Feb. 24, 2012)).

²³² *Id.* at 7, 9, 11, 21, 22, 26, 33, 35, 42 (citing *Advisory Opinion AO-24/17*, *supra* note 7).

²³³ *Id.* at 42.

consistent jurisprudence that started with *Atala*²³⁴ and continued with *Duque v. Colombia*²³⁵ and *Flor Freire v. Ecuador*.²³⁶ These cases were based on the protection of LGBT individuals on principles of equality and non-discrimination, escaping the fate of a European system that has struggled to move LGBT rights away from the right to privacy, towards a recognition of family diversity through the equality principle. AO 24/17 gave the IACtHR the opportunity to analyze the right to equality of trans individuals and the rights of same-sex couples.²³⁷ Human rights and LGBTI rights activists from around the world have rightly welcomed AO-24/17. Its impact was immediate, with Costa Rica altering its legal name change regulations for trans individuals, and the Supreme Court issuing a pro-marriage equality decision.²³⁸ At the same time, a strong focus on marriage equality runs the risk of furthering the marginalization of individuals who do not have access to marriage for reasons unrelated to sexual orientation and gender identity. Discrimination in housing, work, and health services may not change because same-sex couples have access to marriage. More complicated yet, access to marriage for same-sex couples does not create equality of treatment for unmarried heterosexual and same-sex couples.

The Opinion's strong focus on marriage equality runs two important risks. On one hand, while it may have led to Costa Rica's marriage equality decision by Costa Rica's Supreme Court, the backlash almost led to a President ready to denounce the IASHR, energizing anti LGBT activists in the region.²³⁹ At this time, it is impossible to know the real political impact of this Opinion. Second, as welcoming of marriage equality as the Opinion is as a matter of principle, there is a risk for countries to use AO 24/17 to maintain, if not to deepen, the difference of treatment between

²³⁴ *Atala v. Chile*, (ser. C), No. 239.

²³⁵ *Duque v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016) (Spanish only).

²³⁶ *Flor Freire v. Ecuador*, Preliminary Exceptions, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 315 (Aug. 31, 2016) (Spanish only).

²³⁷ *Advisory Opinion AO-24/17*, *supra* note 7.

²³⁸ Gaspar, *supra* note 185; Resolution 12782, *supra* note 231.

²³⁹ Ciara Nugent, *How Far-Right Presidential Candidate Jair Bolsonaro Could Transform Brazil*, TIME (Oct. 25, 2018), <http://time.com/5433379/brazil-bolsonaro-policies/> [<http://perma.cc/2ZNY-M896>] (stating that during Bolsonaro's campaign he signed an agreement with a Catholic voters' association and committed himself to defending traditional marriage).

married and unmarried families. The more countries focus on regulating marriage, the more the situation of the most vulnerable families in the region remains untouched. Trans families, single-parent households, and *de facto* couples exist in parallel to married families. All these groups are part of the family landscape of the region. These groups become more relevant when statistics show that marriage, both heterosexual and same-sex, is an institution more prominent among middle and upper middle classes.²⁴⁰

The region needs more cases before the Inter-American system to defeat regulations that still recognize men as heads of households and regulations that leave unmarried families unprotected. The region would benefit if the IACtHR would review cases that recognize the functional family as protected by the ACHR. In Latin America and the Caribbean, non-biological child caregivers lack rights when compared with biological families.²⁴¹

Equality within the family and recognition of family diversity are among the most important contributions of the IASHR to developing family frameworks in the region, and there is still much space for growth in both areas. Just as the origins of the IASHR had in mind the protection of illegitimate children as some of the most vulnerable members of families, the new cases and reports must keep identifying the most vulnerable members of the family at different times and places.

²⁴⁰ See, e.g., Ferol Mennen, *The Relationship of Race, Socioeconomic Status & Marital Status to Kin Networks*, 15 J. OF SOCIOLOGY & SOC. WELFARE 77 (1988).

²⁴¹ Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 438 (2008).