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INTERNATIONAL LAW

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Volume 44 | Number 2

Article 6

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Spring 2019

## Sexual Orientation and Gender Identity in Inter-American Human Rights Law

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### Recommended Citation

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# Sexual Orientation and Gender Identity in Inter-American Human Rights Law

*Jorge Contesse*<sup>†</sup>

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## I. Introduction

Sexual orientation and gender identity are legally-protected categories in international human rights law and many States.<sup>1</sup> For the past two decades, States and regional (and the universal) human rights systems have expanded the understanding of anti-discrimination law in ways that to many seemed unexpected. Until 2000, no country had legalized same-sex marriage.<sup>2</sup> Less than

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<sup>1</sup> See Dominic McGoldrick, *The Development and Status of Sexual Orientation Discrimination under International Human Rights Law*, 16 HUM. RTS. L. REV. 613 (2016); Holning Lau, *Sexual Orientation and Gender Identity Discrimination*, in 2.2 COMPARATIVE DISCRIMINATION LAW 14 (2018).

<sup>2</sup> The Netherlands became the first country in the world to legalize same-sex marriage in 2000, with the law taking effect in April 2001. See *Same-Sex Dutch Couples*

twenty years later, more than two dozen countries recognize same-sex marriage, and many more recognize same-sex civil unions.<sup>3</sup> Along with the recognition of sexual orientation as a prohibited ground of discrimination, gender identity has also become a legally significant concept for human rights law.<sup>4</sup>

In Latin America, a region traditionally labeled as socially conservative,<sup>5</sup> sexuality laws have also undergone unprecedented changes. In 2008, Uruguay became the first Latin American country to legalize civil unions,<sup>6</sup> and then promptly turned to discuss a same-sex adoption law.<sup>7</sup> In March 2010, the Legislative Assembly of the Federal District of Mexico made the city the first in Latin America to legalize same-sex marriage.<sup>8</sup> A few months later, Argentina's National Congress passed a historic reform that made it the first Latin American country to legalize same-sex marriage,<sup>9</sup> the field having been opened a few years earlier by the Colombian Constitutional Court's recognition of rights of heterosexual and

*Gain Marriage and Adoption Rights*, N.Y. TIMES (Dec. 20, 2000), <https://www.nytimes.com/2000/12/20/world/same-sex-dutch-couples-gain-marriage-and-adoption-rights.html> [<https://perma.cc/3KSF-KDQJ>].

<sup>3</sup> See Claire Felter and Danielle Renwick, *Same-Sex Marriage: Global Comparisons*, COUNCIL ON FOREIGN REL. (CFR) (last updated Dec. 8, 2017), <https://www.cfr.org/backgrounder/same-sex-marriage-global-comparisons> [<https://perma.cc/P4WX-7MKV>].

<sup>4</sup> See Holning Lau, *Gender Recognition as a Human Right*, in THE CAMBRIDGE HANDBOOK ON NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC (Andreas von Arnould, Kerstin von der Decken & Mart Susi eds., forthcoming).

<sup>5</sup> See Omar G. Encarnación, *Latin America's Rights Riddle: Why the Region Says Yes to Same-Sex Marriage and No to Abortion*, FOREIGN POL'Y (Aug. 27, 2018), <https://foreignpolicy.com/2018/08/27/latin-americas-rights-riddle/> [<https://perma.cc/54QR-EEH6>].

<sup>6</sup> Ley No. 18.246, Unión Concubinaria Regulación [The Concubinary Union Law, Law on Concubinage], 10 Jan. 2008 (Uru.).

<sup>7</sup> See Dario Klein, *Uruguay Nears Same-Sex Adoption Law*, CNN (Aug. 29, 2009), <http://edition.cnn.com/2009/WORLD/americas/08/27/uruguay.gays/index.html> [<https://perma.cc/PM3J-G2V3>].

<sup>8</sup> See Elisabeth Malkin, *Gay Marriage Puts Mexico City at Center of Debate*, N.Y. TIMES (Feb. 6, 2010), <https://www.nytimes.com/2010/02/07/world/americas/07mexico.html> [<https://perma.cc/C6TY-WVR4>].

<sup>9</sup> See Alexei Barrionuevo, *Argentina Approves Gay Marriage, in a First for Region*, N.Y. TIMES (July 15, 2010), <https://www.nytimes.com/2010/07/16/world/americas/16argentina.html> [<https://perma.cc/7DD4-MCMM>].

homosexual couples based on the principle of constitutional equality.<sup>10</sup>

Such legal developments cannot be understood without an examination of the role of Latin America's human rights court—the San Jose-based Inter-American Court of Human Rights. This Article discusses the development of sexual orientation and gender identity in the context of inter-American human rights law, in particular, by looking at the decisions of the Inter-American Court.<sup>11</sup> The Article focuses on three contentious decisions and one advisory opinion, discussing the issues at hand in each case and the ways in which the Court has addressed the implications for sexual orientation and gender identity, as well as the institutional concerns that decisions by international tribunals have upon the law of domestic States. Three cases will be studied to understand these implications: *Atala and Daughters v. Chile*; *Duque v. Colombia*; and *Flor Freire v. Ecuador*; and Advisory Opinion OC 24-17, concerning same-sex marriage and right to name change. The impact of these decisions demonstrates the quick nature in which the idea of sexual orientation and gender identity as a protected category has changed and developed in a short period of time.

## II. Caselaw on Sexual Orientation and Gender Identity

This Section discusses the three contentious decisions that the Inter-American Court of Human Rights has handed down on sexual orientation and gender identity, as well as the advisory opinion on gender identity and same-sex marriage. The decisions are examined in chronological order. As shown below, the first judgment—*Atala and Daughters v. Chile*—paved the way for subsequent decisions on a variety of related matters. These included the recognition of

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<sup>10</sup> See Julieta Lemaitre Ripoll, *Love in the Time of Cholera: LGBT Rights in Colombia*, 11 SUR-INT'L J. HUM. RTS. 73, 75–76 (2009); see also Joshua Goodman, *Colombia to Recognize Rights of Gays*, WASH. POST (June 15, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501449.html> [<https://perma.cc/ZC7V-E4CH>].

<sup>11</sup> The Article focuses only on the Inter-American Court's caselaw. It should be noted, however, that the inter-American system is also comprised of the Inter-American Commission on Human Rights, a quasi-judicial body that receives and handles human rights petitions and submits cases to the Court. The Commission has been a critical actor in the expansion of sexual orientation and gender identity as legal categories. See, e.g., *Violence Against LGBTI Persons*, INTER-AM. COMM'N H.R. (Nov. 12, 2015), <http://www.oas.org/en/iachr/reports/pdfs/violenceigbtipersons.pdf> [<https://perma.cc/N3HJ-HEP3>].

economic rights for same-sex couples<sup>12</sup> to the finding that all members of the Organization of American States should legalize same-sex marriage as a question of international law—a doctrine that no other international court had thus far articulated.<sup>13</sup>

*A. The Inter-American Court Breaks Latin American Ground:  
Atala and Daughters v. Chile*

In February 2012, the Inter-American Court of Human Rights held for the first time in its history that sexual orientation and gender identity are protected categories under the American Convention on Human Rights.<sup>14</sup> In a decision labeled as “groundbreaking”<sup>15</sup> and “historic,”<sup>16</sup> the Inter-American Court construed Article 1.1 of the American Convention as encompassing a prohibition against discrimination on the basis of sexual orientation (and gender identity).<sup>17</sup>

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<sup>12</sup> See *Duque v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016).

<sup>13</sup> 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*]. The Inter-American Court of Human Rights is the first international tribunal to declare that same-sex marriage is an individual right protected by international human rights law.

<sup>14</sup> 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). I must disclaim that I acted as leading co-counsel in Ms. Atala’s petition before the Inter-American Commission on Human Rights, and later, in the case before the Inter-American Court of Human Rights.

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

<sup>16</sup> See *The ICJ Welcomes Historic Decision in Atala v. Chile*, INT’L COMM. JURISTS (Mar. 23, 2012), <https://www.icj.org/the-icj-welcomes-historic-decision-in-atala-v-chile/> [<https://perma.cc/46UM-84XC>]; *LGBT Rights Upheld in Historic Inter-American Court Ruling*, OUTRIGHT ACTION INT. (Mar. 22, 2012), <https://www.outrightinternational.org/content/lgbt-rights-upheld-historic-inter-american-court-ruling> [<https://perma.cc/Z47S-JAGJ>].

<sup>17</sup> Article 1.1 of the American Convention states: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or *any other social condition*” (emphasis added). American Convention on Human Rights, Nov. 21,

### *1. Facts and Local Decisions*

The case arose from a 2004 decision by Chile's Supreme Court which stripped Ms. Atala of the custody of her three daughters at the request of her ex-husband, who objected to the girls living with Ms. Atala and her same-sex partner.<sup>18</sup> In 2002, Atala, a criminal judge, and her husband, Mr. Ricardo López Allendes, a public defender, put an end to a nine-year marriage, and jointly decided that Ms. Atala would maintain the care and custody of the three girls and that Mr. López would visit them every week.<sup>19</sup> At the end of 2002, Atala's same-sex partner moved in with her and her three daughters.<sup>20</sup> In January 2003, López Allende filed a custody suit arguing that the girls' "physical and emotional development was seriously at risk" by their mother's decision to have her same-sex partner live with them.<sup>21</sup> The applicant also filed a suit for provisional custody which the Juvenile Court of Villarrica granted, "even though it expressly acknowledged that there was no evidence to presume the legal incompetence of the mother."<sup>22</sup> The court

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1969, 1144 U.N.T.S. 143. The Court found that the two categories were included in the open-ended clause "any other social condition." *Atala v. Chile*, (ser. C) No. 239, ¶ 91.

<sup>18</sup> The Supreme Court found that the children must be raised in "a traditional Chilean" household, with a father and a mother. By having her partner move in with the family, the Supreme Court declared that Ms. Atala neglected her children's best interest, notwithstanding that the three children had expressly said they wanted to live with their mother (and their mother's partner), and that no expert witness raised objections to Ms. Atala's parenting. *See* Corte Suprema [C.S.] [Supreme Court], 31 mayo 2004, "*Atala Riffo*," Rol No. 1193-03, custodia ¶ 20.

<sup>19</sup> *See Atala v. Chile*, (ser. C) No. 239, at ¶ 30.

<sup>20</sup> *See id.*

<sup>21</sup> The girls' father argued that Ms. Atala was "not capable of watching over and caring for [the three girls, given that] her new sexual lifestyle choice, together with her cohabiting in a lesbian relationship with another woman, [were] producing . . . harmful consequences for the development of these minors . . ." He further claimed that legally treating same-sex partners would "distort the meaning of a human couple, man and woman, and therefore [would] alter the natural meaning of the family . . . since it affects the fundamental values of the family, as the core unit of society." Finally, López argued that it was necessary "to take into account all the consequences of a biological nature that would be implied for minors living with a lesbian couple . . . solely in terms of diseases, given the sexual practices of a lesbian couple, the girls are under constant risk of contracting sexually transmitted diseases such as herpes and AIDS." *Id.* ¶ 31.

<sup>22</sup> The Juvenile Court's main argument was that respondent Atala "has given preference to her own well-being and personal interest over carrying out her role as a mother, under conditions that could affect the subsequent development of the minors in the case." *Id.* ¶ 41.

advanced an argument that would eventually make its way to the Supreme Court and ultimately resulted in the Inter-American Court's rebuke of the Chilean courts.<sup>23</sup> The lower court stated that there was "no conclusion other than the petitioner [Mr. López] presents more favorable arguments on behalf of the best interest of the girls, arguments which, *in the context of a heterosexual and traditional society*, take on great importance."<sup>24</sup> Through a provisional custody decision, based on a supposed significance of reinforcing traditional models of the family, Karen Atala ultimately lost custody of her three daughters permanently.<sup>25</sup>

Ms. Atala impugned the judge's impartiality, noting that he had already advanced an opinion against homosexuality and was therefore unable to render a fair judgment.<sup>26</sup> The judge was forced to step down and the court's secretary took up the role of acting judge.<sup>27</sup> In October 2003, the new judge handed down a merits decision, rejecting the petitioner's custody suit.<sup>28</sup> In its merits judgment, the court observed that:

The respondent's sexual orientation was not an impediment to carrying out responsible motherhood, that there was no psychiatric pathology that would prevent her from exercising her 'role as a mother,' and that there were no indications that would allow for the presumption of any grounds for incapacity on the part of the mother to take on the personal care of the minors.<sup>29</sup>

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<sup>23</sup> See generally *id.*

<sup>24</sup> *Id.* ¶ 41 (quoting decision in the provisional custody proceeding by the Juvenile Court of Villarrica, May 2, 2003) (emphasis added).

<sup>25</sup> Media outlets' extensive coverage of the case (*see Atala v. Chile*, (ser. C) No. 239) caused the Judiciary to open an investigation against Judge Atala based on accusations that she had used the government's property for personal business related to LGBTI rights advocacy and that she had disclosed her sexual orientation to members of her chambers. A special judge investigator appointed to conduct the investigation concluded that "it [was] impossible to sidestep the fact that her peculiar emotional relationship has transcended the private sphere with the appearance of the above-mentioned publications, which clearly damages the image of both Ms. Atala and the Judiciary." *See id.* ¶ 214 (quoting report prepared by Justice Lenin Lillo of the Court of Appeals of Temuco, April 2, 2003). *See infra*, note 60.

<sup>26</sup> *See Atala v. Chile*, (ser. C) No. 239, ¶ 232.

<sup>27</sup> *See id.* ¶ 43.

<sup>28</sup> *See id.* ¶ 44.

<sup>29</sup> *See id.*

The court's decision considered significant evidence to rule against Mr. López Allende.<sup>30</sup> It reviewed reports from international organizations, academic institutions, and social workers<sup>31</sup> that dismissed the claims of an alleged risk for the girls to contract sexually-transmitted diseases because of their mother's sexual orientation, and that proved that they lived in a "harmonious family environment, with clear rules and limits and a family routine that operates appropriately with the supervision of the mother."<sup>32</sup> On the argument that the girls *could* be subject to discrimination, the court held that any custody decision must be based on "definite and proven facts in the case and not on mere suppositions or fears."<sup>33</sup> Finally, the court addressed the critical issue of the children's right to be heard, observing that two of them "expressed their desire to return to live with their mother" and the third one expressed "a slight preference for [living with] the mother."<sup>34</sup>

After the court ordered Mr. López to hand over the girls to Ms. Atala, the petitioner filed an appeal before the Court of Appeals of Temuco along with a temporary injunction requesting the Court to suspend the lower court's order.<sup>35</sup> López argued that "complying with the decision would mean a radical and violent change in the girls' current *status quo*."<sup>36</sup> The Appellate Court ruled in his favor and granted the injunction: the girls were to remain with their father while the Court reviewed the appeal.<sup>37</sup>

The Court of Appeals' merits decision came down in March 2004 upholding the district court's decision that rejected Mr. López's custody lawsuit.<sup>38</sup> The Court also reversed the injunction previously granted in favor of López.<sup>39</sup> With the two merits decisions in favor of Atala (and her daughters), it seemed that the case was over. Yet, Mr. López turned to the Supreme Court through a disciplinary complaint against the Appellate Court justices,

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<sup>30</sup> *See id.* ¶ 35 n.44, ¶ 58 n.76.

<sup>31</sup> *See id.* ¶ 45, 47.

<sup>32</sup> *See Atala v. Chile*, (ser. C) No. 239, ¶ 45.

<sup>33</sup> *See id.* ¶ 48.

<sup>34</sup> *See id.* ¶ 49.

<sup>35</sup> *Id.* ¶ 50.

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* ¶ 51.

<sup>38</sup> *See Atala v. Chile*, (ser. C) No. 239, ¶ 52.

<sup>39</sup> *See id.*

arguing that the justices had acted with “fault and serious and flagrant abuse,” ignoring evidence showing that the “open expression of lesbian behavior produced directly and immediately in [the girls] confusion regarding sexual roles that interfered and would later interfere with the development of a clear and defined sexual identity.”<sup>40</sup> As he had done in the Appellate Court proceedings, López also filed an injunction before the Supreme Court seeking to maintain the custody of the girls while the Supreme Court reviewed the disciplinary matter.<sup>41</sup> The Supreme Court granted the injunction.<sup>42</sup> Despite having two merits decisions in their favor, provisional injunctions effectively obstructed Ms. Atala’s and her daughters’ efforts to reunite.<sup>43</sup>

In May 2004, in a 3-2 judgment, the Supreme Court of Chile found that the appellate judges had effectively acted with abuse by failing to consider the evidence on “the deterioration of the social, family and educational environment of the girls since the mother began to cohabit with her homosexual partner, or the possibility that the girls could be the target of social discrimination arising from this fact.”<sup>44</sup> The Court held that Ms. Atala put her own interests before those of her children “when she chose to begin to live with a same sex partner,” and that there was “potential confusion over sexual roles that could be caused . . . by the absence from home of a male father.”<sup>45</sup> Finally, the plurality held that the Court of Appeals had neglected the girls’ right “to live and grow within the bosom of a family that is structured normally and appreciated in the social environment, according to the proper traditional model.”<sup>46</sup> Thus the Supreme Court put an end to the domestic proceedings in the case.<sup>47</sup> Atala had lost the custody of her daughters, despite the merits

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<sup>40</sup> *See id.* ¶ 53.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* ¶ 56 (describing how Ms. Atala alleges that the court ignored evidence in and subsequently granted custody to López, regardless of that evidence).

<sup>44</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 56 (internal citation omitted). Some of the evidence that the Supreme Court refers to in its decision is “the testimony of persons close to the girls, such as the house maids [who refer to] games and attitudes of the girls that reflect confusion about the sexuality of the mother, which they could have perceived in the new cohabitation scheme at their home.” *Id.*

<sup>45</sup> *See id.*

<sup>46</sup> *Id.* ¶ 57.

<sup>47</sup> *See id.*

decisions that had weighed the evidence, including the girls' own statements.<sup>48</sup>

In November 2004, Karen Atala filed a petition before the Inter-American Commission on Human Rights, which initially asked the parties—Atala and her daughters and the State of Chile—to seek a friendly agreement.<sup>49</sup> After two years of negotiations, the petitioners decided to put an end to the procedure as it became clear that the State was not willing to acknowledge its international responsibility.<sup>50</sup> The procedure before the Commission was crucial, among other things, in allowing the Commission to understand the implications of the case and the existence of a violation under the American Convention on Human Rights—that despite the Convention's silence on the issue of sexual orientation, it was a protected category under inter-American human rights law.

## 2. *The Inter-American Court's decision*

In February 2012, the Inter-American Court of Human Rights issued its decision, finding that Chile had violated the rights of Karen Atala and her daughters to the equal protection of the laws, their right to family life, to privacy, and certain rights concerning the judicial protection of their rights.<sup>51</sup> *Atala* broke ground in Latin America as it was the first time that the regional human rights court expressly addressed the matter of sexual orientation (and gender identity—a matter that was not originally part of the petitioners' submission). In order to do so, the Court based its decision in numerous sources of both international and domestic law.

The judgment's most salient feature is the finding that the equal protection clause of the American Convention on Human Rights encompasses the right not to be discriminated on the basis of sexual orientation and gender identity.<sup>52</sup> The Court started by reiterating its doctrine that human rights treaties are “living instruments” that

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<sup>48</sup> See *id.* (finding that even though the evidence was not properly considered, placing the girls with their father was still appropriate).

<sup>49</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 31.

<sup>50</sup> See Jorge Contesse, *Settling Human Rights Violations*, 60 HARV. INT'L L.J. \_\_\_ (forthcoming 2019) (discussing the friendly settlement procedure in the case of Karen Atala's petition before the Inter-American Commission on Human Rights).

<sup>51</sup> 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).

<sup>52</sup> See *Atala v. Chile*, (ser. C) No. 239, ¶ 86.

must be interpreted according to the changing circumstances of social life.<sup>53</sup> This interpretative departure point is crucial to frame the Court's analysis, as the Court was declaring that, despite the American Convention's silence on the matter, sexual orientation and gender identity were in fact prohibited grounds for discrimination. The Court based its holding not only on the developments of inter-American law, the jurisprudence of the European Court of Human Rights, and U.N. treaty bodies<sup>54</sup> but also on legal developments taking place in Latin American countries. The combination of international human rights standards and domestic constitutional law allowed the Court to bolster its novel finding and set the stage for the subsequent development of sexuality rights in Latin American law.

First, the Court resorted to resolutions adopted by the Organization of American States' General Assembly on the protection of persons against discriminatory treatment based on their sexual orientation.<sup>55</sup> The Court's goal was to show that on the inter-American level, States were already moving in the direction of granting recognition of sexual orientation and gender identity as a matter of *regional human rights law*. Second, the Court moved into universal human rights law. It cited communications by the Human Rights Committee,<sup>56</sup> and general comments by the Committee on Economic, Social and Cultural Rights,<sup>57</sup> the Committee on the Rights of the Child,<sup>58</sup> the Committee against Torture,<sup>59</sup> and the Committee on the Elimination of Discrimination against Women,<sup>60</sup>

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<sup>53</sup> *See id.* ¶ 83.

<sup>54</sup> *See id.* ¶ 87–90.

<sup>55</sup> *See id.* ¶ 86. The Court pointed to “four successive resolutions referring to the protection of persons against discriminatory treatment based on their sexual orientation, demanding the adoption of specific measures for an effective protection against discriminatory acts”, four acts were passed in multiple years: “Human rights, sexual orientation and gender identity, approved at the fourth plenary session.” *Id.* ¶ 86 n.97.

<sup>56</sup> *See id.* ¶ 88 (citing *Toonen v. Australia*, indicating that gender encompasses sexual orientation).

<sup>57</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 89.

<sup>58</sup> *See id.* ¶ 89.

<sup>59</sup> Committee against Torture, General Comment No. 2, *Application of Article 2 by States Parties*, CAT/C/GC/2, ¶¶ 20–21 (Jan. 24, 2008).

<sup>60</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 27. *Women of age and the protection of their human rights*, CEDAW/C/GC/27, ¶ 13 (Dec. 16, 2010); Draft of General Recommendation N° 28 in relation to Article 2 of the Convention on the elimination of all forms of discrimination

that establish that sexual orientation and gender identity are protected grounds under international law. Finally, the Court looked at the caselaw of the European Court of Human Rights, as that court had established, more than a decade earlier, that sexual orientation was a protected category under Article 14 of the European Convention on Human Rights.<sup>61</sup> With these references, the Inter-American Court effectively held that the recognition of sexual orientation and gender identity was a *universal* (and European) human rights concern.<sup>62</sup>

The Court also added a local basis for its top-down import of universal and European law into inter-American human rights law. The Court looked to Latin American legislation and case law, showing how some countries have recognized sexual orientation and gender identity as fundamental human rights.<sup>63</sup> In particular, the Court looked at case law from the Supreme Court of Mexico<sup>64</sup> and comparative law developments both in Latin America and elsewhere.<sup>65</sup> The Court used these examples to bolster an argument that the State had raised and that—as explained below—States have brought up in other cases: the lack of consensus in Latin American

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against women, CEDAW/C/GC/28, ¶ 18 (Dec. 16, 2010).

<sup>61</sup> Article 14 of the European Convention on Human Rights states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” *Council of Europe, European Convention on Human Rights, as amended by Protocols Nos. 11 and 14* (June 2010) (emphasis added). In *Atala*, the Inter-American Court wrongly referred to the European Convention’s clause as “another condition,” not “any ground.” *Atala v. Chile*, (ser. C) No. 239, ¶ 87. The Inter-American Court cited four decisions by its sister court in Europe: *Salgueiro da Silva Mouta v. Portugal* (No. 33290/96), Eur. Ct. H.R. ¶ 28 (Dec. 21, 1999); *L. and V. v. Austria* (No. 39392/98 and 39829/98), Eur. Ct. H.R. ¶ 45 (Jan. 9, 2003); *S.L. v. Austria* (No. 45330/99), Eur. Ct. H.R. ¶ 37 (Jan. 9, 2003); and *E.B. v. France* (No. 43546/02), Eur. Ct. H.R. ¶ 50 (Jan. 22, 2008).

<sup>62</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 284.

<sup>63</sup> *Id.* ¶¶ 126, 137 (quoting the Supreme Court of Justice of Mexico, Action of Unconstitutionality A.I. 2/2010, August 16, 2010).

<sup>64</sup> *Id.*

<sup>65</sup> The Court noted that “[w]ithin the framework of comparative law some States explicitly prohibit discrimination based on sexual orientation in their Constitutions (for example Bolivia, Ecuador, Kosovo, Portugal, South Africa, Sweden and Switzerland).” *Id.* ¶ 90 n.113. The Court expressly referred to recent legislative reform in Argentina, with the adoption of same-sex marriage, and Uruguay, with the recognition of civil unions between same-sex couples in 2009. *Id.*

countries on the scope of sexual orientation as a fundamental right.<sup>66</sup>

In its response to Ms. Atala's pleadings, the respondent State noted that "sexual orientation was not a suspect category on which there was consensus in 2004,"<sup>67</sup> and that "it would not be appropriate to demand [that the Supreme Court of Chile] pass a strict scrutiny test for a category on which the Inter-American consensus is recent."<sup>68</sup> The State further made an argument on subsidiarity, observing that the Court may damage its "credibility and trust" if it "assumes an excessively regulatory role, without considering the views of the majority of the States."<sup>69</sup> As explored below, the issue of "credibility and trust" has become more pressing, especially as the Court furthers its case law on sexual orientation and gender identity.<sup>70</sup>

The "lack of consensus" argument was a clever one, albeit flawed. According to the State, just as the Inter-American Court cites the jurisprudence of the European Court of Human Rights to buttress its finding that sexual orientation is a protected category under human rights law, so should the Court adopt the European Court's "European consensus" doctrine, with its corollary notion of the margin of appreciation.<sup>71</sup> In the present case, the Inter-American Court dismissed the State's argument, noting that lack of consensus

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<sup>66</sup> *See id.* ¶ 75.

<sup>67</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 75.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* ¶ 74. On the principle of subsidiarity in international law, see Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003) and Gerald Neuman, *Subsidiarity*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 360 (D. Shelton ed., 2013).

<sup>70</sup> *See infra* Part II.D.

<sup>71</sup> According to this doctrine, the European Court refrains from adjudicating cases that involve public morals whenever it finds that European countries have not reached a consensus on the topic. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 382 (1997). One of the most salient applications of the "European consensus" doctrine, relevant to the discussion in this Article, is found in the European Court's refusal to rule that the right to marry should be recognized to same-sex couples as a matter of European human rights law. *See* *Schalk and Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. ¶ 58 (2010). On the margin of appreciation doctrine, see Andrew Legg, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012); YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002); Marisa Iglesias, *Subsidiarity, Margin of Appreciation and International Adjudication within a Cooperative Conception of Human Rights*, 15 INT'L J. CONST. L. 393 (2017).

could not be a valid argument to deny individuals their fundamental rights or “to perpetuate and reproduce the historical and structural discrimination that [sexual] minorities have suffered.”<sup>72</sup> The Court supported its argument with “*different* international and comparative law sources,”<sup>73</sup> although the Court only referred to reports by Special Rapporteurs and three decisions by the Colombian Constitutional Court.<sup>74</sup> The Court could have used (again) the general comments and communications from treaty bodies, as these are the authoritative bodies tasked with interpreting major human rights treaties. It could also have used the European Court of Human Rights’ case law and *all* the legal developments found in Latin America. These could have really articulated a reference to “different” sources of international and comparative law. Thus, through a combination of both universal and local fundamental rights law, the Court could have framed its rejection to the State’s “lack of consensus” argument—a claim that other States have also made when called on to account for discriminatory acts against same-sex couples.<sup>75</sup>

Against the newly-established scope of the right to equality, the Inter-American Court addressed the different arguments that the Supreme Court of Chile made in its May 2004 decision. As the district court of Villarrica had done in 2003, the Inter-American Court plainly rejected the argument that the girls *could* be subject to discrimination due to their mother’s sexual orientation.<sup>76</sup> The Court held that the justification of “a distinction in treatment and the restriction of a right, based on the alleged possibility of social discrimination, proven or not . . . cannot be used as legal grounds for a decision.”<sup>77</sup> On the issue of an alleged confusion of sexual roles, the Inter-American Court observed that the Chilean court “limited itself to the application of a test of speculative damage, merely referring . . . to the ‘possible confusion of sexual roles’ and the ‘situation of risk for the girls’ development’ without specifying the connection between said cohabitation and the alleged

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<sup>72</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 92.

<sup>73</sup> *Id.* ¶ 92 n.114 (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> *See infra* Part II.B.

<sup>76</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 119.

<sup>77</sup> *Id.*

deterioration.”<sup>78</sup>

Finally, the Court addressed the Chilean court’s assertion that the girls had a right to be raised in a family “structured normally . . . according to the proper traditional model”<sup>79</sup> with a two-pronged response: (1) the Court noted that the American Convention on Human Rights does not define the family and does not protect a “traditional” model of it;<sup>80</sup> and (2) following a case decided by the European Court of Human Rights which used the principle of proportionality,<sup>81</sup> the Inter-American Court rebuked the Chilean court’s judgment as a “limited, stereotyped perception of the concept of family, which has no basis in the [American] Convention.”<sup>82</sup>

As a consequence of the infringement upon Ms. Atala’s right to equality and non-discrimination, the Inter-American Court found that Chile also violated two other rights: the right to private life and the right to family life.<sup>83</sup> On the former, the Court held that “Ms. Atala’s sexual orientation is part of her private life and therefore any interference in it must meet the standards of suitability, necessity, and proportionality.”<sup>84</sup> The Court then found that the custody proceeding had been an “arbitrary interference in [Atala’s] private life, given that sexual orientation is part of a person’s intimacy, and is not relevant when examining aspects related to an individual’s suitability as a parent.”<sup>85</sup> On the right to family life, the Court reiterated that the American Convention does not protect a specific model of family and that Atala, her partner, and Atala’s daughters in fact formed a family unit.<sup>86</sup> Hence, the Chilean court’s arbitrary interference in their private life based on discriminatory grounds also affected their right to family life under the American

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<sup>78</sup> *Id.* ¶ 130.

<sup>79</sup> *Id.* ¶ 141 (quoting Supreme Court of Chile, Judgment of May 31, 2004).

<sup>80</sup> *Id.* ¶ 142.

<sup>81</sup> *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96, Eur. Ct. H.R. ¶¶ 34–36 (1999). On the principle of proportionality as a tool for constitutional interpretation, see AHARON BARAK, *PROPORTIONALITY. CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (2012); DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004).

<sup>82</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 145.

<sup>83</sup> *Id.* ¶ 161.

<sup>84</sup> *Id.* ¶ 165.

<sup>85</sup> *Id.* ¶ 167.

<sup>86</sup> *Id.* ¶ 176–77.

Convention.<sup>87</sup>

The Court did not find a violation of the right to judicial protection against Ms. Atala.<sup>88</sup> The Court established that “neither the Commission nor the representatives . . . provided specific evidence to disprove the presumption that judges’ subjective impartiality” against Karen Atala.<sup>89</sup> However, the Court did find a violation to Ms. Atala’s daughters’ “right to be heard and be duly taken into account” when the Supreme Court failed to consider the girls’ statements made before the lower courts in the tuition proceedings.<sup>90</sup>

Finally, the Inter-American Court found that Chile violated Atala’s right to equal protection because she was subject to disciplinary proceedings based on her sexual orientation.<sup>91</sup> It concluded this despite the State’s claims that the inquiry followed “serious allegations” and was “not at all related to her homosexuality, but instead [to] . . . complaints and facts verified” by an appellate court judge who acted as investigator.<sup>92</sup> The investigator judge issued a report stating that Ms. Atala received visits in her office “by a large number of women” and by her partner’s parents, who she introduced “as her in-laws,” and that Ms. Atala “openly expressed her homosexuality” to the judge and “defended her determination to openly communicate it to the Court’s officials and Senior Judges.”<sup>93</sup> The Inter-American Court concluded “although the disciplinary investigation began with legal grounds . . . it did investigate this in an arbitrary manner” and was therefore a violation of Atala’s right to privacy under the American Convention.<sup>94</sup>

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<sup>87</sup> Art. 11(2) of the American Convention states that, “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.” Art. 17(1) states that, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.” Organization of American States, American Convention on Human Rights, art. 11(2), 17(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>88</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 192.

<sup>89</sup> *Id.* ¶ 191.

<sup>90</sup> *Id.* ¶ 208.

<sup>91</sup> *Id.* ¶ 222.

<sup>92</sup> *Id.* ¶ 217.

<sup>93</sup> *Id.* ¶ 229.

<sup>94</sup> *Atala v. Chile*, (ser. C) No. 239, ¶ 230.

The case of *Atala Riffo and daughters v. Chile* thus marked the beginning of a prominent case law on sexual orientation and gender identity. Despite the outcomes of subsequent decisions, the Inter-American Court's jurisprudence has to some extent failed to maintain the robustness found in *Atala*.<sup>95</sup> The next sections discuss two subsequently contentious decisions adopted by the Inter-American Court and its Advisory Opinion on gender identity. All of these decisions are based on the *Atala* precedent, namely, that sexual orientation and gender identity are protected categories under the American Convention on Human Rights.

*B. Equal Protection and Social Rights: Duque v. Colombia*

*1. Facts*

In February 2016, the Inter-American Court of Human Rights handed down its second decision on the rights of LGBTI individuals. In *Duque v. Colombia*, the Court held that the State's failure to provide a gay man with equal access to public benefits following the death of his partner on the grounds that domestic law did not recognize such benefits for same-sex couples was a violation of the American Convention on Human Rights' equal protection clause.<sup>96</sup> The Court based its decision on the *Atala* doctrine and expanded it to issues of discrimination and access to social rights concerning same-sex couples.<sup>97</sup> The Court, however, did not agree with the petitioners on several grounds. More significantly, two judges wrote dissenting opinions concerning some of the critical institutional features this Article identifies in the Inter-American Court's expansive jurisprudence.<sup>98</sup>

In March 2002, Ángel Alberto Duque submitted a request to the Colombian Company Manager of Pensions and Unemployment Funds (Compañía Colombiana Administradora de Fondos de Pensiones y Cesantías, COLFONDOS S.A.), inquiring whether he could obtain the benefits from his recently deceased partner's

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<sup>95</sup> *Duque v. Colombia*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 310 (Feb. 26, 2016); *Flor Freire v. Ecuador*, Preliminary Exceptions, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 315 (Aug. 31, 2016).

<sup>96</sup> *See Duque v. Colombia*, (ser. C) No. 310

<sup>97</sup> *See id.*

<sup>98</sup> *See infra* Part II.D.

pension.<sup>99</sup> Duque claimed he lacked financial support and had relied on his partner's assistance during the ten years they lived together as a couple.<sup>100</sup> Duque, like his deceased partner, was HIV positive and needed to cover a prescribed anti-retroviral medication.<sup>101</sup> The Company denied Duque's request arguing that Colombia's law on social security, Law 100 of 1993, only contemplated an individual's benefit to receive their deceased partner's pension if the couple consisted of a man and a woman.<sup>102</sup> The pension company argued that under Colombian law, same-sex couples were precluded from obtaining such benefits.<sup>103</sup>

Duque filed a *tutela* action before a district court demanding that the court recognize his right to a survivor's pension.<sup>104</sup> His main argument was that denying a same-sex partner his deceased partner's pension violated several rights, including the rights to equality and to constitute a family, which are protected by both the Colombian Constitution and the American Convention on Human Rights.<sup>105</sup> He also stressed that he lived with HIV and received anti-retroviral treatment and had no income to cover the treatment.<sup>106</sup>

The Tenth Civil Municipal Court of Bogota denied the *tutela* action on two grounds: first, the court held that Mr. Duque did not meet the requirements for a beneficiary of a survivor's pension under Colombian law; and second, it noted the matter was not to be solved through a *tutela* (constitutional) procedure, but in

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<sup>99</sup> See *Duque v. Colombia*, (ser. C) No. 310, ¶ 70.

<sup>100</sup> *Id.*

<sup>101</sup> See *id.* ¶ 69.

<sup>102</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 70.

<sup>103</sup> *Id.*

<sup>104</sup> According to the Colombian Constitution, "[e]very person has the right to file a *tutela* before a judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whomever acts in his/her name for the immediate protection of his/her fundamental constitutional rights when that person fears the latter may be violated by the action or omission of any public authority." CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86. As leading commentators on Colombian constitutional law observe, the *tutela* is "an important symbol of the new [Colombian] constitutional order . . . a kind of individual constitutional complaint or special writ for the protection of fundamental rights . . . the linchpin of the strategy to make constitutional rights real rather than theoretical." See MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 11 (2017).

<sup>105</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 77.

<sup>106</sup> *Id.*

an administrative (legal) procedure.<sup>107</sup> Duque filed an appeal, but the Twelfth Civil Court of Bogotá confirmed the district court's decision, further noting that under Colombian law a family is formed through the union of a man and a woman and because a survivor's pension is intended to protect the family, same-sex couples are excluded from that benefit.<sup>108</sup> Duque then turned to the Constitutional Court, but the Court refused to review the case.<sup>109</sup>

## 2. *Proceeding before the Inter-American System*

In February 2005, Duque filed a petition before the Inter-American Commission on Human Rights, arguing that the State had violated his rights to personal integrity, fair trial, equal protection, and judicial protection.<sup>110</sup> Six years later, the Inter-American Commission issued an admissibility report<sup>111</sup> and in 2014, a merits report.<sup>112</sup> In October of that year, the Commission took the case before the Inter-American Court requesting the Court to declare that Colombia had violated Mr. Duque's rights under the American Convention on Human Rights.<sup>113</sup>

One of the most distinctive features of the case is the significant developments in Colombian law that occurred between the time Mr. Duque filed the *tutela*, in 2002, and the time he initiated proceedings before the Inter-American Commission, in 2005,—and even after the case was lodged before the Commission, in 2014. Indeed, the Colombian State prominently asserted such developments as a defense that the Inter-American Court should not find Colombia internationally responsible.<sup>114</sup> The first development occurred in 2007, when the Colombian Constitutional Court held that the 1990

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<sup>107</sup> *Id.* ¶ 78.

<sup>108</sup> The Circuit Court held that “the survivor’s pension is intended to protect the family . . . formed by the union of a man and a woman, the only beings capable of preserving the species through procreation . . . a homosexual union between a man with a man or a woman with a woman does not, in itself, constitute a family.” Twelfth Civil Court of Bogotá, Judgment of 19 July 2002, at 92–93 (cited in *Duque v. Colombia*, ¶ 79).

<sup>109</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 80.

<sup>110</sup> *Duque v. Colombia*, Case 12841, Inter-Am. Comm’n H.R., Report No. 5/14 (2014) [hereinafter *Duque Merits Report*].

<sup>111</sup> *Duque v. Colombia*, Case 123-05, Inter-Am. Comm’n H.R., Report No. 150/11 (2011).

<sup>112</sup> See *Duque Merits Report*, *supra* note 110.

<sup>113</sup> See *Duque v. Colombia*, (ser. C) No. 310.

<sup>114</sup> *Id.*

Law No 54 (which regulates *de facto* marital unions) also applied to same-sex couples.<sup>115</sup> The Constitutional Court granted same-sex couples the same pension and social security benefits as those enjoyed by heterosexual couples, finding that there was no constitutional justification for the differentiated treatment between same-sex couples and heterosexual couples with regard to access to a survivor's pension.<sup>116</sup> The following year, the Court handed down a critical decision: in Judgment C-336, the Court held that same-sex couples who prove their status as "permanent couples" had the right to a survivor's pension—the core of Mr. Duque's claim before the inter-American system.<sup>117</sup> Subsequently, the Court explained that the scope of Judgment C-336 extended to situations that occurred *before* the decision and that same-sex couples could use any of the mechanisms available to heterosexual couples to prove their status—until that point, same sex-couples could only use one evidentiary mechanism.<sup>118</sup>

According to the State, the decisions adopted by the Constitutional Court between 2007 and 2011 had radically changed the legal landscape for same-sex couples in Colombia.<sup>119</sup> In particular, the State argued that "the [international] illicit act ceased with Judgment C-336 of 2008 . . . and Judgment T-051 of 2010 consolidated the jurisprudential precedent for the protection of same-sex couples' pension rights."<sup>120</sup> Despite these allegations, the Inter-American Court dismissed the State's claim. It held that *at the time Duque filed his request* with the Colombian Company of Pension Funds—that is, March 2002—Colombia's law relating to the right of same-sex couples to a survivor's pension violated the right of equality, as enshrined in the American Convention and, as a result, Colombia was responsible for an international wrongful

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<sup>115</sup> Corte Constitucional [C.C.] [Constitutional Court], febrero 7, 2007, juicio C-075 (Colom.) ¶¶ 6.2.3.2, 6.2.4, 6.4 (quoted in *Duque v. Colombia*, (ser. C) No. 310, ¶ 81).

<sup>116</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 81 (quoting Corte Constitucional [C.C.] [Constitutional Court], octubre 3, 2007, Sentencia C-811/07, ¶ 6 (Colom.)).

<sup>117</sup> *Id.* ¶ 82 (quoting Corte Constitucional [C.C.] [Constitutional Court], abril 16, 2008, Sentencia C-336/08 (Colom.)).

<sup>118</sup> *Id.* (citing Corte Constitucional [C.C.] [Constitutional Court], Sentencia T-051/10, febrero 2, 2010, ¶ 6.7 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], noviembre 15, 2011, Sentencia T-860/11, (Colom.)).

<sup>119</sup> *Id.* ¶ 40.

<sup>120</sup> *Id.*

act.<sup>121</sup>

The Court reiterated its *Atala* doctrine, whereby sexual orientation is a protected category under the American Convention, and that whenever a State wishes to limit the rights of an individual based on their sexual orientation (or gender identity) it must provide a compelling reason.<sup>122</sup> The Court noted that the State failed to provide an “objective and reasonable justification” for the differentiated treatment to same-sex couples in 2002.<sup>123</sup> As in *Atala*, the Court in *Duque* reviewed relevant international human rights standards, this time with a focus on the practice of the Committee on Economic, Social and Cultural Rights.<sup>124</sup> The Court also surveyed the law of certain Latin American States, thus grounding its “universal human rights” claims on the practice of local Latin American law—a method of adjudication that the Court has used in other socially contentious areas, such as reproductive rights.<sup>125</sup>

Here, the Court reiterated an important argument—used in *Atala*, *Flor Freire*, and the 2017 Advisory Opinion OC-24/17—on the “lack of consensus *within* some countries” (emphasis added) as to the full respect of the rights of sexual minorities.<sup>126</sup> The Court repeated its *Atala* doctrine: “the fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter

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<sup>121</sup> *Id.* ¶ 99.

<sup>122</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 106.

<sup>123</sup> *Id.* ¶ 124. The Court, however, did not find the State responsible for the violation of the rights to fair trial and personal integrity. The Court was satisfied with the State’s claim that domestic courts did not reject Duque’s *tutela* action due to discrimination and stereotype. The Court observed that domestic courts referred Mr. Duque to the proper judicial proceedings to claim the pension benefits and that no proof was offered that Colombia did not have an effective judicial remedy to claim the payment of social benefits. *Id.* ¶¶ 155–57. Further, the Inter-American Court observed that the petitioner was not able to establish that Colombian courts based their decisions on stereotypes and other considerations beyond what Colombian law expressly stated at the time. *Id.* ¶¶ 164–65. On the allegation concerning the right to life and personal integrity, the Court noted that Colombian law contemplates protections for HIV positive individuals and that Mr. Duque failed to prove the “tremendous emotional burden,” *Id.* ¶ 184, that he allegedly suffered as a result of the situation as no “medical reports, analysis or tests” were provided by his attorneys, *Id.* ¶ 187, and that he also failed to prove that the subsidiary system for social benefits would have provided fewer benefits than the contributive system. *Duque v. Colombia*, (ser. C) No. 310, ¶ 191.

<sup>124</sup> *Id.* ¶¶ 108–09.

<sup>125</sup> See Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 INT’L J. OF CONST. L. 414, 427 (2017).

<sup>126</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 123.

of consensus, cannot lead this Court to abstain from issuing a decision.”<sup>127</sup> This assertion contrasts with the approach favored by the European Court of Human Rights, which, as already explained, has precisely used the lack of a “European consensus” to deny the existence of a right to marry under the European Convention of Human Rights.<sup>128</sup>

Significantly, the Inter-American Court “note[d] the parties’ submission that the Colombian Constitutional Court modified the domestic legislation in the sense of granting same-sex couples access to survivors’ pension.”<sup>129</sup> The Court, however, observed that some “controversies persist[ed] as the requirements to establish the status of surviving partner, and the retroactive effect of the normative change.”<sup>130</sup> In particular, the Court noted two issues: first, the three-year statute of limitations for claims for a survivor’s pension could affect the petitioner, effectively depriving him of compensation dating back to his 2002 claim;<sup>131</sup> and second, it was unclear whether Mr. Duque would obtain the totality of the pensions he failed to receive since 2002 as a result of the discrimination he suffered.<sup>132</sup> These were the grounds that the Court used to proceed with the review of the case, despite the noted change in legislation in Colombia, and to ultimately hold Colombia responsible for the violation of the right to equal protection of Mr. Duque under the American Convention.<sup>133</sup>

The inter-American human rights community expected *Duque* to be a further development in the Inter-American Court’s jurisprudence on LGBTI rights, in particular, concerning the function of social rights.<sup>134</sup> The Inter-American Commission expressly framed the petition as a social-rights one when it

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<sup>127</sup> *Id.* (quoting *Atala Riffó and daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 92 (Feb. 24, 2012)).

<sup>128</sup> See *Schalk and Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. ¶ 58 (2010).

<sup>129</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 130.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ¶ 134.

<sup>132</sup> *Id.* ¶ 136. The Court further noted: “it is reasonable to conclude that the international unlawful act has not yet been repaired in its entirety because the retroactive payments that Mr. Duque could receive may not be equivalent to what he would have received had he not been a victim of discrimination.” *Id.* ¶ 137.

<sup>133</sup> *Id.* ¶ 138.

<sup>134</sup> *Duque v. Colombia*, (ser. C) No. 310, ¶ 10 (referring to the amici briefs submitted before the Court).

submitted the case before the Court.<sup>135</sup> *Duque* was a second-generation case, developing the case law initiated with *Atala* in 2012. Ultimately, however, the Court seemed to have lost sight of some of the fundamental legal and institutional issues at hand. By forcing a decision, the Court unnecessarily eroded some key functions of international adjudication, including the principles of complementarity and subsidiarity. The Court came to its decision notwithstanding the clear and solid evidence that Colombian same-sex couples were no longer in the situation of Mr. Duque in 2002, and that at that time neither Colombian law nor Inter-American human rights law granted same-sex couples (and individuals) the same rights as heterosexual couples (and individuals).<sup>136</sup> Its main argument was that it was “not possible to fully know” whether Mr. Duque would receive the benefits to which he was entitled, despite the State’s claims that he would.<sup>137</sup> Instead of forcing an international conviction against Colombia, a country where—as the Court itself acknowledged—social rights are judicially protected, the Court could have remanded the case to domestic authorities to solve Mr. Duque’s situation.<sup>138</sup>

The two dissenting opinions filed in the case point in this direction. Judge Manuel Ventura Robles, writing his last vote as a sitting judge in the Court, posed a direct question:

How could the Court not apply the complementarity principle and accept the State’s objection of the petitioner’s failure to exhaust domestic remedies if the State, through the Constitutional Court’s judgment, amended its domestic case law and opened the doors to the reparation of the alleged facts? What else could the State do to remedy the violation?<sup>139</sup>

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<sup>135</sup> See Inter-Amer. Comm’n H.R., *IACHR Takes Case Involving Colombia to the Inter-American Court*, Press Release No. 144/14 (Dec. 1, 2014), [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/144.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/144.asp) [<https://perma.cc/DL44-A5Z3>].

<sup>136</sup> *Id.* ¶ 129–36.

<sup>137</sup> *Id.*

<sup>138</sup> For a discussion on the judicialization of social rights in Colombia, see Cesar Rodriguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669 (2011) and MANUEL CEPEDA ESPINOSA & DAVID LANDAU, *COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES* (2017).

<sup>139</sup> *Duque v. Colombia*, (ser. C) No. 310, at 2 (separate dissenting opinion by Ventura Robles, J.).

Similarly, in a separate dissenting opinion, Judge Eduardo Vio Grossi noted first that the Court could not, as the American Convention establishes, “rule, as Article 63.1 [of the American Convention] mandates, that the injured party be ensured the enjoyment of his right or freedom that was violated since that had already occurred.”<sup>140</sup> Second, Judge Vio criticized the Court for the use of secondary sources of international law as if they were primary ones (like treaties or customary international law).<sup>141</sup> Finally, Judge Vio objected to the claim that Colombia failed to contrast its domestic legislation against international law, the Inter-American doctrine known as “conventionality control.”<sup>142</sup> Judge Vio noted that, at the time of submission of the original petition, there was no international obligation to grant recognition to same-sex couples.<sup>143</sup> Therefore, the State’s act denying Mr. Duque of the survivor’s pension was not—and could not have been—an international wrongful act.<sup>144</sup>

*C. Perceived Sexual Orientation as a Protected Category:  
Flor Freire v. Ecuador*

A few months after the Inter-American Court handed down its *Duque* judgment, it decided the case of *Flor Freire v. Ecuador*.<sup>145</sup> In *Flor Freire*, the Court applied the *Atala* precedent—namely, that sexual orientation is a protected category under inter-American human rights law—in the context of military disciplinary proceedings and in the situation of both actual *and perceived* sexual orientation, a situation where an individual’s right to have his honor respected was also at issue.<sup>146</sup>

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<sup>140</sup> *Id.* at 3 (separate dissenting opinion by Vio Grossi, J.) (internal quotations omitted).

<sup>141</sup> *Id.* at 9 (“[I]t is not stated that international law may not or shall not regulate the situation of same-sex couples in the future . . . but that such regulations must be contemplated by some source of international law, that is, a treaty, customary law or general principles of law applicable to States parties to the Convention, or to the actual State at hand pursuant to a unilateral act. None of this occurs in the present case.”).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 13.

<sup>144</sup> *See id.* at 10.

<sup>145</sup> *Flor Freire v. Ecuador*, Preliminary Exceptions, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 315 (Aug. 31, 2016).

<sup>146</sup> In *Flor Freire*, the Court also addressed issues concerning the right to judicial

Homero Flor Freire was a Military Police official, who reached the rank of lieutenant and remained an active-duty member of the Ecuadorian Army until his separation from the army in 2002.<sup>147</sup> In 2000, Mr. Flor Freire was involved in an incident which has disputed factual accounts. According to several military officers, on November 19, 2000, Flor Freire and another soldier were having sex in Flor's room.<sup>148</sup> This was the narrative that the Ecuadorean authorities used to dismiss Flor from the army.<sup>149</sup> According to the petitioner's account, however, while he was on duty, he saw an intoxicated official outside the Major Coliseum in the city of Shell Mera, province of Pastaza, where a party was taking place.<sup>150</sup> Flor observed that the official was "having problems" with some people attending the party and that he was "putting himself at risk and affecting the honor and reputation of the army."<sup>151</sup> He then decided to take the intoxicated officer to the Amazonas Military Fort.<sup>152</sup> After the officer attempted to return to the party, Flor decided to move him to his room where there was an extra bed.<sup>153</sup> Soon after he entered the room, a Major entered the room and told Flor Freire that he was in trouble and that "witnesses had seen him in acts of homosexuality."<sup>154</sup> The senior officer asked Flor to turn over his standard-issue weapon.<sup>155</sup>

Military authorities commenced a disciplinary process against Mr. Flor Freire based on Article 117 of the Regulations of Military Discipline, which sanctioned members of the Armed Forces "caught in acts of homosexuality."<sup>156</sup> In January 2001, the Military Court of

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guarantee and fair trial. *See id.* ¶¶ 159–211. Since these considerations do not concern issues of sexual orientation and gender identity, they fall outside the scope of this Article and, therefore, are not discussed here.

<sup>147</sup> Homero Flor Freire v. Ecuador, Case 12.743, Inter-Am. Comm'n H.R., Report No. 81/13, ¶ 12 (Nov. 4, 2013), <https://www.oas.org/en/iachr/decisions/court/12743fondoem.pdf> [<https://perma.cc/AR4T-S4W4>].

<sup>148</sup> *Id.* ¶ 32.

<sup>149</sup> *See id.*

<sup>150</sup> *Flor Freire v. Ecuador*, (ser. C) No. 315, ¶ 57.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Flor Freire v. Ecuador*, (ser. C) No. 315, ¶ 61.

Law found against Flor and concluded that he must be put on leave before being discharged pursuant to Article 117 of the Regulations of Military Discipline.<sup>157</sup> Although Flor Freire denied the facts—and denied even being a homosexual—he argued that the disciplinary proceeding violated the Ecuadorean Constitution, which enshrines “the right to take free and responsible decisions on one’s sexual life.”<sup>158</sup>

The Military Court rejected the argument, noting that:

The Constitution of Ecuador . . . guarantees the right to make free and responsible decisions about their sexual life. Nonetheless, in the armed forces, Article 117 of the Rules of Military Discipline is in force; it punishes acts of homosexuality, precisely because of the special nature of the military legislation, its philosophy and constitutional mission, to cultivate and keep intact and unified values such as honor, dignity, discipline . . . extolling civic-mindedness, exalting respect for the national symbols and the Ecuadorian nation, in view of the ethical and moral values it practices, and which are the essential elements of the integral training of the soldier, all of which is not compatible [with the] conduct and behavior adopted by the persons investigated since they are contrary to principles and norms of conduct that all members of the Armed Forces are obligated to observe, the Armed Forces being proud to be the moral reservoir of society, and to have in its ranks men of integrity, capable, responsible, and with unblemished moral authority that enables them to guide and lead their subordinates in operations [and] activities particular to the military career.<sup>159</sup>

In May 2001, the Council of Subaltern Officers upheld the

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<sup>157</sup> The Military Court held that Flor Freire and the other officer “subjectively offended the armed institution, affecting its prestige and reputation . . . causing a scandal and setting a bad example both at the Military Front and in front of the general public.” *Id.* ¶ 76 (quoting Court of Law, Fourth Military Zone, Resolution of Jan. 17, 2001).

<sup>158</sup> THE CONSTITUTION OF THE REPUBLIC OF ECUADOR 1998, art. 23. The current Constitution also protects “[t]he right to freely take informed, voluntary, and responsible decisions on one’s sexuality and one’s sexual life and orientation.” THE CONSTITUTION OF THE REPUBLIC OF ECUADOR 2008, art. 66.

<sup>159</sup> *Homero Flor Freire v. Ecuador*, Case 12.743, Inter-Am. Comm’n H.R., Report No. 81/13, ¶ 40 (Nov. 4, 2013), <https://www.oas.org/en/iachr/decisions/court/12743fondoem.pdf> [<https://perma.cc/AR4T-S4W4>] (quoting Court of Law, Fourth Military Zone, Resolution of Jan. 17, 2001).

Military Court's decision, and in July of that year the Council of Superior Officers followed suit.<sup>160</sup> After the Military Court's decision, Flor Freire filed a constitutional injunction (*amparo*) before the Sixth Civil Court of Pichincha.<sup>161</sup> In July 2001, the court denied the injunction noting that the *amparo* action was out of order, because it was not directed against an act itself with respect to which the court could make a finding of its illegitimacy.<sup>162</sup> Flor appealed the decision and, in February 2002, the Second Chamber of the Constitutional Court upheld the court's decision.<sup>163</sup> A few weeks earlier, Flor Freire had finally been discharged.<sup>164</sup>

A remarkable feature of the case is that, after the Inter-American Commission on Human Rights issued its merits report in November 2013 making recommendations to the State, Ecuador expressed its willingness to comply with the Commission's report.<sup>165</sup> Furthermore, following the report, in July 2014 the State held a public act of atonement at the Ministry of National Defense, where it unveiled a plaque in honor of Mr. Flor Freire and publicly apologized to him "for being dismissed . . . in an arbitrary and unjustified manner, in violation of his constitutional rights."<sup>166</sup> The State's attitude suggested that the inter-American human rights standard set forth in *Atala* had already been internalized. The reason the Inter-American Court had to move forward with the case, in spite of the State's public act of apology, was the State's unwillingness to acknowledge its international responsibility, similarly to what transpired in the *Duque* case.<sup>167</sup>

The Inter-American Court's decision in *Flor Freire* is mainly of interest for two reasons. First, it introduced the notion of "discrimination by perception" and, second, ruled on the issue of

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<sup>160</sup> *Flor Freire v. Ecuador*, (ser. C) No. 315, ¶¶ 79–82.

<sup>161</sup> *Id.* ¶ 83.

<sup>162</sup> *Id.* ¶ 94.

<sup>163</sup> *Id.* ¶ 98.

<sup>164</sup> *Id.* ¶ 100.

<sup>165</sup> *Id.* ¶¶ 34–36.

<sup>166</sup> *Flor Freire v. Ecuador*, (ser. C) No. 315, ¶ 37.

<sup>167</sup> Homero Flor Freire v. Ecuador, Case 12.743, Inter-Am. Comm'n H.R., Report No. 81/13, ¶ 33 (Nov. 4, 2013), <https://www.oas.org/en/iachr/decisions/court/12743fondoem.pdf> [<https://perma.cc/AR4T-S4W4>].

sexual orientation within the Armed Forces.<sup>168</sup> Following developments in international human rights law, the Court observed that the “concept of ‘discrimination by perception’ is contemplated in several international instruments,”<sup>169</sup> as well as the caselaw and legislation of numerous countries.<sup>170</sup> The fact that the petitioner did not identify as a homosexual man was of paramount importance, but, the Court observed, he had nonetheless been a victim of discrimination on the grounds of his *perceived* sexual orientation.<sup>171</sup>

The Court noted that restrictions to sexual relations inside military facilities were not *per se* unreasonable, but that Ecuador had failed to justify why *same-sex* relations were subject to harsher punishment than heterosexual relations.<sup>172</sup> As a result, the Court found Ecuador internationally responsible for violating Mr. Flor Freire’s rights to equality and to have his honor respected, as recognized by the American Convention.<sup>173</sup>

The second notable feature of the decision is the Court’s analysis of sexual orientation within the context of Armed Forces. The Court noted that there was no inter-American standard on the matter, but following the caselaw of the European Court of Human Rights,<sup>174</sup> and the caselaw and legislation of several Latin American countries,<sup>175</sup> it concluded that the prohibition against discrimination “encompasses all spheres of personal development . . . hence, the exclusion of individuals from the armed forces based on their sexual orientation, *whether real or perceived*, is against the American

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<sup>168</sup> See *Flor Freire v. Ecuador*, (ser. C) No. 315, ¶¶ 118–20.

<sup>169</sup> The Court cited the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities (art. 1); the African Commission on Human and Peoples’ Rights Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity; and the Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity*. *Id.* ¶ 122.

<sup>170</sup> The Court referred to decisions by the Supreme Court of Canada, and American, French, and British legislation. *Id.* at n.177.

<sup>171</sup> See *id.* ¶ 120.

<sup>172</sup> *Id.* ¶ 127.

<sup>173</sup> *Id.* ¶¶ 156–57.

<sup>174</sup> *Flor Freire v. Ecuador*, (ser. C) No. 315, ¶ 130.

<sup>175</sup> The Court referred to cases from Colombia, Brazil and Peru, and to legislative changes in Argentina and Chile. See *id.* ¶¶ 131–35.

Convention.”<sup>176</sup>

With this third contentious decision, the Court solidified its caselaw on sexual orientation as a prohibited ground for discrimination. It expanded the *Atala* precedent to different areas, such as social rights (as seen in *Duque*), the special situation of armed forces, and the significance of both real and *perceived* discrimination (*Flor Freire*).

*D. Same-sex Marriage: Does the Court Go Ultra Vires?*

On January 9, 2018, the Inter-American Court of Human Rights (Inter-American Court or Court) released an advisory opinion on Gender Identity, Equality, and Non-Discrimination of Same-Sex Couples.<sup>177</sup> The Court declared that the change of name and the rectification of public records and identity documents to conform to a person’s gender identity are protected by the American Convention on Human Rights.<sup>178</sup> Additionally, the Court maintained that states must extend all existing legal mechanisms—including marriage—to same-sex couples.<sup>179</sup>

The Opinion arose from a request made by Costa Rica for the Court to interpret the scope of the right to privacy, the right to a name, and the right to equal protection of the laws under the American Convention on Human Rights.<sup>180</sup> Costa Rica observed that the protection of rights relating to sexual rights and gender identity vary significantly across the countries of the Organization of American States (OAS), and that further clarification as to what amounts to discrimination was needed.<sup>181</sup>

The Court established that the change of a name, as well as the rectification of the image and the sex or gender in public records

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<sup>176</sup> *Id.* ¶ 136 (emphasis added).

<sup>177</sup> *Advisory Opinion OC-24/17*, *supra* note 13.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* ¶ 2. Costa Rica asked the Court to address the following issues: (i) Whether states must “recognize and facilitate the name change of an individual in accordance with his or her gender identity”; (ii) Whether the lack of administrative procedures for name change in such circumstances could be considered contrary to the American Convention on Human Rights; (iii) Whether the American Convention requires states to recognize all patrimonial rights that derive from a same-sex relationship; and (iv) Whether there must be a specific mechanism to govern relationships between persons of the same sex for the state to recognize all the economic rights that derive from that relationship.

and identity documents is a right protected by the American Convention.<sup>182</sup> Such a right is found in general principles pertaining to the right to a name and the right to identity, as articulated by international human rights bodies.<sup>183</sup>

In its arguably most groundbreaking section, the Court's opinion addressed—and ultimately went beyond—two specific questions related to the patrimonial rights derived from relationships between persons of the same sex: first, that legal standards apply to said relationships, and second, the mechanisms that states should use to recognize and protect such relationships.<sup>184</sup> On the question of the legal standards that apply to same-sex relationships, the Court found that an interpretation of the concept of “family”—a notion that, as explained, the American Convention does not define—that failed to encompass same-sex relationships “would defeat the object and purpose of the Convention.”<sup>185</sup> Although the Convention's drafters did not consider such issues, the Court declared that “by recognizing this type of family, the Court is adhering to the original intention [of the drafters].”<sup>186</sup>

The Court thus fashioned an expansive interpretation of its advisory jurisdiction, finding that “the protection of the family relationship of a same-sex couple goes beyond mere patrimonial rights issues,”<sup>187</sup> and that all types of rights—whether civil, political, economic or social—“applicable to the family relationships of heterosexual couples” should also extend to same-sex couples.<sup>188</sup> Costa Rica had submitted a question about patrimonial rights, but the Court handed down a response regarding *all* rights—what the Romans called *ultra vires*.<sup>189</sup>

Finally, with regard to the mechanisms that States should use to protect same-sex relationships, the Court reviewed the international and comparative practice on the subject, citing its own case law, the

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<sup>182</sup> *Id.* ¶ 116.

<sup>183</sup> *Advisory Opinion OC-24/17*, *supra* note 13, ¶¶ 107–11.

<sup>184</sup> *See id.* ¶ 140. *See also* Macarena Saez, *In the Right Direction: Family Diversity in the Inter-American System of Human Rights*, 44 N.C. J. INT'L L. 317, 338 (2019).

<sup>185</sup> *See Advisory Opinion OC-24/17*, *supra* note 13, ¶ 189; *see also* Saez, *supra* note 184, at 21.

<sup>186</sup> *See Advisory Opinion OC-24/17*, *supra* note 13, ¶ 193.

<sup>187</sup> *Id.* ¶ 198.

<sup>188</sup> *Id.*

<sup>189</sup> *See Ultra Vires*, BLACK'S LAW DICTIONARY (10th ed. 2014).

opinions of United Nations treaty bodies, the European Court of Human Rights' case law, and the practice of a wide range of Organization of American States members.<sup>190</sup> It noted that "States can adopt diverse types of administrative, judicial and legislative measures to ensure the rights of same-sex couples," and observed that extending already-existing institutions—including marriage—to same-sex couples is "the most simple and effective way" to ensure the realization of the standards set forth by the advisory opinion.<sup>191</sup> However, the Court concluded that the existence of "two types of formal unions" is "inadmissible."<sup>192</sup>

### III. Impact

The Inter-American Court's case law on sexual orientation and gender diversity has dramatically expanded in a relatively short period of time.<sup>193</sup> The first decision on the matter—*Atala*, where the Court held that sexual orientation and gender identity are protected categories under inter-American human rights law—came down in 2012.<sup>194</sup> Six years later, the Court had expanded its doctrine to declare that the right to equality—a right that the Inter-American Court has notably declared a *jus cogens* norm—mandates all Organization of American States, including those that are not parties to the American Convention, to legalize same-sex marriage.<sup>195</sup>

As the Court has noted in all its decisions on these matters, Latin American States have been moving towards granting recognition to sexual orientation and gender identity.<sup>196</sup> In this sense, it is possible to situate the Court's case law as part of a larger conversation taking place among, and within, States. The Court can engage with States in two ways: first, it can seek to impose its own understanding of the scope of rights, as it did in its advisory opinion, where it held that the opinion has legal relevance for *all* OAS members, without

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<sup>190</sup> *Id.* ¶¶ 201–05.

<sup>191</sup> *Id.* ¶ 218.

<sup>192</sup> *Advisory Opinion OC-24/17*, *supra* note 13, ¶ 224.

<sup>193</sup> *See Saez*, *supra* note 184, at 13–15.

<sup>194</sup> *See Case of Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 91 (Feb. 24, 2012).*

<sup>195</sup> *See id.* ¶ 79; *see also Advisory Opinion OC-24/17*, *supra* note 13. In contrast, the European Court of Human Rights declared more than two decades ago that sexual orientation is a protected category under the European human rights treaty, but it has yet to declare that the fundamental right to marry extends to same-sex couples.

<sup>196</sup> *See Advisory Opinion OC-24/17*, *supra* note 13.

making a distinction between *American Convention* member States and non-member States, and where it went beyond the scope of the questions that had been submitted to it. A notorious problem with this form of engagement is seen in the unprecedented backlash against the Court, following its Advisory Opinion OC 24/17:<sup>197</sup> the Court's decision caused a Costa Rican presidential candidate running on a platform against the Inter-American Court to go from having little support to becoming the front-runner in a general election.<sup>198</sup>

Second, the Court can deepen its adjudication method whereby it engages with domestic constitutional developments to bolster its own findings, as seen in *Atala* and other cases.<sup>199</sup> Here the Court acts more as a partner of constitutional courts and allows their voice to become “inter-American” by way of the Court's rulings. For instance, by inviting ample submissions on the issues before it,<sup>200</sup> the Court has remarkably opened its doors to public participation. In order to solidify its authority, particularly in a context of growing resistance against international human rights law, the Court should refrain from seeking to decide all matters and be open to sometimes “leaving things undecided,”<sup>201</sup> let States decide—or at least seek forms of implementation of the general principles laid out by the regional court.

In any event, the Court's caselaw has also significantly impacted domestic law. After the Court's advisory opinion was issued in January 2018, the Constitutional Chamber of the Costa Rican Constitutional Court requested an opinion from the country's Attorney General's Office, which declared that the Inter-American

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<sup>197</sup> See *Latin America's Human-Rights Court Moves into Touchy Territory*, THE ECONOMIST (Feb. 1, 2018), <https://www.economist.com/the-americas/2018/02/01/latin-americas-human-rights-court-moves-into-touchy-territory> [https://perma.cc/3GYF-6WRY].

<sup>198</sup> *Id.* On backlash against the Inter-American Court, see Jorge Contesse, *Resisting the Inter-American Human Rights System*, 44 YALE J. INT'L L. (forthcoming 2019), and Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, backlash and the Inter-American Court of Human Rights*, 14 INT'L J. L. IN CONTEXT 237 (2018).

<sup>199</sup> See *Atala Riffo and Daughters v. Chile (Atala v. Chile)*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶ 276–77 (Feb. 24, 2012).

<sup>200</sup> See *id.* ¶¶ 10, 17–23.

<sup>201</sup> I take the phrase from Cass Sunstein's work on judicial minimalism. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3 (2001).

Court's advisory opinion is binding upon Costa Rican judges.<sup>202</sup> Also, the country's Supreme Electoral Tribunal announced that individuals may now change their name at will according to their gender identity, in conformity with the Inter-American Court's decision.<sup>203</sup> In Chile, the Supreme Court applied the advisory opinion to rule that a trans individual had a right to a name change without the need to undergo surgery or hormonal treatment.<sup>204</sup> Similarly, the adoption of Chile's recent law on gender identity was influenced by the Court's caselaw, from *Atala* to OC-24/17.<sup>205</sup> In Ecuador, a nine-year old trans girl successfully obtained a judicial pronouncement to have her name changed, in a decision that partially relied on the Inter-American Court's OC 24/17.<sup>206</sup>

It remains to be seen how the irruption of conservative political movements in Latin America will affect the politics of sexual orientation and gender identity in the region.<sup>207</sup>

<sup>202</sup> Laura Alvarado, *Costa Rica's Attorney General Confirms Ruling of Inter-American Court Regarding Same Sex Marriage is Binding*, THE COSTA RICA STAR (May 13, 2018), <https://news.co.cr/costa-rica-lgbti-rights-gay-rights-costa-rica-marriage/73000/> [<https://perma.cc/ZBB4-D7BK>].

<sup>203</sup> Laura Alvarado, *Transgender Population in Costa Rica Will be Able to Choose the Name Shown in Their ID*, THE COSTA RICA STAR (May 14, 2018), <https://news.co.cr/transgender-population-in-costa-rica-will-be-able-to-choose-the-name-shown-in-their-id/73032/> [<https://perma.cc/UQY9-7G2T>].

<sup>204</sup> Corte Suprema [C.S.] [Supreme Court], 29 mayo 2018, "Sentencia del 29 de Mayo 2018, Rol de la causa: Decisión, (Chile), <http://www.pjud.cl/documents/396543/0/CAMBIO+NOMBRE+Y+SEXO+REGISTRAL+SIN+DATOS.pdf/4e7da234-bffe-4cab-9eab-88aa2765ad94> [<https://perma.cc/4GWH-FUPL>] (party names redacted throughout opinion to protect identities).

<sup>205</sup> See *Chile Enacts Landmark Gender Identity Law*, THE SANTIAGO TIMES (Nov. 29, 2018), <https://santiagotimes.cl/2018/11/29/chile-enacts-landmark-gender-identity-law/> [<https://perma.cc/2WH6-WGXE>].

<sup>206</sup> See Oscar Lopez, *Mother hopes nine-year-old daughter's gender change will help others in Ecuador*, REUTERS (Dec. 12, 2018), <https://www.reuters.com/article/us-ecuador-lgbt-transgender/mother-hopes-nine-year-old-daughters-gender-change-will-help-others-in-ecuador-idUSKBN1OB2HN> [<https://perma.cc/N4AB-H49X>]. See *Unidad Judicial de Familia, Niñez y Adolescencia, Juicio No 17986201800604* (Nov. 6, 2018). The Ecuadorean Civil Registry appealed the decision and, in January 2019, the Provincial Court submitted the case before Ecuador's Constitutional Court.

<sup>207</sup> See Javier Corrales, *The Politics of LGBT Rights in Latin America and the Caribbean: Research Agendas*, 100 EUR. REV. LATIN AMERICAN & CARIBBEAN STUD. 53, 54 (2015) ("The politics of LGBT rights is not just the civil rights issue of our time, but also probably the state-church issue of our time.").

#### **IV. Conclusion**

The recognition of sexual orientation and gender identity in international and domestic law is an impressive phenomenon. Courts all around the world have expanded the contours of what used to be a heteronormative body of law, allowing same-sex couples and gender non-conforming individuals to claim their rights as human rights. In Latin America, a region where conservative political forces have exercised significant power, the Inter-American Court of Human Rights' caselaw on sexual orientation and gender identity has become a crucial driver of social change. The Court has reinterpreted the regional human rights norms allowing for local developments that have expanded the enjoyment of rights. As the Court's caselaw expands, however, so does the pushback against the Court and, more generally, human rights law. Human rights lawyers and scholars—and the Court itself—must find ways to contain the resistance against the Court before the retrenchment of rights that is already seen in the region reverses the wins of the past decade.

