



[Artigos inéditos]

## **To be a mother or to be lesbian? Considerations about the case Atala Riffo and children vs. Chile in the Inter-American Court of Human Rights**

*Ser mãe ou ser lésbica? Considerações sobre o caso Atala Riffo e Crianças vs. Chile na Corte Interamericana de Direitos Humanos*

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Artigo recebido em 01/07/2024 e aceito em 15/12/2024.



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## Abstract

This article is based on a choice posed to Karen Atala Riffo by the Chilean Supreme Court in 2004: to exercise the role of mother or to exercise her sexuality – but not both. It intends to observe the interrelationships between the categories gender, sexuality and reproduction based on the study of the Case Atala Riffo and Children vs. Chile, at the Inter-American Court of Human Rights, understood as an international Justice and Dispute System, through the case study methodology. Still, in addition to discussing the recognition of sexual orientation as a category protected by the American Convention on Human Rights, this work seeks to reflect on the discourse used by both the Chilean and Inter-American Courts regarding the relationship between motherhood and non-heterosexual orientation. In the end, after reassembling in historical perspective the relations of domination that subjugate motherhood to heteronormativity, it aims to question the effectiveness of the Inter-American decision in the face of violence against the LGBTQIA+ community. In the end, it is concluded that the Justice Systems for Conflict Resolution, although they have promoted advances in Human Rights, still face the challenge of structural gender violence.

**Keywords:** Human Rights; Sexual Orientation; Gender; Reproduction; Justice and Dispute System.

## Resumen

El presente artículo parte de una elección impuesta a Karen Atala Riffo por la Corte Suprema de Chile en el año 2004: ejercer el papel de madre o ejercer su sexualidad, pero no ambos. Pretende observar las interrelaciones entre las categorías de género, sexualidad y reproducción a partir del estudio del Caso Atala Riffo y Niñas vs. Chile en la Corte Interamericana de Derechos Humanos, entendida como Sistema de Justicia internacional para la resolución de conflictos, mediante la metodología de estudio de caso. Además, más allá de discutir el reconocimiento de la orientación sexual como categoría protegida por la Convención Americana de Derechos Humanos, el trabajo busca reflexionar sobre el discurso utilizado por las Cortes chilena e Interamericana en lo que respecta a las relaciones entre maternidad y orientación no heterosexual. Al final, después de remontar en perspectiva histórica las relaciones de dominación que subyugan la maternidad a la heteronormatividad, objetiva cuestionar la eficacia de la decisión interamericana ante la coyuntura de violencia hacia la comunidad LGBTQIA+. En conclusión, se observa que los Sistemas de Justicia para la



Resolución de Conflictos, aunque hayan promovido avances en Derechos Humanos, aún tienen como desafío enfrentar la violencia de género estructural.

**Palabras clave:** Derechos Humanos; Orientación Sexual; Género; Reproducción; Sistemas de Justicia para la Resolución de Conflictos.



## 1. Introduction

On February 24, 2012, the Inter-American Court of Human Rights ruled on the Case Atala Riffo and Children vs. Chile, the first case concerning the recognition of the right to sexual orientation as a protected category under the American Convention on Human Rights.

Chilean judge Karen Atala Riffo was married to Jaime López-Allendes, and they had three daughters together. The marriage ended in March 2002, and the couple agreed that the children would live with their mother and maternal half-brother. However, in November 2002, Karen Atala started a same-sex relationship with Emma De Ramón, who moved into the same house as Karen and her daughters. In January 2003, Jaime López filed a lawsuit seeking custody of the children, arguing that De Ramón's presence would have a negative impact on the children's lives.

In May 2003, Jaime López obtained temporary custody, but ultimately, the Trial Court awarded permanent custody of the children to the mother. This decision was upheld by the Appellate Court in Temuco, Chile. However, when the case reached the Chilean Supreme Court in May 2004, custody was reversed in favor of the father by a majority decision.

At the time, the Chilean Supreme Court cited as its main reason for decision the paramount need to consider the best interests of the child above other considerations and rights of the parents, which may require separating the child from the parents (OAS, 2012). According to the Court, the child's right to be raised in a normally structured family and valued in the social environment, according to the traditional model that is inherent to them, should take precedence over the parents' right to exercise their own sexuality in case of a "conflict" between these two rights (OAS, 2012).

After exhausting domestic remedies, Karen Atala filed a petition before the Inter-American Commission on Human Rights in November 2004, which approved admissibility report No. 42 in July 2008 (OAS, 2008). Ultimately, after an eight-year process, the Inter-American Court of Human Rights ruled against the Chilean State, declaring its responsibility for the violation of the right to equality and non-discrimination, the right to private life, and the right to family.

Building upon this pioneering decision in the Inter-American Human Rights System, the aim of this paper is to observe three axes of discussion.



The first, as previously mentioned, addresses the understanding of the Court as an international Justice System regarding the concept of sexual orientation as a protected category under the American Convention on Human Rights. It also intends to discuss the positive and, perhaps, negative effects that the decision may have brought to the domestic sphere of OAS Member States.

The second, using the case study as a methodological tool, aims to question the application of the principle of the best interests of the child in *Atala Riffo and Children vs. Chile* and its interfaces with the right to sexual orientation. To do so, the article intends to draw a comparison between the discourses used, on one hand, by the Chilean Supreme Court and, on the other hand, by the Inter-American Court, regarding the role that gender, and sexual orientation assume in the public and private spheres of an individual's life.

The article will conclude with considerations on the *horrible category*<sup>1</sup> – or even a *troubling category* (Butler, 2002) – employed by the Chilean Supreme Court regarding the relationships between reproduction, motherhood, gender, and sexuality, and their intersections with the functioning of Justice Systems for Conflict Resolution, more specifically the Inter-American Human Rights System.

## 2. Protecting The Right To Sexual Orientation Through A Living Instrument – *Pro Homine*

The American Convention on Human Rights, ratified by Brazil through Decree No. 678/1992, lists duties to be observed by the State parties right in its first chapter. It proclaims in Article 1.1 that no discrimination of any kind shall be promoted on grounds of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition (Brazil, 1992).

It is noticeable that discrimination based on sexual orientation is not expressly prohibited by the Convention – and this was precisely one of the arguments raised by Chile in its defense before the Inter-American Human Rights System. The country argued that when they signed the American Convention, the States consented to an idea of human rights that took into account certain types of violations, and not others that did not exist at that

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<sup>1</sup> Sáez used the term *horrible category* during a lecture at Duke University School of Law in the United States of America on March 8, 2018, and it will be further explored later on.



time (OAS, 2012). Therefore, since sexual orientation was not a category on which there was consensus by the Inter-American Human Rights System in 2004, when the judgment was rendered by the Chilean Supreme Court in the case under analysis, it would not be appropriate to require the Supreme Court of Chile to apply a strict scrutiny test to a category on which there is recent inter-American consensus (OAS, 2012).

Karen Atala, on the other hand, asserted that the States signed the American Convention with an open clause of non-discrimination, and therefore they cannot now argue that their level of socio-political development does not allow them to understand that sexual orientation is among the reasons that prohibit discrimination (OAS, 2012). Alongside the reasons presented by the parties, and in view of the controversies raised, the Inter-American Court began to analyze, among other things, whether sexual orientation should be considered as a protected category under Article 1.1 of the American Convention.

Díaz (2014, p. 58-9) provides a systematization of what he calls “findings” of the Inter-American Court in the Case Atala Riffo Case, based on the text of the decision itself, and among them is sexual orientation as a social condition. He points out that, according to the Court's interpretation<sup>2</sup> of the American Convention on Human Rights, any treatment that can be considered discriminatory regarding any right guaranteed in the Convention generates, by itself, incompatibility with its text. In this sense, the principles of equality and non-discrimination have compelling force and must be observed not only at the international level but also by the legislation in force in its application by the State parties.

The Inter-American Court then affirms that although Article 1.1 of the Convention does not explicitly address the right to sexual orientation, it must be borne in mind that the Convention is a living, dynamic instrument governed by the *pro homine* principle, or *pro persona*.

This means that when interpreting the expression “any other social condition” of Article 1.1 of the Convention, the alternative most favorable to the protection of the rights protected by the Treaty must always be chosen, according to the principle of the norm most favorable to the human being (OAS, 2012). It implies that domestic laws and decisions must be interpreted and applied to protect human rights and the dignity of individuals. If the

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<sup>2</sup> The Inter-American Court of Human Rights had already established in the Case Almonacid Arellano and others vs. Chile, sentenced on September 26, 2006, the obligation to observe its interpretation of the American Convention by all nation-states, as stated in paragraph 124: the Judiciary must take into account not only the treaty used as a parameter of conventionality but also the interpretation made by the Inter-American Court, the ultimate interpreter of the American Convention, of the instrument.



international norm is more beneficial, it should be applied over the national one. On the other hand, if the domestic norm protects human rights more, it should prevail.

However, one cannot overlook the domino and ricochet effects that the paradigmatic (Álvarez, 2014, p. 4; Ochoa; Conteras, 2016, p. 80) decision ended up causing in the domestic sphere of some OAS Member States. Some local courts even cited it as justification for their decisions related to sexual orientation and gender identity, such as marriage equality and adoption by same-sex couples (Sáez, p. 2019, p. 339).

For example, in May 2016, Costa Rica requested the issuance of an advisory opinion<sup>3</sup> from the Inter-American Court, known as OC-24/17. Among Costa Rica's questions was the Court's interpretation of the property rights derived from same-sex relationships. Sáez (2019, p. 347-50) recounts that the OC-24/17 section makes several references to the Case Atala Riffo and concludes that extending the institution of marriage to same-sex couples would be the simplest and most efficient way to guarantee rights to these same couples.

Although such documents do not impose legal obligations on the Member States, the Costa Rican Supreme Court decided to give binding nature to OC-24/17. The media, shortly thereafter, announced that the Inter-American Court had ordered all countries in the region to expand the effects of marriage to same-sex couples.

Moreover, the Advisory Opinion was issued just before the presidential elections in Costa Rica and caused a real battleground between the candidates and their government programs. Fabricio Alvarado, a preacher and evangelical singer, emerged in the polls, winning the first round of the election. His platform was based on rejecting marriage equality and promising that, if elected, he would call for a popular referendum to withdraw Costa Rica from the Inter-American Human Rights System. Alvarado ultimately lost the electoral contest, garnering almost forty percent of the votes (Sáez, 2019, p. 347-50).

The negative reaction perceived in Costa Rica demonstrates that, despite the considered progress in the international sphere regarding the protection of the right to sexual orientation, countries that recognize the contentious jurisdiction of the Inter-American Court as an international system of conflict resolution are not immune to setbacks in the domestic arena.

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<sup>3</sup> Article 64 of the American Convention on Human Rights provides that Member States may request advisory opinions from the Court, which are opinions on the compatibility between any domestic laws and the international instruments used by the Inter-American System as a parameter of conventionality.



It is worth mentioning that, after Atala Riffo, the Inter-American Court has judged several cases that contemplate the protection of sexual orientation: Duque vs. Colombia, in 2016; Flor Freire vs. Ecuador, also in 2016; Azul Rojas Marín and Others vs. Peru, in 2020; Vicky Hernández vs. Honduras in 2021; and Olivera Fuentes vs. Peru, in 2023.

The second case, Duque vs. Colombia, was ruled in February 2016. According to the decision, Ángel Alberto Duque was prevented from receiving a survivor's pension from his partner because they were a same-sex couple. The Inter-American Commission considered that the victim had suffered discrimination based on his sexual orientation since the differential treatment between Duque and other heterosexual couples could not be considered suitable given the "limited and stereotyped" concept of family by the Colombian State (OAS, 2016a).

The Court understood that Colombia failed to explain why there was a restriction on access to a survivor's pension based on sexual orientation and reiterated the interpretation it made of Article 1.1 of the American Convention in the Case Atala Riffo: no rule, decision, or practice of domestic law, whether by state authorities or individuals, can diminish or restrict, in any way, the rights of a person based on their sexual orientation (OAS, 2016a).

Then, in August of the same year, it judged the Case Flor Freire vs. Ecuador, which dealt with discrimination based on sexual orientation in the Ecuadorian Armed Forces. According to the sentence, Homero Flor Freire underwent a military disciplinary process, resulting in his expulsion for allegedly committing "homosexual acts within military installations" (OAS, 2016b). The expulsion, according to the Court, constituted a discriminatory act because it sanctioned the victim more severely for "acts of homosexuality" (OAS, 2016b) than it would have sanctioned if the acts had been committed between same-sex couples.

In November 2017, OC-24/17 was issued, containing a series of information gathered in a glossary (addressing concepts such as sex; sex assigned at birth; binary gender/sex system; intersexuality; gender; gender identity; gender expression; transgender or trans person; transsexual person; transvestite person; cisgender person; sexual orientation; homosexuality; heterosexual person; lesbian; gay; homophobia and transphobia; lesbophobia; bisexual; cisnormativity; heteronormativity; and LGBTQIA+), and criteria for interpreting the right to equality and non-discrimination of LGBTQIA+ people; the right to





gender identity and name change procedures; and international protection of same-sex couples' bonds (OAS, 2017).

Ultimately, it rendered an opinion summarily as follows: States are obliged to recognize, regulate, and establish appropriate procedures for name change/adjustment of public records to conform to the gender identity self-perceived by the individual (OAS, 2017).

They must ensure that interested parties adjust their image in the records according to their gender self-perception based solely on their free consent without the requirement of medical or psychological certifications, in a confidential manner, without requiring surgeries or hormonal treatments, and free of charge, to the extent possible. Moreover, the Member State must recognize and guarantee all rights derived from a family bond between same-sex individuals, unrestrictedly (OAS, 2017).

This includes access to rights such as marriage and other existing figures in domestic legal systems, to ensure the protection of all rights of families formed by same-sex couples, without discrimination compared to those formed by heterosexual couples (OAS, 2017).

The Case Azul Rojas Marín and Others vs. Peru was judged in March 2020 and concerns police violence due to gender expression committed against Azul Rojas Marín, then a gay man, now a transgender woman. The victim was illegally arrested by police officers in an arbitrary, discriminatory, prejudiced, and LGBTQIA+phobic manner. She suffered acts of physical, sexual, psychological violence, and torture due to her identification at the time of the events as homosexual (OAS, 2020).

Peru was convicted of rights violations related to the obligation to respect and guarantee personal freedom expressed in the Convention, including the sexual or sexuality life of the human person (OAS, 2020).

Furthermore, in 2021, the Court sentenced in the Case Vicky Hernández vs. Honduras. Transgender human rights defender Vicky Hernández was a victim of extrajudicial execution during the 2009 coup d'état in Honduras, especially due to her gender expression. The Court found that at that time, there was a context of violence, arbitrary arrests, homicides, and discrimination against LGBTQIA+ people, particularly against trans women engaged in sex work (OAS, 2021).

Honduras was condemned for violating rights to life, physical integrity, personal freedom, name, equality, and discrimination based on sexual orientation and gender identity (OAS, 2021).



In February 2023, the Court again addressed the protection of sexual orientation and gender identity by the American Convention in the Case *Olivera Fuentes vs. Peru* (OAS, 2023), condemning the Member State to develop and implement public policies to promote respect and rights for LGBTQIA+ people. The Court considered any situation that considers a certain group inferior or superior to others to be incompatible with the Convention, given that there is an indissoluble link between the obligation to respect and guarantee Human Rights and the principles of equality and non-discrimination.

Citing the Case *Atala Riffo*, OC-24/17, and previous judgments, it reinforces that sexual orientation, gender, and gender identity are protected categories under the Convention under the expression "any other social condition" in its text. Thus, no rule, decision, or practice of domestic law, whether by state authorities (public sphere) or individuals (private sphere), can reduce or restrict, in any way, the rights of a person based on their sexual orientation, gender identity, and/or gender expression (OAS, 2023).

Aspects related to the challenges of national and international human rights protection institutes will be revisited later, proposing the perspective of a justice system that rejects the exclusivity of rights to heteronormativity and structural LGBTQIA+phobia.

The next topic will address the interfaces between the best interests of Karen Atala's daughters and the place where Karen supposedly should (cease to) exercise her sexual orientation.

### 3. Family, Sexual Orientation, And The Exercise Of (Homo)Sexuality

The discussion involving the category of sexual orientation in the Inter-American Human Rights System is relatively new considering that the European System has been deciding cases involving discrimination based on gender identity and violence against the LGBTQIA+ community for over 40 years. The first case was *Dudgeon vs. United Kingdom*, decided in October 1981, when in Northern Ireland homosexual relations between men were considered criminal.

However, *Atala Riffo*'s appeal to the Inter-American System did not aim to trigger the beginning of the discussion about active protection of the right to sexual orientation. The emphasis was different.



According to Sáez (2019, p. 335), one of the attorneys involved in the case at the domestic level, the appeal to the Inter-American Court was designed with the basic premise of a violation occurring within the realm of family law, and not based on the disregard for sexual rights. The author observes that the object of the process was not Karen Atala's right not to be discriminated against because of her sexual orientation.

Indeed, the Chilean Supreme Court states that an individual's decision to "express their homosexual condition" can be freely made within the scope of their personal rights in sexual gender, without deserving any legal reproach or censure for it (OAS, 2012). However, custody of the children was taken away from her by the highest Chilean instance in the name of the best interest of the child - more specifically, because they were in a "risk situation" since they began living in a "social, family, and educational environment" deteriorated since "the mother began to live in the house with her homosexual partner" (OAS, 2012).

Sáez (2019, p. 336) recounts that it is not about Karen Atala's right to be with her daughters, but the right of the daughters to be with their mother. In the eyes of the Chilean Supreme Court, a mother who does not conform to the stereotypical gender perspective would be incapable of offering her daughters a traditional family, consistent with the preconceived ideal archetype by the judges. After all, one of the main problems regarding the principle of the best interest of the child is the need to compare a child's reality with an ideal scenario that few are in a position to provide. In this sense, a lesbian mother, far from this mold, would have to choose between motherhood and her sexual orientation, but not both.

By choosing to exercise her homosexual condition, Karen Atala ceases to be a good mother. Selfish, she would have put her own interests, which are personal rights, ahead of those of her daughters, namely not being exposed to an "exceptional family environment" that is not appreciated or well-received in the social environment (OAS, 2012). This same good mother, therefore, could only live alone or with a male partner.

The discriminatory nature against Karen Atala is further accentuated when one observes that at no point is the (lack of) ability of Jaime López to assume custody of the minors questioned. Indeed, the Chilean Supreme Court punished Atala for not conforming to the specific behavior that the judges attributed as a good mother. She would have, on the contrary, been considered a good mother, or put the best interest of her daughters before her own desires if she had chosen to be alone or with a male partner, but not with another



woman. Karen would not fall under the *horrible category* as described by Sáez (2019, p. 337) if she had chosen even to be homosexual, but never to act homosexual:

The Supreme Court created this really *horrible category* that was unsustainable within the Chilean legal system and within the American System of Human Rights, of you you had to decide: you can be a lesbian, or you can be a mother. But you can't be both. That's what is unacceptable. So, this idea that you can be, but you can't act; that we will support the status, but we won't support the conduct, was a huge issue that was discussed within the Inter-American System. (Duke Law, 2018)

The Inter-American Court rejected such assertions: it cannot be conceived that the best interest of the child is a legitimate argument "for the restriction of a protected right such as the ability to exercise all human rights without discrimination based on sexual orientation. The best interest of the child, according to the Court, cannot be used to support discrimination against the mother or father based on their sexual orientation (OAS, 2012).

In this regard, Álvarez (2014, p. 17-8) explicitly states that the Case Atala Riffo not only questions the right to sexual orientation but also the relations between public and private; the singular and the plural; non-heterosexual motherhood; being and exercising non-heterosexuality; the kind of family that a good mother must offer to be able to retain custody of her children; and the gender roles that individuals must exercise to be socially accepted. For the author, these are analytical categories used both to reinforce and to question the discourse of the heteronormative conception of family.

Jiménez (2012, p. 1273) points out that homosexual experience still combines binomials that carry potential, yet unproven, risks, nor do they automatically appear when talking about an LGBTQIA+ individual: homosexuality-transmission of venereal diseases; homosexuality-lack of ability to raise and educate minors; and/or homosexuality-perversion. Associations of non-heterosexuals with delinquents and suspects are ignorant, stereotypical, harmful, moralistic, and fallacious, which do not and cannot allow generalization, inconceivable in societies that proclaim respect for Human Rights (Jiménez, 2012, p. 1274; 1321).

Therefore, the sexuality of the father or mother is not an objective measure for the State (or individual) to judge a person's ability to care for or have custody of minors (Jiménez, 2012, p. 1322).

In this sense, in order to further the objective proposed by this work, the next topic will specifically address the apparent conflicts displayed by the paradigmatic decision: the



intersections between being a mother and being a lesbian and the possibilities of relations with Justice Systems, from historical and critical perspectives.

#### 4. Reproduction And Sexuality In Dialogue With Justice Systems? Possibilities And Challenges

The *horrible category* referred to by Sáez exposes a societal construction in which heteronormativity and motherhood are correlated under the mantles of domination structures, which involve gender roles, the body, sexual practices, permissible public expression of desire, and religious discourses (Saéz; Faúndes, 2018, p. 5). It highlights the intersection of heteronormative and patriarchal power structures that regulate female sexuality and motherhood.

The *horrible category* is much like a kind of *troubling category*, here referring to Butler's *Gender Trouble* (2002), as it sets the stage for critical questioning and examination of (non-)conventional gender norms and societal constraints through resistance, in addition to engaging with the complexities and performative aspects of Karen's identity. In the Case Atala Riffo, this category exposes an enforced heteronormative standard, where motherhood is not possible within "non-acceptable" or subversive gender performances – that is, marginalized and deviating existences from the defined societal norms. The very notion of Karen as a person was questioned as incoherent to being a mother and being able to provide what is best for her children. In fact, she appeared to be a person (she can be homosexual), but she failed "to conform to the gendered norms of cultural intelligibility by which persons are defined": she cannot act as homosexual and be a mother at the same time (Butler, 2002, p. 23).

Federici (2017, p. 24) brings to light the plight of female subjects who were destroyed in favor of establishing patriarchal order: "the heretic, the healer, the disobedient wife, the woman who dares to live alone, the *obeah* woman who poisoned the master's food and incited the slaves to rebellion" [emphasis in the original]. The supposed dichotomy between being a mother and being a lesbian involves both the (re)definition of productive and reproductive tasks between men and women and the (re)construction of social roles. It also



involves the disciplining of the female body: appropriation of its knowledge, repression, violence, and silence.

The author explains that due to the "power that sexual desire conferred on women over men," the Church quickly demonized any forms of "women's power and erotic attraction" (Federici, 2017, p. 80). Also, forms of sexual relations and positions were stigmatized. In this sense, non-procreative sexual acts were prohibited, including those of a homosexual nature.

Similarly, Dil (2021, p. 20) explains that as Christian influence in society grew, and with centuries of religious indoctrination that love between two people of the same sex was condemnable, social imagination became imbued with what he called homophobe morality.

The authoritarian order of religion throughout the Middle Ages took women's bodies, labor, sexuality, and reproductive capacity from them and placed them in the hands of the State as economic resources. Thus, it would be the State's prerogative to decide who would be a mother and how that motherhood could be exercised. The only femininity to be obligatorily exercised is the model of the ideal wife: "passive, obedient, frugal, chaste, of few words, and always busy with her tasks" (Federici, 2017, p. 205).

From the political perspective of the patriarchal order, there was an incentive in commercialized Europe for women not to interrupt pregnancy or avoid it. One of the factors for the emphasis on the new institutionalized family model was to ensure, beyond the transmission of property, the reproduction of the workforce. This pro-natalist crusade resulted in women's positions as slaves of procreation, directly in service of capitalist accumulation (Federici, 2017, p. 178).

It is no coincidence, once again, that in the current structure, the man occupies the position of producer and the woman, that of reproducer. From this perspective, it falls to women to create new workers, in two aspects. The first aspect of creation is childbirth itself. It falls to women to bear sons and daughters, with the daughters destined for other reproductions and the sons destined for new productions. The second aspect of creation relates to caring for children and the home; it is the "assumption that women should not work outside the home and that they should only participate in 'production' to help their husbands" (Federici, 2017, p. 182).

It should be noted that, considering the role of women as linked to reproductive sexual practice, the dimension of power as workforce does not leave room for unproductive



experiences of sexuality and sociability (Federici, 2017, p. 246). Motherhood, consequently, can only progress alongside (re)productive sexual practices, predominantly heterosexual. One implication of this patriarchal model is the compulsoriness of motherhood since this would be the woman's useful role in the current structure. Another consequence is that it is not enough to be a mother – women must be required to perform a specific motherhood role. It is expected that the role of a good mother be placed as her main responsibility, and that, consequently, the woman renounces other essential aspects of her identity, often in favor of the alleged best interest of the child (Álvarez, 2014, p. 37).

Indeed, it is necessary to bear in mind that the alleged best interest of the child often "transforms into a political window of intervention by the State that is sometimes based on situations of real danger – abuse, violence, or abandonment – and sometimes channels the phobias and social prejudices of the times – single-parent homes or interracial couples" (Vaggione, 2013, p. 269).

In relation to the Judiciary as a Justice System, it often fails by marginalizing the LGBTQIA+ community, even when it understands that generalized guarantees of fundamental rights would be sufficient to ensure and enforce them in relation to all individuals, without taking into account their individualities or specificities – such as sociological minorities, sexual orientation, and gender (Dil, 2021, p. 37-8).

The Judiciary largely contributes to the institutionalization of a supposedly universal cultural system that constructs and naturalizes heterosexuality as the only viable experience of sexuality (Vaggione, 2013, p. 239, Dil, 2021, p. 39). Despite advances in legal systems, the Law and legal discourse still sustain heteronormativity as a system of domination since it directly links sexuality as primarily a reproductive function (Vaggione, 2013, p. 235; 238).

In Brazil, the Supreme Federal Court (STF) ruled in 2011 to equate same-sex stable unions with heterosexual ones when judging Direct Action of Unconstitutionality (ADI) 4277 and Precept Fundamental Noncompliance Lawsuit (ADPF) 132. Furthermore, the National Council of Justice (CNJ) issued Resolution No. 175/2013, which prohibits authorities from refusing to authorize or celebrate civil marriages between people of the same sex or converting same-sex stable unions into civil marriages.

However, Vaggione (2013, p. 242) criticizes, arguing that the goal should not be to incorporate LGBTQIA+ groups into the institution of marriage, but rather to deconstruct marriage as a social institution and sexual control. The step to be taken is to deinstitutionalize



heterosexual marriage and reassign the different benefits and rights that characterize it, such as social security, based on other categories like citizenship.

As a structure of power, says Vaggione, heteronormativity is based "on the assumption that the biological, moral, and legal capabilities for being fathers and mothers reside, as a rule, in heterosexual couples. LGBTQ persons remain outside of these bonds, and their claim for having equal rights as parents generates adverse reactions" (Vaggione, 2013, p. 254).

Furthermore, under the argument "of defending minors or the family as a social institution," judicial decisions indeed contribute, on a large scale, to institutionalizing a cultural system that constructs and naturalizes heterosexuality as the only possibility to be lived and represented (Vaggione, 2013, p. 254). It is in this sense that the presence of minors in these specific cases exacerbates social prejudice and justifies State intervention to avoid and/or restrict LGBTQIA+ individuals from acting as parents.

Vaggione (2013, p. 254) points out three types of reasons for deciding that the Judiciary has found when debating child custody when one of the parties is not heterosexual. The first is to deny or limit the rights of the father/mother, judging homosexuality as a disease and therefore cannot stand on equal footing with heterosexuality. Here, there is an insurmountable contrast between homosexuality and being a good father or mother, which is why the child will remain under the guardianship or custody of the heterosexual father whenever possible.

The second is to grant custody to the homosexual father or mother as long as it is proven that this situation will not harm the minor. Sexual minorities must prove and show that they will not bring negative consequences to minors, a requirement that does not exist for heterosexual fathers or mothers. Although more sophisticated than the previous reasoning, heterosexuality is still privileged as the rule, says the author (Vaggione, 2013, p. 267-8).

Lastly, the third determines that homosexuality, in itself, is not harmful but custody should be denied when there is evidence that the minor will be harmed, reversing the burden of proof to the homosexual father or mother. Here, heterosexuality itself is not constructed as potential harm to minors. Homosexuality, on the other hand, holds that potential. It implies that the lives of LGBTQIA+ people are open to inspection and the search for elements that discourage custody (Vaggione, 2013, p. 268).





The last two reasons were used by the Chilean state in the Case Atala Riffo to deny her custody of her daughters in favor of the father.

Here lies precisely the *horrible category* where the Chilean Supreme Court would have framed Karen Atala Riffo: a mother who is not good enough because she did not renounce the exercise of her sexuality in favor of the expected performance regarding maternal responsibility, as if the former discredited the latter (Saéz, 2019, p. 337). Karen challenged the heteronormative expectations of motherhood imposed by the Chilean law (Butler, 2002, p. 38). She dared to be a woman while being a woman; exercise her social power; exercise her sexuality, considered unproductive, and occupy public space; not subject herself to male domestication; not to be of service only for procreation; refuse to renounce other essential aspects of her identity to be recognized as a good mother.

On the other hand, Vaggione (2013, p. 240; 246) acknowledges that, despite the hardships and criticisms of the Judiciary, litigation in Latin America has gradually proven to be a successful strategy for activism in favor of sexual diversity, mainly through dissenting votes, given that legal literature and jurisprudence are not homogeneous on issues related to (hom)sexuality. This movement contributes to redefining the concept of family by making LGBTQIA+ people visible as fathers and mothers, recreating a new connection between sexuality and reproduction, and ultimately filling gaps in legislation.

We are faced with challenges that demand boldness from the law itself to truly break the discrimination based on gender and the performance of social roles, in order to ensure a paradigm shift from dissenting opinions to the understanding established by national courts.

## 5. Final Remarks

While they have brought the right to sexual orientation (or sexual orientation as a category of non-discrimination) to the agendas of various member states of the Organization of American States, the decisions of the Inter-American Court of Human Rights and Advisory Opinion No. 24/2017 alone have not proven to be sufficient in overcoming institutionalized repression or generating automatic changes in the domestic social structures of countries.

Legal victories, such as the Case Atala Riffo before the Inter-American Court, although the result of fierce battles, "are still inherently fragile and constantly threatened"



(Arruzza; Bhattacharya; Fraser, 2019, p. 70) – as was the case during the presidential elections in Costa Rica in 2017. It appears that legal rights have not been effective in combating gender-based violence and social discrimination.

Nevertheless, pro-sexual diversity movements have been garnering dissenting votes from domestic courts (both constitutional and infra-constitutional) to challenge heterosexuality as the rule and standard for measuring the rights of LGBTQIA+ individuals to parenthood, leading to decisions contrary to human rights and tainted with prejudice.

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