

LGB HUMAN RIGHTS CASES IN THE INTER-AMERICAN COURT: GREATER PROTECTION THAN IN THE EUROPEAN COURT?

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Round Table 1: The Protection of Lesbian, Gay, Bisexual, Trans and Intersex (LGBTI)
People in the Inter-American System of Human Rights

Canada 150 - 150th Anniversary of Canadian Confederation in the Americas: Canada's Role Regarding the Protection of Human Rights

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The European Court of Human Rights (ECtHR) began protecting LGB human rights, under the European Convention on Human Rights (EConHR), in a case about criminalising same-sex sexual activity (*Dudgeon v. United Kingdom*, 1981). Since then, the case law of the ECtHR has gradually evolved, and now requires some legal recognition of same-sex couples in all 47 Council of Europe member states (*Oliari & Others v. Italy*, 2015; *Taddeucci & McCall v. Italy*, 2016). The Inter-American Court of Human Rights (IACtHR) did not have a chance to consider LGB human rights until 2012, but has decided three cases since then: *Atala Riffo v. Chile* (2012), *Duque v. Colombia* (2016), *Flor Freire v. Ecuador* (2016). These three judgments suggest that the IACtHR will provide at least as much protection for LGB human rights as the ECtHR, and might provide more, because it does not feel obliged to wait for a "consensus" among the parties to the American Convention on Human Rights (AConHR).

I. LGB cases in the European Court of Human Rights

Area of law	ECtHR
Criminal law	<i>Dudgeon v. UK</i> (1981) (sexual activity between men prohibited) <i>S.L. v. Austria</i> (2003) (male-male age of consent 18 vs. 14)
Employment law	<i>Smith & Grady v. UK</i> (1999) (dismissal of LGB members of armed forces; followed by Directive 2000/78/EC)
Family law (parental rights of LGB individuals)	<i>Mouta v. Portugal</i> (1999) (custody of LGB parent's genetic child) <i>E.B. v. France</i> (2008) (adoption of child by LGB individual)
Family law (access by same-sex couples to rights of unmarried different-sex couples)	<i>Karner v. Austria</i> (2003) (housing succession) <i>X & Others v. Austria</i> (2013) (second-parent adoption) <i>Vallianatos & Others v. Greece</i> (2013) (alternative to marriage) <i>Pajić v. Croatia</i> (2016) (residence permit for a non-EU same-sex partner)

	<i>Charron & Merle-Montet v. France</i> (pending Application No. 22612/15; 7 May 2015) (donor insemination for lesbian couples)
Family law (access to rights of married different-sex couples, eg, through civil union or registered partnership)	<p><i>Schalk & Kopf v. Austria</i> (2010) (4 not necessary to decide, 3 yes; under Article 8, a same-sex couple has a "family life", 7-0)</p> <p><i>Gas & Dubois v. France</i> (2012) (second-parent adoption may be restricted to married different-sex couples) (2017 – around 20 of 47 member states allow it)</p> <p><i>Oliari & Others v. Italy</i> (2015) (4 judges found a positive obligation to provide a "specific legal framework" for same-sex couples; civil union law passed in 2016)</p> <p><i>Chapin & Charpentier v. France</i> (2016) (the "specific legal framework" need not be identical to marriage; the applicants had access to the <i>pacte civil de solidarité</i> in 2004, when the case began)</p> <p><i>Taddeucci & McCall v. Italy</i> (2016) (but certain minimum "core rights" must be included, such as a residence permit for a non-EU same-sex partner)</p>
Family law (access to marriage for same-sex couples)	<p><i>Christine Goodwin v. UK</i> (2002) (trans woman has right to marry a non-trans man; procreative capacity not required for right to marry)</p> <p><i>Schalk & Kopf v. Austria</i> (2010) (“men and women” in Article 12 not an obstacle, but not enough consensus yet to require access to marriage for same-sex couples)</p> <p><i>Oliari & Others v. Italy</i> (2015) (same) (2017 – 15 of 47 member states allow it)</p>

II. LGB cases in the Inter-American Court of Human Rights (3 judgments out of 337 from 1987 to 2017 vs. 30,600 judgments in the ECtHR from 1959 to 2016)

http://www.corteidh.or.cr/cf/Jurisprudencia2/busqueda_casos_contenciosos.cfm?lang=es
(judgments)

A. *Atala Riffo v. Chile* (petition to Commission on 24 November 2004; referred by Commission to Court on 17 September 2010; hearing on 23-24 August 2011; judgment adopted on 24 February 2012; published on 20 March 2012; 7 years 3 months)

- judgment available in Spanish, English and Portuguese

para. 91: "... the IACtHR establishes that the sexual orientation and gender identity of persons is a category protected by the Convention. Therefore, any regulation, act, or practice considered discriminatory based on a person's sexual orientation is prohibited. Consequently, no domestic regulation, decision, or practice, whether by state authorities or individuals, may diminish or restrict, in any way whatsoever, the rights of a person based on his or her sexual orientation."

- the IACtHR provided an express and detailed rejection of common concerns regarding the well-being of the children of LGB parents: (a) "alleged social discrimination" against them; (b) "alleged confusion of sexual roles"; and (c) a "right to a 'normal and traditional' family" (the ECtHR has yet to do so)

(a) with regard to "alleged social discrimination" by third parties against the children (eg, at school or in the neighbourhood), the IACtHR ruled that: "119. ... to justify a distinction in treatment ..., based on the alleged possibility of social discrimination ... that the minors might face due to their parents' situation cannot be used as legal grounds for a decision. While it is true that certain societies can be intolerant toward a person because of their race, gender, nationality, or sexual orientation, States cannot use this as justification to perpetuate discriminatory treatments. ... 121. ... [W]ith regard to the argument that the child's best interest might be affected by the risk of rejection by society, ... potential social stigma due to the mother or father's sexual orientation cannot be considered as a valid 'harm' for the purposes of determining the child's best interest."

- at para. 120, the IACtHR cited *Palmore v. Sidoti*, 466 U.S. 429 at 433 (1984), in which the U.S. Supreme Court found unconstitutional racial discrimination where a court had transferred custody of a child to her white father, because her white mother had remarried a black man rather than a white man:

(b) with regard to "alleged confusion of sexual roles", the IACtHR found that: "124. ... the determination of harm must be supported by ... reports from experts and researchers in order to reach conclusions that do not result in discriminatory decisions. 125. Indeed, the burden of proof here falls on the State, which must demonstrate that the judicial decision ... has been based on the existence of clear, specific and real harm to the children's development. ... Otherwise, there is a risk of basing the decision on stereotypes ... exclusively associated with the unfounded preconception that children raised by homosexual couples would necessarily have difficulties in defining gender or sexual roles. ... 128. ... [A] number of scientific reports considered representative and authoritative in the field of social sciences ... conclude that living with homosexual parents per se does not affect a child's emotional and psychological development. These studies agree that: ... ii) the psychological development and emotional well-being of girls or boys raised by gay fathers or lesbian mothers are comparable to those of girls or boys raised by heterosexual parents; ... iv) the sexual orientation of the mother or father does not affect children's development in terms of ... their sense of themselves as male or female, their gender role, behavior and/or sexual orientation ... 129.... the American [Psycholog. Assoc.] ... has stated that existing studies on this matter are 'impressively consistent in their failure to identify any deficits in the development of children raised in a lesbian or gay household ... [T]he abilities of gay and lesbian persons as parents and the positive outcome for their children are not areas where credible scientific researchers disagree'."

(c) with regard to a "right to a 'normal and traditional' family", the IACtHR observed, citing *Mouta v. Portugal* and *Karner v. Austria*: "142. ... the American Convention does not define a limited concept of family, nor does it only protect a 'traditional' model of the family. 145. ... the [Chilean court's] language ... regarding the girls' alleged need to grow up in a 'normally structured family ... appreciated within its social environment', ... not in an 'exceptional family', reflects a limited, stereotyped perception of the concept of family, [with] no basis in the Convention ..."

- the IACtHR therefore concluded: "146. ... although [the Chilean courts] sought to protect the best interests of the girls ... , it was not demonstrated that the grounds stated in the decisions were appropriate to achieve said purpose, since the [Chilean courts] did not prove ... that Ms. Atala's cohabitation with her partner had a negative effect on the girls' best interest ... [T]hey used abstract, stereotyped, and/or discriminating arguments to justify their decisions ... , for which reason said decisions constitute discriminatory treatment against Ms. Atala. ..."

B. *Duque v. Colombia* (petition to Commission on 8 February 2005; referred by Commission to Court on 21 October 2014; hearing on 25 August 2015; judgment adopted on 26 February 2016; published on 15 April 2016; 11 years 2 months)

- judgment available only in Spanish

- case law of ECtHR (above)

- UN HR Committee - *Edward Young v. Australia* (Communication No. 941/2000) (6 August 2003),

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.78.D.941.2000.Sp?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.78.D.941.2000.Sp?Opendocument)

- UN HR Committee - *X v. Colombia* (Communication No. 1361/2005) (14 May 2007), http://www.ccprcentre.org/wp-content/uploads/2012/12/1361_2005-Colombia.pdf

- Constitutional Court of Colombia, *Sentencias*, <http://www.corteconstitucional.gov.co> (Relatoría, Providencias): C-075/07, 7 February 2007; C-811/07, 3 October 2007; T-856/07, 12 October 2007; C-336/08, 16 April 2008; C-029/09, 28 January 2009

- para. 124: "En el presente caso, se puede concluir que el Estado no presentó una justificación objetiva y razonable para que exista una restricción en el acceso a una pensión de sobrevivencia basada en la orientación sexual. En consecuencia, la Corte encuentra que la diferenciación establecida en los artículos 1 de la Ley 54 de 1990 y 10 del decreto 1889 de 1994 con fundamento en la orientación sexual para el acceso a las pensiones de sobrevivencia es discriminatoria y viola lo establecido en el artículo 24 de la Convención Americana."

C. *Flor Freire v. Ecuador* (petition to Commission on 30 August 2002; referred by Commission to Court on 11 December 2014; hearing on 17 February 2016; judgment adopted on 31 August 2016; published on 1 November 2016; 14 years 2 months)

- judgment available only in Spanish

- para. 123: "... el reconocimiento internacional del derecho a la no discriminación por orientación sexual real o aparente ha estado además acompañado con la progresiva prohibición de la criminalización de actos sexuales consentidos entre adultos del mismo sexo [*Dudgeon v. United Kingdom*, 1981; *Toonen v. Australia*, 1994]."

- para. 136: "La Corte considera que la prohibición de discriminación por razones de orientación sexual, conforme ha sido interpretado por este Tribunal, abarca y se extiende a todas las esferas del desarrollo personal de las personas bajo la jurisdicción de un Estado parte de la Convención. Por tanto, la exclusión de personas de las fuerzas armadas por su orientación sexual, sea real o percibida, es contrario a la Convención Americana."

- para. 137: "... existía una clara diferencia entre la regulación aplicable a los 'actos sexuales ilegítimos' y los 'actos de homosexualismo', debido a la disparidad de las sanciones aplicables a ambos tipos de actos, así como por el hecho que los 'actos de homosexualismo' eran

sancionados incluso si eran cometidos fuera del servicio. ... La comisión de actos sexuales [heterosexuales], al interior de las instalaciones militares, no hubiera acarreado la baja del señor Flor Freire. ... hubiera recibido como pena máxima un arresto de 15 días o una suspensión de 30 días ... el señor Flor Freire fue separado de las fuerzas armadas ecuatorianas ...”

- para. 137: “... la mayor sanción para los actos sexuales homosexuales, que fue aplicada al señor Flor Freire y el hecho que estos se sancionaran aún fuera del servicio constituyen distinciones discriminatorias y denotan el objetivo de excluir de las fuerzas armadas a las personas homosexuales.”

- para. 140: “... la aplicación al señor Flor Freire del artículo 117 del Reglamento de Disciplina Militar, que sancionaba de forma más gravosa los ‘actos de homosexualismo’, constituyó un acto discriminatorio. Por tanto, el Estado es responsable por la violación del derecho a la igualdad ante la ley y de la prohibición de discriminación reconocidos en el artículo 24 de la Convención, en relación con los artículos 1.1 y 2 de la Convención, en perjuicio del señor Flor Freire, en virtud de la discriminación sufrida por la orientación sexual percibida.”

D. Pending cases

- *OC-24 (Opinión Consultiva) Advisory Opinion requested by Costa Rica* (hearing on 16-17 May 2017)

http://www.corteidh.or.cr/docs/solicitudoc/solicitud_17_05_16_esp.pdf

“a. ... sobre la protección que brindan los artículos 11.2, 18 y 24 en relación con el artículo 1 de la CADH al reconocimiento del cambio de nombre de las personas, de acuerdo con la identidad de género de cada una.

b. ... sobre la compatibilidad de la practica que consiste en aplicar el artículo 54 del Código Civil de la República de Costa Rica ... a las personas que deseen optar par un cambio de nombre a partir de su identidad de género, con los artículos 11.2, 18 y 24, en relación con el artículo 1 de la Convención.

c. ... sobre la protección que brindan los artículos 11.2 y 24 en relación con el artículo 1 de la CADH al reconocimiento de los derechos patrimoniales derivados de un vínculo entre personas del mismo sexo.”

<http://www.corteidh.or.cr/index.php/es/al-dia/galeria-multimedia> (video of hearing)

- *AIDS-Free World v. Jamaica* (criminalisation, pending in IAComHR since 2011)

- *Gallo & Benado v. Chile* (lesbian couple seek second-parent adoption, pending in IAComHR since 2013)

- *MOVILH & Couples v. Chile* (same-sex marriage, pending in IAComHR from 2012 until friendly settlement in 2016 after civil union law)

III. Greater protection in the Inter-American Court than in the European Court?

Area of law	ECtHR	IACtHR
Criminal law	<p><i>Dudgeon v. UK</i> (1981) (male-male sexual activity banned)</p> <p><i>S.L. v. Austria</i> (2003) (male-male age of consent 18 vs. 14)</p>	<p><i>Flor Freire v. Ecuador</i> (2016) (implicit that the criminal law may not discriminate?)</p> <p><i>Flor Freire v. Ecuador</i> (2016) (implicit that the criminal law may not discriminate?)</p>
Employment law	<i>Smith & Grady v. UK</i> (1999) (dismissal of LGB members of armed forces; followed by Directive 2000/78/EC)	<i>Flor Freire v. Ecuador</i> (2016) (no sexual orientation discrimination in the armed forces)
Family law (parental rights of LGB individuals)	<p><i>Mouta v. Portugal</i> (1999) (custody of LGB parent's genetic child)</p> <p><i>E.B. v. France</i> (2008) (adoption of child by LGB individual)</p>	<p><i>Atala Riffo v. Chile</i> (2012) (custody of LGB parent's genetic children)</p> <p>same as <i>Atala Riffo</i>?</p>
Family law (access by same-sex couples to rights of unmarried different-sex couples)	<p><i>Karner v. Austria</i> (2003) (housing succession)</p> <p><i>X & Others v. Austria</i> (2013) (second-parent adoption)</p> <p><i>Vallianatos & Others v. Greece</i> (2013) (alternative to marriage)</p> <p><i>Pajić v. Croatia</i> (2016) (residence permit for a non-EU same-sex partner)</p> <p><i>Charron & Merle-Montet v. France</i> (pending Application No. 22612/15; 7 May 2015) (donor insemination for lesbian couples)</p>	<p><i>Duque v. Colombia</i> (2016) (survivor's pension for same-sex partner)</p> <p>same as <i>Atala Riffo</i>?</p> <p>same as <i>Duque</i>?</p> <p>same as <i>Duque</i>?</p> <p>?</p>
Family law (access to rights of married different-sex couples, eg, through civil union)	<i>Schalk & Kopf v. Austria</i> (2010) (4 not necessary to decide, 3 yes; Article 8 "family life", 7-0)	?

	<p><i>Gas & Dubois v. France</i> (2012) (second-parent adoption)</p> <p><i>Oliari & Others v. Italy</i> (2015) ("specific legal framework" for same-sex couples)</p> <p><i>Chapin & Charpentier v. France</i> (2016) (need not be identical to marriage)</p> <p><i>Taddeucci & McGill v. Italy</i> (2016) (but certain minimum "core rights" must be included)</p>	<p>?</p> <p>?</p> <p>?</p> <p>?</p>
Family law (access to marriage for same-sex couples)	<p><i>Christine Goodwin v. UK</i> (2002) (procreative capacity not required for right to marry)</p> <p><i>Schalk & Kopf v. Austria</i> (2010) (not enough consensus yet to require marriage for same-sex couples)</p> <p><i>Oliari & Others v. Italy</i> (2015) (same) (2017 – 15 of 47 member states)</p>	<p>?</p> <p>?</p> <p>exclusion of same-sex couples from marriage violates the AConHR, even though only 7 of 35 OAS member states allow it?</p>

Atala Riffo v. Chile (24 February 2012):

“92. ... the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate ... the ... discrimination that [they] have suffered. The fact that this is a controversial issue in some ... countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since ... it must refer solely ... to the ... international obligations arising from ... decision[s] ... to adhere to the American Convention.

93. A right granted to all persons [marriage and adoption?] cannot be denied or restricted under any circumstances based on their sexual orientation.”

Council of Europe (47 member states)

- being a party to the EConHR is compulsory for all member states (47 member states)
- right of individual application to ECtHR compulsory since 1998 (47 member states)
- Committee of Ministers (of member states) supervises execution of judgments
- Robert Wintemute, "Consensus is the right approach for the European court of human rights", <http://www.theguardian.com/law/2010/aug/12/european-court-human-rights-consensus>

Organisation of American States (35 member states)

- being a party to the AConHR is optional (25 member states less Trinidad & Tobago and Venezuela, which have denounced the AConHR = 23)
- for parties, accepting the jurisdiction of the IACtHR is optional (23 member states less Dominica, Grenada and Jamaica = 20)
- the IACtHR supervises execution of its own judgments
- unlike the ECtHR, the IACtHR does not worry about whether or not some OAS member states might denounce the AConHR if they are unhappy with judgments of the IACtHR? this is a political problem for the other OAS member states, not a legal problem for the IACtHR?

IV. Why Canada should sign and ratify the American Convention, and accept the compulsory jurisdiction of the Inter-American Court

(1) Canada's continuing refusal to participate in the regional human rights system of the Americas undermines Canada's credibility with regard to human rights around the world. If Canada will not subject itself to the jurisdiction of an international court with the power to issue binding judgments (unlike United Nations bodies), why should other countries (such as Cuba, Trinidad & Tobago, Venezuela, Russia, Turkey, or even the United Kingdom) do so (see Theresa May's 2016 proposal to leave the EConHR)?

- "Article 68 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. ..."

(2) The fact that Canadian law permits abortion should not be an obstacle:

"Article 4. Right to Life 1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. ..."

- Mexico's Interpretive Declaration (1981), <http://www.cidh.org/basicos/english/basic4.amer.conv.ratif.htm>:

"With respect to Article [4(1)], ... Mexico considers that the expression 'in general' does not constitute an obligation to adopt, or keep in force, legislation to protect life 'from the moment of conception', since this matter falls within the domain reserved to the States."

- *Artavia Murillo (In Vitro Fertilization) v. Costa Rica* (28 November 2012): "264. .. the embryo cannot be understood to be a person for the purposes of Article 4(1) ... In addition, after analyzing the available scientific data, the Court has concluded that 'conception' in the sense of Article 4(1) occurs at the moment when the embryo becomes implanted in the uterus ... Moreover, it can be concluded from the words 'in general' that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible."

(3) The IACtHR would rarely, if ever, find that Canada had violated the AConHR.

(4) Canada could work to strengthen the Inter-American system and reduce the delays in the IAComHR (should it be merged into the IACtHR, as with the EComHR in 1998?).