

**PARTIALLY DISSENTING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ
IN THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS
CASE OF ATALA RIFFO AND DAUGHTERS v. CHILE
FEBRUARY 24, 2012**

1. I have voted against operative paragraph 4, according to which “the State is responsible for violating Articles 11.2 and 17.1” of the American Convention, in consideration that it should only have mentioned a violation of Article 11.2, because given the facts of the present case: I) it is sufficient to declare a violation of Article 11.2, and II) it is not necessary or prudent to declare a violation of Article 17 which could be taken as an implicit pronouncement on the interpretation of various provisions of said Article.

I. IT IS SUFFICIENT TO INVOKE ARTICLE 11.2

2. The American Convention on Human Rights enshrines rights related to the family in Article 11.2 and Article 17, and similarly contains important references to the family in Articles 19, 27.2 and 32.1:

Article 11. Protection of Honor and Dignity

1. Everyone has the right to have his honor respected and his dignity recognized.
 2. 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.
- Everyone has right to the protection of the law against such interference or attacks.

Article 17. Protection of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society and the State.

Article 27. Suspension of Guarantees

1. in time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the grounds of race, color, sex, language, religion or social origin.

2. The foregoing provision does not authorize the suspension of the following Articles: 3 (Right to Juridical Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment); 6 (Freedom from Slavery); 9 (Freedom from Ex Post Facto Laws); 12 (Freedom of Conscience and Religion); 17 (Rights of the Family); 18 (Right to a Name); Article 19 (Rights of the Child); Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. (...).

Article 32. Relationship between Duties and Rights

1. Every person has responsibilities to his family, his community and mankind.
2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

3. The European Convention for the protection of human rights and fundamental freedoms contains two provisions that are relevant in this respect, corresponding to Articles 11 and 17.2 of the American Convention:

Article 8 — Right to respect for private and family life

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 12 — Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

4. Therefore, the case law of the European Court of Human Rights (ECHR), which the judgment cites appropriately and with persuasive value, refers to the provisions of the European Convention that correspond to Articles 11.2 and 17.2 of the American Convention¹, since there are no provisions referring to the matters contemplated in paragraphs 1, 3, 4 and 5 of Article 17.

5. It is of particular importance to examine judgments in which the ECHR considered cases involving cohabiting couples of the same sex or gender² in light of Article 8 of the European Convention, and in relation to Article 14. As the judgment of this Court clearly states in paragraph 174:

¹ In cases similar to this one, the rule that prohibits discrimination is also invoked, which states the following: *Article 14 — Prohibition of discrimination* - the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground, such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

² Perhaps it would have been appropriate to also cite the judgment in the case *P. V. v. Spain* (application N° 35159/09), delivered on November 30, 2010 and made final on April 11, 2011. In this case, the applicant is a male-to-female transsexual who had previously been married to P.Q.F., with whom she had a son in 1998. When the couple was legally separated, the judge approved an agreement concluded between the spouses whereby the custody of the child was awarded to the mother and parental responsibility to both parents jointly. In addition, the agreement established contact arrangements for the father to spend time with the child. Two years later, the mother applied to have her ex-spouse deprived of parental responsibility and to have the contact arrangements and any communication between father and son suspended. She argued that the father had shown a lack of interest in the child, and was undergoing hormonal treatment with a view to gender reassignment and usually wore make-up and dressed as a woman. The domestic court dismissed the mother's application in respect of the first point and, as regards the contact arrangements, the judge decided to restrict the visits, which were later gradually extended. The court's decision, in relation to the facts, was based on a psychological report, according to which P. was experiencing "emotional instability" that "entailed a real and significant risk of disturbing the emotional well-being and development of the child's personality, in view of his age (he was six years old at the time of the expert report) and the stage of development at the time; and, as regards the law, on the best interests of the child. It was not based on the father's status as a transsexual. The ECHR considered that the Spanish courts, unlike the ruling in the case of *Salgueiro da Silva Mouta v. Portugal*, had not based their decision on the applicant's sexual orientation, but had taken into account her "emotional instability" and had given priority to "the interests of the child," adopting more restrictive contact arrangements to enable the child to become gradually accustomed to his father's gender change, and had subsequently extended these arrangements despite the fact that "the applicant's sexual status remained the same."

“..in the case *Schalk and Kopf V. Austria*, the European Court revised its case law in force at that time, which only accepted that the emotional and sexual relationship of a same-sex couple constitutes “private life,” but had not considered what constituted “family life,” despite the applicants having lived together in a long-term relationship. Applying a broader concept of family, the European Court established that “a cohabiting same-sex couple living in a stable *de facto* partnerships, falls within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would,” considering it “artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8³”. [Footnotes omitted.]

6. It also indicates (para. 173), correctly, that, “in the of case *X, Y and Z v. United Kingdom*, the European Court of Human Rights, following an ample concept of family, acknowledged that a transsexual, their female partner and a child may comprise a family, stating that:

When deciding whether a relationship can be said to amount to “family life”, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.⁴

7. For greater clarity, and also keeping in mind any future recourse to the case law or rulings of other bodies for the protection of human rights, I shall briefly outline the facts of each case cited, as well as the EHCR’s conclusions of law.

Case Schalk and Kopf v. Austria

8. *The facts of the case* may be summarized as follows: the applicants, born in 1962 and 1960, respectively, are a same-sex couple living in Vienna. In 2002 they began formalities to be able to marry, but the Austrian authorities considered that they lacked the capacity to contract marriage, given that both applicants were men and, according to Article 44 of the Civil Code, only two persons of opposite sex can marry (paras. 7 to 9). In Austria, the Registered Partnership Act (*Eingetragene Partnerschaft-Gesetz*) provides same-sex couples with “a formal mechanism for recognizing and giving legal effect to their relationships,” with similar characteristics to those of marriage in many aspects (such as “inheritance law, labor, social and social security law, fiscal law, the law on administrative procedure, the law on data protection and public service, passports and registration issues, as well as the law on foreigners” (paras. 16 to 22). However, a number of differences between marriage and registered partnerships remain in several other aspects, particularly with regard to the possibilities of adoption or access to artificial insemination.

9. *The legal considerations* begin (paras. 24-26) with an analysis of European Union Law (Article 9 of the Charter of Fundamental⁵ Rights and various Directives), and in particular of the laws of the 47 Member States of the Council of Europe (paras. 27 to 34). Only six of these currently grant same-sex couples equal access to marriage; another 13 States have “some kind of legislation permitting same-sex couples to register their relationships.” One

³ The judgment in the case *Schalk and Kopf v. Austria* (No. 30141/04) was delivered by a Chamber of the European Court of Human Rights on June 24, 2010, and became final on November 22, 2010, according to Art. 44.2 of the Convention (text established by Protocol N° 11).

⁴ The judgment in the case of *X, Y and Z v. United Kingdom* (No. 21830/93) was delivered by the Grand Chamber on April 22, 1997.

⁵ The text of this provision states: “Article 9 -Right to marry and to found a family – which guarantees “the right to marry and to found a family, according to the national laws governing the exercise of that right.” As noted, the reference to “men and women” disappears, but there is a general remit to the provisions of national laws.

State "recognizes cohabiting same-sex couples for limited purposes, but does not offer them the possibility of registration." With reference to the material, parental and other consequences, the ECHR states that "the legal consequences of registered partnership vary from almost equivalent to marriage to giving relatively limited rights." The ECHR then considers the general principles and their application to the specific case, and finally examines the applicability of Article 14 taken in conjunction with Article 8 and the allegation that it had been violated.

10. *General principles.* The ECHR recalls that, according to its established case-law, "Article 12 secures the fundamental right of a man and a woman to marry and to found a family," and that the exercise of this right "gives rise to personal, social and legal consequences." Although it is subject to the national laws of the Contracting States, "the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired" (para. 49). Furthermore, the ECHR observes that it "has not yet had an opportunity to examine whether two persons who are of the same sex can claim to have a right to marry," but that "certain principles might be derived" from its case-law relating to transsexuals, which initially found that "the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purposes of marriage" (paras. 50-51). In the *Christine Goodwin*⁶ case, the Court departed from that case-law, noting that there had been "major social changes in the institution of marriage" since the adoption of the Convention, citing Article 9 of the European Charter and, taking into consideration the "widespread acceptance of the marriage of transsexuals in their assigned gender," found that "the terms used in Article 12... no longer had to be understood as determining gender by purely biological criteria." Consequently, "the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12" (para. 52). In two other cases concerning marriages between a woman and a male-to-female transsexual,⁷ the ECHR had determined (para. 53) that the complaint concerning the legal requirement to end their marriage in order for the transsexual to "obtain full legal recognition of her change of gender" was "manifestly ill-founded." The ECHR noted that "domestic law only permitted marriage between persons of opposite gender, whether such gender is derived from attribution at birth or from a gender recognition procedure, while same-sex marriages were not permitted," and that "Article 12 enshrined the traditional concept of marriage as being between a man and a woman." Although the Court acknowledged that "several Contracting States had extended marriage to include same-sex couples," it noted that "this reflected their own vision [of said States] of the role of marriage in their societies" but "did not flow from an interpretation of the fundamental right enshrined, as laid down ...in the Convention in 1950". Therefore, it fell "within the State's margin of appreciation how to regulate the effects of the change of gender on pre-existing marriages." Furthermore, if the applicants should opt to divorce, they would have the possibility to enter into a civil partnership, something that "contributed to the proportionality of the gender recognition regime complained of."

11. *Application to the specific case.* The ECHR stated that Article 12 grants the right to marry to "men and women," ("*l'homme et la femme*") and, although the wording of said Article taken in isolation could be interpreted as "to exclude a marriage between two men or two women," considered in the context it should be borne in mind that, "in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or

⁶ *Christine Goodwin v. United Kingdom* (no. 28957/95), Grand Chamber Judgment, July 11, 2002.

⁷ *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV, and *R. and F. v. the United Kingdom* (dec.), no. 35748/05, November 28, 2006.

state that “no one” may be subjected to certain types of prohibited treatment.” The choice of the words “men and women” should be considered “deliberate”, particularly in “the historical context” of the 1950s decade, when “marriage was clearly understood in the traditional sense of being a union between partners of different sex.” As regards the “connection between the right to marry and the right to found a family,” in the case of *Christine Goodwin* the ECHR reached the conclusion that “the inability of any couple to conceive or parent a child” does not exclude *per se* the right to marry. However, this finding “does not allow for any conclusion regarding the issue of same-sex marriage” (para. 56). Although “the Convention is a living instrument which is to be interpreted in present-day conditions,” and the institution of marriage “has undergone major social changes,” the ECHR noted that “there is no European consensus regarding same-sex marriages,” which are only permitted in six out of 47 States Party to the Convention (para. 58). The case under consideration should be distinguished from the *Christine Goodwin* case, which had recognized “a convergence of standards concerning the marriage of transsexuals in their assigned gender” and involved a “marriage between partners who are of different gender,” if this is not defined by purely biological criteria (para. 59). [Thus, the ECHR was agreeing with the assertion of the non-governmental organizations intervening in the case, according to which “while the Court had often underlined that the Convention was a living instrument that should be interpreted in present-day conditions, it had only used that approach to develop its jurisprudence when it had perceived a convergence of standards among Member States”.]

12. *Influence of Article 9 of the European Charter.* As to Article 9 of the European Charter (explained in the official commentary), the deliberate elimination of the reference to “men and women” makes the provision broader in its scope than the corresponding articles in other human rights instruments, but “the reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it” and leaving any decisions on this matter to the States⁸ (para. 60). Having regard to Article 9 of the Charter, the ECHR concluded that “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex,” for which reason said Article was applicable to the case, but emphasized that “the question of whether or not to allow same-sex marriage is left to regulation by the national laws” of each State (para. 61). The Court noted that “marriage has deep-rooted social and cultural connotations which may differ largely from one society to another,” and that the ECHR “must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society” (para. 62). Consequently, it found that “Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage” (para. 63), and ruled that there had been no violation of said Article (para. 64).

13. *Applicability of Article 14 taken in conjunction with Article 8.* According to the ECHR, “Article 14⁹ complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions” (para. 89). In several judgments (the last of which was in 2001¹⁰), the ECHR had held that “the notion of

⁸ According to the commentary, “it may be argued that there is no obstacle to recognizing same-sex relationships in the context of marriage,” but there is “no explicit requirement that domestic laws should facilitate such marriages”

⁹ For the text, see note 1.

¹⁰ *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001-VI, May 10, 2001.

family" in Article 12 also included de facto unions, "where the parties are living together out of wedlock," but in the case of same-sex couples it had only recognized that their relationship constitutes "private life" but not "family life" (paras. 91-92). In the case of *Schalk and Kopf v. Austria*, the ECHR changed that jurisprudence (as correctly indicated in para. 174 of the judgment to which this vote refers), considering that since 2001 there had been "a rapid evolution in social attitudes towards same-sex couples in many Member States", and "a considerable number" of these had "afforded legal recognition to same-sex couples." Similarly, certain provisions of European Union law also reflect "a growing tendency to include same-sex couples in the notion of 'family'" (para. 93). "In view of this evolution," the ECHR considered it "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8", and that, "consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would." (Para. 94).

14. *Alleged violation of Article 14 taken together with Article 8.* Having concluded that the facts of the case fell within "the notion of 'private life' as well as 'family life'", and that Article 14 taken together with Article 8 was applicable (para. 95), the ECHR then considered whether it had been violated (paras. 96-110). To reach this determination it would have to find "a difference in the treatment of persons in relevantly similar situations," which would be "discriminatory if it has no objective and reasonable justification"; in other words, if it does not pursue a "legitimate aim or if there is not a reasonable relationship of proportionality between the means employed the aim sought to be realized." In that respect, the States "enjoy a margin of appreciation" (para. 96). On the one hand, "just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification," but on the other hand, the States are usually allowed "a wide margin" when it comes to "general measures of economic or social strategy" (para. 97), and one of the relevant factors for determining the scope of the margin of appreciation may be "the existence or non-existence of common ground." The ECHR started from "the premise that same-sex couples are just as capable as different-sex couples of entering into stable and committed relationships," and therefore are in a "relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship" (para. 99). Nevertheless, the Court decided that, although the applicants had not been permitted to marry, a law subsequent to lodging their complaint but prior to the judgment (the Registered Partnerships Act¹¹), which entered into force on January 1, 2010) had provided alternative legal recognition (para. 102). While there is "an emerging European consensus toward legal recognition of same-sex couples," which has "developed rapidly over the past decade," the States that provide for legal recognition are not yet a majority. This question must therefore be considered as one of "evolving rights with no established consensus, where States must also enjoy a margin appreciation in the timing of the introduction of legislative changes" (para. 105). In conclusion, having examined the juridical status of registered partnerships and the differences that persist with respect to marriages, the ECHR said that it did not see "any indication that the respondent State has exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership" (para. 109) and found that there had been no violation of Article 14 taken in conjunction with Article 8 (para. 110).

Case X, Y and Z v. United Kingdom

15. *The facts of the case* may be summarized as follows: the first applicant, "X", a female-to-male transsexual, was born in 1955. However, from the age of four years "X" felt like a

¹¹ *Supra*, para. 6.

sexual misfit and was drawn to “masculine” behaviour roles. This discrepancy caused him to suffer suicidal depression during adolescence. In 1975, he began hormonal treatment and began to live and work as a man. Since 1979 he has lived in a permanent and stable union with the second applicant, “Y”, a woman born in 1959. Shortly after beginning that relationship, “X” underwent gender reassignment surgery. The third applicant, “Z”¹², was born in 1992 to “Y” as a result of artificial insemination by a donor (IAD). Subsequently, “Y” gave birth to another child by the same method. The complaint brought before the ECHR was prompted by the fact that the United Kingdom authorities had denied “X”’s application to be registered as the father of “Z” in the civil registry.

16. *Considerations of law.* Citing several previous rulings, the ECHR recalled that “the notion of ‘family life’ in Article 8 is not confined solely to families based on marriage and may encompass other de facto relationships,” and added that “when deciding whether a relationship can be said to amount to “family life”, a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (para. 36).” As a starting point, I consider that “regard must be had to the fair balance that has to be struck between the competing interests of individual and of the community as a whole” and that “the State enjoys a certain margin of appreciation” (para. 41). On the specific point of parental recognition (para. 44), the ECHR observed that “there is no common European standard with respect to the granting of parental rights to transsexuals” and that it has not been established “that there exists any generally shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law.” The Court added that, “although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly with regard to the question of filiation, remain the subject of debate. For example, there is no consensus amongst the Member States of the Council of Europe on the question of whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor’s identity.” Therefore, since the issues in the case “touch on areas where there is little common ground” amongst the Member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation.” In conclusion it stated, “given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 cannot, in this context, be taken to imply an obligation for the respondent State to formally recognize as the father of a child a person who is not the biological father.” Therefore (para. 52), “the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision.”

17. Clearly, the extensive citation of judgments by the ECHR does not imply that the Inter-American Court should take these as required precedents. As mentioned previously (*supra*, para. 4), these rulings have “persuasive value” to the extent that the arguments contained therein may be intrinsically convincing, something that will depend, in good measure, “on the status of the Court from which they emanate, and on the personality of the judge who drafted the judgment.”¹³ In view of the status of the ECHR and the similarity

¹² In his concurring opinion, Judge L-E. Pettiti stated that “Should there be another case like this one, it would no doubt be desirable for the Commission and the Court to suggest to the parties that a lawyer be instructed specifically to represent the interests of the child alone.”

¹³ Cfr. Alberto Pérez Pérez, “Reseña de la vida jurídica angloamericana,” in *Revista de Derecho Jurisprudencia y Administración*, t. 61, pages. 109-120 (the citation is from page 112).

between its functions and those of the Inter-American Court, the judgments cited in this reasoned vote are of great importance, as we shall see in Chapter II.

II. IT IS NOT NECESSARY OR PRUDENT TO INVOKE ARTICLE 17.1

18. As I have already indicated, I do not consider it necessary or prudent to declare a violation of Article 17, which could be taken as an implicit pronouncement on the interpretation of different provisions of said Article. Indeed, Article 17 contains a number of provisions connected with each other, beginning with the declaration of principle that “the family is the natural and fundamental group unit of society,” followed by the provision, within the same paragraph 1, whereby the family “is entitled to protection by society and the State,” and further on several provisions that could be interpreted (a point on which in this vote makes no pronouncement) in a way that presupposes that the family is based on a heterosexual marriage or de facto union. The right to not “be the object of arbitrary or abusive interference with his private life, (or) his family”, enshrined in Article 11.2, is a specific and autonomous aspect of the general duty of protection, so therefore it is not necessary to invoke Article 17.1 cumulatively with Article 11.2. The determination that some of the facts themselves violate a general duty and a specific duty (or the corresponding rights) does not change the nature or severity of the violation, and nor does it lead to different reparations being ordered than if only invoking the provision that enshrines the right or specific duty. Instead, invoking Article 17.1 includes the aforementioned declaration of principle, and, by implication, could encompass the rest of Article 17.

19. The declaration of principle regarding the family contained in Article 17.1 essentially agrees with the provisions of many Latin American constitutions:

Bolivia: Article 62. The State recognizes and protects families as the fundamental nucleus of society, and guarantees the social and economic conditions necessary for their integral development. All family members have equal rights, obligations and opportunities.

Article 63. I. Marriage between a woman and a man is constituted by legal ties and is based on the equal rights and duties of the spouses.

II. Free or de facto unions which are stable and monogamous and entered into by a woman and a man without legal impediment, shall have the same effects as a civil marriage, both as regards the personal and patrimonial relations of the spouses and as regards the children adopted or born of these unions.

Brazil: Article 226. The family, which is the foundation of society, shall enjoy special protection from the State.

This article continues with specific provisions related to wedlock or marriage, and the “stable union between a man and a woman as a family entity,” among other matters.

Chile: Article 1 (in Chapter I, Bases of Institutionalality). Men are born free and equal in dignity and rights.

The family is the basic core of society.

The State recognizes and defends the intermediate groups through which society organizes and structures itself and guarantees them the necessary autonomy to fulfill their own specific objectives.

The State is at the service of the individual and its goal is to promote common welfare. To this effect, it must contribute to the creation of the social conditions which permit each and every one of the members of the national community to achieve the greatest possible spiritual and material fulfillment, with full respect for the rights and guarantees established by this Constitution.

It is the duty of the State to safeguard national security, provide protection for the people and the family, promote the strengthening of the latter, further the harmonious integration of all sectors of the Nation and guarantee everyone the right to participate in national life with equal opportunities.

Colombia: Article 5. The State recognizes, without any discrimination whatsoever, the primacy of the inalienable rights of the individual and protects the family as the basic institution of society.

Article 42. The family is the basic nucleus of society. It is formed on the basis of natural or legal ties, by the free decision of a man and a woman to contract matrimony or by their responsible resolve to comply with it.

The State and society guarantee the integral protection of the family. The law may determine the inalienable and unseizable family patrimony. The family's honor, dignity and intimacy are inviolable.

Family relations are based on the equality of rights and duties of the couple and on the mutual respect of all its members. Any form of violence in the family is considered destructive of its harmony and unity, and shall be sanctioned according to law.

The children born within matrimony or outside it, adopted or conceived naturally or with scientific assistance, have equal rights and duties. The law shall regulate parental responsibility to the offspring.

The couple has the right to decide freely and responsibly the number of their children and shall support them and educate them while they are minors or dependents.

The forms of marriage, the age and qualifications to contract it, the duties and rights of the spouses, their separation and the dissolution of the marriage ties, shall be determined by civil law. Religious marriages shall have civil effects under the terms established by law.

The civil effects of all marriages shall be determined by divorce in accordance with civil law.

Also, decrees of annulment of religious marriages issued by the authorities of the respective faiths shall have civil effects within the limits established by law.

The law shall determine matters relating to the civil status of individuals and the consequent rights and duties.

Costa Rica: Article 51. The family, as the natural unit and foundation of society, is entitled to the special protection of the State. Mothers, children, the elderly and the infirm and destitute are also entitled to such protection.

Article 52. Marriage is the essential foundation of the family and is based on the equality of rights between spouses.

Article 53. Parents have the same obligations toward children born out of wedlock as to those born within it.

Every person has the right to know who his parents are, in accordance with the law.

Cuba: Article 35. The State protects the family, motherhood and marriage.

The State recognizes the family as the main nucleus of society and attributes to it the important responsibilities and functions in the education and development of the new generations.

Article 36. Marriage is the union voluntarily established between a man and a woman, who are legally fit to marry, in order to live together. It is based on full equality of rights and duties of the partners, who must provide for the support of the home and the integral education of the children through a joint effort compatible with the social activities of both.

The law regulates the formalization, recognition and dissolution of marriage and the rights and obligations deriving from such acts.

Ecuador: Article 67. The family in its various forms is recognized. The State shall protect it as the fundamental core of society and shall guarantee conditions that integrally favor the achievement of its purposes. The family shall be constituted by legal or *de facto* ties and shall be based on the equal rights and opportunities of its members.

Marriage is the union between a man and a woman and shall be based on the free consent of the persons entering into this bond and on equality of rights, obligations and legal capacity.

Article 68. The stable and monogamous union between two free individuals without any other marriage ties who establish a common-law home, for the period of time and under the conditions and circumstances stipulated by law, shall enjoy the same rights and obligations as those families bound by formal marriage ties.

Adoption shall only be permitted for different gender couples.

El Salvador: Article 32. The family is the fundamental basis of society and shall have the protection of the State, which shall dictate the necessary legislation and create the appropriate institutions and services for its integration, well-being and social, cultural and economic development.

The legal foundation of the family is marriage which rests on the juridical equality of the spouses. The State shall promote marriage; but the lack of it shall not affect the enjoyment of the rights established in favor of the family.

Article 33. The law shall regulate the personal and patrimonial relations between the spouses and between them and their children, establishing the rights and reciprocal duties on an equitable

basis; and shall create the necessary institutions to guarantee its applicability. Likewise it shall regulate family relationships resulting from the stable union of a man and a woman.

Nicaragua: Article 70. The family is the fundamental nucleus of society and has the right to protection by society and the State.

Article 71. It is the right of Nicaraguans to form a family.The law shall regulate and protect this right. ...

Article 72. Marriage and stable *de facto* unions are protected by the State; they rest on the voluntary agreement between a man and a woman, and may be dissolved by mutual consent or by the will of one of the parties, as provided by law.

Article 73. Family relations rest on respect, solidarity and absolute equality of rights and responsibilities between the man and woman.

Parents must work together to maintain the home and provide for the integral development of their children, with equal rights and responsibilities. Furthermore, children are obligated to respect and assist their parents. These duties and rights shall be fulfilled in accordance with to the relevant legislation.

Paraguay: Article 49. Protection of the Family

The family is the foundation of society. Its comprehensive protection shall be promoted and guaranteed. The family comprises the stable union of a man and a woman, their children and the community formed with any of their ancestors and descendents.

Article 50. Right to Constitute a Family

Everyone has the right to constitute a family, in whose formation and development a woman and a man shall have the same rights and obligations.

Article 51. Marriage and the Effects of De Facto Partnerships

The law shall establish the formalities to be observed for marriage between a man and a woman, the requirements for contracting it, the grounds for separation or dissolution and its effects, as well as provisions for the administration of goods and other rights and obligations between spouses.

A de facto partnership between a man and a woman, having no legal impediments to contracting marriage and being characterized by stability and monogamy, produces a similar effect to marriage, in accordance with the provisions established by law.

Article 52. Union in Marriage

The union in marriage of a man and a woman is one of the fundamental elements in the formation of a family.

Peru: Article 4. The community and the State extend special protection to children, adolescents, mothers and the aged in a situation of abandonment. They also protect the family and promote marriage. They recognize the latter as natural, fundamental institutions of society.

The form of marriage and grounds for separation and dissolution are governed by law.

Article 5. The stable union between a man and a woman who, free of any matrimonial impediment, establish a common-law home gives rise to a joint estate subject to the provisions for conjugal partnerships, insofar as these are applicable.

Uruguay: Article 40. The family is the basis of our society. The State shall safeguard its moral and material stability, for the optimum development of children within society.

Article 41. Parents a duty and a right to care and educate their children so that they may develop their full physical, intellectual and social capabilities. Those having responsibility for a large number of offspring have the right to compensatory assistance, provided that they need this.

The law shall make the necessary provision to ensure that children and young people are protected against physical, intellectual or moral neglect by their parents or guardians, as well as against exploitation and abuse.

Article 42. Parents have the same duties to children born out of wedlock as to those born within it. Motherhood, whatever the condition or status of the woman, has the right to the protection of society and to assistance in the event of abandonment.

Venezuela: Article 75. The State shall protect families as a natural association of society and as the fundamental unit for the overall development of persons. Family relationships are based on equal rights and duties, solidarity, common effort, mutual understanding and reciprocal respect among family members. The State guarantees protection to the mother, father or other person acting as head of a household.

Children and adolescents have the right to live, be raised and develop in the bosom of their original family. When this is impossible or contrary to their best interest, they shall have the right to a substitute family, according to law. Adoption has effects similar to those of parenthood, and is

established in all cases for the benefit of the adopted child, according to law. International adoption shall be subordinated to domestic adoption.

Article 76. Motherhood and fatherhood are fully protected, whatever the marital status of the mother or father. Couples have the right to decide freely and responsibly the number of children they wish to conceive and are entitled to have access to the information and means necessary to guarantee the exercise of this right. The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception, throughout pregnancy, delivery and the puerperal period, and guarantees full family planning services based on ethical and scientific values.

The father and mother have the shared and inescapable obligation of raising, nurturing, educating, maintaining and caring for their children, and the latter have the duty to provide care when the former are unable to care for themselves. The necessary and appropriate measures to guarantee the enforceability of the obligation to provide alimony shall be established by law.

Article 77. Marriage between a man and a woman, which is based on free consent and absolute equality of rights and duties of the spouses, is protected. A stable *de facto* union between a man and a woman which meets the requirements established by law shall have the same effects as marriage.

20. I agree with the notion of an evolving interpretation that considers the American Convention as a living instrument to be understood according to present-day circumstances, but on the understanding that in order to make progress in that area it is necessary to reach a consensus, or common ground or a convergence of standards among the States Party (see *supra*, para. 9 (11)). This is the case as regards the recognition that discrimination based on sexual orientation should be understood as prohibited (paras. 83 to 93 of the Judgment), since a clear concept exists in this respect, not only among the States Party to the American Convention, but also among all Member States of the OAS, expressed in the resolutions of the General Assembly cited (note 97).

21. The same cannot be said with respect to the evolution of the notion of the family and its status as the foundation or basic or natural element of society, which continues to be present in the Constitutions of many States Party (*supra*, para. 19). The irrefutable fact that there are currently many different concepts of 'family, as stated in note 191 of the judgment¹⁴, does not necessarily mean that each and every one of these must correspond to what the American Convention understands by family - even with an evolving interpretation according to the parameters mentioned (*supra*, paras. 9 (11) and 18)- as the "natural and fundamental element of society," or to what the States Party with similar provisions understand as such. Nor does it mean to say that all States Party must recognize

¹⁴ The text of note 191 states the following (cursives added): "The United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No. 21 (13th period of sessions, 1994). Equality in marriage and in family relationships, para. 13 ("*the form and the concept of the family can vary from State to State and even between regions within a State. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family, both at law and in private, must conform to the principles of equality and justice for all people, as Article 2 of the Convention requires*"); Committee on the Rights of the Child, General Comment No. 7. Implementing Child Rights in Early Childhood, CRC/C/GC/7, September 30, 2005, paras. 15 and 19 ("The Committee recognizes that '*family*' here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family and other traditional and modern community-based arrangements, provided that these are consistent with children's rights and best interests. [...] the Committee notes that in practice *family patterns are variable and changing in many regions*, as is the availability of informal networks of support for parents, with an overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children"); Human Rights Committee, General Comment No. 19 (39th period of sessions, 1990). The Family (Article 23), HRI/GEN/1/Rev.9 (Vol.I), para. 2 ("*The Committee notes that the concept of family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition*"). Cfr. United Nations, Human Rights Committee, General Comment No. 16 (32nd period of sessions, 1988). Right to Privacy (Article 17), HRI/GEN/1/Rev.9 (Vol.I), para. 5 ("Regarding the term 'family', the objectives of the Covenant require that for the purposes of Article 17, this term be given a broad interpretation that includes all those comprising the family, as understood in the society of the State Party concerned.")

all the concepts or models of family. Indeed, in General Comment N° 19, the Human Rights Committee, in the same paragraph in which it notes that :

"...the concept of family may differ in some respects from State to State, and even between regions within a State, so that it is not possible to give a standard definition of the concept."

22. Emphasizes that:

"...when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection referred to in Article 23. Consequently States Parties should report on how the concept and scope of the family is construed or defined in their own society and legal system. Where diverse concepts of family, "nuclear" and "extended", exist within a State, this should be indicated with an explanation of the degree of protection afforded to each one. In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States Parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic laws and practice." (Cursives added)

23. In other words, it is one of the areas in which it is most essential to allow a *national margin of appreciation*. For this purpose it will be necessary to conduct an inquiry, which is not appropriate to undertake in this case, but should be done whenever the point is raised in a case brought before this Court and the arguments in that regard presented by the parties and by any *amici curiae* are heard.

24. All this reaffirms my conviction that in this case it is not necessary or prudent to declare a violation of paragraph 1 of Article 17 which could be taken as an implicit pronouncement on the interpretation of the different provisions of said Article.

Alberto Pérez Pérez
Judge

Pablo Saavedra Alessandri
Secretary