



Right to religious freedom and non-discrimination

and non-discrimination of queer people
in the Inter-American case law: the
case of Pavez Pavez v. Chile



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Introduction

Queer rights¹ in Latin America have been experiencing important developments since the 90s.² Activists, organisations, and the LGBTQIA+ community, as a whole, have achieved several victories in different countries of the region, such as decriminalisation and the legalisation of same-sex marriage. During the last decade, part of this development has articulated itself within the human rights framework, manifesting itself in the main bodies of the Inter-American System of Human Rights, with the recognition of queer rights in the Inter-American case law.

The first case in which the Inter-American Court of Human Rights addressed queer rights was *Atala Riffo et al. v. Chile* in 2012.³ Since then, the Court has issued several judgments related to queer rights and the Advisory Opinion OC-24 on Gender Identity, Equality and Non-Discrimination of Same-Sex Couples.⁴

However, the development of queer rights in the region has also created strong resistance.⁵ Conservative and religious groups have been trying to stop the advancements of queer rights in Latin America.⁶ The clergy and politically organised church-goers have become relevant actors making the further development of queer rights more difficult.⁷ Naturally, religion plays a pivotal role in these discussions. That is why the judgement of the case *Pavez Pavez v. Chile* was highly expected.

Sandra Pavez Pavez is a catholic religion teacher that worked in the municipal school “Cardenal Antonio Samoré” in the Municipality of San Bernardo.⁸ Chilean law allows public education institutions, such as municipal schools to provide religious classes, which are regulated by Decree 924.⁹ Its Article 9 establishes that in order for a religion teacher to work as such, they “shall be in possession of a certificate of suitability granted by the corresponding religious authority, which shall be valid as long as it is not revoked, and shall also accredit the studies carried out to hold such position”.¹⁰ Pavez was awarded the diplomas of “Teacher of Catholic Religion and Morals”, “Religion Teacher for General Basic Education”, and of “Catechist”, all of them issued by different certified universities.¹¹ She also

- 1 This article will use the term ‘queer’ as an umbrella term to refer to non-cis-heterosexual identities. For more see Judith Butler’s work.’
- 2 Jairo Antonio López, ‘La “Ideología de Género” y Las Resistencias Frente a Los Derechos LGBT En América Latina’ in Teodoro Verdugo Silva and Claudia Astudillo Ambrosi (eds), *Género Feminismo y Derechos Humanos: Reflexiones desde el Sur* 60.
- 3 *Atala Riffo et al. v Chile* [2012] Inter-American Court of Human Rights Serie C 239.
- 4 *Advisory Opinion OC-24/17 requested by the Republic of Costa Rica Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* [2017] Inter-American Court of Human Rights Serie A 24.
- 5 López (n 2) 58.
- 6 *ibid.*
- 7 Javier Corrales, ‘The Politics of LGBT Rights in Latin America and the Caribbean: Research Agendas’ *European Review of Latin American and Caribbean Studies* 53, 54.
- 8 *Pavez Pavez v Chile* [2022] Inter-American Court of Human Rights Serie C 449 19–20.
- 9 *ibid* 17.
- 10 *ibid.*
- 11 *ibid* 19.

has been granted the required certificates of suitability by church authorities on several occasions since 1985.¹² However, in 2007, the rumour that Pavez was a lesbian spread throughout the school, and it reached the Diocese of San Bernardo.¹³ Due to this, the Vicar of Education urged Ms Pavez on several occasions to “end her homosexual life” and that in order to continue working as a religion teacher, she should undergo psychiatric therapy.¹⁴ Since she refused, the Vicar revoked her certificate of suitability, preventing her from continuing her profession in Cardenal Antonio Samoré.¹⁵ In the letter that notified the school of the Diocese’s decision, the Vicar argued that the suitability of a religion teacher entails three aspects: professional suitability, spiritual suitability, and moral suitability.¹⁶ With respect to the latter aspect, the letter said the following:

“Indeed, although Professor Pavez holds a legitimately awarded diploma, and her knowledge of the contents of the Catholic doctrine may be sufficiently well known to her, her moral suitability has suffered a serious alteration by living publicly as a lesbian, in open contradiction with the contents and teachings of the Catholic doctrine that she was called upon to teach”.¹⁷

As a consequence of this withdrawal, Ms Pavez was prevented from teaching the Catholic religion not only in Cardenal Antonio Samoré but in every school in the country.¹⁸ The administration of the school, however, offered her the position of acting inspector general, a position that she held until her retirement in 2020.¹⁹ Nonetheless, she never taught religion again.²⁰

Pavez Pavez v. Chile was a unique opportunity for the Court to explore and develop the content of the right to freedom of religion and contrast it with the right to non-discrimination based on sexual orientation. This article will explore the main findings of this judgement. First, it will study the right to religious freedom in the Inter-American case law and the main contributions to it of the *Pavez Pavez* case. Second, it will examine the right to non-discrimination in the Court’s jurisprudence. Finally, it will analyse how the Court applied the strict test of equality in the *Pavez Pavez* judgement.

12 *ibid* 22.

13 *ibid* 23.

14 *ibid*.

15 *ibid* 24–25.

16 *ibid* 26.

17 *ibid*.

18 *ibid* 27.

19 *ibid* 28.

20 *ibid*.



Church of Tenaún in the Chiloé Island in the south of Chile. Source: © throggers/Flickr, 2014.

Right to religious freedom in the Inter-American Case-law

The American Convention on Human Rights guarantees the right to freedom of conscience and religion in Article 12, which reads as follows:

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 12 of the American Convention is one of the least developed provisions in the Inter-American case law. The low number of judgements that refer to it may be explained by the fact that traditionally, religious intolerance has not been a problem in Latin America, unlike other regions in Europe.²¹ To this date, the Court has referred to this issue in only three cases: the Last Temptation of Christ, the Río Negro Massacre, and now, *Pavez Pavez*.

In *Olmedo Bustos et al. v. Chile*, also known as the case of the Last Temptation of Christ, the Court pronounced itself about the censorship that the movie of the same name was subjected to in the South American country. As a result of a lawsuit of constitutional protection of fundamental rights, the exhibition of the movie was prohibited.²² While the main issue of the case was the violation of the right to freedom of expression, the Inter-American Commission of Human Rights also argued that the prohibition of the film also infringed the right to religious freedom because the movie had a religious content, and to prevent people from watching it and forming their own opinion about it was a violation of the right ensured in Article 12.²³ The Court dismissed this argument due to a lack of evidence.²⁴ However, the Court used this opportunity to refer to the content of Article 12 in the following terms:

21 Fernando Arlettaz, 'La Libertad Religiosa En El Sistema Interamericano de Derechos Humanos' (2011) Año 1 Revista Internacional de Derechos Humanos 39, 43.

22 "*The Last Temptation of Christ*" (*Olmedo-Bustos et al.*) *v Chile* [2001] Inter-American Court of Human Rights Serie C 73 60.

23 *ibid* 74.

24 *ibid* 79.

“According to Article 12 of the Convention, the right to freedom of conscience and religion allows everyone to maintain, change, profess and disseminate his religion or beliefs. This right is one of the foundations of democratic society. In its religious dimension, it constitutes a far-reaching element in the protection of the convictions of those who profess a religion and in their way of life”.²⁵

The Court used the same conception of religious freedom in *Río Negro Massacres v. Guatemala*. This case was about five massacres that the Mayan community of Achí de Río Negro suffered since the 1980s.²⁶ Among other things, the representatives of the victims and the Commission argued that there was a violation of Article 12 because the mortal remains of the executed members of the community were either destroyed or buried by the soldiers who carried out the massacres, preventing the survivors from executing the funerary rituals that their religious beliefs demand.²⁷ The Court observed that the Achí people were not able to perform these rituals according to their tradition because, on the one hand, the State had not identified most of the mortal remains of the executed people, and on the other, because the sacred territories used for these and other ceremonies were flooded by a hydroelectric company.²⁸ Therefore, the Court found a violation of Article 12.²⁹

Based on these two cases, the development of the content of the right to freedom of conscience and religious freedom in the Inter-American case law reached the extent to consider it a foundation of a democratic society, and that its far-reaching protection includes the respect of religious ceremonies such as funerary rituals.³⁰ Against this background, the *Pavez Pavez* case offered the Court an interesting opportunity to further expand the content of this right.

One aspect that was addressed by the Court was the relationship between the State and religion, specifically with respect to Decree 924. As previously mentioned, this decree allowed public schools in Chile to offer religion classes, which must be imparted by teachers that possess a certificate of suitability issued by the corresponding religious authority.³¹

With respect to that, the Court stated that one of the guarantees of the right to religious freedom is the right of the parent or guardians to have their children receive religious or moral education in accordance with their beliefs.³² This guarantee, in accordance with the regulatory framework of each State, can imply the possibility for religious authorities to select the teachers who will impart religion classes,

25 *ibid.*

26 *The Río Negro Massacres v Guatemala* [2012] Inter-American Court of Human Rights Serie C 250.

27 *ibid* 151.

28 *ibid* 160.

29 *ibid* 165.

30 “*The Last Temptation of Christ*” (*Olmedo-Bustos et al.*) *v. Chile* (n 22) 79; *The Río Negro Massacres v. Guatemala* (n 26) 151.

31 *Pavez Pavez v. Chile* (n 8) 17.

32 *ibid* 97.

even in public institutions.³³ Thus, Decree 924 and the certificate of suitability that it established would be a way to incorporate Article 12 into domestic law, and it is not contrary per se to the American Convention.³⁴

Nonetheless, while the State can delegate to religious authorities the faculty to confer these certificates of suitability to religion teachers, the American Convention does not allow States to grant religious authorities the power to deny these certificates based on discriminatory criteria.³⁵ In accordance with the rights to judicial guarantees and judicial protection, these decisions must be subjected to subsequent revision by the State authorities, or to appropriate and effective remedies before judicial authorities, “in order to protect and safeguard the rights of individuals against discriminatory acts contrary to the Convention ”.³⁶

In our view, the reasoning of the Court with respect to Decree 924 presents two problematic aspects. One of them is the right of parents or guardians to have their children receive religious education in accordance with their beliefs, which the Court stated is contained within the right to religious freedom. This right raises several questions.

First, this right may collide with the principle of the best interest of the child. What would happen if the parents’ religion entailed beliefs that are detrimental to their children, for example, a religion that considers same-sex relations sinful in the case of a queer child. Which one would prevail? The rights of the parents or the rights of the child?

Second, these parents’ rights may also interfere with the children’s right to education. For instance, what would happen if the parents, based on their religious beliefs, would not allow their children to learn sex education? Would the right to education be of more importance than the religious freedom of the parents?

Thirdly, the parent’s right to choose their children’s religious education may collide with the right to religious freedom itself. Article 12 establishes that everyone has the right to maintain and change their religion or beliefs. What would happen if a child raised as Catholic wants to change their religion to Islam or Buddhism or to no religion at all? Does the right of the parents prevail over the religious freedom of the children?

All these questions would have to be determined by the Court in future cases that deal with these kinds of issues.

The other problematic aspect of the Court’s reasoning is the erosion of the boundaries between the Church and the State as a result of the acceptance of the conventionality of Decree 924. Indeed, policies like this one allow religious authorities to indirectly elect public officials. Besides the issues related to the delegation of public functions, which were addressed, the Court’s reasoning does not analyse the implicit premise of policies like this one, i.e. the possibility of public institutions providing religious

33 *ibid.*

34 *ibid.*

35 *ibid.* 159.

36 *ibid.*

classes. In the context of Latin American countries where the predominant religion is composed of powerful organised institutions such as the Catholic Church, a policy like Decree 924 may pose a risk for minority faiths. Indeed, it is not clear whether policies like this one promote the implementation of the right to religious freedom in a pluralist and democratic way, or on the contrary, they incentivise the State's promotion of a majority religion to the detriment of minority ones or the absence of belief. Again, further development in Inter-American case law is needed to fill this gap.

Pavez Pavez v. Chile also presented an opportunity for the Court to develop the relation between religious freedom and the right to non-discrimination of queer people. This will be addressed in the following sections.



Queer rights protest in Santiago de Chile. Source: © MOVILH/Flickr, 2014.

Right to non-discrimination of queer people in the Inter-American Case-law

The main source of the right to non-discrimination in the Inter-American System are two articles of the American Convention on Human Rights; Articles 1.1 and 24:

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Both provisions refer to non-discrimination in different ways. To understand the relation between Articles 1.1 and 24, it is necessary to understand the concept of subordinate and autonomous clauses.³⁷ A subordinate clause of non-discrimination forbids discrimination with respect to the enjoyment of the rights guaranteed in a specific instrument, in this case, the American Convention.³⁸ An autonomous clause of non-discrimination, on the other hand, obliges the States to respect and guarantee the absence of discriminatory treatment against any person in any legal situation.³⁹ Against this background, Article 1.1 would be a subordinate clause of non-discrimination, while Article 24 would be an autonomous clause.⁴⁰ This has been recognised by the Court in numerous judgements, such as *Apitz Barbera et al. v. Venezuela*, *Fernández Ortega v. México*, and *Atala Riffo et al. v. Chile*.⁴¹ That way, non-discrimination with respect to access to the rights ensured by the American Convention is covered by Article 1.1, while Article 24 refers to non-discrimination in general.

In order to fully understand these provisions, it is necessary to define two key concepts: discrimination and equality.

The Inter-American Law does not have an explicit definition of discrimination. Due to this reason, in its case law, the Court constructed a definition based on the notion developed by the European Court of

37 Edward Pérez, *La Igualdad y No Discriminación En El Derecho Interamericano de Los Derechos Humanos* (Comisión Nacional de los Derechos Humanos México 2016) 23.

38 *ibid* 23–24.

39 *ibid* 24.

40 *ibid*.

41 *ibid* 27.

Human Rights and the Human Rights Committee.⁴² The latter, in its General Comment n°18, defined discrimination as

“any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.⁴³

This definition was adopted by the Court in the cases of *Atala Riffo et al. v. Chile*, *Norín Catrímán et al. v. Chile*, and later on in the Advisory Opinion n°24 on gender identity, equality, and non-discrimination of same-sex couples.⁴⁴

With respect to the notion of equality, within International Human Rights Law, and in the Inter-American System, it is possible to distinguish two conceptions: formal equality and substantive equality.⁴⁵ Substantive equality or equality of opportunities is based on the acknowledgement that in the society there are groups that have been systematically excluded from the enjoyment of their rights, which is why it is the duty of the State to revert the effects of this historical marginalisation.⁴⁶ This notion is closely related with the use of affirmative actions, that is preferential measures in favour of these excluded groups that seek the long term integration of their members to society.⁴⁷ The Court has recognised and applied this conception of equality when it talks of equality between those who are different.⁴⁸ In cases like *Familia Pacheco Tineo v. Bolivia* or *Artavia Murillo et al. v. Costa Rica*, the Court has demanded the States to provide the necessary conditions for structurally excluded groups to enjoy their rights in conditions of equality.⁴⁹

Formal equality, on the other hand, refers to the prohibition of an arbitrary treatment. That is, the law must be applied equally to everyone regardless of their characteristics, and when that is not the case, in order to be legitimate, the distinctions must be reasonable and objective.⁵⁰ This conception of equality has been applied by the Court in cases like *Atala Riffo et al. v. Chile*, and also, although defectively, in *Pavez Pavez v. Chile*.

42 *ibid* 32.

43 *General Comment No 18: Non-discrimination* (Human Rights Committee) 7.

44 Pérez (n 37) 32; *Advisory Opinion OC-24/17 requested by the Republic of Costa Rica. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 4) 62.

45 Marianne González Le Saux and Óscar Parra Vera, ‘Concepciones y Cláusulas de Igualdad En La Jurisprudencia de La Corte Interamericana. A Propósito Del Caso Apitz’ (2008) 47 *Revista Instituto Interamericano de Derechos Humanos* 127, 136.

46 *ibid* 132.

47 *ibid* 133–134.

48 Pérez (n 37) 35.

49 *ibid* 37.

50 González Le Saux and Parra Vera (n 45) 130.

In order to determine whether a distinction constitutes arbitrary treatment, and therefore a violation to the right to non-discrimination, the Court has developed a test. According to it, a distinction is reasonable and objective when it has a legitimate aim, when it is necessary to achieve that legitimate aim, and when there is proportionality between the legitimate aim and the applied distinction.⁵¹ In other words, if someone argues that they have been discriminated against, they have to prove that the distinction does not fulfil at least one of the elements of this test.

Nonetheless, the Court has stated in its case law that this burden of proof is reversed towards the State if the distinction is based on a suspect classification.⁵² Suspect classifications are different criteria that are almost impossible to imagine as a reasonable base for a distinction.⁵³ Examples of suspect classifications are race, sex, political ideology, religion, nationality, among others. As we can observe above, the American Convention contains a catalogue of suspect classifications in Article 1.1. When a suspect classification is used as base for a distinction, it becomes the obligation of the State to explain why the distinction is reasonable and objective.⁵⁴ This is what is denominated as the strict test of equality.

The catalogue of suspect classifications of Article 1.1 does not refer explicitly to sexual orientation nor gender identity. However, in the landmark case of *Atala Riffo et al. v. Chile*, the Court established that both of these categories are protected under the American Convention, and that indeed constitute suspect classifications that fall within the concept of “any other social condition”.⁵⁵ Thus, the Court expanded the interpretation of the right to non-discrimination to protect the rights of queer people.

The strict test of equality does not only include the reversal of the burden of proof. The Court has stated that this test must incorporate especially rigorous elements into the analysis.⁵⁶ Specifically, there are three elements to consider after the Court has determined that a suspect classification was indeed used. First, the different treatment should constitute a necessary measure for achieving a conventional and imperative aim.⁵⁷ The legitimate aim sought must not only be in accordance with the American Convention, it also has to be of utter importance. Secondly, the means employed must be adequate and enabling for the achievement of the legitimate aim.⁵⁸ The means also have to be necessary, that is they cannot be replaced by other less harmful means.⁵⁹ Lastly, the measure has to be proportional.⁶⁰ This means that the benefits of the adoption of the measure in question “must be clearly more advantageous than the restrictions it imposes on the treaty-based principles it affects”.⁶¹

51 Pérez (n 37) 44.

52 *Flor Freire v Ecuador* [2016] Inter-American Court of Human Rights Serie C 315 125.

53 González Le Saux and Parra Vera (n 45) 131.

54 *ibid* 132.

55 *Atala Riffo et al. v. Chile* (n 3) 91.

56 *Advisory Opinion OC-24/17 requested by the Republic of Costa Rica. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 4) 81.

57 *ibid*.

58 *ibid*.

59 *ibid*.

60 *ibid*.

61 *ibid*.

An example of a clear employment of the strict test of non-discrimination by the Court can be seen in the case of *Atala Riffo et al. v. Chile*, the first one in the Inter-American case law that acknowledged queer rights. *Atala Riffo et al.* is a case about a judge that lost custody of her daughters to her former husband due to her sexual orientation. In the final stage of the judicial custody process, the Chilean Supreme Court considered that her lesbian lifestyle was incompatible with the best interest of her children.⁶² Specifically, the Court considered that Ms Atala put her interests before the interests of her daughters when she decided to live together with her new female partner.⁶³ According to the tribunal, that living situation can have a negative impact on the psychological and emotional development and wellbeing of her children due to the lack of a male parent figure and the possible confusion of sex roles.⁶⁴ Thus, the Supreme Court deemed the ex-husband more suitable as a parent and granted him the custody of Ms Atala's daughters.

Before applying the test, the Court had to determine whether the distinction in question was based on a suspect classification, in which case the burden of proof was reversed towards the State.⁶⁵ The arguments of the different tribunals involved in the custody process revolved around Ms Atala's sexual orientation and the possible negative effects that her "lifestyle" may have on the children.⁶⁶ As it was already stated, sexual orientation is a suspect classification.⁶⁷ The Court found that the sexual orientation of Ms Atala was pivotal when deciding the custody of her daughters.⁶⁸ Therefore, the distinction was based on a suspect classification and the Chilean State was in the obligation to justify the legitimacy of this distinction. Once that was established, the Court proceeded to analyse the reasons given by the Chilean State to justify the adoption of the measure in question.

With respect to the first element of the test, the conventional and imperative aim, Chile identified as such the best interest of the child.⁶⁹ The Court considered that the best interest of the child is indeed a legitimate and imperative aim, based on the dignity of every human being, as well as in the special characteristic of children, and in the necessity to provide an adequate environment for their development.⁷⁰ In other words, the first element of the strict test was met.

For the second element of the test, that is the adequacy of the means employed, Chile argued that the measure was justified because of the adverse effects that the expression of Ms Atala's expression of her sexual orientation had on the wellbeing of her daughters.⁷¹ The Court, however, considered this explanation insufficient. It stated that in custody procedures the determination of the best interest of

62 *Atala Riffo et al. v. Chile* (n 3) 56.

63 *ibid* 58.

64 *ibid*.

65 *Flor Freire v. Ecuador* (n 52) 125.

66 *Atala Riffo et al. v. Chile* (n 3) 96–98.

67 *ibid* 93.

68 *ibid* 96–98.

69 *ibid* 105.

70 *ibid* 108.

71 *ibid* 106.

the child has to be made with respect to specific behaviours of the parents, and cannot be based on presumptions, speculations, or generalised considerations about personal characteristic of the parents, nor on cultural preferences of traditional concepts of family.⁷² The mere reference to the best interest of the child without proving how the mother's sexual orientation can be of risk or produce harm to her daughters, cannot be used as an adequate means for the restriction of the right to non-discrimination.⁷³ The best interest of the child cannot be used as a justification for discrimination against the parents for their sexual orientation.⁷⁴ Therefore, considering that the reasons used by the Chilean Supreme Court to support its decisions were abstract, stereotyped, and/or discriminatory, the second element of the test was not met, and the Court declared a violation of Article 24 in relation to Article 1.1 of the American Convention.⁷⁵

The Court did not go further to analyse the third element of the strict test, that is the proportionality of the measure. One must conclude that this means that the lack of compliance of one of the elements of the test is enough to declare the violation. In that sense, the elements of the strict test work as steps. The legitimate aim is a prerequisite to determine the adequacy of the means employed. If there is no legitimate aim, the analysis of the means employed make no sense. Similarly, the proportionality cannot be evaluated if there has not been a prior analysis of the adequacy of the means. On what basis could the proportionality be assessed if the means employed were inadequate? Consequently, a correct application of the test requires an analysis of its elements step by step. If the requisite of the legitimate aim is met, then the Court can continue its analysis to the adequacy of the means employed. Only if this step is met, then it can continue further to the analysis of the proportionality of the measure.

The example of the *Atala Riffo* case is useful to see a correct application of the strict test of equality. As we will see in the next section, that was not the case in *Pavez Pavez*.

72 *ibid* 109.

73 *ibid* 110.

74 *ibid*.

75 *ibid* 146.



Sandra Pavez Pavez holding a rainbow flag. Source: © MOVILH/Flickr, 2016.

Application of the strict test of equality in *Pavez Pavez v. Chile*

When confronting the issue of discrimination against the victim in the *Pavez Pavez* case, the Court began its analysis with the acknowledgement that as a result of the revocation of her teaching licence, Ms Pavez's rights to personal freedom, to private life, and to work were restricted.⁷⁶ Thus, the Court needed to determine whether the distinction in question was discriminatory.⁷⁷ In order to do that, and since the distinction was based on a suspect classification, sexual orientation, the Court stated that the strict test of equality was applied, and explained all the elements of said test, i.e. the conventional and imperative aim, the adequacy of the means employed, and the proportionality of the measure.⁷⁸

Up to this point, the application of the test does not differ from the one seen in *Atala Riffo*. There was an acknowledgement of the use of a suspect classification, the burden of proof was reversed, and now the Court was supposed to analyse the reasons given by the Chilean State for the use of sexual orientation as criteria for the distinction in question.

Chilean State argued that the reassignment of duties of Ms Pavez were in compliance with the strict

⁷⁶ *Pavez Pavez v. Chile* (n 8) 141.

⁷⁷ *ibid.*

⁷⁸ *ibid* 142–143.

test of equality.⁷⁹ According to Chile, the conventional and imperative aim sought by the measure was the realisation of the right to religious freedom contained in Article 12 of the American Convention.⁸⁰ With respect to the adequacy of the means employed, the State argued that the measure was suitable to fulfil the purpose, and it was necessary since no other alternative means would allow the realisation of the right to freedom of religion.⁸¹ Chile also considered the measure proportional, because in its view, the impact on Ms Pavez's rights were less than the interference to the right to freedom of religion of the Catholic Church.⁸² In addition to the requirement of the strict test of equality, Chile also stated that the right to non-discrimination in employment applies different to religious communities due to the separation of Church and State, and that the withdrawal of the suitability certificate was no difference in treatment because it was based on religious requirements of consistency of conduct.⁸³ Nonetheless, the Court did not go through each step of the strict test of equality, as it did in *Atala Riffo*. Instead, the Court only destined one paragraph to the strict test analysis, which reads as follows:

“This Court considers that the costs of the restrictive measure to the detriment of Sandra Pavez Pavez do not outweigh the advantages obtained in terms of protecting religious freedom and the right of parents to choose their children's education. Indeed, at no time was there any consideration of the effects that this measure would have on Sandra Pavez Pavez's personal life or on her teaching vocation. Nor is it clear that there is an actual or potential infringement of the autonomy of the religious community, or of the right to religion, or the right of parents or guardians to have their children or wards receive the religious education that is in accordance with their beliefs. On the contrary, the alleged victim stated - without this being challenged by the State - that she received support in the form of 700 signatures ‘from students and their parents, who were even authorized to speak to the Bishop on my behalf so that I could continue teaching, and from all the teachers who were there at the time this happened in 2007’. Finally, regarding the State's argument related to the coherence between the content of the religion classes and the conformity of the lifestyle of the person who teaches those classes with the religious creed, this Court considers that it cannot operate in such a way as to justify or legitimise different treatment that is discriminatory based on the categories protected by Article 1(1) of the Convention, in the area of public education”.⁸⁴

Within this paragraph we can identify three main points. First, the lack of proportionality of the mea-

79 *ibid* 50.

80 *ibid*.

81 *ibid*.

82 *ibid*.

83 *ibid* 50–51.

84 *ibid* 144.

sure, since the advantages in protection of religious freedom do not outweigh the detriments of Ms Pavez's rights.⁸⁵ Second, that it was not clear whether there was a potential infringement of religious autonomy.⁸⁶ Lastly, that the coherence between the content of religion classes and the lifestyle of the teacher cannot operate as justification for different discriminatory treatment.⁸⁷ The last point seems to refer to the additional points that the Chilean State made after giving its justifications for the use of sexual orientation as a criteria.

This paragraph perfectly illustrates how defective the Court's application of the strict test of equality was in this case. The Court did not go through the elements of the test step by step. The Court referred first to the third element of the test, the proportionality of the measure. Then, in its second point, it mentioned an argument that may be destined to dismiss Chile's justifications for the second element of the test, the adequacy of the means employed. On top of that, an analysis or reference to the legitimate aim argued by the Chilean State, the right to religious freedom, is nowhere to be found.

A correct application of the test should have been as follows. First, the Court should have analysed the conventional and imperative aim proposed by the Chilean State. In our view, the right to religious freedom suffices as a legitimate aim, since it is ensured in the American Convention in Article 12.

Second, the Court should have analysed the adequacy of the means employed. Chilean State argued that the withdrawal of Ms Pavez certificate was suitable to fulfil the purpose of the realisation of religious freedom, and that there was no other alternative. In the judgement, the Court mentioned that it was not clear whether there was a potential infringement to religious autonomy.⁸⁸ However it did not explain why, leaving several questions unanswered. What would constitute an infringement to the right to religious freedom in this context? Does a non-heterosexual sexual orientation constitute a risk for religious freedom? Does religious freedom allow discrimination based on sexual orientation? Following the previous Inter-American case law, it seems that the Court should have arrived at a similar conclusion than in *Atala Riffo*, i.e. that the mere reference to religious freedom without proving how the sexual orientation of Ms Pavez can infringe on the full realisation of this right cannot be used as an adequate means for the restriction of the right to non-discrimination. Furthermore, the Court already stated in the Advisory Opinion OC-24 that a recognised right cannot under any circumstance be denied or restricted to anyone based on sexual orientation.⁸⁹

Nevertheless, the Court still made a reference to the element of proportionality in the judgement. In doing so, especially considering the lack of an analysis of the previous elements of the test, the Court implicitly stated that the legitimate aim and the adequacy of the means were complied with by Chilean

85 *ibid.*

86 *ibid.*

87 *ibid.*

88 *ibid.*

89 *Advisory Opinion OC-24/17 requested by the Republic of Costa Rica. Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples* (n 4) 84.

State's explanation. In other words, the Court appears to consider that the problem in this case was only with regards to the proportionality of the measure. Does this mean that the right to religious freedom allows discrimination based on sexual orientation as long as the detriments produced do not outweigh the advantages of it? Are there advantages of discriminating queer people?

While it is true that the Court found the Chilean State responsible and ordered several measures of redress for Ms Pavez, the defective application of the strict equality test sets a dangerous precedent for future cases. In the worst-case scenario, this judgement could be interpreted as if the Inter-American case law allows discrimination of queer people under some circumstances, which would be a step back from the current jurisprudence in the matter.

Conclusion

Pavez Pavez v. Chile was a rare opportunity for the Court to develop the content of a right that was scarcely discussed in its jurisprudence. Unfortunately, the Court did not take full advantage of it. The Chilean State was found responsible, and Ms Pavez was granted an adequate reparation. However, the Court did so without meaningfully advancing the understanding of the right to religious freedom in relation to queer rights. A case that could have produced a landmark judgement ended up being a wasted opportunity for the development of the Inter-American jurisprudence. Hopefully in the future, further cases that will reach the Court will allow a more thorough evolution than the countries of the region to achieve a plural society where religion is not a threat for the enjoyment of queer rights.

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