Justice, Prejudice, and the Basis for Reasonable Legal Argument: The Karen Atala Case

Justicia, prejuicio, y bases para un argumento legal razonable: El caso Karen Atala

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Received: 22-09-2011 **Accepted**: 10-12-2011

Abstract: **Abstract**: The criteria for argument analysis and evaluation provided by the theory of argumentation can assist in restraining the discretion of judges. The Toulmin model of argumentation provides a basic reasonableness test for court decisions. Contemporary legal argumentation theory proposes additional criteria for evaluating hard-case decisions involving basic rights. If these are not met, a decision may be arbitrary and, therefore, discriminatory. Using the Toulmin model of argumentation, this article reviews the decisions made on a custody battle fought by two Chilean lawyers. The father filed for sole custody of the couple's minor daughters, arguing that the mother is a homosexual who openly cohabits with her female partner. While both the trial and appellate courts agreed with the legal presumption that mothers are fittest to look after their children and noted that societal bias or moral considerations did not suffice to find otherwise, the Supreme Court overruled them on grounds of breach or abuse of discretion. The article concludes that the standard of argument used by the trial and appellate judges did meet the sound discretion criteria required. In contrast, the Supreme Court failed both to meet the test of reasonableness and present the principles at stake in their best light.

Keywords: Discrimination, child's best interest, Karen Atala, prejudice, sound discretion.

Resumen: La teoría de la argumentación nos proporciona criterios para el análisis y evaluación argumental que pueden contribuir a controlar la discrecionalidad de los jueces. El esquema del argumento de Toulmin provee un test de razonabilidad mínima y aceptable de justificación de las decisiones judiciales. La teoría contemporánea de la argumentación jurídica ofrece criterios adicionales, para evaluar la justicia de

la decisión frente a un caso difícil, que involucra derechos fundamentales. Cuando estos requisitos no se cumplen la decisión puede ser tachada de arbitraria y, por tanto (si además desconoce un derecho fundamental), de discriminatoria. En este artículo analizo y evalúo, echando mano al esquema de Toulmin, los fallos dictados en un caso en que un matrimonio de abogados chilenos disputaron la tuición de sus hijas menores de edad. El padre solicitó la tuición debido a que la madre es homosexual y convive abiertamente con su pareja de sexo femenino. Las sentencias de primera y segunda instancia acogieron la presunción legal que da preferencia a la madre para asumir la tuición de los hijos, considerando que no es razón suficiente para alterar esta regla los prejuicios sociales, o las preferencias morales de las personas. La Corte Suprema acogió un recurso extraordinario del padre, estimando que los jueces de primera y segunda instancia cometieron "falta o abuso en el ejercicio de sus funciones". Concluyo que los jueces de primera y segunda instancia aplicaron estándares de argumentación que satisfacen el criterio de "sana crítica" requerido para el caso; el fallo de la Corte Suprema, en cambio, no satisface el test de razonabilidad ni presenta los principios en juego "desde su mejor perspectiva".

Palabras clave: Discreción válida, discriminación, el mejor interés del niño, Karen Atala, prejuicio.

1. Introduction

A distinguishing feature in the transition from the rule of law based on the statutory (formal) interpretation to a constitutional state was the emergence of principle as a mandatory legal standard that allowed judges to make exceptions to rules in the interest of fairness. Certainly, judges still have to do "justice according to the law" and their decisions have to be well-founded in the light of all principles and rules in force. What is expected of the judge is that he should work out the best possible interpretation of the available legal material in order to resolve the case, in the understanding that such an interpretation would have to be the one most coherent with the higher principles of order, and the one which offers the best structure for justifying it.

The analysis and evaluation of tools in the theory of legal argumentation help verify whether the courts have adequately interpreted the principles at stake. These tools also help scrutinize justifications for consistency with the principles and rules in force (i.e., if it shows the principle "in its best light"). The analysis below will avail itself of the Toulmin model of argument and the criteria for tackling hard cases proposed by MacCormick. Toulmin's

model offers a basic framework which allows us to reconstruct decisions starting from their premises, and to evaluate the structure of their justification. This framework is particularly suitable for analyzing higher court decisions, since in them the facts are normally taken as proved and the review is essentially about warrants and rebuttals. MacCormick's theory, for its part, helps us to determine whether the issues are factual (e.g., problems of proof, questions of classification of facts) or normative (e.g., problems of relevancy or interpretation). This article also proposes additional criteria to evaluate the arguments which sustain the decision.

Carrying out this analysis is of both academic and practical interest, as it shows that even Supreme Court decisions are reviewable in international courts if they negate fundamental principles –such as equal treatment (non-discrimination) provisions– entrenched in international instruments. This article examines one of the most controversial decisions that Supreme Court of Chile has handed down in recent times, one which has indeed been impugned before the Inter-American Court of Human Rights. The decision ruled on a custody battle fought by a judge and a public defender of native groups over three minor daughters. Following a disciplinary complaint filed by the father, the Supreme Court awarded custody to him on grounds that the mother was a homosexual who openly cohabits with her female partner, which in the Court's view was detrimental to the girls' social and personal well-being. Both the trial and appellate courts had agreed with the legal presumption that a mother is fittest to look after her children, noting that societal bias or moral considerations did not suffice to find otherwise. By ruling in favor of the complainant, the Supreme Court was required by law to find that the trial and appellate courts were guilty of breach or abuse of discretion.

Section 2 recounts the case, the principles and rules used to find "the right answer", and the reasons making this a bona fide hard case. Section 3 examines the various decisions from the point of view of the Toulmin model of argumentation to determine if they met the sound discretion rule. Substantive criteria are then used to evaluate the structure of the Supreme Court justification relative to the constitutional principles at stake. The conclusion is that the Supreme Court ruling had no basis in fact, did not meet the standards of adequate practical reasoning –as sexual orientation

does not constitute grounds for denial of custody, was in breach of both the principle of equal protection of the law and the duty to respect sexual choice, and made Chile accountable to the international legal system.

2. The Case: Private Lives, Public Issues

The custody battle fought by a couple consisting of a judge and a public defender over M., V. and R. López Atala, their daughters born in 1994, 1998 and 1999, respectively, has been the subject of much debate in Chile.

Upon separation in March 2002, the couple agreed that the girls would be in the care of their mother. Yet, in January 2003 the father filed for sole custody, arguing that judge Karen Atala, an admitted homosexual who had started a live-in relationship with a lesbian partner, was inflicting serious psychological and social harm on the girls and endangering their health. The father saw it in his daughters' best interest to protect them from the negative consequences of being brought up by a lesbian couple. He and his new heterosexual partner, he argued, could provide a psychologically and emotionally safer environment. Atala countered that: (i) Reducing the concept of family to the union between man and woman was discriminatory and contrary to both the Constitution and international human rights instruments; (ii) Article 225 of the Chilean Civil Code provides that, in case of parental separation, minor children will be in their mother's care unless she is found unfit for the causes stated in the law, none of which includes sexual orientation; and (iii) A child's best interest should be construed from a legal rather than an ideological perspective, as passing moral judgment on her lesbian identity was inadmissible and in any event was part of her private life.

In October 2003 the Villarrica District Court found in favor of Atala, in a ruling that accepted a broader definition of family and gave no effect to societal bias. The sentencing judge handed down a well-rounded decision based on a thorough analysis of the evidence and the legal principles and standards at bar. The judge further noted that sexual identity did not fall within the definition of "reasonable grounds" in Civil Code article 225 or the "serious moral impediment" in article 42 of the Minors' Protection

Act (MPA). In March 2004 the Temuco Court of Appeals ratified the ruling. Endorsing its line of reasoning, the Court added: "[T]he evidence submitted does not in any way modify the findings of the sentence under appeal". The girls' father then filed a disciplinary complaint with the Supreme Court. The complaint claimed that, in upholding the ruling of first instance, the appellate court acted arbitrarily, committed a serious breach or abuse of discretion, and infringed the requirement to assess evidence in family matters as conscience dictates by dismissing proof of the consequences on the girls of their mother's openly lesbian conduct. In May 2004 a Supreme Court panel voted 3-2 to award custody to the father and reprimanded the Temuco appellate court for breach or abuse of discretion.

In November 2004 Karen Atala filed a petition against Chile with the Inter-American Commission on Human Rights (IACHR). In December 2009, IACHR Merits Report 139/09 concluded that Chile had indeed violated Atala's right to equality and non-discrimination under article 24 of the American Convention on Human Rights (ACHR) as well as her right to a private and family life under ACHR article 11. In September 2010 the IACHR referred the matter to the Inter-American Court of Human Rights, where it is now pending as Case 12502. The IACHR noted that this will be the first time that the Court will be required to rule on the issue of discrimination based on sexual orientation and on discriminatory prejudices in the exercise of public power (p. 4).

2.1. The Pre-Interpretive Stage: The Relevant Legal Material

Dworkin's understanding of the law (1978, 1986) focuses on hard cases, those where the correct answer has to be justified by constitutional principle and values. In Dworkinian theory, the law includes not only the rules enacted in accordance with the community's accepted practice but also the principles that provide the best moral justification for those enacted rules. He treats the concept of law as an interpretive concept (Dworkin, 2011, p. 402). As such, in hard cases the law is not only the object but also the result of the interpretation, because interpretation is done under a constructive model that seeks to present the object or practice in its best light (to make of it the best possible example of its genre). Interpretation always begins

with a pre-interpretive stage that identifies and categorizes legal material: the rules and standards taken to provide the tentative content of the practice (Dworkin, 1986, p. 52, p. 66).

In the case at hand, the best candidates to provide a solution are the rules in Civil Code art. 225: "The children of separated parents will be cared for by their mother" and art. 225(3): "If the best interest of the child so requires due to abuse, neglect or other reasonable grounds, custody may be awarded to the other parent"[1]. Reference to the best interest of the child must be construed as defined in art. 3(1) of the Convention on the Rights of the Child (CRC): "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Court decisions must also respect the principle of equal treatment enshrined in the Chilean Constitution and in the ACHR, whose art. 24 states: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law". This is closely connected with ACHR art. 1(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"[2].

No courts of third instance exist in Chile. Disciplinary complaints are an extraordinary tool provided in art. 545 of the Code of Court Procedure "[S]olely to rectify serious breaches or abuses committed by a court of law… [F]indings in favor of a disciplinary complaint will discuss in detail the evi-

[1] Art. 42 of the MPA defines unfit parents as follows: (1) The mentally unsound; (2) Chronic alcoholics; (3) Those who neglect their children's upbringing, personal care, or education; (4) Those who allow their children to become vagrants or panhandlers, whether overtly or under the guise of a profession or trade; (5) Those found guilty of child abduction, abuse or neglect; (6) Those who abuse or contribute to the delinquency of their children or whose presence in the home endangers their children's moral integrity; and (7) Those who for any other reason place their children in moral or material danger.

[2] The American Convention on Human Rights (Pact of San José) was ratified on October 22, 1969 and published in Chile's Official Gazette on January 5, 1991. Art. 5 of the Chilean Constitution recognizes that sovereignty is restricted by the basic rights enshrined therein and in the international human rights instruments ratified by Chile.

dence proving breach or abuse of discretion as well as the manifest and glaring errors or omissions in the original ruling, and will order measures to redress such breach or abuse… Higher courts striking a lower court ruling on these grounds will order appropriate disciplinary action". Family courts are further expected to heed the sound discretion rule (art. 36 MPA) requiring judges to weigh the evidence as conscience dictates, based on the principles of logic (e.g., what is reasonable) and the maxims of experience.

2.2. A Hard Case

Since the case was settled by applying a rule, the Toulmin model of argumentation can help ascertain whether the decision was correct. The *claim* is that custody rests with the mother; the *data* are filiation and marriage breakdown; the *warrant* is the presumption in favor of the mother, and the *backing* is Civil Code art. 225. There is also a *qualifier*: maternal rights stand unless conditions for *rebuttal* exist (e.g., reasonable grounds for exception based on the child's best interest). Yet, this is clearly a hard case insofar as mere application of the rule does not yield a custody decision. In fact, based on the principle of the child's best interest, the law gives courts latitude to ascertain reasonable grounds to award custody to the father. In addition, the grounds expressly contemplated in the law for loss of custody (e.g., abuse or neglect) are absent, as are other reasonable grounds contemplated in case law, such as parental depravity. The court is thus being asked to find unprecedented reasonable grounds –sexual orientation– to rule a mother unfit for custody. Lastly, the court must judiciously interpret the principles at stake (child's best interest, equal treatment, and the right to privacy) and present them in their best perspective.

A court finding that lesbianism constitutes grounds to deny custody would infringe the mother's privacy rights, including the right to sexual orientation. Contrary to what some scholars hold (López, 2001, p. 122), this is not just a matter of deciding which environment is most convenient for the child. Courts are not required to award custody to the parent who is socially or financially better off –an objectionable notion in a democracy– but to award custody to the mother unless the child's best interest requires otherwise by reason of abuse, neglect or other equivalent grounds. While

the law does grant judges some leeway for the sake of the child's best interest, they must heed the precepts of the law and adequate reasoning, lest they impinge on other principles.

Making this a hard case are problems of interpretation, proof, and classification (MacCormick, 1978, p. 68; pp. 87-97). Indeed, even when the rules and principles are known, their concrete meaning and scope of application remain blurred since the law does not categorically state grounds for unfitness and gives judges latitude to find other reasonable grounds. To make the decision-taking even more complicated, while both the Constitution and international instruments ratified by Chile entrench the principle of equality under the law and ban discrimination based on social condition, it is unclear whether the ban includes courts making custody decisions based on the child's best interest. On the other hand, evidence is normally construed as that which enables us "to hold as true propositions about the present and to infer from these, propositions about the past" (MacCormick, 1978, p. 88). Yet, this case involved the admissibility of evidence intended to determine the likelihood of a proposition about the future –the consequences to the girls of living with their mother– based on propositions about the present and past. Such a case requires a veritable test of coherence to verify that all pieces of the story fit and all evidentiary assessment rules were adhered to. Lastly, the case also poses problems of classification, or of secondary facts, since there are no doubts about the existence of certain primary facts (which are presumed proven), whether they constitute a circumstance subsumed in the rule's assumption is open to question. Proven facts include the mother's lesbianism, which she readily acknowledged in her response, and her cohabitation with a same-sex partner; but whether these are reasonable grounds to rule her an unfit mother is far from clear.

While the dissenting Supreme Court opinion noted that Chile has no court of third instance, it would appear that this was de facto the case. The Supreme Court had to ascertain whether the appellate judges had committed serious breach or abuse in interpreting the rules and weighing the evidence and determine whether a mother's sexual orientation was reason enough to deprive her of custody under the law. The feeling in local intellectual and legal circles –echoed in the IACHR report and filing– is that the majority Supreme Court opinion exhibited bias about homosexuality, was based on a specious view of what a family is, and discounted the rights of

both the children and their mother. As such, one custody decision among many managed to reopen an old debate about law and morals, in particular about the meaning of basic rights and whether homosexual parents can have custody of their children. Case decisions will be examined below per the Toulmin model of argumentation and from the standpoint of external justification, e.g., the validity of the premises in light of the constitutional principles and standards in play.

3. Analysis and Evaluation of Arguments

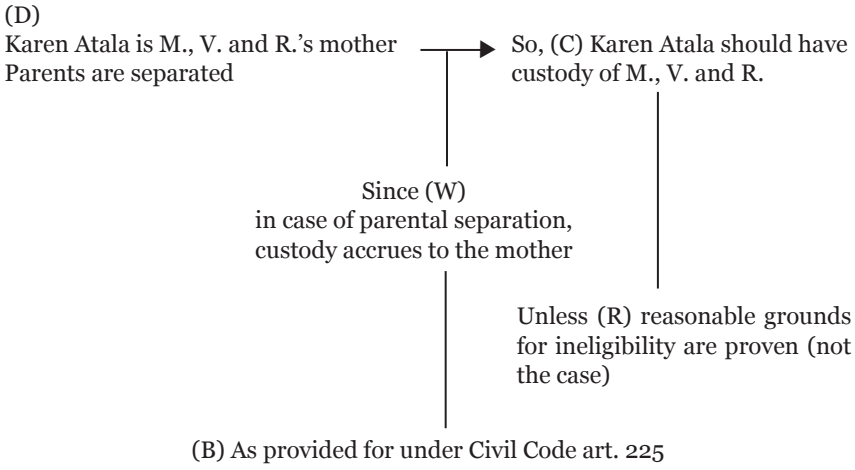
One of the reasons for the advancement of logic in the law (or of the theory of legal argumentation) is the need to control the fundamentals of court rulings. The obligation to substantiate decisions has deep democratic roots: it ensures public scrutiny of the discretional power of judges, helps guarantee respect for actor rights, and prevents arbitrary acts. This is the best remedy for the inevitable discretion judges must enjoy in adjudicating hard cases (which is a matter of settling, not finding, priorities within the legal system, according to MacCormick, 2008, p. 163).

Below I will use the Toulmin model of argumentation to briefly analyze and present all arguments on Atala's fitness to have custody of her daughters. This analysis will seek to identify the contending points of view, their explicit and implicit premises, and the structure of argument (Van Eemeren et al., 2002). Toulmin (2003, pp. 90-94) identified six elements in an argument: claim (C), data (D), warrant (W), backing (B), modal qualifiers (Q) and conditions of exception or rebuttal (R). A *claim* is both the starting and end point of an argument. Whenever claims are questioned –if not, there is no need for argument– proponents must furnish relevant and sufficient facts that give grounds to the claim *(data)*. It is important to bear in mind that *data* are not general theories but specific facts, e.g., those generically described in the rules (the condition for applying the respective rule). Next, even when the facts are not disputed, moving from data to claim must still be justified. The general, hypothetical statements which act as "bridge" and authorize this step constitute the *warrant* of the argument and may consist, inter alia, of a maxim of experience, a principle, or a law of nature. The *warrant* is especially valid and significant when several possible op-

tions for moving from data to claim are available. As such, proponents have to show that their warrant is better than all others, with specific reference to the general field of information and the source or *backing* presupposed. *Modal qualifiers* evince the strength of the warrant, while a *rebuttal* describes the circumstances in which its general authority is to be discounted.

3.1. The First Instance Ruling

The court asserted that since parental separation had occurred, the Civil Code requires that custody be awarded to the mother, adding that departing from this rule requires at least one of the grounds stated in the law. In other words, the law presumes the mother's fitness and places the burden of proving otherwise on complainants. The outline of the decision was as follows:



(R) does not apply since *lesbianism does not constitute grounds for unfitness*. This claim issues from proven facts: Karen Atala's sexual orientation does not make her an unfit parent; she is not mentally unsound, and homosexuality is not a pathology. The *warrant* in this argument is (i) an implicit definition of unfitness referring to a mother's potentially "immoral" conduct; and (ii) the logic of scientific research: What is accredited by authoritative research can help ascertain with certainty whether an event

may or may not cause another. As to the *backing*, (i) the implicit warrant adopts the definition in Chilean jurisprudence; and (ii) the second warrant is backed by a report from the University of Chile's Psychology Department noting that homosexuality is a normal form of human sexuality, and another from the Faculty of Education of the Catholic University of Chile which rules out the idea that children raised by lesbian mothers are psychologically or socially disadvantaged or that their sexual identity may be atypical.

The decision makes a second, convergent claim to the effect that *the presence in the home of the mother's lesbian partner does not constitute grounds for denial of custody*. The basis for this conclusion are that while two of the girls exhibit some confusion about gender roles and difficulty defining adult sexual stereotypes, there is no proof that this is a direct consequence of the same-sex partner's presence in the household. In general, the evidence shows that children of non-heterosexual families are not developmentally different or disadvantaged relative to those raised in heterosexual families. In addition, there is no proof that the girls' welfare has been harmed by the presence in the home of their mother's lesbian partner. The warrant is the same as in the previous argument: (i) an (implicit) definition of unfitness, and (ii) the logic of scientific research. In this case, the backing includes: (i) the jurisprudence and (ii) psychological reports making no mention of confusion about gender roles; a report by the University of Chile's Psychology Department concluding that, in general, the children of non-heterosexual families are well cared for and tend to be heterosexual; and reports by the Forensic Medicine Institute concluding that there are no psychological impediments to same-sex couples raising children[3].

The ruling establishes another supporting reason: *It is also an established fact that Atala did provide well for her daughters*. Indeed, (D) under her care the girls were in good health and growing normally and had regular medical checkups in the presence of their mother. In 2001 M. was promoted to second grade with a grade point average of 6.8 (on a scale of 1 to 7) while V. was promoted to kindergarten after performing satisfactorily in preschool. The warrant here is a maxim of experience: *when a mother*

[3] Although a psychological report found the girls somewhat confused about gender roles, the trial court dismissed it as standing in contradiction to evidence ruled consistent and conclusive.

cares, it shows. This works on the basis of generalization: Atala's concern for her daughters' health and education is an objective expression of her fitness to care for them and exercise her role as a mother. This assertion was backed (B) by documentary evidence –including reports and certificates from the girls' doctors and teachers- that was not contested during the trial. The trial court discounted (R) that the girls were targeted for discrimination under their mother's care, noting that "this court must base its decision on true and proven facts rather than on conjecture or fear" (consideration 28).

The first instance ruling is a case of complex or multiple argumentation structure, involving several cross-cutting arguments. To van Eemeren and Grootendorst, these are alternative defenses for the same standpoint (1992: p. 73; 2004, p. 4). Each argument can be reconstructed under the Toulmin model, ensuring that the sound discretion standard has been met. The clear structure of each argument and their concatenation into a consistent argumental storyline are *prima facie* unassailable. Indeed, no first instance conclusion was contradicted or rebutted in the Supreme Court's ruling. To the extent that the above arguments helped establish that (D) Atala cared well for her daughters and that her lesbianism or her sharing her home with a same-sex partner did not developmentally affect the girls, it follows (C) that *the principle of the child's best interest was not infringed,* as no conduct of their mother's that could have jeopardized their basic rights was ever proven. The warrant in this case are the very contents of the principle of the child's best interest, insofar as rather than a right in itself, this principle stands as a guide, a basis, and a limit for the role of society as regards children. This principle is specifically applied in cases of a collision of rights, those that cannot be exercised simultaneously (including children's right to life, to physical and mental integrity, to not be separated from their parents, to identity, non-discrimination, etc.), with an emphasis on primary over secondary rights. Backing (B) is provided by the opinion of family judge Alba Llanos M. in her article "The Child's Best Interest", published in Issue 3 of the *Journal of the Legal Studies Institute*.

As such, the first instance ruling appears to have met every legal substantiation requirement. The rules of logic and maxims of experience were consistently applied, as illustrated by the fact that the basic argument can be reconstructed using the Toulmin model, which provides a sufficient

reasonableness standard concerning the sound discretion rule. Furthermore, the principles and rules of Chilean law were applied in a seemingly correct manner. Considering that the court had to weigh the evidence as conscience dictates, can the judges be deemed to have committed serious breach or abuse of discretion? All indications are that this was not the case.

3.2. The Supreme Court Ruling

The Supreme Court decision that agreed with the complainant (C) found that the lower courts had committed a serious breach or abuse of discretion by (W) failing to protect the girls from potential harm, contrary to their best interest. It also ruled the lower courts in violation of the principle requiring judges to weigh the evidence in family matters as conscience dictates, notably by ascribing more value to expert reports than to witness statements about the girls' deteriorating social and family circumstances. The decision's line of argument was as follows:

(a) The child's best interest overrides all other competing rules or rights.

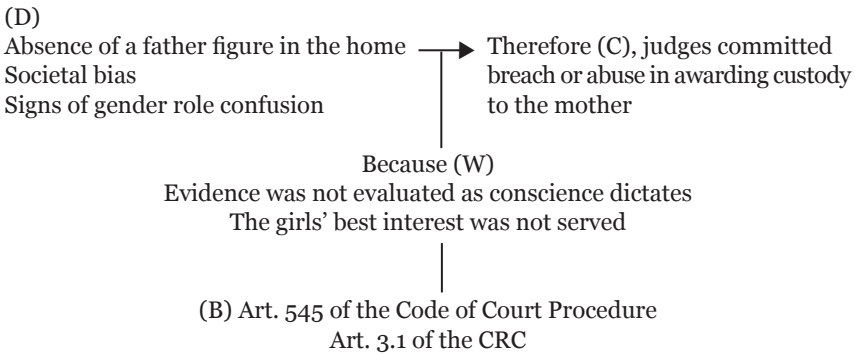
(b) The rule that custody should be awarded to the mother admits exceptions based on the above principle, if reasonable grounds exist.

(c) Court decisions are incumbent solely on judges; witness statements, expert reports and other evidence must be weighed along with the rest of the facts. In this case, the trial court allowed psychological and social reports confirming Atala's normal conduct and absence of risk to the girls, but dismissed witness reports about a deterioration of their environment, a decline in visits from friends, and games and behavior evidencing confusion about Atala's gender role.

(d) Their mother's cohabitation with a same-sex partner can be deleterious to the girls' welfare and psychological and emotional growth, while the absence of a father figure in the home can lead to confusion about gender roles. These circumstances make the girls socially vulnerable, as their exceptional (i.e., different) family setting can expose them to isolation and discrimination.

(e) The resulting potentially irreversible harm constitutes reasonable grounds to award custody to the father. By disregarding the girls' preferential right to be raised by a nuclear family (i.e., a family with a "traditional" structure), the appellate court is deemed guilty of serious breach or abuse of discretion and its ruling is reversed.

Of these, the only reasons that could aspire to the status of grounds are (i) a witness statement about a decline in visits from friends and games showing gender role confusion; (ii) the absence of a father figure in the home; and (iii) the existence of bias against non-nuclear families. The apparent warrant is the definition of breach or abuse of discretion contained in art. 545 of the Code of Court Procedure and the principle of the child's best interest (as defined by the CRC). The outline of the decision is as follows:



The absence of a *rebuttal* is itself grounds for suspicion about the Supreme Court's reasoning, as it would appear that bias against non-nuclear families and signs of gender role confusion in children suffice to conclude that lesbianism constitutes grounds to deprive a mother of the custody of her daughters –in their best interest. In actual fact, the argument's true warrant is an implicit premise: a value judgment about the likelihood of harm accruing to the girls –a conclusion resting on no other evidence than the self-fulfilling bias prophecy driving the Court's decision. The argumental fallacy is clear: the Court inappropriately poked around Atala's private life; found unspecified and hitherto nonexistent grounds for unfitness, and

discriminatorily applied them to the case. Worse still, the Court penalized homosexuality by setting a presumption of moral superiority about a particular type of family unit. For the benefit of readers who might still have reservations about this line of evaluation, let us scrutinize the Court's reasoning for adequate justification.

(a) The child's best interest, a principle that obligates parents and guides the work of judges, is paramount in family matters. But as a non-specific concept articulated in very general terms, its concrete contents must be ascertained in each specific ruling. As a principle *sensu strict*, a standard that is to be observed because it is a requirement of justice (Dworkin, 1978: 22), it justifies basic rights and helps resolve clashes with other recognized rights or interests. But the Supreme Court ruling makes no argument about contents or meaning, and rather than interpret the principle, it is content with reiterating the applicable legal provisions.

Ascertaining the child's best interest does not imply discretion –in a "strong sense"– so as to adopt just any decision based on it. The child's best interest is always a concrete finding concerning a particular child, and judges are required to appraise his/her actual, specific circumstances. For example, the child's own opinion is a crucial aspect of ascertaining his/her best interest.[4] In addition, if a child happens to have a lesbian mother, a court's appraisal about his/her best interest must assume that his/her life experience will have to take this unchangeable fact into account. As the Pennsylvania Superior Court wrote in 1992: "The child's best interest is served by exposing (the child) to reality and not fostering in the child shame or abhorrence for a parent's non-traditional commitment." [*Blew v. Verta,* 617 A.2d 31, 36 (Pa. Super. Ct. 1992)]. The New Jersey Superior Court used a similar logic: "If [the lesbian mother] retains custody, it may be that because the community is intolerant of her differences these girls may sometimes have to bear themselves with greater than ordinary fortitude. But this does not necessarily portend that their moral welfare or safety will be

[4] The Supreme Court decision is silent on this. Yet, during the trial the girls said they hoped their parents would get back together while in the last hearing they said they wanted to live with their mother.

jeopardized. It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice. Taking the children from [the mother] can be done only at the cost of sacrificing those very qualities they will find most sustaining in meeting the challenges inevitably ahead. ...[T]he girls' best interest would not be served" [*M.P. v. S.P.,* 404 A.2d 1256, 1263 (N.J. Super. Ct. App. Div. 1979)].

(b) The Civil Code's legal presumption in favor of the mother admits proof to the contrary but shifts the burden by setting special conditions. Custody is only awarded to the father when reasonable grounds –e.g., an unfit mother– exist and the child's best interest so demands. Reasonable grounds exist only when the harm inflicted on the child by remaining with the mother is greater than that inflicted by forced separation. It is well-established law in Alabama that "Once a parent has been awarded custody of a child, the noncustodial parent seeking a change in custody has the heavy burden of proving that a change of custody would materially promote the child's best interests and welfare and that the benefits of such a change would outweigh the disruptive effect caused by the change" [*Ex parte McLendon,* 455 So.2d 863 (Ala. 1984)*; Powell v. Boyd,* 601 So.2d 1039 (Ala. Civ. App. 1992)]. It is also well established that "the judgment of the trial court as to child custody is presumed correct and will not be disturbed on appeal unless it is so unsupported by the evidence as to be plainly and palpably wrong or an abuse of discretion" (*Powell, supra).*

Chilean law does not allow sacrificing the interest of the child to that of an adult, not even the mother's. Yet, in the case at hand the Supreme Court failed to conclusively establish reasonable grounds to find the mother unfit. Finding that the interests of the children of a lesbian mother are better served by removing them from her care because of societal bias is a protracted argumental walk that the Chilean Supreme Court did not walk. As the courts in Alabama emphasized: "a change of custody from one parent to another is not a decision to be made lightly; on the contrary, it may be

made only where the evidence discloses an obvious and overwhelming necessity for change" [*Ex parte Peppers,* 703 So.2d 299 (Ala. 1997)].

(c) Obviously enough, court decisions are made only by judges. Technically speaking, judges who disregard witness statements may indeed be held responsible for breach or abuse of discretion. But in the case at bar, the trial judge was required to weigh the evidence based on sound discretion, i.e., as conscience dictates. The Toulmin model of argumentation shows that the trial court correctly applied the rules of logic and the maxims of experience, that it based its decision on an appraisal of the entire body of evidence, and that it provided warrant and backing as to why certain pieces of evidence outweighed others. As such, it is far-fetched to hold the appellees guilty of serious breach or abuse of discretion. In contrast, the Supreme Court decision failed to meet minimum standards of justification by neglecting to account for the limits of witness statements. The witness testimony is affected by their experiences and temperaments, so it is fallible, uncertain and unpredictable (Frank, 2008, p. 115). Witnesses may swear having seen something but cannot offer guarantees about the certainty of the facts involved. In addition, the Supreme Court forgot that while witness statements may carry weight when establishing the facts, expert opinion carries even more when interpreting them. In this particular case, the Supreme Court completely neglected to explain why it held the testimony of Atala's housemaid as more credible than the scores of expert reports examined by the trial court. Things being so, the Court's decision appears a matter of mere, evidently arbitrary preference.

(d) The Supreme Court committed a fallacy of false dilemma when it wrote that Atala's sexual orientation was not subject to reproach but upheld its duty to serve the girls' best interest by removing them from her care because her sexual orientation made them socially vulnerable. Yet, no moral dilemma forcing a choice between the girls' best interest and their mother's right to her sexuality was proven. The Court also committed a causal fallacy by erroneously linking a cause to an effect *(non causa pro causa)* as no evidence was furnished about a causal link between social vulnerability and living with a lesbian mother; far from it, at least in this case the evidence pointed in the opposite direction. The claims the Court presumed proven

to deny Atala custody of her daughters were mere conjectures or fears – the very factors that the ruling of first instance expressly noted as inappropriate basis for a decision. The Court did not consider citing empirical evidence (facts), scientific theory ("truths"), authorities, or presumptions necessary as "the starting point" for argumentation (Perelman, 2003: 23). It simply assumed their likelihood, even as the research and the experts consulted during the trial contradicted this view.

In brief, the factual premises failed to meet consistency requirements, or failed to pass the "test of coherence" (MacCormick, 1978, p. 90). The propositions about the past –the proven facts– contradicted Supreme Court assertions about the present (or future) that held an unproven risk as true. In evidentiary matters, judges are required to go by the facts. If the evidence heard at trial showed that fear and prejudice about homosexual parents are unfounded and that no concrete signs of potential harm or risk to the girls were substantiated, the only valid conclusion is that the judges committed no breach or abuse of discretion when ruling based on legal presumption and the available evidence.

(e) When asserting that homosexuals living with same-sex partners cannot have custody of their children because the resulting social context may not be in the children's best interest, the Supreme Court is at odds with generally accepted guidelines of legal interpretation and evidentiary assessment. Courts must rule on individual cases, and while they cannot foretell the future, they can avail themselves of objective studies and research. These can help courts acquire the certainty that their decisions rest on solid ground rather than on societal bias. In addition, *reasonable grounds* ought to be interpreted as extraordinary circumstances in the particular case rather than as an objective standard valid for any scenario (such as homosexuality). Civil Code article 242 does allow judges to repeal measures "[W]hen the underlying cause ceases to exist". If the Supreme Court felt that a legal presumption in favor of mothers is not in children's best interest and that custody decisions are best left to judicial judgment, its critique had better be aimed at legislators rather than the trial court. In addition, Civil Code article 23 requires courts to interpret rules without regard to what may be propitious or odious in them. But rather than substantiating its conclu-

sions, the Chilean Supreme Court purely and simply attached to the principle a surprising dogma: "The girls' right to live and grow within a normally structured, socially appreciated family constituted in the traditional way". The breach or abuse of discretion ascribed to the lower courts consisted of not recognizing a category that did not exist in law or in jurisprudence before this ruling, something, therefore, that the lower courts could not possibly have known. Worse, a mother was penalized for infringing a supposed duty that did not exist before the ruling that deprived her of the custody of her daughters.

By equating the concept of family with one of its types, i.e., the nuclear family, the Court's argument further committed a fallacy of composition. When appealing to the authority of tradition, it also committed a fallacy of *argumentum ad verecundiam*.[5] Not only was the Supreme Court decision flawed, it had an aggravating circumstance: by signaling its preference for one type of family, it arbitrarily excluded homosexuals from enjoyment of their basic parental rights. But as Fuller holds, homosexual acts between consenting adults should not be subject to criminal sanctions (Fuller: 133). In the United States, a white father asked for sole custody of his son after his former wife married a black man. The U.S. Supreme Court ruled: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect" *[Palmore v. Sidoti, 466 U.S. 429 (1984)]*.

3. Conclusions

The methods and criteria for argument analysis and evaluation provided by the theory of legal argument can assist, *inter alia*, in restraining the discretion of judges so that the law may play its role of guiding behavior based on rules. Justifying a ruling means providing the reasons that base a decision on preexisting law as if it was final and with due consideration to the circumstances of the case. This is what gives court rulings the backing and force of the law. Contemporary legal argument theory proposes additional criteria for evaluating hard-case decisions involving basic rights.

[5] About fallacies, see Copi, 1982; van Eemeren and Grootendorst, 1992.

One is that in order to justify a decision, the premise should be a universal standard so that the decision can be (formally) universalizable (MacCormick, 1978, p. 84), which implies a commitment to coherence with the past and the future. If these criteria are not met, a decision may be arbitrary. If it also negates a fundamental right, it may also be discriminatory.

Article 1 of the Chilean Constitution states that all individuals are created free and equal in dignity and rights. Article 19(2) guarantees equality under the law and prohibits arbitrary discrimination, while article 4 defines Chile as a democratic republic. But a basic principle of democracy is pluralism, which entails the need to legally recognize and protect a wide range of reasonable lifestyle choices. Democratic societies not only approve of and safeguard the customs, mores, traditions and beliefs of the majority, but also those of minorities that are different or have alternative lifestyles. Since the Constitution explicitly entrenches the principles of democracy and equality, judges pondering basic rights have to rise to their responsibility and offer a justification that presents the principles involved in their best light. Such justification must show equal concern for the fate of every person involved and it must respect fully the responsibility and right of each person to decide for himself how to make something valuable of his own life (Dworkin, 2011, p. 2).

In conclusion, the trial and appellate judges of the case did correctly apply sound discretion when finding that the general rule about a mother's fitness cannot be modified lightly or arbitrarily, and that reasonable grounds for unfitness apply only when the evidence conclusively shows that the child's best interest is served by awarding custody to the father or a third party. Such reasonable grounds must at all times speak to the character, fitness, or conduct of the parents in question –never to their sexual preference. In contrast, the Supreme Court did not meet the test of reasonableness or present the principles at stake in the best light possible. By taking the girls from their mother based solely on her sexual orientation, the Supreme Court of Chile imposed a sanction that is contemplated in no law and was discriminatory to boot. Should the Inter-American Court of Human Rights follow a line of reasoning similar to that discussed here, a ruling against Chile should be the most likely outcome.

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