

NOT ONE STEP BACK: LESSONS LEARNED AND CHALLENGES IN A CONSOLIDATE AGENDA OF SEXUAL AND REPRODUCTIVE RIGHTS IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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*Never forget that a political, economical or religious crisis will be
enough to cast doubt on women's rights. These rights will never
be vested. You'll have to stay vigilant your whole life.*

Simone de Beauvoir

Abstract: There have been advances in Latin America regarding the recognition of sexual and reproductive rights, especially in relation to disadvantaged groups such as women and LGBTI persons. In this sense, it is relevant to mention the recognition by the Inter-American System of the right to health as a true right. Nevertheless, there are still many challenges to be faced.

In this paper, I will review the progress and challenges of the Inter American Court of Human Right in sexual and reproductive health rights, looking to offer a panoramic overview from a global south perspective by analyzing specific cases. I will then highlight some achievements and setbacks in this area, focus on the impact of these cases in the region and criticize some of the Court's limited responses.

Keywords: Right to health, sexual right, reproductive right, Inter-American Court, impact, advances, challenges.

INTRODUCTION

The last decade of the 20th century was marked by major achievements regarding the recognition of women and LGBTI's human rights. In fact, some Latin American States assumed different obligations with the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in the international arena, and the Convention on the Eradication of Violence Against Women (The 'Belem do Pará'), the American Convention on Human Rights (hereinafter ACHR), and the Protocol of San Salvador in the regional arena, (O'Connell, 2020; Burgorgue- Larsen, 2017). In certain cases, the States adopted similar obligations even in their constitutional and legal system. However, beyond this recognition Latin America continues to be the most unequal region in the world regarding wealth distribution (ECLAC, 2017; UNDP, 2021) has a relevant impact on the enjoyment of women and LGBTI's rights. They suffer structural discrimination, physical and psychological violence, as well as economic, institutional, and other ways of violence. For instance, women are criminalized for obstetric emergencies that end up in miscarriage and for accidents related to childcare. Besides, as childcare is assumed

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to be mainly their responsibility, in most cases they can only get jobs whose conditions are very bad.² In addition, they can't decide on their bodies³ and they are exposed to violent situations in different contexts such as schools, jobs, health care institutions and others. On the other hand LGBTI people experience similar treatment. Since homophobia is very much alive in the region, it is forbidden for them to express their identity or sexual orientation, so they are excluded from their families and the schools, sentenced to work as prostitutes with severe rights violations by the authorities.⁴

Although sexual and reproductive rights are not specifically recognized in the ACHR, the Inter-American System has protected women from sexual violence, especially when this violence is consummated in the context of internal armed conflicts or systematic persecution by state agents, thus producing important jurisprudential development.⁵ However, it does not account for all the violations of sexual and reproductive rights that women and LGBTI people suffer daily in regular contexts. Only recently⁶ has the Inter- American Court of Human Rights (hereinafter IACtHR) given attention to them.⁷ It is important to highlight what these standards represent, especially in a context of advancing conservative policies in the region.⁸ As Yamin (2008: 46) said “in human rights frameworks, health is a matter of justice- a product of social relation as much as biological or behavioral factors”, so, it is necessary to emphasize that all violence against women and LGBTI is a public health concern (Cedaw, General Recommendation #24).⁹

² See, among others, IACtHR, *Employees of the Fireworks Factory of Santo Antônio de Jesus and their families v. Brasil* (2020).

³ For example, in many countries abortion is prohibited or forced sterilization is frequent.

⁴ About the situation of LGBTI people in Latin America, see Encarnación (2016). Furthermore, most of these women and LGBTI people live in poverty and forced displacement, are migrants, afro-descendants, single mothers, heads of households and generally have access neither to education nor to the health system. Thus, according to the IACoHR they are in a situation of *intersectional discrimination* (Crenshaw, 1991).

⁵ In this regard, see Cases “Penal Castro Castro Vs. Perú” (2006) “González and others (Campo Algodonero) vs. México” (2009) “Fernandez Ortega vs. México” (2010); “Rosendo Cantú vs. México” (2010), among others.

⁶ Abramovich, 2009. Specifically, about women's rights see O'Connell, 2019. On advances in the universal and European sphere v. Nowicka, 2011.

⁷ The IACtHR did not recognize has not recognized the direct violation of Economic, Social and Cultural Rights (ESCR) and especially of the right to health, until a few years ago. In this regard, see Ferrer MacGregor, E. (2020); Ronconi/ Barraco (2021), among others. Although of course, many of the cases analyzed here imply the violation of other rights such as equality, private and family life, however, I am interested in focusing on the development of sexual and reproductive rights specifically as components of the right to health. I thank the reviewer reference for making a point on this comment.

⁸ This article was conceived by dictation of the Supreme Court of the United States of the case “Dobbs v Jackson Women's Health Organization” (June, 2022) in which the court held that the Constitution of the United States does not confer a right to abortion. In addition, see Press release “IACHR calls for progress in the recognition and protection of reproductive rights in the region” January 31, 2023. Available in https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/011.asp

⁹ About this point Pou Giménez (forthcoming) suggests that “before we had monism or strict binaries. Now we have multiple subjects or instantiations of identity...multiple constitutive experiences... multiple ways of measuring gender advancement” (977) and for this reason she agrees with Erdman and Assis on the need for rewriting General Recommendation #24 of the CEDAW Committee from the perspective of a “serial-structural subject”.

Much progress has been made on the sexual and reproductive rights agenda by academics, activists, legislators and judicial operators and important lessons could also be drawn from successes and setbacks of other actors.¹⁰ Nevertheless, in this paper I would like to talk specifically about the advance of the IACtHR in sexual and reproductive health rights.¹¹ This advances achieved are important because they are “steps forward” (in terms of Abramovich and Courtis, 2002) that cannot be left aside by the States but, on the contrary, must be respected specially by the “conventional control” (von Bogdandy, et. al., 2017).

This work provides a panoramic overview of the IACtHR works¹² from a global south perspective.¹³ I will highlight some achievements and setbacks in this area, focus on the impact of some cases where these issues have been debated and decided in the region and criticize some of the court's limited responses. This work is divided into two parts. First, (I) I will describe some IACtHR resolutions regarding sexual rights identifying the critical points and the doors they opened to advance the sexual rights agenda in the region. Secondly, (II) I will analyze different sentences on reproductive rights, indicating advances and challenges they brought about. I will finally conclude that the IACtHR has produced very important advances in the recognition of sexual and reproductive standards although this should be expanded especially when it comes to taking into account how the combined stereotypes such as gender, poverty, and others operate when denying or restricting these rights

1. SEXUAL RIGHTS

Sexual rights ensure people's control over their sexuality. The components of sexuality that should be protected are, at least sexual identity, sexual orientation, choice of partner and absence of coercive sexual activity.¹⁴ Thus, non-heterosexual and non-procreative sexual activity should be protected, since in fact there is no reason to link

¹⁰ Legal activism (often based on social mobilizations) in Latin America has been considered an example of concrete achievements (Yamin, Pichon Riviere, Bergallo, 2019; Rodriguez- Garavito, 2011); thus, it is important to see what has happened there so that it can be taken as an example elsewhere.

¹¹ Furthermore, some human rights organizations have referred to the scope and implications of sexual and reproductive rights in their sentences, decisions, and other relevant pronouncements. See, IACHR (2019). This analysis is important as Pou Giménez (2023: 988) said “as Latin American socio-legal scholars have stressed, constitutional rulings have not only instrumental and direct effects, but also a range of constitutive and indirect effects. Such effects include placing in the public agenda topics that were previously not salient, promoting civil society action around certain topics, changing public perceptions, and dignifying and vindicating certain realities. By naming and stating normative principles at the highest level, judicial rulings are perceived to be in themselves partially transformative of reality. The language, the maximalist or minimalist style, the scope of the arguments and the shape of the remedies in the different human rights systems are traversed, in short, by strategic, normative and cultural understandings of law and society that comparative analysis should acknowledge”.

¹² There are very good papers that critically analyze specifically some of the cases seen here; nevertheless, I believe the general view is important so as to observe how the Court has developed the concept of sexual and reproductive health. On advances in the IACHR see Ramírez Huaroto (2018)

¹³ On the importance of building an epistemological alternative to health from the global south see Basile, 2022.

¹⁴ ESCR Committee, GO #22 (2016), parr. 5.

sexuality with reproduction. We can see advances in the position of ICtHR regarding sexual rights, especially in sexual orientation and gender identity.

1.1. Sexual Orientation

The firm decision of the IACtHR regarding the guarantee of sexual rights, especially sexual identity and orientation, can be clearly seen in some cases, the first of which was “*Atala Riffo vs Chile*” (2012) where the Court recognized that sexual orientation is a protected ground from discrimination, which was not explicitly recognized in the original wording of art 1.1 of the ACHR.¹⁵ On the basis of this argument, the Chilean state was condemned for discrimination when it sentenced withdrawal of parental custody of three daughters from their mother who publicly manifested to be a lesbian. The Court held that the Chilean State could not prove a very important reason (strict scrutiny) for the withdrawal; thus, the decision had been based on prejudices and stereotypes regarding the bond resulting from a lesbian mother and her daughters. As Coddou (2017) said “*Atala* was a strong and activist judgment, which provides support for the broader role law can play in social and cultural change...In the same sense *Atala* was an important and revolutionary case, supported by a successful legal and political activism that is very solid throughout the region” (2). This case shows three aspects which are relevant for sexual rights. One is the consideration of sexual orientation as a protected ground (Clérico, Aldao, Ronconi, 2017). Another is the recognition and protection under the ACHR of different kinds of families. The third is the Court’s argument which claims that the grounds of sexual orientation are not restricted to the declaration of homosexuality; they also include the homosexuality forms of expression and its logical consequences in a person’s life project.

Another case is “*Duque vs. Colombia*” (2016) in which the IACtHR condemned the Colombian state for discrimination of Ángel Duque for not allowing him equal access to the survival pension after the death of his partner in 2001, because it was a same-sex couple; and yet another is the case “*Flor Freire vs. Ecuador*” (2016) where the IACtHR condemned the Ecuador state for discrimination since Mr. Freire was fired from the army for his homosexual behavior.¹⁶ In both cases, the IACtHR held that a person's sexual orientation is a protected ground according to the Convention. Consequently, no rule, decision or practice of domestic law, whether by state authorities or by individuals, may reduce or restrict, in any way, the rights of a person based on their sexual orientation, be it real or perceived, since this would be contrary to the provisions of art. 1.1 of the ACHR.¹⁷

These three cases were very important because they were the first approach of the IACtHR to this topic. In fact, “it provides a foundation for a legally driven project of social and cultural change, which should be triggered and channeled by the state” (Coddou, 2017: 13) By then, only a few States of the region started recognizing the right of LGBTI people or even same-sex couples. Both Argentina and Ciudad de México recognized same-sex

¹⁵ On the evolution of the ICtHR’s interpretation of the equality clause, see Serrano Guzmán (2022).

¹⁶ Mr. Freire denied his homosexuality. In this regard, the Court held that the important thing is to investigate whether the state act was linked to a discriminatory act based on sexual orientation (real or perceived).

¹⁷ The Court upheld this argument again in the case *Ramírez Escobar and Others vs. Guatemala* (2018).

marriage in 2010 while in 2011 the Supreme Federal Court of Brazil ruled that same-sex couples could form “stable unions” and granted rights to unmarried *de facto* cohabitants. In 2016 the Colombian Constitutional Court also ended years of uncertainty for same-sex couples and the rights of LGBTI people by upholding the validity of same-sex marriage.

This recognition of sexual orientation broke the heteronormative structures and although it could be seen as a civil right, it also has a direct impact on the right to health. Firstly, because it forces medical practitioners and health care workers to take those who fall outside this norm seriously. And secondly because it recognizes that these couples can make decisions related to health, for example in an emergency or in cases linked to procreation. In addition, it implies the need to eliminate stereotypes regarding homosexuality.¹⁸

1.2. Gender Identity

Although the aforementioned were very relevant cases, the IACtHR only recognized their normative side but did not identify the structural discrimination suffered by LGBTI people. In fact these people were included in the health system but still pathologized. As Litardo (2022) says this had very negative consequences such as: “1) limiting or denying a person's autonomy; 2) reinforcing and creating arbitrary limits between healthy or pathological ways of being through a gender point of view; 3) and making trans people's lives depend on a diagnosis.... Thus, pathologizing gender identity is equivalent to violating not only comprehensive health but also freedom of choice and realization of sexual, mental or reproductive health”.¹⁹ This made LGBTI people distance themselves from the health system, with all the risks that this implies.

This aspect was taken into account in 2017 when the Court received a request from Costa Rica for an advisory opinion on Gender identity, equality and non-discrimination with regard to same-sex couples. In response to this, Advisory Opinión 24/17, the Court identified some relevant points.

First it defined Gender identity as the internal and individual experience of gender the way each person feels it, which may or may not correspond to the sex assigned at birth. This includes the personal experience of the body as well as other expressions of gender, such as dress, speech and mannerisms.

¹⁸ In Argentina, for example, the Blood Donation Law prevented homosexual men from donating blood if they had had homosexual relations in the last 6 months. See, Monti, N./ Von Opiela, C. (2013).

¹⁹ According to the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (A/73/152) this includes rape and other sexual and gender-based violence, forced sterilization, so-called “conversion therapy” and surgery without consent; blatant discrimination and abuse at the hands of health systems and providers; increased risk of HIV/AIDS and other communicable diseases resulting from exclusionary prevention and education programs; denial of essential health services, including sexual and reproductive health and gender-affirming services; and increased incidence of severe mental health harms such as trauma-related depression, anxiety and suicidal ideation. On the different models of medicalization and self-determination in the word see Jaramillo Sierra, I./ Carlson, L. (2021).

Secondly, it held that Sexual orientation, gender identity and gender expression are categories protected by Article 1.1 of the Convention; this implies that when the State uses one of these categories to make distinctions, the Court considers that there is evidence that the State has acted arbitrarily. Thus, the full respect for the rights of certain groups or persons identified by their real or perceived sexual orientation, gender identity or gender expression cannot be considered a valid argument to deny or restrict their human rights.

Third, the protection of people's right to private life, including the capacity to develop their own personality and aspirations, determine their identity, and define their personal relationships. This concept encompasses aspects of social and physical identity, including the right to personal autonomy and personal development, and the right to have and develop relationships with other human beings and with the external world.

Another argument and one with structural relevance is that of the change of name, the rectification of the image and the rectification of the sex or gender in the public records and identity documents, so that they correspond to the self-perceived gender identity. Consequently, States are obliged to recognize, regulate and establish the appropriate procedures which should comply with the following requirements established in this Opinion: they should be based on the free and informed consent without involving requirements such as medical and/or psychological or other certifications such as evidence of surgery and/or hormonal therapy; they should be confidential and universally available and, insofar as possible, cost-free.

On the other hand, different treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family does not pass the strict test of equality (Clérico, Aldao, Ronconi, 2017), since Article 17 ACHR protects the family ties that may derive from a relationship between persons of the same sex. Thus, States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to heterosexual families. To this aim, even States that face institutional difficulties to adapt the existing regulations should do so on a transitional basis, while promoting such reforms in good faith.

After this advisory opinion, many States, such as Costa Rica,²⁰ Ecuador²¹ and Chile²², approved same-sex marriage. Other States, such as Argentina, Ecuador and Chile approved norms to recognize gender identity.²³ The recognition of rights between same-sex couples and the right to sexual and gender identity are essential when it comes to access to the right to health.

²⁰ In the case of Costa Rica this Advisory Opinion was fundamental. See, Constitutional Chamber of the Supreme Court of Justice of the Republic, (May, 26th. 2020).

²¹ Constitutional Court of Ecuador, Judgment 10-18-CN and Judgment 11-18-CN (June, 2019).

²² Law 21400 (December, 2021).

²³ Argentina (Law 26.743-2012-); Ecuador (Ley Orgánica de Gestión de la Identidad y Datos Civiles-2016-); Colombia (T-063/15. Derecho a la corrección del sexo en el Registro Civil y demás documentos de identidad de las personas trans); Chile (Ley 21120-2018-)

With these advances, both in the arguments of the Court and in the recognition of rights in various countries of the region, in 2021 the Court resolved the case “*Vicki Hernández vs. Honduras*”, condemning Honduras for the death of Vicky Hernández, a trans woman, sex worker and human rights defender. Besides, responsibility was attributed to the Honduran State, as the participation of state agents in the events was proven. It was the first case in the international level in which a State was condemned for the death of a trans person applying a women's treaty. The Court considered Vicky was killed due to her gender identity and expression, thus going further with its standards on *gender identity* as a protected ground. In fact, it applied Belém do Pará Convention, which claims that gender identity is a factor to be taken into account when analyzing the intersectional violence suffered by women. The Court argued that “this violence is based on a system of patriarchal domination deeply-rooted in gender stereotypes and constitutes a manifestation of the historically unequal power relations between women and men. Violence against persons based on gender identity or expression, and specifically against trans women, is also based on gender, as a social construct of the identities, attributes and roles that society assigns to women and men” (para. 128).²⁴ With that the IACtHR maintained that the duties of enhanced due diligence in the area of prevention, investigation, prosecution and punishment of serious acts of violence is also applicable with respect to trans women.²⁵ Thus, this case represents a great advance in the breakdown of binary recognition, placing the need for an evolutionary interpretation of rights at the center of the scene (Alterio, 2022).

Thus, it is possible to see how the Court advanced in the recognition of sexual rights, first focusing on the rights of same-sex couples but gradually expanding its scope to those regarding gender identity. Likewise, in the last cases analyzed the Court didn't just invalidate discriminatory normative but rather established specific obligations for the States of the region to expand the enjoyment of rights for LGBTI people,²⁶ shifting the focus from pathologization to autonomy.²⁷ That is a consequence of the evolution of the paradigm on gender equality law. As Pou Gimenez said “in the course of a couple of decades, equality law has gone from a paradigm of protection, to one of equal treatment, to one of inclusion, to one of structural transformation. The earlier paradigms do not fade away completely and retain a degree of influence, but it is the new ones that provide the core orientations” (2023: 979). The recognition of identity is very important in the health system. First because it promotes the elimination of violence against this group. Secondly,

²⁴ The dissenting opinion of Judge Elizabeth Odio Benito considered that the Convention of Belém do Pará was not applicable in the case since its purpose is to protect biological women. In this way, the violations of the alleged rights had to be analyzed taking into account that Hernández's aggressors committed these acts because they perceived him “as a trans person, and not because he was a woman”.

²⁵ The Court had upheld it regarding homicides and sexual crimes committed against women (“González and others vs. Mexico”, “Véliz Franco vs. Guatemala”, “López Soto vs. Venezuela”) and LGBT people (“Azul Rojas Marín vs. Perú”).

²⁶ Recognition of trans people and other members of the LGBTI community in the civil registration, as well as recognition of the rights of same-sex couples; guarantee participation of trans people and organizations dedicated to the protection of their rights in the design and execution of training measures for security forces; among others.

²⁷ In this sense, ESCRC, General Comment # 22.

it enables LGBTI people to access the health system, without fear of being judged, which improves their health (taken a comprehensive health conception) and life conditions in general.²⁸ It means adopting a social model that implies gender identity as neither a mental disorder, nor an individualistic or private issue but a social matter which involves the state as a provider to make your rights effective (Litardo, 2022).

Subsequently, in *Advisory Opinion No. 29* regarding the rights of individuals under conditions of detention, the Court consolidated valuable standards related to health and sexual rights of LGBTI people. It highlighted the limits of the binary prison paradigm, the need to respect gender identity and the need to hear the prisoner's opinion regarding their accommodation in the prison, providing options depending on each case. The Court held that "within the framework of medical care, it is the duty of States to ensure that, in no treatment or medical advice, sexual orientation and gender identity should be addressed as diseases" (para. 266). In addition, it emphasized that trans people in prison must be guaranteed access and continuity of the medical treatment they require, recognizing "any particular need based on their sexual orientation or gender identity, even with regard to reproductive health, and hormonal or other types of therapy, as well as sex reassignment treatments if they wished" (para. 270).

Despite these advances, there are still standards to be improved, such as those regarding prostitution or sexual work. In this sense, in the *Advisory Opinion 27/21* the Court already referred to "sex workers" (para. 182) but did not go further or open the debate on the implications of adopting one position (prohibitionist/abolitionist) or the other (regulationist).²⁹ Another important topic is the necessity for recognizing a third sex,³⁰ guaranteeing access to technological progress, for example, in fertilization or interventions in the body.³¹ Intersectionality is another important challenge the Court should consider for example relating gender identity and childhood standards; since it does not mention anything regarding children's access to health services without parental consent or other limitations to their rights. Another example is the right to sexuality for people suffering HIV, as the Court has elaborated standards regarding this disease³² but none is related to sexuality. In addition, the Court should elaborate standards on the right to sexuality for people with disabilities, specifically regarding fully informed consent to medical procedures and treatment, among others. I will return to some of these ideas in the next section.

2. REPRODUCTIVE RIGHTS

Reproductive rights imply the recognition of the basic rights to decide if you want to have children, and if so the number and the interval between their births; to have the

²⁸ A/HRC/50/27, 12 July 2018.

²⁹ About this, see Peter de Marneffe (2009).

³⁰ In this sense, different positions argue "that self-determination in sex leads to the deconstruction of sex" Jaramillo, 2021, p. 23.

³¹ The question is, should the health system comprise these needs? If we take health rights seriously the answer is yes (Ronconi, 2012).

³² Gonzales Lluys vs. Ecuador (2015) and Cuscul Pivaral vs. Guatemala (2018).

information and the means to do so; to get the highest standard of sexual and reproductive health, including the right to make reproductive decisions free from discrimination, coercion and violence. So, their recognition is very important, not only for women but also for other groups (men, trans, and others) although it is especially relevant in the life of women because society points them as almost exclusively responsible for reproductive matters.

In this regard, the Court consolidated some standards specially related to women's reproductive rights such as when life begins and the role of reproductive technologies, informed consent and gender stereotypes in the context of women's delivery, criminalization of obstetric emergencies and prohibition of obstetric violence.

2.1. The Beginning of Life and Reproductive Technologies

In the judgment *Artavia Murillo v. Costa Rica* (2012), the IACtHR ordered Costa Rica to invalidate a Supreme Court decision that prohibited in vitro fertilization (IVF) in order to legalize and regulate this practice. The IACtHR held that "personal decisions" to have biological children through IVF were protected under the ACHR. Although the Court does not speak of reproductive freedom and women's rights specifically, the arguments provided are relevant considering the following aspects:

The first and main argument it uses, applying various interpretive approaches, is that the human embryo is not a person and is therefore not protected by the right to life provision under the ACHR (art. 4.1). It argues that the words "in general" of art. 4.1 indicate that the protection of life is not absolute but gradual and incremental and exceptions to the general rule are allowed. Thus, it was made clear that life protection increases gradually as the embryo develops.

Secondly, the Court determines that banning IVF constitutes an interference in private life as it restricts autonomous decision-making related with personal reproductive health. Specifically it recognizes that this prohibition has a discriminatory impact based on disability to procreate, gender and socioeconomic status (Teles Pires, 2017) since they don't have access to practices assisting them to have children.

In conclusion, the judgment ordered Costa Rica to legally authorize IVF creating a regulatory framework to support it, as well as subsidizing it through the social security system as a form of reparation.

This case is very important in the region as its impact is still latent. On the one hand, because this was the first case where the Court did recognize reproductive rights as human rights although included within the rights to privacy, family, liberty, and integrity.³³

³³ Some time later, the Court had to rule on a request for provisional measures regarding a Salvadoran woman who had requested a therapeutic abortion since she was seriously ill and the fetus was anencephalic. It had been denied because abortion was penalized in her country. The Court granted the provisional measures taking into account the woman's serious state of health, the urgency, the risk of irreparable damage that continuing the pregnancy implied for her physical and mental health. IACoHR, Matter of B. regarding El Salvador. Provisional Measures. Order of the Inter-American Court of Human Rights of May 29, 2013.

On the other hand, since the Court was conclusive when holding that the right to life is not absolute and embryos have only incremental protection which is relevant for the different countries of the region as when seeking progress for more permissive laws on abortion, the right to life appears as an insurmountable barrier (Sutton and Vacarezza, 2021). This argument has had a very strong impact when it comes to advancing norms for the decriminalization of abortion in the region.³⁴

Moreover this decision could have a very strong impact in the recognition of reproductive rights of LGBTI people in the region, since through IVF techniques and other tools (reproductive technologies) possibilities are opened for gestating couples or people who cannot achieve conception naturally.³⁵ Thus, this represents an advance beyond the specific case that was claimed such as the right of LGBTI people to benefit from scientific progress on reproductive techniques abandoning the binary logic that used to characterize it (Lamm, 2019). Finally, the Court claimed that the State must also guarantee IVF through the public health system for reparation, which it is important in contexts of extreme poverty since all people, not just those who can pay for it, can have access to it.

2.2. Informed Consent and Gender Stereotypes in Sexual and Reproductive Health. The Obligation of States in the Context of Women's Delivery

In the case *I.V. vs. Bolivia* (2016) the IACtHR condemned Bolivia for the non-consensual sterilization of a poor, migrant woman, who lived in Bolivia as a political refugee, during the delivery of her second daughter. This was the first case where the Court produced standards about informed consent in the health context, especially in reproductive rights, under both the ACHR and the Convention of Belém do Pará.

After being persecuted, arrested and tortured in Peru, her country of birth, I.V. settled as a refugee in Bolivia. In 2000, after her water broke, she went to the emergency room of the Women's Hospital in La Paz where she received a cesarean section. During the procedure, complications arose and the following morning, the doctor informed I.V. that her Fallopian tubes had been tied, arguing that future pregnancies would be dangerous for her which meant she would not be able to have children again. The doctor argued that he had obtained I.V.'s verbal consent during the trans-operative period although at that moment she was under epidural anesthesia.

This case is very important because, even though the Court does not recognize the violation of the right to health, it establishes the following relevant standards:

-regarding consent: the Court acknowledged that informed consent ensures autonomy as an inalienable element of a person's dignity (Hevia and Constantin, 2018). In this sense, the IACtHR said "the existence of a connection between physical and psychological integrity with personal autonomy and the freedom to make decisions about

³⁴ About the situation of Latin America abortion Law and advances, see Ramón Michel (2020); Bergallo/Ramón Michel (2016).

³⁵ For example, two cis men, or a couple of a cis man with a trans man, or a single woman or man, or a cis woman whose partner is a trans woman, among others (Lamm, 2019).

one's body and health requires, on the one hand, the State's ensuring and respecting decisions and choices freely and responsibly made and; on the other hand, guaranteeing access to relevant information so that people are able to make informed decisions about the course of action regarding their body and health according to their own plan of existence" (para. 155).

The Court held that there is an international obligation of the State to obtain the patients' consent for medical acts, especially in the case of women's sterilizations by health workers considering the stress and vulnerability under which women are during or immediately after childbirth or cesarean section (para. 183). Thus, the patient's consent, free, full and informing the possible future consequences has to be prior to decision making. This standard of informed consent has a relevant impact not only in cases of pregnancy but also in other situations regarding health. That is the case of trans people since consent, as Litardo says, "should have a non-pathologization approach, which means that you don't need to have a medical diagnosis based on your gender identity so as to have full access to healthcare: like in any other medical intervention, your informed consent is enough" (Litardo, 2022). This was reinforced later by the Court, in the recent Advisory Opinion No. 29 (2022).

-regarding discrimination: the Court identified two situations of discrimination:

First the woman's special vulnerability since she was poor, a refugee, a migrant of Peru, delivering a baby (para. 318 and ss). The IACtHR pointed out that women's freedom of autonomy in sexual and reproductive health tends to be analyzed under the lens of social determinism (Hevia and Constantin, 2018), which implies that people's actions are determined by factors such as their belonging to a certain social class, the way in which they participate in productive structures, their educational background, and the cultural traditions and social habits of their environments, among others. Adding to this, IV was in the middle of delivery, which made her even more vulnerable. Thus the Court claimed that I.V. suffered *intersectional discrimination*.³⁶

Second, the power of doctors in general and especially during women's delivery or in situations related to sexual and reproductive health which is also related to gender stereotypes.

-regarding gender stereotypes: the IACtHR showed a relation between forced sterilization and gender stereotypes since women have historically been considered, even within health practices, as dependent and subordinate due to power relations regarding gender. In this sense, it concludes that "it is transcendental to prevent the personal doctor from inducing the patient to consent as a result of the lack of understanding of the information provided, and to refrain from acting without it, particularly in cases where the woman has limited economic resources and/or low levels of education, under the pretext that the measure is necessary as a means of population and birth control. The latter can, in

³⁶ This is a concept that the Court returns to in other judgments. For example, "Gonzales LLuy vs. Ecuador", "Poblete Vilches vs. Chile", "Employees of the Fireworks Factory vs. Brazil" and others.

turn, lead to a situation in which decision-making is induced in favor of the sterilization of women and not men, based on the stereotype that women are the ones who hold the primary role of procreation and must be responsible for contraception” (para. 188).

The Court reaffirms in this case that people are autonomous, even before medical procedures, breaking the paternalistic logic so powerful in the context of medicine. In this sense, “the stereotypes of maternity, about the role of women and violence towards non-normative gender identities can constitute real barriers to access to sexual and reproductive rights, because they are still rooted in the effectors of health and in state practice” (Brichetti, 2021: 40, my translation). Besides, the relevance of linking gender stereotypes and the effective exercise of rights arises also in relation to gender identity and sexual orientation. For example, in hormonal therapy and gender reassignment treatment or surgery.

This case is also important because of the remedies ordered by the Court, many of which seek to have a structural impact guaranteeing non-repetition. In this regard, it ordered:

- to design dissemination material that explains synthetically, clearly and easily accessible the rights of women in terms of their sexual and reproductive health, with specific mention of prior, free, full and informed consent
- to create education and training programs aimed at medical students and doctors, as well as all health workers on issues regarding informed consent, gender-based discrimination and stereotypes, and gender-based violence.

On the other hand, in the case of I.V., the court ordered to effectively guarantee psychological treatment. With this, it made it clear that in order to guarantee access to health, it is not enough to have a public system; it is also necessary to provide certain structural conditions; health is much more than having access to a hospital, it implies that people should be able to arrive at such a hospital, that doctors should be available to treat them, that quality of attention should be guaranteed, among other conditions.

In conclusion, with this case, the Court recognized the structural context in which violations to women’s sexual and reproductive rights occur and provided fertile ground for further discussions on the ways in which discrimination and human rights intersect (Hevia and Constantin, 2018).³⁷

2.3. The Criminalization of Obstetric Emergencies

In the case “*Manuela and others vs. El Salvador*” (2021) the IACtHR found El Salvador responsible for violations of Manuela’s rights to personal liberty and presumption of innocence during her pre-trial detention; her rights to judicial guarantees, personal

³⁷ Other international human rights bodies have in fact advanced further. For example, the CEDAW Committee recognizes that in certain cases violations of sexual and reproductive rights may constitute torture or cruel, inhuman or degrading treatment. A/HRC/22/53; CEDAW Committee, General Recommendation # 35 (2017).

integrity, and equality before the law during her trial; and her rights to life, personal integrity, health, private life, and equality before the law while incarcerated.

Manuela lived in a poor context, in a farmhouse with her parents and her two children where she moved after her husband left to look for a job in the US. Both she and her parents were illiterate. Since 2006 she was in hospital several times for severe headaches and lumps in her neck which were diagnosed as tiredness, gastritis, and other mild illnesses.

In February 2008, when she was 32 years old, she experienced severe pelvic bleeding and finally lost consciousness. Her family took her to the local public hospital where she was diagnosed with out-of-hospital delivery. Before receiving medical treatment, she was reported to the prosecutor because she was suspected to have had an abortion. While she was handcuffed to her hospital bed and interrogated by the police without a lawyer, police officers aggressively questioned her parents, forcing her father to sign a document he could not understand since he could not read. It was in fact a formal accusation against Manuela, later used as a key piece of evidence against her. In the trial, where she was represented by a poorly prepared lawyer, Manuela was sentenced to 30 years in prison for aggravated homicide. She died in prison in April 2010 after being diagnosed with Hodgkin's lymphoma because she was not provided with consistent chemotherapy. This case represents an advance in different aspects:

First, the Court analyzed the case, taking into account the *context* in which abortion was criminalized. In 1998, in El Salvador, a new Criminal Code had entered into force in which the non-punishable causes of abortion were eliminated and the classification as attenuated homicide in cases in which the "mother kills her child during the birth or within seventy-two hours after" was ruled out; In addition, it established that doctors, pharmacists, patients and other people who practiced professions related to health had to report any suspicion of abortion to the justice system. In Manuela's case the Court recognized the strong impact of this legislation on the criminalization of women who suffered obstetric emergencies in El Salvador were pregnant women requiring emergency care are often accused of abortion, a charge then augmented to aggravated homicide, which requires automatic pretrial detention and can lead to a 40-year prison sentence. Consequently, approximately 200 women and girls have been prosecuted since the complete criminalization of abortion in 1998 (Viterna/ Bautista, 2017; Peñas Defago/ Canaves, 2018). This shows that Manuela's was not an isolated case.³⁸

Second, the Court took into account the *discrimination and stereotypes* involved in the case. The fact that Manuela was a young, poor, rural woman, without education and with rudimentary access to health service was a cause of special discrimination due to the intersectionality of the factors involved.³⁹ And it was also a case of indirect discrimination

³⁸ Different reports and observations from human rights treaty bodies warned about this situation in El Salvador.

³⁹ In this sense, "in a rights framework, health is produced, experienced, and understood in the social, political, historical, and economic contexts in which we live. This perspective forces us to see the suffering

as she lived in a patriarchal and unequal society where the absolute prohibition of abortion rules. This regulation, apparently neutral, has particularly disproportionate negative repercussions only on specific persons or groups due to the existence of stereotypes in both health agents and judicial operators and the ambiguity of the legislation ruling in El Salvador regarding the obligation of doctors to both keep secrecy and report crimes, which is applied especially in public hospitals and not in private clinics. The stereotype of “good mother” is associated with women, especially when they are poor and thus, they are stigmatized when they resort to abortion without further ado.⁴⁰ In Manuela's case, no health agent wondered in which health condition she had arrived at the obstetric emergency; instead, it was assumed that she had had an abortion. This wouldn't have happened if she had gone to a private hospital, which makes it evident that this “legislative ambiguity” does not affect women who have sufficient financial resources (parr. 254).

Finally, the Court established standards regarding *professional medical secrecy* and the protection of Manuela's sensitive data. Due to the disclosure of medical information women who need medical assistance may avoid going to a hospital for fear of being criminalized, which can result in inadequate access to medical care (Brichetti 2021, p. 37). Thus, the Court reinforces the obligation to keep professional secrecy and guarantees for women who attend hospitals, as it was outlined in the case “IV vs. Bolivia”. On the other hand, negative gender prejudices and stereotypes affect judicial agents' objectivity, closing possible lines of investigation into actual facts. Thus, the Court concluded that Manuela's deprivation of liberty prevented her from receiving adequate medical care for the illness she developed. These omissions in medical care also constituted a breach of the duty to guarantee Manuela's right to life. The entire healthcare process should be free of gender stereotypes⁴¹: they must be eradicated not only from health (IV vs. Bolivia) but also from judicial and/or research operators.

However, the criticisms to this sentence are very strong because, although the Court recognizes and identifies the effects of the absolute prohibition of abortion, it does not declare that the legislation in El Salvador is contrary to the ACHR. The Court only mentioned the disproportionality of the punishment (para. 162 and ss). In this sense, the Court fails to declare that the absolute criminalization of abortion (and its impact on poor rural women and girls) was the real reason to prosecute Manuela. The Court could have reinforced the standards established in “Artavia Murillo” by claiming that the protection of life according to the ACHR is not absolute and thus legislations such as those of El Salvador would be incompatible with the Convention. This was a failed opportunity to

that is not the result of “natural” biological causes but rather stems from human choices about policies, priorities, and cultural norms, about how we treat each other and what we owe each other” (Yamin, 2008: 47).

⁴⁰ About stereotypes in the IACtHR, see Undurraga (2017), Gauché Marchetti (2020), Clérico/ Bórquez (2021), Ronconi (2022), among others.

⁴¹ In another sense, like in *Guzmán Albarracín vs Ecuador* (2020), the Court reinforced the importance of comprehensive sexual education to guarantee autonomous decisions regarding sexual and reproductive health, highlighting the importance of leaving the protectionist logic behind so as to guarantee public sexual education policies that improve the conditions in which people make their decisions related to sexual and reproductive health. See, Martínez Coral and Martínez, 2021.

broaden the debate on abortion in the region.⁴² Although international instruments do not speak of the right to access abortion, the guidelines on the right to life, equality and autonomy seem to indicate that this is a right. Access to safe and legal abortion is a very important toll for the autonomy and health rights of women.

2.4. Obstetric Violence

For some years the IACtHR had been developing standards regarding sexual and reproductive rights. However, it had not yet developed obstetric violence as a concept in itself, allowing several opportunities to pass. In fact, obstetric violence marked the facts of the cases *IV vs. Bolivia* and *Manuela vs. El Salvador* and yet the IACtHR didn't recognize it. Then in *Advisory Opinion 29/22* appeared a related concept but it was with *Brítez Arce's* case that obstetric violence was more thoroughly developed, which represents a great advance in a region where the rates of maternal deaths and reports of violence in health centers are high.

Advisory Opinion N. 29 (2022) refers for the first time to the concept of *obstetric violence*, specifically related to pregnant women who are in conditions of detention during childbirth, postpartum and breastfeeding, applying the standards of the Belem do Pará Convention in terms of state obligations. This Convention establishes that states have to prevent this type of violence in prison settings, to guarantee contact with health personnel and family members of women in labor in a simple and culturally acceptable manner and to guarantee access to justice and adequate reporting channels. But this standard was not enough because it comprised only those women in prison.

But it was with the *Brítez Arce vs Argentina (2022)* case that the Court deepened the concept of obstetric violence. When Cristina Brítez Arce, a 38-year-old Paraguayan lady was nine months pregnant, she arrived at hospital with lumbar discomfort, fever, and little fluid loss from her genitals. An ultrasound was performed, which indicated a dead fetus, for which she was admitted to induce labor. Cristina died in hospital a few hours later. Although she had had a risky pregnancy, during that period she had received neither adequate information nor the right attention. So in fact this medical lack of attention was the real cause of her death after entering hospital. Nevertheless, according to the death certificate, the victim died that same day due to non-traumatic cardiorespiratory arrest. As a result of this case, the Court held that States have the obligation to provide adequate, specialized, and differentiated health services during pregnancy and childbirth within a reasonable period before and after childbirth, in order to guarantee the mother's right to health and prevent mortality and maternal morbidity. This implies the obligation to guarantee: a) accessibility to health information, especially on reproductive and maternal

⁴² In this sense, progress in the region is few. Colombia's Constitutional Court recent Decision C-055 of 2022, which decriminalized abortion during the first 24 weeks of pregnancy, is historic for three main reasons. In Argentina in 2020 the Congress approved the voluntary interruption of pregnancy, in México in 2021 the Supreme Court rules criminal penalties for abortion unconstitutional, among others. About this situation, see Bergallo, Jaramillo, Vaggione (2018). On the other hand, the Court must come out strongly in favor of safe and legal abortion access and have others cases to do so. For example, in *Case Beatriz and others vs. El Salvador*. More information in https://www.corteidh.or.cr/docs/tramite/beatriz_y_otros.pdf

health during all stages of pregnancy, which must be based on scientific evidence, issued without bias, free of stereotypes and discrimination;⁴³ b) a birth plan agreed in advance with the health institution that will assist the birth; c) the right to mother-child contact.

Most importantly the Court held that *obstetric violence, prohibited by different human rights instruments, is a form of gender-based violence exercised by those in charge of health care on pregnant people, during access to services that take place during pregnancy, childbirth and postpartum*. This is made evident mostly, although not exclusively, by a dehumanized, disrespectful, abusive or negligent treatment towards pregnant women; by the refusal of treatment and complete information about the state of health and the suitable treatments; by forced or coerced medical interventions, and by the tendency to pathologize natural reproductive processes, among other threatening manifestations in the context of health care during pregnancy, childbirth and postpartum.

The cases analyzed made it possible to identify important advances in the field of reproductive rights, especially regarding the relevance of informed consent for medical practices, the importance of technologies as forms of reproduction, and developments in the recognition of obstetric violence. It also revealed the characteristics that have marked these cases and have allowed the Court to further develop the concept of stereotypes. However, this concept still needs to be expanded abandoning the isolated classifications to welcome more complex forms that interact with each other (combined stereotype) (Clerico/ Bórquez, 2021).

In addition, context has to be observed when it comes to sexual and reproductive rights so as to provide a comprehensive solution. In this sense, the Court developed relevant standards for women and LGBTI people in contexts of violence, poverty, imprisonment and rurality but did not, for instance, develop similar standards for children, people with disabilities and indigenous peoples although there are clear guidelines on sexual and reproductive rights in, for example, the Committee on the Rights of the Child or in the Follow-up Mechanism to the Belem do Pará Convention (MESECVI), among others.

Another relevant issue that has not been developed by the Court is conscientious objection that has become the mechanism through which many professionals avoid providing this population with the necessary health service, even refusing to refer their patients to other health care institutions where the practice in question should be guaranteed.

All these cases are important since they show not only remedies but also actions to prevent violations of sexual and reproductive rights. In this sense, we should highlight that the IACtHR recognizes the relevance of comprehensive sexual education as a tool to develop women and LGBTI people's autonomy (Ronconi, Espiñeira, Guzman, 2023).

3. CONCLUSION

A lot of progress has been made in the region regarding sexual and reproductive rights. Several causes have contributed to these advances such as cultural and political

⁴³ In the same sense that the IACtHR hold in the case "IV vs. Bolivia".

demonstrations, legal activism, and others. The IACtHR has been a very important actor in this context producing advances in the recognition of these rights and their interpretation.

For example, in the definition regarding when life begins, the obligation of States about free, prior consent in the context of women's delivery, professional confidentiality, personal autonomy, obstetric violence, among others. These recognitions play a very important role in the region, since it must be applied by national judges under the doctrine of "conventionality review". Nevertheless, there are a lot of situations where human rights standards should be expanded, because they are being discussed in academic analysis, but have not yet reached everywhere, especially those people such as health operators who must apply these standards in the first stage of the problem. Here, then, there is a great challenge for the States of the region, even for the Inter-American Court itself.

In addition, as we have already mentioned, it is necessary for the Court to reinforce the concept of inequality and stereotypes. Especially how they operate with respect to women and LGBTI people in contexts of intersecting inequality.

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