



WHO IS AFRAID OF GENDER (DIVERSITY)?

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ATALA RIFFO AND DAUGHTERS V. CHILE (FEBRUARY 24, 2012)



91. “(...) the Inter-American Court establishes that the sexual orientation and gender identity of persons is a category protected by the (American) Convention.”

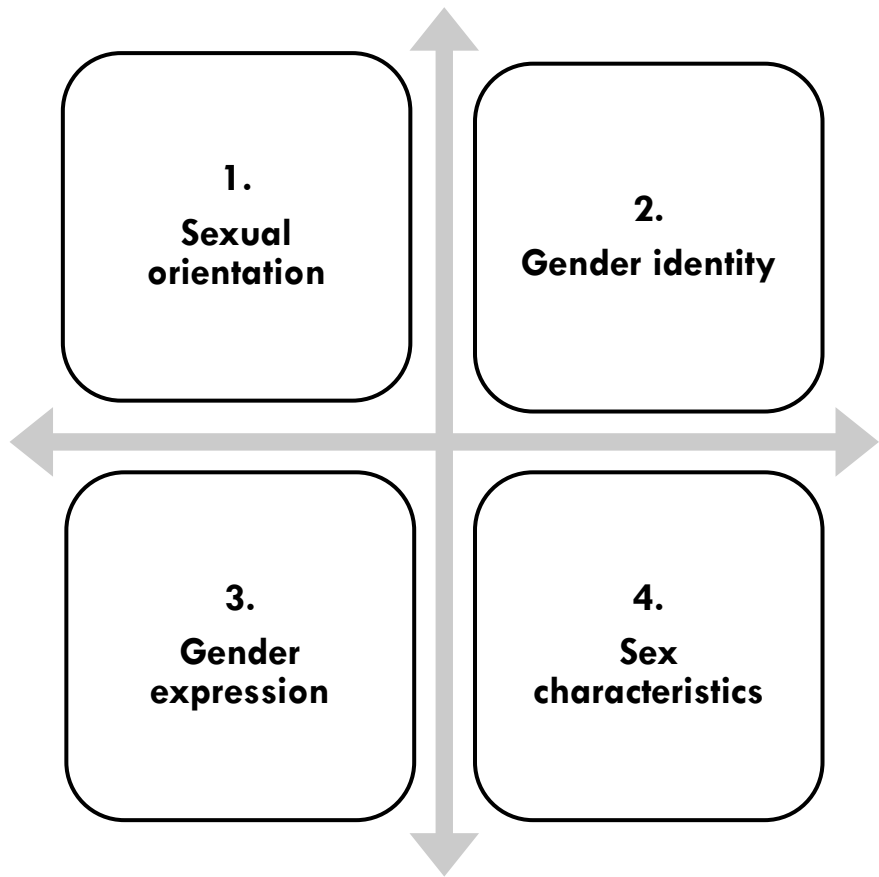
VIOLENCE AGAINST LGBTI PERSONS (2015)



Sex as a social construct

16. "(...) sex assignment is not an innate biological fact; rather, persons are socially assigned a sex at birth based on the perception others have of their genitals."

VIOLENCE AGAINST LGBTI PERSONS (2015)



Advisory Opinion OC-24/17
of November 24, 2017:

- 1. Sexual orientation*
- 2. Gender identity*
- 3. Gender expression*

AZUL ROJAS MARÍN AND OTHER V. PERU (MARCH 12, 2020)



Violence against LGBTI persons
(Non-lethal violence)

VICKY HERNÁNDEZ AND OTHERS V.
HONDURAS
(MARCH 26, 2021)



Violence against LGBTI persons
(Lethal violence)

VICKY
HERNÁNDEZ
AND OTHERS VS.
HONDURAS
(MARCH 26,
2021)

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129. (...) Article 9 of the Convention of Belém do Pará urges States, when adopting measures to prevent, punish and eradicate violence against women, to take into account “the vulnerability of women to violence by reason of, among others, their race or ethnic background, or their status as migrants, refugees or displaced persons.” This list of factors is not numerus clausus, as indicated by the use of the expression “among others.” Thus, it may be considered that, in certain circumstances such as those of this case which relates to a trans woman, gender identity constitutes a factor that may contribute, intersectionally, to the vulnerability of women to gender-based violence. Indeed, the Court has determined that sexual orientation and gender identity are categories protected by the American Convention and that any discriminatory law, act or practice based on a person’s sexual orientation or gender identity is prohibited. In addition, the Court has indicated that gender identity is “the internal and individual experience of gender as each person feels it, which may or may not correspond to the sex assigned at birth,” so that “recognition of gender identity is necessarily linked to the idea that sex and gender should be perceived as being part of the constructed identity that is the result of the free and autonomous decision of each person and without this having to be subject to their genitalia.”

VICKY
HERNÁNDEZ
AND OTHERS VS.
HONDURAS
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2021)
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133. Based on the above and on an evolutive interpretation, the Court considers that, in the sphere of application of the Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women, there is also a reference to situations of gender-based violence against trans women, as in this case.

134. In addition, the Court recalls that, when applying the said treaty, it has developed the notion of enhanced due diligence. This signifies applying a gender perspective in the investigation and prosecution of cases of violence against women, including violence against trans women, as well as avoiding chronic impunity that sends a message of tolerance and permits a repetition of the facts. The purpose of the treaty is to achieve the eradication of this phenomenon which is structurally rooted in our societies.

VICKY HERNÁNDEZ AND OTHERS VS. HONDURAS (MARCH 26, 2021)

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135. In the preceding sections, the Court has examined the acts of violence against Vicky Hernández and her murder and concluded that the State was responsible for the violation of her rights to life and personal integrity. It has also considered that there is sufficient evidence to conclude that these facts occurred owing to her gender identity as a trans woman. Furthermore, the Court underscored the State's enhanced obligation to investigate such facts, and also the omissions that occurred owing to the failure to consider the particularities involved in the investigation of a crime related to the victim's gender identity. Moreover, in this case, it was very relevant that Vicky Hernández was a trans woman sex worker living with HIV, and that she carried out activities in defense of the rights of trans women. These characteristics placed Vicky Hernández in a particularly vulnerable situation where numerous factors of discrimination converged intersectionally.

PARTIALLY
DISSENTING
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13. (...) I have to admit that I do not understand these new concepts that, under the guise of struggles by historically marginalized groups, which is absolutely true, seek to erase what is also irrefutable: the concept of sex.

PARTIALLY DISSENTING OPINION OF JUDGE ELIZABETH ODIO

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15. To conclude this part of the analysis, I reiterate my position that the central issue of feminism (and, in this case, the violence against women due to being women) is women and the specific oppression that they suffer, its origin and impact. If we confuse the feminist struggle and substitute the subject of feminism, if the subject of feminism is no longer the biological woman and becomes a strange and confused variable of subjective identities, we should reflect on and raise the issue of the more than probable negative impact that it would have on decades of feminist theory and struggle. Moreover, not only feminism would disappear, but also the theory of human rights that is also based on objective and scientific categories, rather than on feelings or self-perceptions. Thus, we should ask ourselves: if sex, as a substantive and scientific category disappears, absorbed by “gender identity,” an individual subjective perception, what would gender violence be based on? And what would the feminine sex be reduced to? How would rape and other crimes of sexual violence against women be documented? How would the violence suffered by trans persons be documented if the sex change is something confidential that cannot be documented? And salary differences? And discrimination in access to formal and informal education at all levels? Many more questions arise. But these few are sufficient to reveal the chaos and retrogression that we are facing.

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34. Understanding the causes of violence against vulnerable groups (in this case, women and trans persons) is essential in order to attack the root of the problem. Mixing up or even merging these different realities merely leads to confusion – and, therefore, a hindrance – that does not benefit either of the two groups. This is why the judgment, by equating “gender” with “gender identity” commits the error of ignoring the differentiating elements between these types of violence and completely distorts the analysis of the causes and consequences of such violence. In sum, it is my opinion that the judgment that is the subject of the critical analysis should have focused on the violence perpetrated against Vicky Hernández due to the fact that those who attacked her perceived her to be a trans person, and not for being a woman.

CONCURRING OPINION OF JUDGE PATRICIO PAZMIÑO

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8. This preamble serves as a basis to introduce the discussion that occurred within the Court on whether, from an ontological, phenomenological or finalist perspective, trans women should be included within the sphere of protection of international law that is granted to cisgender women based on the specific international instruments and the case law that the Inter-American Court has developed on violence and discrimination against women. Evidently, any approach to this issue means that not only should the aforementioned elements be taken into consideration, but also the pro persona principle, and the progressivity of rights. (...) As in the case of the American Convention, the Convention of Belém do Pará and, in general, all human rights treaties “are living instruments that must evolve with the actual circumstances.”

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11. (...) according to the case law of the Inter-American Court itself, trans women are protected by the Convention of Belém do Pará because they are women.

13. (...) as indicated by expert witness Carlos Zelada “[w]hen we speak of trans women and transvestites, we are speaking of women whose gender expression and identity do not usually fit in with the traditional and, above all, static notions of femininity.” International human rights law cannot ignore these advances, moving away from its ultimate goal which is the protection of the individual, especially recognizing the extreme vulnerability of trans women in our region.