

SYMPOSIUM ON LATIN AMERICAN INTERNATIONAL LAW

LATIN AMERICAN FEMINISTS, GENDER, AND THE BINARY SYSTEM OF HUMAN RIGHTS PROTECTION

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On March 26, 2021, the Inter-American Court of Human Rights found Honduras responsible for the killing of Vicky Hernández, a trans woman and human rights defender.¹ The *Vicky Hernández et al. v. Honduras* judgment is the first in which an international court has protected a trans woman by applying a human rights treaty that protects women. It thus provides an opportunity to analyze the impact of feminist ideas on the system of human rights protection at the regional level, with implications for international law more generally. In this essay, I defend the Inter-American Court's majority decision against the dissenting opinions, by arguing that the political subject of human rights is dynamic and emergent and, therefore, positive law is often one step behind in the struggles for recognition. For this reason, we need interpretations of rights that are inclusive, that evolve, and that push for the destabilization of law as binary, allowing the emergence of a more egalitarian legal system that recognizes intersectionality.

The decision in the case of Vicky Hernández takes a step in this direction. The majority of the judges on the Inter-American Court maintained that, in order to activate the instruments of enhanced protection—such as the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (hereinafter, Convention of Belém do Pará)²—the category of “women” is not bound to particular genitalia.³ However, there were two dissenting opinions that insisted on not confusing the concept of “gender” with the concept of “sex.” This minority view, which a few decades ago was only held by conservatives,⁴ has now installed itself within feminism, splitting feminism into two irreconcilable positions that are reflected in the Court's judgment.

On one side, there are trans-exclusionary feminists (self-identified as “radical”) who believe it is necessary to distinguish biological women by their *sex* from any other gender. Only in this way can women be recognized as protected subjects of legal regulations that foreground sex difference in order to achieve material equality, such as

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¹ *Vicky Hernández et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 422 (Mar. 26, 2021).

² Organization of American States, *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, “Convention of Belém do Pará,” June 9, 1994.

³ *Hernández v. Honduras*, *supra* note 1, para. 129, citing *Advisory Opinion OC-24/17, Solicited by the Republic of Costa Rica, Gender Identity, Equality and Non-Discrimination with Regard to Same-Sex Couples*, 2017 Inter-Am. Ct. H.R. (ser. A) No. 24, para. 94 (Nov. 24, 2017) (“[S]ex 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.”).

⁴ This group, linked to religious expressions, vindicates (biological) sex as binary and as the only possible reality, and considers gender as an “insult to the rules of nature imposed by divine transcendence.” See DORA BARRANCOS, *LOS FEMINISMOS EN AMÉRICA LATINA* 251–58 (2020).

women's rights, affirmative action measures, and segregation by sex in sports, bathrooms, and prisons. For this group, the analytical category of "gender" helps us understand the social, cultural, legal, and political structures of oppression that compel certain roles or behaviors of persons by function of their sex. But gender is not understood as connected to individual expression of identity. Thus, a specific protection system cannot be rooted in gender identity, which is changeable and subject to the choice or disposition of the individual, and therefore lacks a specific subject and threatens to dissolve existing mechanisms of women's protection.⁵

On the other side, there are inclusive feminists and transfeminists, who share a conception of sex as a dynamic, historical, non-binary category. They advocate for an understanding of the political subject of feminism in relational terms within a social hierarchy, not in biological or inherent terms. They also make visible the material reality of intersex persons, who historically have been ignored, pathologized, and subjected to processes of "normalization" to fit into an artificially binary conception of sex.⁶ For this group, the term "gender" not only refers to the social construction through which sexed bodies are systematically disciplined and organized, but also signifies the manifestation of identity and individual expression.⁷ The Inter-American Court's judgment in *Vicky Hernández* subscribes to this view.

The *Vicky Hernández* Decision⁸

The Inter-American Court ruled against Honduras for the killing of Vicky Hernández in the context of intensified violence against LGBTQIA+ persons, which followed the coup d'état on June 28, 2009. The context may suggest Hernández was unusually vulnerable because of coup-related violence, but LGBTQIA+ persons generally suffer from systematic violence in the region.⁹

The Court did not categorize the case as "transfemicide,"¹⁰ but as homicide on account of gender and/or due to the victim's expression of her gender identity,¹¹ and applied the Convention of Belém do Pará to find against Honduras. According to the Court, when the Convention refers to "violence against women based on their gender," it implies a system of patriarchal domination rooted deeply in gender stereotypes that includes the violence experienced by persons who defy gender norms, such as trans women.¹² Article 9 of the Convention urges states to take special account of "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." But the Court held that this list of factors is not *numerus clausus* and that gender identity may contribute, through intersectionality, to the vulnerability of women who suffer gender-based violence.¹³ This intersectional approach responds to feminist criticism of the way courts

⁵ In this line of thought we find Amelia Valcárcel, Alda Facio, and Andrea Medina. See [el Foro Aclaraciones necesarias sobre las categorías Sexo y Género](#), organized by the Center for Interdisciplinary Research on Sciences and Humanities, UNAM (Mar. 24, 2022).

⁶ See Siobhan Guerrero & Leah Muñoz, *Ontologías del cuerpo trans: controversia, historia e identidad*, en [DIÁLOGOS DIVERSOS PARA MÁS MUNDOS POSIBLES](#) 71–94 (Lucía Raphael de la Madrid & Antonio Gómez Cíntora coords., 2018).

⁷ See [Foro Historia y política del cuerpo sexuado](#), organized by Posgrado UNAM (Apr. 1, 2022).

⁸ The dissents were from Elizabeth Odio Benito and Eduardo Vio Grossi, although I will only analyze the first.

⁹ See Inter-American Commission on Human Rights, [Violencia contra Personas Lesbianas, Gay, Bisexuales, Trans e Intersex en América](#), OAS/Ser. L/V/II rev.2, Doc. 36 (Nov. 12, 2015); [Hernández v. Honduras](#), *supra* note 1, paras. 30–39.

¹⁰ "Transfemicide" is the preferred nomenclature. See Blas Radi & Alejandra Sardá-Chandiramani, [Travesticidio/transfemicidio: Coordenadas para pensar los crímenes de travestis y mujeres trans en Argentina](#) (2016).

¹¹ [Hernández v. Honduras](#), *supra* note 1, para. 120.

¹² *Id.*, para. 128.

¹³ *Id.*, para. 129.

have interpreted anti-discrimination law.¹⁴ The critique argues that protected categories, such as gender or race, are applied in a way that protects only the dominant members within the protected group, making invisible the experiences of the most vulnerable within the group. By contrast, intersectional approaches foreground the experience of the most marginalized within the protected group—in this case, trans women—and thereby ensures the protection of everyone within the group.

Judge Elizabeth Odio Benito dissented. In her view, the Convention of Belém do Pará does not apply, and the Court incorrectly mixes the concepts of sex (biological)¹⁵ and gender (social and hierarchical construction), equating sex with gender identity,¹⁶ and, as a result, erasing “feminine sex with all its biological properties, mixing everything up in a single subjective and self-proclaimed category.”¹⁷ Nevertheless, she continues, feminism as a political theory and social movement has as its goal the eradication of inequality between men and women in all social structures. Thus, the “central issue of feminism (and, in this case, the violence against women due to being women) is *women* . . .”¹⁸ If, she concludes, we substitute the subject of feminism for “a strange and confused variable of subjective identities,” decades of struggle and feminist theory would be negatively impacted: “not only would feminism disappear, but also the theory of human rights that is based on objective and scientific categories, rather than on feelings or self-perceptions.”¹⁹

The judge, as well as others who adhere to this position, did not deny that LGBTQIA+ persons suffer discrimination and violence. But, in her view, said violence has a different cause and thus must be protected in a different way, not through the mechanisms that focus on biological women.²⁰ However, as the next section shows, the concern for the “erasure of women” that Judge Odio Benito expresses not only lacks empirical support, but is premised on a conservative and reifying misunderstanding of both the “political subject” and the systems of protection of rights created by political mobilization.

Feminist Interventions in International Human Rights Law

Toward the end of the 1960s, feminist movements adopted the concept of “gender” to refer to the social relations of power based on the differences which distinguish the sexes. Gender, as an analytical category, served to argue that many of the differences between men and women were produced socially, and thus, could change.²¹ The goal was to name the ideological system at work, placing people within cultural and social hierarchy. This system, called “patriarchy,” overvalued the masculine, associating power with masculinity, and considered everything

¹⁴ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL F. 139 (1989).

¹⁵ According to her approach, biological sex is supported by science and is defined by anatomical, genetic, and physiological traits of men and women, “never a social construct or even less a subjective matter or feeling.” *Hernández v. Honduras*, *supra* note 1, part. diss. op., Odio Benito, J., para. 8.

¹⁶ Gender identity, instead, would be for the judge, “a feeling that can change even from one day to the next.” *Id.*, para. 12.

¹⁷ *Id.*, para. 5.

¹⁸ *Id.*, para. 15 (emphasis in original). In a similar vein, Vio Grossi considers that when the Convention speaks of “women,” it does not include “trans women.” Thus, the reform should be promoted, or the protection expanded, through the signing of new international instruments. *Id.*, part. diss. op., Vio Grossi, J., para. 33.

¹⁹ *Id.*, part. diss. op., Odio Benito, J., para. 15.

²⁰ *Id.*, paras. 17, 19, 21, 39 & 41. It is debatable whether it would be better to have a system of protection specifically focused on gender identity. In my view, this solution would not only be difficult to realize politically, but could also contribute to the further fragmentation of rights protection, in direct contrast to the comprehensive approach used by the Inter-American Court of Human Rights.

²¹ Mari Mikkola, *Feminist Perspectives on Sex and Gender*, in [THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY](https://doi.org/10.1017/ajhu.2022.50) (Edward N. Zalta ed., 2022).

related to (or constructed as) the feminine to be inferior and subordinated.²² As a social movement, feminism struggles to evince and dismantle this system, which claims to be natural.

However, the question of who embodies the political subject of feminism soon became controversial. From the attempt of feminist methodology to reclaim “the” experience of women to prove how such experience has been marginalized, to identifying the “shared problems” of women that need to be addressed, to the call for mechanisms for women’s “representation” in political systems, among others, the problem of identifying who this “woman” is became evident. In short, the criticisms of essentialism—the idea that there is something that makes us women that is permanent, linked to anatomy, and which can be isolated and described independently of other realities of experience—have called into question the political subject of feminism, enriching and complicating the debate.²³

To insist, as Odio Benito’s dissent does, on a static definition of woman as “female” serves to maintain a binary system of gender that oppresses those who defy it.²⁴ Odio Benito’s interpretation does not seek to understand in structural terms the situation of gender-based oppression, but instead to attach intrinsic characteristics to some persons and from there to infer legal results.²⁵ This line of reasoning leads to the absurd outcome that choices (such as religion or ideas) self-identification (such as indigeneity) or conditions (such as poverty or migration) would not merit protection by the human rights system, even when they put persons in vulnerable situations, because they do not reflect immutable or “objective and scientific” characteristics.²⁶

By contrast, a progressive interpretation of rights must be situated, open, and possibilistic,²⁷ and the categories on which it is based must be “explicitly tentative, relational, and unstable.”²⁸ One must understand how social hierarchies operate in different contexts and historical moments in order to, on the one hand, recognize persons who suffer oppression and, on the other, try to dismantle the body of prejudices, stereotypes, and violence which work to maintain said system of domination.²⁹ In this sense, *cis* (biological) and *trans* women both suffer patriarchal gender-based violence.³⁰ And although the manifestations of violence are not identical (not even among *cis* women), the system which produces them is the same—and it is that system against which international human rights law instruments fight.

In its decision, the Inter-American Court of Human Rights undertook a progressive interpretation by relying on the Convention of Belém do Pará to identify the type of violence and advance a comprehensive response for those

²² Tatiana Alfonso Sierra & Ana Micaela Alterio, *Judicialización de DESCA y desigualdades estructurales: El caso de la desigualdad de género ante la SCJN*, in [MANUAL SOBRE DERECHOS ECONÓMICOS, SOCIALES, CULTURALES Y AMBIENTALES](#), TOMO II, 1075 (Christian Courtis ed., 2021).

²³ Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 603 (1990); see also JUDITH BUTLER, [GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY](#) (2006).

²⁴ *Hernández v. Honduras*, *supra* note 1, part. diss. op., Odio Benito, J., para. 9.

²⁵ It should be the reverse. Since the regulation of sex is a legal business and not medical, the recognition of gender identity must not depend on the opinions of medical science, which cannot determine the reach of fundamental rights. See Sara Bengtson, et al., Christine Goodwin v. the United Kingdom, in [FEMINIST JUDGMENTS IN INTERNATIONAL LAW](#) 181, 185 (Loveday Hodson & Troy Lavers eds., 2019).

²⁶ *Hernández v. Honduras*, *supra* note 1, part. diss. op., Odio Benito, J., para. 15.

²⁷ ROBIN WEST, [PROGRESSIVE CONSTITUTIONALISM. RECONSTRUCTING THE FOURTEENTH AMENDMENT](#) 216, 275–76 (1994).

²⁸ Harris, *supra* note 23, at 586.

²⁹ SANDRA FREDMAN, [DISCRIMINATION LAW](#) 28–30 (2012).

³⁰ “Trans” is an umbrella term that encompasses persons who do not identify with the sex assigned them at birth. It is a political category that corresponds to that subject that transcends the binary and traverses genders. See Diana Maffia & Alba Rueda, *El concepto de travestimiento/transfeminicidio y su inscripción en el pedido de justicia por Diana Sacayán*, in [MIRADAS FEMINISTAS SOBRE LOS DERECHOS](#) 183 (Diana Maffia, Patricia Laura Gómez & Aluminé Moreno comps., 2019).

who are subject to this violence, while also recognizing intersectionality and moving beyond a binary conception of gender.³¹

Conclusion

The significance of the *Vicky Hernández* decision is that it demonstrates how to overcome the limits presented by the normative systems of human rights protection. When not interpreted in a progressive manner, systems of rights protection can hinder the emancipatory claims of those who do not perfectly “fit” within their assumptions, even though they suffer the vulnerabilities foreseen by such systems. The judgment represents a major step forward for inter-American human rights law, and also for the understanding of law itself, in both feminist and transformative terms.

As Harris highlights, although essentialism is easy—because essentialism defines dominant culture, represents “emotional security” for those who embrace it and, above all, offers women “the opportunity to play all-too-familiar power games both among themselves and with men”—it comes at the expense of the possibility of social transformation.³² By contrast, a progressive feminist agenda must escape from those “safe places,” be inclusive, and advance transformative interpretations that ultimately destabilize the entire legal system rooted in the artificial sex/gender binary, which helps to maintain and reproduce gender-based violence in all its dimensions.

³¹ *Hernández v. Honduras*, *supra* note 1, para. 69.

³² *Harris*, *supra* note 23, at 605–06.