HHR
Health and Human Rights Journal

Gendered Power Relations and Informed Consent: The *I.V. v. Bolivia* Case

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Abstract

In a landmark decision handed down on November 30, 2016, the Inter-American Court of Human Rights analyzed the foundations of the right to informed consent. The court held Bolivia responsible for the forced sterilization of I.V., an immigrant woman from Peru, and recognized the importance of personal autonomy as a constitutive element of personality. This paper discusses the ethical foundations of the decision and explains the relevance of this judgment in furthering women's rights in Latin America.

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Competing interests: None declared.

Introduction

The right to health, a fundamental human right, requires respect for the will of the individual person with regard to his or her own well-being and personal health. This is closely linked to the right to autonomy and the right to free development of the individual. Patients' right to informed consent—that is, their right to make informed choices about their bodies according to their values—is essential to the right to health.[1]

In a landmark decision handed down on November 30, 2016, for the very first time in the inter-American human rights system, the Inter-American Court of Human Rights analyzed the foundations of the right to informed consent. In its ruling, the court held Bolivia responsible for the forced sterilization of I.V., an immigrant woman from Peru, and recognized the importance of personal autonomy as a constitutive element of personality.

This article examines the grounds of the *I.V. v. Bolivia* case. In the first section, we offer a brief description of the background of the case. The second section examines the power relations, the ethical foundations of informed consent, and the concept of equal dignity present in the case by exploring the links between human rights, dignity, and health. Lastly, the third section remarks why the decision of the Inter-American Court of Human Rights is groundbreaking and sets out our thoughts about the relevance of this judgment in furthering women's rights in Latin America.

Facts of the case

I.V. was born in Peru in 1964. When she was 17 years old, she became pregnant; several months later, while still pregnant, she was accused of "apology for terrorism" and was detained by the Counter-Terrorist Directorate, a branch of the National Police of Peru. While in custody, she was physically, psychologically, and sexually assaulted. She was later imprisoned in a penitentiary in El Callao, which she left only to give birth to her daughter in a hospital. After 10 months, I.V. was released from prison and reunited with her seven-month-old daughter, whose upbringing had been left in charge of I.V.'s mother. A year and a half later, I.V. was arrested again and tortured by the Counter-Terrorist Directorate. She was then sentenced to three years in prison.

In 1993, in the context of Fujimori's dictatorship, I.V. fled to Bolivia, where she was granted asylum based on the physical, sexual, and psychological mistreatment at the hands of the Peruvian anti-terrorism agency. In Bolivia, she was able to rebuild her and her family's lives and began working at a hotel. In 1999, she got pregnant again and stopped working.

On July 1, 2000, I.V. went to the emergency room of the Women's Hospital in La Paz after her water broke, and she received a caesarean section. During the procedure, complications arose due to multiple adhesions in the lower segment of her uterus. The following morning, the doctor informed I.V. that her Fallopian tubes had been tied and that she would not be able to have children again. The tubal ligation had taken place without her prior and informed consent.

Later that year, she submitted a series of complaints before the relevant medical regulatory bodies, which resulted in administrative proceedings against the doctor who had tied her tubes. During the course of those proceedings, the doctor argued that he had obtained I.V.'s verbal consent during the trans-operative period, while I.V. was under epidural anesthesia. However, the medical audit conducted by the Ministry of Health concluded that there was no written preoperative consent for the tubal ligation surgery and that it is not acceptable to seek a patient's consent during the surgical or trans-operative act, since the patient is under surgical stress and under anesthesia, even if it is regional anesthesia.

By that time, Peruvian authorities had initiated a criminal procedure against the doctor, which I.V. joined as a civil party. This proceeding concluded four years later, when the Bolivian courts declared the claim time-barred. In March 2007, through the Bolivian Public Defender's Office, I.V. then referred her petition to the Inter-American Commission on Human Rights, which declared it admissible a year later.[2]

In its merits report, the commission found that Bolivia violated, to the detriment of I.V., articles 5(1) (right to humane treatment), 8(1) (right to a fair trial), 11(2) (right to privacy), 13 (freedom of thought and expression), 17 (rights of the family), and 25 (right to judicial protection) of the American Convention on Human Rights and article 7 (duty of the states to prevent, punish, and eradicate violence against women) of the Convention of Belém do Pará.[3] In 2015, the commission referred the case to the Inter-American Court of Human Rights after concluding that Bolivia had not complied with the commission's recommendations.

In its ruling on the case, the Inter-American Court stated that "the informed consent of the patient is a *sine qua non* condition for the medical intervention, which is based on respect for the patient's personal autonomy and freedom to choose her life plans without interference."[4] In other words, the court acknowledged that informed consent ensures the effectiveness of the rule that recognizes autonomy as an inalienable element of the dignity of the person.

Remarkably, the court made a reference to gendered power relations and their impact on dignity, suffering, and health.[5] This marks the first time in which the Inter-American Court has connected gender stereotypes to forced sterilization and has recognized the role that gendered power relations play in reinforcing gender stereotypes and social practices that position women as dependents and subordinates. Moreover, the court pointed to the impact that this type of power relationship can have on excluding, restricting, and nullifying the recognition, enjoyment, and full realization of women's sexual and reproductive rights. Thus, the ruling is important not only because of its focus on informed consent but because of its emphasis on women's sexual and reproductive rights under both the American Convention on Human Rights and the Convention of Belém do Pará—in fact, it may be seen as the second decision of the Inter-American Court of Human Rights on reproductive rights (the first one being *Artavia Murillo v. Costa Rica*).[6] The court emphasized that women's freedom to decide freely on their bodies and their reproductive health, especially in cases of sterilization, may be undermined by discrimination in access to health; by power relations with respect to a woman's husband, her family, her community, and relevant medical personnel; by additional vulnerability factors; and by gender stereotypes in health care services. As a result, the court noted that "factors such as race, disability, socioeconomic status, cannot be a basis for limiting the patient's free choice … or obviate obtaining her consent."[7]

What lies beneath

The concept of informed consent imposes on medical professionals the duty to refrain from exercising paternalistic control and instead provide women with the information necessary for them to decide which course of action to adopt. In other words, "no physician, in so far as he is a physician, [should] consider his own good in what he prescribes, but the good of his patient."[8] However, the physician-woman relationship is usually full of gender prejudices and stereotypes. That is, the relationship between a physician and a woman patient is per se an asymmetrical power relationship that has the potential to endanger women's reproductive autonomy and dignity.[9] Paternalism in health care was widespread for many years under the belief that physicians were in the best position to make appropriate decisions concerning the health of their patients.[10] According to Thérèse Murphy, even today, interactions between health professionals and their patients are often driven by "expert" professional discourses where the patient's voice may be lost.[11]

In the words of Rebecca Cook, "the role of health professionals is to give the individual decision-maker medical and other health-related information that contributes to the individual's power of choice and does not distort or unbalance that power."[12]

In this sense, the Inter-American Court's decision analyzed, for the first time in the court's history, women's freedom of autonomy in sexual and reproductive health under the lens of *social determinism*—the idea that people's actions are determined by factors such as their belonging to a

certain social class, by the way in which they participate in productive structures, by their educational background, and by the cultural traditions and social habits of their environments, among others.[13] The court recognized that throughout history, sexual and reproductive health has been limited or annulled based on negative and harmful gender stereotypes according to which women's primary role is the fulfilment of a reproductive function and men are seen as decision makers over women's bodies. The court determined that such stereotypes, coupled with gendered power relations, may end up leading "to a situation in which a decision is made to sterilize women and not men, based on the stereotype that women are the ones who hold the primary role of procreation and should be responsible for contraception."[14] Accordingly, the court concluded that the doctor's failure to request I.V.'s consent to the sterilization procedure was a reflection of this historically unequal relationship.[15]

Thereby, having stressed women's particular vulnerability to forced sterilization, the Inter-American Court found a violation of the right to non-discrimination. Indeed, the court noted how the process of informed decision making in this case operated under the negative and harmful stereotype that I.V., as a woman, was unable to make such decisions, leading to "an unjustified paternalistic medical intervention" restricting her autonomy and freedom.

The court's reasoning took the "social determinism" argument and linked it with personal autonomy and the idea of human dignity in order to find Bolivia responsible for creating—or at least maintaining—unequal power relationships and gender stereotypes. The court recognized that the obligation to eliminate all forms of discrimination against women carries the obligation to eliminate discrimination based on gender stereotypes that are socially dominant and persistent and that consciously or unconsciously constitute the basis of practices that reinforce women's position as dependents and subordinates.[16] The court based its reasoning on the Ethical Framework for Gynecologic and Obstetric Care from the International Federation of Gynecology and Obstetrics, which acknowledges that women tend to be vulnerable "because of social, cultural and economic circumstances."[17]

Human dignity has been defined in many different ways, but the central premise of these definitions is that human beings should not be treated as a mere means to an end. Dignity implies having agency. The decisions that may affect us must be made in a context were no one is dominating or controlling us. In order to be able to make our own decisions for ourselves, we must have the relevant information that allows us to make an informed choice. As Alicia Ely Yamin puts it, "dignity requires the conditions that enable one to govern one's self and exercise ethical as well as physical independence within a specific social context; it also requires us to respect the humanity in others."[18]

According to the International Federation of Gynecology and Obstetrics, within the doctor-patient relationship, "women's care has often been dominated by the paternalism of their advisors."[19] This paternalism is inconsistent with women's fundamental human rights and dignity, which require obtaining a woman's informed consent before any medical intervention.[20]

From a deontological approach, human beings are, in and of themselves, the end.[21] Under this perspective, the reason behind the protection of human dignity is the notion of personal autonomy, or the idea that people are capable of developing their own conception of the good life and that neither the state nor third parties may interfere with that choice (provided that it is not harmful to others). Instead, the state should design institutions that facilitate the pursuit of individual or collective plans. This point has often been made within the inter-American human rights system.[22] Furthermore, under this deontological view, personal autonomy is the companion to the principle of inviolability of the person: as a rule, a person and her personal plans may not be sacrificed in the name of others or of a collective entity. According to this deontological account, persons cannot be used as a mere means for the purpose of values that they do not share.[23] Thus, doctors cannot impose their views on how women should fulfill their sexuality and should not act on

women's bodies without their consent. These ideas are clearly reflected in the Inter-American Court's reasoning in *I.V. v. Bolivia*, for the court considered that informed consent ensures the effectiveness of the rule that recognizes autonomy as an inalienable element of the dignity of the person.[24] Accordingly, the court considered that health

> *not only covers access to health care services ... but also the freedom of each individual to control their health and their bodies and the right not to be subjected to interference ... In this way, the existence of a connection between physical and psychological integrity with personal autonomy and the freedom to make decisions about one's body and health requires, on the one hand, that the State ensure and respect decisions and choices freely and responsibly made and, on the other hand, that access to relevant information is guaranteed 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.*[25]

In other words, to recognize human beings as such, we need to ensure that they enjoy the agency to make their own decisions. The state has a duty to ensure and respect the exercise of our autonomy—of our agency—when we make free and responsible decisions.

Another remarkable step in the court's reasoning was its decision to rely on the definition of violence against women enshrined in the Convention of Belém do Pará and to frame a violation of women's reproductive rights as a result of gender-based discrimination. The court concluded:

> *[T]he doctor should have foreseen that the intentional alteration of I.V.'s physical capacity of biological reproduction in total disregard for her autonomy and reproductive freedom was going to provoke an intense emotional suffering and, in spite of it, he did not modify his behavior under the belief that he was the one in the best position to make the decision that he considered most beneficial for I.V.*[26]

The court considered that an intrusion of such magnitude on the body and personal integrity of I.V. without her consent foreseeably caused significant suffering for the victim, since the doctor made himself what should have been a personal decision for I.V.

Conclusion: Significance of the *I.V. v. Bolivia* decision for Latin America

It is important to emphasize that, in its ruling, the Inter-American Court sought to stress the fact that I.V.'s suffering was not an isolated case. Rather, for the court, I.V. was but one example of widespread structural discrimination against and paternalistic treatment of women in Latin America. Although the court was deciding on the specific claim brought by I.V., it also sent a clear message to all states parties to the American Convention on Human Rights and the Convention of Belém do Pará. Under human rights law, states have the obligation to respect and guarantee human rights for everyone without discrimination. States such as Bolivia that fail to develop a gender-sensitive approach to health care are in violation of their international duties to respect, protect, and fulfill the human right to health. By recognizing that women have historically been subject to various forms of discrimination, the court made it clear that states have an obligation to remedy that discrimination and integrate a gender perspective in the design and implementation of laws and public policies affecting women. This is all the more important since states parties to the American Convention on Human Rights have also either ratified or acceded to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In that line, the CEDAW Committee has noted that states parties are obliged to take steps to prevent, prohibit, and punish violations of human rights guaranteed by CEDAW, regardless of whether such violations are committed by the state or by third parties (such as doctors).[27] In this light, doctors have a duty to refrain from exercising paternalistic control over women's bodies and must provide women patients with the necessary information for them to decide on the course of action to be taken.

By incorporating a gender perspective into its analysis and reasoning, the Inter-American Court was able to offer an overall picture of 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. In this way, it removed from women the burden of proof for a specific rights violation by placing the issue within a historical, cultural, and structural context.

Latin American countries that fail to ensure and protect the right to informed consent contravene their obligations under international and regional human rights law and violate women's right to health, dignity, and, ultimately, their autonomy. But legal change on its own will not achieve the desired end. National gynecologic and obstetric associations, together with civil society organizations, play an important role in raising awareness within the medical profession and society about women's human rights and ensuring both the implementation and oversight of states' actions. In this way, informed consent will not be just written law but a reality.

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