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OBSTETRIC VIOLENCE: THE BRÍTEZ ARCE CASE AND ITS RELEVANCE TO EUROPE

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Abstract According to a recent Court ruling, Argentina has to take necessary action to prevent maternal death, including a campaign to inform women about their rights during pregnancy, childbirth and the post-partum care period, broadcasted on radio and television and available at all maternity clinics in the country. The court's message is crystal clear: countries in America should take the problem of obstetric violence seriously. But what about European countries? It is argued that the message also affects reproductive policies in European countries.

Keywords
obstetric violence,
human rights,
reproductive health,
IAHRCt,
ECtHR

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1 Occasion: the Brítez Arce case

Cristina Brítez Arce was more than 40 weeks pregnant when she went to the hospital in Buenos Aires for an ultrasound scan. She had a clinical history of arterial hypertension and was seen by a cardiologist. The scan indicated that the fetus was dead, and, therefore, an induced labour was attempted to deliver the dead fetus. The procedure took about five hours. During that time, she had to wait two hours with full dilatation in a chair. She died the same day of "non-traumatic cardiopulmonary arrest".

In a malpractice procedure, it appeared that the patient's medical record was falsified, and an expert opinion concluded that Ms. Britez Arce was a high-risk patient who did not receive the treatment needed. It was concluded that she suffered from eclampsia and brain haemorrhage, which led to her death, and the necessary precautions were not taken.

After 20 years of legal battles, the Argentine Cassation Court dismissed the claim. As a last resort, the case was submitted in 2021 to the Inter-American Human Rights Court (IAHRCt), challenging that Argentina was internationally responsible for violating the patient's rights to life, personal integrity, and health under the American Convention.[1]

2 Legal analysis: Argentine's Failure to Protect Reproductive and Maternal Health

Referring to international treaty documents, the Court recognises that the State has specific obligations regarding health care during pregnancy, ruling that Argentina had failed to guarantee the mother's and fetus' fundamental rights.[2] 'Maternal deaths are not "mere misfortunes or unavoidable natural disadvantages of pregnancy" but rather preventable injustices that Governments are obliged to remedy through their political, health and legal systems'.[3] As a result, the Court ordered to provide adequate, specialised and differentiated care during pregnancy, childbirth and the postnatal period, and preventing maternal mortality and morbidity. Failure to take

[1] Judgement of the The Inter-American Court of Human Rights of 16 November 2022, Brites Arce v. Argentina.
[2] Ibid, paras 68-71.
[3] Cook, 1997, p. 1 as quoted in: Special Rapporteur on violence against women, E/CN.4/1999/68/Add.4, January 21, 1999, para 70.

proper measures to prevent maternal mortality threatens the lives of pregnant women. Part of these measures includes the assurance of access to precise and timely information on reproductive and maternal health during each stage of pregnancy. At the same time, this information must be based on scientific evidence and delivered without bias and discrimination.[4]

The Court finds that Ms. Britez Arce presented various risk factors during her pregnancy that were not treated adequately (lack of specialised care, specific information on her health status, nor recommendations on how to prevent/treat hypertension). Moreover, the state of anxiety the victim was subjected to in labour with a dead fetus and immediately after childbirth made her a victim of dehumanising treatment and the denial of full information on her health status, and constituted obstetric violence for which Argentina was held responsible.

3 Brítez Arce and its Relevance to Europe

The tragic death of Ms Brítez Arce was the result of obstetric violence, a 'preventable injustice' that should be remedied by adequate measures. That is a rather bold statement made by the Court. In this case, the Court identified omissions in the Argentine healthcare system and shortcomings in respecting the patient's rights by health professionals. What is more, in this ruling, the Court applied the WHO definition of obstetric violence in reviewing the State's human rights obligations to pregnant women. The Court blames the medical staff for leaving the patient unattended in labour with a dead fetus for more than two hours. Instead of stabilising and evaluating the patient, she was ignored in a situation of anxiety and stress, which made her a victim of 'dehumanised treatment'. Also, the lack of precise and timely information about the patient's health status, risk of pre-eclampsia and its implications of the high likelihood of maternal mortality, and alternative treatment options have been criticized. The victim's right to information has been disrespected during the treatment; a fundamental human right recognised by international treaty law.

[4] General Comment (GC) No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/22, 2 May 2016, para 18, 19.

Is this case unique to Argentina? Unfortunately not, the phenomenon of obstetric violence has been described on other occasions[5, 6] and condemned by various quasi-judicial bodies such as the Committee for the Elimination of Discrimination against Women (CEDAW), as in the case of Spain.[7] On three occasions, the CEDAW Committee ruled that a caesarean section without consent, inappropriate comments made by health personnel, the use of inexperienced medical staff, disregard of the appropriate protocols, violated the woman's right to sexual and reproductive health and access to maternity services free form discrimination and violence (Arts. 2, 5, and 12 CEDAW). Quite remarkable, as in all cases, the Constitutional Court dismissed the earlier application for a legal remedy since it had "no special constitutional significance". That makes it painfully clear that national administrative and legal proceedings initiated were not able to end gender stereotypes and that domestic judicial authorities did not carry out a thorough assessment of the evidence provided by the women, giving credence only to the hospital reports and making assumptions based on stereotypes. In these cases, national authorities responsible for assessing responsibility for such acts seem to reproduce stereotypical and thus discriminatory notions by assuming that the doctor decides on the need for a caesarean section or episiotomy without patient consent. Psychological harm due to the absence of informed consent is a matter of "mere" perception!

The need for conducting an independent investigation into women's allegations of mistreatment and gender-based violence in healthcare facilities was already confirmed by the Special Rapporteur in its 2019 report explaining the root causes of obstetric violence.[8] In the same year, the Council of Europe adopted a Resolution affirming that 'this form of violence is widespread and systemic in nature' in the European context, calling for necessary preventive measures to be taken to fight this

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[5] Report of the UN Special Rapporteur on Violence against Women, A/74/137, Published 11 June 2019. Retrieved from https://eipmh.com/wp-content/uploads/2019/09/UN_Res.71170..pdf (January 10, 2024); Report of the Office of the UN High Commissioner for Human Rights. Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal morbidity and mortality, UN Doc. A/HRC/21/22. Retrieved from https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/148/47/PDF/G1214847.pdf?OpenElement (Jan. 10, 2024).

[6] Council of Europe, Report on Obstetrical and Gynaecological Violence, Doc. 14965, Published 16 September 2019. Retrieved from https://pace.coe.int/pdf/e6606eb0457c469e7c121afcd43b39d328955bbc2fab73d2e930866bcf2597d5/doc.%2014965.pdf (Jan. 10, 2024).

[7] SFM v Spain, CEDAW Committee Communication No. 138/2018, published 28 February 2020, para. 3(4). Retrieved from https://juris.ohchr.org/casedetails/2710/en-US (10 January 2024); NAE v Spain, CEDAW Commission Communication No. 149/2019, published 13 July 2022; MDCP v Spain, CEDAW Commission Communication No. 154/2020, published 9 March 2023.

[8] A/74/137, p. 13-16.

phenomenon.[9] This Resolution recalls the key principles of the Istanbul Convention condemning all forms of violence against women, including female genital mutilation, sterilization and abortion without consent.[10]

More recently, a case study report from the European Union was published in 2024, informing Member States about experiences with obstetric violence and initiatives to respond to this phenomenon.[11] Key observations concern the institutional recognition of the occurrence of obstetric violence and its causes, as this will help to increase awareness about this phenomenon, the need to guarantee informed consent and shared decision-making for women in labour, and the implementation of training programmes on human rights and childbirth for healthcare workers.[12]

Different from the IAHRCt, the European Human Rights Court (ECtHR) has so far never mentioned obstetric violence explicitly, but it has ruled in similar cases on pregnant women. The list of 'European' obstetric violence cases is long, dealing with the absence of emergency obstetric care, sterilisation without informed consent, and unnecessary examinations.[13]

In Europe, Obstetric violations are based on similar human rights protected under the European Convention on Human Rights (ECHR), i.e., the right to life (Art. 2), prohibition of inhuman and degrading treatment (Art. 3), and the right to private life (Art. 8). Of particular interest are the involuntary sterilization cases, in which the ECtHR concluded that these practices clearly violate Article 8 of the Convention. As a general principle, sterilisation might be legitimately performed at the request of the mentally competent adult patient. The only exception without consent is in emergency situations in which medical treatment cannot be delayed, and appropriate consent cannot be obtained. In the absence of a life-threatening situation (medical emergency) requiring urgent action, there is no justification for ignoring the basic

[9] Council of Europe, Parliamentary Assembly, Resolution 2306 (2019) on Obstetrical and Gynaecological Violence, text adopted on 3 October 2019. Retrieved from https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=28236 (Jan. 11, 2024).
[10] Council of Europe, Convention on preventing and combating violence against women and domestic violence, CETS No. 210, 11 May 2011.
[11] European Commission Justice and Consumers, Case studies on obstetric violence: experience, analysis, and responses, 2024, DOI 10.2838/712175.
[12] Ibid., pp. 48, 69-70, 99-100.
[13] Judgement of the ECHR of 9 April 2013, app. no. 13423/09, *Mehmet Şentürk and Bekir Şentürk v. Turkey*; Judgement of the ECHR of 22 March 2016, app. no 74114/12, *Elena Cojocaru v Romania*; Judgement of the ECHR of 8 November 2011, app. no. 18968/07, *VC v. Slovakia*; Judgement of the ECHR of 20 September 2022, app. no. 43399/13, *YP v. Russia*; Judgement of the ECHR of 22 November 2022, app. .o. 44394/15, *GM and Others v. Moldova*.

rule of informed consent. Consequently, the Court concluded the patient's private life had been violated because the doctor failed to seek and obtain her express, free and informed consent for sterilisation.[14] Decisive is the absence of an imminent threat to the applicant's life or health. Alternatively, involuntary sterilization does not necessarily breach Article 3. Whether a particular form of ill-treatment reaches the threshold of severity is relative and depends on all circumstances of the case, such as the duration of the treatment and its physical and mental effects.[15] What is decisive is whether the doctors who performed the sterilization had acted in bad faith, let alone with the intent of ill-treating or degrading her.[16] When that is not the case, the required threshold of severity is not reached, therefore no violation of Article 3 (inadmissible). Unlike Article 3, for the Article 8 assessment, the doctors' good intentions in Y.P. were irrelevant. Surgical necessity cannot justify the absence of consent in the case of such a major intervention, which has grave consequences for reproduction.[17]

These cases have in common the special duties of the state towards pregnant women as defined by international treaty texts and interpretative documents, and the Court reviewing whether domestic authorities did what could be reasonably expected of them to fulfil their obligation to protect the patient's life, health, and physical integrity by providing adequate medical treatment. In these cases, both the CEDAW Committee and the ECtHR apply legal standards similar to those of its American counterpart, confirming that human rights are interrelated and interdependent. This has been emphasized by the international treaty references made by the ECtHR when interpreting the Convention's rights.

Since the ECtHR applies similar standards to determine what reasonably can be expected to protect pregnant women's lives and health, it is up to national governments to implement these human rights standards progressively. In that respect, General Comment no 22, the Spain CEDAW decisions, and the Council of Europe's resolution define the normative content of reproductive rights, and state obligations realizing these rights. More concrete, informed and shared decision-making about the recommended treatment instead of the patronizing attitude of doctors to ensure that medical personnel follow applicable standards and medical

[14] Judgement of the ECHR of 20 September 2022, app. no. 43399/13, *YP v. Russia*, para. 55.
[15] Ibid, para. 35.
[16] Ibid, para. 37.
[17] In more detail, see: Exter den, 2023, pp. 1-10.

protocols for childbirth, preventing gender stereotypes that constitute discrimination against women, and providing effective remedies when reproductive rights have been violated. All these elements, explained in the CEDAW Commission's decisions and reviewed by the ECtHR's rulings, were confirmed by the Council of Europe's resolution. Therefore, one may conclude that there is consensus about the nature of Member States' obligations to ensure women's reproductive health at the international level.

4 Recommendations

Apart from enacting patients' and reproductive rights legislation and providing effective legal remedies in practice, there is also a need for raising awareness among the public on this type of gender-based violence, and training health professionals on preventing obstetric violence and discriminatory practices against pregnant women. In this respect, particularly the Istanbul Convention already set the scene for the eradication of violence against women within the broader context of combating discrimination. For instance, governmental awareness-raising campaigns on obstetric violence may also involve civil society (private organisations and media) since many NGOs have a long tradition of carrying out successful awareness-raising activities at local, regional or national level.[18]

Training (health) professionals is an effective means of preventing obstetric violence. Training raises awareness among professionals and promotes changes in mentality and attitudes.[19] That change may also significantly improve the nature and quality of patient services. It is emphasized that relevant training should be supported and reinforced by clear protocols and guidelines setting standards medical professionals are expected to follow in their respective fields. The effectiveness of these protocols, where relevant, should be regularly monitored, reviewed and, where necessary, improved.[20] The relevant professionals may include health professionals and professionals in the judiciary.

Effectuating patients' rights, victims of obstetric violence should be supported by women's organisations and provided with information on the admissibility rules and procedural requirements relating to the applicable national and international

[18] Ibid note 10, Explanatory report, paras. 91-2.
[19] Ibid, para. 98.
[20] Ibid, para. 99.

complaint mechanisms, whereas States should not impede in any way access to these mechanisms.[21]

Finally, national policies and measures should be evaluated to assess whether they meet the needs of victims, fulfil their purpose, and uncover unintended consequences [exp rep para 71].

Systematic and adequate data collection is essential for evaluating the effectiveness of policy-making to prevent and fight obstetric violence. Despite this recognition, examples of systematically collected administrative or population-based data in Council of Europe member states remain rare.[22]

5 Conclusion

Taking women's reproductive rights and the problem of obstetric violence seriously, national, regional and international human rights courts play an important role. Enforcing international treaty obligations on women's reproductive rights contributes to the creation of a world free from violence against women.

But apart from the role of courts, it starts with raising awareness about obstetric violence among health professionals and administrative and judiciary authorities. In that respect, already available documents provide for various measures to effectuate a change in mentality among those concerned.

Finally, national policies and measures must be systematically evaluated for their effectiveness in preventing and fighting obstetric violence.

Note

No conflict of interest noted.

Laws, Conventions, Case-law

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[21] Ibid, para. 129.
[22] Ibid, para. 74.

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Povzetek v slovenskem jeziku

Argentina mora v skladu z nedavno sodbo sprejeti potrebne ukrepe za preprečevanje smrti mater, vključno s kampanjo za obveščanje žensk o njihovih pravicah med nosečnostjo, porodom in poporodno oskrbo, ki naj se predvaja po radiu in televiziji ter naj bo na voljo v vseh porodnišnicah v državi. Sporočilo sodišča je povsem jasno: države v Ameriki morajo problem porodniškega nasilja jemati resno. Kaj pa evropske države? Trdi se, da sporočilo vpliva tudi na reproduktivno politiko v evropskih državah.