



UNIVERSITY OF PERUGIA
DEPARTMENT OF PUBLIC LAW

“The Effectiveness of Rights in the Light of European Court of Human Rights
Case Law”

Section: Globalization and Human Rights – Inter-American Court of Human Rights

Title: *Gonzales Lluy et al. v. Ecuador: The First Judgment of the Inter-American Court of Human Rights Declaring Violation of Article 13 (Right to Education) of the Protocol of San Salvador*

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Judgment: IACtHR (Judgment) 1 September 2015, *Gonzales Lluy et al. v. Ecuador (Preliminary Objections, Merits, Reparations and Costs)*, Series C No. 298.

Conventional parameters: Article 13 PSS; Article 19(6) PSS; Article 1(1) ACHR; Article 19 ACHR; Article 63(1) ACHR.

Key words: Right to education; means of protection; obligation to respect rights; rights of the child; HIV-related stigmatization; disability; principle of non-discrimination; “intersectionality” of discrimination; measures of reparations.

“When I was five years old, I attended the Zoila Aurora Palacios Public School. I was happy because I made a lot of friends. When Christmas came, one day my teacher [...] told my mother not to take me to school, to take me back home. My mother went to see the Director and came out crying and we never went back”.

(Talía Gabriela Gonzales Lluy)



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1. Introduction

On 1 September 2015, the Inter-American Court of Human Rights (IACtHR, Court) issued its decision in the case of *Gonzales Lluy et al. v. Ecuador*, finding the State of Ecuador internationally responsible for diverse human rights violations committed against Talía Gabriela Gonzales Lluy who, at the age of three years, had contracted the human immunodeficiency virus (HIV) on receiving a transfusion of blood that had not undergone the corresponding serological tests, in a private health clinic.

In particular, this case is hugely significant because it is the first in the history of the IACtHR in which it declared the violation of a norm established not in the American Convention on Human Rights (ACHR, Convention), but rather in the Additional Protocol to the Convention in the Area of Economic, Social and Cultural Rights (PSS, Protocol of San Salvador).

Thus, in the case of *Gonzales Lluy et al. v. Ecuador*, the Court declared, for the first time, the violation of Article 13 (Right to Education) of the Protocol of San Salvador.

2. Chronology of the Facts

Subsequently to the infection with HIV following a blood transfusion performed on her daughter, Teresa Lluy had filed diverse civil and criminal actions seeking the punishment of those responsible for Talía’s infection, and payment of damages. However, the actions had been unsuccessful.

In September 1999, at the age of five years, Talía had been enrolled at the first level of basic education in the “Zoila Aurora Palacios” Public School for basic education in Cuenca. She had attended classes normally for two months.



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In November 1999, the teacher had found out the HIV *status* of Talía, and had advised the school director.

On 3 February 2000, the school director had informed Teresa Lluy of the decision not to allow Talía to attend school any longer.

On 8 February 2000, Teresa Lluy had filed an application for constitutional protection (*amparo*) before the Third District Contentious-Administrative Court of Cuenca against the Ministry of Education and Culture, the school director, and the teacher, asserting that Talía’s right to education had been violated, asking for her reincorporation into the school, and also requesting reparation for the harm caused.

On 9 February 2000, a public hearing had been held in the case. In the testimony of the school director, Talía had been required to provide medical reports that had specified her *status* as a person living with HIV and her good hematological conditions. In spite of this, because she had experienced some hemorrhages at school due to an illness called idiopathic thrombocytopenic purpura (ITP), according to the school director, the risk of contaminating other students had heightened, in addition to the fact that these students had access to sharp objects in the course of their different activities.

On 11 February 2000, the Third Contentious Administrative District Court had declared the application for *amparo* inadmissible, considering the existence of «a conflict of interests between the individual rights and guarantees of [Talía] and the interests of a group of students, a conflict that mean[t] that the societal or collective interests, such as the right to life, outweighed the right to education». Hence, that court had considered that Talía could have exercised her right to education, «by individualized and distance education».

The burden that Talía had had to assume as a result of the stigma and stereotypes surrounding HIV had accompanied her at different times. Talía and her family had had to hide the HIV and the expulsion from the school in order to register her in other establishments. Talía had been enrolled in



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the “El Cebollar” kindergarten, the “Brumel” School, the “12 de Abril” School and the “Ángel Polibio Chávez” School. According to Teresa Lluy’s testimony, «each time they found out who [they] were, [her] daughter was ostracized in some educational establishments [...] alleging that they could not accept a child with HIV, because it was a risk for all the other students. Both the teachers and the parents, discriminated against [them], isolated [them], and insulted [them]».

3. Violation of Article 13 (Right to Education) of the Protocol of San Salvador: Considerations of the IACtHR

The IACtHR first recalled that the right to education was contained in Article 13 (Right to Education) of the Protocol of San Salvador¹, and that it had competence to decide on contentious cases concerning this right based on Article 19(6) (Means of Protection) of the Protocol of San Salvador².

¹ Article 13 (Right to Education) of the Protocol of San Salvador: “1. Everyone has the right to education. 2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. 3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: a. Primary education should be compulsory and accessible to all without cost; b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education; c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education; d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction; e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies. 4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above. 5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties”.

² Article 19(6) (Means of Protection) of the Protocol of San Salvador: “Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the



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In order to decide the dispute between the parties about the possible violation of the right to education, considering that Talía had been dismissed from the school owing to the assumption that she could have endanger the integrity of her companions, the Court examined: *a)* the relevant implications of the right to education in this case; *b)* the violation of the right to remain in the education system, the right not to be discriminated against, and adaptability in relation to the right to education.

With regard to the first point, the Court noted that, historically, individuals with HIV had been discriminated against owing to different social and cultural beliefs that had stigmatized the illness. As a consequence, the fact that a person was living with HIV/AIDS, or even the mere assumption that he or she had HIV/AIDS, could create social and attitudinal barriers to that person having equal access to all his or her rights.

The Court considered that the relationship between this type of barrier and a person’s health *status* justified the use of the social model of disability as a relevant approach to assess the scope of some of the rights involved in this case. It indicated that although living with HIV was not *per se* a situation of disability, in some circumstances, the attitudinal barriers faced by those living with HIV meant that the surrounding circumstances placed them in a situation of disability.

Taking the above into account, the Court clarified some elements of the right to education of those living with medical conditions that could result in disability such as HIV/AIDS. It particularly considered that there were three obligations inherent in the right to education in the case of persons with HIV/AIDS: *i)* the right to have timely, prejudice-free information on HIV/AIDS; *ii)* the prohibition to deny access to educational establishments to persons with HIV/AIDS; *iii)* the right that education should promote their inclusion and non-discrimination by their social milieu.

Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights”.



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With regard to the dispute concerning the way in which Talía had been suspended from the school she had been attending, the IACtHR indicated that this decision had been based on the medical condition of Talía associated with both ITP and HIV. Therefore, a differentiated treatment had been accorded based on Talía’s health *status*.

To determine whether that difference in treatment had constituted discrimination, the IACtHR examined the justification provided by the State. On verifying that the differentiated treatment of Talía had been based on a prohibited category, it corresponded to the State to prove that neither the purpose nor the effect of the decision to expel Talía from school had been discriminatory.

If a difference in treatment had been stipulated on the basis of a medical condition or illness, that difference in treatment had to be made based on medical criteria and the real health *status* of the person concerned, and evaluating the real and proven harm or risks, and not the speculative or imaginary ones.

Consequently, speculations, presumptions, stereotypes or general consideration on persons with HIV/AIDS or any other type of illness were inadmissible, even if those prejudices were concealed by reasons that appeared to be legitimate, such as the protection of the right to life or public health.

The IACtHR found that the real and significant risk of infection that would have jeopardized the health of Talía’s companions had been extremely small. In the context of an assessment of the need and strict proportionality of the measure, the IACtHR emphasized that the means chosen had constituted the most harmful and disproportionate of those available to meet the objective of protecting the integrity of the other children at the school.

Even though the judgment of the domestic court had been intended to protect Talía’s classmates, the reasoning provided in the decision had not proven that the decision had been appropriate to achieve this objective. In this case, the decision had used abstract, stereotyped arguments to justify an extreme and unnecessary decision. Thus, the decision had constituted discriminatory treatment against Talía.



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Furthermore, the Court observed that the educational environment had not demonstrated any adaptability to Talía’s situation by adopting the biosafety or similar measures that should exist in any educational establishment for the general prevention of the transmission of illnesses.

The Court determined that, in Talía’s case, numerous factors of vulnerability and risk of discrimination had intersected that had been associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV.

In this regard, the Court noted that certain groups of women endured discrimination throughout their life based on more than one factor combined with their gender, which increased their risk of suffering acts of violence and other violations of their human rights. In the case of women with HIV/AIDS, the gender perspective provided a way of understanding living with the illness in the context of the roles and expectations that had an impact on people’s behaviours.

In this case, statements – not contested by the State – illustrated the impact that the Lluys family’s situation of poverty had had on the approach to Talía’s HIV. Besides, these statements explained the discrimination in the educational environment associated with how, in a prejudiced and stigmatizing way, Talía had been considered a risk for her classmates, not only when she had been expelled from the “Zoila Aurora Palacios” Public School, but at other time when she had tried to access the education system.

Moreover, with regard to employment, Teresa Lluys had been dismissed from her job in the company for which she had worked for 10 years, owing to the stigma of having a daughter with HIV and, subsequently, in other jobs she had obtained, she had also been dismissed for the same reason.

According to the IACtHR, the discrimination experienced by Talía had been caused not only by numerous factors, but had also arisen from a specific form of discrimination resulting from the intersection of those factors. Otherwise stated, if one of those factors had not existed, the discrimination would have been different.



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As a matter of fact, the poverty had had an impact on the initial access to health care that had not been of the best quality and that, to the contrary, had resulted in the infection with HIV. The situation of poverty had also had an impact on the difficulties to gain access to the education system and to lead a decent life. Because of her *status* as a person living with HIV, the obstacles that Talía had suffered in access to education had had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. As a child with HIV, she would have required greater support from the State to implement her life project. As a woman with HIV, she would have needed proper counseling regarding doubts about future maternity and interaction in a relationship.

The concurring opinion of Judge E. Ferrer Mac-Gregor Poisot elaborated the concept of the “intersectionality” of discrimination further.

Based on all the foregoing, the IACtHR concluded that the Ecuadorian State had violated the right to education contained in Article 13 (Right to Education) of the Protocol of San Salvador, in relation to Articles 19 (Rights of the Child)³ and 1(1) (Obligation to Respect Rights) of the Convention⁴, to the detriment of Talía Gabriela Gonzales Lluy.

4. Reparations Ordered by the IACtHR

The IACtHR observed that, in 2013, Talía had entered the Universidad Estatal de Cuenca to study graphic design, but she had had to withdraw owing to health problems resulting from activities inherent in this field of study. Accordingly, in 2015, Talía had begun to study social psychology at this university.

³ Article 19 (Rights of the Child) of the Convention: “*Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state*”.

⁴ Article 1(1) (Obligation to Respect Rights) of the Convention: “*The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition*”.



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Considering this, the IACtHR appreciated the State’s willingness expressed during the public hearing to provide Talía the opportunity for a scholarship based on academic excellence. Nevertheless, this type of scholarship did not acknowledge Talía specifically, being available to any academically gifted Ecuadorian student.

Therefore, in relation to reparations under Article 63(1) of the Convention⁵, the Court required the State, as a measure of satisfaction, to grant Talía Gabriela Gonzales Lluy a scholarship to continue her university studies – not conditional on obtaining the marks necessary to earn a scholarship based on academic excellence –, and to cover all the expenses until completing her education, for both academic materials and living costs if necessary.

Additionally, the Court ordered the State, as a measure of satisfaction, to award Talía Gabriela Gonzales Lluy a scholarship to undertake postgraduate studies – regardless of her academic performance during her undergraduate studies, but based on her condition of victim –, and to cover the amount corresponding to the academic and living costs.

5. Conclusion

The case of *Gonzales Lluy et al. v. Ecuador* represents a precedent in many regards.

For the first time, the IACtHR recognized the full and direct justiciability of a second-generation right – i.e. the right to education – that is one of the two rights in relation to which Article 19(6) (Means of Protection) of the Protocol of San Salvador establishes the possibility that the system of individual petitions operates.

⁵ Article 63(1) of the Convention: “If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party”.



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It's a truly important jurisprudential advancement taking into account that, for years, the IACtHR has established the violation of the aforesaid right only indirectly, or as a specific component of the conventionally recognized rights, or as an integral part of the right to reparation.

This case of great institutional relevance for the jurisprudence of the Inter-American System of Human Rights Protection is the first in which the social model of disability has been applied to HIV/AIDS.

For the first time, the IACtHR used the concept of “intersectionality” to analyze the discrimination: a fundamental approach in order to comprehend the specific injustice of what had occurred to Talía and her family, which could only be understood in the context of the convergence of the different forms of discrimination that had happened.



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Bibliographical References

M.F. BRITO SOLIZ, D.P. FLORES JIMA, *Incidencia jurídica de la sentencia de la Corte interamericana de derechos humanos en el caso Gonzales Lluy vs. Ecuador* (Machala, Unidad Académica de Ciencias Sociales, 2016).

R.C. RAMOS LIMÓN, A.C. CERVANTES CASTAÑEDA, M.A. CERVANTES CASAS, “Caso *Gonzáles Lluy y otros Vs. Ecuador*: Un avance exponencial hacia la justiciabilidad directa de los derechos económicos, sociales, culturales y ambientales”, <www.primerainstancia.com>.

L. RONCONI, “Mucho ruido y pocos... DESC. Análisis del caso *Gonzales Lluy y Otros* contra *Ecuador* de la Corte Interamericana de Derechos Humanos”, 12 *Anuario de Derechos Humanos* (2016), pp. 119-131.

E. SAMYAN, “*Gonzales Lluy et al. v. Ecuador*”, 40.3 *Loy. L.A. Int’l & Comp. L. Rev.* (2017), pp. 1697-1722.

P.T. TORRES FERNANDEZ, J.C. PEÑA NOVILLO, *Vulneración a la tutela judicial efectiva, sus efectos con relación a la protección de derechos: caso Gonzalez Lluy versus Ecuador* (Machala, Unidad Académica de Ciencias Sociales, 2017).

S. VANNUCCINI, “La ‘justiciabilidad’ del diritto all’istruzione dinanzi alla Corte interamericana dei diritti dell’uomo”, *Federalismi.it. – Focus Human Rights* n. 3 (2013), pp. 1-25.

S. VANNUCCINI, “L’avanzamento giurisprudenziale operato dalla Corte interamericana dei diritti dell’uomo in tema di ‘justiciabilidad’ del diritto all’istruzione”, *Federalismi.it. – Focus Human Rights* n. 2 (2017), pp. 1-28.

G. VARGAS VERA, “Interseccionalidad de la discriminación, formas agravadas de vulnerabilidad. El caso *Gonzales Lluy y otros vs. Ecuador*”, 18 *Iuris Dictio* (2016), pp. 143-152.



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Abstract

In 1998, Talía Gabriela Gonzales Lluy, a three-year-old girl, had been diagnosed with idiopathic thrombocytopenic purpura (ITP), a hemorrhagic disorder requiring blood and platelets transfusion urgently. Nevertheless, the donated blood had been transfused into her body without having being tested previously. As a result, Talía had been contaminated with HIV-infected blood.

When she had begun attending primary school, she had faced hostile climate and discrimination within the educational environment, and had been barred from attending classes owing to her medical condition.

In 2015, in the case of Gonzales Lluy et al. v. Ecuador, for the first time, the Inter-American Court of Human Rights stated violation of Article 13 (Right to Education) of the Protocol of San Salvador.

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