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Abstract

This paper aims to analyze the case law of the Inter-American Court of Human Rights (IACtHR) in the realm of violence against women (VAW) in light of the theory of transformative constitutionalism, in order to assess the potential and limits of this approach in the multilevel protection of human rights.

The paper is structured as follows: the first section discusses the unique features of the legal context for VAW in the Inter-American system; the second section provides a broad overview of the theory of transformative constitutionalism; the third section focuses on the Cotton Field case and the issue of transformative reparations; in conclusion, I highlight the pros and cons of this particular approach – very different from the ECHR approach to human rights protection in EU Member States – which aims to promote profound cultural and social change, sometimes even beyond the strict mandate of an international institution.

Key-words

IACtHR, Gender violence, Transformative constitutionalism, Latin America, Human rights.

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SUMMARY: 1. Introduction. – 2. The legal framework of VAW in the Inter-American system: the Belém do Pará Convention. – 3. Transformative constitutionalism and the IACtHR case law. – 4. Is transformative constitutionalism really transformative? Potential and limits in the field of gender-based violence.

1. Introduction

This paper aims to analyze the case law of the Inter-American Court of Human Rights (IACtHR) in the realm of violence against women (VAW) in light of the theory of transformative constitutionalism.[1]

The case law on gender-based violence developed by the IACtHR is one of the most interesting and advanced in a comparative perspective[2].

This is not surprising: the Inter-American system has become very dynamic in protecting human rights in Latin America,[3] and its jurisprudence is one of the most advanced at the supranational level, especially in sensitive areas such as minority rights, discrimination, and violence.

This is also true for VAW, on which the IACtHR has ruled over time in a number of landmark cases relating to acts perpetrated by private and state actors. The interest generated by IACtHR case law on VAW stems from the role of jurisprudence in promoting societal change, especially given the widespread nature of VAW in the region.

Indeed, the phenomenon of VAW is a pervasive and endemic problem in most Latin American countries: according to the Social Institutions and Gender Index (SIGI) regional report on Latin

[1] I have adopted the definition of transformative constitutionalism introduced by Karl E. Klare, "Legal Culture and Transformative Constitutionalism", 14 S. *AFR. J. HUM. RTS*. 146 (1998). According to the Author, "by transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law", p. 150. See also Michaela Heilbronner, "Transformative Constitutionalism: Not Only in the Global South", *The American Journal of Comparative Law*, vol. 65, no. 3, 2017, pp. 527– 565.

[2] Sabrina Ragone, "The Inter-American System of Human Rights: Essential Features", *Transformative Constitutionalism in Latin America: the Emergence of a new Ius Commune*, Oxford, Oxford University Press, 2017, pp. 279 – 300.

3 About Latin America constitutionalism see Rosalind Dixon & Tom Ginsburg, "Comparative Constitutional Law in Latin America - An Introduction," *Comparative Constitutional Law in Latin America*, Edward Elgar, 2017.

America and Caribbean countries (LAC)[4], 27% of women in the region have suffered violence from an intimate partner at least once in their lifetime. Moreover, femicide has become an endemic problem. The LAC region has the highest rates of femicide in the world, with 3,529 women killed across the region for gender-related reasons in 2018. As stated by the United States government "women, peace, and security" congressional report, "of the countries with the top 25 highest femicide rates, approximately 50 percent of femicide acts are committed in Latin America".[5]

The endemic nature of VAW has even been exacerbated by the norms of social distancing imposed in response to the pandemic[6]. Some commentators have defined VAW during lockdown as the 'other pandemic'[7] or the 'shadow pandemic'[8] because of the widespread prevalence of violence, especially in domestic contexts.

Over time, the relevance of the phenomenon has fostered the adoption – partly thanks to the efforts of NGOs and international institutions – of specific legal frameworks in many Latin American countries to punish VAW. To date, 18 Latin American countries have already introduced laws that sanction VAW and feminicide on various grounds: Costa Rica[9] (2007), Guatemala[10] (2008), Chile (2010 and 2018[11]), Argentina,[12] Mexico[13] and Nicaragua[14] (2012), Bolivia,[15] Honduras,[16] Panama[17] and Peru[18] (2013), Ecuador,[19] Dominican Republic[20] and Venezuela[21] (2014), Brazil[22] and

[4] OECD (2020), *SIGI 2020 Regional Report for Latin America and the Caribbean*, Social Institutions and Gender Index, OECD Publishing, Paris, https://doi.org/10.1787/cb7d45d1-en.

[5] United States government women, peace, and security congressional report, July 2020, p. 27, https://www.state.gov/wp-content/uploads/2022/07/US-Women-Peace-Security-Report-2022.pdf.

[6] see Carla Bassu, "Parità di genere ai tempi del coronavirus: l'impatto diretto e indiretto della crisi sanitaria sui diritti delle donne", *Percorsi Costituzionali*, 2019, p. 595 ss. See also UNFPA, Avenir Health, Johns Hopkins University (USA), Victoria University (Australia), Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage, April 2020, in https://www.unfpa.org/resources/impact-covid-19-pandemic-family-planning-and-ending-gender-based-violence-female-genital.

[7] Editorial, Violence against women: tackling the other pandemic, The Lancet , vol. 7 January 2022.

[8] UN Women, Report *Measuring the shadow pandemic: Violence against women during COVID-19*, November 2021.

[9] *Ley para la Penalización de la Violencia contra las Mujeres*, 2007.

[10] Decreto 22-2008 del Congreso de la República de Guatemala, Ley Contra Femicidio y otras Formas de Violencia Contra la Mujer.

[11] In particular, in 2018 the so-called *Ley Gabriela* was approved. This new law extends the legal definition of femicide to any person who commits a gender-motivated homicide of a woman.

[12] Art. 80 of the Criminal code, as amended by the Law, "FEMICIDE – Criminal Code. Modifications. Incorporation", No. 26.791, 2012.

[13] Art. 325 Federal Criminal Code, as amended by the Law "By which several provisions of the Federal Criminal Code are reformed and added in the General Law of Access for Women to a Life Free from Violence, the Organic Law of Public Administration, and the Organic Law of the Attorney General of the Republic" 2012.

[14] Art. 9 "Comprehensive Law against Violence against Women" No. 779, 2012.

[15] Art. 252 *bis* of the Criminal Code, as amended by the "Comprehensive Law to guarantee women a life free from violence".

[16] Art. 118A Criminal Code incorporated by Law n. 23/2013.

[17] Art. 132A Criminal Code introduced by Art. 41, "Law that adopts measures to prevent violence against women and reforms the Code", No. 82, 2013.

[18] Art. 108 B Criminal Code, introduced by "Law incorporating Article 108A into the Criminal Code and amending Articles 107, 46B, and 46C of the Criminal Code and Article 46 of the Criminal Sentencing Code, to prevent, punish, and eradicate feminicide", Law No. 30.068, 2013 (amends the numbering of articles by Legislative Decree 1237/2015).

Colombia[23] (2015), Paraguay[24] (2016), and Uruguay[25] (2017).

Despite increasing State action against VAW, it is difficult to eradicate as it is deeply rooted in the cultural tradition of patriarchal societies based on the unequal power relations between women and men. It is in this cultural and societal context that the IACtHR has developed its "transformative case law," which reflects a specific "way of understanding the role of human rights in society,"[26] and aims to promote profound social change. Transformative constitutionalism is a fascinating, although controversial, theory that looks at the power of law and legal actors as a way to promote social change in a given context.

The main interpreters of transformative constitutionalism have been constitutional courts, especially in the Global South— South Africa,[27] Colombia, and India in particular.

In a recent paper, Von Bogdandy and Urueña extend the concept of transformative constitutionalism to the specific context of the Inter-American System of Human Rights protection. In particular, the IACtHR appears to pursue a "transformative mandate" in its interpretive function, aimed at changing realities in the region and addressing "structures of violence, exclusion and weak institutions."[28]

The authors define the IACtHR's transformative constitutionalism as an "approach to legal interpretation that considers the effective transformation of deeply entrenched structures toward a more egalitarian or democratic society one of the paramount goals of interpretative practice."[29]

In line with this approach, the IACtHR has developed a set of very sophisticated tools to address state violations of human rights in a transformative way. It has carved out a prominent space within a common area of human rights protection in the region.

Based on this conceptual framework, this paper aims to analyze the IACtHR case law on VAW

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[19] Art. 141 Criminal Code of 2014.
[20] Art. 100 Law No. 550, 2014.
[21] Art. 57 "Organic Law on the Right of Women to a Life Free from Violence, " as amended by the Law of Reform of 2014.
[22] Art 121 of the Criminal Code, as amended by the Law, "FEMICIDE: Amendment to the Criminal Code" No. 13.104 de 2015.
[23] Art. 104 of Law 599 in 2000 (Criminal Code) as amended by the Law, "By which FEMICIDE is defined as an autonomous crime and establishing other provisions (Rosa Elvira Cely)", No. 1.761, July 2015.
[24] Art. 50 of the Law "Of integral protection of women, against all forms of violence" No. 5777 of 2016.
[25] Art. 312 Nal. 8 of the Criminal Code introduced by Law No. 19538 of 2017.
[26] Armin von Bogdandy and René Urueña, *International Transformative Constitutionalism in Latin America,* 2020, p. 405.
[27] Karl E. Klare, "Legal Culture and Transformative Constitutionalism", 14 *S. AFR. J. HUM. RTS*. 146, cit. About VAW in the South African context see Beth Goldblatt, B., "Violence against Women in South Africa: Constitutional Responses and Opportunities" in Rosalind Dixon, Theunis Roux (eds.), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence*, Cambridge: Cambridge University Press, 2018, pp. 141-173.
[28] Armin von Bogdandy and René Urueña, cit., 408.
[29] Armin von Bogdandy and René Urueña, cit., 405.

in the light of transformative constitutionalism in order to assess the potential and limits of this approach in the multilevel protection of human rights.

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2. The legal framework of VAW in the Inter-American system: the Belém do Pará Convention

The legal grounds for the protection of women's rights can be found in the Inter-American Convention on Human Rights and in a specialized treaty adopted in 1994: the Belém do Pará Convention on the Prevention, Punishment, and Eradication of Violence Against Women. This is the first international instrument that specifically addresses the problem of violence against women and has proven to be a fundamental source for the Court acting in the area.

The Belém do Pará Convention defines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere" (Art. 1).

The treaty imposes a duty on States to prevent, punish and eradicate violence against women, taking special account of situations of vulnerability due to race, ethnic background, migrant status, age, pregnancy, and socioeconomic situation. As has been argued, the Belém do Pará Convention "places the daily reality of women in the region under the microscope of international human rights law, adopting as a new paradigm of human rights – and particularly women's rights – that the private is public and consequently, the State has an inescapable duty to prevent, eradicate and punish violence in the lives of women, in both the public and private spheres."[30]

With regard to the private sphere, the Convention distinguishes between violence that "occurs within the family or domestic unit or within any other interpersonal relationship" and violence "perpetrated outside the home by any person and including, *inter alia*, rape, sexual abuse, torture,

[30] Mejía Luz Patricia, "La Comisión Interamericana de Mujeres y la Convención de Belém do Pará. Impacto en el Sistema Interamericano de Derechos Humanos", *Revista IIDH: Edición especial sobre el XXX Curso Interdisciplinario en Derechos Humanos* (56), San José: Inter-American Institute of Human Rights (IIDH), 2012, pp. 194-195, http://iidh-webserver.iidh.ed.cr/multic/UserFiles/Biblioteca/IIDH/3_2013/766d57df-258c-45f8-a242-ecc65d785cc3.pdf.

trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place" (Art. 2). Significantly the Convention extends the concept of violence also when it is "perpetrated or condoned by the State or its agents regardless of where it occurs" (Art. 2).

Moreover, in Article 9, the Convention gives special recognition to women belonging to minority groups or in a situation of particular vulnerability, since there are women who are exposed to violations of their rights on the basis of more than one risk factor. The IACtHR has used this concept of intersectionality in several cases dealing with VAW in the case of women belonging to an indigenous community or being vulnerable in a number of ways.

On a procedural level, the Convention recognized the jurisdiction of the IACHR and the IACtHR in cases of violations of Article 7 of the Convention, thus confirming the justiciability of the conventional provisions.

The Convention was drafted through the unprecedented collaboration of civil society, the Member States and the institutions of the Organization of American States (OAS). This joint effort explains why the Convention entered into force quickly, and has been ratified by many countries in the region (32 out of 35).

This involvement of the Member States is crucial in raising awareness of the endemic problem of gender-based violence and in creating the conditions for effective implementation of the provisions of the Convention. Indeed, after it entered into force, there was a wave of legislation adopted by States to address gender-based violence.

The Convention also provides a link to the work of the IACHR and the IACtHR, allowing them to hear individual complaints of alleged violations of the Treaty.

The Belém do Pará Convention and the resulting national legislation aim to create a legal framework to deal with the persistent phenomenon of VAW, which is so pervasive in historical, cultural and social circumstances that it makes the violation of women's human rights acceptable.

The Belém do Pará Convention might have triggered the creation of mechanisms designed to protect and defend women's rights in the struggle to eradicate physical, sexual and psychological violence against women in the public and private spheres, but question remains as to how far the law can go in changing the very deeply-rooted cultural and social attitudes that influence and determine gender-based violence.

In other words, one can ask whether and to what extent the law is the most appropriate and effective tool to penetrate a deeply-rooted cultural and societal structure and to promote broader structural change.

3. Transformative constitutionalism and the IACtHR case law

The IACHR - IACtHR case law on VAW is considered one of the most emblematic examples of the Court's transformative mandate.

A brief analysis of the development of the IACtHR's jurisprudence on VAW reveals general trends in the interpretations from the IACtHR.

The first case in which the Inter-American Commission applied the Belém do Pará Convention was Maria da Penha Maia Fernandes v. Brazil (2001). This was a case of domestic violence, as Mrs. Fernandes was the victim of aggression by her spouse, as a result of which she suffered irreversible paraplegia and other physical and psychological trauma. Mrs. Fernandes applied to the domestic courts, but after 17 years, the Brazilian justice system had not issued a final ruling on the case, despite the seriousness of the accusations, the mountain of evidence against him, and the grave nature of the crime committed against Mrs. Fernandes.

The Commission, applying for the first time Article 7 of the Convention, ruled that "ineffective judicial action, impunity, and the inability of victims to obtain compensation provide an example of the lack of commitment to take appropriate action to address domestic violence. Article 7 of the Convention of Belém do Pará seems to represent a list of commitments the Brazilian State has failed to meet in such cases" (IACHR).

The IACHR has also ruled on the VAW committed by state agents, as in the case of Ana, Beatriz et Celia Gonzalez Perez v. Mexico. Here the Commission, taking into account the Belém do Pará Convention, indicated that rapes committed by state agents, as well as the inaction of the authorities to investigate, judge, and punish these crimes, triggered the State's responsibility not only under the Convention but also under the Inter-American Convention to Prevent and Punish Torture.

In this case, the Commission applied the concept of intersectionality,[31] recognizing a pattern of violence explicitly targeting indigenous and young women.

Even the IACtHR started to address gender-based violence in 2006, with the case of Miguel Castro Castro Prison v. Peru (2006).[32]

The case related "to the execution of Operative Transfer 1 within the Miguel Castro Castro Prison" in Peru, "during which the State [had] allegedly . . . caused the death of at least forty-two inmates, injured 175 inmates, and sub[jected] . . . 322 [other] inmates to a cruel, inhuman[e], and degrading treatment."[33] For the first time, the Court stressed that gender-based violence is a form of

[31] On intersectionality see Crenshaw, Kimberlé W., "On Intersectionality: Essential Writings", *Faculty Books*, 2017.
[32] *IACtHR, Miguel Castro Castro Prison v. Peru* (2006).
[33] *Ibidem.*

discrimination referring to the Committee on the Elimination of Discrimination against Women (CEDAW) and the aggravated nature of human rights violations when they are committed against women or when they disproportionately affect women.

This early jurisprudence laid the groundwork for a second generation of IACtHR cases dealing more directly with VAW and transformative constitutionalism. With the "Cotton Field case" in 2009, the emphasis is placed on the potentially transformative effect of reparations.

The application concerns the State's alleged international responsibility for the disappearance and subsequent deaths of the Mss. Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos Monárrez (from now on "Mss. González, Herrera and Ramos"), whose bodies were found in a cotton field in Ciudad Juárez on November 6, 2001. The State is considered responsible for "the lack of measures for the protection of the victims, two of whom were minor children, the lack of prevention of these crimes, despite full awareness of the existence of a pattern of gender-related violence that had resulted in hundreds of women and girls murdered, the lack of response of the authorities to the disappearance [...]; the lack of due diligence in the investigation of the homicides [...], as well as the denial of justice and the lack of an adequate reparation."[34]

The Court held that the State has positive obligations to respond to VAW committed by private actors, and that these obligations are justiciable under Article 7 of the Belém do Pará Convention.

In assessing the responsibility of the State of Mexico, the Court placed this case in the context of persistent violence against women, often characterized by irregularities on the part of state authorities. This case also demonstrates the epistemic function of the Inter-American Court. As has been argued, "the whole point of the Campo Algodonero case was precisely that domestic authorities had been unable (or unwilling) to see the wider factual context of the systematic victimization of women that the Inter-American institutions identified and validated. One key transformative intervention was defining that wider factual context—a transformation that was not achieved by developing new legal standards or by offering legal interpretation or 'naming and shaming' strategies but by providing tools such as statistics, demography, and ecology. Leading to a different description of reality, these tools thus serve a basic epistemic function."[35]

The transformative impact of this decision can also be found in the application of the concept of transformative reparations.

In the Cotton Field case, the Court ruled on a violation of the Belém do Pará Convention, and it introduced a distinction between reparations (individual remedies) and transformations of the pre-

[34] *Ibidem.*
[35] Armin von Bogdandy, Renè Urueña, *International Transformative Constitutionalism in Latin America*, 2020, 405, cit.

existing context (structural remedies), with particular reference to the societal causes of the high rate of VAW in Ciudad Juarez.[36] As has been noted, "the judgment suggested a significant redefinition of the Court's concept of adequate reparations by highlighting that, when the violations occur in a context of structural discrimination, reparations cannot simply return victims to the situation they were in before the violation took place (one of discrimination); instead, reparations should aim to transform or change the pre-existing situation."[37]

In this regard, in addition to the more traditional monetary reparations for individual damages, the Court established that the reparations were intended to reconstruct the economic, social and cultural relations that affect women and to eliminate the factors that cause discrimination. In particular, as transformative reparations, the Court ordered that future investigations include a gender perspective and that specific lines of inquiry be undertaken with regard to sexual violence, which must include exploring the corresponding patterns in the zone. Moreover Mexico had to continue to standardize all its protocols, manuals, prosecutorial investigation criteria, expert services, and judicial services used to investigate crimes related to the disappearance, sexual abuse and murder of women, in accordance with international standards on searching for disappeared persons and from a gender perspective; it had to create a website that it updated continually with the necessary personal information of all the women and girls who have disappeared in Chihuahua since 1993 and who remain missing; the State had to create or update a national database with the personal information available on disappeared women and girls; the State had to continue implementing permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to ensure due diligence in conducting preliminary inquiries and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society; last but not least, it had to implement an educational program for the general population of the state of Chihuahua so as to redress the situation women find themselves in.

Looking at compliance a decade on from this decision, the State has still not adopted several measures: for example, "that the different institutions involved in the investigations have sufficient material and human resources; to sanction those responsible; to provide medical attention to the victims; to investigate, identify, prosecute and punish those responsible for human rights violations; to investigate the public officials mentioned in the judgment; and, to the design of a comprehensive

[36] Ruth Rubio-Marin, C. Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton field Judgment", *Human Rights Quarterly,* 2011, p. 1090 ss.
[37] *Ibidem*.

care plan for victims."[38]

From a legal perspective, the Cotton Field decision marked a new approach by the Court to cases dealing with gender-based violence. As has been argued, the judgment recognizes that "the treatment of reparations in cases involving discrimination calls not for restitution but for transformative redress since it would be against the core foundations of human rights law to redress women, or for that matter any other subordinated group, by returning them to the situation that allowed the violations to happen in the first place.[39]"

The Cotton Field case opened a new path in the jurisprudence on VAW, and it has posed new challenges for future developments in this area of human rights adjudication.[40] Adopting a transformative approach, the Court appears to depart from the classical role of human rights adjudicator, focused on individual cases, and to step into the realm of defining general policies and regulations.

Other cases followed the Cotton Field decision. Among the most recent ones, it is worth mentioning the case Paola Guzmán Albarracín v. Ecuador[41], decided by the IACtHR in 2020. Paola Guzmán Albarracín was a student in Ecuador, who had been repeatedly sexually abused by her public school's vice principal and by the school's doctor. In 2002, she became pregnant and she was forced to have an abortion. Paola committed suicide and died.

After 18 years from Paola's death, the IACtHR issued a decision finding Ecuador liable for several rights violations: Paola's rights to life, personal integrity, private life and dignity; the right to enjoy special protection from the State as a child; the right to equality and non-discrimination; the right to education; and the right to live free from gender violence.

Moreover, in line with the transformative reparations, the decision obliged Ecuador to adopt structural measures to address sexual violence in schools, including policies to provide sex and reproductive education. The Court's judgment is particularly relevant since it is the first decision

[38] Irene Spigno, "Gender violence against low-income women in Mexico. Analysis of the Inter-American doctrine", *Diritti Comparati*, 1/2019.

[39] Ruth Rubio-Marin, C. Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton field Judgment", cit., p. 1090.

[40] As has been argued, the case does "provide the inter-American system four key opportunities for the future development of human rights standards related to the rights of women; namely, (1) to continue defining the content of cornerstone State obligations, such as due diligence and access to justice; (2) to clarify the intersection between the issues of violence, discrimination, due diligence, and access to justice, and what this intersection means for State compliance with their human rights obligations at the national level; (3) to shed light on the content of Article 7 of the Convention of Belém do Pará , the complementary nature of its provisions, and its symbiotic relationship with the more general obligations contained in the American Convention; and (4) to define the regional and international terminology used to describe the problems of discrimination and violence against women in a way that impacts the adoption of legislation and other public measures to address these problems at the national level", see Rosa M. Celorio, "The Rights of Women in The Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-setting", 65 *U. Miami L. Rev.*, 2011, 819.

[41] Inter-American Court of Human Rights, *Guzmán Albarracín and others v. Ecuador.* Judgment of June 24, 2020. Merits, Reparations, and Costs. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_405_esp.pdf.

that contributes to defining human rights standards on the obligation to prevent sexual harassment in the educational context[42], also highlighting the importance of sexual education as part of the broader right to education.

The prominence of IACtHR's transformative approach also reverberates in national courts: as Rubio Marin recently argued, "it seems that courts are becoming increasingly aware of the structural dimension of violence against women, the problems surrounding impunity, and the under-reporting of these crimes"[43]. Among the most transformative Courts, we should mention the Colombian Constitutional Court, which has developed, over time, an interesting jurisprudence on gender violence, and recently, it has ordered the government to create programs to foster gender-responsive treatments and policies for forcefully displaced women[44].

4. Is transformative constitutionalism really transformative? Potential and limits in the field of gender-based violence

Looking at the evolution of the case law of the Inter-American system on VAW, it is undeniable that the IACtHR plays a fundamental role in the region in terms of advancing the States' agenda on human rights. This feature places the IACtHR at the forefront of human rights protection from an international and comparative perspective.

In particular, the Court's transformative approach has the potential to be a valuable tool in addressing systemic and widespread gender-based violence in the region. However, implementing corrective and transformative reparations is a critical challenge given the Court's limited power to address structural problems. Moreover, the effectiveness of such an approach remains needs to be seen.

In other words, transformative reparations require the court to move beyond a narrowly conceived role of administering justice in individual cases and into the realm of institutional reform and policymaking by requiring States to address structural deficiencies in the protection of human rights.[45]

This, in turn, poses questions about the legitimacy of such intervention in politically sensitive areas. The tension that may arise at the intersection between the IACtHR's human rights agenda and

[42] Catalina Martínez Coral, Carmen Cecilia Martínez, "Sexual violence against girls in schools as a public health issue: a commentary on the case Paola Guzmán Albarracín v. Ecuador", *Sex Reprod Health Matters*. 2021

[43] Ruth Rubio Marin, "Transformative Gender Constitutionalism", in Ruth Rubio Marin (ed.), *Global Gender Constitutionalism and Women's Citizenship, Cambridge Studies in Constitutional La*w, 2022, p. 469.

[44] *Ibidem.* See also *Colombian Constitutional Court T-25/04.*

[45] Ruth Rubio-Marin, C. Sandoval, "Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton field Judgment", cit. p. 1093 ss.

national legislative preferences is one of the most difficult challenges in the multilevel protection of rights.

On the one hand, the advancement of the human rights agenda in the region can only partially rest on the Inter-American Court alone as it also requires cooperation of States, without which progress will never be possible. The IACtHR has developed some tools to make such cooperation more practical, such as conventionality control. As has been argued, conventionality control "tasks domestic courts with reviewing any national act, including domestic laws, for compatibility with the American Convention on Human Rights, as interpreted by the IACtHR."[46]

However, even such an attempt to foster integration between the domestic and international levels is not exempt from the inherent limitations of an international human rights protection regime. Globally, there is growing resistance and opposition to global constitutional convergence and supranational influence on national spheres of power, driven especially (but not exclusively) by populist politicians. More broadly, the "general trend towards political and constitutional convergence, globalism and supra-nationalism have spawned an array of localist counter-movements that profess to represent a given polity's, region's or a community's 'genuine' identity. As such, the more expansive constitutional convergence trends are, the more apparent the paradox of global constitutionalism becomes as the likelihood of dissent and resistance increases."[47]

In this context, as Hirschl argues, "when understood against the backdrop of formidable centripetal forces of political, cultural, and economic globalization, the rise of a new trans-national constitutional order and judicial class and the corresponding decrease in the autonomy of 'Westphalian' constitutionalism, as well as an ever-increasing deficit of democratic legitimacy, counter pressures for preserving a given sub-national unit's, region's, or community's unique constitutional legacy, cultural-linguistic heritage, and political voice seem destined to intensify, not decline."[48]

In this light, despite the potential of transformative constitutionalism, it is important to be aware of its concrete limits and its effectiveness.

Moreover, specifically with regard to transformative reparations, it is key to recognize "the relatively limited practical impact of the Inter-American Court's remedial interventions. Generally, the States party to the disputes have paid the reparations due to the immediate victims and often provided measures of symbolic and moral reparations (such as public apologies, for instance). But by far, the most difficult measures of reparation have been those seeking to ensure the non-

[46] Armin von Bogdandy and René Urueña, cit., p. 408.
[47] Ran Hirschl, "Opting Out of 'Global Constitutionalis", *Law & Ethics of Human Rights* 12 (1), 2018, 5.
[48] *Ibidem*, p. 35.

repetition of the violations – i.e., exactly those remedial measures most centrally related to the impact that the violations have on the more general systemic problem of social exclusion. When the guarantees of non-repetition involve training programs for the 'sensitization' of civil servants or police forces, they are as commonly complied with as they are seemingly ineffective at producing real change. The much harder and rarer steps to take are those requiring substantial legal and constitutional reforms."[49]

For deeply-rooted societal problems in particular, the role of law in achieving a structural change may not be overly robust and, specifically for women's rights, several obstacles to the full realization of women's human rights and citizenship persist: women continue to suffer from physical, psychological and sexual violence, discrimination and violations of the most basic human rights. In fact, after the Cotton Field case, it has been argued that femicide and disappearances have continued throughout Mexico. These extreme forms of discrimination have continued against families and defenders fighting to end impunity for gender-based violence.

This aspect highlights the inherent limitations of international human rights mechanisms in addressing the problems of gender-based violence and, more generally, of social exclusion: the tangible impact and effectiveness of the IACtHR's actions are, on the whole, relatively limited, as they depend on the willingness of the State to take concrete steps and often on cultural and societal structures that are difficult to dismantle and eradicate through legal and judicial means. In other words, court-led transformative constitutionalism can be seen as "an oxymoron disguising an illusion."[50]

As Carozza argues, "to some extent, we have run up against the limits of law in general in bringing about substantial social change. At the margins, the law sometimes leads and often follows societal attitudes and mores, but rarely is it dramatically different from them. So, to expect from the law the eradication of social exclusion, and the generation of inclusiveness and participation, is already necessarily a semi-utopian project at best."[51]

In light of this, "human rights are perhaps best directed not to the utopian project of transforming society but instead to the more modest and realistic one of maintaining the conditions of openness within which persons and groups can have the conditions to exercise their moral agency, room to develop new social initiatives generative of greater inclusion, and the space to

[49] Paolo Carozza, "The Possibilities and Limits of International Human Rights Law to Foster Social Inclusion and Participation", available at http://www.pass.va/content/scienzesociali/en/publications/acta/participatorysociety/carozza.pdf.
[50] Carlos Bernal, "Introduction to I-CONnect Symposium–Contemporary Discussions in Constitutional Law–Part II: The Paradox of the Transformative Role of the Colombian Constitutional Court", *Int'l J. Const. L. Blog*, Oct. 31, 2018.
[51] Paolo Carozza, "The Possibilities and Limits of International Human Rights Law to Foster Social Inclusion and Participation", cit.

dedicate themselves to the good of one another in community."[52]

This is the challenge for concretely addressing the still unfulfilled promises of gender justice and equality.

[52] *Ibidem.*