doi:10.1017/ajil.2020.27

International Transformative Constitutionalism in Latin America

By Armin von Bogdandy[*] and René Urueña[**]

Abstract

This Article analyzes the rise of international transformative constitutionalism in Latin America and responds to some of the challenges to its legitimacy and effectiveness. It focuses on the practice of the Inter-American Court of Human Rights (IACtHR), the decisions and procedures of which constitute a small, but vibrant and essential, part of a wider Latin American community of human rights—a diverse group of actors who confront violence, social exclusion, and weak institutions through legal means.

On July 18, 1978, the American Convention on Human Rights entered into force. Four decades later, we argue, the human rights system it has established has become the cornerstone of a phenomenon that we label as international transformative constitutionalism in Latin America. This Article explores the operation of transformative constitutionalism as a response to Latin America's structural problems—especially violence, exclusion, and weak institutions—and responds to some of the challenges to its legitimacy and effectiveness. To do so, we focus on the practice of the Inter-American Court of Human Rights (IACtHR) and offer a reading of its decisions and procedures as constituting a small, but vibrant and essential, part of the far wider Latin American community of human rights.

International transformative constitutionalism in Latin America is many things. It is certainly contested. Consider, for example, the unsolicited public communication that the presidents of Argentina, Brazil, Chile, Colombia, and Paraguay (a group of countries that amounts to around 70 percent of the region's population and 80 percent of its gross domestic product) sent to the Inter-American Commission of Human Rights (IACHR) in April 2019. While acknowledging the importance of the Inter-American Human Rights System, the communication strongly suggested, among other things, that regional institutions should show greater respect for the principle of subsidiarity, apply more restrained methods of interpretation, and operate with "due knowledge and consideration of the political, economic, and

* Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany, professor of public law at Goethe University, Frankfurt/Main. Email: sekreavb@mpil.de.

** Associate Professor and Director of Research, Universidad de los Andes School of Law (Colombia). Email: rf.uruena21@uniandes.edu.co. The Article is the fruit of a Tandem Project, established in 2017 between the Law Faculty of the Universidad de los Andes and the Max Planck Institute. We gratefully acknowledge financial support by the Leibniz Programme of the Deutsche Forschungsgemeinschaft and by the Vice-Presidency of Research, Universidad de Los Andes (Colombia). We are indebted to the Dienstagsrunde for critique, and to Volker Daiber and Theodor Shulman for their editorial assistance. We are most grateful to the colleagues with whom we have developed the common law in Latin America approach (ICCAL) so far, in particular Eduardo Ferrer MacGregor, Manuel Góngora Mera, Flávia Piovesan, and Mariela Morales Antoniazzi.

social realities of States by the organs of the . . . System."[1] In response to this missive, more than two hundred nongovernmental organizations (NGOs) immediately mobilized against what they viewed as a "backsliding for the proper functioning" of the system.[2]

The presidents' letter no doubt reveals the politically motivated concern of governments that are often criticized by Inter-American institutions for their human rights practices. But the letter's arguments are also reflective of a wider wariness in the region with what critics perceive to be an illegitimate expansion of the Inter-American System's powers, particularly in the face of an apparent lack of legal basis for such an expansion. It is in this debate that this Article intervenes. It interprets the practice of the IACtHR as an expression of international transformative constitutionalism, describes the Latin American community of human rights practice as the key mechanism for allowing this phenomenon to emerge in the region, and responds to the critiques to its legitimacy and legality.

To do so, Part I of the Article first explores the concept of international transformative constitutionalism and argues that it arises from a distinctive confluence of domestic and international legal developments. It then briefly presents the conventionality control doctrine as the core tool to embed the Court's jurisprudence domestically. Part II describes the operation of international transformative constitutionalism in Latin America, presenting it as the practice of a diverse group of actors that comprise the Latin American human rights community. We then show how that community creates relevant knowledge and frames the perception of social issues. Next, we address a chief objection to attributing a significant role to the IACtHR in transformative constitutionalism: its orders have serious problems of compliance. We argue, however, that the Court's transformative effect becomes evident when the prism is expanded to consider the Court's wider social impact.

International transformative constitutionalism could not work if its creative lawyering could not present itself as legal and legitimate. Part III considers the arguments supporting this foundation. It begins by reviewing the pertinent criticisms of international transformative constitutionalism leveled by scholars, practitioners, and governments in the region. Recognizing that many of these criticisms derive from reasonable concerns, we reconstruct the Court's mandate in light of the alleged *ultra vires* character of some of its decisions, respond to its purported democratic deficit, and identify the factors that guide, frame, and, ultimately, constrain the Court's jurisprudence.

The Article concludes in Part IV by taking stock of the current state of transformative constitutionalism in Latin America and offering some preliminary thoughts about how the phenomenon might evolve in the future.

[1] *See* República Argentina, la República Federativa del Brasil, la República de Chile, la República de Colombia y la República del Paraguay [Republic of Argentina, Federal Republic of Brazil, Republic of Chile, Republic of Colombia, and Republic of Paraguay], Declaración Sobre el Sistema Interamericano de Derechos Humanos [Declaration on the Inter-American Human Rights System] (2019), *available at* https://www.mre.gov.py/index.php/noticias-de-embajadas-y-consulados/gobiernos-de-argentina-brasil-chile-colombia-y-paraguay-se-manifiestan-sobre-el-sistema-interamericano-de-derechos-humanos. On the backlash against the Inter-American tribunal, see Ximena Soley & Silvia Steininger, *Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights*, 14 INT'L J. L. CONTEXT 237 (2018).

[2] *See* Center for Justice and International Law, *Attacks on the Interamerican Human Rights System Violate the Regional Protection of Human Rights* (May 3, 2019), *at* https://www.cejil.org/en/attacks-interamerican-human-rights-system-violate-regional-protection-human-rights.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

I. The Essence of International Transformative Constitutionalism in Latin America

The case law of the IACtHR reflects a specific way of understanding the role of human rights in society, which we refer to in this Article as international transformative constitutionalism. In this section, we identify its premises and its institutional implications by introducing, first, the notion of transformative constitutionalism as it emerged in domestic law, and then suggesting how it can be usefully deployed to describe the Inter-American approach to legal interpretation.

A. Defining Latin American Transformative Constitutionalism

Transformative constitutionalism describes the practice of interpreting and applying constitutional norms in a way that seeks to promote deep social change. In its English-language version, the notion was initially proposed by the American scholar Karl Klare in the context of South African constitutional adjudication in the late 1990s.[3] Klare, who argues that transformative constitutionalism is part of "post-liberal law," is keen on giving his conception a Critical Legal Studies bend. Following the South African scholar Theunis Roux, we believe, however, that the transformative approach to interpretation can be squared with liberal constitutionalism.[4] Indeed, around the same time and similar to South Africa, many Latin American judges, activists, and academics started using policy-oriented techniques of legal interpretation from the liberal mainstream (such as the principle of proportionality) in order to transform political and distributive realities in the region, an approach often labeled "neo-constitutionalism."[5]

We understand 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. The phenomenon has special relevance for Latin America, which particularly suffers from violence, exclusion, and weak institutions. Latin America represents about 8 percent of the world's population, but 33 percent of its homicides in 2018. Four countries in the region (Brazil, Colombia, Mexico, and Venezuela) accounted in 2018 for almost 25 percent of all the

[3] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. Afr. J. Hum. Rts. 146 (1998). "By transformative constitutionalism," says Klare, "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 non-violent political processes grounded in law." *Id.* at 150.

[4] *See* Theunis Roux, *A Brief Response to Professor Baxi*, *in* Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa 40, 50, (Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., 2013). For Francois Venter, by contrast, the notion of transformation in South Africa has become "pliable, and ideologically compromised." *See* Francois Venter, *The Limits of Transformation in South Africa's Constitutional Democracy*, 34 S. Afr. J. Hum. Rts. 143, 165 (2018).

[5] *See generally* Paolo Comanducci, *Formas de (neo)constitucionalismo: Un análisis metateórico* [*Forms of (Neo)constitutionalism: A Meta-theoretical Analysis*], *in* Neoconstitucionalismo(s) [Neoconstitutionalism(s)] 75 (Miguel Carbonell ed., 2003). Roberto Gargarella, *Piazzolla, Dworkin, y el Neoconstitucionalismo* [*Piazzolla, Dworkin and Neoconstitutionalism*], Blog: Seminario de teoría constitucional y filosofía política [Constitutional Theory and Political Philosophy Seminar Blog] (Aug. 25, 2011), *at* http://seminariogargarella.blogspot.com/2011/08/piazzolla-dworkin-y-el.html.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

murders in the world.[6] The judicial practice of the IACtHR, we argue in the next section, reflects some of the characteristics of transformative constitutionalism in its response to these conditions.

Latin America does not present the only case of transformative constitutionalism.[7] The Indian Supreme Court[8] and the South African Constitutional Court,[9] for example, have developed a distinct jurisprudence to address structural problems, in particular deep patterns of injustice.[10] To frame transformative constitutionalism in more theoretical terms, the notion of "responsive law" that Nonet and Selznick introduced in the late 1970s is helpful.[11] In their seminal work, the authors identify various forms of legal ordering. The first one is "repressive law," in which the ultimate goal of the legal system is order, legal reasoning is ad hoc, expedient, and particularistic, coercion is extended and weakly restrained, and law is generally subordinated to power politics. The second is "autonomous law," in which the goal of the legal system is legitimation, legal reasoning adheres strictly to legal authority (but is susceptible to excessive formalism), coercion is controlled by legal restraints, and law is generally not at the whim of politics.[12]

These two archetypes paint an accurate picture of the context in which transformative constitutionalism emerged in Latin America. On the one hand, many scholars and activists have regarded law as a continuation of the politics of repression that characterized much of the region. From this perspective, constitutionalism could not work as a viable platform for social change, thus leaving it to electoral politics, social mobilization, or even armed revolution. On the other hand, the archetype of autonomous law reflects the strand of formalistic legal thought that characterized constitutionalism in the region, which focused on legal forms and turned a blind eye to their actual effects in real life.

While autonomous law is a great improvement over the repressive archetype, Nonet and Selznick argue, it usually ignores distributive impacts. They therefore suggest a third archetype: a "responsive" law in which the legal system, building on the premise of an autonomous law, responds to social need and aspirations. Legal actors, in this archetype, test "alternative strategies for the implementation of mandates and reconstructing those mandates in the light

[6] Robert Muggah & Katherine Aguirre Tobón, *Citizen Security in Latin America: Facts and Figures*, IGARAPÉ INST., 2, 5 (2018), *at* https://igarape.org.br/en/citizen-security-in-latin-america-facts-and-figures. Moreover, it is one of the most unequal region in the world. Alicia Bárcena & Winnie Byanyima, *Latin America Is the World's Most Unequal Region. Here's How to Fix It*, ECON. COMM'N LATIN AM. & THE CARIBBEAN (2016), *at* https://www.cepal.org/en/articulos/2016-america-latina-caribe-es-la-region-mas-desigual-mundo-como-solucionarlo.

[7] *See generally* Michaela Hailbronner, *Transformative Constitutionalism: Not Only in the Global South*, 65 AM. J. COMP. L. 527 (2017).

[8] Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TULANE J. INT'L COMP. L. 49, 92–103 (2007).

[9] Theunis Roux, *Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference*, 20 STELLENBOSCH L. REV. 258 (2009).

[10] For the global phenomenon, see CONSTITUTIONALISM OF THE GLOBAL SOUTH. THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado ed., 2013)

[11] PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978). Making the explicit link of how Selznick's responsive law inspired some of the early thinking on new constitutionalism in Latin American in the 1990s, see Manuel José Cepeda Espinosa, *Responsive Constitutionalism*, 15 ANN. REV. L. SOC. SCI. 21 (2019).

[12] NONET & SELZNICK, *supra* note 11, at 16.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

of what is learned."[13] Such a process implies a redistribution of resources within society—a redistribution that "transforms" social structures. Hence, what Nonet and Sleznick call "responsive law" undergirds a transformative approach to the legal system that regards law as separate from politics but is still concerned with its effects on society.

What we describe as "transformative constitutionalism," therefore, is an approach to constitutional texts, a set of empirical assumptions, argumentative tools, and normative goals that coalesce around the notion that legal interpretation should strive toward being responsive to society's problems. Such an approach can have both critical and pragmatic modes. In its critical mode, transformative constitutionalism points out the distributive consequences of purely formal or technical questions of constitutional adjudication. In its pragmatic mode, transformative constitutionalism interprets legal texts with the specific goal of realizing constitutional objectives, which often implies changing or transforming current structures.[14]

Defining transformative constitutionalism as an approach to legal interpretation narrows the kinds of questions that can be studied through its prism. In particular, questions of whether the intended social transformations are fully realized is not central to our inquiry: transformative constitutionalism "works" as soon as courts or other actors deploy its particular interpretative stance. The fact that a decision informed by a transformative approach does not deeply "transform" society in the short or medium term, does not make such a decision less exemplary of transformative constitutionalism.

As an example, consider the Colombian Constitutional Court's ambitious decision of 2005 that aimed to protect the rights of the internally displaced population (IDP) in that country.[15] At the time of the decision, Colombia had more than 3.5 million IDP—the largest in the world. The government's numerous policies on IPDs had not brought concrete results, due to systematic implementation failures and insufficient allocation of resources.[16] Facing this situation, the Colombian Constitutional Court issued an unprecedented decision, in which it sought to reverse the inertia of dormant bureaucracies, and gave orders that sought to incentivize the construction of institutional capabilities, coordinate different agencies responsible for tackling the humanitarian challenge, and create reliable indicators to monitor policy implementation. The decision was notable in its ambition, and is reflective of a transformative constitutionalism mindset to the extent that one of its guiding objectives was to transcend the formalism of legal categories and transform the actual situation of the displaced population—an approach encapsulated in the Court's attempt to measure the "effective enjoyment of rights."[17] The Constitutional Court's decision succeeded in catalyzing a coordinated front for tackling the IDP crisis in Colombia, including a joint effort with civil society

[13] *Id.* at 109.

[14] Karin van Marle, *Transformative Constitutionalism as/and Critique*, 20 STELLENBOSCH L. REV. 286 (2009).

[15] Corte Constitucional [Constitutional Court], Sentencia T-025 de 2004 [Decision T-025 of 2004] (per Manuel José Cepeda Espinosa), Apr. 27, 2004 (Colom.) *See generally* CÉSAR AUGUSTO RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, MÁS ALLÁ DEL DESPLAZAMIENTO: POLÍTICAS, DERECHOS Y SUPERACIÓN DEL DESPLAZAMIENTO FORZADO EN COLOMBIA [BEYOND DISPLACEMENT: POLITICS, RIGHTS, AND OVERCOMING FORCED DISPLACEMENT IN COLOMBIA] (2010).

[16] *Id.* at 44–47

[17] *See* René Urueña, *Internally Displaced Population in Colombia: A Case Study on the Domestic Aspects of Indicators as Technologies of Global Governance*, *in* GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH QUANTIFICATION AND RANKINGS 249 (Kevin Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

organizations, and many policies that undoubtedly left IDPs better off were adopted. However, thus far, the decision's effects have been limited, as the rights of this population continue to be violated: IDPs continue being one of most vulnerable groups among Colombians.[18] This situation, we submit, does not undermine the "transformative" character of the decision, however, because it approached the constitutional text with the intent to have an impact on reality over the long term.

In this sense, the realm of transformative constitutionalism is that of legal interpretation, not of public policy effects. To be sure, a transformative interpretation of legal texts will often imply an assessment of how to achieve the desired outcomes. If that calculation fails, however, and if the outcome is not achieved, or if society achieves the outcome through means not connected to a particular judicial decision, the interpretation would remain "transformative" regardless of its impacts.

Why do we use this concept of constitutionalism for the Inter-American regime of human rights? First, because the admittedly charged concept of "constitutionalism" is useful to account for the Inter-American regime's close connection to domestic constitutional law: the transformative thrust of the interpretations by the IACtHR is triggered and supported by particular features of domestic constitutions.[19] Second, because the Court's interpretation of the American Convention reflects the particular approach of what is called "transformative constitutionalism," as one of its interpretive objectives is to transform realities in the region—in particular to address structures of violence, exclusion, and weak institutions. Finally, because the Court operates much like a domestic constitutional court, not least because it has declared that parliamentary statutes contrary to the Convention are void, a power usually reserved to constitutional adjudication. We wish to stress that we do not see transformative constitutionalism in Latin America as the iteration of global or international constitutionalism.[20] Indeed, we use different analytical frames for the general development of institutional international law.[21]

B. The IACtHR's Transformative Mandate

The transformative interpretation of treaties by the Inter-American Court rests on a dynamic interaction with the transformative mandate of domestic constitutions. To

[18] Andrés Mauricio Mendoza Piñeros, *El desplazamiento forzado en Colombia y la intervención del estado* [*Forced Displacement in Colombia and State Intervention*], 14 Rev. Econ. Inst. (2012).

[19] Paola Andrea Acosta Alvarado, Diálogo judicial y constitucionalismo multinivel: El caso interamericano [Judicial Dialogue and Multilevel Constitutionalism: The Inter-American Case] (2015) (ebook).

[20] On global constitutionalism, see generally Anne Peters, *Constitutionalization*, *in* Concepts for International Law – Contributions to Disciplinary Thought 141 (Sahib Singh & Jean d'Aspremont eds., 2019); Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 Leiden J. Int'l L. 579 (2006). Antje Wiener, Anthony F. Lang Jr., James Tully, Miguel Poiares Maduro & Mattias Kumm, *Global Constitutionalism: Human Rights, Democracy and the Rule of Law*, 1 Glob. Const. 1 (2012).

[21] Armin von Bogdandy, Matthias Goldmann & Ingo Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 Eur. J. Int'l L. 115 (2017); René Urueña, *Global Administrative Law and the Global South*, *in* Research Handbook on Global Administrative Law 392 (Sabino Cassese ed., 2016). René Urueña, *Espejismos constitucionales: La promesa incumplida del constitucionalismo global* [*Constitutional Mirages: The Unfulfilled Promise of Global Constitutionalism*], 24 Rev. Derecho Público Univ. Los Andes (2010).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

understand this crucial link, one needs to consider the region's history. In the 1960s, when the American Convention was debated, most Latin American countries were under authoritarian or repressive governments. The 1970s were a particularly dark period. Only from the 1980s onward did the countries of the region make a slow transition toward democracy, seeking to ensure a *¡Nunca Más!*[22] of massive human rights violations in their societies. To do so, they locked in a broad social consensus by enacting new constitutional texts: Brazil in 1988, Colombia in 1991, Paraguay in 1992, Peru in 1993, Ecuador in 1998 and 2008, Venezuela in 1999, and Bolivia in 2009.[23] Other countries reformed their constitutions accordingly, such as Argentina in 1994 and Mexico in 2011. The outlier is Chile, where the Constitution enacted under the Pinochet regime in 1980 is still in force, notwithstanding some important amendments and a process of constitutional change that started in 2019.[24]

What these domestic constitutional transformations have in common is that they adopted a transformative approach to the law. The new constitutions were specifically designed to overcome, in Nonet and Selznick's terms, the dark legacy of repressive laws. At the same time, though, they also sought to go beyond the premise of autonomous law and its risk of extreme formalism.[25] Most constitutions in the region introduced a generous bill of fundamental rights, including socioeconomic rights,[26] as well as clauses intended to improve democratic participation, be it direct participation or better representation.[27] All this built

[22] Comisión Nacional sobre la Desaparición de Personas, Nunca más [National Commission on the Disapparance of People, Never Again] (1984).

[23] *See generally* Mariela Morales Antoniazzi, Protección supranacional de la democracia en Suramérica. [Supranational Protection of Democracy in South America] Un estudio sobre el acervo del ius constitutionale commune [A Study About the *Acquis* of *Ius Constitutionale Commune*] (2014).

[24] República de Chile, Constituciones Políticas de la República de Chile 1810–2015 [Political Constitutions of the Republic of Chile 1810–2015] (Diario Oficial de la República de Chile [Official Diary of the Republic of Chile]), at 448–514 (2015). In November 2019, Chilean MPs and other political leadership reached an "Agreement for Social Peace and a New Constitution," under which Chileans would vote on a referendum to establish an assembly to replace the 1980 Constitution. For a general description of the Agreement and its main legal implications, see Fernando Muñoz, Pablo Contreras & Domingo Lovera, *Definiendo las reglas para lo constituyente* [*Defining the Rules for the Constituent*], La Tercera (Nov. 15, 2019), *at* https://www.latercera.com/opinion/noticia/definiendo-las-reglas-lo-constituyente/902502. For a defense of the constitutional process, see Fernando Atria, Constanza Salgado & Javier Wilenmann, El proceso constituyente en 138 preguntas y respuestas [The Constituent Process in 138 Questions and Answers] (2020).

[25] Cepeda Espinosa, *supra* note 11, at 24–28.

[26] César A. Rodríguez Garavito & Diana Rodríguez-Franco, Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South (2015).

[27] Country-specific studies on constitutional amendment toward democratic enhancement in the 1990s in the region include: In Venezuela: Edward Jonathan Ceballos Méndez, *Participación Ciudadana en el marco de la Constitución de la República Bolivariana de Venezuela y los Consejos Comunales* [*Citizen Participation in the Framework of the Constitution of the Bolivarian Republic of Venezuela and the Communal Councils*], 21 Provincia 43, 43–60 (2009). Also: Luis Salamanca, *La Constitución Venezolana de 1999: De la representación a la hiper-participación ciudadana* [*The Venezuelan Constitution of 1999: From Representation to Citizen Hyper-participation*], 82 Rev. Derecho Público 85, 85–105 (2000). Chile, Colombia, and Guatemala: María Antonieta Huerta Malbrán et al., Descentralización, municipio y participación ciudadana: Chile, Colombia y Guatemala [Decentralization, Municipality, and Citizen Participation: Chile, Colombia, And Guatemala] (2000). In Perú: Víctor Cuesta López, Juan Fernando López Aguilar & Juan Rodríguez-Drincourt Álvarez, Participación directa e iniciativa legislativa del ciudadano en democracia constitucional [Direct Participation and Legislative Initiative of the Citizen in a Constitutional Democracy] (Doctoral Thesis, Univ. Las Palmas de Gran Canaria, 2007). Democracia y ciudadanía: Problemas, promesas y experiencias en la Región Andina [Democracy and Citizenship: Problems, Promises, and Experiences in the Andean Region] (Martha Lucía Márquez Restrepo, Eduardo Pastrana Buelvas & Guillermo Hoyos Vásquez eds., 2009). Ecuador and Argentina: Yanina Welp, *La participación*

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

on a deeper shift that reflected the emergence of a responsive archetype, one that viewed law not as the product of an elite keen on obstructing social change (a vision widely held by progressives in the region in the 1960s and 1970s[28]) but as a crucial instrument for social transformation. In a wide indictment of the legal formalism that dominated the region at the time, the forces behind these constitutional changes sought to protect rights in real life and to guarantee true participation in the emerging democratic decision-making processes.[29]

Such a transformative approach would have remained a matter of domestic constitutional law, unrelated to international adjudication, were it not for the fact that these new constitutions also "opened" domestic law to international law, in particular to human rights law, through clauses incorporating international law in domestic legal systems. While there are significant variations among these clauses, with Chile being the least open, the overall outcome was a deep integration of domestic and international human rights law, thereby allowing the American Convention and its institutions to play a key role in domestic constitutional law. For example, the 2009 Bolivian Constitution gave international human rights treaties the same status as the Constitution. The 2008 Ecuadorian Constitution provided for the integration of international human rights, albeit with a lower status than the constitutional text, while recognizing that human rights treaties that provide for more favorable rights than the Constitution prevail in the domestic order over "any other legal norm or act of public power." Brazil's 2004 constitutional amendment, in turn, established that human rights treaties approved by Congress by the same majority as a constitutional amendment would be considered an actual amendment and thus part of the constitution.[30] Doctrinally, most countries conceive of this integration as the "block of constitutionality," which is formed by the

ciudadana en la encrucijada. Los mecanismos de democracia directa en Ecuador, Perú y Argentina [*Citizen Participation at the Crossroads. Direct Democracy Mechanisms in Ecuador, Peru, Argentina*], 31 ÍCONOS REV. CIENC. SOC. FLACSO-ECUADOR 117, 117–30 (2008).

[28] For a seminal text, see EDUARDO NOVOA MONREAL, EL DERECHO COMO OBSTÁCULO AL CAMBIO SOCIAL [THE LAW AS AN OBSTACLE TO SOCIAL CHANGE] (1975).

[29] Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. LAW REV. 1587 (2011). Many of the lawyers behind these changes were trained in the United States. For the background of many of those acting in Argentina, Brazil, Chile and Mexico, see YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002). In Colombia: CÉSAR A. RODRÍGUEZ GARAVITO, LA GLOBALIZACIÓN DEL ESTADO DE DERECHO: EL NEOCONSTITUCIONALISMO, EL NEOLIBERALISMO Y LA TRANSFORMACIÓN INSTITUCIONAL EN AMÉRICA LATINA [THE GLOBALIZATION OF THE RULE OF LAW: NEOCONSTITUTIONALISM, NEOLIBERALISM AND INSTITUTIONAL TRANSFORMATION IN LATIN AMERICA] (2009).

[30] Chile's 1989 amendment (which can be read as an outlier in this trend) merely established the "duty of the organs of the State to respect and promote [essential] rights, guaranteed by this Constitution, as well as by international treaties," without any specific reference to their status. *See* Francisco Cumplido Cereceda, *Alcances de la Modificación del Artículo 5° de la Constitución Política Chilena en Relación a los Tratados Internacionales* [*Scope of the Modification of Article 5 of the Chilean Political Constitution in Relation to International Treaties*], 23 REV. CHIL. DERECHO 255, 255–58 (1996). In contrast, other constitutions in the region have become much more open. On Bolivia, see: Constitution of the Plurinational State of Bolivia, Arts. 257, 410; José Ismael Villarroel Alarcón, *El tratamiento del derecho internacional en el sistema jurídico Boliviano* [*The Treatment of International Law in the Bolivian Legal System*], *in* DE ANACRONISMOS Y VATICINIOS: DIAGNÓSTICO SOBRE LAS RELACIONES ENTRE EL DERECHO INTERNACIONAL Y EL DERECHO INTERNO EN LATINOAMÉRICA [OF ANACHRONISMS AND PREDICTIONS: DIAGNOSIS ON THE RELATIONS BETWEEN INTERNATIONAL LAW AND INTERNAL LAW IN LATIN AMERICA] 29 (Paola Acosta Alvarado, Juana Inés Acosta López & Daniel Rivas Ramírez eds., 2017). On Ecuador, see Constitution of the Republic of Ecuador, Art. 424; Danilo Alberto Caicedo Tapia, *El bloque de constitucionalidad en el Ecuador. Derechos Humanos más allá de la Constitución* [*The Constitutional Block in Ecuador. Human Rights Beyond the Constitution*], FORO REV. DERECHO 5 (2009). For Brazil, see Constitution of the Federal Republic of Brazil, Art. 5, as amended by Enmienda Constitucional No. 45. This overview of the main "open"

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

domestic constitution and the Inter-American Convention[31] and constitutes one reason why the latter can be considered an integral part of domestic constitutional law in many states in the region.[32]

The substantive guarantee of constitutional rights, on the one hand, and constitutional openness, on the other hand, are in fact two complementary processes that create the space for international transformative constitutionalism. In the times of dictatorial regimes, Latin American civil society relied heavily on international and foreign institutions to advance change, as Keck and Sikkink seminally observed in the late 1990s in Argentina, Chile, and Mexico.[33] The constitutional opening vis-à-vis international law can be read as the formal blessing of this strategy, as a way of formalizing the legal protections that activists had achieved in their struggle against authoritarian rule. Latin American transformative constitutionalism is a two-level system, therefore, in which a horizontal interaction among domestic institutions that share this transformative outlook provide supplemental support. These institutions include domestic judges, first and foremost, but also prosecutors, ombudspersons, specialized administrations, and, importantly, NGOs.[34] This is why transformative constitutionalism in Latin America does not operate only thorough "judicial" means, but more broadly through "legal" means.

In sync with these changes, the IACtHR put forward a key doctrinal development that supports these constitutional developments: the evolutionary interpretation of human rights treaties, through which the Court started adapting the meaning of the Convention's guarantees, largely taken from the European Convention on Human Rights (ECHR), to the specific challenges of Latin America. The evolutionary interpretation of treaties evidences the Court's crucial embrace of a "transformative" approach, for it considers social transformation one of its guiding principles. In the words of the Court, "human rights treaties are living instruments, whose interpretation must accompany the evolution of times and current living conditions."[35] Through evolutionary interpretation, the Court expanded and deepened the protection of different rights with a specific Latin American twist, as can be seen in its jurisprudence—now globally recognized—on forced disappearances,[36]

constitutional clauses in the region is based on René Urueña, *Domestic Application of International Law in Latin America*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 565 (Curtis A. Bradley ed., 2019).

[31] *See* MANUEL EDUARDO GÓNGORA MERA, INTER-AMERICAN JUDICIAL CONSTITUTIONALISM. ON THE CONSTITUTIONAL RANK OF HUMAN RIGHTS TREATIES IN LATIN AMERICA THROUGH NATIONAL AND INTER-AMERICAN ADJUDICATION (2011).

[32] Christina Binder, *Hacia una Corte Constitucional Latinoamericana? La jurisprudencia de la Corte Interamericana de Derechos humanos con enfoque especial sobre las amnistias* [*Towards a Latin American Constitutional Court? The Jurisprudence of the Inter-American Court of Human Rights with a Special Focus on Amnesties*], *in* LA JUSTICIA CONSTITUCIONAL Y SU INTERNACIONALIZACIÓN [CONSTITUTIONAL JUSTICE AND ITS INTERNALIZATION] 156 (Armin von Bogdandy, Eduardo Ferrer MacGregor & Mariela Morales Antoniazzi eds., 2010).

[33] KATHRYN SIKKINK & MARGARET KECK, ACTIVISTS BEYOND BORDERS (1998).

[34] Alejandra Azuero Quijano, *Redes de diálogo judicial trasnacional: Una aproximación empírica al caso de la corte constitucional* [*Transnational Judicial Dialogue Networks: An Empirical Approach to the Constitutional Court Case*], 22 REV. DERECHO PUBLICO - UNIV. LOS ANDES (2009).

[35] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, para. 114 (Oct. 1, 1999).

[36] Case of Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 4, para. 155 (July 29, 1988); Case of Godínez Cruz v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 5, para. 155 (Jan. 20, 1989).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

privacy,[37] personal liberty,[38] children's rights,[39] collective property,[40] and equality and nondiscrimination.[41]

The ambition of transformation through international law would have been pointless absent a specific tool for implementing the Court's interpretations. This tool is the doctrine of "conventionality control,"[42] which directly applies the judges' evolutive interpretations to people's lives. In essence, the doctrine 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.[43] The conventionality control doctrine turns every national judge into an Inter-American judge, therefore, with the proviso to respect "the framework of their respective jurisdiction and the corresponding procedural rules."[44] The European Court of Human Rights (ECtHR) never dared to go as far;[45] rather, the IACtHR recalls the Court of Justice of the European Union, the world's most powerful supranational court, with its daring definition of the domestic effect of its decisions.[46] The Inter-American Court has also claimed jurisdiction to review the conformity of domestic laws with the Convention.[47] In exceptional cases, it has even claimed the power to enforce the

[37] Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, para. 272 (Nov. 28, 2012)

[38] Case of Ituango Massacres v. Colombia, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, para. 152 (July 1, 2006).

[39] Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, paras. 191–98 (Nov. 19, 1999); Case of the Gómez-Paquiyauri Brothers v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, paras. 164–67 (July 8, 2004).

[40] Case of the Mayagna (Sumo) Awas Tingni v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 148 (Aug. 31, 2001).

[41] Case of Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 239, paras. 83, 91 (Feb. 24, 2012).

[42] Case of Almonacid Arellano et al. v. Chile, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154 (Sept. 26, 2006). On the doctrine, see generally Eduardo Ferrer Mac-Gregor, *Conventionality Control the New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93 (2015); MIRIAM HENRIQUEZ VIÑAS & MARIELA MORALES ANTONIAZZI, EL CONTROL DE CONVENCIONALIDAD: UN BALANCE COMPARADO A 10 AÑOS DE *ALMONACID ARELLANO V. CHILE* [CONTROL OF COVENTIONALITY: A COMPARATIVE BALANCE TO TEN YEARS OF *ALMONACID ARELLANO V. CHILE*] (2017).

[43] Conventionality control can be thought of as the international equivalent of the constitutional control (*control de constitucionalidad*), which is used by national courts to review national laws on the basis of the Constitution. The analogy between constitutional control and conventionality control was elaborated by Inter-American Judge García Ramírez in his concurring opinion in the Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 114, para. 3 (Sept. 7, 2004) (García-Ramírez, J., concurring).

[44] *See* Case of Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, para. 193 (Feb. 24, 2011); Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 158 (Nov. 24, 2006).

[45] For a comparison of the two courts, see Laurence Burgorgue-Larsen, *The Added Value of the Inter-American Human Rights System: Comparative Thoughts*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW *IUS COMMUNE* 377 (Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan & Ximena Soley eds., 2017)

[46] Seminal Case 26/62, Van Gend en Loos [1963] ECR 1, 11 et seq. On the Court of Justice's expanded jurisdictions, see Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AJIL 1 (1981).

[47] Néstor Pedro Sagüés, *Obligaciones internacionales y control de convencionalidad* [*International Obligations and "Conventionality Control"*], 8 ESTUD. CONST. 117, 120 (2010); Claudio Nash Rojas, *Control de convencionalidad. Precisiones conceptuales y desafíos a la luz de la jurisprudencia de la Corte Interamericana de Derechos Humanos*

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

Convention by finding that domestic statutes have "no legal effects,"[48] a power usually reserved for constitutional adjudication.[49] These moves greatly expand the American Convention's reach and create a veritable decentralized enforcement system that comprises not just Inter-American organs but potentially thousands of national authorities.[50]

It is beyond the scope of this Article to review all instances of Inter-American jurisprudence that have aimed at transforming deeply entrenched structures. However, three themes, which we discuss below, exemplify the reach of the Court's transformative thrust. The first is the Court's case law limiting amnesties for grave human rights violations in the region. In the last section of this Article, we discuss the *Gelman* decision, in which the Court, building on a well-established line of precedent, decided that Uruguay's law limiting the prosecution of human rights violations was in breach of the America Convention and had to be revoked, even though the law had been reviewed by a domestic court on several occasions and had twice been ratified in a free popular vote. This ruling, as we explain, transformed international adjudication with regard to domestic laws. Second, the Court has gone to great lengths to protect the rights of victims of human rights violations. We use as examples the Inter-American case law to protect the victims of the Colombian armed conflict, and particularly the innovative decision that recognized the status of the Community of Peace in San José de Apartadó, a grass roots community that defined itself as a "victim," and was recognized as such by the Court, thus pushing the traditional categories of victimhood in international law. Third, the Court has also greatly advanced the legal framework to protect women's rights, as evidenced in *Campo Algodonero*, also discussed below, in which the judges redefined the approach to gender violence in Latin America. In all these areas, the Court has adopted an interpretive approach that, at its core, endeavors to bring about the profound social change that we label as international transformative constitutionalism.

II. Transformative Constitutionalism Is the Practice of a Community

Constitutional openness, evolutive interpretation, and conventionality control provide the legal tools for Latin American transformative constitutionalism. The transformative approach is relevant in the region because numerous actors of the Latin American human rights community apply it in their legal work on the ground, thus turning an interpretive mindset into a social practice common to the region. So far, we have addressed this practice doctrinally, as the emergence of a common law of human rights in Latin America.[51] The concept of a Latin

[*Conventionality Control. Conceptual Clarifications and Challenges in Light of the Jurisprudence of the Inter-American Court on Human Rights*], 19 Anu. Derecho Const. Latinoam. 489, 491–92 (2013).

[48] *See* Case of La Cantuta v. Peru, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162, para. 189 (Nov. 29, 2006). In his separate opinion to this decision, Sergio García Ramírez argues that domestic laws that violate the Convention are "basically invalid." *Id.* (García Ramírez, J., sep. op.). *See also* Case of Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 (Mar. 14, 2001).

[49] Even the Court of Justice of the European Union (CJEU) only recently dared to declare a national measure as void. Joined Cases C-202/18 and C-238/18, Rimšēvičs/ECB v. Latvia, ECLI:EU:C:2019:139, paras. 69 et seq. (2019). See on the judgment, A. Hinarejos, *The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: Rimšēvičs*, 56 Common Market L. Rev. 1649 (2019).

[50] Eduardo Ferrer Mac-Gregor, *Conventionality Control the New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL Unbound 93 (2015).

[51] *See generally* Transformative Constitutionalism in Latin America, *supra* note 45.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

American human rights community, which we now develop, deepens the understanding of this phenomenon.

A. The Latin American Human Rights Community

The Latin American human rights community is a group of actors that interact, on the basis of the Inter-American Convention on Human Rights, to promote their agendas and to fulfill what they regard as their mandates. This *community of practice* is composed of different actors: transnational NGOs that bring cases before the Inter-American system, grassroots organizations that use these rights to protect victims on the ground, clinics at law schools that file amicus briefs, domestic courts that interpret and apply the Convention and IACtHR case law, civil servants that work on human rights for domestic governments, scholars writing and teaching Inter-American human rights law, the commissioners and judges of the Inter-American system, and also politicians with a human rights agenda. The president of Costa Rica, who won the 2018 elections on a platform in which support for the Inter-American system was key, is a high-profile example.[52]

The concept of a community of practice originates in education research. In 1991, anthropologist Jean Lave and computer scientist Étienne Wenger proposed the notion of situated learning; learning, they argued, is fundamentally a social process and implies socialization.[53] A community of practice, then, denotes a group of people that is defined by mutual engagement, a joint enterprise, and a shared repertoire, meaning "routines, words, tools, ways of doing things, stories, gestures, symbols, genres, actions, or concepts that the community has produced or adopted in the course of its existence and which have become part of its practice."[54] This notion was later taken up by international relations scholar Emanuel Adler, who suggests that "there is no reason . . . why we should not be able to identify transnational or even global communities of practice. The closer we get to the level of practices, in fact, the more we can take the international system as a collection of communities of practice—for example, communities of diplomats, of traders, of environmentalists, and of human rights activists. Communities of practice cut across state boundaries and mediate between states, individuals, and human agency, on one hand, and social structures and systems, on the other."[55]

Communities of practices have been discussed in international law scholarship. Most importantly, Jutta Brunnée and Stephen Toope have applied the notion in order to analyze

[52] Kirk Semple, *Costa Rica Election Hands Presidency to Governing Party Stalwart*, N.Y. TIMES (Apr. 1, 2018). For the position of his adversary, see Tatiana Gutiérrez Wa-Chong, *Fabricio Alvarado: "Corte Interamericana no puede legislar en el país"* [*Fabricio Alvarado: "Inter-American Court of Human Rights Cannot Legislate in the Country"*] LA REPUBLICA (Mar. 26, 2018), *at* https://www.larepublica.net/noticia/fabricio-alvarado-corte-interamericana-no-puede-legislar-en-el-pais-para-eso-estan-los-diputados; Fernanda Romero, *Fabricio Alvarado dispuesto a salirse de la Corte IDH para que no le "impongan" agenda LGTBI* [*Fabricio Alvarado Willing to Leave the Inter-American Court of Human Rights so that They Do Not "Impose" LGBTI Agenda*], EL MUNDO (Jan. 11, 2018), *at* https://www.elmundo.cr/costa-rica/fabricio-alvarado-dispuesto-salirse-la-corte-idh-no-le-impongan-agenda-lgtbi. The Costa Rican presidential elections of 2018 are a clear example of how the case law of the Inter-American Court of Human Rights has a transformative ambition, that triggers controversy.

[53] The seminal text is JEAN LAVE & ÉTIENNE WENGER, SITUATED LEARNING: LEGITIMATE PERIPHERAL PARTICIPATION (1991).

[54] ÉTIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 83 (1998).

[55] EMANUEL ADLER, COMMUNITARIAN INTERNATIONAL RELATIONS: THE EPISTEMIC FOUNDATIONS OF INTERNATIONAL RELATIONS 15 (2005).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

the problem of international legal obligation.[56] For Brunnée and Toope, transnational communities of practice provided the space for interaction that created the emergence of such obligations: "legal obligation, then, is best viewed as an internalized commitment and not as an externally imposed duty matched with a sanction for non-performance."[57] This notion explains the workings of transformative constitutionalism in Latin America.

A community of practice does not imply homogeneity.[58] Its members often have different, even conflicting, projects and views of human rights. In our understanding, a community of practice is not constituted by a single goal, but it requires common practices as well as a shared understanding of the social meaning of those practices.[59] The Latin American human rights community shares a framework: its institutions, a body of law, its actors, the challenges to be faced—i.e., a sense of purpose—and its realities. This is not to say that all actors in the community of practice agree on all issues. In fact, members of the community may disagree on at least at three levels: first, by rejecting that the Court's activities should be framed in terms of transformative constitutionalism; second, by rejecting the Court's transformative approach;[60] and, third, by rejecting the outcome of a particular case, or the remedies ordered by the Court, that reflect a transformative approach.[61] However, such disagreements do not undermine the claim that a community emerges around the transformative interpretative; on the contrary, they confirm its existence, in the sense that actors of the community of practice compete to give meaning to the American Convention. Such a debate thus reaffirms the relevance of the transformative constitutional approach and clarifies its legal framework. The framework allows for many views of Inter-American human rights, but continuous interaction settles the meaning of an international norm for a given case.

National judges are particularly important members of the community, which is why their engagement with decisions of the IACtHR is of particular importance.[62] In terms of identity,

[56] Stephen J. Toope & Jutta Brunnée, Legitimacy and Legality in International Law: An Interactional Account (2010).

[57] *Id.* at 115

[58] Adler, *supra* note 55, at 22. The notion of communities of practice has been criticized as remaining silent on the issue of power unbalances; for example, in Alessia Contu & Hugh Willmott, *Re-embedding Situatedness: The Importance of Power Relations in Learning Theory*, 14 Org. Sci. 283 (2003). However, our reading of the Latin American community of human rights practice takes power differences into account, as it considers many actors and not only states and intergovernmental organizations.

[59] *Community* is a term that comes with many meanings, see Steven Brint, *Gemeinschaft Revisited: A Critique and Reconstruction of the Community Concept*, 19 Sociological Theory 1 (2001).

[60] For example, by arguing that the transformative could imply an unjustifiable expansion of the Court's powers. *See* Jorge Contesse, *The Final Word? Constitutional Dialogue and the Inter-American Court of Human Rights*, 15 Int'l J. Const. L. 414 (2017).

[61] For example, when conservative Evangelical groups reject the Court's case law expanding LGBTI rights. *See* René Urueña, *Evangelicals at the Inter-American Court of Human Rights*, 113 AJIL Unbound 360 (2019).

[62] On this, see Manuel Góngora Mera, *Interacciones y convergencias entre la Corte Interamericana de Derechos Humanos y los tribunales constitucionales nacionales* [*Interactions and Convergences Between the Inter-American Court of Human Rights and the National Constitutional Courts*], *in* Direitos humanos, democracia e integração jurídica: Emergência de um novo direito público 312 (Armin von Bogdandy, Flávia Piovesan, & Mariela Morales Antoniazzi eds., 2017), Diana Guarnizo-Peralta, *¿Cortes pasivas, cortes activas, o cortes dialógicas?: Comentarios en torno al caso Cuscul Pivaral y otros v. Guatemala* [*Passive Courts, Active Courts, or Dialogical Courts?: Comments on the Case of* Cuscul Pivaral et al. v. Guatemala], *in* Interamericanizacio´n de los DESCA. El caso Cuscul Pivaral de la Corte IDH [Inter-Americanization of DESCA. The Cuscul Pivaral Case of the Inter-American Court of Human Rights] 429 (Mariela Morales Antoniazzi, Liliana Ronconi & Laura Clérico eds., 2020).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

important national judges self-identify as "Inter-American judges"—even while voicing explicit disagreement with the Court on issues that affect them.[63] Thus, for example, the (acting) president of the Costa Rican Supreme Court, Carmenmaría Escoto, explicitly affirmed that her court contributes to the construction of an Inter-American *ius commune*[64]—and this, just two years after her court's 2016 showdown with the Inter-American Court around in vitro fertilization (IVF), described below.

The notion of a community implies that there are insiders and outsiders. While homogeneity is not required among insiders, there *are* outsiders: first, and most obviously, there are those who simply are not engaging with Inter-American human rights law; and, second, those who seek to undermine the common practices of the community, or the shared understanding of their social meaning. The letter by the presidents of Argentina, Brazil, Chile, Colombia, and Paraguay provides a border line case. On the one hand, the letter engages with the system, supports its basic thrust and deploys legitimate arguments for its development; hence, the five presidents are part of the community. On the other, there is the suspicion that the letter could be part of a strategy to dismantle the system or to change its basic outlook, which would then position the five presidents as outsiders.

The fact that there is no homogeneity of meaning in the Latin American community of human rights practice allows for very different interpretations of the American Convention to coexist and to compete for influence. Another ambivalent case is that of conservative Evangelical Christian groups, which have mobilized important financial and political resources to resist certain decisions of the Inter-American Court, particularly concerning LGBTI rights. This tension came to its clearest expression in Costa Rica. On May 2016, the Costa Rican (center-left) government submitted a request for an advisory opinion on the issue of same-sex marriage with an idea to allow it against a hesitant legislature.[65] The Court issued a groundbreaking opinion in 2017, holding that same-sex couples should enjoy all rights without discrimination, including marriage, and established standards on the self-determination of gender identity.[66]

The advisory opinion came just a year after a harsh standoff between the Costa Rican Supreme Court and the Inter-American Court, concerning IVF. In 2012, the IACtHR had held that Costa Rican Supreme Court's decision to declare IVF unconstitutional was in violation of the American Convention of Human Rights, and had to be revoked.[67] Compliance with such a measure became highly contested in Costa Rica, with the Supreme Court at one

[63] See the contributions by Arturo Zaldívar Lelo de Larrea (Mexico), Carmen María Escoto (Costa Rica), and Dina Ochoa Escribá (Guatemala) at the Inter-American Court in occasion of the fortieth anniversary of the Inter-American Convention, to be published on the Court's website.

[64] Poder Judicial - República de Costa Rica, *Presidenta de la Corte en ejercicio destaca labor de la Corte IDH* [*Acting President of the Court Highlights Work of the Inter-American Court of Human Rights*] (2018), *at* https://pj.poder-judicial.go.cr/index.php/prensa/389-cme-corteidh.

[65] Gender Identity, and Equality and Nondiscrimination with Regard to Same-Sex Couples. State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18, and 24, in Relation to Article 1, of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, para. 4 (Nov. 24, 2017). The following description of the Costa Rican case is based on René Urueña, *Reclaiming the Keys to the Kingdom (of the World): Evangelicals and Human Rights in Latin America*, 49 NETH. Y.B. INT'L L. 174 (2018).

[66] *Id.*

[67] *Case of Artavia Murillo*, *supra* note 37.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

point standing in open defiance of the IACtHR, declaring null and void the national norm that sought to implement the international order.[68] During that confrontation, the Evangelicals in general, and Fabricio Alvarado Muñoz (not to be confused with Carlos Alvarado Quesada, the current president) in particular, were key players in resisting the implementation of the order—Fabricio Alvarado was, in fact, one of the proponents of the legal action that asked the Supreme Court to strike down the implementing norm.[69] Such action to undermine the IACtHR's very authority is to be considered outside the community. The IACtHR reacted swiftly, adopting a stern decision for monitoring compliance in which it declared that IVF was, in effect, valid in Costa Rica—notwithstanding the Supreme Court's ruling.[70] Ultimately, the Costa Rican judges accepted the IACtHR's authority, and decided to take "a step aside" and let the government implement the international order.[71] The Evangelicals in Congress kept up the fight,[72] although with little success to date.[73]

It was in that context that the IACtHR's 2017 advisory opinion on same sex marriage entered Costa Rican politics, provoking a fierce backlash among conservative—and especially Evangelical—movements in Costa Rica.[74] The shift was sharp: in a matter of weeks, Fabricio Alvarado seized on the Court's opinion and made LGBTI rights the central theme of the presidential election, pushing him ahead of the other contenders. Taking his cue from the IVF confrontation, Alvarado said that national (and legislative) sovereignty had to be reclaimed from unduly international interference that promoted the "LGBTI agenda."[75] Evangelicals took the issue from the altars to the voting stations as a way to challenge a perceived international imposition upon local values, up to the point that the "election campaign was dominated by opposition candidate and evangelical Fabricio Alvarado Mu[ñ]oz's forthright criticism of gay marriage."[76] In an outcome that was completely unpredictable just two

[68] Sala Constitucional de la Corte Suprema de Costa Rica [Constitutional Chamber of the Supreme Court of Costa Rica], Sentencia No. 2016–01692 [Judgment No. 2016-01692], Nexus PJ (Feb. 3, 2016).

[69] Aarón Sequeira, *PUSC se mete de lleno en lucha contra decreto de Luis Guillermo Solís sobre la FIV* [*PUSC Is Fully Involved in the Fight Against the Decree of Luis Guillermo Solís on IVF*], La Nación (Sept. 22, 2015).

[70] Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica, Resolution on Compliance (Inter-Am. Ct. H.R. Feb. 26, 2016) (in particular, see paras. 26 and 36). See, however, Judge Vio Grossi's strong dissenting opinion, in which he questions the IACtHR's jurisdiction to adopt such a decision, especially in paragraph 52

[71] Manuel Avendaño Arce, *Magistrado Luis Fernando Salazar: Es momento de que la sala IV se haga a un lado* [Magistrate Luis Fernando Salazar: "It Is Time that the Constitutional Chamber Steps Aside"], La Nación (Mar. 1, 2016), *at* https://www.nacion.com/el-pais/salud/magistrado-luis-fernando-salazar-es-momento-de-que-la-sala-iv-se-haga-a-un-lado/KXMCQE7VEZGW7PQPFTGDR25JKU/story.

[72] Patricia Recio, *Mario Redondo: La resolución de la Corte IDH es una atrocidad* [Mario Redondo: "The IACtHR's Decision Is an Atrocity"], La Nación (Mar. 1, 2016), *at* https://www.nacion.com/el-pais/politica/mario-redondo-la-resolucion-de-la-corte-idh-es-una-atrocidad/FF5M5WY4M5EHHABRXE6TRRHVEM/story.

[73] Ramón Ruiz, *Bloque cristiano con pocas opciones de limitar la FIV* [Christian Block with Few Options to Limit In Vitro Fertilization (IVF)], La Nación (Mar. 3, 2016), *at* https://www.nacion.com/el-pais/politica/bloque-cristiano-con-pocas-opciones-de-limitar-la-fiv/SKBCLWYIDJDPJNJOH6DSGUI2KA/story.

[74] *Latin America's Human-Rights Court Moves into Touchy Territory*, Economist (Feb. 1, 2018), *at* https://www.economist.com/the-americas/2018/02/01/latin-americas-human-rights-court-moves-into-touchy-territory. The following discussion of the Costa Rican elections is based on Urueña, *supra* note 65.

[75] Álvaro Murillo, *El matrimonio no parece ser un derecho para homosexuales* [*Marriage Does Not Seem to Be a Right for Homosexuals*], El País (Mar. 26, 2018), *at* https://elpais.com/internacional/2018/03/26/america/1522024297_765736.html.

[76] David Alire García, *Costa Rica Vote Halts March of Religious Conservatism*, Reuters (Apr. 2, 2018), *at* https://www.reuters.com/article/us-costarica-election-evangelical/costa-rica-vote-halts-march-of-religious-conservatism-idUSKCN1HA081.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

months earlier, Fabricio Alvarado Muñoz won the first round of balloting with 24.9 percent of the votes. He was, however, defeated in the second round by Carlos Alvarado Quesada, a candidate who pledged to comply with the IACtHR opinion. Following the election, the Constitutional Chamber of the Costa Rican Supreme Court ruled in late 2018 that Costa Rican laws prohibiting same-sex marriage were unconstitutional, and gave the National Assembly eighteen months to amend them.[77] To reach its decision, the Costa Rican Court proved itself as a member of the Latin American human rights community by relying extensively on Inter-American case law on LGBTI rights. Interestingly, it explicitly considered the Inter-American advisory opinion requested by Costa Rica's government as just one of the three Inter-American decisions relevant for the case (the other two being *Atala Riffo v. Chile*[78] and *Duque v. Colombia*[79]).[80] By doing so, the Costa Rican decision strikes a balance between giving importance to Inter-American case law as a general basis for its decision, but stopping short of framing its decision as an act of implementing the specific Inter-American advisory opinion in question.

The existence of different interpretations of the American Convention is not an argument against the existence of a Latin American community of practice, but rather confirms it. Even those that deeply disagree with the IACtHR on certain issues (like groups of Evangelical conservative activists on LGTBI rights) are part of such a community as long as they are engaged in the common practices with the goal of transforming the reality of violence, exclusion, and weak institutions, just as, in our example, LGBTI organizations are. It is easy to exaggerate the differences between groups that heatedly debate over a particular interpretation of the Convention, and which might even consider themselves as belonging to opposing social communities. The added value of the community of practice approach is that it underscores the fact that, for all the differences in approach and interpretation, all actors in the community shared a minimal understanding, a mutual agreement, on the kind of practice they are engaging with: basically, interpreting legal text under a given judicial authority with an aim to change what they see as a deeply deficient social reality. It only takes a minimal level of common understanding to build such a community of practice, which often blossoms with heated controversy over valid interpretations of the Convention.

The community of human rights practice is therefore not necessarily unified in its support of the entire case law of the Inter-American Court. In that sense, the community is different from what Karen Alter and Laurence Helfer have called "jurist advocacy movements"—that is, groups of legal operators that advocate for a specific goal—in Alter and Helfer's study, the goal was furthering European integration.[81] In our reading, different juris advocacy movements interact in the community of practice, proposing their interpretations of the Convention. Thus, while jurist advocacy movements are important and, as

[77] Supreme Court of Justice (Costa Rica), Constitutional Chamber, Exp: 15-013971-0007-CO. Res. No. 2018012782, Aug. 8, 2018, Boletín Judicial No. 219, 18.

[78] *Case of Atala Riffo and Daughters*, *supra* note 41.

[79] Duque v. Colombia, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 310 (Feb. 26, 2016).

[80] *See* Supreme Court of Justice (Costa Rica), *supra* note 77, at 23–26

[81] KAREN J. ALTER & LAURENCE R. HELFER, TRANSPLANTING INTERNATIONAL COURTS: THE LAW AND POLITICS OF THE ANDEAN TRIBUNAL OF JUSTICE 230–33 (2017). The authors argue that, while the jurist's movement was pivotal for the promotion of European integration, they remain largely absent from the process of supporting Andean economic integration.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

Alter and Helfer suggest, they can advance legal integration, they are only part of the community of practice. The kind of access to power and expertise that successful jurist advocacy movements represent is only one of the diverse voices that compose the community of practice.

Viewed through this prism, the idea of a sharp division between domestic and international interaction, and a hierarchical, top-down approach that places the Inter-American Court at the top, is factually inaccurate. The IACtHR is at the center of a community of practice that includes both domestic and international actors: national judges, domestic civil servants, Inter-American Commissioners, clerks, litigators, and scholars.

Time, iterative interactions, and learning are crucial for this practice. It is hard to understand the community if one conceptualizes the interaction between actors as a matter of discrete encounters. Although this conception might prove correct for some domestic civil servants who face the Court once or twice in their tenure, it certainly does not hold true for national judges, national human rights institutions, or victims' organizations—all frequent users of the Inter-American system. Iteration creates an interaction that is qualitatively different from that of discrete contact, as the constant process of interaction and learning shapes expectations of the Inter-American system. Iteration, in other words, changes not only the strategies within a game but the game itself.[82] Constructivist international relations have also explored this idea: while the interaction between agents develops the structure, being part of the structure impacts on the interests and strategies of the agents.[83] Interaction in the community of practice establishes the terms of engagement.

The social dimension throws into relief one further feature of the Court's transformative interpretation of the Convention: the perception of many actors of the Latin American human rights community that the Court's case law allows them to better fulfill *their own mandates*. Both the American Convention and most national constitutions task all public authorities, not only judges, with addressing, within the scope of their powers and procedures, the challenges of violence, social exclusion, and weak institutions. For example, Article 3 of the Ecuadorian Constitution states that the state's prime duties are, among others, "planning national development, eliminating poverty, and promoting sustainable development and the equitable redistribution of resources and wealth to enable access to the good way of living," and "guaranteeing its inhabitants the right to a culture of peace, to integral security and to live in a democratic society free of corruption." Article 3 of the Brazilian Constitution states that the fundamental objectives of the Federative Republic of Brazil are, among others, to "guarantee national development" and "to eradicate poverty and substandard living conditions and to reduce social and regional inequalities." Accordingly, the interaction with the Inter-American Court has become an important dimension of the mandate of national human-rights institutions in the region. It is now common for such institutions to adopt the Inter-American Court's evolutive interpretation of the Convention and to promote

[82] In game-theory parlance, the interaction implicit in the social dimension of the Inter-American human rights community of practice is a dynamic evolution game. In detail, Brett Frischmann, *A Dynamic Institutional Theory of International Law*, 53 BUFF. L. REV. 679 (2003).

[83] Alexander E. Wendt, *The Agent-Structure Problem in International Relations Theory*, 41 INT'L ORG. 335 (1987); ADLER, *supra* note 55, at 5–6

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

human rights in their respective states based on such understanding.[84] The Court, in turn, construes expansively the powers to gather information found in Article 69(2) of its Rules.[85] For example, it directly relies on national human rights institutions in order to cooperate in the process of state compliance with its orders (even against the wishes of the respective government) or to intervene in procedures for monitoring compliance, acting as independent participants. In so doing, it draws those institutions closer into the community of practice. Examples include *Artavia Murillo v. Costa Rica*, the IVF decision discussed above, in which the Costa Rican Defensoría del Pueblo intervened in the public hearing of monitoring compliance, and *Velez Loor v. Panama*, a case concerning an Ecuadorian migrant, tortured and mistreated in Panama, in which the Panamanian Defensoría intervened in a private hearing of compliance.[86]

To conclude, a new community of practice has created a new legal phenomenon that comprises elements of different legal orders connected by a common thrust. A wave of new constitutionalism has created domestic legal settings for a region-wide transformative constitutional project. A community of practice brought such legal standards to life by attributing a core role to the IACtHR. The resulting body of law, in turn, strengthens the broader Latin American human rights community.

B. The Epistemic Dimension

The Latin American community of human rights is a practice that generates not only norms and decisions but also ways to understand the social world. It establishes cognitive frameworks that are created and circulated for interventions in concrete conflicts and for the purpose of human rights governance.[87] This section explores two ways in which the Inter-American system triggers epistemic practices that are crucial to understand its workings. First, the Inter-American system incites the creation of domestic expertise. Secondly, it requires information on what is happening on the ground, thereby triggering epistemic practices through which the Court constitutes the Latin American context. These techniques help set the epistemic basis for the transformation of reality through human rights law in Latin America.

First, the Inter-American system incentivizes the production of domestic knowledge—a social process that involves sharing experiences, exerting and gaining influence, and

[84] Thomas Innes Pegram, *National Human Rights Institutions in Latin America: Politics and Institutionalization*, *in* HUMAN RIGHTS, STATE COMPLIANCE, AND SOCIAL CHANGE: ASSESSING NATIONAL HUMAN RIGHTS INSTITUTIONS 210 (Ryan Goodman & Thomas Innes Pegram eds., 2012).

[85] IACtHR Rules, Procedure for Monitoring Compliance with Judgments and Other Decisions of the Court, Art. 69(2). ("The Court may require from other sources of information relevant data regarding the case in order to evaluate compliance therewith. To that end, the Tribunal may also request the expert opinions or reports that it considers appropriate.")

[86] *See Case of Artavia Murillo*, *supra* note 37; Vélez Loor v. Panama, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 218 (Nov. 23, 2010).

[87] This understanding applies methodologies of literary critique. *See* Sahib Singh, *Narrative and Theory: Formalism's Recurrent Return*, 84 BRIT. Y.B. INT'L L. 304, 307–13 (20014). Diego López has, in turn, applied Harold Bloom's "anxiety of influence" to the appropriation of transnational legal theories in Latin America. DIEGO EDUARDO LÓPEZ MEDINA, TEORÍA IMPURA DEL DERECHO: LA TRANSFORMACIÓN DE LA CULTURA JURÍDICA LATINOAMERICANA [IMPURE THEORY OF LAW: THE TRANSFORMATION OF THE LATIN AMERICAN LEGAL CULTURE] 22–70 (2004). Our discussion, though is not primarily interested in legal theory as a literary artifact but instead focuses on how Inter-American human rights law is deployed in domestic settings. For this approach in international law in general, see Urueña, *supra* note 61, at 403–09

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

developing networks that produce specifically *legal* knowledge. Certain interpretations of the Inter-American human rights law, as developed by the Court, are taught, defended, and made dominant in the Latin American community of human rights practice. This process of knowledge creation and circulation not only occurs in academic fora but also represents a core activity of many actors in the community. Thus, NGOs draft reports and gather data, national human rights institutions create human rights tutorials, and governments, last but not least, publish their own reports and support the circulation of their own practices of knowledge.

Such knowledge is essential to the functioning of the community that emerges around transformative constitutionalism. Domestic judges need to learn Inter-American human rights standards and jurisprudence; universities must establish courses and research centers on those topics; and moot court competitions bring new talent to the field. Consider American University Washington College of Law's Inter-American Human Rights Moot Court Competition, established in 1995, which has trained more than three thousand students from more than three hundred universities.[88] The contest has fostered a community of young human rights practitioners, many of whom have moved on to distinguished careers as advocates, civil servants, activists, or academics, and have thus contributed to the social construction of the international transformative constitutionalism in Latin America. All these activities help to expand the influence of the IACtHR, beyond legal obligation, or rational choice calculus.

The Inter-American system also triggers the production of other kinds of knowledge. Consider the need for quantitative data on human rights.[89] International law requires the production of indicators, statistics, and other quantitative knowledge, along with many other governance tools. Article 19 of the San Salvador Protocol of the American Convention on Human Rights, which orders parties to report, through indicators, on advancements toward compliance with the Protocol, is exemplary of this development.[90]

Domestic knowledge also encompasses the political economy of human rights in Latin America. Development agencies from Europe and the United States play a crucial role in this context, particularly where good governance and rule-of-law initiatives are concerned. Many actors of the Latin American human rights community are attached to such international development aid missions, funded by institutions like the Ford or the Konrad-Adenauer foundations.[91] Depending on their financial capability and political priorities, some development agencies will favor the production of certain forms of knowledge that might become relevant for the Inter-American system. The transformative impact of the Inter-American Court thus demands thinking about the politics of the production of legal knowledge in Latin America and the power structures, biases, or blind spots that they might engender.

[88] *See* American University, Academy of Human Rights and International Humanitarian Law, *Inter-American Human Rights Competition 2020*, *at* https://www.wcl.american.edu/impact/initiatives-programs/hracademy/academia/concurso.

[89] *See generally* René Urueña, *Indicators as Political Spaces*, 12 Int'l Org. L. Rev. 1 (2015).

[90] *See* San Salvador Protocol of the American Convention on Human Rights, Art. 19.1; *see also* Laura Cecilia Pautassi, *Monitoreo del acceso a la información desde los indicadores de derechos humanos* [*Monitoring Access to Information from Human Rights Indicators*], 18 Sur - Int. J. Hum. Rts. 59 (2013).

[91] A classic reflection of the role of the Ford Foundation in the creation legal knowledge in Latin America in the 1970s is David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062 (1974).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

A second dimension of knowledge production relates to how "problems" are cognitively framed to allow for an answer that considers human rights. In many instances, the human rights dimension is not at all evident in the early stages of a conflict, often because the problem is simply too large or too complex to be processed as a distinctively *legal* dispute. To base a human rights case on social problems, the system must often intervene to reconstruct these problems in a profound way. The Court intervenes in complex domestic situations and needs to understand them, which implies cognitive framing. Transformative constitutionalism in Latin America involves a specific definition of Latin American problems in terms of human rights; any participant in the field has to develop a certain competence to "fit" her case into the Inter-American system's categories, thereby rendering the dispute, as well as its wider context, comprehensible for the Court.

A crucial legal tool in this respect is the exhaustion of local remedies, which Article 46(2) of the Convention establishes as a procedural requirement of admissibility.[92] This requirement has an epistemic function, since an important part of the Inter-American system's actual work of framing domestic reality often occurs at the domestic level. The Court is mostly dependent for its factfinding on the evidence included in domestic judicial processes. Despite its efforts, it cannot truly be "on the ground." In fact, the logic of complementarity, which manifests itself in the exhaustion requirement,[93] prevents it from being on the ground.

This does not diminish the cognitive role of the IACtHR. The framing of human rights violations does not remain constant across scales, but rather changes as the jurisdiction of the institution that analyzes them varies—thus, a human rights violations framed as an international problem by an international court will look very different from that very same human rights violations framed as a local problem by a local court[94]—the same facts look different when described from the Court's international perspective. Transformative constitutionalism thus provides a deep framing of the issues, which has important consequences. Consider the groundbreaking decision of *González y otras (Campo Algodonero) v. México*.[95] The case concerned three women whose processes of victimization the domestic authorities originally regarded as discrete and unrelated rather than part of a legally relevant wider trend or context.[96] At the complainants' behest, the Inter-American Commission and Court intervened and cast into sharp relief the social context of victimization and provided it with legal significance in terms of human rights adjudication. To do so, the complainants established a general pattern of violence in Ciudad Juárez, specifically of the killing of women (feminicide), thus turning the three deaths into part of a wider pattern that had existed since the 1990s in the city and its surrounding areas. In the process, the Court developed the categories with which it defined reality, thereby creating and mobilizing certain kinds of knowledge (such

[92] Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 92–97 (2012).

[93] Bernard Duhaime, *Subsidiarity in the Americas: What Room Is There for Deference in the Inter-American System?*, *in* Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation 289 (Wouter G. Werner & Lukasz Gruszczynski eds., 2014).

[94] Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J. L. Soc'y 279, 287 (1987).

[95] González and Others ("Cotton Field") v. México. Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009).

[96] *Id.*, para. 127.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

as statistical knowledge of crime against women and impunity), and deeply impacting the interpretation and application of the law.

This may initially seem to be a trivial observation: all courts define the "facts" as part of their adjudication. But the epistemic function of the Inter-American Court is anything but trivial. 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. The alternate description of reality has important implications for human rights adjudication and can even be seen as an act of governance. Thus, cognitive categories produced by the IACtHR find their way into domestic legal practices, influencing, for example, the way domestic reparations are conceived and implemented.[97]

Such descriptions are not neutral; they imply normative choices. Cognitive framing goes beyond the mere "translation" of domestic realities;[98] it also helps organize actors' interpretation of their own contexts.[99] For example, complex domestic socioeconomic issues are read through the prism of human rights in order to become understandable for the Latin American human rights community.

The crucial concept of "victim" in the Inter-American system provides a good example. The system requires conceiving of the victim as someone who holds rights (particularly the right to participate in transitional justice proceedings) and is entitled to various forms of reparations. But the idea of victim in Inter-American law is also an epistemic category that organizes the way in which civil society gets to know its realities, and eventually itself. It offers the building blocks to describe reality—the actors, structures, and the representation of a process—the criminal process whereby the "perpetrator" creates the victim. All this influences strategy on the ground.

In Colombia, for example, the concept of victim shaped the country's institutional and regulatory machinery—a prime example being the Victims Unit at the Ministry of Interior.[100] But the concept of victim framed a much broader universe of possibilities for political mobilization.[101] Issues such as participation in the peace process with the

[97] Lina M. Escobar Martínez, Vicente F. Benítez-Rojas & Margarita Cárdenas Poveda, *La influencia de los estándares interamericanos de reparación en la jurisprudencia del Consejo de Estado Colombiano* [*The Influence of Inter-American Reparation Standards in the Colombian Council of State Case Law*], 9 ESTUD. CONST. 165 (2011). *See generally* Salvador Herencia Carrasco, *Las reparaciones en la jurisprudencia de la Corte Interamericana de Derechos Humanos* [*Reparations in the Inter-American Court of Human Rights Case Law*], *in* SISTEMA INTERAMERICANO DE DERECHOS HUMANOS Y DERECHO PENAL INTERNACIONAL [INTER-AMERICAN SYSTEM OF HUMAN RIGHTS AND INTERNATIONAL CRIMINAL LAW] 381 (Kai Ambos, Ezequiel Mallarino & Christian Steiner eds., 2011).

[98] Sally Merry has explored the political and discursive implications of this process in SALLY ENGLE MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006).

[99] In detail, Sheila Jasanoff, *The Idiom of Co-Production*, *in* STATES OF KNOWLEDGE: THE CO-PRODUCTION OF SCIENCE AND SOCIAL ORDER 1 (Sheila Jasanoff ed., 2004).

[100] *See* Colombian Victims Unit at the Ministry of Interior, *at* https://www.unidadvictimas.gov.co.

[101] Nadia Tapia Navarro, *The Category of Victim "From Below": The Case of the Movement of Victims of State Crimes (MOVICE) in Colombia*, 20 HUM. RTS. REV. 289 (2019).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

Revolutionary Armed Forced of Colombia (FARC, for its Spanish initials), administrative reparations, and even the question of land titling are all tied to the way in which the victim is defined and understood. For example, only those that self-identified as "victims" were allowed the directly participate in the Colombian negotiations that led to the 2016 peace deal.[102] Five delegations, with a total of sixty victims, visited Cuba and spoke directly to the negotiators. Such a direct role for victims was a key innovation in recent peace negotiations, and the very process of selecting the victims (and the controversy that surrounded it), gave high visibility to the victims' movement.[103] Similarly, the administrative procedure put together to provide for administrative reparations and land restitutions under the peace agreement is contingent on the self-identification as a "victim," and registration in the "Victims Registry."[104] In the end, the concept helped many individuals who have suffered from extreme marginalization gain access to financial and political capital.[105]

As a cognitive category, the notion of "victim" transforms social realities. Once it is clear that the Latin American community of practice can be mobilized around this concept, actors in that community will adapt their strategies. They might even reframe their very identities. This move, in turn, greatly helps the transformative influence of the Inter-American Court, since it is credited as framing these categories that have become crucial for the activities of civil society.

Colombia again provides a good example. The Inter-American Court decided to protect a collective of over five hundred peasant farmers in the Urabá region that faced threats, stigmatization, assassinations, and massacres because its members chose to resist displacement and declare themselves neutral in the midst of the country's civil war. In 2000, the IACtHR ordered provisional protective measures for 189 individuals; following extreme violence against the community, the Court then ordered the protection of the community as a whole.[106] This move created an entity, the "Peace Community of San José de Apartadó," that defines itself as such and hence organizes, mobilizes, and strategizes on that basis.[107]

[102] *See* Roddy Brett, La voz de las víctimas en la negociación: Sistematización de una experiencia [The Victims' Voice in the Negotiation: Systematization of an Experience] 12–17 (2017).

[103] *See* Natalia Arenas, *El viaje de las víctimas a La Habana desnuda el mayor problema de la Ley de Víctimas* [*The Victims' Journey to La Habana Exposed the Major Problem of the Victims Act*], La Silla Vacía (Aug. 14, 2014), *at* https://lasillavacia.com/historia/el-viaje-de-las-victimas-en-la-habana-desnuda-el-mayor-problema-de-la-ley-de-victimas-48419. The selection process was controversial, as the victims of the acts of each actor in the conflict did not necessarily felt represented by organizations representing victims of other actors. Thus, for example, victims of human rights violation by state agents were often at odds with victims of the FARC, thus creating a difficult (and painful) landscape of conflicting victimhood.

[104] The registry was established by Article 155 of Law No. 1448/11, 2011 J.O. 48.096 (Colom.)—called, in turn, "Victims' Act."

[105] For a review of the impact of the notion of "victim," see Angelika Rettberg, *Ley de víctimas en Colombia: Un balance* [*Victims' Act in Colombia: A Balance*], 54 Rev. Estud. Soc. 185 (2015). For a textured discussion of the mobilization structures of civil society around the notion, see Julieta Lemaitre Ripoll, *Diálogo sin debate: La participación en los decretos de la Ley de Víctimas* [*Dialogue Without Debate: Participation in the Decrees of the Victims' Act*], 31 Rev. Derecho Publico - Univ. Los Andes 1 (2013).

[106] Matter of the Peace Community of San José de Apartadó Regarding Colombia, Precautionary Measure, at 9(i); 16, considering clause 7 (Inter-Am. Comm'n. H.R., Nov. 24, 2000). *See also* Matter of the Communities of Jiguamiandó and Curbaradó Regarding Colombia, Precautionary Measure, at 9, considering clause 8 (Inter-Am. Comm'n. H.R., Feb. 7, 2006).

[107] On the "comunidades de paz" in Colombia, see Nadia Tapia Navarro, *A Stubborn Victim of Mass Atrocity: The Peace Community of San José de Apartadó*, 50 J. Leg. Plur. Unoff. L. 188 (2018). John Gregory Belalcázar Valencia, *Las comunidades de paz: Formas de acción colectiva en resistencia civil al conflicto armado Colombiano* [*The*

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

Of course, all these realities *exist*; they represent flesh-and-blood phenomena, not merely categories. The crucial point, however, is that the Inter-American concept of victim defines the way those individuals (and the Latin American human rights community) understand their predicament. The reality of being victims was coproduced by the very deployment of legal knowledge that comes with the concept of "victimhood." This is an important aspect of the workings of transformative constitutionalism.

C. *Compliance as a Transformative Practice*

Skeptics of the transformative character of Inter-American adjudication often highlight a certain lack of compliance with the Court's orders, in particular if they demand deep change.[108] This deficit may appear to undermine any suggestion of international transformative constitutionalism: if the Court's authority appears flimsy when applied to the case at hand, a broad transformative role seems utterly unlikely. However, focusing solely on case-specific compliance overlooks the transformative effects of the IACtHR's expansive compliance activities. Moreover, the focus on compliance conceals the wider impact of its orders and interpretations, which comes to light if we consider the Court's influence on the behavior of the Latin American community of human rights.

As an initial matter, the IACtHR understands inducing compliance as part of its core mandate, unlike the ECtHR, as Article 46 of the ECHR delegates this task to the Committee of Ministers. The IACtHR's monitoring of compliance is mostly dialogical and informational in nature: not so much concerned with *enforcing* certain orders but rather with creating cognitive frameworks and domestic political dynamics that will help to realize the Court's orders. Some of the relevant tools at its disposal are the Commission's country reports, informational requirements, and *in loco* visits,[109] as well as the Court's decentralized compliance

Peace Communities: Forms of Collective Action in Civil Resistance to the Colombian Armed Conflict], 7–8 REV. ENTORNO GEOGRÁFICO 196 (2011). Roland Anrup & Janneth Español, *Una comunidad de paz en conflicto con la soberanía y el aparato judicial del Estado* [*A Peace Community in Conflict with the Sovereignty and the State Judicial System*], 35 DIÁLOGOS SABERES 153 (2011).

[108] For analyses on compliance, Fernando Basch, Leonardo Filippini, Ana Laya, Mariano Nino, Felicitas Rossi & Bárbara Schreiber, *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions* 7 SUR - INT'L J. HUM. RTS. 9 (2010); Damián A. González-Salzberg, *La implementación de las sentencias de la Corte Interamericana de Derechos Humanos en Argentina: Un análisis de los vaivenes jurisprudenciales de la Corte Suprema de la Nación* [*The Implementation of the Inter-American Court of Human Rights Judgments in Argentina: An Analysis of Jurisprudential Swings of the Supreme Court*] 8 SUR - INT'L J. HUM. RTS. 117 (2011). For a more nuanced view of compliance, see James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AJIL 768 (2008); regarding the Commission, Ariel Dulitzky, *Derechos humanos en Latinoamérica y el sistema Interamericano: Modelos para desarmar* [*Human Rights in Latin America and the Inter-American System: Models to Take Apart*] 299 (2017); regarding orders against Colombia, Sergio Iván Anzola, Beatriz Eugenia Sánchez & René Urueña, *Después del fallo: El cumplimiento de las decisiones del Sistema Interamericano de Derechos Humanos, Una propuesta de metodología* [*After Ruling: The Compliance with the Inter-American System of Human Rights Decisions, a Methodological Proposal*], 11 DOCUMENTOS JUSTICIA GLOBAL 447 (2015).

[109] Bertha Santoscoy Noro, *Las visitas in loco de la Comisión Interamericana de Protección de los Derechos Humanos* [In Loco *Visits by the Inter-American Commission of Protection of Human Rights*], *in* EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI [THE INTER-AMERICAN SYSTEM OF PROTECTION OF HUMAN RIGHTS IN THE XXI CENTURY THRESHOLD] 606 (2003).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

hearings.[110] In all these instances, both the Court and the Commission strive to create the cognitive and political frameworks that will facilitate domestic compliance pressure, which is usually exerted by domestic civil society groups.[111] In doing so, the Inter-American system provides a space for encounters between national authorities and domestic stakeholders, and it works in tandem with civil society to impact on conditions that lead to compliance. From this perspective, compliance monitoring is part of a wider process of transformation.

This Inter-American approach differs greatly from the traditional understanding of compliance. Traditional readings view both the judicial decision and the context of implementation as static, and compliance is understood as a rather mechanical process in which "leverages" are activated to achieve the demanded behavior from the addressees. The paradigmatic form is domestic private law: compliance with a judicial decision is achieved by activating certain sociopolitical mechanisms (judicial enforcement, for instance) to "force" the addressee of the decision to do something (comply with an obligation). This view informs the dominant understanding of compliance in international legal scholarship,[112] in which the key problem seems to be how to incentivize compliance when there is little political leverage to compel states to change their behavior.[113] Given the scarcity of enforcement mechanisms, compliance appears an almost discretionary choice for states, particularly in the context of human rights.[114]

Our reading rebuts that understanding in two directions. First, it rejects the idea that a judicial decision is static in the sense of being fully crystallized or carved in stone. Indeed, orders by international courts are often vague, since their precise contours only become apparent in the process of implementation, hence in dialogue with the involved state authorities. In other words, a judicial order is just one step (though certainly an essential one) in a long process. It defines the scope and thrust of possible implementation but usually lacks the details of concrete policy to ground the decision.

Moreover, the context of implementation is rarely static. Therefore, the Inter-American Court creates a continuum between the decision and the conditions for its implementation. The political leverage that could lead to compliance are dynamic, and they can be influenced by the very decision whose implementation is sought. Thus, when the Court adopts an order, the question of compliance is not merely whether there are tools to coerce the state into compliance. For example, what kind of leverage is there to induce domestic prosecution of perpetrators? Is there an active domestic judiciary? Is there a powerful civil society? Instead, the issue is also how the very decision can be used to mobilize and even generate such tools and

[110] *See* Felipe González, *La Comisión Interamericana de Derechos Humanos: Antecedentes, funciones y otros aspectos* [*The Inter-American Commission of Human Rights: Background, Functions, and Other Aspects*], 5 ANU. DERECHOS HUM. 35, 39–41, 54 (2009).

[111] *See* Celeste Kauffman & César Rodríguez-Garavito, *De las órdenes a la práctica: Análisis y estrategias para el cumplimiento de las decisiones del sistema interamericano de derechos humanos* [*From Orders to Practice: Analysis and Strategies for Compliance of the Decisions of the Inter-American System of Human Rights*], *in* DESAFÍOS DEL SISTEMA INTERAMERICANO DE DERECHOS HUMANOS. NUEVOS TIEMPOS, VIEJOS RETOS [CHALLENGES OF THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS. NEW TIMES, OLD CHALLENGES] 276 (2015).

[112] For a map, see Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998). For a critique, see also Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB. POL'Y, 127 (2010).

[113] ERIC A. POSNER & A. O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 198–208 (2013).

[114] *See, e.g.*, ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 69–78 (2014).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

push a state toward compliance. How can the domestic judiciary use *this* decision to force compliance with it? How can civil society mobilize around *this* decision?

In that context, even explicit instances of resistance to Inter-American decisions are part of a wider process of influence. Consider the *Fontevecchia* case, in which the IACtHR ordered Argentina to render a Supreme Court decision ineffective, as it was in breach of the right of freedom of expression of two journalists who had been ordered by a domestic court to pay compensation to a former president.[115] The Supreme Court of Argentina, though, explicitly decided that the Inter-American decision could not be implemented. For that Court, while Inter-American decisions were "in principle" binding, they could not be complied with if the international tribunal had exceeded its powers, or if its decision contradicted "principles of Argentinean public constitutional law."[116] The Supreme Court of Argentina was thus not only backtracking from a line of precedent that accepted Inter-American decisions were always binding under Argentinean law,[117] but also positioned itself in frank opposition to the IACtHR —in much the same way as the Costa Rican Supreme Court in the in vitro fertilization case discussed above.

The Supreme Court's defiant attitude in *Fontevecchia* was not the end of the story, however. The Inter-American Court continued monitoring compliance with its decision, and ultimately signaled alternative mechanisms of compliance available to Argentina. Instead of necessarily revising the domestic judicial decision, the IACtHR found that Argentina could remove the decision "from the web pages of the Supreme Court of Justice and the Judicial Information Center, or that its publication is maintained, but some type of annotation is made indicating that this sentence was declared in violation of the American Convention by the Inter-American Court."[118] The Argentinean court decided to accept the IACtHR's proposal, and added the following text to the official text of its decision: "This judgment was declared incompatible with the American Convention on Human Rights by the Inter-American Court (judgment of November 21, 2011)."[119]

To be sure, this outcome may be undesirable for some of the Argentinean court's critics, who believe that only revoking the domestic decision would have been sufficient to comply with the Inter-American Court's order. For our purposes, however, the *Fontevecchia* saga reveals that what at first seems to be a definitive backlash against Inter-American human rights adjudication in fact illustrates how an initial act of noncompliance may be only the starting

[115] Case of the Fontevecchia and D'amico v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 238, para. 137 (Nov. 29, 2011).

[116] Corte Suprema de Justicia de la Nación [Supreme Court of Justice of the Nation], Feb. 14, 2017, *Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso "Fontevecchia y D'Amico vs. Argentina" por la Corte Interamericana de Derechos Humanos* [*Foreign Affairs Ministry Report on the Inter-American Court Ruling "Fontevecchia y D'Amico v. Argentina"*], consideration 12 (Arg.).

[117] *See* Corte Suprema de Justicia de la Nación [Supreme Court of Justice of the Nation], Dec. 23, 2004, *Espósito, Miguel Ángel s/ incidente de prescripción de la acción penal promovido por su defensa* [*Miguél Ángel Espósito, Incident of Prescription of the Criminal Action Raised by His Defense*], "considering" 6, 10 (Arg.); Corte Suprema de Justicia de la Nación [Supreme Court of Justice of the Nation], Nov. 29, 2011, *Derecho, René Jesús s/ incidente de prescripción de la acción penal – causa n° 24.079* [*René Jesús Derecho, Incident of Prescription of the Criminal Action, Case No. 24,079*], "considering" 4, 5 (Arg.).

[118] Case of Fontevecchia and D'Amico v. Argentina, Monitoring Compliance with Judgment, para. 21 (Inter-Am. Ct. H.R. Oct. 18, 2017).

[119] Corte Suprema de Justicia de la Nación [Supreme Court of Justice of the Nation], Dec. 5, 2017, Resolution No. 4015 (Arg.).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

point of a wider process. Facing a sharp rebuke from the Argentinean tribunal, the Inter-American Court adapted its position, offering different alternatives for compliance, which were then taken up by the domestic court. Neither the specific mechanism of compliance, nor the Argentinean context, were carved in stone: both the international tribunal and its domestic counterpart engaged in a process of interaction and adaptation that resulted in an outcome that was not anticipated before.

The IACtHR's compliance review process thus presents an opportunity for exercising judicial authority. It is not a political process largely outside the Court's bailiwick but rather an integral part of it; it is not analytically separate from adjudication but instead a continuation thereof. More broadly, it is part of a process that involves many stakeholders. Ultimately, compliance in a given case is not an end in itself but part of a much larger process of transformation that involves domestic pro-rights constituencies, including civil society organizations, national human rights institutions, domestic tribunals as well as actors that oppose a particular decision of the Court.

D. Transformative Constitutionalism Beyond Compliance

One should not fetishize *compliance* as a proxy for real-life impact. While compliance studies are of course relevant, they are only one element in a deeper understanding of the impact of Inter-American institutions on human rights protection and advancement.[120] This is particularly true when evaluating the operation of an international human rights court that addresses structural problems.[121] Following its mandate of supporting transformative constitutionalism, the Court orders reparations that are often very difficult to fully comply with, such as prosecuting individuals who form part of powerful social groups. If the Court considered full compliance its supreme objective, it would have to renounce its mandate to aspire for deep change. Surely that does not make sense. In transformative constitutionalism, the issue of compliance becomes part of the wider concern with impact, which also accounts for the social process (and not just the result) of compliance, and for the numerous actors involved in that process.

Using "impact" as a wider analytical prism than "compliance" allows for a better understanding of the dynamics of human rights protection. Domestic civil society groups often use Inter-American decisions to promote domestic human rights agendas.[122] This creates "compliance partnerships" that promote collaboration between Inter-American institutions and domestic civil society groups.[123] The system's decisions, moreover, lend voice and

[120] On the impact of domestic adjudication, see RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 15. For wider impacts of Inter-American adjudication, see Oscar Parra Vera, *The Impact of Inter-American Judgments by Institutional Empowerment*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW *IUS COMMUNE*, *supra* note 44. For a review of the relevant literature on these wider impacts, see Par Engstrom, *Introduction: Rethinking the Impact of the Inter-American Human Rights System*, *in* THE INTER-AMERICAN HUMAN RIGHTS SYSTEM: IMPACT BEYOND COMPLIANCE 1 (Par Engstrom ed., 2019).

[121] Cavallaro & Brewer, *supra* note 108. Ximena Soley, *The Transformative Dimension of Inter-American Jurisprudence*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW *IUS COMMUNE*, *supra* note 44, at 337; Howse and Teitel, *supra* note 112.

[122] Cavallaro and Brewer, *supra* note 108.

[123] Alexandra Huneeus, *Compliance with International Judgments*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 437 (Yuval Shany, Karen J. Alter & Cesare P.R. Romano eds., 1st ed. 2013). A similar argument proposing the effect of the Inter-American system as a function of the relative strength of

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

recognition to those who have been systematically ignored. Inter-American jurisprudence on reparations, for example, often orders symbolic reparations in which monuments are built to honor victims of atrocities, and not merely the plaintiffs. For example, in *19 Comerciantes*, the Court ordered Colombia to "erect a monument in memory of the victims and, in a public ceremony in the presence of the next of kin of the victims, shall place a plaque with the names of the 19 tradesmen [that were killed]."[124]

In addition, the Inter-American system empowers domestic pro-human rights institutions to use Inter-American decisions in their disputes with other domestic actors. For example, in 2009, three Colombian Supreme Court justices who were investigating the links of the right-wing paramilitary with both the presidency and with Congress asked the Inter-American Commission for precautionary protection against threats that came from within the Colombian state.[125] The measures came, so the investigations could continue. The system's orders are also useful to unblock institutional lockdowns that prevent human rights protections. Bureaucracies are path-dependent and often lack empathy with the marginalized. By jump-starting bureaucracies that may be reluctant to engage in human rights protections, domestic civil society actors or pro-rights public institutions might use orders by the Inter-American system to combat institutional inertia or bypass institutional gatekeepers.[126]

Through this strategic interaction, Inter-American institutions reach deep into the states' legal systems.[127] Building on the domestic constitutional provisions explored in the first section of this Article, Inter-American norms penetrate the legal reasoning in domestic courts, parliaments, and administrative agencies, thus creating a wider Inter-American legal space which is used by actors of the human rights community.[128]

Of course, there are many limits to such a practice. Courts cannot and should not provide for deep social change on their own. Transformations of that magnitude require a strong commitment from many actors throughout a society as well as great political will.[129] At the same time, many actors of the Latin American human rights community do rely on adjudication as a strategy to transform the region, with the IACtHR being an important forum. Instead of considering them naïve, many such organizations are sophisticated and repeat players who understand the possibilities (and limits) of transformation that human rights in Latin America offer.

This constant presence of Inter-American norms, decisions, and institutions throughout the region creates a cognitive framework shared by civil society, courts, academics, and even

domestic constituencies of constitutional lawyers, see Alexandra Huneeus, *Constitutional Lawyers and the Inter-American Court's Varies Authority*, 79 L. & CONTEMP. PROBS. 179 (2016).

[124] *See* Case of the 19 Merchants v. Colombia, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 109, at 132 (July 5, 2004) (English translation).

[125] Parra Vera, *supra* note 120.

[126] RODRÍGUEZ GARAVITO & RODRÍGUEZ FRANCO, *supra* note 15.

[127] ACOSTA ALVARADO, *supra* note 19.

[128] René Urueña, *Double or Nothing: The Inter-American Court of Human Rights in an Increasingly Adverse Context*, 35 WIS. INT'L L.J. 398 (2017).

[129] Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011); Ariel E. Dulitzky, *El impacto del control de convencionalidad. Un cambio de paradigma en el sistema interamericano de derechos humanos?* [*The Conventionality Control Impact. A Change of Paradigm in the Inter-American System of Human Rights?*], *in* TRATADO DE LOS DERECHOS CONSTITUCIONALES [CONSTITUTIONAL RIGHTS TREATISE] 533 (Julio César Rivera ed., 2014); Soley, *supra* note 121, at 338, 344.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

by state institutions that are responsible for human rights violations. In this process, many important sociopolitical conflicts are reframed as distinctive *human rights* issues, and no longer as problems of an economic or political nature that are beyond the law. This, we propose, is the ultimate meaning of transformative constitutionalism: that apparently intractable social problems which were once understood as amenable to nothing but sheer political force or raw power, are instead also framed as *legal* issues and, indeed, as human rights problems that can be addressed by the legal system. Effectively expanding the frontiers of what can be framed as a human rights issue is essential to transformative constitutionalism. Arguably, the Inter-American Court's deepest impact stems from allowing for this reframing and fostering the accompanying Latin American community of practice.

III. Legality and Legitimacy of International Transformative Constitutionalism in Latin America

International transformative constitutionalism, we have argued, is the social practice of a community. As such it needs an idea of its legitimacy. Being a community of lawyers, this includes a substantiated argument of the practice's legality. In the following section, we develop such an idea. We do this as insiders of the community, assuming that writing as participants, rather than observers, does not undermine our scholarly claim.[130] The Inter-American Court advances transformative constitutionalism with truly far-reaching and innovative decisions that raise serious issues of legality and legitimacy. Approaching legal texts with the ambition of transforming deeply entrenched structures (even if that ambition is not always realized) is bound to be controversial. Both domestically and at the international level, much of the critique of transformative constitutionalism is normative, focusing on whether courts *ought* to interpret texts from a transformative vantage point in cases in which, for example, this approach risks undermining the division of powers in a democracy or has insufficient democratic legitimacy. But these arguments also have an analytical dimension, for they imply that transformative constitutionalism could hardly work without strong arguments supporting legality and legitimacy.

The remainder of this Article, accordingly, seeks to justify the legality and legitimacy of transformative constitutionalism in the Inter-American system. We show how it can meet three forms of critique. The first is the *ultra vires* critique, which highlights the legal limits of the Court's transformative mandate. The second critique argues that the IACtHR does not sufficiently defer to domestic democratic decision making. Finally, the Court has been criticized as denying that "reasonable and persistent differences of opinion [persist] with regards to justice and rights."[131]

A. The Generation of the Court's Transformative Mandate

One incisive critique is that the Court's transformative constitutionalism exceeds the limits of its mandate as set forth in the relevant international instruments, i.e., that it acts *ultra vires*.

[130] For a seminal reconstruction of international legal scholarship as participating in larger projects, cf. Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960 (2001); Martti Koskenniemi, *Constitutionalism as a Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 Theoretical Inquiries L. 9 (2007).

[131] *See* Roberto Gargarella, *Democracy and Rights in* Gelman v. Uruguay, 109 AJIL Unbound 115, 118 (2015).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

An aspect concerns the lack of textual basis for the practice. There is indeed little on this matter in the text of the American Convention on Human Rights. The drafters of the Convention could hardly have imagined the treaty as providing a basis for transformative constitutionalism. After all, most of the states that signed the American Convention had an authoritarian or military government or were democratic in name only. Moreover, the Convention emerged from the Organization of American States, in which the United States' Cold War geopolitical interests were key.[132]

However, because the transformative agenda is enshrined in domestic constitutions—in particular through generous bills of rights—and the American Convention is now constitutionally embedded through the block of constitutionality, the IACtHR has received through those domestic transformations a role to complement domestic constitutional processes through evolutive interpretation. The Court has assumed that mandate not through a high-handed, power-grabbing decision, we argue, but in response to the domestic constitutions it complements.[133]

This is not, to be sure, the traditional juridical form of delegating authority in international institutional law.[134] Yet it is widely recognized that the mandate of an international institution, its tasks and competences, evolve and often expand over time.[135] The functionalist mindset of strict principal-agent accountability is insufficient to explain the generally accepted dynamic role of international institutions—especially in the area of human rights.[136] This enables responses to changing contexts, in our case to domestic constitutional provisions that foresee, and might even demand, supportive actions from international institutions. This is the case in Latin America. The adoption of domestic constitutions with generous bills of rights, intended to transform the actual reality in the region, paired with constitutional clauses that opened domestic legal systems to international law, allow for such interpretation. Such domestic constitutional texts can be interpreted as expressing an expectation on behalf of states and domestic civil societies that the Inter-American Court

[132] Par Engstrom, *The Inter-American Human Rights System and US-Latin American Relations*, *in* COOPERATION AND HEGEMONY IN US-LATIN AMERICAN RELATIONS: REVISITING THE WESTERN HEMISPHERE IDEA 209, at 215–21 (Juan Pablo Scarfi & Andrew R. Tillman eds., 2016). JUAN PABLO SCARFI, THE HIDDEN HISTORY OF INTERNATIONAL LAW IN THE AMERICAS: EMPIRE AND LEGAL NETWORKS 179–190 (2017). On the previously unimagined potential of the Convention, as well as the unexpected evolution that led to innovative outcomes, see Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, 19 HUM. RTS. Q. 510 (1997).

[133] *See* Part I.B *supra*.

[134] JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2009).

[135] JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 92–95, 139–43 (2005); HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY, at paras. 206–36 (2011); Enzo Cannizzaro & Paolo Palchetti, *Ultra Vires Acts of International Organizations*, *in* RESEARCH HANDBOOK ON THE LAW OF INTERNATIONAL ORGANIZATIONS 365 (Jan Klabbers & Åsa Wallendahl eds., 2011); Armin von Bogdandy, *General Principles of International Public Authority: Sketching a Research Field*, *in* THE EXERCISE OF PUBLIC AUTHORITY BY INTERNATIONAL INSTITUTIONS: ADVANCING INTERNATIONAL INSTITUTIONAL LAW 727 (Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann eds., 2010); RENÉ URUEÑA, DERECHO DE LAS ORGANIZACIONES INTERNACIONALES [INTERNATIONAL ORGANIZATIONS LAW] 209–25 (2008).

[136] Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations Law*, 26 EUR. J. INT'L L. 9 (2015). The International Law Commission Articles on Responsibility of International Organizations (UN Doc. A/66/10, 2011) provide good evidence of the limitations of the narrow functionalist approach, which has been highlighted by most commentators. *See, e.g.*, Arnold N. Porto, *Reflections on the Scope of Application of the Articles on the Responsibility of International Organizations*, *in* RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE 147 (Maurizio Ragazzi ed., 2013).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

could be an active ally in the domestic transformative project. As already mentioned, the countries know well how important external support is for advancing a human rights agenda domestically.[137] Thus, the Inter-American Court plays a "constitution supplementing function"[138] that, although originally not included in its statute, has gradually gained acceptance from a large number of domestic bodies, as evidenced for example by their following of the IACtHR's precedents.[139]

The transformative mandate thus operates at two different levels. First, it gives the Inter-American Court the powers to support domestic processes of constitutional transformation. Secondly, and no less importantly, it provides the legal framework for the community of human rights practice, which has grown to *expect* that the Inter-American Court supports such processes of transformation. In a region of traditionally weak national judiciaries,[140] domestic courts have used Inter-American decisions to bolster their independence and to gain space to adopt controversial decisions.[141] The IACtHR thus contributes to solving domestic institutional blockages—that is, to triggering action where power structures, bureaucratic inertia, and path dependency stand in the way of necessary change.[142]

Another aspect of the *ultra vires* critique challenges the Court's general lawmaking. Thus, the five presidents deemed it relevant to "stress the importance of strict application of the sources of International Human Rights Law" and to "recall that the resolutions and judgments of the organs of the Inter-American system only have effects for the parties to the litigation."[143] This critique is shaky on many grounds. First, the Court's application of sources seems to be reasonably strict: as the Court itself has explained, soft law instruments are mostly used as just guidelines for interpreting conventional or consuetudinary rules.[144] Second, although we share the critique that the IACtHR may have stretched its interpretation of *jus*

[137] Sikkink & Keck, *supra* note 33; *see also* Kathryn Sikkink, *The Transnational Dimension of the Judicialization of Politics in Latin America*, *in* The Judicialization of Politics in Latin America 263 (Rachel Sieder, Line Schjolden & Alan Angell eds., 2005).

[138] *See* Armin von Bogdandy & Ingo Venzke, In Whose Name?: A Public Law Theory of International Adjudication 131–33 (2014).

[139] For examples in Bolivia, Brazil, Colombia, Chile, and Peru, see Protección multinivel de derechos humanos [Multilevel Protection of Human Rights] 327–416, 449–69 (René Urueña, George Rodrigo Bandeira Galindo & Aida Torres Pérez eds., 2013).

[140] *See generally* Olivier Duhamel & Manuel José Cepeda Espinosa, Las democracias: Entre el derecho constitucional y la política [Democracies: Between Constitutional Law and Politics] (1997).

[141] For this same observation outside Latin America, see Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

[142] Parra Vera, *supra* note 120, at 376.

[143] República Argentina, la República Federativa del Brasil, la República de Chile, la República de Colombia y la República del Paraguay [Republic of Argentina, Federal Republic of Brazil, Republic of Chile, Republic of Colombia, and Republic of Paraguay], *supra* note 1.

[144] *See* The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (Ser. A) No. 23, para. 45 (Nov. 15, 2017). However, the Court has on occasion relied on soft norms to base important decisions, without giving enough explanation as to the specific role of their legal status in its reasoning. For example, see Advisory Opinion OC-24/17, *supra* note 65, paras. 174, 206–13. Highlighting this problem with nonbinding legal sources in the majority opinion, see the dissenting opinion of Judge Vio Grossi, paras. 66–69.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

cogens norms too far,[145] we find that the criticism ignores the fact that the Court would engage in discriminatory practices if it followed the five presidents' request. While there is no doubt that Inter-American judgments are legally binding only on the parties to each case, a basic standard of nondiscrimination requires that cases be decided by considering prior decisions of the same court in similar situations.[146] If prior decisions exist, courts must either decide analogously or must provide strong reasons (of fact or of law) that warrant a different treatment. Not doing so would imply arbitrary discrimination against a complainant.

But the presidents' critique also misses its mark in a wider sense. As discussed above, the new constitutions or constitutional amendments in Latin America created a specific expectation, expressed in constitutional law, that the Court would be an active ally in domestic transformative projects. This function requires much more than merely determining state responsibility for breaches of the American Convention in the case at hand; it would have been unnecessary, after all, to amend constitutions in the region and create openness clauses if that was the sole scope of the Court's mandate. Beyond establishing state responsibility for a concrete breach, the Inter-American mandate comprises the definition of standards that are applicable to the region as a whole, not only to the parties to a particular dispute. Indeed, such lawmaking is a general feature of international courts.[147] It is only by means of those general standards that the IACtHR can truly accompany domestic constitutional transformations. Indeed, many domestic courts are using these standards precisely in this way.[148]

[145] For example, the Court's persistent view that the principle of equality and nondiscrimination is a *jus cogens* norm, because it "is applicable to all States, regardless of whether or not they are a party to a specific international treaty" (Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, para. 173.4 (Sept. 17, 2003)) seems to confuse standard customary international law with peremptory rules and lacks, moreover, a strong basis in general international law. The Court has repeated this argument in *Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, para. 184 (June 23, 2005); *Case of "Mapiripán Massacre" v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, para. 178 (Sept. 15, 2005); *Case of Girls Yean and Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, para. 141 (Sept. 8, 2005); *López Álvarez v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 141, para. 170 (Feb. 1, 2006); *Servellón García et al. v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 152, para. 97 (Sept. 21, 2006); and *Case of Atala Riffo and Daughters*, *supra* note 41, para. 79. On the narrow concept of *jus cogens*, see Jochen A. Frowein, *Obligations* Erga Omnes, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, at paras. 6–8 (Rüdiger Wolfrum ed., 2008); Jochen Frowein, Jus Cogens, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, at paras. 6–8 (Rüdiger Wolfrum ed. 2013).

[146] *See* VON BOGDANDY AND VENZKE, *supra* note 138, at 117. In a similar vein, the ECtHR held that "while it is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the Court must, however, have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved." *See* Chapman v. United Kingdom, 2001-I Eur. Ct. H.R., para. 70. On how decisions of the ECtHR have influenced domestic policies across Europe on most sensitive issues, see Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014).

[147] See contributions in INTERNATIONAL JUDICIAL LAWMAKING: ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE (Armin von Bogdandy & Ingo Venzke eds., 2012).

[148] For examples of domestic use of Inter-American standards in Argentina, Bolivia, Brazil, Colombia, Guatemala, and Peru, see DE ANACRONISMOS Y VATICINIOS: DIAGNÓSTICO SOBRE LAS RELACIONES ENTRE EL DERECHO INTERNACIONAL Y EL DERECHO INTERNO EN LATINOAMÉRICA [OF ANACHRONISMS AND PREDICTIONS: DIAGNOSIS ON THE RELATIONS BETWEEN INTERNATIONAL LAW AND INTERNAL LAW IN LATIN AMERICA] 29–46, 327–416, 449–69 (Paola Acosta Alvarado, Juana Inés Acosta López & Daniel Rivas Ramírez eds., 2017).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

B. Democracy in the Latin American Human Rights Community

A second major objection to the Inter-American Court's transformative practice claims that it disrespects democracy.[149] Often, this critique is accompanied by the request that the Court concede democratic states a margin of appreciation.[150] Here, we do not consider the general issue but focus instead on the seminal *Gelman* case. Macarena Gelman's Argentinean parents were captured, tortured, and killed by the Uruguayan military in 1976, in a joint Argentina-Uruguay action under "Operación Cóndor." Gelman's mother was seven months pregnant when she was captured, and she gave birth in captivity. After the mother's forced disappearance, the infant was raised by a Uruguayan policeman and his wife, who were unaware of her real identity until a paternal grandparent managed to track her down in 2000.

These facts are mostly undisputed and are confirmed by an official "Peace Commission" report of 2003.[151] However, a 1986 Uruguayan Law, which granted amnesty to members and agents of the dictatorship (the "Expiry Law"), prevented prosecuting the perpetrators. The Expiry Law was adopted by a democratically elected Congress and, in three decades, was reviewed three times for constitutionality by a relatively independent domestic Supreme Court. Moreover, it was subject to a free national referendum not once but *twice*. At a purely procedural level, it is hard to think of a domestic decision with a better formal democratic pedigree. However, the Law openly collided with a consistent theme in Inter-American jurisprudence, which emphasizes states' obligation to ensure victims' right to the truth,[152] a criminal process against the perpetrators of human rights abuses, and full reparation for wrongdoing.[153] By the time of the *Gelman* case, the IACtHR had already rejected blanket amnesties in transitional justice processes in Peru. Specifically, the roadblock for the Uruguayan Expiry Law was the 2001 decision in *Barrios Altos*[154] and the 2006 decision in *La Cantuta,*[155] according to which amnesties constituted a violation of the American Convention; the Court even ruled that such amnesties "lacked legal effects."[156]

[149] Contesse, *supra* note 60, at 430; Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 L. & CONTEMP. PROBS. 123, 135–44 (2016); Roberto Gargarella, *La democracia frente a los crímenes masivos: Una reflexión a la luz del caso* Gelman [*Democracy in the Face of Mass Crimes: A Reflection in Light of the* Gelman *Case*], REV. LATINOAM. DERECHO INT. (2015); Gargarella, *supra* note 131.

[150] *See, e.g.*, Juana Inés Acosta-López, *The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity*, 110 AJIL UNBOUND 178 (2016); Contesse, *supra* note 60, at 141–42. The concept comes from the ECtHR, see *Marckx/Belgium*, 31 Eur. Ct. H.R. (ser. A), para. 58 (1979); Dean Spielmann, *Allowing the Right Margin: The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?*, 14 CAM. Y.B. EUR. LEGAL STUD. 381–401 (2011–2012); JOSEPHINE ASCHE, DIE MARGIN OF APPRECIATION (2018).

[151] *Gelman v. Uruguay*, *supra* note 44.

[152] Thomas M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23 MICH. J. INT'L L. 977 (2002).

[153] PASQUALUCCI, *supra* note 92, at 230–88.

[154] *Case of Barrios Altos v. Peru*, *supra* note 48; *see generally* Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, 12 GER. L.J. 1203 (2011).

[155] *Case of La Cantuta v. Peru*, *supra* note 48.

[156] *Case of Barrios Altos v. Peru*, *supra* note 48, paras. 41–44, Res. 4. In his separate opinion to *La Cantuta v. Peru*, Sergio García Ramírez argues even more forcefully that domestic laws that violate the Convention are "basically invalid" (paras. 4–5).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

The Uruguayan situation was quite different, as the Peruvian amnesties had little democratic legitimacy.[157] Nevertheless, the Inter-American system stood by its categorical statements from *Barrios Altos* and *La Cantuta*. It maintained its strict no-deference standard of review and claimed that the Uruguayan Expiry Law, despite its democratic pedigree, violated the Inter-American Convention. The Court held that, just like the Peruvian amnesties, the Uruguayan law "lacked legal effects"[158] and could not remain an obstacle to further prosecutions.[159] To reach that conclusion, the Court stressed that democratic support for a measure does not imply its legality under human rights law. In its words:

> the fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions, namely, through the exercise of direct democracy, does not automatically or by itself grant legitimacy under International Law . . . .
>
> The democratic legitimacy of specific facts in a society is limited by the norms of protection of human rights recognized in international treaties, such as the American Convention, in such a form that the existence of (a) true democratic regime is determined by both its formal and substantial characteristics, and therefore, particularly in cases of serious violations of (peremptory) norms of International Law, the protection of human rights constitutes a(n) impassable limit to the rule of the majority, that is, to the forum of the "possible to be decided" by the majorities in the democratic instance . . . .[160]

This stance has been subject to criticism, which maintains that the Court does not adequately consider domestic democratic processes. In its starkest form, this critique seeks to regain a far greater autonomy for democratic states vis-à-vis the Inter-American system: a general margin of appreciation. Such is the tone of the five presidents' letter, which argues that "the principle of subsidiarity, which underpins the legal presuppositions of admissibility of a petition, . . . implies that . . . the State has the right to have its own judicial system resolve the situation before being submitted to an international instance." More generally, the letter stresses, "the legitimate space of autonomy available to States should be respected in order to ensure to all people subject to their jurisdiction, through their own democratic processes, the rights and guarantees enshrined in the Convention in accordance with their constitutional systems."[161]

In a similar vein (but with differing political allegiances), scholarly criticism targets the Court for not respecting the specific domestic democratic pedigree of the policies it reviews.[162] The most elaborate version of this criticism suggests a sliding scale: the stronger

[157] The Peruvian amnesty laws were adopted by a Congress put together by Alberto Fujimori, after he closed the democratically elected Congress in the so-called "auto-coup" of 1992. *See generally* Steven Levitsky, *Fujimori and Post-party Politics in Peru*, 10 J. DEMOCRacy 78 (1999).

[158] *Gelman v. Uruguay*, *supra* note 44, paras. 232, 246, 312.11.

[159] *Id.*, para. 312.11

[160] *Id.*, paras. 238–39.

[161] República Argentina, la República Federativa del Brasil, la República de Chile, la República de Colombia y la República del Paraguay [Republic of Argentina, Federal Republic of Brazil, Republic of Chile, Republic of Colombia, and Republic of Paraguay], *supra* note 1.

[162] Contesse, *supra* note 60.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

the democratic pedigree of the measure, the more deferential the Inter-American Court should be, and vice versa.[163]

As a matter of principle, this latter view does not necessarily conflict with the *Gelman* approach. There is little evidence that the Inter-American Court generally rejects a malleable standard of review, with democratic pedigree as the independent variable. The difference lies in the question to what extent a democratic majority may claim the right to a final, nonreviewable decision. Specifically, the dispute concerns what makes up the essence, the core, of the Latin American community of human rights: its fundamental experiences of injustice, and the impact of such experiences in the definition of what the human rights community can consider democratic. In a way, the conflict ultimately concerns the legacy of the *¡Nunca Más!* in Latin America.

For the Inter-American Court, any domestic decision that contradicts this basic principle will violate the Convention, therefore, even if it is taken through a fully democratic domestic process. By contrast, critics argue that the Court should apply the sliding scale even on these core issues: hence, *Gelman* should be subject to a low standard of review, such as arbitrariness or unreasonableness, given its high domestic democratic pedigree.[164]

Looking at the issue through the prism of the Latin American community of human rights helps disentangle this knotty problem. For the Court, there is a clear line dividing human rights adjudication from the democratic public, and hence from majoritarian decisionmaking. However, understanding the Court as part of the Latin American community of human rights practice shows that this dividing line is porous. Because the Court contributes to the Latin American community of human rights, its adjudication is connected with a public fostered by that community. Indeed, this linkage is crucially important: decisions such as *Gelman* do not exist because they are "correct" in terms of legal reasoning but because the relevant community of practice accepts and supports them as legally plausible, substantially convincing, and practically useful. This social legitimacy is fundamental to human rights adjudication. A decision that is rejected by the community of practice as legally implausible will not be socially legitimate. The most important reason why the Court's position on what is "nondecidable" stands and exerts influence is because a public, the relevant community of practice, accepts and supports it.

It is crucial to see that this community, this public, is transnational, and is the deep structure of the IACtHR's operation. The Court's mandate is *Inter-American*—meaning that the Court is called to consider not only the national publics and the individual national democratic processes but also the Latin American regional public, the regional social process, as understood and carried out by the Latin American community of practice.

Critiques that focus on national publics and political processes fail to take into account the regional social process of the Latin American community of practice. Yet this process is legitimately the dominant reference for the Inter-American Court's interpretations. The IACtHR acts as a transnational court when engaging in evolutive interpretation for an evolving transnational context. Even though the Uruguayan Expiry Law in *Gelman* has a sterling national democratic pedigree, the Court still has to ponder what its possible acceptance of that Expiry Law would mean for that regional community in general, and for the processes of

[163] Gargarella, *supra* note 131.
[164] *Id.*

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

democratization in other countries in particular. Given the centrality that *¡Nunca Más!*, with its quest for justice, has for that community, it seems perfectly reasonable for the Court to apply a strict standard of review.

Accordingly, the Court's decision appears far more legitimate if one understands that the Latin American community of human rights has created a Latin American public. Of course, a public in the sense of an electorate only exists at a national level in Latin America. This focus, however, fails to account for all relevant publics. If one is amenable to the idea of a community of practice beyond the state, then the appropriate standard of review should consider that wider scope and include the social practices and the regional publics that come with it.

We acknowledge that such thinking will meet with skepticism.[165] But the Latin American community of human rights is an observable social fact that is hard to deny—as is the public it entails. Again, the public that comes with the Latin American community of human rights practice is not a replication of national democracies—it is different in character, institutions, and depth. Regional social practices build on domestic social processes but remain distinct from them. Such regional practices do not replace or reproduce domestic democratic practices; they complement them.

Many challenges are regional and need to be tackled at that level with its transnational public. Circumscribing social practices relevant to the legitimacy of human rights adjudication exclusively to domestic constituencies fails to understand the regional dimension of the Latin American society. How to think about accountability in elections to Inter-American institutions,[166] for example, if not by building on the social expectations of a region-wide community of practice? How to tackle challenges such as migration,[167] protection of the Amazon,[168] or the regional corrupt practices of Odebrecht,[169] without this further regional layer of social interaction and its transnational public that strives to advance a transnational common interest? We need not posit a formal regional democratic process in order to see how a regional community of human rights practice can legitimate transnational decisions that confront these regional challenges. Critics tend to ignore this wider regional practice and public and focus solely on the national. However, by doing so, they risk overlooking a crucial dimension of Latin American politics, as the forceful reactions to the five presidents' communication clearly show.

[165] *See generally* Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 COLUM. J. TRANSNAT'L L. 221 (2008). For a summary of the skeptical arguments, see Steven Wheatley, *A Democratic Rule of International Law*, 22 EUR. J. INT'L L. 525 (2011). For the other side, see Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations*, 23 EUR. J. INT'L L. 315 (2012).

[166] Due Process of Law Foundation, *Fundación para el debido proceso, expertos y expertas independientes evalúan postulantes a la Comisión Interamericana de Derechos Humanos* [*Independent Experts Evaluate Applicants to the Inter-American Commission on Human Rights*] (2019), *at* http://www.dplf.org/es/news/expertos-y-expertas-independientes-evaluan-postulantes-la-comision-interamericana-de-derechos.

[167] MICHAEL J. CAMILLERI & FEN OSLER HAMPSON, NO STRANGERS AT THE GATE: COLLECTIVE RESPONSIBILITY AND A REGION'S RESPONSE TO THE VENEZUELAN REFUGEE AND MIGRATION CRISIS (2018).

[168] Letícia Casado & Ernesto Londoño, *Under Brazil's Far-Right Leader, Amazon Protections Slashed and Forests Fall*, N.Y. TIMES (July 28, 2019), *at* https://www.nytimes.com/2019/07/28/world/americas/brazil-deforestation-amazon-bolsonaro.html.

[169] For a summary, see Nicholas Casey & Andrea Zarate, *Corruption Scandals with Brazilian Roots Cascade Across Latin America*, N.Y. TIMES (Feb. 13, 2017), *at* https://www.nytimes.com/2017/02/13/world/americas/peru-colombia-venezuela-brazil-odebrecht-scandal.html.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

C. *Dealing with Legal Vagueness*

A third line of criticism relates to how the Inter-American Court deals with the vagueness of human rights. It builds on the insight that legal texts in general, and human rights texts in particular, cannot in and of themselves determine the outcome of a case.[170] According to this critique, such vagueness implies, in the Inter-American context, that "we disagree over what (human) rights should be, and what their content and contours are," which is why "we should not simply treat the idea of rights as isolated from or lacking any contact whatsoever with the notion of majority rule."[171]

Of course, human rights texts cannot define the outcome of a given conflict. They gain precision only in a law-generating process of interpretation and application. The IACtHR plays down this indeterminacy of human rights. For example, in *Gelman* it failed to recognize that relying on its amnesty jurisprudence as developed for Peru was not the only possible path. Such is the thrust of Gargarella's "disagreement" critique, and he is right in pointing it out. But then again, downplaying vagueness *is what most courts usually do.*[172] The mere fact that the Inter-American Court fails to draw attention to the contingency of its argumentative choices (and, hence, to its deep link to wider social practices) does not make *Gelman* a badly decided case, but rather a squarely traditional human rights decision.

If there is contingency, that does not mean that the judges can just order whatever they think best. The mandate to advance transformative constitutionalism in Latin America is guided, framed, and constrained by numerous legal and contextual safeguards: the factual setting of the cases, legal methods, the selection of judges, collegiality and procedures, precedents, and the need to build and protect the Court's authority.

The mandate finds its external limits in the challenges that arise from social reality. In Latin America, interpreting the Convention in light of such a reality mainly entails addressing the weakness of institutions, social exclusion, and violence.[173] There is broad agreement in the region that these are core challenges which must be confronted. It is also clear that such a transformative constitutionalism needs to be advanced by employing structural measures and addressing structural deficiencies.[174] The mandate of the Court, therefore, reaches far beyond the decision on whether a breach of the Convention has occurred in the case at hand.[175] This

[170] For the radical indeterminacy thesis in general international law, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 60–66 (2006). In human rights in particular, see Martti Koskenniemi, *Human Rights, Politics, and Love*, 4 MENNESKER RETTIGHEDER 33, 83–84 (2001).

[171] Gargarella, *supra* note 131, at 118

[172] Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

[173] Flávia Piovesan, Ius Constitutionale Commune en América Latina: *Context, Challenges, and Perspectives*, *in* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW *IUS COMMUNE*, *supra* note 44, at 50–51.

[174] Alexandra Huneeus, *Reforming the State from Afar: Structural Reform Litigation at the Human Rights Courts*, 40 YALE J. INT'L L. 1 (2015). Víctor Abramovich, *De las violaciones masivas a los patrones estructurales: Nuevos enfoques y clásicas tensiones en el sistema interamericano de derechos humanos* [*From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American System of Human Rights*], 6 REV. SUR 7 (2009).

[175] Soley, *supra* note 121.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

justifies the Court's creative and far-reaching orders on reparations, which have grown to be a key component of transformative constitutionalism.[176]

If this is a broad field in which the Court still has great discretion, there are many standards and safeguards against "judicial activism run wild" that support the claim of legality and legitimacy of the outcomes.[177] There are the protocols of legal reasoning, for instance, part of which are the methods of legal interpretation. Any judicial decision must be linked *lege artis* to the basic source of a court's authority, in our case the American Convention on Human Rights. Of course, our own previous discussion shows that one should not overestimate these protocols: they hardly ever determine the outcome of a decision, in particular decisions of supreme, constitutional or international courts. But these protocols do frame the decision and, no less importantly, provide standards for critique of the Court's decisions. The principle of collegiality, similarly, provides a further safeguard. Any decision rests on the judgment of several judges. Dworkin's Hercules provides a wrong idea of what happens in San José. Disputes among the judges, it bears noting, are built into the system.

Further guidance and constraints result from the process that develops the case, the actors and their submissions, the specific context and path of the case, and the likely implications of different possible decisions. Then there is the process of selecting Inter-American judges. Each new judge comes with an idea of what the Convention's mandate is and should be. All new judges, and all actors of the community, know how important an election to the Court is for the field's evolution, particularly considering that there are only seven judges (and seven members of the Commission), who are elected for a period of six (four) years, respectively, and may only serve two terms. As a result, the Inter-American Court could radically change its perspective with only four appointments. It seems likely that the five presidents are pondering this option in order to push the Court closer to their political agenda; for the same reason, civil society groups decide to invest part of their scarce resources into making the Latin American public heard in the election processes.[178]

Not least, this prospect encourages us to look for further safeguards. Vagueness does not imply that all outcomes are equally acceptable, or that "law is politics" once and for all. The identity of the system is a further constraining factor—an identity created by the path travelled so far by the Court and laid down in its case law, as well as in the legacy of the struggles that produced it. This is again a point where the social dimension of the Inter-American mandate becomes pivotal. Thinking in terms of social practice allows us to appreciate the relevance

[176] On reparations and transformative constitutionalism, see *id.* at 346–48; ANTONIAZZI, *supra* note 23, at 267–75. For a view acknowledging some of the challenges to the legitimacy of the Court's reparations practice, see David L. Attanasio, *Extraordinary Reparations, Legitimacy, and the Inter-American Court*, 37 U. PA. J. INT'L L. 813 (2016).

[177] *See* VON BOGDANDY AND VENZKE, *supra* note 138, at 156.

[178] See, for example, the strict scrutiny of the 2019 elections of Inter-American Commissioners by civil society organizations. Center for Justice and International Law, *Panel independiente de expertos-as evalúa candidaturas a la CIDH y recomienda a los Estados de la OEA nominar personas idóneas e independientes* [*An Independent Panel of Experts Assesses Candidacies for the IACHR and Recommends that OAS States Nominate Suitable and Independent Persons*] (June 7, 2019), *at* https://www.cejil.org/es/panel-independiente-expertos-evalua-candidaturas-cidh-y-recomienda-estados-oea-nominar-personas. In part due to the lobbying of civil society, the Colombian candidate to the Commission failed to be elected. *See Everth Bustamante no sería apto para ser comisionado ante la CIDH, dice panel de universidad* [*Everth Bustamante Would Not Be Eligible to Be Commissioner Before the IACHR, Says University Panel*], EL ESPECTADOR (June 10, 2019), *at* https://www.elespectador.com/noticias/el-mundo/everth-bustamante-no-seria-apto-para-ser-comisionado-ante-la-cidh-dice-panel-de-universidad-articulo-8651693.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

of the Latin American human rights community as a constraint on Inter-American judges. Decisions such as *Barrios Altos* and *Cantuta* are more than statements of international legal obligations; they also express deeply shared convictions in the community of practice, convictions around which that same community interacts. *Gelman* was a reiteration of the *acquis* of the Latin American community of practice, crystallized by a legal utterance of the Inter-American Court, which establishes a nondeferential standard of review when dealing with amnesties for gross violations of human rights. Indeed, there are few convictions as clearly crystallized in that community as the nondeferential standard of *Barrios Altos*, *Cantuta*, and now *Gelman*. It is hard to imagine that the five presidents can staff the Inter-American Court with judges who can break with that Latin American community as easily as that. In fact, in a recent decision monitoring compliance with *Barrios Altos* and *La Cantuta*, the Inter-American Court held that the standard restricting amnesties for grave human rights violations are part of the *acquis* of international human rights law and of international criminal law. [179]

Indeed, the anticipation of the reception that any decision is likely to receive—from domestic courts, political actors, public opinion, civil society, and academia, and particularly from those actors who form the Latin American community of human rights practice—furnishes another constraining element. Courts' authority, their most important asset, is never settled but rests instead on a continuous interaction with a wide range of stakeholders, thereby emphasizing the pertinent community of practice.[180]

IV. Conclusion: A Flexible, but Steadfast, Approach

Transformative constitutionalism is not an "on/off switch" that provides a blueprint for a better world. Instead, it is flexible and situational, not least because it very much depends on cases. It requires rather little in terms of "hardware" (institutional or financial infrastructure), and rather much in terms of "software" (as a legal mindset). When it comes to hardware, what it takes is a basic infrastructure in terms of constitutional democracy: a constitution with basic rights that operates as higher law, basic institutions of democratic representation, and a reasonable and somewhat independent judiciary. As to software, it takes a supportive public as well as a number of legal actors whose approach to legal interpretation, first, responds to the perception that a particular society is structurally failing on its constitutional principles and, second, understands those structural deficiencies as issues that can be meaningfully addressed—though certainly not fully solved—through legal processes over individual cases that represent such deficiencies. This transformative mindset rests on the hope that the interpretation, and application, of constitutional law to such cases might move the entire society a little closer to the basic social compact; this, crucially, is a specific contribution only lawyers can make.

Part of transformative constitutionalism's strength, though, lies in its flexibility, which is evidenced by the manner in which the Inter-American Court is developing and adapting its crucial link with the domestic judiciary: the conventionality control doctrine. As it needs a

[179] Case of Barrios Altos and Case of La Cantuta v. Peru, Monitoring Compliance with Judgment, Inter-Am. Ct. H.R., paras. 44–45 (May 30, 2018).

[180] In a similar sense, see Paula Baldini Miranda da Cruz, *Trackers and Trailblazers: Dynamic Interactions and Institutional Design in the Inter-American Court of Human Rights*, 11 J. Int. Dispute Settlement 69 (2020), arguing that "one of the reasons why the Inter-American Court of Human Rights is more creative than other similar tribunals is because its Member States encourage it to do so by complying with its judgments" (at 70).

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

community of practice that engages with its decisions, the Court appears savvy in not alienating some key community insiders, such as important national courts. Faced with critiques coming from scholars and domestic courts, the Inter-American Court has relaxed some elements of this doctrine. At a given point, the IACtHR seemed to require that conventionality control of parliamentary legislation was an obligation of all state organs, and not only of the top judicial authorities.[181] However, this interpretation carried major risks in domestic systems where the rule of law is often weak, and also threatened the very position of the top judicial authorities in their own domestic systems.[182] Faced with that critique, the Court stuck to a more limited understanding of the doctrine by clarifying that conventionality control should be exercised by state authorities "evidently within the framework of their respective jurisdictions and the corresponding procedural rules."[183] Accordingly, conventionality control implies that domestic institutions have the duty to apply international law, but only as long as this is compatible with domestic norms of jurisdictions and procedure—a much less radical doctrine than was initially apparent.[184]

But the IACtHR's flexibility is principled. It is not merely tactical, in other words, but a function of its overall steadfast pursuit of its transformative mandate. Thus, it has not backed down with respect to its substantive case law, which has drawn no less fire from critics. Here, it has proven steadfast, not least in comparison with the ECtHR.[185] We have discussed two salient examples above. The first is the Court's case law on amnesties, particularly *Gelman*, which was highly controversial. A year after *Gelman*, the IACtHR decided the *Masacre del Mozote* case, which dealt not with amnesties in the context of transition from dictatorships to democracies, as was the case of *Gelman*, but with a peace agreement resulting from the armed conflict in El Salvador.[186] In *Mozote*, the Court adopted a more flexible standard for armed conflicts, as international humanitarian norms were applicable, and the prospects for peace hung in the balance.[187] Yet the Court was adamant to underscore that, in cases such as *Gelman*, no flexibility could be allowed.[188]

[181] Case of Cabrera García and Montiel-Flores v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, para. 225 (Nov. 26, 2010).

[182] For an insider's view of the Court's shift, *see* DIEGO GARCÍA-SAYÁN, CAMBIANDO EL FUTURO [CHANGING THE FUTURE] (2017). García-Sayán was a judge at the Inter-American Court from 2004 to 2015, and was president from 2010 to 2014, when the main shift took effect. For a scholarly overview of the critiques, see Ariel E. Dulitzky, *An Inter-American Constitutional Court-The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L.J. 45, 60–64, 71–79 (2015).

[183] *Gelman v. Uruguay*, *supra* note 44, para. 193.

[184] The discussion of this dimension of conventionality control is based on René Urueña, *Domestic Application of International Law in Latin America*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW, *supra* note 30, at 565.

[185] Compare, regarding concerning refugee rights, *Hirsi Jamaa et al. v. Italy*, App. No. 27765/09 (Eur. Ct. Hum. Rts. Feb. 13, 2012) with *ND and NT v. Spain*, App. Nos. 8675/15 and 8697/15 (Eur. Ct. Hum. Rts. Feb. 12, 2020). On the ECtHR and the challenges to its decisions, see Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 L. & CONTEMP. PROBS. 141 (2016).

[186] Case of the Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252 (Oct. 25, 2012).

[187] *Id.*, paras. 284–286. Case of the Massacres of El Mozote and Nearby Places v. El Salvador, Concurrent Vote, Diego García-Sayán, paras. 10, 18, 20, 37–38 (Inter-Am. Ct. H.R.).

[188] *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, *supra* note 186, para. 283; *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Concurrent Vote, Diego García-Sayán, *supra* note 187, para. 9.

https://doi.org/10.1017/ajil.2020.27 Published online by Cambridge University Press

A similar attitude can be observed in the second example—LGBTI rights. This Article discussed how controversial the advisory opinion on same sex marriage was. The opinion was not the first controversial decision of the Court regarding LGBTI rights, however. It followed closely the 2012 precedent of *Atala Riffo v. Chile*, where the Court ruled against Chile and held that sexual orientation was a suspect classification in terms of discrimination[189]—a case that stirred a heated cultural debate in Chile.[190] Four years later, the Court continued expanding its case law regarding LGBTI rights, finding, in a ruling against Colombia, that same-sex couples should be given equal access to certain socioeconomic rights.[191] The year after, the Inter-American Court adopted the advisory opinion discussed in this Article. As these decisions show, the Court is steadfast in its transformative case law, and tends to double down in the face of criticism. Indeed, it has recently opened a new frontier in its steadfast pursuit of its transformative mandate: the question whether social rights are justiciable.[192]

In that steadfast pursuit, it might be worthwhile broadening the community of practice, to include more of those who do not believe the system to be so great; those who feel that the Court should be more formalist; those who believe that the system's objectives can be better attained through other mechanisms such as more robust economic growth; and those who are skeptical of anything transnational. The Latin American community of human rights practice, for all the depth and breadth it has acquired over the last four decades, is only one of the various forces that compete to shape the future of the Americas.

[189] *Case of Atala Riffo and Daughters v. Chile*, *supra* note 41, paras. 83–93.

[190] Alma Luz Beltrán-Puga, *Karen Atala vs. La Heteronormatividad: Reflexiones más allá de la discriminación por orientación sexual* [*Karen Atala v. Heteronormativity: Reflection Beyond Discrimination Based on Sexual Orientation*], 1 ANU. DERECHO PÚBLICO - UNIV. DIEGO PORTALES 259 (2011).

[191] *Duque v. Colombia*, *supra* note 79, paras. 126, 137.

[192] *See* Case of Lagos del Campo v. Peru, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 340 (Aug. 31, 2017); Poblete Vilches and Others v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 349 (Mar. 8, 2018); Cuscul Pivaral and Others v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 359 (Aug. 23, 2018); Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020).