

# Is International Transformative Constitutionalism Decolonial? An Analysis from the Recent Jurisprudence of the Inter-American Court in Cases Against Brazil

¿Es el constitucionalismo transformativo internacional decolonial?  
Un análisis de la jurisprudencia reciente de la Corte Interamericana en casos contra Brasil

O constitucionalismo transformacional internacional é decolonial?  
Uma análise da jurisprudência recente da Corte Interamericana em casos contra o Brasil

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## ABSTRACT

Transformative constitutionalism is a form of legal interpretation, which intends to allow, in the long run, to achieve a more just, democratic, and non-exclusive society. Thus, it is a tool for transforming existing structures. In Latin America, international transformative constitutionalism is glimpsed in the praxis of the Inter-American Court of Human Rights. Through its decisions, the Court promotes changes in state conduct and structures to improve alignment with human rights. It is at this point, however, that we question the possibility of linking international transformative constitutionalism and decolonial thinking. The latter refers to a line of thought that moves away from the logic of a single world, forged by Eurocentric capitalist modernity, and marked by relations of power, domination and subjugation. It promotes a plurality of voices and paths, and seeks the right to be different and a counter-hegemonic epistemology. Hence, through this article, we part from the following hypothesis: considering international transformative constitutionalism as a tool that enables social transformation towards the assurance of human rights, especially for those who suffer from violence and exclusion, could it be considered a decolonial tool? Or does it stop us from subjectively analyzing concrete cases, presenting only a “decolonial cover”? To answer this question, we will examine the aforementioned ideas in an attempt to identify common features, and analyze the most recent jurisprudence of the Inter-American Court in relation to Brazil. We will do so, particularly, to evaluate how, and whether or not, its decisions reflect these theories, using the approach and language of the Court in three cases to address the violations perpetrated.

**Keywords:** transformative constitutionalism; decolonial tool; Inter-American Court of Human Rights; Brazilian jurisprudence.

## RESUMEN

El constitucionalismo transformativo es una forma de interpretación jurídica que busca, a largo plazo, lograr una sociedad más justa, democrática y no excluyente. Por lo tanto, es una herramienta para transformar las estructuras existentes. En América Latina, el constitucionalismo transformativo internacional se vislumbra en la praxis de la Corte Interamericana de Derechos Humanos. A través de sus decisiones, la Corte promueve cambios en la conducta y las estructuras estatales para que estén más alineadas con los derechos humanos. Es en este punto, sin embargo, nosotras cuestionamos la posibilidad de vincular el constitucionalismo transformativo internacional con el pensamiento decolonial. Este último, se refiere específicamente a una línea de pensamiento que se aleja de la lógica de un mundo único, forjada por la modernidad capitalista eurocéntrica, marcada por relaciones de poder, dominación y subyugación. Promueve una pluralidad de voces y caminos, y busca el derecho a la diferencia y una epistemología contrahegemónica. Por lo tanto, a través de este texto, partimos de la siguiente hipótesis: considerar el constitucionalismo transformativo internacional como una herramienta que facilita la transformación social hacia la garantía de los derechos humanos, especialmente para quienes sufren violencia y exclusión, ¿podría considerarse una herramienta decolonial? ¿O nos impide analizar subjetivamente casos concretos, presentando únicamente una “capa decolonial”? Para responder a esta pregunta, además de realizar algunas consideraciones sobre las reflexiones mencionadas en un intento de verificar las líneas comunes, analizaremos la jurisprudencia más reciente de la Corte Interamericana en relación con Brasil. Lo haremos, en particular, para evaluar cómo sus decisiones permiten, o no, una aproximación a estas teorías, utilizando el enfoque y el lenguaje de la Corte en tres casos para abordar las violaciones perpetradas.

**Palabras-clave:** constitucionalismo transformativo; herramienta decolonial; Corte Interamericana de Derechos Humanos; jurisprudencia brasileña.

## RESUMO

O constitucionalismo transformativo é uma forma de interpretação jurídica que visa permitir, a longo prazo, alcançar uma sociedade mais justa, democrática e não exclusiva. Assim, é uma ferramenta para transformar estruturas existentes. Na América Latina, o constitucionalismo transformador internacional é vislumbrado na praxis da Corte Interamericana de Direitos Humanos. Por meio de suas decisões, a Corte promove mudanças na conduta e nas estruturas do Estado para que estejam mais alinhadas com os direitos humanos. É neste ponto, porém, que questionamos a possibilidade de vincular o constitucionalismo transformador internacional ao pensamento decolonial. Este último refere-se a uma linha de pensamento que se afasta da lógica de um único mundo, forjada pela modernidade capitalista eurocêntrica, que é marcada por relações de poder, dominação e subjugação. Promove uma pluralidade de vozes e caminhos, e busca o direito à diferença e uma epistemologia contra-hegemônica. Assim, por meio deste artigo, partimos da seguinte hipótese: se considerarmos o constitucionalismo transformador internacional como uma ferramenta que permite a transformação social em direção à garantia dos direitos humanos, especialmente para aqueles que sofrem com violência e exclusão, poderia ele ser considerado uma ferramenta decolonial? Ou isso nos impede de analisar subjetivamente casos concretos, apresentando apenas uma “cobertura decolonial”? Para responder a essa pergunta, além de fazer algumas considerações sobre as ideias mencionadas na tentativa de verificar os traços comuns, analisaremos a jurisprudência mais recente da Corte Interamericana em relação ao Brasil. Isso será feito, em particular, para avaliar como suas decisões permitem, ou não, uma aproximação dessas teorias, usando a abordagem e a linguagem da Corte em três casos para tratar das violações cometidas.

**Palavras-chave:** constitucionalismo transformador; ferramenta decolonial; Tribunal Interamericano de Direitos Humanos; jurisprudência brasileira.

Transformative constitutionalism is a form of legal interpretation, which does not intend to profoundly transform society in the blink of an eye. Based on interpretations different from the traditional ones, it aims at achieving, in the long run, a more just, democratic, and non-exclusive society. Thus, according to von Bogdandy and Ureña (2020), it appears to be a tool for transforming existing structures. In Latin America, international transformative constitutionalism is glimpsed in the praxis of the Inter-American Court of Human Rights through the conventionality control tool. Through its decisions, the Court promotes changes in state conduct and structures so that they are more aligned with human rights. This has been the subject of several studies that aim to 'point out existing bridges between the international and national systems in favor of the Inter-American *corpus iuris* and the continuous construction of a Latin American *ius commune*, forged around its reality and of its subjects', as I have already argued in another text (Squeff & Guimarães, 2021).

Nevertheless, it is worth recalling that the Inter-American System of Human Rights (IASHR) has its roots in the Pan-Americanism forged by the American Institute of International Law (AIIL), which parts from a United States (US)-led vision (Scarfi, 2022). Because of this, it might be assumed that the IASHR could not be truly connected to a decolonial approach, since decolonial thinking essence lies in the criticism and deconstruction of the logic of coloniality, which comes from relations of power, domination and subjugation.

A decolonial approach advocates for the opening of social structures to a plurality of voices and paths, and seeks the right to be different, to think differently, and to be necessarily counter-hegemonic, which is projected in social resistance movements. Therefore, it is considered a social, political, cultural and economic liberation project that aims to give voice and visibility to subalternized and oppressed peoples who have been silenced for a long time and who still today are found on the margins of Latin American societies, given the legacy of the colonial period that still remains in society today.

Moreover, the System is rooted in a "US-led, ethnocentric and elitist vision" (Scarfi, 2022, p. 141), which might challenge the decolonial

approach that has been suggested to be derived from international transformative constitutionalism. This raises the question whether international transformative constitutionalism can be linked to decolonial thinking. After all, the latter specifically refers to a line of thought that moves away from a one-world logic, forged by Eurocentric capitalist modernity, framed by the USA (Grosfoguel, 2008a).

Hence, through this text, we part from the following questions: considering international transformative constitutionalism as a tool that enables social transformation towards the assurance of human rights, especially for those who suffer from violence and exclusion, could it be considered a decolonial tool? Or does it stop us from subjectively analyzing concrete cases, presenting only a “decolonial cover”?

Our hypothesis is that even though the basis of the IAHRs can be traced back to the AILL, the current approach of the System not only features a decolonial cover thrown over it in order to make it seem truly regional, as Pahuja (2005) would say. It can be considered to have decolonial nuances especially because international transformative constitutionalism not only promotes a “living” interpretation of the American Convention, moving it away from a unique American tradition. Instead, it calls for the promotion of true changes in the states of the region, helping them to overcome the remnants of colonial times that are truly embedded in the states because of coloniality. Besides, this is precisely what decolonial thinking seeks, that is, propositions or possibilities that go beyond the Western view, providing the necessary epistemological openness to seek local solutions that can improve the regional situation from within, without external and/or northern impositions.

To prove this hypothesis, in addition to making some considerations on the aforementioned ideas, we will analyze the most recent jurisprudence of the Inter-American Court in relation to Brazil. We will do so, particularly, to evaluate how, and whether or not, its decisions reflect these theories, using the approach and language of the Court to address the violations perpetrated. To this end, we will analyze the cases of (I) Brasil Verde Farm, (ii) Employees of the Santo Antônio de Jesus fireworks factory, and (iii) Márcia Barbosa de Souza. The cases were selected for three reasons. First, they reflect the Court’s current approach to

structural violence and reparations. Second, taken together, they span distinct but recurring forms of severe harm (respectively, exploitation in labor relations, large-scale socio-environmental catastrophe, and gender-based violence and impunity), representing a more robust test of whether “decolonial nuance” travels across contexts rather than being confined to a single issue-area. Third, Brazil provides an analytically valuable site because the cases shed light on how international judicial intervention interacts with a complex domestic legal order marked by entrenched inequalities and contested implementation pathways. These cases were not chosen for statistical representativeness purposes, but analytical leverage, as these are used to illustrate, and to stress-test, the proposed evaluative framework for identifying decolonial nuance in international transformative constitutionalism, or the lack thereof.

In light of this, it is stressed that this article adopts a qualitative doctrinal method. It performs a close reading of the Inter-American Court’s reasoning and reparations in three recent cases against Brazil, focusing on how the Court (i) constructs the subject of rights and frames the underlying harm, (ii) identifies structural patterns of discrimination or historical continuity relevant to responsibility, and (iii) designs remedies and guarantees of non-repetition. For that, it encompasses three sections and a conclusion.

The first of these sketches the basis of decolonial thinking, placing it under the post-colonial studies (genus), but focused on the Latin American perspectives and suggestions. This is important for establishing the theoretical foundations that support the hypothesis of this text. The second section examines the origins of human rights in Latin America from the US-led Pan-Americanism, looking into the potential decolonial bias that the Inter-American System could eventually have, to the current theory of international transformative constitutionalism, which departs from that perspective precisely because it brings contributions from the South itself. Finally, in the third part, the three cases against Brazil before the Inter-American Court of Human Rights are analyzed, so that we can directly test the proposed hypothesis. The conclusion, therefore, assesses the possibility of international transformative constitutionalism being indeed considered decolonial.

## Decolonial Thinking: An Epistemological Basis for Thinking about Alternatives Specific to the Global South

Decolonial thinking has its origins in the debates held in the Modernity/Coloniality Group, founded “from the disintegration of the Latin American Group of Subaltern Studies, due to the divergence between some of its members about the continued use of European authors as main theoretical instruments” (Squeff & Gomes, 2017). Distancing itself from Europeanized epistemologies, the group would aim to “produce effectively subaltern studies”, with originally Latin American sources (Squeff & Gomes, 2017).

Although it is possible to situate decolonial thinking within postcolonial studies (*genus*)<sup>1</sup>, it should not be confused with postcolonialism (*species*). While both criticize Eurocentrism and its supposed universality, in search of “another point of view than the one we are used to looking at [...], identifying and suspending prejudices in the search for understanding [of the modern world]” (Bragato, 2009), postcolonialism, specifically, still employs predominantly European epistemologies to do so.

Its contributions share “the ‘discursive character of the social’, the ‘decentralization of contemporary narratives and subjects’, the ‘method of deconstructing essentialisms’ and the ‘proposal of an epistemology critical of the dominant conceptions of modernity’” (Ballestrin, 2013, p. 90), but they do so from critical authors framed under a European context. An example of this is the French triad formed by Albert Memmi (1947), Aimé Cèsaire (1950) and Frantz Fanon (1961), who “were the spokespeople who interceded for the colonized people when they had no voice”, fighting to overcome the condition of Western domination in which they were inserted (Ballestrin, 2013, p. 90).

Even Edward Said, another highly renowned author within post-colonialism alongside Antonio Gramsci, is one of the foundations of Subaltern

<sup>1</sup> Postcolonial studies are considered a critical development of poststructuralism, deconstructivism and postmodernism (Bragato & Mantelli, 2019).

Studies<sup>2</sup> who builds his reasoning model until the mid-1980s<sup>3</sup> based on Michel Foucault to criticize the construction of the Eastern imaginary by the West (Said, 2007). Thus, even though post-colonialism seeks to “disrupt the relationship of domination of the Eurocentric tradition” whether from an economic, political or even epistemological perspective (Mignolo, 2008a), when considering the distinct colonial legacies of Africa/Asia and Latin America (Castro-Gómez & Mendieta, 1998), the discontent of the Modernity/Coloniality Group with the use of European references in its search for emancipation is perceived.

With regard to Latin American singularity, it can be seen that the starting point of decolonial thinking is linked to the year 1492, a date that marks the birth of the myth of modernity precisely because this is the time when “a process of concealment of the non-European” begins, as Dussel (1998) states. This is because, with the “discovery” of America, “Europe interpreted itself [...] as the center of human happening in general and, therefore, developed its particular horizon as a universal horizon (Western culture),” so that everyone should follow the European model, since it considered (by itself) the center of global modernity and, therefore, seen (also by itself) as a missionary of civilization, removing any element and/or meaning that the native (Latin American) could originate (Dussel, 1998, p. 33, 36, 65). After all, the latter was considered barbaric/savage.

In other words, this reality imposed by European colonization attributed to Latin Americans “a new geocultural identity, [...] repressing as much as possible [...] the forms of knowledge production of the colonized [...]. The repression in this field was admittedly violent, deep and long-lasting, in which part of the history and intellectual heritage could not be preserved” (Quijano, 2005, p. 121) largely due to the various forms of abuse and aggressions suffered by the natives. Therefore, it

<sup>2</sup> South Asian branch of postcolonial studies (*genus*), which also “aim to question the theoretical colonialism of the great centers and give voice and place to those who are silenced by hegemonic power” (Figueiredo, 2010). The main theoretical framework of this Indian group is the work of the Italian Antonio Gramsci and his debate on the subaltern classes (Guha, 2009).

<sup>3</sup> It is important to emphasize that there is a shift in Said’s doctrine, distancing himself from Foucauldian references from 1984 onwards, with the publication of ‘ *World, the Text, the Critic* ’ (Legg, 2013).

is said that in Latin America there was one total colonial domination, because it was not “only a subordination of other cultures to European culture, in an external relationship. [...] Repression fell, above all, on ways of knowing, of producing knowledge, of producing perspectives, images and image systems, symbols, modes of signification; on the resources, patterns, and instruments of expression”, in short, of life as a whole (Quijano, 1992, p. 11).

Moreover, this process did not end with the departure of Europeans from the Americas in the mid-19th century, on the contrary it perpetuated and expanded over time, in a continuous suppression of the political, social and cultural characteristics of the native peoples (Quijano, 1992, p. 11). This is because, with the formal (political) self-determination of Latin American countries, the ‘material colonial syndrome’ began, with a theoretical-epistemological matrix. This hindered them from having their own thinking or political-economic model separate from the European standard, since it was still considered the only modern and civilized paradigm to be followed, representing a real ontological closure of understanding of the world (Loomba, 1998, p. 19).

This constant colonization of the “imaginary of the dominated” (Quijano, 1992, p. 11), even without a formal political and legal link, is called coloniality, since it continues “to live under the same matrix of colonial power”.<sup>4</sup> According to Restrepo and Rojas (2010, p. 15), “Coloniality [...] refers to a power pattern that operates through the naturalization of territorial, racial, cultural, and epistemic hierarchies, reproducing domination relationships.”

These colonial situations are explicitly seen in various spheres of oppression, such as: power, being, knowledge and doing. The first pertains to maintenance of the power matrix built in 1492, which is based on the ethnic-racial hierarchy of peoples, directly reflecting the international division of labor and the accumulation of capital (Quijano, 1992). This is because, “as long as the social relations that were being configured were relations of domination, [thel] [social] identities [that were created]

<sup>4</sup> “International law is, in itself, the result of the colonial encounter. [...] For a new approach, international law was not essentially something ‘good’ that existed prior to the colonial encounter, but rather something that had been temporarily captured and perverted by the imperialist agenda.” (Grosfoguel, 2008b, p. 126).

were associated with the corresponding hierarchies, places and social roles”, configuring a “racist distribution of labor within colonial/modern capitalism” (Quijano, 2005, p. 119).

The coloniality of knowledge is linked to the suppression and domination of the cultures and knowledge of non-European peoples, based on the existence of “a [single] way of producing knowledge” to be repeated worldwide: Western way (Quijano, 2005, p. 126). In turn, the coloniality of being is linked to “the lived experience of colonization”, that is, to the colonized being, to the one who is the target of violence and abuse originating from coloniality (Maldonado-Torres, 2007) and who, as a result, has their rights limited (Mignolo, 2013, p. 44), encompassing all those who do not fit the “privileged” stereotype of being male, white, Western, Christian, heterosexual, patriarchal, property owner and anti-socialist (Bragato, 2015, p. 58).

Finally, the coloniality of doing is linked to who can create the rules that will govern society (Squeff, 2021a). Since the arrival of Europeans in the Americas, international law has been imposed on its inhabitants (Eslava et al., 2016, p. 42), still persisting in the current context if we consider that the proposal or even approval of rules today is still limited to certain countries and their positions<sup>5</sup>, with other nations being mere observers on the international stage.

Therefore, it is clear that the various current colonial situations still reflect a persistent “cultural, political, sexual and economic oppression/exploitation of subordinate ethnic/ racialized groups by dominant ethnic-racial groups” (Grosfoguel, 2008b, p. 120), in a way that forbids a true local geopolitical articulation of knowledge, preserving Western “egopolitics”<sup>6</sup> and its rules. In this scenario, decolonial thinking, as a counterpoint to coloniality, can be considered promising.

The decolonial option seeks “the initial detachment of the modern rhetoric in which models of thought are legitimized and converted into equivalents of the same organization of societies and their histories”

<sup>5</sup> For some examples see (Giannini et al., 2019).

<sup>6</sup> “The modern *ego cogito* [‘I think, therefore I am’] was preceded by more than a century by the practical *ego conquiro* [‘I conquer, therefore I am’] of the Luso-Hispanic who imposed their will (the first will-of-the-modern-period) on the American Indian.” (Dussel, 2005).

as Mignolo argues (Mignolo, 2008b, p. 15). In this sense, decolonial thinking does not presuppose becoming a universal solution, but rather enabling former colonies and their inhabitants to emancipate themselves in ontological, epistemic, political-economic and legal terms, finding their own alternatives, without these being silenced, emptied or even considered invalid, undue or inappropriate.

So, besides deconstructing the cognitive bases used until then – those that tend to maintain these hierarchical, oppressive, exclusionary and supposedly neutral structures—<sup>7</sup> decolonial thinking allows us to discuss other positions beyond the Western view, providing the necessary epistemological opening to seek mechanisms that circumvent the situation of coloniality, finding more concrete responses to the realities of the Global South, which until then were disregarded/silenced by the North (Squeff & Gomes, 2017). After all, the struggles and assumptions are not the same between the North/West and the South/colonized. Using the theoretical bases of the West would be a total disregard for the oppression it conducts and its continuity today.

Taking human rights as a basis, it is based on European universalism, and is framed under the “classical liberalism and its ideas of individual freedom and formal equality”, seeking to “empower individuals through the granting of rights arising from autonomy and the exercise of free will, derived from their rationality”—with no equivalence in the events that occurred in the South (Bragato, 2014, pp. 204-205; Barreto, 2013, p. 142) or even in the very conception of rights of its inhabitants<sup>8</sup>.

<sup>7</sup> “The search for alternatives to the profoundly exclusionary and unequal structure of the modern world requires an effort to deconstruct the universal and natural character of liberal-capitalist society. This requires questioning the claims of objectivity and neutrality of the main instruments of naturalization and legitimization of this social order: the set of knowledge that we know globally as social sciences”. (Lander, 2005, p. 8).

<sup>8</sup> “All cultures have different conceptions of human dignity, but not all of them are thought as human rights. There are multiple cultural and political experiences in countries of the global South in which social resistance movements play a key role based on different ideological bases from predominant Western cultural and political references” (Rubio, 2015, p. 205).

These developments cannot be denied<sup>9</sup>, but it is necessary to assume that this normative framework<sup>10</sup> could be extended to former colonies because of its implicit exclusionary concepts. Furthermore, as stated in another study (Squeff & Gomes, 2017), it should be remembered that European universalism itself disregards “any contribution from other peoples (the colonized) to the international moral and normative construction of human rights, because they are considered to be initially primitive, mere legatees of the civilizing light brought by Europeans via colonization, incapable of achieving modernity” without the help of the West.

As Wallestrein (2007, p. 118) states: “universal universalism [also] rejects essentialist characterizations of social reality, historicizes both the universal and the particular, and reunifies the so-called scientific and humanistic sides into a [single] epistemology.” According to the above, it is imperative to open up to other forms of knowledge supported by ideas based on other paradigms<sup>11</sup>, such as decolonial thinking, which provides the necessary opening to deconstruct such centrality and listen to the submissive, the hidden, the ethnicized—the subject of the global South.

Decolonial thinking includes decolonial tools, referring to mechanisms that can be used to challenge colonial structures in order to achieve the aforementioned emancipation through the valorization of

<sup>9</sup> In this sense, as already supported by Bragato, for whom “it cannot be denied that the various reactions to the abuse of colonial power gave rise to the formation of ideas and the recognition of values that are now translated into the idea of human rights. The successive insurrections and rebellions of the colonial world help to explain the dynamics that human rights have assumed today, with the same, or even more clarity than the European anti-absolutist political struggles” (Bragato, 2014, p. 205).

<sup>10</sup> Creuz states: “The traditional historiography of human rights is marked by the centrality of the West to the detriment of the exclusion of stories from the South, and one of the basic premises of this Eurocentric model is precisely that human rights are the political manifesto of modernity, whose manifestation occurs from the French and American Revolutions. The contributions arising from the Haitian Revolution are an example of the payment of marginalized stories for the invention of Human Rights, despite their clearer adherence to Latin American legal traditions, such as the Brazilian one” (Creuz, 2024, p. 5).

<sup>11</sup> For Mignolo ‘other paradigms’ is the “critical and utopian thought that is articulated in all those places where imperial/colonial expansion denied the possibility of reason, of thought, and of thinking about the future.” More than that, it is “a way of thinking that is not inspired by its own limitations and does not seek to dominate and humiliate; a universally marginal, fragmentary, and open way of thinking; and, as such, a way of thinking that, because it is universally marginal and fragmentary, is not ethnocidal” (Mignolo, 2003, pp. 20, 102).

geolocalized practices and thoughts from the South. Such tools are nothing more than counter-hegemonic means of affirming and legitimizing emerging practices and rights to the extent that they recognize the identity of marginalized social subjects, their differences<sup>12</sup> and their basic needs (Wolkmer, 2015, pp. 128, 183).

These tools can take many forms, such as soft law on an international level (Squeff, 2021a), a new constitution on a domestic level<sup>13</sup> or even sentences that promote the establishment of the right to be different and other forms of protection<sup>14</sup> beyond the traditional/modern ones. This results in the visibility to different agendas, thus making Mignolo's idea of a world "in which many worlds can coexist" palpable (Mignolo, 2008c, p. 296). With this in mind, we will now examine whether international transformative constitutionalism can also be considered a decolonial tool.

## Human Rights in Latin America: from the US-led Pan-Americanism to International Transformative Constitutionalism

Initially, it is worth mentioning that the protection of human rights, from a colonial perspective, did not encompass colonized individuals. In this sense, any statements that may be made regarding the conception, content and purpose of human rights must remember that this can be

<sup>12</sup> Here we are referring to the right to be different itself, which is protected through decolonial tools. According to Bittar, the "right to be different is an expansion, within the culture of law, of the affirmation of forms of struggle for recognition. The elastic expansion of the concept of law, to also encompass the idea of a right to be different, consolidates the ambition of differentiation within modern societies that tend to produce homogenization and standardization. It is in a reactive way, therefore, that the struggle for difference is inscribed, dialectically, alongside the identity of an uninterrupted struggle for equality" (Bittar, 2009, p. 553).

<sup>13</sup> An example of this are the new constitutions of Bolivia (2009) and Ecuador (2008), which oppose the homogeneous European model and seek to overcome social and economic inequalities (Gross & Groth, 2018).

<sup>14</sup> The example here is the 'Denilson case', tried by the Court of Justice of the State of Roraima-TJRR, which dismissed the conviction of an indigenous person by the common justice system, since he had already been punished by his own community (Freitas & Squeff, 2023).

considered a project to save the barbarian (subject of the colonies), who, in fact, suffers from violations by the very State that would supposedly protect their rights, but who, given the racialized bias that the State holds in relation to the human person holding rights, are not protected by it (Mutua, 2002).

In other words, it cannot be denied that the origin of human rights is largely Western and that, therefore, it is partial. On the other hand, it cannot be forgotten that there were attempts at dialogue, especially after the Second World War, to include rights that were important to the nascent Global South, as in the Universal Declaration of Human Rights itself (Ramcharan, 1998). Despite this, in fact, even this document, which is today the basis for the internationally accepted conception of human rights, presents a high degree of individuality, proportionally being little attentive to notable social issues that were already salient to other parts of the world.<sup>15</sup>

In any event, it is vital to remember that it was preceded by the American Declaration of Human Rights, published months before its global homonym, on May 2<sup>nd</sup> 1948, which devoted “the entire second chapter to the prescription of duties, which relate to the need for each individual to contribute to the collective well-being” (Bragato & Damacena, 2013, p. 326). This document is considered the basis for the regional construction of human rights protection in the Americas, having been subsequently followed by the American Convention on Human Rights, adopted in 1969, and other inter-American treaties that regionally enshrine the protection of specific rights.

Created under the auspices of the Organization of American States (OAS), this regulatory framework is part of a regional system that is now considered the main form of human rights protection in the region due to its bicameral judicial system, formed by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human

<sup>15</sup> On this, Costa Douzinas points out that: “Liberal intellectuals and western government responded [to Marxism] in kind. Civil and political rights have a clear priority over social and economic ones. Historically, they were the first to enter the world scene, and they are superior because of their negative and individualistic character. Their aim is to place limits around state activities, thus opening areas free of political and legal interference where individuals can exercise their initiative without prohibitions or excessive regulation” (Douzinas, 2000, p. 166).

Rights (IACHR). This system makes it possible to verify the conduct of States in relation to their legal obligations and to impose punishments on them in order to fully compensate victims when the existence of human rights violations is confirmed.

Because this system operates within the context of the OAS, in order to verify the potential of its measures to be considered a decolonial tool, it is necessary to revisit the foundations of this organization itself, whose origins lie in the Pan-American movement between 1890 and 1945 (Scarfi, 2022, p. 138), that is, long before it was formally launched in 1948, with the Pact of Bogotá.

It should be clarified that Pan-Americanism “can be understood in light of two main currents, Bolivarian Pan-Americanism and North American Monroeism”. While the first concerns the implementation of Bolívar’s proposal for “a collective security system in America [...], under the aegis of a supranational legal system of solidarity,” as expressed in the Panama Congress in 1826; the “Monroist strand of Pan-Americanism, [can be] summarized in the motto ‘America for the Americans’”, therefore, largely tied to unilateral “proper imperialist interests” of the United States in the region, which culminated in the First Pan-American Conference, held in Washington in 1889 and in those that followed (Bueno, Oliveira, 2015).

It is under this second aspect of Pan-Americanism that the American Institute of International Law (AIIL) was designed, launched in 1912 by the Chilean jurist Alejandro Alvarez<sup>16</sup> and the American jurist James Brown Scott (2022, p. 138). According to Scarfi (2022, p. 141), this institute “provided an institutional and legal basis for renewing the Pan-American movement by 1915 and thus promoting a Pan-American

<sup>16</sup> It should be noted how Monroeism was intrinsically linked to the creation of the Institute based on what Alvarez himself advocated: “[t]he Chilean jurist defended the Monroe Doctrine as a continental principle, and advocated for the existence of American International Law, or Pan-American, as he sometimes called it. In Álvarez’s view, there were reasons, such as continental differences, that identified Latin American legal unity. Thus, the jurist defined the Monroe Doctrine as “a pillar of a Pan-Americanist language of solidarity between Latin America and the United States.” In contrast, at the Third Latin American Scientific Congress (1907), Álvarez was criticized for his theory, which was embodied in the publication *La codification du droit international, ses tendances—ses bases*” (Silva, 2023, pp. 73-74).

hemispheric approach to international law”, which, however, undeniably translated and privileged American interests and visions.

The AAIL became a hemispheric space of hegemonic interactions where a series of liberal internationalist aspirations acquired the status of shared hemispheric ideals and languages of a specific Western Hemisphere international society in matters of codification, the promotion of peace, and the condemnation of war. The group of international lawyers, diplomats, and politicians that were involved in the AAIL came to believe that the Americas shared a series of special US-led political and legal doctrines and approaches to international law and international relations. (Scarfi, 2016, p. 173)

The AAIL, therefore, was the *locus* of Pan-American Monroeist legal production in the first part of the 20<sup>th</sup> century, serving as a basis for discussing documents on the rights and duties of States from the US understanding<sup>17</sup> and which would be taken to the Pan-American Union for discussion from the fifth Pan-American Conference, held in 1923<sup>18</sup>, until the collapse of the institute in the 1930s, when US policy for the region began to change, moving towards multilateralism. As argued by Scarfi:

By 1933, [...] the future of the AAIL and codification began to erode. Paradoxically, this was the time when the United States proclaimed one of the most official policies of multilateral engagement with Latin

<sup>17</sup> “Some common beliefs began to be established as part of the standard mindset of the organization: the legitimacy of the Monroe Doctrine and Pan-Americanism as authentic doctrines of continental solidarity and cooperation; the acceptance of US hegemonic role in the development of international law in the Americas and of its own legal tradition as exemplary for the continent; the right to intervene to protect the lives and properties of foreigners located abroad; the principle of sovereign equality; acceptance of the Platt Amendment as a legitimate legal principle, that is, the formal right of the United States to intervene in Cuba on a regular basis; the attachment to hemispheric exceptionalism, and the condemnation of violent interventions, territorial conquests, and war” (Scarfi, 2016, p. 173).

<sup>18</sup> The Pan-American Conferences were: I International American Conference (1889) – Washington DC; II International American Conference (1901) – Mexico City; III International American Conference (1906) – Rio de Janeiro; IV International American Conference – Buenos Aires (1910); V International American Conference (1923) – Santiago, Chile; VI International American Conference (1928) – Havana; VII International American Conference (1933) – Montevideo; VIII International American Conference (1938) – Lima; the IX International American Conference – Bogotá (1948) (Guedes, 2015).

America, the Good Neighbor Policy. [...] [With this, a] new language and a set of new principles and orientations in foreign affairs began to emerge in the Americas. One of the most significant shifts in the language of Western Hemisphere international law and US–Latin American relations was the transition from Pan-Americanism to Inter-American multilateralism. (Scarfi, 2016, pp. 185-186)

It is in this multilateralism framework that the institutional foundations of the OAS were established, an organization “based on multilateral policies and principles and the formal continental and US adherence to the principle of nonintervention” (Scarfi, 2016, p. 174), as a replacement for the Pan-American Union (Scarfi, 2017, p. 175). More than that, this multilateralism was not only intended to crown continental hegemony, but also the US ambition to promote global governance based on the principles of the Liberal International Order since 1945 (Scarfi, 2022, p. 147).

Furthermore, in addition to the OAS itself, the AAIL can be seen as one of the foundations of the Inter-American System for Human Rights Protection.<sup>19</sup> This is because, in this regard, the documents proposed by Álvarez and specifically discussed during the Institute’s meetings “provided the doctrinal and ideological basis for the formulation [of the System]” (Silva, 2022, p. 76).

During the first meeting, for example, held in Washington DC between 1915 and 1916, the duties of people to assist other members of society in case of need, even if they were located abroad, were discussed. This “solidarity” towards other people who suffer from violations of their rights carried out through interventionist mechanisms, according to Álvarez himself, denoted the need for mechanisms “for safeguarding human rights and condemning their violation through a solid institutional and legal framework”, which, for Scarfi, are the foundations for the “creation of the Inter-American Commission of Human Rights in 1959” (Scarfi, 2022, p. 174).

<sup>19</sup> “The Inter-American System and particularly the Inter-American Human Rights system is a clear legacy of pioneering legal networks of hegemonic interactions, such as the AAIL” (Scarfi, 2017, 182).

In the second meeting, held in Havana in 1917, a document that outlined the initial foundations of the American Declaration of the Rights and Duties of Man was discussed, but it would only be adopted in 1948, as previously noted. That document contained:

[...] notions of human rights under the name of ‘international rights of individuals and international associations’. These included certain individual rights, such as, the inviolability of property, the right to enter and reside in any part of the territorial jurisdiction of the state, the right to associate and meet, the rights to liberty of press, conscience, cults, commerce, navigation, and industry, the rights of foreigners to be protected by the national courts of their country of residence, and the rights of states to protect their nationals when their rights have been affected. (Scarfi, 2022, p. 145)

This whole picture shows how AAIL, forged within American Monroeism, helped, in a broader sense, the United States to consecrate itself “as the undisputed hegemon over non-European people” (Grosfoguel, 2008c, p. 4; 2022, pp. 211-212), firstly in Latin America and then across the globe<sup>20</sup>, maintaining the colonial hierarchies previously imposed by Europeans through a legal discourse centered on their interests.

At this point, the potential decolonial bias, that the Inter-American System could eventually have, must be considered. After all, if its foundation is intrinsically linked to an imperial hegemonic power, such as the United States, it would not be theoretically possible to connect it to a counter-hegemonic initiative, which lies far away from universalist and specifically Western perspectives. On the other hand, it must be considered that even if its origins lie in the American Monroeist tradition, today, it may take distance from it, following a different path. And what fosters this line of reasoning is the theory of international transformative constitutionalism.

<sup>20</sup> “Latin America [...] served as a continental imperial workshop and laboratory for the early development of US imperialism, which was later to be projected on a global scale. Therefore, it helps understand the foundations of its present-day global hegemony” (Scarfi, 2017, p. 180).

Transformative constitutionalism, according to von Bogdandy and Ureña (2024, p. 19), “describes the practice of interpreting and applying constitutional norms in a way that seeks to promote profound social change”. In this case, when carried out by the IACHR through its opinions and judgments, which deal with structural problems specific to Latin American countries, such as violence, exclusions and weak institutions (Von Bogdandy & Ureña, 2024 p. 21), this constitutionalism<sup>21</sup> becomes internationalized.

This way of interpreting the work of the IACHR is based on the assumption that the protection of human rights is currently a task that “crosses the various legal systems in a multi-level global system”, and that it is the guardian of such rights in the event of non-compliance by the State (Borges & Piovesan, 2019, pp. 6, 8-10). Although it is also the role of the State to protect its subjects, to the extent that it ratifies a set of international regulations, it should review its practices and standards so that the rights provided for therein are followed, based on the *pacta sunt servanda*, good faith and, in particular, *pro homine* principles (Pinto, 2004). However, if it does not act in this way, the Court may request, based on the conventionality control<sup>22</sup>, the compatibility and harmonization of its standards and interpretations on a certain topic.

Certainly, because protection must always converge around the effective protection of the human person, as Piovesan (2016, p. 15) stated, this dialogue between the IACHR and the States that have adhered to its jurisdiction is not unilateral, “top-down”, since the Convention itself is

<sup>21</sup> Von Bogdandy and Ureña (2024, p. 21) argue that the term constitutional is retained even when referring to the Inter-American Court of Human Rights because it operates as a constitutional court, determining that acts contrary to the American Convention on Human Rights are considered ineffective – “a power reserved for constitutional adjudication”.

<sup>22</sup> It was in the case of *Almonacid Arellano and Others vs. Chile* that the Inter-American Court outlined the first lines on the control of conventionality: “124. The Court is aware that internal judges and tribunals are subject to the empire of the law and, therefore, are obliged to apply current provisions in the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the apparatus of the State, are also subject to it, which obliges them to ensure that the effects of the provisions of the Convention are not hindered by the application of laws contrary to its objective and purpose, and which from the beginning lacks legal effects. conventionality” among the internal legal norms that apply in concrete cases and the American Convention on Human Rights. In this task, the Judicial Power must have sole responsibility for the treaty, as well as the interpretation of the same by the Inter-American Court, ultimate interpreter of the American Convention”. (IACHR, 2006, par. 124).

seen as a ‘living instrument’, as the IACHR itself pointed out in the case *Villagran-Morales et al. vs. Guatemala*, in 1999 (IACHR, 1999, para. 193). Being a living instrument means that the “new” constructions in favor of the protection of the human being in the face of a specific case do not arise from the vision of the judges that make up the Court, coming from the practice of the States in the region, which is noted and externalized by its interpreters (judges), in a truly constructive dialogue.

While the “Inter-American Court does exercise control over conventionality in a concentrated form, having the final say on the interpretation of the American Convention” (Piovesan, 2016, p. 16), it does not verify the compatibility of the conduct of States with the American Convention in an imposing and singular manner. This is shown, for example, in the case of *Artavia Murilo v. Costa Rica* of 2012, which interpreted the concept of life, prescribed for in Art. 4 of the American Convention based on developments in its State Parties (IACHR, 2012, pp. 260-264).

Bottom-up actions like this demonstrate how the Court, through its dialogic engagement with states, can be decolonial. After all, acting decolonially means allowing “the (re)construction of knowledge from the subaltern subject, the individual and/or colonized collectives” (Afonso, 2015, p. 145). This includes opting for a project that “reconstructs the discursive foundations upon which its own proposals come to life” (Afonso, 2015, p. 145), to the detriment of the “historical-cultural” —and legal (Squeff, 2021a)— dependence provoked by coloniality (Quijano, 2005, p. 123), which erases the differences among subjects of a given society.

Thus, it appears that the IACHR can serve as a true transformative agent, whether in terms of dissemination of Inter-American norms, as Ansolabehere (2014, pp. 146-147) pointed out, or in terms of the propagation of justice<sup>23</sup>, when it impacts and changes the Latin American social context, to echo Piovesan (2016, p. 5). And the final topic of this text explores the latter by analyzing some Brazilian cases judged by the Court

<sup>23</sup> Here, the spread of justice is interpreted as the one that creates a legal culture that favors the use of human rights and is open to the judgments of international courts, promoting the internal application of international provisions (Ansolabehere, 2014, pp. 146-147). For a different view, that justice within the still dominant Westphalian model sometimes does not reach everyone and reproduces injustices, cf (Fraser, 2009, pp. 22-24).

concerning vulnerable groups, in an attempt to highlight the possibilities for the continued affirmation of human dignity from the South.

## **International Transformative Constitutionalism in Practice: An Analysis of the Recent Brazilian Jurisprudence before the Inter-American Court of Human Rights**

The convergence between the domestic and international spheres has always been a subject of study in international law (Ribeiro, 2001). The key issue is that the proposed intersections failed to address the colonial aspects of international law (Anghie, 2006), which imposed Global North standards on all those who make up international society, failing to allow for exchanges between the international and domestic spheres that took into account local particularities.

In this regard, Borges and Piovesan (2019, pp. 15-16) highlight the relevance of the system proposed by the Inter-American Court of Human Rights for building bridges through dialogue in favor of respect for the inter-American *corpus iuris* and the continuous constitution of a Latin American *ius commune*. This proposal aims at constructing a set of regulations that does not have the State as its central element, targeting the protection of human rights as its fundamental axis and, therefore, “permeating domestic and international legal systems transversally, allowing for their adaptation/transformation in light of specific cases and social dynamics, as long as human dignity is at the core” (Squeff & Silva, 2021).

Therefore, it is important to examine how this occurs in practical terms. Thus, three Brazilian paradigmatic cases were selected as an analytical point, namely: (i) Workers of Brasil Verde Farm, (ii) Employees of the Santo Antônio de Jesus fireworks factory, and (iii) Márcia Barbosa de Souza. These cases were selected because they contribute to the current interpretation of the Inter-American *corpus iuris* concerning the issue of the protection of vulnerable groups, serving as a parameter for the defendant State, as well as for all other members of the Organization of American States, given their common objective (Acosta Alvarado,

2017, p. 26) of ensuring the full protection of human rights in the region from within the same region.

### ***The Workers of Brasil Verde Farm case (IACHR, 2016)***

This case concerns the subjection of 85 workers to slave-like labor at Brasil Verde Farm, located in the state of Pará, in northern Brazil (IACHR, 2016, para. 206). Its significance lies in the fact that this is the first case the Court has tried on contemporary forms of slavery, which involved the lack of formal work registration, an abusive remuneration system (*truck system*), exhausting workdays, physical and psychological coercion, armed surveillance and false imprisonment, degrading working and housing conditions, and the lack of potable water (IACHR, 2016, pars. 160, 221, 303). Based on this, the Court recognized the violation of Articles 1(1), 3, 5, 7, 8.1, 11, 22, and 25 of the American Convention due to the State's failure to prevent, diligently investigate, and punish those responsible.

However, in reaching this conclusion, the Court made some interesting considerations. First, it noted that even though the prohibition of slavery is considered a binding rule and implies obligations *erga omnes* (IACHR, 2016, para. 249), it is still present in Brazilian society. The Court contextualized the case within the national historical framework of slavery, arguing that this is a practice rooted in the country's history (i.e., presenting a structural character) (IACHR, 2016, pars. 225, 334-338) and that unfortunately it still plagues a substantial portion of the population, especially in the North and Northeast regions, whether due to their illiteracy or young age, their (extreme) poverty, or even their race (Afro-descendants), which not only facilitates their recruitment but also demonstrates Brazil's own tolerance of the act (IACHR, 2016, pars. 110-115, 303-310).

Second, the Court noted that modern slavery, while no longer associated with formal ownership of persons (IACHR, 2016, para. 269), involves equivalent forms of domination, such as extreme submission to the will of another, with the consequent nullification of the victim's legal personality, thus encompassing both servitude (IACHR, 2016, pars. 276-280) and human trafficking (IACHR, 2016, pars. 287-289). Considering

that this practice is increasingly common in the Brazilian and Latin American contexts (IACHR, 2016, para. 318), involving not only women and children but also migrants and other vulnerable groups, especially economically (IACHR, 2016, para. 340), the relevance of the decision is evident in advancing the interpretation of Article 6.1 of the American Convention, expanding its scope to encompass human trafficking and forced labor (IACHR, 2016, pars. 291-293) as modern expressions of slavery, which derive from multiple/compound or even intersectional structural discrimination (IACHR, 2016, Reasoned Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 44).

Finally, because poverty or economic conditions are key factors in the development of modern slavery, the Court determined that “every person who finds themselves in a situation of vulnerability [is] entitled to special protection” (IACHR, 2016, Reasoned Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 49), calling for particular attention to respect and guarantee of human rights by members of the Inter-American System, demonstrating, therefore, the need to change the local reality to offer effective protection to human beings, especially those with a history of socioeconomic exclusion.

Hence, this case proved relevant not only for adapting the concept of slavery to the present day, but especially for noting that it shows peculiar characteristics of structural discrimination in Latin American societies. This imposes on the countries of the Inter-American System, in addition to Brazil, which was convicted in the case, the need to adopt measures to ensure that crimes related to slavery are punished, instigating diligent investigations. Furthermore, it proves necessary to promote adaptations both legally —such as the creation of domestic laws— and procedurally —to ensure that cases are not affected by the statute of limitations— so that this practice ceases to occur in the Latin American context.

While in Brazil there was already internal regulations (although not very effective, given the occurrence of the case itself), the influence of this imbroglio is noticeable with regard to the statute of limitations, since some domestic courts are applying the precedent regarding the imprescriptibility of the crime of subjecting people to a situation analogous to

slavery<sup>24</sup>, denoting the practical and/or transformative change in reality through the decisions of the Inter-American Court.

### ***The Employees of the Santo Antônio de Jesus Fireworks Factory Case (IACHR, 2020)***

This case concerns Brazil's conviction for human rights violations resulting from the explosion at a fireworks factory in the municipality of Santo Antônio de Jesus, Bahia, which resulted in the deaths of 60 people and injuries to six others, including 23 children (IACHR, 2020, para. 110). As a result, the Court recognized Brazil's violation of multiple rights, such as Articles 4, 5, 8.1, 19, 24, 25, and 26 of the American Convention, notably its failure to monitor and inspect working conditions at the factory. This resulted in "high risk and imminent danger to the life and personal integrity of the workers" (IACHR, 2020, para. 1), who were primarily illiterate Afro-descendant women (IACHR, 2020, para. 71) who had no other alternative for work in the municipality (IACHR, 2020, para. 142), albeit informal (IACHR, 2020, para. 70), given their poverty.

In its ruling, the Inter-American Court made some important points, including, first, the history of the Santo Antônio de Jesus region, which was home to people whose ancestors were slaves and who faced difficulties exercising their rights as citizens over the decades (IACHR, 2020, para. 57). The limitations included, as noted by the Court, the right to work, which was typically marked by informality and precariousness, low-skilled employees, and low pay, resulting in poverty becoming the norm in the area (IACHR, 2020, paras. 58-59). In this context, the installation and permanence of fireworks factories in the region was facilitated, but with no due supervision and inspection by the State, unsafe provision of the service and routine exposure to health risks. This meant that, notably, the workers (women, pregnant or not, children and the elderly), the vast majority of whom were Afro-descendants and undergoing multidimensional poverty (IACHR, 2020, paras. 143, 185), became even more vulnerable (IACHR, 2020, paras. 62, 65-66, 198), denoting the structural (IACHR, 2020, para. 190) and intersectional

<sup>24</sup> For example, in favor of imprescriptibility, see Brazil, 2025a; 2025b and 2023a.

discrimination (IACHR, 2020, para. 191) experienced by the victims in this case.

Secondly, the Court determined that States have two types of obligations under the American Convention and other Inter-American instruments, namely, “to respect the rights and freedoms recognized therein (negative obligation)” and “to adopt all appropriate measures to guarantee them (positive obligation)” (IACHR, 2020, para. 115). This determination is of particular importance when it comes to Articles 4, 5.1 and 19 of the ACHR, imposing on countries the duty to “create a normative framework adequate to deter any threat” to those rights (IACHR, 2020, para. 116), even from third parties who are within its jurisdiction (IACHR, 2020, para. 117). After all, it is the State’s responsibility to “regulate, supervise and monitor the practice of activities”, especially those dangerous ones that imply high risks to such rights (IACHR, 2020, para. 118), especially in the case of children (IACHR, 2020, paras. 149-153).

In this case, although legislation existed in Brazil governing the operation of fireworks factories (IACHR, 2020, para. 132), as well as rules ensuring satisfactory and equitable occupational safety, health, and hygiene conditions (IACHR, 2020, paras. 170-171, 201), the State had failed in its duty to monitor and prevent risks inherent to work at the Santo Antônio de Jesus Fireworks Factory (IACHR, 2020, paras. 133-138, 174-176). Therefore, due to its failure to act in the face of actions by private actors who created, maintained, and/or favored discriminatory situations with the State’s tolerance and/or acquiescence (IACHR, 2020, para. 186), Brazil was held internationally responsible.

Therefore, among the reparations ordered by the Inter-American Court, the country was required not only to implement a systematic inspection policy at fireworks factories but also to develop a socio-economic inclusion program for the region’s population. And as a result of this conviction, it can be stated that some steps have already been taken in this direction, such as the signing of a Conduct Adjustment Agreement (TAC, Portuguese acronym)<sup>25</sup> between the municipality and the

<sup>25</sup> “The conduct adjustment agreement is an agreement that the Public Prosecutor’s Office enters into with the violator of a certain collective right. This instrument aims to prevent the continuation of the illegal situation, repair the damage to the collective right, and avoid legal action.” (MPF, n/d)

Public Ministry of Labor of Bahia (MPT/BA, Portuguese acronym), with the purpose of training public officials, establishing agreements for professional training courses, and ensuring that protective measures for vulnerable families are adopted. This aims to address the structural and intersectional discrimination that exists in Santo Antônio de Jesus municipality (Brazil, 2023b), in addition to providing reparations to the families of direct victims (Brazil, 2024).

### *The Márcia Barbosa de Souza Case (IACHR, 2021)*

This case is specifically related to violence against women, as it concerns the arbitrary application (IACHR, 2021, para. 110) of parliamentary immunity in a case of femicide committed against Márcia Barbosa de Souza in 1998, a poor young Afro-descendant (IACHR, 2021, para. 65), preventing the criminal liability of the perpetrator, who, at the time of the events, was a state deputy for the state of Paraíba (IACHR, 2021, para. 122).

In view of this, Brazil was condemned in the Inter-American Court, as it prevented due access to justice by the indirect victims (Márcia's family members), who sought reparations for the following events: the violation of the right to a reasonable time due to the suspension of the process while the deputy served his term (IACHR, 2021, paras. 60, 72, 136); recurring flaws in the criminal investigation, endowed with gender stereotypes (IACHR, 2021, paras. 120, 138, 145-146); and lack of due diligence on the part of the authorities (IACHR, 2021, paras. 83-87), constituting a violation of substantive (Articles 5.1 and 24) and procedural (Articles 8.1 and 25) rules of the American Convention on Human Rights, in addition to Article 7.b of the Convention of Belém do Pará.

Therefore, this case is relevant, as it discusses gender-based violence. At this point, when considering the case, the Court made important observations about this violence in the country, stating that it is a structural and widespread problem, given that "there are no effective public policies" to combat it (IACHR, 2021, para. 47). Furthermore, it noted that "the violent deaths of women in Brazil do not occur equally, [with] a significant racial bias" (IACHR, 2021, para. 53). The Court stated that "the specific profile of women murdered in Brazil in greater numbers

corresponds to young, black, and poor women”, again drawing attention to the existence of multidimensional poverty and intersectional discrimination in the state (IACHR, 2021, paras. 53, 125, 142).

Therefore, in cases like *Márcia’s*, the Inter-American Court understood that the degree of violence of the crime, the characteristics of the victim, and the impossibility of access to justice must be taken into consideration when deciding whether or not to uphold parliamentary immunity (IACHR, 2021, paras. 108-109, 120), if it is provided for by the State. After all, this immunity could not be used as an “instrument of impunity” and should be interpreted as a “functional guarantee of democracy” (IACHR, 2021, para. 100). Furthermore, the Court noted that:

Judicial ineffectiveness in dealing with individual cases of violence against women creates an environment of impunity that facilitates and promotes the repetition of acts of violence in general and sends a message that violence against women can be tolerated and accepted, which favors its perpetuation and social acceptance of the phenomenon, the feeling and sensation of insecurity among women, as well as their persistent distrust in the justice system. (IACHR, 2021, para. 125)

Hence, the Inter-American Court has stated that the investigative process must value the victim, above all, based on their gender, as a way of providing due diligence (IACHR, 2021, para. 126). This does not mean that the investigation is an obligation of results; it remains an obligation of means. Furthermore, “it must be serious, objective, and effective, and must be oriented toward determining the truth and the prosecution, capture, and eventual punishment of the perpetrators” (IACHR, 2021, para. 128), especially in cases of death and sexual abuse of women (IACHR, 2021, para. 130)—which did not occur in *Márcia’s* case.

Consequently, Brazil was ordered to pay full reparations to their families. Among the measures imposed by the Inter-American Court, special emphasis should be given to the creation of a national data system on violence against women and the adoption of a national protocol for investigating femicide. In this regard, some improvements in Brazil that resulted from this decision are noteworthy, such as the adoption of the ‘National Protocol for Investigation and Expertise in Crimes of

Feminicide' in 2025 (Brazil, 2025c), and a national data system on violence against women in Brazil, which consists of a series of initiatives aimed at protecting women, such as the 180 Hotline and the Judiciary Statistics Panel, as well as a database that cross-references information related to health and public safety (Brazil, 2025d) (CNI, 2025).

### ***Results of the Case Studies: The Promotion of Latin American Justice***

Based on the three cases analyzed, it can be said that the transformation of the South advances through the thesis of transformative constitutionalism promoted by the IACHR. Even if its foundations did not have this purpose, the case studies demonstrate the advancement of the idea of a *living instrument* that clearly goes beyond the interpretation of the Convention, but rather involves changing the behavior of states in favor of a reality oriented toward human rights and more attentive to the local particularities of Latin America, as Acosta Alvarado points out (Acosta Alvarado, 2015).

Here lies the difference between merely recognizing rights and truly promoting justice, as Igreja and Rampin (2021) argue. While the former relates to the movement toward institutionalization, the latter deals with "bringing justice closer to the subjects, with the guarantee that the space to be accessed will provide the necessary conditions for the interaction between actors to lead to the recognition [...] of dignity" (Igreja & Rampin, 2021). And not just any subject, but the Latin American subject, that demonstrates the decolonial potential of the theory of transformative constitutionalism.

## **Conclusion**

Despite the origins of the Inter-American Court of Human Rights, and considering the objective of decolonial thinking —namely to unveil the colonial/imperial past of Latin-American societies so that the reality of such societies can be understood as descending from that historical moment, seeking alternatives from within, that is, locally situated and

contextualized, thus escaping the shackles of Western thought— it is possible to say that transformative constitutionalism can be used as a decolonial tool when it is used to question and seek to deconstruct a reality that comes from the colonial period, but which remains in Brazil today due to coloniality, such as issues of poverty, race and gender.

After all, the cases studied demonstrate the Inter-American Court's capacity to challenge the Brazilian reality, imposing specific reparations that, when materialized, transform the local reality from a Latin American perspective. This fosters local solutions, replacing the Eurocentric narratives (Squeff, 2021b) that could emerge from a Europeanized approach to human rights, which routinely disregard exploitation in labor relations because of the exclusion of non-standard subjects as holders of human rights, ignore large-scale socio-environmental catastrophes when these occur in non-central regions, and do not seek the punishment of perpetrators of gender-based violence. These were precisely the points raised in the three decisions handed down by the Inter-American Court of Human Rights that were analyzed, as they established important standards for combating such violations locally, imposing a reinterpretation of the local/southern reality and, therefore, moving away from the Eurocentric perspective of human rights.

However, it is important to keep in mind that not all judgments handed down will be fully observed by states. This is because the Inter-American system itself lacks more concrete tools to enforce its decisions as those existing in the European regional context, for example, through the Council of Ministers of the Council of Europe. However, it should be recalled that there is a key difference between compliance and the effectiveness of the impact of the Court's decisions domestically. While compliance generally refers to the "implementation of decisions" handed down by the Court, considered individually, effectiveness is tied to the ability of decisions to raise "the level of human rights conditions and reduce the possibility of recurrence of abuses, thus offering a satisfactory remedy to victims" (Engstrom, 2017, p. 1255).

Ultimately, one cannot generalize and conclude that the analyzed cases in this text have already completely transformed the local reality, since domestic decision-making for the future —and not merely to remedy the specific situations questioned in Court— takes time. The

executive branch and, especially, the legislative branch typically take time to transform what the Court has pointed out into a broader prescription, towards the future. However, as stated above, it does encourage the consideration of these measures, including within the jurisdictional sphere, encouraging the adoption of Inter-American standards in future decisions, based on the Conventionality Control principle. However, there are actual cases in which constitutional jurisdiction has proven resistant to the determinations of the Inter-American Court of Human Rights (as per cases of Amnesty Laws), particularly in Brazil. But there are also positive examples, such as the case of custody hearings that are now carried out in Brazil as demanded by the ACHR and the Inter-American Court of Human Rights.

In this regard, consideration is once again given to the promotion of justice, which is sought through the adjudication of cases by the Inter-American Commission in the Court (also known as strategic litigation). And once again, we see how *international transformative constitutionalism* aligns with this tactic when it pursues real, albeit slow, transformation of local realities. As von Bogdany (2015, p. 31) argues, “no one bets on quick or revolutionary solutions”, it is necessary to build a jurisprudence that, based on local realities, makes it possible, little by little, to propose changes that could have an impact far beyond what was originally expected, since they are truly transformative.

Thus, in short, despite the OAS’s history, if the Inter-American Court reflects the context in which it operates, especially considering the countries/national societies that comprise it, seeking, in its rulings, to transform its own determinations into fair and effective measures in the domestic spheres of its members, it can be seen as decolonial. It is not a mere “cloak of legality”, as Pahuja would say (Pahuja, 2005), because instead of distorting reality, it acts by highlighting a country’s situation—such as gender-based violence and structural and intersectional discrimination—being these the reasons why it proposes specific solutions.

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