General Articles

The Polysemy of Gender Discrimination in the IACtHR Jurisprudence: Towards the Elimination of Structural Gender Discrimination Through Transformative Reparations*

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This article focuses on the jurisprudence of the Inter-American Court of Human Rights (IACtHR) on structural gender discrimination and transformative reparations. It dwells on feminist legal and political analysis on the multiple meanings of gender discrimination and distinguish three feminist categories –that have been incorporated in the International Human Rights Law– that respectively focus on the disadvantaged group ('women approach'), the discriminatory structure that produces disadvantage ('gender approach'), and the combined effects of different grounds of discrimination ('intersectionality approach'). The article is novel for its use of the polysemy of gender discrimination as a lens to analyze strengths and weaknesses of three emblematic cases of the IACtHR: González et al. ('Cottonfield') v. México, Atala Riffo v. Chile, and Gonzales Lluy et al. v. Ecuador. Our analysis shows that the IACtHR refers to different meanings of gender discrimination in the interpretation of the facts, on the one hand, and in the reparation and non-repetition measures, on the other. Our findings allow us to suggest that the pathway to strengthen the role of the Inter-American Court towards the elimination of gender structural discrimination is to issue transformative reparations that include the reforms of the legal and institutional gender-blind framework that maintain and reproduce such discrimination. This study is not only relevant for the Inter-American systems but also for the European Court of Human Rights and the African Court on Human and People's Rights that can use the IACtHR jurisprudence as a model.

Keywords: Gender discrimination; structural gender discrimination; intersectionality; Inter-American Court of Human Rights; reparations and non-repetition measure

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I. INTRODUCTION

Statistics show that Central and South America, Caribbean, and Mexico constitute the least gender equal region in the world.[1] In this region, unemployment is 'a problem that particularly affects women'.[2] The majority of the female population either lack their own income, or their salaries are lower than minimum wage. 94 percent of those who engage in paid care work, which is usually under precarious conditions, are women; of these, 24 percent are poor and 63 percent do not have social security. 50 percent of women with children under seven years old find themselves outside of the labor market. [3]

[1] Comisión Económica para América Latina y el Caribe, 'Desigualdad distributiva' (CEPAL 2016) <cepal.org/es/infografias/desigualdad-distributiva> accessed August 1st, 2023.

[2] Comisión Económica para América Latina y el Caribe, 'Segundo informe anual sobre el progreso y los desafíos regionales de la Agenda 2030 para el Desarrollo Sostenible en América Latina y el Caribe' (CEPAL 2018), p 66, <https://repositorio.cepal.org/bitstream/handle/11362/43415/5/S1800380_es.pdf> accessed August 1st, 2023.

[3] Comisión Económica para América Latina y el Caribe, 'Consolidar políticas integradas de cuidado: Un imperativo de igualdad' (CEPAL 2016). <cepal.org/es/infografias/consolidar-politicas-integradas-cuidado> accessed August 1st, 2023.

Multiple barriers exist preventing women's equal participation in decision-making. Although certain countries have shown progress,[4] at the end of 2021, only Honduras had a female head of government; women parliamentarians were only 30.7 percent of elected representatives and – despite the public commitment to create gender-balanced cabinets– the percentage of female ministers only increased to 27.1 percent.[5] Moreover, the ministerial portfolios headed by women continue in most cases to be related to social affairs, family, culture, and the environment, showing the enduring impact of gender stereotypes in the division of productive and reproductive roles.[6] The judicial branch scores even lower as, on average in the region's national high courts, only two out of seven judges are women.[7] Even the Inter-American Court of Human Rights (hereinafter IACtHR) reached gender balance in 2022 for the first time.[8] Throughout its four-decade history, only eight women judges have integrated the Court and only two of them have become presidents.[9]

Also with regards to the most severe forms of inequality, sexual violence and femicide, Central and South America, Caribbean, and Mexico is one of the

[4] For example, on June 1st, 2021, women occupied 58.8 percent of ministerial posts in Nicaragua, 52 percent in Costa Rica, and 42.1 percent in Mexico. In parliaments, women accounted for 48,4 percent in Nicaragua, 48, 2 percent in Mexico and 46,2 percent in Bolivia. See UN Women, 'Women in Politics' (UN 2021) <unwomen.org/en/digital-library/publications/2021/03/women-in-politics-map-2021> accessed August 1st, 2023.

[5] Ibid.

[6] Political harassment is also a threat to achieving women's equality and autonomy. See the Declaration on Political Harassment and Violence Against Women, adopted in 2015 as a follow up of the Convention of Belém do Pará.

[7] Comisión Económica para América Latina y el Caribe, 'Democracia paritaria' (CEPAL 2016) <cepal.org/es/infografias/democracia-paritaria>, accessed August 1st, 2023.

[8] In January 2022, three women judges joined the Court for the period 2022-2027. For the first time since its creation, the Inter-American Court of Human Rights has today a gender balanced composition.

[9] The Inter-American Court selection is based on the candidatures offered by the States that, by not offering gender-balanced lists of candidates, violate Article 8 of CEDAW.

deadliest region in the world.[10] The highest rates of femicide are found in Honduras (227 killed women in 2020, 4.7 per 100,000 women), the Dominican Republic (132 killed women in 2020, 2.4 per 100,000 women), El Salvador (73 killed women in 2020, 2.1 per 100,000 women), Brazil (1738 killed women in 2020, 1.6 per 100,000 women), Bolivia (113 killed women in 2020, 2.0 per 100,000 women) and Mexico (948 killed women in 2020, 1.4 per 100,000 women).[11]

Against this scenario, this article focuses on the role of the Inter-American Court of Human Rights in eliminating gender discrimination and violence through transformative reparations. Our starting point is that gender violence is not the result of random individual bad behaviors, but deeply rooted in structural relations of gender inequality.[12] From this perspective, criminal measures are essential to address individual violations, punish culprits, and provide reparations to victims. However, since the approval of the Convention for the Elimination of all Forms of Discrimination

[10] UN Development Program and UN Women, 'From Commitment to Action: Policies to End Violence Against Women in Latin America and the Caribbean' (UNPD 2017) <latinamerica.undp.org/content/rblac/en/home/library/womens_empowerment/del-compromiso-a-la-accion--politicas-para-erradicar-la-violenci.html> accessed August 1st, 2023. See most recent data available on femicide from 21 countries in the region at Comisión Económica para América Latina y el Caribe 'Observatorio de Igualdad de Género de América Latina y el Caribe' (CEPAL 2020) <https://oig.cepal.org/en/indicators/femicide-or-feminicide>, accessed August 1st, 2023. See also Comité de América Latina y el Caribe para la Defensa de los Derechos de las Mujeres y CLADEM 'Investigación sobre la interrelación y los vínculos entre la violencia sexual y la muerte de niñas y adolescentes en la región de América Latina y el Caribe (2010-2019)' (CLADEM 2021) <https://cladem.org/investigaciones/wp-content/uploads/2021/12/Investigacion-completa-.pdf>, accessed August 1st, 2023.

[11] Ibid.

[12] United Nations, 'Ending violence against women: From words to action. Study of the Secretary-General' (UN 2006) <unwomen.org/sites/default/files/Headquarters/Media/Publications/UN/en/EnglishStudy.pdf>, accessed August 1st, 2023.

(CEDAW) in 1979,[13] International Human Rights Law recognizes that criminal measures are insufficient to eliminate the causes of structural inequality.[14] A comprehensive approach must address the social structures gender discrimination and violence are anchored in, including education, language, media, political representation, institutional organization, and distribution among care and paid work. We align with scholars arguing that, when causes of discrimination are systemic, seeking structural transformation 'is both a necessary and legitimate task for an international human rights tribunal'.[15]

In the last decade, the Inter-American Court has been making significant strides by recognizing that discrimination and violence against women both have structural causes that systematically produce human rights violations.[16] The Court also recognizes that the effects of human rights violations cannot always be repaired by payment of just satisfaction. On the basis of Article 2 of the American Convention on Human Rights (ACHR), the Court can order the respondent State – within the margin of appreciation of each

[13] Convention on the Elimination of all forms of Discrimination Against Women, New York, 1979.

[14] Rashida Manjoo, 'Introduction: reflections on the concept and implementation of transformative reparations' (2017) 21 The International Journal of Human Rights 9.

[15] Ruth Rubio-Marín and Clara Sandoval, 'Engendering the reparations jurisprudence of the Inter-American court of human rights: The promise of the cotton field judgment' (2011) 33 Human Rights Quarterly 1062, p 1091.

[16] See for instance Miguel Castro Prison v. Peru (2006), the emblematic Cottonfield case (2009), the Advisory Opinion requested by Costa Rica (2017) regarding Gender identity and equality and non-discrimination of same-sex partners or the recent cases Women Victims of Sexual Torture in Atenco v. Mexico (2018) and López Soto v. Venezuela (2018). See Enza Tramontana, 'Hacia la consolidación de la perspectiva de género en el Sistema Interamericano: avances y desafíos a la luz de la reciente jurisprudencia de la Corte de San José' (2011) 53 Revista IIDH 141; Laura Clérico and Celeste Novelli, 'La violencia contra las mujeres en las producciones de la comisión y la Corte Interamericana de Derechos Humanos' (2014) 12 Estudios Constitucionales 15.

State[17]– to reform domestic legislation in order to guarantee the rights and freedoms protected under the American Convention on Human Rights. The Inter-American Court awards reparations that include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[18] In particular, the non-repetition measures aim at going beyond the individual violation and preventing the repetition of the same type of violations.[19] Non-repetition measures often are orders to reform legislation 'to remedy a structural wrong that the Court has recognized in its examination of a case'.[20] The Inter-American Court is a pioneer in arguing that non-repetition measures must have a 'transformative vocation' with corrective and not just restorative purpose. Although its function is to repair individual human rights violations, when these result from structural discrimination, the IACtHR argues that the context needs to be taken into special consideration.[21] Although few examples of effective execution mechanisms exist,[22] the Court has gained general acceptance among American States. Scholarly consensus exists on the importance of the

[17] H. Sofía Galván Puente, 'Legislative measures as guarantees of non-repetition: a reality in the Inter-American Court, and a possible solution for the European Court' (2009) 49 Revista IIDH 69.

[18] Douglass Cassel, 'The expanding scope and impact of reparations awarded by the Inter-American Court of Human Rights' (2004) 27 Hastings International and Comparative Law Review 91.

[19] Galván Puente, supra note 17.

[20] Judith Schonsteiner, 'Dissuasive measures and the 'society as a whole': A working theory of reparations in the Inter-American Court of Human Rights' (2007) 2 International Human Rights Law 127, p 149.

[21] See Ruth Martinón and Isabel Wences, 'Corte Interamericana de Derechos Humanos y pobreza. Nuevas incursiones a la luz del caso Hacienda Brasil Verde' (2020) 20 Anuario Mexicano de Derecho Internacional 169.

[22] Only a small number of States have modified domestic legislations in execution of IACtHR's judgments. See Galván Puente, supra note 17, p 89. See also Santiago A. Canton 'Reparations and Compliance with Reports and Judgments in the Inter-American System' (2007) 56 American University Law Review 1453, p 1455; James L. Cavallaro and Stephanie Erin Brewer, 'Reevaluating regional human rights litigation in the Twenty-First Century: The case of the Inter-American Court' (2008) 102 American Journal of International Law 768.

IACtHR jurisprudence in transforming the institutional culture in the region.[23] Since gender equality is one of the Sustainable Development Goals (SDGs) that the UN seeks to achieve before 2030, resistances to execution on behalf of some respondent States should not pre-empt efforts to search for cooperation of international organizations with national actors. The collaboration of the political, legislative, judicial powers with the media, civil society, and academia is required.

This article aims to contribute to existing scholarship on structural gender discrimination by analysing how the Inter-American Court uses the concept of gender discrimination in its jurisprudence. Within the polysemy of gender discrimination, we distinguish three meanings –'women', 'gender' and 'intersectionality'– that we use as lenses to analyze the case-law, highlighting strengths and weaknesses of the IACtHR jurisprudence. The first part of the article elaborates on the theoretical and practical implications of using 'women', 'gender' and 'intersectionality' as conceptual categories in law and policies, especially focusing on the development of international human rights law. With the aim of bridging the gap among theory and praxis, the second part of the article utilizes this theoretical framework to analyze three emblematic cases: *González et al. ('Cottonfield') v. México*, *Atala Riffo v. Chile,* and *Gonzales Lluy et al. v. Ecuador*.

[23] Galván Puente, supra note 17, p 84. See also Pablo Santolaya and Isabel Wences (eds). La América de los Derechos (Centro de Estudios Políticos y Constitucionales 2016); Armin Von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Flávia Piovesan (eds), Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune (Oxford University Press 2017). Armin Von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi and Pablo Saavedra (eds), Cumplimiento e impacto de las sentencias de la Corte Interamericana de Derechos Humanos y del Tribunal Europeo de Derechos Humanos. Transformando realidades (Max Planck Institute 2019); Digno Montalván-Zambrano e Isabel Wences (eds), La justicia detrás de la Justicia. Ideas y valores políticos en la Corte Interamericana de Derechos Humanos (Marcial Pons 2023).

Our analysis shows that the IACtHR applies these different approaches to gender discrimination in the interpretation of the facts through contextualization and the identification of the human right violation at stake on the one hand, and in reparation and non-repetition measures, on the other. Our findings allow us to suggest a pathway to consolidate the Court's key role in the American region to eliminate structural gender discrimination through transformative reparations. Our main point is that structural gender discrimination should be addressed through legal and institutional reforms. For this reason, our study is not only relevant within the Inter-American system, but also for the European Court of Human Rights and the African Court on Human and People's Rights that can follow the IACtHR jurisprudence as a model.[24]

II. THE POLYSEMY OF GENDER DISCRIMINATION

The category of gender is not unisonous, nor is the meaning of gender equality. Since its origin, feminist scholarship and activism engaged in intense debates on the definition of this key concept for feminist theory and action.[25] Although such debates have been defined as one of the strengths of feminism,[26] it is worth recalling that it is a critical theory that seeks social change. Multiple meanings are thus attributed to gender not only in theoretical debates but also when putting the gender perspective in social, political and legal practice. Moreover, actors and institutions construct

[24] After the Declarations of San Jose and Kampala, the three regional human rights courts agreed to cooperate to produce a Joint Law Report containing the leading decisions delivered by each court. For more information see the webpage corteidh.or.cr/tablas/tres-cortes/index.html and the joint reports at echr.coe.int/Pages/home.aspx?p=court/dialoguecourts/regionalcourts&c=.

[25] Joan Scott, 'Gender: A Useful Category of Historical Analysis' (1986) 91(5) American Historical Review 1053; Butler, J. *Bodies that Matter: On the Discursive Limits of 'Sex'* (Routledge 1993); Mary G. Dietz, 'Current Controversies in Feminist Theory' (2003) 6 Annual Review of Political Science 399.

[26] Judith Butler, 'Contingent foundations: Feminism and the question of postmodernism' in Sheyla Benhabib, Judith Butler, Drucilla Cornell, & Nancy Fraser (eds), *Feminist contentions: A philosophical exchange* (Routledge 1994).

multiple meanings of gender equality not only in law and policy adoption but also when interpreting the legal and political texts in relation to the context and the specific cases at stake.[27] Yet, opaqueness and embeddedness of gender norms create 'sticky' legacies that are difficult both to change and research.[28] We argue that the multiple meanings of gender equality need to be analytically distinguished to fully understand their effect in the praxis. Following Kantola and Lombardo,[29] we distinguish between three approaches: the 'women approach' – the focus on the disadvantaged group, the 'gender approach' – the focus on the discriminatory structure that produces disadvantage, and the 'intersectionality approach' – the focus on the combined effects of different grounds of discrimination. We draw on Carol Bacchi's[30] and Mieke Verloo's[31] research to analyze the different meanings of gender discrimination used by the Courts in the judicial decision. We distinguish between the diagnosis –or the interpretation of the facts, analysis of the context, and identification of the human rights violation at stake– and the prognosis –or the reparations and non-repetition measures. The next section bridges the gap between theory and praxis by presenting the theoretical framework which will be used to analyze the selected IACtHR case-law in the following section.

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[27] Verloo, M., *Multiple Meanings of Gender Equality: A Critical Frame Analysis of Gender Policies in Europe* (CPS Books 2007).

[28] Waylen, Georgina (ed). *Gender and informal institutions* (Rowman & Littlefield 2017).

[29] Johanna Kantola and Emanuela Lombardo, *Gender and political analysis* (Palgrave 2017). See also MariaCaterina La Barbera and Emanuela Lombardo 'Towards equal sharing of care? Judicial implementation of EU equal employment and work–life balance policies in Spain' (2019) 38 Policy and Society 626; Rebecca Tildesley, MariaCaterina La Barbera and Emanuela Lombardo, 'What use is the legislation to me? Contestations around the meanings of gender equality legislation and its strategic use to drive structural change in university organizations' (2023) Gender, Work and Organization, <https://doi.org/10.1111/gwao.13039>, accessed August 1st, 2023.

[30] Carol Bacchi, 'Policies as gendering practices: Re-viewing categorical distinctions' (2017) 38(1) Journal of Women, Politics and Policy 20.

[31] Verloo, supra note 27.

1. *The 'Women Approach', or the Focus on the Disadvantaged Group*

The 'women approach' mainly consists in an asymmetrical focus on women as a disadvantaged group. It implies addressing differences between women and men, linked both to biological (for example, pregnancy, lactation, sexual and reproductive health) and social factors (for example, underrepresentation in the workforce and decision-making, overrepresentation in care work). Preventing women's exclusion from the labor market, political institutions, and decision-making, are the main focus. Feminist scholars have argued that political theory, public policy, and the law – based on purportedly neutral models – reinforce and maintain discrimination against women.[32] Thus, measures such as positive actions aimed at minimizing discrimination or compensating for disadvantages are favored, such as work-life balance policies targeting women, equal pay, and gender quotas.

These theoretical developments have been reflected in International Human Rights Law, in particular in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The adoption of a specific international convention to protect women's rights transformed the way of conceiving human rights.[33] The CEDAW Committee clarifies that the Convention does not guarantee different rights to women but establishes the specific measures and actions that States should adopt to guarantee human

[32] Susan M. Okin, Women in western political thought (Princeton University Press 1979); Frances Olsen, 'The myth of state intervention in the family' (1985) 18 University of Michigan Journal of Law Reform 835; Ellen Kennedy and Susan Mendus (eds) Women in western political philosophy: Kant to Nietzsche (St. Martin's Press 1987); Catherine MacKinnon, Toward a feminist theory of the state (Harvard University Press 1989); Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds) The Ashgate Research Companion to Feminist Legal Theory (Ashgate 2013).

[33] Charlotte Bunch 'Women's rights as human rights: Towards a re-vision of human rights' (1990) 12 Human Rights Quarterly 486; Christine Chinkin, 'Violence against women: The international legal response' (1995) 3 Gender & Development 2; Rebecca J. Cook and Simone Cusack, Gender Stereotyping: Transnational Legal Perspectives (University of Pennsylvania Press 2010).

rights to women, removing *de iure* and *de facto* obstacles that hinder its effective protection.[34]

CEDAW provided a detailed and comprehensive roadmap to achieving gender equality that includes the elimination of legal obstacles that prevent women's access to rights and freedoms; the recognition of the specific women's needs, including sexual and reproductive rights; the elimination of stereotypes that perpetuate discrimination against women; the adoption of positive actions to compensate for historic discrimination and grant access to institutions from which women have traditionally been excluded both *de jure* and *de facto;* and the transformation of society through education with a gender perspective.

CEDAW establishes that 'States Parties condemn discrimination against women in all its forms, [and] agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women'.[35] The Convention requires ratifying States to review periodically national legislation, jurisprudence and administrative memos in order to eliminate norms which harm women through direct or indirect discrimination.[36]

[34] The CEDAW Committee explains that 'women's biologically determined permanent needs and experiences should be distinguished from other needs that may be the result of past and present discrimination against women by individual actors, the dominant gender ideology, or by manifestations of such discrimination in social and cultural structures and institutions'. See CEDAW Committee, General Recommendation n. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, para 11.

[35] CEDAW, supra note 13, Article 2.

[36] Although important reforms have been made in South and Central America, de iure limitations of women's access to rights still exist in the region. For example, women cannot mine or work at night in Argentina, Bolivia, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama and Uruguay; cannot register a business in Suriname; cannot request a passport or choose the place of residence in Haiti. See World Bank, Women, Business and the Law 2019 (The World Bank 2019); Karla Hora Miriam Nobre, Claudia Brito and Soledad Parada, 'ATLAS de las mujeres rurales de América Latina y el Caribe' (FAO 2017)

Finally, CEDAW requires courts to protect against discriminatory actions or omissions of authorities (for example, judges or police), private organizations, companies or individuals.[37] The first key advance of CEDAW is the asymmetrical focus on women as a group experiencing disadvantages. The second one is the establishment of actions for minimizing discrimination and compensating the disadvantages caused by discriminatory attitudes, behaviors, and social structures that are recognized as socially constructed. The third key advance is the explicit transformative aim of the Convention.[38]

In the American region, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Convention of Belém do Pará, indicates that violence against women is 'a manifestation of the historically unequal power relations between women and men'[39] and recognizes that the right of every woman to a life free of violence includes the right to be free from all forms of discrimination. Article 7 stipulates:

<fao.org/3/i7916s/i7916s.pdf> accessed August 1st, 2023. Important reforms are related to indirect discrimination, exclusion of women from certain types and modalities of work, equal pay, domestic workers's rights, maternity and equal sharing of care (ONU Mujeres and Secretaría General Iberoamericana 'Análisis de legislación discriminatoria en América Latina y el Caribe en materia de autonomía y empoderamiento económico de las mujeres' (SEGIB 2018) p 8 <segib.org/wp-content/uploads/LeyesDiscriminatoriasEmpoderamientoEconomicoMujeres1.pd > accessed August 1st, 2023.

[37] CEDAW supra note 13, Article 2.

[38] See CEDAW Committee, supra note 34, para 10: 'The position of women will not be improved as long as the underlying causes of discrimination against women, and be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns'.

[39] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará), Preamble"

> The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:
>
> […]
>
> (b) apply due diligence to prevent, investigate and impose penalties for violence against women;
>
> (c) include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary.[40]

Despite its transformative effects in redistribution, recognition and participation[41], focusing on women as a disadvantaged group entails one main limitation: it pays insufficient attention to the structures that generate women's discrimination. The 'women approach' is well-suited to identify the exclusion of women from the labor market, political and legal institutions, and decision-making with the aim of integrating them. However, this approach does not allow an in-depth transformation of these discriminatory structures which produce and maintain those disadvantages.[42] In other words, it attacks the symptoms, but it does not question the causes. Placing women outside of history and social structures, the 'women approach' ignores, in the words of Simone de Beauvoir, how 'one becomes a woman' within and through those structures.[43]

[40] Ibid, Article 7.

[41] Nancy Fraser, Justice Interruptus: Critical Reflections on the Postsocialist Condition (Routledge 1997).

[42] Kantola and Lombardo, supra note 29; Sandra Fredman 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712, p 722.

[43] Chandra T. Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist Review 61, p 80.

2. *The 'Gender Approach', or the Focus on the Discriminatory Structure that Produces Disadvantage*

The 'gender approach' focuses on the discriminatory social structure that affects women. It views gender discrimination as a structural rather than an individual problem,[44] and targets the hierarchical relationships that systematically place women on the subordinate side of the social order. This implies that the political and social institutions produce or maintain gendered power relations.[45] The 'gender approach' pursues a transforming goal of the social and institutional structures that produce and maintain gender inequality. It focuses on the roles associated with femininity and masculinity and warns that rather than being natural and universal attributes, they are contextual social constructions.[46] It differentiates between socially constructed roles and biological needs, questioning the traditional separation between productive and reproductive work.[47] By tackling the cause of the asymmetric relations of privilege and power between men and women, it seeks to dismantle them.

The 'gender approach' aims at eradicating stereotypes and prejudices that affect women's enjoyment of rights and freedoms. In legal terms, using the 'gender approach' means addressing those written and unwritten norms that *de facto* impair women's access to goods, rights, and opportunities. The

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[44] Iris M. Young, 'Structural injustice and the politics of difference' in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds) Beyond intersectionality: Law, power and the politics of location (Routledge 2009). MariaCaterina La Barbera, 'La vulnerabilidad como categoría en construcción en la jurisprudencia del Tribunal Europeo de Derechos Humanos: límites y potencialidad' (2019) 62 Revista de Derecho Comunitario Europeo 235.

[45] Joan Wallach Scott, 'Gender: A useful category of historical analysis' (1986) 91 The American Historical Review 1053.

[46] Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013).

[47] Okin, supra note 32; Nancy Fraser, *Unruly practices: power, discourse, and gender in contemporary social theory* (University of Minnesota Press 1989).

'gender approach' recognizes that, if these obstacles are not removed, the law and public policies perpetuate and reinforce existing social inequalities.

Despite the wide variety of perspectives, at least three common aspects characterize the 'gender approach'.[48] First, the understanding that gender is a social structure that includes reproduction, care, and sexuality,[49] traditionally considered 'personal matters'. The 'gender approach' enables the understanding that the public versus private dichotomy is fictitious and grounds the well-known revindication that 'the personal is political'.[50] Second, the comprehension that gender is the result of complex social relations that construct femininity and masculinity as opposites and complementary through the attribution assignment of roles, attitudes, desire, and expectations. In contrast with the traditional vision of feminine and masculine roles as biologically grounded, gender is recognized as a context-dependent social structure.[51] Third, the questioning of unequal social relations with the aim of transforming gender roles in equal terms. The 'gender approach' calls for recognizing that gender discrimination can only be effectively addressed by considering gender as a collective problem of power relations that requires public intervention to bring about social transformation towards a more just society.[52]

Such theoretical developments have been progressively included in International Human Rights Law. Since its adoption forty years ago, the CEDAW and its Committee clarified that the recognition of equality before the law and the elimination of formal obstacles are insufficient. CEDAW

[48] Kantola and Lombardo, supra note 29.

[49] Andrea Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (Harper & Row 1976); Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Verso 1970).

[50] Carole Pateman, 'Feminist critiques of the public/private dichotomy' in Stanley I. Benn and Gerald F. Gaus (eds) *Public and private in social life* (St. Martin's Press 1983). Olsen, supra note 32.

[51] Nina Lykke, *Feminist Studies: A Guide to Intersectional Theory, Methodology and Writing* (Routledge 2010), p 93.

[52] Kantola and Lombardo, supra note 29, p 27.

requires addressing the structural dimension of gender inequality by correcting baseline disadvantages. This is achieved through special measures, guaranteeing women's 'voice' as well as counteracting prejudices, stigmatization, and stereotypes.[53] The Convention recognizes that the distinction between public and private is fictitious and that States must intervene in arenas traditionally considered as a private realm – such as reproduction, care responsibilities and domestic violence.[54] This eliminates the 'cultural patterns which define the public realm as a man's world and the domestic sphere as women's domain'.[55] These collective patterns are 'invisible' if a 'gender approach' is not adopted,[56] creating the environment in which both direct and indirect individual discrimination and violence (whether physical, psychological, or sexual) takes place.

Overcoming the merely formal dimension of equality, CEDAW connects substantive equality[57] with its transformative dimension.[58] By aiming at eradicating the social, cultural, and institutional structures that systematically produce and maintain discrimination, it recognizes equality as a transformative project for the society as a whole. CEDAW requires States to modify social and cultural patterns that determine prejudices and practices based on sexist stereotypes that restrict women's access to work, social participation, and decision-making[59]. States are called to undertake 'a real transformation of opportunities, institutions and systems so that they are no

[53] Fredman, supra note 42, p 727.
[54] CEDAW, supra note 13, Introduction.
[55] Ibid.
[56] Eva Giberti and Ana María Fernández (eds), *La mujer y la violencia invisible* (Sudamericana 1989).
[57] CEDAW, supra note 13, Article 4.
[58] Fredman, supra note 42; Elena Laporta Hernández 'Desde la Convención sobre la Eliminación de todas las Formas de Discriminación de la Mujer a la igualdad transformativa en España' in MariaCaterina La Barbera and Marta Cruells (eds) *Igualdad de género y no discriminación en España, evolución problemas y perspectivas* (Centro de Estudios Políticos y Constitucionales 2016).
[59] CEDAW, supra note 13, Article 5.

longer grounded in historically determined male paradigms of power and life patterns'.[60]

CEDAW recognizes that achieving substantive equality requires to change the unjust *status quo*; to transform social structures that undervalue women based on gender stereotypes; and to eliminate the obstacles that effectively impede equal representation for women. States parties have the obligation to address the persistence of gender-based stereotypes that affect women, not only through individual actions but also through legislation, political institutions and social structures.[61] Different spheres of action are identified: political representation and officeholding in governments, private business, and the economic sector;[62] and the social and cultural patterns, including sexist language and objectification of women's bodies in media;[63] formal education at all levels and continuous education and training at workplace and professional development;[64] employment, including the right to equal opportunities, equal pay, and maternity leave.[65]

The main limitation of the 'gender approach' is that it assumes gender as a uniform structure and defines women as a coherent, homogeneous, 'pre-social' collective with common objectives.[66] Gender is conceived 'as if all women were white',[67] middle class, healthy, heterosexual, and citizens of the country where they live. This approach is both essentialist and exclusionary. By assuming that a 'Woman' essence (in the singular form) exists, the 'gender approach' identifies gender as the only form of discrimination against

[60] CEDAW Committee, supra note 34, para 10.
[61] Ibid., paras 7 and 10.
[62] CEDAW, supra note 13, Article 3 and 7.
[63] CEDAW, supra note 13, Article 5.
[64] CEDAW, supra note 13, Article 10.
[65] CEDAW, supra note 13, Article 11.
[66] Iris M. Young, 'Gender as Seriality: Thinking about Women as a Social Collective' (1994) 19 Signs 713.
[67] Gloria Hull, Patricia Scott and Barbara Smith (eds), *All the women are white, all the blacks are men, but some of us are brave: Black women's studies* (The Feminist Press 1982), p 123.

women. It is essentialist because it reduces the unequal access to resources, options, rights, and freedoms experienced by women to gender only.[68] It is exclusionary because it leaves out of its scope those women who suffer multiple and interconnected forms of discrimination and fall into the cracks of the legal systems.[69]

3. *The 'Intersectionality Approach', or the Focus on the Combined Effects of Different Grounds of Discrimination*

The focus on the intersection of gender with other grounds of discrimination is known as intersectionality. Intersectionality looks at women's social positions through a 'matrix of domination'[70] in which numerous forms of subordination interconnect.[71] It addresses such an interaction and questions 'essentialism in all its forms',[72] challenging the reduction of multiple discrimination to a problem of arithmetical sum.[73] The 'intersectionality approach' calls to explore how gender intersects with other grounds of discrimination, producing specific discriminations that cannot be protected through segmented antidiscrimination law.

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[68] MariaCaterina La Barbera, 'Intersectionality and its journeys: from counterhegemonic feminist theories to law of European multilevel democracy' (2017) 8 Investigaciones Feministas 131.

[69] Kimberlé Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 Tulsa Law Review 151, p 158.

[70] Patricia Hill Collins, *Black Feminist Thought. Knowledge, consciousness, and the politics of empowerment* (Routledge 1990).

[71] Floya Anthias and Nira Yuval-Davis, 'Contextualizing Feminism: Gender, Ethnic and Class Divisions' (1983) 15(1) Feminist Review 62; Mohanty, supra note 43; MariaCaterina La Barbera, 'Intersectional-gender and the Locationality of Women in Transit' in Glenda Bonifacio (ed) *Feminism and Migration: Cross-Cultural Engagements* (Springer 2012).

[72] Avtar Brah, *Cartographies of Diaspora: Contesting Identities* (Routledge 1996), p 156.

[73] Spelman, E. *Inessential Woman: Problems of Exclusion in Feminist Thought* (Beacon 1988); Angela Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42(3) Stanford Law Review 581.

Coined in 1989 by Kimberlé Crenshaw, the term intersectionality originally referred to the interconnection of discriminations experienced by African American women on the grounds of racialization, class stratification, and gendered social structures.[74] Further developments transformed intersectionality into a powerful category of analysis and tool for action not only for African American women, but also for other particularly vulnerable individuals and collectives like indigenous[75] or migrant women.[76] The 'intersectionality approach' calls nowadays for addressing also other protected categories, such as ethnic and national origin, disability, religion, health, socioeconomic status, age, and sexual orientation[77] as well as the articulation of the multiple forms of domination enmeshed in the 'colonial/modern gender system'.[78]

Intersectionality challenges single-issue and additive approaches that consider intersecting discrimination as the sum of separable factors.[79] Understanding gender discrimination from an intersectional perspective reveals that gender inequality affects women differently depending on their

[74] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex' (1989) 1 University of Chicago Legal Forum 139.

[75] Karina Bidaseca, 'Mujeres blancas que buscan salvar a las mujeres color café de los hombres color café' (2011) 17(8) Andamios. Revista de investigación social 61; Sylvia Marcos, 'Descolonizando el feminismo' in Verónica Renata López Nájera (ed) *De lo poscolonial a la descolonización. Genealogías latinoamericanas* (UNAM 2018).

[76] MariaCaterina La Barbera, 'A Path Towards Interdisciplinary Research Methodologies in Human and Social Sciences: On the Use of Intersectionality to Address the Status of Migrant Women in Spain' (2013) 9 The International Journal of the Humanities 193.

[77] Kimberlé Crenshaw, 'Gender-related aspects of race discrimination', Background paper for Expert Meeting on Gender and Racial Discrimination, November 21st, 2000, Zagreb, Croatia (EM/GRD/2000/WP.1).

[78] María Lugones, 'Heterosexualism and the Colonial/Modern Gender System (2007) 22 Hypatia 186.

[79] La Barbera, supra note 58; MariaCaterina La Barbera, Julia Espinosa-Fajardo, and Paloma Caravantes, 'Implementing intersectionality in public policies: key factors in Madrid City Council, Spain' (2022) Politics & Gender, <https://doi.org/10.1017/S1743923X22000241>, accessed August 1st, 2023.

level of education and income, ethnicity, nationality, age, health, and sexual orientation. Being older, indigenous, migrant, African American, or LBTI, as well as belonging to an ethnic or religious minority, living in poverty, or having a disability expose an individual to situations of particular vulnerability. For example, a racialized migrant woman who is lesbian does not experience gender discrimination in the same way as a white, heterosexual woman who is a citizen of the country she resides in. Similarly, a man with a disability belonging to an ethnic minority needs special measures to remedy the suffering of intersecting discrimination.[80]

Intersectionality is an essential tool for human rights lawyers that allows them to recognize the particular vulnerability of those exposed to rights violations because of their subordinate position in more than one structure of systemic discrimination, intersecting with the others. It aims at identifying the forms of discrimination that the segmented antidiscrimination law makes invisible and leaves unprotected. Intersectionality is a key interpretative category to address the specific procedural position of claimants at the crossroad of different protected categories.[81] The 'intersectionality approach' is based on the inseparability and interconnection of human rights proclaimed in the Universal Declaration of Human Rights.[82]

In the last decade, the developments of feminist scholarship and activism on intersectionality have been integrated in the International Human Rights

[80] MariaCaterina La Barbera, Julia Espinosa-Fajardo, Paloma Caravantes González, Sonia Boulos, Ghufran KhirAllah, Laura Cassain and Leticia Segura Ordaz, Hacia la implementación de la interseccionalidad: El Ayuntamiento de Madrid como caso de estudio (Aranzadi 2020).

[81] La Barbera, supra note 58; La Barbera, supra note 44; MariaCaterina La Barbera and Marta Cruells, 'Towards the Implementation of Intersectionality in the European Multilevel Legal Praxis: B. S. v Spain' (2019) 53 Law & Society Review 1167.

[82] Johanna E. Bond, 'International intersectionality: A theoretical and pragmatic exploration of women's international human rights violations' (2003) 5 Emory Law Journal 71.

Law. The United Nations declares the need to intensify efforts to ensure equal enjoyment of all human rights for all women who face multiple barriers due to color, ethnicity, age, language, culture, religion or disability.[83] The CEDAW Committee recognizes that intersectionality is a key concept for understanding the scope of international obligations of States parties. States must recognize and prohibit intersecting forms of discrimination and their combined negative impact on women's lives.[84] The Committee on the Elimination of Racial Discrimination recognizes that considering gender and racial discrimination separately erases the combined effects that particularly affect Afro-American, indigenous, and migrant women.[85] The Convention on the Rights of Persons with Disabilities recognizes the specific discrimination suffered by women and girls with disabilities and the need to adopt special measures to counteract it.[86]

Yet, international legislation often reduces intersectionality to 'multiple discrimination'.[87] Examples in the American region are found in the Inter-American Convention against All Forms of Discrimination and Intolerance (Article 1.3 and 11)[88], and the Inter-American Convention against Racism,

[83] Beijing Declaration and Platform for Action, Article 32.

[84] CEDAW Committee, General Recommendation n. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para 18.

[85] CERD Committee, General Recommendation n. 25, Gender Related Dimensions of Racial Discrimination, para 1.

[86] Convention on the Rights of Persons with Disabilities, Article 6.

[87] La Barbera, supra note 68.

[88] Article 1.3: 'Multiple or aggravated discrimination is any preference, distinction, exclusion, or restriction based simultaneously on two or more of the criteria set forth in Article 1.1, or others recognized in international instruments, the objective or result of which is to nullify or curtail, the equal recognition, enjoyment, or exercise of one or more human rights and fundamental freedoms enshrined in the international instruments applicable to the States Parties, in any area of public or private life'; Article 11: 'The States Parties undertake to consider as aggravating those acts that lead to multiple discrimination or acts of intolerance, i.e., any distinction, exclusion, or restriction based on two or more of the criteria set forth in Articles 1.1 and 1.3 of this Convention'.

Racial Discrimination and Related Forms of Intolerance. Our study relies on Hancock's[89] distinction among multiple –which accounts for two or more axes of discrimination– and intersectional approaches to discrimination –that considers the interaction between the different axes of inequalities and seeks to explore the relationships among them as an open empirical question related to the specific context. We argue that using intersectionality and multiple discrimination as synonyms is misleading because the latter relies on the conceptualization of equality strands as parallel[90] and assumes an additive approach, based on the incremental conceptualization of vulnerability as the sum of different factors of discrimination as opposed to the mutual constitution of inequalities.[91] This additive approach encourages an unproductive 'Oppression Olympics' whereby groups compete for attention and resources[92] or the creation of 'risk groups' that the 'intersectionality approach' questions form its origin.[93]

The limitations of the 'intersectionality approach' are mainly three. The first one is related to the segmentation of antidiscrimination law and bodies that do not offer adequate protection for individuals who experience interconnected forms of discrimination.[94] Moreover, the prevailing ideology of antidiscrimination based on segmented categories prevents law practitioners from adequately addressing complex situations of

[89] Ange-Marie Hancock 'When multiplication doesn't equal quick addition: Examining intersectionality as a research paradigm' (2007) 5(1) Perspectives on Politics 63.

[90] Ashlee Christoffersen, 'The Politics of Intersectional Practice: Competing Concepts of Intersectionality' (2021) 49(3) Policy & Politics 573.

[91] Hill Collins, P., Black Feminist Thought. Knowledge, consciousness, and the politics of empowerment (Routledge 1990).

[92] Hancock, supra note 86.

[93] Sarah Rudrum, 'An Intersectional Critical Discourse Analysis of Maternity Care Policy Recommendations in British Columbia' in Olena Hankivsky (ed) An Intersectionality-Based Policy Analysis Framework, (Simon Fraser University 2012).

[94] Sarah Hannett, 'Equality at the Intersections' (2003) 23 Oxford Journal of Legal Studies 65.

discrimination suffered by victims.[95] The second limitation is related to the conceptual assimilation of intersectionality to the notion of 'multiple discrimination'. For example, both the Inter-American Convention against All Forms of Discrimination and Intolerance, and the Inter-American Convention against Racism, Racial Discrimination and Related Forms of Intolerance refer to multiple layers of discrimination, but they do not consider the co-constitutive interactions between them. Finally, the third limitation is related to the disputed function of intersectionality in judicial decisions. A tendency exists to understand intersectionality as a tool to grant greater compensation when more than one ground of discrimination is identified. However, intersectionality is not about 'winning the Olympics of the most oppressed',[96] but providing adequate reparations considering the different grounds of discrimination that determined the specific rights violation.

With the aim of advancing the research on transformative reparations issued by international human rights courts, the following section of this article analyzes how the Inter-American Court refers to the polysemy of gender discrimination in three selected judicial decisions. In its analysis, the article will discuss the judicial decisions of: *González et al ('Cottonfield') v Mexico* (2009), *Atala Riffo and* Daughters *v Chile* (2012) and *Gonzales Lluy et al v Ecuador* (2015). The analysis in the next section shows how the Court interprets the polysemy of gender. We focus on the meanings of gender discrimination used when interpreting the facts and when issuing reparations, seeking to uncover which meaning was used in each part, to reveal the inconsistencies among those, and to make visible the practical effects that they produce. Although for analytical reasons we separated the 'women', 'gender' and 'intersectionality' approaches, we argue that these dimensions of gender discrimination should be considered jointly by the courts to identify i) the discriminated group, ii) the causes of discrimination,

[95] Nitya Iyer, 'Categorical Denials' (1993) 19 Queen's Law Journal 179; La Barbera and Cruells, supra note 81.

[96] Hancock, supra note 89.

and iii) the interaction with other factors of discrimination that exposes certain individuals or collectives to intersecting inequalities.

III. The Polysemy of Gender Discrimination in the IACtHR Jurisprudence

1. *González et al. ('Cottonfield') v. Mexico*

The IACtHR considers *Cottonfield* [97] one of its most emblematic cases on gender discrimination.[98] This decision represents a key progress in strengthening a gender perspective both in the interpretation of the facts and the identification of the human right violation at stake and in the non-repetition measures. It is a leading case in the identification of gender violence as a result of structural discrimination and in issuing reparation measures aimed at social transformation. The case was brough before the Inter-American Court because the kidnapping, sexual abuse, and murder of Claudia Ivette González, Esmeralda Herrera Monreal, and Laura Berenice Ramos –perpetrated by non-State actors[99]– was not diligently investigated nor persecuted by Mexico, leaving the crimes unpunished.[100]

In the definition of the dispute, the Court refers to gender as a discriminatory social structure that generates systematic violations of women's rights.[101] *Cottonfield* recognizes that the extreme violence suffered by the victims is the bloodiest manifestation of the structural gender discrimination that

[97] González et al ('Cottonfield') v Mexico, Preliminary Objections, Merits, Reparations and Costs, judgment of November 16th, 2009, Series C n. 205.

[98] IACtHR, 40 años protegiendo derechos (Corte Interamericana de Derechos Humanos 2018).

[99] Partial acknowledgement of the responsibility of the state is declared, as well as the violation of the following articles of the American Convention on Human Rights: 4.1 (Right to Life), 5.1 and 5.2 (Right to Integrity and Humane Treatment), 7.1 (Right to Personal Liberty), 8.1 (Right to a Fair Trial), 19 (Rights of the Child) and 25.1 (Right to Judicial Protection), as well as Articles 1.1 and 2; additionally, Article 7.b and 7.c of the Convention of Belém do Pará.

[100] Cottonfield, supra note 97, para 149.

[101] Cottonfield, supra note 97, paras 164, 129-134 and 450.

persists in Mexico. The Court argues that the crimes were perpetrated in a context marked by a 'culture' of discrimination against women[102]. The Court explicitly refers to structural discrimination and states:

> The Court concludes that, since 1993, there has been an increase in the murders of women, with at least 264 victims up until 2001, and 379 up to 2005. However, besides these figures, which the Tribunal notes are unreliable, it is a matter of concern that some of these crimes appear to have involved extreme levels of violence, including sexual violence and that, in general, they have been influenced, as the State has accepted, by a culture of gender-based discrimination which, according to various probative sources, has had an impact on both the motives and the method of the crimes, as well as on the response of the authorities. In this regard, the ineffective responses and the indifferent attitudes that have been documented in relation to the investigation of these crimes should be noted, since they appear to have permitted the perpetuation of the violence against women in Ciudad Juárez. The Court finds that, up until 2005, most of the crimes had not been resolved, and murders with characteristics of sexual violence present higher levels of impunity.[103]

The special consideration of the context is a step forward towards the recognition of the structural rather than individual dimension of gender violence.[104] In *Cottonfield*, structural discrimination affected not only the motives and mode of the crimes, but also the institutional response.[105] Following the CEDAW[106] and the Convention of Belém do Pará[107]

[102] Ibid, para 164.
[103] Cottonfield, supra note 97, para 164.
[104] See Martinón and Wences, supra note 21.
[105] See also Veliz Franco et al v Guatemala (2014) –which events 'occurred in a structural context of gender violence and impunity in which there is also strong discrimination against women that has repercussions for the criminal process on the homicide of the victim'– and Velázquez Paiz et al v Guatemala (2015) –which events took place in a context of increased homicidal violence against women that was known by the state.
[106] CEDAW, supra note 13, Article 1.
[107] Belém do Para, supra note 40, Article 1.

definitions of discrimination against women,[108] *Cottonfield* considers that the discrimination against women includes any difference in treatment based on sex that, even unintentionally, places women at disadvantage and impairs their full recognition of and access to human rights, both in the public and private spheres.

Structural gender discrimination conditioned implicitly or explicitly, both informal institutional practices, the language and the reasoning of the State agents involved in the case. According to the Court, 'the creation and use of stereotypes becomes one of the causes and consequences of gender violence'.[109] It recognizes that both legislation and the *modus operandi* of the institutional actors are not neutral and that, in absence of a 'gender approach', they reproduce gender stereotypes and maintain the existing discriminatory structures. The IACtHR identifies gender violence at stake as the direct outcome of gender stereotypes and women's subordination.[110] *Cottonfield* is a pioneer not only for the identification of the structural causes of violence, and the responsibility of the State for non-State actors' violations, but also for the transformative measures issued to guarantee the non-repetition of the violation. In its decision, the Court explains that when violations occur in a context of structural discrimination, the restoration of the prior situation and elimination of the effects produced by the violation is not sufficient. The IACtHR clarifies that reparations must have the

[108] CEDAW, Article 1: 'For the purposes of the present Convention, the term discrimination against women shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

[109] Cottonfield, supra note 97, para 401. Similarly, Velásquez Paiz et al v Guatemala, para 180; Ramírez Escobar et al v Guatemala, para 294.

[110] In para 394, the Court refer to the Belém do Pará Convention that identify violence against women as 'a manifestation of the historically unequal power relations between women and men' and recognizes that the right of every woman to a life free of violence includes the right to be free from all forms of discrimination.

purpose of transforming the structural causes of violence identified, having not only restorative but also corrective effects[111].

The IACtHR orders three types of reparations. First, it orders the State to adopt measures to comply with due diligence in cases of violence against women. This involves adopting an adequate legal framework for police investigations and judicial proceedings, with effective implementation through policies and administrative procedures, that allow effective protection of women. Second, it tackles the gender stereotypes of institutional actors and orders the State to implement training courses on i) gender and human rights, ii) gender perspective in conducting preliminary investigations and judicial proceedings related to discrimination, violence and homicides perpetrated against women, and iii) overcoming stereotypes on the social role of women.[112] The Court establishes that training courses should target politicians, public prosecutors, judges, members of the military, and officials providing services and legal assistance to crime victims. Third, the Court seeks not only restorative but also corrective effects.

> The Court recalls that the concept of 'integral reparation' (*restitutio in integrum*) entails the re-establishment of the previous situation and the elimination of the effects produced by the violation, as well as the payment of compensation for the damage caused. However, bearing in mind the context of structural discrimination in which the facts of this case occurred, which was acknowledged by the State (supra paras. 129 and 152), the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable. Similarly, the Tribunal recalls that the nature and amount of the reparations ordered depend on the characteristics of the violation and on the pecuniary and non-pecuniary damage caused. Reparations should not make the victims or their next of kin either richer or poorer and they should be directly proportionate

[111] Cottonfield, supra note 97, para 450.
[112] Ibid, para 541.

> to the violations that have been declared. One or more measures can repair a specific damage, without this being considered double reparation.[113]

It also orders educational programs from a gender perspective for the population at large with the aim of transforming the 'culture' of discrimination against women.[114]

By aiming to integrate women in criminal investigations, the Court adopts a 'women approach' that focuses on women as a disadvantaged group. The Court argues that gender equality must be guaranteed by eliminating risk factors and strengthening institutional response when cases of violence against women occur.[115] The 'women approach' is well-suited to make women visible in criminal investigations, but it does not allow an in-depth transformation of the gender-blind legal institutions that reproduce discrimination against women.[116] It modifies the tip of the iceberg, but it does not attack the causes of gender violence.

On the other hand, *Cottonfield* adopts an essentialist approach and considers the victims only as women. By failing to undertake an 'intersectionality approach', it ignores that the victims were indigenous women working in the *maquilas*. By ignoring the intersection of gender discrimination with other grounds of discrimination, the non-repetition measures do not consider the relevance of the intersection of gender with ethnicity, poverty, and labor exploitation in the *maquilas* as determining factors of the special vulnerability of the victims.[117] *Cottonfield* therefore leaves out the multiple

[113] Ibid, para 450.
[114] Ibid, para 543.
[115] Cottonfield, supra note 97, para 258. See also Favela Nova Brasília v Brazil, para 243; V.R.P., V.P.C. et al v Nicaragua, para 153.
[116] Kantola and Lombardo, supra note 29; Sandra Fredman 'Substantive Equality Revisited' (2016) 14 International Journal of Constitutional Law 712, p 722.
[117] Laura Clérico and Celeste Novelli, 'La inclusión de la cuestión social en la perspectiva de género: notas para re-escribir el caso Campo Algodonero sobre violencia de género' (2016) 67 Revista de Ciencias Sociales 453.

and interconnected forms of discrimination of indigenous *maquila* worker women that suffered violence.[118]

Despite having adopted a 'gender approach' in the interpretation of the facts, the IACtHR does not address the legal and institutional norms that produce unequal access for women to goods, rights, and opportunities. It also ignores that the law and public policies perpetuate and reinforce existing social disadvantages. *Cottonfield* identifies training for institutional actors and education for the population at large as the only measures to transform the structural dimension of discrimination. By reducing the ordered legal reforms to criminal investigations, the Court misses a key opportunity to indicate legal reforms required to eradicate the structural gender discrimination that causes gender violence.[119]

To pursue this goal, the IACtHR should have identified the legal and institutional reforms required. Since the Court's interpretation of the facts relies on the 2006 CEDAW Committee's report on Mexico, it could have followed the CEDAW report also when ordering the legal and institutional reforms required to eliminate all forms of discrimination against women in Mexico. The CEDAW Committee indicates several measures to be adopted, including the coordination of States of the Republic of Mexico to adopt law and policies on gender equality by amending existing laws to make effective the access to human rights by women. Such measures can include increasing the number of women in managerial positions and establishing mechanisms to ensure women's access to basic education and health services.[120] These

[118] Kimberlé Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 Tulsa Law Review 151, p 158.

[119] Rubio-Marín and Sandoval, supra note 15.

[120] See Recommendation 27: 'The Committee calls on the State party to give priority to women in its poverty eradication strategy, with special attention to women in rural and indigenous areas; in this context, measures and specific programmes should be adopted to ensure that women fully enjoy their rights on an equal footing in the areas of education, employment and health, with special emphasis

measures can satisfy women's basic needs by allowing them to participate on equal footing in decision-making concerning the labor rights of women in the *maquila* industry (or duty-free factory); and through protecting women from all forms of discrimination, particularly indigenous women in rural areas.

2. *Atala Riffo and Daughters v. Chile*

The Inter-American Court of Human Rights considers *Atala Riffo*[121] a leading case on LGBTI rights.[122] The case is pioneer because it considers gender and sexual orientation as discriminatory social structures. The Court reviewed the decision of the Chilean justice system to grant custody of Karen Atala's daughters to their father, because of her homosexuality. Upon separation from her husband, the couple had agreed that the applicant should maintain custody over their three daughters. When she declared to be engaged in a same-sex relationship, however, the Chilean court withdrew custody, supposedly to prevent risks to her daughters' physical and emotional development stemming from her sexual orientation.[123]

Following its established jurisprudence, the IACtHR reiterates the States' obligation to abstain from actions that directly or indirectly aim at

on joint work with non-governmental organizations and on women's participation not only as beneficiaries, but also as agents of change in the development process'. CEDAW Committee, 'Consideration of reports submitted by States Parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women. Sixth periodic report of States parties: Mexico, CEDAW/C/MEX/6 (OHCHR 2006) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW percent2FC percent2FMEX percent2F6&Lang=en> accessed August 1st, 2023.

[121] Atala Riffo and Daughters v Chile, Merits, Reparations and Costs, judgment of February 24th, 2012, series C n. 239.

[122] IACtHR, supra note 98.

[123] The Inter-American Court declares violations of Art. 8.1 (Judicial Guarantees), 11.2 (Protection of Honor and Dignity), 17.1 (Protection of the Family), 19 (Rights of the Child) and 24 (Equality Before the Law) in relation to Article 1.1. of the IACtHR.

generating situations of discrimination, including on the ground of sexual orientation.[124] The Court argues that the expression 'any other social condition' contained in Article 1(1) of the Convention should be interpreted in light of the evolution of contemporary international law.[125] It builds upon numerous resolutions of the General Assembly of the Organization of American States aimed at protecting against discriminatory treatments based on sexual orientation and gender identity.[126] The Inter-American Court also considers that 'requiring the mother to limit her lifestyle options implies using a traditional concept of women's social role as mothers'.[127] *Atala Riffo* adopts a 'gender approach' when identifying the human rights violation at stake. It recognizes gender as a discriminatory social construction and points to the stereotypes that determine the assignment of gender roles in care responsibilities as its cause. It also relies on an 'intersectionality approach' when referring to age, sexual orientation and gender identity, among others.[128] The Court quotes the CEDAW Committee General Recommendation n. 28 mentioning that 'the discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste, sexual orientation and gender identity'[129]. By referring to CEDAW Committee's inclusion of sexual orientation into the prohibited categories for discrimination, the IACtHR aligns with CEDAW in recognizing that gender discrimination may affect women differently. As a result, states must legally recognize such intersecting forms of discrimination and their

[124] See Advisory Opinion AO-24/17 of November 24th, 2017.

[125] Atala Riffo, supra note 121, para 85.

[126] Ibid, para 86. The Court also refers to decisions by the European Court of Human Rights; the resolutions of the Universal Human Rights System; and the Committee on Economic, Social, and Cultural Rights, which classified sexual orientation as one of the prohibited categories of discrimination

[127] Atala Riffo, supra note 121, para 140.

[128] CEDAW Committee, General Recommendation No. 27 on older women and protection of their human rights, para 13.

[129] Atala Riffo, supra note 121, para 89.

compounded negative impact pursuing policies and programs designed to eliminate them.[130]

When issuing reparation measures, *Atala Riffo* elaborates further the concept of 'comprehensive reparation', explaining that reparations must produce both restorative and corrective effects to promote structural changes,[131] providing State compensation for damages and adopting effective guarantees of non-repetition. Seeking to transform the social structure that produce LGBTI discrimination, the Court ordered non-repetition measures that include training courses on i) human rights, sexual orientation, and non-discrimination, ii) the protection of the LGBTI rights, and iii) the elimination of homophobic stereotypes. The training courses target public officials at the regional and national levels and, particularly, judicial officials of all areas and levels of the judicial branches.[132]

Although the IACtHR relies on a 'gender approach' in the identification of the violation, when issuing the non-repetition measures, it focuses on the disadvantaged group and fails to recognize that the interconnected discriminatory social structures are reproduced and maintained through legal institutions. Similarly, to *Cottonfield*, *Atala Riffo* also fails to identify the need to reform the legal and institutional framework that sustains gender subordination on the basis of gender and LGBTI stereotypes. Among the non-repetition measures, the IACtHR ordered Chile to implement training courses to sensitize the public institution personnel towards the LGBTI rights and to include the LGBTI collective in the existing institutions –that have traditionally been exclusionary– but leaves those institutions unaltered. Non-repetition measures also ignore the interconnection of gender, motherhood and sexual orientation. The 'intersectionality approach' is missing from the non-repetition measures because they leave out of the scope those who suffer interconnected forms of discrimination and, because

[130] CEDAW Committee, supra note 84, para 18.
[131] Atala Riffo, supra note 121, para 267.
[132] Ibid, para 271.

of that, fall into the cracks of the institutional organization.[133] An 'intersectional approach' could have helped the Court to consider the combined effects of intersecting discriminations and advance, in a substantive way, towards the transformation of structural discriminations.

In line with our previous argumentation, we argue that the IACtHR should rely on the reports offered by the CEDAW as tools to identify the legal and institutional reforms required to eliminate gender discrimination at the intersection of other forms of discrimination. The 2012 recommendation of the CEDAW Committee to Chile could have helped to identify the structural reforms needed. In this report, Chile was called upon to adopt a comprehensive strategy targeting women, men, girls, and boys to overcome the 'machismo culture' and discriminatory stereotypes regarding the roles and responsibilities of women and men in the family and in society, reforming legislation on sexual health, equal pay and pension, and matrimonial property.[134] It also recommended addressing intersecting forms of discrimination affecting women with disabilities, indigenous women, afro-descent and migrant women as well as lesbian, bisexual, transgender, and intersex women.[135] In this decision, the Court missed a key opportunity to transform the interconnected structures of discrimination and advance toward substantive equality. Firstly, the Court failed to order reforms of legislative and institutional frameworks maintaining the sexual division of labor, care, and the essentialized view of motherhood. Secondly, the Court ignored the intersection of gender discrimination with homophobia and LGBTI stereotypes.

[133] Kimberlé Crenshaw, 'Close Encounters of Three Kinds: On Teaching Dominance Feminism and Intersectionality' (2010) 46 Tulsa Law Review 151, p 158.

[134] CEDAW Committee, 'Concluding observations of the Committee on the Elimination of Discrimination against Women: Chile, CEDAW/C/CHL/CO/5-6' (OHCHR 2012) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW percent2FC percent2FCHL percent2FCO percent2F5-6&Lang=es> accessed August 1st, 2023.

[135] Ibid.

3. *Gonzales Lluy et al. v. Ecuador*

Gonzales Lluy[136] is pioneer because it is the first IACtHR case that explicitly incorporates an 'intersectionality approach'.[137] It is the first IACtHR decision that considers gender at the intersection with other grounds of discrimination. The case concerns the negligent HIV transmission to a three-year-old girl, Talía Gabriela Gonzales Lluy. The rights violated were both directly linked to HIV as well as to the discrimination of her family members at the workplace and in the neighborhood. They were forced to move from one place to another because of prejudices around HIV. Despite the specific situation of vulnerability related to the state of despair, uncertainty, and insecurity for the entire family, Ecuador did not adopt any measure to guarantee the applicant and her family's rights and prevent discrimination. The IACtHR found Ecuador responsible for violations of the right to life, personal integrity, and health through failure to regulate, monitor, and supervise the provision of services in private health centers, the right to education, and the right to fair trial.

Although living with HIV is not a disability *per se*, the circumstances surrounding the applicant and her family placed them in a situation of

[136] Gonzales Lluy et al v Ecuador, Preliminary Objections, Merits, Reparations and Costs, judgment of September 1st, 2015, series C n. 298.

[137] Although without explicitly referring to the concept of intersectionality, since 2010 the Inter-American Court gradually developed an 'intersectionality approach' in several cases in which it recognizes the specific obstacles faced by indigenous women in access and enjoyment of human rights and, specifically, in cases of gender violence, such as Fernández Ortega et al v Mexico (2010), Para 78; Rosendo Cantú et al v Mexico (2010), para 185; Xákmok Kásek Indigenous Community v Paraguay (2010), paras 152, 233, and 234; Gelman v Uruguay (2011), paras 1, 97-98, 149, and 153; Río Negro Massacres v Guatemala (2012), para 59; Ramírez Escobar et al v Guatemala (2018) para 276; Manuela et al v El Salvador (2021), para 253; Digna Ochoa and family members v Mexico (2021), para 101. See Clérico and Novelli, supra note 16; Magdalena M. Martín Martínez, 'La discriminación interseccional en la jurisprudencia de los tribunales internacionales y su relación con los delitos de odio' in Patricia Laurenzo Copello and Alberto Daunis Rodriguez (eds) Odio, prejuicios y Derechos Humanos (Comares 2021).

vulnerability according to the Convention on the Rights of Persons with Disabilities. The Court argues that the applicant experienced intersectional discrimination for being female, HIV positive, a minor, and poor in a situation of disability.[138] These intersecting factors situated the entire family in a situation of special vulnerability that resulted in a specific form of discrimination. *Gonzales Lluy* argues that if one of those factors had not existed, the discrimination suffered by the applicant would have been different. The Court relies on the idea that HIV-related stigmatization does not affect everyone in the same way, but impacts members of vulnerable groups more severely. The IACtHR affirms that, PDD 'poverty had an impact on the initial access to health care that was not of the best quality and that, to the contrary, resulted in the infection with HIV'.[139] Poverty also reinforced barriers to access the education system and to conduct a decent life. The obstacles that the applicant suffered in accessing education and appropriate counseling regarding safe sexual relationships and maternity had a negative impact on her overall development.

In the interpretations of facts, *Atala Riffo* explicitly uses an 'intersectionality approach' that recognizes the intersection of different grounds of discrimination that produced the specific rights violations experienced by the applicant. According to the judge Ferrer Mac-Gregor Poisot, the concept of intersectionality allowed the Court to expand the Inter-American jurisprudence on the scope of the principle of non-discrimination and understand the composite nature of the causes of discrimination.[140] *Gonzales LLuy* is not an isolated case in the Inter-American jurisprudence. Since 2015, the IACtHR has referred explicitly to intersectionality as an interpretative criterion in: *I.V. v Bolivia,*[141] *Ramírez Escobar et al v Guatemala,*[142] *V.R.P.,*

[138] Gonzales Lluy et al, supra note 136, para 238.
[139] Ibid, para 290.
[140] Concurring opinion of judge Eduardo Ferrer Mac-Gregor Poisot, para 7.
[141] I.V. v Bolivia, Preliminary objections, Merits, Reparations and Costs, judgment of November 30th, 2016, series C n. 329.
[142] Ramírez Escobar et al v Guatemala, Merits, Reparations and Costs, judgment of March 9th, 2018, serie C n. 351.

V.P.C. et al v Nicaragua,[143] *Cuscul Pivaral et al v Guatemala,*[144] *Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v Brazil*,[145] *Guzmán Albarracín et al v Ecuador*,[146] *Manuela et al v El Salvador*,[147] *Digna Ochoa and family members v México*,[148] and *Bedoya Lima et al v Colombia*.[149] This is contrasted by the jurisprudence of the ECtHR which has adopted intersectionality only in one case so far.[150]

With regards to reparation, the Court ordered Ecuador to adopt a program for training health practitioners to prevent or reverse the situations of discrimination suffered by persons with HIV, particularly minors.[151] Despite having adopted an 'intersectionality approach' in the interpretation of the facts, the IACtHR focused only on one disadvantaged group, people living with HIV, when issuing the non-repetition measures, thus leaving unaddressed the intersections with gender, poverty, and disability. The Court ordered Ecuador to provide training only for professionals in the health sector and not in the education and judicial sectors.[152] Tackling these other sectors would have enabled the State to address the intersection of the rights to life, health, education, housing, education, and fair trial as

[143] V.R.P., V.P.C. et al v Nicaragua, Preliminary objections, Merits, Reparations and Costs, judgment of March 8th, 2018, serie C n. 350.

[144] Cuscul Pivaral et al. v. Guatemala, Preliminary objection, Merits, Reparations and Costs, judgment of August 23rd, 2018, serie C n. 359.

[145] Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v Brazil, Preliminary objections, merits, reparations and costs), judgment of July 15th, 2020, serie C n. 407.

[146] Guzmán Albarracín et al v Ecuador, Merits, Reparations and Costs, judgment of June 24th, 2020, serie C n. 405.

[147] Manuela et al v El Salvador, Preliminary objections, Merits, Reparations and Costs, judgment of November 2nd, 2021, serie C n. 441.

[148] Digna Ochoa and family members v Mexico, Preliminary objections, Merits, Reparations and Costs, judgment of November 25th, 2021, serie C n. 447.

[149] Bedoya Lima et al. v. Colombia, Merits, Reparations and Costs, judgment of August 26th, 2021, serie C n. 431.

[150] La Barbera and Cruells, supra note 81.

[151] Gonzales Lluy et al, supra note 136, para 386.

[152] Gonzales Lluy et al, supra note 136, para 378.

interdependent violations and provide a more effective guarantee of non-repetition. In *Gonzales Lluy* the 'intersectionality approach', in practice thus ended up reduced to 'multiple discriminations' that were segmented and treated separately.

To continue progressing towards substantive equality, international courts should issue non-repetition measures that address all the rights at stake and their intersection when they identify structural gender discrimination at the intersection with other grounds of discrimination. The CEDAW Committee's reports indicate the reforms required to make progress to eliminate gender discrimination. In its 2015 report on Ecuador, the CEDAW Committee recommended to expand the visibility of and knowledge about CEDAW among public institutions personnel to accelerate the application of laws aimed at eliminating discrimination against women and to develop a broad strategy to eliminate stereotypical patriarchal attitudes.[153] It also recommended to reinforce training on gender equality of media professionals. The CEDAW Committee called upon Ecuador to adopt measures to increase women's participation in elections and in public life, especially indigenous and Afro-Ecuadorian women; to promote women's access to formal employment; to decriminalize abortion and adopt a bill on intercultural practice in the national health system.[154] Given that the Inter-American Court recognized that living with HIV had a particularly negative impact on Talía Gonzales Lluy because she is a woman, it should have ordered structural reforms in Ecuador to eliminate gender discrimination at the intersection with other grounds of discrimination.

[153] CEDAW Committee, 'Concluding observations on the combined eighth and ninth periodic reports of Ecuador, CEDAW/C/ECU/CO/8-9/' (OHCHR 2015) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW percent2FC percent2FECU percent2FCO percent2F8-9&Lang=en> accessed August 1st, 2023.

[154] Ibid.

IV. Conclusions

The IACtHR is leading international jurisprudence on transformative reparations with corrective and not just restorative purposes, arguing that reparations must guarantee non-repetition. Our study contributes to the debate on transformative reparations of international human rights courts from a feminist perspective. Its novelty is linked to the analysis of the polysemy of gender discrimination in the interpretation of the facts and in reparations and non-repetition measures.

Our analysis shows that the IACtHR relies on sophisticated interpretations of gender discrimination based on the 'women', 'gender' and 'intersectionality' approaches. Its jurisprudence identifies the human rights violations at stake as manifestations of gender structural discrimination at the intersection with other grounds of discrimination. Specifically, *Cottonfield* includes for the first time the diagnosis of structural gender discrimination as the cause of deadly violence. *Atala Riffo* makes explicit the interconnection of gender and sexual orientation as discriminatory social structures that caused the violations of the applicant's human rights, and *Gonzales Lluy* explicitly recognized that the intersection of gender with other factors of discrimination was the source of the specific vulnerability of the victim. In the last decades, the Inter-American Court has played a key role in advancing towards gender equality in the American region and its work is a model for other international courts.

Our analysis also shows that the Inter-American Court of Human Rights does not use the same meaning of gender discrimination when interpreting the facts and when issuing reparations. In the identification of violations, the IACtHR refers not only to the disadvantaged group but also to the structural and, more recently, to the intersectional dimension of gender discrimination. Yet, when ordering measures to eliminate gender discrimination, the Court does not address all the legal and institutional reforms required to change the gendered status quo. Despite its enormous advancements, the concept of structural discrimination that the Court relies

on impairs the transformative effects of its non-repetition measures. Because the Inter-American Court of Human Rights considers gender as a social structure independent of the legal and institutional order, it orders respondent States to provide training courses and educational programs rather than legal and institutional reforms.[155] Moreover, the non-repetition measures consider gender in isolation, leaving unaltered the cracks of the legal systems through which the victims of intersecting discrimination fall.

Identifying structural gender inequality as the cause of gender discrimination and violence requires recognizing that gender-blind social and legal norms sustain discrimination. If these norms are not reformed or eliminated, discrimination will perdure. When identifying gender discrimination as the cause of human rights violations, international human rights courts should urge respondent States to comply with the requirements of the CEDAW Committee in their periodic country reports. These reports provide comprehensive guides to overcoming structural gender discrimination in each country. We align with scholars arguing that, when causes of discrimination are systemic, seeking structural transformation is not only a legitimate but a necessary task for an international human rights tribunal.[156] Moreover, non-repetition measures have to include legislative and institutional reforms to guarantee the elimination of the structural problems that the Court has recognized as the cause of the violation.

Since gender equality is one of the Sustainable Development Goals (SDGs) that the UN seeks to achieve before the end of the decade, all efforts should be made to eliminate structural discrimination in all the spheres identified by the CEDAW. Progress in this direction signifies not only wellbeing for women but for the society as a whole. Relying on the work of other human

[155] Isabel Wences and MariaCaterina La Barbera, 'Entrevista a Humberto Sierra Porto, juez de la Corte Interamericana de Derechos Humanos' (2020) 17 Andamios: Revista de Investigación Social 197, p 209.

[156] Ruth Rubio-Marín and Clara Sandoval, 'Engendering the reparations jurisprudence of the Inter-American court of human rights: The promise of the cotton field judgment' (2011) 33 Human Rights Quarterly 1062, p 1091.

rights bodies, international courts could foster the coherence of the international human right legal framework and the institutional cooperation among human rights bodies to jointly advance towards the social and institutional transformation foreseen by the 2030 Agenda.