

perspectives have been considered in the present case, divisions along seemingly political lines may threaten the Court's legitimacy.

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doi:10.1017/ajil.2022.14

Peruvian Constitutional Tribunal—women's right to live free from violence—international (human rights) law—inter-American human rights system—relationship between international and domestic law

FILE 03378-2019-PA/TC. At <https://tc.gob.pe/jurisprudencia/2020/03378-2019-AA.pdf>. Peruvian Constitutional Tribunal, March 5, 2020

On March 5, 2020, the Peruvian Constitutional Tribunal (PCT or Tribunal) unanimously rejected the writ of *amparo* (a procedure for protecting constitutional rights) filed by Jorge Guillermo Colonia Balarezo (petitioner). The Tribunal found that a woman's right to live free from violence justifies limiting an aggressor's right to a hearing in certain contexts—here concerning judicial measures to protect women's physical and psychological integrity. In reaching this conclusion, the PCT relied on and contributed to the development of international law regarding the right of women to live free from violence.

On October 24, 2018, María Luis Paredes Tambra accused the petitioner of psychological violence against her before a family court. The Tribunal ordered protective measures without affording the petitioner a hearing. The measures were subsequently ratified by the High Court (p. 1). On April 1, 2019, the High Court rejected the petitioner's *amparo* which alleged that these judicial decisions violated his right to a hearing (pp. 1–2). The petitioner then filed an *amparo*, on the same grounds, before the PCT on July 24, 2019 (*id.*).

The PCT first examined the *amparo* for admissibility (paras. 4–13). The High Court had declared the request for the writ to be inadmissible *in limine* because, in its view, the petition seemingly did not relate to a constitutional matter concerning human rights (para. 5). Relying on international human rights law, the PCT overruled this finding. It emphasized the need to consider Article 8(1) of the American Convention on Human Rights (ACHR), which recognizes everyone's "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in . . . any accusation of a criminal nature made against him" or to determine "his rights and obligations of . . . any . . . nature" (para. 6). The PCT concluded that the *in limine* inadmissibility of the *amparo* was unjustified because the right to a hearing *prima facie* guarantees the right to be heard in any judicial process that determines rights or obligations (para. 7).

The PCT then confronted the core question of the *amparo* on the merits: whether measures to protect a woman who is a victim of violence can breach the right to a hearing of the petitioner who is accused of being the aggressor (paras. 14–93). First, the PCT examined the non-derogable content of the right to a hearing (paras. 14–18). Quoting Article 8(1) of the

ACHR, the PCT found that the right to a hearing guarantees that everyone who participates in a judicial process is not defenseless (paras. 16–17). The right is not limited to criminal or judicial processes but applies to any proceeding in which individuals' rights and obligations are decided (para. 17). Accordingly, it determined that the right to a fair hearing also applies to special processes such as protective measures in cases of violence against women (para. 18). The Tribunal then examined whether the protective measures for the female victim were *prima facie* consistent with the petitioner's right to a hearing (paras. 19–30). In this case, such measures prohibited the petitioner from communicating, approaching, and verbally or physically mistreating the victim (para. 24). They were granted without hearing him because the case was considered to be high-risk for Paredes Tambra (*id.*). The PCT found that these measures do not *prima facie* affect the non-derogable content of the right to a fair hearing because: they are temporary and urgent; they protect the female victim's physical and mental integrity; and the petitioner can exercise his right to a hearing later in the proceedings (para. 29).

Second, the PCT examined the justification for issuing protective measures for the female victim without having heard the accused aggressor (paras. 31–93). It found that women's right to live free from any kind of violence justifies such a practice (paras. 31–32). This right is not subsumed into another human right, it is enshrined at the highest level in Peru's legal system, and its contents interact with the rights to life, personal integrity, free development, and equality of every person, all of—which is especially pressing due to Peru's context of generalized violence against women (para. 35).

After reviewing international law sources, the PCT determined that the non-derogable core of a woman's right to live free from violence involves four aspects: (1) not being subject to state or private actions that may cause death or may inflict physical, sexual, or psychological harm; (2) not being the victim of rape, sexual abuse, torture, human trafficking, forced prostitution, and sexual harassment at work or elsewhere; (3) not being discriminated against, especially on grounds of sex; and (4) being considered and educated without stereotypes or sociocultural practices of inferiority or subordination (para. 36).

In identifying the content of this right, the PCT considered that the human rights in the Peruvian Constitution must be interpreted and applied in accordance with the Universal Declaration of Human Rights and applicable international treaties ratified by Peru (para. 37).¹ The Tribunal specifically found that a woman's right to live free from violence became a human right in Peru's legal system upon its recognition in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, also known as the Belém do Pará Convention (*id.*). The PCT quoted Article 3 of this Convention, which establishes that: "Every woman has the right to be free from violence in both the public and private spheres" (*id.*). The PCT added that this right was legislatively developed in Article 9 of the 2015 Act on Prevention, Punishment and Eradication of Violence against Women and Family Members (Act 30364) (*id.*). The PCT also considered that women's right to live free from violence can interfere with the right to a hearing when judges issue protective measures without participation by the aggressor (para. 38).

In finding a conflict between these basic rights, the PCT first examined the situation of violence against women in Peru by analyzing, *inter alia*, the legal framework. The PCT highlighted

¹ Peru's Constitution (Fourth and Final Transitory Provision) also prescribes this.

that Peru ratified the Belém do Pará Convention, and quoted Article 1 of this Convention under which “violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere” (para. 53). It remarked that Article 5 of Act 30364 incorporates this definition of violence against women (*id.*). The PCT also quoted the Peruvian Ministry for Women and Vulnerable Population’s definition of gender violence, which is based on Article 1 of the Convention and the Inter-American Court of Human Rights (IACtHR)’s judgment in *González et al. v. Mexico* (“*Cotton Field*”)² (para. 55). Thus, the PCT understood gender violence as: (1) actions based on gender and aggravated with discrimination on diverse grounds (race, class, age, ethnicity, sexual identity, etc.) that cause death or sexual, physical or psychological harm in public or private spheres; and (2) violence in a context of systemic discrimination against women and linked to sociocultural structures that subordinate and treat women as inferior beings while men have power and supremacy (*id.*).

Subsequently, the PCT invoked a definition of femicide of the Office of the UN High Commissioner for Human Rights (OHCHR),³ which states that this crime: (1) consists of the violent killings of women and shows a special motivation or a context of violence and discrimination on gender grounds; (2) perpetuates cultural roles associated with women, namely, subordination, weakness, sentimentalism, fragility, and femininity; and (3) reinforces structural discrimination against women (para. 71). Under the OHCHR’s approach, the PCT added that femicide constitutes a discriminatory act against female victims (para. 72). It also invoked the definition given in General Recommendation No. 19 (Violence Against Women) of the Committee on the Elimination of Discrimination Against Women⁴ (*id.*). The Tribunal noted that the Committee considered that discrimination against women includes violence against them because the victims are women or women are affected disproportionately, and such violence seriously inhibits the exercise of women’s rights and freedoms on a basis of equality with men (*id.*). The PCT remarked that the IACtHR in *Cotton Field*⁵ adopted these criteria (*id.*).

Next, the PCT examined the state’s main actions to fight violence against women (paras. 77–89). It found that Peru adopted specialized legislation and designed public policies to recognize and protect women’s rights and combat violence and discrimination against women (para. 78). The Tribunal noted that Peru had ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Belém do Pará Convention (para. 79). Under Article 55 of Peru’s Constitution, treaties ratified by the state and in force are part of national law (*id.*). The PCT also found that these two treaties are interpretative standards in Peru’s legal system (*id.*). It noted that the Peruvian judiciary had issued binding decisions to protect women’s rights and contribute to preventing violence against women, particularly the Peruvian Supreme Court’s binding plenary agreements⁶ on femicide,

² *González et al. v. Mexico* (“*Cotton Field*”), Preliminary Objection, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 205 (Nov. 16, 2009).

³ OHCHR, Modelo de protocolo latinoamericano de investigación de las muertes violentas de mujeres por razones de género (femicidio/feminicidio), 35–36 (2012).

⁴ Committee on the Elimination of Discrimination Against Women, General Recommendation 19: Violence Against Women, paras. 1, 6, UN Doc. A/47/38 (1992).

⁵ *Cotton Field*, *supra* note 2, para. 395.

⁶ These are the Supreme Court’s judicial standards concerning a topic and which are adopted for a more consistent development of case law.

physical/psychological injuries, and crimes of violence against women adopted in 2017 (para. 87). The PCT added that the Inter-American Commission on Human Rights has identified these plenary agreements to be good practices on protection of women, integral prevention of violence against women, and women's access to justice in cases of violence against them (*id.*).⁷

Finally, the PCT examined the proportionality of the interference with the aggressor's right to a hearing resulting from the above-mentioned protective measures (paras. 90–93). It considered that women's right to live free from violence is extremely important, which justifies protective measures to protect that right (para. 93). The Tribunal then found that the interference with the right to a hearing resulting from temporary judicial protective measures is relatively minor when compared to the full realization of a life free of violence and, thus, the interference is neither disproportional nor unreasonable (*id.*). Therefore, the PCT rejected the *amparo*.

In his concurring opinion, PCT Judge Espinosa-Saldaña strongly emphasized the autonomous nature of a woman's right to live free from violence (para. 7). According to him, this right is neither new nor implicit because it is recognized in the Belém do Pará Convention, which Peru ratified and hence has full force in Peru's legal system (*id.*). As a result, there is no need to rely on the interrelationship among the rights to life, personal integrity, free development, and equality (para. 8). In justifying the autonomy of the right of women to be free from violence, Judge Espinosa-Saldaña invoked the so-called *convencionalización* of law (para. 9).⁸ This involves the incorporation and systematization of contributions from supranational normative provisions and supranational jurisprudence, which are part of Peru's legal order and must be understood as *jus commune* including *jus cogens* norms, especially concerning human rights protection (*id.*). Finally, he stated that *convencionalización* does not mean that national legal sources are eliminated or ignored but that these sources must be interpreted within a multi-level system to enhance and enrich them (*id.*).

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The PCT's decision and Judge Espinosa-Saldaña's concurrence are important for several reasons. First, the Tribunal explicitly recognizes a woman's right to live free from violence in a domestic legal system, drawing from international human rights law. Indeed, Peru's Constitution does not list such right. Yet, according to the Tribunal, the right enters the Peruvian legal order directly. Still, in practice this process is never automatic. Even in monist states, such as Peru, the PCT's decision illustrates the need for national jurisprudence to fully incorporate and develop internationally recognized human rights in the national level. Drawing on international law sources, the Tribunal for the first time clearly and painstakingly recognized the existence of a woman's right to live free from violence *and* that this right is not subsumed into another human right. The concurring opinion further emphasized the autonomous character of the right.

Overall, these findings are consistent with international law, and especially human rights law. The Inter-American Convention on the Prevention, Punishment, and Eradication of

⁷ *Violencia y discriminación contra mujeres, niñas y adolescentes: Buenas prácticas y desafíos en América Latina y en el Caribe*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II. Doc.233/19 (Nov. 14, 2019).

⁸ This concept means that national laws/judicial decisions need to be consistent with international law, particularly the ACHR/IACtHR's jurisprudence in Latin America. See, e.g., Eduardo Ferrer Mac-Gregor, *Conventionality Control the New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93 (2015).

Violence Against Women, the IACtHR,⁹ and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence have explicitly recognized a woman's right to live free from violence as a freestanding right. Although UN human rights treaties do not explicitly list this right, the CEDAW Committee has examined rights affected by violence against women.¹⁰ Furthermore, the UN special rapporteur on violence against women remarked that a life free of violence is a right.¹¹ Commentators also recognize this as a freestanding right and/or derived from other rights.¹²

Notably, the PCT found that the right to be free from violence holds a constitutional (not only statutory) status in Peru. In its view, incorporation of this right from the Belém do Pará Convention enshrined it in Peru at the highest national normative level. Furthermore, the manner in which the PCT recognized and discussed a woman's right to live free from violence can substantially contribute to the right's effective exercise. The Tribunal considered it to be no mere "formality" in domestic law, but rather a justiciable and self-executing right. This is consistent with international standards,¹³ and especially welcome in a country where violence against women is widespread and systemic.

Second, the PCT fleshed out the *contents* of a woman's right to live free from violence, again by largely relying on diverse international human rights law sources. However, the Tribunal should have better systematized the international sources, taking into account their binding or soft law nature, the respective supranational system (UN or Inter-American), and their more general or specific scope. Such breadth of sources enabled the PCT to consider substantive and procedural aspects of the contents of women's right to live free from violence as well as related state actions and international obligations. Nevertheless, the PCT should have better delimited state obligations that involve or require *immediate* actions from state obligations related to *progressive* realization measures in line with the Belém do Pará Convention, which requires both types of measures under Articles 7 and 8, respectively. By not systematizing these sources formally, the judges arguably accrued to themselves a rather healthy bit of discretion, which was useful to jurisprudentially delimit the woman's right to a life free from violence, flesh out the contents thereof, and determine resulting state obligations.

What the PCT called the non-derogable core of a woman's right to live free from violence is generally consistent with international standards.¹⁴ Yet, the PCT framed this content in perhaps an overly static manner. It would have been preferable to use more open-ended language

⁹ *Cotton Field*, *supra* note 2, para. 394.

¹⁰ General Recommendation 19, *supra* note 4, para. 7.

¹¹ Report by the Special Rapporteur on Violence Against Women, 15 Years of the United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences (1994–2009), 35 (2009).

¹² See Christine Chinkin, *Violence Against Women: The International Legal Response*, 3 GENDER & DEV. 23 (1995); Alda-Maria Sousa-Gant, *Domestic Violence Against Women as a Human Right Violation*, 3 REVISTA DO INSTITUTO BRASILEIRO DE DIREITOS HUMANOS 9 (2002); Beate Rudolf & Andrea Eriksson, *Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, 5 INT'L J. CONST. L. 507 (2007); ALICE EDWARDS, *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW* (2010); INTERNATIONAL LAW AND VIOLENCE AGAINST WOMEN: EUROPE AND THE ISTANBUL CONVENTION (Johanna Niemi, Lourdes Peroni & Vladislava Stoyanova eds., 2020).

¹³ See Belém do Pará Convention, Arts. 7, 12; General Recommendation 19, *supra* note 4, para. 24; Chinkin, *supra* note 12, at 25–28; EDWARDS, *supra* note 12, at 1–35, 88–343; Sousa-Gant, *supra* note 12, at 15–21.

¹⁴ See Belém do Pará Convention, Arts. 3–6; General Recommendation 19, *supra* note 4, paras. 6–8; Chinkin, *supra* note 12, at 25–28; EDWARDS, *supra* note 12, at 1–35, 140–343; Sousa-Gant, *supra* note 12, at 19–21.

to encourage evolutive or dynamic interpretations of international and domestic law,¹⁵ which are necessary to better address ever-changing social phenomena like violence against women. For example, although the PCT listed some sexual violence attacks explicitly mentioned in the Belém do Pará Convention (Article 2(b)), it worded them in an exhaustive rather than illustrative manner. Thus, the Tribunal omitted other serious sexual attacks against women, such as slavery, forced pregnancy, and enforced sterilization, listed in the Statute of the International Criminal Court¹⁶ (to which Peru is a party), as well as forced marriage and female circumcision listed in the CEDAW Committee's general recommendations.¹⁷ Overall, the Tribunal's approach may still be open enough to evolutive or dynamic interpretation, which it (and other Peruvian courts) should apply in future jurisprudence on violence against women. Yet, the Tribunal ideally should not have left this matter partially in doubt.

Third, the PCT refrained from looking to international sources on the meta-question of how to manage conflicts of rights from a broader array of fields, including not only international human rights law but also international and comparative criminal law. The Tribunal invoked international law sources to conduct an appropriate balancing assessment between seemingly conflicting human rights: women's right to live free from violence and the aggressor's right to a hearing. Article 8(1) of the ACHR was key for the PCT's determination of the core contents of the right to a fair hearing and the application of such right to special proceedings on judicial protective measures for female victims. Thus, it found the *amparo* admissible. On the merits, the PCT invoked various sources of international human rights law to find that the ordered protective measures were proportional and justified. Reliance on international law thus enabled the PCT to conclude that an interference with the aggressor's right to a hearing is valid if such interference does not affect core contents of this right under the ACHR and because protective measures are necessary to safeguard women's right to live free from violence. Although the PCT overall achieved a sound balance between those conflicting rights, it should have also considered international law sources that more specifically deal with (potential) conflicts of rights in the particular context of violence against women and/or related to criminal proceedings. Certain additional human rights sources¹⁸ and international criminal law sources¹⁹ are useful to further justify or explore manners to balance aggressors' rights and female victims' rights in legal proceedings concerning violence against women. The outcome likely would have been the same. However, consideration of a wider array of sources is advisable not only as a matter of an intellectual exercise but also (and more importantly) in terms of alternative or cumulative protective measures for female victims of violence as well as full consistency with the highest international standards on the rights of the suspects and accused persons.

¹⁵ Rudolf and Eriksson, *supra* note 12, at 523–24.

¹⁶ Rome Statute of the International Criminal Court, Arts. 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), July 17, 1998.

¹⁷ General Recommendation 19, *supra* note 4, para. 11.

¹⁸ *E.g.*, Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3, CAT/C/GC/3 (Dec. 13, 2012); Gutiérrez-Soler v. Colombia, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 132, paras. 109–10 (Sept. 12, 2005); Istanbul Protocol, UN Doc. HR/P/PT/8/Rev.1 (2004).

¹⁹ *E.g.*, Rome Statute, *supra* note 16, Art. 68; International Criminal Court Rules of Procedure and Evidence, Rules 70, 87–88.

Fourth, this PCT's decision, as the concurring opinion made explicit, illustrates the *conventionalization* or "control of conventionality" doctrine as a particular Latin-American approach to the relationship and interaction between international law and domestic law. Under this doctrine, national organs such as the PCT need to examine the compatibility of national laws, judicial decisions, and policies with legal sources from the inter-American human rights system (both treaties and jurisprudence) and international law more generally.²⁰ The IACtHR pronounced the doctrine in 2006,²¹ and Latin-American domestic courts have increasingly applied it since then.²² This contrasts with the European Court of Human Rights' "margin of appreciation" doctrine that gives comparatively more deference to states.²³ In Latin America, international law-backed jurisprudential interpretations of national legal sources under the control of conventionality doctrine can importantly enhance national legal systems to (much) better address violence against women as well as other rights conflicts or conflicts between human rights and states' interests.

In sum, the Tribunal's decision in this case is a significant milestone in the protection of women's rights in Peru, and arguably for the development of international human rights law in general. The PCT explicitly recognized women's right to live free from violence, clarified the contents thereof, assessed related state actions, and examined the right's interplay with potentially conflicting rights—largely relying on international law at each stage. International human rights law is not self-enforcing, even in monist countries. Due to the endemic nature of violence against women in many countries, this kind of international law-backed jurisprudence makes necessary progress toward stopping such abuses.

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 doi:10.1017/ajil.2022.15

Inter-American Court of Human Rights—Advisory Opinion OC-26/20—collective guarantee—good faith—Inter-American democratic test

ADVISORY OPINION OC-26/20, DENUNCIATION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS AND THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES AND THE CONSEQUENCES FOR STATE HUMAN RIGHTS OBLIGATIONS. At https://www.corteidh.or.cr/docs/opiniones/seriea_26_eng.pdf.

Inter-American Court of Human Rights, November 9, 2020

²⁰ See, e.g., Ferrer Mac-Gregor, *supra* note 8; PABLO GONZÁLEZ DOMÍNGUEZ, THE DOCTRINE OF CONVENTIONALITY CONTROL: BETWEEN UNIFORMITY AND LEGAL PLURALISM IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2018); Jorge Contesse, *The International Authority of the Inter-American Court of Human Rights: A Critique of the Conventionality Control Doctrine*, 22 INT'L J. HUM. RTS. 1168 (2018).

²¹ *Almonacid Arellano v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (Ser. C) No. 154, para. 124 (Sept. 26, 2006).

²² See, e.g., TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW IUS COMMUNE (Armin Von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan & Ximena Soley eds., 2017).

²³ See, e.g., YUTAKA ARAI TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR (2002).