On unmasking power dynamics: the role of sound legal narratives in the case *Espinoza Gonzáles v. Perú*

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1. Sound narratives and bad narratives

The war against Ukraine has again brought to the fore the systematic use of sexual violence against women. It further exposes the depth of a subculture of ferocity that targets women's bodies to brutalise them and, through them, the entire society to which they belong.

Human rights law developed principles and doctrines to conceptualise violence against women in armed conflict as a form of gender discrimination that deserves to be addressed and repaired with specific legal instruments. However, the path toward recognising gender violence as a legal and cultural problem is not straightforward and still needs to be completed. It is characterised by the confrontations of opposing stories about what exactly happens when, during armed conflicts, a state or its officials decide to target women. Therefore, story elements become crucial to understanding the root of violence, connecting it to the cultural context in which it takes place and finding the appropriate remedies. As for any other crime, in sexual violence cases, story elements are essential to building proof, questioning a given factual reconstruction and understanding the context of specific behaviours. Plaintiffs and defendants are engaged in translating their stories into the rhetorical forms authorised by

law.[1] Their narrations play a role in the judges' reasoning. Moreover, judges develop their narrative by elaborating on the parties' accounts of the case's circumstances.

Story elements can be isolated as facts only to clarify the circumstances to which a legal norm will be applied, assuming that the separation between fact and its juridical qualification (law) is the logical presupposition of legal interpretation.[2] Story elements then condition the selection of the applicable law and guide its interpretation to answer the problems raised by the case's particular circumstances. However, when one looks at courts' argumentation, story elements can also be understood as contributing to a *narrative* – that is, to a sequence of events unfolding in time that the narrator connects in such a way as to convey a coherent account.

Legal narratives are not neutral. They are influenced by prejudices, biases and emotions. At the same time, legal narratives can incorporate a deep understanding of the social and cultural contexts in which violence against women takes place. In that sense, legal narratives can contribute to unmasking biases, misunderstandings and false representations of facts. In other words, 'sound narratives', grounded in data and the ability to tune in to the victims' experience, can be opposed to 'bad narratives' based on prejudices and subcultural conceptions.

Feminist theories have explored the relevance of cultural preconceptions in establishing and perpetuating discrimination.[3] They have equally pointed out the weight of cultural reactions to gender discrimination and subordination. What feminist theorists suggest is that our understanding of the world impacts our strategies of coupling with the complexity of the social, thus conditioning the way we interact, make decisions for ourselves and conceptualise ourselves in the social space.[4] Gender stereotypes thus are the product of our understandings, which can be decisively influenced by 'epistemic injustices' – that is, by misconceptions driven by a partial or manipulated access to the knowledge relevant to comprehending our social interactions.[5] If this is true, then legal narratives can expose the roots of gender stereotypes by incorporating a thick understanding of the social context in which sexual violence matures and is perpetrated.

Against this backdrop, the paper shall argue that a judge's ability to unmask stereotypical narratives and develop sound ones is critical for the correctness of the argumentation in cases of sexual violence against women. The paper shall develop the argument by explaining in what sense story elements create legal narratives relevant for argumentation in cases of gender discrimination (para. 2). It will then highlight the use of legal narratives in the pivotal judgment *Espinoza Gonzáles v. Perú*[6] adopted by the Inter-American Court of Human Rights

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[1] R.A. Posner, *Legal narratology*, 64 *University of Chicago Law Review* 737 (1997).
[2] F. Modugno, *Interpretazione giuridica*, Padova, 2012, p. 84.
[3] C. Saas, *L'appréhension des violences sexuelles par le droit ou la reproduction des stéréotypes de genre par les acteurs pénaux*, *La Revue des droits de l'homme*, 2015, 1.
[4] M. Garcia, *La conversation des sexes*, Torino, 2022, 190.
[5] Ibidem, 195.
[6] Corte Interamericana de Derechos Humanos, caso *Espinoza Gonzáles vs. Perú*, dec. 20 November 2014, available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_289_esp.pdf.

(IACtHR) in 2014 (para. 3). It will focus on the consequences of those legal narratives on the qualification of conducts and identification of remedies under international law (paras. 4 and 5) Finally, the paper will offer some conclusions on the relevance of narratives in legal argumentation concerning cases of sexual violence against women (para. 6).

2. Legal narratives and discriminations

Legal scholarship has explored the meaning and power of 'legal narratives' at length.[7] Some scholars have doubted that narratives should play a role in legal argumentation, assuming that they include biases or endanger the neutrality of the law.[8] According to such a view, neutrality commands a judicial approach grounded in an exercise of legal reason that separates facts and their human understanding from principled thinking.[9] In contrast, valuing facts and circumstances would lead to an interpretation of the law guided by social, emotional or emphatic constructions rather than the rigorous logic of legal reasoning.

Critiques of legal narratology also come from a legal feminist perspective. Catherine MacKinnon argues that while it is true that narratives can break stereotypes, stereotypes are also embedded in narratives. In her view, the interpretation of the law should trust data more than narratives, avoiding subjective representation of facts because the latter always carries the risk of an unfaithful depiction of the political reality of a given problem.[10]

Marta Nussbaum has contributed to the debate by challenging the idea that narratives are inherently problematic. She argues that narratives can be sound when grounded in an empathic understanding of the experience of people. Nussbaum claims that neutrality in practical reason does not require an emotional (subjective) distance from the materiality of the facts of life.

In fact, Nussbaum maintains that emotions, notably compassion, play an important role in practical reason by helping us identify ethical problems and articulate effective responses.[11] Such an approach is valuable in judicial reasoning concerning problems of justice and equality. By looking at case law on discrimination on the grounds of sex or race, Nussbaum concludes that judges' "determination to get close to the experience of people in positions

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[7] See U. Andersson, M. Edgren, L. Karlsson, G. Nilsson, *Rape Narratives in Motion*, Cham, 2019.

[8] P. Gewirtz, *Introduction*, in P. Brooks, P. Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in the Law*, New Heaven, 1996, p. 6-7 who challenge legal narratology for its lack of typicality, that is of a clear identification of factors and elements contributing to a specific development of facts. The author maintains that legal narratives cannot be used to assess the appropriateness of a given policy choice because they do not rely on accurate data analysis.

[9] See, for example, the classical work of H. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *Harvard Law Review* 1 (1959), who pioneered studies on neutrality in the Supreme Court's decision-making processes. Wechsler was especially targeting the Court and Chief Justice Earl Warren's activist jurisprudence, largely based on a factual analysis of the circumstances in which the law was being applied. See also G. Gee, G. Webber, *Rationalism in Public Law* 76 *Modern Law Review* 708 (2013).

[10] C. MacKinnon, *Law's Stories as Reality and Politics*, in P. Brooks – P. Gewirtz (eds) *Law's Stories*, above n 8, p. 235.

[11] M. Nussbaum, *Narratives of Hierarchy – Loving v. Virginia and the Literary Imagination*,17 *Quinnipiac Law Review* 337 (1997).

of inequality"[12] is a decisive step in the "correct solution of the case."[13] In her view, far from suffering from epistemological inadequacies, legal narratives constitute an essential element of the correctness of practical reasoning in legal matters. Narratives expose asymmetries in the human meaning of situations regulated by law, thus clarifying the extent to which a given solution addresses equality and justice concerns.

Most importantly, empathic narratives put judges in the position of understanding human experience in its interaction with the law, uncovering the roots of inequalities that the law can redress. Nussbaum then compels judges to use their imagination to put themselves in empathic contact with the victim of discrimination. She provides an example to clarify how empathic approach matters in the outcome of a case.

In *Loving v. Virginia*, the US Supreme Court declared unconstitutional a Commonwealth of Virginia statute prohibiting interracial marriages.[14] The state argument insisted that the law impacted white and black people equally by providing the same sentence in cases of violation of the anti-miscegenation provision. The Court dismissed the state defence, rejecting the notion that the mere 'equal application' of a statute containing racial classifications is enough to justify the discrimination it contains. Writing for the majority, Chief Justice Earl Warren maintained that:

> The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their justification, as measures designed to maintain White Supremacy.[15]

While the law treated white and black individuals equally, it was motivated by an invidious logic, thus having a particularly hideous impact on the member of the couple belonging to a racial minority. The result had not been reached by seeking the neutrality of legal reasoning. Instead, the Court looked at the history of segregation and social stigma characterising the life of African Americans in the US. It linked anti-miscegenation laws to the white supremacy subculture, thus contextualising them in the concrete circumstances of the black population's life experience. Such contextualisation exposed the discriminatory nature of a law formally directed at both races.

Nussbaum's analysis can be applied to a more recent case. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the US Supreme Court addressed the problem of pay discrimination based on gender.[16] Lilly Ledbetter was an employee at Goodyear. During her years at the factory as a salaried worker, raises were given and denied based partly on evaluations and recommendations regarding worker performance. From 1979 to 1981, Ledbetter received a

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[12] M. Nussbaum, *Narratives of Hierarchy*, above n 11, at p. 348.
[13] Ibidem.
[14] *Loving v. Virginia*, 388 US 1 (1967).
[15] 388 US 12.
[16] 550 US 618.

series of negative evaluations, which she later claimed were discriminatory. Although her subsequent evaluations were good, she never reached the level of male employees.

In March 1998, Ledbetter filed a sexual discrimination suit against the Goodyear Tire Company, claiming a violation of Title VII Civil Rights Act 1964, which prohibits discrimination by employers based on race, colour, religion, sex or national origin. The statute, however, includes a procedural barrier: a charge can be filed within 180 days after the alleged unlawful employment practice occurred. For these reasons, the Eleventh Circuit and later the Supreme Court dismissed Ledbetter's claim.

The confrontation of arguments in the Supreme Court's opinions is particularly interesting. The majority interpreted Title VII in the sense that it allows employees to sue their employers over race or gender pay discrimination when the actual intentional discrimination occurred within the time limit of 180 days. By following precedent, the Court also rejected Ledbetter's argument that each check was an act of discrimination because the proof had not been reached on the existence of discriminatory intent.

Justice Ginsburg's dissenting opinion offered a different narrative. In her dissent, she unmasked the formality of the majority's reasoning by arguing:

> The Court's insistence on immediate contest overlooks common characteristics of pay discrimination. Pay disparities often occur, as they did in Ledbetter's case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee's view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not be seen … particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.[17]

In other words, the time limit inadequately addressed women's situation because the circumstances of gender pay discrimination are difficult to prove if one considers a small portion of the employer's life. Justice Ginsburg pointed to the facts to stress that the time limit rule substantially burdened people in a non-traditional environment, where discrimination can be concealed in multiple episodes, thus escaping the legislative scheme. Justice Ginsburg, however, added something even more relevant to her argument. By blindly applying the time limit rule, the majority of the Court erred in identifying the conduct (i.e. discretionary decisions on small raises of salary) and its legal qualification as an act of discrimination perpetrated over time.[18] The unlawful employment practice should have been identified with the last check received by Mrs Ledbetter, which resulted from a long series of discrete acts of discrimination.

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[17] 550 US 618 (Ginsburg, J., Dissenting).

[18] Some scholars have criticised the judgment because of the detachment from the reality of workers' life that the majority's opinion shows. See G. Bindu, *Ledbetter v. Goodyear: A Court Out of Touch with the Realities of the American Workplace*, 18 *Temple Political & Civil Rights Law Review* 253 (2008) and P.A. Monopoli, *In a Different Voice: Lessons from Ledbetter*, 34 *Journal of College and University Law* 557 (2008).

The two cases exemplify that story elements can be translated into a narrative; they can be connected as they unfold in time to explain how the law interacts with the circumstances of individuals' lives. By doing so, judges weave facts so that the reader makes sense of the relation between the different elements of the story. In both cases, legal narratives form elements of the reasoning on the assumption that their inclusion in the argumentation is essential to the correctness of the legal solution offered by the judge.

3. The use of legal narratives in the case *Espinoza Gonzáles v. Perú (IACtHR)*

The epistemological value of legal narratives can be appreciated in the leading case *Espinoza Gonzáles v. Perú*[19] concerning sexual violence against women in times of armed conflicts. The IACtHR delivered the judgment in 2014, almost twenty years after what happened to Mrs Espinoza. To understand the decision, let us consider for a moment the context of the case.

During the 1990s, Peru faced an internal conflict characterised by a climate of generalised violence perpetrated by state officials. In this context, the practices of torture, sexual violence and rape were systematically used in the fight against subversion. Moreover, the anti-terrorist legislation adopted in 1992 affected the institutionalisation of those practices, thus favouring the impunity of perpetrators.[20]

In *Espinoza*, the IACtHR addressed the case of Gladys Espinoza Gonzáles, a Peruvian woman abducted with her partner by the Peruvian intelligence services (División de Investigación de Secuestros, DIVISE) in conjunction with the anti-terrorism division (Dirección Nacional Contra el Terrorismo, DINCOTE) in 1993 upon suspicion of being a member of a terrorist organisation During her captivity, Mrs Espinoza was tortured and repeatedly raped to obtain information on the activities of the alleged terrorist group and her partner.

After her abduction, Mrs Espinoza was detained illegally for some weeks until a trial was arranged under the rules of anti-terrorism legislation, sentencing her to life imprisonment. Ten years later, the Peruvian Supreme Court declared the judgment vacated because of several violations of fair trial guarantees. At the same time, another criminal proceeding was initiated following new rules of procedure as the political situation in Peru changed, and the state of emergency ended. Mrs Espinoza was sentenced again, and a long series of judicial appeals at different stages of detention in state prisons followed.

The case finally reached the IACtHR after about ten years of criminal proceedings against Mrs Espinoza and numerous reports of violations of her human rights. She claimed the violation of several rights, protected by both the Inter-American Convention of Human

[19] Corte Interamericana de Derechos Humanos, caso *Espinoza Gonzáles vs. Perú*, dec. 20 November 2014, available at https://www.corteidh.or.cr/docs/casos/articulos/seriec_289_esp.pdf.

[20] Legal scholars have discussed at length how sexual violence in armed conflicts (or in the context of generalised violence) has been perpetrated against women to treat them as properties and spoils of men, with a widespread sense of impunity: see N. Dynai-Mhango, *The Jus Cogens Nature of the Prohibition of Sexual Violence against Women in Armed Conflicts and State Responsibility*, 27 *Stellenbosch Law Review*, 114 (2016).

Rights (IACHR) and the Convención Interamericana para Prevenir, Sancionar y Erradicar la Violencia contra la Mujer (Convención de Belém do Pará). The list of violations included the right to personal freedom (Art. 7 IACHR), personal integrity (Art. 5.1 IACHR), protection of honour and dignity (Art. 11 IACHR), the right not to be subjected to torture (Art. 5.2 IACHR), the right not to suffer from sexual violence (Arts. 3 and 4 Convención de Belém do Pará) and the obligation not to discriminate against women (Art. 6 Convención de Belém do Pará).

The IACtHR meticulously reviewed each alleged infringement by interpreting the IACHR in conjunction with the Convención de Belém do Pará. Eventually, the Court found Peru responsible for all the contested violations by articulating a twofold argument. First, the rights whose violation had been claimed are absolute and belong to the *jus cogens*. Consequently, their infringement may constitute a crime against humanity, for which international law requires prosecution.[21] Second, a situation of emergency, such as the one declared in Peru at the time of the facts, cannot justify the limitation of those rights, whose absolute nature implies that neither derogation nor limitation of their essential content can be validated.[22]

The use of a harmonising interpretative technique, whereby the content of either Convention article is read in light of the other, allowed the Court to address the issues of the case from a gender perspective. Such an approach was reflected in the analysis concerning the violation of the right not to be subjected to sexual violence and the obligation not to discriminate against women.

The Court started by examining the obligation not to discriminate stemming from the IACHR. It then moved to the corresponding obligation in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The Court clarified that discrimination against women "includes violence based on sex, that is, violence directed against women [i] because is a woman or [ii] that affects her disproportionately".[23] Finally, the Inter-American judges cited the preamble of the Convención de Belém do Pará, which states that gender violence is "una manifestación de las relaciones de poder históricamente desiguales entre mujeres y hombres".[24]

In the Court's view, sexual violence has a discriminatory purpose because rape is perpetrated against women to affirm men's position of power and domination over their free will. Power dynamics of this kind may occur even in the context of generalised violence, where rape is systematic as an instrument of aggression directed against men and women. Even in these circumstances, the crime is connotated with a discriminatory aim against women, who are targeted because of their sex.

The proper qualification of the criminal conduct then is not sexual violence but gender-based sexual violence, which implies the violation of the right to personal integrity, honour

[21] Para. 233.
[22] Para. 141.
[23] Ibidem.
[24] Para. 190.

and dignity, prohibition of torture, prohibition of sexual violence and prohibition of discrimination against women.

The decision methodically cited international legal instruments protecting the rights concerned and built a harmonising argument that logically derives the qualification of gender-based sexual violence from the existence of a discriminatory purpose. Nevertheless, when analysing the elements that support the existence of such a purpose, the Court's reasoning did not proceed with logical deductions. The Court needed to deflect attention from the law toward Peru's broader social and political context to understand how state officials perpetrated the practice of sexual violence against terrorist suspects and those who opposed the regime.

According to the Court, the practice of rape was systematic. It was a weapon to weaken, humiliate and inflict suffering on opponents with the final intention to 'punish' them for their actions and reluctance to collaborate. Sexual assaults were intended to create an atmosphere of fear that would have discouraged other people from taking political action. The generalised and known practice of sexual violence not only inflicted individual harm but also weakened the state's social fabric. Indeed, the threat of rape, with its mental, physical and social consequences, was intended to keep women away from any political engagement.[25]

In that respect, the Court specified that rape is a particularly severe trauma for women. This experience is not alleviated by time passing and leaves permanent psychological and social consequences.[26] Moreover, the existence of an internal armed conflict between the state and allegedly subversive organisations does not provide state officials with any reason to use inflictive measures. Likewise, it does not imply that sexual violence can be interpreted as a predictable, though dreadful, side effect of the emergency. On the contrary, the symbolic meaning of rapes is not only connected to the situation of conflicts *per se* but also magnifies deeper cultural oppression against women. The criminal actions of the Peruvian security apparatus were not isolated but perpetrated in a context characterised by historical inequality between men and women. Therefore, the repeated infliction of sexual violence on Mrs Espinoza should be framed as a manifestation of intentional aggression against a woman who dared to participate in political activities and, therefore, challenge men's place in society.

After describing the sociocultural context, the Court explained how it played out in the case of Mrs Espinoza. The Court mentioned that she was medically assisted with considerable delay when she was brought to a male doctor and asked to undress in front of agents, with no respect for her dignity, honour and privacy. She was not assisted by specialised personnel in any detention and prosecution stages. Instead, she was confronted mainly by males unprepared to understand and manage the physical and mental trauma of repeated sexual violence. Moreover, when she was finally allowed to ask for *habeas corpus* and, later, challenge

[25] Para. 225 and 226. See D.S. Medawatte, *Conflict-Related Sexual Violence: Patriarchy's Bugle Call*, 21 *Georgetown Journal of Gender & Law* 671, 688 (2020) who argues that 'Identifying that structural, societal, and contextual discrimination against women is prevalent in society helps situate Conflict-Related Sexual Violence within the larger schema of patriarchal condescension against women.'
[26] Para. 193.

the grounds of her detention, Mrs Espinoza was not put in the condition to deliver her accounts of facts in a safe and protected manner.

In addition, the Court highlighted that on several occasions in the long history of Mrs Espinoza's trials, expert witnesses depicted her personality as histrionic and affected by dissociation.[27] Sometimes these testimonies were part of a strategy to challenge her reliability as a witness. More generally, they were an expression of a subcultural prejudice according to which women suspected of involvement in criminal activities must be manipulative, wicked and untrustworthy.[28] The Court mentioned that court expert witnesses maintain that such a narrative is often offered in cases of women harassed while in custody in an attempt to justify perpetrators and lift their responsibility by targeting the woman and her evil nature.[29] The IACtHR then read the reference to a histrionic and disturbed personality as an indicator of the endurance of narratives depicting women as unreliable, inclined to use seduction to obtain benefits and then deserving of punishment.[30]

All those circumstances proved that rape was systematically perpetrated as a manifestation of a culture of oppression against women that aimed to marginalise their social and political existence. The targeting of women was also functional to send a message to the society as a whole since the symbolism of violence against women reverberated on the entire population thus weakening its potential civic reaction.

Ultimately, the Court's judgment offered a narrative of the facts that provided a sound justification for the final decision, namely Peru's responsibility for infringement of state obligations to prevent, prosecute and punish sexual violence. However, at a closer look, one finds that the narrative helped the judges identify and qualify the *kind* of violation perpetrated by state officials as gender-based. The description of the circumstances of the repeated rapes was not separated from the contextualisation of actions, words and practices in the broader picture of a male-dominated environment driven by a culture of oppression against women. In doing so, the Court chose the victim's point of view.

Two elements can further clarify the relevance of such a narrative to develop the Court's argumentation. First, the judges recognised that male Peruvian agents perpetrated sexual violence against men as a form of torture designed to obtain information and create an atmosphere of generalised fear. Second, they clarified that Mrs Espinoza's testimony highlighted that the personal experience in a situation of violence is one of being a target for aggression first and foremost *because* of her sex. Therefore, even if the security forces' practice of sexual violence in Peru was widespread for torturing both male and female opponents,

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[27] Para. 271.
[28] Ibidem.
[29] Para. 272.
[30] The existence and endurance of such narrative is signalled by the so-called rape shield laws designed to correct the ingrained association of women's credibility and personality and sexual behaviour. In particular, rape shield laws have been passed over the years in the US, preventing victims from having their testimony scrutinised and credibility as witnesses challenged: see K.C. Swiss, *Confined to a Narrative: Approaching Rape Shield Laws through Legal Narratology*, 6 *Washington University Jurisprudence Review* 397, 399 (2014).

such practice was aimed at women. Oppressing them was a way to restore the unequal balance of power that women challenged by engaging in political action.[31]

4. Un-stereotyping sexual violence against women

Espinoza is an example of legal narratives used to unmask gender discrimination in the practice of systematic sexual violence against women in the context of internal armed conflict. By elaborating a narrative whereby rapes are symbolic means to humiliate and punish women for their opinions or political actions, the Court exposed the logic of oppression by looking at the historical power dynamics constituting the root of sexual violence. The Court then pinpointed the subculture of those who perpetrated the violence by subjugating women's personal sphere of autonomy and choice.

This is a far cry from those approaches that looked at the women who suffered from sexual violence as casualties of war or armed conflicts, doomed to a destiny of social stigma.[32] In contrast to such approaches, the reasoning in *Espinoza* removes stereotypes surrounding sexual violence against women perpetrated in the context of armed conflicts in two senses. First, systematic rapes are not considered *casually* connected to the emergency; instead, they are *causally* linked with conflicts. They are part of a strategy to humiliate and weaken women because of their sex. Second, women are pictured as unjustly wronged individuals with the right to adequate and timely remedies rather than powerless victims of male oppression.[33]

Espinoza is a turn in legal narratives concerning sexual aggressions against women in armed conflicts. Some recent examples clarify this point.

In the early 2000s, a significant number of Italian women victims of sexual violence during the Second World War requested access to the legislative scheme providing for pecuniary measures in favour of victims of war, including women who suffered sexual violence.[34] Some

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[31] Some scholars argue that empirical evidence shows that women are affected by armed conflicts in ways that men are not: see H. Charlesworth, *Feminist Methods in International Law*, 93 *American Journal of International Law* 379, 385 (1999).

[32] C. Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 *European Journal of International Law* 326, 330 (1994). See also G. Romeo, *La violenza di genere durante la liberazione come "questione sociale": una prospettiva costituzionale*, in B. Pezzini, A. Lorenzetti, *70 Anni dopo tra uguaglianza e differenza*, Torino, 2019, p. 406 and G. Gaggioli, *Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law*, 96 *International Review of the Red Cross* 503 (2014) who argues that for a long time both international humanitarian law and human rights law have been unprepared to address the problem of sexual violence against women during armed conflicts, thus leaving the victims with a deep sense of shame and helpless in the absence of effective remedies and vindication.

[33] See K. Engle, *Judging Sex in War*, 106 *Michigan Law Review* 941 (2008) who claims that the narrative of women as powerless victims of men's aggression has dominated the debate in international law, implicitly considering women who have been raped as doomed to a destiny of subjugation and social stigma. See also Vincent Bernard; H. Durham, *Sexual Violence in Armed Conflict: From Breaking the Silence to Breaking the Cycle*, 96 *International Review of the Red Cross*, no. 894 427, 428 (2014) explaining that for a long time, cases of sexual violence against women in armed conflict were not reported out of shame or difficulties denouncing or prosecuting them.

[34] See Art. 10, Law no. 648 of 1950, which establishes pension treatments for those who have suffered physical injuries because of the armed conflict. The category includes both individuals who have been permanently harmed and those who suffered temporary consequences preventing them from working due to an action casually connected to the armed conflict. See also Law no. 313 of 1968 and decree the 23 of December 1978, no. 915.

women requested compensation for the first time; the majority sought continuation or upgrading of an already existing pension treatment. The National Institute for Social Security (*Istituto Nazionale per la Previdenza Sociale*) had terminated several pensions' supply because proof of physical impairments no longer existed due to the time passed since the events occurred. Therefore, the National Institute denied or revoked the social welfare benefit on several occasions. At this point, the claimants appealed denials in front of the Court of Auditors (*Corte dei conti*) only to be confronted with the same argument: the right to claim damages must be grounded in the existence of a physical harm associated with the sexual aggression.[35]

The Court's interpretation is based on Italian legislation passed in the early 1950s to address the situation of the Italian population who faced personal, social and economic consequences after the war. The law, however, connected social benefits to the proof of a physical injury directly linked to the rape. This legislation mirrors the lack of awareness of the broader social and personal consequences of sexual violence in armed conflicts.

Interestingly, the constitutional precedent has not changed the situation. In 1986, the Italian Constitutional Court finally declared the law unconstitutional as it did not include the moral and existential damages of victims of sexual violence in the compensatory scheme. According to the Court, the consequences of such a hideous crime are long-lasting, irrespective of the concurrence of a physical injury.

In its decisions, however, the Court of Auditors has consistently ruled out the application of the constitutional judgments with regard to already exhausted legal situations, thus barring women from seeking the restoration of a treatment terminated because of physical recovery from the injury. Similarly, upgrading such treatment to consider moral and existential damages has been denied. As a result, several women victims of sexual aggression during the Second World War are excluded from accessing a pecuniary remedy.[36]

By carefully reading the Court of Auditors' decisions, one realises they are based on a particular understanding of sexual violence in armed conflicts that significantly departs from the IACtHR's conclusions while mirroring the Italian legislative scheme. Sexual violence is viewed as an accident of war, which justifies most state reparatory measures, such as pensions. In that sense, a woman who has suffered rape receives the same legal treatment as someone who has been casually injured in the context of warfare.

In a different historical context, the Bosnian Constitutional Court, in a decision rendered in 2013, excluded the award of moral, biological and existential damages to a woman who claimed a member of Serbian occupying forces had raped her during the conflict in former

[35] Dec. No. 336/2004, 142/2004, 143/2005 and 155/2005.

[36] Some of the victims lodged a claim in front of the European Court of Human Rights (ECtHR) seeking damages for violation of Art. 6 (fair trial) and Art. 13 (effective remedy) of the European Convention of Human Rights. Although the ECtHR declared itself to be 'sympathetic to the applicants for their experience and the perceived injustice they suffered', it dismissed the case as inadmissible and ill-founded because the claims were based on an internal conflict of jurisprudence to be solved by national authorities: *Sepe and others v. Italy*, 16 September 2014, application no. 36167/07. See G. Romeo, *La violenza di genere durante la liberazione come "questione sociale": una prospettiva costituzionale*, above n 31 at 419.

Yugoslavia.[37] The Constitutional Court maintained that a statute of limitations barred the prosecution of the crime. Consequently, any claim for non-pecuniary damages against legal entities filed after five years since the injured party learned about the damage and the identity of the person who caused it was time-barred. Domestic judges considered it irrelevant that it was challenging (if not impossible) for a victim of rape to claim her rights during the first post-war years when political instability and fear of reprisals from public institutions rendered the resort to judicial remedies substantially ineffective.

International bodies seem keener to look at the situation of victims. The UN Human Rights Committee expressed concerns about the judicial interpretation adopted by the Bosnian Constitutional Court because it left victims of sexual violence in times of armed conflicts without any effective remedy.[38]

However, a turning point arrived six years after the Constitutional Court's decision. In 2019, the victim submitted a request for consideration to the UN Committee against Torture, the overseeing body established under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Committee adopted a pivotal decision under Art. 22 that establishes its competence to consider state submission concerning violations of CAT. In an unprecedented move, it declared that Bosnia Herzegovina had violated Art. 1 for not providing effective remedies to the victim of sexual violence.[39] The statute of limitations cannot operate in cases of sexual violence because they deprive victims of redress, compensation and rehabilitation.

Moreover, according to the Committee, rapes constitute torture and discrimination against women. It argued that, particularly in the context of armed conflicts, women become the target of violence with an intent to humiliate them because of their sex.[40] Consequently, the conduct of a state that does not recognise compensation for biological and moral damage in favour of the victim of sexual violence in a time of armed conflict constitutes a violation of Art. 1 read in conjunction with Art. 14 of the Convention.

The Committee's argument that sexual violence is causally connected to the armed conflict mirrored the IACtHR's statement about rape as a symbolic means to degrade and threaten women. Both international bodies contend that such practice determines permanent moral and existential damages that compel states to provide appropriate remedies, including prompt, fair and adequate compensation. In that sense, both the IACtHR and the UN Committee against torture remove stereotypes on gender violence by driving attention to the culture of oppression in which it is perpetrated and strengthening victims' claims of justice and compensation.

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[37] Constitutional Court of Bosnia and Herzegovina, Decision N. AP-3111/the 09 of Decemberthe 23 of December 2013, *Hamza Rekic v. RS*.

[38] Human Rights Committee, Concluding Observations *Lale and Blagojevic v. Bosnia* (CCPR/C/119/D2206/2012) paras. 17-18.

[39] Committee Against Torture, the 22 of August 2019, decision adopted under Article 22, concerning communication No. 854/2017, CAT/C/67/D/854/2017. The Committee's reluctance to include sexual violence in the definition of torture is discussed by A. Edwards, *The Feminizing of Torture under International Human Rights Law*, 19 *Leiden Journal of International Law* 439, 370 (2006).

[40] Committee Against Torture, above n 38, at 8-9.

Comparing the approaches of international and domestic bodies reveals that the latter avoid stereotypical representations of women as defenceless and casual victims of sexual violence in armed conflicts. Rather, women are represented as targets, especially in those cultural contexts where masculinity is identified with a relationship of power that oppresses women because of their sex. Those international bodies establish a narrative that identifies aggressors as individuals moved by discriminatory intents, point at the subcultural roots of their behaviour, and look for adequate remedies to compensate victims and prevent sexual violence from happening in the future. The legal narrative is functional to understand the facts and apply the proper remedy.

5. The identification of state obligations and remedies

In the IACtHR's *Espinoza* judgment, legal narratives also play a role in identifying the most appropriate remedies states are required to put in place to fulfil their obligation to prevent and prosecute gender violence. The Court's reading of the circumstances of the case drives the interpretation of the relevant articles of the IACHR and the Convención de Belém do Pará to make those international legal instruments respond to the facts suffered by Mrs Espinoza.

In particular, the Court's reference to the existence of historical roots of power imbalances between men and women led the IACtHR to identify a twofold state obligation to provide for both individual and collective remedies. Indeed, the obligation to repair the damage for the person affected is coupled with a preliminary obligation to prevent gender violence. This conclusion was reached because the Court interpreted the use of state power to violate the rights of women in an internal conflict as the infliction of pain to the victim and having 'the purpose of causing an effect on society through these violations and giving a message or lesson'.[41] The IACtHR reiterated an argument it has used in previous cases.[42] For example, in the 2006 judgment *Miguel Castro Castro v. Perú*, the Court maintained that the systematic use of sexual violence against women represents a means to threaten society as a whole because it conveys the message that women will be punished to repress society's reaction against injustices.[43]

Therefore, developing a gender culture based on rejecting the stereotypical representation of either sex is decisive in preventing the societal effect. The Court further explained that the lack of such culture determines the state's unpreparedness to address cases of systematic sexual violence and ultimately afford justice to the victims.

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[41] Para. 226.

[42] *Miguel Castro Castro v. Perú*, decision 25 November 2006, Serie C No. 160, para. 224 and *Masacre de El Mozote y lugares aledaños v. Salvador*, dec. 25 October 2012, Serie C No. 252, para. 165. On the IACtHR's case law on gender violence as expression of discrimination see R. Rubio Marin, C. Sandoval, Engen*dering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the Cotton Field Judgment*, 33 *Human Rights Quarterly* 1062 (2011).

[43] *Miguel Castro Castro v. Perú* para. 223 and 224.

An example of the legal consequences of judges' lack of gender-based awareness is the problem of proof. The IACtHR contended the state defence's argument, according to which medical examinations did not show evidence of violence. According to the Court, the logic of the argument is substantially flawed. Check-ups were carried out significantly after the violence had occurred, thus reducing the chance of collecting evidence. Moreover, doctors were not trained to perform examinations or ask questions in cases of rape perpetrated in captivity with no access to medical assistance.

Against this backdrop, the victim's reluctance to talk and allow examination of her body must be understood as a sign of the trauma. If one considers these elements, the lack of evidence from the medical examination cannot be used, the Court contends, to question the victim's reliability. In contrast, judges must ponder whether the victim was treated with care and consideration of the particularly traumatic experience she had suffered.[44]

The legal consequence of the approach suggested by the Court is lowering the standard of proof required due to the nature of the crime of sexual violence. Even more so in the context of armed conflict. The absence of scientific proof is not considered an element that prevents judges from declaring that proof of the violence has been reached.[45]

The predictable incompleteness of the medical examination, in turn, highlights the importance of testimonial evidence, in open contrast with the state defence's argument, according to which Mrs Espinoza could not be fully trusted. Moreover, the Court underlined that testimonial evidence should be acquired with appropriate tools.[46] Inter-American judges reiterated that a woman's hesitancy to tell her story must be understood because of the painful and distressing memories the testimony brings back.[47] State obligations then include establishing procedures to collect the information a victim is willing to give as evidence to set out the facts of the rape.[48]

Ultimately, the IACtHR concluded that states cannot successfully claim the impossibility of finding proof of gender violence. When available and adequately collected, victims' statements must be treated as reliable, thus contributing to the proof, irrespective of a corresponding medical examination.[49] This argumentative move allows the Court to give back to the woman victim of violence and prejudice central importance in the development of the case. Her personal experience becomes as legally valuable as scientific, objectively observed evidence.

The UN Committee against Torture argues along the same lines when it maintains that state obligations in cases of sexual violence perpetrated by state officials include ensuring

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[44] Para. 256-258.
[45] Ibidem.
[46] Para. 259-260.
[47] See V. Bernard, E. Pothelet, *Through the eyes of a detention doctor: Interview with Raed Aburabi*, 96 *International Review of the Red Cross*, no. 894, 480 (2014) who describes with the help of field research victims' difficulties in reporting cases of sexual violence.
[48] These procedures include an appropriate medical examination to assist the victim of a rape. On the importance of health assistance see P. Bouvier, *Sexual violence, health and humanitarian ethics: Towards a holistic, person-centred approach*, 96 International Review of the Red Cross, no. 894 565 (Summer 2014).
[49] Para. 261.

free medical and psychological care immediately after the violence. Moreover, the state must apologise publicly for the suffering inflicted on the victims.[50] Those measures, taken together with the obligation to adequately compensate the victim, redress state wrongdoing because they address the hideous nature of the crime, motivated by an intent to subjugate and humiliate women because of who they are.

Those cases are examples of legal narratives used as epistemological tools to understand better how to interpret the law in a way that effectively answers the circumstances of the case.

6. On empathy and reaction

In 2006, the UN Secretary-General maintained in his *In-depth Study on All Forms of Violence Against Women* that 'State inaction leaves in place discriminatory laws and policies that undermine women's human rights and disempowers women (...). It also functions as approval of the subordination of women that sustains violence and acquiescence in the violence itself'.[51] The reaction through legal instruments, especially when sexual violence is perpetrated systematically by state officials, is a critical element of the legal strategy of prevention and restoration.[52]

This approach is testified by the decisions discussed here. The IACtHR and the UN Committee identified a list of state obligations stemming from legal instruments such as the IACHR, CEDAW or UN CAT. In the last ten years, compensation in favour of victims of gender violence has been identified as an indispensable means to redress cases of sexual violence in international law. The approach is shared within the EU as the Directive requiring states to adopt a legislative scheme to compensate victims of violent crimes demonstrates.[53] Such an approach corresponds to the idea that state intervention in cases of sexual violence has an emancipatory intent towards those women for whom sexual violence ends up being, for cultural and environmental reasons, a social stigma and a *de facto* exclusion from effective participation in the political community's life.

If the reaction is the approach required from states to give justice in both the individual case and at the societal level, then the ability to tune in to the victims' experience works as

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[50] Committee Against Torture, above n 38, at 14.

[51] UN Secretary-General, UN Doc. A/61/122/Add. 1 (2006), p. 34.

[52] R. Rubio Marin, C. Sandoval, Engen*dering the Reparations Jurisprudence of the Inter-American Court of Human Rights,* above n 40 at 1064.

[53] Council Directive 2004/80/CE, the 29 of April 2004, OJEU, the 06 of August 2004, L 261/15. It is interesting to notice that in 2016, the Italian Parliament adopted, in belated implementation of the directive, a law regulating the compensation of victims of violent crimes. The law expressly mentioned sexual abuse as a case in which the State grants compensation even in the absence of medical and welfare expenses. The law was passed only after the EU Court of Justice had declared Italy in violation of the duty to implement the directive. The Italian Parliament has finally fulfilled the obligation by introducing a series of conditions for recognising compensation not provided for in the directive's text, among which income limits coinciding with that set for admission to legal aid at the expense of the State. Court of Justice (Grand Chamber) the 11 of October 2016, C-601/14. See C. Amalfitano, *Indennizzo delle vittime di reati intenzionali violenti: nuova censura della Corte di Giustizia … sufficiente la risposta contenuta nella legge europea 2015-2016?*, *Eurojus*, 12 October 2016.

an epistemological device, allowing judges to detect behind the episode of violence the universe of meanings that the act conveys to the victims and the perpetrators. The former perceives the ferocity of the act as affirming their subordinate role. The latter intends to assert their power through an action that testifies their domination. In that sense, judges can detect the cultural roots of violence and identify appropriate remedies.

The intellectual posture of standing in the victim's shoes consists of comprehending their personal experience as something that contributes to the knowledge of the circumstances of the fact and, ultimately, to the correctness of the reasoning. It is an intellectual attitude that rejects some rationalist assumptions according to which practical thinking originates from reason by universalised arguments that reveal 'an inconsistency in egoistic exceptionalism'.[54] For rationalists, the moral significance of emotions is irrelevant to determining a course of action because emotions carry biases that prevent the development of a legally correct solution. In contrast, the intellectual posture described here conceives personal experiences as elements that enter legal reasoning because they build a system of information that judges must ponder to reach a reasonable and sound decision.

Especially in *Espinoza*, such intellectual attitude is directed to understand both victims' experience and perpetrators' behaviour; interpret facts; identify motives, including discriminatory intent; and detect subcultural attitudes and beliefs. In that sense, it helped judges navigate reality and ultimately find solutions corresponding to the variety of problems brought about by the complexity of life experiences. The critical element of the judgment is the intellectual posture adopted by judges, who demonstrated that the law cannot easily dismiss individuals' emotions as subjective, biased and unreliable depictions of reality.

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ABSTRACT: Legal narratives are not neutral. They are influenced by prejudices, biases and emotions. At the same time, legal narratives can incorporate a deep understanding of the social and cultural contexts in which violence against women takes place. In that sense, legal narratives can contribute to unmasking biases, misunderstandings and false representations of facts. In other words, 'sound narratives', grounded in data and the ability to tune in to the victims' experience, can be opposed to 'bad narratives' based on prejudices and subcultural conceptions. Feminist theories have explored the relevance of cultural preconceptions in establishing and perpetuating discrimination. What feminist theorists suggest is that our understanding of the world impacts our strategies of coupling with the complexity of the social, thus conditioning the way we interact, make decisions for ourselves and conceptualise ourselves in the social space. Gender stereotypes thus are the product of our understandings, which can be decisively influenced by 'epistemic injustices' – that is, by misconceptions driven by a partial or manipulated access to the knowledge relevant to comprehending our social interactions. If this is true, then legal narratives can expose the roots of gender

[54] See J. Steinberg, *An Epistemic case for empathy*, 95 *Pacific Philosophical Quarterly* 47, 49 (2014).

stereotypes by incorporating a thick understanding of the social context in which sexual violence matures and is perpetrated. Against this backdrop, the paper shall argue that a judge's ability to unmask stereotypical narratives and develop sound ones is critical for the correctness of the argumentation in cases of sexual violence against women.

KEYWORDS: legal narratives, sexual violence, gender discrimination, armed conflicts, Inter-American Convention of Human Rights

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