

# TRANSFORMATIVE CONSTITUTIONALISM OR FEMINIST CONSTITUTIONALISM? ADVANTAGES OF A TRANSFORMATIVE CONSTITUTIONAL ADJUDICATION

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**ABSTRACT:** *Transformative constitutionalism is a current of legal thought based on the belief that constitutional judges can play a key role in promoting social change and expanding constitutional rights. Another current, feminist constitutionalism, seeks to remedy deficiencies resulting from the failure of the law and constitutions to sufficiently protect the rights of women. These two constitutionalist currents could be regarded as constituting an unnecessary conceptual separation, since they share a fundamental convergence in their view of the important role constitutional judges can play in the advancement of women's rights. This note argues that the underlying principles of the various currents of constitutionalism rest on the same legal foundation, that is, a legal system comprised of a constitution with normative force and an institutionalized system of constitutional justice. As a result, the practice of transformative constitutional adjudication is a more realistic and constructive means by which to foster transformative social change than either of the aforementioned constitutionalisms since it does not require the institutionalization of a specific constitutional framework. All that is required is the transformative conviction of the constitutional judges themselves. This note is organized in the following way: first, I analyze the concept of constitutionalism in general; second, I explain transformative constitutionalism; third, I describe feminist constitutionalism; fourth, I propose the concept of transformative constitutional adjudication that combines principles from both of the previously reviewed constitutionalisms; fifth, I examine eight specific cases from various countries where transformative constitutional adjudication was employed in the resolution of the constitutional issue raised.*

**KEYWORDS:** *Constitutionalism, transformative constitutionalism, feminist constitutionalism, transformative constitutional adjudication, constitutional judges.*

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**RESUMEN:** *La corriente del constitucionalismo transformador se basa en conseguir cambios sustanciales en la realidad social a través de los derechos y del papel de los jueces constitucionales. Al mismo tiempo, existe una corriente constitucionalista feminista que lucha por una reivindicación de los derechos de las mujeres desde la Ley y la Constitución, lo que podría ser, primero, una separación conceptual innecesaria y, segundo, una convergencia fundamental a través del papel de los jueces constitucionales para la reivindicación de los derechos de las mujeres. Esta nota sostiene, como tesis central, que las corrientes del constitucionalismo tienen la misma base jurídica representada en una Constitución con fuerza normativa y la justicia constitucional, por lo que es más realista y valioso referirse a lo que llamo una adjudicación constitucional transformadora, ya que no se necesita un marco constitucional específico, sino sólo la convicción transformadora de los jueces constitucionales. Así: primero, analizo el constitucionalismo y su significado como fenómeno; segundo, explico el constitucionalismo transformador; tercero, describo el constitucionalismo feminista; cuarto, propongo el concepto de adjudicación constitucional transformadora que conjuntaría ambos postulados de los constitucionalismos revisados; quinto, examino algunos casos en la práctica constitucional en los que se demuestra la adjudicación constitucional transformadora.*

**PALABRAS CLAVE:** *Constitucionalismo, constitucionalismo transformador, constitucionalismo feminista, adjudicación constitucional transformadora, jueces constitucionales.*

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## I. INTRODUCTION

Contemporary constitutionalism is a theoretical, ideological, and methodological doctrine which can be characterized as a currently existing phenomenon despite a lack of uniformity among its various currents.<sup>1</sup> Transformative consti-

<sup>1</sup> We can identify the principle currents of constitutionalism as: *principalista* (focused on rights), *garantista*, *popular*, and *dialogico*. See Luis Prieto Sanchís, *El constitucionalismo de los derechos*, 71

tutionalism (hereafter, “TC”) and feminist constitutionalism (“FC”) envision reformulating legal propositions in such a way that the constitution, constitutional rights, and constitutional judges (“CJs”) can become the instruments through which social transformation and the advancement of women’s rights can be achieved. Although these two perspectives present an apparent conceptual separation,<sup>2</sup> they converge when the focus is limited to viewing the constitution, rights, and CJs as the specific instruments for advancing their goals. This leads to two key questions: Is a specific constitutional institutional design necessary to promote the advancement of women’s rights? And can the role of CJs be transformative of women’s reality, even when the juridical system itself cannot be characterized as TC or FC?

Several issues should be addressed before developing answers to these questions. First, when we say that a specific institutional design is not necessary, for example, a feminist design, it should be emphasized that there is a substantial difference between what is necessary and what is desirable. This note will not address the desirability of a feminist institutional constitutional design with a strong gender perspective. Rather, I aim to demonstrate that even with an unreliable or unstable institutional design, CJs still retain the ability to harmonize the demands of the constitution and the promotion of women’s rights. Second, my goal here is not to compare the merits and shortcomings of TC and FC, but to outline the principal objectives of each viewpoint and identify the convergences between the two. Finally, it is essential to note that the concept of transformative constitutional adjudication (“TCA”) proposed here will be developed as both a descriptive and a normative proposition, that is, it will describe existing constitutional judicial practice as well as offer a new judicial perspective that can be incorporated into this practice.

Thus, the objectives and methodology of this note will be: 1) to provide a general analysis of constitutionalism as a phenomenon, highlighting its theory, ideology, and method; 2) to identify several of the premises of TC, with the aim of highlighting the role that CJs play in bringing about change at a societal level; 3) to point out some of the main arguments of FC to highlight its ideological purpose; 4) to describe how constitutional adjudication is an area of convergence between TC and FC, and to propose the concept of TCA; 5) to show, through a compilation of constitutional rulings

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REVISTA ESPAÑOLA DE DERECHO CONSTITUCIONAL 47-72 (2004); Luigi Ferrajoli, *Constitucionalismo principialista y constitucionalismo garantista*, 34 REVISTA DOXA 15-53 (2011); Roberto Niembro, *Una mirada al constitucionalismo popular*, 38 REVISTA ISONOMÍA 191-224 (2013); Roberto Gargarella, *El nuevo constitucionalismo dialógico frente al sistema de los frenos y contrapesos*, 14 REVISTA ARGENTINA DE TEORÍA JURÍDICA 1-3 (2013).

<sup>2</sup> I refer to an “apparent conceptual separation” because although different constitutionalisms favor different approaches to constitutional institutional design, they all have the following convergences: 1) in their conceptual connections: constitution, rights, democracy, constitutional review; 2) in recognizing the dual dimension of the constitutional state; 3) in the objection or defense at constitutional review; and 4) in requiring a solid legal basis for the legal system generated by a constitution.

from legal systems that do not have a feminist institutional design, that TCA has considerable relevance for the advancement of women rights, which will reinforce the hypothesis of this text, namely, that the transformative and feminist conviction of CJs can significantly facilitate the advancement of women's rights.

## II. CONSTITUTIONALISM

The term constitutionalism refers to a complex set of historical, political and constitutional phenomena that, for many authors, began with the Magna Carta of June 15, 1215, in England.<sup>3</sup> It represents the origin of the contemporary constitutions, the idea of limiting or controlling public power, and the recognition of various individuals' rights. From the beginning, constitutionalism has represented a normative proposition about how the constitutional text, democracy, rights, and justice should function in modern society.<sup>4</sup> We could refer to foundational constitutionalism as the conception and practice of public power restrained to guarantee certain specified spheres of freedom.<sup>5</sup> This conception was reflected in the liberal ideals of the late eighteenth century and functioned as an instrument of legitimization in the legal-political discourse of that time.<sup>6</sup>

The concept of constitutionalism functions both as a theory relating to the constitutionalization of legal systems, as well as an analytical point of departure for evaluating a constitution as a normative and axiological model.<sup>7</sup> Therefore, constitutionalism can also be understood as an ideology founded on a distrust of political power in general, as well as a distrust of the way democracy itself might function in practice.<sup>8</sup> Finally, constitutionalism can be regarded as a methodology which allows constitutional principles and fundamental rights to act as a bridge between law and morality.<sup>9</sup>

Thus, constitutionalism is a phenomenon comprised of all the aforementioned characteristics, as well as the constitutionalization of the law itself through formal written constitutions which consist of a host of specifically enumerated rights and set boundaries for legislation, jurisprudence, the

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<sup>3</sup> MARTÍN CARLOS DE CABO, *PENSAMIENTO CRÍTICO, CONSTITUCIONALISMO CRÍTICO* 57 (Trotta, 2014).

<sup>4</sup> Peter Häberle, *El constitucionalismo como proyecto científico*, 29 *REVISTA DE DERECHO CONSTITUCIONAL EUROPEO* 105 (2018).

<sup>5</sup> Luigi Ferrajoli, *supra* note 1, at 17.

<sup>6</sup> MAURIZIO FIORAVANTI, *CONSTITUCIONALISMO. EXPERIENCIAS HISTÓRICAS Y TENDENCIAS ACTUALES* 17-ff. (Trotta, 2009).

<sup>7</sup> Paolo Comanducci, *Formas de (neo)constitucionalismo: un análisis metateórico*, 16 *REVISTA ISONOMÍA* 97-99 (2002).

<sup>8</sup> *Ibid.*, at 100.

<sup>9</sup> *Ibid.*, at 101.

action of political actors, and social relations.<sup>10</sup> In other words, the theory, ideology, and methodology of constitutionalism manifest themselves in institutional and social reality. Here, constitutionalism shares the evolution of the different models of the rule of law.<sup>11</sup> As well as the idea of a juridical-political project (*the liberal model*), and nowadays of a constitutional project for a political community (*a constitutional democracy*). Therefore, all constitutionalist currents pursue specific aims and objectives and offer their own methodology for the analysis and evaluation of new proposals to determine the degree to which they might advance or frustrate those aims and objectives. Among these currents are TC and FC.

### III. CONSTITUTIONALISM WITH A TRANSFORMING CONVICTION

TC considers that the objective of a constitution is not only to control power and preserve fundamental rights,<sup>12</sup> but to link the constitutional text with social progress.<sup>13</sup> In other words, it is a constitutionalism that favors social transformation to make manifest the basic pillars of the social state.<sup>14</sup> Given this premise, the constitution, rights, and the role of CJs are of central importance since TC is based on a model of strong constitutional justice as opposed

<sup>10</sup> MANUEL ATIENZA, CURSO DE ARGUMENTACIÓN JURÍDICA 29 (4th ed., Trotta, 2016).

<sup>11</sup> I refer to three stages of the rule of law: 1) the liberal stage, which is based on elective representation, the rights of citizens, and the separation of powers, which together could be summarized as mechanisms for the protection against the arbitrariness of public administration through the law; 2) the constitutional stage, where a large number of human rights were included within states (individual, political, and social rights), as well as the inclusion of a system of constitutional justice for the protection of these rights; and 3) the contemporary stage, which involves a complex synthesis between the central elements of the liberal state, the social state, and constitutional democracy, see GUSTAVO ZAGREBELSKY, EL DERECHO DÚCTIL. LEY, DERECHOS, JUSTICIA 23 (9th ed., Trotta, 2009); Robert Alexy, *La institucionalización de los derechos humanos en el Estado constitucional democrático*, 8 DERECHOS Y LIBERTADES 21-ff. (2000); José Ramón Cossío, *Constitucionalismo y multiculturalismo*, 12 REVISTA ISONOMÍA 84 (2000).

<sup>12</sup> Although the concept of, and trend towards, transformative constitutionalism was developed in Colombian constitutionalism after the promulgation of the Constitution of 1991, the contributions of South African constitutionalism has also been significant. In both cases, judicial practice has developed new theoretical approaches for transformative constitutionalism. On the reception and evolution of transformative constitutionalism in South Africa, see Theunis Roux, *Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?*, 2 STELL LR 258-ff. (2009); CASS SUNSTEIN, *Social and economic rights? Lessons from South Africa*, 11 CONSTITUTIONAL FORUM 123-125 (2000).

<sup>13</sup> MAURICIO GARCÍA VILLEGAS, *Constitucionalismo aspiracional*, 29 REVISTA ARAUCARIA, 79 (2013).

<sup>14</sup> Jorge Roa Roa, *El rol del juez constitucional en el constitucionalismo transformador latinoamericano*, in MPIL RESEARCH PAPER SERIES. MAX PLANCK INSTITUTE 3 (Bogdandy, A. & Peters, A. eds., 2020).

to a weak one.<sup>15</sup> Hence, even judicial activism finds strong institutional support in TC due to its role in establishing new rights.<sup>16</sup> However, this activist role of the CJs is not regarded as a monopolization of the fundamental collective decision-making function. On the contrary, TC envisions CJs using their position to encourage action by other governmental powers to ensure the constitutional text has an impact on social reality.<sup>17</sup> Such a role is particularly important in a society where there is a high degree of inertia in the legislative and executive branches.<sup>18</sup>

Thus, the role of CJs can be perceived in either of two ways: it can be perceived as overly intrusive regarding the other branches of power, or it can be viewed as complementary to democratic values. TC sees that role as complementary to democratic values because rulings by CJs can only transform society if the transformation is supported by the society itself.<sup>19</sup> In this sense, the view of democracy adopted by TC is a constitutional democracy where all of the various state powers must coordinate together to realize a constitutional project. This is an important issue considering the difficulty generally associated with advancing social rights since any transformative ruling, without the support and participation of the other state powers, would likely result in becoming nothing more than an unenforceable declaration.

The notion of fundamental rights is central to TC, particularly those rights with a social dimension. Since the protection of these rights by CJs in societies with a welfare state that is still in the process of construction, or where structural inequalities exist, it contributes to a consolidation of the levels already achieved on these societies.<sup>20</sup> South African TC can be

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<sup>15</sup> A system having strong constitutional justice, that is, where the constitutional court has the last word, does not mean that transformative constitutionalism is in conflict with other political or social institutions, rather, one of its objectives is to strengthen such institutions. See David Landau, *A Dynamic Theory of Judicial Role*, 55 BOSTON COLLEGE LAW REVIEW 1535-ff. (2014). Likewise, some positions arising in popular and dialogical constitutionalism refer to a weak form of constitutional justice and suggest that institutional dialogue offers the best way for social rights to be realized. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 228-ff. (Princeton University Press, 2008).

<sup>16</sup> However, judicial activism is difficult to define since it is a phenomenon that moves between arbitrariness and judicial discretion without a clear demarcation; thus, a rethinking of judicial activism would have to be considered. See Julio Muñoz Mendiola, *Un replanteamiento al significado del activismo judicial*, 34 UNIVERSITAS. REVISTA DE FILOSOFÍA, DERECHO Y POLÍTICA DE LA UC3M 75-96 (2021).

<sup>17</sup> Rosalind Dixon & Roux Theunis, *Making Constitutional Transitions: The Law and Politics of Constitutional Implementation in South Africa*, 64 UNSW LAW RESEARCH PAPER 1-ff. (2018).

<sup>18</sup> Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-form Judicial Review Revisited*, 5 INT. J. CONST. LAW 403-ff. (2007).

<sup>19</sup> Armin Von Bogdandy, *Ius constitutionale commune en América Latina: una mirada al constitucionalismo transformador*, 34 REVISTA DEL ESTADO 23 (2015).

<sup>20</sup> JORGE ROA ROA, *supra* note 14, at 10.

differentiated from Latin American TC since the latter contains a complex convergence in two areas: first, between human rights, democracy, and the rule of law, and second, between the constitutional courts and the regional courts charged with protecting human rights.<sup>21</sup> However, there is no doubt that the tenets of TC presuppose that CJs have a transformative and openly activist conviction.

#### IV. CONSTITUTIONALISM WITH A FEMINIST IDEOLOGY

In order to analyze FC, it is necessary to first consider several features of feminism in general. First, it is characterized by *polyconceptualization*<sup>22</sup> in the sense that distinctions are frequently made between different feminisms.<sup>23</sup> Second, there is a theoretical duality contained in feminism, for example, it can be regarded as a theory of equality, or as a theory about the objectivity of the law.<sup>24</sup> Lastly, feminism also has a dual practical aspect in that it has a constitutional character generally focused on the individual rights of women in a given society,<sup>25</sup> but also has a universal character in the sense that the international community has begun to take its demands into consideration, as well as the fact that it has become a consolidated global social movement.<sup>26</sup> However, due to the complexity of feminism, the analysis here will be limited to its legal and constitutional dimensions.

<sup>21</sup> In the Latin American region, transformative constitutionalism is also called *ius constitutionale commune*, see Armin Von Bogdandy, *supra* note 19, at 16-ff.

<sup>22</sup> OWEN FISS, ¿Qué es el feminismo?, 14 REVISTA DOXA 321 (1993).

<sup>23</sup> Distinctions such as *radical feminists*, *cultural feminists*, *liberal feminists*, and *socialist feminists* which should be analyzed and evaluated from an ontological perspective. See Gemma Nicolas Lazo, *Feminismos, concepto sexo-género y derecho*, in ANÁLISIS FEMINISTA DEL DERECHO. TEORÍAS, IGUALDAD, INTERCULTURALIDAD Y VIOLENCIA DE GÉNERO 15-28 (Sánchez Urrutia, Ana & Pumar Beltrán, Núria, coords., 2013).

<sup>24</sup> *Ibid.*

<sup>25</sup> JAMES TULLY, *STRANGE MULTIPLICITY. CONSTITUTIONALISM IN AGE OF DIVERSITY* (Cambridge University Press, 1995).

<sup>26</sup> For example, Article 1 of the Universal Declaration of Human Rights of 1948 contains an expansive mandate for equality which has expressed itself in various ways within the UN, such as *The Spotlight Initiative*, which is a campaign between the European Union and the UN aimed at eliminating all forms of violence against women and girls; and, the *Women, Girls and Adolescents in Latin America and the Caribbean program*, which is a project of the Inter-American Commission of Human Rights. These are available respectively at: <https://www.un.org/es/spotlight-initiative/> and <https://cidhoea.wixsite.com/mujeres>. On the analysis and perspectives of feminism as a social movement, see Grace Prada Ortiz, *El feminismo, un movimiento social alternativo*, 19 REPERTORIO AMERICANO 36-ff. (2005); Marta Fuentes, *Feminismo y movimientos populares de mujeres en América Latina*, 118 REVISTA NUEVA SOCIEDAD 55-ff. (1992); Giovanna Mérola, *Feminismo: un movimiento social*, 78 REVISTA NUEVA SOCIEDAD 112-ff. (1985).



One starting point is in the field of critical legal studies, where the contingency of law is criticized because it lacks objectivity in its goals.<sup>27</sup> Thus, feminism would try to use the law to reverse: 1) the differences between women and men;<sup>28</sup> 2) the ethic of justice that fails to recognize inequalities between women and men;<sup>29</sup> and 3) the domination and exploitation of women by men.<sup>30</sup> In the constitutional sphere, the feminist perspective recognizes that the constitutional paradigm is based on a principle of equality,<sup>31</sup> but objects to the fact that historically it has primarily benefitted men,<sup>32</sup> effectively excluding women from the founding covenant of contemporary constitutional states.<sup>33</sup> From that perspective, therefore, the constitutional state and constitutionalism have demonstrated they are not a sufficiently effective tool in the struggle to reverse the structural inequalities faced by women, that is, to improve democracy.<sup>34</sup> In this sense, FC adopts the demand for equality originating in the liberal thought of the late eighteenth century, as well as from feminist theory, with the aim of [re]conceptualizing equality as the central axis of the constitutional state.<sup>35</sup>

FC is a legal current that has developed out of several theoretical bases.<sup>36</sup> These bases are founded not only in a legal-institutional vision, but

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<sup>27</sup> Critical legal studies are a field of study focused on an alternative use of the law which would promote the rights of excluded social groups, such as people of color, women and workers. See MATTHEW KRAMER, *CRITICAL LEGAL THEORY AND THE CHALLENGE OF FEMINISM*, 265-ff. (Rowman & Littlefield, 1995).

<sup>28</sup> DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* 87-ff. (William Morrow, 1990).

<sup>29</sup> See CAROL GILLIGAN, *IN A DIFFERENCE VOICE* (Harvard University Press, 2003).

<sup>30</sup> See CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (Harvard University, 1987).

<sup>31</sup> The post-war period saw advances in the equality between women and men, but these advances were incomplete since they were limited to extending to women the rights already enjoyed by men. In addition, women's rights continued to be affected by gender roles in the family and in the private sphere. See Ruth Rubio-Marín, *The (dis) establishment of gender: care and gender roles in the family as constitutional matter*, 4 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW* 787-818 (2015).

<sup>32</sup> Some of the most radical feminist currents regard society as being comprised almost exclusively of constructs of male domination over women, which makes the problem of addressing inequality almost impossible to resolve. For these currents, see Ignacio Álvarez Rodríguez, *El movimiento feminista y la Constitución como norma*, 281 *REVISTA DE LA FACULTAD DE DERECHO DE MÉXICO* 84 (2021).

<sup>33</sup> Nilda Garay Montañez, *Constitucionalismo feminista: evolución de los derechos fundamentales en el constitucionalismo oficial*, in *IGUALDAD Y DEMOCRACIA: EL GÉNERO COMO CATEGORÍA DE ANÁLISIS JURÍDICO. ESTUDIOS HOMENAJE A LA PROFESORA JULIA SEVILLA MERINO* 270 (Corts Valencianes 2014).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at 270-271.

<sup>36</sup> Someone could argue, by contrast, that a feminist legal theory is not necessary since an equality legal theory would be sufficient. Fiss, Owen, *supra* note 22, at 335.



also in a philosophical-political one.<sup>37</sup> For example, critical legal studies scholarship includes the notion that it is desirable that the law be used as a tool to advance women's equality, that is, an instrumental use of the law.<sup>38</sup> This is because FC reveals the dysfunction of the liberal model: it was not only biased in the creation of the legal system and its laws, but was also founded on the complete exclusion of women from participation in many areas.<sup>39</sup>

Thus, FC would seek to embed feminist principles and issues into the institutional design of a constitutional system, giving it a strong gender perspective.<sup>40</sup> An important point to note is that some of the most radical currents of feminism sometimes overlook the fact that the constitution represents a common project to support diverse and often conflicting ideologies.<sup>41</sup> With that in mind, a fundamental objective of FC would be the reformulation of constitutions within legal systems, which implies at least three possibilities: 1) feminist constituent processes will include women as constituent legislators, and feminist rights, principles, and values will be incorporated into the text of new constitutions;<sup>42</sup> 2) constitutional reforms will be carried out with true feminist participation, especially when constitutional norms relating to issues affecting the rights of women are being debated and established;<sup>43</sup> 3) constitutional adjudication will include interpreting and applying the consti-

<sup>37</sup> See MALENA COSTA, *FEMINISMOS JURÍDICOS* (Ediciones Didot, 2016); Jenny Chapman, *La perspectiva feminista*, in *TEORÍA Y MÉTODOS DE LA CIENCIA POLÍTICA*, (Marsh, David & Stoker, Gerry, eds., 1995).

<sup>38</sup> OWEN FISS, *supra* note 22, at 339-ff.

<sup>39</sup> Ana Marrades Puig, *Los derechos políticos de las mujeres: evolución y retos pendientes*, 36 CUADERNOS CONSTITUCIONALES DE LA CÁTEDRA FADRIQUE FURIÓ CERIO, 196-ff (2001).

<sup>40</sup> Baines, Beverley *et al.*, *Introduction: The Idea and Practice of Feminist Constitutionalism*, in *FEMINIST CONSTITUTIONALISM. GLOBAL PERSPECTIVES* 1-ff. (Baines, Beverley *et al.*, eds., 2012).

<sup>41</sup> ÁLVAREZ RODRÍGUEZ, *supra* note 32, at 85. In fact, feminism can serve as an ideological instrument at the service of populism. This would represent a reduction in the value of individual autonomy since the credibility of their rationally plausible and fully debatable claims depends on a separation between populism and feminism. See Alfonso García Figueroa, *¿Unidas podemos? La deriva populista del feminismo*, in *ESTUDIOS SOBRE MUJERES Y FEMINISMO. ASPECTOS JURÍDICOS, POLÍTICOS, FILOSÓFICOS E HISTÓRICOS* 119-ff. (Escribano Gámir, María, coord., 2021).

<sup>42</sup> The recent Constituent Convention in Chile represents the first time in world history in which a constituent process will be entirely made up of men and women on an equal basis.

<sup>43</sup> It could be objected that a constitution should enshrine generic constitutional concepts (equality, freedom, justice), and not particular viewpoints about those concepts (christian, marxist, or feminist), because if feminism were to become the religion of the state as a result of constitutional reform, then the constitution will have lost its neutrality (ideological, political, or religious) and the society would be moving in a regressive direction. Itziar Gómez, *¿Qué es eso de reformar la Constitución con perspectiva de género? Mitos caídos y mitos emergentes a partir el libro "Una Constituyente feminista"*, 16 EUNOMÍA. REVISTA EN CULTURA DE LA LEGALIDAD 312-329 (2019).

tution from a feminist perspective, for example, interpreting constitutional objectives and goals in a manner which advances women's rights and strives to achieve an equality that is actually reflected in the social reality.<sup>44</sup> These three possibilities are not mutually exclusive, but rather represent a possible integration of the theoretical and practical aspects of FC. However, of the three, constitutional adjudication offers the most immediate, realistic, and concrete option for achieving the objectives of FC.

## V. CONSTITUTIONAL ADJUDICATION WITH A TRANSFORMATIVE CONVICTION

Before proposing the concept of TCA, it is necessary to point out two areas of convergence between TC and FC. First, there is a convergence in their vision of the Constitution, and the Fundamental Rights it establishes as an instrument of social change, not merely as a legal or political discourse. Second, there is a convergence in their reactionary character for achieving a realization of a constitutional state. These two convergences between TC and FC would be based on a specific institutional design; however, both constitutionalisms would find it difficult to their institutional designs work in the social reality. This is where TCA would be important to achieve the goals of TC and FC, since TCA only needs an institutional design that contemplates a constitutional justice system (*a constitution with normative force and a strong model of constitutional justice*).<sup>45</sup>

At this point, TCA would be a viable and realistic option to make possible women's rights, even in precarious contexts (*legals, politicals, and socials*).<sup>46</sup> This would situate the TCA with a means-goals structure,<sup>47</sup> but also with a

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<sup>44</sup> Regarding adjudication of the Constitution, if a woman can apply the law with the same capabilities as a man, why could a man not do the same as a woman regarding issues relating to justice? Alfonso García Figueroa, *Feminismo de Estado: Fundamentalmente religioso y religiosamente fundamentalista*, 17 EUNOMÍA. REVISTA EN CULTURA DE LA LEGALIDAD 358-376 (2019).

<sup>45</sup> A model of strong constitutional review is where CJs have the authority to review, modify or invalidate laws for being contrary to the constitution. Even intermediate models between weak and strong forms are included. An example of this is the Canadian Supreme Court. That Court can review and invalidate laws for being contrary to its bill of rights, however, Canadian legislation also contains a "notwithstanding clause" which gives representative assemblies the power to leave a ruling of the Canadian Court without any effect. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 THE YALE LAW JOURNAL 1353-1359 (2006).

<sup>46</sup> The tenets of both TC and FC acknowledge these precarious contexts since both constitutionalism's face adverse conditions that inhibit progress toward their aims and objectives. For example, FC aims to abolish the patriarchal structure of the legal system.

<sup>47</sup> From my perspective, all public power and its exercise presents this means-ends structure, that is, a thesis of the instrumentality of public power which establishes that this power represents a means that is oriented to the achievement of specific constitutional aims and objectives that impact social reality.

pluralist character since the constitutional text is a framework that contains all the projects and principles of a pluralistic society;<sup>48</sup> therefore, TCA will have a plurality of goals to be achieved. Here is where a feminist institutional design would not be essential since the goal of TCA would be change the legal, political, institutional, and social structures designed under a patriarchal or unequal logic for women.<sup>49</sup>

The concept of TCA that I propose is based on three pillars: 1) the foundational nature of constitutional adjudication in constitutionalism;<sup>50</sup> 2) the historical-pragmatic role of CJs as a brake on public and political power; and 3) a kind of “cosmopolitan constitutionalism”.<sup>51</sup> CJs adhering to these pillars in the context of expanding rights and freedoms, would be playing an openly activist role, but a role that was, nevertheless, an institutional one. From a political perspective, such behavior could invite criticism by other governmental powers for what could be perceived as overreach for CJs.<sup>52</sup>

Of course, the transforming conviction of the CJs needs other elements, for example, in Latin America there are several factors that helping to this conviction, such as: 1) the inclusion of human rights in the region through the constitutional blocks; 2) the regional jurisdiction for the protection

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<sup>48</sup> JAIME CÁRDENAS GRACIA, *DEL ESTADO ABSOLUTO AL ESTADO NEOLIBERAL* 106 (UNAM-IJ, 2017).

<sup>49</sup> It is not my intention to trivialize the tenets or objectives of feminist constitutionalism. I am not saying that constitutional interpretation and application are sufficient, rather, that such a proposition represents a practical and nondiscursive perspective. I would only emphasize that constitutional adjudication is a powerful tool for promoting change, and although it is not a unique solution, it can help to bring about change in different dimensions of the state, that is, in its legal, political, and social spheres.

<sup>50</sup> Diego Valadés, *La garantía política como principio constitucional*, 132 BOLETÍN MEXICANO DE DERECHO COMPARADO 1265-1267 (2011).

<sup>51</sup> Cosmopolitan constitutionalism is based on the fact that although a uniform constitutional state does not exist since constitutions have different meanings in different legal systems, they still have practical convergences in the area of constitutional justice that stand out. Gustavo Zagrebelsky, *Jueces constitucionales*, 117 BOLETÍN MEXICANO DE DERECHO COMPARADO 1136 (2006).

<sup>52</sup> An example of this was the so-called *Warren Court* in the United States which played a valuable role in the expansion of individual rights and liberties of great importance for American society. The activism it displayed, however, resulted in a certain level of societal ambivalence toward the Court, since although its conduct was institutional, some believed the Court was improperly intruding into the political sphere. However, the fact that significant rights were obtained during that time through constitutional adjudication cannot be denied. See Justin Driver, *The Constitutional Conservatism of the Warren Court*, 5 CALIFORNIA LAW REVIEW 1101-ff. (2012); ROBERT McCLOSKEY, *Reflections on the Warren Court*, 7 VIRGINIA LAW REVIEW 1229-ff. (1965). In its paradigmatic case, *Brown v. Board of Education* (1954), the Court used constitutional adjudication to begin to reverse the long-standing inequality and deeply embedded discrimination that had been effectively institutionalized in that North American society. This case can be consulted at: <https://supreme.justia.com/cases/federal/us/347/483/#tab-opinion-1940808>.

of these rights;<sup>53</sup> and 3) the so-called *conventional control* made by national courts.<sup>54</sup> These exogenous factors have allowed CJs to use their interpretative and adjudicative powers to become agents of change. This does not mean that their convictions are always desirable or correct from the point of view of those who prefer that CJs have a feminist conviction, as is proposed in the thesis of this note. However, I am not interested here in making a historical defense of constitutional adjudication, I merely want to point out that by means of these adjudications, it is possible for CJs to achieve structural changes,<sup>55</sup> and, that this possibility does not necessarily depend on a legal system having a constitutional framework designed in conformance with the principles of FC.

Hence, TCA, as presented, provides an alternative method for reversing specific manifestations of structural inequality.<sup>56</sup> From its institutional position within the legal system it can also provide a louder voice to demands for social change. TCA is further supported by the recognition that CJs contribute to social transformation through their interpretation of the constitutional text due to their awareness of the effects of their decisions, particularly when they are designed to remedy structural problems.<sup>57</sup> In this context, constitutional adjudication with a feminist ideology would be a significant tool for furthering social change through constitutional interpretation. Compared to the other branches of government, CJs are uniquely positioned to promote constitutional goals that impact society,<sup>58</sup> especial-

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<sup>53</sup> Armin Von Bogdandi & René Urueña, *Comunidad de práctica en DDHH y constitucionalismo transformador en américa latina*, special issue ANUARIO DE DERECHOS HUMANOS 15-34 (2020). Here, it is appropriate to clarify that if we are considering the transforming conviction of CJs at a global level, we must consider the fact that in countries such as South Africa or India there are no mechanisms such as *conventional control* created by the Inter-American Court of Human Rights, which highlights the importance of conviction on the part of their CJs to transform their social reality.

<sup>54</sup> Heideer Miranda Bonilla, *El control de convencionalidad como instrumento de diálogo jurisprudencial en América Latina*, 12 REVISTA JURÍDICA IUS 1-ff (2015).

<sup>55</sup> We should take into account the variables that could have an impact on this hypothesis, for example, achieving change by way of constitutional adjudication also requires strategic litigation, as well as the involvement and collaboration of other public entities, including the government in power. As a result, a ruling by a CJ is more than a procedural act that puts an end to a legal conflict, it is a decision with political transcendence. RAÚL BOCANEGRA SIERRA, *EL VALOR DE LAS SENTENCIAS DEL TRIBUNAL CONSTITUCIONAL* 19 (Instituto de Estudios de Administración Local, 1982).

<sup>56</sup> JESÚS DE LA TORRE RANGEL, *EL DERECHO COMO ARMA DE LIBERACIÓN EN AMÉRICA LATINA, SOCIOLOGÍA Y USO ALTERNATIVO DEL DERECHO* 124 (CEDH-UASL-CEJS, 2006).

<sup>57</sup> In this regard, CJs would be empowered as the highest interpreter and defender of constitutional rights, defining how authorities should act with a view toward concretizing these rights and solving identified social problems. Nestor Osuna, *Las sentencias estructurales*, in JUSTICIA CONSTITUCIONAL Y DERECHOS FUNDAMENTALES N° 5. LA PROTECCIÓN DE LOS DERECHOS SOCIALES. LAS SENTENCIAS ESTRUCTURALES 89-125 (Bazán, Víctor, ed., 2015).

<sup>58</sup> ROSALIND DIXON, & ROUX THEUNIS, *supra* note 17, at 1-ff.

ly when the legislative and executive branches are paralyzed by inertia.<sup>59</sup> Thus, TCA represents a realistic vision for social transformation in contexts where institutional, political, and social conditions reveal an unequal protection of women's rights.

## VI. SOME EXAMPLES OF TRANSFORMATIVE CONSTITUTIONAL ADJUDICATION

In this section, I will provide some examples of how TCA was able to advance women's rights, even in adverse contexts. The aim here is not a quantitative analysis, but rather a qualitative analysis, highlighting the transformative role played by CJs in the area of women's rights. My objective is to clarify how TCA has been employed in judicial practice. The principal point here is that neither a specifically transformative nor feminist institutional design is necessary, since in the legal systems where TCA has been employed, CJs were operating within a typical institutional framework based on a constitution with normative force and characterized by strong constitutional review. This reinforces the hypothesis that TCA is realistic, valuable, and viable, and can contribute to the advancement of women's rights even in adverse contexts.

The following information shows eight cases in which the adjudication by CJs was transformative and promoted women's rights. Nevertheless, there will also be cases in which the adjudication represented a setback for women's rights. The analysis provides the facts of each case, the decision, the constitutional framework of the relevant legal system, and reviews the resulting repercussions on women's rights.

### *Ruling:*

*Supreme Court of  
United States* *United  
States v. Virginia*,  
1996 (EE UU)<sup>60</sup>

### *Facts/decision about case:*

The Virginia Military Institute, which provides university-level academic and military training to its students, denied admission to a female applicant because of the Institute's tradition and rules which reserved admission exclusively to men. The applicant filed a discrimination claim, and The District Court ruled in favor of Institute since it was not possible to force the Institute to admit women. The Fourth Circuit reversed and ordered to State of Virginia to implement a parallel program for women (*Virginia Women's Institute for Leadership*). Later, The Court of Appeals acknowledged that both Institutes have substantively comparable benefits to his students. However, this decision was vulnerable to challenge since it merely constituted a new form of the previously rejected doctrine of "separate but equal". The case would reach the Supreme Court which held the discrimination violated the Fourteenth Amendment's Equal Protection Clause

<sup>59</sup> ROSALIND DIXON, *supra* note 18.

<sup>60</sup> This case can be consulted at: <https://supreme.justia.com/cases/federal/us/518/515/case.pdf>.

which prohibits discrimination based on gender.<sup>61</sup> Thus, the Institute was required to provide training in the same form and conditions for women as it did for men.

*Constitutional framework:*

The U.S. Constitution is very general in its content and reduced in its articles (7 *articles* & 27 *amendments*), and it is not a text that is continuously reformed, its adaptation has been by The Supreme Court.<sup>62</sup> Therefore, the institutional design of the Constitution is not feminist, although, the Fourteenth Amendment has a generic equality clause which has helped to Court rules gender cases.

*Repercussions:*

In this case, the constitutional adjudication was transformative and resulted in advancing women's rights. The Court's decision established the precedent that any law attempting to deny women equal rights, freedoms, or opportunities due to her gender would be deemed unconstitutional. This occurred despite not having a FC institutional design.

*Ruling:*

*Constitutional Court of Chile Rol 740/2007 (Chile)*<sup>63</sup>

*Facts/decision about case:*

A group of deputies challenged a regulatory decree that legalized the use of emergency hormonal contraception (*the pill and IUDs*) claiming it would violate the Constitution, specifically, the right to life protected in Article 19.1. The Court found the decree violated the constitutional protection of the unborn child, whose life begins at conception, since the contraception would be abortive. The Court based its decision on the constitutional personhood of the human embryo since Chilean constitutional doctrine has affirmed that constitutional protection of the person begins at the moment of conception. Thus, because the exact effects of emergency hormonal contraception cannot be conclusively established, there exists a reasonable doubt as to its abortive nature. Therefore, the unborn child should be protected. In other words, the *pro persona* principle requires the interpretation that most protects the person, and as a result, the life of the unborn child should be defended.

*Constitutional framework:*

The current Chilean Constitution is the product of a dictatorship, therefore, it does not have a FC institutional design; however, Article

<sup>61</sup> The U.S. Supreme Court relied on *Mississippi University for Woman v. Hogan* (1982), which held that a statute prohibiting a man from entering an all-women's nursing school was unconstitutional, and *J.E.B. v. Alabama ex rel. T.B.* (1994), which held that peremptory challenges of jurors based solely on their gender to be unconstitutional. These cases can be consulted at: <https://supreme.justia.com/cases/federal/us/511/127/#tab-opinion-1959474> <https://supreme.justia.com/cases/federal/us/458/718/#tab-opinion-1954696>.

<sup>62</sup> Perhaps in the Ninth Amendment is an obligation of CJs to adapt the constitutional text to the social reality, at least with regard to rights and liberties, the Amendment establishes *that the enumeration of certain rights in the Constitution cannot be understood as a denial or disregard of others that the people retain*.

<sup>63</sup> This case can be consulted at: <https://www.tribunalconstitucional.cl/expediente>.

	<p>19.5 prescribes equality between women and men before the law and in the exercise of fundamental rights.<sup>64</sup></p> <p><i>Repercussions:</i></p> <p>The constitutional adjudication was to the detriment of women and represented a setback in their sexual and reproductive rights. It also had the effect of promoting inertia on the part of public authorities. It would be ten years before the Court would rule again on the rights of women in Rol 3729-17,<sup>65</sup> a case which recognized the fundamental rights of women and would be a step toward free abortion for Chilean women.</p>
<p><i>Ruling:</i></p> <p><i>Constitutional Court of Spain</i> STC 12/2008 (Spain)<sup>66</sup></p>	<p><i>Facts/decision about case:</i></p> <p>A group of deputies challenged an organic law that established gender parity in the nomination of candidates of parties, federations, coalitions of parties, and electoral groupings. The Court decided the law was constitutional since the aim of the legislation was to overcome a social reality characterized by the lower presence of women in public life. Therefore, under the substantive mandate of material equality of Article 9.2 of the Constitution, the Court required political parties to have a balanced composition of women and men.<sup>67</sup></p> <p><i>Constitutional framework:</i></p> <p>The Spanish constitutional framework does not present an institutional design of FC, nor does it contain norms that explicitly guarantee women's rights. However, some norms could be considered neutral, such as Articles 14, 23.2, 35.1, and 9.2, the last being the one the Court relied on to resolve this dispute via its mandate of material equality.</p> <p><i>Repercussions:</i></p> <p>In this case, the constitutional adjudication was both transformative and collaborative with respect to the legislature, guaranteeing women's rights by the use of gender quotas which remedied the structural inequality faced by Spanish women in the political sphere.</p>
<p><i>Ruling:</i></p> <p><i>Mexican Supreme Court</i> Amparo en revisión 1340/2015 (Mexico)<sup>68</sup></p>	<p><i>Facts/decision about case:</i></p> <p>A woman challenged the constitutionality of a civil law provision that regulated presumptions concerning the determination of compensatory pensions upon the termination of a marriage. She claimed it failed to take gender perspectives into account and perpetuated stereotypes.</p>

<sup>64</sup> Perhaps by the time this note is published, the new Chilean constitution will have already been promulgated; here I am referring to the constitutional text precedent to this new text.

<sup>65</sup> This case can be consulted at: <https://www.tribunalconstitucional.cl/expediente>.

<sup>66</sup> This case can be consulted at: <http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/6244>.

<sup>67</sup> The only dissenter in this case argued against gender quotas claiming they violated the guarantees of ideological freedom and self-organization of political parties under Articles 6 & 22 of the Constitution. The dissent also emphasized the freedom of creation and exercise of political parties, as well as the absence of any constitutional obligation regarding quotas in other European countries such as France, Germany, Italy, Belgium, and Portugal. As a result, the dissent argued quotas should not be imposed on political parties by the legislature.

<sup>68</sup> This case can be consulted at: <https://www.scjn.gob.mx/sites/default/files/igualdad/sentencias/documento/2016-12/2%20CIVIL%20AR%201340-2015%2012AMfj.pdf>.



The rule did not specifically differentiate between men and women concerning the granting of a pension, but it indirectly excluded the possibility that the woman might be unable to work or develop professionally because she had been dedicated primarily to the care of her home and her children. The Court decided the law was unconstitutional since it disregarded the structural inequality between men and women in professional development. The Court also determined that the division of labor constituted a real, objective, and legitimate cause of need for the woman who had devoted herself primarily to the home, and that this need should be alleviated to the extent possible by the one who had benefited over the years, which in this case was the man.

*Constitutional framework:*

The Mexican constitutional framework does not represent an institutional design of FC, but it does have more explicit protections for women. This is because, in addition to Article 4 of the Constitution establishing equality between men and women, there are also conventions that specifically protect the rights of women, such as CEDAW which is domestic law through the block of constitutional regularity that operates in the Mexican legal system.

*Repercussions:*

In this case, the constitutional adjudication was transformative for the rights of women since the decision authorized a new rule regarding the awarding of compensatory pensions to women from men. Therefore, family judges are required to not only apply gender perspectives to concrete cases involving structural inequality, but also to make use of the concept of intersectionality.<sup>69</sup>

*Ruling:*

*Indian Supreme Court Shayara Bano et al. v. Union of India et al., 2016 (India)*<sup>70</sup>

*Facts/decision about case:*

An Indian woman claimed that her right to equality before the law was violated by the religious practices of triple talaq, polygamy, and nikah halala because they discriminated against women.<sup>71</sup> The Supreme Court decided that the practice of *triple talaq* was unconstitutional as it violated Articles 14 and 13.1 of the Constitution because it represented an inequality between men and women, as well as discrimination based on gender. Furthermore, the law that permitted this practice, *sharia of 1937*, which predated the effective date of the current Constitution, was, by way of Article 13.1, subject to conformity with the fundamental rights enshrined in the constitutional text.

<sup>69</sup> That is, taking into account that discrimination against women based on sex and gender is indivisibly linked to other factors that affect them as well, such as race, ethnic origin, religion or beliefs, health, status, age, and sexual orientation, among others.

<sup>70</sup> This case can be consulted at: [https://main.sci.gov.in/supremecourt/2016/6716/6716\\_2016\\_Judgement\\_22-Aug-2017.pdf](https://main.sci.gov.in/supremecourt/2016/6716/6716_2016_Judgement_22-Aug-2017.pdf).

<sup>71</sup> Talaq is a religious practice in Islam that allows a man to divorce his wife without any legal or religious consequences by merely uttering the phrase “I divorce” (“Talaq”) three times. This practice is unusual since it is a custom with deep cultural and social roots but is not contemplated in the holy book of Islam, the Koran.

<p><i>Ruling:</i></p> <p><i>Federal Supreme Court of Brazil Habeas Corpus 124.306, 2016 (Brazil)</i><sup>73</sup></p>	<p><i>Constitutional framework:</i></p> <p>The Indian constitutional framework is peculiar, as it is immersed in both a Western and a conservative context at the same time. Therefore, it does not have a FC institutional design, nor does it have norms that guarantee a gender perspective or address feminist demands.</p> <p><i>Repercussions:</i></p> <p>In this case, the constitutional adjudication was more than transformative for the rights of women, as the prevailing context in India is overtly patriarchal. The decision of the Court succeeded in banning the <i>triple talaq</i> at the national level.<sup>72</sup></p> <p><i>Facts/decision about case:</i></p> <p>The Supreme Court heard a habeas corpus petition filed by several people against the Public Prosecutor of Rio de Janeiro who had prosecuted patients, nurses, and doctors for having worked in a clinic that allegedly performed clandestine abortions. Although the actual constitutional dispute was about the imposition of preventive detention on the defendants, one of the dissenting opinions questioned the legitimacy of the underlying measure itself considering abortion was being determined to be constitutional during the first 12 weeks of pregnancy. The Court held that although the fetus did enjoy constitutional protection, this protection was gradual and increased along with fetal development. In contrast, the limitations on women's fundamental rights (i.e., personal autonomy, physical and psychological health, sexual and reproductive rights, and the violation of gender equality) were excessive and unwarranted.<sup>74</sup></p> <p><i>Constitutional framework:</i></p> <p>The Brazilian constitutional framework does not present an institutional design of FC as such. However, Articles 3 and 5 of the Constitution recognize both the equality of men and women, as well as other gender-based rights. These legal protections are similar to human rights treaties the Brazilian state has signed as well, such as CEDAW.</p> <p><i>Repercussions:</i></p> <p>In this case, the constitutional adjudication was partially transformative regarding the rights of women, but only in the sense that the dissenting vote introduced the issue of decriminalization of abortion into the public debate, a debate in which experts, academics, as well as national and international institutions, would participate.</p>
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<sup>72</sup> Almost immediately following this ruling, the Government of India introduced a bill criminalizing this practice. However, the Indian Parliament would not approve such criminalization until 2019.

<sup>73</sup> This case can be consulted at: <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=12580345>.

<sup>74</sup> The dissenting opinion, by contrast, focused on the direct impact of intersectional discrimination on women's human dignity, which represented an argument with a very clear gender perspective.

*Ruling:*

*Constitutional Court of Colombia T 398/2019 (Colombia)*<sup>75</sup>

*Facts/decision about case:*

The Constitutional Court dealt with a case involving the menstrual health of a homeless woman living on the street. The Court's ruling established that the State must provide at least a minimal level of hygiene and health services to this woman, as well as all women living in similar circumstances. The Court recognized a fundamental right to menstrual health services for this particular homeless woman, which thereby obligated various state entities to try to resolve a structural problem that affected many other homeless women.<sup>76</sup>

*Constitutional framework:*

The Colombian constitutional framework does not have an institutional design of FC. However, Articles 13, 42, and 43 of the Constitution recognize equality between women and men in different areas, such as marital relations. In addition, the Colombian state has signed various treaties that protect the rights of women, and which have direct application in its legal system such as CEDAW.

*Repercussions:*

In this case, the constitutional adjudication was transformative and structurally reinforced the rights of women. The Court's ruling sought to reverse a problem faced by all homeless women. It is worth noting that a right to menstrual health services is a right exclusively for women.

*Ruling:*

*Polish Constitutional Court K1/2020 (Poland)*<sup>77</sup>

*Facts/decision about case:*

The Constitutional Tribunal examined the constitutionality of a controversial law on family planning and the conditions that permit the termination of a pregnancy. The Court examined whether Article 4 of the law, which enumerated certain conditions for allowing the termination of a pregnancy, had a basis in the Polish Constitution. The Court ruled that it did not have a basis in the Constitution. This ruling can be understood as limiting both the free development of the personality and the sexual rights of women, since it prohibits abortion even in cases where the life or health of the woman is in danger. The central argument of the decision was that the inherent human dignity of the fetus attaches to it from the moment of conception.

*Constitutional framework:*

The Polish constitutional framework does not have an institutional design of FC, although it should be noted that Articles 33.1 and 33.2

<sup>75</sup> This case can be consulted at: <https://www.corteconstitucional.gov.co/relatoria/2019/T-398-19.htm>.

<sup>76</sup> Some of the actions indicated by the Court's ruling were: 1) investment in social spending to attend to homeless women who do not have access to adequate menstrual hygiene services; 2) legislative modifications and implementation of public policies in the short and long term; 3) analysis by the secretariats charged with this social problem to identify and keep track of women in this situation; and 4) implementation of a contingency plan which extended the right to menstrual health services in other parts of the country.

<sup>77</sup> This case can be consulted at: <https://trybunal.gov.pl/en/hearings/judgments/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerwywania-ciazy>.

of the constitution establish equality between women and men in the marital, public, political, labor, social, economic, and educational dimensions.

*Repercussions:*

In this case, the constitutional adjudication was detrimental to the sexual and reproductive rights of women since the Court's decision has conclusively settled the abortion issue.

The following points can be inferred from the cases analyzed in the model: 1) the different legal systems of the analyzed cases did not present an institutional design of FC, nor a large number of constitutional norms with a gender perspective; 2) most of the constitutions in the systems that were analyzed contain a generic equality clause that expressly emphasizes equality between men and women; 3) the appearance of TCA as a method to resolve a claim for women's rights was contingent, but, of the eight cases reviewed, six complied with TCA; and 4) the constant that determines whether TCA will result in a favorable outcome for women's rights is the conviction of the CJs to carry it out, or as the case maybe, not to do so.<sup>78</sup>

## VII. CONCLUSION: THE IMPORTANCE OF CONSTITUTIONAL JUDGES WITH A TRANSFORMATIVE VOCATION

Constitutionalism is a phenomenon that can incorporate varying ideologies, such as TC and FC. However, its foundation is built on a normative constitution, strong constitutional review, and a leading role for CJs. Through their

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<sup>78</sup> The rulings analyzed here highlight the fact that, in most of the cases, the CJs held a strong conviction regarding the importance of women's rights. Although there is no guarantee that a constitutional ruling will change the social reality women face, these rulings often have an effect that radiates beyond the litigants themselves. Several examples of this are: 1) The case of *United States v. Virginia* (1996) established a precedent for the analysis of laws that differentiate between people on the basis of gender, or that discriminate against women, including such areas as wage discrimination, which was employed later in the case of *Ledbetter v. Goodyear* (2006); 2) In the case STC 12/2008, the Spanish Constitutional Court declared Organic Law 3/2007 constitutional, and the effectiveness of this law in strengthening women's rights can be seen in various areas, such as labor, where women have achieved managerial positions and the wage gap has narrowed; 3) In the case AR 1340/2015 the Supreme Court of Justice of the Nation introduced the concept of intersectional discrimination as a category of analysis which allowed for a more comprehensive analysis and facilitated identification of other types of discrimination that affect women; 4) In the case of *Shayara Bano v. Union of India* (2016), the Supreme Court of India declared the practice of triple talaq unconstitutional which not only prompted reform at the national level regarding this practice, but also marked a change of jurisprudential direction in the recognition of women's rights in India.

adjudications, CJs can generate changes that impact society, not only at the legal level but also at a structural level, in the following ways: 1) pursuing an activist role within institutional margins for the achievement of constitutional aims and objectives; 2) searching for opportunities for collaboration with other public powers since constitutional adjudication is not sufficient by itself to achieve concrete constitutional objectives; 3) taking into consideration the instrumentality of public power in their decisions, since all public powers are obliged to fulfill constitutional aims and objectives,<sup>79</sup> and CJs play a fundamental role in initiating and orchestrating that collaboration.<sup>80</sup> All of the above may be considered controversial insofar as a constitutional decision imposes a mandatory institutional dialogue between the various institutions of state power. However, from the perspective of this note, this collaborative exercise must be understood as a functional, institutional form of dialogue that is necessary in order to make new rights a concrete reality in the social dimension.<sup>81</sup>

This note did not propose that an institutional design of TC or FC would not be desirable. However, as the analysis in Section VI reveals, these types of institutional designs did not exist in the various legal systems under examination. Given that reality, CJs with a transformative vocation could make a significant impact by linking the law to a vision of a more equitable social order.<sup>82</sup> Examples of this would include reversing the structural inequalities faced by women and working to eliminate gender partiality in the law. CJs can operate as an engine of change by using TCA to promote projects or movements such as feminism, since they are the guarantors of the social pluralism reflected in the constitution. Thus, TCA is a means to achieve constitutional objectives that have an impact on society, and for purposes of this note, that includes the objectives of gender equality and protecting the rights of women.

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<sup>79</sup> For example, the aim of CJs, when they engage in the act of interpretation, is to fulfill the purpose for which a constitution was created. See AHARON BARAK, *UN JUEZ REFLEXIONA SOBRE SU LABOR. EL PAPEL DE UN TRIBUNAL CONSTITUCIONAL EN UNA DEMOCRACIA* 58-ff. (SCJN, 2008).

<sup>80</sup> Regarding the collaboration of constitutional judges with other public authorities, this collaboration is extraordinary in constitutional practice since a ruling obligates these authorities for the realization of actions to make possible social rights, but the collaboration of these authorities will depend on an institutional dialogue that will be supported by a goal of the constitutional State. Furthermore, we must take into account that the factual possibilities of CJs to guarantee social rights will have a profound link between the enforceability of this rights and public spending. See HOLMES, STEPHEN y SUNSTEIN, CASS R., *EL COSTO DE LOS DERECHOS. POR QUÉ LA LIBERTAD DEPENDE DE LOS IMPUESTOS*, 53-59 (SIGLO VEINTIUNO, 2011).

<sup>81</sup> See Julio César Muñoz Mendiola, *Un replanteamiento a la forma de entender la legitimidad democrática del juez constitucional a través del ejercicio del poder público a su cargo*, 19 *REVISTA PRECEDENTE* 100-ff. (2021).

<sup>82</sup> Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 *OSGOODE HALL LAW JOURNAL* 522 (1990).

Due to the short length of this note, it was not possible to explore other lines of research regarding TCA, for example, the analysis of TCA by each CJs into a constitutional court since their *transformative feminist* vocation could also make a big difference.<sup>83</sup>

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<sup>83</sup> For example, the conservative US Supreme Court Justice, Sandra Day O'Connor, who was appointed by President Ronald Reagan, was personally opposed to abortion. However, despite her personal beliefs she was a key player in preventing the U.S. Supreme Court from overturning the important precedent of *Roe v. Wade* (1973), which represented a triumph for feminist demands and the reproductive rights of American women. This case can be consulted at: <https://supreme.justia.com/cases/federal/us/410/113/>.