

The Virtues and Limits of Transformative Constitutionalism

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2021-03-25T11:40:32

On 23 February 2021, prison riots broke out across Ecuador. They continued for several days and at least 79 people were killed ([here](#), [here](#)). The images and videos broadcast live on social networks offered a grim glimpse of the Ecuadorian state, which appeared powerless to protect the human rights of persons deprived of liberty (PDL).

On 4 March, the Ecuadorian Constitutional Court published [Decision No.4-20-EE/21](#). This judgment underlines the key functions of a Court empowered with a transformative mandate in the face of systemic failures in public policy. Following a methodology applied in previous cases, the Court initiated a period of judicial supervision, using the vocabulary of PDL rights to describe the social unrest. In addition, the Court took a step forward by declaring 'structural failures' on the part of the Ecuadorian State and ordered concrete steps be taken to shape its future actions. However, this decision shows the limits of a Court's power that will need a broader political agreement to implement the necessary comprehensive measures to solve the systemic failures in Ecuadorian prisons.

The Court decision and the collapse of prisons in Ecuador

Since August 2020, before February's events, the Ecuadorian President Lenin Moreno had already requested emergency powers on two occasions to deal with the situation inside prisons. First, on 11 August 2020, the Ecuadorian President requested the Constitutional Court review a decree ([here](#)) granting him executive emergency powers to address riots in prisons where 9 people died and 20 more were injured.. The Court authorized such powers ([here](#)). Second, on 19 October 2020, the Court accepted another request from the President to extend the emergency powers of his office for an additional 30 days ([here](#)). In both resolutions, the Ecuadorian Court acknowledged a 'serious situation' and ordered the President to take 'structural measures' to solve the levels of violence registered inside prisons where even long-range firearms were found in the possession of PDLs.

The events of 23 February 2021 showed that the emergency powers granted to the President were ineffective in finding a solution to the prison crisis in Ecuador. In its 2021 judgment, the Court identified a situation of 'systemic failure' of public policy, a concept used by the Court to describe: a) weak institutions that do not have the minimum resources to carry out 'organized, efficient and sustainable' actions to implement structural solutions; and, b) the absence of a public policy focused on

human rights, which could address the problem of prisons beyond considerations strictly related to security.

The Court decided (Decision No.4-20-EE/21) to monitor the enforcement of its two previous 2020 judgments, thereby also recognizing the absence of a comprehensive public policy. The Constitutional Court ordered the executive to take immediate measures, such as: urgent action to ensure security in prisons; to conduct, in coordination with other branches of the state, an exhaustive investigation of the events; and to design a public policy proposal that could provide an effective solution to the crisis.

Thus, the Court's 2021 Decision could shape public debate by framing the response to the crisis not only as a security challenge, but also, as a severe violation of PDL rights, which Ecuador is obliged to protect under its Constitution (Article 51) and in terms of International human rights law. However, the most important element in the Court's decision was determining that the prison riots were a result of the lack of a comprehensive public policy.

The function of a Court under a transformative mandate

It could be argued that the Ecuadorian Court should fulfill a transformative mandate, supported by the extensive catalog of rights it is granted by the Ecuadorian constitution (Articles 10 to Article 83 of the Constitution) and the 'prime' duties of the state listed in Article 3 of the Constitution, including guaranteeing the exercise of rights, both in the Constitution and in international instruments, eliminating poverty, and promoting sustainable development. This means that in cases where the lack of public policy in a specific matter has caused structural failures, the Court is forced to take a more active stance to fulfill the 'prime' duties contained in the Constitution.

The Court integrated the standards for public policy established by the Inter-American Commission (IACHR) in the document Public Policy with a Human Rights Approach ([here](#)) in its analysis. More specifically, the court emphasized the connection between the defense of human rights (article 41 of the American Convention on Human Rights) and the need for what is termed by the IACHR a 'transformative approach', which should focus on the structural conditions that make human rights violations possible and trigger them. Thus, the Ecuadorian Court, by relying on the IACHR documents, linked its transformative mandate to international and regional obligations. The Court was thus able to interpret the Ecuadorian constitution in a way that should allow to keep the constitutional promises: deep social change that will foster a more inclusive society (Article 3, Ecuadorian Constitution).

Systemic failures

Despite the traditional rhetoric from Latin-American countries at the international level, which espouses favourable attitudes to human rights, the treatment of the

prison population in a number of countries in the region, Ecuador in particular, has been – not only in exceptional circumstances, but as a general rule degrading and inhumane. As reports and decisions adopted by the United Nations and regional human rights monitoring bodies reveal, some Latin-American prisons do not even guarantee the minimum standards under international human rights law ([here](#), [here](#) and [here](#)). The explanation for this situation has to do with the failure of State authorities to implement practical means to ensure the equality and dignity of individuals. In contrast to promising rhetoric and legislation, the actions of various states tie dignity not to the human being as such but rather to what the human being's performance within society. Therefore, in many cases, PDL are subject to such degrading conditions that they are being treated as individuals no longer worthy of dignity.

Furthermore, the deplorable conditions in detention such as overcrowding, high levels of violence, lack of control by prison authorities, insalubrity, spread of contagious infections, lack of access to health services, are not isolated incidents but the consequence of systemic problems resulting from a malfunctioning prison system. There are several factors that have contributed to the prison crisis in these Latin-American countries. Among them is the tendency to make extensive use of criminal law, the prison, and the preventive detention to face diverse social problems. For instance, data show that in the last twenty years, the incarcerated populations in Colombia, Brazil, and El Salvador have respectively increased by 300%, 500%, and 600% ([here](#)).

The limits of a constitutional mandate

There are limits to what courts with a transformative mandate can do. They cannot resolve such structural problems by themselves. Nonetheless, the Ecuadorian case shows that the impact of a court in the face of systemic deficiencies in public policy should not be underestimated, either. A judgment like the one described fulfills two functions: first by framing social unrest with a vocabulary of constitutional values and second, by outlining a concrete course of action.

To put it bluntly, a court cannot – and should not – aim to transform the national prison system with a single judgment. Making a meaningful impact on the systemic problems of prisons requires the collaboration of the whole state, civil society, and considerable amounts of political will. However, a judgment like that of the Ecuadorian Court can provide fundamental elements for a broader national political agreement.

