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Human Rights Penality and Violence Against Women: The Coloniality of Disembodied Justice

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Abstract

Despite the persistence of violence inside and around prisons, and the dubious adequacy of criminal law to respond to victim–survivors, international human rights (IHR) discourse increasingly promotes the mobilisation of the state's penal apparatus to respond to human rights violations, including violence against women (VAW). Using an anticolonial feminist approach, this article scrutinises the ontological and epistemological commitments underlying 'human rights penality,' by analysing features of the Western-colonial register vis-a-vis more relational worldviews. Separateness, abstraction, and transcendence broadly underpin the exclusion of embodied experience, context, and material reality from the juridical field. In the second part, through discourse analysis of Inter-American and European case law, the author shows the deployment of human rights penality, the displacement of experience, and the disregard of context in IHR discourse. VAW is construed as a procedural and penal matter: it is the absence of a penal process that courts regard as failure to protect women, rather than the state's inability/unwillingness to address structural subordination. Moreover, the 'virtues' attributed to the penal system justify its expansion, which facilitates the continuity of penal violence and debilitates alternative approaches to justice. Finally, the author posits penal abolition as an anticolonial praxis, pointing at examples of anti-carceral feminist work.

Keywords Human rights · Violence against women · Coloniality · Penality · Inter-American Human Rights System · European Court of Human Rights

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Introduction

Since 2021, prison riots in Ecuador have resulted in extreme violence and the brutal killing of at least 400 people (Noroña 2022). Among the victims were impoverished young men, community organisers, and detainees awaiting trial[1] (Roa Chejín 2021). Disturbing images of mutilated bodies and human bonfires circulated on social media and instant messaging platforms. On each occasion, the government was too late. The official version presented the events as a mere matter of 'gang warfare', which was contested by the victims' families, prison researchers, human rights advocates, grassroots movements, and formerly incarcerated people (CDH 2023). These groups are denouncing worsened poverty in the country, inadequate access to education and employment, overcrowded mega-prisons that lack basic services, police corruption, and the government's involvement with the organised crime that controls the prison system (Ponce 2021; CDH 2022; Tritton and Fleetwood 2017; Human Rights Watch 2022).

Amidst this unspeakable violence, scant attention is being given to the fact that convicting a person in Ecuador virtually amounts to a death sentence. This is happening in a country that incorporated concepts from Indigenous worldviews into its Constitution, many of which could defy penal expansion and carcerality, but have not disrupted penality[2] (Tapia Tapia 2016; Tapia Tapia and López Hidalgo 2022). The Constitution also emphasises due process and human rights-based guarantees, while the death penalty and inhuman and degrading punishments are prohibited. Yet, far from halting torture and murder in prisons, these principles appear to rationalise the punitive drive (Tapia Tapia 2022a, chap. 4). In a spectrum from the abstract to the material, from law to life, dominant legality tends to privilege doctrine and rules over embodiment, contexts, and relationships.

As a feminist scholar, I live through the contradictions of responding to violence against women (VAW) using penality. I have long been concerned with the limitations and paradoxes of resorting to legal mechanisms to posit emancipatory demands (Tapia Tapia 2016). Although for many feminists, the criminalisation of VAW amounts to a political act of recognition of wrongness and harm, with a potential to produce social change (Gotell 2015; Schneider 2000), others have exposed the practices of law as reaffirmations of the very discourses that subordinate women (Rifkin 1980; Smart 1989). Furthermore, penality is at odds with the objectives of counter-hegemonic feminist projects, given that the penal apparatus reproduces subordination based on race, gender, class, ability, and more. In this way, Black feminists have denounced racialised police and prison violence (Davis 2005; Gilmore 2007; Richie 2012) while Latin American women's movements are resisting and

[1] Most of the prison population in Ecuador, as in many other Latin American countries, is male and young and has had little access to education or employment opportunities. An estimated 43.08% of the prison population is in pre-trial detention (Kaleidos 2021).

[2] The term refers to the whole penal sphere; the set of mechanisms and rationales that compose the penal system, including criminal law, police, and prisons, as well as the discourses that normalise them (Garland 2013; Foucault 1977).

theorising carcerality and exclusion (Coba Mejía 2015; Fulchiron 2016; Hernández Castillo 2017). They denounce, for instance, that women typically bear the economic burdens and care work resulting from the imprisonment of men (Aguirre Salas, Léon, and Ribadeneira González 2020; RIMUF 2022). Penal violence hits beyond prison walls.

In addition, feminist empirical research shows that the penal apparatus systematically revicitimises women by subjecting them to burdensome processes, doubting their credibility, scrutinising their bodies, and submitting them to surveillance and social stigma (Corrigan 2013; Smart 1989; Snider 1994; Orenstein 1998; Goodmark 2021; Mills 1999). Many survivors refrain from reporting violence or withdraw from trials at early stages due to fear of retaliation, mistrust in the legal system, concern about the economic and emotional consequences of the offender's imprisonment, fear of losing child custody, and lack of time and resources to undertake cumbersome trials (Maier 2008; Hansen et al. 2021; Tapia Tapia 2021; De Aquino 2013; Oduro, Deere, and Catanzarite 2012). Overall, the penal system neglects the needs and expectations of survivors, while law reform allows states to claim that they 'take matters seriously', even when they do not provide the services and resources required to halt and overcome VAW (Tapia Tapia and Bedford 2021). Still, and despite the little impact that criminal law-centric frames have had in reducing VAW, penality thrives and expands.

Paradoxically, international human rights (IHR) are pivotal in the growing drive to require prosecution and punishment in the interest of victims (Pinto 2020, 2022; Bernstein 2012). 'Zero tolerance' and 'anti-impunity' campaigns are central to global human rights advocacy (Engle 2015). Locally, constitutions and penal codes appeal to IHR mandates, not only to criminalise, but also to establish principles that 'rationalise' punitive power (Tapia Tapia 2018). Feminist appeals to carcerality may partly be explained by a 'progressive punitivism' (Aviram 2020; Snider 1998), that is, the idea that holding the powerful penally accountable foregrounds the victims' voices and catalyses social change. Indeed, it has become almost impossible to speak about severe human rights violations without invoking carcerality.

These tensions are addressed in recent literature on 'coercive human rights' (Lavrysen and Mavronicola 2020) and 'human rights penality'.[3] Although some scholars may regard international courts' punitive mandates as restorative (Balta 2020), the pursuit of 'emancipation through criminal law' (Mavronicola and Lavrysen 2020) is not unproblematic. Mavronicola contends that the risks of human rights penality include coercive overreach, the dilution of human rights standards, the distortion of counter-punitive principles aligned to foundational commitments within human rights, the diversion of human rights doctrine to conservative stances, the delegitimisation of counter-carceral human rights agendas, and the hollowing out of visions of justice within the human rights frame (*The human rights case for rethinking human rights penality*, paper on file with author). I will add that the

[3] The term was first used in a workshop to which I was invited, entitled 'Human rights penality: the next decade', supported by the Modern Law Review, held in Birmingham on March 25, 2022, and organised by Natasa Mavronicola, Mattia Pinto, and Steven Malby.

normalisation of penality as a central human rights tool reinforces a colonial model of justice, delegitimising other possible praxes, including those of anti-carceral feminist grassroots.

In this article, I consider that the growing rupture between formal law and embodied experience is not merely a problem of 'implementation' (Hunter 2008), that is, we are not only facing the gap between 'law in the books and law in action'. The very conception of reality and the assumptions that sustain dominant legal knowledge play a part in limiting what is possible through law. Building on critique that regards the globalisation of IHR as intertwined with the historical legacies of colonialism and empire (Douzinas 2007; Kennedy 2004; Orford 2003; Tzouvala 2020; Barreto 2018; Fitzpatrick 2014), I suggest that the universalisation of a criminal-law centric paradigm through dominant IHR discourse is an expression of colonialism and epistemic violence.

To explore this further, I set out to show that the legal foundations sustaining dominant IHR stem from colonial ontological and epistemological commitments. It is not only a matter of 'whose knowledge counts', but also 'whose reality is allowed to be real' (Burman 2017, p. 925). When VAW is framed as a human rights violation, the penal logic that is subsequently adopted reflects a separation-based ontology and epistemology. The reign of formalism over embodiment, emotion, and present states of affairs obscures the real suffering that law can cause. Dominant legality, which aspires to transcendence, posits criminal prosecution and carceral punishment *as* justice, regardless of the destructive consequences that these technologies may produce in context. The resulting assemblage perpetuates the invisibility of dispossession and pain, including the one produced by penal violence inside and around prisons, and universalises a narrow framework that silences those who dare imagine gender justice outside penality or, indeed, a world without prisons.

With this backdrop, this article is divided into three parts. The first part schematically presents the colonial-Western register that underlies dominant legality in IHR. To characterise said paradigm, I draw from literature that tackles Western thought's broad reliance on ontological separateness and epistemic abstraction (Sullivan 2017; Burman 2017; Trownsell 2021; Orellana Matute 2021), as well as work on colonialism and coloniality (Maldonado-Torres 2013; Quijano 2000a; Escobar 2013; Mendoza 2016; Lugones 2007; Rivera Cusicanqui 2010a). In that light, I frame dominant legality as the colonial imposition of a worldview that tends to dismiss relationality. Then, I compare examples from the colonial-Western register with alternatives found in non-Western thought, including Buddhist[4] and Indigenous relational thinking. These are broadly founded on an ontology of 'radical interdependence' (Sattar 2019; Kapur 2018; Trownsell 2021; Paiva 2014).[5]

[4] Buddhism has been considered a useful basis for comparison with Western models because of its distinct philosophical foundations (Long 2021).

[5] Latin American decolonial theories are, of course, contested: it has been argued that they still rely on a Western ontological register founded on separation. Preserving this foundation may reproduce the dualistic hierarchies of the colonial paradigm (Orellana Matute 2021; Trownsell 2021, 6). Delving further into the implications of these critiques is outside the scope of this paper; however, I do rely on work that has addressed the 'coloniality of being' and explored the effects of coloniality in lived experience (Arias Marín, Carrillo Maldonado, and Torres Olmedo 2020; Quintana 2009).

The second part of the paper employs discourse analysis (Niemi-Kiesiläinen et al. 2007; Lange 2005; Ravid and Schneider 2019; S. J. A. Taylor 2019), to show how the Western register is deployed in European and Inter-American IHR case law on VAW. Historically, these bodies have dealt with similar topics and often cite each other in the field of VAW. Also, both systems have ostensibly influenced the domestic legislations of their member States (Council of Europe and Inter-American Court of Human Rights 2016).

A total of 38 documents were sampled from judgements that are highlighted in the websites of the Council of Europe (CoE), the Organisation of American States (OAS), the European Court of Human Rights (ECtHR), the Inter-American Commission on Human Rights (IACHR),[6] and the Inter-American Court of Human Rights (IACtHR). Atlas.ti (a qualitative analysis software package) was used to support successive coding cycles. Due to space, only a few demonstrative excerpts will be presented to exemplify the observed patterns. Overall, the abstract, doctrinal functions attributed to the penal system facilitate the disregard of embodied experience and context and re-legitimise the penal apparatus as an adequate and principal device to counter VAW.

Finally, in discussing these findings, I refer to the work of two grassroots collectives. One is *Mujeres de Frente* (Women Facing Forward), a feminist anti-carceral group based in Ecuador, which, in developing community projects, envisions a world without prisons. The other is *Actoras de Cambio* (Actors for Change), from Guatemala, who are survivors of military sexual violence and are developing alternative praxes of justice. These are examples of non-penal worldviews that focus on the community, the life experiences of the diverse people who compose it, and the materiality of life. I conclude with a proposal to frame penal abolition as an anticolonial feminist project.

Scope and Limitations

A macro critique of Western thought is beyond the scope of this paper. I point at dominant pitfalls at the intersection between IHR and penality by tracing links between a separation-based ontology, colonial legal knowledge, and the IHR framing of VAW. IHR are not monolithic but rather informed by diverse currents of thought, and there are Western traditions of thought that address many of the matters I speak to here. For instance, phenomenology has been used to address the embodied experience of illness (Carel 2016), as well as social reliance on punitive justice (Chamberlen and Carvalho 2022). Likewise, there are proposals to place relationality at the centre of legal thought and practice (Nedelsky 2012). Furthermore, sectors of Western feminism early problematised the patriarchal exclusion of women's experience from the realm of legitimate knowledge (Smith 1974; Gregg 1987), noting that the way in which reality is instituted, via ontological schemas that order it, is the

[6] The IACHR functions as a quasi-judicial organ. It can receive reports from individuals and/or organisations relating to human rights violations, examine these petitions, and adjudicate cases with the assumption that they comply with admissibility requirements.

outcome of political struggle (Oksala 2010). Although these and other works have influenced my analysis and methods, they do not necessarily frame legal knowledge as colonial, nor map how it translates into dominant penal paradigms. Here, I map the territory for a project that is not only critical, abolitionist and feminist, but also anticolonial and anti-racist.

Finally, I shall clarify that in using comparisons to point at elements of the colonial-Western register, I am not establishing a defined binary between Western and non-Western worldviews. Reality is nuanced and phenomena manifest in spectrums; thus, the comparisons have didactic purposes only. A more disruptive approach would require a 'detachment from knowledge' (Orellana Matute 2021), given that academic and scientific cannons largely rest on an ontological reductionism. This article may be considered a more modest step toward understanding the limitations of legal knowledge, its colonial foundations, and some of its outcomes. In my ongoing research, I do incorporate participatory and action-based strategies (Tapia Tapia 2022b) that may bring us closer to practising alternative justices.

The Coloniality of Reality: Legal Knowledge and Disembodied Justice

'Internal colonialism' (Gonzáles Casanova 2006; Rivera Cusicanqui 2010a) and 'coloniality' (Quijano 2000b; Escobar 2013) are frameworks proposed by Latin American critics to analyse the discourses and practices of subordination that are articulated through global capitalism, with roots in the European invasion of the Americas. In the first instance, the invention of race and the coloniality of gender (Lugones 2007; Mendoza 2016; Quijano 2000b) produced hierarchies, exploitation and exclusion through the division of labour, the extraction and monopolisation of resources and power, and the invalidation of the ways of viewing, knowing, and being in the world that do not conform to the colonising paradigm.

These power dynamics continued beyond colonial rule at the global and local level. After the independence wars in the Americas, the new governing elites reproduced extractive and exploitative practices, while gradually introducing the ideas of European liberalism on free trade, individual rights, and private property. These shaped the nascent nation's legal systems (Rivera Cusicanqui 2010b; Dore 2000). At the same time, states tolerated and even protected servitude, peonage, enslavement, and segregation, which informed the dissemination of the penitentiary in the nineteenth century, also based on European legal and criminological knowledge (Salvatore and Aguirre 1996; Moore 2023).

In this regard, decolonial theories have challenged the assumption that knowledge is disembodied and independent of its 'geohistorical location' (Mignolo 2017). Further, commentators have noted that ontology is often absent from debates on cognitive justice and coloniality (Trownsell 2021; Orellana Matute 2021; Sullivan 2017; Burman 2017), even though knowledge cannot be separated from the basic assumptions about the nature of reality in a given tradition (Burman 2017, p. 925). Drawing on these elaborations, I highlight some of the Western-colonial ontological and epistemological presuppositions that underpin the dominant IHR discourse on VAW

by eliciting an encounter between said tenets and other possibilities taken from non-Western traditions.[7] As mentioned above, the comparison does not imply a rigid duality; rather, these are didactic examples that are manifest in different degrees, in spectrums.

A fundamental assumption about reality underlying the Western ontological register is separateness. As Trownsell (2021) puts it: 'distinguishability among stuff' indicates the basic condition of existential autonomy, which is also at the core of scientific/academic knowledge. Thus, coloniality entails the imposition of a worldview that separates and hierarchically classifies the entities that compose reality. This separateness sustains the distinctions between humans, non-humans, and less-than-humans (white/non-white people; humans/nature), with an impact on the organisation of knowledge, labour, sexuality, power, and governance (Mendoza 2016; Lugones 2007).

This 'coloniality of reality' (Burman 2017) translates into the dominance of a 'rational' and 'scientific' interpretation of what exists, based on ontological separateness, which informs the divide between subject and object in the cognitive process. An example is the Cartesian division between consciousness and matter (the mind/body dualism), which introduces the possibility of an external 'objective' and 'neutral' knowledge. Abstraction is necessary to claim universality: context and materiality fade away so that ideas can be universally applicable. In the realm of law, Gómez and Gómez (2018) have argued that impartiality in judicial reasoning reflects how scientific discourse studies the world: it distinguishes between the cognising (or judging) subject and the analysed (or judged) object. Thus, legal claims to impartiality enable the idea that legal decisions can be above and beyond politics (Gregg 1987; Smart 1989; Rivera Cusicanqui 2010b). The alleged objectivity of legal decisions is then performed through procedural formalism and legal technicalities.

At another point of the spectrum, rather than understanding reality as an ensemble of separate units, interconnectedness is the basic condition of existence. Buddhist thought, for instance, asserts that every functioning thing we perceive arises and ceases in dependence on its causes and conditions, its parts, and the minds that perceive it. Reality is the result of 'interdependent co-arising': everything is the outcome of multiple connected causes and conditions (Hanh 1999; Long 2021).[8] That is, 'relational ontological suppositions […] assume that the mind is always and already intertwined with the world' (Orellana Matute 2021, p. 505). This means that 'the contemplation of the interbeing of subject and object is also the contemplation of the mind. Every object of the mind is itself mind' (Hanh 1999, 143). Hence, the separation between subject and object is not a requisite for knowledge formation. Interconnectedness and embodiment are inherent to all knowing practices. For instance:

[7] For the sake of brevity, I have grouped the latter under the term 'relational thinking'.

[8] As noted, there are manifestations of Western thought that may be monist (e.g., Spinoza). However, the trends underlying dominant IHR, which have been universalised as rational, 'proper', and true (hence, their coloniality), tend to make a distinction between the abstract-rational and the embodied-emotional.

Table 1 From separateness to relationality

	1 Separation-based ontology	2 Relational ontologies
1	**Separation** is the fundamental condition of existence	**Interconnectedness** is the fundamental condition of existence
2	Mind/world—Mind/body **dualism**	Mind/world—Mind/body **monism**
3	Prevalence of the **rational** over the material, emotional, imaginal	**Inseparability** of these realms
4	Emphasis on **abstraction** and form	Emphasis on context and **embodiment**
5	Emphasis on **transcendence**	Emphasis on **immanence**
6	**Individual**, rational and autonomous cognising subject	**Collective**, emotional, knowing practices
7	A-historical, **non-situated** knowledge	**Situated**, embodied knowing

> […] the Mayan cosmovision […] recognises that the body is the material space from which we live and relate to the world, that we are integral beings, and that everything on the planet comes from the same source (Fulchiron 2016, p. 408).

Likewise, Kichwa communities conceive of themselves as relational beings inhabiting a cosmos where ontological separation is not possible (Orellana Matute 2021; Trownsell 2013); therefore, the mechanisms of conflict resolution cannot be isolated from their contexts and the experiences of those involved. To synthesise, Table 1 below captures different points on a spectrum from a worldview based on separateness, towards more relational ways of conceiving and knowing reality. This is, of course, a demonstrative simplification of a continuum of possibilities.

A separation-based ontology informs dominant legality in several ways. For instance, it makes hierarchies possible, including based on categories like gender and race. Separateness provides the conditions of possibility for criminal typologies that characterise 'deviant' subjects that pose a risk to 'civilised' citizens (Foucault 1977; Gilmore 2007), which are often based on 'scientific' assumptions regarding the intellectual inferiority and aggressiveness of non-white, colonised subjects (Ellwood 1912; Zaffaroni 2009; Moore 2023).

Likewise, mind/body separation, and the prevalence of 'mind over matter' produce a focus on reason and rationality that expels the corporeal and even the 'imaginal' (Bottici 2010) from the juridical field. The rational (male, white, able) legal subject tends to be situated above nature, authorised to extract and appropriate its resources. This is reflected on liberal law's[9] focus on individual rights, primarily private property (Whyte 2019; Douzinas 2014). On these foundations, the law can be posited as a rational and stable system to govern an 'external' world.

Once the world 'out there' is deemed governable through legal rules, these rules must be abstract and formal to be generalisable. Abstraction entails a cognitive

[9] Liberalism is widely regarded as the dominant political philosophy in the international legal order (Kapur 2018; Douzinas 2014; Sattar 2019).

process by which legal decisions, despite targeting facts, are made by excluding complex contextual information. Context cannot be accounted for without endangering the stability and universality of the juridical apparatus, as the principle of legal certainty demands a dogmatic interpretation of rules. Procedural formalism further ensures stability and uniformity in the application of the law, which in turn deepens its incapacity to account for embodiment, relationships, and systemic inequalities. To paraphrase feminist theorist Nina Gregg (1987): the law does not possess a methodology to recognise and explain relatedness. A stable legal order requires the dismissal of corporeal and emotional knowing practices, which specialists may consider 'non-juridical' and even detrimental to delivering an 'impartial' justice. Importantly, embodiment and emotion tend to be associated with non-white, feminine and 'irrational' colonised subjects.

In addition, the law aspires to transcendence (Table 1, column 1, row 5; c1–r5). Natural law theories, which are foundational to universal human rights (Ferreira da Cunha 2013; Douzinas 2014) propose that, just like physical laws exist, so do universal moral laws (whether secularised or rooted in a divine plan). The transcendental reason is beyond the mundane world: archetypes prevail over lived reality. Thus, transcendence involves elevated levels of abstraction. From a Kantian perspective, for example, experience is not relevant to moral behaviour; human reason on its own can produce moral imperatives to be directly practiced. Since the Kantian categorical imperative seeks to transcend empirical data, the pursuit of a higher law, valid in all times and places, translates into a universalism that erases the particularities of life in any specific historical, geographical, and political setting. Consequently, in Kantian moral theory, there is an inherent duty to punish the 'autonomous and rational' offender (Table 1, c1–r6), regardless of the factors that determine conduct, the practical consequences of punishment, or the futility of the sanction in terms of producing behavioural and social change. Punishment is an absolute moral duty (Sattar 2019).

Through the law, imprisonment—a technology that paradoxically undermines the highest values of liberalism—is rationalised via the assumption that the state acts with the consent of a self-sufficient, autonomous citizen. Were it not for this hypothetical consent, incarceration would be an absurd and brutal application of force. In addition, procedural law establishes principles such as legality and proportionality, which make penal intervention juridically sensible even when materially inhumane. This reliance on procedure and legal rules can only be grounded on formal equality; it would not survive the test of material equality, given that economic and social capital are necessary to successfully litigate in the real world. Moreover, the judge or tribunal *has* to be satisfied with formalities even when the 'guilt that is established to the satisfaction of the criminal courts is not the same as actual guilt' (Sanders and Young 1994, p. 3). These are broadly the assumptions underlying human rights penality.

Overall, emphasising the coherent interpretation of abstract rules to ensure their stability entails an increased dissociation between the legal system and the materiality of life. As it happens in Ecuador, legal reasoning obscures the pain that people experience around and inside prisons, since judicial decisions are produced within the boundaries of formal coherence. For instance, if the laws and procedures that

uphold a conviction are constitutional and human rights-compliant, this is enough to legitimise a judgement. The inherent formalism of dominant legality allows operators to make decisions that may violently alter the lives of real people, but these consequences are not at issue in the juridical field. Carceral punishment is not justified on the basis of inmates' life stories or empirical accounts of social violence. It emerges from a priori moral imperatives, abstract legal principles, and formal procedural rules.

A more immanent alternative (Table 1, c2–r5), whereby everything in existence is seen as intimately interconnected, may entail a profound commitment to the present moment and a resistance to establishing an ultimate foundation:

> Zen Buddhism is animated by an original trust in the here, by an original 'trust in the world'. […] The Buddhist expression 'nothing sacred' denies any extraordinary, extraterrestrial place. It formulates an 'impulse to return' to the everyday here (Han 2015, sec. 446).
> [in Andean philosophy] the divine is not transcendent but immanent to the universe: 'It is the cosmic chakana par excellence, a 'bridge' between above and below, and left and right; it is the orderer and 'mediator' (or 'relational') par excellence, the cosmic relationality itself that newly makes life and order possible' (Sobrevilla 2008, p. 238).

A justice that is closer to a robust relationality, which pays attention to 'the everyday here', may not be blind to embodied suffering. What happens daily inside a prison or on the premises of a courthouse cannot be outside the considerations of justice.

In Table 2, I propose five features to characterise this dominant legality and compare it with possibilities that could emerge from a more relational approach. As above, this is a schematic representation of points in a spectrum.

The elements above signpost some assumptions that characterise IHR discourse on VAW and anticipate that which is outside human rights penality. As shown next, international courts conceive the initiation and progress of a penal process as the state's due diligence. These interventions remain contained in a narrow enclosure, which often side-lines structural violence and considerations of the further harms that an expanding penality can cause.

Disembodied Justice in International Human Rights Responses to Violence Against Women

In this section, through discourse analysis, I show how dominant legality is deployed in IHR responses to VAW. The patterns observed in the analysed Inter-American and European case law confirm that penal mechanisms make up the preferred, when not the only legitimate pathway to justice. Criminal investigation, prosecution, and punishment constitute the state's 'due diligence', while the penal apparatus is construed as comprehensive; that is, capable of producing deterrence, protection and remedies, simultaneously and with minimal harm. Although courts at times acknowledge penal violence and structural gender inequalities, these are not concretely addressed.

Table 2 From disembodied to relational justice

	1 Disembodied justice	2 Relational justices
1	Legal **formalism** prevails over embodied experience	Knowing practices and embodied experiences are **inseparable**
2	Emphasis on protecting **individual** liberties, e.g., private property	Emphasis on relationships, connections, and **harmony** amongst all forms of life
3	Social conflicts are atomised, leading to an **interpersonal** understanding of violence and **adversarial** models of justice	**Structural** and systemic violence is recognised and addressed at a **community** level
5	**Procedural** justice: law reform, legal **proceedings**, courts, and lawyers are central	**Embodied** justice: community life, **material** well-being, the present moment and healing are central

This framing is oblivious to many victim–survivors' experiences and representations of justice. At the same time, the model overlooks the risks of penal expansion, including that of exacerbating carceral violence. In other words, IHR bodies do not analytically link the prominence afforded to penality to the persistence of violence against victim–survivors or incarcerated people. Such an approach is not only inefficient but also potentially damaging. Human rights penalty is, moreover, a colonising response to VAW.

The Colonising Dominance of Human Rights Penality

Appealing to criminal law, procedures and courts has become the backbone of IHR approaches to VAW. In this regard, discourse analysis revealed that the possibility of reporting VAW as a criminal offence and the willingness of public authorities to initiate a criminal process is what IHR discourse conceives of as justice. Putting criminal laws in place and enforcing them is the paramount state duty. The ECtHR has, in fact, developed the theory of the 'procedural obligation' of the state, which has been taken up by the Inter-American system (Tojo, Elizalde, and Taboada 2011). Penality is, in addition, justified through doctrinal assumptions on its ability to prevent, deter, redress, and rehabilitate.

In Volodina v. Russia (2019), the ECtHR addressed the state's legislative changes on domestic VAW, whereby non-aggravated battery was decriminalised and reclassified as an administrative offence. The case was brought after significant public outrage, which denotes additional social actors' investments in penality. In this case, the ECtHR noted:

> The obligation of the State in cases involving acts of domestic violence would usually require the domestic authorities to adopt positive measures in the sphere of criminal-law protection. Such measures would include, in particular, the criminalisation of acts of violence within the family by providing effective, proportionate and dissuasive sanctions (Volodina v. Russia 2019, vol. 41261/17, para. 78).

Even though the Court acknowledged that non-penal options were available, it insisted (without empirical grounds) on their insufficiency: 'The Court reiterates that such an [civil] action could have led to the payment of compensation but not to the prosecution of those responsible' (Volodina v. Russia 2019, vol. 41261/17, para. 100). The Court concluded that, due to the lack of criminal legislation (and not the absence of transformative preventive policies and services), the State had failed to protect women from violence and discrimination. Although the Court recognised, to a degree, that structural inequalities produce VAW, all mandated measures remained within the penal realm. In sum, it was the abscence of criminal law and exemplary sanctions, and not the systemic inequalities tolerated and facilitated by the state and society at large, that the Court construed as state failure.

Another recurring pattern concerns the abstract legal notion of deterrence, which takes the dissuasive power of criminal law for granted: there is an implicit trust in 'general prevention', that is, the belief that enforcing punishment will deter the social conglomerate from committing crimes. Although feminist research has suggested that, especially in the realm of VAW, the threat of imprisonment is not likely to deter (Snider 1994) and, more broadly, the dissuasive power of penal sanctions is at best dubious (Bottoms and Von Hirsch 2010), the ECtHR indicated:

> 150. […] While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions (Case of Siliadin v. France 2005).

Likewise, in Opuz v. Turkey (2009), the ECtHR stated that perpetrators of domestic violence did not usually receive deterrent punishments because domestic criminal courts mitigated their sentences. The assumption was that harsher punishments are more dissuasive, however, the Court also acknowledged that the state *had* activated its penal system, but this did not have a deterrent effect (Section 199). Oddly, despite this recognition, the Court insisted that the penal apparatus should be used more vigorously. In other words, in the absence of deterrence, what is deemed appropriate is to toughen sanctions, rather than delving deeper into why dissuasion does not occur, or how states can provide women with safe spaces, meaningful protection, and resources to overcome violence.

Another troubling pattern is that IHR bodies consider the determination of criminal responsibility as reparatory on its own. That is, the initiation and pursuit of criminal proceedings that lead to a conviction is seen as inherently restorative. In Penal Miguel Castro Castro v. Perú, echoing existing Inter-American case law, the IACtHR declared that '7. This judgement constitutes per se a form of reparation.' (2006, Serie C No. 160:153). The Court also mandated the state to:

> [...] effectively investigate the facts denounced in the present case, identify and, if appropriate, punish those responsible, to which end it must open the corresponding proceedings and effectively conduct the criminal proceedings

> that are underway as well as those that may be opened (Penal Miguel Castro Castro Vs. Perú 2006, Serie C No. 160:153).

The facts of the case occurred in 1992, in the context of armed conflict in Peru, when counterinsurgency operations against *Sendero Luminoso* (Shining Path) resulted in extrajudicial executions and forced disappearances.[10] During a vicious police raid in a prison, various acts of sexual violence against incarcerated women were committed. It is perplexing that the Court connected the penal apparatus to reparations precisely in a case where carceral and police violence, in connection to VAW, were manifest. Proposing a court's verdict as a reparation per se, moreover, is not only an utmost expression of abstraction and formalism, it also virtually effaces the materiality of the damage that VAW causes, as well as the substantial and structural causes of VAW.

Furthermore, as corroborated by the ECtHR, pecuniary compensations are not normally conceived as meaningful without a penal procedure:

> 103. […] where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure (Aydin v. Turkey 1997).

In sum, the activation of penality stands for access to justice in IHR discourse. Prosecution and punishment are regarded, a priori, as adequate to prevent violence, protect survivors, and remedy damages even in the face of present penal violence. The ontological and epistemic separation between the rational and the bodily realms (Table 1), c1–r2) leads to the dominance of abstract principles, such as 'general prevention', through which penality is justified.

In the next section, to further demonstrate the colonial underpinnings of this IHR model, I account for how penality results in the dismissal of context and lived experience.

The Dismissal of Context and Embodied Experience

This section shows how penality is consistently triggered by IHR bodies despite its unresponsiveness to women's needs and the risk of carceral violence that is brought about by penal expansion.

In Raquel Martín de Mejía v. Peru (1996), the Inter-American Commission on Human Rights (IACHR) established that the petitioner's rape by a military man

[10] For an account of the conflict, its racial implications, and the violence it produced in Peru, see Mealy and Austad (2012).

amounted to torture. Her husband had been extrajudicially executed on suspicion of terrorism during the same military operation, again in the context of counterinsurgency raids, in 1989. The Commission condemned the use of military courts for judging human rights violations, stating that it resulted in impunity and reaffirming the state's penal courts as the appropriate means to address such issues. In this case, the IACHR knew about the petitioner's reluctance to approach the penal system:

> Raquel Mejía was a victim of rape, and as a consequence, of an act of violence that caused her 'physical and mental pain and suffering'. As she states in her testimony, after having been raped she 'was in a state of shock, sitting there alone in her room'. She was in no hurry to file the appropriate complaint for fear of suffering 'public ostracism'. 'The victims of sexual abuse do not report the matter because they feel humiliated. In addition, no woman wants to publicly announce that she has been raped. She does not know how her husband will react. [Moreover], the integrity of the family is at stake, the children might feel humiliated if they know what has happened to their mother' (Raquel Martín de Mejía v. Perú 1996, Case 10.970:19).

As we see, the petitioner feared that a criminal trial could worsen violence and harm her family. However, even in the context of a state that persecuted the petitioner, the Commission advocated for the use of the penal apparatus without thoroughly exploring the reasons why victim–survivors might fear or distrust the system. Additionally, it did not assess the effectiveness of penal measures in curbing sexual violence amid systematic military abuse. In other words, it did not account for the context in Peru:

> […] when a human rights violation is the outcome of an act classified as criminal, the victim is entitled to obtain from the State a judicial investigation that is conducted 'purposefully with the means at its disposal… in order to identify those responsible [and] apply to them the appropriate penalties…' (Raquel Martín de Mejía v. Perú 1996, Case 10.970:22).

At the same time, citing the ECHR and again without addressing state violence, the IAHRC framed the sexual abuse of Raquel Martín as a matter of 'private life':

> The Commission considers that sexual abuse, besides being a violation of the victim's physical and mental integrity, implies a deliberate outrage to their dignity. In this respect, it becomes a question that is included in the concept of 'private life'. The European Court of Human Rights has observed that the concept of private life extends to a person's physical and moral integrity, and consequently includes her sex life (Raquel Martín de Mejía v. Perú 1996, Case 10.970:20).

The Commission thus prioritised an individualistic approach to sexual VAW (Table 2, c1–r3), framing it as a personal attack against intimacy, instead of a systematic form of abuse, even in view of the misogynist violence perpetrated by the

militia. What is more, the Commission acknowledged that the state had criminally persecuted Raquel and her husband as subversives and terrorists. The accusations had resulted in a criminal investigation that the Commission deemed flawed and non-compliant with due process. Hence, there is a paradox in condemning the force of the Peruvian penal apparatus *against* the petitioner and then mandating the same apparatus, in the same context, to do justice *for* the petitioner. This is possible due to separateness, abstraction, and the dominance of formal legality. Appeals to penality are underpinned by a moral and legal aspiration to transcendence, regardless of the real-world consequences of bolstering the penal apparatus in a particular enclave.

The main recommendation was for the State to conduct a thorough, rapid, and impartial penal investigation to identify and punish the perpetrator. In other words, systemic violence was rendered interpersonal and state responsibility was construed in terms of penality. The centrality of the rational, self-interested subject (Table 1, c1–r6) tends to atomise social violence; subsequently, individual responsibility displaced the state's obligation to ameliorate the present, material state of affairs and to halt its own misogynistic practices.[11] The Commission noted Raquel Martín's distrust in the penal apparatus but did not act upon it. This can be read as the colonising imposition of a narrow and individualistic discourse—a colonial 'human rights imaginary' (Fletcher 2022) of sorts—, whereby the world is seen as 'manageable' through rational rules, procedures, and institutions, regardless of where, how and with what outcomes they are implemented. At the same time, the way in which Raquel might have imagined justice (without recourse to the penal apparatus, for example), that is, the 'imaginal' realm (Bottici 2010), was obscured by the juridical field.

Other cases of military sexual violence corroborate this pattern. In Rosendo Cantú, Vs. Mexico (2010), regarding the rape and torture of a girl from an indigenous community by military personnel, the Inter-American Court acknowledged the material and systemic disadvantages that racialised women face when approaching a court of law:

> 70. […] In general, the indigenous populations live in a situation of vulnerability and this is reflected in a number of ways, such as in the administration of justice and health care services, and in particular because they do not speak Spanish and have no interpreters, because they lack the financial resources to find a lawyer, to travel to health care centres or to the courts and also because they are often victims of abusive practices or practices that violate due process. […] members of the indigenous communities do not use the courts or the public agencies for the protection of human rights because they distrust them or fear reprisals. In the case of indigenous women the situation is even worse because filing complaints concerning certain acts has become a challenge for

[11] Primarily, courts address the demands presented by the litigants. Nevertheless, they possess the discretion to broaden their rulings to encompass other issues raised in the case, including forms of violence that have an impact on societies.

them with many obstacles, such as rejection from their community and other 'harmful traditional practices' (Rosendo Cantú y otra Vs. México 2010).

Despite these appreciations, the Court established the violation of the state's duty to prevent, investigate, and punish violence (Article 7 b of the Belem do Pará Convention) and, as it did in Penal Miguel Castro Castro (2006), it stated that 'This Judgment constitutes **per se** a form of reparation' (Rosendo Cantú y otra Vs. México 2010, p. 87, emphasis in original). Expectedly, the Court ordered the State to conduct the investigation and criminal proceedings related to the rape, as well as a reform of the Military Justice Code. As we see, solutions hardly surpassed a juridical field in which justice is primarily procedural, while social change is expected via law reform. Although research has documented the hurdles created for marginalised communities by legal systems (Sieder and Sierra 2011), which were noted by the IACHR, the penal apparatus was still expected to provide meaningful redress. Penality is deemed useful and appropriate, regardless of the victims-survivors being indigenous, urban, rural, rich, or poor.

Similarly, in Opuz v. Turkey (2009), the ECtHR acknowledged the victim's negative experiences of approaching the penal system. The judgement noted that she had consecutively filed and withdrawn several domestic violence complaints. However, without addressing her motives, the Court emphasised the State's obligation to pursue a criminal investigation *ex officio* (whether the victim files a complaint or not). Feminists have contested this approach, since mandatory measures often harm women (Mills 1999, 2009). Yet, without elaborating on actions that the state should have adopted to effectively protect the woman (e.g., shelter and safeguards for her and her child), the Court focused on the State's obligation to arrest the perpetrator. The assignment of blame and punishment was emphasised while the victims' immediate needs for protection took second place (Macaulay 2006).

Overall, in IHR discourse, the recognition that women's subordination is structural and worsened by racialisation, stigma and poverty is not counterbalancing penality. The displacement of context and embodiment (Table 2, c1–r1) is also reflected in the case law's silences: penality is implicitly benign, its enhancement is never associated with the risk of carceral violence, and there are no considerations of the limits that states should observe in criminalising conducts and prosecuting offences. Further, although the European and Inter-American systems co-exist with, and often cite the United Nations (UN) instruments, those that aim at protecting incarcerated or detained people are never invoked[12]; they almost exist in a separate universe.

[12] Some examples are the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the United Nations Standard Minimum Rules for the Treatment of Prisoners, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

Table 3 From ontology to law: a colonial human rights penality

Ontological separateness →
Epistemic dualism
↓
Colonial legal knowledge →
Emphasis on abstraction, individualism, formalism, and transcendence
↓
Colonial-liberal criminal law →
Human rights penality
Activating the penal apparatus as 'due diligence'
↓
Legitimised exclusion of embodied experience and context

To schematise the stream from coloniality, to legal knowledge, and human rights penality, I propose a diagram (Table 3) that exemplifies the passage from the ontology of separateness to human rights penality.

Despite the hegemony of human rights penality, the model above is far from the only imaginable approach to VAW. In mentioning non-Western ontologies and epistemologies based on relationality, I anticipated the possibility of imagining other worlds and, therefore, other justices. In the last section of this article, I formulate some conclusions and point at the work of anti-carceral women's collectives, whose political resistance is strengthening relational practices of justice.

Toward Relational Justice: Anticolonial Feminist Abolitionism

In the introduction to this article, I posited a question regarding the insufficient discussions, among justice operators, scholars, and decision-makers, on the material consequences of convicting people in contexts of extreme carceral violence. How are judgements that will in all probability produce torture and death legitimised? Noting that such convictions are grounded on a dominant legality whose self-referential principles are privileged over the materiality of life, I endeavoured to scrutinise the unacknowledged assumptions on which said legality rests. Our penal 'common-sense', I consider, can be demystified by tracing its underlying ontological and epistemological commitments, and learning about other possible worldviews. Thus, I framed colonial-liberal legality as rooted in a worldview that divides reality into independent entities, detaches the 'rational' from the corporeal, and privileges formalism. The imposition of this paradigm entails the subordination of colonised subjects and the invalidation of their knowledges.

After pointing at separateness, abstraction, and transcendence as cornerstones that underlie legal knowledge, I probed the framing of VAW in IHR discourse. Overall, the colonial-liberal paradigm by which 'mind' prevails over matter, and humans are 'rational' and self-interested beings, translates into the atomisation of systemic issues, which leads to an individualistic and adversarial model of justice (Table 2,

c1–r3). These trends facilitate the framing of VAW as a legal/penal matter: it is the non-existence of criminal law, and/or the non-initiation and advancement of a criminal trial that IHR bodies typically regard as state failure.

This human rights penality displaces embodied experiences, neglects systemic subordination, and overlooks situated contexts through abstract notions, such as 'general prevention', deterrence, and the idea that penal judgements are reparatory per se. This has occurred even in the face of brutal carceral violence and military sexual abuse. That is, enhancing penality is paradoxically conceived as essential to violence mitigation even when it produces atrocity. Judges may perceive their role as that of objective arbiters and, consequently, see themselves as obliged to overlook present realities, including embodied suffering, in the name of impartiality. The ideal of judicial neutrality entails a refusal to acknowledge the specific circumstances of the people whose lives are impacted by the law.

The idea that creating and enforcing legislation can solve the complexities of VAW is shockingly entrenched for a strategy that has almost never lives up to expectations. As Carol Smart (1989) noted, the failure of law to modify social reality usually prompts a new event of reform, rather than a change of tactics. This is to the detriment of other possible approaches to that could respond more effectively to systemic subordination, dispossession, and penal violence. A justice that is closer to ontological interconnectedness may be more attentive to our material needs, relational experiences, and systemic power imbalances.

Examples of the fruits of boosting our political imagination already exist. Anti-carceral feminist grassroots are developing counter-hegemonic practices of justice that challenge the narrowness of the penal approach. One case is *Mujeres de Frente*[13] (Women Facing Forward, or Women Up Front) in Ecuador. Composed of informal street vendors, formerly and currently incarcerated women, academics, artists, youths, and children, they attest to penality as a producer of dispossession (Mujeres de frente 2022). They dispute the value and implications of penally reporting VAW for impoverished, racialised women whose daily struggles include defending themselves from police. They also denounce that the penalised population by far exceeds that of the prisons, since it is women who mostly bear the costs of men's incarceration, and the incarceration of women penalises families and children (Aguirre Salas, Léon, and Ribadeneira González 2020; Aguirre Salas 2019). Since women's survival strategies in the 'illegal' and 'informal' economy are often policed and criminalised, *Mujeres de Frente* has started community projects that include a day nursery, a food bank, a textile workshop, a catering service and, importantly, a political school for women (Mujeres de Frente 2021). These projects have potential to reduce VAW, for instance, through resource-sharing, providing spaces for protection and accountability, as well as developing endeavours that are led by women and include men.

Another project toward a relational justice emerges from the Guatemalan collective *Actoras de Cambio* (Women Actors for Change), composed of Indigenous and black women. They have published *La Ley de Mujeres* (The Law of Women), a work

[13] Their official website is https://mujeresdefrente.org.

that starts by recognising that the justice of the courts 'is not fair for women, in particular for rape survivors, and even more so when they are Mayan, black or lesbian' (Fulchiron 2021, p. 7):

> Experience has taught us that justice goes far beyond the punishment of the aggressor; that justice is life, and that the feeling of justice is born at the moment that justice is done in every area of life that was broken by genocidal rape. Without understanding the specificity and dimension of the social injustice of sexual violences and the immense harms that they have brought to women's lives, there is no way to create places, processes and methods that respond to survivors' yearnings for justice (Fulchiron 2021, p. 8).

Amandine Fulchiron (2018), who works with *Actoras de Cambio*, has documented numerous testimonies of victim–survivors for whom the penal system was not conducive to rebuilding their lives or overcoming pain. From that realisation, they focused on healing, community recognition, and mobilising to ensure that abuses never happen again 'to our daughters or our granddaughters' (Fulchiron 2021).

Both *Actoras de Cambio* and *Mujeres de Frente* situate penal violence and the destruction it causes as manifestations of racialised and gendered oppression. They do not see structural imbalances, material needs and lived experiences as alien to the field of gender justice. Whether they denounce racialised poverty and the criminalisation of social reproduction in their communities, or the patriarchal and misogynistic nature of state violence, they are building non-penal and anti-carceral tools to reimagine responses to conflict and pain.

In this view, I propose that in considering the colonialism of human rights penality, the perils of penal violence, and the possibility other worlds, we radicalise our critiques and work toward an anticolonial and abolitionist feminism. We can elicit more spiritual, emotional, relational, and embodied knowledge-seeking practices, instead of more instances of criminal law reform. As scholars, practitioners, and organisers, we can put our findings at the service of bottom-up projects of political and economic redistribution, as well as mobilise resources that favour grassroots communities. This is urgent, facing the heightened role of penality in reproducing violence against colonised subjects, who, as it is happening in Ecuador, are deemed less than human and disposable. An anticolonial feminist stance is, I reckon, inherently abolitionist.

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