

# **The impacts of the Inter-American Court of Human Rights' decisions on the effectiveness of the right to health in Latin America**

Ana Carolina Girard Teixeira Cazetta

## 1. Introduction

Before starting the specific discussion on the right to health, it is important to understand the Inter-American System of Human Rights.

The Charter of the Organization of the American States (1948) establishes the first principles and axes of the Inter-American Human Rights System, by setting the Inter-American Commission as one of its bodies. The Buenos Aires Protocol put it as an important organ of the OAS, as well as embodied the rights already established in the American Declaration on the Rights and Duties of Man. This instrument made the IACommission a compulsory organ for all parties of the Charter.

In 1969, the states party signed the American Convention on Human Rights (ACHR), which formally creates the IAHRs as well as the Inter-American Court of Human Rights. In contrast of the IACHR, there is not a compulsory jurisdiction of the states, yet it shall be expressly admitted, or not, by the parties if they submit themselves to the Court's jurisdiction.

The IACommission started its function in 1960, being the first international organism in the Americas to deals directly with the promotion and protection of human rights regionally, but still fragile.<sup>1</sup> It is also the principal and autonomous organ of the OAS created to promote and protect human rights in the Americas. Besides its creation under the Charter of the OAS, only through the ACHR the functions were well established.

Among the functions, the IACHR has the duty to promote and protect human rights in the Americas, as well as receive, analyze and investigate individual petitions, observe the general situation of human rights in the Member States, realize *in loco* visits under the countries, develop awareness of human rights, organize lectures, seminars and meetings with the state and civil society, recommend measures, adopt precautionary

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<sup>1</sup> TEREZO, Cristina Figueiredo. **A atuação do sistema interamericano de proteção dos Direitos Humanos na defesa dos direitos econômicos, sociais e culturais**. PHD thesis at Federal University of Pará. Belém/PA. 2011.

measures, present cases to the IACourt, request advisory opinions to the Court and receive communications regarding violations in any State party.

To exercise its functions, the mechanisms available are the ones defined in the American Convention on Human Rights and systematized by TEREZO: the possibility of petitions (articles 44, 45 and 63); the publication of Advisory Opinion (article 64); the development of reports related to specific countries (articles 42 and 43) or thematic reports about human rights in the Americas (article 41).<sup>2</sup>

Furthermore, the IACommission has two main dimensions, according to RODRÍGUEZ-PINZÓN: political and judicial. The political dimension may be more suitable in some situations, considering the fragility of some democracies, such as negotiations and international pressure, rather than specific recommendations on some cases.<sup>3</sup>

In its turn, the Inter-American Court is an autonomous legal institution created to interpret and apply the American Convention through contentions and advisory function, as well as can order provisional measures, which is the only way to directly access the IACourt. Besides that, all cases are presented by the IACommission.

In view of the above, it is important to highlight that both are autonomous, which means that it has political and institutional independency from the OAS and from the states, since the members of the bodies are in the role of experts, not representatives. This is so important that the System has been considered as the “jewel” of the organization by some authors.<sup>4</sup>

## 2. The framework of the Economic, Social, Cultural and Environmental Rights

The construction of Human Rights in Latin America followed the same pattern of the rest of the world: divided among Civil and Political rights, and the Economic, Social, Cultural (and now) Environmental Rights. This is illustrated in the division in two different international documents of Human Rights protection in the United Nations

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<sup>2</sup> Idem.

<sup>3</sup> Idem.

<sup>4</sup> Kletzel, Gabriela. Barreto Maia, Camila. Debates actuales sobre la institucionalidad regional en derechos humanos: el futuro del sistema interamericano y las nuevas dinámicas de integración en america latina. In **CELS, derechos humanos en argentina**. Informe 2013. Buenos aires: siglo XXI editores. 2013.

system: International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966).

In all of the main international agreements this is the classical division that has been made, presenting the ESCER as rights of “second degree”, by, at times, putting it on facultative protocols (as the Protocol of San Salvador) so it could make the States more receptive to sign it, since it would not be obligatory.

This characteristic – of the classical division – is clearly represented in the American Convention, which was signed in 1969, and only dedicated 1 article (article 26) for the protection of the ESCER, while 22 were devoted to Civil and Political Rights. Only 19 years later, by 1988, the Protocol of San Salvador was created, devoting its attention to the ESCER, which only 20 of the 33 original signatories signed the facultative protocol<sup>5</sup>.

Article 26 is written as follows:

**Article 26. Progressive Development**

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving **progressively**, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The fact that the American Convention presented as a progressive right, allowed the States to use it – for a long time – as an argument to delay the enforcement of the ESCER. The lack of specific conditions also enabled the states to also argue they were non justiciable, since the provision contained in the AC is broad.

The American Convention is a living instrument, which assumes new boundaries throughout time. As the guarantor of the document, the Court also does so.

The progressive element allowed several avoidable Human Rights violations over the years, some of them represented in the cases above, and many more if we dedicate the study to analyze all of ESCER cases before the IACourt. This also happened to amplify the economic and social inequality within states, since the defense had to be linked to civil and political rights, reaffirming its alleged superiority, a priority agenda, or even allowing the states to allege the lack of necessary resources.

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<sup>5</sup> Data consulted at the official site of the OAS. Available at: <<https://www.oas.org/juridico/spanish/firmas/a-52.html>>.