



HOW TO CITE:

Caballero Pérez, A. & Guzmán Rincón, A. M. (2021). The Inter-American System for the Protection of Human Rights and Persons with Disabilities: challenges and perspectives beyond the non-discrimination rule. *Jurídicas*, 18(2), 43-60. <https://doi.org/10.17151/jurid.2021.18.2.4>

Recibido el 3 de septiembre de 2020
Aprobado el 15 de marzo de 2021

The Inter-American System for the Protection of Human Rights and Persons with Disabilities: challenges and perspectives beyond the non-discrimination rule*

ADRIANA CABALLERO PÉREZ **
ANDRÉS MAURICIO GUZMÁN RINCÓN ***

ABSTRACT

The present article focuses on the Inter-American System for the Protection of Human Rights (Inter-American System) in the context of disability. It addresses several relevant issues regarding complaint mechanisms. The article is divided into three main parts. The first part explains the organs of the Inter-American System and corpus iuris centered on disability rights. The second part explores rights to non-discrimination and non-segregation of persons with disabilities based on relevant reports and recommendations issued by the Inter-American Commission on Human Rights, as well as case-law of the Inter-American Court of Human Rights. The last part of this article includes some concluding remarks.

KEY WORDS: Inter-American System for the Protection of Human Rights, UN Convention on the Rights of Persons with Disabilities, Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, access to justice.

*Artículo producto de investigación en el marco del proyecto "Justicia y derechos en el sur global: conflictos territoriales y gobernabilidad democrática", que se desarrolla desde febrero de 2020 en la Facultad de Derecho de la Universidad Libre de Colombia, adscrito al grupo de investigación en estudios constitucionales y de la paz.

**Abogada de la Universidad Católica (Colombia), magíster en derecho internacional de los derechos humanos (Lund University, estudiante de Doctorado en Derecho (Maastricht University).

E-mail: accaballerop@gmail.com. [Google Scholar](#).

ORCID: 0000-0002-5618-3323

***Abogado y magíster en derecho de la Universidad Nacional de Colombia. Magíster en Derechos humanos y democratización de la Universidad Nacional de San Martín (Argentina), candidato a doctor en derecho de la Universidad de Buenos Aires (Argentina). Docente investigador de la Facultad de Derecho de la Universidad Libre de Colombia. Miembro del grupo de investigación de estudios constitucionales y de la paz de esa misma universidad. Profesor de la Facultad de Posgrados de la Escuela Superior de Administración Pública.

E-mail: andresm.guzmanr@unilibre.edu.co. [Google Scholar](#).
ORCID: 0000-0002-0975-0057



El Sistema Interamericano de Protección a los Derechos Humanos y los derechos de las personas con discapacidad: desafíos y perspectivas más allá de la regla de no discriminación

RESUMEN

El presente artículo describe la evolución de las reglas y precedentes del Sistema Interamericano de Protección de los Derechos Humanos en el contexto de los derechos de las personas con discapacidad. El artículo está dividido en tres partes. La primera parte analiza el corpus iuris principal proferido por los órganos del Sistema Interamericano en materia de derechos de las personas con discapacidad. La segunda parte explora reglas jurisprudenciales de los órganos del Sistema Interamericano sobre los derechos a la no discriminación y no segregación de personas con discapacidad con base en el análisis de informes temáticos, visitas in loco, medidas cautelares y provisionales, así como algunos casos relevantes en la materia. La última parte de este documento incluye algunas conclusiones.

PALABRAS CLAVE: Sistema Interamericano de Protección a los Derechos Humanos, Convención Internacional sobre los Derechos de las Personas con Discapacidad, Convención Americana para la eliminación de todas las formas de discriminación contra personas con discapacidad, acceso a la justicia.

Introduction

This article focuses on the Inter-American System for the Protection of Human Rights (Inter-American System). In the first part, the article presents the organs of the Inter-American System and *corpus iuris*, mainly on disability rights. In the second part, the document explores the main precedents on non-discrimination and non-segregation against persons with disabilities set by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights according to reports of on-site visits; precautionary measures; and, case law.

It is possible to identify the evolving process of the principle of non-discrimination against persons with disabilities, including the obligation to take into account the will and agreement of persons, mainly those with intellectual disabilities, in the decision-making of supports and services. Additionally, the Court has incorporated concepts such as indirect discrimination; special protection; and, more recently, intersectionality to analyse the discrimination.

I. Inter-American System for the protection of human rights –its organs and *corpus iuris*

I.1. Organization of American States, organs and functions

The Organization of American States (OAS) is a regional organization that draws together all 35 independent states of the Americas. In the words of Article 1 of the Charter of the OAS, the organization aims to achieve an order of peace and justice in the region and to defend sovereignty, territorial integrity and independence. According to Article 53 of the Charter, the OAS accomplishes its purpose through some organs, such as (i) the General Assembly; (ii) the Inter-American Commission on Human Rights; and, (iii) the Inter-American Court of Human Rights, among others.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the two main entities of the Inter-American System for the Protection of Human Rights.¹

I.1.1. The Inter-American Commission on Human Rights

The OAS created the Inter-American Commission on Human Rights (starting now “the Commission” or “IACHR”) in 1959, and its mandate stems from the Charter of the OAS. The Commission’s headquarters are in Washington, DC, United States and is composed of seven independent members serving in their personal capacity. The mission of the

¹Additional bodies of the Inter-American System focus on specific human rights or groups of populations, e.g. the Working Group on the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”; and the Inter-American Commission of Women.

Commission is to promote and protect human rights in the Americas based on three main pillars: (i) the individual petition system; (ii) monitoring of the human rights situation in the Member States; and (iii) the attention devoted to priority thematic areas. Individuals, groups of individuals or organisations may submit an individual petition before the Commission by alleging violations of the human rights guaranteed in the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights (“the American Convention”), and other inter-American human rights treaties (Organization of American States, 1969).

The Commission examines the petitions that allege violations of the American Convention, which applies only to those States that have ratified it. For the OAS Member States that have not ratified the American Convention, it is possible to allege violations of rights contained in the American Declaration. Moreover, the violation of a right protected in another human rights treaty can be alleged if the State in question has ratified it depending on the applicable conditions of each treaty.

The State may be responsible for violating human rights by action (because of an act by the State or its agents); acquiescence (because of the tacit consent of the State or its agents); or, omission (because of the State or its agents fail to take action when they should have done so). The Commission is not competent to attribute individual liability; that is, it cannot determine whether a person is or is not guilty. The Commission can only determine the international responsibility of a Member State of the OAS in which case the Commission will issue a report that may include recommendations to the State (Inter-American Commission on Human Rights, 2010).

The Commission might, when conditions are met, refer cases to the Inter-American Court of Human Rights only for those States that have ratified the American Convention and have previously recognized the contentious jurisdiction of the Court, unless a State accepts the jurisdiction expressly for a specific case.

Some other working mechanisms by the Commission are (i) **on-site visit reports** to member States to observe the human rights situation on the ground², and (ii) **precautionary measures** (as a mechanism to ensure a rapid response by the Commission in serious and urgent situations where there is an imminent risk of irreparable harm to persons or groups of persons in the OAS member states, according to Article 25 of the Rules of Procedure of the Commission). (Inter-American Commission on Human Rights, 2015).

1.2. The Inter-American Court of Human Rights

The American Convention adopted in 1969 entered into force on 18 July 1978. The Inter-American Court of Human Rights (hereinafter “the Court”) was created by Article 33b of the American Convention and installed in 1979 as an autonomous

² An *in loco visit* by the Commission is defined as one with the participation of at least two Commissioners.

judicial organ of the OAS. The Court has its headquarters in Costa Rica and is made up of seven judges from OAS Member States elected in their personal capacity. The objective of the Court is to interpret and apply the American Convention. Its two main functions are: (i) **adjudicatory**—the Court determines if a State has incurred international responsibility for having violated any of the rights enshrined in the American Convention or other treaties if their provisions adjudicate jurisdiction to the Court; and (ii) **advisory**—the Court interprets the articles of the Convention and other treaties to provide an in-depth guide about the provisions and has the power to adopt provisional measures (American Convention on Human Rights, 1969, arts. 63 y 64).

According to Article 61(1) of the American Convention, only States Parties to the American Convention who have accepted the Court's contentious jurisdiction and the Commission may submit a case to the Inter-American Court. Individuals do not have recourse to the Court; thus, they must submit their petition to the Commission and go through the procedure for cases before the Commission.

2. Main treaties and provisions of the Inter-American System on the Protection of Human Rights concerning disability rights

Firstly, it is relevant to note that the American Convention neither contains an explicit reference about human rights of persons with disabilities nor a definition of discrimination. However, according to Article 29(b) of the American Convention, both the Commission and the Court are entitled to use international treaties and standards other than those emanating from the Inter-American System to interpret the provisions of the American Convention.

The principle of systemic integration finds conventional reflection in Article 29(b) of the American Convention. This principle is the means established in general international law to enable normative dialogue between legal regimes (United Nations, 1969).

The Court tends to use a systematic interpretation of different international instruments to protect the rights of persons with disabilities. The Court has rendered its judgment of cases concerning disability rights by interpreting the American Convention in light of the UN Convention on the Rights of Persons with Disabilities (UN CRPD), for example (Court IDH, Case of Furlan and family v. Argentina, 2012). In terms of the regional normative environment of the American Convention, the Protocol of San Salvador in its Article 18 recognizes the protection of persons with disabilities, as follows:

Article 18. "Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality (...)"

It is important to note that the language used in the drafting of article 18 of the Protocol of San Salvador indicates a lack of a social perspective on disability. However, the Protocol of San Salvador includes some provisions on the rights to work and education of persons with disabilities under Articles 6(2) and Article 13(3) (e), respectively, that have been relevant to the protection of disability rights.³

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belem do Pará”), being the first international bill of rights for women that defines what constitutes violence against women, establishes that States Parties must undertake measures to respect human rights especially considering the vulnerability of women with disabilities:

Article 9. “With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or if they are disabled, underaged, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom”.

The notion of “special vulnerability” propounded by the Convention of Belem do Pará is critical for understanding the transition process from the concept of formal equality to the concept of multidimensional disadvantage equality in the protection of girls and women with disabilities.

Likewise, special attention is given to the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (“CIADDIS”) adopted in 1999. The CIADDIS reaffirms that persons with disabilities have the same human rights and fundamental freedoms as other persons, and, that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person (Fredman, 201; Smith, 2016).

Because the CIADDIS was drafted before the UN CRPD, its concept of disability may be controversial in light of other approaches:

Article 1(1) CIADDIS

Disability: “The term disability means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more

³ “Article 6(2) Right to work. “The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled” Article 13(3)(e) Right to education. “The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education: (...) Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies” (Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights, Protocol of San Salvador, 1988).

essential activities of daily life, and which can be caused or aggravated by the economic and social environment”.

Critics of the definition of disability, propounded by the CIADDIS, focused on its alleged medical perspective on disability.⁴ For the purposes of this article, the CIADDIS’s critical element is its admonition to States Parties about all of the possible discrimination grounds against persons with disabilities:

Article 1(2)(a) CIADDIS

Discrimination against persons with disabilities: “The term discrimination against persons with disabilities means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.” (Underline included).

The CIADDIS’s provision of the possible discrimination grounds aims to incorporate a broad conception of discrimination by recognizing that a person with a disability might be discriminated against based on the disability itself, a record of it, a condition resulting from a previous disability, the mere perception of disability, and even on the ground of a past or present disability. Thus, the CIADDIS emphasizes the analysis of the discrimination based on disability.

Nevertheless, the CIADDIS is one of several inter-American human rights treaties that does not attribute jurisdiction to the Court to identify violations of its provisions, which reduces capacities for its enforcement.⁵

Among soft law instruments in the Inter-American System, the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (“the Principles”) approved by the Commission in 2008 (Inter-American Commission on Human Rights, 2008) is also suitable for disability rights protection. The Principles recognize the critical situation of violence, overcrowding, and inhumane living conditions in several places of deprivation of agency in the Americas, as well as the particular vulnerability of persons with mental disabilities deprived of agency in psychiatric hospitals and prisons.

Principle III(3) proclaims special measures for persons with mental disabilities:

⁴ The Court analysed the arguable incompatibility between the CIADDIS and standards on disability rights arising from UN CRPD in its judgment of *Furlan and Family v. Argentina* case (2012). The Court asserted that disability is not only defined by the presence of physical, mental, intellectual or sensory impairment, but it is interrelated with the barriers or limitations that exist socially for persons to exercise their rights effectively (Bregaglio, 2014) (Palacios, 2015).

⁵ After the entry into force of the CIADDIS, the OAS Member States created a second instrument of an operational nature to guide public policies aimed at the social inclusion of persons with disabilities: *the Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (PAD)*. The PAD is a political guidance, and it represents the commitment of the States Parties to take actions towards making substantive progress in building inclusive societies.

“The health systems of the Member States of the Organization of American States shall apply in conformity with the law a series of measures in favor of persons with mental disabilities, with a view to gradually de-institutionalizing these people, and organizing alternative service models that facilitate the achievement of objectives that are compatible with an integrated, continuing, preventative, participatory, and community-based psychiatric care and health system, and in this way avoid unnecessary deprivation of liberty in hospitals or other institutions”.

As an interpretative tool, Principle III(3) agrees with the right of persons with disabilities to independent living and community inclusion, as well as reflects attempts to interpret regional human rights treaties in light of international standards, mainly Article 19 of the UN CRPD. More recently, States Parties to the OAS adopted two human rights instruments regarding non-discrimination: the Inter-American Convention against all forms of Discrimination and Intolerance that recognizes discrimination on the ground of disability (Organization of American States. Inter-American Convention against all forms of Discrimination and Intolerance, 2013) and the Inter-American Convention against Racism, Racial Discrimination and related forms of Intolerance which develops the concept of discrimination and establishes that racial discrimination may take place in any area of public or private life (Organization of American States, Inter-American Convention against Racism, Racial Discrimination and related forms of Intolerance, 2017). These last two treaties build upon the concept of multiple discriminations, and both define the concept of indirect discrimination, as well as special measures of affirmative actions to ensure equal enjoyment or exercise of human rights. However, the Inter-American Convention against all Forms of Discrimination and Intolerance is pending to entering into force, and the Convention Against Racism, Racial Discrimination and related forms of Intolerance owing to its recent entry into force needs further implementation. In light of the *corpus iuris* described above, the Commission and the Court have known cases and individual petitions regarding human rights violations of persons with disabilities.

2.1. Main precedents on non-discrimination and non-segregation against persons with disabilities set by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights according to reports on-site visits; precautionary measures; and, case law

This part argues that primary developments within the Inter-American System toward the right of persons with disabilities to live in the community have been adopted through IACHR mechanisms, which are different from the system of petitions and cases. The two IACHR mechanisms explored here are (i) reports on-site visits to member States to observe the human rights situation on the ground; and (ii) precautionary measures.⁶

⁶ According to Article 25 of the Rules of Procedure of the IACHR this mechanism is designed to ensure a rapid response by the IACHR in serious and urgent situations where there is an imminent risk of irreparable harm to persons or groups of persons in the OAS members states.

2.1.1. Mechanism of reports

In 2012, the IACHR granted precautionary measure MC-370-12 on behalf of 334 patients in the case *Federico Mora Hospital v. Guatemala*. Federico Mora Hospital is the only long-term public institution in Guatemala providing psychiatric care to the country's entire population. Through the request for the measures, the IACHR learned of several different violations jeopardising the lives and safety of the patients at the Federico Mora Hospital. The IACHR asked the State of Guatemala to adopt several measures to ensure the lives and personal integrity of the patients at the hospital.

In August 2017, in the context of its on-site visit, the IACHR visited the Federico Mora Hospital. On 31 December 2017, the IACHR released its report on the situation of human rights in Guatemala. The IACHR reiterated that the prevailing situation at this hospital "reflects the lack of protection of persons with disabilities in Guatemala" (Inter-American Commission on Human Rights, 2017, p. 455). According to the IACHR, the rights to independent living and community inclusion, in light of the CRPD, implies that persons with disabilities are provided all the necessary means enabling them to exercise choice and control over their lives and make all decisions concerning their lives. The IACHR stated:

"When there is a lack of alternatives in the community, institutions segregate persons with disabilities from the community, because this becomes the only option for them to be able to receive the care and services they need" (Inter-American Commission on Human Rights, 2017, p. 465).

To the IACHR, the protection of the right to independent living means that the lives of persons with disabilities take place outside residential institutions of all kinds. Furthermore, the IACHR recalled that the Committee on the Rights of Persons with Disabilities (CRPD Committee) (2017) in its General Comment on article 19 establishes that "involuntary institutionalization on the basis of impairment, is often caused or increased by a lack of disability-specific support services, and leads to arbitrary deprivation of liberty" (para. 83). In its report, the IACHR noted the words of the Committee, as follows:

"Investment of resources in institutions, instead of in developing possibilities for persons with disabilities to live independently in the community, leads to abandonment, dependence on family, institutionalization, isolation and segregation" (UN Committee on the Rights of Persons with Disabilities, 2017, para. 1).

Even though the IACHR did not state explicitly that segregation through institutionalisation is one of the most severe forms of discrimination, it stated that the lack of services designed to meet the needs of the patients of the Federico Mora Hospital in the community leads to their indefinite segregation. Furthermore, the IACHR affirmed that community-based support must be designed to help persons

with disabilities to be included in the community and to avoid their isolation and segregation (Inter-American Commission on Human Rights, 2017). The IACHR urged the State of Guatemala to: a) expeditiously define a strategy for the de-institutionalisation of persons with disabilities including a timeline, sufficient resources and specific evaluation measures; b) ensure the participation of persons with disabilities, directly and through the organizations representing them, in the design and implementation of said strategy, and c) allocate sufficient resources for the development of support services.

2.1.2. Mechanism of precautionary measures

On 4 August 2017, the IACHR decided to request precautionary measures in favour of Zaheer Seepersad. Seepersad was a citizen of Trinidad and Tobago who suffered from a neurological condition causing abnormal postures and was admitted to a psychiatric asylum against his will. In the hospital, Seepersad did not receive the required treatment and was beaten by other patients. The IACHR considered that Mr Seepersad's situation was serious and urgent because of his state of health and the alleged lack of adequate medical care. The IACHR requested that the State adopted the necessary measures to protect the life and personal integrity of the beneficiary, it also consulted the measures to implement with Seepersad and his representatives to ensure their resolution (Inter-American Commission on Human Rights. Resolution 28 de 2017).

In another case, on 7 July 2016, the IACHR decided to request that precautionary measures be adopted for "Irene" in Argentina. "Irene" was a 12-year-old girl with a severe neurological condition who needed various types of medical treatment and therapy to alleviate her condition and allow her to go to school. To the IACHR, the information presented showed that "Irene" was facing a serious and urgent situation and that her life and personal integrity were at risk. Consequently, the IACHR considered the disability and health condition of "Irene" and ordered that the girl had access to special support services recommended by specialists, following international standards on this regard. Accordingly, the IACHR asked the State to reach an agreement with "Irene" and her representatives on the measures to adopt (Inter-American Commission on Human Rights, Precautionary Measures MC 376 de 2015).

The above statements made by the IACHR on support services and efforts to ensure the agreement of persons with disabilities follow the international standards derived from article 19 of the CRPD. The CRPD Committee has stated that involuntary institutionalisation is often caused or increased by a lack of disability-specific support services and that implementing article 19 of CRPD will ultimately prevent violation of article 14 of CRPD on the right to liberty and security of persons with disabilities (UN Committee on the Rights of Persons with Disabilities, 2017).

In another case, on 21 December 2011, the IACHR granted precautionary measures for Virgilio Maldonado Rodríguez, a Mexican national with a mental disability

sentenced to death in Texas. The IACHR asked the United States to refrain from execution until the IACHR had an opportunity to decide on the petitioner's claim of an alleged violation of the American Declaration. The petition for precautionary measures alleged that the United States did not take into account Maldonado's mental disability. The main argument was that death penalty constituted cruel punishment under the American Declaration of the Rights and Duties of Man (Inter-American Commission on Human Rights, Precautionary Measures PM 465 de 2011).

On 29 July 2009, the IACHR granted a request for precautionary measures on behalf of the patients at the Neuropsychiatric Hospital of Paraguay. The request seeking precautionary measures alleged that acts of physical violence and sexual abuse were committed against the hospital's patients and none useful measure was taken to investigate the facts of violence. The IACHR asked the Paraguayan State to take the measures necessary to protect the lives and physical integrity of the beneficiaries, as well as to prevent additional acts of physical violence and sexual abuse inside the hospital.

The IACHR did not assess the institutionalization of persons with disabilities nor analyze the violation to the right to humane treatment in the cases of Virgilio Maldonado Rodríguez and patients at the Neuropsychiatric Hospital of Paraguay. However, the IACHR used its legal faculty to order precautionary measures in favor of persons with disabilities; requested the State to report the measures taken; and compromised itself, as Commission, to monitor the situation. These actions adopted by the IACHR represent its rejection of segregation practices against persons with disabilities.

2.1.3. Case law

This section analyses the central pronouncements on institutionalisation established by the Court in its case law. It is critical to note that the Court has not yet ruled in any case related to the right to living independently of persons with disabilities. Notwithstanding, the Court, in some cases, has analysed the particular situation of risk faced by persons with disabilities, mainly those with intellectual disabilities, providing relevant statements on the prohibition of and protection from discrimination, as follows:

The first time that the Court addressed disability rights issues was in its judgment of *Ximenes-Lopes v. Brazil*. *Damião Ximenes Lopes* was a man with a mental illness, hospitalized as part of a psychiatric treatment, who died after being exposed to inhuman and degrading conditions inside the psychiatric clinic. In this case, the Court stated that the "personal features" of an alleged victim should be taken into

⁷ The United States is one of the few OAS Member States that has not yet ratified the American Convention on Human Rights neither has accepted the jurisdiction of the Inter-American Court of Human Rights. It is only bound by the human rights obligations stated in the Charter of the OAS and the American Declaration of the Rights and Duties of Man, as interpreted by the Inter-American Commission on Human Rights.

consideration to assess a violation of the right to personal integrity (Inter-American Court of Human Rights, Case of Ximenes-Lopes v. Brazil, 2006).

The Court recognized the status of Ximenes-Lopes as a subject with special legal protection for having a disability by stating: “Due to their psychological and emotional condition, persons with mental illness are particularly vulnerable to any health treatment, and such vulnerability is greater when they are admitted to mental health institutions” (Inter-American Court of Human Rights, Case of Ximenes-Lopes v. Brazil, 2006, para 129).

In its judgement, aligned with the CRPD’s provisions, the Court stated that the respect of human dignity and will of a person with an intellectual disability is an obligation of the State, as a principle.

The Court stated “Mental illnesses should not be understood as a disability for determination and the assumption that persons with mental illness are capable of expressing their will, which should be respected by both the medical staff and the authorities, should prevail” (Inter-American Court of Human Rights, Case of Ximenes-Lopes v. Brazil, 2006, para 130). In this case, the Court rejected the assumption that a person with a mental disability cannot express her or his will.

The Court concluded that the Brazilian State violated its obligation of non-discrimination under Article 1(1) of the American Convention and the right to humane treatment under Article 5 of the American Convention. In Mr. Ximenes-Lopes’ case, the Court called attention to provide treatments to persons with mental disabilities based on the patient’s best interest and respect for his or her autonomy (Inter-American Court of Human Rights, Case of Ximenes-Lopes v. Brazil, 2006, para 135).

In another case, regarding a ban on In-Vitro Fertilization treatment by the Constitutional Chamber in Costa Rica, case *Artavia Murillo et al. (“In vitro fertilisation”)* v. Costa Rica (2012), the Court concluded that indirect discrimination against persons with fertility issues occurred due to the possibility to assimilate them as persons with disabilities.

To the Court, female sterilization could be equivalent to disability based on the following reasons: (i) infertility is defined as a “disease of the reproductive system” by the World Health Organization (WHO); (ii) some experts have observed that “involuntary infertility is a disability”; (iii) under the social model, disability is not defined exclusively by the presence of a physical, mental, intellectual, or sensorial impairment, but it is interrelated to the barriers or limitations that exist in society for the individual to be able to exercise his rights effectively; (iv) States must promote social inclusion practices and adopt measures of positive differentiation to remove barriers; and, (v) the right of persons with disabilities to have access to the necessary techniques to resolve reproductive health problems

is inferred from Article 25 of the CRPD (Inter-American Court of Human Rights, Case *Artavia Murillo v. Costa Rica*, 2012, para 291).

In the *In vitro* fertilization case, the Court considered as a “barrier” the decision adopted by the Constitutional Chamber of Costa Rica to ban fertility treatments for persons with fertility problems. The decision, according to the Court, was arbitrary and excessive interference in private and family life with discriminatory effects. Besides, the Court asserted that the rights of persons with disabilities protected persons with infertility in Costa Rica (Inter-American Court of Human Rights, Case *Artavia Murillo v. Costa Rica*, 2012, para 293).

The Court brought persons with infertility problems into the notion of special protection of persons with disabilities in order to conclude that Costa Rican State should adopt positive measures based on the specific needs for protection. To the Court, Costa Rica should provide the medical treatment *In-vitro* fertilisation to persons with fertility problems due to its obligation to facilitate the inclusion of persons with disabilities using equality of conditions, opportunities and participation in all spheres of society.

Despite being an effort made by the Court to assess the differentiated impact of laws, judicial or administrative decisions and policies on persons with disabilities, the analysis made by the Court in *Artavia Murillo et al. (“In vitro fertilization”)* v. Costa Rica faced some critical issues. For example, the presumably inadequate equivalence between infertility and disability; the perspective from WHO focused on the “illness” which is contrary to the social model promoted by CRPD; and, the no clear explanation on how infertility as an “illness”, being supposedly similar to a disability, interacts with the barrier (Constitutional Chamber’s decision) in order to impede the full participation of persons with fertility issues in the society.

More recently, in the case of *Gonzales Lluy et al. v. Ecuador*, by the first time in its history, the Court used the concept of intersectionality to analyse the discrimination against a victim. The Court asserted that discrimination against *Gonzales Lluy* was associated with factors such as being a girl, a person living with HIV, a person with disabilities, a minor, and a person who belongs to a low socio-economic status. Moreover, in *Gonzales Lluy* case, the Court declared, for the first time, the violation of Article 13 (right to education) of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador” (Inter-American Court of Human Rights, Case of *Gonzales Lluy et al. v. Ecuador*, 2015).

The case of *Gonzales Lluy et al. v. Ecuador* refers to *Talía Gabriela Gonzales Lluy* and her family (mother and brother). In June 1998, being a child, *Talía* was diagnosed with a hemorrhagic disorder and needed multiple blood transfusions to be treated.

Talía got a transfusion in a private health clinic⁸ where medical personnel used untested blood samples that came from the Red Cross Blood Bank. As a result, Talía got infected with HIV. Local authorities expelled Talía from school for considering her as a threat to the life of her classmates.

In the case of González Lluy, the Court incorporated the social model of disability and the definition of disability established in the UN CRPD:

The Court asserted “The Court notes that, historically, persons with HIV have been discriminated against owing to different social and cultural beliefs that have stigmatized the illness. Thus, the fact that a person is living with HIV/AIDS, or even the mere assumption that he or she has HIV/AIDS, may create social and attitudinal barriers to that person having equal access to all his or her rights” (Inter-American Court of Human Rights, Case of Gonzales Lluy *et al.* v. Ecuador, 2015, para. 236).

The Court explained how people infected with HIV or even perceived to be infected might be considered as having a disability based on the social model of disability, primarily on the recognition of the concept of “barriers” or external factors that interact with a particular condition, such a health status:

“The relationship between this type of barrier and a person’s health status justifies the use of the social model of disability as a relevant approach to assess the scope of some of the rights involved in this case” (Inter-American Court of Human Rights, Case of Gonzales Lluy *et al.* v. Ecuador, 2015, par 236).

The Court used the term “disability” to support its idea about how people infected with HIV lose or see their opportunities limited to take part in the average life of the community on an equal level with others due to the external barriers. Under this interpretation, the Court asserted that any person could be subject to a particular form of exclusion or oppression because of particular health status. This interpretative activity reflects that the Court relied on the protection of Talia’s human rights as its primary goal.

Moreover, owing to the American Convention does not provide a concept of discrimination, the Court made references to the notion of discrimination in the respective *corpus iuris* following a systemic interpretation.⁹

The Court asserted that discrimination relates to “any distinction, exclusion, or restriction based on specific reasons, (...) or any other social condition, which has the intention or effect of nullifying or impairing the equal recognition, enjoyment or exercise of the

⁸ The Pablo Jaramillo Humanitarian Clinic Foundation of Cuenca, Province of Azuay, Ecuador.

⁹ The Court took into account the definitions of discrimination contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 1(1) of the Convention on the Elimination of All Forms of Discrimination against Women; and Article 2(a) of the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities.

human rights and fundamental freedoms of all human beings” (Inter-American Court of Human Rights, Case of Gonzales Lluy *et al.* v. Ecuador, 2015, par 253).

To the Court, the health status of a person infected or perceived as infected with HIV was within the realm of the expression “any other social condition”, by interpreting Article 1(1) in light of some of the leading international human rights treaties:

“The International Covenant on Economic, Social and Cultural Rights prohibits discrimination for different reasons, including ‘any other social condition’, and the Committee on Economic, Social and Cultural Rights of the United Nations has confirmed that the ‘health status (including HIV/AIDS)’ is a prohibited reason for discrimination” (Inter-American Court of Human Rights, Case of Gonzales Lluy *et al.* v. Ecuador, 2015, par 254).

Under this interpretation, the condition of being a person with HIV was clearly understood by the Court as a category protected by Article 1(1) of the American Convention.

In this regard, the Court asserted: “The direct legal effect of the fact that a condition or characteristic of a person falls within the categories included in Article 1(1) of the Convention is that judicial scrutiny should be stricter when assessing differences in treatment based on these categories. The authorities have a limited possibility of differentiating based on such questionable criteria (...)” (Inter-American Court of Human Rights, Case of Gonzales Lluy *et al.* v. Ecuador, 2015, par 256).

Using stricter judicial scrutiny, the Court applied the rule of proportionality to conclude that the domestic authorities did not follow a strict assessment of the need for the measure of expelling Talía from the school. To the Court, the means chosen by the authorities constituted the most harmful and disproportionate of those available to meet the objective of protecting the integrity of the other children at school.

Furthermore, the Court noted that the discrimination against Talía was associated with certain factors, such as being a woman, a person living with HIV, a child with disabilities, and belonging to a low socio-economic status. The Court introduced the concept of “intersectionality” to explain the connection among discriminatory factors.

The Court explained that the discrimination experienced by Talía was caused not only by numerous factors but also arose from a specific form of discrimination that resulted from the intersection of those factors. The Court asserted that various elements of vulnerability and risk of discrimination intersected that were associated with Talía’s condition as a child, a female, a person living with a disability and a person living with HIV in poverty.

The Court supported its analysis on “intersectionality” on the American Convention, other human rights instruments, and soft law instruments.¹⁰

Conclusions

The Inter-American System for the Protection of Human Rights has an acceptable *corpus iuris* to protect persons with disabilities against all forms of discrimination, including institutionalisation. Both the Inter-American Commission of Human Rights (IACHR) and the Inter-American Court of Human Rights (the Court), as the primary organs of the Inter-American System, are entitled to use international treaties other than those emanating from the Inter-American System to interpret the provisions of the American Convention on Human Rights in conformity with its Article 29(d). The principle of systemic integration allows the dialogue between the American Convention and the UN Convention on the Rights of Persons with Disabilities (CRPD).

The main developments on the right of persons with disabilities to live in the community within the Inter-American System have been adopted through some mechanisms of the IACHR; reports on-site visits and precautionary measures. The Court has not yet ruled in any case related to the right to living independently of persons with disabilities. Notwithstanding, the IACHR has used its mechanisms to stress that the right to independent living and to be included in the community, in light of the CRPD, implies that persons with disabilities are provided with all necessary means enabling them to exercise choice and control over their lives and make all decisions concerning their lives.

The IACHR has not explicitly affirmed that segregation through institutionalisation is one of the most severe forms of discrimination, however, it has stated that the lack of support and community services for persons with disabilities and their families create incentive to institutionalise them. This not only violates their right to live in the community, but also leads to abandonment, isolation and segregation.

By using the mechanism of precautionary measures, the IACHR has requested States to adopt all necessary measures to protect the life and personal integrity of persons within institutions. However, the more recent report on the situation of human rights in Guatemala, following an on-site visit, reveals a significant change in the approach of the IACHR to start noting that the failure to create community services violates Article 19 of the CRPD.

Based on the case law, it is possible to identify the evolving process of the principle of non-discrimination of persons with disabilities, including the obligation to consider the will and agreement of persons, mainly those with intellectual disabilities, in the

¹⁰ Such as the CEDAW, CRC, CRPD, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the CEDAW, and General Comment No. 3 of the Committee on the Rights of the Child on HIV/AIDS.

decision-making of supports and services. Additionally, the Court has incorporated concepts such as indirect discrimination; special protection; and, more recently, intersectionality to analyse the discrimination. The ruling practice of the Court reveals its commitment in understanding the composite nature of the causes of the discrimination against persons with disabilities, which can evolve to affirm that segregation through institutionalisation is a severe form of discrimination in further cases aiming to protect persons with disabilities in the Americas.

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