Righting Wrongs: The Judicialisation and Justiciability of Health-Related Rights in the Americas

Po-Han Lee* and Isaiah Christian Felix Antonio**

Abstract

The judicialisation phenomenon is prominent in the Americas, where people who suffer from diseases and adverse health impacts of environmental pollution utilise judicial institutions seeking the states' respect and protection of their right to health. Litigation has also been a mechanism for the local community and civil society organisations to promote the right to a healthy environment. Gaps between the rights recognised in law and realised in practice have been well documented in the growing body of literature on such judicial activism for health. Reviewing the health-related cases decided by regional and international human rights bodies such as the Inter-American Commission on Human Rights, Inter-American Court of Human Rights, and other UN human rights treaty-based committees, this paper presents the ways in which these institutions frame health(care) issues. These cases were internationalised when local remedies were exhausted while the states had not fully addressed the complaints. As health science and intervention develop, internationalising relevant rights claims has been proven to be a helpful approach to achieve the highest attainable standard of health, but the strategy may also be limited by the scope and effect of individual petitions on a case-by-case basis.

* Assistant Professor, Global Health Program, National Taiwan University; PhD Sociology, University of Sussex

** International Project Assistant, Taiwan Fact-Check Center; MSc Global Health, National Taiwan University

Keywords: health and human rights; Inter-American Commission on Human Rights; Inter-American Court of Human Rights; judicialisation; justiciability; the right to health

矯正錯誤：美洲區域中健康權利可訴訟性及司法化現象

李柏翰*、安仰深**

摘要

在美洲區域，健康權司法化的現象十分突出，病患或遭環境污染影響的社區居民利用司法機構尋求各國對健康權之尊重和保護，公民社會組織也經常利用訴訟機制尋求健康促進。針對衛生措施司法行動主義的文獻，記錄了法律承認之權利與國家實踐之間的差距。本文回顧美洲人權委員會、美洲人權法院及其他基於聯合國人權條約所建立之委員會等國際人權機構裁決之與健康相關的案件，分析健康議題在這些機制中所呈現之多元面貌。這些案件被「國際化」時係當其用盡當地救濟措施，而相關權利損害未被國家妥善回應。隨著衛生科學與介入措施之發展，權利主張國際化確實是追求可達到最高健康標準之有用途徑，但該策略也可能受到個案請願之範圍與效力等限制。

關鍵字：健康與人權、美洲人權委員會、美洲人權法院、司法化、可訴訟性、健康權

* 國立臺灣大學全球衛生學程助理教授，薩塞克斯大學社會學博士

** 臺灣事實查核中心國際專案專員，國立臺灣大學全球衛生學程理學碩士

I. Introduction

On 8 October 2021, the United Nations Human Rights Council (UNHRC) adopted Resolution 48/13 on 'the human right to a clean, healthy and sustainable environment'.[1] This marked a historic moment for environmental and health justice, whereby having a safe, clean, healthy, and sustainable environment was recognised as a human right.[2] Such a right – containing both the dimensions of individual and collective rights – encompasses elements of other human rights, including the right to health, the right to adequate housing, the right to food, the right to water, the right to cultural life, and indigenous rights. It is a resolution decade in the making that formally recognises the existence of such a right, considering the accumulation of relevant state and international practices through legislative efforts, policy measures, and judicial pronouncements. In this context, we address the influence of judicialising the right to health on social activism and public health in the Americas, with a focus on the internationalisation of judicialisation practices.

In the region of Latin America, the 'judicialisation' of health-related issues – the phenomenon in which citizens and civil society organisations aim to protect and promote the right to the highest attainable standard of health through litigation – is prominent.[3] These endeavours have involved judiciary and quasi-judicial bodies in

---

[1] Among the thirty-seven states contributing to the draft resolution, nine were from the Americas including Chile, Costa Rica, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Panama, and Uruguay (A/HRC/48/L.23/Rev.1). In addition, Argentina, Bolivia, Brazil, Cuba, and Venezuela voted in favour of the resolution, while the only four states that abstained from voting were China, India, Japan and Russia (A/HRC/RES/48/13).

[2] Lichet, Victoria & Tigre, Maria Antonia (2021). Historic Breakthrough for Environmental Justice: The UNHRC Recognizes the Right to a Healthy Environment as a Human Right. *Opinio Juris*. Available at: http://opiniojuris.org/2021/10/20/historic-breakthrough-for-environmental-justice-the-unhrc-recognizes-the-right-to-a-healthy-environment-as-a-human-right/ [accessed 30 November 2021].

[3] Gauri, Varun & Brinks, Daniel M. (2008). *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*. Cambridge: Cambridge University Press.

accountability mechanisms for health-related rights and have enabled the conceptualisation of the human right to a healthy environment.[4] The strategy of integrating the human rights discourse into the domestic legal order through judicial practices has given local advocacy groups opportunities to participate in large regional and international human rights bodies and to intervene in the process of relevant policy reforms.[5] Yet, conventional doctrinal legal studies, which consider the positive obligations of the right to health, have focused more on the enforceability and justiciability of such rights and paid little attention to the role of judicial activism in the social movements for health.[6]

There is a growing body of literature looking into the judicialisation of the right to health – especially regarding equitable access to necessary medical treatment, medicines, and resources – as 'a response to patients' legal action (less often of whole communities) to obtain care' across the Latin America and Caribbean Region.[7] The anthropological and sociological accounts have been interested in various framings of the right to health discourse and how they contribute to the promotion of health equity. These studies have focused on Brazil, which was the point of departure from which the judicialisation phenomenon was first observed and identified. Among all of the American countries, Brazil has been explored the most, mainly because of the transformative victories in Brazil in regard to incorporating the right to health in its

---

[4] Syrett, Keith (2018). "Evolving the Right to Health: Rethinking the Normative Response to Problems of Judicialization." Health and Human Rights 20(1): 121-132.

[5] Socal, Mariana P et al. (2020). "Right-to-Medicines Litigation and Universal Health Coverage: Institutional Determinants of the Judicialization of Health in Brazil." *Health and Human Rights* 22(1): 221-235.

[6] Rodríguez-Garavito, César A. (2011). "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America." *Texas Law Review* 89(7): 1669-1698.

[7] Villar Uribe, Manuela, Escobar, Maria-Luisa, Ruano, Ana Lorena, & Iunes, Roberto F. (2021). "Realizing the right to health in Latin America, equitably." *International Journal for Equity in Health* 20(1): 34, p. 3.

Constitution (see Table 1).[8] Although all Latin American countries have been involved in health-related human rights complaints, some states with better-established health systems and the recognition of the right to health and/or healthcare in law receive more attention and have been referenced more by judicialisation studies.[9]

Looking beyond the domestic health and judicial systems, the judicialisation of the right to health or health-related rights issues is also prevalent at the regional and international levels, especially between states that have failed to provide adequate judicial protection. As we call it in this paper, such a phenomenon of internationalising the judicialisation of health needs and concerns indicates the pronunciation of positive obligations concerning health-related human rights via the Inter-American human rights mechanism and at the UN forums. Although most of the literature studying the judicialisation phenomenon focuses on specific national contexts, we have noticed that such a situation also occurs beyond the domestic plane. The victims of alleged human rights violations have also been involved, by resorting to regional and international human rights bodies, such as the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR), and different UN human rights treaty-based committees.

Therefore, in this paper, we first identify cases in which the states in the Americas have been the respondents regarding the judicial and quasi-judicial investigation and reparation for the violation of the right to health and other health-

[8] Biehl, João et al. (2016) "The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil." *Health and Human Rights* 18(1): 209-220; Biehl, João et al. (2019). "Judicialization 2.0: Understanding right-to-health litigation in real time." *Global Public Health* 14(2): 190-199.

[9] Ferraz, Octávio Luiz Motta (2018). "Health in the Courts of Latin America." *Health and Human Rights* 20(1): 67-77; Fleury, Sonia et al. (2013). *Right to health in Latin America: beyond universalization*. Santiago United Nations.

related human rights. The observation of all the relevant cases extracted from database searches is located in the context of relevant legal instruments in relation to the Inter-American human rights system. Thus, we will also elaborate on our rationale for selecting, categorising, and summarising the cases, including the thematic topics that are defined. Our analysis first attends to the institutional design, including the rules and procedures for individual complaints, and the Inter-American judicial and quasi-judicial system for human rights protection, which is followed by a summary of the substantive content of the right to health and other health-related rights in the American human rights instruments.

Based on a review of the academic literature in judicialisation studies and the results of the database search, we found that the way in which health is represented and discussed in the inter-American human rights regime has been inconsistent, not only between states but also between national and regional mechanisms, which is an intriguing site for interrogation. This is particularly relevant in the situation where the alleged American state is not a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). In this regard, we aim to address questions concerning the way in which the right to judicial protection has been utilised to protect the right to health and other health-related human rights, which has substantively expanded the scope and categories of the rights-holding subject of the right to health. Considering the change in medical and public health sciences and practices, the internationalisation of relevant rights claims is revealed to be a helpful, and sometimes necessary, approach to health justice for health social movements through judicial interpretations.[10]

---

[10] Brown, P., & Zavestoski, S. (2004). Social movements in health: An introduction. Sociology of Health & Illness, 26(6), 679-694.

II. Health and human rights in the American human rights instruments

In this section, we first introduce the Inter-American human rights system. Emphasis will be placed on the relationships between the Organization of American States (OAS), the IACHR, and the IACtHR, particularly regarding the procedural rules concerning how an alleged human rights violation is made a *case* in both quasi-judicial (IACHR) and judicial (IACtHR) forums. As the oldest regional organisation in the world, dating to 30 April 1948, the OAS – headquartered in Washington DC in the US and currently comprising 35 member states – was established out of a regional concern regarding the independence of, and the interconnection between the American states in the context of post-war globalisation. The OAS has four main pillars in terms of its institutional purpose, which are democracy, human rights, security, and development, and to fulfil its purposes, the IACHR and IACtHR were established respectively in 1959 and 1979.

Both human rights organs have been responsible for monitoring the states' compliance with the OAS Charter, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights (ACHR),[11] the Protocol of San Salvador (on social, economic, and cultural rights),[12] and other treaties, to

[11] The ACHR was adopted at the Inter-American Specialized Conference on Human Rights on 22 November 1969 and entered into force on 18 July 1978. It has been ratified by 25 OAS member states; two have denounced the ratifications subsequently – Trinidad and Tobago and Venezuela, while the latter ratified again in 2019. Thus, as of 2022, there are 24 state parties to the ACHR (namely, Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela). For the status of ratification, see the Department of International Law, OAS: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm [last checked 28 June 2022].

[12] The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") was adopted at the 18th Regular Session of the OAS General Assembly on 17 November 1988 and came into effect on 16 November 1999. It has been ratified and acceded to by 17 OAS member states, including, as of 2022, Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. For the status of

which the states are parties. The IACHR is located in Washington DC, and the IACtHR is in San José, Costa Rica. Regarding their relationship, the members of the IACHR (seven commissioners, four-year term plus one re-election) are elected by the OAS General Assembly and those of the IACtHR (seven judges, six-year term plus one re-election) by the ACHR state parties. These members should work autonomously and impartially. The IACHR is responsible for promoting respect for and the defence of human rights, preparing reports regarding the human rights situations in OAS member states, and acting on individual *petitions*. At the same time, the IACtHR, as a judicial organ, is responsible for resolving individual contentious *cases* – fulfilling the adjudicatory function – and interpreting the ACHR and other human rights instruments – fulfilling the advisory role.

Understanding the rules of procedure as well as the possible remedies available to potential victims – which are authorised by relevant treaties – is essential and useful, because they provide a critical context in which both the litigation strategies of victims and social movement tactics of rights advocates have been conceived, formulated, and pursued.[13] In summary, the petitions reviewed by the IACHR have to go through a two-tier process: the procedure on admissibility and the procedure on merits, the latter of which involves notifying both parties of compliance deadlines and hence will continue to monitor the progress of state responses to the IACHR decision. Under the ACHR, cases are referred to the IACtHR by either the IACHR (article 50) or a state party (article 61); this is different from many other similar courts, which usually accept communication from individual citizens. In this way,

---

ratification, see the Department of International Law, OAS: http://www.oas.org/juridico/english/sigs/a-52.html [last checked 28 June 2022].

[13] Socal, Mariana P et al. (2020). "Right-to-Medicines Litigation and Universal Health Coverage: Institutional Determinants of the Judicialization of Health in Brazil." *Health and Human Rights* 22(1): 221-235; Vargas-Pelaez, Claudia Marcela et al. (2019). "Judicialization of access to medicines in four Latin American countries: a comparative qualitative analysis." *International Journal for Equity in Health* 18(1): 68-82.

the admissibility must be determined through the IACHR's referral. The function of the IACHR, whose aim includes creating a space for the parties to have a dialogue with each other, is very different from that of the judicial function of the IACtHR, which typically interprets the rules of procedure more flexibly.

The substantive content of the right to health is principally enshrined in article 26 of the ACHR, which requires the state parties 'to adopt measures, both internally and through international cooperation…with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards' according to the OAS Charter. Accepting the progressive realisation of social, economic, and cultural rights should not be interpreted as jeopardising the importance of the principles of non-discrimination and non-retrogression.[14] The right to health, in the Inter-American system, has normally been protected through safeguarding other rights such as the right to life (article 4, in its extension to one's wellbeing and liveable situation), the right to humane treatment (article 5), the right to equal protection of the law (article 24, regarding equitable access to healthcare), as well as the rights of the child (article 19, when children are involved).

The rights in relation to the protection of individual and community health have been further clarified in article 10 on the right to health, in which health is recognised as a public good, article 11 on the right to a healthy environment, and other related rights (in relation to the social determinants of health) of the Protocol of San Salvador. Many states have not acceded to the Protocol, while many of the rights contained in this document are considered 'unenforceable' or 'non-justiciable'. For example, in

---

[14] This has been reemphasized by the IACHR in health-related cases as well, for example, in Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez v. El Salvador*, Report No. 27/09, Case 12.249, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009). The IACHR follows Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)," E/C.12/2000/4 (2000).

Mossville Environmental Action Now v. the United States (2010), the US contested the existence of such a right to 'a safe or healthy environment' in either domestic or customary international laws.[15] In fact, the US signed the ACHR in 1977 but has not proceeded with ratification, and this was why the case could only be brought as a case concerning the American Declaration of the Rights and Duties of Man. Similarly, the ACHR has not been ratified by Canada (due to the anti-abortion clause in the treaty)[16] or several of the English-speaking Caribbean nations either.

To better understand the scope of the right to health within and related to the Inter-American context, we have relied on the rationales provided in the most recent development of the right to health discourse. They include the IACtHR Advisory Opinion OC-23/17,[17] requested by Colombia on the environment and human rights, and its judgment on *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*,[18] as well as the cases decided by other international bodies, for example, *Marcia Cecilia Trujillo Calero v. Ecuador*,[19] *Alyne da Silva Pimentel v. Brazil*,[20] and *L.C. v. Peru*.[21] Among the eight state parties to the Optional Protocol to the ICESCR from the region, Ecuador has had the most cases at the UN Committee

---

[15] Inter-American Commission on Human Rights, *Mossville Environmental Action Now v. the United States*, Report No. 43/10, Petition 242-05 (2010), para. 18.

[16] Schabas, William A. (1998). "Canadian Ratification of the American Convention on Human Rights." *Netherlands Quarterly of Human Rights* 16(3): 315-42.

[17] Inter-American Court of Human Rights, "Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights." Advisory Opinion OC-23/17 (2017).

[18] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations, and Costs, Judgment, IACtHR (series C), No 400 (2020).

[19] Committee on Economic, Social and Cultural Rights, *Marcia Cecilia Trujillo Calero v. Ecuador*, Communication 10/2015, UN Doc. E/C.12/63/D/10/2015 (2015).

[20] Committee on the Elimination of Discrimination against Women, *Alyne da Silva Pimentel v. Brazil*, Communication No. 17/2008; UN Doc. CEDAW/C/49/D/17/2008 (2008).

[21] Committee on the Elimination of Discrimination against Women, *L.C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009 (2009).

on Economic, Social and Cultural Rights (CESCR) compared to other American countries.[22]

III. Different framings of 'health' in human rights discourse in America

The practice of 'judicialising' health concerns in the American region has been an interesting phenomenon, which is relevant to the historical, sociocultural, political, and legal contexts shared by many American countries. Namely, the legacies of settler colonialism, authoritarian regimes and democratic transition, communist and socialist movements, racial discrimination, and civil wars have all played a role – especially considering the emergence of indigenous rights movements throughout the Americas.[23] In addition, the existence of the Pan American Health Organization (PAHO) – one of the oldest and largest international health organisations in the world – is also significant in this respect. Its particular importance lies in its active role in promoting the ideas and best practices around health justice and the social and political determinants of health as well as the 'One Health' paradigm in recent years.[24]

Bearing all of these factors in mind, through a database search with the keywords such as 'health' ('salud') and 'right to health' ('derecho a la salud') on the

---

[22] The eight state parties are Argentina, Bolivia, Costa Rica, El Salvador, Honduras, Paraguay, Uruguay, and Venezuela. A state authorises the CESCR to receive and consider communications when it becomes a party to the Optional Protocol to the ICESCR. More studies are needed to identify the legal and socio-political contexts and human rights activism of Ecuador. For the status of ratification of a core international human rights treaty or its optional protocol, see the database of the Office of the United Nations High Commissioner for Human Rights: https://indicators.ohchr.org/ [last checked 16 February 2022].

[23] See Biehl, João & Petryna, Adriana. (eds. 2013). *When People Come First*. Princeton: Princeton University Press.

[24] Alleyne, George A.O. (2002). "The Pan American Health Organization's first 100 years: Reflections of the Director." *American Journal of Public Health* 92(12): 1890-1894; Marmot, Michael (2018). Just societies, health equity, and dignified lives: the PAHO Equity Commission." *The Lancet* 392(10161): 2247-2250.

official websites of the IACHR and IACtHR,[25] we first identified the diversity of health-related issues that have been brought to both institutions. In addition to the right to health, many cases have looked at situations regarding illnesses and injuries at work or in prison and/or protecting individual health by realising other rights – which are not necessarily limited to the socioeconomic domains such as social security, but also include political and civil rights, especially the right to autonomy, the right to life, and the right to judicial protection. Such a holistic approach to health-related rights also demonstrates the interrelatedness of different rights under international human rights law, echoing the 1993 Vienna Declaration and Programme of Action. All of these cases indicate that health has been represented in the Inter-American human rights regime at various levels, including individuals' access to healthcare, the public's and communities' resilience to the negative health impact of development projects, and the linkages between health and the environment.

Many states that have been mentioned less in the judicialisation literature still appear in the results of database searches (e.g. see Table 1). Such an inconsistency, from our perspective, may imply, on the one hand, that researchers of judicialisation studies have paid little attention to regional and international (quasi)judicial bodies. On the other hand, some domestic courts are less active and responsive, so the citizens under their jurisdictions go to international bodies soon after the local remedies have been exhausted.[26] The reasons for the absence of these states in academic inquiries are manifold, including that the states are themselves inactive in involving the rights discourse in health-related disputes due to the lack of explicit

---

[25] See *Corte IDH Protegiendo Derechos* (Catálogo en linea), [online] available at: https://biblioteca.corteidh.or.cr/busqueda. With the keyword 'salud' there were 30 results, and with 'derecho a la salud' there were 19 results [last checked 25 June 2022].

[26] Harrington, Alexandra R. (2013). "Life as We Know It: The Expansion of the Right to Life under the Jurisprudence of the Inter-American Court of Human Rights." *Loyola of Los Angeles International and Comparative Law Review* 35(2): 313-341.

references to the right to health and/or health-related rights in their national constitutional and legal frameworks. For the OAS member states that have not ratified the ACHR and the Protocol of San Salvador, the judicialisation of health concerns relies fully on the legal development at the domestic level.[27] In this regard, we consider that it would be interesting to explore the local social, political, and policy contexts in which the contention between victims and the alleged state is made a 'case' on the inter-American plane.

	Sonia Fleury et al.(2013)	Octávio Ferraz(2018)	Alicia E. Yamin(2019)	João Biehl et al.(2019)
South America	• Argentina (12 mentions) • Bolivia (3 mentions) • **Brazil (38 mentions)** • **Chile (25 mentions)** • **Colombia (24 mentions)** • Ecuador (4 mentions) • Peru (2 mentions)	• Argentina (3 mentions) • Bolivia (4 mentions) • **Brazil (24 mentions)** • Chile (5 mentions) • Colombia (6 mentions) • Ecuador (2 mentions) • Paraguay (2	• Argentina (15 mentions) • **Brazil (29 mentions)** • Chile (2 mentions) • **Colombia (76 mentions)** • Ecuador (1 mention) • Peru (2 mentions)	• **Brazil (24 mentions)** • Colombia (2 mentions) • Ecuador (1 mention)

27 Yamin, Alicia Ely (2019). "The Right to Health in Latin America: The Challenges of Constructing Fair Limits." *University of Pennsylvania Journal of International Law* 49(3): 695-734.

	• Uruguay (1 mention) • Venezuela (2 mentions)	mentions) • Peru (2 mentions) • Uruguay (14 mentions) • Venezuela (1 mention)		
Central America	• **Costa Rica (20 mentions)** • Mexico (9 mentions)	• **Costa Rica (27 mentions)** • El Salvador (2 mentions) • Guatemala (2 mentions) • Honduras (1 mention) • Mexico (4 mentions)	• Costa Rica (16 mentions) • **Mexico (20 mentions)**	• Costa Rica (1 mention) • Mexico (1 mention)
Caribbean	• Cuba (8 mentions)	• Cuba (3 mentions) • Haiti (4 mentions)		

Table 1. Mentions of states in review studies regarding the 'judicialisation' phenomenon[28]

[28] The ones in bold indicate more than 20 mentions in the discussion of the paper. In fact, following

In addition, via the Global Health and Human Rights Database,[29] we systematically pulled relevant cases concerning the right to health as well as other health-related rights decided by both the IACHR and IACtHR. We have included the instances that, even if without a direct reference to the right to health, infer the protection and promotion of health through the safeguarding of other rights. In total, we extracted 40 cases along with the summaries provided by the Database.[30] Based on the significance and perceived preference drawing on the discussion between the authors, we have selected 18 cases for analysis. The purposive selection aims to demonstrate the variety of framings of health issues in the inter-American forums. These cases were made into eight categories based on a thematic and a discourse analysis regarding the health concerns at issue in each contentious case, as shown in Table 2.

1. The right to a clean, healthy, and liveable environment	• IACHR: *Community of La Oroya v. Peru* (2009) • IACHR: *Mossville Environmental Action v. the United States* (2010) • IACtHR: *Lhaka Honhat v. Argentina* (2020)
2. The linkages between land, livelihood, and health	• IACHR: *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay* (2002)

Brazil, other states that are also frequently mentioned include Colombia, Chile, Costa Rica, Mexico, and Argentina.

[29] See *Global Health & Human Rights Database*, [online] available at: https://www.globalhealthrights.org.

[30] The retrieval of cases was also done with the support of the UN Refugee Agency's database 'Refworld' when the website of the Global Health and Human Rights failed to provide access to a case. See *Refworld*, [online] UNHCR, available at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain.

	• IACtHR: *Sawhoyamaxa Indigenous Community v. Paraguay* (2006) • IACtHR: *Xákmok Kásek Indigenous Community v. Paraguay* (2010)
3. Community informed consent regarding development project	• IACHR: *Ngobe Indigenous Communities v. Panama* (2009) • IACtHR: *Kichwa Peoples of the Sarayaku Community v. Ecuador* (2012)
4. Individual informed consent regarding medical interventions	• IACHR: *María Mamérita Mestanza Chávez v. Peru* (2003) • IACtHR: *I.V. v. Bolivia* (2014)
5. Progressive realisation of the right to health (including 'urgent measures')	• IACHR: *Jorge Odir Miranda Cortez v. El Salvador* (2009) • IACHR: *People Living with HIV v. Chile* (2001)
6. Deportation case (cf. death row phenomenon)	• IACHR: *Andrea Mortlock v. US* (2008)
7. Reproductive health and the right to abortion	• IACHR: *Ramírez Jacinto, et al. v. Mexico* (2007)
8. Remedies regarding medical negligence and malpractices	• IACHR: *Luis Rolando Cuscul Pivaral, et al. (Persons Living with HIV/AIDS) v. Guatemala* (2005) • IACHR: *Pediatric Clinic of Los Lagos v. Brazil* (2008) • IACtHR: *Suarez Peralta v. Ecuador* (2013) • IACtHR: *Vinicio Poblete Vilches v. Chile* (2018)

Table 2. Cases extracted from the Global Health and Human Rights Database and reviewed

The eight categories include those that pertain to both the 'entitlement' and 'freedom' elements of the individual right to health.[31] The former also applies to issues regarding the prevention of deprivation of medicines and medical treatment due to deportation and repatriation, and remedies for medical negligence and malpractices. The latter is included in reproductive health and the right to abortion (which intersects with women's rights in the health context),[32] and the right to individual informed consent regarding medical interventions (where a friendly social and institutional context is required). The right to individual informed consent regarding medical interventions can be compared to a community's right to informed consent regarding development projects, through which the habitants' self-determination can be realised. Relatedly, the other category that indicates the dimension of health as a collective right includes a community's right to a clean, healthy, and liveable environment, reflecting the linkages between land, livelihood, and health.

In addition to the core obligations such as eliminating discrimination that states should fulfil immediately, some cases reaffirm the significance of progressive realisation of the right to health (normally through provisional measures). Nonetheless, despite the rapid development of judicialising health needs in the human rights language and the usefulness for advocacy and seeking reparation for violations of individual rights, critiques also identify that the judicialisation efforts have been defined with two features – they are highly individualised and highly pharmaceuticalised. The former feature may have made the effect hardly extend to and benefit the wider public, and the latter draws on the fact that most of the health

---

[31] See Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)," E/C.12/2000/4 (2000).

[32] See also Committee on Economic, Social and Cultural Rights, "General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)," E/C.12/GC/22 (2016).

rights litigations are about access to medication and health services.[33] Both features are tied to the fact that the human rights discourse is, by nature, individualistic and that the urgent need for the state's protection of the right to health normally arises from one suffering illnesses and diseases.[34] Therefore, the provision of medical attention and treatment connotes a significant part of states' obligations regarding health-related claims; this is particularly relevant in the American context considering the HIV/AIDS crisis since the 1990s and the Zika epidemic.[35] Yet, such a phenomenon may potentially counteract promoting the awareness of the social determinants of health and health justice.[36]

IV. The making of health-related rights and resonance between forums

The developments in judicial practice imply the state's positive obligations to actively protect people's health at different levels. Within the realm of the OAS, we first analyse cases related to 'health-related rights' (including the right to health) – for instance, the IACHR's decisions in *Victor Rosario Congo v. Ecuador* (regarding adequate healthcare for people with a mental health condition) in 1999,[37] *Andrea Mortlock v. the United States* (regarding the obligation to avoid unnecessary death

---

[33] Andia, Tatiana S., and Everaldo Lamprea. (2019). "Is the judicialization of health care bad for equity? A scoping review." *International Journal for Equity in Health* 18 (1): 61; Biehl, João et al. (2019). "Judicialization 2.0: Understanding right-to-health litigation in real time." *Global Public Health* 14(2): 190-199.

[34] Da Silva, Michael. (2018). "The International Right to Health Care: A Legal and Moral Defense." *Michigan Journal of International Law* 39(3): 343-384.

[35] See Biehl, João et al. (2016) "The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil." *Health and Human Rights* 18(1): 209-220; Rasanathan, Jennifer J. K., MacCarthy, Sarah, Diniz, Debora, Torreele, Els, & Gruskin, Sofia. (2017). "Engaging Human Rights in the Response to the Evolving Zika Virus Epidemic." *American Journal of Public Health* 107(4), 525-531.

[36] Andia, Tatiana S., and Everaldo Lamprea. (2019). "Is the judicialization of health care bad for equity? A scoping review." *International Journal for Equity in Health* 18 (1): 61.

[37] Inter-American Commission on Human Rights, *Víctor Rosario Congo v. Ecuador*, Case 11.427, Report No. 12/97, IACHR OEA/Ser.L/V/II.95, Doc. 7 rev. at 257 (1997).

and foreseeable stigma) in 2008,[38] and *Jorge Odir Miranda et al. v. El Salvador* (regarding the progressive realisation of the right to health) in 2009.[39] The most recent development includes the IACtHR's Advisory Opinion in response to Colombia's request concerning whether the ACHR recognises and protects the right to a healthy environment. The extensive interpretation was later applied in its 2020 judgment on the *Lhaka Honhat v. Argentina* case, which mentions that, whether at risk or not, indigenous peoples should enjoy the right to self-determination of development based on the right to a healthy environment.[40]

To clarify the relevant legal norms, the general comments and decisions made by the UN human rights bodies are also important and have been considered integral to and consistent with the Inter-American system. For example, the Committee on the Elimination of Discrimination against Women (CEDAW) held in both *Alyne da Silva Pimentel v. Brazil* and *L.C. v. Peru* (2009) that, considering the lengthy procedures at medical institutions, requiring the victims to comply with the principle of exhausting local remedies was indeed an unreasonable expectation.[41] As a result, the CEDAW requires the Brazilian and Peruvian states to ensure accessibility to and quality of urgent medical care for the petitioners. The IACHR held similar opinions in *La Oroya v. Peru* and *Jorge Odir Miranda Cortez et al. v. El Salvador* regarding the unreasonable waiting times at the respective constitutional courts.[42]

---

[38] Inter-American Commission on Human Rights, *Andrea Mortlock v. the United States*, Report N.63/08, IACHR Case 12.534 (2008).

[39] Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez v. El Salvador*, Report No. 27/09, Case 12.249, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009).

[40] Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations, and Costs, Judgment, IACtHR (series C), No 400 (2020), paras 202-207

[41] Committee on the Elimination of Discrimination against Women, *Alyne da Silva Pimentel v. Brazil*, Communication No. 17/2008; UN Doc. CEDAW/C/49/D/17/2008 (2008); Committee on the Elimination of Discrimination against Women, *L.C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009 (2009).

[42] Inter-American Commission on Human Rights, *Community of La Oroya v. Peru*, Report No. 76/09,

With respect to granting a precautionary measure, which may happen at any time before and during the petition procedure, the IACHR has held the position that preventing unnecessary illnesses and even deaths is the most critical concern in a health rights-related claim. For example, the *La Oroya* case is concerned with irreparable harm of environmental pollution against human health and the *Jorge Odir Miranda Cortez* case with the limited healthcare provided for HIV-positive persons.[43] Regardless of whether or not there exists a violation of human rights obligations, protecting life should be treated as the utmost priority for states, which justifies the need for urgent, precautionary measures to be offered. The urgency and precaution stem from the state's obligation to protect life and health in any event, which should comply with the principle of non-discrimination; in many cases, precautionary measures have been granted to prisoners and persons in custody.[44]

On the other side of the coin, by reviewing relevant contentious and advisory cases, we have also explored the way in which local rights organisations and research institutions produce knowledge about situations that are alleged to be violating the health-related human rights of actual and potential victims. Namely, through contextualising the judicialisation of alleged situations, the aim is to better understand the liminality of and intertextuality between cases. This is an important element in the making of human rights jurisprudence, which is not only linked to the UN and other regional human rights norms and precedence but also contains

Petition 1473-06, August 5, 2009; OEA/Ser.L/V/II., Doc. 51, corr. 1 (2009); Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez v. El Salvador*, Report No. 27/09, Case 12.249, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009).

[43] Also see Inter-American Commission on Human Rights, *People Living with HIV v. Chile*, Precautionary Measures, IACHR OEA/Ser.L./V/II.114, doc. 5 rev. (2002).

[44] See, for instance, Inter-American Commission on Human Rights, *Jorge Luis García Pérez-Antúnez v. Cuba*, Precautionary Measures, IACHR OEA/Ser./L/V/II.114, doc. 5 rev., Ch. III, para. 28 (2001); Inter-American Commission on Human Rights, *Isabel Velarde Sanchez v. Peru*, Precautionary Measures, IACHR OEA/Ser./L/V/II.114, doc. 5 rev., Ch. III, para. 50 (2001).

American regional and cultural particularities.[45] Moreover, since health is a field in which scientific, risk, and regulatory discourses are involved, the construction of facts regarding the interpretation of relevant rights and norms is an essential component of the contemporary 'health and human rights' theory.[46] Therefore, in the American context where the right to health is highly 'judicialised' and where 'health and human rights' activism is vibrantly developed,[47] the dynamics of such an intersection of both movements makes a fascinating case.[48]

In this regard, we have further identified three tendencies in which the norm of the right to health is developed in relation to the judicialisation practices: protecting health through making the contention a legally disputable question, developing collective rights-holders of health, and making the judicialisation of health needs an international claim. These three developments, drawing on the jurisprudence of the IACHR and IACtHR, have gone beyond the binary of states' negative/passive obligations (in terms of respecting of personal freedoms) and positive/active obligations (in terms of protecting one against the harms from others and fulfilling the right to health), as demonstrated by the CESCR in its General Comment No. 14,

---

[45] See, for instance, Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, IACtHR (ser. C) No. 254 (2012).

[46] Annas, George J. & Mariner, Wendy K. (2016). "(Public) Health and Human Rights in Practice." *Journal of Health Politics, Policy and Law* 41(1): 129-139; Mann, Jonathan M. (1997). "Health and Human Rights: If Not Now, When?" *Health and Human Rights* 2(3): 113-120.

[47] See Meier, Benjamin Mason (2006). "Employing Health Rights for Global Justice: The Promise of Public Health in Response to the Insalubrious Ramifications of Globalization." *Cornell International Law Journal* 39(3): 711-778; Yamin, Alicia Ely et al. (2015). "Human-rights-based approaches to health in Latin America." *The Lancet* 385(9975): e26-e29.

[48] Yamin's study has identified that multiple forms of obstacle to pursuing and operationalising advocacy on the right to health, in addition to the economic burden for local rights activists. The barriers include, on the normative level, the ill-defined content of the right to health or the inadequacy of law, and on the structural and institutional level, the lack of human rights consciousness regarding health needs and the lack of procedures for enforcing related judgements. However, this requires further empirical investigation and is beyond the scope of the current study. See Yamin, Alicia Ely. (2000). "Protecting and promoting the right to health in Latin America: selected experiences from the field." *Health and Human Rights* 5(1): 116-148.

adopted in 2000.

i. Protecting health via judicialising contentions

The judicialisation of the right to health – employing other human rights such as the right to judicial protection and the right to reasonable remedies from the domestic to the international/regional level – forms an integral part of pursuing the realisation of the right to health in the Americas.[49] Notably, making a health-related issue legally disputable and subject to judicial scrutiny in relation to human rights language includes but is not limited to the contention regarding justiciability, which indicates that a (quasi)judicial body can competently identify violations and adequately correct them with legal remedies. However, judicialisation refers to interference in the formulation and implementation of public policies through the active and conscious expansion of the judiciary's role.[50] In the inter-American human rights system, the specificities of constitutional and legal institutions of American states are called to assume accountability, and the *amparo* mechanism is of particular relevance in this regard, even in the circumstances where lower courts have been unable to balance against the executive and legislative branches of the government. Particular implications drawing on the cases reviewed here are concerned with the following:

1) The right to judicial protection (including utilising the writ of *amparo*) has been identified as significant in providing access to essential medicines and adequate medical treatment, an extraordinary legal remedy in Latin American legal systems, which has been discussed relentlessly by the IACHR, especially against unreasonable delays in remedying human rights

[49] Yamin, Alicia Ely (2019). "The Right to Health in Latin America: The Challenges of Constructing Fair Limits." *University of Pennsylvania Journal of International Law* 49(3): 695-734.

[50] Timo, Pétalla Brandão. (2012). "The justiciability of the right to health: A look into the Brazilian case." *Revista Latinoamericana de Derechos Humanos* 23(1): 227-248.

violations,[51] and enunciated through the IACtHR's Advisory Opinions OC-8/87 and OC-9/87, which state that 'amparo' should be an adequate remedy that is prompt, simple, and effective.[52]

2) There are a variety of ways in which human rights contentions are resolved. They include – in the inter-American human rights system due to regional particularities in terms of domestic partisan politics and the relationship between states and civil society – the processes of granting provisional measures, mediating friendly settlements,[53] and deciding upon litigated cases. In this context, precautionary measures are of particular importance in terms of addressing 'urgent' and 'necessary' needs (as discussed earlier).

3) The repeated recognition of progressively realising socioeconomic rights (including the right to health) has resonated with the principle given in the ICESCR and reaffirms that such a principle also indicates the principle of

[51] For instance, Inter-American Commission on Human Rights, *Community of La Oroya v. Peru*, Report No. 76/09, Petition 1473-06, August 5, 2009; OEA/Ser.L/V/II., Doc. 51, corr. 1 (2009); Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez v. El Salvador*, Report No. 27/09, Case 12.249, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009).

[52] See Inter-American Court of Human Rights, "Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)." Advisory Opinion OC-8/87 (1987); Inter-American Court of Human Rights, "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights)," Advisory Opinion OC-9/87, IACtHR (Ser. A) No. 9 (1987).

[53] See, for example, Inter-American Commission on Human Rights, *María Mamérita Mestanza Chávez v. Peru*, Report No. 66/00, Case 12.191, OEA/Ser./L/V/II.111, Doc. 20 rev. (2001) – a case that is concerned with the freedom from forced sterilisation; also Inter-American Commission on Human Rights, *Ramírez Jacinto, et al. v. Mexico*, Case 161/02, IACHR Report No. 21/07, OEA/Ser.L/V/II.130, doc. 22, rev. 1 (2007) – a case that is concerned with women's/mothers' right to terminate pregnancy. But at times the petitioners may decide to withdraw from the friendly settlement procedure due to the perceived bad faith in the government's offer and the lack of trust in the governments, for instance *Jorge Odir Miranda Cortez et al. v. El Salvador* (2009); Inter-American Commission on Human Rights, *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Case 12.313, IACHR Report No. 2/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1 (2003); Inter-American Court of Human Rights, *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, IACtHR (ser. C) No. 214 (2010).

non-retrogression unless reasonable exception is justified; in this regard, the threshold of justifying reasonable exception is high in that, informed by the *Cortez et al. v. El Salvador* case, any 'backtracking' of health measures and services would be presumed to be retrogressive even if the state is only negligent.[54]

4) Lastly, through interpreting the scope and content of other human rights – as the underlying, sociocultural, and political determinants of health – the health-related cases further extend the ideas developed from the 'health and human rights' theory and politics. For the IACHR and IACtHR, attention to the health impact of violations of human rights and the human rights impact of a health policy is integral to the respect for, protection of, and fulfilment of the right to health, for example, the way in which family planning policy (involving compulsory sterilisation) affects people's reproductive behaviour in the *María Chávez v. Peru* case.[55]

ii. Developing collective rights-holders for health

In the inter-American human rights system, it also becomes more and more apparent that the right to health and health-related human rights has been developed to include both individual and collective rights-holders. The two dimensions indicate, respectively, the individual right to health (non-indigenous community) and the community right to land and a liveable environment (indigenous peoples). On the one hand, it has long been well recognised in international and regional human rights conventions that individuals as the proper rights-holder of a human right. In the

---

[54] Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez v. El Salvador*, Report No. 27/09, Case 12.249, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009), para. 105.

[55] Inter-American Commission on Human Rights, *María Mamérita Mestanza Chávez v. Peru*, Report No. 66/00, Case 12.191, OEA/Ser./L/V/II.111, Doc. 20 rev. (2001).

American context, the individual right to health, as reflected in article 26 of the ACHR, is closely related to and therefore often cited with the right to an adequate standard of living and working conditions.[56] Also, sometimes the element of health is ticked out through an extensive interpretation of other rights, such as the right to life, the right to human treatment, the right to property ownership, and the right to judicial protection, which have been articulated to include, and are indivisible from socioeconomic rights.

On the other hand, regarding the conceptualisation of collective rights-holders, Paraguay has been brought to the IACHR by the Yakye Axa and the Sawhoyamaxa indigenous communities, and the case brought by the Xákmok Kásek indigenous communities was even made to the IACtHR. These indigenous communities are all settled in the Gran Chaco area in the north-western part of the country. Although the right to health is not placed in the central argument in these cases, other rights (such as the rights to life, human treatment, property, and judicial protection) have been interpreted holistically to include the restitution of a liveable environment and redress to the existing harms against the health of the population concerned.[57]

For example, in the 2006 case of the Sawhoyamaxa Indigenous Community, the IACtHR has considered a 'legal limbo' in which the indigenous community's 'very existence and identity were never legally recognized', although its members were born, had citizenship, and died in Paraguay.[58] The absence of juridical personality

---

[56] See, for example, Inter-American Commission on Human Rights, *Community of La Oroya v. Peru*, Report No. 76/09, Petition 1473-06, August 5, 2009; OEA/Ser.L/V/II., Doc. 51, corr. 1 (2009); Inter-American Commission on Human Rights, *Mossville Environmental Action Now v. the United States*, Report No. 43/10, Petition 242-05 (2010).

[57] See also Mendieta Miranda, M. & Cabello Alonso, J. (2017). *Advancing indigenous peoples' rights through regional human rights systems: The case of Paraguay*. London: International Institute for Environment and Development.

[58] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, IACtHR (Series C), No. 146 (2006), para. 192.

has resulted in the loss of culture and challenges to their wellbeing. However, the IACtHR's recognition of a collective rights-holding status is merely implicit. In his separate opinion, Judge Sergio García Ramírez argues that 'individual rights, which constitute human rights under the Pact of San José, originate from, and acquire existence, effectiveness, and significance in, the context of collective rights'. There should be no conflict between individual and collective rights, and these two ways of looking at the status of persons complement each other.[59]

In the 2010 *Xákmok Kásek* case, for another example, dismissing the Paraguayan state's contention that denies the relationship between the land and physical survival, the IACtHR reiterates the state's *positive obligation* to take all appropriate measures to protect and preserve the right to life, in which 'the right to a decent existence' is contained. Here, 'decency' is defined by adequate water resources, nutritional requirements, access to healthcare, and access to education. [60] Moreover, the IACtHR – referring to CESCR General Comment No. 21, adopted in 2009, a year before the judgement – recognises the collective titles to the ancestral lands, the collective experience of cultural erosion and vulnerability, a collective imagination of social life as the basis of the right to a decent life of all the members of the Community'.[61] To do so enables the conceptualisation of a collective right to 'a clean, healthy, and liveable environment', which links land and livelihood (material), dignity and culture (symbolic), and health and wellbeing – which was eventually enshrined in the judgment of *Lhaka Honhat v. Argentina* in 2020.[62]

---

[59] Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, IACtHR (Series C), No. 146 (2006), Separate Opinion of Judge Sergio García Ramírez, para. 11.

[60] Inter-American Court of Human Rights, *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, IACtHR (ser. C) No. 214 (2010), paras. 194-217.

[61] Inter-American Court of Human Rights, *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, IACtHR (ser. C) No. 214 (2010), para. 217.

[62] See Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our*

Furthermore, in addition to the positive obligations regarding the right to health (entitlements), the dual dimensions have also been demonstrated in its negative obligations (freedoms), in terms of the community members' informed consent regarding development projects such as in *Ngobe Indigenous Communities v. Panama*,[63] and *Kichwa Peoples of the Sarayaku Community v. Ecuador*.[64] Such an application of the community right to informed consent should not be confused with the individual right to informed consent with regard to medical interventions, as demonstrated in *María Chávez v. Peru*,[65] and *IV v. Bolivia*.[66] The latter derives from medical ethics, while the former is concerned with the right to self-determination of an indigenous community against contemporary settler colonialism. Conceptually, these two rights-holding subjects regard, respectively, an individual right to health and a community right to self-determination and survival, which have been promoted by the regional human rights bodies in relation to the health framings.

That is, they resonate with each other in the sense that the IACHR has emphasised in both contexts the importance of ensuring a friendly environment in which 'self-determination' and 'free will' can be pursued by the affected individuals and communities and fully respected by the states.

Land) Association v. Argentina, Merits, Reparations, and Costs, Judgment, IACtHR (series C), No 400 (2020), paras. 209, 240.

63 Inter-American Commission on Human Rights, *Ngobe Indigenous Communities v. Panama*, Report No. 75/09, Petition 286-08, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009).

64 Inter-American Court of Human Rights, *Kichwa Peoples of the Sarayaku Community v. Ecuador*, Case No. 12.465, Series C No. 245 (2012).

65 Inter-American Commission on Human Rights, *María Mamérita Mestanza Chávez v. Peru*, Report No. 66/00, Case 12.191, OEA/Ser./L/V/II.111, Doc. 20 rev. (2001).

66 Inter-American Commission on Human Rights, *I.V. v. Bolivia (Merits)*, Report No. 72/14, Case 12.655, Merits I.V. BOLIVIA (2014).

iii. Judicialising health concerns beyond the state

In addition to the significance of the right to judicial protection for realising the health-related human rights (judicialisation) and the development of collective rights-holding status for indigenous peoples (re-conceptualisation), another interesting yet often neglected dimension of the judicialisation phenomenon is the 'internationalisation' of such a strategy. As mentioned earlier, some states (e.g. Peru and Paraguay) that have been less referenced in the judicialisation literature appear before the IACHR and IACtHR quite frequently. This implies that the judicialisation strategy for health-related rights advocacy in these countries may not be as successful as in countries such as Brazil, Chile, and Colombia, considering the principle of exhaustion of local remedies as the threshold for being admissible in international human rights (quasi)judicial forums. Among the cases reviewed, in this regard, we consider the internationalisation of judicialising the situations in question where the harms are against not just an individual but a 'community'. There are three types of community:

1) A minority community, whose members share the same culture, language, and land – for example, indigenous peoples, who are entitled to a collective rights-holding status and should enjoy special protection for minority rights in the area of socioeconomic and cultural rights;[67]

[67] See, for example, Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations, and Costs, Judgment, IACtHR (series C), No 400 (2020); Inter-American Commission on Human Rights, *Ngobe Indigenous Communities v. Panama*, Report No. 75/09, Petition 286-08, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009). Minority rights have been argued by the Office of the UN High Commissioner for Human Rights to be applicable extensively to a so-called 'minority-like situation', including indigenous peoples, who, however in particular, enjoy the rights to practise customary law, protect traditional knowledge, and preserve traditional territories against the legacies of colonial invasion, occupation, and possession. The UN Special Rapporteur on Minority Issues clarifies that individualistic views that do not accept the notion of group rights have been weakened by recognising that 'certain groups, including women, children and indigenous peoples, should be considered as requiring specific attention'. See de Varennes, Fernand. 2019. *Report of the Special*

2) A neighbourhood community in the geographical sense, where the habitants of an area all suffer together (normally environmental harm), by which vulnerability is commonly shared among an estimated (yet unfixed) number of individual victims,[68] and

3) A community that is socio-politically made, whether voluntary or not, through the way in which people are labelled, stigmatised, and discriminated against for the same reason (normally due to health-related or lifestyle-related stigmas).[69]

In the Inter-American human rights system, the first type of community is concerned with the linkages between land, livelihood, and wellbeing. The second type is vital to relate environmental harms to their adverse health impact. The last type is closely linked to anti-discrimination and de-stigmatisation campaigns. These cases have demonstrated the connection between the petitions and a larger social movement, in which nongovernmental organisations – such as civil society organisations, research institutions, and health experts – play a significant role. Namely, the activists' and professionals' support for and assistance to the petition have realised the judicialisation of the contentions between a community and the state – to address the socio-political context in which the 'cases' are produced.

Rapporteur on Minority Issues. A/74/160, footnote 7; also Lee, Po-Han. (2022). "Struggle for Recognition: Theorising Sexual/Gender Minorities as Rights-Holders in International Law." *Feminist Legal Studies 30*(1): 73-95.

68 See, for example, Inter-American Commission on Human Rights, *Community of La Oroya v. Peru*, Report No. 76/09, Petition 1473-06, August 5, 2009; OEA/Ser.L/V/II., Doc. 51, corr. 1 (2009); Inter-American Commission on Human Rights, *Mossville Environmental Action Now v. the United States*, Report No. 43/10, Petition 242-05 (2010).

69 For example, the HIV seropositive status such as in Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez v. El Salvador*, Report No. 27/09, Case 12.249, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009).

To use the examples mentioned here, the cases concerning the indigenous community's allegation against the Paraguayan state all involve an organisation – namely Tierraviva a los Pueblos Indigenas del Chaco (along with the Center for Justice and International Law and the International Commission on Human Rights in the Yakye Axa case). Also, it was evident that Mossville Environmental Action Now, which has worked since the 1980s as an environmental justice campaign, supports an African-American community in Calcasieu Parish, Louisiana, to speak against industrial toxins that are 'tolerated' and/or sponsored by the US government. In *Cortez et al. v. El Salvador*, the claimants were all members of the Atlacatl Vivo Positivo Association, which has not only fought for access to medical treatment and medicines for HIV-positive persons in El Salvador but also provided peer and communal support since the 1990s.

These examples show that the international judicialisation of health concerns in the human rights framings requires interdisciplinary efforts that are contributed to by multiple social actors, in addition to the courts themselves. Take the Republic of Paraguay as an example. The Paraguayan Constitution of 1992, following the overthrow of Alfredo Stroessner's authoritarian regime, recognises health as a right under an independent chapter on the right to health (Chapter VI). It also refers to health-related issues in different contexts of fundamental rights, for instance, the right to a healthy environment (article 7), and the right, individually or collectively, to defend 'common interests' such as 'the integrity of the habitat, public health, national cultural heritage, the interests of consumers and others' (article 38). The constitutional commitment to socioeconomic and cultural rights is also demonstrated in Paraguay's accession to the Protocol of San Salvador in 1997 without reservation. However, a well-crafted law does not necessarily guarantee substantive protection by the government (in terms of expenditure and programmes) and court (regarding effective redress). Health and social activities thus often seek remedies from

international bodies.[70] A similar situation happened in post-Fujimori Peru.[71]

The possibilities of internationalising a rights contention are indeed predetermined, to a large extent, by the law with respect to the legal sources of rights as well as the access and formality of remedies, in which the latter concerns the legality of regional and international human rights bodies in the national legal systems. In addition, the potential and limitations of internationalising the case at issue also depend on factors such as the domestic historical and political context and the state's commitment to comply with international treaties – which includes, on the one hand, the government's stance regarding international organisations and their 'guidance', if this is not perceived as interference in domestic affairs. On the other hand, it includes national justices' attitudes towards *outsiders'* legal opinions, and this has attracted more and more attention from researchers in different fields.[72]

V. Conclusion: An intersection of social and judicial activisms for health

In this paper, we have considered the role of judicial bodies in safeguarding the right to health and other rights necessary for protecting and promoting health to its highest attainable standard in the state concerned. Following a review of relevant

---

[70] Torales, J., Villalba-Arias, J., Ruiz-Díaz, C., Chávez, E., & Riego, V. (2014). "The right to health in Paraguay." *International Review of Psychiatry* 26(4): 524-529; Gayet, Anne-Claire. (2018). "The Inter-American Court of Human Rights." In Marie Mercat-Bruns, David B. Oppenheimer, & Cady Sartorius (eds.), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools* (pp. 543-562). Cham: Springer.

[71] See Frisancho-Arroyo, Ariel. (2013). "The right to health in Peru." In José M. Zuniga, Stephen P. Marks, & Lawrence O. Gostin (eds.), *Advancing the Human Right to Health* (pp. 181-196). Oxford: Oxford University Press.

[72] See Huneeus, Alexandra. (2010). "Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights." In Alexandra Huneeus, Javier Couso, & Rachel Sieder (Eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (pp. 112-138). Cambridge: Cambridge University Press; Hillebrecht, Courtney. (2021). *Saving the International Justice Regime: Beyond Backlash against International Courts*. Cambridge: Cambridge University Press.

literature from the burgeoning field of judicialisation studies, particularly in the American context, it was revealed that this is an interdisciplinary field, which requires attention to the social and political contexts in relation to the production and interpretation of the law. Considering that most studies in this regard focus more on the phenomenon at the domestic level, we decided to investigate the cases determined by the Inter-American human rights regime, such as the IACHR and IACtHR. For the analysis, we first classified the cases into eight categories based on different themes, compared them between themselves, and then compared them with the communications processed by the UN treaty-based bodies.

Having thematised and analysed the cases that were identified as a health rights-related argument, we identified three directions in which the right to health – or, more broadly, the relationship between health and human rights – has developed. They include, first, the importance of judicialising contentions between the state and the people to protect individual and public health. Second, the scope of health-related rights has been extended to encompass the right to a healthy environment (*ratione materiae*) and indigenous peoples as collective rights-holders (*ratione personae*), whose sufferings have demonstrated the inextricable nexus between a decent life, health and wellbeing, lands/property, and cultural identity. Such a judicial and conceptual contribution is important in responding to the demands and intersection of indigenous rights movements and environmental activism. Informed by these implications, lastly, we argued for the usefulness of making such contentions an international claim by resorting to the Inter-American and UN mechanisms when local remedies are foreseeably inadequate, both substantively and procedurally.

Therefore, to judicialise the contentions – from the domestic to the international level seems to be a necessary activism strategy to hold the state responsible and accountable. Such a strategy, which links both the normative and operational

dimensions of a human rights norm, may have reaffirmed the actors' agency, including the petitioners, supportive activists and campaigners, and others who have suffered similar precarious and vulnerable situations. Making a case and 'righting the wrong' provides opportunities for social movements in health by judicialising the right to health. This phenomenon demonstrates, even latently, the diverse forms and methods through which the states can protect and promote the health and wellbeing of an individual or a population. Health social movements involving (quasi)judicial practices to react to the harms to people's health that are committed, endorsed, or tolerated by governments have the potential to advance the global resonance of health-related contentions through inter-referencing and citational practices between domestic courts, and regional and international human rights bodies. Hence, future research may explore the impact of recognising the right to a healthy environment and new rights-holding status deriving from the contexts of different cases, including its transnational implications and practical limitations.

References

i. Journal articles

Alleyne, George A.O. (2002). “The Pan American Health Organization’s first 100 years: Reflections of the Director.” *American Journal of Public Health* 92(12): 1890-1894.

Andia, Tatiana S., and Everaldo Lamprea. (2019). “Is the judicialization of health care bad for equity? A scoping review.” *International Journal for Equity in Health* 18 (1): 61.

Annas, George J. & Mariner, Wendy K. (2016). “(Public) Health and Human Rights in Practice.” *Journal of Health Politics, Policy and Law* 41(1): 129-139.

Biehl, João et al. (2019). “Judicialization 2.0: Understanding right-to-health litigation in real time.” *Global Public Health* 14(2): 190-199.

Biehl, João et al. (2016) “The Judicialization of Health and the Quest for State Accountability: Evidence from 1,262 Lawsuits for Access to Medicines in Southern Brazil.” *Health and Human Rights* 18(1): 209-220.

Brown, P., & Zavestoski, S. (2004). Social movements in health: An introduction. *Sociology of Health & Illness*, 26(6), 679–694.

Da Silva, Michael. (2018). “The International Right to Health Care: A Legal and Moral Defense.” *Michigan Journal of International Law* 39(3): 343-384.

Ferraz, Octávio Luiz Motta (2018). “Health in the Courts of Latin America.” *Health and Human Rights* 20(1): 67-77.

Harrington, Alexandra R. (2013). “Life as We Know It: The Expansion of the Right to Life under the Jurisprudence of the Inter-American Court of Human Rights.” *Loyola of Los Angeles International and Comparative Law Review* 35(2): 313-341.

Lee, Po-Han. (2022). “Struggle for Recognition: Theorising Sexual/Gender Minorities as Rights-Holders in International Law.” *Feminist Legal Studies 30*(1): 73-95.

Lichet, Victoria & Tigre, Maria Antonia (2021). Historic Breakthrough for Environmental Justice: The UNHRC Recognizes the Right to a Healthy Environment as a Human Right. *Opinio Juris*. Available at: http://opiniojuris.org/2021/10/20/historic-breakthrough-for-environmental-justice-the-unhrc-recognizes-the-right-to-a-healthy-environment-as-a-human-right/ [accessed 30 November 2021].

Mann, Jonathan M. (1997). “Health and Human Rights: If Not Now, When?” *Health and Human Rights* 2(3): 113-120.

Marmot, Michael (2018). Just societies, health equity, and dignified lives: the PAHO Equity Commission.” *The Lancet* 392(10161): 2247-2250.

Meier, Benjamin Mason (2006). “Employing Health Rights for Global Justice: The Promise of Public Health in Response to the Insalubrious Ramifications of Globalization.” *Cornell International Law Journal* 39(3): 711-778.

Rasanathan, Jennifer J. K., MacCarthy, Sarah, Diniz, Debora, Torreele, Els, & Gruskin, Sofia. (2017). “Engaging Human Rights in the Response to the Evolving Zika Virus Epidemic.” *American Journal of Public Health* 107(4), 525-531.

Rodríguez-Garavito, César A. (2011). “Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America.” *Texas Law Review* 89(7): 1669-1698.

Schabas, William A. (1998). “Canadian Ratification of the American Convention on Human Rights.” *Netherlands Quarterly of Human Rights* 16(3): 315-42.

Socal, Mariana P et al. (2020). “Right-to-Medicines Litigation and Universal Health Coverage: Institutional Determinants of the Judicialization of Health in Brazil.” *Health and Human Rights* 22(1): 221-235.

Syrett, Keith (2018). “Evolving the Right to Health: Rethinking the Normative Response to Problems of Judicialization.” *Health and Human Rights* 20(1): 121-132.

Timo, Pétalla Brandão. (2012). “The justiciability of the right to health: A look

into the Brazilian case." *Revista Latinoamericana de Derechos Humanos* 23(1): 227-248.

Torales, J., Villalba-Arias, J., Ruiz-Díaz, C., Chávez, E., & Riego, V. (2014). "The right to health in Paraguay." *International Review of Psychiatry* 26(4): 524-529.

Vargas-Pelaez, Claudia Marcela et al. (2019). "Judicialization of access to medicines in four Latin American countries: a comparative qualitative analysis." *International Journal for Equity in Health* 18(1): 68-82.

Villar Uribe, Manuela, Escobar, Maria-Luisa, Ruano, Ana Lorena, & Iunes, Roberto F. (2021). "Realizing the right to health in Latin America, equitably." *International Journal for Equity in Health* 20(1): 34.

Yamin, Alicia Ely et al. (2015). "Human-rights-based approaches to health in Latin America." *The Lancet* 385(9975): e26-e29.

Yamin, Alicia Ely (2019). "The Right to Health in Latin America: The Challenges of Constructing Fair Limits." *University of Pennsylvania Journal of International Law* 49(3): 695-734.

Yamin, Alicia Ely. (2000). "Protecting and promoting the right to health in Latin America: selected experiences from the field." *Health and Human Rights* 5(1): 116-148.

ii. Books and chapters

Biehl, João & Petryna, Adriana. (eds. 2013). *When People Come First*. Princeton: Princeton University Press.

Fleury, Sonia et al. (2013). *Right to health in Latin America: Beyond universalization*. Santiago United Nations.

Frisancho-Arroyo, Ariel. (2013). "The right to health in Peru." In José M. Zuniga, Stephen P. Marks, & Lawrence O. Gostin (eds.), *Advancing the Human Right to Health* (pp. 181-196). Oxford: Oxford University Press.

Gauri, Varun & Brinks, Daniel M. (2008). *Courting Social Justice: Judicial*

Enforcement of Social and Economic Rights in the Developing World. Cambridge: Cambridge University Press.

Gayet, Anne-Claire. (2018). "The Inter-American Court of Human Rights." In Marie Mercat-Bruns, David B. Oppenheimer, & Cady Sartorius (eds.), *Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: Challenges and Innovative Tools* (pp. 543-562). Cham: Springer.

Hillebrecht, Courtney. (2021). *Saving the International Justice Regime: Beyond Backlash against International Courts*. Cambridge: Cambridge University Press.

Huneeus, Alexandra. (2010). "Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights." In Alexandra Huneeus, Javier Couso, & Rachel Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (pp. 112-138). Cambridge: Cambridge University Press.

Mendieta Miranda, M. & Cabello Alonso, J. (2017). *Advancing indigenous peoples' rights through regional human rights systems: The case of Paraguay*. London: International Institute for Environment and Development.

iii. Official documents

Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)," E/C.12/2000/4 (2000).

Committee on Economic, Social and Cultural Rights, "General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)," E/C.12/GC/21 (2009).

Committee on Economic, Social and Cultural Rights, "General Comment No. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)," E/C.12/GC/22 (2016).

de Varennes, Fernand. 2019. *Report of the Special Rapporteur on Minority Issues*. A/74/160.

Human Rights Council (2021). "The human right to a safe, clean, healthy and sustainable environment." Human Rights Council, 48th session, A/HRC/48/L.23/Rev.1. Available at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G21/270/15/PDF/G2127015.pdf?OpenElement [accessed 10 February 2022].

Human Rights Council (2021). "The human right to a clean, healthy and sustainable environment." Human Rights Council, 48th session, A/HRC/RES/48/13. Available at: https://undocs.org/A/HRC/RES/48/13 [accessed 10 February 2022].

iv. Judgements and decisions

Committee on Economic, Social and Cultural Rights, *Marcia Cecilia Trujillo Calero v. Ecuador*, Communication 10/2015, UN Doc. E/C.12/63/D/10/2015 (2015).

Committee on the Elimination of Discrimination against Women, *Alyne da Silva Pimentel v. Brazil*, Communication No. 17/2008; UN Doc. CEDAW/C/49/D/17/2008 (2008).

Committee on the Elimination of Discrimination against Women, *L.C. v. Peru*, U.N. Doc. CEDAW/C/50/D/22/2009 (2009).

Inter-American Commission on Human Rights, *Víctor Rosario Congo v. Ecuador*, Case 11.427, Report No. 12/97, IACHR OEA/Ser.L/V/II.95, Doc. 7 rev. at 257 (1997).

Inter-American Commission on Human Rights, *Jorge Luis García Pérez-Antúnez v. Cuba*, Precautionary Measures, IACHR OEA/Ser./L/V/II.114, doc. 5 rev., Ch. III, para. 28 (2001).

Inter-American Commission on Human Rights, *Isabel Velarde Sanchez v. Peru*, Precautionary Measures, IACHR OEA/Ser./L/V/II.114, doc. 5 rev., Ch. III, para. 50 (2001).

Inter-American Commission on Human Rights, *María Mamérita Mestanza Chávez v. Peru*, Report No. 66/00, Case 12.191, OEA/Ser./L/V/II.111, Doc. 20 rev. (2001).

Inter-American Commission on Human Rights, *People Living with HIV v. Chile*, Precautionary Measures, IACHR OEA/Ser.L./V/II.114, doc. 5 rev. (2002).

Inter-American Commission on Human Rights, *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Case 12.313, IACHR Report No. 2/02, OEA/Ser.L./V/II.117, Doc. 1 rev. 1 (2003).

Inter-American Commission on Human Rights, *Ramírez Jacinto, et al. v. Mexico*, Case 161/02, IACHR Report No. 21/07, OEA/Ser.L/V/II.130, doc. 22, rev. 1 (2007).

Inter-American Commission on Human Rights, *Andrea Mortlock v. US*, Report N.63/08, IACHR Case 12.534 (2008).

Inter-American Commission on Human Rights, *Jorge Odir Miranda Cortez v. El Salvador*, Report No. 27/09, Case 12.249, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009).

Inter-American Commission on Human Rights, *Ngobe Indigenous Communities v. Panama*, Report No. 75/09, Petition 286-08, OEA/Ser.L/V/II., Doc. 51, corr. 1, 30 (2009).

Inter-American Commission on Human Rights, *Community of La Oroya v. Peru*, Report No. 76/09, Petition 1473-06, August 5, 2009; OEA/Ser.L/V/II., Doc. 51, corr. 1 (2009).

Inter-American Commission on Human Rights, *Mossville Environmental Action Now v. US*, Report No. 43/10, Petition 242-05 (2010).

Inter-American Court of Human Rights, "Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)." Advisory Opinion OC-8/87 (1987).

Inter-American Court of Human Rights, "Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on Human Rights),"

Advisory Opinion OC-9/87, IACtHR (Ser. A) No. 9 (1987).

Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, IACtHR (Series C), No. 146 (2006).

Inter-American Court of Human Rights, *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, IACtHR (ser. C) No. 214 (2010).

Inter-American Court of Human Rights, *Kichwa Peoples of the Sarayaku Community v. Ecuador*, Case No. 12.465, Series C No. 245 (2012).

Inter-American Court of Human Rights, *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, Judgment, IACtHR (ser. C) No. 254 (2012).

Inter-American Commission on Human Rights, *I.V. v. Bolivia (Merits)*, Report No. 72/14, Case 12.655, Merits I.V. BOLIVIA (2014).

Inter-American Court of Human Rights, "Advisory Opinion OC-23/17 of November 15, 2017 Requested by the Republic of Colombia: The Environment and Human Rights." Advisory Opinion OC-23/17 (2017).

Inter-American Court of Human Rights, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations, and Costs, Judgment, IACtHR (series C), No 400 (2020).