The Inter-American Human Rights System and social justice: What role for the SDGs to enforce human rights in the Americas?

By:

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December 2, 2019

Introduction

Between September 26 and 28, the Schulich School of Law of Dalhousie University hosted the workshop “The Role of Business Regulation in Advancing the Sustainable Development Goals”. The organizers were kind enough to invite me to present on the role of the Inter-American Human Rights System (IAHRS) and I thought that a new case that was just submitted to the Inter-American Court of Human Rights (IACtHR) a few weeks ago could help us discuss if there is a role for the Sustainable Development Goals (SDGs) in human rights, particularly in international litigation.

Martina Vera, private health policies and the duty to protect of the

State

On September 6, 2019, the Inter-American Commission of Human Rights (IACHR) submitted to the IACtHR a case against Chile. The case focuses on the alleged violation of the right to life, personal integrity and the right to health of Martina Vera.

Martina Vera is a child that, months after her birth in 2006, was diagnosed with Leigh syndrome, a chronic condition that leads to the loss of mental and psychomotor abilities. Due to the impossibility of the public hospital in their hometown of Arica (located in northern Chile) to provide adequate medical treatment, her parents contracted a private health policy (*Instituciones de salud previsional*, ISAPRE), which included home medical daycare. According to the admissibility report of the IACHR, Martina Vera received private health care in her home between 2007 and 2010. But at the end of that year, the ISAPRE unilaterally canceled the policy, due to the chronic condition of the child.

The family filed a lawsuit against the company, yet despite winning in lower courts, in May 2011, the Supreme Court of Chile ruled in favour of the ISAPRE. The reason was that, according to Chilean regulations at that time, chronic conditions were not covered under home medical daycare insurance policies.

The family presented a claim before the IACHR in November 2011. In addition to the alleged violation of the rights mentioned in the second paragraph, the petitioners argued that this case showed the impact that the lack of regulation in the health sector has on marginalized populations. They were forced to take a private medical policy because the public hospital did not have the equipment or trained doctors to treat their daughter. This was not a personal preference; it was the only alternative to keep their daughter alive.

The public hearing of the case will take place in 2020 and a judgement should be released late next year or early 2021. As local media has reported, the case of Martina Vera could open the possibility for the IAHRS (i) to examine the duty of the state to protect human rights in a region where health and education services are increasingly provided by private companies; and (ii) to examine the responsibility of states for the lack of supervision and regulation towards

private health insurance companies.

This last element is important because, as it happens with specialized fields like policy insurances, it is a usual practice in Latin America for the state and the private company that will provide the service (like health services), to co-draft the regulations. Potentially, this could be a case about the right to health, the SDGs and Business & Human Rights.

The IAHRS and social justice: Navigating a sea of uncertainties

As background information, the IAHRS is a regional human rights body created in 1969 by the Organization of American States. The American Convention on Human Rights (ACHR) is the governing instrument of this system. Its object is to protect individual rights and freedoms, similar to those established in the Universal Declaration on Human Rights or the International Covenant on Civil and Political Rights.

The IACtHR is the judicial body of the IAHRS and its decisions are legally binding on states parties to the ACHR. Since the publication of its first judgment on the merits for the *Velásquez Rodríguez vs. Honduras* case in 1988, the Court has adopted 382 decisions addressing issues related to due process, freedom of expression, the right to collective property of Indigenous Peoples, among other rights protected under the ACHR and other Inter-American conventions, like the Belém do Pará Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

Going back to the situation of Martina Vera, one of the rights that most likely will be litigated before the Court is the alleged violation of her right to health. I am speculating at this point because the IACHR has not published the merits report of the case. But for the sake of this post, let's assume this is correct. The right to health is one of the essential economic, social and cultural rights (ESC right). Article 26 of the ACHR expressly posits that ESC rights have a progressive nature and not judicially enforceable by the IACtHR. This has been the standard –and limitation- under which the IAHRS has operated, until late 2017.

The IACtHR and the direct enforceability of ESCR rights In December 2017, the IACtHR significantly changed its jurisprudence related to the progressive nature of ESC rights. In *Lagos del Campo vs. Peru*, the Court determined for the first time that a state was responsible for an autonomous violation of an ESC right. In this case, it was the right to work and job security. Since then, the IACtHR has adopted three other decisions determining the direct responsibility of states for breaching ESC rights. The case of *Dismissed Employees of Petroperú vs. Peru* was also about the right to work, while the case of *Poblete Vilches vs. Chile* and the case of *Cuscul Pivaral and others vs. Guatemala* focused on the right to health.

Of these four cases, only *Cuscul Pivaral* marginally makes a reference to Agenda 2030 of the SDGs. The case deals with the responsibility of Guatemala for not having any public policy to treat people with HIV/AIDS between 1992 and 2004. Of the 49 victims, 15 died due to the lack of medical attention. Even though the facts of the case took place before the adoption of the SDGs, this could have been used by the Court to assess what the state has done since then and to perhaps adopt a reparation to assure guarantees of non-repetition and compliance with objectives 3 (ensure healthy life), 3.3 (end the epidemics of AIDS) and 3.8 (universal health coverage) of the SDGs. Instead, the Court uses these objectives to remind the state of its political commitments to assure the right to health.

The IAHRS and the SDG: Connecting the dots

As the IAHRS consolidates its jurisprudence on ESC rights, the SDGs could contribute to set specific targets for states which could bolster non-repetition guarantees and institutional reforms ordered by the IACtHR. As Prof. Okafor posted in his blog for this workshop, the SDGs “(…) do not include any meaningful mechanisms for holding the relevant actors accountable for delivering on the resources without which almost all of the goals cannot be achieved”. However, this could change if international courts begin to use these instruments as elements to measure the fulfilment of human rights.

Going back to the case of Martina Vera, SDG 3 focuses on different activities to ensure healthy lives and promote well-being for all at all ages. In particular,

objective 3.8 determines the following goal:

- 3.8 Achieve universal health coverage, including financial risk protection, access to quality essential health-care services and access to safe, effective, quality and affordable essential medicines and vaccines for all.

A rights-based approach could easily be constructed under this goal in support of Martina Vera's case. The family adopted a financially onerous decision to treat their daughter, the only quality health-service available in their hometown was offered from the private company and the unilateral termination of the policy by the ISAPRE affected Martina's right to access the essential medicines to keep her alive. If these arguments are successful, the SDGs could have a direct impact on the enforcement of the right to health. In addition, it could contribute to assure a stronger supervision and regulation by the state towards health insurance companies.

In June 2019, the UN Economic Commission for Latin America and the Caribbean (ECLAC) released a progress report on the implementation of Agenda 2030. Regarding health coverage, the report shows that despite some progress in the past years, only 34.2% of the lowest income population in Latin America is affiliated to a health system while this percentage spikes to 71.2% in the population with the highest income. In the latter, these are usually affiliated with a private health policy.

Chile is one of the most unequal countries in Latin America. As we have seen in the news, Chileans have massively protested against a system that perpetrates inequalities like the case of Martina Vera. These protests were triggered by a 30 pesos (0.04 USD) increase in the subway ticket. But this was the last straw in a series of measures that seem to protect the elite rather that the people. After a series of violent confrontations, which include serious allegations of violations of human rights by the police and military, the government has agreed to call for a plebiscite in April 2020 to constitute a new Constitutional Assembly.

In all of these discussions, including the calls for a Constitutional Assembly to replace the current Pinochet-era Constitution, civil society organizations have adopted a strong rights-based approach. Yet, there is no mention or reference to Agenda 2030 and how restrictive policies could impact its fulfillment.

Although I am focusing on the case of Chile, this could be applicable throughout Latin America.

I am not sure why the IAHRS has not used Agenda 2030 in a more consistent manner. And this is not only a problem of the Court. For example, the IACHR released in early September the thematic report "Public Policy with a Human Rights Approach". This report, which could become an authoritative source for states to draft policies do not include a single reference to Agenda 2030.

In a similar manner, an early thematic report titled "Situation of Human Rights of the Indigenous and Tribal Peoples of the Pan-Amazon Region", released in early October, does not include any reference to Agenda 2030, even though there are specific goals and targets in the SDGs related to Indigenous Peoples. In all fairness, in 2016 the IACHR published the report "Poverty and Human Rights", which included a section on the SDGs, focusing on the potential impact that this instrument could have in fighting poverty.

I believe that there is a need to connect the dots between this fairly new judicial practice of enforcing ESC rights by the IACtHR with the SDGs or other international instruments. Perhaps workshops like this could help us come with new ideas and collaborative efforts towards stronger public interest litigation.

Before I conclude, I would like to point out that the enforceability of ESC rights and the growing interest in the impact that economic and fiscal policies have towards the enjoyment of human rights have not been well received by all. Some states as well as some academics are concerned that the IAHRS is overreaching the scope of the ACHR. In addition, there is a growing concern that these groundbreaking decisions of the IACtHR are nothing more than symbolic victories while nothing really changes.

These criticisms are valid and merit a thoughtful response. However, it is interesting to see how, despite its enormous and severe limitations, the IAHRS seems to be going against the tide on human rights. While some are talking about a post-human rights world, the IACtHR determines that ESC rights as well as the right to environment are internationally enforceable. As the U.S. Department of State creates a Commission of Unalienable Rights, which

includes a former member of the IACHR, Paolo Carozza, the IACtHR could assess the responsibility of states in the provision of health services by private corporations.

Conclusions

The purpose of this workshop was to debate on the role of the SDGs in the Business sphere. And we will only be able to achieve this is we are capable of exploring the different alternatives and challenges in all parts of the world. I believe that there is a role for the SDGs within the IAHRS and it is left to us to determine the best ways to use it.

The case of Martina Vera shows the impact of self-regulation in the health sector in Chile. Her case is only starting before the IACtHR. So I would like to extend an invitation to those interested in working together in an amicus brief regarding the SDGs, the right to health and the duty of the state to oversee the work of private health insurance companies.

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