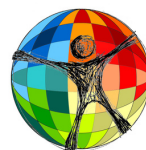


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Participation Rights as Remedy for Systemic Discrimination in the Inter-American Court of Human Rights

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ABSTRACT

For a few decades now, both the academia and national and international courts have identified two dimensions of discrimination: individual and systemic. This latter form of discrimination is particularly problematic since most of the time it is not evident, and does not involve one specific situation. On the contrary, systemic discrimination—often directed towards historically excluded groups—constitutes a complex problem, deeply entrenched in social behavior, and in institutional organization, practices and policies. Consequently, systemic discrimination requires transformative remedies that change or eliminate these exclusionary policies, rules and practices. In this context, participatory rights emerge as an important element of systemic remedies, since participation is a process of inclusion and justice, and is fundamental for a more equal society. Considering the above, the present article examines how the Inter-American Court of Human Rights has taken up on this link between systemic discrimination and participation rights as part of the remedies. To this end, this article describes and analyzes three cases adjudicated by said court. All this cases involved generalized practices of discrimination directed at members of vulnerable and historically excluded groups—indigenous peoples, persons with disabilities, and persons with HIV—and in all of them the court ordered systemic measures to be adopted by the States with the participation of the affected groups, ensuring their right to participate.

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I. Introduction

Discrimination is a long-standing problem that penetrates different spheres and groups of society.² Currently, there are several particularly vulnerable groups that have been historically excluded: women, children, people with disabilities, Indigenous peoples, LGBTIQ+ people, migrants and refugees, and people with HIV/AIDS, among others. Likewise, there are many settings—public and private—where discrimination can be found, such as families and homes, school, work place, economy, law, and even the city itself.³

For a few decades now, both academia and national and international courts have identified two types of discrimination: individual and systemic.⁴ The identification of the latter form of discrimination has been significant, since it has made it possible to understand discrimination not as a particular problem, referring to specific and exceptional cases⁵; but as a complex problem, deeply entrenched in social behavior, and in institutional organization, practices and policies.⁶ There are several definitions of systemic discrimination. For example, the Canadian Federal Court of Appeal has defined systemic discrimination as “a continuing phenomenon which has its roots deep in history and in societal attitudes. It cannot be isolated to a single action or statement. By its very nature, it extends over

² See Cristian Tileagă, *The Nature of Prejudice: Society, Discrimination and Moral Exclusion* (London: Routledge, 2016); See also Tal Z Zarsky, “Understanding Discrimination in the Scored Society” (2014) 89:4 Wash L Rev 1375.

³ See Sarah Schindler, “Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment” (2015) 124:6 Yale LJ 1934.

⁴ Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montréal: McGill-Queen’s University Press, 2010) at 17 [Sheppard].

⁵ See *ibid.*

⁶ See United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No 20 Non-Discrimination in Economic, Social and Cultural Rights* (art 2, para 2), CESCR 42d Sess Geneva, 4-22 May 2009 Item 3 of the provisional agenda, E/C12/GC/20 at 5 [CESCR G Comment No 20].

time.”⁷ In turn, Colleen Sheppard—former Director of the McGill Centre for Human Rights and Legal Pluralism, and expert in the field of non-discrimination and equality rights—has pointed out that systemic discrimination “does not stem from an isolated act of an aberrant individual or from a single policy or rule. It is a broader, dynamic, and institutionalized phenomenon perpetrated, sometimes unwittingly, by individuals who may even endorse the ideals of equality. It is often deeply embedded in social practices and institutional cultures.”⁸ Although there are some differences among the various forms of understanding and conceptualizing systemic discrimination, generally all definitions identify it as the kind that emerges from patterns of behaviour, policies or practices that are part of the social or administrative structures of an organization, public or private.⁹

Understanding discrimination in its systemic dimension broadens our knowledge and awareness on this problem. This is important to identify actual cases of discrimination, which may be invisible to us without this analysis.¹⁰ Systemic discrimination most of the time is not overt, and—consequently—is usually linked to indirect discrimination or discrimination of adverse effects (e.g., of seemingly neutral rules and policies).¹¹ Given this complex, non-obvious form of discrimination, understanding it helps us to identify it.¹² Only once it is recognized is it possible, subsequently, to condemn this type of discrimination, and to attempt to remedy it. This leads us to a second fundamental aspect: methods and measures to remedy discrimination. A broader understanding of discrimination is critical for developing and implementing successful anti-discrimination remedies. There are different remedies for each type of discrimination and, consequently, individual measures—such as compensations—for

⁷ *Public Service Alliance of Canada v Canada (Department of National Defence)*, [1996] 3 FCR 789 at para 16, 1996 CanLII 4067 (FCA).

⁸ Sheppard, *Inclusive Equality*, *supra* note 4 at 22.

⁹ See J Aislinn Bohren et al, “Systemic Discrimination: Theory and Measurement” (2022) No w29820 National Bureau of Economic Research.

¹⁰ See *ibid* at 44.

¹¹ However, it should be noted that systemic discrimination is a broader concept that also encompasses direct discrimination. See Sheppard, *Inclusive Equality*, *supra* note 4 at 22.

¹² See *ibid* at 23.

systemic discrimination will not be effective.¹³ Indeed, as pointed out by Justice Abella of the Supreme Court of Canada, “systemic discrimination requires systemic remedies. Rather than approaching discrimination from the perspective of the single perpetrator and the single victim, the systemic approach acknowledges that by and large the systems and practices we customarily and often unwittingly adopt may have an unjustifiably negative effect on certain groups in society.”¹⁴

Thus, systemic remedies have been identified with those of a transformative¹⁵, institutional nature, “which involves changing or eliminating exclusionary policies, rules, practices, or standards.”¹⁶ These remedies seek to solve complex problems of historical exclusion. It is in this context that participatory processes emerge as an important part of these systemic remedies.¹⁷ Participation is fundamental for a more equal society¹⁸, since it entails the real possibility of everyone to influence in decision-making through their recognition as members of a common life.¹⁹ Participation allows us to articulate and defend interests with respect to the development and improvement of our living conditions. Additionally, participation is not only fundamental for equality as a means, but also as an end in itself. Indeed, participation promotes relationships based on solidarity and respect for diversity.²⁰ In Nancy Fraser’s words, participation constitutes a fundamental element for those disadvantaged or excluded groups, which are struggling for

¹³ See Dominique Allen, “Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach” (2010) 29:2 U Tas L Rev 83; Melissa Hart, “Civil Rights and Systemic Wrongs” (2011) 32:2 Berkeley J Emp & Lab L 455.

¹⁴ Rosalie Silberman Abella, *Equality in Employment: A Royal Commission Report* (Ottawa: Ministry of Supply and Services Canada, 1984) at 9.

¹⁵ See Colleen Sheppard, “Of Forest Fires and Systemic Discrimination: A Review of British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.” (2001) 46:2 McGill LJ 533.

¹⁶ Sheppard, *Inclusive Equality*, *supra* note 4 at 27.

¹⁷ Sandra Fredman, “Substantive Equality Revisited” (2016) 14:3 Int J Constitutional Law 712.

¹⁸ See Sheppard, *Inclusive Equality*, *supra* note 4 at 119–21.

¹⁹ See Nancy Fraser, “Reframing Justice in a Globalizing World” (2005) 36 NLR 69.

²⁰ See Sheppard, *Inclusive Equality*, *supra* note 4 at 139.

recognition and representation.²¹ Participation is a process of inclusion and justice.

The role of participation as part of the remedies for eliminating systemic discrimination has been expressly recognized by the United Nations Economic and Social Council, which has stated that: “States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programs ... States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of rights is eliminated. *Individuals and groups of individuals, who may be distinguished by one or more of the prohibited grounds, should be ensured the right to participate in decision-making processes over the selection of such measures.*”²²

It is within this framework that this research aims to determine how the Inter-American Court of Human Rights (“IACtHR”) has taken up on this link between systemic discrimination and participation rights as part of the remedies.²³ To this end, this article describes and analyzes three cases of discrimination adjudicated by said court. These cases are: (i) the “Chichupac Village Members” case²⁴; (ii) the “Furlan” case²⁵; and (iii) the “Cuscul Pivaral” case.²⁶

In none of these cases does the IACtHR expressly mention nor develop the concept of systemic or structural discrimination.²⁷

²¹ See Fraser, *supra* note 19.

²² CESCR G Comment No 20, *supra* note 5 at 11 [emphasis added].

²³ On the capacity of the courts to order systemic remedies see Gwen Brodsky et al, “The Authority of Human Rights Tribunals to Grant Systemic Remedies” (2017) 6 Can J Hum Rts 1.

²⁴ *Chichupac Village Case (Guatemala)* (2016) Inter-Am Ct HR (Ser C) No 328 [Chichupac Case].

²⁵ *Furlan Case (Argentina)* (2012) Inter-Am Ct HR (Ser C) No 246 [Furlan Case].

²⁶ *Cuscul Pivaral Case (Guatemala)* (2018) Inter-Am Ct HR (Ser C) No 359 [Cuscul Case].

²⁷ On the absence of a normative development of the concept of “structural discrimination” in the IACtHR, see Paola Pelletier Quiñones, “Structural

Nonetheless, it is possible to note that all of these cases involved systemic discrimination. Indeed, all the victims were members of vulnerable and historically excluded groups (indigenous peoples, persons with disabilities, and persons with HIV/AIDS). Additionally, in these cases the court recognized generalized practices or patterns of discrimination. In turn, in all three cases, the IACtHR provided—among other forms of reparation—for systemic measures to be adopted by the States (policies, programs and/or strategies), which must be designed and implemented with the participation of the affected groups, ensuring their right to participate.

However, as will be described in the following sections, in all these cases there is no clarity regarding the relationship between systemic discrimination and participation rights, nor the role that participation really plays in remedying this kind of discrimination. Although there is an implicit recognition of the relationship between systemic discrimination and participation as part of the remedies, this is not explicitly developed.

The absence of this development is not clear, but it is important to highlight that in all these cases not only a situation of discrimination was discussed, but also so was discrimination in the exercise of *other rights*. Article 1.1 of the American Convention on Human Rights²⁸ (“ACHR”)—which establishes the principle of equality and non-discrimination—provides that: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” Thus, discrimination in the Inter-American system must necessarily be connected to the violation of other rights and freedoms.

Due to the foregoing, the IACtHR in all these cases had to devote significant efforts not only to analyze the facts underlying the discrimination, but also the violation of other specific rights,

Discrimination in the jurisprudential evolution of the Inter-American Court of Human Rights” (2014) 60 *Revista iindh* 205.

²⁸ *American Convention on Human Rights*, 22 November 1969 (entered into force 18 July 1978) [ACHR].

such as the right to life²⁹, freedom of movement and residence³⁰ and the right to judicial protection.³¹ Nevertheless, it is worth reaffirming that this link between participation rights as a remedy for systemic discrimination is in fact present in the IACtHR and, therefore, there is an opportunity for the court to develop this link explicitly in the future.

II. The cases

II.1. The “Members of the Chichupac Village” case

Between 1962 and 1996, Guatemala underwent a serious internal armed conflict between the State of Guatemala and the Guatemalan National Revolutionary Unity (*Unidad Revolucionaria Nacional Guatemalteca*).³² During this period, citizens of the country suffered systematic, serious and massive human rights violations. In this context, the indigenous Mayan population was particularly affected.³³

The Government of Guatemala applied the so-called “National Security Doctrine.”³⁴ This doctrine used the idea of “internal enemy” which—on the basis of racist prejudices—identified members of the Mayan indigenous peoples within said category.³⁵ According to the Commission for Historical

²⁹ See *ibid*, art 4.

³⁰ See *ibid*, art 22.

³¹ See *ibid*, art 25.

³² See Arturo Taracena Arriola, “History, Memory, Oblivion, Armed Conflict and Human Rights Violations: the Vicissitudes of Guatemala’s Historical Clarification Commission”, in Maria Rosaria Stabili, ed, *Between Stories and Memories* (Madrid: Editorial Vervuert, 2007).

³³ See Morna Macleod, “Mayan Testimonies during Guatemala’s Internal armed Conflict” (2020) 62 *Revista de Ciencias Sociales* 36.

³⁴ Julieta Rostica, “Dictatorships and the Logic of Domination in Guatemala (1954–1985)” (2005) 29 *Terceras Jornadas de Jóvenes Investigadores* 30.

³⁵ See Ana González, “Guatemala: Gender violence, genocide and racism” (2012), online (pdf): *Universidad Nacional de Tres de Febrero*

Clarification of Guatemala (*Comisión para el Esclarecimiento Histórico*), "83.3% of the victims of human rights violations belonged to one of the Mayan indigenous peoples."³⁶ Moreover, the commission concluded that "in most cases, the identification between the Mayan communities and the insurgency was intentionally exaggerated by the State, based on traditional racist prejudices."³⁷

This case focuses specifically on the events that occurred in the village of Chichupac and neighboring communities in the municipality of Rabinal.³⁸ The inhabitants of these communities are indigenous *Maya achi*.³⁹ During this period, and despite the fact that the village of Chichupac and the sector of Rabinal was not a combat zone⁴⁰, the Guatemalan army carried out illegal executions; forced disappearances; crimes of sexual violence; and illegal abduction and retention of minors⁴¹; among other atrocities. In addition to the crimes described above, the Guatemalan army—with the clear objective of displacing the communities from their land—burned their homes; destroyed their crops; and stole their cattle and food.⁴² As a consequence of these acts and, in general, due to the existing violence in the

<www.untref.edu.ar/>

[www.untref.edu.ar/documentos/ceg/3%20ANA%20GONZALEZ.pdf].

³⁶ Comisión para el Esclarecimiento Histórico, "Guatemala, Memory of Silence" (1999) at 321, online (pdf): Centro Nacional de Memoria Histórica <centrodememoriahistorica.gov.co/>

[www.centrodememoriahistorica.gov.co/descargas/guatemala-memoria-silencio/guatemala-memoria-del-silencio.pdf] [translated by author] [Commission for Historical Clarification Report].

³⁷ The commission also indicated that "the undeniable reality of racism as a doctrine of superiority permanently expressed by the State of Guatemala was a fundamental factor in explaining the particular ferocity with which the military operations were carried out against hundreds of Mayan communities" (*ibid* at 29 [translated by author]).

³⁸ See *ibid*.

³⁹ Mayan indigenous people belonging to the *achi* linguistic community: See Sergio Navarrete Pellicer, *Maya Achi Marimba Music in Guatemala* (Philadelphia: Temple University Press, 2005).

⁴⁰ Chichupac Case *supra* note 24 at para 84.

⁴¹ The separation of children from their families led, in some cases, to the illegal adoption or sale of the children. In other cases, children were subjected to conditions of servitude by agents of the state (see *ibid* at para 79).

⁴² See *ibid* at para 96.

area, the surviving members left their land to take refuge in the mountains, and in other municipalities, departments and cities.⁴³

The conflict ended in 1996, however, as of 2016, survivors of the Chichupac village continued to denounce that they had not been able to return to their lands and reconnect with their community and culture.⁴⁴ The victims explained that this inability to return was mainly due to the lack of support from the Government of Guatemala.⁴⁵ The victims accuse that the Public Prosecutor's Office and the judiciary branch had not made any progress in the investigation of the crimes mentioned above, despite the fact that several complaints have been filed to date, describing the places where the crimes occurred, those responsible, victims and possible witnesses.⁴⁶ This lack of progress promoted the fear, suffering and persecution experienced by the displaced indigenous people, preventing their return.

In addition, members of the Chichupac village denounced that also existed "material" impossibilities to return. During the armed conflict, the army of Guatemala stole the documents that accredited the possession of their lands, or these were destroyed.⁴⁷ The victims pointed out that the Government of Guatemala did not take any action to resolve this situation, which would allow the displaced indigenous communities to recover their land titles and return to their place of origin.

a) Equality and non-discrimination considerations.

The IACtHR placed special emphasis on the forced disappearance of persons from the village of Chichupac and neighboring communities in the municipality of Rabinal.⁴⁸ In this

⁴³ See *ibid* at para 95.

⁴⁴ See *ibid* at para 98

⁴⁵ See *ibid* at para 179.

⁴⁶ See Edgar Armando Ramos Gómez, "Criminal Impunity as a Result of the Internal Armed Conflict in Rabinal" (2018), online (pdf): *Universidad de San Carlos de Guatemala* <www.usac.edu.gt/> [www.repositorio.usac.edu.gt/10776/1/TD-134.pdf].

⁴⁷ See Chichupac Case, *supra* note 24 para 98.

⁴⁸ See *ibid* at para 124–57. This special emphasis on the forced disappearances was due to the continuous and permanent nature of this crime.

regard, the court noted that the forced disappearances were framed in the context of violence and persecution against the Mayan people suspected, due to racial prejudice, of being linked to subversion.⁴⁹ Consequently, the IACtHR declared guilty the State of Guatemala for the actions of the army, due to the violation of the rights to life, to personal integrity and to personal liberty, established in articles 3, 4, and 7 of the ACHR, in relation to article 1.1 of the same instrument.

Additionally, the IACtHR established that the State of Guatemala, specifically the judiciary and the executive branches, through the lack of guarantees to ensure the return of displaced persons, violated the rights to freedom of conscience and religion, freedom of association, and the right to movement and residence, established in articles 12, 16 and 22.1 of the ACHR, in relation to the principle of equality and non-discrimination enshrined in article 1.1. As will be explained below, the IACtHR concluded that the Government failed to identify the differentiated and disproportionate impact of the displacement of these communities from their lands; and, consequently, failed to implement special measures to remedy this situation.

First, the IACtHR noted that the Public Prosecutor's Office and the judiciary branch had not acted with due diligence in the investigations and conviction of these crimes.⁵⁰ The court concluded that this had significantly affected the ability of survivors to return to their territory, as impunity continues to generate fear and insecurity.⁵¹ Thus, the failure of these agencies

This had a double effect: on the one hand, it allowed justifying the competence of the court in the present case; and, on the other hand, because it demonstrated the important impacts on the victims that continue to the time of the ruling, specifically the impossibility of those members of the Mayan communities to return to their territory out of fear.

⁴⁹ The court concluded that a total of 22 persons were victims of forced disappearance. In 2008, the whereabouts of 4 of these victims was established.

⁵⁰ See Chichupac Case, *supra* note 24 at para 141. The court emphasized that in cases of forced disappearance, "as long as the disappearance continues, the States have the duty to investigate and, eventually, to punish those responsible in accordance with the obligations derived from the American Convention and, in particular, from the Inter-American Convention on Forced Disappearance of Persons" [translated by author].

⁵¹ See *ibid* at para 180.

to act had perpetuated the forced displacement of the victims. Second, the IACtHR pointed out that there was no evidence that the State of Guatemala had established any alternative methods for the members of the Chichupac village and neighboring communities who has lost all documentation, to prove the possession of their lands.⁵² Third, the court highlighted that the municipal office of the National Reparations Program (*Programa Nacional de Resarcimiento*) in Rabinal, which was intended to assist in remedying the effects of the armed conflict in that locality, had closed in 2016 without any progress.⁵³ Thus, the court concluded that the State of Guatemala did not adopt sufficient and effective measures to guarantee the displaced indigenous communities of Chichupac a safe return to their land.⁵⁴

The IACtHR noted that forced displacement and the inability to return had a special impact on indigenous Mayan communities, such as: the destruction of the social structure, the dissociation with community leaders, and the loss of cultural and traditional practices, including the *Maya achi* language. It was highlighted in the ruling that forced displacement has seriously impacted the indigenous people's life projects and family relationships⁵⁵; their traditional, cultural and ancestral community ties ("disarticulation of the community fabric and reduction of communal cohesion"⁵⁶); cultural and religious aspects⁵⁷; and their connection with the land and nature, affecting their identity and cultural roots, especially those of their children.⁵⁸

This situation of disproportionate impact meant that the State of Guatemala should have adopted special positive measures to reverse the effects of this condition of vulnerability.⁵⁹ The State of

⁵² See *ibid* at para 184.

⁵³ See *ibid* at para 185.

⁵⁴ See *ibid* at para 189.

⁵⁵ See *ibid* at para 190.

⁵⁶ *Ibid* at para 191.

⁵⁷ See *ibid* at para 194.

⁵⁸ See *ibid* at para 202.

⁵⁹ The Inter-American Court noted that the obligation of States to protect the rights of displaced persons entails not only the duty to adopt preventive measures but also to provide the necessary conditions for a dignified and safe

Guatemala did not take into account the fact that the victims were members of indigenous communities, whose relationship with the territory is essential to maintain their cultural structures and their ethnic and material survival. The IACtHR concluded that there was an absence of special measures adopted by the State to reverse the effects of displacement, and that these omissions were based on the total ignorance and lack of recognition of the victims as indigenous peoples, and the differentiated impacts of the displacement on them.⁶⁰

b) Remedies.

The court recognized that the violations described above had a complex nature, encompassing different elements. For example, the IACtHR noted that different facts, years and State agencies were responsible for the violations. It also identified that these violations affected both the individual sphere of the victims and the collective sphere. In turn, these effects had not only been material, but also psychological, affecting the victims social relations, and the dynamics of their families and communities. In light of this, the IACtHR considered the need to grant various measures of reparation in order to repair the damages in a comprehensive manner. Consequently, the court paid special attention to guarantees of non-repetition, which included the participation of the victims to ensure their success, seeking their inclusion and non-discrimination.⁶¹

The IACtHR ordered the elaboration and implementation of educational programs in human rights and international humanitarian law for members of the Guatemalan Army, the

return to their place of habitual residence or their voluntary resettlement in another part of the country. To this end, their full participation in the planning and management of their return or reintegration must be guaranteed (see *ibid* at para 175).

⁶⁰ See *ibid* at para 197.

⁶¹ It is important to note that the IACtHR also ordered participatory processes within remedies that are more of an individual nature, such as: (i) medical and psychological care to be carried out through the healers of the *Mayan achí* community (paras 303-304); and, (ii) that the State of Guatemala must implement the necessary measures to guarantee—in coordination with the representatives of the affected indigenous communities—adequate conditions so that the persons who remain displaced can return to their communities of origin (para 298).

Public Prosecutor's Office and the Judiciary branch.⁶² The Court noted that these programs are fundamental to face discrimination and generate guarantees of non-repetition, which must be developed in a participatory manner with indigenous peoples and other especially vulnerable groups.⁶³ The Court stated that "such programs must incorporate the need to eradicate racial and ethnic discrimination, racial and ethnic stereotypes, and violence against indigenous peoples, particularly Guatemalans."⁶⁴

Also, the court ordered the elaboration of an educational program on non-discrimination within the National Educational System of the country.⁶⁵ The court specified that this program must "reflect the multicultural and multilingual nature of Guatemalan society, promoting respect and knowledge of the diverse indigenous cultures, including their worldviews, histories, languages, knowledge, values, cultures, practices and ways of life."⁶⁶ However, surprisingly, with respect to this measure, the court did not order the participation of Mayan indigenous peoples in the design and implementation of the said educational program.

Finally, in attention to the "possibility that discriminatory attitudes and feelings persist in the Guatemalan society"⁶⁷, the court determined that as a complementary measure the State of Guatemala had to strengthen the institutional framework against racial and ethnic discrimination, creating public organizations with the objective of promoting the revaluation of indigenous cultures, disseminating their history and richness. The Court in this case did order the direct participation of indigenous people in the creation of said organizations.⁶⁸

⁶² See *ibid* at paras 310–18.

⁶³ See *ibid*.

⁶⁴ See *ibid*.

⁶⁵ See *ibid* at para 319.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* at para 320 [translated by author].

⁶⁸ *Ibid*.

II.2. The “Furlan” case

On December 21, 1988, Sebastián Furlan—a 14-year-old boy from the town of Ciudadela, Province of Buenos Aires, Argentina—entered a field near his home to play.⁶⁹ This field was an abandoned military training circuit owned by the Argentinian Army.⁷⁰ This property had no fence or barrier that prevented the entry, and was normally used by children to play sports.⁷¹ A piece of approximately 50 kilos fell on Sebastián Furlan, while trying to hang from a crossbar of one of the facilities inside the premises, hitting him in the head and causing him to lose consciousness.⁷²

Sebastian Furlan was admitted to the hospital with a fracture skull.⁷³ On January 23, 1989, after a long operation, he was discharged.⁷⁴ This child was left with severe difficulties in speech, and in the use of his arms and legs.⁷⁵ The doctors indicated that it was necessary a rehabilitation treatment. However, given the Furlan family’s limited financial resources, it was impossible for them to pay for ongoing medical treatment.⁷⁶ The accident also

⁶⁹ See Furlan Case, *supra* note 25 at para 72.

⁷⁰ See *ibid.*

⁷¹ See *ibid.*

⁷² See *ibid.*

⁷³ See *ibid* at para 73.

⁷⁴ See *ibid* at para 74.

⁷⁵ See *ibid.*

⁷⁶ See *ibid* at para 71. The locality of Ciudadela, where Sebastián Furlan lived, was “a lower middle class and lower class area, less than 500 meters from one of the most marginal and dangerous neighborhoods of Buenos Aires, known as *Fuerte Apache*” [translated by author]. The IACtHR did a notorious analysis on the relationship between the situation of disability and the socioeconomic level of the victim. See paras 132-133.

caused the child to have cognitive disabilities⁷⁷, which resulted in depressive psychological disorders.⁷⁸

The following year, in 1990, Sebastián Furlán's father filed a lawsuit against the Argentinian Army, in order to claim compensation for the damages caused by his son's accident.⁷⁹ This legal process lasted ten years, mainly due to the conduct of the Argentinian civil court.⁸⁰ For example, the civil court took five years to order the notification of the claim.⁸¹ Also, despite the fact that—according to the Argentinian civil procedure code—the evidentiary stage cannot exceed 40 days⁸², in this trial the evidentiary stage lasted almost three years.⁸³

This slow progress in the civil procedure had several pernicious effects for the judicial defense of Sebastián Furlan.⁸⁴ A particularly negative impact was that, in consideration of the fact that the child came of age during the trial, the Argentinian Ombudsman of Minors and Persons with Disabilities (*Asesoría de Menores e Incapaces*⁸⁵)—autonomous body of the State

⁷⁷ See *ibid* at para 75. The boy was diagnosed with “post-traumatic organic disorder and an abnormal neurotic reaction with obsessive compulsive manifestation with deterioration of his personality, which has determined an important degree of psychic incapacity [...] and irreversible disorders in the cognitive and motor areas” [translated by author]. One of the experts in said process concluded that Sebastián Furlan had a 70% mental disability.

⁷⁸ *Ibid* at para 76. After two attempts to take his own life, he was admitted to the hospital for observation for “severe adolescent depression” in August 1989.

⁷⁹ See *ibid* at 78.

⁸⁰ See *ibid* at paras 90-100.

⁸¹ See *ibid* at para 85.

⁸² Article 367 of the Argentine Code of Civil Procedure establishes that: “The term for the production of evidence shall be set by the judge, and shall not exceed forty days” [translated by author].

⁸³ See Furlan Case, *supra* note 25 at para 97.

⁸⁴ See Ricardo D Monterisi, “The Reasonable Time Limit in Civil Proceedings under the Focus of the Inter-American Court of Human Rights” (2012) 14:12 *Revista de responsabilidad civil y seguros: publicación mensual de doctrina, jurisprudencia y legislación* 249.

⁸⁵ In accordance with Argentinian Law No 24.946, the Argentinian Ombudsman of Minors and Persons with Disabilities “have the function of representing, assisting and defending the human rights and guaranteeing the right to be heard of minors and of those who, due to their mental disabilities,

Administration—informed the civil court that it was not appropriate for said entity to represent him.⁸⁶ Thus, Sebastián Furlan lost the opportunity for this legal assistance. At no time did the Ombudsman consider the disability situation of Sebastián Furlan to determine whether or not he could be assisted by such organism.⁸⁷

Finally, in the year 2000, the civil court upheld the claim, establishing that the damage caused to Sebastian Furlan was the result of negligence on the part of the Army of Argentina, as owner of the property⁸⁸ (and due to the conditions of abandonment, without any perimeter fence to prevent entry, and with elements of notorious risk⁸⁹). This sentence was confirmed in the second instance the same year.⁹⁰ The State was ordered to pay a sum of 103,400 Argentiniana pesos as compensation in favor of Sebastián Furlan.⁹¹ This payment fell under Argentinian Law No. 23,982 of 1991⁹², which regulated the method of payment of money by the State for judicial and administrative disputes. This law was enacted due to the economic crisis that Argentina was suffering at that time⁹³, and established that the State could pay the amounts of money owed in two ways: (i) in a deferred manner over time; or, (ii) through the issuance of government bonds.

Taking into account the precarious conditions in which the Furlan family found itself—and the need to obtain the money

need to be heard” [translated by author]: See Ministerio Público de Argentina, “Minors and persons with mental disabilities: Counseling and Guardianships” (last visited April 13 2022), online: <www.mpf.gob.ar/> [www.mpba.gov.ar/asesoria].

⁸⁶ See Furlan Case, *supra* note 25 at para 86.

⁸⁷ See *ibid* at para 236

⁸⁸ See *ibid* at para 99.

⁸⁹ See *ibid*.

⁹⁰ See *ibid* at 101.

⁹¹ See *ibid* at 102.

⁹² Argentinian Law No. 23,982 on obligations to pay sums of money after their final acknowledgment in administrative or judicial proceedings.

⁹³ Leandro Ladigan, “Consolidation of National Government debts” (2007), online (pdf): Universidad de Buenos Aires <www.uba.ar/> [bibliotecadigital.econ.uba.ar/download/tpos/1502-0584_LadiganL.pdf].

quickly—Sebastian Furlan’s father opted for government bonds.⁹⁴ The sale of these bonds resulted in approximately 38,300 Argentinian pesos; out of the 130,000 ordered by the court.⁹⁵ That is to say, due to the method of payment, the victim finally received less than one third of the amount granted by the court.

a) Equality and non-discrimination considerations.

The IACtHR analyzed this case taking into special consideration the fact that Sebastian Furlan was a person with disabilities.⁹⁶ This is relevant since, as stated in the ruling, any person in a situation of vulnerability is entitled to special protection by the State, to ensure due respect and guarantee of their rights.⁹⁷ Indeed, the IACtHR emphasized that the right to equality and non-discrimination encompasses not only a negative conception related to the prohibition of arbitrary differences in treatment, but also a positive conception related to the obligation of States to create conditions of real equality for groups that have been historically excluded or are at greater risk of being discriminated against.⁹⁸

The IACtHR concluded that Sebastián Furlan was discriminated by several State agencies, which failed to recognize during the judicial process his condition of person with disabilities.⁹⁹ Consequently, said agencies did not take any positive action to safeguard the equal exercise of his rights.¹⁰⁰ In view of the above, the court determined that the State of Argentina violated the right to judicial protection of Sebastián Furlan established in article 8.1, in relation to article 1.1, both of the ACHR.

The IACtHR noted that the Argentinian civil court’s actions “involved significant levels of passivity, inactivity and lack of due

⁹⁴ See Furlan Case, *supra* note 25 at para 104.

⁹⁵ See *ibid* at para 105.

⁹⁶ See *ibid* at para 124.

⁹⁷ See *ibid* at para 134.

⁹⁸ See *ibid* at para 267.

⁹⁹ See *ibid* at para 269.

¹⁰⁰ See *ibid* at para 269.

diligence”¹⁰¹, which constituted a discriminatory action considering that the plaintiff was a person with disabilities. Due to said condition, an expeditious judicial process was imperative to ensure his timely access to medical treatment in order to avoid lifelong consequences.¹⁰² The IACtHR stated that the civil court should have taken an active position and avoid paralyzing the process.¹⁰³ Moreover, the court pointed out that it was imperative to take the appropriate measures to ensure the plaintiffs judicial rights, such as prioritizing the attention and resolution of the proceeding.¹⁰⁴ This implied a reinforced obligation to respect and guarantee the rights of Sebastián Furlan, considering that excessive delay would have a disproportionate impact on him, due to the fact that the medical treatment depended on the outcome of the trial.¹⁰⁵

The IACtHR also established that the Argentinian Ombudsman of Minors and Persons with Disabilities acted in a discriminatory manner by unjustifiably denying legal counsel to Sebastian Furlan simply because he had reached the age of majority. The plaintiff was clearly a person with disabilities, which is why he met the requirements to be assisted by said agency. The court stated that it did not receive any evidence that the Ombudsman of Minors and Persons with Disabilities had considered this circumstance when denying legal assistance.¹⁰⁶ This was considered a serious act of discrimination since the participation of said state agency is essential to assist in legal proceedings for persons with disabilities in order to ensure the protection and defense of their rights.

¹⁰¹ *Ibid* at para 189 [translated by author].

¹⁰² The Court highlighted the statement of one of the medical experts who testified in the case, who pointed out that “the cranial skull accident, with fracture, should have been managed in intensive care, and that if the suggested treatment and a neurocognitive therapy sustainable over time had been implemented, [it is] certain that at present his functioning and quality of life would be better” (*ibid* at para 338) [translated by author]. The court concluded that Sebastian Furlan “did not have the necessary treatments with the required frequency and continuity, which would have allowed him to perhaps reach adulthood with better possibilities of self-sufficiency” (*ibid* at para 339) [translated by author].

¹⁰³ See *ibid* at para 186.

¹⁰⁴ See *ibid* at para 196.

¹⁰⁵ See *ibid* at para 202.

¹⁰⁶ See *ibid* at paras 237–43.

Finally, regarding the method of payment of compensation, the IACtHR indicated that the application of Law No. Law 23.982—which allowed the payment of compensation through government bonds—also had a disproportionate impact on the victim.¹⁰⁷ Sebastián Furlan, because of the payment through bonds did not receive the compensation in a complete and integral manner. Therefore, the application of the law directly affected its possibility of obtaining medical treatment and other needs arising from his condition of person with disabilities.¹⁰⁸ The court concluded that the Army of Argentina should have foreseen this type of disproportionate impact and applied a less harmful alternative of payment.¹⁰⁹

Finally, the Court emphasized that in accordance with article 1.1 of the ACHR, persons with disabilities must enjoy genuine access to justice and be beneficiaries of due process of law on an equal footing with those who do not face disadvantages. The IACtHR stated that, in order to achieve this objective, the judicial process must recognize and resolve the factors of real inequality of those who engage in said procedures.¹¹⁰ In this sense, the court highlighted that “the presence of conditions of inequality compels the State to adopt compensatory measures to reduce or eliminate the obstacles that prevent the effective defense of those persons in vulnerable situations.”¹¹¹ Thus, the court concluded that the State agencies involved in this case failed to adopt measures to remedy the disadvantaged situation in which Sebastián Furlan found himself. None of this public agencies

¹⁰⁷ See *ibid* at para 222.

¹⁰⁸ See *ibid*.

¹⁰⁹ The Court highlighted that: “it is not enough for States to refrain from violating rights, but it is imperative to adopt positive measures, determinable according to the particular needs of protection of the subject of rights, either by their personal condition or by the specific situation in which they find themselves, such as disability. In this sense, it is the obligation of the States to promote the inclusion of persons with disabilities through equal conditions, opportunities and participation in all spheres of society, in order to ensure that the limitations described above are dismantled. Therefore, it is necessary that States promote social inclusion practices and adopt positive differentiation measures to remove such barriers” (*ibid* at para 134 [translated by author]).

¹¹⁰ See *ibid* at para 268.

¹¹¹ *Ibid* [translated by author].

provided mechanisms to adequately guarantee and protect the rights of Sebastián Furlan as a person with disabilities, under equal conditions and taking into account his specific needs.

b) Remedies.

The IACtHR ordered the State numerous direct remedies for Sebastián Furlan, such as the payment of compensation; free medical and psychological care through specialized public health institutions; and the provision of services to support his social, educational and labor inclusion.¹¹² Notwithstanding the above, the court noted that, given that these violations of rights of access to justice (not supported by Argentine legislation¹¹³) were committed against a person with disabilities—arising from said condition and in an act of discrimination—reparation measures should not focus exclusively on the individual measures described above, but must include measures that generally help persons with disabilities to address the barriers or limitations in accessing justice.¹¹⁴ This, so that they can “achieve and maintain maximum independence, physical, mental, social and vocational capacity, and full inclusion and participation in all aspects of life.”¹¹⁵

The court concluded that it was necessary—as a guarantee of non-repetition—that the State of Argentina conducted effective training courses for officials of the executive and judicial branches, and public information campaigns, on the protection of the rights of persons with disabilities. The IACtHR indicated that these courses and campaign “must duly reflect the principle of full participation and equality, and be carried out in consultation with organizations of persons with disabilities.”¹¹⁶ In addition, the court pointed out that State must strengthen the

¹¹² See *ibid* at paras 274-277.

¹¹³ The Argentinian Civil Procedure Code establishes strict time limits and the capacity of the court to carry out the process; the law of Argentinian Ombudsman of Minors and Persons with Disabilities empowers said agency to represent persons with disabilities; and the law regulating the payment of judicial and administrative compensation is optional for the State, and not mandatory, so that Argentinian Army could have established another less pernicious modality of payment.

¹¹⁴ See Furlan Case *supra* note 25 at para 278.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid* at para 308.

cooperation between its agencies and non-governmental organizations ("NGOs") of persons with disabilities, "ensuring that they can play a fundamental role, guaranteeing that their concerns are duly considered and addressed, and providing better care for persons with disabilities and their families."¹¹⁷

II.3. The "Cuscul Pivaral" case

This case involved 34 people living with HIV in Guatemala; and 15 people who lived with this condition but died.¹¹⁸ All of these persons were diagnosed with HIV between 1992 and 2004.¹¹⁹ The claim was based on the total lack of medical care for this group of people prior to 2007, and the insufficient medical care received after said year.¹²⁰

The State of Guatemala has several public instruments in place for the control of HIV. The Guatemalan Health Code establishes that the Ministry of Health is responsible for formulating, evaluating and supervising actions aimed at the control of sexually transmitted diseases.¹²¹ In 2000, the Guatemalan government issued the "General Law for HIV and AIDS"¹²², and in 2002 the Ministry of Health adopted the bylaws of said law. In 2005, the State approved the Public Policy on AIDS, the Guide for Antiretroviral Treatment and Opportunistic Infections,

¹¹⁷ *Ibid* [translated by author].

¹¹⁸ See Cuscul Case, *supra* note 26 at para 34.

¹¹⁹ *Ibid* at para 63.

¹²⁰ *Ibid* at para 35.

¹²¹ Article 35 of the Guatemalan Health Code provides that "given the magnitude, importance and other epidemiological characteristics of Sexually Transmitted Diseases (STD) and Acquired Immune Deficiency Syndrome (HIV/AIDS), the Ministry of Health shall support the specific development of programs for education, detection, prevention and control of STD and HIV/AIDS, with the participation of various sectors" [translated by author].

¹²² Decree No. 27. This general law recognizes the infection of this virus as a social problem of national urgency and assures "that every person diagnosed with HIV/AIDS must receive comprehensive care immediately and on equal terms with other persons, respecting their will, dignity, individuality and confidentiality; and that no health worker may refuse to provide the care required by a person living with HIV/AIDS, and must take the recommended biosecurity measures" [translated by author].

and the HIV/AIDS Guidance Manual.¹²³ In 2006, the National Strategic Plan for the Prevention, Care and Control of HIV and AIDS was adopted; and in 2007, the National Strategy for Information, Education and Communication for the prevention of HIV and AIDS was launched.

In view of the foregoing, the IACtHR pointed out that the State of Guatemala has in fact a normative framework aimed at preventing and combating HIV; and, that under this normative framework, it has the obligation to provide HIV education, detection, prevention and control services.¹²⁴ Thus, the dispute in this case centered on whether the State was responsible for the violation of the right to health as a result of the lack of medical care provided to the victims as persons with HIV; and whether the State should have adopted differentiated treatment measures for persons who were in a situation of vulnerability or risk.¹²⁵

The court found that the victims in this case had not received public medical treatment prior to 2007; and that, subsequently, it was inadequate to address their condition as persons with HIV.¹²⁶ In this regard, the IACtHR indicated that medical treatment for persons with HIV requires the availability of sufficient quantities of antiretroviral for the treatment of diseases associated with HIV, whose irregular, null or inadequate access, due to their condition, violates their right to health.¹²⁷ The court noted that: (i) many victims did not have access to treatment in a timely manner (late access); (ii) the treatment was insufficient, due to shortages or lack of regularity in the supply of their medications; and, (iii) in relation to the persons in whom therapeutic failures were detected due to antiretroviral treatment, there was no change in the treatment scheme.¹²⁸

The IACtHR determined that the State of Guatemala failed to comply with its duty to guarantee the right to health inasmuch as its omissions are incompatible with the elements of availability, accessibility and quality of health care, which were specifically

¹²³ Guatemalan Governmental Agreement No. 638- 2005,

¹²⁴ See *Cuscul Case*, *supra* note 26 at para 117.

¹²⁵ See *ibid* at para 118.

¹²⁶ *Ibid* at para 119.

¹²⁷ *Ibid* at para 121.

¹²⁸ See *ibid*.

directed at a specific group that was particularly vulnerable.¹²⁹ Consequently, the court concluded that the State was responsible for the violation of the right to health, in relation to the principle of equality and non-discrimination, in accordance with article 1.1 and 26 of the ACHR.¹³⁰

a) Equality and non-discrimination considerations.

The IACtHR noted that, within the ACHR, HIV is a ground on which discrimination is prohibited under the term “other status” set forth in article 1.1.¹³¹ In this framework, the court emphasized—as in the Furlan case—that the right to equality and non-discrimination encompasses two conceptions: a negative one related to the prohibition of arbitrary differences in treatment, and a positive one related to the obligation of States to create conditions of real equality vis-à-vis groups that have been historically excluded or are at greater risk of being discriminated against, as is the case of persons with HIV.¹³² Therefore, the adoption of positive measures by the States is particularly relevant in relation to the protection of persons with HIV, who must be guaranteed equal access to medical health services.¹³³ The court also conducted an intersectional analysis between people with HIV and other conditions of vulnerability, such as socioeconomic status and gender.¹³⁴ Indeed, the IACtHR noted that the economic condition in which many of the victims lived was a determining factor in their inability to access health facilities, goods and services, and that the State did not take any action to mitigate this impact.¹³⁵

Additionally, the court noted that 25 of the victims in this case were women, 5 of whom were pregnant at the time they were

¹²⁹ See *ibid* at para 126.

¹³⁰ See *ibid* at para 127.

¹³¹ See *ibid* at para 130.

¹³² See *ibid*.

¹³³ See *ibid*.

¹³⁴ See *ibid* at paras 131-139.

¹³⁵ “The Court recognizes that people living in poverty often have inequitable access to health services and information, which puts them at greater risk of infection and inadequate or incomplete health care” (*ibid* at para 131[translated by author]).

diagnosed with HIV, or were pregnant after their diagnosis.¹³⁶ In this regard, the court conducted an analysis of the State's actions or omissions related to pregnant women with HIV. The IACtHR identified that one of the women was diagnosed with HIV when she was seven months pregnant, however she did not receive adequate treatment to avoid transmission of the virus to his child (vertical transmission), which indeed occurred; and another women was five months pregnant when she was diagnosed with HIV, and that even though she received antiretroviral treatment during her pregnancy, the medical staff at the hospital where she gave birth refused to perform a scheduled C-section, which put her child at risk of vertical transmission.¹³⁷

The IACtHR concluded that the failure to provide antiretroviral treatment to a woman when she was pregnant, and the failure to perform a C-section as a preventive measure, constituted a form of gender-based discrimination, as the State failed to provide adequate medical care to pregnant women living with HIV, which had a differential impact and generated a risk of vertical transmission of HIV to their children. In this context, the court indicated that the Committee on the Elimination of Discrimination against Women recommended that programs to address HIV "pay special attention to the rights and needs of women and children and to the factors related to women's reproductive function and their subordinate position in some societies, which makes them especially vulnerable to HIV infection."¹³⁸ Finally, the IACtHR stressed that States should support adequate, accessible and effective HIV prevention and care services, which should be designed by and for populations at higher risk, especially women of childbearing age.¹³⁹

b) Remedies.

The IACtHR ordered several measures to remedy the damages in a comprehensive manner. In addition to the pecuniary compensations to those directly affected (as an individual remedy), the court ordered as a guarantee of non-repetition that

¹³⁶ See *ibid* at para 135.

¹³⁷ See *ibid* at para 136.

¹³⁸ *Ibid* at para 133.

¹³⁹ See *ibid* at para 134.

the State design a *mechanism* to guarantee the accessibility, availability and quality of antiretroviral, diagnostic tests and health benefits for the population with HIV.¹⁴⁰ The Court noted that the minimum objectives that this mechanism must meet are: (i) increase the availability, accessibility and quality of antiretroviral drugs, diagnostic tests for the detection of HIV and for the diagnosis and treatment of opportunistic diseases; (ii) improve care programs for the population living with HIV and increase care coverage; (iii) increase and improve immediate and urgent health care measures for the population with HIV; and, (iv) improve the information available for decision-making by all competent authorities.¹⁴¹

The IACtHR ordered that people living with HIV who are users of the health system—including organizations that represent them—the Guatemalan Human Rights Ombudsman's Office, and the medical community, must participate in the design and implementation of this mechanism.¹⁴² The court stated that this participation must focus, at least, in "setting priorities for care, decision making, and planning and evaluation of strategies for improved health care."¹⁴³ Thus, the IACtHR ordered the State to develop the mechanism within the framework of a participatory public policy, including the excluded group in question, in addition to other relevant groups and agencies.

III. Comments

From the analysis and description of the three cases, it is possible to note that the IACtHR does not explicitly use or develop a concept of systemic—or structural—discrimination in any of them. However, the court does recognize this type of discrimination mainly through: (i) the analysis it makes of victims as members of vulnerable and historically excluded groups, identifying generalized practices or patterns of discrimination; and (ii) through the incorporation of reparatory measures (or

¹⁴⁰ See *ibid* at para 226.

¹⁴¹ See *ibid*.

¹⁴² See *ibid*.

¹⁴³ *Ibid*.

remedies) aimed at guaranteeing the non-repetition of discrimination against these groups, through programs and plans.

In all these cases the IACtHR ordered (among other remedies) measures of a systemic nature, with the participation of those groups affected, ensuring their right to participate. However, nowhere in the judgments did the court explain the relationship between the discriminatory facts underlying the case, their nature, and the role of the participation of these groups as a fundamental element to remedy the discrimination. In other words, the court did not elaborate on the participation of the excluded groups as a substantial element for the effectiveness of the remedies of systemic discrimination. In this sense, although there is an implicit recognition of the relationship between systemic discrimination and participation as part of the remedies, it is not explicitly developed. Consequently, the IACtHR currently lacks a solid doctrine on this matter that could serve as a basis for future cases.

The court missed the opportunity to give content and context to participatory rights in the fight against discrimination. The IACtHR, surprisingly, did not link such measures to those fundamental instruments of the inter-American human rights system, such as the Charter of the Organization of American States¹⁴⁴ ("OAS Charter") and the Inter-American Democratic Charter¹⁴⁵, both which recognize participation as a fundamental element for achieving equality. Indeed, article 34 of the OAS Charter states that: "The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development."¹⁴⁶ Likewise, article 45(f) states that: "The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: The

¹⁴⁴ *Charter of the Organisation of American States*, 30 April 1948 (entered into force 13 December 1951) [Charter].

¹⁴⁵ *Organization of American States, Inter-American Democratic Charter*, General Assembly Sess. Lima September 11, 2001 [Democratic Charter].

¹⁴⁶ Charter, *supra* note 143, article 34.

incorporation and increasing participation of the marginal sectors of the population ... in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system."¹⁴⁷

Likewise, article 9 of the Inter-American Democratic Charter expressly indicates that "the elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation."¹⁴⁸ Additionally, article 6 establishes that "it is the right ... of all citizens to participate in decisions relating to their own development. This is also a necessary condition for the full and effective exercise of democracy. Promoting and fostering diverse forms of participation strengthens democracy."¹⁴⁹

Thus, the aforementioned instruments that are part of the inter-American human rights system constitute a relevant source that makes important connections between participation, non-discrimination and equality. Consequently, the IACtHR could have resorted to these sources to provide meaningful content to participatory measures and the role they play in eliminating discrimination.

The court also fails to explain how the absence of these participatory processes could render the systemic measures ineffective; or explain how, without participation, such measures could be downright harmful. Indeed, the elaboration of policies and plans aimed at facing discrimination elaborated unilaterally by the State, without the participation of excluded groups, will have serious difficulties of success; and can constitutes in turn a new situation of exclusion and re-victimization. Thus, the full participation of the community is essential to ensure that this

¹⁴⁷ *Ibid*, art 45 (f).

¹⁴⁸ Democratic Charter, *supra* note 145, art 9.

¹⁴⁹ *Ibid*, art 6.

measure really constitutes a remedy. Yet, the court was silent on this matter as well.

The reasons for these omissions are unclear. However, there is no doubt that the IACtHR in all these cases had to devote significant efforts not only to analyze the facts underlying the discrimination, but also the violation of other specific rights, such as the right to life, the right to movement and residence, right to health, and the right to judicial protection, among others. It is perhaps this effort—necessary given the way in which the principle of equality and non-discrimination is enshrined in Article 1.1 of the ACHR—that may have diverted the court's attention. The requirement to analyze the violation of other rights may have prevented the IACtHR from focusing and developing in more detail the discriminatory aspects of these cases and the participation as a critical element of the remedies.

IV. Conclusion

Discrimination is a complex problem, with different scales or dimensions, both individual and systemic. The recognition of discrimination as a systemic phenomenon broadens our understanding of this problem, realizing that discrimination is deeply embedded in social practices and institutional cultures. This deeper understanding has also allowed us to better comprehend the remedies needed to successfully address discrimination. In this sense, it is clear that individual remedies, such as compensation to those directly affected, do not have the capacity to remedy systemic discrimination. It is worth reiterating, as a *mantra*, that systemic discrimination requires systemic remedies. Individual and systemic remedies are completely different in nature, as the latter is aimed at transforming society and resolving complex problems of historical exclusion. Among these remedies are the development of policies, plans and programs by the States aimed at eliminating or reducing the different forms of discrimination, and educating the population in matters of equality and inclusion.

Given the objective of these remedies, participatory processes have emerged as an important element. Participation is fundamental for fostering more just and equal societies. Participation promotes relationships based on solidarity and

respect for diversity; and it constitutes, without a doubt, a process of inclusion. Participation as relevant element of remedies against systemic discrimination is present—albeit weakly—within the IACtHR. Indeed, in the three cases analyzed in the present article, the court ordered the States the elaboration and implementation of policies, plans and programs aimed at combating different forms of discrimination, requiring the participation of excluded groups in the process.

In none of these cases does the IACtHR expressly mention the concept of systemic or structural discrimination. Additionally, the court does not expressly establish a relationship between systemic discrimination and participation rights, nor the role that participation actually plays in remedying this discrimination. Moreover, the IACtHR does not explain how the absence of these participatory processes could make the measures ordered ineffective: or, how they could be harmful, in that they could constitute new acts of exclusion. However, given that a relationship has in fact been established, the IACtHR can in the future develop a doctrine on this matter that could serve as basis for other discrimination cases, both in this court and in other international and domestic courts.

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