

“An intruder body”. Antidiscrimination law and the justiciability of the economic, social and cultural rights in the Inter-American Court of Human Rights: an analysis based on the *Case of Guevara Díaz vs. Costa Rica*

“Un cuerpo intruso”. Derecho a la no discriminación y justiciabilidad de los derechos económicos, sociales y culturales en la Corte Interamericana de Derechos Humanos: un análisis a partir del Caso Guevara Díaz vs. Costa Rica

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Recepción: 19 de enero de 2024

Aceptación: 28 de abril de 2024

Publicación: 1 de julio de 2024

DOI: <https://doi.org/10.22201/ijj.24484881e.2025.52.18864>

ABSTRACT: This article aims to analyze the *Case of Guevara Díaz vs. Costa Rica*, judged in June 2022 by the Inter-American Court of Human Rights, especially about Anti-Discrimination Law. The precedent innovates by establishing the normative force of the principle of progressive development provided for in article 26 of the American Convention on Human Rights (ACHR), understood, at least until then, as a mere interpretative principle of the ACHR. The decision also deserves to be highlighted due to the adoption of Anti-Discrimination Law as a backdrop to enable the direct justiciability of Economic, Social and Cultural Rights (DESCA). In terms of methodology, the research is carried out based on a critical-reflexive review of the topics covered and the use of the hermeneutic phenomenology method.

Keywords: antidiscrimination law, Inter-American Court of Human Rights, economic, social and cultural rights, human rights.

RESUMEN: Este artículo tiene como objetivo analizar el *Caso Guevara Díaz vs. Costa Rica*, juzgada en junio de 2022 por la Corte Interamericana de Derechos Humanos, especialmente en lo que respecta a la Ley Antidiscriminación. El precedente innova al establecer la fuerza normativa del principio de desarrollo progresivo previsto en el artículo 26 de la Convención Americana sobre Derechos Humanos (CADH), entendido, al menos hasta entonces, como un mero principio interpretativo de la CADH. La decisión también merece ser destacada por la aprobación de la Ley Antidiscriminación como telón de fondo para permitir la justiciabilidad directa de los Derechos Económicos, Sociales y Culturales (DESCA). En términos metodológicos, la investigación se realiza a partir de la revisión crítico-reflexiva de los temas tratados y el uso del método de la fenomenología hermenéutica.

Palabras clave: derecho antidiscriminación, Corte Interamericana de Derechos Humanos, derechos económicos, sociales y culturales, derechos humanos.

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I graffitied the sidewalks of streets
where rue was born
Subliminal tags against self-help
And from the bottom of the abyss
the normal people looked at me
confused
I was at the top, me of all people,
an intruding body

Billy Saga

I. INITIAL CONSIDERATIONS

In June 2022, the Inter-American Court of Human Rights (I/AC HR) ruled on the *case Luis Fernando Guevara Díaz vs. Costa Rica*, holding the Costa Rican state responsible for the violation of Mr. Luis Fernando's human rights. This violation occurred within the context of a public competition for the Ministry of Finance, in which the victim was not selected due to being a person with a disability, despite having been ranked and approved with the highest score in the competition.

The case, still relatively unexplored academically, given its unprecedented nature, is marked by two fundamental discussions in the human rights

landscape: the justiciability of economic, social, and cultural rights (ESCE) and, especially, Anti-Discrimination Law as a central category of analysis—topics that this text delves into.

In this sense, this article aims to understand how Anti-Discrimination Law can, in light of the precedent set by the *Guevara Díaz* case, assume a prominent role in what is considered the most audacious human rights protection system among regional systems.

Two hypotheses are considered in the research. The first recognizes that Anti-Discrimination Law, based on the *Guevara Díaz vs. Costa Rica* case, has been and will be championed by the Two hypotheses are considered in the research. The first one recognizes that Anti-Discrimination Law, based on the *Guevara Díaz vs. Costa Rica* case, has been and will be championed by the IAC H.R. as a central category of analysis to reconstruct national institutions from an anti-capacitist and, in general, anti-discrimination perspective, even enabling the direct justiciability of economic, social, cultural, and environmental rights (ESCE). as a central category of analysis to reconstruct national institutions from an anti-capacitist and, in general, anti-discriminatory perspective, even enabling the direct justiciability of ESCE rights. The second assumes that there is no trend toward this form of handling the processing and judgment of claims submitted to the I/AC HR.

The study is made possible through a critical-reflective review of the outlined themes and the utilization of the phenomenological hermeneutic method, employing an analysis of the *Guevara Díaz vs. Costa Rica* case. The goal is to comprehend whether there is indeed a trend toward reconstructing institutional and structural practices with an anti-discriminatory bias within the I/AC HR and directed towards enabling the direct judicialization of ESCE rights in the inter-American context.

For this purpose, the work is divided into three sections. The first one provides brief considerations about the I/AC HR. and its mechanisms of operation, especially regarding the Commission and the Inter-American Court (I/AC HR.). The second section delves into Anti-Discrimination Law and its nuances to support the understanding of this analytical category within the I/AC HR. The third and final section analyzes the intricacies of the *Guevara Díaz vs. Costa Rica* case, aiming to comprehend whether it indeed constitutes a paradigm shift in terms of the justiciability of economic, social, cultural, and environmental rights (ESCE) in the I/AC HR. and, furthermore, whether it can effectively be considered a groundbreaking milestone in terms of Anti-Discriminatory Law in the Inter-American Court.

II. “NOW WE TURN THE MAP UPSIDE DOWN”: THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The denial of a portion of humanity is sacrifice,
Exercised long before the miracle of solstice.
A waste of the natural condition,
Of a fraction that, by excluding me, claims to be universal
Billy Saga

“Our north is the South. There should be no north for us, except in opposition to our South. That’s why we now turn the map upside down, and then we have the exact idea of our position, not as the rest of the world wants it.” The phrase prefacing this section, by the Uruguayan Joaquín Torres García, alludes to his “Inverted America.” On October 12, 1492, Christopher Columbus arrived in the Americas. García (1874-1949) then proposed a map in these terms: looking at the world from another perspective, and it is from this alternative territoriality that we must understand the Inter-American System and its idiosyncrasies.

An important initial observation lies in recognizing that we are dealing with a region marked by a high degree of exclusion and social inequality, where violence and impunity remain deeply rooted. Two fundamental factors, therefore, characterize the Latin American context: the period of authoritarian regimes and the (flawed) transition to democratic regimes in the 1980s in Argentina, Chile, Uruguay, and Brazil. During these authoritarian periods, the most basic rights and freedoms were violated. Summary executions, forced disappearances, systematic torture, illegal and arbitrary detentions, political persecutions, and the abolition of freedoms of expression, assembly, and association were part of the daily life of the people (Piovesan, 2006).

This circumstance, the existence of tyrannical governments, is crucial for the realization or violation of human rights, considering the inseparable relationship established between such rights and democracy. The establishment of a democratic government requires not only bureaucratic or legislative formalities but also the encouragement of the effective consolidation of the regime, a prerogative that has not yet been fully achieved in the Latin American context (and, as we well know, at times, we regress more than we progress towards the solidification of the democratic environment). In other words, there is a significant distance to be covered between the es-

tablishment of a democratic government and the consolidation of that government. It is possible to understand, in this sense, the reasons why the initial activities of the Inter-American Commission on Human Rights (I/AC HR) were confined to dialogue with government authorities and monitoring the human rights situation in contexts of ruptures of the democratic-constitutional regime (Salazar y Cerqueira, 2015). This dynamic reflects, to some extent, the fact that the universalization of civil and political rights is not complete without addressing violations of economic, social, and cultural rights (and, more recently, environmental rights). A similar perception can be found in Guillermo O'Donnell's (1998) work, where extreme poverty and social inequality weaken (if not render ineffective) the effective exercise of formal rights, even in democratic contexts.

Furthermore, it cannot be forgotten that the Latin American subject embodies precisely the idea of the Other, the barbarian, given that the Americas colonized by the Portuguese and Spanish were appropriated (and castrated) by the Modern discourse of the universalized and abstract European Self. In this sense, the “Latin American guy with no money in the bank, without important relatives and coming from the countryside,” as mentioned by Belchior in his timeless composition from 1976, beautifully illustrates the individual born out of oppression, poverty, and scarcity—circumstances that will resonate in their process of subjectivation and, consequently, in categories such as *self* and *status*.

Even today the region continues to be problematic in terms of social inequality, facing challenges in achieving democracy and an adequate pattern of sustainable development. A recent report by the Economic Commission for Latin America and the Caribbean (ECLAC), titled “Social Panorama of Latin America,” demonstrated that although income inequality in Latin America decreased between 2008 and 2015, the pace of decline slowed between 2012 and 2015, leaving current levels of inequality alarmingly high. It was also found that gender and ethnic-racial status are still key factors in the structural inequality that has taken hold (or was imposed) in the region (ECLAC, 2016).

However, it is important to incorporate into this analysis the fact that there is currently a tendency for a different stance from Latin American society regarding its past of exclusion and exploitation, strengthening alternative perceptions that escape negative reductions analyzing the region (Lucas y Cenci, 2014). In fact, “all of Latin America’s history, at least since the Europeans arrived, is a history of human rights” (Zaffaroni, 1989, p. 22). There-

fore, if every fraction of (un)consciousness of our being is colonized by the oppression to which the Latin American people have been subjected, that conscious fraction also has a lucid perception that we have rights and that something brings us closer to those individuals from the North mentioned by Joaquín Torres García.

The Inter-American Human Rights System (IAHRS) is composed of four essential normative instruments: The American Declaration of the Rights and Duties of Man (ADRDM), the Charter of the Organization of American States (OAS), the American Convention on Human Rights (ACHR), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador). These instruments support the two protection regimes of the IAHRS: one based on the OAS Charter and the other on the American Convention, also known as the Pact of San Jose, Costa Rica, being the most important of them. In order to give effectiveness to the system, the American Convention has an apparatus that includes the Inter-American Commission on Human Rights (IACHR), an organ of the OAS, and the Inter-American Court (IACtHR), an autonomous branch responsible for monitoring and implementing the rights that enunciates. Its main function is the observance and protection of human rights in the Americas.

The IACHR, established in 1959 and formally installed in 1960, is headquartered in Washington. It has jurisdiction over all states party to the American Convention concerning the human rights outlined in it, and over all member states of the OAS concerning the rights guaranteed in the American Declaration of 1948. The Commission consists of seven members elected by the OAS General Assembly for a term of four years, with the possibility of reelection only once. Commissioners must be individuals of high moral standing and recognized competence in the field of human rights.

In summary, the Commission is an almost-judicial body endowed, on the one hand, with political-diplomatic functions, and on the other hand, with jurisdictional duties regarding the receipt of individual cases of human rights violations. Its role is to promote the observance and defense of human rights within the territory of OAS member states, even if they are not parties to the American Convention. Therefore, the Commission's jurisdiction is not limited to states that have ratified the Pact of San Jose, Costa Rica, as in the case of non-ratification, the IACHR can still oversee and hold international accountability for violations of rights outlined in the American Declaration, which predates the Convention (1948) and, more importantly,

represents the initial framework of the construction of the Inter-American Human Rights System.

The Commission has promotional, advisory, and human rights protection functions. The promotional function involves advising states to raise awareness about the importance of human rights. In terms of advisory functions, the IACtHR can draft treaties and conventions. In the realm of protection, the Commission can conduct on-site investigations into the human rights situation.

Among the important duties of the Commission is the preparation of conclusive reports informing whether the State has violated the American Convention or not. Therefore, a State sanctioned by the Commission for violating its international obligations will be subject to public international pressure, the so-called “shaming.” This is the Commission’s maximum sanction, and it is also possible to include recommendations to the State in the report.

Regarding the filing of individual cases before the Commission, any person, group of people, or non-governmental entity legally recognized by at least one of the OAS member states can submit a complaint. Afterward, the phase of admissibility or inadmissibility begins based on formal requirements, including the need to exhaust domestic remedies or, alternatively, falling under one of the exceptions listed in Article 46.2 of the American Convention. “Most of the time, the State uses the lack of internal resources by the petitioners as its main argument in defense” (Galli y Dullitzky, 2000, p. 71). In fact, “the majority of complaints submitted to the Inter-American Commission are based on such exceptions, given the structural flaws in individuals’ access to justice systems in Latin American countries, and the impunity of most human rights violations” (Galli y Dulitzky, 2000, p. 74).

Once the complaint is received, the Commission’s Secretariat forwards it to the State, requesting information regarding the reported facts, which must be provided within two months. Subsequently, there is a kind of response from the petitioning party, making observations and providing evidence it possesses. Similarly, the State will respond to these allegations. Regarding evidence, the American Convention and the Commission’s Regulations do not establish a rigid system of assessment to effectively verify the truth of the facts.

If the petition is admitted, the Commission offers its assistance to the parties in seeking a friendly settlement. If unsuccessful, the next phase involves the preparation of the report referred to in Article 50 of the American Convention, which will include the Commission’s pronouncement on the

reported facts, as well as recommendations for the State to remedy the proven rights violations within three months. If the State does not comply with the recommendations within the specified period, it can be brought before the Inter-American Court of Human Rights, or the Commission may choose to prepare a final report setting a deadline for compliance with the recommendations. If the State once again fails to comply, the Commission deliberates on the publication of the final report condemning the State in the so-called “Annual Report of the Commission,” which is submitted to the OAS General Assembly.

Finally, it is worth noting the possibility of requesting precautionary measures from the Commission when there is a danger or risk of harm to the victim, in cases provided for in Article 25 of the Commission’s Regulations. The adoption of precautionary measures can be requested by the Commission concerning any OAS member state, even if it has not ratified the American Convention. It is important to emphasize that precautionary measures lack conventional force, as they are established solely by the internal rules of that body. On the other hand, provisional measures, which fall under the jurisdiction of the Inter-American Court (although they can also be requested by the Commission), are not only provided for in its Regulations but also in the American Convention, notably in Article 63. This implies that if the State does not comply with such provisional measures, there is indeed a violation of the Convention.

On another note, the Inter-American Court of Human Rights adds a touch of legality to the proceedings of the Inter-American System. Its establishment is derived from Article 33 of the American Convention, and its headquarters are located in San Jose, Costa Rica. The Court is composed of seven judges from the OAS member states, who are elected on a personal basis from jurists of the highest moral authority, possessing recognized competence in human rights matters and meeting other necessary conditions for the exercise of the function. Judges are elected through a secret ballot for a term of six years, with the possibility of reelection only once.

The Court performs both advisory and contentious functions. The advisory function is based on the fact that any member of the OAS, whether a party to the Convention or not, can request an advisory opinion on the interpretation of the Convention or other treaties related to human rights that are applicable in the American states.

The contentious procedure, in turn, begins after the expiration of the state’s deadline to comply with the recommendations contained in the report

provided for in Article 50 of the American Convention on Human Rights. It is necessary for the state to have accepted the jurisdiction of the Court for the Commission to be able to forward the case. Otherwise, the procedure continues before the Commission, which is a subject of criticism as it supposedly weakens the system.

Upon receiving the case, the Court verifies whether it has personal, material, and temporal jurisdiction. In this regard, it is noteworthy that the Commission “is the only access channel for individuals to the Inter-American System, on an equal footing with the Member States.” (Galli y Dulitzky, 2000, p. 64). Cançado Trindade (2002), in this sense, is one of the harshest critics regarding the restriction of the victim’s right to international action. According to the Brazilian legal scholar and former judge of the International Court of Justice and the Inter-American Court of Human Rights, who passed away in 2022, the persistent denial of the procedural capacity of the individual as a petitioner before the Court stems from another historical era, which is why a reform of the system in this aspect is necessary. Regarding material jurisdiction, the Court can examine any case related to the interpretation or application of the provisions of the American Convention or other specific treaties. Finally, concerning temporal jurisdiction, the Court only considers cases that have occurred after the State denounced accepted the Court’s jurisdiction.

The Court must also verify whether the formal requirements for presenting the case are met, which are outlined in Article 26 of its Regulations. Once the procedure is initiated, the Commission is called to participate as a party in all cases before the Court, playing a role similar to that of the public prosecutor in domestic law. The application must be submitted in writing, in ten copies, indicating the subject matter, description of the facts, evidence, legal grounds, delegation details, and conclusions. In its defense, the State may raise preliminary exceptions as incidents within the procedure. The Court’s Regulations, in Article 34, outline the written phase of the procedure, while the oral phase is detailed in Articles 45 and subsequent articles of the same document. Regarding means of proof, the Court has a broad understanding of the type of admissible evidence.

It is worth mentioning that in all cases of extreme gravity and urgency, as already occurs in the Commission with precautionary measures, the Court can establish provisional measures to prevent irreparable harm. It is important to reiterate that these measures have conventional force and, therefore, bind the Member States.

At last, the judgment rendered by the Court is final and not subject to appeal. It will include the eventual responsibility of the defendant State for the presented facts and the corresponding reparations or compensations due.

Finally, it is important to recall the warning that Cançado Trindade (2002) had long been making: States generally do not pose obstacles to pecuniary reparations. Unfortunately, the same does not occur with other types of sanctions, especially those that fundamentally flexibilize the concept of sovereignty, as they determine structural and institutional reforms within the States themselves. This highlights, in a way, the reason why the economic, social, cultural, and environmental rights are so crucial in scenarios of deep social inequalities. They do not consolidate without the structural, institutional, and even symbolic reforms that are often determined by the Court. The following sections will address these tensions, starting from the notion of Antidiscrimination Law, its conceptual and normative aspects, and the important Guevara Diaz case.

III. “AN INTRUDING BODY”: THE ANTIDISCRIMINATION LAW ON STAGE

The good, the bad, the fat and the thin,
The tall and the short, the strong and the weak standing or sitting

These are labels that, misused, deny independence
Causing obstacles much more serious than disability

Emotional intelligence so you don’t lose track

Because inclusion only in speech is a litany
So I make mine, break the box, give new meaning

It’s magnificent that for the system I am atypical

Billy SAGA

In liberal democracies, the notion of equality holds one of the most important legal statuses in modern constitutionalism. The protection and promotion of equality are of central relevance in the logic of how constitutional democracies operate — political systems whose main objectives include providing equal treatment to all individuals within the legal framework, as everyone holds the same moral value when part of a democratic political community.

However, it cannot be denied that even democratic societies are permeated by arbitrary power relations that (re)produce the exclusion of certain social groups, hindering, impeding, or excluding these marginalized groups

from the legal goods, social respectability, and material security enjoyed by the majority of groups holding the dominant *status quo*.

Due to this political and social exclusion resulting from processes of marginalization, modern democracies seek to establish legal norms aimed at protecting and integrating these minority groups. In this regard, as stated by Adilson Moreira, “modern legal systems have created various norms that seek to protect individuals and groups subjected to various forms of discriminatory treatment so that they can have a minimally dignified life” (Moreira, 2020, p. 45).

Indeed, the emergence of social constitutionalism and social rights, changes in constitutional culture with the advent of constitutional charters with essentially substantive character —which incorporate concepts such as human dignity, material equality, and the minimum essential— and the political mobilization of minority groups, especially after the 1960s and multicultural movements, are some of the circumstances that foster the emergence of this Anti-Discrimination Law.

The entire legal structure of the state, which includes protective legal norms for vulnerable and discriminated groups, judicial decisions that develop new perspectives of the principle of equality, moving towards its material dimension, not merely formal, public policies aimed at protecting minorities and vulnerable groups, among other perspectives, are part of what is known as Antidiscrimination Law.

Before moving forward, however, it is important to have clarity on the concept of “discrimination.” To do so, the concept brought by international instruments for the protection of human rights, already incorporated into the Brazilian legal system, will be used, notably the International Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the Inter-American Convention to Prevent, Punish and Eradicate Violence against Women (1994), the Convention on the Rights of Persons with Disabilities (2006), and the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance (2013). Based on such documents, discrimination is any distinction, exclusion, restriction, or preference that has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise on an equal footing of human rights and fundamental freedoms in the economic, social, cultural, or any other field of public life.

It is important to mention here the Inter-American Convention against All Forms of Discrimination and Intolerance, adopted on June 5, 2013,

in Guatemala, on the same occasion when the Inter-American Convention against Racism, Racial Discrimination, and Related Forms of Intolerance was approved. Although it has been signed, the mentioned regulation has not been ratified by Brazil. Up to the present moment, only two States parties have ratified the text: Uruguay and Mexico. This regulation is extremely important because, in its Article 1, it can list that

discrimination can be based on nationality, age, sex, sexual orientation, gender identity and expression, language, religion, cultural identity, political opinion, or any other nature, social origin, socioeconomic status, educational level, migrant status, refugee status, repatriated status, statelessness, or internal displacement, disability, genetic characteristic, physical or mental health status, including infectious or contagious conditions, and disabling psychological condition, or any other condition.

That is, the Convention presents an extensive list of scenarios, beyond racial issues, that can constitute discrimination. Furthermore, it specifies concepts such as direct, indirect, and multiple or aggravated discrimination.

This Convention is a pioneer in the Americas and also predates any potential universal treaty on combating discrimination and intolerance in general. Moreover, this convention represents a significant advancement in the field: no other human rights convention, up to the present moment, has such an inclusive concept regarding the different facets of discrimination, explicitly addressing factors of discrimination and vulnerable groups (such as sexual orientation and migrants) that were previously overlooked (Ramos, 2021, p. 589).

With the understanding of the legal concept of discrimination in hand, it is now crucial to comprehend Antidiscrimination Law as a legal category. From the perspective of its specific nature, it is the “legal field composed of a series of norms that aim to reduce or eliminate significant disparities between groups, one of the central objectives of constitutional texts in democratic societies” (Moreira, 2020, p. 46). This field seeks to establish an egalitarian relationship among social segments, involving the fight against discrimination through the joint analysis of structural relations between two central elements: equality and discrimination. “The pursuit of the realization of various forms of equality contemplated in this transformation program requires

the annulment of discriminatory mechanisms that keep social groups in a situation of structural disadvantage” (Moreira, 2020, p. 47).

From the perspective of its functions, Antidiscrimination Law articulates “three important themes for constitutional jurisdiction: fundamental rights, ordinary legislation, and substantive democracy” (Moreira, 2020, p. 52). Anti-discrimination norms, in this sense, serve as integrative tools in the democratic system, allowing a higher level of equality among members and groups within the political community, operating to “prevent or mitigate the material and cultural marginalization that vulnerable groups face within a given society” (Moreira, 2020, p. 52).

The goal of Antidiscrimination Law goes beyond legal, political, and philosophical purposes aimed at producing equality —in its material dimension— among individuals, departing from the individualistic conception of equality and adopting a substantive perception aiming to promote social groups, not just individuals. The complexities within the field of discriminations must be incorporated into the political ideology aiming at the transformation of society and the consequent promotion of the values of equality and social respect for all members of the political community, with Antidiscrimination Law serving as the legal instrument for realizing this transformation.

In terms of structure, Antidiscrimination Law

covers a variety of special categories of legal protection, criteria indicating significant disadvantages among groups, and criteria indicating systematic disadvantages. These disadvantages can take various forms in different areas of individuals’ lives. Antidiscrimination Law also incorporates a series of obligations directed at public and private actors. These obligations can take the form of ensuring the observance of rights or imposing measures to promote the inclusion of vulnerable groups (Moreira, 2020, p. 56).

The sources of Antidiscrimination Law stem from norms within various national and international protective legal frameworks. “International treaties, constitutional texts, and special legislation are among the norms intended to protect groups in a disadvantaged situation” (Moreira, 2020, p. 57). It is crucial that anti-discrimination norms evolve with social dynamics, and in this context, jurisprudence plays a significant role in constructing this protective system.

Certainly, the “Antidiscrimination Law can be used as a legal field that seeks to apply the ideal of equality to those dimensions of individuals’ lives where equal treatment is relevant for achieving a dignified life” (Moreira, 2020, p. 61).

Many norms have been created with the intention of promoting freedom and equality among people in liberal democracies, and these struggles allow for the increasingly evident expansion of the scope of Antidiscrimination Law.

Finally, given the importance of the topic for the analysis of the hermeneutical aspects of the judgment in the Guevara Díaz case, it is crucial to elaborate on the foundations that underlie Antidiscrimination Law.

The philosophical foundations of Antidiscrimination Law, according to Adilson Moreira (2020), are justice, freedom, and dignity. Justice is the objective that Antidiscrimination Law seeks to achieve, imposing a set of material and procedural rights that legitimize and justify democracies and that should be attained equally for all individuals. Therefore, Antidiscrimination Law warns against the illegality and illegitimacy of practices, decisions, and norms that are inconsistent with the legal-political model of justice. Freedom is a right that allows all individuals to lead their lives with autonomy and authenticity, free from external situations that restrict their ability to act. All individuals are free beings to build their life projects, self-determine, and be a project in themselves. Finally, human dignity is, especially since the Modern era, an essential attribute universally attributed to individuals, a moral condition of their humanity. Human beings carry an inherent dignity in the exact measure that they are an end in themselves and, therefore, have autonomy and authenticity to lead their lives freely and according to their own choices. For this, it is crucial to ensure their rights that guarantee the material and formal conditions of being in the world on an equal footing and in a free manner, without being instrumentalized and without being existentially subordinate (Moreira, 2020).

Regarding anthropological foundations, Moreira (2020) emphasizes that humans, beyond being mere biological and organic bodies that obviously need proper nourishment, are historically, socially, politically, and so on, constituted. They build connections and pathways that give meaning to their existence in the world. This “being” in the world needs to be protected, demanding the safeguarding of identity, work, forms of communication, religious freedom, and more – in essence, all these mechanisms of sociability that constitute the human being and the political forms of organizing pow-

er. Therefore, Antidiscrimination Law needs to ensure that all anthropological experiences, being foundational to individuality and various institutions, are protected on equal terms.

Antidiscrimination Law also has political foundations. Its norms are aligned with a democratic culture that recognizes the equal moral worth of all human beings. In this sense, it establishes norms that mandate equal treatment, acknowledge social contradictions and segregations, and propose a set of measures to correct discriminatory mechanisms. Antidiscrimination norms set standards for relationships among individuals and between individuals and institutions in the context of a democratic society. A truly democratic society recognizes and protects the identity status of minorities, giving them visibility and a voice, enabling vulnerable groups to advocate for better living conditions and dignified existence. In this case, it is about ensuring that everyone, on equal terms, is treated equally, regardless of their differences and, therefore, irrespective of their identifying characteristics that may, to a greater or lesser extent, impose various forms of discrimination and vulnerabilities.

Finally, the legal foundations of Antidiscrimination Law refer to the fact that legal norms allow individuals to bring cases to court seeking protection from discriminatory situations. The status of being a legal subject ensures that discriminated individuals can invoke the law and access legal systems to protect their condition of equality and autonomy. And these norms, due to their importance, are part of the constitutional framework that underpins the law as a whole. “The protective system embodied in antidiscrimination norms expresses the values that mark the objective order of fundamental rights present in a constitutional system” (Moreira, 2020, p. 93).

The standards that operationalize Antidiscrimination Law are, therefore, fundamental rights. Moreover, they express the political dimension of the constitutional order. The universality of fundamental rights is also a legal foundation of Antidiscrimination Law. Since the liberal Modernity, at least formally, the moral equality of human beings and their equal capacity and right to live autonomously have been recognized. If, then, everyone is equally covered by fundamental rights that guarantee individuals to live their lives fully, it is evident that discriminatory practices negatively impact this model of legal protection and must be combated. Finally, a project of an egalitarian society requires legal norms that encompass all individuals and establish a model of treatment among people and the definition of legitimate criteria for the distribution of opportunities and rights.

Ultimately, it is timely to bring up the reflection put forth by Rios, Leivas, and Schäfer (2017, p. 146), who argue that the “confluence of international human rights law and anti-discrimination law can also be fruitful, particularly for Brazilian law and, even more so, for the improvement of legal protection against discrimination of minority groups, adopting a group model of legal protection.” In this sense,

the development of an appropriate dogma of anti-discrimination law, aiming at the collective legal protection of minority groups, demands the consolidation of an understanding of collective rights beyond what is already legislatively established in the realms of consumer law. Otherwise, there will be a deficient protection of human and fundamental rights whose recognition and exercise, by discriminated groups, can only occur in a trans individual manner.

Having covered the main aspects related to Antidiscrimination Law, we will now proceed to the analysis of the Guevara Díaz case, recently adjudicated by the Inter-American Court of Human Rights.

IV. THE GUEVARA DÍAZ VS. COSTA RICA CASE: DIRECT JUSTICIABILITY OF ESCE RIGHTS AND ANTI-DISCRIMINATION LAW IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

A discomfort, a disorder, a foreigner
Out of place even among the tough ones
Strange, ugly, and fragile, an obtuse
Profane, uncolonized, an intrusive body
Your sterile pity doesn't ring true
Never spawned the slightest act of humanity
Billy Saga

1. The facts

On March 24, 2021, the Inter-American Commission on Human Rights submitted the case Guevara Díaz vs. Costa Rica to the Inter-American Court. The case concerns the violation of the human rights of Mr. Luis Fernando Guevara Díaz, who was not selected in a public competition held by the Ministry of Finance due to his condition as a person with intellectual disabilities.

On June 4, 2001, Mr. Guevara was appointed as an interim worker in the position of Diverse Worker by the Ministry of Finance. Later, the Human Resources department of the Ministry of Finance instituted a public competition for the filling of the same position. Mr. Guevara participated in the mentioned competition and was approved (with the highest grade).

Nevertheless, on June 13, 2003, the person in charge of the department where the victim worked sent an official communication to the General Coordinator of the Technical Unit of Human Resources, in which he stated, “due to his problems of retardation and emotional blockage (information provided by his mother), I consider he is not fit for the position. If you wanted to help him, there are several ways to do so.” (IACHR, 2022, § 31). In this sense, it was suggested to review Mr. Guevara Díaz’s hiring, which resulted in him not being selected for the appointment to the position, despite having the highest score.

On June 18, 2003, Mr. Guevara Díaz filed an appeal against the decision that dismissed him from his position. On July 9, 2003, the Senior Official and Administrative and Financial General Director of the Ministry of Finance stated that all parameters established by the legal system were followed for cases like Mr. Guevara’s and declared the appeal inadmissible.

Subsequently, Mr. Guevara Díaz filed a petition before the Constitutional Chamber, arguing that he had experienced discrimination at work. However, on February 14, 2005, the Constitutional Chamber declared the victim’s appeal inadmissible, arguing that

while it is true that there is a note from the Head of the Maintenance Area of the Ministry of Finance, mentioning the disability issues the appellant faces, it has been reported under oath to this Court (with the legal consequences) that the selection of the employee to fill the vacant position was made prior to the aforementioned note and that it had no influence on choosing the suitable person for the position. In line with the repeated criteria of this Constitutional Court, constitutional protection is limited to ensuring equal participation of those interested in joining the respective list or shortlist, and it is not its role to review the legality, timeliness, or appropriateness of the decision of the competent bodies in the specific selection, which is done in the exercise of discretionary powers (IACHR, 2022, § 38).

On August 6, 2003, the Secretary-General of the Union of Employees of the Ministry of Finance filed a complaint with the National Directorate

of Labor Inspection regarding the discrimination suffered by Mr. Guevara. On November 26, 2003, the complaint was deemed unfounded, as the existence of discrimination at work was not proven. On January 27, 2004, the General Secretariat of the Union filed a new appeal, which was deemed valid, and on March 5, 2004, the Union of Employees of the Ministry of Finance sent a communication to the Minister of Finance requesting the immediate reinstatement of the coworker Luis Fernando Guevara Díaz to his position (IACtHR, 2022, § 40).

In response to this recommendation, the Minister of Finance replied on March 18, 2004, stating that the reinstatement of the victim was not convenient, as there were no omissions in the procedure carried out, indicating that there was no unequal treatment, arbitrariness, or any other discriminatory act.

With the support of his mother and the Union of Employees of the Ministry of Finance, Mr. Guevara Díaz submitted his case to the Inter-American Commission on Human Rights on July 12, 2005. The Commission approved Admissibility Report No. 13/12 on March 20, 2012. On July 2, 2020, the Commission approved the Merits Report No. 175/2020. The Republic of Costa Rica was notified on August 24, 2020, on which occasion the Commission granted a two-month period to provide information on compliance with the recommendations made in the Merits Report.

Finally, on March 24, 2021, the case is submitted to the Court, which requests the International Court to declare Costa Rica's international responsibility for the violations contained in the Merits Report regarding Mr. Guevara Díaz.

The proceedings of the case before the Court concluded with the recognition by the State of Costa Rica of its international responsibility for the violations of the articles of the American Convention as pointed out by the Commission. This acknowledgment took place during the public hearing held on March 24, 2022, and in its final arguments, and was positively evaluated by the Court.

2. The verdict

In its ruling, the Court recognized that, in the current stage of evolution of International Law, the fundamental principle of equality and non-discrimination is situated within the framework of *ius cogens* norms, which are imperative and, therefore, cogent. It also asserted that the right to equality

and non-discrimination encompasses two concepts: one regarding the prohibition of arbitrary differentiated treatment, and the other regarding the obligation of States to create real conditions of equality for groups that have historically been excluded or withheld (Corte IDH, 2022, §§ 46-49).

In this context, the Court analyzed, in light of the State's full acknowledgment of responsibility, its conduct regarding the fulfillment of obligations related to the right to equality before the law and work, the prohibition of discrimination, and the termination of the employment relationship with Mr. Guevara Díaz.

The Court considered that the references to the victim in the letters sent to the General Coordinator of the Technical Unit of Human Resources and the General Coordinator of the Unit of Technical Supplies and General Services constitute sufficient evidence to demonstrate the reason why Mr. Guevara Díaz was bypassed for the position for which he was approved, namely, his condition as a person with intellectual disabilities.

Thus, the Court acknowledged that there was an arbitrary differential treatment regarding Mr. Guevara Díaz based on his intellectual disability. This differentiation was carried out without any objective and rational argument. In summary, “The above constituted an act of direct discrimination in access to employment and, therefore, a violation of Mr. Guevara’s right to work” (IACHR, 2022, § 79).

The Court makes it clear, furthermore, that it could have been reasonable and proportional to decide not to appoint a person with a disability if that disability were incompatible with the essential functions to be performed. However, this was not the case, and “the absence of adequate justification for deciding not to appoint a person due to a disability generates a presumption about the discriminatory nature of this measure” (IACHR, 2022, § 80). The case demanded, therefore, a more rigorous and accurate justification for the alleged objective reasons for the decision to dismiss the victim.

Consequently, the Court concluded that the discrimination suffered by Mr. Guevara Díaz regarding access to and retention of employment constituted a violation of the right to work, the right to equality before the law, and represented the State’s failure in its duty to prohibit discrimination.

As a result, the State was held responsible for the violation of Articles 24 and 26 of the American Convention on Human Rights (ACHR), in relation to Article 1.1 of the same legal instrument, to the detriment of Mr. Luis Fernando Guevara Díaz.

In order to repair the harm caused, the Court determined restitution measures, satisfaction measures, and the adoption of guarantees of non-repetition. Concerning the restitution measure, the Court found it pertinent to order the reinstatement of Mr. Guevara Díaz to a position of equal or higher hierarchy than the one for which he competed in the Ministry of Finance. It was also considered that if Mr. Guevara Díaz does not wish to be reinstated or appointed to the Ministry of Finance for justifiable reasons, the State must provide an opportunity for the victim to be appointed to another position that suits his skills and needs. In the event that Mr. Guevara Díaz is not reinstated or does not wish to be reinstated, the State is required to pay compensation of \$25,000.00 to the victim.

As for satisfaction measures, the Court determined that the State should publish, within six months from the notification by the Court's Secretariat, an official summary of the judgment in the Official Gazette of Justice and in a widely circulated newspaper. Additionally, the full judgment should be published on the Ministry of Finance's website for a period of one year.

Regarding the guarantee of non-repetition, the Court positively acknowledged the efforts made by the State to train public officials in terms of ensuring the rights to equality and non-discrimination. However, the Court also considered it essential to adopt specific training programs aimed at preventing the occurrence of similar incidents to the present case. Therefore, the Court ordered the State to adopt, within a maximum period of one year, an education and training program for employees of the Ministry of Finance, over a three-year period, on the topics of equality and non-discrimination of people with disabilities. These programs, as stated by the Court, should address essential content related to the state's obligations in terms of respecting and ensuring the right to work for people with disabilities in cases of recruitment, appointment, promotion, and dismissal. They should also cover the special duties that arise in handling complaints related to acts of discrimination based on disability.

Concerning the financial compensation, the Court estimated that, considering the circumstances of the case, the amount of \$500,000.00 is sufficient to compensate Mr. Guevara Díaz for lost earnings. As for moral damages, the Court deemed an indemnification of \$300,000.00 appropriate for the benefit of the victim to compensate for the intangible harm experienced.

Finally, the Court understood that Costa Rica has spearheaded legislative and public policy measures aimed at ensuring the rights of all people with disabilities and preventing employment discrimination against this

group. Therefore, the Court did not find it pertinent to order general measures to modify the legal framework of the State.

Currently, the judgment is in the compliance monitoring phase, with reports submitted by the State on September 30, 2022, and February 23, 2023.

3. The infamous article 26 of the American Convention on Human Rights

In the end, the Court unanimously recognized the violation of Article 24 of the American Convention on Human Rights (CADH), which states, “All persons are equal before the law. Therefore, they are entitled, without discrimination, to equal protection of the law.”

There was disagreement, however, regarding the violation of Article 26 of the American Convention on Human Rights.

Article 26 of the American Convention on Human Rights is the only provision in the Convention specifically addressing economic, social, cultural and environmental (ESCE) rights, and it reads as follows:

CHAPTER III ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

Article 26. Progressive Development

The States Parties undertake to adopt measures, both at the domestic level and through international cooperation, especially economic and technical, to achieve progressively the full realization of the rights derived from the economic, social, and educational norms set forth in the Charter of the Organization of American States, amended by the Protocol of Buenos Aires, to the extent of available resources, through legislative or other appropriate means.

Discussing Article 26 of the American Convention on Human Rights (ACHR) is talking about the justiciability of economic, social, and cultural rights (ESCE). According to Ramos (2021), discussing its justiciability, involves considering the “judicial (national or international) requirement for the implementation of such rights by the States” (Ramos, 2021, p. 161).

According to Ramos (2021), there are two modes of justiciability for economic, social, and cultural rights: indirect and direct. The indirect mode is the classical model of justiciability, and it is the most commonly used, given the constraints imposed by Article 26 of the American Convention on Human Rights. It involves the possibility of demanding the recognition

of social rights through a civil and political right, eliminating the hypothetical barrier between civil and social rights. On the other hand, the direct mode arises from the autonomous violation of social, economic, social, cultural, and environmental rights. Thus, the social right to health, housing, education, work, etc., is invoked directly, as traditionally occurs with civil and political rights. Article 26 of the American Convention on Human Rights and the Protocol of San Salvador on Human Rights in the Area of Economic, Social, and Cultural Rights do not adequately address the issue of economic, social, and cultural rights. Therefore, the legal strategy of demanding ESCE rights through the indirect mode of justiciability has been used in an attempt to compensate for the lack of conventional instruments for direct justiciability.

For the majority of the Inter-American Court, however, the Guevara Díaz case implied a violation of Article 26 of the American Convention on Human Rights (ACHR). This is where the significant paradigm shifts of the judgment, released in September 2022, lies.

The majority of the judges of the Court understood that Article 26 of the American Convention on Human Rights protect rights derived from economic, social, and cultural norms contained in the OAS Charter. Similarly, they recognized that the scope of these rights should be understood in relation to the other clauses of the American Convention. Therefore, States are subject to the general obligations contained in Articles 1.1 and 2 of the Convention and may be subject to the supervision of the Court. This conclusion, according to the Court, is based not only on formal issues but also results from the interdependence and indivisibility of civil and political rights and economic, social, cultural, and environmental rights, as well as their compatibility with the object and purpose of the Convention (Court IDH, 2022, § 56).

According to the Court, the objective and purpose of the Convention are the protection of fundamental human rights. In this sense, the judgment notes that human rights are interdependent and indivisible, and therefore, it does not allow the position that economic, social, and cultural rights should be exempt from the jurisdictional control of the Inter-American Court. Indeed, the Court has argued, as it did in the cases Lagos del Campo vs. Peru, Factory Workers of Santo Antônio de Jesus and Family vs. Brazil, and Laid-off Workers of Petroperu and Others vs. Peru, that the right to work is a right protected by the American Convention. In this context, it was pointed out that Articles 45.b and c, 46, and 34.g of the OAS Charter establish a se-

ries of norms that allow identifying the right to work. Based on this, the Court considered that there is a sufficiently precise reference in the OAS Charter regarding the right to work to solidify its existence and its implicit recognition by the respective Charter.

The Court also refers to the American Declaration of Human Rights, the Protocol of San Salvador, the International Covenant on Economic, Social and Cultural Rights, the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the UN Agenda 2030, and instruments from the advisory jurisdiction of UN and OAS Committees. It states that a joint interpretation of Articles 1.1, 24, and 26 of the American Convention on Human Rights (ACHR) imposes a specific obligation on States to protect the right to work of persons with disabilities. In other words, there is a special duty to protect the rights of individuals in situations of vulnerability, including persons with disabilities. This duty sometimes involves the protection of the right to work. Therefore, States must refrain from, and more than that, prevent actions that violate the right to work as a result of discriminatory acts. They must also adopt positive measures aimed at achieving greater protection, taking into account the particular circumstances of persons with disabilities.

Considering the above, this Court warns that there is a reinforced obligation on States to respect the right to work of people with disabilities in the public sphere. This obligation translates, first of all, into the prohibition of practicing any act of discrimination on grounds of disability related to the enjoyment of their labor rights, particularly with regard to job selection and hiring, as well as permanence in the position, promotion and working conditions; and, secondly, derived from the mandate of real or material equality, in the obligation to adopt positive measures for the labor inclusion of people with disabilities, which must aim to progressively remove barriers that prevent the full exercise of their labor rights. In this way, States are obliged to adopt measures so that people with disabilities have effective and equal access to public competitions through professional training and education, as well as the adoption of special adaptations in evaluation mechanisms that allow participation on equal terms, conditions, and employing people with disabilities in the public sector (Corte IDH, 2022, § 73).

In this sense, the Court, by majority, understood that there was a direct violation of Article 26 of the American Convention on Human Rights.

Judge Humberto Sierra Porto, in turn, issued a partially dissenting vote regarding the Court's judgment, arguing that the right to work should not be considered an autonomous right in the specific case. He believed that the violation of Article 26 of the American Convention on Human Rights was not established (Court IDH, 2022a, § 2).

Judge Patrícia Peres Goldberg (Court IDH, 2022b), in line with Judge Humberto Porto, issued a partially dissenting vote also to discuss the competence of the Inter-American Court in matters of economic, social, and cultural rights. In her view, "Conceiving Article 26 of the Convention as a referral norm to all ESCE rights, which would be included in the OAS Charter ignores the commitment adopted by the States" (Court IDH, 2022b, § 8).

Regarding the dissenting votes, Judge Rodrigo Mudrovitsch, appointed by the Brazilian government in 2020, expresses concern in his technical and extensive concurring vote about the disagreement regarding the recognition of the violation of Article 26 of the American Convention on Human Rights. For him, the direct justiciability of economic, social, and cultural rights is an element already incorporated into the IAHRS (Court IDH, 2022c, § 18) and is in accordance not only with the Court's language but also with that of the States and other actors who, according to him, form an open society of interpreters of the Convention, using the well-known expression of Peter Häberle (2002). For the most recent Judge of the Inter-American Court of Human Rights (Court IDH, 2022c, § 6),

the path forward, therefore, is not to deconstruct the block of precedents that recognize the justiciability of the DESC, but rather to evolve in the development of solid reparatory parameters for the interpretation and application of Article 26 of the Convention. The central problem, in my opinion, is not exactly in recognizing the existence of a violation of such a conventional precept, but in defining the appropriate way to repair it, which implies considerations about the decision-making technique and the appropriate choice of remedies to be applied.

In a well-founded argument, the Brazilian Judge of the Court argues that it is not for the judge to interpret human rights in a restrictive manner, as done by the judges who adhered to the minority position in the Court, especially considering the historical-legal tradition of Latin America. It is enough to recall the fact that the Mexican Constitution of 1917 acts as a

driving force for the social constitutionalism it inaugurated, addressing fundamental issues such as those of Antidiscrimination Law. Therefore, the Inter-American Court cannot decide in isolation from social reality. Hence, the promotion of dialogue between courts, with decisions of the Inter-American Court being another standard to be taken into account in domestic law.

V. FINAL CONSIDERATIONS

In light of the above, it is possible to conclude that the ISHR has been reformulated, including regarding the composition of the I/AC HR, in order to increasingly enable the direct justiciability of ESC rights and, consequently, the recognition that the progressive development referred to in Article 26 of the ACHR is more than a mere interpretative vector or a suggestion to the member states, constituting a true guideline in the fight against discrimination of vulnerable groups by non-inclusive state public policies. This requires a concerted effort by the ISHR to finally recognize the indivisibility of human rights.

That is to say, there is no adequate exercise of civil and political rights without the counterpart of economic, social, cultural, and environmental rights. Indeed, in the words of Isaiah Berlin (2002, p. 231), “to offer political rights or safeguards against state intervention to illiterate, undernourished, or sick individuals is to mock their condition: they need medical assistance or education before they can understand or benefit from an increase in their freedom”.

Therefore, with this research, the intention was to contribute to a discussion based on a case that is still relatively unexplored in the academic scene, aiming to provide support for further studies and deeper analyses regarding the justiciability of economic, social, cultural, and environmental rights and Antidiscrimination Law precisely in a region where such issues are highly relevant to the legal tradition.

The case, most certainly, establishes a new understanding by the Inter-American Court of Human Rights regarding the principle of progressive development and proves to be a significant precedent that solidifies the interdependence and indivisibility of civil, political, social, economic, cultural, and environmental rights.

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Cómo citar

Sistema IIJ

Lucas, Doglas Cesar y Copetti Santos, André Leonardo, “An intruder body”. Antidiscrimination law and the justiciability of the economic, social and cultural rights in the Inter-American Court of Human Rights: an analysis based on the *Case of Guevara Díaz vs. Costa Rica*, *Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, México, vol. 26, núm. 52, enero-junio de 2025, e18864. <https://doi.org/10.22201/ijj.24484881e.2025.52.18864>

APA

Lucas, D. C. y Copetti Santos, A. L. (2025). “An intruder body”. Antidiscrimination law and the justiciability of the economic, social and cultural rights in the Inter-American Court of Human Rights: an analysis based on the *Case of Guevara Díaz vs. Costa Rica. Cuestiones Constitucionales. Revista Mexicana de Derecho Constitucional*, 26(52), e18864. <https://doi.org/10.22201/ijj.24484881e.2025.52.18864>