

**OC - (ILA-14160) - THE EVOLVING INTERPRETATION OF THE RIGHT TO EQUALITY OF LGTBI PERSONS: A STUDY OF THE METHODS USED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS TO ASSESS THE EVOLUTION OF ARTICLE 24 OF THE AMERICAN CONVENTION IN CASES CONCERNING LGTBI RIGHTS**

Tainá Garcia Maia (Germany)<sup>1</sup>

1 - University of Münster

**Tainá Garcia Maia**

Admitted PhD fellow in the University of Münster (starting on September 2019), Master in the Theory and Practice of Human Rights (University of Oslo, 2019), and Bachelor of Laws with a Minor in History (Federal University of Minas Gerais, 2015). Visiting Professional at the Inter-American Court of Human Rights (2018) and Special Adviser at the Permanent Mission of Brazil to the United Nations (2015).

**Abstract**

The American Convention on Human Rights (ACHR) was adopted in 1969, in order to consolidate “within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man” in the American continent (ACHR, Preamble, para.1). The Convention contains 82 provisions, among which 22 safeguard a determined array of civil and political rights, and one establishes the obligation of states parties to adopt measures in order to progressively achieve “the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the Charter of the Organization of American States [OAS]” (ACHR, Article 26). Yet, since its adoption, the ACHR has evolved and expanded in light of changing times and new living conditions. This expansion has not only taken place through the adoption of additional protocols, but also through the practice of the Inter-American Court of Human Rights (IACtHR) itself, as an interpreter of the American Convention. The Court has engaged in an evolutive interpretation of the ACHR, reached in light of a comparative study of international instruments, including rules and soft law instruments adopted outside of the Inter-American System of Human Rights.

Yet, to affirm that human rights treaties evolve does not clarify how this evolution takes place. In other words, how do courts assess the extent to which a given provision has evolved, and what are the elements that should be taken into consideration in this analysis? In the understanding of the IACtHR, put forward in its 1999 *Advisory Opinion on the Right to Consular Information*, “the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty [...], but also the system of which it is part” (IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, 1999, para.113). In other words, the international legal system to which a given treaty is part and the instruments

that compose it may offer guidance to an interpreter. In the understanding of the IACtHR, “[t]his guidance is particularly relevant in the case of international human rights law, which has made great headway thanks to an evolutive interpretation of international instruments of protection” (IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, 1999, para.114).

Accordingly, the IACtHR has often looked for guidance in external sources during the interpretation of the ACHR. By external sources, this abstract refers to instruments of international law that do not integrate the legal framework of the Inter-American System of Human Rights. Examples of such sources that have guided the decisions of the IACtHR include United Nations treaties, rules emanating from the European Council and even soft law instruments. By applying the technique of external referencing as a tool for the evolutive interpretation of the ACHR, the Court has recognized a series of rights, including some that are directly related to the right to equality.

The research that is here proposed will analyse the methodology used by the IACtHR to apply the evolutive interpretation of Article 24 of the ACHR (right to equal protection) in relation to the rights of LGTBI persons, which resulted in the expansion of the content and scope of the right to equality under the American Convention. To conduct this investigation, the article will engage in a critical study of relevant cases from the IACtHR, assessing the conclusions of the Court in light of the VCLT/69 and related theories on treaty interpretation. The case of *Attala Riffo and Daughters v. Chile* (2012) and the Court’ Advisory Opinion *on gender identity and equality and non-discrimination of same-sex couples* (OC-24, from 2017) will be of particular relevance to the research.

Three reasons explain the choice of the researcher to focus on equality cases concerning the rights of LGTBI persons. First, in the two decisions mentioned above, the IACtHR expressly engaged in a discussion of the meaning and scope of equality. Second, some of the decisions of the Court on this topic, including the abovementioned Advisory Opinion OC-24, prompted a significant public debate within Member States of the Organization of American States. The advisory opinion in question was even met with inquiries concerning the legitimacy of the Court. Hence, these cases constitute good illustrations of the importance of investigating the legal basis of the technique of external referencing as a tool for the evolutive interpretation of the ACHR. Finally, some of the cases on this topic constitute good examples of the use of soft law instruments by the IACtHR during the interpretation of the American Convention.