

# **DERECHO AL TRABAJO Y A UNA JUSTA RETRIBUCIÓN EN LA DECLARACIÓN AMERICANA DE LOS DERECHOS Y DEBERES DEL HOMBRE**

## ***THE RIGHT TO WORK AND TO FAIR REMUNERATION IN THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN***

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### **RESUMEN:**

La Declaración Americana de los Derechos y Deberes del Hombre fue uno de los primeros instrumentos internacionales de derechos humanos en consagrar el derecho de toda persona al trabajo y a una justa retribución. Con motivo de su 70 aniversario, este artículo hace un repaso del proceso de redacción del artículo XIV sobre el derecho al trabajo, así como del desarrollo posterior y de la protección legal del mismo en el marco del sistema interamericano de derechos humanos. El estudio de la práctica de la Comisión y del Corte Interamericanos de Derechos Humanos permitirá demostrar el valor actual de la Declaración Americana para la interpretación y la protección efectiva del derecho al trabajo.

**PALABRAS CLAVES:** Derecho al Trabajo, Justa Retribución, Derechos Humanos.

### **ABSTRACT**

The American Declaration of the Rights and Duties of Man became one of the first international human rights instruments to enshrine every person's right to work and to fair remuneration. On the occasion of its 70<sup>th</sup> anniversary, this article provides an overview of the drafting history of the article XIV on the right to work, as well as subsequent normative development and legal protection thereof in the context of the inter-American human rights system. An overview of the case-law of the Inter-American Commission and Court of Human Rights will allow to demonstrate the value

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of the American Declaration for the interpretation and effective protection of the right to work.

**KEYWORDS:** Right to Work, Fair Remuneration, Human Rights.

**SUMMARY:** INTRODUCTION. 1. DRAFTING HISTORY OF THE ARTICLE XIV OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN 1.1. The right to work in the preliminary draft of the American Declaration formulated by the Inter-American Juridical Committee 1.2. The right to work in the final draft of the American Declaration formulated by the Inter-American Juridical Committee 1.3. The right to work and to fair remuneration in the final text of the American Declaration 1.4. Normative development of the right to work and to fair remuneration after the American Declaration 2. THE RIGHT TO WORK AND TO FAIR REMUNERATION IN THE PRACTICE OF THE INTER-AMERICAN COMMISSION AND COURT OF HUMAN RIGHTS. 2.1. The right to work and to fair remuneration in the practice of the Inter-American Commission on Human Rights 2.2. The right to work and to fair remuneration in the practice of the Inter-American Court of Human Rights. CONCLUSION.

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## INTRODUCTION

The year 2018 marked the 70<sup>th</sup> anniversary of the American Declaration of the Rights and Duties of Man, also known as “Bogotá Declaration”, adopted by Resolution XXX of the Final Act of the Ninth International Conference of American States on 2 May 1948.

The Declaration was not conceived by the adopting States as a binding instrument. As Inter-American Juridical Committee noted a year after the adoption of the Resolution XXX, “the Declaration of Bogotá does not create a legal contractual obligation” and lacks the status of “positive substantive law”<sup>2</sup>. The text of the

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<sup>2</sup> See BUERGENTHAHL, T., “The Revised OAS Charter and the Protection of Human Rights”, *American Journal of International Law*, Vol. 69, N 4 (1975), p. 829, citing Inter-American Juridical Committee, Report to the Inter-American Council of Jurists Concerning Resolution XXXI of the Bogotá Conference,

Declaration itself refers to the instrument as the “initial system of protection considered by the American States as being suited to the present social and juridical conditions”<sup>3</sup>, an intermediate step toward further progressive development of inter-American system of human rights. However, as many authors have claimed, certain legal changes in the inter-American system, as well as the use that the Inter-American Commission and the Court have made of the Declaration and its *travaux préparatoires* over the years, led to significant strengthening of the normative value of this instrument<sup>4</sup>.

Buergenthal alludes to the dual nature of the American Declaration, being at the same time a political manifest and a normative instrument<sup>5</sup>. As the author explains, as a political manifest, the Declaration expresses the hopes and aspirations of the American peoples. At the same time, as a normative instrument, it lays down legal foundation for the promotion and protection of human rights in the inter-American system, thus, becoming a normative bridge between the Charter of the Organisation of the American States and the American Convention on Human Rights<sup>6</sup>.

In this regard, it is fitting to refer to the advisory opinion of the Inter-American Court of Human Rights on the interpretation of the American Declaration, in which the Court points out that in order to determine the current legal status of this instrument, “it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in

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September 26, 1949, reprinted in Pan American Union, *Human Rights in the American States* (1960), pp. 164, 165.

<sup>3</sup> American Declaration of the Rights and Duties of Man, introduction, para. 4.

<sup>4</sup> See on the legal effects of the Declaration, for example, BUERGENTHAL, T., “La relación conceptual y normativa entre la Declaración Americana y la Convención Americana sobre derechos humanos”, *Revista Instituto Americano de Derechos Humanos*, número especial en conmemoración del cuadragésimo aniversario de la Declaración Americana de Derechos y Deberes del Hombre, 1ª ed., 1989, pp. 116-117; NIKKEN, P., “La Declaración Universal y la Declaración Americana. La formación del moderno derecho internacional de los derechos humanos”, *Revista Instituto Interamericano de Derechos Humanos*, *op. cit.*, pp. 83 y ss.; BUERGENTHAL, T., “The Revised OAS Charter and the Protection of Human Rights”, *op. cit.*, p. 835; MONROY CABRA, M. G., “Aplicación de la Declaración Americana de Derechos y Deberes del Hombre por la Comisión Interamericana de Derechos Humanos”, *Revista Instituto Interamericano de Derechos Humanos*, *op. cit.*, p. 134.

<sup>5</sup> BUERGENTHAL, T., “La relación conceptual y normativa entre la Declaración Americana y la Convención Americana sobre derechos humanos”, *op. cit.*, p. 112

<sup>6</sup> *Ibid.*

1948"<sup>7</sup>. The Court concludes that the fact that the Declaration was not conceived as a treaty does not prevent it from having legal effect under certain conditions<sup>8</sup>.

Regardless of the extent of its binding legal effects, the moral, political and normative value of this document for the protection of fundamental rights and freedoms on the American continent is undeniable. Buergenthal referred to it as a *Carta Magna* of the inter-American system of human rights<sup>9</sup>. Its entire content lays foundation for human rights as inherent to human personality, indivisible, interdependent and of universal character. As a pioneer instrument that enshrined a comprehensive set of civil, political, economic, social and cultural rights and freedoms, the American Declaration, in the words of Cançado Trindade, advanced the integral vision of human rights and highlighted the correlation between the rights and the duties<sup>10</sup>.

Among the rights contemplated in the American Declaration, the article XIV became the one to enshrine the right to work and to fair remuneration, as one of the 'new' socio-economic rights. Thus, the Declaration became one of the first international instrument to include this right as subject to respect and protection by the States.

Nowadays, the right to work is recognized in several international and regional legal instruments<sup>11</sup>, as well as set forth in the national constitutions across the world<sup>12</sup>.

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<sup>7</sup> IACtHR, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights, 14 July 1989, para. 37, p. 10.

<sup>8</sup> *Id.*, para. 45: "For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2)(b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization"; para. 46: "For the States Parties to the Convention, the specific source of their obligations with respect to the protection of human rights is, in principle, the Convention itself. It must be remembered, however, that, given the provisions of Article 29(d), these States cannot escape the obligations they have as members of the OAS under the Declaration..."; and para. 47: "That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect..."

<sup>9</sup> BUERGENTHAL, T., "La relación conceptual y normativa entre la Declaración Americana y la Convención Americana sobre derechos humanos", *op. cit.*, p. 111.

<sup>10</sup> CANÇADO TRINDADE, A. A., "El sistema interamericano de protección de los derechos humanos (1948-1955): evolución, estado actual y perspectivas", in BARDONNET, D., CANÇADO TRINDADE, A. A. (eds.), *Derecho internacional y derechos humanos: libro conmemorativo de la XXIV sesión del programa exterior de la Academia de Derecho Internacional de la Haya, San José (Costa Rica) 24 de abril - 6 mayo de 1995*, Instituto Interamericano de Derechos Humanos, San José / la Haya, 1996, p. 49.

<sup>11</sup> See, for example, Universal Declaration of Human Rights, adopted 10 May 1948, art. 23; International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966, art. 6; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", adopted 17 November 1988, art. 6; European Social Charter of 1996 (revised), part II. Art. 1; African Charter of Human and Peoples' Rights, adopted June 1981, art. 15.

<sup>12</sup> See *infra* note 59.

Article 6 of the International Covenant on Social, Economic and Cultural Rights probably deals with this right more comprehensively than any other instrument, while the commentary provided by the respective UN Committee contributes to the interpretation of the scope and the content of the right to work<sup>13</sup>.

This right is intrinsically linked to human dignity, being essential for achieving an adequate standard of living of the individual and his/her family and, ultimately, ensuring necessary conditions for unhindered development of human personality according to his/her values and aspirations and recognition within the community.

As a fundamental human right, it has a core intangible content, that cannot be altered or subject to conditions and must be respected and protected at all times. In its modern understanding, the individual right to work implies at least an access to employment in the conditions of equality and non-discrimination, a freedom to accept or choose work without being forced, as well as the right not to be unfairly deprived of employment<sup>14</sup>. Furthermore, in order to ensure decent living of the individual and his/her family, the employment must be respectful of the fundamental rights of the worker in terms of safety, remuneration and physical and mental integrity<sup>15</sup>.

While State parties to the various legal instruments that establish the right to work are under general obligation to ensure its progressive realization aiming at achieving full employment, there are specific obligations requiring States to respect the right to work by prohibiting forced labour or limitation of the equal access to employment; to protect it through legislative, administrative, judicial and other measures ensuring equal access to decent work and preventing abuses by non-State actors; and to fulfil the right to work through recognizing it in national legal systems and implementing measures aimed at countering unemployment<sup>16</sup>.

The authors of the American Declaration had considered many of those aspects of the right to work in the process of elaboration of the document, as will be demonstrated further.

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<sup>13</sup> UN Committee on Economic, Social and Cultural Rights, General Comment No. 18: The right to work (art. 6) (2005)

<sup>14</sup> *Id.*, paras. 1-4, 6.

<sup>15</sup> *Id.*, para. 7.

<sup>16</sup> *Id.*, paras. 19-28.

Thus, the first part of this article will provide an overview of the drafting process of the article XIV, from the first draft of the Declaration toward its final formulation, as well as explore the reasoning of the drafters behind chosen wording and suggested amendments. It will also take stock of the normative development of the right to work in the inter-American human rights system after the adoption of the American Declaration. The second part of the article will focus on the contribution of the Inter-American Commission and the Court of Human Rights in relation to the protection of the right to work.

## **1. DRAFTING HISTORY OF THE ARTICLE XIV OF THE AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN**

### **1.1. The right to work in the preliminary draft of the American Declaration formulated by the Inter-American Juridical Committee**

Resolution XL adopted during the 1945 Conference on Inter-American Problems of War and Peace in Mexico City commissioned the drafting of a declaration on human rights to the Ninth International Conference of American States<sup>17</sup>. In accordance with this resolution, the Inter-American Juridical Committee prepared a preliminary draft of the text of the Declaration and distributed it among the governments so that they could present their comments and observations.

The members of the Committee saw it necessary to include not only ‘traditional’ freedoms that had been recognized in most of the national constitutions, but also ‘new’ economic and social rights, as an expression of the concept of a democratic State pursuing well-being of all its members<sup>18</sup>. Among these ‘new’ rights were the right to

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<sup>17</sup> Resolution XL, “Protección internacional de los derechos esenciales del hombre”, adopted at the plenary session on 7 March 1945, in PAÚL, A., *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana*, Universidad Nacional Autónoma de México, México, 2017, Annexes, p. 87.

<sup>18</sup> *Id.*, Inter-American Juridical Committee, Informe anexo al anteproyecto de Declaración de los Derechos y Deberes Internacionales del Hombre, p. 111.

property, participation in the benefits of science, social security and education, as well as the right to work, set forth in the article XIV of the preliminary draft<sup>19</sup>.

The drafters of the document expressly pointed out that classification of the right to work as a socio-economic right by no means deprived it of its fundamental nature, recognizing, at the same time, its historic character<sup>20</sup>. The authors of the draft alluded to the 1848 French Constitution as a starting point of the emergence of the right to work – even though it had not been included in the final text of the Constitution, its authors discussed extensively the inclusion thereof in the document<sup>21</sup>. Among other precursors of the right to work, the members of the Juridical Committee referred to the 1944 speech of the US President Franklin Roosevelt on the acceptance of the so-called ‘second Bill of Rights’, in which he placed “the right to a useful and remunerative work in the industries or shops or farms or mines of the Nation” on the first place among the socio-economic rights<sup>22</sup>, and the Declaration of Philadelphia adopted by the General Conference of the International Labour Organisation on 17 May 1944<sup>23</sup>. The latter set forth a principle, according to which “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity”<sup>24</sup>, while establishing the obligation of the Organisation to fulfil this principle by furthering the programmes aimed at achieving full employment<sup>25</sup>.

The authors of the draft explained the need for recognizing and protecting the right to work in the Declaration by referring to the examples of massive unemployment at the time, which required intervention of the State as regulator of the private industry in order to ensure employment opportunities that would allow individuals to earn a

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<sup>19</sup> *Id.*, Inter-American Juridical Committee, Anteproyecto de Declaración de los Derechos y Deberes Internacionales del Hombre, arts. VIII, XIV-XVII, pp. 99, 101-102.

<sup>20</sup> *Id.*, Informe anexo al anteproyecto de Declaración de los Derechos y Deberes Internacionales del Hombre, p. 131.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Id.*, p. 131. Referring to “State of the Union Message to Congress”, 11 January 1944, transcription retrieved 1 Oct 2018, from [http://www.fdrlibrary.marist.edu/archives/address\\_text.html](http://www.fdrlibrary.marist.edu/archives/address_text.html).

<sup>23</sup> *Ibid.*, referring to “ILO Declaration of Philadelphia: Declaration concerning the aims and purposes of the International Labour Organisation”, ILO, 10 May 1944.

<sup>24</sup> ILO Declaration of Philadelphia, part II (a).

<sup>25</sup> *Id.*, part III.

living with their own effort<sup>26</sup>. The drafters pointed out the incompatibility of sustaining oneself through benefitting from charities or government aid with human dignity<sup>27</sup>.

Accordingly, for the members of the Juridical Committee, the purpose and the essence of the right to work consisted in ensuring that every individual had the means to sustain him/herself and to contribute to the maintenance of his/her family<sup>28</sup>. According to the drafters, the right to work primarily encompassed the right of the individual to follow his/her vocation freely, in as much as existing job opportunities allowed for that. As a means of ensuring the realization of this right, the article provided for the right to change job and the freedom of movement associated with the change of employment. The authors of the draft also included the right to form workers' and professional unions in the article XIV, having considered that it was closely connected with the right to work.

Furthermore, the drafters saw it necessary to emphasize the reciprocal character of the rights and duties in relation to work between the individual and the State, as well as between the individuals. Accordingly, the work was envisioned not only as a right, but a duty of a person to contribute to the well-being of the State. The State was expressly entitled to claim the services of an individual in case of public emergency. The article also described in general terms the obligations of the State in relation to the right to work, which included a duty to assist the individual in realization of his/her right to work when his/her own efforts were not sufficient to obtain employment; to make every effort to promote the stability of employment and to ensure proper working conditions by establishing minimum standards of just remuneration.

Although the drafters included the duties of the State aimed at achieving the realization of the right to work in the text of the article, they recognized that the practical implementation thereof presented difficulties<sup>29</sup>. This, in turn, explained why

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<sup>26</sup> Informe anexo al anteproyecto de Declaración de los Derechos y Deberes Internacionales del Hombre, *op. cit.*, p. 131.

<sup>27</sup> *Ibid.*

<sup>28</sup> See Anteproyecto de Declaración de los Derechos y Deberes Internacionales del Hombre, *op. cit.*, art. XIV.

<sup>29</sup> Informe anexo al anteproyecto de Declaración de los Derechos y Deberes Internacionales del Hombre, *op. cit.*, p. 132.



the right to work and the corresponding duties of the State could be articulated in the draft of the Declaration only in general terms<sup>30</sup>.

The drafters explained the general character of the wording corresponding to the right to work by referring to the fact that its full realization could only be attained by stages and by means chosen in accordance with the particular conditions of every country. Additionally, they reiterated the importance of balance between the right to work and the right to personal freedom, referring to the Economic Charter of the Americas, which proclaimed the “rising levels of living and the economic liberty that will encourage full production and employment” as two pillars of a positive economic program<sup>31</sup>. Therefore, State’s intervention aimed at realization of the right to work could by no means enter in conflict with the right to personal liberty and lead to situations in which a democratic State turned into totalitarian regime due to the excessive regulation of economic activity<sup>32</sup>.

## **1.2. The right to work in the final draft of the American Declaration formulated by the Inter-American Juridical Committee**

The Juridical Committee forwarded their preliminary draft of the Declaration for consideration of the national governments. After having received and considered various comments by the States, the Committee prepared the final draft of the document.

In the final draft presented for consideration of the American governments at the Ninth International Conference, the text of the article establishing the right to work got substantially modified. Taking account of the critical observations regarding the preliminary draft of the document, the Committee opted for tighter formulations, omitting the details and focusing on the fundamental principles<sup>33</sup>. Besides, as the Committee observed, the guarantees related to the protection of the right to work had

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<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, referring to the Economic Charter of the Americas, US Economic and Industrial Proposals made at Inter-American Conference, 26 Feb 1945, New York Times, preamble, para. 3.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.*, Inter-American Juridical Committee, Informe Anexo al Proyecto Definitivo de Declaración de los Derechos y Deberes Internacionales del Hombre, p. 176.

been included in the project of the Inter-American Charter of Social Guarantees in a more detailed way<sup>34</sup>.

Thus, in the final draft, the Committee deleted from the text of the article XIV the reference to the right to form workers' and professional unions and to the power of the State to demand the services of the individual in case of public emergency<sup>35</sup>. The Committee observed that the latter was redundant, because the article 2 already mentioned this State power in connection with the right to personal liberty<sup>36</sup>. At the same time, the drafters added a reference to the right to support and protection for those who are unable to sustain themselves and the corresponding State duty to ensure such protection. This right was initially part of the article I on the right to life. However, the authors of the draft observed that it had closer connection with the right to work<sup>37</sup>.

The delegates of the States had once again the opportunity to present their comments on the final draft of the Declaration. The majority of the proposed amendments did not concern the formulation of the right to work. It can be mentioned that the alternative draft presented by Panama suggested to abridge the wording of the article as to include the right to work of every person and the corresponding State duty to take such measures as may be necessary to ensure that all its residents have an opportunity for useful work<sup>38</sup>.

### **1.3. The right to work and to fair remuneration in the final text of the American Declaration**

The Sixth Commission of the Ninth Conference established a working group on human rights during its third session. This working group was mandated to prepare the final text of the American Declaration that could serve as a base text for further debates of the Commission. The Sixth Commission indicated three sources that were to serve as

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<sup>34</sup> *Id.* Referring to the Project of Inter-American Charter of Social Guarantees formulated by the Inter-American Juridical Committee for consideration at the Ninth International Conference of American States, Pan American Union, Washington, 1948.

<sup>35</sup> *Id.*, Inter-American Juridical Committee, Proyecto de Declaración de los Derechos y Deberes internacionales del Hombre, art. XIV, p. 167

<sup>36</sup> *Id.*, Informe Anexo al Proyecto Definitivo de Declaración de los Derechos y Deberes Internacionales del Hombre, p. 174.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Id.*, Proyecto de Declaración de los Derechos y Libertades Fundamentales del Hombre, proposal by Panama, p. 182.

a foundation for elaboration of the final text of the Declaration: 1) the final draft of the Declaration formulated by the Juridical Committee and presented for consideration on 8 December 1947; 2) the amendments and the observations presented by the delegations of the States at the Ninth Conference; and 3) the Draft International Declaration on Human Rights formulated by the Commission on Human Rights of the United Nations during its second session held at Geneva from 2 to 17 December 1947<sup>39</sup>. The latter refers to the document later adopted as the Universal Declaration of Human Rights by the United Nations General Assembly on 10 December 1948. It is interesting to note, that although the adoption of the American Declaration preceded the Universal Declaration by several months, the drafting and negotiating process of both documents had been taking place almost simultaneously<sup>40</sup>. The mutual influence between the two Declarations is undeniable<sup>41</sup>.

Both, the draft American Declaration of the Juridical Committee and the Draft International Declaration on human rights referred to States' obligations in relation to the right to work. However, one of the most significant changes introduced by the working group concerned the references to the duties of the States aimed at ensuring effective realization of the corresponding rights. The working group decided to delete them from the final text having considered that they would water down the wording of the articles and diminish the clarity of the Declaration<sup>42</sup>. For similar reasons, separate references to the situations in which the State was required to establish the limits on the exercise of a particular right were deleted from the final text. In this case, the working group found inspiration in the draft of the UN Declaration, which consolidated the grounds for limitation of the rights in a single article<sup>43</sup>. Additionally, the members of the working group decided not to follow the method of the Juridical Committee regarding the formulation of the rights and corresponding duties of the individual in the same

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<sup>39</sup> *Id.*, Informe del Relator del Grupo de Trabajo sobre Derechos del Hombre, p. 184.

<sup>40</sup> See SCHABAS, W. A. (ed.), *The Universal Declaration of Human Rights: the travaux préparatoires*, Cambridge University Press, Cambridge, 2013.

<sup>41</sup> See, for example, PAÚL, A., *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana*, op. cit., pp. 2-5; GLENDON, M. A., "The Forgotten Crucible: The Laton American Influence on the Universal Human Rights Idea", *Harvard Human Rights Journal*, Vol. 16 (2003), pp. 27-40.

<sup>42</sup> Informe Anexo al Proyecto Definitivo de Declaración de los Derechos y Deberes Internacionales del Hombre, op. cit., p. 185

<sup>43</sup> *Id.*, referring to the Draft International Declaration on Human Rights, art. 2: "In the exercise of his rights everyone is limited by the rights of others and by the just requirements of the democratic State", in SCHABAS, W. A. (ed.), *The Universal Declaration of Human Rights: the travaux préparatoires*, op. cit., p. 1342.

article, but to consolidate all references to the individual duties in a specially designated part of the Declaration (part II). They observed that this would make the text of the Declaration more clear and apprehensible<sup>44</sup>.

Consequently, the final version formulated by the working group introduced several amendments to the text of the article XIV<sup>45</sup>. The first important modification concerned the very title of the article, which now also featured the right to fair remuneration. In accordance with the amended title, the drafters emphasized the right of every person who works to receive remuneration in proportion to his/her capacity and skills and that would ensure a standard of living suitable for him/herself and his/her family. The preceding draft of the Juridical Committee only mentioned the duty of the State to establish the minimum standards of fair remuneration but did not treat it as a separate right. Another important amendment introduced by the working group specified that every person was not only entitled to the right to work, but to work under proper conditions. Finally, as have been mentioned above, the references to the State duties in relation to the effective realization of the right to work and to the individual duty to work for the well-being of the State were deleted from the article XIV. The individual duty to work was, instead, moved to the new article XXXVII and formulated in a less rigorous way, compared to the draft of the Juridical Committee. The latter stipulated the duty of every person to work for the well-being of the State in an imperative and unconditional manner. According to the new wording, “it is the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community”<sup>46</sup>.

The article XIV on the right to work and to fair remuneration was voted in favour by the State delegates without any amendments or objections during the 5<sup>th</sup> session of the 6<sup>th</sup> Commission on 22 April 1948 with the following wording<sup>47</sup>:

“Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.

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<sup>44</sup> Informe Anexo al Proyecto Definitivo de Declaración de los Derechos y Deberes Internacionales del Hombre, *op. cit.*, p. 186.

<sup>45</sup> PAÚL, A., *Los trabajos preparatorios de la Declaración Americana de los Derechos y Deberes del Hombre y el origen remoto de la Corte Interamericana*, *op. cit.*, Annexes, Declaración Americana de los Derechos y Deberes Esenciales del Hombre: Proyecto de Texto, art. XIV, p. 189.

<sup>46</sup> *Id.*, p. 192.

<sup>47</sup> *Id.*, Acta resumida de la quinta sesión de la Comisión Sexta, p. 277.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.”

The article XXXVII on the duty to work was approved during the 8<sup>th</sup> session on 24 April 1948, although the delegates of the United States and Nicaragua made their observations regarding the formulation of the duty<sup>48</sup>. The representative from Nicaragua demanded to put on record that the interpretation of the duty to work did not put the limits on the right to strike<sup>49</sup>.

The representative of the United States questioned whether the duty to work impeded a possibility to dedicate oneself to a leisure activity in case when an individual did not need to work to earn a living<sup>50</sup>. In effect, the wording of the article seems to imply that a person cannot decide not to work even in case of alternative sources of livelihood being available to him/her. As Paúl observes, such interpretation follows from the understanding of the human dignity being the foundation of the human rights rather than personal autonomy<sup>51</sup>. The idea of duties as an expression of dignity of the individual liberty exalted by rights can be observed throughout the statements of the document drafters. The Juridical Committee reiterated that a person could not enjoy the benefits of the civilization unless he/she participated in the attainment of the broad goals of the State, law, order, justice and general well-being<sup>52</sup>, and, therefore, some rights were to be exercised in the benefit of the community and maintenance of order and public security<sup>53</sup>. Similarly, the working group of the Sixth Commission emphasized the correlation between the rights and the duties as an essential condition for the exercise of human rights<sup>54</sup>.

Consequently, the observation by the delegate of the United States did not affect the final wording of the article, voted in favour without any modifications.

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<sup>48</sup> *Id.*, Acta resumida de la octava sesión de la Comisión Sexta, p. 299.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Id.*, p. 48.

<sup>52</sup> *Id.*, referring to Informe Anexo al Proyecto Definitivo de Declaración de los Derechos y Deberes Internacionales del Hombre, *op. cit.*, p. 130.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Id.*, referring to Informe del Relator del Grupo de Trabajo sobre Derechos del Hombre, *op. cit.*, p. 186. See also on the duty of work in the American Declaration, BADILLA, A. E., URQUILLA BONILLA, C. R., “El derecho al trabajo en el Sistema Interamericano de Derechos Humanos”, p.195, retrieved 1 Oct 2018, from <http://www.corteidh.or.cr/tablas/a22091.pdf>.

#### **1.4. Normative development of the right to work and to fair remuneration after the American Declaration**

The Draft Inter-American Convention on Protection of Human Rights, elaborated by the Inter-American Juridical Committee in accordance with the resolution VII of the 5<sup>th</sup> Reunion of Foreign Ministers, contemplated 21 article establishing social, economic and cultural rights, including the right to freely chosen work<sup>55</sup>. The Second Special Inter-American Conference resolved to send the draft for further deliberation to the Council of the OAS upon receiving the views of the Inter-American Commission on Human Rights. However, the Commission suggested that it was not necessary to reproduce the provisions on the economic, social and cultural rights in the Convention, since they were substantially incorporated into the Protocol of Amendment to the OAS Charter<sup>56</sup>. Ultimately, the only reference to this category of rights appears in the article 26 of the American Convention on Human Rights<sup>57</sup>, establishing States' duty to adopt measures "with a view to achieving progressively" "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 as amended by the Protocol of Buenos Aires".

It was not until the adoption of the Protocol of San Salvador in 1988, that the right to work was established in a legally binding instrument, as a right "which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity". The article 6 of the protocol also establishes the duty of the State Parties to "adopt measures that will make the right to work fully effective", emphasizing the need to ensure suitable family care, which would contribute to the exercise of the right to work by women. However, the right to work was not made subject to protection through the system of individual petitions<sup>58</sup>. Instead, it is subject to a supervision mechanism through presentation of the periodic reports by the State Parties on the "progressive measures they have taken to ensure due respect for the rights set forth in this Protocol".

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<sup>55</sup> "The draft Inter-American Convention on Human Rights prepared by the Inter-American Council of Jurists", *Inter-American Yearbook on Human Rights 1968*, General Secretariat of the OAS, Washington, 1973, p. 68.

<sup>56</sup> *Id.*, The Opinion prepared by the Inter-American Commission on Human Rights, p. 91.

<sup>57</sup> American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, adopted 22 November 1969

<sup>58</sup> Protocol of San Salvador, *supra* note 11, art. 19 (6).

Although the wording may vary, the right to work and to fair remuneration also found its way to the national constitutions of the American States<sup>59</sup>, while their courts contribute to the interpretation and understanding of the essential content of this right<sup>60</sup>.

## **2. THE RIGHT TO WORK AND TO FAIR REMUNERATION IN THE PRACTICE OF THE INTER-AMERICAN COMMISSION AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS**

As a preliminary observation, it can be pointed out that the right to work has not been receiving the attention it deserves in the context of the inter-American human rights system. As López-Patrón suggests, the reason for that is not the absence of the infringements of this right, but the severity of violations of other human rights<sup>61</sup>. However, as will be explained below, the American Declaration continues to be an instrument of great relevance for both the Inter-American Commission and the Court of Human Rights, including in relation to the protection of the right to work.

### **2.1. The right to work and to fair remuneration in the practice of the Inter-American Commission on Human Rights**

At the time of the adoption, the American Declaration did not provide for a system of international protection through inter-American bodies. This situation partly

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<sup>59</sup> Argentina (art. 14 bis), Bolivia (art. 46 y 48), Brazil (art. 6), Colombia (art. 25), Costa Rica (art. 56), Chile (art. 19), Ecuador (art. 33), El Salvador (art. 37 y 38), Guatemala (art. 101), Haiti (art. 35), Honduras (arts. 127 y 129), Mexico (art. 123), Nicaragua (arts. 57 y 80), Panamá (art. 64), Paraguay (art. 86), Peru (art. 2), Dominican Republic (art. 62), Suriname (art. 4), Uruguay (art. 36), Venezuela (art. 87).

<sup>60</sup> See, for example, on constitutional jurisprudence in relation to the right to work in Colombia, MOLINA HIGUERA, A. (auth.), *Contenido y alcance del derecho individual al trabajo: marco para la evaluación de la política pública del derecho al trabajo desde una perspectiva de derechos humanos*, Serie DESC, Defensoría del Pueblo – Colombia, Bogotá, 2005, pp. 51 y ss. Also, in Argentina, Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/ accidentes ley 9688, Supreme Court of Justice of the Republic of Argentina, 21 September 2004, retrieved 25 Oct 2018, from <https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoSumario.html?idDocumentoSumario=10710>; in El Salvador, case 232-2001, judgement of 30 April 2002, Supreme Court of Justice of El Salvador (Constitutional Chamber), retrieved 25 Oct 2018, from <http://www.jurisprudencia.gob.sv/portal/>.

<sup>61</sup> LÓPEZ-PATRÓN, J. M., “Los derechos laborales en el sistema interamericano de protección de derechos humanos: la protección de los derechos económicos, sociales y culturales”, *Revista Colombiana de Derecho Internacional*, N 12 (2008), p. 186.

changed with the creation of the Inter-American Commission on Human Rights<sup>62</sup>. The Commission had been conceived as an organ of the OAS whose principle purpose was to promote respect for human rights<sup>63</sup>. The Statute of the Commission defined human rights as those set forth in the American Declaration of the Rights and Duties of Man, thus, turning the provisions of the latter into applicable standards in the exercise of its functions by the Commission<sup>64</sup>.

Currently, the Statute and the Rules of Procedure<sup>65</sup> of the Commission provide for a dual legal regime and procedure for the system of petitions concerning alleged violations of human rights: 1) with regard to the Member States of the OAS that are parties to the American Convention on Human Rights; and 2) with regard to the OAS Member States that have not ratified the latter. The Commission is empowered to receive and examine petitions that denounce alleged violations of human rights set forth in the American Declaration in relation to this second group of States.

It is fitting to mention that in one of its early decisions the Commission observed that the fact that the American Declaration had been mentioned in the art. 1(2)(b) of its Statute could not be interpreted as to incorporate by reference all of the rights embodied in the Declaration into the American Convention on Human Rights<sup>66</sup>. Therefore, the Commission concluded that it could not take into consideration any petitions on presumed violations of human rights that were not incorporated in the Convention in relation to cases concerning its State parties, in particular presumed violations of the right to work or other economic, social and cultural rights<sup>67</sup>.

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<sup>62</sup> Statute of the IACHR was initially promulgated by the OAS Council on 25 May 1960. Text of the original Statute reproduced in doc. OEA/Ser.L/V/II, 26 September 1960. The amended Statute currently in effect adopted by the OAS General Assembly in October 1979, retrieved 1 Oct 2018, from <http://www.oas.org/en/iachr/mandate/Basics/statuteiachr.asp>. See also BUERGENTHAL, T., "The Revised OAS Charter and the Protection of Human Rights", *op. cit.*, p. 835. The author argues that the revised OAS Charter (1967) incorporated the Statute of the Commission by reference, thus, transforming the legal status of the Commission and its Statute and strengthening the normative character of the American Declaration.

<sup>63</sup> BUERGENTHAL, T., "The Revised OAS Charter and the Protection of Human Rights", *op. cit.*, p. 830, referring to the text of the original Statute of the IACHR, arts. 1.

<sup>64</sup> *Ibid.*, referring to the art. 2 of the original IACHR Statute.

<sup>65</sup> Current version approved by the Commission in 2009, and modified in 2011 and 2013, for entry into force on 1 August 2013. Retrieved 1 Oct 2018, from <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

<sup>66</sup> IACHR, Annual report of the Inter-American Commission on Human Rights 1987-1988, Report cases No. 9777 and 9718, Argentina, 31 March 1988, Conclusions, para. 6.

<sup>67</sup> *Id.* Although, as Cerna observes, following the advisory opinion of the IACtHR (*supra* note 7), the Commission started to apply both the Declaration and the Convention in the same case to State parties to



Additionally, the Commission submits annual reports to the OAS General Assembly that include information on the attaining of the objectives set forth in the inter-American human rights instrument, including the American Declaration<sup>68</sup>. Annual reports of the Commission may also include overview of the situation of human rights in member States in case of, *inter alia*, unlawful suspension<sup>69</sup>; massive, serious and widespread violations<sup>70</sup>; or other serious impediments to the use and enjoyment of the rights guaranteed in the applicable human rights instruments<sup>71</sup>, including the American Declaration.

However, the Commission was asked to focus attention on the observance of several specific rights embodied in the American Declaration, which had not included the right to work<sup>72</sup>.

The Commission dealt with violation of the right to work and to fair remuneration only on a few occasions in cases concerning the countries that were not parties to the American Convention on Human Rights<sup>73</sup>. In a case brought against Cuba, the petitioner alleged that his wife was dismissed from her work at the municipal agency of the Ministry of Public Health because of having asked to leave the country and, consequently, had to live off charity of relatives and friends with her daughter. Commission recognized that Cuba violated the right to work but did not elaborate on the elements of the right that had been affected, nor provided any reasoning for recognizing the violation. It can be suggested that the Commission took account of such aspects of the right to work as the right to protection from being dismissed unfairly and the very purpose of the right to work and to fair remuneration to ensure a standard of living suitable for the individual and his/her family.

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the American Convention, by declaring violations of rights set forth in the American Declaration that occurred before a State became a party to the American Convention. CERNA, C. M., "Reflections on the normative status of the American Declaration of the Rights and Duties of Man", *University of Pennsylvania Journal of International Law*, Vol. 30, N 4 (2009), p. 1213.

<sup>68</sup> IACHR, Rules of Procedure, art. 59(2)

<sup>69</sup> *Id.*, Art. 59(6)(b)

<sup>70</sup> *Id.*, Art. 59(6)(c)

<sup>71</sup> *Id.*, Art. 59(6)(d)

<sup>72</sup> BUERGENTHAL, T., "The Revised OAS Charter and the Protection of Human Rights", *op. cit.*, p. 831, referring to the Resolution XXII of the Second Special Inter-American Conference in November 1965. See also Statute of the IACHR, art. 20(a).

<sup>73</sup> Resolution N 6/82, case 7602, Cuba, March 8, 1982, operative part, para. 2.

In some cases, the petitioners alleged violation of the article XIV of the Declaration, but the Commission did not pronounce on the allegations in the decision on merits<sup>74</sup>.

The Commission has rarely referred to the American Declaration in relation to the right to work and to fair remuneration in its reports. However, it did address the right to work in some of its annual and thematic reports, allowing to deduce, to a certain extent, the organ's interpretation of the content thereof.

In several reports, the Commission addressed the right to work in relation to specific groups of population. In the 2011 thematic report on women's economic, social and cultural rights, the Commission examined principal advances and challenges and State's immediate obligations in relation to the women's right to work<sup>75</sup>. Firstly, the Commission evaluated general situation in relation to the women's right to work in the region, noting down that most of the American states recognized the right to work and the right to exercise it freely without any form of discrimination, including gender-based discrimination<sup>76</sup>. Further on, the IACHR estimated that the laws recognizing equal pay for women and men, women's right to maternity leave and protection during pregnancy; requiring the creation of nurseries and daycare centers; prohibiting workplace harassment, sexual harassment and other forms of violence against women in the workplace would enable women to effectively realize their right to work, making it possible for them to find work "that is decent, dignified and of quality"<sup>77</sup>. At the same time, the Commission took note of the insufficient implementation of such laws and the existence of gaps in the laws and policies resulting in the lack of equal access to jobs and equal terms of employment for women<sup>78</sup>. Secondly, the report described the international framework for women's right to work and other labour rights, which

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<sup>74</sup> See, for example, Report N 75/02, case 11.140, Mary and carry Dann v. United States, December 27, 2002, part III(A), para. 35. The case concerns allegedly illegal appropriation of ancestral lands belonging to the members of the western Shoshone indigenous people. The petitioners alleged, *inter alia*, violation of the right to work, claiming that that the ranch situated on the ancestral lands was their sole means of support through the sale of their livestock, goods and produce. However, the Commission mainly focused on the right to property, equality under the law, self-determination and cultural integrity, and did not address the right to work.

<sup>75</sup> IACHR, *The Work, Education and Resources of Women: The Road to Equality in Guaranteeing Economic, Social and Cultural Rights*, OEA/Ser.L/V/II.143, Doc. 59, 3 Nov 2011, retrieved 6 Nov 2018, from <http://www.oas.org/en/iachr/docs/annual/2012/WomenDESC2011.pdf>.

<sup>76</sup> *Id.*, para. 80, p. 28.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Id.*, paras. 81-83, pp. 28-29.

includes article XIV of the American Declaration<sup>79</sup>. Thirdly, the Commission singled out a series of obligation that the States should prioritize in order to ensure effective realization of the women's right to work, which refer to the adoption of necessary legislative, programmatic and policy-related measures to guarantee women's equality and non-discrimination at workplace<sup>80</sup>. The latter primarily include measures aimed at reducing gender wage gap for work of equal value, combatting workplace violence and harassment against women, as well as protecting women's rights during pregnancy and maternity leave<sup>81</sup>. Thus, the Commission sees non-discrimination guarantees and their effective implementation as a critical factor in ensuring women's right to work. It is interesting to note, that the report took note of the shift that had been produced with regard to the concept of 'work' itself to include not only productive, remunerated employment, but also unremunerated work in the home<sup>82</sup>. Accordingly, the Commission urged States to formally recognize women's unremunerated work and grant them social security benefits comparable to those granted for remunerated employment<sup>83</sup>.

In the recommendation issued to Venezuela in 2015 annual report on the human rights situation, the Commission highlighted the importance of the right to work as a means of economic and social empowerment of women and youth, urging the State of Venezuela to carry out strategies in the areas of access to resources, decent work and education<sup>84</sup>.

In its 2015 report on the human rights situation in the Dominican Republic and 2014 annual report, the IACHR linked the difficulties that the migrants, refugees and asylum seekers encounter in exercising social, economic and cultural rights, including the right to work, to their vulnerability, expressing concern that the right to work for these groups may be hindered by the existence of patterns of discrimination and xenophobia<sup>85</sup>. Similarly, the Commission stressed out that the impossibility of entering

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<sup>79</sup> *Id.*, para. 89, p. 30.

<sup>80</sup> *Id.*, paras. 169, p. 61.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Id.*, para., 79, p. 28; paras. 141-144, pp. 51-52.

<sup>83</sup> *Ibid.*

<sup>84</sup> IACHR, Annual report 2015, Chapter IV, Venezuela, Recommendations, par. 56, p. 722. Retrieved 5 Nov 2018, from <http://www.oas.org/en/iachr/docs/annual/2015/doc-en/InformeAnual2015-cap4-Venezuela-EN.pdf>.

<sup>85</sup> IACHR, Report on the Situation of Human Rights in the Dominican Republic, OEA/Ser.L/V/II, Doc. 45/15, 31 Dec 2015, par. 539, p. 211, retrieved 5 Nov 2018, from <http://www.oas.org/en/iachr/reports/pdfs/DominicanRepublic-2015.pdf>; IACHR, Annual report 2014, ch.

into formal employment for the refugees and asylum seekers hindered the exercise of their right to work, given that they are compelled to work in informal sectors of the economy or request third parties to receive their wage<sup>86</sup>. Thus, only a formal employment, allowing the worker to benefit from the social security and gain access to the housing savings fund system, in the conditions of equality and non-discrimination, could be qualified as decent work, according to the Commission.

The IACHR specifically examined the situation of people of African descent in the Americas, taking note of their low positions in the job hierarchy and low wages, as regards the right to work<sup>87</sup>. Once again, the Commission stressed out that discrimination (on racial grounds) resulting in unequal access to job opportunities and unequal terms of employment was a significant obstacle to the effective realization of the right to work<sup>88</sup>.

The commission also pointed out the connection of the right to work with other human rights. For example, the IACHR mentioned the need to guarantee the right to work as a means to ensure citizen security<sup>89</sup>, as well as affirmed the connection of the right to work with the freedom of association, in particular, in relation to the right to form and participate in workers' and professional unions<sup>90</sup>. In addition, the IACHR reiterated the prohibition on contemporary forms of slavery and forced labour as a form of protection of the right to freely chosen work, with fair and satisfactory working conditions<sup>91</sup>.

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IV, Human rights developments in the region, para. 145, p. 387, retrieved 5 Nov 2018, from <http://www.oas.org/en/iachr/docs/annual/2014/docs-en/Annual2014-chap4A.pdf>.

<sup>86</sup> IACHR, Annual report 2014, Ch. IV Venezuela, para. 653, p. 525, retrieved 5 Nov 2018, from <http://www.oas.org/en/iachr/docs/annual/2014/docs-en/Annual2014-chap4Venezuela.pdf>.

<sup>87</sup> IACHR, The Situation of People of African Descent in the Americas, OEA/Ser.L/V/II., Doc. 62, 5 Dec 2011, para. 47, p. 18, retrieved 5 Nov 2018, from <http://www.oas.org/en/iachr/docs/annual/2012/afrodescendantseng.pdf>.

<sup>88</sup> *Id.*, paras. 48-49, p. 19.

<sup>89</sup> IACHR, Situation of Human Rights in Guatemala: Diversity, Inequality and Exclusion, OEA/Ser.L/V/II, Doc.43/15, 31 December 2015, para. 109, p. 62, retrieved 5 Nov 2018, from <http://www.oas.org/en/iachr/reports/pdfs/Guatemala2016-en.pdf>.

<sup>90</sup> IACHR, Annual report 2015, Chapter IV, Venezuela, *op. cit.*, para. 56, p. 722; IACHR, Annual report 2012, Ch. IV Human Rights Developments in the Region – Cuba, para. 84, p. 326, retrieved 6 Nov 2018, from <http://www.oas.org/en/iachr/docs/annual/2012/TOC.asp>.

<sup>91</sup> IACHR, *Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco*, OEA/Ser.L/V/II, Doc. 58, 24 Dec 2009, paras. 55-62, pp. 16-18, retrieved 6 Nov 2018, from <http://www.oas.org/en/iachr/indigenous/docs/pdf/CAPTIVECOMMUNITIES.pdf>.

## **2.2. The right to work and to fair remuneration in the practice of the Inter-American Court of Human Rights**

The Inter-American Court of Human Rights is a judicial institution whose purpose is explicitly stated as “application and interpretation of the American Convention on Human Rights”<sup>92</sup>. Thus, the adjudicatory jurisdiction of the Court comprises those cases that concern the interpretation and application of the rights enshrined in the Convention. The only article of the Convention that can be alluded to in relation to the right to work is the article 26, establishing States’ duties of progressive development in the area of social, economic and cultural rights. Additionally, the Court extended its advisory jurisdiction to the interpretation of the American Declaration according to the procedure contemplated in the art. 64(1) of the Convention<sup>93</sup>. The Court established that it was authorized to render advisory opinion interpreting the American Declaration at the request of an OAS Member State or a qualified OAS organ “within the scope and framework of its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of the human rights in the American state”<sup>94</sup>. In deciding so, the Court referred to the article 29(d) of the American Convention, which stipulates that none of its provisions should be interpreted as to include or limit the “effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have”<sup>95</sup>.

Accordingly, as Meza Flores suggests, it is possible to identify two approaches for the protection of social, economic and cultural rights, including the right to work, in the case-law of the Inter-American Court<sup>96</sup>. The first approach entails protection in case of State’s failure to fulfil its duty of progressive development in the area of social, economic and cultural rights under the article 26 of the Convention. The second approach, which until recently has been dominant in the Court’s practice, involves protection of the essential content of the social, economic and cultural rights through protection of the civil and political rights set forth in the American Convention.

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<sup>92</sup> Statute of the Inter-American Court of Human Rights, adopted October 1979, art. 1.

<sup>93</sup> Advisory opinion OC-10/89, *supra* note 7.

<sup>94</sup> *Id.*, p. 13.

<sup>95</sup> *Id.*, par. 36, p. 10.

<sup>96</sup> MEZA FLORES, J. H., “La protección de los derechos económicos, sociales y culturales en el sistema interamericano de protección de derechos”, *Boletín Mexicano de Derecho Comparado*, N 132 (2011), p. 1154.

As Sánchez-Castañeda rightly affirms, the right to work can be fulfilled only when exercised in harmony with civil and political rights in the context of employment, such as freedom of expression, association or manifestation exercised in the context of working relations<sup>97</sup>. Thus, any infringement of the workers' rights also implies violation of the right to work, which lies at the heart of all specific general, individual and collective rights derived from it<sup>98</sup>.

Therefore, it can be said that the right to work has been latent in the Inter-American Court's case-law<sup>99</sup>, which until recently have been addressing this issue tangentially.

One of the characteristic cases that demonstrates this approach is the Case of the Dismissed Congressional Employees (Aguado – Alfaro et al.) v. Peru<sup>100</sup>. Alleged victims filed a request for precautionary measures and later presented a petition to the IACHR. The case concerns the dismissal of 257 workers of the National Congress of Peru by means of two executive decisions issued in the context of serious social upheaval and the rupture of the institutional order in 1992. In 2004, the Commission adopted report on merits after having examined the positions of the State and the petitioners, and later decided to submit the case to the Inter-American Court, having considered that the State had not acted satisfactorily on the recommendation of the Commission<sup>101</sup>.

The IACHR did not allege State's failure to comply with the article 26 of the Convention, asking the Court to establish the responsibility of the State for violating the right to fair trial, judicial protection, as well as for breaching its obligation to respect the rights and to adopt provisions of domestic law. Therefore, the Court did not pronounce on the violation of the right to work or any other socio-economic right affected by the dismissal of the workers. However, the Court took note of the victims' arguments with regards to article 26 of the Convention, which alluded to the fact that the alleged

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<sup>97</sup> SÁNCHEZ-CASTAÑEDA, A., "La presencia del derecho al trabajo en la Corte Interamericana", in KURCZYN VILLALOBOS, P. (coord.), *Derechos humanos en el trabajo y la seguridad social. Liber Amicorum: en homenaje al doctor Jorge Carpizo*, Universidad Nacional Autónoma de México, México, 2014, p. 233.

<sup>98</sup> *Id.*, p. 236.

<sup>99</sup> *Id.*, p. 233

<sup>100</sup> IACtHR, Judgement of 24 November 2006 (Preliminary objections, merits, reparations and costs), retrieved 2 Oct 2018, from [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_158\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_158_ing.pdf).

<sup>101</sup> IACHR, Application before the IACtHR in the case of dismissed congressional employees (case 11.830) against the State of Peru, 4 February 2005.

arbitrary character of the dismissal unjustly deprived them of their employment and of their right to remuneration, which, in turn, resulted in violations of other related rights, such as the right to social security. In response to this argument, the Court reiterated that the purpose of the judgement was to determine whether State violated victims' rights to judicial guarantees and judicial protection rather than to establish the nature of the dismissal, and limited itself to observing that the violation of these guarantees had prejudicial consequences for the victims, "to the extent that any dismissal has consequences for the exercise and enjoyment of other rights inherent in labor relations"<sup>102</sup>. In its separate opinion, judge Cançado Trindade expressed his dissatisfaction with the Court's refusal to address alleged violation of the article 26, reiterating that "all human rights, even economic, social and cultural rights, are promptly and immediately demandable and justiciable, once the interrelation and indivisibility of all rights are affirmed at both the doctrinal and the operational levels"<sup>103</sup>.

Similarly, in a more recent case of *Canales Huapaya et al. v. Peru*<sup>104</sup>, two of the judges expressed their discontent with the Court's limited analysis of the article 26 of the American Convention in relation to the violation of the right to work. In a separate opinion, judges Caldos and Ferrer Mac-Gregor Poisot argued that despite the fact that neither the Commission nor the victims alleged the violation of the right to work, the Court could have addressed it in the context of the principle *iura novit curia*<sup>105</sup>. The circumstances of the case are similar to the one of *Aguado - Alfaro et al. v. Peru*, since both cases concern the dismissal of congressional employees.

The judges argued that the Court should have declared the State of Peru responsible for the violation of the article 26 of the Convention, because the arbitrariness of the dismissal resulted in a disproportionate limitation of the right to work, which in its turn, hindered victims' right to remuneration and social benefits. They supported their reasoning by referring to the 1) extent of the article 26 of the American Convention; 2) interdependency and indivisibility of civil and political rights

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<sup>102</sup> Judgement of 24 November 2006, *op. cit.*, para. 136, p. 48.

<sup>103</sup> *Id.*, Separate opinion of Judge A. A. Cançado Trindade, para. 7.

<sup>104</sup> IACtHR, Sentencia de 24 de junio de 2015 (Excepciones preliminares, fondo, reparaciones y costas), retrieved 2 Oct 2018, from [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_296\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_296_esp.pdf).

<sup>105</sup> Voto conjunto concurrente de los jueces Roberto F. Caldas y Eduardo Ferrer Mac-Gregor Pisot, para. 3, p. 2.

and economic, social and cultural rights; 3) systematic interpretation of the American Convention and the Protocol of San Salvador; 4) right to work as an autonomous right and recognition of its direct justiciability by the courts in the region; 5) extent of the right to work in the context of the case<sup>106</sup>.

Firstly, the judges argue that the rights protected by the article 26 of the Convention are those rights that can be derived from the norms referring to the economic, social, scientific, cultural development and education and to the respective State duties set forth in the OAS charter. In its turn, the exact array of those rights can be established by referring to the American Declaration and other human rights treaties ratified by a State<sup>107</sup>. Additionally, the judges recall the provisions of the article 29 of the American Convention, which, according to their reasoning, when read in conjunction with the article 26, leads to conclusion that the provisions of national constitutions, laws and conventions ratified by a State should be taken into consideration by the Court to ensure maximum protection of human rights<sup>108</sup>. Therefore, those laws and constitutions, as well as other international instruments, including the American Declaration, can be of assistance in establishing the exact content and scope of the rights embodied in the article 26 and in the OAS Charter.

Secondly, it is argued that the Court can extend protection to the right to work by referring to the interdependence and indivisibility of social, economic and cultural rights on the one hand and civil and political rights on the other, “because they must be understood integrally as human rights without any specific ranking between them, and as rights that can be required in all cases before those authorities with the relevant competence”<sup>109</sup>.

Thirdly, it is suggested that Court’s jurisdiction to hear cases alleging violation of the right to work can be derived from the article 26 of the American Convention read in conjunction with the article 1.1 (State obligation to respect the rights recognized therein), 2 (State duty to adopt legislative and other measures to give effect to the rights and freedoms recognized in the Convention) and article 29 regarding the interpretation

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<sup>106</sup> *Id.*, para. 5, pp. 2-3.

<sup>107</sup> *Id.*, para. 8, p. 3.

<sup>108</sup> *Id.*, paras. 10-11, p. 4.

<sup>109</sup> *Id.*, para. 12, p. 4, referring to the cases of Suárez Peralta v. Ecuador, para. 131 and Acevedo Buendía et al. v. Peru, para. 101.



of the Convention<sup>110</sup>. In turn, several instruments must serve as reference in the process of interpretation of the right to work, including article XIV of the American Declaration<sup>111</sup>. The judges also highlighted special value of the American Declaration as a source for interpretation of the right to work<sup>112</sup>.

Fourthly, the judges recall the provisions of the national constitutions of the State parties to the American Convention and the decisions of the constitutional courts in order to demonstrate the fundamental character of the right to work as human right and its direct justiciability in the context of the American Convention<sup>113</sup>.

Thus, as follows from the reasoning set forth in the separate opinion, even though the right to work is not explicitly recognized in the American Convention, the Court can protect this right by referring to the article 26 in connection with other relevant provisions of the Convention, and using international instruments that contain provisions on the right to work, including article XIV of the American Declaration, for the purpose of interpreting article 26.

In one of its most recent decisions, the Inter-American Court seems to endorse the reasoning set forth in the separate opinion of the judges Caldos and Ferrer MacGregor Poisot, recognizing for the first time the direct justiciability of economic, social and cultural rights under article 26 of the American Convention. The case of *Lagos del Campo v. Peru*<sup>114</sup> concerns the dismissal of a labour leader after he publicly denounced illicit actions of his employer in an interview for a magazine. The IACHR submitted the case to the Inter-American Court after the State denied having violated the rights of the petitioner.

In this landmark decision, the Court analysed alleged violation of the right to work and related labour rights. The Court took into consideration the fact that the victim repeatedly alleged violation of the right to work in its communication with the IACHR, even though the Commission has not mentioned it in the application lodged before the

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<sup>110</sup> *Id.*, para. 31, pp. 10-12.

<sup>111</sup> *Id.*, para. 31(b), p. 11.

<sup>112</sup> *Id.*, para. 31 (c), p. 11: “Cabe resaltar que estas dos Declaraciones [Universal and American] tienen un especial valor interpretativo de conformidad con lo previsto en el artículo 29.d del pacto de San José”.

<sup>113</sup> *Id.*, parte IV.

<sup>114</sup> IACtHR, *Caso Lagos del Campo v. Perú*, Sentencia de 31 de agosto de 2017 (Excepciones preliminares, fondo, reparaciones y costas), retrieved 2 oct 2018, from [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_340\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_340_esp.pdf).

Court, and affirmed its jurisdiction to examine the scope of the right to work, and the right to security of employment in particular, under the article 26 of the Convention<sup>115</sup>.

In its reasoning, the Court referred to the article XIV of the American Declaration as one of the provisions relevant for defining the scope of the protection granted in the article 26. The Court also recalled the provisions of the General Comment 18 of the UN Committee on Social, Economic and Cultural Rights and of the International Labor Organisation Convention 158<sup>116</sup> in order to demonstrate that State's failure to protect the workers from arbitrary dismissal leads to violation of their right to stability of employment, derived from the human right to work<sup>117</sup>. Accordingly, the Court established that States have the following obligations in relation to the protection thereof: 1) to take appropriate measures to ensure proper regulation and oversight of this right; 2) to protect workers against unfair dismissal through competent bodies; 3) to remedy the situation in case of unfair dismissal through reinstatement, compensation or other means available under national legislation; 4) to ensure availability of effective grievance mechanisms in case of unfair dismissal in order to guarantee access to justice and effective legal protection in relation to the right to work<sup>118</sup>.

Consequently, in relation to the case of Alfredo Lagos del Campo, the Inter-American Court concluded that the State of Peru did not comply with its Convention duties, because it failed to ensure protection of the right to work from the abuses attributable to third parties.

Thus, the Court has not only confirmed direct justiciability of the right to work under American Convention, but also specified State duties in relation to the protection of this right and made it clear that a State can be held responsible for violation of the right to work if it fails to adopt positive measures ensuring effective protection thereof from abuses by either state officials or private persons.

The Special Rapporteurship on Economic, Social, Cultural and Environmental Rights of the Inter-American Commission on Human Rights welcomed the decision of the Court in the case of Lagos del Campo, calling it an "historic milestone in the Inter-

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<sup>115</sup> *Id.*, paras. 133-140, pp. 42-46.

<sup>116</sup> ILO, Convention concerning Termination of Employment at the Initiative of the Employer, adopted 22 June 1982

<sup>117</sup> Lagos del Campo v. Perú, para. 147-148, p. 49.

<sup>118</sup> *Id.*, para. 149, p. 50.

American jurisprudence and a step forward in the region for the interdependence and indivisibility between civil and political rights, on the one hand, and economic, social, cultural and environmental rights, on the other”, as well as “one of the most important precedents in the regional jurisprudence on the matter”, which “globally advances the strengthening of a vision of integral and joint protection of human rights”<sup>119</sup>.

No doubt, this decision will continue to inform future practice of the Inter-American Court and the Commission. Since Lagos del Campo judgement has been adopted in 2017, the IACHR issued several positive decisions on admissibility in cases alleging violation of the right to work<sup>120</sup>.

## CONCLUSION

1. Adoption of the American Declaration on the Rights and Duties of Man in 1948 in Bogotá marked the beginning of the codification of human rights in the context of the inter-American human rights system. The right to work was included in the Declaration along with other social, economic and cultural rights, such as the right to leisure time, social security and education. Historic context, social, economic and political conditions, as well as various ideological influences at the time of the adoption of this instrument echoed in the final wording of the article XIV and other provisions of the Declaration.

2. Article XIV of the American Declaration addresses two central aspects of the human right to work. On the one hand, it enshrines the right to choose work freely, that is to say without any coercion or external pressure, and to exercise it in conditions of dignity and respect for human rights. On the other hand, article XIV contemplates the

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<sup>119</sup> The Special Rapporteurship on Economic, Social, Cultural and Environmental Rights Welcomes the Historic Decision of the Inter-American Court of Human Rights on Justiciability in Matters of ESCER, IACHR, Press release, 15 November 2017, retrieved 9 Nov 2018, from [http://www.oas.org/en/iachr/media\\_center/PReleases/2017/181.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/181.asp).

<sup>120</sup> See, for example, Report N 34/18, petition 1018-07, Guillermo Juan Tiscornia and Family, Argentina, par. 22. The Commission observed as regards the allegations of violations of art. XIV of the American Declaration that it is the American Convention, and not the Declaration, that is applied by the IACHR once it enters into force with respect to a State. However, since the petition alleged “violation of rights of identical substance upheld by both instruments”, the Commission deemed that alleged violations of the art. XIV could be examined at the merits stage in relation to the art. 26 of the Convention.

right to fair remuneration, understood as such a remuneration that would assure a standard of living suitable for every person who works and for his/her family.

3. The content of the right to work contemplated in the American Declaration can be fully comprehended only in conjunction with the correlative duty to work, understood as a social obligation or a moral imperative carried out for the well-being and satisfaction of the needs of the community, to which a person belongs to.

4. Article XIV of the American Declaration continues to be of great relevance for the protection of the right to work in the context of the inter-American system of human rights. Protection of the right to work granted under the American Declaration can be invoked as a legal basis for presenting individual petition alleging violation of this right by a State that did not ratify the American Convention on Human Rights before the Inter-American Commission. The IACHR can also invoke American Declaration in its reports on the situation of human rights in a particular State and draft recommendations aimed at tackling violations of the human rights embodied in the Declaration. Additionally, the reports and the decisions of the Commission provide interpretation on the scope and on the various aspects of the right to work.

5. Until recently, the Inter-American Court of Human Rights has not been granting direct protection to the right to work, addressing it only in connection with alleged violations of civil and political rights. However, its recent decision in the case of *Lagos del Campo v. Peru* recognized direct justiciability of the right to work under Article 26 of the American Convention on the progressive development of social, economic and cultural rights in connection with State's obligation to respect the rights recognized in the Convention and to adopt measures necessary to give effect to those rights.

6. Inter-American Court's decision in *Lagos del Campo* paved way for stronger protection of the right to work as a fundamental human right in the inter-American system, while, at the same time, recognizing the value of the article XIV of the American Declaration as one of the most important sources for the interpretation and determination of the scope of the right to work.

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