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Using International Human Rights Law to Guarantee the Right to Health: a Brazilian Experience

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[In 2014, fourteen families searched for assistance from the Public Prosecution of the State of Paraíba](#) to guarantee the right to an effective medical treatment for their relatives—sixteen patients who suffered from several neurological conditions which caused multiple seizures a day (sometimes 20 in one single afternoon).

All conventional treatments proved unsuccessful. There was hope that products based on cannabidiol (CBD) would considerably lessen the number of daily seizures (and, even, put an end to it), allowing patients and their families to have a better quality life.

CBD is of the many active substances identified in *cannabis sativa*. [Even though it causes no addiction](#), since it doesn't contain any of the psychoactive components of *marijuana*, such as THC, the Brazilian Health Surveillance Agency has kept the substance on the list of proscribed chemical components for many years.

Considering this, what could be done when the State, the one responsible for guaranteeing the access to health, fails to provide it?

The Dialogue between International Human Rights Law and Brazilian Law

Until 2008 it had been assumed by the Supreme Court that human rights treaties, once incorporated, would have the same legal status of a federal ordinary law. But since then the Court has changed opinion on this subject.

For the record, back in 2004, Congress passed the [amendment to Constitution n. 45](#), which, among other provisions, held that “[i]nternational human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the representative members shall be equivalent to constitutional amendments.” International human rights treaties, then, would not always share the same position as federal ordinary laws.

[When the Supreme Court ruled in 2008 that there would be no more civil imprisonment for indebtedness in the case of an unfaithful trustee](#), it placed human rights treaties that were not approved under the legislative process of constitutional amendments one level above federal ordinary laws. In other words, within a hierarchical scale such treaties would be below the Constitution, but above any other domestic legal disposition. This is the case of the [Inter-American Convention on Human Rights](#).

Consequently, all laws and other normative acts are only valid after submitted to (and approved in) both constitutionality and conventionality control.

The Doctrine of the Conventionality Control in Use

The doctrine started to be delineated under the scope of the Inter-American Human Rights System with the case [Almonacid Arellano y otros vs. Chile \(2006\)](#), in which the Inter-American Court argued that national judges, as part of the State, are bound by the conventions the State has ratified, and therefore must verify if the domestic legal order is compatible with the provisions of the American Convention by exercising a sort of conventionality control. The Court established “to perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention.”

In 2012, a group of Law students gathered and led by Professor Flavianne Nóbrega (at that time professor of Universidade Federal da Paraíba), decided to put academic knowledge into practise. One of its goals was to assist the Public Prosecution and the Public Defence in assessing the Inter-American System treaties and jurisprudence, so as to identify how human rights standards could be used to uphold legal actions concerning human rights violations.

Named “Access to the Jurisdiction of the Inter-American Human Rights System,” the group is registered at the [National Council of Technological and Scientific Development](#) and has been contributing to the aforementioned institutions with international legal aid, being mostly focused on cases that involve violations of the right to health and the rights of indigenous people and other traditional communities to the land.

In 2014, with regards to the situation previously described involving those sixteen patients, the Public Prosecution of the State of Paraíba requested a legal opinion on the extent of Brazil's duties to protect, respect and fulfil human rights under the Inter-American Court of Human Rights, emphasizing the right to health.

The group searched for all human rights documents relating to this subject, some even beyond the inter-American scope. The main sources included the American Convention on Human Rights the Convention on the Rights of Persons with Disabilities and the jurisprudence of the Inter-American Court of Human Rights.

Based on meticulous research, in July of 2014 the group wrote a legal report highlighting the reasons why Brazil should allow the import of cannabidiol-based products for medical use, grounded on the idea of the conventionality control. The main arguments emphasized that, according to the current status of incorporated human rights law in relation to the federal ordinary laws and other normative acts, the prohibition of the National Health Surveillance Agency regarding cannabidiol represented a violation of the human right to health, since it prevented the access to the most reliable treatment available.

The Public Prosecution filed a [class action](#) using the full content of the legal opinion written by the group and obtained in 2015 [an injunction](#) against the State, which allowed the patients to import the products. In the same year the [National Health Surveillance Agency removed the cannabidiol from the list of banned substances](#), thus authorizing its prescription for patients whose medical conditions demand the use of cannabidiol-based products. The [judgment on the merits](#) was rendered three months later.



Little Davi, aged 5, awaiting his mother to prepare the cannabidiol-based medicine.

Source: <http://oglobo.globo.com/sociedade/anvisa-divulga-orientacao-sobre-como-importar-remedio-feito-partir-de-substancia-da-maconha-12460663>

The implementation of the right to health poses everyday challenges. [Some Brazilian families still struggle to get access to effective medical treatment concerning CBD](#). However, the decision represented a big step towards protecting human dignity. Furthermore, it shows that when a group of dedicated students decide to talk about human rights and do something about it, good things happen...in Paraíba or in London!

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