

THE DOCTRINE OF IMPLIED AND EXPLICIT RIGHTS IN THE DECISIONS OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

GUANOLUISA ALMACHE FRANCISCO ALEJO¹, LIZCANO CHAPETA CARLOS JAVIER², CRESPO BERTI
LUIS ANDRÉS³

Universidad Regional Autónoma de Los Andes Ibarra. Ecuador.

¹E-mail: ui.franciscog@uniandes.edu.ec

ORCID: <https://orcid.org/0000-0001-9381-9776>

²E-mail: ui.carloslizcano@uniandes.edu.ec

ORCID: <https://orcid.org/0000-0002-1265-9465>

³E-mail: ui.luiscrespo@uniandes.edu.ec

ORCID: <https://orcid.org/0000-0001-8609-4738>

ABSTRACT

This scientific article aims to analyze the issue of explicit rights, and implicit rights, rights that are not expressly regulated in the Inter-American Convention on Human Rights, but are still recognized and protected in fact by its Court. The purpose of this research is to have an analysis of the sentences issued by the Inter-American Court of Human Rights, in which the responsibility of Ecuador is sanctioned and established for violating the human rights of its citizens. In this essay, the Hervadian doctrine of the existence of subsequent natural rights and the need for their promulgation for their historical validity will be defended. The methodology used was a bibliographic-documentary design; the type of qualitative-descriptive research and the tools of content analysis and hermeneutics were assumed. By way of example, the right to identity, to truth, to a dignified life and to a life project will be discussed. At the same time, we will investigate the relationship that could exist between these rights and human dignity, as a justification basis for these rights in a universal human nature. It was concluded that the ordinary Judges of the Ecuadorian Judicial System must compulsorily abide by the inter-American jurisprudential precedents dictated within this type of rights.

Keywords: Human rights, dignity, *iusnaturalism*, *Hervadiana*

INTRODUCTION

The American Convention on Human Rights (Pact of San José) was published in Official Gazette No. 801 of Ecuador on August 6, 1984. Through this Convention, Ecuador undertakes to respect the rights and freedoms recognized therein and to guarantee their free and full exercise to all persons subject to its jurisdiction, without discrimination of any kind, on any grounds. According to this Convention, a person is every human being.

It also undertook to adopt, in accordance with its constitutional and treaty procedures, such legislative or other measures as may be necessary to give effect to the rights and freedoms set forth in the present Covenant. For example, within the civil and political rights covered by articles 3 to 25 of the Convention. Accordingly, in compliance with this treaty mandate, Ecuador must comply with and comply with all judgments handed down against it for violating explicit and implicit rights, which will be specified below.

In the Ecuadorian constitutional legal system, within the principles of application of the rights provided for in the (*Constitucion_2008*), art. 11, paragraph 8, of the Constitution states: "The recognition of the rights and guarantees established in the Constitution and in international human rights instruments shall not exclude other rights derived from the dignity of individuals, communities, peoples and nationalities that are necessary for their full development."

For Boiled (2009), to say the right entails the object of determining the title and the measure of the right: "The title is that in which the right originates, or, in other words, it is what causes the attribution of the thing to a given subject. There are many kinds of titles, but they can be summed up in human nature, law, custom, and covenants or contracts." (p. 74).

The Hervadian thesis in relation to jurisdiction, part of an integral conception of the human person and its intrinsic juridicity, which allows an overview of the legal phenomenon that allows us to



develop satisfactory explanations to several of the current problems of law. For example, the issue of implicit human rights.

It is worth noting that before defining what implicit human rights mean, it is necessary to refer to the issue of the scope and meaning of the dignity of the human being, as a source of the explicit and implicit rights, recognized and protected by the American Convention on Human Rights, which serve as the basis for dictating the law in this international instance.

For Nogueira (2003), the modern charters and declarations on human rights, conceive of the dignity and worth of the human person, as creative foundations of all world humanitarian legislation: "In this way the dignity of the person constitutes a supra-constitutional ontological reality as well as the rights that are inherent to him, the State and the Constitution only recognize and guarantee it but do not create it, thus the State and the legal system that regulates it must exclude any instrumentalizing approach to the person, any vision of the totalitarian or authoritarian State as an end in itself. Human dignity is violated when the person is turned into an object or constituted as a mere instrument for the achievement of other ends" (p. 3).

In international human rights law, international treaties ratified by Ecuador shall be subject to the provisions of the Constitution. In the case of treaties and other international human rights instruments, the principles of non-restriction of rights, direct applicability and open clause shall apply. This constitutional norm specified in Art.417 of the Ecuadorian Constitution of 2008, at the moment that establishes this principle of open clause, is allowing implicit rights to be created, by binding precedents issued by the Inter-American Court of Human Rights and are of immediate application in our domestic legal system.

The Inter-American Court has jurisdiction to interpret and apply the Convention that motivates this test, in the solution of the cases that are submitted to its jurisdiction. It has the power to decide on the violation and comprehensive reparation of the rights or freedoms and protected by it.

In the jurisprudential field, the Inter-American Court, in the case *Artavia Murillo et al. vs. Costa Rica*, derives an implicit human right to access to the technology necessary to exercise the right to private life and reproductive freedom in the broadest sense. Similarly, in the case of the *Kichwa Indigenous People of Sarayaku vs. Ecuador*, it creates an implicit human right to the cultural identity of indigenous peoples, and in this case, by not having consulted the execution of an oil project by the Consortium of the General Fuel Company, the Ecuadorian State violated their implicit human rights to the communal property of the Sarayaku people. which is closely related to the right to life and personal integrity of the members of this indigenous people.

Returning to what has been said, with regard to explicit rights we could say that there is no difficulty. However, when we speak of implicit or unenumerated rights, we refer to those that, without being expressly established in the Inter-American Convention, are recognized. By way of a progressive interpretation, in order not to add the new content to the Convention, but if the broad interpretation of the article that enshrines their existence is used, as a clause that avoids the closure of the catalog of rights contained in the Convention.

DEVELOPMENT

MATERIALS AND METHODS.

For the development of this research work, a critical approach of qualitative research was addressed, under the bibliographic-documentary design, when consulting digital and printed materials, constitutional and conventional legal norms, legal bodies, books, publications, guides and judgments issued by the CIH, in relation to the doctrine of explicit and implicit rights.

Likewise, a series of implicit rights that the Inter-American Court has been outlining in recent years through its contentious rulings were analyzed. By way of example, the following cases: *Artavia Murillo*, *Sarayaku Village*, *Gelman*, *Almonacid Arellano*, *Street Children*, *Yakye Axa Indigenous Community*, *Loayza Tamayo*, among others

As for the type of research, the descriptive was assumed, the mechanisms of interpretation provided for in Art. 29 of the IACHR Convention, which have allowed through an act of interpretation to

establish the binding jurisprudence of the Inter-American Court, in relation to implicit rights that we will specify later.

Implicit rights were identified, such as: Right to a dignified life, right to truth, right to identity and right to a life project.

The data and information collection instruments used were the content sheets of the relevant judgments issued by the Inter-American Court, with respect to the implicit rights cited above. The strategies of the summary and comparative matrices that allowed the compendium of the legal and doctrinal aspects related to the subject matter of the study.

In addition, to proceed with the analysis of the information collected in the documentary research, the tools that provided the content analysis and hermeneutics were applied. The evaluations of the theoretical and doctrinal positions related to the object of the research were carried out. Therefore, the rules of hermeneutics allowed the interpretation of international legal instruments, with the subject that is being addressed.

It was important to determine the scope of the aforementioned judgments and to analyze them to deduce the implicit rights that were generated in the exercise of contentious jurisdiction by the Inter-American Court.

Results.

From the review of the judgments issued by the Inter-American Court, which have the character of being final and unappealable, the implicit rights that arise from them emerge from the cases analyzed, in relation to the explicit rights that regulate the Inter-American Convention. In this sense, a set of relevant judgments of the Inter-American Court in relation to the rights that are the subject of this investigation is presented below.

Table 1: Relevant Judgments of the Inter-American Court, in relation to implicit and explicit rights.

Case	Explicit Human Right	Implicit Human Right
Artavia Murillo	Everyone has the right to have his or her life respected.	Right of access to the technology necessary for the exercise of private life and reproductive freedom in the broadest sense
Kichwa people of Sarayacu	Right to life and personal integration	Right to communal property and right to cultural identity of indigenous peoples
Gelman	Right to recognition as a person before the law	Right to Identity
Almonacid Arellano	Judicial guarantees and judicial protection	Right to the truth
Yakye Axa	Right to life	Right to a dignified life
Loayza Tamayo	Right to personal liberty	Right to the life project

In summary, these relevant cases and judgments should be studied by legal operators, research professors, for a better knowledge and development of the legal culture in the field of explicit and implicit Human Rights.



DISCUSSION:

The theme of implicit rights in relation to human dignity and the jurisprudential development of these rights in the instance of the Inter-American Court, from particular cases, we were able to determine certain occasions such as in the Right to Identity or to a dignified life, where dignity plays different roles, but always an explicit and fundamental one. While in other cases, implicit rights such as the right to truth and life project, the same ones that are related to the explicit right to personal liberty and guarantees and judicial protection.

By conventional mandate, that is, the rights and guarantees provided for in the Inter-American Convention can be interpreted in the sense of excluding other rights and guarantees that are inherent to the human being or that derive from the representative democratic form of government, as established in Article 29 letter c) of the Convention. In accordance with art. 31 Idem, which makes it possible to include and recognize other rights in the protection regime of that convention by means of the amendment or draft additional protocol. The judges of the Inter-American Court have been constructing the doctrine of implicit rights in order to comprehensively protect human rights.

From the analysis of the contentious rulings issued by the Inter-American Court in relation to the implicit rights, specified above, at least two essential characteristics of these rights are in tension, on the one hand, what could be called their pre-positivity, and on the other hand, their conventionality.

With regard to the foundation of both implicit and explicit human rights, we must note the thinking of the naturalistic *ius type*:

Consequently, the post-war restoration of the rule of law was mechanically imbued with a *ius naturalist* aura, characterized by two elements: on the one hand, to give the human person and his dignity a central position in the Constitution, assigning to it the character of a supreme and inviolable political and legal norm, as a limitation and rationalization of power; This meant strengthening the free and lively political process, interpreting the Constitution as a fundamental legal order of the State at the service of the human person and his dignity. On the other hand, the State is refounded not only in the principle of legality, nor in the social principle, but also in the democratic principle, in the formula of the democratic and social State of law. (Landa, 2002, pp. 116-117)

In this vein, Javier Hervada, legal philosopher, who has influenced the decisions of the Inter-American Court, through Hervadian theory argues about implicit human rights, that is, basic goods due in justice not expressly protected in the normative statements of international treaties signed by the States parties.

CONCLUSIONS

In summary, the doctrine of implicit human rights upheld by the Inter-American Court, in its jurisprudence, is based on human dignity, that is, on its supra-positive aspect, which arises from human nature, which does not exclude the other implicit rights that arise from an act of interpretation based on the *pro homine* principle.

Implicit human rights also have their origin in a treaty mandate, specifically, in Article 31 in accordance with Articles 76 and 77 of the American Convention on Human Rights, which may be included in the catalogue of rights and freedoms, through an amendment or draft protocol additional to the aforementioned Convention.

In a globalized, changing world with the presence of authoritarian governments, which do not respect the principles and rules of democratic games; The inter-American jurisdictional organs will continue to issue exemplary rulings, in which both explicit and implicit human rights come to life, in order to protect, an American system of integral protection of human rights, which every day is attuned to the multiple demands of the demands of a true humanitarian, specialized, competent and impartial justice. And to cherish hopes for the development of a culture of respect for the human being, just for the fact of being so.



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