

Theses of the PhD Dissertation

**SYSTEM AND HIERARCHY OF HUMAN RIGHTS:
COLLISION BETWEEN FREEDOM OF RELIGION
AND OTHER HUMAN RIGHTS
IN THE INTER-AMERICAN SYSTEM**

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1. Research Background and Justification

Context and Significance

Whether certain human rights take precedence over others is not merely an abstract dilemma: courts and international bodies confront this question each time two formally equal rights lead to incompatible obligations. While the 1993 Vienna World Conference proclaimed human rights as indivisible, interdependent, and interrelated, the practical resolution of rights conflicts inevitably reveals implicit hierarchies within normative systems. The philosophical foundation for understanding these hierarchies can be traced from Fichte's transcendental framework and Kant's moral autonomy through Hegel's dialectical integration of rights with social institutions, to contemporary scholars such as Wuerffel, Koji, and Klein, who have explored how hierarchical organization manifests in international law.

Freedom of religion provides a particularly revealing lens for examining these hierarchies. As a right intersecting individual identity with collective social practices, it frequently clashes with non-discrimination, equality, and freedom of expression. These tensions reveal underlying assumptions about the relative importance of different rights and provide insights into how legal systems prioritize competing claims, exposing the mechanisms, often implicit, through which normative orders handle conflict.

The Inter-American Context

The predominantly Catholic heritage of Latin America, coupled with growing evangelical influences and indigenous spiritual traditions, creates an intricate religious ecosystem. Catholic identification has declined from 92% in 1970 to approximately 69% in 2020, while evangelical Protestantism has grown to 19% of the population. This transformation, coupled with increasing religious disaffiliation and the persistent presence of indigenous spiritual traditions, has created unprecedented pluralism. Yet the Catholic Church continues to occupy a privileged position in many national contexts, reflected in concordats, constitutional references, and cultural hegemony.

Democratization across the Americas has produced legal provisions on medical care, sexuality, and reproduction that generate direct tensions between

religious and human rights sectors. Alliances between Catholic and Protestant groups advocating natural law arguments and initiatives concerning reproductive rights, gender identity, same-sex marriage, and educational programs addressing sexual diversity have created new landscapes of normative conflict. The collision of freedom of religion with other rights is intensified when religious authorities declare certain expressions of sexuality immoral or condemn LGBTQ individuals, creating direct conflicts between non-discrimination principles and religious expression.

Within the Inter-American system, the American Declaration articulates freedom of religion as the right to "freely profess a religious belief" without defining precise parameters. The American Convention introduces freedom of conscience alongside freedom of religion without clearly defining either concept, creating fertile ground for interpretive conflicts that courts must resolve through implicit or explicit hierarchical reasoning.

Comparative Dimension

The study situates the Inter-American system within a broader global landscape by examining how different regional mechanisms address the tension between religious liberty and other fundamental rights. The European system, with its margin of appreciation doctrine, grants states substantial discretion in regulating religion-state relations, resulting in more robust protection for religious institutional autonomy. The African system, through the Banjul Charter, emphasizes collective and communal dimensions of rights that reshape freedom of religion's scope. These comparative perspectives reveal that the Inter-American Court's systematic subordination of freedom of religion to equality norms represents a distinctive regional approach rather than a universal pattern in international human rights adjudication.

Research Questions

- Does a hierarchy of human rights exist in the Inter-American system, and what factors influence it?
- What is the hierarchical position of freedom of religion, and is it influenced by Member States' interpretations?
- How does this hierarchical position influence society, and which groups are most affected?

Hypotheses

- A discernible hierarchical order exists in the Inter-American system despite formal commitments to indivisibility.
- Freedom of religion occupies a conditionally subordinate position, with its protection level depending on contextual interaction with equality, non-discrimination, and gender identity principles. In disputes where freedom of religion conflicts with these principles, the Court's jurisprudence tends to favour secular equality as a structural foundation of democratic coexistence.
- Freedom of religion can acquire contextually reinforced weight when intersecting with state neutrality, freedom of conscience, or the protection of minority identities. In such circumstances, both the Inter-American Court and national constitutional courts affirm the autonomy of belief as a constitutive element of human dignity and pluralism, as demonstrated in cases involving indigenous spiritual practices tied to cultural survival (Sarayaku, Yakye Axa). Freedom of religion thus operates as a right whose position varies dynamically within a flexible hierarchy shaped by the factual circumstances of each case.

2. Methodology and Approach

Research Design

This research adopts a qualitative and comparative methodological approach combining content analysis of judicial decisions with case study examination. The study employs qualitative content analysis as its primary framework, selected for its effectiveness in analyzing contextualized texts according to established analytical models without resorting to quantification. Through this interpretive lens, the study seeks to comprehend social and legal phenomena through the meanings they hold for the actors involved, enabling evaluation of the legal instruments structuring the Inter-American system for human rights protection.

Corpus of Analysis

- Inter-American Court of Human Rights judgments and advisory opinions.
- Landmark constitutional court decisions from Mexico, Colombia, Chile, and Peru.
- International instruments and normative frameworks governing freedom of religion.
- Comparative references to European, ASEAN and African human rights systems.

These jurisdictions were selected for their active engagement with Inter-American standards, representative diversity within the region, and presence of specific domestic legislation regulating freedom of religion. Each judicial decision was analyzed multiple times to ensure consistency and interpretive accuracy, with analytical notes systematically recorded to document coding criteria and emerging categories.

Key Cases Examined

The study centres on landmark cases including *Olmedo Bustos et al. v. Chile* (2001) on freedom of expression and religious sensitivities, *Sandra Pavez v. Chile* (2022) and *Atala Riffo v. Chile* (2012) on non-discrimination, religious institutional autonomy, employment discrimination and sexual orientation. Complementary cases include *Artavia Murillo v. Costa Rica* (2012) on

reproductive rights and religious conceptions of personhood, *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012) on indigenous spiritual practices and territorial rights. Advisory opinions, particularly OC-24/17 on gender identity, complement the contentious case analysis. The documented patterns across these cases regarding scrutiny levels, analytical framing, burden allocation, and remedial approaches provide the empirical foundation for the theoretical conclusions.

Theoretical Framework

The study integrates two principal theoretical lenses. First, Rawlsian lexical ordering, examining whether basic liberties take categorical priority over other values and how freedom of religion is positioned relative to other basic liberties. Rawls's ordering is transcendental in nature, reconstructing the principles that make the realization of subsequent rights possible. Second, the theory of hierarchy of human rights, drawing on scholars such as Alexy, Klein, Koji, Shue, Farer, Hierro, and Rubio Llorente, which examines how normative systems inevitably organize rights into hierarchical structures through formal mechanisms (jus cogens, non-derogability, basic human needs, immediate vs progressive realization) and interpretive practices (differential scrutiny, burden-shifting). The combination of these perspectives suggests that, although all human rights are inherently valuable, practical adjudication requires principled methods for resolving conflicts.

The integrated framework addresses the indivisibility paradox by recognizing that indivisibility operates at the level of human dignity and conceptual unity, while practical implementation requires contextual prioritization. This approach maintains the normative ideal of indivisibility while providing tools for principled decision-making in concrete cases.

Scope and Delimitations

The research focuses geographically on the Inter-American region with emphasis on Latin America, temporally on post-1990 developments, and methodologically on qualitative rather than quantitative analysis. Sources include academic literature, legal documents, conference proceedings, and scholarly discussions with experts. While this study does not seek statistical generalization, it offers a rigorous qualitative understanding of how legal discourse in Latin America produces and legitimizes hierarchies among rights.

3. Results of the Dissertation

1. A Five-Tier Hierarchical Structure

Despite formal commitments to rights indivisibility, the comprehensive examination of Inter-American Court jurisprudence establishes that the system operates through systematic hierarchical ordering across five discernible tiers:

- **Tier 1 (Apex):** Jus cogens norms prohibiting torture, slavery, and forced disappearance, admitting no derogation or balancing, as established in *Barrios Altos v. Peru* (2001).
- **Tier 2:** Non-derogable rights under Article 27 ACHR (right to life, humane treatment, due process), receiving heightened protection requiring compelling state justification.
- **Tier 3:** "Quasi-fundamental rights" (freedom of expression, political participation, equality), with robust but not absolute protection through strict scrutiny and heavy presumptions against restriction.
- **Tier 4 (Fluctuating):** Freedom of religion, occupying a variable position between tiers 3 and 5. Its protection varies based on contextual factors: when linked to indigenous cultural survival (*Sarayaku, Yakye Axa*), it approaches tier 3 protection; when institutional religious autonomy conflicts with equality norms (*Pavez, Atala Riffo*), it descends toward tier 5.
- **Tier 5 (Subordinated):** Economic, social, and cultural rights, characterized by weak justiciability and deferential review, even in landmark decisions extending direct justiciability such as *Lagos del Campo v. Peru* (2017).

2. Freedom of Religion's Subordinate Position

- Freedom of religion occupies a fluctuating but consistently subordinate position when confronting rights deemed essential to democratic functioning or protection of historically vulnerable populations.
- *Olmedo Bustos v. Chile* (2001) established the foundational framework for subordination, positioning freedom of expression as "one of the essential foundations of a democratic society" while treating religious sensibilities as individual preferences.

- *Pavez v. Chile* (2022) crystallized three subordination mechanisms: categorical trumping (equality rights automatically override religious claims), burden reversal (religious institutions must prove their practices cause no discriminatory effects), and scope contraction (engagement with public functions strips religious institutions of autonomy protections).
- *Artavia Murillo v. Costa Rica* (2012) rejected religious conceptions of embryonic personhood, subordinating religious epistemology to scientific and philosophical frameworks deemed appropriate for rights adjudication.
- The contrast with indigenous spiritual practices is instructive: in *Sarayaku v. Ecuador* (2012), the Court granted protection rarely available to mainstream religious claims, but this differential treatment derives from indigenous peoples' historical vulnerability rather than inherent value accorded to religious exercise as such.

3. *Five Methodological Mechanisms of Hierarchy*

The Court operationalizes hierarchical ordering through five distinct but interrelated mechanisms that establish hierarchy not through explicit rank-ordering but through systematic patterns embedded in adjudicative technique:

- **Differential scrutiny:** strict scrutiny for restrictions on expression and equality classifications versus deferential review for limitations on religious claims and economic rights.
- **Burden-shifting frameworks:** asymmetric evidentiary advantages for discrimination claims involving suspect classifications, while religious institutional autonomy assertions bear full evidentiary burdens without presumptive validity.
- **Evidentiary requirements:** relaxed standards and shifted presumptions for cases involving violence against women, racial discrimination, or violations against indigenous peoples, with no comparable advantages for freedom of religion claims.
- **Proportionality analysis:** embedding hierarchical judgments within ostensibly neutral balancing. The Court consistently finds restrictions

on highly-protected rights disproportionate while upholding limitations on subordinate rights through identical methodology.

- **Interpretive presumptions:** expansive interpretation of expression with restrictions narrowly construed, versus comparatively restrictive interpretation of freedom of religion with limitations broadly construed when religious claims conflict with competing interests.

4. Theoretical Vindication

- Rawls's lexical ordering is confirmed for apex rights (jus cogens norms), which admit no balancing regardless of consequences, reflecting what Klein identifies as hierarchical superiority grounded in fundamental values that precede and constrain positive law.
- The theory of human rights hierarchy (Alexy, Klein, Koji, Shue, Farer, Hierro) accurately explains how the Court's differential scrutiny levels, burden-shifting frameworks, and interpretive presumptions embed systematic hierarchical judgments across rights categories. These hierarchies serve three functions: conflict resolution, systemic coherence, and legitimacy grounding.
- The Inter-American Court departs from Rawls by systematically subordinating freedom of religion (a right Rawls accords basic liberty status) when it conflicts with equality, expression, or reproductive autonomy. This divergence reflects the Court's alignment with European constitutional traditions emphasizing secularism and equality, rather than the American tradition emphasizing religious accommodation.
- Indivisibility and hierarchy operate at different analytical levels: indivisibility as moral principle asserting equal inherent value of all rights; hierarchy as adjudicative necessity reflecting pragmatic requirements of conflict resolution. Recognizing this distinction enables more sophisticated understanding of rights discourse.

5. Four Determinative Factors

- **Democratic necessity:** rights deemed essential to democratic functioning, particularly freedom of expression and political

participation, receive categorical precedence over rights characterized as individual preferences.

- **Historical vulnerability:** rights protecting historically marginalized populations, including indigenous peoples and victims of gender-based violence, receive enhanced judicial solicitude through differential evidentiary standards and burden-shifting frameworks.
- **Institutional capacity:** rights requiring positive state action and resource allocation are subordinated relative to negative liberties requiring only governmental restraint.
- **Philosophical commitments:** secular public reason, following Rawls's distinction between comprehensive doctrines and political values, positions religious claims as comprehensive doctrines that must yield to political values capable of securing pluralistic consensus.

6. Societal Implications and Affected Populations

The hierarchical subordination of freedom of religion produces differential impacts across specific populations:

- **Indigenous peoples** benefit from enhanced protection when spiritual practices are framed through collective rights and cultural survival (Sarayaku, Yakye Axa), but communities whose spirituality does not fit territorial claims may find this protection unavailable.
- **Women within religious minorities** face intersectional challenges: while the Court increasingly protects women from discrimination justified by religious doctrine in public spheres, it remains hesitant to address discrimination within religious communities themselves.
- **LGBTQ+ individuals** receive clear protection against discrimination in public employment and services (Pavez, Atala Riffo, Advisory Opinion OC-24/17), but those from religious backgrounds face unique challenges including religious trauma and family rejection that the Court's framework inadequately addresses.
- **Afro-descendant religious practitioners** (Candomblé, Santería, Vodou, Umbanda) continue facing social stigma, police harassment, and exclusion from interfaith dialogues despite formal legal recognition.

- **Traditional religious communities** (Catholic, Evangelical Protestant, and Orthodox institutions) face systematic pressure to modify employment practices, educational curricula, and service provision policies to comply with equality mandates.
- The gap between the Court's cosmopolitan liberalism and domestic populations' socially conservative values generates compliance resistance, as evidenced by Argentina's rejection of Artavia Murillo's reasoning and Panama's defiance of marriage equality mandates.

7. Original Contributions

- First comprehensive documentation of systematic hierarchical patterns across 34 years of Inter-American Court jurisprudence on freedom of religion.
- Identification of the five-tier hierarchy and five methodological mechanisms through which courts establish hierarchy via ostensibly neutral procedural devices.
- Synthesis of Rawlsian lexical ordering with theories of human rights hierarchy as a comprehensive theoretical framework for international human rights adjudication.
- Doctrinal contribution analyzing Article 12 ACHR through comprehensive examination of the Court's jurisprudence, revealing distinctive approaches distinguishable from universal systems.

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