

# FREE MOVEMENT IN THE COUNTRIES OF THE ANDEAN COMMUNITY

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**ABSTRACT:** *The Andean Community has concentrated its efforts on strengthening commercial and economic integration, leaving both the social and human rights aspects in the background, until recently. The road to the creation of a common Andean market has allowed us to make progress in the sector of the development of certain rights and freedoms; in particular those relating to migration, starting from the principle of the free movement of people.*

*At the origin of Andean integration, the free movement of people is linked to the objective of creating a common Latin American market, based on the four fundamental freedoms of movement: goods; services; capital; people. The free movement of people, both internally and externally, was not addressed as a topic until recently, when the 1st Andean Forum on Migration was held in 2008.*

*The Cartagena Agreement, the Treaty establishing Andean integration, does not make direct reference to the free movement of people, in any of its capacities: workers, tourists or students. The first community rules, which promote the right to free movement, in particular of workers, date back to the first decade of Andean integration.*

**KEYWORDS:** *Andean Community, Freedom, Movement, Treaty, Cartagena*

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## 1. INTRODUCTION

The maximum expression of the combination of the free movement of people and human rights is contained in the Andean Charter for the Promotion and Safeguarding of Human Rights, which contains a specific section dedicated to the "Human Rights of migrants and their families"<sup>1</sup>.

The Andean Labor Migration Instrument (SAML) contained the essence of the principle of free movement of people in establishing that in Andean integration there was no discrimination in the employment of migrant workers due to sex, race or religion. or nationality. Consequently, they will have the same rights as workers from the country of immigration, including the implementation of collective agreements, and will receive the same treatment with regards to the exercise of trade union rights, subject to opposition to the legislation of the country of immigration.<sup>2</sup> From the need to promote the goal of forming a common Andean market in 2005, there was a complete remodeling of the SAML in 2003.

This modification in a certain sense was very apt, as it directly facilitated the free movement of people in the Andean Community. The use of identification documents responds to a need aimed at facilitating the free movement of people throughout the territory of the State.

Beyond the right of admission and entry with one's national identity documents, the amendment made to the SAML contains a provision of greater legal significance in the field of Community citizenship

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<sup>1</sup> Apartado E, arts. 50 y 51.

<sup>2</sup> Art. 8 SAML

rights. It establishes that national tourists from one of the member countries must enjoy the same rights as citizens of the state they entered, without prejudice to national internal provisions on immigration, internal public order, security and health.

The right of EU citizenship relating to the right to free movement of people also extends to citizens of third countries, for the sole reason of having identification documents issued by one of the member states of the Andean Community.

A particularly favorable sector for the development of actions aimed at facilitating and strengthening the free movement of people is cross-border cooperation, through community work in various subjects such as: infrastructure, customs, migration and harmonization of the rules and laws of the member countries.

CAN has sought to adopt a global approach to the free movement of people in the context of a community citizenship statute that allows the enjoyment of rights within and beyond borders on the principle of identity of the Andean Community. The Andean community structure regarding free movement is completed with a rule intended to protect migrants outside the Andean Community, in the territory of a third state.

## 2. METHODOLOGY

In this study, the methodology of work will be qualitative, so it is based on data recovery from different texts, i.e secondary sources. We will do an interpretation of the literature, by comparing the research with the theoretical knowledge, creating a picture regarding the selection of the right methodology. To achieve the objectives of the paper, the collection of secondary information was done by dividing the literature into theoretical and empirical, literature which was obtained from the Library of Urbino University "Carlo Bò", in the Faculty of Law.

Another important source for collection information has been electronic addresses of various international institutions and scientific journals.

## 3. DISCUSSION

The theme of free circulation is also addressed in the Constitution of Venezuela. Article 50 mentions: "Everyone can move freely within the national territory, change domicile or residence, leave the Republic or return to it, bring their goods home or take them out, with the limitations established by law. Venezuelans can return to their homeland without requiring any authorization. No act of public authority can impose expatriation to the detriment of Venezuelan citizens".

The wording of the article is quite complete, as it presents some elements regarding the right to free movement, which are not found in other regulatory texts. To ensure the most effective exercise possible of the right to free movement, it establishes that in the case of a concession, the law will establish the necessary conditions in which its use is guaranteed in an alternative way.

For an in-depth analysis of Article 24 of the Colombian Constitution it must be stated that the latter was very much inspired by the German Constitution, which in Article 11 states: "All Germans enjoy freedom of movement throughout the federal territory"<sup>3</sup>.

The influence of German jurisprudence and doctrines are evident, but one cannot speak in any way of "copy" or "imitation". The orientation towards European constitutionalism, and in particular towards

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<sup>3</sup> The right to free movement affirmed by Article 11 of the German Constitution can only be limited by law or on the basis of a law, and only in cases in which, due to the lack of sufficient means of subsistence, practical burdens for the community would arise, or in cases where this is necessary to avert an impending danger to the existence or to the fundamental liberal and democratic order of the Bund or a Land, or to combat dangers arising from epidemics, natural catastrophes or disasters particularly serious, or to protect youth from lack of assistance or in order to prevent criminal actions.

the German model, has not led to a loss of the identity of the 1991 Political Constitution<sup>4</sup>. The right of movement includes both the right of Colombians to move throughout the national territory and to enter and exit the country whenever they deem it necessary.

Foreigners also have the first right, i.e. that of moving freely within Colombian territory, but their entry or abandonment is subject to international treaties and immigration and forestry regulations. However, in any case, the foreigner who is in a country legally cannot be expelled except by virtue of a law or a sentence issued by the competent authority. The right to free movement has the character of a legal reserve, and consequently can only be modified by provisions of the same rank. This right allows partial restrictions in relation to certain places and times, means of transport, such as those resulting from the need to guarantee the safety of certain State officials or officers; it can also be subject to limitation during states of exception without however harming its essential core and other fundamental rights. The authorities have the right to require the presentation of a residence permit and also to force certain people to prematurely favor their place of residence, to allow greater security of the community and the physical integrity of people.

Article 24 of the Colombian Constitution also recognizes the right of Colombian citizens to be able to freely leave the country without the need for permits that indirectly violate this right. Another fixed point from which the Colombian Constitution took inspiration on the subject of free movement is the American Convention on Human Rights of 1969<sup>5</sup>.

Article 22 of the Convention states the "Freedom of movement and residence" in its various points:

1. Every person legally present in the territory of a State Party has the right to move within it and reside there, within the limits of the law. As we can see, also from what was stated previously, a person's freedom of movement constitutes a fundamental right, which can only be limited in the presence of a law, sentence or for reasons of national security; but even in this situation it must be kept in mind that this cannot in any way harm the dignity of a person.
2. Everyone has the right to freely leave any country, including their own.  
This second point of the Convention establishes the right of any person to be able to freely choose whether to avail themselves of the right to travel outside their country of origin or not.
3. The exercise of the rights set out above may be limited only by law and to the extent necessary in a democratic society to prevent crime or to protect national security, public safety and order, public morals, public health or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may be restricted by law in certain areas for reasons of public interest.
5. No one will be expelled from the territory of the State of which he is a citizen or deprived of the right to access it.
6. A foreigner legally present in the territory of a State Party to this Convention may be expelled only following a decision adopted pursuant to a law.
7. Every person has the right to request and obtain asylum in a foreign territory, in accordance with internal laws and international conventions, if he or she is prosecuted for political crimes or related common crimes.
8. Under no circumstances can a foreigner be expelled or returned to a country, whether it is his country of origin or not, if in that country his right to life or his personal freedom risks being violated for reasons of race, religion, social condition or political opinions.
9. Collective expulsions of foreigners are prohibited.

In the American Convention the right of all people to move freely is once again affirmed. The ability to use, or rather exploit, this right does not necessarily have to be the consequence of a particular reason, as it is a necessary condition for the development of the person.

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<sup>4</sup> "Jurisdicción Constitucional y Derechos Fundamentales en Alemania y Colombia" Christian H. Werkmeister

<sup>5</sup> International treaty on human rights, also known as the "San Jose Pact". It was adopted by the Nations of the Americas in San Jose, Costa Rica in 1969. It came into force after the eleventh ratification (that of Grenada) which was deposited on July 18, 1978.

A violation of Article 22 of the Convention occurred in two very particular cases, in which the victims and their families suffered deprotection resulting from internal displacement, resulting in turn from the incursion of paramilitary groups, acting with the acquiescence of the state.

In the case of the Mapiripan Massacre, the paramilitaries who made the incursion through the action and omission of state agents, established themselves from 15 to 20 July 1997, a period during which they impeded the right to free movement of the citizens of this country, and not only that, as during this period of time massacres and slaughters of approximately 49 people were committed. The massacre committed in Mapiripan, together with the fear that such actions could be repeated by the paramilitaries, led to the internal displacement of all families for the citizens of this country. The displacement of Mapiripan families has its origins in the lack of protection due during the commission of the massacres, resulting in the denial of the physical and moral integrity of the people. With Judgment C No. 134 the Court declared that Colombia violated Article 22 of the Convention, as the latter affirms the right of people not to be forcibly deported from their country, contrary to what happened in Mapiripan.

Another situation in which there has been a limitation of the right to free movement concerns the Ituango Massacre Case. In June 1996 and starting from October 1997, in the rural areas of El Aro y La Granja, both located in the municipality of Ituango, paramilitary groups perpetrated successive armed incursions, killing 19 helpless civilians. In the case of the La Granja massacre, 31 family members of one of the murdered people were forced to move to other municipalities in Antioquia.

In the El Aro massacre, however, the paramilitaries, before retreating, destroyed and set fire to approximately 80% of the citizens' homes and supplies, and forced approximately 681 people to abandon their homes and their jobs. However, these numbers are very approximate, as the number of people forced to move due to lack of an identification document is not known with certainty.

For the Court, the massacres that occurred in this area, in addition to the fear that they could be repeated or in any case the destruction of most of the homes and properties, meant that many families moved to other nearby municipalities. In this case the Inter-American Court of Human Rights ordered the Colombian state to answer for these massacres. The sentence states that the State is responsible for the violation of the right to life, the forced displacement of farmers and the humiliation suffered by them. The Court also urges the State to publicly ask for forgiveness for what happened.

Article 24 of the Political Constitution was modified by article 2 of Legislative Act 2 of 2003<sup>6</sup>. This Legislative Act was declared UNCONSTITUTIONAL by the Constitutional Court through Sentence C-816 of 2004, due to procedural defects, of the Sala Piena. The initial wording of this article which stated the possibility of the National Government establishing the obligation to show a certificate of residence to inhabitants in the national territory, in accordance with the statutory law issued for this purpose, has been modified, and more precisely cancelled. The modification deriving from this Legislative Act to article 24 of the Political Constitution, and not only, are a consequence of the fight against terrorism. In previous legislation, Article 24 of the Political Constitution was mentioned:

***“El artículo 24 de la Constitución Política quedará así:***

*Artículo 24. Todo colombiano, con las limitaciones que establezca la ley, tiene derecho a circular libremente por el territorio nacional, a entrar y salir de él, y a permanecer y residenciarse en Colombia. El Gobierno Nacional podrá establecer la obligación de llevar un informe de residencia de los habitantes del territorio nacional, de conformidad con la ley estatutaria que se expida para el efecto.”* An important modification to Article 24 of the Political Constitution also derives from Law 137 of 1994. In Article 28 the law establishes the Limitations on freedom of movement and residence: “With the aim of protecting the lives of the inhabitants and facilitating war operations, the Government may limit the movement or residence of people within the national territory. Just as it will be able to establish special circulation and residence zones, to ensure the protection of the population that could be affected by the actions of armed conflict. No one may be forcibly taken to special areas and forced to reside there.”

<sup>6</sup> Published in the Official Duery No. 45.406, on December 19, 2003.

#### 4. CONCLUSIONS

The right to free movement affirmed by article 24 of the Political Constitution was also a topic of discussion in Sentence C-292/08. The ruling has as its object the declaration of unconstitutionality of article 821<sup>7</sup> of the Tax Statute, as the latter violates articles 1, 13, 24, 28, 83 and 100 of the Political Constitution. We note the right of the tax authorities to prevent the exit from the country of people who have pending tax obligations.

The Constitutional Court recognized that article 821 of Decree 624 of 1989 disregards citizens' right to free movement. It is stated that although Article 24 of the Political Constitution refers to Colombian citizens, this does not imply that foreigners do not have the guarantee of being able to move freely. In accordance with the various international treaties ratified by Colombia, foreigners who legally enter the territory of the State have the right to have their freedom of movement respected, and in case of limitations of this freedom, these must be justified and not implemented arbitrarily. None of the limitations indicated by international treaties such as national security, public interest, health, etc. are applicable to the specific case. For these reasons the contested provision is declared unconstitutional. The reasons indicated by the Court regarding the sentence, regarding the argument of free movement, concern the fact that any fact or act cannot be invoked to limit the right to free movement. The Court states that the Political Constitution considers the right to free movement to be a fundamental right of the individual. Even if article 24 refers only to Colombian citizens, article 100 of the Constitution also extends this right to foreigners and allows different behavior only for reasons of public order and national security, which, analyzed in concrete terms, demonstrate sufficient relevance so that the aforementioned right is limited.

With regard to what was stated by the Human Rights Committee, regarding the situation of foreigners who have entered the State legally, it is noted that once the State itself has allowed the entry of foreigners into its territory, they possess all the rights listed by the International Covenant of civil and political rights, including the right to move freely and to choose one's residence, as well as the right to leave the State itself.

The **Constitution of Ecuador**<sup>8</sup> it distances itself significantly from the exclusive recognition of the right to free movement to national citizens only. Thus, in article 23 it is stated that "foreigners also have the right to enjoy this freedom as provided by law". Exiting the country will be prohibited only by a decision of the competent judge, in accordance with the law.

The right to free movement is also recognized in other constitutions, such as that of Panama, referred to in the article 27<sup>9</sup> this right is affirmed, and the limitations provided for by law are also established. The Constitution of Peru also presents a very similar formulation. The article 2.11<sup>10</sup> it affirms not only the right to free movement but also establishes the limitations placed for health reasons, judicial limits or foreign laws.

Like other constitutional norms, article 21.7 of the Bolivian Constitution mentions: "Bolivians have the following rights: ..... to freedom of residence, permanence and movement throughout the

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<sup>7</sup>Article 821: "La Dirección General de Impuestos y Aduanas Nacionales podrá solicitar a los organismos de seguridad, se impida la salida del país de aquellos extranjeros que hayan obtenido ingresos de fuente nacional, mientras no cancelen el valor de los impuestos."

<sup>8</sup> Independent since 1830, it has been a republic since 1832, after having been a Spanish colony for a long time and after having been part, for some years, of Greater Colombia, founded by Simon Bolivar.

<sup>9</sup> Article 27: "All people can move freely within the national territory and change their residence or domicile without limitations, other than those imposed by law or by tax, health and immigration transit regulations".

<sup>10</sup> Article 2. 11: "every individual has the right: to elect his own residence, move within the national territory, and exit and enter it, except for limitations for health reasons, a judicial sentence, or by virtue of a foreign law".

Bolivian territory, including entry and exit from the country". As happens in the Argentine Constitution, the Bolivian Constitution also seems to recognize this right only to its citizens and furthermore also recognizes all the distinctive elements of the right to free movement.

In a conference held in Bogota on the theme of free movement for the member countries of the Andean Community, a rejection was established towards discrimination against foreigners, racism, xenophobia and all unilateral laws that penalize or discriminate against 'immigrant.

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