

Report on the Human Right to Life in Ecuador

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Report on the Human Right to Life in Ecuador

REPORT ON THE HUMAN RIGHT TO LIFE IN ECUADOR

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I. Introduction

This report presents the current legal and political perspective on the right to life in the Republic of Ecuador. As it will be discussed, the country is at a potential turning point, on the one hand anchored in a deep and clear tradition protecting the right to life, and on the other hand influenced by health policies and international pressures that seek to restrict this protection, under the argument of the sexual and reproductive rights.

The Ecuadorian constitutional tradition is unanimous and clear in its constant and explicit protection of the right to life from conception. The analysis regarding the current constitutional regime on fundamental rights is of particular interest. As it will be discussed, the Constitution confirms this tradition, as it modifies it with an enforced doctrine on the supremacy of fundamental rights, and even placing them above the constitution. The fact is, in short, that Ecuador is a country that offers its citizens, including the unborn, enhanced protection of their rights, among which is the right to life.

Something of this sort is happening with the main legislation that regulates this issue, from the Criminal Code to the laws relating to the protection of children, among others. However, at that policy level, the protection of the unborn child is becoming more ambiguous. On the one hand, the laws on the protection of children explicitly recognize, once again, the right to life of the unborn child. On the other hand, the Criminal Code, while considering abortion as a crime, includes certain exceptions that could be interpreted as restrictions to this right. In any case, however, the Ecuadorian legislation unanimously testifies that it is illegal –although not always a crime– to end the life of an unborn human being.

This coherent legal structure begins to flounder taking into account the current government's policies – particularly, by the Ministry of Health – on sexual and reproductive rights, through which “emergency contraception” methods have been extensively permitted. These

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means of contraception are nothing else but abortifacients, and their authorized use is based on the growing recognition of the sexual and reproductive rights.

A similar ambivalence exists in the international field. On the one hand, the international treaties on human rights that have been ratified by Ecuador recognize, some explicitly, the right to life of the unborn. On the other hand, however, the trend of the international organizations in their reports and recommendations is to pressure the country to reduce its protections of the right to life, and to expand the policies that include the use of abortifacient contraception. It appears that the decriminalization of abortion is a “recommendation” that could arrive at any moment. Once again, all of this is argued within the defense of the sexual and reproductive rights.

Ecuador, therefore, is in a time of transition. The national and international legislation is clear: the unborn has the right to life, and this right is inviolable. Political practice, however, domestically and abroad, has used the sexual and reproductive rights to begin to corrode the current legal structure. The question is whether the current Government, and those that follow it, will solve this contradiction between law and politics.

II. Political organization of Ecuador

Ecuador’s current constitution, promulgated in the year 2008 by President Rafael Correa, defines the country as a constitutional State of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, multinational, and secular, with a republican and decentralized government. According to the Constitution, one of the first duties of the State is to safeguard, without discrimination, the full enjoyment of the rights established within it, and of the rights recognized in international instruments. Ecuador is a State that safeguards the rights of its citizens, since, as this report will demonstrate, their fundamental rights are widely recognized throughout the Constitution.

The Ecuadorian State, having a republican and decentralized government, divides its territory into regions, provinces, cantons, and rural parishes. The mentioned entities have their own decentralized autonomous governments with political, administrative and financial autonomy, exercised through the rural parish meetings, the town councils, the municipal councils, the metropolitan councils, the provincial councils, and the regional councils. Each autonomous government has different powers in local matters, specified by the Constitution of the republic, and those that are not specified remain an exclusive competence of the central Government.

For purposes of this report, it is necessary to mention that, according to the Constitution, the central Government of the Ecuadorian State has exclusive competence over policies on education and health, as well as those that it must apply as a result of an international treaty.

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III. Historical development of right to life in the Constitution of Ecuador

Human rights, like the rights recognized by the constitutions of different countries, surged after World War II through the creation of the United Nations (“UN”). However, before that event, the constitutions of various countries already recognized the fundamental rights of all citizens, although under different names. The right to life was not necessarily recognized as a human right, but as a right inherent to each human being by natural law, and so the State was bound to safeguard that right. The various constitutions which Ecuador has had in the last two centuries manifest the trends and positions that the country has had on social and political issues.

The first constitutions of the XX century in Ecuador (1906, 1929, 1945, 1946) recognized the right to the inviolability of life, indicated within the chapter that contained the rights and protections of all citizens. The remaining constitutions of the last century (1967, 1979, 1998) go even further than the last ones, by explicitly recognizing the right to life from conception within a single article, as well as its inviolability. All of the mentioned constitutions recognize the right to life within a special section that lists the rights and protections of all citizens, either as a fundamental right, as an individual protection, or as a human right.

The constitution of 1998 was the first one to extend the recognition of all human rights, by including those recognized in international treaties that have been signed and ratified by Ecuador. This constitution begins to legally define Ecuador’s openness to international law, as well as its subjection to the compromises and principles of the international community.

IV. National regulation of right to life

a) Constitutional recognition of human rights

Ecuador’s current constitution reflects the same posture as its previous constitutions regarding the recognition of human rights and the right to life. As will be seen later, it recognizes the right to life from conception, and, like the constitution of 1998, it recognizes the human rights that are recognized by the international treaties by which Ecuador is bound.

The human rights are scattered throughout the Constitution, and their precedence over other rights is explicitly recognized. Firstly, article 3 of the Constitution establishes, as a primary duty of the State:

*Guarantee without any discrimination whatsoever the true possession of the rights set forth in the Constitution and in international instruments, especially the rights to education, health, food, social security and water for its inhabitants.*³

³Constitution of the Republic of Ecuador, Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

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Title II of the Constitution contains the list of all the rights, as well as their implementation principles. Article 10 begins affirming that all persons are entitled to and will enjoy the rights safeguarded by the Constitution and international treaties. Article 11 enumerates the principles that will govern the exercise of rights, stating the importance and primacy that they have in relation to any other norm. Said article states as follows:

Article 11, 2nd paragraph: All persons are equal, and shall enjoy the same rights, duties, and opportunities.

Article 11, 3rd paragraph: The rights and guarantees set forth in the Constitution and in international human rights instruments shall be directly and immediately enforced by and before any civil, administrative or judicial servant, either by virtue of their office or at the request of the party.

For the exercise of rights and constitutional guarantees, no conditions or requirements shall be established other than those set forth in the Constitution or by law.

Rights shall be fully actionable. Absence of a legal regulatory framework cannot be alleged to justify their infringement or ignorance thereof, to dismiss proceedings filed as a result of these actions or to deny their recognition

Article 11, 4th paragraph: No legal regulation can restrict the contents of rights or constitutional guarantees.

Article 11, 8th paragraph: The contents of rights shall be developed progressively by means of standards, case law, and public policies.

The State shall generate and guarantee the conditions needed for their full recognition and exercise. Any deed or omission of a regressive nature that diminishes, undermines or annuls without justification the exercise of rights shall be deemed unconstitutional.⁴

As can be seen, the mentioned constitutional principles protect the full exercise and effective applicability of the rights of every citizen, preventing the restriction of their content, recognition, enjoyment, or exercise. Under these principles, the State guarantees the maximum protection of human rights, as well as their primacy over other rights.

Beyond the State's duty to recognize and safeguard human rights, article 83 of the Constitution establishes that one of the duties and responsibilities of all citizens is to respect those rights and to fight for their fulfillment. Also, article 27, in the section on the right to education,

⁴Ibid.

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establishes that education will be developed in the framework of respect for human rights, among other things, and that it is indispensable for the knowledge and exercise of those rights.

In addition to the recognition, the Constitution also provides for certain defense mechanisms and protection of human rights, such as its strong regulatory safeguards for recognition and enforcement. Article 84 mentions one of them as follows:

The National Assembly and all bodies with legal and regulatory authority shall be obligated to adjust, formally and materially, the laws and other legal standards related to the rights provided for in the Constitution and international treaties and those that are needed to guarantee the dignity of human beings or communities, peoples and nations. In no case shall amending the Constitution, laws, other legal and regulatory frameworks or actions by the government endanger the rights recognized by the Constitution.⁵

Similarly, article 172 establishes that judicial authorities shall be subject to the Constitution, and international human rights treaties in the administration of law.

Without going yet into detail about the hierarchy of norms in regards to the applicability of international human rights treaties, it is relevant to mention that article 417 of the Constitution recognizes the principle *pro personae* or *pro serhumano*, which assumes that, in case of a contradiction between a right established in the Constitution and another right established in an international treaty, the right or norm that most benefits the person in question will be applied. This principle confirms the primacy of human rights over any other right, and the duty of the State to enforce them at all times, and under any circumstance. Article 424 reaffirms this, by stating that the Constitution and international human rights treaties that recognize rights more favorable than those enshrined in the Constitution shall prevail over any other law or political act.

b) Constitutional recognition of the right to life from conception

The right to life from conception is found within the multiple rights recognized by the Constitution, and it is guaranteed by the same defense and protection mechanisms for it to be fully recognized and applicable.

First of all, article 45 of the Constitution recognizes and guarantees the care and protection of the right to life from conception directly, within the section that recognizes the rights of children and adolescents. It states as follows:

⁵ Ibid.

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*Children and adolescents shall enjoy the rights that are common to all human beings, in addition to those that are specific to their age. The State shall recognize and guarantee life, including care and protection from the time of conception.*⁶

This last article means that the Constitution considers the unborn as “children”, terminologically recognizing them as subjects of law (specifically, they are subjects of law with the exclusive right to life). It is also relevant and significant that this recognition is made under Title II, Chapter III on “Rights of priority persons and groups” (before it was under section five, on “Vulnerable groups”). Since the unborn are priority persons and groups, the Constitution gives them preferential treatment, and therefore establishes the principle *pro nascituro*, as a base for other principles like that of the most favorable treatment for the unborn, the *in dubio pro nascituro*, the real – not formal – equality of the unborn, with a preferential treatment, among others.⁷

It is also important to clarify that conception is defined as fertilization, as it is scientifically proven that from this early stage there is a whole human being – the human embryo is a person from this time – and, therefore, recognition and legal protection is given from conception, which occurs at fertilization. The Ecuadorian jurisprudence has held the same, as will be seen later.

Article 35 of the Constitution indirectly states that girls, boys and adolescents – all of which, as was previously stated, have the right to life from conception –, as well as pregnant women shall receive priority and specialized attention in the public and private sectors. This reaffirms the State’s duty to protect those in a state of vulnerability, including the unborn.

Another constitutional provision that indirectly protects the right to life of the unborn is article 43, within the section that recognizes the rights of pregnant women. This article states as follows:

The State shall guarantee the rights of pregnant and breast-feeding women to:

- 1. Not be discriminated for their pregnancy in education, social, and labor sectors.*
- 2. Free maternal healthcare services.*
- 3. Priority protection and care of their integral health and life during pregnancy, childbirth and postpartum.*
- 4. The facilities needed for their recovery after pregnancy and during breast-feeding.*⁸

⁶Ibid.

⁷Cfr. RiofríoMartínez-Villalba Juan Carlos y FlorRubianes Jaime, Constitutional Regulation, International, Canonical Crime and Criminal Abortion, Ecuador, 2013.

⁸Constitution of the Republic of Ecuador, Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

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The fact that the State separately recognizes, at a constitutional level, the rights of pregnant women in such a concrete way demonstrates that it values the circumstance they are in, since a new life depends on them, so the State knows that it is a matter of protecting two distinct lives.

The right to life is recognized more fully by the current Constitution, since the 1998 constitution only protected life “since conception”, and now the Constitution not only guarantees the right to life, it also recognizes its protection and caring, from the moment of conception. Of all the constitutions that Ecuador has had, the current Constitution is without a question the one that most provides all possible guarantees to protect the right to life.

In accordance with the foregoing, it is clear that the Constitution of the Republic of Ecuador clearly, directly, and indirectly protects the right to life from the moment of conception. Subsequently is the analysis on the supremacy of the Constitution over any other national or international norm, which will once again demonstrate the normative primacy of the right to life over other rights, by being a right that is recognized and protected by the highest law of the Ecuadorian State.

V. Criminal regulation of right to life: Abortion as a Crime

a) Criminal Code

In October of 2013, Ecuador’s National Assembly approved a new Comprehensive Criminal Code for the country, which modifies several provisions of the Penal Code which has been in force in the country since 1971. The new code includes amendments to the laws governing genocide, torture, sexual violence against women and family, fraud, theft, trafficking, terrorism, among other crimes.

The original project of the new Criminal Code included the decriminalization of abortion, since the Criminal Code of 1971 considered it a crime – specifically in the case of women who had been raped– as will be seen later. However, the legislature’s efforts to do so were terminated after President Rafael Correa threatened to resign if the motion had passed; setting an important precedent that reaffirms Ecuador’s prolife legal tradition. Therefore, all crime related to abortion remains on the same terms as the previous Criminal Code.

The final version of the new Criminal Code has not yet been published, so it is not possible to specify the articles regarding abortion as a crime. However, since the terms in which it is criminalized have not changed, their content can be mentioned, according to how it was originally stated in the Criminal Code of 1971. Every article refers to the past Criminal Code.

The crime of abortion is under Title VI, of “Crimes against persons”, chapter I, of “Crime against life”, of the past Criminal Code. The criminal legislation without a doubt has the same position on abortion as the current Constitution, since it considers abortion as a crime against human life, and not just as a criminal definition that protects other legal interests.

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As noted in the previous section, the Constitution considers the unborn as a “child”, which is why the crime of abortion is under the title that regulates crimes against persons, and under the chapter that regulates crimes against human life. As will be seen below, the Criminal Code criminalizes different types of abortions, with different penalties, according to the gravity of the offence, the unlawfulness, and the accountability of the offender. However, the Code still permits certain exceptions when abortion is not considered a crime, which violates the full constitutional protection of the right to life from conception.

The Criminal Code does not define the term abortion, but it does indicate the elements or means necessary for carrying out an abortion. Article 441 mentions them as “food, drink, drugs, violence, or any other means”, as follows:

Whoever intentionally uses food, drink, drugs, violence or any other means to perform an abortion on a women without her consent, shall be punished with a sentence of three to six years of prison.

If the means employed have no effect, the crime shall be punishable as an attempt.⁹

This article criminalizes forced abortion (without the consent of the women), when it is carried out with one of the specified means. If there is no harmful effect, the crime is not consummated and it remains as an attempted offence, which means that, for reasons beyond the offender’s control, the execution of the crime was interrupted, without producing a result that would deserve the imposition of the complete punishment.

Article 442 of the Criminal Code refers to an abortion that is caused by violent acts done voluntarily, but without the intention of causing the abortion. In other words, the result of the criminal conduct is worse than the result intended by the offender. This type of abortion is criminalized as follows:

When an abortion is caused by violent acts done voluntarily but without any intention of causing the abortion, the offender shall be punished with a sentence of six months to two years of prison.

If the violence is committed with malice or with knowledge of the women’s pregnancy, the penalty increases to one to five years of prison.¹⁰

Premeditation increases the punishment for the crime of this type of abortion, when the offender acts with knowledge of the women’s pregnancy. Therefore, the first paragraph of article 442 refers to an abortion that is provoked with violence but without knowledge of the women’s

⁹ Criminal Code of Ecuador (1971),
http://www.wipo.int/wipolex/es/text.jsp?file_id=195754#LinkTarget_510.

¹⁰ Ibid.

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pregnancy, and the second paragraph of the same article refers to the use of violence with knowledge of the women's pregnancy.

Article 443 of the Criminal Code refers to a crime that is less severe, since it has a minor punishment. In this case, the abortion is caused with the consent of the women, with the intervention of a third party and using the same means referred to in article 441. This type of abortion is criminalized as follows:

Whoever causes a woman to abort with her consent by using food, beverages, drugs or any other means shall be punished with imprisonment of two to five years.¹¹

Article 444¹² also refers to an abortion that is caused with the consent of the woman, but without the intervention of a third party.

Article 445 refers to an abortion that is caused by the same means mentioned in article 441, and that causes the death of the woman. In this case, the level of punishment depends on the consent of the woman regarding the abortion. This article states as follows:

When the means employed for an abortion, with the consent of the woman, cause the death of the latter, the offender shall be punished with three to six years of prison; if the woman did not consent to the abortion, the punishment shall be eight to twelve years of prison.¹³

Article 446 simply increases the penalty for the types of abortions referred to in articles 441 (abortion without the consent of the woman), 443 (abortion with the consent of the woman), and 445 (abortion that causes the death of the woman), if the one who carries out the abortions is a doctor, obstetrician, practitioner or pharmacist. This aggravating circumstance is regulated as follows:

In the cases provided for in articles 441, 443 and 445, the penalty will increase to three to six years of prison in the first case; four to eight years of prison in the second case; and twelve to sixteen years of prison in the third case, when the abortion is caused by a doctor, an obstetrician, a practitioner or a pharmacist.¹⁴

However, even though the Ecuadorian legislation criminalized abortion and the Constitution recognizes the right to life from conception, the Criminal Code includes certain exceptions, or "unimputability" cases, that prevent the full protection of the unborn's life. While it's true that abortion is illegal in Ecuador, an attack against the life of an unborn child is not considered a crime

¹¹Ibid.

¹² Ibid.

¹³Ibid.

¹⁴Ibid.

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in certain cases. According to article 447 of the Criminal Code, an abortion is not punishable in the following cases:

An abortion performed by a physician, with the consent of the woman, or her husband, or close relatives, when she is not able to give her consent, will not be punishable:

- 1. If it is done to prevent danger to the life or health of the mother, when the danger cannot be avoided by any other means, and,*
- 2. If the pregnancy is the result of a rape or “estupro” (sexual intercourse with a minor through the abuse of authority or deception), committed on an “idiot” or “mad” woman. In this case, the consent of the legal representative of the woman is needed for the abortion.¹⁵*

With regard to the first case, Ecuadorian jurisprudence has stated that the “health” of the woman refers to her physical health, not psychological. The second case requires three things: (i) that the pregnancy be a result of a rape or “estupro”; (ii) that the abortion is done on an “idiot” or “mad” woman; and (iii) that the legal representative of the woman consent on her behalf.

Eventually, non-punishability, unimputability, pardons, amnesties, etc., are not considered a legalization of a certain conduct, even though some have tried to demonstrate otherwise. There is no doubt that a pardon or an amnesty of a certain conduct does not mean that it is no longer illegal. Something similar occurs when for some reason the legislator excludes the application of a penalty for actions that would *a priori* be considered as crimes. In other words, the exceptions for an abortion not to be punishable do not mean the recognition of the right to abortion.¹⁶

VI. Other laws which recognize the human right to life

As the supreme law of Ecuador, the Constitution is the basis for the full recognition of the right to life from conception. The Criminal Code, based on the Constitution, recognizes abortion as a crime, but it also contravenes the constitutional provision on the right to life, since it includes exceptions that do not punish the crime of abortion in certain cases. In addition, Ecuador has other laws that reaffirm the right to life from conception, on the same terms as the Constitution, either directly or indirectly. The following laws protect the right to life in Ecuador:

¹⁵Ibid.

¹⁶Cfr. RiofríoMartínez-Villalba Juan Carlos y FlorRubianes Jaime, RegulaciónConstitucional, Internacional, Canónica y Penal del Delito de Aborto, Ecuador, 2013.

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a) “Código de la Niñez y Adolescencia” (Code on Children and Adolescents)

The Childhood and Adolescence Code was published on January 3rd of the year 2003, in accordance with the provisions of the current Constitution. Its purpose is to guarantee the full protection of all girls, boys, and adolescents of Ecuador in order to achieve their integral development and complete enjoyment of their rights. It also includes the means of enforcing such rights, in accordance with the principle of the best interests of the child that protects them.

Article 2 of the Childhood and Adolescence Code states that its norms are applicable to “all human beings, from the moment of conception, until the age of 18.”¹⁷ Therefore, the unborn is protected by the laws of Ecuador, according to that article and to the provisions of the Constitution on the same matter. Accordingly, article 4 of the Code defines a child (boy or girl) as the person who has not reached the age of 12, which confirms the fact that the unborn is considered a person, since it has not yet reached the age of 12.

Lastly, article 20 of the Child and Adolescence Code affirms that “girls, boys, and adolescents have the right to life from conception” and that “it is the duty of the State, the society, and the family to ensure by all possible means their survival and development.”¹⁸ The same article goes on to say that “medical and genetic experiments and manipulations from the fertilization of the ovum until the birth of the child are prohibited; as well as the authorization of any technique or practice that may threaten their life or affect their integrity or full development”¹⁹. This indirectly reaffirms the fact that the Ecuadorian State considers that conception begins at the moment of fertilization, and that from that moment the right to life of the unborn must be recognized and protected.

b) Civil Code

Ecuador’s Civil Code is from the XIX century, and a recast text was published in 2005, in which the articles were reordered, since it had been out of date due to many amendments. As with the Constitution, the Civil Code recognizes the right to life from the moment of conception.

Article 41 of the Civil Code establishes that “every individual of the human species is a person, whatever their age, sex or condition is”²⁰. The Civil Code therefore reaffirms that an unborn child is a person, since the Constitution recognizes that a child has a right to life from conception.

Furthermore, article 61 of the Civil Code states that “the law protects the life of the unborn”²¹, and article 63 affirms that “the rights that would correspond to the creature that is in

¹⁷Código de la Niñez y Adolescencia.

http://www.law.yale.edu/rcw/rcw/jurisdictions/ams/ecuador/Ecuador_Code.htm.

¹⁸Ibid.

¹⁹Ibid.

²⁰Código Civil del Ecuador.

http://www.wipo.int/wipolex/en/text.jsp?file_id=251955, p. 8

²¹Ibid.

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the mother's womb, if it was born and alive, will be on hold until the birth is taken place"²². This is also in accordance with the Constitution, and with the Child and Adolescence Code. It is therefore clear that the right to life from conception is recognized by the internal legal system of Ecuador, at both the constitutional and secondary legislation levels.

VII. The Right to Life and Sexual and Reproductive rights

The issue of sexual and reproductive rights is completely related to the right to life. The recognition of their existence is very recent, intensely driven at the international level, and in the last few years they have begun to gain recognition in the legislations of different countries. A common and concrete interpretation of these rights does not exist, and their content may vary from legislation to legislation.

As discussed throughout this section, the national health system of Ecuador, gives special emphasis to policies and programs aimed at the female sector, including the provision of sexual and reproductive health (promoted and supported by the Ministry of Health). Government efforts include the implementation of programs to provide access to contraception, teen pregnancy prevention, and prevention of unsafe abortions, among other things. The government's efforts to provide universal access to these services are increasing.

It is correct to state that sexual and reproductive rights are related to the right to life since, in many cases, abortion is considered as women's right to choose on their sexual and reproductive health. Access to contraceptives and condoms may also be considered as a sexual and reproductive right, which constitutes an attack on the right to life of the unborn since many contraceptives are abortive.

a) Constitutional recognition

The Ecuadorian State recognized the sexual and reproductive rights for the first time in the current Constitution, within the section of health rights, by recognizing the access to sexual and reproductive health. Article 32 recognizes these rights as follows:

Article 32. Health is a right guaranteed by the State and whose fulfillment is linked to the exercise of other rights, among which the right to water, food, education, sports, work, social security, healthy environments and others that support the good way of living.

²²Ibid.

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*The State shall guarantee this right by means of economic, social, cultural, educational, and environmental policies; and the permanent, timely and non-exclusive access to programs, actions and services promoting and providing integral healthcare, sexual health, and reproductive health. The provision of healthcare services shall be governed by the principles of equity, universality, solidarity, interculturalism, quality, efficiency, effectiveness, prevention, and bioethics, with a gender and generational approach.*²³

Furthermore, the third paragraph of article 66, within the chapter that recognizes the rights of liberty, states that the right of personal integrity includes physical, moral and sexual integrity. Paragraph ten of the same article recognizes the right to “take free, responsible and informed decisions about one’s health and reproductive life and to decide how many children to have”²⁴, and paragraph eleven, by recognizing the right to confidentiality about one’s convictions, states that “In no case shall it be possible to require or use, without the authorization of the holder or his/her legitimate representatives, personal or third-party information about one’s religious beliefs, political affiliation or thinking, or data about one’s health or sexual life, unless required for medical care”²⁵.

On this basis, it is clear that the Constitution of Ecuador recognizes the sexual and reproductive rights as rights to sexual and reproductive health services. In this regard, it is the competence of the State, through the Ministry of Health, to formulate and apply the health policies that will define the means with which to guarantee the right to sexual and reproductive health, in accordance with article 361 of the Constitution.

*Article 361. The State shall exercise leadership of the system through the national health authorities, shall be responsible for national health policymaking, and shall set standards for, regulate and monitor all health-related activities, as well as the functioning of sector entities.*²⁶

As for the application of sexual and reproductive health policies, article 363 states that the State shall be responsible for “ensuring sexual and reproductive health actions and services and guaranteeing the integral healthcare and the life of women, especially during pregnancy, childbirth and postpartum”²⁷.

It is clear that the highest law of the Ecuadorian State recognizes the right to sexual and reproductive health services for all of its inhabitants, and the enforcement of this right has been guaranteed through national health policies, as will be seen below.

²³Constitution of the Republic of Ecuador, National Assembly, Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

²⁴Ibid.

²⁵Ibid.

²⁶Ibid.

²⁷Ibid.

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b) Access and availability of contraception methods

Based on the constitutional provisions cited above and on the Comprehensive Law on Health that will be analyzed later, the Ecuadorian State, through the Ministry of Health, issued a bylaw to regulate the availability and access to contraceptive methods in the national health system, as a way to enforce the sexual and reproductive health policies. This bylaw came into force on March 25th of 2013, through the Ministerial Agreement 2490.

The purpose of the bylaw is to:

... Make available to women and men of the country, comprehensive quality care services and all the information required on family planning, contraception, prevention of sexually transmitted infections (STIs), including HIV AIDS, oral emergency contraception, sexual and reproductive health and prevention of teenage pregnancies or unplanned pregnancies.²⁸

It is therefore evident that the bylaw is clearly related with the right to life, since it regulates oral emergency contraception, and unplanned pregnancies. It places these services within the right to sexual and reproductive health, in accordance with the constitutional provisions that recognize this right, but in detriment to the right to life from conception that is fully recognized and protected by the Constitution, the Civil Code, the Child and Adolescent Code, and many international commitments which will be discussed later in this report.

It appears that the bylaw does not set a limit for the access to the services it guarantees and regulates and guarantees, since it states that the information and advice on them, as well as the access to them (including emergency contraception), especially for adolescents, and young people, require that it, be provided free of charge and administered in a timely manner. It also states that, among other things, the age and the education level are not a condition needed to receive information or assistance on the services it provides, and that no authorization from the family or the partner is needed. In other words, a minor child has the right to receive from the State all the information required about any contraceptive method (including oral emergency contraception), as well as the free of charge delivery for them to use at their personal convenience, without the need to seek authorization from their parents or guardians. In addition, direct access to these methods does not require a gynecological consultation, nor a medical prescription.

As a summary of its provisions, the bylaw states as follows:

Any person regardless of their ethnicity, age, gender, cultural identity, marital status, language, religion, ideology, political affiliation, socioeconomic status,

²⁸Reglamento para Regular el Acceso y la Disponibilidad de Métodos Anticonceptivos en el Sistema Nacional de Salud, Artículo 1, pág. 3.

<http://www.codajic.org/sites/www.codajic.org/files/SIE-DP-13-99.pdf>

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economic migration, sex-gender identity, health status, being a carrier of HIV / AIDS, disability, physical difference, or other status, that requests care from the Health Units in accordance with the Care Level, are entitled to:

- a) *Make informed and free decisions about the treatment or contraceptive method they will use, without being subject to choose one, under pressure or harassment. The health personnel will offer all options of contraception, through previous guidance and advice.*
- b) *Attend as often as deemed necessary to receive services of sexual and reproductive health care, resolve any queries on the contraceptive method chosen and/or request a change or termination of the chosen contraceptive option. These services will be free of charge.*
- c) *The users shall receive advice/counseling and quality comprehensive care on sexual and reproductive health and/or contraception, with adequate time for such activity, with 45 minutes for the initial consultation and/or insertion of IUD or implant, and 30 minutes for counseling/advice and/or subsequent consultation.²⁹*

The contraceptive services recognized and guaranteed by the bylaw are stated as follows:

- a) Simple or combined oral contraception
- b) Simple or combined injectable contraception
- c) Subdermal contraception
- d) Emergency oral contraception
- e) Temporary barrier methods
- f) Temporary intrauterine methods

With regard to emergency oral contraception, it is clearly abortive, since the bylaw states that its purpose is to prevent a pregnancy after sexual intercourse. This method is defined as follows:

Emergency Oral Contraception: A contraceptive method that women can use to prevent an unwanted pregnancy, within five (5) days after unprotected sexual intercourse. All young, teen or adult women can use this method.³⁰

The bylaw also permits the distribution of the “Yuzpe Method”, as a type of emergency contraception, and it defines it as follows:

Yuzpe Method: Involves the use of a higher dose of normal contraceptives, as a method for emergency contraception. They require eight (8) tablets containing

²⁹ Ibid, article 5, pg. 4.

³⁰ Ibid, article 30, pg. 9.

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30 mg of Ethinyl Estradiol and 150 mg of Levonorgestrel (Nordette, Microgynon). Women should use four (4) tablets in a period of five (5) days after unsafe sexual intercourse, making sure to take them in a shorter period of up to three (3) days with four (4) pills, twelve (12) hours after the first dose.³¹

These emergency contraceptive methods violate the right to life from conception that is recognized by the Constitution of Ecuador, since if sexual intercourse has already occurred, the pregnancy and, therefore, the conception of a new human being can automatically occur or not, and if it has, any type of emergency oral contraception would eliminate the conceived human being that results with the pregnancy. The term “prevent a pregnancy” in almost every case simply means “eliminate the conceived human being during the pregnancy”. In other words, if the woman has ovulated and the fertilization has occurred, the effect that any emergency contraceptive method would have is to prevent the implantation of the ovum (human being) in the mother’s uterus, by discharging it entirely.

c) “Ley Organica de Salud” (Comprehensive Health Law)

The Comprehensive Health Law was issued on December 22, 2006, and its purpose is to regulate the acts that guarantee the right to health enshrined in the Constitution of Ecuador.

Chapter III of this law regulates sexual and reproductive health care. However, the same chapter contains a provision that recognizes the right to life guaranteed by the Constitution. Article 20 states that “the sexual and reproductive health care policies and programs shall guarantee the access of men and women, including adolescents, to health actions and services...³²”, and article 21 states:

The State recognizes maternal mortality, teen pregnancy and unsafe abortions as public health problems; and it shall ensure access to public health services at no cost to users in accordance with the provisions of the Free Maternity and Child Care Act.

Public health problems require comprehensive care, including prevention of risk situations and educational, health, social, psychological, ethical and moral solutions, favoring the right to life guaranteed by the Constitution.³³

This can be interpreted in many ways, in favor or against the right to life, but article 29 of this law clearly states that “private and public health care services are permitted to interrupt a pregnancy solely and exclusively in the cases provided for in article 447 of the Criminal Code”³⁴.

³¹Ibid.

³² Ley Orgánica de Salud, pg. 7.

http://www.vertic.org/media/National%20Legislation/Ecuador/EC_Ley_Organica_de_Salud.pdf

³³ Ibid.

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In connection with the bylaw analysis above, article 26 of the Comprehensive Health Law states that “the members of the National Health Care System shall implement prevention and care actions on comprehensive sexual and reproductive health, aimed at women and men, with an emphasis on adolescents, and at no cost to users in public institutions”³⁵.

In addition, the Comprehensive Health Law includes the right to education on sexual and reproductive health issues, and it stipulates the obligation of public education institutions to implement sexual and reproductive health programs. Article 27 states:

*The Ministry of Education and Culture, in coordination with the national health authority, and with the state agency that specializes in gender and other organizations, shall develop and implement mandatory educational programs for the education establishments nationwide, for information and guidance on sexual and reproductive health, with the purpose of preventing teen pregnancies, HIV-AIDS and other sexually transmitted diseases, the promotion of responsible parenthood and the eradication of sexual exploitation; and it shall assign sufficient financial resources for that purpose.*³⁶

With regard to the local or regional implementation of sexual and reproductive health care programs and policies, article 28 states that “regional governments, in collaboration with the national health authority and considering their local reality, shall develop activities for the promotion, prevention, education, and common participation on sexual and reproductive health care, in accordance with the norms that it dictates”³⁷.

Article 32 of the Law also mentions the emergency contraceptive methods, by stating that, in the case of domestic sexual violence; health service personnel “shall provide, among other things, emergency contraception...”³⁸.

Finally, the Comprehensive Health Law defines the terms sexual health and reproductive health, as follows:

Sexual Health: It is the state of complete physical, mental and social well being and not merely the absence of disease or infirmity that allows the person to freely and responsibly enjoy a complete and enjoyable sexual life, free of sexual abuse, coercion or harassment, and free of sexually transmitted diseases.

Reproductive health: It is the state of complete physical, mental and social well being and not merely the absence of disease or infirmity, in all matters relating to

³⁴Ibid., pg. 8.

³⁵Ibid., pg. 7.

³⁶Ibid.

³⁷Ibid., pg. 8.

³⁸Ibid.

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*the reproductive system and its functions and processes, involving the right of individuals to make decisions about it.*³⁹

VIII. Hierarchy of regulations and applicability of international human rights treaties

Until now, it has been demonstrated that the Constitution and the ordinary legislation of Ecuador recognizes and guarantees the right to life from conception, like a right that all persons possess. Before analyzing the international commitments undertaken by Ecuador, it is necessary to present the hierarchy of rules that are in force in the country, and the applicability of international law and its hierarchy with respect to rules, in order to reaffirm the primacy regulations, which human rights have in the legislation in Ecuador.

In the first place, Article 11, paragraph 6, of the Constitution establishes that “all the principles and rights are inalienable, irrevocable, indivisible, interdependent, and of equal rank”⁴⁰. This refers to the rights recognized in the Constitution, and not to their hierarchical position with respect to the rights set out in other secondary provisions.

As for the implementation of human rights, Article 11, paragraph 3 of the Constitution provides that “the rights and guarantees established in the Constitution and in international human rights instruments will be of direct and immediate application before any public servant or official, administrative or judicial, on its own motion, or upon request.”⁴¹

Article 11, paragraph 5, refers to the observance of the rights, which cannot be compromised by their applicability. This article states:

*In terms of rights and constitutional guarantees, public servants, administrative or judicial, shall apply the standard and interpretation that is most beneficial in its actual effect.*⁴²

The hierarchy of law and supremacy of the Constitution over other standards is clearly established in Article 425 in the following terms:

³⁹ Ibid., article 259, pg. 38.

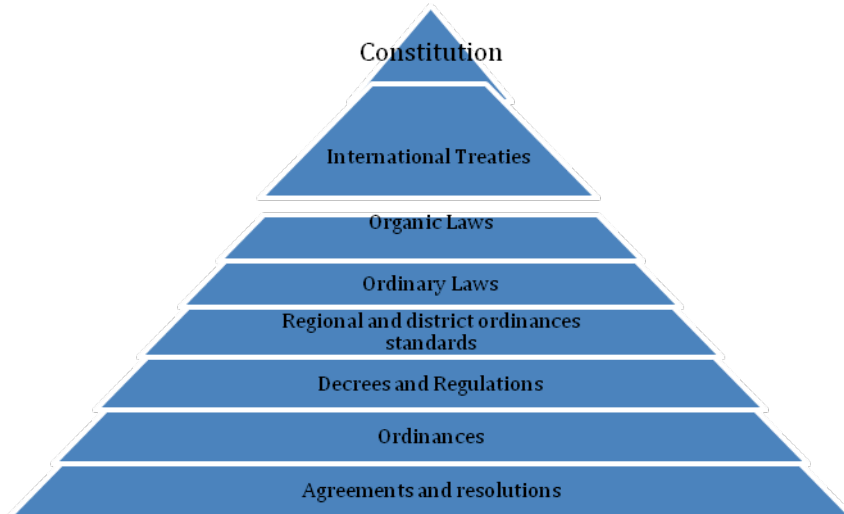
⁴⁰ Constitution of the Republic of Ecuador, Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

⁴¹ Ibid.

⁴² Ibid.

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*The hierarchical order of application of the rules is as follows: The Constitution, international treaties and conventions, the comprehensive laws, the decrees and regulations, ordinances, agreements and resolutions, and other acts and decisions of public authorities.*⁴³



The same article states, “In the event of any conflict between regulations from different hierarchical levels, the Constitutional Court, judges, administrative authorities and public servants, it shall be settled by the application of the standard of higher order of precedence. The regulatory order of precedence shall take into consideration, in what pertains to it, the principle of jurisdiction, especially the entitlement to exclusive jurisdiction of decentralized autonomous government.”⁴⁴

Article 424 reaffirms the supremacy of the Constitution, in establishing that “the Constitution is the supreme norm and prevails over any other judicial order. The norms and acts of public power should maintain conformity with the constitutional provisions; in cases where they are to the contrary they will have no legal effect.”⁴⁵

As for the primacy of human rights, the same article goes on to say that “the Constitution and international human rights treaties ratified by the State to recognize rights more favorable than those contained in the Constitution, shall take precedence over any rule of law or act of public power.”⁴⁶ This provision can be interpreted as a modification to the hierarchical order of the rules, since it states that it may be the case that an international treaty is applied above the Constitution,

⁴³ibid.

⁴⁴ibid.

⁴⁵ibid.

⁴⁶ibid.

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provided that it recognizes a right that is more favorable to the person than that established by the Constitution.

Furthermore, Article 427 states “the constitutional norms shall be interpreted by the wording that best suits the Constitution in its entirety. If in doubt, it is to be interpreted in the sense most favorable to the full enjoyment of the rights and which best respects the will of the electorate, and in accordance with the general principles of constitutional interpretation.”⁴⁷

Article 416, paragraph 9, recognizes international law as a rule of conduct, and Article 417 specifies that international treaties are subject to the provisions of the Constitution, but in the case of international treaties that recognize human rights, apply the principles which are pro human rights, without restriction, directly applicable as established by the Constitution.

The principle “*pro serhumano*”, recognized in Article 424 above, implies that the interpretation and application of a rule should attempt to achieve the greatest benefit to the person. That means, according to that Article, if an international treaty recognizes a right more favorable to a person in a case, that provision will be applied over the provisions of the Constitution, although it is recognized as the supreme law in the general manner.

Although the Constitution establishes the principle that should govern the interpretation and application of the rights established in the Constitution or international treaties, Article 428 states that “when one judge, on its own motion or upon request, considers that a legal rule is contrary to the Constitution or international human rights instrument that provides for rights more favorable than those granted in the Constitution, processing of the case should be suspended, and the record shall be transmitted to the Constitutional Court within a period not more than 45 days, to decide on the constitutionality of the norm.”⁴⁸

Finally, the ultimate authority to decide on the conflict between the Constitution and international human rights treaties is the Constitutional Court under Article 436, which confers the authority to “the highest body for interpretation of the Constitution, and international human rights treaties ratified by the Ecuadorian state, through its opinions and judgments. Their decision will be binding.”⁴⁹

IX. The Right to Life in international human rights treaties signed and ratified by Ecuador

⁴⁷ibid.

⁴⁸ibid.

⁴⁹ibid.

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Article 26 of the Vienna Convention on the Law of Treaties, which was ratified by the Ecuadorian state in 2005, establishes that “every treaty in force is binding upon the parties and must be performed by them in good faith.”⁵⁰ This is a basic principle of international law, called *Pacta Sunt Servanda* (pacts must be fulfilled) that governs the enforcement of international treaties and private contracts; it is the foundation of its binding force. This principle also means that states cannot invoke provisions of domestic law to justify a breach of a treaty, under Article 27 of the Convention.

Therefore, in the case that Ecuador does not comply with an international compromise, sanctions exist which would have to be assumed. In other words, failure to observe the principle of *pacta sunt servanda* by a State entails international responsibility, which, in principle, can be done by any branch of the state acting or omitting to act in such a way that violates provisions of a binding international treaty, regardless of rank. So, all kinds of acts or omissions attributable to a particular State, which are in violation of any rule of international law, are the international responsibility of the State.

As will be later shown, Ecuador has signed and ratified various treaties and international instruments that recognize and guarantee the right to life at conception, in the same terms as within their own Constitution. These international provisions directly bind the Ecuadorian state, as established by the Constitution, to the holding of treaties and as established by the Vienna Convention on the Law of Treaties.

American Convention on Human Rights⁵¹

⁵⁰Vienna Convention on the Law of Treaties. Art. 26.

<http://www.oas.org/legal/english/docs/Vienna%20Conv.%20Treaties%20InternOrg.htm>

⁵¹ The body in charge of the interpretation of the American Convention on Human Rights is the Inter-American Court of Human Rights (Art. 1 Statute of the Inter-American Court of Human Rights). The scope of the Inter-American Court’s judgments, according to article 68 of the Convention, is that “the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.” It is important to highlight that the Court’s decisions make clear the lineament of interpretation that the Court holds before certain rights. The consequence of this is the predictable result before the arrival of similar cases of different Countries.

A recent relevant decision regarding the right to life is the case *Artavia v Murillo*, Costa Rica, in which the Court held that the status of the human person begins at implantation of the embryo and not in the conception. This could bring significant impact on both internal laws and judicial decisions of the signatory countries, in order to comply with this interpretive guideline.

Within the member countries of the Inter-American system, there are some, such as Peru whose Constitutional Court held that the judgments of the Inter-American Court of Human Rights are binding on all agencies of government, including those in which Peru has not been part of the process (*Judgment of the Constitutional Court of Peru on June 19, 2007, in the action of unconstitutionality filed by the Bar Association Callao against Law 28,642*). At the same time, other States, as Uruguay, whose Supreme Court held that the ultimate interpreter of the Uruguayan Constitution is the Supreme Court of Uruguay, and the jurisprudence of the Interamerican Court has no binding force. (*Supreme Court 22/02/2013 justice of Uruguay, ML, J. FF, O. -. Complaint – Exceptional Items unconstitutionality of 1, 2 and 3 of Law 18831, ¶ WHEREAS III (a) No. 20/2013 (Uru.)*.)

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The American Convention on Human Rights, better known as the Pact of San Jose, was developed in the American Specialized Conference on Human Rights, which met in San Jose, Costa Rica in 1969. It came into effect in 1978, increasing the effectiveness of the Interamerican Commission on Human Rights, on the interpretation and protection of its provisions. The Court has jurisdiction to hear matters relating to the fulfillment of the commitments made by States parties to the Pact.

Ecuador signed and ratified the American Convention on Human Rights in 1969, as provided for in Title VIII, Chapter Two, of the Constitution regarding international treaties and instruments. Concerning the recognition of the right to life upon conception, the first paragraph of Article 4 establishes the following:

Every person has the right to respect for his life. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of life.⁵²

This article recognizes this as a human right, considered one of the fundamental rights that the State may not suspend by any means, as per Article 27.2 of the same normative instrument. The only limitations permitted on such a right must be defined by a law and be necessary to protect the security, order, health or public moral, or the rights and freedoms of others. Furthermore, Article 30 includes another limit on restricting rights, in establishing that “the restrictions permitted, in accordance with this Convention, in the enjoyment and exercise of the rights and liberties recognized within in, cannot be applied unless they conform with laws enacted for reasons of general interest and with the purpose for which they were established.”

a) Convention on the rights of Children

The Convention on the Rights of Children was adopted by the General Assembly of the UN in 1989, and was signed and ratified by Ecuador in 1990. Like the constitutional and legal provisions on the rights of children which have been enacted in the Ecuadorian state, the Convention on the Rights of the Child states that, according to the Declaration on the Rights of the Child, “the child, by

Read more at the Report *A PRO-CHOICE READING OF A PRO-LIFE TREATY: THE INTER-AMERICAN COURT ON HUMAN RIGHTS'DISTORTED INTERPRETATION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS IN COSTA RICA ARTAVIAV.*..By Ligia M. Jesus.

⁵² AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA"
http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm

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reason of his physical and mental health, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”⁵³

The above demonstrates that such Convention recognizes the right to life at the moment of conception, and once again expresses it in Article 6, in the following manner:

1. Party States recognize that every child has the intrinsic right to life.
2. Party States guarantee to the maximum extent possible the survival and development of the child.⁵⁴

These two previous international Conventions are a clear example of the international obligations on the right to life, which Ecuador has assumed and must fulfill. The Constitution of Ecuador, bridging what has been mentioned recognizing sexual and reproductive rights, has implemented legislation recognizing the right to life, which is consistent with international rules on the matter, and so it should be maintained in that way.

X. The right to life in the jurisprudence of Ecuador

The Constitutional Court of Ecuador exercises the authority to issue binding rulings that constitute binding regulations, held pursuant to Article 436 of the Constitution. As for the relevance of jurisprudence for the recognition of the right to life, Article 11 of the Constitution states that one of the principles governing the exercise of rights is that “the content of the rights will be progressively developed through regulations, case law, and public policy.” The Ecuadorian regulations can be considered a higher standard of mandatory character, which should ensure due recognition of the right to life from the moment of conception.

The following cases are some of those that recognize the right to life, and punish the crime of abortion:

In a case in 2007,⁵⁵ the Supreme Court distinguishes the crime of abortion from that of murder. The defendant had shot a pregnant woman, intending to kill them both, and the Court determined that the defendant was “guilty of the crime which defines and punishes Article 441 of the Criminal Code (intentional non-consensual abortion) and not murder, but of attempted murder, since the woman did not die...”⁵⁶

⁵³Convention on the Rights of the Child

<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁵⁴Ibid.

⁵⁵Supreme Court, Criminal Chamber II, judgment of 18-I-2007 issued in the criminal proceeding No. 19-2007 (RO 367, 25-VI-2008).

⁵⁶Ibid.Resolutive paragraphs

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Another case published by the Azuay Tribunal of 1994⁵⁷ and confirmed by the Supreme Court⁵⁸, defined the term abortion, in determining that abortion “was incriminated in all of the Criminal Codes with few exceptions”, it is “the voluntary and conscious use of suitable methods for producing a miscarriage or heightening the risk of one, with an immediate or eventual death of a fetus, or to produce its destruction. It can be the ejection of a fetus before the time of viability. It can be at the time of ovulation; embryonic or fetal according to the time they occurred.”⁵⁹

Finally, a case of the old Constitutional Tribunal banned marketing or admissibility of the “morning after pill” or emergency contraception, for its abortifacient effects. The considerations of the resolutions still rule the field today, and provide:

ELEVEN: In all forms, this Court is aware of all social scientific debate and cannot assert that conception occurs from fertilization of the ovum, but that cannot be sure otherwise. That is, the analysis of this matter has generated a reasonable doubt that forces us, in our capacity as constitutional judges, to make the interpretation of the rule contained in Article 49 of the Constitution, with a scope in favor of the person and the right to life, by the provision of Section 18, second paragraph of said Constitution, which states: “In terms of rights and constitutional guarantees, it will be viewed in the most favorable interpretation of their effective force. No authority may impose conditions or requirements not stated in the Constitution or the law, for the exercise of these rights.” It is about applying the universal principle of *in dubio pro person*, which means that in the case of doubt, it should be in favor of the person.

TWELVE. – (...) Seen in this light, it must be concluded that, the drug POSTINOR -2, in one of its phases, as an agent to prevent implementation of the zygote, i.e., after the fertilized egg, undermines the life of the new human being.

On the one hand, to the argument raised by stakeholders in the process, they consider that the suspension of product marketing of POSTINOR -2 undermines sexual and reproductive rights of women, the Board considers it necessary to prefix the principle of interpretation of the practical concordance, which forces a consideration of the values contained in the constitutional principles, which is as indubitable that in this case it should give priority to the constitutional legal right to life, over the value of sexual and reproductive rights of woman and individual freedom. If no person can dispose of their own life, even less may they decide for the lives of other or on the unborn. Furthermore, without an enforceable right to life, it would not be possible to exercise other constitutional rights.

⁵⁷ III Court of Azuay, judgment of 19-X-1994.

⁵⁸ The above sentence was known on appeal by Division I of the Criminal Division of the Supreme Court, who in Case 30-V-1997 confirmed the above findings (Gaceta Judicial year XCVII Series XVI, 9. P. 2331).

⁵⁹ *Ibid.*, Item 2.

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RESOLVED: 1.- Granting constitutional protection proposed by Mr. Jose Fernando Rosero Rohde, licensing of the medicine and health registration certificate No. 25.848-08-04, the product called POSTINOR -2/LEVONORGESTREL 0.75 Tablet is permanently suspended, effective August 5, 2004.⁶⁰

After this statement, it is unthinkable to question the primacy right to life has in relation to any other rights in Ecuador. The Court makes clear that priority should be given to the legal constitutional right to life, over sexual and reproductive rights of women and individual freedom. Stating that “if no person can dispose of their own life, even less may they decide for the lives of other or on the unborn,” recognizing that life quite obviously begins at conception and should be protected from that moment.

XI. Political positions and international pressure on the right to life.

a) Current President, Rafael Correa

The current Constitution of Ecuador was signed by President Rafael Correa, and thus, its content reflects the favorable position of the President regarding the right to life, and the recognition of sexual and reproductive rights, which are the basis of public policies on the distribution of abortifacient contraception. The media have described him as a leftist President, and as part of his “citizen’s revolution”, has supported and promulgated access to sexual health services and reproductive health, as it is reflected in the Constitution.

Nevertheless, President Correa has allowed certain executive orders on the right to life to remain in force, which can be considered as an official position on the issues, despite the policies for sexual and reproductive rights. Executive Order 1441, issued by President Alfredo Palacio and published in the Gazette on June 9, 2006, confirms the recognition of life from conception in the Constitution, setting March 25 as the celebration of “Day of the unborn child.” Its content referring to the previous Constitution no longer exists, but the Article on the right to life referred to remains almost identical in the current Constitution. The opening paragraph states:

That Article 49 of the Political Constitution of Ecuador warrants, assures, and guarantees to the human being the right to life from conception;

That the Constitution qualify the conceived person as a child and assures and recognizes this child as a natural person subject to this right, that they cannot be discriminated against because of being unborn, pursuant to paragraph three of Article 23 of the Magna Carta;

⁶⁰Third Chamber, case 0014-2005-RA, R.O. Suppl. 297 of June 22, 2006.

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That human life is the greatest gift, which by its nature is a unique and inviolable dignity, recognizing these terms regardless of age, sex, ideology or religion that they profess;

That life, from conception, is a natural right, inherent to human beings, supreme, prior, and prevailing over any other law, for without it there is no law that can be enjoyed or exercised;

Besides being a Constitutional obligation of the State to protect and safeguard the lives of every human being from conception, it is also a duty recognized in international conventions such as the Pact of San Jose, Costa Rica, which is ratified by Ecuador;

That the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on December 10, 1948, proclaimed that freedom, justice and peace in the world are based on the recognition of the inherent dignity [of human beings] and of the equal and inalienable rights of all members of the human family, (...)⁶¹

This Decree supplements, in greater depth, the right to life from conception that is recognized by the Constitution, secondary laws that have been analyzed, case law, and international treaties signed and ratified by Ecuador. The fact that the Decree has remained in force shows the stance the current government maintains, despite policies on sexual and reproductive health that have been promoted in recent years.

President Correa has also ratified his position on the right to life at other times, as when he stated, “we genuinely defend life from conception, as it says in the Constitution, because of this abortion is not allowed.”⁶² Likewise, when he began the debate on the proposed Comprehensive Criminal Code, which, among other things, came to include the decriminalization of abortion, President Correa said he would veto any article on abortion that goes beyond what is already provided in the current Penal Code. In October 2013, the possibility of decriminalizing abortion- especially in the case of rape- was debated, but President Correa threatened to resign if that

⁶¹Executive Decree No. 1441 Dr. Alfredo Palacio González declaring March 25 Day of the Unborn Child, Official Registry No 288, June 9, 2006.

<http://issuu.com/revistavive/docs/ro090288>

⁶²Newspaper: El Ciudadano, Enlace CiudadanoNmr 322, video.

http://www.elciudadano.gob.ec/index.php?option=com_content&view=article&id=42136:enlace-ciudadano-nro-322-desde-mocha-tungurahua&catid=43:enlaces-ciudadanos-todos&Itemid=67

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decriminalization were to occur. Thanks to the position of the President, abortion remains as a crime against life in the criminal law of Ecuador (with the exceptions previously discussed above).

However, President Correa's position on the right to life is not entirely clear. On the one hand, he allowed the recognition of the right to life from contraception in the current Constitution, in secondary laws previously mentioned, and in the executive order which still remains in force, but on the other hand he has allowed the implementation of public policies on health that hinder the exercise of the right to allow free access and distribution of abortifacient contraception. However, his most recent statement regarding preventing the legalization of abortions in the new Penal Code is a strong display of his position in favor of the right to life, because, as it seems, he is willing to resign to defend it.

b) Ministry of Health.

Policies on sexual and reproductive health have been widely promoted by the Ministry of Health of Ecuador, including the promulgation of rules for access and distribution of contraceptive methods discussed above, and other similar initiatives. All actions in favor of sexual and reproductive rights, which first assume free access to abortion and birth control, will eventually be expanded to include access to abortion services, are supported by President Correa, and have been implemented by his Ministry of Health, Carina Vance, who has a significant academic and professional background in sexual and reproductive rights.

i. "Estrategia Nacional Intersectorial de Planificación Familiar y Prevención del Embarazo Adolescente" (Intersectorial National Strategy for Family Planning and Teen Pregnancy Prevention)

The "Estrategia Nacional Intersectorial de Planificación Familiar y Prevención del Embarazo Adolescente" ("ENIPLA"), was implemented by the National Government, through the Ministry of Health, to bring awareness to family planning methods and prevent increase of teen pregnancies. Its two objectives were; 1) reduce the gap between unwanted pregnancies and maternal mortality observed and related to them, and 2) reduce the percentage of teen pregnancies nationwide.

This strategy also involves the Ministry of Education, Social and Economic Inclusion, and the Institute for Children and Families. The goals of it are to reduce teen pregnancy by 25% and reduce by 25% the gap between desired pregnancies and unwanted pregnancies, taking place within a two-year period. It also includes training 1,250 youth to disseminate content on sexual and reproductive rights, and other content regarding sexuality.

The Strategy does not seem to be directly related to the right to life upon conception which is recognized by the Constitution, but it does seem to be an indirect aggression against it, because not only will it ensure access to contraception abortifacients, but also the services which can be

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offered to prevent “unwanted” or teenage pregnancies, which can very easily come to include abortions. It is a program which is fully connected to, and even complimented by, the regulations for the distribution and access to contraceptive methods already discussed. As mentioned, the concept of “sexual and reproductive rights” can be interpreted in various ways, and its significance and specific content can be adjusted to the convenience of the government to create their own systems of social programs.

In conformance to the above, and despite statements of President Correa against the decriminalization of abortion, are the sexual and reproductive rights an indirect method the Ecuadorian government is using to open the door to abortion?

c) International political pressures

As with every nation, in its legal system, Ecuador reflects in its legal system the property and values it considers essential, starting with the recognition of the right to life from the moment of conception. By their common history and identity, Latin American countries have always shared a set of social and cultural values reflected in their laws, including those recognized in international human rights instruments, as now seen in the case of Ecuador.

Since 1998, Latin American countries have changed their laws on abortion, whether to liberalize laws that prohibit it, or to reinforce them. By their clear record of the respect for life, most Latin American countries increased and strengthened restrictions in the access to an abortion , so they have been the object of strong pressure from international organizations that promote sexual and reproductive rights in women, among these legalization of abortions is found. These organizations assert that national laws that penalize abortion violate international human rights treaties in which access to sexual and reproductive health is recognized.

In the case of Ecuador, various national and international organizations have pushed the country to decriminalize abortion in the Criminal Code⁶³, through direct official recommendations that ignore the recognition of the right to life from conception embodied in the Constitution. These guidelines can be translated into a kind of moral or economic coercion, of which if the country does not fulfill them, it is discredited by the international community , and to be considered as a state that does not comply with the obligation to respect and protect human rights recognized by

⁶³ In the Concluding observations of the Committee on the third periodic report of Ecuador as approved by the Committee at its forty-ninth session (14–30 November 2012 E/C.12/ECU/CO/3: http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.ECU.CO.3_sp.pdf) paragraph #29 provides as follows: *“The Committee notes with concern that, under article 447 of the Criminal Code of Ecuador, the only cases in which an abortion is not an offence is when it is performed because the mother’s life or health is endangered or when a woman with mental or psychosocial disabilities has been raped. The Committee recommends that the State party amend its Criminal Code so as to establish that abortion is not an offence if the pregnancy is the result of rape, regardless of whether or not the woman in question has a disability, or if the existence of genital anomalies has been established. (...)”*

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international treaties , and social development is conditioned on assistance from other countries in the international community.

Below are some recommendations of international organizations aimed at Ecuador.

i. Human Rights Watch

In August of this year, Human Rights Watch published a report titled “Rape Victims as Criminals”⁶⁴, which recommended to President Correa⁶⁵, to the National Assembly of Ecuador which supports the existing laws which prohibit abortion, and to the Ministry of Health which guarantees the practice of “quality” abortions in cases of sexual violence or rape, to support the absolute right to an abortion. The organization asks that the Criminal Code be reformed, so as not to criminalize women who have an abortion, or the doctors which perform abortions, especially when the pregnancy was as a result of rape, and that access to safe abortions be permitted so as not to jeopardize the lives of women, who many times have abortions in clandestine and unsafe manners. This report was presented in Washington, and is based on a study completed between May and July 2013 in Ecuador.

Human Rights Watch is concerned with the lack of protection of women and teens in Ecuador who are victims of sexual violence, and claims that these victims’ rights are not fully guaranteed, and consider that decriminalization of abortion is the solution. The report states, as kind of a threat, “if Ecuador wants to comply with the rights of women, and the objectives of the developmental goals of the millennium, it should move towards the decriminalization of abortion”⁶⁶ and that it is necessary “to strengthen the safeguards for women and young victims of violence that exist in Ecuador and to respect their rights, including the right to life, physical integrity, health, and to not be discriminated. The government of Ecuador should abolish criminal penalties for abortion.”⁶⁷

ii. CEDAW: Committee on the elimination of discrimination against women

The Committee was created in 1979 by the establishment of the Convention on the Elimination of All Forms of Discrimination Against Women. It promotes very positive actions in favor of respecting women having a life free from violence of all kinds, but within the rights that seek to recognize and guarantee this for all women, is the unrestricted access to abortion. Nowhere in the Convention recognizes the right to abortions, but its provisions are interpreted according to the ideological position held by the members of the committee which is pressuring of countries that

⁶⁴ RAPE VICTIMS AS CRIMINALS: Illegal Abortion after Rape in Ecuador
http://www.hrw.org/sites/default/files/reports/ecuador0813_ForUpload_1.pdf

⁶⁵ Ibidem. P. 23

⁶⁶ Ibidem. P. 16

⁶⁷ Ibidem. P. 3

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recognize and guarantee abortions to comply with their international obligations, since all countries that have signed the Convention undertake to implement what it provides.

The Committee is authorized to review the progress made by State Parties (those that have signed and ratified the Convention, as the case of Ecuador) in the implementation and enforcement of the Convention. Therefore, the State Parties undertake to submit a report on the legislative, judicial, administrative, or other measures they have implemented to enforce the provisions of the Convention to the Secretary General of the UN, through the Committee in charge of examining them⁶⁸. However, the Committee has exceeded its authority and power on numerous occasions, in questioning the laws which prohibit and criminalize abortion, recommending the revision of the law of the country in question to permit termination of pregnancies, and distribution of emergency contraceptives, as a way to guarantee women's right to sexual and reproductive health.

Ecuador signed the Convention in 1980 and ratified it in 1981. The last recommendation they received, upon submitting the required country report was in 2008. This recommendation stated that the Committee was concerned that abortion was a major cause of maternal mortality⁶⁹, because as a result of its illegality, women use unsafe means to obtain abortions, and therefore the

⁶⁸See Convention on Elimination of all Forms of Discrimination against Woman.

Art. 18: 1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect (...)

<http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article18>

⁶⁹See Overview – Latin America Reaffirms its Commitment to Life

<http://defendiendovidas.org/en/overview-la.pdf>

Worth clarifying that “high rates of maternal mortality are not related to the illegality of abortion.” (...) “In this regard, the World Bank has calculated that, if every woman had access to medical services to address their complications during pregnancy, especially access to obstetric emergency care, 74% of women could be saved. (WAGSTAFF, A. and M. CLAESON, 2004 *The Millennium Development Goals for Health: Rising to the Challenges*. Washington DC: The World Bank, cited by the Inter-American Commission of Human Rights, *Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 3)

The Inter-American Commission of Human Rights (IACHR) has expressed that in Peru, 74% of women in rural areas give birth at home without qualified professional care, as do 90% of women in indigenous communities, even though one of the factors recognized internationally as associated with reducing maternal morbidity and mortality is whether childbirth is attended by qualified personnel.

In Bolivia, a country with the highest maternal mortality rate in the Andean region (290), the rate of maternal mortality varies significantly depending on geographic region (high plateau, valleys, or tablelands) and depending on place of residence (urban or rural), with obstetrical complications, hemorrhage, and infections being the main causes of maternal mortality. (*Inter-American Commission of Human Rights, Access to Maternal Health Care from a Human Rights Perspective*, Organization of American States, Washington DC, 2010, p. 3 and 5.)

This shows that high rates of maternal mortality are not related to the criminalization of abortion, and the experience of countries like Honduras and Chile, two countries profiled herein, confirm his point. As a matter of fact, rates of maternal mortality in these countries have been reduced even while their criminal laws against abortion were strengthened, revoking all cases of *allowed* abortion”

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Ministry of Health conducted research on the topic in order to determine the legislative and political measures necessary to solve the problem. In other words, it suggested that the country accommodate their laws and implement public policies that ensure access to safe and legal abortions, in order to reduce maternal mortality which is supposedly caused by failing to legalize abortions and other sexual and reproductive health services. This recommendation verbatim establishes the following:

The Committee recommends that the State Party strengthen measures to tackle teenage pregnancies, especially among indigenous and black girls, through the allocation of adequate and specific resources for the Adolescent Pregnancy Prevention Plan, and programs to help pregnant adolescents. The Committee further recommends that the Ministry of Health conduct an investigation or study on the issue of unsafe abortions and their impact on women's health, in particular maternal mortality, which serves as a basis for legislative and political policy to address this problem. The Committee urges the State Party to allocate sufficient resources for the full implementation of the de facto Free Maternity Law and to take steps to ensure that all women have [these resources].⁷⁰

iii. UPR: Universal Periodic Review

In March 2006 the Universal Periodic Review (“UPR”) was created by the UN General Assembly. It is a procedure that is performed every four years to monitor the observance of human rights in member states of the UN. Each State is required to provide information on the measures taken within its borders to improve observance of human rights, and the final report is carried out through a dialogue between the delegation of various countries on human rights issues in a particular country, which leads to various delegations putting forward recommendations for the country concerned. It can be viewed as another means whereby the international community puts pressure on countries to change their laws and to comply with its international obligations regarding human rights in accordance with international standards.

Many countries are forced to respond to the recommendations provided by other countries, and that often constitutes a kind of economic pressure which conditions social development assistance on changing of their laws. In recent years, many European countries focused mainly on Latin America. Apparently, the main concern revolves around controversial issues on sexual and reproductive health rights and their reinterpretation to include abortion. Their recommendations put pressure on countries to incorporate their belief that abortion is an international human right,

⁷⁰ Concluding observations of the Committee on the Elimination of Discrimination against Women: Ecuador, United Nations, 7 November 2008, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/602/59/PDF/N0860259.pdf?OpenElement>.

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arguing that the inclusion of provision of access to abortions into their national laws is a violation of international human rights laws.

The latest report of the UPR was on July 5, 2012, which set out the statements of 73 delegations participating in the interactive dialogue that made the recommendations. Among the findings and recommendations (which were supported by Ecuador), none specifically mention abortion, but a specific recommendation on access to sexual and reproductive health, which is often interpreted to include the right to abortion, is made. In this regard, Uruguay stated:

135.53 Strengthening measures to address teenage pregnancy and to promote access to reproductive health services includes education on sexual and reproductive health, as well as counseling and health care tailored for minors (Uruguay);⁷¹

iv. Committee for Economic, Social, and Cultural Rights

The Committee for Economic, Social, and Cultural Rights is a body of the UN, formed by a group of experts, which supervises the application of the International Pact on Economic, Social, and Cultural Rights by its State Parties⁷². It was established by means of the Economic and Social Board of the United Nations on May 28, 1985. All the State Parties should present a periodic report to the Committee on the ways they apply and guarantee the rights consecrated by the Pact, in order for the Committee to examine the report and formulate their final observations, which express concerns and recommendations for the State in question.

The Committee examined the last report – its third periodic report- regarding Ecuador’s application of the Pact at meetings held in November 2012, and approved the final observations on November 30, 2012, which were published December 13 of that same year. As for sexual and reproductive rights, the Committee expressed the following concern and recommendation:

The Committee expresses their concern regarding the elevated rates of adolescent pregnancy in the State Party (82.8 thousand women), one of the highest in the group of countries with high human development in Latin America. The Committee is concerned with the extremely low coverage of services for planned families, of which is only 12%, and the barriers in providing emergency contraception in detriment to women’s right to sexual and reproductive health.

The Committee recommends to the State Party to perform the necessary efforts under the National Intersectoral Strategy for Family Planning and other suitable programs to prevent adolescent pregnancies, from a perspective of exercising human rights. The

⁷¹ Report of the Working Group on the Universal Periodic Review: Ecuador, Human Rights Council, 21st Session, General Assembly of the United Nations, July 5, 2012,.

⁷² Ecuador signed the International Covenant on Economic, Social and Cultural Rights in 1967 and ratified it in 1969.

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*Committee urges the Party State to eliminate the barriers present for access to emergency contraceptives and specifically to remove the limitations on distribution of contraceptives, to develop strategies to overcome cultural prejudice that restrict access to women and to campaign on women's right to access.*⁷³

The previous recommendation reiterates the efforts Ecuador is already taking in favor of access to sexual and reproductive health services, its continued efforts to take them, and boosts them even more. It seems coincidental that the legislative and political actions the country has been realizing in the recent years coincides perfectly with what the international human rights bodies have been "recommending" to them.

On the one hand, the Committee also expresses itself on abortion, through the following concern and previous recommendation:

The Committee observes with concern that article 447 of the Criminal Code of Ecuador only disclaims liability for abortions to avoid danger to the life or health of the mother or in cases of women with mental or psychological disabilities being raped.

*The Committee recommends that the Party State implement reform of the criminal code with an end goal of establishing exceptions to the criminalization of abortion when the pregnancy is as a result of rape even when it does not deal with disabled women, as well as situations when the existence of congenital disfigurement has been established. The Committee urges the party State to omit from its criminal code the terms "idiot" and "demented" when referring to the women with mental and/or psychological disabilities.*⁷⁴

In this case, the Commission directly solicits the country to reform its Criminal Code, in order to decriminalize abortion in the previously mentioned cases. This recommendation also has been reflected in the legislative actions of Ecuadorian government, being that the discussion for the promulgation of the Comprehensive Criminal Code has been urged more during the last year, and the decriminalization of abortion is supposedly one of the central topics.

The amount of recommendations that have been formulated at Ecuador in the last years by international human rights bodies show a trend towards liberalization of laws that prohibit abortion, as well as the recognition of women's sexual and reproductive rights, each time broader, which are interpreted to include the right to abortion as a so-called human right.

These recommendations, which ultimately translate into economic pressures, lack any basis, as there is no right to abortion in the international legal order. Rather, by conforming to the

⁷³ Concluding observations on the third periodic report of Ecuador, adopted by the Committee at its 49th session, 14 to 30 November 2012, United Nations, 13 December 2012, Economic and Social Council E/C.12 / ECU/CO/3.

⁷⁴ Ibid.

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international treaties that have been analyzed and other customary rules, the nations have the duty to protect unborn children, recognizing and guaranteeing the right to life as the right which enables the exercise of all other rights. The UN human rights bodies and other external actors (countries that form part of the international community) exceed their powers when they demand that sovereign nations modify their national laws that recognize the right to life from conception, and it is only logical that these sovereign states reject unjustified claims, regardless of their position on the issue.

XII. Conclusion

The narrative implicit here is of the conflict between the right to life of the unborn and the legal and ideological structure of sexual and reproductive rights. The former is the legal heritage of Ecuador from its birth as an independent republic; the latter, of significance from the newer mindset.

The spectacle of this conflict is remarkable, because it is a direct clash between the clear, unambiguous, and impassable statements of the Constitution, international treaties, and the laws of the Republic, and political pressures, internal and external, to mitigate, avoid, or dilute it. The present situation, therefore, is transitional. It is unclear whether this change will lead to a ratification of what has been an uninterrupted legal tradition, or to a flaw in this order on behalf of a groundbreaking and foreign paradigm.

What is clear, however, is that the current tension cannot be concluded with the maintenance of the status quo. To protect the right to life and its trajectory in the legal tradition of Ecuador, it will be necessary to undertake a new series of original and brave policies, which convert that right into a political reality. However, if consolidation of the extension of the sexual and reproductive rights is opted for, it will be necessary to modify all of the normative structure - constitutional, international, and legal – which protects the right to life of the unborn, unless in this instance it is desired to produce a breakdown of the civil order, in favor of a new political ideal.

As has previously been stated, it is an open question as to where Ecuador will tilt, only the coming years will tell.

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