

Constitutional Court of Ecuador Gives Way to Abortion in Cases of Rape

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Context

In Latin America, some countries provide abortion impunity in their legislation for various exceptions: Paraguay, Venezuela, Guatemala, Peru, and Costa Rica, in the event that the life or health of the pregnant woman is in danger; in Chile, Colombia, and Brazil for cases of rape or the infeasibility of the fetus; in Bolivia, incest; and, in the case of Belize, socioeconomic factors. Ecuador is also part of this list with three exceptions: when it threatens the life or health of the woman, infeasibility of the fetus, and the rape of a woman with a mental disability. Therefore, the abortion decriminalization provided in Ecuadorian legislation according to the three above exceptions seemed to be enough for justice. However, for local feminist groups supported by foreigners, this is not enough. According to them, this practice that deprives a pregnant human being of birth for any reason must constitute a right.

There have been several attempts to legalize abortion in Ecuador in the last three years. Many organizations in favor of both maternal and unborn life sounded the alarm and were tirelessly fighting against the feminist wave, which was often supported by international organizations. These battles started in 2019 with the reform proposal to the Comprehensive Organic Penal Code (COIP) in which the National Assembly eliminated reform articles that sought to legalize abortion; in 2020, the proposed Health Code (COS) reform that envisaged any type of abortion as an emergency and eliminated conscientious objection by prohibiting doctors from refusing to treat said emergency, was approved in the National Assembly by vote but upon reaching the hands of President Lenin Moreno, was vetoed completely. Also, in 2020 when Ecuador requested a loan from the International Monetary Fund (IMF), it included within its conditions the development of policies in favor of abortion. Still, fortunately, this condition was withdrawn from the agreement.

A constant struggle for two years, the pressure of pro-life groups and political lobby prevented the approval of total abortion legalization in the country. Undoubtedly, this was a very great pressure, but it did not take into account the actual needs of Ecuadorian society. For example, this pressure establishes nothing regarding the most severe penalties for sexual offenders, which was contemplated in the COIP reforms in 2019. Furthermore, nothing is set either on the priority or safe care of pregnant women during a pandemic, which was not discussed in the COS reform proposal in 2020. Similarly, in the ordinary session of April 28, 2021, the Constitutional Court, under the action of unconstitutionality of articles 149 and 150 of the Comprehensive Organic Penal Code, extended the penalty exceptions from the rape of women with mental disabilities to any case of rape.

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A Blind and Unconstitutional Reform

On April 29, 2021, the Court declared unconstitutional the non-inclusion of a rape exception to the abortion penalty in the Comprehensive Organic Criminal Code, establishing that abortion performed by the woman, or third parties that perform it, will not be sanctioned in cases of alleged rape.³

It is important to note that the Constitution of the Republic of Ecuador (2008) recognizes in its content the rights of pregnant women and children. Regarding this last group, it recognizes the unborn as a subject of protection. Due to her condition, she has a gestational development that needs adequate guarantees for her growth and potential enjoyment and exercise at birth.

With this background, the legislature has established sanctions in the criminal regulations for those who violate or undermine the rights recognized by the Ecuadorian State. Among these, we have Crimes against life, and Crimes against physical, psychological, and sexual integrity. Likewise, it has established two exceptions for which there would be no criminal offense even though the conduct is classified as a crime: "State of necessity and Legitimate Defense." This rule indicates that before harming someone's right, it is necessary to consider that there are no other less harmful means to defend that right.

The question then arises: Has the Constitutional Court valued that there are no other practicable and less harmful means to defend the health of pregnant women?

In point 22 of that sentence, Dr. Corral affirms: *"If the decriminalization of abortion is not the solution to the problem of rape crimes, then the constitutional judge's analysis must have another approach. The State, for its part, through its competent bodies, must implement public policies and awareness campaigns focused on respect for women; ... As responses to abortion, all these options require a serious debate within society and the State before decriminalization."*

There would be two victims in this type of sexual crime: the woman and the unborn child, which poses the question: Why apply the death penalty to infants? Why did the Constitutional Court, in its majority vote, forget that there are other practical and less harmful means to defend rights? Why did they not comment on the aggressors and the little – or no – criminal policy we have to counteract this type of crime?

Conclusion

The majority vote of the Constitutional Court was based on its own criteria and not motivated by doctrine. It leaves us with doubts and unresolved questions. We understand the painful situation of those who live in conditions of violence, and they need the State's and social support. However, we remind the State that art. 9 of the Convention of Belem do Pará establishes that pregnant women who are victims of violence are vulnerable. Therefore, it is necessary to apply positive

³ Judgment No. 34-19-IN / 21 AND ACCUMULATED Constitutional Court of the Republic of Ecuador

measures that allow them to leave the circle of violence in which they find themselves. And we reject those who try to use that pain to open the door to arbitrariness without any protective filter to stop the harm to an unborn human, authorized by a simple court declaration.