

## **Interview (Ecuador)**

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### **1. Who is "human" in the concept of modern human rights?**

From the perspective of the inter-American system of Human Rights, the Inter-American Court of Human Rights has indicated that the protection of the Pact of San José de Costa Rica or the American Convention of Human Rights only extends to the rights of physical people and not of legal entities. However, it has also determined that Article 8.1.A of the Protocol of San Salvador grants rights to labor unions, federations and confederations, which grants them standing before the inter-american system.

In addition, the Court has also indicated that “in some cases” (regarding to property rights and freedom of expression) physical people can exercise their rights through legal entities and, in that sense, the actions of those legal entities undertake in the domestic legal system may justify the requirement of “exhaustion of internal remedies” to access the jurisdiction of the inter-american system.

Finally, indigenous and tribal communities also have standing before the inter-american (Advisory Opinion of the Inter-American Court of Human Rights OC-22/16. February 26, 2016 requested by the Republic of Panama). On the other hand, in Ecuador, a state that is member of the inter-american, it is considered that fundamental rights correspond to natural persons - citizens or foreigners -, to legal entities and even nature as it has been considered as subject of rights (articles 10 and 11 of the Constitution of the Republic of Ecuador 2008).

### **2. How is carried out of the protection of a right which is not regulated in the Constitution in your legal system? What kind of balancing is done when a right uncounted in the Constitution is conflicted with a constitutional right?**

From a practical perspective, in the recent Ecuadorian constitutional history there has not been a memorable conflict between explicit and implicit constitutional rights. However, article 11.7 of the Constitution of the

Republic of Ecuador (2008) states “the recognition of the rights and guarantees established in the Constitution and in international human rights instruments, shall not exclude other rights derived from the dignity of the people, communities, peoples and nationalities, that are necessary for their full development”. This means that the legal system provides three sources of fundamental rights: those explicitly enshrined in the constitutional text, those derived from international human rights instruments - or from the interpretation of the organs with jurisdiction over those instruments - and finally other rights that are derived and recognized from the concept of human dignity.

A case that might satisfy the question raised could be the one regarding the equal marriage between people of the same sex. Article 67 of the Constitution states that "marriage is the union between man and woman." Notwithstanding, the Constitutional Court argued under the Advisory Opinion 24/17 of the Inter-American Court of Human Rights that the axiological nature of the constitution was the guarantee of the rights and equality of people, so the fundamental norm could not be interpreted in the sense that it established a prohibition on equal marriage (restrictive or literal interpretation). On contrary, the Constitutional Court ruled that there was a legal loophole in the constitution. That legal loophole was resolved using the pro persona interpretation. In general, conflicts between constitutional rights are solved, in Ecuador, using the balancing technique as developed by the German jurist Robert Alexy. The criteria of necessity, suitability and strict proportionality are used in addition to the method of interpretation pro persona in case of doubt.

**3. Do International Human Rights Documents applied in your country represent minimum standards that are already provided or the must-reach aims? Are there any regulations in your legal system above international human rights standards? If there are, would you please explain?**

The Ecuadorian Constitution of 2008, being an extremely recent text, incorporates the premises and concepts of the most relevant human rights treaties. In fact, the constitution itself recognizes that in the event that international instruments provide better guarantees of fundamental rights, they will be immediately applied by any public authority and will prevail even over the constitution (Art.424). Indeed, the Ecuadorian constitution contains regulations that have not been included in human rights treaties. For example, there is no international treaty that regulates amnesty power. However, the constitution of Ecuador prohibits amnesty in crimes against humanity, war crimes, genocide and even crimes against public

administration (Arts. 80, 120). Of course, there are pronouncements of international courts such as the Inter-American Court of Human Rights or the UN Covenant on Civil and Political Rights in this regard. However, in the absence of an international treaty, it is still a sign of progress. Another issue that deserves to be highlighted is that the Ecuadorian Constitution recognizes nature or “Pacha Mama” as a subject before the law and not as an object of it, which does not occur in the scope of international treaties.

**4. In your legal system, is the jurisdiction an actor itself to move forward human rights standards? If it is, would you please explain?**

In my opinion, it could be affirmed that the Constitutional Court of Ecuador is, as an institution, a fundamental actor for the development of human rights. For example, this court has guaranteed the right of same-sex persons to marry; noted that people with catastrophic diseases should enjoy health protection even when the medicines they require are not in the basic table designed by public authorities; that certain foreigners cannot be discriminated on the grounds of nationality in order to establish requirements that are impossible to achieve for entering the country because they are refugees, among others important rulings. I believe that one of the fundamental aspects that make this type of decisions possible has to do with the immobility of the judges, because according to the constitution they cannot be subject to impeachment or removed from office on the basis of the content of their rulings.

**5. Are there values and issues in your country that are not covered by human rights documents but need to be protected under the concept of human rights? If your answer is yes, would you please explain?**

No answer recorded.

**6. Are there such human right regulations in the legal system of your country that is protected by the constitution but contradicts social reality and justice?**

Unfortunately, as Roberto Gargarella has mentioned, Latin American constitutions are a broad catalog of broken promises. They contain a long list of constitutional rights, an openness to indigenism, and a broad vision regarding economic and social rights. However, the organization of power has remained intact throughout the centuries, which has encouraged hyper-presidential systems that hinder the exercise of democracy. The common problems of Latin America are many: prison overcrowding, bankruptcy of the public health system, extreme poverty, lack of independence of the judicial

system, clearly demonstrate that social reality collides and denies the advanced text of constitutions such as Ecuador.

**7. Are there any social realities contradicting international human rights concept based on individualism?**

In the Ecuadorian case, there are several cases that demonstrate the shift of individualistic paradigm of human rights towards a transformation based on collective representation. For example, in the area of indigenous rights it is widely accepted that communities can be considered as holders of collective rights such as the ownership of ancestral lands. On the other hand, recognizing the procedural standing of workers' unions implies recognizing the possibility that they may ask for the protection of collective rights. Finally, in relation the nature or "Pacha Mama" as a subject of rights according to the Ecuadorian constitution, anyone can exercise its representation to guarantee collective rights such as water and air quality or protection against environmental damage.

**8. In your legal system, are there legal mechanisms to protect human rights if fundamental rights are violated by private persons? Are these mechanisms effective?**

In the Ecuadorian legal system, the Constitution and the Law of Jurisdictional Guarantees and Constitutional Judicial Review recognizes the possibility of bringing an "acción de protección" against private individuals who violate constitutional or human rights. However, article 88 of the fundamental norm establishes certain requirements. In this sense, a private person may only be sued through an "acción de protección" "if the violation of the right causes serious damage, if he provides improper public services, if he acts by delegation or concession, or if the affected person is in a state of subordination, helplessness or discrimination".

Regarding the question of the effectiveness of the legal order, it should be mentioned that theoretically the system provides satisfactory solutions because the judge has the power to order precautionary measures to suspend the alleged violation of rights during the duration of the trial. In addition, the Judge has the power to ask any public authority to help enforce his judgment. Finally, the procedural system contemplated by the law is expedite and has limited procedural requirements. However, in practice the system is very deficient due to the corruption of judicial officials in general, as well as the increasing abuse of constitutional justice to deal with ordinary lawsuits.

**9. Are there groups in your country who have their own national, ethnical, religious and linguistic identities? Could you please give some information about them (especially if you feel yourself one of them)?**

Like all Latin American countries, Ecuador has a long pre-Hispanic history with indigenous, ethnic and religious communities that have values with legal significance that are very different from those of the Western legal community. In the Ecuadorian case, the mestizo population (descendants of Spaniards and Aborigines) coexists, along with peoples with their own racial identity (Afro Ecuadorians and montubios) in addition to the indigenous people. Within this last group, a distinction must be made between the indigenous people who have been integrated into the western collective life and the indigenous population who have decided to live in voluntary isolation in the Ecuadorian Amazon.

The Ecuadorian Constitution has an interesting regulation regarding these groups. For example, article 6 recognizes that Ecuador is a "plurinational" State. In addition, article 38 of the constitution establishes that public policies should be designed "taking into account" the cultural conceptions of different nationalities and peoples. According to article 45 of the constitution, children have the right to be educated in the language and in the contexts of their culture or nationality. Article 57 of the constitution establishes a catalog of special rights for these groups that include, among many others, the limitation of military activity in their territory and the right to prior and informed consultation in the case of exploitation of resources natural in its territory. It is also necessary to mention that article 171 recognizes the "indigenous justice system" by which indigenous communities can apply their own (unwritten) law to solve their internal conflicts without resorting to the State judicial system. Regarding the language, Spanish and Kichwa are both official in Ecuador.

**10. What is the definition of the notion "minority" according to your constitutional system? What is your opinion on this concept? Do you think that minority rights should be protected broadly by the constitutional level? Do you think that constitutional regulations that would broaden the rights of minorities will solve the conflicts between majorities and minorities?**

A complex notion of constitutional democracy such as that developed by Professor Luigi Ferrajoli, but also by Ernesto Garzón Valdés or Norberto Bobbio has two dimensions: formal and substantive. The formal dimension of democracy is based on negative freedom rights (not being tortured, freedom of expression, property, right to vote, among others) and the

possibility of electing a government in a democratic manner. However, the substantial notion of democracy implies that no majority, however overwhelming it may be, can repeal the rights of minorities. In addition, only by guaranteeing social and economic rights is possible to achieve a real democracy in contexts such as Latin America where societies are characterized by poverty, inequality and exclusion. This reality justifies the judicial review as a guarantee of the rule of law for the weakest.

In that sense, having a constitutionalized catalog of minority rights is very useful because they establish, at least, minimum standards that cannot be transgressed by private persons or by the State. Likewise, having a catalog of minority rights implies that the legislator has a duty “to legislate for them as well”. The Ecuadorian Constitution does not incorporate the concept of "minorities" but rather the concept of "vulnerable groups", which in my opinion seems very appropriate. It is not a quantitative issue but a qualitative one, think of slavery or the global migration crisis, for example. These groups of people are treated arbitrarily and unfairly not because they are not numerous but rather because they have been historically discriminated.

In addition, the concept of vulnerability is broader and allows greater protection of rights by exceeding the limited criteria of discrimination. In this sense, Article 34 of the Constitution of Ecuador (2008) provides: “the elderly, girls, boys and adolescents, pregnant women, persons with disabilities, persons deprived of liberty and those who suffer from catastrophic or highly complex diseases, will receive priority and specialized attention in the public and private spheres. The same priority attention will be given to people at risk, victims of domestic and sexual violence, child abuse, natural or anthropogenic disasters. The State will provide special protection to persons in a condition of double vulnerability”. The constitution also recognizes the vulnerability situation of migrants and establishes a special catalog of rights.

**11. What do you think on the notion and the concept of minority rights in international law? Could the international regulations/treatments be a response to the reality and problems of the peoples in your country? In other words, do they cover the reality in your country from the view of the state and the view of peoples?**

No answer recorded.

**12. What you think is the most current human rights problem in your country?**

In my opinion, the most pressing human rights issue in Ecuador is corruption. Ecuador is in 150th place out of 180 countries in the corruption test conducted by Transparency International. Without a doubt, it is a tragic reality shared throughout Latin America, but at different levels. In the Ecuadorian case, corruption has corroded all branches of power, especially the executive and the judicial. For example, the plot of bribery in which participated the Brazilian company Odebrecht involved more than one Latin-American president in cases before the criminal system. These experiences have caused the citizens to lose confidence in the State and has distracted necessary resources for fundamental aspects such as economic and social rights to the pockets of public officials and private companies.

This disenchantment with politics has caused a permanent transition in the country (Ecuador was founded in 1830 and so far has had 20 constitutions: now the possibility of constitution number 21 is being discussed). I would say then that generalized corruption has become systemic crisis by affecting the institutionality and economy of the country, which translates into palpable problems as prison overcrowding and riots, the bankruptcy of the social security system, massive dismissals of public servants justified in austerity measures, the dramatic increase of unemployment in the private sector and, of course, the significant increase of violent crime.