

Ecuador's Constitutional Landscape Towards COVID-19

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A Year in Review: Overview of Legal and Political Response and Adaptation to COVID-19

The President of the Republic of Ecuador, Lenín Moreno, is the [worst evaluated](#) President among ten heads of state in Latin America with respect to the management of the pandemic. Seven out of ten Ecuadorians (71.1%) rate him poorly or very poorly, one out of ten do not know (9.8%) and only two out of ten (19.1%) evaluate him positively.

At present, at least according to official data, there are 267,000 cases of coronavirus in Ecuador, of which 230,000 refer to people who have recovered and 15,321 to people who have died from the disease. However, many analysts agree that the government's information [is not accurate](#). In addition, Ecuador was ranked as the second country in the world with the most [excess deaths](#) per million inhabitants.

The political landscape in Ecuador is complex as President Lenín Moreno concludes his term in May 2021. Presidential and legislative elections were held on 7 February 2021. A curious fact to note is that the pandemic [did not prevent](#) Ecuadorians from going to the polls to vote. The results are still [uncertain](#) and there will be a ballottage in April 2021 between the candidate Andres Arauz (for the political line of former President Rafael Correa) who will face Guillermo Lasso, right-wing candidate, after the National Electoral Council decided that Yaku Pérez, candidate of the indigenous left, ended in [third place](#).

Ecuador is also one of the Latin American countries with the least number of vaccines for Covid-19 and there are no clear expectations of how and when they will arrive in the country. The few vaccines that have arrived have been distributed with non-transparent criteria and in some cases in an [abusive manner](#), which triggered a request for [impeachment](#) against the Health Minister. However, Minister Zevallos [resigned](#) and left the country as the impeachment procedure continues.

Considering the political scenario, this article will highlight that the government's management of the pandemic has been ill-timed; it has not been holistic but rather aimed at providing temporary solutions without alleviating the underlying problems of the Ecuadorian population and that the control of the President's exceptional powers has been assumed mainly by the Constitutional Court of Ecuador and not by the legislature.

The Executive and Use of Powers in Response to Emergency

The Ecuadorian Constitution of 2008 establishes a detailed regulation on state of exception (estado de excepción) which can be declared only by the President in the following cases: international aggression, international or civil armed conflict, natural disasters, severe social commotion, or public calamity (Art. 164 Const.).

On the procedural aspects, the state of exception must be adopted by an executive decree and may be controlled ex post by the National Assembly at a political level, and it is automatically controlled by the Constitutional Court on matters of law (Art. 436.8 Const.). Additionally, the state of exception has a temporal limit of a maximum of 60 days after which it shall be renewed or automatically revoked. A state of exception must also be notified to the Organization of American States as required both by the fundamental norm (Art. 166 Const.) and the article 27 of the Inter American Convention of Human Rights. Ecuador immediately complied with this requirement.

The only measures authorized by the fundamental norm are the suspension or limitation of the rights of the inviolability of domicile, correspondence, freedom of transit, association and assembly and freedom of information. Authorized measures also include: decreeing the early collection of taxes; using public funds (of the national government) assigned to other purposes, except for the funds of public health and education; moving the government base to any place of national territory; deploying media censorship in emergency related issues; designating a part or the whole national territory as a security zone; ordering the call to action of police, military and reserve forces; disposing the closing of ports and national borders and the citizens' obligation to collaborate and the possibility of private property requisitions (Art. 165 Const.).

From March 2020 to the present date, the President ordered the mobilization of the armed forces to collaborate with the police; he suspended the rights of assembly, free transit and association. In this sense, he established [curfews](#) and the prohibition of mass events. Likewise, the President decreed the possibility of carrying out [requisitions](#) to guarantee the public health service. He also ordered the [anticipated collection](#) of income tax for large taxpayers.

In addition, while a state of exception is in force, the President may submit several economically urgent legislative bills, which must be approved or denied by the National Assembly within 30 days. If the Assembly does not decide, the bills will be published as a decree-law (Art. 140 Const.).

Using this power, the President submitted to the Assembly on [16 April 2020](#) the [“humanitarian support law”](#) and the [“law for the organization of public finances”](#). Both laws entered into force. The humanitarian support law establishes new labor contracting modalities; it temporarily prevents evictions for non-payment of rents; it allows for more lenient agreements between creditors and debtors; it established an extension for the payment of debts with banks and other financial entities.

On the other hand, the law for the organization of public finances gives financial autonomy to the Ecuadorian social security system. It establishes limits to the modification of the general state budget (previously the President could increase or reduce spending by 15% according to the general state budget, now only by 5%) and establishes a state savings obligation which is denominated as the financial stabilization fund.

A critical reading of the government's actions is to highlight that it has concentrated on specific aspects of the pandemic without adopting a holistic approach to cover the social, economic and health needs of the population.

The Effectiveness of Judicial and Legislative Scrutiny and Oversight

In response to the Covid-19 pandemic, Lenin Moreno Garcés, issued several state of exception decrees. In this regard, it is important to note that the Ecuadorian Constitution (approved by popular referendum on 2008) allows a state of exception for 60 days and an extension of 30 additional days, after which the state of exception ends automatically (Art. 166 Const.).

In fact, the Ecuadorian Constituent Assembly did not foresee the possibility that an emergency could be prolonged and require a state of exception also prolonged in time. Rather, it chose to limit the power of the executive for fear that it might abuse the power to declare states of exception to limit the rights of the people.

However, the Constitutional Court of Ecuador, the body responsible for the control of constitutionality of the declarations of a state of exception and the measures adopted under it, endorsed that the President dictated two states of exception and their respective renewals based on the Covid-19 pandemic, arguing that the scenario was not foreseen by the Constituent Assembly and that the pandemic had unprecedented consequences for all mankind.

Specifically, the President issued the following executive decrees:

1. Executive Decree No. 1017 of 16 March 2020 due to the Covid-19 pandemic, which established a state of exception at the national level for 60 days. The Constitutional Court declared it constitutional in [ruling No. 1-20-EE/20](#).
2. Executive Decree No. 1052, of 15 May 2020, which contained the renewal of the state of exception for public calamity due to the Covid-19 pandemic. The Constitutional Court declared it constitutional in [ruling No. 2-20-EE/20](#).

This decision is important because the Constitutional Court urged the national government to *“in coordination with all national and local authorities, take the necessary measures to organize and confront the pandemic in accordance with the ordinary legal mechanisms”*.

3. Executive Decree No. 1074 of 15 June 2020, by which the President declared a state of exception due to Covid-19 and the “economic emergency” in the country because of the virus. The Constitutional Court declared it **conditionally constitutional** in [ruling No. 3-20-EE/20](#).

This decision is relevant because the Constitutional Court of Ecuador indicated that the economic crisis is not a constitutionally provided cause for declaring a state of exception; that the economic crisis in Ecuador is structural and prior to Covid-19 and, finally, that the state has prerogatives (such as the proposal of urgent economic laws) that allow it to adopt public policies in the fiscal, labor, economic and tax areas by means of ordinary regulation, without the need to resort to a state of exception.

Likewise, the decision of the Constitutional Court is important because it provides *“that the President of the Republic report every 30 days to this Court, counted from the notification of this ruling, on the actions aimed at establishing a transition regime to the “new normality”*. At the same time, the Constitutional Court conditions the constitutionality of the state of exception on several parameters being observed. Among them: 1) that the norms of social distancing cannot imply interrupting the normal functioning of state institutions; 2) that telework must be promoted and biosecurity standards must be ensured and 3) that the right to peaceful protest cannot be suspended in the name of social distancing.

4. Executive Decree No. 1126 of 14 August 2020, by which the President of the Republic decided to renew the state of exception established in June 2020. The Constitutional Court declared the validity of the renewal in [ruling No. 5-20-EE/20](#). This time, the Court indicated to the government that *“it will not admit a new declaration on the same facts that configured the public calamity”*.

In June 2020, the President ordered the anticipated collection of income tax for large taxpayers. At first, the Constitutional Court annulled the measure in its ruling [3-20-EE/20A](#) of August 2020 as it was considered **unconstitutional** since, although the Constitution grants the President this extraordinary power, it should be exercised under standards of necessity, suitability and strict proportionality. In summary, the Court annulled the anticipated collection of income tax because the government did not justify that the money collected was to be used exclusively in the management of the Covid-19 pandemic and not in current expenses. However, the President submitted a new decree detailing the destination of the extraordinary collection of taxes and the Constitutional Court **approved** the measure in its ruling No. [5-20-EE/A](#) of 4 September 2020.

5. Finally, the President of the Republic, through executive decree No. 1217 of 21 December 2020, issued again a state of exception alleging that the new strain of Covid-19 coming from the United Kingdom implied greater possibilities of contagion. The Constitutional Court **declared unconstitutional** the state of exception by [ruling No. 7-20-EE/20](#).

The reasoning of the Constitutional Court was that Covid-19 ceased to be a public calamity in the technical-legal sense as it was no longer “unforeseeable” but had become part of the “new normality” and that the government should act using

its ordinary powers. The Court also recalled that *“without resorting to a state of exception, it is possible to restrict capacity, commercial activities, vehicle circulation, among other measures aimed at regulating the use of public and private space”*. For this reason, *“in the opinion of this Court, it is not justified to resort to this exceptional figure to adopt such measures”*.

In synthesis, judicial control of emergency powers has been more effective than legislative control. Although the National Assembly of Ecuador can repeal the decrees of state of exception of the President at any time (Art. 166 Const.), a motion was never proposed for that purpose. Instead, the control of constitutionality by Ecuador’s Constitutional Court was more effective because it is mandatory and automatic and because the Court was able to maintain a balance between the need to grant the government leeway during the emergency as well as the need to prevent a permanent state of exception and the transition to the “new normality”. In conclusion, no new states of exception will be allowed in Ecuador due to Covid-19 or its different strains.

National, Regional and Local Response and Coordination

Ecuador is a unitary, republican state governed in a decentralized form (Art. 1 Const.). Since it is not allowed to dictate new states of exception regarding Covid-19, public authorities must exercise their ordinary powers in a coordinated manner for the management of the pandemic. This is carried out through the National Emergency Operations Committee in coordination with the various Emergency Operations Committees at the local level.

Articles 389 and 390 of Ecuador’s Constitution establish a deconcentrated risk management system. Likewise, the law of public and state security establish that the Emergency Operations Committees are bodies composed of personnel from various institutions with the objective of preventing and mitigating risks. There are three types of Emergency Operations Committees: national, regional and local.

Given the principle of autonomy, each body must exercise its attributions within its legal and territorial scope. For example, the central government and the National Emergency Operations Committee have exclusive powers for the control of the entry and exit of people by air, land or sea. In that sense, the government has established the obligation to present a negative PCR test for travelers seeking to enter Ecuador.

On the other hand, there are competences that are exclusive to local governments, for example, deciding whether to open gyms and restaurants, establishing the rules of capacity, regulating the sale of alcoholic beverages. Precisely, the fact that local and national authorities have ordinary powers to regulate issues such as telework, education, mass entertainment and other aspects that affect the management of the Covid-19 pandemic, was one of the arguments of the Constitutional Court to reject the possibility of new states of exception.

Although, in abstract, the risk management model seems beneficial because it allows a certain degree of autonomy and the establishment of restrictions on a case-by-case basis, the truth is that there is a high degree of incoordination in practice and that this may result in the measures adopted by a city being ineffective because the same measures are not complied with in neighboring cities.

Human Rights and Civil Liberties Considerations

From the perspective of human rights and civil liberties, it is worth noting that the Constitutional Court of Ecuador has been particularly activist in clarifying, for example, that homeless people cannot be arrested for being out during curfews.

Similarly, the Constitutional Court has insisted that the service of justice and basic guarantees such as habeas corpus cannot be suspended at any time. Dealing with executive provisions such as the suspension of freedom of transit, the Constitutional Court has ruled that it should be limited only in those places where there is a high concentration of Covid-19 infected persons. In other words, the limitation must be proportional. The Court also urged the national government to guarantee access to medical supplies for front-line personnel and people in vulnerable situations. It is positive to note that no press censorship measures have been implemented and that the Constitutional Court urged the government to adopt a public prison policy that considers the pandemic in order to allow that those who are not convicted or are in a situation of vulnerability may benefit from an alternative regime.

2021 Outlook: Recommendations for Governance, Democracy, Human Rights, and the Rule of Law

In conclusion, it is important that Ecuador adopts regulations to address the pandemic in a holistic manner and considering that it is an issue that may only be solved in the medium or long term. This implies not limiting public policy and legislation to labor or economic regulations but understanding the need to adapt all aspects of our lives to the pandemic. Likewise, the state must develop an effective and transparent strategy on the acquisition of vaccines and their distribution among the population.

Regarding democracy and the rule of law, it should be noted that regardless of the political option that comes into power, there are institutional counterweights such as the Constitutional Court, the attorney general's office among other important institutions, in addition to the fact that no political force has a clear majority in the legislature, which may prevent abrupt changes such as a constituent assembly in Ecuador.

