



## **Legitimate consent: Impact on the execution of criminal forensic protocols in the Ecuadorian legal framework**

## **Consentimiento legítimo: Impacto en la ejecución de protocolos periciales penales en el marco legal ecuatoriano**

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### **ABSTRACT**

The evolution of the concept of legitimate consent has witnessed an intriguing journey throughout medical and legal history, the aim is to analyse legitimate consent as an impact on the execution of criminal expert protocols in the Ecuadorian legal framework. This article is aligned with documentary research of a descriptive nature and bibliographic design. The doctor-patient relationship, the private sphere and criminal justice converge in the need to recognise and respect legitimate consent as an inalienable right. This analysis offers a comprehensive and thoughtful overview, highlighting its central role in medical ethics, individual rights and justice in Ecuador. A thorough understanding of the associated duties and conditions legitimises its essential position in medical practice and reinforces ethical commitment to health care and justice.

Descriptors: right to privacy; data protection; medical personnel. (Source: UNESCO Thesaurus).

### **RESUMEN**

La evolución del concepto de consentimiento legítimo ha sido testigo de una intrigante travesía a lo largo de la historia médica y legal, se tiene por objetivo analizar el consentimiento legítimo como un impacto en la ejecución de protocolos periciales penales en el marco legal ecuatoriano. Este artículo se alinea con una investigación documental de naturaleza descriptiva y diseño bibliográfico. La relación entre médico y paciente, la esfera privada y la justicia penal convergen en la necesidad de reconocer y respetar el consentimiento legítimo como un derecho inalienable. Este análisis ofrece una visión completa y reflexiva, subrayando su papel central en la ética médica, los derechos individuales y la justicia en Ecuador. La comprensión profunda de los deberes y condiciones asociadas legitima su posición esencial en la práctica médica y refuerza el compromiso ético en la atención de la salud y la justicia.

Descriptorios: derecho a la privacidad; protección de datos; profesión médica. (Fuente: Tesoro UNESCO).

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**Research articles section**



## INTRODUCTION

The evolution of the concept of legitimate consent has witnessed an intriguing journey through medical and legal history, marking significant milestones that have shaped the delicate relationship between physicians and patients (Maclean, 2002). From the distant case of *Slater v. Baker and Stapleton* in 1767, where lack of consent resulted in the legal liability of physicians, to the pivotal 1914 landmark in *Schloendorff v. Society of the New York Hospital*, where the ability of individuals to decide over their own bodies was affirmed, each episode has sculpted a deeper understanding of the rights and responsibilities of both parties in the realm of medical intervention (Moreno-Morejón, 2020).

The Nuremberg Code, born out of the trials that followed the Second World War, stands as an ethical monument in 1947. This code, arising from the war crimes perpetrated by Nazi doctors, stresses the imperative need for voluntary and informed consent when participating in experiments, emphasizing the personal responsibility of each individual when faced with crucial medical decisions (Weisleder, 2022).

The year 1957 brings with it the case *Salgo v. Leland Stanford Jr. University Board of Trustees*, where the term "informed consent" is coined for the first time. Lack of information about the risks associated with translumbar aortography results in paralysis, leading to judicial recognition of the obligation to inform the patient, allowing them to make informed decisions about their own care.

The high point is reached in 1960 with the *Nathanson v. Kline* case, consolidating patient self-determination. This case revolutionises medical practice by affirming that even in situations where a patient's decisions may be detrimental to his or her own life, his or her autonomy must be respected. Here was born the seed of informed consent, a fundamental principle that has blossomed and matured, transforming medical practice and redefining patient-physician interactions in an era of empowerment and mutual respect.



The intersection between legitimate consent and the execution of criminal expert protocols in the Ecuadorian legal context constitutes a fascinating and unexplored terrain in the legal field. In this scenario, the expert diligence becomes a key player, where the legitimacy of consent plays a crucial role in the validity and effectiveness of the evidence presented in court.

This article delves into the complexity of this relationship, exploring the legal, ethical and procedural implications that arise when weighing legitimate consent in the development of criminal expert protocols. Through a detailed analysis of the Ecuadorian legal framework, it seeks to unravel how the perception and application of legitimate consent can significantly shape the quality and admissibility of expert evidence, thus outlining the fabric of a debate that challenges the very foundations of criminal justice in Ecuador.

In light of the above, the aim is to analyse legitimate consent as an impact on the execution of criminal expert protocols in the Ecuadorian legal framework.

## **METHOD**

The methodological approach adopted in this article is aligned with documentary research of a descriptive nature and bibliographic design, implementing the analytical-synthetic method. The population selected for this study comprises 15 research papers that provide a comprehensive and diverse view of the social and legal dimensions related to legitimate consent.

The research focuses on the figure of legitimate consent, exploring its multiple facets and examining its crucial role in the implementation of forensic protocols in the criminal field. Particular attention is paid to victims of crimes involving physical, psychological, verbal and sexual violence. In addition, a detailed analysis is made of the right to autonomy and its relevance in the decision-making of people who have been subject to such protocols.

The methodology employed is based on an exhaustive documentary review, a fundamental tool for tracing the conceptual evolution of legitimate consent. This approach allows for the identification of previous research, relevant authors, and key premises related to the topic. It also facilitates the construction of a solid



theoretical basis, revealing similarities, differences and areas not yet explored in the scientific literature.

In this process, theses, scientific articles and legal regulations that shape the conceptual framework of legitimate consent are compiled, with a special focus on forensic expert protocols applied to victims of violence. The documentary review serves as a bridge to understand the doctrinal conceptions, historical background and the surrounding legal framework, from the consolidation of the concept to its current normative expression. The article is built on a solid structure, supported by a meticulous documentary review.

The conduct of this research implies a fundamental ethical commitment to safeguard the integrity and rights of the people involved, especially when addressing sensitive issues such as legitimate consent in the context of forensic expert protocols applied to victims of violence. Some relevant ethical considerations are presented below:

**Confidentiality and Privacy:** The collection of data from research papers, theses and legal regulations should be carried out with the utmost respect for the confidentiality and privacy of the subjects of study. The identification of specific individuals or cases must be carefully avoided to prevent any violation of their privacy.

**Respect for Autonomy:** Given the nature of the subject matter, it is imperative to respect the autonomy of the individuals whose cases are addressed in forensic expert protocols. Informed and voluntary decision making must be a guiding principle, both in document review and in the application of the protocols.

**Scientific Rigour and Objectivity:** Documentary review should be conducted with an objective and rigorous approach, avoiding biases that may distort the understanding of legitimate consent. Diverse perspectives and sources should be considered to ensure representativeness and impartiality in the presentation of results.

**Transparency in Methodology:** It is essential to provide a clear and complete description of the methodology used, allowing other researchers to evaluate and replicate the study. This contributes to transparency and honesty in scientific research.



**Gender and Vulnerability Considerations:** When dealing with victims of violence, a gender and vulnerability sensitive approach must be taken. It is essential to avoid re-victimisation and to ensure that research does not cause additional harm to those who have already experienced traumatic situations.

**Ethical Approval:** If necessary, approval from a research ethics committee should be obtained to ensure that the study meets established ethical standards and respects the fundamental rights of participants.

These ethical considerations provide a sound basis for the responsible conduct of research, ensuring that the results contribute to scientific knowledge without compromising the dignity and rights of the individuals involved.

## **ANALYSIS OF THE RESULTS**

Based on the documentary findings, they are presented:

### **Legitimate Consent as an Ethical Pillar in the Doctor-Patient Relationship in Ecuador**

The concept of legitimate consent is addressed in depth and clearly, highlighting its fundamental role in guaranteeing the free self-determination of patients. The doctor-patient relationship is enriched by this principle, which establishes specific duties for health professionals, thus ensuring the protection of the recognised rights of patients (Estévez-Abad, 2018). A relevant contribution of this analysis is the identification of two crucial duties imposed on doctors: obtaining authorisation for any surgical intervention and the obligation to provide complete and necessary information about the procedures. Attention to these duties becomes a catalyst for respecting patient autonomy and safeguarding patient dignity (Harbishettar, et al. 2019).

It is recognised that legitimate consent not only benefits the patient but also strengthens the relationship between medical personnel and the individuals under their care. Openness to patient self-determination provides a basis for more informed and respectful decision-making, avoiding reproach and cultivating an environment of mutual trust (Vega-Hurtado, 2020).



In the specific context of Ecuador, the definition of legitimate consent according to Ministerial Agreement 5316 stands out. This approach highlights the importance of communication and deliberation in the doctor-patient relationship, underlining autonomy and voluntariness as key factors for its application. It also addresses essential conditions for the effectiveness of consent, such as the provision of sufficient information, patient understanding, respect for freedom of decision, and assessment of the patient's capacity to make informed decisions. These aspects, endorsed by the Ministry of Public Health of Ecuador, reflect a comprehensive and ethical approach to the consent process (Abad-Arévalo, et al. 2023).

At the ethical level, it underlines the duty of the health professional not to limit himself or herself to the provision of medical services, but to provide information and documents necessary for the patient to be able to inform his or her decisions. The doctor-patient relationship is presented as a reciprocal partnership, where both actors have duties and responsibilities, avoiding the idea of submission and highlighting the importance of shared power (Zamora-Vázquez, 2020).

Therefore; the proposed analysis offers a comprehensive and reflective view on legitimate consent in the medical field in Ecuador. It highlights its role as a guarantor of rights, a promoter of patient autonomy and an ethical foundation in the doctor-patient relationship. A thorough understanding of the duties and conditions associated with consent legitimises its central role in medical practice and reinforces ethical commitment in health care.

### **The evolution of legitimate consent and its link to the right to privacy in Ecuador**

Legitimate consent, enriched from various perspectives worldwide, emerges as a crucial component not only in the medical sphere but also in the legal sphere. In the Ecuadorian context, where it has been defined in a specific and detailed manner, a profound connection with other legal aspects can be observed, highlighting the importance of the right to privacy as an intrinsic and complementary component.

The regulations in the Republic of Ecuador, by recognising Legitimate Consent through Ministerial Agreement 5316 and the right to privacy enshrined in Article 66 of the Constitution, evidence a significant interrelation. Both rights, based on the



self-determination and freedom of individuals, stand as pillars that seek to safeguard the private sphere and the capacity to decide on personal and health aspects.

The imprescriptibility, inalienability and inviolability attributed to the Right to Privacy highlight its importance in the Ecuadorian legal framework. This legal consecration provides a solid basis for the protection of the freedom and autonomy of individuals, highlighting the need to respect decisions taken in the private sphere.

The link between legitimate consent and the right to privacy is evident in recognising that both rights share the foundation of self-determination in decision-making on personal matters. The private sphere, both in personal information and in decisions about the body, is presented as an inviolable terrain, where intrusion and arbitrariness are excluded.

The discussion reveals the close relationship between these rights, where legitimate consent acts as a specific mechanism to protect the right to decide on medical interventions and treatments, while the right to privacy is positioned as a broader principle that encompasses decisions and actions from the private sphere.

In this context, there is a progressive evolution of legitimate consent from a simple legal requirement to a mechanism that supports the self-determination of individuals. This development not only recognises fundamental rights, but also establishes an ethical framework that fosters a mutually respectful relationship between health professionals and patients (Yambay-Bautista, et al. 2022).

The analysis reflects the importance of considering legitimate consent and the right to privacy together in the construction of a robust legal and ethical framework in Ecuador. Both rights, aligned with self-determination, contribute to consolidating legislation that respects the dignity and freedom of individuals in the area of health and privacy.

### **The evolution of autonomy in the doctor-patient relationship and its link to bioethics in Ecuador**

The principle of autonomy arose as a response to a past marked by medical paternalism, where health professionals made decisions for patients without considering their will. This paternalism, evidenced in the period of World War II with



the abuses of Nazi doctors, led to the creation of the Nuremberg Code, recognising human dignity and autonomy as fundamental criteria.

The Declaration of Helsinki in 1964 was a milestone in establishing ethical guidelines and recognising patients' rights, emphasising autonomy in the doctor-patient relationship. This significant moment in the history of medical ethics reflected a paradigm shift in recognising the importance of protecting vulnerable individuals and highlighting autonomy as a fundamental principle.

In the United States, the Belmont Commission, formed in 1978, produced the Belmont Report, considered the world's first bioethics document. This report, by recognising autonomy, beneficence, justice and later non-maleficence, established ethical guidelines for biomedical research, especially to prevent abuses similar to those that occurred during the Holocaust.

Bioethics, according to (Spaciuk & Ariasgago, 2013), is defined as an interdisciplinary field that reflects on ethical concepts in the health sciences. It emerged as a response to technological advances in medicine and the need to recognise the rights of vulnerable individuals, establishing ethical regulations to guide medical conduct and resolve ethical dilemmas in practice.

Autonomy, understood as the capacity of individuals to decide independently, has evolved from its recognition in historical documents to current definitions that highlight the importance of rational deliberation and the capacity to make decisions about the body, therefore; autonomy is recognised as the right of every person to follow their own life plan, as long as it does not affect the rights or property of others (Iosa, 2017).

In this context, autonomy becomes a guiding principle in the doctor-patient relationship. The ability to decide on treatments, diagnoses and procedures is placed at the centre of medical care, marking a significant change in the patient's role in his or her own care (Muñoz-López, 2007).

Bioethics, by reflecting on the ethical aspects of medicine, seeks to ensure that patient autonomy is respected and that medical decisions are made in accordance with fundamental ethical principles. This interdisciplinary approach provides ethical





guidance for health professionals and helps to resolve ethical dilemmas that may arise in the practice of their discipline (Gregg, 2022).

In the Ecuadorian context, the evolution of autonomy is reflected in legislation that recognises legitimate consent and the importance of autonomy in patients' decisions. Autonomy, understood as an inalienable and imprescriptible right, is placed as a crucial element in the doctor-patient relationship in the search for the patient's well-being and respect for his or her fundamental rights.

The evolution of the principle of autonomy in the doctor-patient relationship, linked to historical milestones and the development of bioethics, highlights the importance of recognising the dignity and decision-making capacity of individuals in the field of health. In Ecuador, this principle is consolidated as an essential component to guarantee ethical medical care that respects individual rights.

Legitimate consent in forensic expert protocols in Ecuador: guaranteeing rights and avoiding revictimization

The role of the expert witness in criminal cases, especially in crimes of verbal, physical, psychological and sexual violence, highlights the importance of establishing forensic expert protocols. These protocols serve as standard guidelines for the actions of the experts, avoiding the re-victimisation of those affected and guaranteeing the integrity of the judicial process. However, despite these protocols, some victims may hesitate to report due to lack of trust in the legal system and lack of knowledge about their rights.

In Ecuador, protocols and forensic expert manuals have been implemented that seek to prevent re-victimisation and establish clear guidelines for the investigation. In crimes of sexual and domestic violence and injuries, the importance of the victim's legitimate consent to carry out examinations and necessary procedures is highlighted. This consent is an essential component for initiating the investigation process and laying the groundwork for punishment (Matute-Calle, et al. 2021).

The information provided by experts to victims should be comprehensive, clear and understandable. In addition to explaining the procedures, emotional support should be provided to avoid a stressful process that may aggravate the victim's trauma.



This comprehensive approach is not only limited to information, but also to the creation of a safe environment where the victim feels protected.

In the case of children and adolescents, the need to inform both the victim and his or her legal representative is established. If the representative objects to the proceedings, a guardian must be appointed. It is essential to respect the autonomy of persons with capacity to consent, and if they refuse the expertise, psychological or social support should be provided.

The Legitimate Consent forms in Ecuador, approved in 2018, reflect a differentiated approach according to the age of the victim. The forms address the authorisation of physical, proctological, gynaecological examinations and the taking of biological samples, recognising the diversity of cases and guaranteeing the comprehensive protection of rights.

It is crucial that the expert ensures that the victim fully understands the information provided and voluntarily consents. In addition, the individual's decision-making rights must be respected, and any refusal must be recorded. This ethical and respectful approach not only complies with protocols but also preserves the dignity of the victim (Pérez-Martínez, & Rodríguez-Fernández, 2022).

In specific cases, such as sexual crimes against children and adolescents or gender-based violence, routes and procedures for comprehensive care have been established. These approaches are designed to comply with constitutional and international standards, avoiding re-victimisation and providing the necessary support.

Legitimate consent in the field of forensic expertise in Ecuador is presented as an essential tool to respect the autonomy and rights of victims. The proper implementation of these protocols not only contributes to the effectiveness of the criminal investigation but also reflects Ecuador's commitment to guarantee justice that protects and respects those who have suffered violence (García-Garduza, 2014).



## CONCLUSIONS

This comprehensive analysis of legitimate consent in different contexts in Ecuador highlights its fundamental role in guaranteeing rights, promoting autonomy and building ethical relationships. In the doctor-patient relationship, legitimate consent stands as an ethical pillar, establishing specific duties for health professionals and cultivating an environment of mutual trust.

The evolution of legitimate consent, linked to the right to privacy, shows a significant interrelationship in the Ecuadorian legal framework. Both rights, based on self-determination and freedom, safeguard the private sphere and the capacity to decide on personal and health issues.

In the forensic field, forensic expert protocols represent a crucial step to avoid re-victimisation in cases of violence. Legitimate consent emerges as an essential mechanism to respect victims' autonomy and preserve their dignity, highlighting the importance of providing comprehensive information and emotional support.

The doctor-patient relationship, the private sphere and criminal justice converge in the need to recognise and respect legitimate consent as an inalienable right. This analysis offers a comprehensive and thoughtful overview, highlighting its central role in medical ethics, individual rights and justice in Ecuador. A thorough understanding of the associated duties and conditions legitimises its essential position in medical practice and reinforces ethical commitment to health care and justice.

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