

# Adopción por parejas del mismo sexo en Ecuador: falta de regulación y la experiencia internacional

## Adoption by same-sex couples in Ecuador: lack of regulation and the international experience

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### Resumen

Durante el debate de la Asamblea Constituyente de 2008 de Ecuador, las organizaciones LGBTI+ realizaron campañas para la inclusión del derecho de uniones civiles de las personas del mismo sexo, así consiguieron se encuentren inmersas en el artículo 68 de la Constitución, a pesar de las protestas en contra de los movimientos religiosos. En la Constitución vigente la diferencia sustancial entre las parejas de diferente sexo, uniones civiles o matrimonios, y las parejas de mismo sexo se funda en la prohibición que tienen estas últimas para adoptar. En efecto, por el hecho que existía una prohibición literal a los matrimonios civiles del mismo sexo, en el año 2019 la Corte Constitucional de Ecuador admite los matrimonios civiles por personas del mismo sexo, y su posibilidad de registrarse ante la entidad competente. Este trabajo analiza los efectos posteriores a la sentencia de la Corte Constitucional de 2019 que determinó la inconstitucionalidad de una norma que establecía que el matrimonio solo podía otorgarse por la unión de un hombre y una mujer. La aprobación del matrimonio igualitario es el inicio para la inclusión de los diferentes beneficios de la estructura "original" de la familia, tales como procrear y criar. El derecho a la familia se reconoce en la Constitución pero siempre se negó acceso a quienes no encajaban en esa estructura "original". Con la aprobación del matrimonio igualitario, se entendería que se reconoce y acepta a los diferentes tipos de familia, y consecuentemente, el derecho que tienen las familias LGBTI+ de adoptar.

### Palabras Clave:

*Adopción, adopción internacional, familia, matrimonio, matrimonio igualitario, homosexual, homo parental, paternidad del mismo sexo, adopción de parejas del mismo sexo.*

### Abstract

During the debate on the Ecuadorian Constitution of 2008, LGBTI+ organizations campaigned for the inclusion of same-sex civil unions, which were eventually included in the article 68 of the Constitution, despite protests from religious movements. In this new Constitution, the substantial difference between same-sex unions and those of the opposite sex is that same-sex parent family adoptions are not allowed, while adoption rights are the same for civil unions as for civil marriages. Since there was a literal prohibition for same-sex couples to access civil marriage in Ecuador's legal system, in 2019, the Constitutional Court admitted civil marriages for same-sex couples and the possibility to register them before the competent authority. Therefore, this research essay will analyze the effects arising from the ruling of the Constitutional Court in 2019 that declared the unconstitutionality of the legal norm that established that marriage could be granted only to the union of one man and one woman. The approval of equal marriage is the beginning of inclusion of the different benefits of the "original" family structure, such as procreate and raise. The right to a family is recognized in the Constitution, but it was always denied to those who did not fit into the original family structure. With the approval of same-sex marriage, which means the acceptance of different types of family, it also leads to thinking that it is approved and allowed the right to adopt to those LGBTI+ families.

### Keywords:

*Adoption, international adoption, family, marriage, equal marriage, homosexual, homo parental, same-sex parenthood, same-sex parent family adoption.*

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## Introduction

*“Family is a construct of elements that converge in a human-affective nucleus which varies according to a space-time; and constitutes the basic pillar of organized human relations”.*<sup>2</sup> Certainly, family as an institution represents an essential pillar for humanity. This could be better understood by following Aristotle's thought, which portrays human beings as social and political individuals whose primary needs are living in organized communities where the essential and most basic order for human life is preserved.<sup>3</sup> Therefore, the right to start a family and even more, the right to grow up in a proper family environment—which would provide the most basic needs for the development of minors, especially for unparented ones—seems to be meaningful issues to take into consideration.

Jurists like Planiol and Ripert state that a family is a group of people whose interrelationship is linked by marriage, filiation, or adoption.<sup>4</sup> Under the thought, the Ecuadorian Constitution recognizes family in its various types and states it as the fundamental nucleus of our society.<sup>5</sup> Thus, family protection must be ensured, guaranteeing the conditions that fully

favor the achievement of its goals. Families will be constituted by legal or de facto ties and their members shall enjoy equal rights and opportunities. In relation to legal ties, they are the ones created by marriage, filiation, and adoption.<sup>6</sup>

In that sense, adoption can also play an important role when starting a family. This has legal standing and is regulated both by international organizations and treaties, as well as by Ecuadorian legislation. It is important to mention that adoption will proceed as long as it fulfills its main purpose, which is to ensure and watch over the best interests of the child at all times. For that reason, the Ecuadorian Constitution establishes the right to have a family and to enjoy family and community coexistence for all children and teenagers.<sup>7</sup> Moreover, the same legal text indicates that in order to protect the rights of all family members, daughters and sons will have the same rights without considering filiation or adoption records. However, adoption in Ecuador is restricted as, only different-sex couples can adopt, meaning that same-sex couples are excluded from this right.

Notwithstanding, the concept of family cannot be understood as an isolated manner, but rather following the pluralism principle: *“[family is a] dynamic and open nucleus, an indeterminate legal concept, [...] its basis*

<sup>2</sup> ORDEÑA, Tatiana, BARAHONA, Alexander. *El derecho de familia en el nuevo paradigma constitucional*. Quito: Cevallos Editora Jurídica, 2016, p. 18. ISBN: 9789978392782.

<sup>3</sup> MAZZOLENI, Rocío. *El lenguaje, elemento de lazo social e identidad*, en Tatarendy, Vol. 1, No. 4, 2013, p. 185-191.

<sup>4</sup> PLANIOL, Marcel, RIPERT, Georges. *Derecho Civil*. México: Harla, Tomo 8, 1997.

<sup>5</sup> Constitución de la República del Ecuador (Registro Oficial 449 del 20 de octubre del 2008), Artículo 67.

<sup>6</sup> LARREA HOLGUÍN, Juan. *Manual Elemental de Derecho Civil del Ecuador: Derecho de Familia*. Quito: Corporación de Estudios y Publicaciones, 2008.

<sup>7</sup> Constitución de la República del Ecuador (Registro Oficial 449 del 20 de octubre del 2008). Artículo 45.

*is affected by a changing reality of a historical process to which life in society is subject*".<sup>8</sup> It is prime to remember that law is dynamic as it changes over time, adapting to the different circumstances and realities that society faces. Thus, the plurality of families shows the richness of human relationships diversity in an intercultural context and supports the statement about family as the core nucleus of society and the space for peoples' formation and development.

In response to the different types of families that can be determined nowadays such as: nuclear, single-parent, assembled or reconstructed, foster, disintegrated, and same-sex families, laws should regulate and establish a proper construction of said families. Especially when talking about single and same-sex families, in which biological procreation does not take place and people must seek other alternatives like surrogacy or adoption. Furthermore, the concern about this regulation lies in the fact that these diverse types of families have been affected over time since they did not enjoy the same privileges as the nuclear families, father-mother. A clear example is the impossibility of access to an adoption process for same-sex families given by an express prohibition determined in the Ecuadorian Constitution.<sup>9</sup>

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<sup>8</sup> ORDEÑA, BARAHORNA, *Op. Cit.*, p. 36.

<sup>9</sup> Constitución de la República del Ecuador, *Op. Cit.*, Artículo 68. "*Art. 68.- La unión estable y monogámica entre dos personas libres de vínculo matrimonial que formen un hogar de hecho, por el lapso y bajo las condiciones y circunstancias que señale la ley, generará los mismos derechos y obligaciones que tienen las familias constituidas mediante matrimonio. La adopción corresponderá sólo a parejas de distinto sexo.*".

This situation generates controversy since the Ecuadorian Constitution seems to be an absolutely protectionist law body, providing all possible guarantees. In such a way, not accepting or regulating adoption by same-sex couples would constitute a violation to the principle of having a family as it would be impeding same-sex families from developing progressively within society as equal marriage was already approved in Ecuador in 2019. Also, it would deny children who are living in orphanages the opportunity to grow up in a stable and family environment to those unparented. All of this seems to be the result of a strong presence of heteronormative thinking in the Ecuadorian Constitution, controlled by a conservative, discriminatory and sexist society. In fact, certain rights are recognized to a specific group of people and not to the entire population, which leads to believe that the Constitution itself opposes its principles and rights, creating a serious legal antinomy.

Consequently, it would signify that the rights to equality and non-discrimination established in the Constitution are null and void. Furthermore, they lack value in the adoption process by diverse families since there is no place for adoption by same-sex couples or single people belonging to the LGBTI+ community, even when the Constitution itself recognizes the right of all diverse families without discrimination.<sup>10</sup> Hence, this research aims to develop the mentioned topics for a better understanding of them, making an analysis in which the institution of adoption by same-sex

couples can be deepened taking in regards the express prohibition of it in Ecuador and adapting it to an international study through comparative law, as well as an analysis of international adoption by private international law.

Therefore, to carry out this non-experimental research, in order to analyze how same-sex parent adoption, by the use of the international adoption, will guarantee ‘the best interests of the child’ principle, especially for unparented children, as well as the right to start a family and to grow up and develop in a good family environment, the following research process and sources will be used: 1. State definitions for the institution of family, its main characteristics, especially how those diverse types of families are recognized in society nowadays, more specifically the same-sex family in the Ecuadorian legal system and global context; 2. State definitions for the term adoption, its regulation in Ecuador, and the doctrinaire approach about the legal figure of adoption; 3. State definitions for international adoption, its regulation by international private law and how it seeks the best interests of the child.

Besides, it is important to take into consideration that this work will be also focused on studying the Ecuadorian case,

by a comparative analysis of some international legal systems that already had implemented same-sex parent adoption in their legislatures. Respectively, there will be a review on international laws on this topic that Ecuador has ratified, the Constitution of the Republic of Ecuador, and other legal bodies on the matter to be discussed, such as the Ecuadorian Civil Code and the ‘Código de la Niñez y Adolescencia’. By using an inductive method, this work will perform an analysis between Ecuador’s legislation and international legislation to obtain a better understanding of the Ecuadorian context in regard to same-sex parent adoption.

### **1. The institution of the family and its characteristics**

Family, as an institution, is a basic unit for society: its multiple functions made it significant and necessary for human beings and their community development. Hence, some relevant functions performed by the family formerly were the reproduction of new members and their socialization, as well as the provision of emotional and physical care to the elderly and the young.<sup>11</sup> In fact, the family is portrayed as an institution that solves or alleviates a great number of social problems. Moreover, after studying more than 250 multicultural societies, George Peter Murdock, an American anthropologist,

<sup>10</sup> Ibid. Artículo 67.

*“Art. 67.- Se reconoce la familia en sus diversos tipos. El Estado la protegerá como núcleo fundamental de la sociedad y garantizará condiciones que favorezcan integralmente la consecución de sus fines. Estas se constituirán por vínculos jurídicos o de hecho y se basarán en la igualdad de derechos y oportunidades de sus integrantes [...]”.*

<sup>11</sup> RODRÍGUEZ, Jorge, LÓPEZ, Nayibis, TAMAYO, Olga, RODRÍGUEZ, Soraya. *La familia como célula fundamental de la sociedad en la Atención Primaria de Salud*, en Revista Cubana de Tecnología de la Salud, Vol. 5, No. 3, 2014, p. 50. ISSN 2218-6719.

defined the term family as a “[...] *social group characterized by common residence, economic cooperation, and reproduction. It includes adults of both sexes, at least two of whom maintain a socially approved sexual relationship, and one or more children, own or adopted, of the socially cohabiting adults.*”<sup>12</sup> As observed, even though this definition was given in 1949, it already included adopted children as an alternative and as a fundamental element in the construction of the family as an institution.

In effect, the family is consolidated within society, integrating and developing under economic, political, emotional and social foundations.<sup>13</sup> It has a *material or economic function* since they become social agents who must produce to survive, meaning that the standard of living achieved by the family depends on this; an *affective function* as it is within the home and the family where children and teenagers receive or do not receive the first signs of love and affection, which will later influence the development of their personality, formation of knowledge, skills, values and habits; and a *social function*, referring to the development of the family within the environment, giving an special emphasis on the education received by the child at school and home,

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<sup>12</sup> MURDOCK, George in PATHAK, Akhilesh. *Discussing the Indispensability of Family as a Social Institution*, in International Journal of Humanities and Social Sciences, Vol. 7, No. 1, 2017, p. 83. ISSN 2250-3226.

<sup>13</sup> MARTÍNEZ, Haydee. *La familia: una visión interdisciplinaria*, en Revista médica electrónica, Vol. 37, No. 5, 2015, p. 524.

which would be returned as they grew up, creating a balance.<sup>14</sup>

As seen, family influences most of the people's decisions and thus constructs society. A simple example could be Latin American countries: people who mostly grow up in a traditional and conservative family nucleus are going to have a more conservative way of thinking, which would influence the most at the moment of taking decisions in all social aspects, from how education is held to the way governments rules, frequently portrayed on their public policies and legislation. However, not only in Latin America, the family structure has changed dramatically in the last 50 years. The “*mom and dad*” family is no longer the standard, and various versions of the family have been generated.<sup>15</sup>

The doctrine and jurisprudence recognize and explain the six different family structures in today's society. For starters, the *nuclear family* is constituted by a group united by biological links, it consists of two parents and children. On the contrary, *single-parent families* are made up solely of the father or mother, who raise one or more children on their own. There are also *assembled or reconstructed families*, originated when, after the separation of a couple, new unions are consolidated. Another type, such as *foster families*, which are formed when a child has been separated from his biological family and is reintegrated into

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<sup>14</sup> *Ibid.*, p. 527.

<sup>15</sup> PÉREZ, Araceli. “*Homoparentalidad*” *Un nuevo tipo de familia*, en Repositorio Digital de la Universidad de Chile, 2016.

a new family nucleus for an extended time. There is also, *disintegrated families*, where those family nuclei disintegrated because their members have been separated for extraordinary reasons, such as deprivation of liberty or emigration, commonly found in Latin America countries; and *homoparental families*, same-sex families, which are emotional relationships made up of people of the same sex.<sup>16</sup>

At this point, it is highly relevant to introduce the term same-sex parenthood derived from same-sex families. Homoparentality arises as a consequence of certain transformations within the Western culture. Children are raised since the last century with new values as a consequence of all these new conceptions and types of families mentioned above. In the same way, science plays an important role, since approximately thirty years ago, medicine no longer considers homosexuality as a disease and neither does psychology as a perversion.<sup>17</sup> Moreover, some studies argue that the formation of families by people of the same sex does not deteriorate the institution of the family *per se*. Otherwise, it transforms it in a more inclusive way where the framework of its cultural unity will be expanded: the link will no longer be father-mother-child but will present variations that will enable various relationships within this

institution.<sup>18</sup>

However, even nowadays it is a hard task to determine the number of same-sex parent families as most of them are not willing to showcase their relationship to the world for fear of suffering some kind of discrimination, physical or verbal, that could destroy or hurt their family, for example, by losing their jobs, or the custody of their children. Furthermore, it is important to take into consideration that there is no specific prototype of a predetermined same-sex family. Sometimes couples decide to have children within their relationship, while in most cases the children come from previous heterosexual relationships. Thus, it is common for the child within a same-sex family to be biologically linked to one of their parents. Nevertheless, thanks to advances in science and laws, there are currently other alternatives for those same-sex couples who decide to have children, such as surrogacy, artificial insemination, and adoption.<sup>19</sup>

In that regard, adoption is one of the oldest institutions of law. It is said that it has its origin in India and was later transmitted, by religious beliefs, to neighboring civilizations: *"everything suggests that the Hebrews took it from there, transmitting it in turn, with their*

<sup>16</sup> ORDEÑA, BARAHORNA, Op. Cit., p. 39-42.

<sup>17</sup> CHAPARRO, Laura, GUZMÁN, Yudy. *Adopción homoparental: Estudio de derecho comparado a partir de las perspectivas de los países latinoamericanos que la han aprobado*, en Revista CES Derecho, Vol. 2, No. 8, 2017, p. 268. ISSN: 2145-7719.

<sup>18</sup> ROBLES, Claudio, DE IESO, Lía, GARCÍA, Alejo, REARTE, Pamela, GONZÁLEZ, Mariel. *Diversidad familiar: un estudio sobre la dinámica de los hogares homoparentales*, en Rihumso: Revista de Investigación del Departamento de Humanidades y Ciencias Sociales, Vol. 1, No. 6, 2014, p. 112. ISSN-e 2250-8139.

<sup>19</sup> AMERICAN ASSOCIATION FOR MARRIAGE AND FAMILY THERAPY. *Same Sex Parents and Their Children*, 2021.

*migration, to Egypt, from where it went to Greece and then to Rome*".<sup>20</sup> Indeed, adoption had primarily an eminently religious purpose, which was based on the perpetuation of domestic worship. It probably arose as a resource to avoid the custom established by religion itself, which made the woman, if she did not have children with her husband, try to have them with her brother or with her closest relative. Besides, adoption was considered in Roman Law as an institution of civil law, where the main purpose was to establish between two people, the same civil relations that exist between the head of the family (paterfamilias) and the child born in legitimate marriage.<sup>21</sup>

Nowadays, adoption legally recognizes a family relationship between the adoptive parents and the child. The right to establish and maintain this relationship is protected by the human right to private life and family. The purpose of adoption is to ensure that children deprived of parental care can live in a family environment. Therefore, one of the most important factors at the moment of talking about adoption is that it must fulfill and guarantee the best interests of the child, a principle established in the Ecuadorian Constitution as the protection

to the "*interés superior del niño*".<sup>22</sup> This means that the interests of the child must prevail over those of the adoptive parents. In other words, adoption means providing a child with a family, not a family with a child. And after adoption, the legal relationship between the adoptive father and the adopted child is going to be the same as between a biological father and the child.<sup>23</sup>

It is fundamental to take into consideration the influence of human rights at the moment of analyzing the progressive transformations that family law has experienced. The incorporation of new core principles in this matter, such as the main protection of the weakest in family relationships, which includes the *best interests of the child*, is foolproof of this.<sup>24</sup> As a matter of fact, principles can be described in a legal context as a simple recognition of rights: "*[they] are rights that allow the exercise of other rights and to resolve conflicts between equally recognized rights*".<sup>25</sup> In the same school of thought, Dworkin establishes principles as standards that must be observed, "*not because it favors or ensures an economic, political or social situation that is considered desirable, but because it is a requirement of justice, equity or some dimension of morality*".<sup>26</sup>

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<sup>20</sup> BITBOL, Alfredo. & OBAL, Carlos. & LERNER, Bernardo. *Enciclopedia Jurídica Omeba*. México: Bibliográfica Omeba, Tomo I, 2009, p. 499.

<sup>21</sup> ODERIGO, Mario. *Sinopsis de derecho romano*. 6ª Edición. Buenos Aires: Depalma, 1982, p. 100.

<sup>22</sup> Constitución de la República del Ecuador, Op. Cit., Artículo 44. "*Art. 44.- El Estado, la sociedad y la familia promoverán de forma prioritaria el desarrollo integral de las niñas, niños y adolescentes, y asegurarán el ejercicio pleno de sus derechos; se atenderá al principio de su interés superior y sus derechos prevalecerán sobre los de las demás personas [...]*".

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<sup>23</sup> ORDEÑA, BARAHORNA, Op. Cit., p. 70.

<sup>24</sup> LEPIN, Cristian. *Los Nuevos Principios Del Derecho De Familia*, en Revista Chilena de Derecho Privado, Vol. 1, No. 23, 2014, p. 9-55. <http://dx.doi.org/10.4067/S0718-80722014000200001>

<sup>25</sup> BRUÑOL, Miguel. *El interés superior del niño en el marco de la Convención internacional sobre los Derechos del Niño*, en Justicia y Derechos del Niño, Vol. 1, No. 125, 1998, p. 56.

<sup>26</sup> DWORKIN, Ronald. *Los derechos en serio*. (translated) Martha Guastavino. Barcelona: Editorial Ariel, 1998, p. 72. ISBN: 978-84-344-1508-9.

Principles imply mandatory compliance by public authorities. Concerning the best interests of the child, it emerged by following the line that rights must be equally guaranteed for all human beings.<sup>27</sup> Children, according to the United Nations Declaration of the Rights of the Child of 1959, are universally recognized as human beings who must be able to develop “*physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity*”.<sup>28</sup> In this way, it arises the need to protect people who are in a particularly defenseless or helpless situation: “*the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*”.<sup>29</sup> Therefore, the prevalence of the best interests of the child must be understood as the need to satisfy all the rights of minors.

## 2. The legal figure of adoption

As mentioned, family is part of people’s identity. The State must favor the development and strength of the family nucleus. Otherwise, any affectation on this may imply violations of the right to personal integrity in its psychological dimension. Indeed, children’s rights lay on life with their family and receive protection against arbitrary or illegal interference in their homes. Moreover,

the best interests of the child, as a principle, determine two intimately linked areas of protection: a general one that implies the implementation of norms and public policies with a focus on the rights of the child; and a special one aimed at the concrete materialization of them. Both, public policies and judicial guarantees must be developed following the principle of the best interests of the child and assuring the protection of family relationships in dignified conditions.<sup>30</sup>

Ecuadorian laws such as ‘Código Civil’ (civil code) and ‘Código de la Niñez y Adolescencia’ (children and adolescents code) are clear in establishing that family is the natural space for the integral development<sup>31</sup> of the child or teenager: “[they] have the right to live and develop in their biological family. The State, society and the family must adopt, as a priority, appropriate measures that allow their permanence in said family”.<sup>32</sup> Exceptionally, said rule establishes that when circumstances or the family context itself harm the rights of the minor and goes against their best

<sup>27</sup> LEPIN, *Op. Cit.*, p. 24.

<sup>28</sup> Declaration of the Rights of the Child (UN General Assembly, resolution 1386 (XIV), A/RES/14/1386, 20 November 1959), Principle 2.

<sup>29</sup> *Ibid.*, preamble.

<sup>30</sup> ORDEÑA, BARAHORNA, *Op. Cit.*, p. 156-157.

<sup>31</sup> Código Civil (Registro Oficial Suplemento 46 del 24 de junio de 2005), Artículo 81.

“Art. 81.- Matrimonio es un contrato solemne por el cual dos personas se unen con el fin de vivir juntos y auxiliarse mutuamente.”.

<sup>32</sup> Código de la Niñez y Adolescencia (Registro Oficial 737 del 17 de diciembre de 2002), Artículo 22.

“Art. 22.- Derecho a tener una familia y a la convivencia familiar.- Los niños, niñas y adolescentes tienen derecho a vivir y desarrollarse en su familia biológica. El Estado, la sociedad y la familia deben adoptar prioritariamente medidas apropiadas que permitan su permanencia en dicha familia. Excepcionalmente, cuando aquello sea imposible o contrario a su interés superior, los niños, niñas y adolescentes tienen derecho a otra familia, de conformidad con la ley.”.



interests, children and teenagers have the right to another family. At this point, the legal figure of adoption enters as the main alternative to ensure the welfare and safety of the minor.

In consequence, adoption is that act of authority by which a relationship of adoptive filiation is established between the adopter and the adoptee, which means that a bond of filiation, comparable to biological for all purposes, is created between the minor and the adopters. In fact, it has the same effects, rights and obligations as a biological filiation. In other words, the adoption is *"a judicial resolution that produces as its main effect the birth of a relationship of filiation, similar to the natural one, between the adopter and the adoptee"*.<sup>34</sup> Correlatively to this effect, the adoption causes the breaking of the legal bond that the adoptee had with his previous family (biological parents). Moreover, the doctrine states that *"[the adoption] gives the adopter the quality of adoptive child, well understood that the adopter must give him his name and surnames, making the corresponding annotations in the respective adoption certificate"*.<sup>35</sup> Thus, adoption will generate the same effects as paternity by consanguinity.

According to Ecuador's Civil Code,

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<sup>33</sup> MOLINER NAVARRO, Rosa. *Adopción, familia y derecho*, en Revista bolivariana de derecho, No. 14, 2012, p. 103. ISSN: 2070-8157.

<sup>34</sup> GRANDE, Pablo, GONZÁLEZ, Esther. *Acogimiento y adopción*. Madrid: Agencia Estatal Boletín oficial del Estado, 2004, p. 49. ISBN 9788434015135.

<sup>35</sup> GONZÁLEZ, Juan. *Elementos de Derecho Civil*. 9a Edición. Ciudad de México: Editorial Trillas, 2014, p. 77.

adoption is an institution by which a person, who takes the name of adopter, acquires the rights and the obligations of a parent, concerning a minor, who is identified as adopted.<sup>36</sup> It must be taken into account that, for adoptions in Ecuador, the person who does not turn 21 will be considered a minor and would have the possibility to be adopted.<sup>37</sup> In the same line, Ecuador's Children and Adolescents Code stipulates that the purpose of adoption is to guarantee a suitable, permanent, and definitive family to the boy, girl, or teen who are in social and legal aptitude to be adopted.<sup>38</sup> Therefore, the Ecuadorian law only admits full adoption,<sup>39</sup> meaning that all the rights, attributes, duties, responsibilities, prohibitions, disabilities, and impediments proper to the adoption are established between the adopter and the adoptee, this being the same as a parent-filial relationship. Consequently, the adoptive child is assimilated into everything to the consanguineous child, extinguishing the relationship between the adoptee and the

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<sup>36</sup> Código Civil, Op. Cit., Artículo 314.

*"Art. 314.- La adopción es una institución en virtud de la cual una persona, llamada adoptante, adquiere los derechos y contrae las obligaciones de padre o madre, señalados en este Título, respecto de un menor de edad que se llama adoptado. Sólo para los efectos de la adopción se tendrá como menor de edad al que no cumple 21 años."*

<sup>37</sup> *Ibid.*

<sup>38</sup> Código de la Niñez y Adolescencia, Op. Cit., Artículo 151.

*"Art. 151.- Finalidad de la adopción.- La adopción tiene por objeto garantizar una familia idónea, permanente y definitiva al niño, niña o adolescente que se encuentren en aptitud social y legal para ser adoptados"*.

<sup>39</sup> *Ibid.*

*"Art. 152.- Adopción plena.- La ley admite solamente la adopción plena, en virtud de la cual se establecen entre el o los adoptantes y el adoptado todos los derechos, atributos, deberes, responsabilidades, prohibiciones, inhabilidades e impedimentos propios de la relación parento filial. En consecuencia, jurídicamente el hijo adoptivo se asimila en todo al hijo consanguíneo [...]"*.

members of its biological family.<sup>40</sup>

In Ecuador it is recognized that all children have the right to grow up in a family. For this reason, the Ministry of Economic and Social Inclusion of Ecuador (MIES) is the entity in charge of guaranteeing a suitable family for those children who, due to some external circumstance, cannot live or remain with their biological family. The MIES establishes that either a family, understood as spouses, or single people can adopt. However, there are certain restrictions when adopting in Ecuador. More specifically, in the case of couples, the law is clear in determining that only heterosexual couples can adopt, excluding same-sex couples.<sup>41</sup> This particular situation seems to be out of context as it violates a basic human right such as guaranteeing a family, a stable place to live, for a vulnerable child who is in helplessness. Moreover, it seems discriminatory knowing that since 2019 equal marriage was approved in Ecuador.

### 2.1. National and international adoption in a wide perspective

In this framework, it is important to mention that in Ecuador, adoption can be classified as national or international. Although the Civil Code does not

mention the different types of adoption, the Children and Adolescents Code recognizes two types of adoptions. On one hand, *national or domestic adoption*, is the one in which both the adoptive parents and the adopted child, are of the same nationality and reside in the same country.<sup>42</sup> In other words, it occurs between Ecuadorians within the national territory. On the other hand, international adoption “*involves parents of a nationality other than that of the child, whether or not they reside - and continue to reside - in the child’s habitual country of residence*”.<sup>43</sup> Moreover, according to article 180 of the Children and Adolescents Code, international adoption materializes when the candidates for adopters, whatever their nationality, have their habitual residence in another country that has subscribed an adoption agreement with Ecuador, as well as one in which the candidate or adopters are foreigners, domiciled in Ecuador for less than three years.<sup>44</sup>

It is worth mentioning international adoption since this may arise as an alternative for those same-sex families that have not been able to access a national adoption due to the mandatory prohibitions of the Ecuadorian regulations. In brief, international adoption involves “*the transfer of children for parenting purposes from one nation to another*”.<sup>45</sup>

<sup>40</sup> Ibid.

“Art. 152.- Adopción plena.- [...] La adopción extingue el parentesco entre el adoptado y los miembros de su familia de origen. No obstante, quedarán subsistentes los impedimentos matrimoniales que afectaban al adoptado por causa de las relaciones de parentesco extinguidas”.

<sup>41</sup> Constitución de la República del Ecuador, *Op. Cit.*, Artículo 68. “Art. 68.- [...] La adopción corresponderá sólo a parejas de distinto sexo.”

<sup>42</sup> UNICEF. Intercountry Adoption. Florence: Innocenti Research center, No. 4, 1999, p. 2. ISSN 1028-3528.

<sup>43</sup> Ibid.

<sup>44</sup> Código de la Niñez y Adolescencia, *Op. Cit.*, Artículo 180.

<sup>45</sup> BARTHOLET, Elizabeth. *International adoption - Children and youth in adoption, orphanages, and foster care: a historical handbook and guide*. Westport: Greenwood Press, 2006, p. 107. ISBN: 0-313-33183-9.

Both, adoptive parents and children to be adopted, emerge and come up from contrasting socio-cultural contexts: the biological relationship or kinship will not be the only difference, but other aspects will arise such as differences in socioeconomic, cultural, ethnic, and most important, nationality. The fundamental issue here is that international adoption serves the “*need of some of the world’s neediest children for family*”.<sup>46</sup>

Nevertheless, controversy arises at the moment of talking about international adoption. There has been a lot of criticism about this figure. Certain positions are inclined to assert that international adoption involves abuses of power and violations of basic human rights of minors, among these, are baby buying, fraud, and kidnapping.<sup>47</sup> It is also said that international adoption violates human rights since it deprives children of the cultural heritage of their birthplace. It seems to be a matter of pride and nationalism issue: “*in many ‘sending countries’ national pride has led to calls to stop selling, or giving away, ‘our most precious resources’, and to claims that the country should take care of our own*”.<sup>48</sup> Moreover, it is described as an exploitative situation because many biological parents, due to their poverty conditions and lack of opportunities, seem in need of giving their children in order to provide them a better future.

UNICEF and other international organizations are concerned about this situation. Their official position is that international adoption must be subsidiary, which means that in-country options would be preferred to international ones.<sup>49</sup> From a wide perspective, it is similar to what is determined in the Ecuadorian legal system, which establishes that national adoption will be preferred over international adoption.<sup>50</sup> Nonetheless, this position “*limit children’s opportunities for finding homes [...] [and] deny or at best delay the adoptive placements that are typically only available abroad*”.<sup>51</sup> It is well known that poor countries have limited prospects for adoption, which means that most of their population are not willing to go through an adoption process due to their scarce conditions. Ideally, governments should work to improve living conditions in these poor countries and, consequently, biological parents could raise their children with dignity. However, these changes are not going to happen overnight, and until they occur, unparented children should not be relegated to orphanages, where living conditions are deplorable and welfare and nurturing are simply not fulfilled.

Therefore, international adoption stands out as a better alternative for these children “*to grow up into a nurturing*

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<sup>46</sup> Ibid, p. 108.

<sup>47</sup> BARTHOLET, Elizabeth. *International Adoption: The Human Rights Position*, en *Global Policy*, Vol. 1, Issue 1, 2010, p. 92. ISSN 1758-5880.

<sup>48</sup> Ibid.

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<sup>49</sup> Ibid, p. 93.

<sup>50</sup> “*Art. 153.- Principios de la adopción.- La adopción se rige por los siguientes principios específicos: [...] 2. Se priorizará la adopción nacional sobre la internacional. La adopción internacional será excepcional [...]*”, Código de la Niñez y Adolescencia, Op. Cit., Artículo 153.

<sup>51</sup> Ibid., p. 97.

*family*”.<sup>52</sup> It is important to remember the main purpose of international adoption, which is closely linked to the protection of minors and their interests: “*intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights*”.<sup>53</sup> This approach will ensure the development of the child in a stable environment, guaranteeing their most basic human rights: “*human beings need parental care for a prolonged period to survive physically and to develop mentally and emotionally [...] International law makes central the child’s human right to grow up in a family*”.<sup>54</sup>

Indeed, concerning the practice of international private law, Ecuador is subscribed to several International Conventions to complement its legislation with international regulations and also to improve diplomatic relations. Following the adoption matter, two conventions deal with this issue: The United Nations Convention on the Rights of the Child (1989) and the Hague Convention on the protection of children and co-operation in respect of intercountry adoption (1993).

According to the UN Convention on the Rights of the Child (1989), children temporarily or permanently deprived of their family environment, or whose best interests require not to remain in that

environment, will have the right to protection and will receive special assistance from the State.<sup>55</sup> As well, States Parties will guarantee, following their national laws, other types of care for these children, which include foster care and the possibility of adoption. Accordingly, the same convention establishes that the States Parties that recognize or allow an adoption system must primarily take care of the best interests of the child, ensuring that the adoption is held and authorized by the competent authorities.<sup>56</sup> This authority will determine, according to the law, if the adoption is admissible or not. Likewise, international adoption is recognized as an alternative in terms of caring for the child in cases when he or she can not be placed into a foster home or given to an adoptive family in their country of origin. Finally, States Parties must ensure that the child to be adopted in another country enjoys safeguards and standards equivalent to those existing to adoption in the country of origin.

On the other hand, the Hague Convention on the protection of children and co-operation in respect of intercountry adoption (1993) establishes the guarantees to ensure that international adoptions have as a priority concern the respect of the fundamental rights of children that are recognized in international law.<sup>57</sup> Hence, a system of cooperation should be established between the Contracting States to ensure

<sup>52</sup> Ibid., p. 97.

<sup>53</sup> Convention on the protection of children and co-operation in respect of intercountry adoption (Hague Conference on Private International Law, Proceedings of the Seventeenth Session, Tome II, Adoption – co-operation, 29 May 1993), Article 1.

<sup>54</sup> BARTHOLET, *International Adoption: The Human Rights Position in Global Policy*, Op. Cit., p.94.

<sup>55</sup> Convention on the Rights of the Child (General Assembly Resolution 44/25, 20 November 1989), Article 20.

<sup>56</sup> Ibid., Article 21.

<sup>57</sup> Convention on the protection of children and co-operation in respect of intercountry adoption, Ibid.

respect for their guarantees and thus prevent kidnapping, sale, or trafficking of children. The fundamental basis here is that the signatory States of this agreement recognize that, for the harmonious development of the child's personality, he or she must grow up in a family environment, with a climate of happiness, love, and understanding. As can be seen, both Conventions are significant as they directly and precisely regulate the issue of adoption, especially international adoption, in order to safeguard and care for the best interests of the child during the adoption process and after it, in regards of its development and upbringing.

### 3. Same-sex parenthood and adoption

As seen, there are a great variety of families identified by national and international doctrine. Among them, same-sex families are recognized. Nevertheless, based on their biological conditions, this type of family often finds it impossible to have children in a natural/biological manner. This barrier leads them to find other alternatives and methods, such as adoption. However, the issue of same-sex parent adoption is still being highly controversial nowadays, mainly because a great percentage of people, especially in Latin American countries,<sup>58</sup> remain conservative ideologies

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<sup>58</sup> "The countries of Latin America share the same socio-cultural tradition; according to the Development Bank of Latin America, the region's cultural synthesis has permeated all its eras and simultaneously covers all its directions [...] For this reason, Latin American countries also share, as a common characteristic, the various forms of social discrimination against the LGBTI population, which are still present in the cultural conception of a majority group", CHAPARRO, GUZMAN, Op. Cit., p. 268.

linked to a close-minded way of thinking, attached to patriarchal or religious ideologies about the family.<sup>59</sup> Ecuador is not the exception: adoption between people of the same sex is prohibited and it is exclusive for heterosexual couples.

However, not everything is black or white. Given the different protests lead by LGBTI+ activist movements and human rights defenders, there are more and more countries up to date accepting and introducing same-sex parent adoption in their legislations. First of all, because it represents an excellent opportunity for unparented children to grow up in a healthy and familiar environment. Secondly, because starting a family should be granted for all human beings since it is a fundamental and human right, therefore, no prohibitions nor exclusivity for certain groups of people in the society should exist. Equally important, sexual orientation *per se* should not be a condition that determines if children raised in same-sex families would experience psychological disorders affecting their development in comparison to children raised in a heterosexual environment.<sup>60</sup> In consequence, there are no significant differences between homosexuals and heterosexuals when it

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<sup>59</sup> "It is said that same sex adoption pointed to the increased risk of growing up to be gay or lesbian. Their position is based on the following points: 1) That homosexuality is wrong and unnatural; 2) Same sex adoption would be detrimental to society and to marriage; 3) That same sex adoption is not in the best interests of children; 4) Denying same sex couples eligibility to adopt is not discriminatory; 5) That there is no need for reform; 6) That such a change lacks public support; 7) And would have adverse effects on the adoption process", KUKHIANIDZE, Ketevan. Adoption by same-sex couples, en European Scientific Journal, Vol. 9, No. 10, 2013, p. 75. ISSN 1857- 7431.

comes to exercising parental functions.

In fact, a wide range of research shows that children with two mothers or two fathers do just as well as children with heterosexual fathers:

“[...] a certain tendency and consistency among the studies shows that there is no difference in the psychological well-being or the development of sexuality between these two groups of families. In contrast, there is a greater possibility of stigmatization, a variable that does not depend itself on the conformation of the family or the sexual orientation of the parents, but depends on external factors such as the social and educational environment of the child and his peers”.<sup>61</sup>

Accordingly, a comprehensive study of children carried out by lesbian mothers and gay parents concluded that children raised by same-sex parents do not differ from other children raised in nuclear families in terms of emotional functioning, sexual orientation, stigmatization, gender role behavior, behavioral adjustment, gender identity, and learning. Furthermore, when differences have been found, they

mostly favored same-sex parents, as children raised in same-sex families were more open to change and more tolerant and respectful.<sup>62</sup> Therefore, to guarantee equal rights and, in turn, provide a better quality of life for a child who does not have a family, there are approximately 53 countries around the world that approve adoption between same-sex couples, but with one requirement, marriage first.<sup>63</sup> The first country to take this great step was the Netherlands, allowing same-sex families to adopt since the year 2000.<sup>64</sup> Continuously, same-sex parenthood began to be approved in different countries around the world: “*from the year 2002, initially in Sweden and South Africa; later in Spain in 2005, Iceland and Belgium in 2006 and Norway in 2009*”.<sup>65</sup>

In order to avoid discrimination cases, same-sex parent adoption is regulated similarly in all countries where it is accepted. Spain, for example, with the emission of Law 13/2005,<sup>66</sup> was one of the first countries that gave rise to adoption and same-sex marriage: “*Spain was the third state that recognized*

<sup>60</sup> “In “*Children of Lesbian and Gay Parents*,” a 1992 article in *Child Development*, Charlotte Patterson states, “Despite dire predictions about children based on well-known theories of psychosocial development, and despite the accumulation of a substantial body of research investigating these issues, not a single study has found children of gay or lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents”.”, *Ibid.*, p. 76.

<sup>61</sup> MARTÍNEZ, Juan, SÁENZ, María, ECHEVERRY, Jairo. *Efectos de adopción y crianza homoparental*, en *Archivos de Medicina (Col)*, Vol. 19, No. 2, 2019, p. 398.

<sup>62</sup> CAMPO-ARIAS, Adalberto, HERAZO, Edwin, *La adopción por parejas del mismo sexo en Colombia*. *Revista colombiana de psiquiatría*, Vol. 44, No. 2, 2015, p. 75-76. ISSN: 0034-7450.

<sup>63</sup> EQUALDEX. *Same-sex adoption*, LGBT Issues, 2023.

<sup>64</sup> ROSENTIEL, Tom, *Same-Sex Marriage: Redefining Legal Unions Around the World*, en Pew Research Center, 2007.

“*The Netherlands was the first country to legalize same-sex marriage. In December 2000, the Dutch parliament passed legislation that gave same-sex couples the right to marry, divorce and adopt children*”. ROSENTIEL, Tom, *Same-Sex Marriage: Redefining Legal Unions Around the World*, Pew Research Center, 2007.

<sup>65</sup> CHAPARRO, GUZMAN, Op. Cit., p. 268.

<sup>66</sup> GUTIÉRREZ, Melania, *Regulación de la adopción homoparental en España*, Repositorio Digital de la Universidad de La Laguna, 2017, p. 1.

*same-sex marriage with equal rights, only after Belgium and the Netherlands. Today, 17 of the states of the European Union, 7 of Latin America, South Africa, Australia, New Zealand and Taiwan, have followed this path*".<sup>67</sup> In Asia, the first country to allow this procedure was Israel, due to the constant struggles of activist groups that fought to expand the possibility to adopt not only when the child was from one of the spouses, but to others as well (when there was no biological connection).<sup>68</sup> Besides, the first country in Latin America to recognize same-sex couples' adoption was Uruguay, through a law enacted in 2009.<sup>69</sup> Nonetheless, this kind of adoption was limited and will only proceed when the child is biologically linked to one of the spouses. The same limitations are established in Chilean and Colombian legal systems.

*"Adoption by same-sex couples constitutes a paradigm shift regarding the possibility that minors can be part of a family and a home, even if it is made up of people of the same sex"*.<sup>70</sup> Indeed, adoption as an institution is a social issue

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<sup>67</sup> MARAVALL, Héctor. *17 años de la aprobación del matrimonio igualitario*, en Nueva Tribuna, 2022.

<sup>68</sup> FISCHER, Marion, *Timeline of LGBTQ rights in Israel*, en ISRAEL21c, 2022.

*"Lesbian, gay, bisexual, and transgender rights in Israel are considered the most developed in the Middle East [...] 2008: Same-sex couples are able to jointly adopt [...] 2009: The right of adoption is recognized for same-sex male couples"*.

<sup>69</sup> BBC MUNDO CONO SUR. Uruguay: luz verde a la "adopción gay", 2009.

*"In Uruguay, homosexual couples may be parents with equal rights to heterosexual marriages. This is established by a legal reform approved by the Uruguayan Senate, which makes the country the first in the region to open the way to full adoption for same-sex couples."*, PERASSO, Valeria, *Uruguay: luz verde a la "adopción gay"*.

<sup>70</sup> CHAPARRO, GUZMAN, Op. Cit., p. 268.

that little by little has been adapting to modern society, opening its access for all human beings without discrimination. Although Ecuador still does not recognize adoption between people of the same sex, it will not be long until the Ecuadorian legal system approves it, as it has as a precedent the legalization of same-sex marriage. After all, the only thing that is avoided by not legalizing this matter is the possibility to offer to a child without parents the opportunity to have a family and thus, their development in society with a better quality of life.

As mentioned above, the Ecuadorian Constitutional Court approved equal marriage in 2019. It is now time to allow same-sex family adoption as a way to fulfill and guarantee those core principles established in Family Law, such as equality and the best interests of the child. This could be better understood by following examples such as a neighboring country, Colombia, which would relate the most in a socio-cultural context. Also, it is important to analyze the Spain case as it is one of the first countries that established same-sex marriage and adoption in its legal system. It is imperative to mention that in both cases, from comparative law, Colombia and Spain, there were needed certain legal precedents, obtained by Court decisions, to recognize and legitimate same-sex couples' rights.

### *3.1. Same-sex parent adoption in Colombia*

In Colombia, adoption will only proceed if it follows its main objective which is *"to preserve the child's right to*

grow up in the bosom of a family”.<sup>71</sup> As seen, similar to the Ecuadorian legislation, the Colombian Code of Childhood and Adolescents stipulates that every minor has the right to grow up within a family.<sup>72</sup> If this right is violated, the Colombian Family Welfare Institute must take measures to re-established it as soon as possible.<sup>73</sup> In addition, according to the same legal body, adoption can be understood as a measure of protection that, by extreme supervision of the State, irrevocably establishes a paternal-filial relationship between people who do not have it by nature (biologically).<sup>74</sup> In other words, adoption could be explained as a “kind of filiation of undeniable reality, based on a fiction, where the adoptive mustn’t be a blood child of the adopter”.<sup>75</sup> Thus, according to the Colombian Code of Childhood and Adolescents, adoption generates civil kinship.<sup>76</sup>

#### Within the Colombian State, adoption

<sup>71</sup> PARRA, Jorge. *Derecho de Familia*. 2ª Edición. Bogotá: Editorial Temis, 2017, p. 517.

<sup>72</sup> Código de la Infancia y la Adolescencia - Ley 1098 de 2006 (Diario Oficial No. 46.446 de 8 de noviembre de 2006), Artículo 22. “ARTÍCULO 22. DERECHO A TENER UNA FAMILIA Y A NO SER SEPARADO DE ELLA. Los niños, las niñas y los adolescentes tienen derecho a tener y crecer en el seno de la familia, a ser acogidos y no ser expulsados de ella”.

<sup>73</sup> *Ibid.*, Artículo 60.

“ARTÍCULO 60. VINCULACIÓN A PROGRAMAS DE ATENCIÓN ESPECIALIZADA PARA EL RESTABLECIMIENTO DE DERECHOS VULNERADOS. Cuando un niño, una niña o un adolescente sea víctima de cualquier acto que vulnere sus derechos de protección, de su integridad personal, o sea víctima de un delito, o cuando se trate de una adolescente o mujer mayor de 18 años embarazada, deberán vincularse a un programa de atención especializada que asegure el restablecimiento de sus derechos”.

<sup>74</sup> *Ibid.*, Artículo 61.

“ARTÍCULO 61. ADOPCIÓN. La adopción es, principalmente y por excelencia, una medida de protección a través de la cual, bajo la suprema vigilancia del Estado, se establece de manera irrevocable, la relación paterno-filial entre personas que no la tienen por naturaleza”.

<sup>75</sup> PARRA, Op. Cit.

can only be held by people who are capable, have reached 25 years of age, and are at least 15 years older than the adoptee. These are basic measures taken to guarantee the “physical, mental, moral and social suitability to manage a stable family for the child”.<sup>77</sup> Moreover, it is important to mention that there is only one type of adoption in Colombia. Nevertheless, according to the Colombian Constitutional Court, in their judgment C-071 of February 18, 2015, there are three adoption modalities admitted in their country: *individual or single-parent adoption*, when an adopter is a single person; *joint adoption*, which is carried out by spouses or permanent partners who demonstrate an uninterrupted coexistence of at least 2 years; and *complementary or by consent adoption*, when the son or daughter of one the spouses or permanent partner is adopted.<sup>78</sup>

Concerning individual adoption, as its name implies, it is given individually by a single person who may adopt without showing any marital tie. As a matter of fact, the Colombian Code of Childhood and Adolescents establishes as a condition that this person must be single.<sup>79</sup> On the other hand, complementary

<sup>76</sup> Código de la Infancia y la Adolescencia - Ley 1098 de 2006, Op. Cit., Artículo 64.

“ARTÍCULO 64. EFECTOS JURÍDICOS DE LA ADOPCIÓN. La adopción produce los siguientes efectos: [...] 2. La adopción establece parentesco civil entre el adoptivo y el adoptante, que se extiende en todas las líneas y grados a los consanguíneos, adoptivos o afines de estos”.

<sup>77</sup> PARRA, Op. Cit., p. 533.

<sup>78</sup> Sentencia de la Corte Constitucional Colombiana [SCCC], 18 de febrero de 2015 (Sentencia No. C-071/15, Ponente: Jorge Palacio Palacio).

<sup>79</sup> Código de la Infancia y la Adolescencia - Ley 1098 de 2006, Op. Cit., Artículo 68.



or by consent adoption is given in cases when one of the spouses or permanent partners wishes to adopt the child of their other spouse or partner with whom they have had an uninterrupted coexistence (relationship) of no less than 2 years. In the same way, joint adoption arises when a couple wants to adopt a child: both spouses or permanent partners can adopt jointly.<sup>80</sup> The difference is that in joint adoption there must not be a biological link by any of the adopting parties, otherwise, it should be considered as a complementary adoption.

The relevance of joint adoption in the Colombian legal system lies when it approaches same-sex couples' possibility of adoption. Thus, in the case of permanent companions, constitutional jurisprudence has been in charge of defining, when they are of the same sex, whether they can adopt or not. After a long journey of debates and discussions, the Constitutional Court has concluded that, taking into consideration the best interests of the child, same-sex couples are also included in the legal framework of what a family is. In consequence, they found that *"it is not constitutionally valid to exclude same-sex couples that make up a family from adoption processes"*.<sup>81</sup>

The approval of same-sex parent adoption in Colombia was the result of a progressive acceptance of this changing paradigm called family and the

guarantees it must imply. It all started in 2011 when the Colombian Constitutional Court recognized same-sex couples as a family. Then, in May 2012, the same Court issued a ruling in favor of Chandler Burr,<sup>82</sup> a North American citizen who was about to lose custody of his two adopted Colombian children because the Colombian Family Welfare Institute (Instituto Colombiano de Bienestar Familiar (ICBF), in Spanish), which is the institution responsible for carrying out the adoption proceedings, considered that he was hiding his sexual orientation: *"The Seventh Chamber of Guardianship Review of the Constitutional Court protected the right to due process of a single homosexual man and the rights of his adoptive children to be heard and not to be unjustifiably separated from their father, after the ICBF initiated a process of restoring rights, separating the children from their father, without any evidence that the rights of the children were being violated or that they were under any threat"*.<sup>83</sup>

As seen, the judgment of the Constitutional Court preserves that the opening of the administrative process that separated the Burr family had no justification since there was no evidence of any kind of violation or threat perpetrated against the two adopted children. This set a precedent and since then, the ICBF cannot ask a person's sexual orientation when talking about

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<sup>80</sup> Ibid.

<sup>81</sup> Sentencia de la Corte Constitucional Colombiana [SCCC], 04 de noviembre de 2015 (Sentencia No. C-683/15, Ponente: Jorge Palacio Palacio).

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<sup>82</sup> Sentencia de la Sala Séptima de Revisión de tutelas de la Corte Constitucional [SSSRTCC], 11 de abril de 2012 (Sentencia T-276/12, Ponente: Jorge Ignacio Pretelt Chaljub).

<sup>83</sup> Comunicado a la opinión pública Sentencia T-276 de 2012 (Presidencia Corte Constitucional, 24 de mayo de 2012).

individual adoption. Moreover, since 2014 LGBTI+ people can adopt their partner's biological child, and on November 4, 2015, the Constitutional Court ruled 6-2 in favor of grant full adoption rights of same-sex couples: the Court instructed adoption agencies not to discriminate against same-sex couples in the provision of services of adoption.<sup>84</sup>

The Colombian legislation is quite similar to the Ecuadorian one based on terms and functional handling of the adoption and its procedures to follow. However, in Colombia, adoption by same-sex couples is allowed, while in Ecuador the legislation does not cover this type of adoption, even though same-sex families are already recognized by the approval of same-sex marriage in 2019. In this sense, it would be important to take into consideration the precedents determined in the judgments of the Constitutional Court of Colombia, which, as could be observed, prevails the best interests of the child over other circumstances:

“[...] the legal problem to be resolved no longer consists in defining whether this exclusion violates the rights of couples to equality and to form a family, which was dismissed by the majority of the Chamber in the Judgment C-071 of 2015. What the Court must determine in this opportunity is, from a different

constitutional approach, whether the norms that regulate the legal regime of adoption in Colombia, by excluding same-sex couples from the possibility of participating in adoption processes, violates the principle of best interests of the minor, represented in his right to have a family to guarantee his harmonious and integral development [...] The Constitutional Court concludes that the adoption of children by people with diverse sexual orientation, in general, and by same-sex couples, in particular, does not affect itself the best interests of the minor or negatively compromise their physical and mental health or its harmonious and integral development [...]”<sup>85</sup>

“[...] the high corporation concludes that preventing a child from having a family based solely on the reason of being adopted by a same-sex couple represents an unacceptable restriction of their rights and constitutes an approach contrary to their best interests. Thus, the corporation concluded that, like any adoption process, it must always be aimed at guaranteeing the best interests of the child and the restoration of their rights, it will be the duty of the State to verify in each case if the requirements established in the

<sup>84</sup> Sentencia de la Corte Constitucional Colombiana [SCCC], 04 de noviembre de 2015 (Sentencia No. C-683/15, Ponente: Jorge Palacio Palacio).

<sup>85</sup> ARDILA, Jaime, *SENTENCIA: C-683-15 - Adopción - Uniones maritales de hecho, compañeros permanentes del mismo sexo ("Derecho del Bienestar Familiar")*. Bogotá: Avance Jurídico Casa Editorial, 2019. ISBN: 978-958-98873-3-2.

legal system are met, as well as the appropriateness of the adopting family, in such a way that it provides socioeconomic stability and an environment of respect, love and well-being for the minor”.<sup>86</sup>

### 3.2. Same-sex parent adoption in Spain

Spain legalized same-sex marriage and adoption rights for same-sex couples in 2005. Indeed, through Law 13/2005, the Spanish Civil Code was amended in regards of marriage.<sup>87</sup> However, the debate about these reforms came from the previous year: in December 2004, the Spanish Government approved the preliminary project about the legalization of same-sex marriages, and simultaneously, added to the discussion the possibility of adoption by these couples.<sup>88</sup> In the months that these issues were debated, it

was taken into consideration the social context in which these reforms will be implemented, including the psychological aspects<sup>89</sup> that may be influenced for children raised by same-sex parents. Furthermore, there was a group of eleven specialists, which were requested by certain parliamentarians to discuss both the advantages and disadvantages of adoption by same-sex couples: “*From the eleven proposed appearing parties, there were a total of six psychologists, three lawyers, a psychiatrist, and a doctor. And from the appearances of these experts in the Senate, it is necessary to highlight the widely majority opinion that there is no scientific study that shows any disadvantage in the psychological development of the children of homosexual couples*”.<sup>90</sup> Once the debates were over, the Spanish legislators adopted the position where same-sex parent adoption is equal to adoption by heterosexual couples.<sup>91</sup> There should be no distinction.<sup>92</sup>

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<sup>86</sup> AMBITO JURÍDICO. *Así es la trascendental sentencia que permite adoptar a las parejas gays*, 2016. ISSN: 2805-6396.

<sup>87</sup> Ley 13/2005 de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio. (Boletín Oficial del Estado No. 157, del 1 de julio de 2005).

<sup>88</sup> HERNÁNDEZ, Carmen. *Cambio revolucionario en España en una institución milenaria: del matrimonio heterosexual al matrimonio homosexual*, en Revista Chilena de Derecho Privado, No. 9, 2007, pp. 124. ISSN: 0718-0233.

<sup>89</sup> GONZÁLEZ, María del Mar. Homosexualidad y adopción. Entre la ciencia y el prejuicio, en INFOCOP (Consejo General de Colegios Oficiales de Psicólogos), No. 24, 2005, p. 17.

*“The children of gays and lesbians show a healthy and harmonious development in the different dimensions that have been studied: self-esteem, emotional and behavioral adjustment, sexual and gender identity, social competence, academic competence, moral development, and social integration, both during childhood and in adolescence or young adulthood. In none of these exposed dimensions differences have been found with the sons or daughters of heteroparental families, except in their greater flexibility with respect to gender roles, their lesser prejudices regarding homosexuality and the greater freedom and reflection with which they define their sexual orientation [...] And what is more important, it has not been found that the sexual orientation of the parents is a variable that determines or compromises the psychological adjustment of sons or daughters [...]”.*

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<sup>90</sup> GARCÍA, Agurtzane, MARTÍNEZ, Paz. *Adopción homoparental, un nuevo modelo de familia*, en INFOCOP (Consejo General de Colegios Oficiales de Psicólogos), No. 24, 2005, p. 4.

<sup>91</sup> PARRA, María. *Matrimonio y «Matrimonio entre personas del mismo sexo»: La Constitucionalidad de la Ley 13/2005*, Derecho Privado y Constitución, No. 27, 2013, p. 272. ISSN: 1133-8768.

*“The reform is justified in the preamble of the Law [13/2005] by the legislator's desire to remove discrimination based on sexual orientation through the «establishment of a framework of personal fulfillment that allows those who freely adopt a sexual and affective option by people of their same sex, to develop their personality and their rights in conditions of equality»”.*

<sup>92</sup> Ley 13/2005 de 1 de julio, Op. Cit., p. 23633.

*“The law allows marriage to be celebrated between persons of the same or different sex, with full and equal rights and obligations, regardless of its composition. Consequently, the effects of marriage, which are maintained in their integrity respecting the objective configuration of the institution, will be unique in all areas regardless of the sex of the contracting parties; among others, those related to rights and social benefits, as well as the possibility of being part of adoption procedures”.*

Moreover, both are regulated by the Spanish Civil Code and their basis lays on seek at all times the best interests of the child, as well as the equal right to be able to start a family for all its citizens without distinction or discrimination.

Consequently, up to date, Spain has two types of same-sex parent adoption.<sup>93</sup> First, there is the *one-person adoption*, which carries out the adoption by only one person, who may be single or have a partner or marriage. However, in the case of a couple, the effects of filiation will only correspond to the person who adopted individually. On the other hand, there is dual adoption. This type of adoption is held by spouses or stable couples, and it can be carried out jointly or successively.<sup>94</sup> It is understood that it will be jointly when the two members of the couple adopt a minor who is not related to either of them (there is no

biological link), and it will be successively when only one of the couple has to adopt since the minor comes from a marriage or previous stable relationship of the other member of the couple,<sup>95</sup> or it comes from a prior adoption:<sup>96</sup> “*single-person adoption by only one of the spouses or member of the stable couple can lead to a joint adoption if the other spouse so decides later*”.<sup>97</sup>

Withal, the Spanish legal system is clear in establishing that the purpose of adoption is to grant a minor, who is in a situation of abandonment, as an unparented children, a family where they can develop in a stable environment.<sup>98</sup> Likewise, Spain opens the possibility of international adoption,<sup>99</sup> which can be accessed by all its citizens without distinction.<sup>100</sup> However, according to what is established in the reports of the General Council of the Judiciary, international adoption is more difficult

<sup>93</sup> GUTIÉRREZ, Op. Cit., p. 6.

<sup>94</sup> Código Civil de España, Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil (BOE-A-1889-4763, Ministerio de Gracia y Justicia «Gaceta de Madrid» No. 206, de 25 de julio de 1889), Artículo 175.4.

“4. Nadie podrá ser adoptado por más de una persona, salvo que la adopción se realice conjunta o sucesivamente por ambos cónyuges o por una pareja unida por análoga relación de afectividad a la conyugal [...]”.

<sup>95</sup> GUTIÉRREZ, Op. Cit., p. 7.

<sup>96</sup> ABAD, Encarnación. *Reflexiones sobre los requisitos y las prohibiciones existente para poder adoptar y ser adoptados: la conciliación entre el Código Civil y la normativa de las comunidades autónomas*, en *Revista de Derecho UNED*, No.7, 2010, p. 27.

“[...] in successive adoption, the second to adopt will be the adopter, since the adoptee was initially adopted by another person, so that he or she already has an adoptive father or mother and, consequently, is already adopted, so now he or she is going to complete the adoptive filiation. Therefore, adoption by a person (single adoption) is admitted when the previous adoption, whether maternal, paternal or both, no longer exists, either due to death or by the exclusion of the adopter. Cases in which the subsequent adoption will extinguish the previous one, unless the next adopter is the spouse or stable partner of the deceased or excluded adopter”.

<sup>97</sup> FERNÁNDEZ, María. *El nuevo régimen jurídico de la adopción nacional tras la reforma de la Ley 26/2015*, de 28 de julio., en *Repositorio Digital de la Universidad Pontificia Comillas Madrid*, 2017, p. 14.

<sup>98</sup> Código Civil de España, Op. Cit., Artículo 176.

“1. La adopción se constituirá por resolución judicial, que tendrá en cuenta siempre el interés del adoptando y la idoneidad del adoptante o adoptantes para el ejercicio de la patria potestad. [...]”.

<sup>99</sup> Ley 54/2007 de 28 de diciembre de 2007, de Adopción Internacional (Boletín Oficial del Estado No. 312 del 29 de diciembre de 2007), Artículo 2.

“Artículo 2. Objeto y finalidad de la Ley. 1. La presente Ley establece el marco jurídico y los instrumentos básicos para garantizar que todas las adopciones internacionales tengan lugar en consideración al interés superior del menor. 2. La finalidad de esta Ley es proteger los derechos de los menores a adoptar, teniendo en cuenta también los de los solicitantes de adopción y los de las demás personas implicadas en el proceso de adopción internacional”.

<sup>100</sup> *Ibid*, Artículo 10. “Artículo 10. Idoneidad de los adoptantes. [...] 5. En el proceso de declaración de idoneidad, se prohíbe cualquier discriminación por razón de discapacidad o cualquier otra circunstancia”.

for same-sex couples since the countries where adopted children usually come from don't regulate same-sex marriage either same-sex parent adoption.<sup>101</sup>

In relation to jurisprudence, two judgments demarcate a line of thought based on guaranteeing the right to adoption without discrimination on the sexual orientation of the adopters. In the first place, the Spanish Constitutional Court in 2012, determined that marriage or union by same-sex couples is constitutionally valid, meaning that nothing can prevent them from adopting a minor.<sup>102</sup> Also, the Court establishes that what matters and must be taken into consideration is the guarantee of the

rights and interests of the minor.<sup>103</sup> Secondly, the Judgement of the European Court of Human Rights of January 22, 2008 (Case E.B. v. France, Application No. 43546/02), creates a precedent in which said Court determines that two fundamental rights of the interested party (prohibition of discrimination and the right to respect for private and family life) have been violated<sup>104</sup> by denying the adoption of a minor due to the sexual condition of party:

“93. In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention [...] 96. Having regard to the foregoing, the Court cannot but observe that, in rejecting the applicant's application for authorisation to adopt, the

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<sup>101</sup> CONSEJO DEL PODER JUDICIAL. Informe emitido por el Consejo General del Poder Judicial [CGPJ] 26 de enero de 2005, (Estudio sobre la reforma del Código Civil en materia de matrimonio entre personas del mismo sexo, Ponente: José Luis Requero Ibáñez), 2005, p. 59.

“[...] en cuanto a la posibilidad de adoptar de los matrimonios de personas del mismo sexo y partiendo de que la adopción internacional es la mayoritaria en España, ésta se rige por las normas de cada país de origen, siendo de destacar que, hasta ahora, ninguno de los que tienen convenio con España permite la adopción a parejas del mismo sexo. Por otra parte, con independencia de la existencia o no de convenio bilateral, los diez principales países en número de adopciones -Rusia, China, Ucrania, Colombia, Bulgaria, Bolivia, Etiopía, India, México y Perú- que con 3.582 suponen más del 90% de las totales producidas en España el año pasado, prohíben que los matrimonios de personas del mismo sexo puedan adoptar niños en su territorio.”

<sup>102</sup> Sentencia del Tribunal Constitucional Español [STCE], 06 de noviembre de 2012 (Sentencia 198/2012, Boletín Oficial del Estado No. 286, Presidente: Pascual Sala Sánchez), p. 200. “[...] el interés del menor adoptado por un matrimonio entre personas del mismo sexo, o por un matrimonio entre personas de distinto sexo, ha de ser preservado conforme a lo dispuesto en el art. 39.2 CE. Y este interés se tutela en cada caso concreto en función del escrutinio al que se somete a los eventuales adoptantes con independencia de su orientación sexual, de modo que el deber de protección integral de los hijos que se deriva del art. 39.2 CE no queda afectado por el hecho de que se permita o se prohíba a las personas homosexuales adoptar, bien de forma individual, bien conjuntamente con su cónyuge”.

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<sup>103</sup> *Ibid.* p. 201. “El ordenamiento jurídico, que no reconoce un derecho fundamental a adoptar, prevé mecanismos suficientes en las disposiciones que regulan la adopción nacional (arts. 175 y ss. CC y disposiciones autonómicas equivalentes, y Ley Orgánica 1/1996, de 15 de enero, de protección jurídica del menor) e internacional (Ley 54/2007, de 28 de diciembre, de adopción internacional), como para garantizar la preservación del interés superior del menor en el proceso de adopción, garantía contemplada también en el art. 21 de la Convención de los derechos del niño de 20 de noviembre de 1989, ratificada por España el día 30 de noviembre de 1990, como fin primordial por el que deben velar los Estados”.

<sup>104</sup> Ruling of the European Court of Human Rights [JECtHR], 22 January 2008 (E.B. v. France, App No. 43546/02, President: Christos Rozakis), p. 25-26. “91. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a “legitimate aim” or that there is no “reasonable proportionality between the means employed and the aim sought to be realised” [...] Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8 [...]”.

domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention [...]”.<sup>105</sup>

As can be seen, the Spanish legal system is remarkably advanced in terms of inclusion and non-discrimination in comparison to certain Latin American countries. For example, discrimination in employment concerning sexual orientation has been prohibited throughout the country since 1995. Likewise, LGBTI+ people have been allowed to adopt (same-sex couples) legally in Spain since July 2005. Additionally, some of the Spanish autonomous communities had previously legalized these adoptions, in particular Navarra in 2000, the Basque Country in 2003, Aragon in 2004, Catalonia in 2005, and Cantabria in 2005.<sup>106</sup> Not to mention, since 2015 married lesbians can register both names on their children's certificates, when one of them is the biological mother or, when both are, in the case of having conceived the minor through an assisted reproduction method.

All of these means that Spanish laws are constantly evolving as society changes, adapting to their needs and requirements, as a way to guarantee their rights.<sup>107</sup> Therefore, Ecuador should not

be left behind since that would mean a constant violation of the rights and principles of its citizens.

### 3.3. *The Ecuadorian case*

The impossibility of same-sex parent adoption arises as a result of the decision 11-18-CN/19 issued by the Constitutional Court of Ecuador in the year 2019, in which they approved equalitarian marriage. Thus, if the right to establish a family is granted to the LGBTI+ community by getting married, why was it not discussed consecutively the possibility for said same-sex families to access an adoption process? This situation showcases certain legal contradictions and antinomies since the eminent violation of constitutional and fundamental rights, such as the right to form a family, expressly prohibited as the Constitution forbids adoption for same-sex couples. And more importantly, it violates the best interests of unparented children.

## Conclusions

In Ecuador, there great number of same-sex families that are waiting for a possible homologation or constitutional reform to be able to register their children properly, which causes defenselessness in the minor and a detriment to the constitutional and fundamental rights of the parents. This would be eradicated with the approval of adoption by same-sex couples. Besides, as mentioned above, there is the International Hague Convention, which can serve as a tool to find a solution to this problem. However,

<sup>105</sup> *Ibid.*

<sup>106</sup> DE LA ROSA FERNÁNDEZ, Ricardo. *El tratamiento jurídico de la filiación en el seno de las parejas homoparentales*, en Repositorio Digital de la Universitat de Barcelona, 2017, p. 120-126.

<sup>107</sup> MADRID ES NOTICIA. *La evolución de los derechos LGTB en España: un recorrido por la historia*, 2019.

the little knowledge and the delay in normative terms hinder the protection of children and diverse families.

In regard to international adoption, this arises as a protection mechanism for those children who are in high-risk and dangerous situations, allowing them to develop in life with dignified conditions. What is sought is the best interest of the child, a principle established in the Ecuadorian legislation and supported internationally. Therefore, according to this principle and studies carried out, there is no negative influence on the adoption of these children by same-sex families. In fact, many countries have already approved this type of adoption, pointing out that the minor will receive more benefits than against: unparented children will grow up surrounded by people who appreciate them and show them affection. Likewise, it is established that the sexual orientation of the parents does not cause any negative influence on the development of the child.

According to comparative law, Ecuador and Colombia, in addition to being territorially neighboring countries, share very similar legislations. In most cases, both countries resolve conflicts appreciating the jurisprudence by analyzing analogous issues. In this way, it should be mentioned how the Colombian Constitutional Court approved same-sex parent adoption as an example for other Latin American countries. Colombian legislators had an open-mind perspective and followed the applicable principles of their Constitution for all their population, granting that family right to all without

distinction or discrimination based on their sexual orientation or ideological preferences. Consequently, Ecuador should follow Colombia's example and establish the possibility for same-sex couples of being able to adopt, making effective their right to start a family, but primordially, offer a better life opportunity for unparented children.

In regards of the Spanish regulations portray, it can be seen how Spain has an advanced legal system that adapts and evolves attending to the necessities and demands of their citizens. For example, thanks to the new scientific advances and technological discoveries, there are now several methods for having children related to biological ways, and in consequence, Spanish laws have already adapted to regulate each of these alternatives to expressly avoid incorrect application on it and to ensure the best interests of the child at all times. Ergo, once again, the question arises, why Ecuadorian legislation has not adapted same-sex adoption according to the needs of its society? And yes, same-sex marriage has already been approved as a way to enforce the constitutional and fundamental rights of being able to have a family and to develop in society. Nonetheless, prohibiting filiation or adoption to said couples and families would constitute a detriment to those recently granted right. Hence, the approval of adoption by people with a different sexual orientation must be taken into consideration, especially because it would provide adopted children with a much better quality of life than the one they experience in orphans.

In conclusion, same-sex families in Ecuador are not far from being able to have children through adoption. However, there is a gap that leaves couples who legally formed a family unprotected and wish to register their children in the country. The Hague Convention on the Protection of Children and Cooperation in the Matter of Intercountry Adoption, in addition to protecting child trafficking and money laundering, seeks to protect same-sex couples who have legitimately adopted a child and to enforce their registration in the country where they wish to reside. Countries like Colombia had to go through a constitutional decision in order to protect the right of a child to have a family and the right of same-sex families to adopt. In that sense, Ecuador, as part of the Hague Convention and following the Colombian example, should leave behind its conservative way of thinking and put prejudice aside when it comes to matter the benefit of an unprotected minor.

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