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Adoption of Orphaned Children and Adolescents in Lgbti Marriages in the City of Tulcán

Adopción De Los Niños Niñas Y Adolescentes En Estado De Orfandad En Los Matrimonios Lgbti En La Ciudad De Tulcán

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Abstract

In today's world, same-sex adoption is legal in 29 countries, considering that the LGBTIQ community's fight for their rights has gained significant momentum. Ecuadorian legislation prioritizes the right to equality, but there are still legal gaps that do not allow for the full enjoyment of rights for all individuals. The methodology of this research is quantitative, involving the application of techniques and instruments for data collection through surveys and interviews to achieve the research objective. The study focused on same-sex adoption within the LGBTIQ community, based on the right to create a family and safeguard the best interests of the child to be adopted. Homosexual individuals have been subjected to various forms of discrimination based on their sexual orientation over the years, which creates a significant impediment to ensuring the full realization of their rights. This article aimed to analyze the feasibility of legal recognition of same-sex adoption in Ecuador. In this regard, it was proposed to assess the viability of amending Article 159, section 6 of the Childhood and Adolescence Code to address the restriction that currently states that only heterosexual couples can adopt and thus expand it to same-sex couples.

Keywords: Same-sex adoption; discrimination; equality; family; recognition.

Resumen

En el mundo actual la adopción homoparental es legal ya en 29 países, tomando en cuenta que la lucha del colectivo LGBTIQ ha ido tomando un gran impulso al respeto de sus derechos. La legislación ecuatoriana prioriza el derecho a la igualdad, pero aún existen vacíos legales los cuales no permiten el goce total de los derechos de todas las personas. La metodología de la presente investigación es cuantitativa, mediante la aplicación de técnicas e instrumentos para la recolección de la data mediante encuestas y entrevistas y así cumplir con el objetivo de la investigación. El objeto de estudio fue la adopción homoparental en la comunidad LGBTIQ, en base al derecho de poder crear una familia y así salvaguardar el mejor interés del menor que se desea adoptar. Las personas homosexuales a través de los años han sido vulneradas mediante varias formas de discriminación por su preferencia sexual, estableciendo así un gran impedimento para garantizar la plenitud de sus derechos. El presente artículo versó sobre un análisis para determinar la viabilidad del reconocimiento legal de la adopción

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homoparental en el Ecuador. En ese sentido, se propuso analizar la viabilidad de una reforma al Código de la Niñez y Adolescencia en su artículo 159, numeral 6, a fin de solventar la restricción que expresa que sólo podrán adoptar matrimonios heterosexuales y, de esta manera, ampliarla a los matrimonios homoparentales.

Palabras Clave: *Adopción homoparental; discriminación; igualdad; familia, reconocimiento.*

Palabras Clave: *988 Legal Analysis of Compound Interest in Ecuador*

Introduction

Same-sex adoption is one of the most controversial topics, not only in the legal field but also socially, as it has been in several countries such as Germany, Argentina, Australia, Austria, Brazil, Canada, Israel, Mexico, Colombia, Chile, Uruguay, South Africa, and Spain (Solanda, 2016). For several years, homosexuality has not been considered a pathological disease or a perversion, especially with the new values and thoughts that children have regarding family composition (Chaparro and Guzmán, 2017). In this research, emblematic countries like Mexico, Colombia, and Spain, where the rights of the LGBTIQ community have been guaranteed without any discrimination, are considered.

In Colombia, same-sex adoption is based on moral controversy, full of prejudices based on marital phenomena related to legal, jurisprudential, and conceptual backgrounds (Rengifo, L.A. 2017). Chaparro and Guzmán (2017) believe that "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." This creates a contrast based on the equality recognized by the rights of non-discrimination for any reason, as most Latin American constitutions guarantee equal rights and, therefore, the recognition of human rights that we all have in countries where rights are guaranteed, while in Mexico, Angulo, Granados, and Gonzales (2014) state that "Families formed by gays and lesbians have been family arrangements existing long before same-sex marriage was legalized. With legal recognition and guaranteed rights, these families have more visibility." That is why in Mexico, with the approval of same-sex marriage, there were many reforms to its civil laws, guaranteeing equal rights over any other social prejudice.

Much is said about adoption, but little about same-sex adoption; however, many women and fewer men without partners have decided to create a family through international adoption, a model of family that is suffering from the closure of many countries, continuous obstacles in national adoption, and the consequences of the crisis. Nevertheless, and despite everything, single-parent adoption is fighting to make its way as another model of family. The experience of more than a decade of these families who single-handedly raise their children speaks for itself.

Historically and to the present day, adoption rights in Ecuador are limited and exclusively available to heterosexual couples. This limitation stems from the premise established by a conservative society that does not accept that couples with a sexual orientation different from the traditional (heterosexual) can access the right to adoption. As established in this work, the adoption system in Ecuador has been created solely for heterosexual couples, so it can be said that adoption rights in Ecuador have a discriminatory aspect towards same-sex couples.

In a historic decision for Colombia, with 6 votes in favor and 2 against, the Constitutional Court approved that same-sex couples can apply for the adoption process. This ruling is the

result of a constitutional challenge filed by Professor Sergio Estrada of the University of Medellín, which revealed the lack of rights for homeless children in Colombia who cannot be adopted by same-sex families. The 1991 Law 12 of the Convention on the Rights of the Child states that the sex of the parents should not be considered in adoption matters. This time, the Constitutional Court decided that the type of family the State should provide for children to ensure their well-being should not be determined by the sexual orientation of the adoptive parents, and, above all, the well-being of children should take precedence over the type of family (Jiménez, 2020).

The Constitution of the Republic of Ecuador and the rest of the sub-constitutional norms are designed in such a way that only heterosexual couples can access the right to adoption, thus violating the fundamental rights of couples with a different sexual orientation than heterosexual. In this way, the rights of children and adolescents who aspire to be adopted by a couple that can provide them with the care, love, and protection they need for their proper physical and emotional development are also violated (Sánchez, 2022). In this context, we must ask, is there a violation of the constitutional rights to formal equality and non-discrimination of same-sex couples in Ecuador by not allowing them to access the right to adoption solely based on their sexual orientation? To answer this question, this research aims to review the concept of family, homosexuality, and adoption, their historical origin, and evolution using deductive and inductive research methods to determine if there is a violation of constitutional rights to formal equality and non-discrimination by limiting the right to adoption to same-sex couples (Lora, 2010).

Currently, there are 267 same-sex marriages in Ecuador, but adoption remains an unresolved issue with no signs of a solution. Same-sex marriage in Ecuador has been legal since June 12, 2019. Since then, 267 couples have been married nationwide. However, the right to adoption is still subject to prohibition. The Constitution establishes in articles 67, 68, and 69 that the State recognizes and will protect the family as a fundamental unit of society, but in a separate section, it states: "Adoption will be limited to opposite-sex couples." (Troya, 2022), an activist for LGBTQ+ rights, mentions that similar to same-sex marriage, which also had a constitutional restriction, same-sex adoption must go through the Constitutional Court. Article 68: The stable and monogamous union between two persons, free of marital ties, who form a de facto household for the period and under the conditions and circumstances established by law, will generate the same rights and obligations as families formed through marriage. (Constitucion De La Republica del Ecuador, 2008)

Now that Ecuador has granted rights to people of different sexual orientations, there is a contradiction in allowing certain rights but not fully ensuring their rights, one of the main ones being the right to a family. Additionally, the principle of equality is being violated by not treating members of this community in the same way as all Ecuadorians. This situation has been recurring throughout history, and conservative society has contributed to its invisibility. Even though there are numerous households where children and adolescents grow up with only one father or mother, widowed or divorced parents, minors resulting from casual relationships, or simply as a result of unwanted pregnancies. Finally, there are cases in which these minors live under the care of relatives such as grandparents, uncles, cousins, or acquaintances, regardless of their sexual orientation, as legal norms should align with reality, and evolve with it, in order to prevent the violation of constitutional rights and, on the contrary, guarantee them. (Méndez, 2021).

On the other hand, this work also analyzes the presentation of cases and the review of arguments and legal norms established in other countries. It includes a comparative analysis,

adapted to human rights protection standards and the recognition of constitutional rights, regarding the adoption of same-sex couples in Ecuador (Villaseca, 2020)

The term "homoparentality" (same-sex parents) establishes the de facto or legal union in which a minor is linked to an LGBTI couple, a couple that has formalized their civil union in accordance with Argentine legislation to immediately form a family and, in the future, the possibility of increasing the number of family members, a significant development brought about by Law 26,618, a regulation included in the new edition of the Argentine Civil Code. (Coral, 2020).

However, despite Argentina is an example with significant legal advancements in regulating the rights of same-sex couples and the possibility of adoption, as well as Colombia, a country where the debate on same-sex adoption has been of interest over the years, especially in the last three decades, the Ecuadorian legislator has not taken the task of ensuring the rights of these individuals through clear legislation. (Castillo, 2019).

Same-sex adoption is one of the most controversial topics, not only in the legal field but also in the social sphere, as it has been happening in several countries such as Germany, Argentina, Australia, Austria, Brazil, Canada, Israel, Mexico, Colombia, Chile, Uruguay, South Africa, and Spain (Solanda, 2016). It can be determined that for many years, homosexuality has not been considered a pathological condition, let alone a perversion. Especially with the new values and thoughts that children have regarding family structure (Chaparro and Guzmán, 2017). In this research, Mexico, Colombia, and Spain are considered emblematic cases, as they ensure the full enjoyment of rights without any discrimination. In Colombia, same-sex adoption is based on moral controversy filled with prejudices, often relying on marital phenomena related to legal, jurisprudential, and conceptual precedents (Rengifo, L.A. 2017).

Chaparro and Guzmán (2017) believe that "Adoption by same-sex couples constitutes a paradigm shift regarding the possibility for children to be part of a family and a home, even if it is formed by people of the same sex." This creates a contradiction based on the equality recognized by the rights of non-discrimination for any reason, as most Latin American constitutions guarantee equality rights and, therefore, the recognition of human rights that we all have in countries where rights are guaranteed. In Mexico, Angulo, Granados, and Gonzales (2014) state that "Families formed by gay and lesbian individuals have been existing family arrangements long before same-sex marriage was legalized."

Currently, there are 267 registered same-sex marriages in Ecuador, but adoption remains pending. Facilitating this process is a "win-win" situation, explain activists. In Ecuador, same-sex marriage has been legal since June 12, 2019. Since then, 267 couples have been married nationwide. However, the right to adoption is prohibited. The Constitution establishes in articles 67, 68, and 69 that the State recognizes and protects the family as a fundamental nucleus of society, but in a section, it states: "Adoption shall be limited to opposite-sex couples" (Troya 2022). An activist for LGBTIQ+ rights comments that, similar to same-sex marriage, which also had a constitutional restriction, same-sex adoption should go through the Constitutional Court. Article 68 states: "The stable and monogamous union of two persons, free of marital ties, who form a de facto household, for the time and under the conditions and circumstances established by law, shall generate the same rights and obligations as families formed through marriage" (Constitution of the Republic of Ecuador, 2008).

Currently, single-parent adoption is fighting to establish itself as another family model, aiming to overturn the historically exclusive right to adoption in Ecuador, which is limited and

exclusively available to heterosexual couples (Villarreal, 2018). This limitation stems from a conservative society that does not accept that couples with non-traditional sexual orientations (non-heterosexual) can qualify for adoption processes. In this context, this research aims to legally analyze the relevance of amending Article 159, paragraph 6 of the Childhood and Adolescence Code in order to address the restriction that only opposite-sex marriages can adopt and, thereby, expand it to same-sex marriages.

Methods

The methodological design of this research has been established under the concept of a qualitative-quantitative approach (Gómez et al., 2017). This concept is motivated by the characteristic of incorporating both research paradigms. Therefore, the qualitative contribution follows a qualitative research approach because it "uses data collection and analysis to refine research questions or reveal new questions in the process of interpretation" (cited from Hernández, 2014). Similarly, the quantitative paradigm is based on associating variables within the framework of knowledge and interpreting research results, thereby reducing discrimination against this group. The correlational scope will be used to establish the connection between various phenomena and variables to determine a comprehensive concept (Gómez et al., 2017). This will relate to the various factors found regarding the legal recognition of same-sex adoption.

The instruments used in this research will be a questionnaire for the survey and an interview guide. These will be directed toward members of the LGBTIQ community, as well as various officials in the justice administration, self-practicing lawyers, public servants, and all legal experts (Gómez et al., 2017). This will help determine the viability and relevance of an amendment to Article 159 of the Childhood and Adolescence Code.

Results

Ecuador is not yet fully prepared for the recognition of the rights of the LGBTI community, especially due to the country's inequalities and beliefs. In this section, the research results obtained by applying the respective instruments are specified. Therefore, the following questions were generated, and the results are as follows:

Do you know what homosexuality is?

Figure 1. Awareness of homosexuality. Source: own elaboration

The results of this question reveal that the majority of the respondents, 92.5%, state that they do know what homosexuality is, while the minority, 7.5%, are not aware of it. This indicates a significant level of awareness regarding different sexualities.

Do you think a homosexual person should have the same rights as a heterosexual person?

Figure 2. Equality of rights. Source: own elaboration.

The results of this question reveal that 95% of the respondents believe that a homosexual person should have the same rights as a heterosexual person, while the lowest percentage thinks they should not have the same rights. This indicates that society has a greater acceptance of homosexual individuals.

Figure 3: Main obstacles. Source: own elaboration.

The results of this question show that the majority, 35%, believe that discrimination is the main obstacle to same-sex adoption. 27% believe it is due to society's ignorance, 17.5% attribute it to masculinity, 15% to the conservatism that still exists in society, and 5% to religion. This indicates that Ecuador is still in the process of advancing equal rights.

Do you think Ecuador is ready for the legal recognition of same-sex adoption?

Figure 4: Readiness for legal recognition. Source: own elaboration.

The results of this question show that the majority expressed their belief that Ecuador is not ready for the legal recognition of same-sex adoption, while a smaller percentage thinks it is ready. This demonstrates that Ecuador is not prepared for the recognition of this right for the LGBTQ+ community.

What do you think is the main reason for Ecuador not approving same-sex adoption?

Figure 5: Reasons for non-approval. Source: own elaboration.

The results of this question show that the majority expressed their belief that the main reason for Ecuador not approving same-sex marriage is standardized prejudices. 32.5% of the respondents believe that it is because of the emotional impact it might have on adopted children, 12.5% think it is due to the country's culture, and 10% consider it is because of religious imposition.

Discussion

Likewise, according to Morales-Murillo et al. (2020), it is stated that this research allows identifying the incongruity of the current situation of same-sex adoption in Ecuador regarding the right to equality before the law and not being subjected to any form of discrimination. As mentioned earlier, it can be stated that Ecuador has not yet regulated same-sex adoption, affecting the best interest of the child, from the perspective of not having access to a home even if it is a same-sex one. Furthermore, discrimination against same-sex couples is prevalent in both the legal and societal aspects by not allowing them to adopt children and provide them with a loving home.

Additionally, according to Morales-Murillo et al. (2020), it is stated that, in this context, the comprehensive protection provided by the Childhood and Adolescence Code, in accordance with constitutional provisions, is important. It proposes a joint effort between the state, society, and the family to ensure the full and priority exercise of the rights of children and adolescents. This should be done while maintaining a balance between their rights and responsibilities, in a manner that best suits their personal development, obliging administrative and judicial authorities and public and private institutions to adjust their decisions and actions to fulfill this purpose.

Under this context, it should be noted that the Constitutional Court recognizes equal marriage rights, including various family types. The focus is on the child's right to have a loving home, even if it is with same-sex couples. These aspects are gradually being accepted in other countries, such as Colombia, which allows same-sex adoption.

According to Morales-Murillo et al. (2020), it is mentioned that this situation is based on the definition of family outlined in international legislation and by the Constitutional Court of Ecuador. It is considered a fundamental and natural element of society where all individuals,

without any limitation, have the right to form a family group according to their lifestyles and sociocultural contexts. Although it does not refer specifically to adoption, this allows for the consideration of the potential recognition of this institution in Ecuador by same-sex couples. As the concept of adoptive parenthood has evolved with changes in customs, social organization, and the aspirations of LGBTQ+ communities regarding issues such as marriage and parenthood, they seek to fully exercise their rights within the framework of the constitutional state of rights and justice established by the Ecuadorian state.

According to the above, there is a ruling from the Constitutional Court, which opens the possibility for the formation of a family without restrictions and in an open manner. In this context, a family led by same-sex couples could contribute to children's development and those who are in adoption programs would not have to miss the warmth and love of a home, regardless of the gender composition. According to the Constitutional Court of Ecuador (cited in Morales-Murillo et al., 2020), the Court has expressed that, based on the principle of the best interests of children, this group of priority attention has the status of subjects with reinforced constitutional protection. Their rights and interests are superior and prevail, and satisfying these should be the primary goal of all actions that concern them.

In this context, and in order to always uphold the best interests of the child, same-sex adoption should be allowed for individuals with different sexual orientations from birth, as no one should be discriminated against. This issue leads to a contradiction in the Constitution of the Republic of Ecuador, which only allows adoption by people of the opposite sex. The solution would be to amend this constitution to prevent discrimination, unite families, and uphold the best interests of the child.

Gutiérrez (2018) points out that, based on a more accurate definition, adoption involves integrating someone into a family who is not part of it due to consanguinity or blood relations. This creates a family status, or a relationship of kinship based on the act of adoption.

Furthermore, according to Gutiérrez (2018), in Spain, same-sex adoption has been legal since the approval of Law 13/2005, dated July 1, 2005, which amended the Civil Code regarding marriage to allow same-sex marriage. This law also permits other rights that come with marital unions, including adoption. Additionally, same-sex couples who are in civil partnerships have the possibility of adopting.

Considering the expressed above, it can be stated that other countries, such as Spain, have made the decision not to discriminate against individuals based on their sexual orientation and allow same-sex adoption. This is done to provide a home for children in vulnerable situations, and it is an international precedent that upholds the best interests of the child and family formation even before Ecuador's constitution addressed it.

In this context, according to Gutiérrez (2018), the Universal Declaration of Human Rights defines the concept of the family as an essential institution in our society, which must be protected by both society and the state. Furthermore, it highlights that the notion of the family has evolved in many Western countries due to the advancement of human rights and the rights of homosexuals.

With the same perspective, Gutiérrez (2018) argues that, thirdly, the formation of same-sex families composed of same-gender couples occurred in the Western world in the 1960s and 1970s. However, it was in the 1970s that the spread of laws in various countries began with the purpose of safeguarding these types of families.

Gutiérrez (2018) states that same-sex families in Spain were first regulated with the approval of Law 13/2005, dated July 1, 2005, which modified the Civil Code regarding the right to marry. The law, in its Second General Provision, states, "The law allows marriage to be celebrated between persons of the same or different sex, with full equality of rights and obligations regardless of their composition. Consequently, the effects of marriage, which are maintained in their entirety, respecting the objective configuration of the institution, are the same in all areas regardless of the sex of the contracting parties. This includes rights and social benefits, as well as the possibility of participating in adoption proceedings." Therefore, a same-sex family is defined as one that consists of a same-sex couple or marriage who become parents of one or more children, either through adoption, surrogacy or as a result of artificial insemination in the case of women. Adoption is regulated in Articles 175 to 180 of the Civil Code.

Regarding the European Union context, it is worth noting that Spain was one of the first countries to legalize these types of unions and, consequently, to allow adoption by same-sex marriages or couples. However, before Spain, the Netherlands did so in September 2000, eliminating any form of discrimination between heterosexual and homosexual individuals or couples.

Conclusions

One of the main causes of inequality in Ecuador is discrimination, particularly regarding diverse sexual orientations. This discrimination hinders the full progression of rights in the country, with one aspect being same-sex adoption. It is considered that the fundamental role of the Ecuadorian state should be based on the exclusive responsibility of recognizing same-sex adoption to ensure the well-being of both minors and the LGBTQ+ community.

In Ecuador, adoption serves as a legal framework for protecting children who are, in some way, alone in the world without any form of protection. Denying couples with the desire to protect these children based on their sexual orientation is not only a discriminatory problem affecting prospective adoptive parents but also the children who want to be part of a loving home. This is especially problematic given that our constitution is rigid in stipulating adoption only for heterosexual couples, clearly establishing inequality of rights for the LGBTQ+ community.

There is a significant contradiction in the constitution in Article 68, Section 2, as it restricts adoption to couples of different sexes. Considering that our country is a Constitutional State of Rights and Justice, limiting adoption to heterosexual couples violates principles of equality and family rights by denying not only aspiring adoptive parents but also children the opportunity to grow up in a family.

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