

## **SAME-SEX ADOPTION AND THE “BEST INTERESTS OF THE CHILD” DOCTRINE IN ECUADOR**

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### **ABSTRACT**

This article aims to analyze same-sex adoption and the doctrine of the “best interests of the child” in Ecuador. There has been considerable discussion regarding the right to be adopted and the applicant’s right to adopt; nevertheless, beyond the argument of whether adoption is a right, paramount in both contexts are the best interests of the child. This perspective is necessary to ensure their proper development, well-being, and other guarantees established by current legal regulations, which are complemented by international treaties on children’s rights.

The methodology applied considers the requirements, purposes, and most prominent aspects of adoption, and whether it is legal in Ecuador. The findings show that national legislation requires adopting couples be heterosexual, which contradicts the concept of family and family diversity promoted in the constitution. Several studies have indicated that applicants’ sexuality or sexual orientation within the adoption process has neither constituted a turning point nor determined the individual’s suitability. This assessment should be based on their abilities, attitudes, attributes, and other relevant factors that qualify them to responsibly care for and nurture a child or adolescent entrusted to them by the state.

### **RESUMEN**

El presente artículo tiene como objetivo principal analizar la adopción homoparental y el principio de interés superior del niño en Ecuador. Mucho se ha dicho sobre el derecho a ser adoptado y el derecho del solicitante a adoptar, pero más allá de discutir si adoptar es o no un derecho, lo que debe prevalecer en cualquiera de ambas acepciones es el interés superior del niño. Esto se hace necesario para garantizar su desarrollo, bienestar y demás garantías establecidas por la normativa legal vigente, que se complementa con los tratados internacionales en materia de niñez.

La metodología usada para este artículo describe los requisitos, fines y los aspectos más emblemáticos de la adopción, y si esta es legal en Ecuador. Se concluirá que la legislación nacional ha impuesto como un requisito para adoptar que las parejas sean heterosexuales, lo cual es contrario al concepto de familia y diversidad familiar promovida en la constitución. Varios estudios han demostrado que la sexualidad u orientación sexual de los solicitantes dentro de un proceso de adopción no marca un punto de inflexión ni determina la calidad de idóneo de una persona. Esta debe ser calificada en función de sus aptitudes, actitudes y atributos, y demás consideraciones válidas que permitan su calificación como apto para que el Estado ponga en sus manos la tarea de la crianza y desarrollo de un niño o adolescente.

**KEY WORDS:** Same-sex adoption, best interests of the child, family, rights of the child, filiation.

**PALABRAS CLAVE:** Adopción homoparental, interés superior del niño, familia, derechos del niño, filiación.

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## INTRODUCTION

This article addresses the issue of same-sex adoption, examining specific aspects through the perspective of the “best interests of the child” doctrine, as well as exploring related concepts including family, adoption, and marriage. It also reviews the relevant international and local legal frameworks and examines what comparative law has synthesized through jurisprudence regarding adoption by same-sex couples.

### **1. The best interests of the child and the scope of guardianship considering a child as a subject of protection**

The concept of the “best interests” of children is one of the most important principles of the Convention on the Rights of the Child, which was unanimously adopted by the United Nations General Assembly on November 20, 1989, and ratified by Spain on December 6, 1990 (Sillero, 2016). This fundamental principle must be prioritized in all matters involving the rights of children and adolescents. The first paragraph of Article 2 of the Convention on the Rights of the Child delineates the scope of this principle in relation to institutions involved in ensuring children’s comprehensive development. In this regard, the best interests of children constitutes the paramount and obligatory principle in processes involving childhood and adolescence, as fundamentally established in Article 3 of the Convention on the Rights of the Child (López, 2015).

The “best interests” principle is based on promoting rights such as physical integrity, ensuring healthy personality development, and growing up in a nurturing environment, all with the “primary purpose of the general well-being of the child” (Court of Justice of Guatemala, 2012). Other factors also contribute to the best interests of the child; the Legal Status and Human Rights of the Child (IACHR, 2002) indicates that the dignity of the human being and the unique characteristics of children must be considered, as should the particular characteristics of the child’s circumstances. Further, this interest comprises several factors, serving as a fundamental principle for childhood development and the protection of the rights of children as recognized subjects of protection by the state, the family, and society. This underscores the tripartite duty aimed at ensuring the comprehensive well-

being of children. Moreover, this best interest doctrine “is the foundation for the effective realization of all human rights of children” (Aguilar, 2008); it must be a primary consideration to ensure it is evaluated and implemented in any decision affecting children (Cañarte, Cantos and Espinoza, 2022).

The doctrine analyzed herein is not merely a statement of what should be assured for children; it must be complemented by procedural safeguards and measures in accordance with the various aspects, rights, duties, and obligations involved in their overall well-being. The purpose of guardianship for children is to ensure comprehensive protection of their rights from childhood through adolescence while gradually recognizing and enabling their autonomy to exercise these rights (Guío, 2022). Ultimately, the best interests of children and adolescents should be a primary consideration in all legal matters concerning the effective exercise of their rights; its elements have been identified as components of social well-being and general welfare to “achieve the good life” and their holistic and comprehensive development.

## **2. Adoption as a legal act to preserve the rights of the child**

Adoption is defined as “[t]he legal status by which the adoptee is conferred the status of son or daughter of the adopter(s) and the latter the duties and rights inherent in the parent–child relationship” (Pérez, 2010). From this definition arises the question: is adoption a right?

The Chilean Clear Language Commission (2018) has clarified that adoption is a judicial act that establishes a new kinship bond for a child or adolescent. A more specific definition indicates that full adoption is when there is a surrogate process to establish filiation in the absence of biological ties. Beyond being a judicial act or a legal status that protects the interests of the child, adoption is established as an opportunity that supports the right to family, as it allows children to have parental figures who guide their development into good citizens. Molinier (2012) has asserted that there is no right to adoption but rather an obligation of public authorities to select those who can adequately protect the interests of vulnerable children. Chaparro and Guzmán (2017) agree that the right to adopt is not expressly enshrined, but instead, the right of children to be adopted and live in an environment of respect and tolerance is protected, more than the act of adopting itself. Any

regulations relating to adoption should promote the interest of the adoptees, not the adopters.

Ecuador is recognized as one of the nations that has not adequately regulated the issue of adoption, and it is particularly concerning that little or no attention has been given to same-sex adoption (Quintero, 2015). However, regardless of the scope of same-sex adoption, the country still needs to address the bureaucracy in the adoption process. The Ministry of Economic and Social Inclusion (MIES, 2020) itself acknowledges that the adoption process undermines children’s rights, as many fail to find a family due to delays and bureaucratic difficulties, despite the Constitution of the Republic of Ecuador recognizing families in their various forms and supporting nondiscrimination, as well as the “best interests of the child.”

Adoption (Abad, 2017) is, therefore, an action undertaken by institutions responsible for children in care facilities that aims to secure a family and identity for each child and adolescent. The term “adoption” has been understood as an “institution,” “judicial act,” “false right,” and “legal status,” but beyond its definition, what truly matters is the scope of its protective power and the impact of safeguarding a child who lacks a family, even if it is not being implemented as effectively in reality.

### **3. Same-sex adoption**

Before analyzing the concept of same-sex adoption, it is necessary to deconstruct the family diversity recognized in contemporary legislation, which acknowledges, to a certain extent, the right of families to freely form themselves, eradicating the traditional concept of the family (i.e., the man as father, woman as mother, and children). Indeed, what family diversity seeks is to recognize and embrace the rights of nontraditional family structures. This is a challenge that society must face, but, along with this effort, new needs and challenges arise for same-sex couples, such as parenthood and, correspondingly, adoption (Maroto, 2006).

Formally, there is no doctrinal impediment to same-sex adoption (Portugal and Araújo, 2004). No arguments can be made against it from the perspective of mental health or any other discipline, except when reasons based on religious doctrines are invoked. Thus, barriers to same-sex

adoption, should they exist, cannot be unequivocal or definitive if they firmly indicate the suitability of homosexual couples to pursue adoption, and under no circumstances do they support the idea that it is detrimental to the child's development. A study by the American Psychological Association (2004) determined that gay and lesbian parents are just as likely as heterosexual parents to provide healthy and nurturing environments for their children. Similarly, child development studies have shown almost imperceptible differences in children raised by same-sex couples compared to by traditional families, which could easily occur among children raised by heterosexual parents. It was also found that children of same-sex couples, as a result of adoption, have normal social relationships with peers and adults. Consequently, the requirement of adoption suitability involves an assessment of their abilities, circumstances, and capacity to become an adoptive family (Bermúdez, 2007), which has nothing to do with an applicant's sexual orientation.

Thus, same-sex parenting is not a pretext for denying adoption, as various anthropological studies lend no support to the idea that civilization or a viable social order depend on the family as a heterosexual institution (Federación Española de Sociedades de Sexología, 2005). Based on the aforementioned conceptions, it has been asserted that the primary objective of adoption is to ensure the "protection of children who require a stable family environment conducive to their comprehensive development, with this being the prevailing interest for both the administration and the judge" (Martínez, 2007). The doctrine also establishes the need for further research into same-sex adoption and the recognition of rights for same-sex couples, such that the structural changes of contemporary families and recent changes in legal norms can be identified and incorporated (Nusdeo and De Salles, 2006).

Families built on natural, not solely legal, bonds are integral to the social fabric. According to Acevedo et al. (2017), same-sex foster families commit to providing affection, solidarity, respect, protection, and support, similar to traditional families, as guaranteed and recognized in the Ecuadorian Constitution. Reiterating this last idea, the scope of adoption in the Ecuadorian Constitution is unequivocal and does not allow same-sex adoption per se. According to Bernal (2015), the Supreme Norm regarding adoption is "openly at odds with the protective stance of the constitution, particularly concerning children, and emphasizes the defense of children's right to have a family" (p.56).

The prioritization of heterosexuality over the best interest of the adoptee, as asserted by the doctrine, distorts the true purpose of adoption (Basoalto, 2019). However, how does the sexual orientation of the adopter or applicant factor into this? Opponents of same-sex adoption are typically religious leaders and individuals with conservative views who reject same-sex unions based on their religious texts, arguing that only what they term as the “natural family” should exist (Vidal, 2017). Yet, the scope of the natural family cannot be limited to what a specific group wishes to impose, as this would undermine its “naturalness.”

Countries such as Argentina, Mexico, and Brazil have moved away from conservative views and those against same-sex adoption, passing laws to allow it. This reflects the historical outcome of legal precedent established through the analysis of landmark cases, which have paved the way for legal frameworks governing adoption that transcend requirements such as heterosexuality, despite their continued provision in Ecuadorian legislation.

#### **4. Legal analysis: Does Ecuadorian legislation allow adoption by same-sex couples?**

According to Article 7 of the Universal Declaration of Human Rights, “all are equal before the law and are entitled without any discrimination to equal protection of the law” (United Nations, 1948). Article 16 establishes: (i) individuals’ right to marry and form a family and that (ii) the family is the natural and fundamental unit of society.

Further, Article 20 of the International Convention on the Rights of the Child regulates the state’s obligation to protect the family environment of children, while Article 21 regulates adoption, stating that the state must prioritize the best interests of the child with special primary consideration and ensure that all necessary safeguards are in place to guarantee that adoption is permissible (UNICEF, 2006). That being said, Article 67 of the Constitution of Ecuador states, “The family is recognized in its diverse forms” (Asamblea Nacional, 2008). As a cornerstone of society, the family merits special protection from the state, beginning with the recognition of these “diverse forms,” reflecting the complex and evolving nature of society over time. The concept of family is no longer solely tied to marital bonds; this notion has gradually diminished in importance, without detracting from

the significance of marriage itself. Nevertheless, the Ecuadorian Civil Code states that one of the purposes of marriage is “procreation”; adoption would also serve the formation of a family.

Concerning marriage, the aforementioned article states that “[t]he union between a man and woman shall be based on the free consent of the contracting parties and on the equality of their rights, obligations, and legal capacity” (Asamblea Nacional, 2008). The Constitutional Court has ruled that marriage extends beyond the union between individuals of opposite sexes; rather, it encompasses the right of same-sex couples to marry. This interpretation challenges the restrictive nature of the second clause of Article 67 of the Constitution. Hence, it required supplementation through the pronouncement of the country’s highest constitutional oversight body. The Constitutional Court has asserted that, under the principle of favorability, “[t]here is no prohibition on marriage between same-sex couples; instead, marriage between same-sex couples complements the constitutionally and legally recognized marriage” (Corte Constitucional, 2019).

Nevertheless, in terms of both traditional and diverse forms of marriage, Article 68 of the Constitution of Ecuador states in its second paragraph that “[a]doption shall only be granted to different-sex couples” (Asamblea Nacional, 2008). At first glance, this represents a requirement mandated by constitutional law and whose spirit should prioritize the well-researched concept of the child’s best interests rather than solely considering the rights of the applicants. However, the interpretation provided in the preceding paragraph is succinct, given that the current article has cited and analyzed evidence suggesting that the adopter’s sexuality should not be a determining factor, as it has been shown not to adversely impact children’s development. Therefore, in this case, invoking the principle of the best interests of the child as a pretext to deny same-sex adoption would not make sense. In summary, it has been demonstrated that same-sex couples in Ecuador face this discrimination, as they are restricted by an apparent suitability requirement despite evidence that the sexual orientation of the adoption petitioner neither impacts nor compromises the development or personality of the child within the framework of marital equality.

The paradigm shift has allowed the Civil Code to perceive marriage as the union of two individuals, as stated in Article 81 of the aforementioned



legal framework. Article 314 sets forth the following fundamental concept of adoption: “Adoption is an institution by virtue of which a person, called the adopter, acquires the rights and assumes the obligations of a parent, as set forth herein, with respect to a child, called the adopted” (Congreso Nacional, 2005). Article 319 establishes that married persons may adopt persons of either sex without distinction, by mutual agreement. Further, consistent with this analysis, Section 151 of the Children and Adolescents Code stipulates that the purpose of adoption is to secure a suitable, permanent, and definitive family for children or adolescents who are socially and legally eligible for adoption (Congreso Nacional, 2002). Likewise, Article 152 of the aforementioned source states that full adoption is that recognized by the law, as it encompasses all rights, attributes, duties, responsibilities, prohibitions, disqualifications, and impediments inherent to the parent–child relationship. However, when discussing the requirements for adoptive parents, Article 159, clause 6, reaffirms what is expressly stipulated by the constitution. Consequently, it specifies that “[i]n cases of adoptive couples, they must be heterosexual and have been in a marriage or common-law union that meets the legal requirements for over three years” (Congreso Nacional, 2002).

According to Judgment No. 11-18-CN/19, the Constitutional Court has stated that “[t]he right to family is a right or goal to which every person can aspire without any discrimination. Marriage is a right or means that allows access to forming a family” (Corte Constitucional, 2019). Thus, heterosexual marriage implies “a prohibition on alternative ways of constituting a family beyond the marriage contract” (Corte Constitucional, 2019). This jurisprudential precedent makes it evident that contemporary law has openly moved away from the concept of “traditional family,” thereby highlighting the contradiction. The family, as the cornerstone of society, should prioritize the best interests of the child and not concern itself with the sexuality of the applicant in the adoption process.

Ensuring the genuine well-being of children hinges on granting them access to a family during this process. This family should comprise suitable individuals who meet specific requirements; under no circumstances should sexual orientation be used to justify suitability or qualification to be a parent. The Constitutional Court (2019) has stated that if people, regardless of their sexual orientation, are endowed with equal dignity and deserve equal respect, then they should be comparable in exercising the right to marriage;

therefore, why should forming a family not be considered constitutionally valid for all? Denying gay marriage causes “excessive harm that is not commensurate with any benefit, as it does not affect heterosexual couples’ right to marriage” (Corte Constitucional, 2019). The same principle should apply to the denial of same-sex adoption in Ecuador, as it constitutes an unjustified, discriminatory, and unconstitutional measure.

National law, primarily because of the requirement of heterosexuality for adoption, overlooks the fact that the child is not an object or a right. Instead, as stated by the Constitutional Court (2018), the child is “the focal point of right protection, meaning the one to whom the right is owed.” Similarly, the Constitutional Court (2018) defined the best interests of the child as a *sine qua non* requirement to be considered when adopting any administrative, legal, or other type of decision in which the rights and guarantees of children are determined. Finally, it is incorrect to argue that imposing a heterosexuality requirement on the applicant is in the best interests of the child. Such an imposition has not been proven indispensable or vital for child protection; on the contrary, studies have demonstrated the opposite. In Ecuador, same-sex adoption is not permitted, as constitutional regulations limit the right to form a family to children whose applicants or prospective parents are heterosexual couples or of a different sex. This restriction effectively denies children the opportunity to have diverse role models thanks to the conservative biases within the framework of a “constitutional state of rights and justice.”

Based on the preceding discussion, the erroneous belief that prohibiting same-sex adoption protects the child lacks support from scientific or reliable studies. This does not mean that the behavior of same-sex families with adopted children has not been analyzed but that previous research has not shown any deviations in children’s sexual orientation. Therefore, this misconception reflects stereotypes within a conservative society (Andrade, 2022).

## 5. A comparative legal perspective

Mexican jurisprudence has established that “[t]he existence of marriages and families with homosexual members neither promotes nor prohibits, much less excludes, the continuation and growth of heterosexual families” (Corte Suprema de Justicia Mexicana, 2010). Therefore, same-sex adoption is and should be legal, as it aims to ensure the social protection of the child.

Subsequently, the Mexican Supreme Court of Justice (2012) argued that excluding same-sex couples from the institution of marriage perpetuates the idea that they are less worthy of recognition than heterosexual couples, thus undermining their dignity as individuals. In 2014 in the State of Campeche, Mexico, it was concluded that sexual orientation cannot be a determining factor in deciding adoption suitability, regardless of whether the applicants are in a heterosexual marriage or same-sex partnership (Comisión de los Derechos Humanos, 2014). This is because sexuality itself is not a *sine qua non* requirement for assessing applicant suitability.

Toward the end of the 20th century in Argentina, the court emphasized that the establishment of a family is crucial in the adoption process; the institution of marriage was seen as particularly significant in ensuring the stability and preservation of the adopted child’s family unit (Juzgado Civil de Mendoza, 1998). In Uruguay, “[t]he social assessment of homosexuality is changing, and states and their legal systems must facilitate this social change and not legitimize or support forms of discrimination that undermine human rights” (Rey, 2014). This suggests that in Ecuador, the legalization of same-sex adoption will likely require a comprehensive process that involves interpreting the second clause of Article 68 of the Constitution. Ecuador’s Constitutional Court may interpret that within the context of “couples of different sexes,” this difference is a subjective component of each individual and their identification at the time they complete an application. Otherwise, the only way to allow same-sex adoption would be to reform the Supreme Norm.

Colombia stands out as a country with notable advancements in same-sex adoption. Its Constitutional Court has asserted that there is no valid reason to deny a child the opportunity to be placed with a same-sex couple. This is because the administrative officer overseeing adoption processes evaluates the suitability and stability of each couple on a case-by-case basis, ensuring the doctrine of the child’s best interests is upheld (Corte Constitucional Colombiana, 2009). Same-sex adoption in Colombia is subject to the following arguments set forth by Judgment C 802/09:

1. Scientific evidence indicates that children adopted by same-sex couples experience no negative impact on their overall development. Restricting adoption by homosexual couples means limiting children from being part of a family.
2. According to the Colombian Constitution, an individual's sexual diversity or gender identity cannot be an indicator of unsuitability for adoption.
3. From the perspective of the child's best interests as outlined in the Constitutional Norm, the law cannot establish a justified difference regarding the sexual orientation of couples seeking to adopt.
4. Adoption processes are aimed at guaranteeing the doctrine of the best interests of the child, irrespective of the sexual orientation of the applicants. Competent authorities must assess whether the applicants meet the necessary criteria, without considering the sexual orientation of the adopting couple (Corte Constitucional Colombiana, 2009).

## CONCLUSIONS

The doctrine of the best interests of the child is not merely a statement of what should be ensured; it must also be complemented by procedural guarantees and processes that address the various aspects, rights, duties, and obligations involved in the overall well-being of children and adolescents as subjects entitled to protection and care by the state, family, and society.

Barriers to same-sex adoption, should they exist, cannot be absolute or definitive if same-sex couples' suitability to access adoption is solidly supported. In no case has the conclusion that same-sex adoption is detrimental to the child's development been substantiated.

Same-sex couples in Ecuador experience discrimination, as they are limited by a narrow requirement of apparent suitability. This constraint persists despite the understanding that the sexual orientation of adoption applicants does not adversely affect the child's development or personality within the context of marriage equality.

In Ecuador, same-sex adoption is not allowed, as constitutional rules have restricted the right to form a family only to children whose applicants or prospective parents constitute couples of different sexes or those that are heterosexual. This effectively prevents children from having a role model due to the conservative biases of a “constitutional state of rights and justice.” It is incorrect to argue that requiring applicants be heterosexual is in the best interests of the child, as such an imposition has not been justified as vital for the protection of children. On the contrary, studies have shown the opposite. In countries such as Uruguay, Mexico, Argentina, and Colombia, same-sex adoption is allowed and recognized through jurisprudence. The adoption process has been established as a mechanism to ensure the doctrine of the best interests of the child, wherein the sexuality of the adoptive parents is neither a barrier nor a requirement for assessing adopter suitability. It is the responsibility of regulatory bodies to verify if applicants meet the necessary requirements to assume parental responsibility for a child and grant them filiation rights; under no circumstances should sexuality be considered for such a declaration.

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