

## The Marriage in Ecuador: From the Perspective of the Constitutional Court

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### Abstract

*Throughout history, marriage has been perceived as a solemn, contractual institution deeply rooted in the doctrine of the Catholic Church. This union between a man and a woman, recognized and validated by most legal systems in the world, requires compliance with certain formal criteria. However, with the growing diversity in society, which breaks away from the binary schema, questions arise about the possibility and legitimacy of other forms of marriage, particularly, same-sex marriage. This work examines this questioning through the lens of constitutional jurisprudence, analyzing how marriage could adapt, deform, or be rejected when contemplating union between people of the same sex. The rulings N° 10-18-CN/19 and N° 11-18-CN of the year 2019 by the Constitutional Court of Ecuador, which explore the social and legal implications of same-sex marriage, are analyzed. In these judgments, the Court acknowledges the solemnity of the marital contract, but challenges this structure with the argument of human rights. This perspective highlights the human right to the freedom to marry, guaranteed by the constitutional mandate and public institutions. It assures that we are all equal before the law, and this equality implies understanding and accepting our differences.*

**Keywords:** marriage, diversity, union, human rights, equality.

### Introduction

In 2008, Ecuador inaugurated an innovative constitutional paradigm by putting its new Constitution into effect. This document stands out for granting a preeminent role to jurisprudence as a legal source, placing the Constitutional Court in a position of utmost authority in the interpretation and supervision of the supreme norm. Through this elevated function, the Court not only safeguards constitutional supremacy but also takes on the responsibility of ensuring the protection of human rights, thus contributing to a more effective and humane administration of justice.

This article examines the legal and social evolution of the matrimonial institution in Ecuador, contrasting it with the changing social and legislative demands. Since the establishment of the first Constitutional Court in 2012, its judges have played a crucial role in the clarification and advancement of the norms, favoring a more accessible understanding for the Ecuadorian citizenry. It is important to emphasize that, as observed in the jurisprudence analyzed, the law is a framework of dynamic instruments; therefore,

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legal hermeneutics must be adaptive in order to respond to the varied and new needs and claims that emerge in the human context.

In line with this adaptive and guarantor perspective, the Constitutional Court has issued pronouncements that strengthen the interpretation of human rights, applying the criterion of favorability. These decisions reflect a notable consonance with the integral essence of the Ecuadorian Constitution, enhancing its hierarchy not only from a formalist perspective but also from a human and progressive approach.

The object of study of this work focuses on marriage, an institution that has experienced a notable transformation to align with the advancements in the protection of human rights. We will proceed to analyze two rulings issued by the Constitutional Court of Ecuador to explore how this entity has been a catalytic agent in the contemporary reformulation of this area of civil law.

## **Methodology**

### Methodological Design

The present research adopts a qualitative approach with an explanatory level, designed to provide a comprehensive and detailed understanding of the legal, social, and cultural implications of equal marriage in the Ecuadorian context. This approach allows for an in-depth examination of the variables, in this case, legal and social, that interact in the construction of public policies and in the jurisprudence related to equal marriage. The selection of an explanatory level aims to not only describe the current state of the phenomenon but also determine the causes and effects of the policy and the regulations in force.

### Documentary Corpus

For the development of this research, a wide range of legal documents were used, including rulings of the Constitutional Court of Ecuador, current legislation, and advisory opinions from the Inter-American Court of Human Rights. Additionally, secondary documents such as academic articles from journals specialized in Constitutional Law and Human Rights, reports generated by NGOs and relevant international organizations, as well as media publications that have covered the topic in depth were incorporated.

### Database and Additional Sources

The database compiled for this study includes an exhaustive repository of laws, regulations, and jurisprudences related to equal marriage, not only in Ecuador but also in other countries with significant advancements or similar challenges in this area. This comparative approach brings a global perspective to the analysis, allowing for the identification of international trends and the evaluation of Ecuador's position within a broader context.

### Analysis Techniques

Given the qualitative focus of the study, various document analysis techniques will be employed to examine the collected material. These will include content analysis, thematic analysis, and discourse analysis. The intention is to uncover patterns, narratives, and legal arguments that have influenced the evolution of equal marriage in Ecuador. Each source will undergo rigorous scrutiny to identify key elements such as legal terminology, the argumentative frameworks employed, and the interpretations of constitutional and human rights principles.

### Methodological Rigor and Timeline

To ensure methodological rigor, the principles of triangulation will be followed, using multiple sources and analysis techniques. The research timeline has been designed to

allow sufficient time for data collection, analysis, and the drafting of the final report. This methodological design presents itself as a comprehensive strategy to effectively and fully address the inherent complexity of equal marriage in Ecuador.

Sentencia N° 10-18-CN/19 del 12 de junio de 2019. Corte Constitucional de Ecuador (Matrimonio entre personas del mismo sexo)

Ruling number 10-18-CN/19, issued on June 12, 2019, by the Constitutional Court of Ecuador, arises from a protection action against the country's Civil Registry. This action begins due to the entity's refusal to formalize the marriage contract between two men. This situation leads the civil judicial unit to request a pronouncement from the Constitutional Court regarding the constitutionality of certain norms, specifically article 81 of the Civil Code and article 52 of the Organic Law of Identity and Civil Data Management.

Article 81 of the Civil Code states that marriage is a contract celebrated between a man and a woman. Based on this provision, the Civil Registry argues that the applicants, being both men, do not meet the requirements stipulated in the current legislation. According to this reasoning, the administrative authority acted correctly in denying the application, thus fulfilling its duty and the applicable regulations.

The review of this situation is carried out through two legal mechanisms: firstly, a protection action, which is a jurisdictional guarantee aimed at the direct and effective protection of constitutional rights, as stipulated in article 39 of the Organic Law of Jurisdictional Guarantees and Constitutional Control; and secondly, an unconstitutionality action, which seeks to remove from the legal system any norm that contravenes the Constitution or the constitutional block.

The Constitutional Court, in its presentation led by Justice Alí Lozada Prado, addresses various fundamental aspects to resolve the action. Firstly, the Court questions the nature of the marriage definition in article 81 of the Civil Code. It argues that this provision does not establish a "definition" per se, but rather an enumeration of conditions for the realization of marriage between a man and a woman. Thus, it is inferred that article 81 does not necessarily circumscribe marriage to a single modality.

The ruling raises certain "legal problems," such as whether marriage between same-sex individuals constitutes a fundamental right. If it is not, the legislator would have the freedom to allow or prohibit it without incurring unconstitutionality. However, if it is determined that marriage between same-sex individuals is a fundamental right and the legislator does not institutionalize it, then it would be incurring an act of unconstitutionality.

Therefore, the core of the discussion focuses on determining whether marriage, in general terms and not simply in the heteronormative format, can be considered a fundamental right. This question opens up various facets that are meticulously analyzed in the ruling, thus setting a crucial precedent in the interpretation and application of marital law in the Ecuadorian context.

To address the question of whether marriage constitutes a fundamental right, the Constitutional Court of Ecuador examined Article 16 of the Universal Declaration of Human Rights. This article states that all people have the right to marry and found a family, without restrictions based on race, nationality, or religion, and that marriage can only be entered into with the free and full consent of the prospective spouses. This international document, issued in 1948 by the United Nations, suggests that the conceptualization of marriage in the realm of human rights is intrinsically linked to human dignity. The Court recognizes this approach, although it also contemplates other dimensions, which will be explored later. It is important to note that the Universal Declaration of Human Rights is not the only international instrument that mentions marriage as a human right.

In a historical and conceptual analysis, marriage has been traditionally associated with the formation of a family. In certain conceptions, it has even been established that marriage is the only legitimate way to constitute a family, a perspective often rooted in the notion of procreation as a requirement for marital validity. However, a deep exploration of the conceptual evolution of the family can question the idea that its formation and perpetuation are only possible through marriage.

Additionally, it should be considered that the family is a crucial context for individual and social development. According to Santelices (2001), the family is the "undisputed educational reality" and responsible for establishing the foundations for social development. In this conceptualization, it is notable that marriage is not mentioned as a prerequisite for family formation. This diverges from Roman law, where marriage and family were inextricably linked. In that legal tradition, the family could not exist without marriage, as it was the mother who assumed the responsibility of adding members to the family, even though she lacked decision-making authority within it.

The contemporary conception of the family has undergone significant changes, not only socially but also in the legislative sphere. Various legal frameworks, including the Constitution of the Republic of Ecuador, have adopted a more inclusive definition of the family. According to article 67 of said constitution, "The family is recognized in its various types." This inclusive approach compels a broader analysis of what constitutes a family, and it is argued that the answer should be formulated from a human perspective that aligns with the constitutional principle of "good living" (living well).

In this context, it can be inferred that each individual has the right to decide what kind of family they want to form or belong to, and it is the duty of the State to protect that right in terms of equality and without discrimination. Thus, different family arrangements—whether a couple of a man and woman with children, a single mother, or a same-sex couple—must receive equal consideration and protection under the law.

Judgment No. 10-18-CN/19 explains this approach, pointing out that a person's free decision to marry or form a family is justified in the constitutional content itself, which operates within a "axiological fabric." According to the reporting judge, this term refers to the set of values, principles, and human rights that underpin constitutional supremacy. Article 424 of the Constitution of Ecuador emphasizes that the Constitution is the supreme law, a statement that represents the formal aspect of constitutional supremacy.

However, this formal aspect is complemented by Article 1 of the same Constitution, which establishes that Ecuador is a "constitutional state of rights and justice, social, democratic, sovereign, independent, unitary, intercultural, plurinational, and secular." This article highlights the substantive aspect of constitutional supremacy, that is, the "axiological fabric" composed of a series of values and principles that guide the nation.

From a legal-scientific perspective, constitutional supremacy manifests itself in both formal and substantive aspects. On the issue of marriage and its social and legal evolution, this dual approach allows an axiological interpretation that recognizes marriage as a human right, guaranteed without discrimination or inequality. This approach allows for going beyond literal interpretations of the constitutional text that could lead to human rights violations or even contradictions within the legal framework itself.

Regarding the purpose and nature of marriage, the legislator does not establish an obligation to marry but sets criteria that must be met in case the parties decide to do so. It is imperative to note that the concept of marriage has evolved since its origin in Ancient Rome, where it was mainly contemplated as a union between a man and a woman based on various discriminatory and hierarchical parameters, such as the condition of "conubium," reserved for free Roman citizens. Slaves, for example, did not have the right to "conubium," highlighting the discriminatory bias of such an approach.

The classic criteria for the validity of marriage, such as "affectio maritalis" (the will to remain united in marriage), puberty with specific age limits for both sexes, exogamy, and monogamy, reflect a conception of marriage that has been subject to questioning and revision in the contemporary context. These criteria, based on a patriarchal structure that assigned a subordinate role to women, have been transformed to adapt to a social and legal environment that emphasizes equality and human rights.

It is relevant to note that, in the case of Ecuador, the legacy of these ancient and discriminatory conceptions of marriage has endured in various legal forms. For example, the Civil Code of 1889 was based on religious and patriarchal precepts when asserting that the validity of marriage should be decided by the ecclesiastical authority. Even the Constitution of 1978 limited the definition of family and marriage to a nuclear model, excluding other forms of family unions.

Therefore, the evolution of constitutional interpretation and legislation around marriage in Ecuador and other places in Latin America shows a gradual transition towards a more inclusive and equitable legal framework. This transformation is partly the result of an axiological review that recognizes the diversity of family structures and human rights as central elements of the "axiological fabric" of constitutional supremacy.

In the contemporary legal and social context, the notion of constitutional supremacy holds a preeminent place in interpreting issues related to equality and non-discrimination. This principle, which encompasses both formal and substantive elements, becomes particularly relevant in examining issues such as marriage and its axiological evolution towards a human right. Such hermeneutic evolution allows for the inclusion of same-sex marriages, even if a literal interpretation could suggest otherwise. This ability to interpret beyond the literal is justified by the potential risk of human rights violations and breaches of the constitutional text itself.

It is instructive to consider that the conceptualization of marriage has undergone a significant historical and cultural evolution. In Roman law, for example, marriage was the union of a man and a woman under certain conditions that today might be considered discriminatory. The historical analysis reveals regulations such as 'affectio maritalis' and restrictions on age and kinship that have evolved or even been dismissed in contemporary legislation.

The scenario in Ecuador presents additional complexities, given the prevalence of Catholicism in the population. According to the International Religious Freedom Report for 2020, 74.8% of Ecuadorians identify as Catholics. Although the Ecuadorian Constitution establishes the secularism of the State, the strong religious bias can incite social tensions on issues such as family and marriage, which have historically been under the aegis of the Church. Despite this context, the Constitutional Court of Ecuador has emphasized that the preponderance of a particular religion does not justify discriminatory practices, including those based on sexual orientation. The Court appeals to the principle of proportionality to arbitrate between religious freedom and other fundamental rights.

This need for balance becomes more urgent in the face of statistics of violence against the LGBTQ+ community. The application of material equality is hindered by deep-seated and systemic discrimination. In this regard, Article 424 of the Constitution of the Republic of Ecuador and the concept of "constitutional block" explained by Peña (2010) provide a solid basis for the inclusion of international treaties in the national legal framework, as long as they promulgate more favorable rights.

Thus, the interpretative function of the Constitutional Court is carried out within this constitutional block, which encompasses a diversity of international instruments subscribed by Ecuador. This approach strengthens constitutional supremacy and ensures the protection of all citizens in terms of equality and without discrimination.

### I. Ruling No. 11-18-CN. Constitutional Court of Ecuador. (Equal Marriage)

Within the complex architecture of the human rights system, both nationally and internationally, Ruling No. 11-18-CN of the Constitutional Court of Ecuador stands as a crucial node for the legal analysis of equal marriage. The decision offers a deep exploration of the legal value of Advisory Opinion 24/17 issued by the Inter-American Court of Human Rights, a document considered a milestone in the fight for the rights of same-sex couples.

In a scenario preceding the pronouncement of the Constitutional Court, the Labor Chamber of the Provincial Court of Justice of Azuay denied marriage to a same-sex couple in 2018. The basis of such a decision was based on the premise that advisory opinions lack binding character for Ecuador. This legal scenario raises a relevant question: what is the degree of obligation of an instrument issued by an international human rights body for a member state that has signed and ratified the corresponding treaty?

To address this issue, Ruling No. 11-18-CN clarifies several aspects. First, it defines the scope and nature of an advisory opinion. According to the Court, such opinions function as mechanisms for member states of the Organization of American States (OAS) or its organs to consult on the compatibility of their domestic laws with the relevant international treaties. In this context, advisory opinions fulfill a vital function in the interpretation of norms pertaining to human rights and, therefore, in safeguarding democracies.

However, the mandatory nature of these advisory opinions remains under debate. Here, León's work (2019) offers a useful conceptual framework, distinguishing between "hard law" and "soft law" in the realm of international human rights law. Signed and ratified treaties and agreements constitute "hard law," while subsequent interpretations, such as advisory opinions, form part of the "soft" or evolving law. Both categories configure a spectrum of normativity that, although differentiated in terms of obligatoriness, establishes behavior standards for states.

It is noteworthy that advisory opinions, once issued, are notified to the state parties transparently and democratically, endowing them with intrinsic authority that, although not legally binding in all contexts, cannot be ignored without reasonable justification.

Therefore, Ruling No. 11-18-CN of the Constitutional Court of Ecuador not only reinforces the interpretation of marriage as a human right but also contributes to the academic and jurisprudential debate on the nature, scope, and applicability of advisory opinions in the international human rights system.

Within the context of the international legal system pertaining to human rights, the Advisory Opinion in question holds a distinctive character by explicitly stating the responsibility of state parties to ensure non-discrimination towards same-sex couples in access to the legal structures protecting heterosexual couples. In this framework, the opinion unequivocally affirms that marriage is not only a legal figure but also a manifestation of fundamental human rights, such as freedom and the free development of personality.

Consistent with this perspective, the Constitutional Court of Ecuador has elucidated that marriage acts as a "medium-right" to access a broader spectrum of rights, such as building a family. In turn, the Court emphasizes that creating an alternative legal figure exclusive for same-sex couples, like a *sui generis* marriage, would constitute discrimination itself and therefore, a violation of human rights and the country's constitutional block.

It is crucial to observe that the ruling does not introduce a modification in the legal nature of marriage. Rather, it reaffirms its underlying conceptual structure, maintaining the unaltered requirements of mutual consent, fulfillment of formalities, and exclusivity of

the union. Consequently, the ruling is a conservative element regarding the traditional structure of marriage but revolutionary in terms of its inclusive applicability.

Regarding the essence of the institution of marriage, the advisory opinion abstains from altering its intrinsic nature. What it does is reiterate its character as a human right that must be guaranteed to all individuals, including those identifying with LGBTQ or sex-gender diverse communities. This approach is particularly relevant globally, where sustained efforts have been recorded by these groups for the recognition of equal rights. It is not about creating new or special rights but expanding the scope of existing human rights to combat historical and systemic forms of discrimination.

## Conclusions

The evolution of marriage as a legal construct reflects a notable transition from a rigid, exclusive, and often discriminatory structure to one that is inclusive and grounded in human rights. This metamorphosis is not an isolated phenomenon, but rather a consequence of social, legal, and cultural progress driven by supranational bodies and high-profile litigation. The Constitutional Court of Ecuador, aligned with pronouncements from the Inter-American Court of Human Rights and organizations such as Amnesty International, has significantly contributed to this discourse by recognizing marriage as a human right.

The modern interpretation of marriage, supported by United Nations documents, is no longer limited to a union between people of opposite sexes. This expansive interpretation urges States to review and modify their legal systems to recognize unions between people of the same sex. In the Ecuadorian context, judicial progress has been notable, although legislative harmonization with these jurisprudential advancements remains pending.

It is worth noting that the Republic of Ecuador has significantly advanced in the legal recognition of equal marriage, although it still faces the challenge of updating its normative framework to be in full accordance with emerging international standards. However, the constitutional course is clearly defined, and the constitutional block is prepared to address the reformulation of marriage from an inclusive and human rights-respecting perspective.

Therefore, the legal and social dialogue surrounding marriage has reached a turning point. Existing jurisprudence and international doctrine provide a solid framework for the redefinition and expansion of the concept of marriage, transcending old limitations and paving the way for a more humane and egalitarian approach in future legislation.

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