

STUDIA I ARTYKUŁY

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The Fundamental Right to Family: How the Inter-American Court of Human Rights Shaped Ecuador's Constitutional Right to Same-Sex Marriage

1. Introduction

On 5th August 2013 Pamela Troya and Gabriela Correa, a lesbian couple in Ecuador, requested a certificate of marriage from Ecuador's Civil Registry¹. Their request was flatly denied, and the petition was described as both illegitimate and unconstitutional². The judge that issued the strict denial asserted that marriage was only permitted for heterosexual couples. For six years, these women fought the judge's decision by forming a collective advocacy group and filing a lawsuit against the State for denying them the right to marry³. The women requested the Constitutional Court of Ecuador (the „CCE”) to „reinterpret [A]rticles 11 and 67 of the Constitution [of the Republic of Ecuador], which recognize equal rights for all people without distinction of sex, race or religion, as well as the family in its variety of types³⁴.

1 NPR Latino USA, *After...*

2 NPR Latino USA, *After...*

3 NPR Latino USA, *After...*

4 NPR Latino USA, *After...*

Before the CCE decided on these issues, the Inter-American Court of Human Rights (the „IACHR”) issued an advisory opinion in response to questions from the Republic of Costa Rica regarding the scope and implementation of same-sex partnerships⁵. Due in large part to the holding and reasoning in this advisory opinion, the CCE later reinterpreted the Constitution of Ecuador, and the country became the twenty-seventh in the world to legalize same-sex marriage⁶. Same-sex couples like Troya and Correa would no longer have to settle for civil partnerships, but would instead be granted the same title, rights, and benefits as their married heterosexual counterparts.

This article will analyze the IACHR’s advisory opinion, focusing on three elements this Court used to arrive at its holding: the developed trend for the interpretation of global laws, the relevant provisions of the American Convention on Human Rights, and the positive obligation of member States derived from the interpretation of these Convention provisions. I will then discuss the two opinions from the CCE and the extent to which they were based on the IACHR’s advisory opinion.

2. History

In the global context, a constitutionally recognized right to same-sex marriage remains the minority⁷. Throughout Asia and Africa, there is almost no right to same-sex marriage or to civil unions⁸. Europe is starkly divided, with many countries recognizing same-sex unions in place of marriage and others still finding no rights to government-recognized

5 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 1.

6 Corte Constitucional del Ecuador, *Boletín de Prensa*, 12th June 2019, <https://drive.google.com/file/d/1iimdNTXRXnGgMLzZaqVjIzUfXBGMycr0/view>.

7 L. Garlicki, *Sexual...*, p. 1 – „This has been (and still is) a phased and multi-step process, developing from initial toleration (...) through gradual inclusion into regular patterns of social life (...) to, finally, full legal recognition (in particular, by extension of the institution of marriage to non-heterosexual couples”.

8 L. Garlicki, *Sexual...*, p. 1, 13 – „it seems that most countries of the world are still very far from accepting the European-American approach to the problem” of legal recognition for same-sex marriages.

relationships in any capacity⁹. With respect to the Western Hemisphere, the constitutional right to same-sex marriage has now become recognized by most of the major countries¹⁰. In South America specifically, Ecuador was the fifth country to legalize same-sex marriage, joining sister countries Argentina, Brazil, Uruguay, and Colombia¹¹. Civil unions of same-sex couples are recognized by both Peru and Chile¹². In contrast, all types of same-sex unions have been found constitutionally banned in Paraguay, Venezuela, Bolivia, and Guyana; Suriname, while not deeming them constitutionally banned, does not recognize the marriage or civil unions of same-sex couples¹³. Guyana remains the only South American country in which „homosexual acts” are still illegal¹⁴.

In Ecuador, the development of lesbian, gay, bisexual, transgender, and intersex (LGBTI)¹⁵ rights has almost entirely taken place in the last two decades. Until 1997, same-sex relationships were considered a crime punishable by four to eight years in prison¹⁶. Several years after Ecuador decriminalized these acts, the country outlawed conversion therapy in rehabilitation institutions¹⁷. Ecuador later became „the first country in the Americas, and the third in the world, to include sexual orientation as one of the categories protected against discrimination”, in its 2008 Constitution¹⁸. The protection against discrimination was further expanded with a 2015 change in labor laws making it „illegal for employers

9 See S. Ragone, V. Volpe, *An Emerging...*, p. 451, 474–476, discussing the lack of ‘European consensus’ in regard to gay marriages and civil unions.

10 L. Garlicki, *Sexual...*, p. 13 – „[I]n both Americas the courts as well as politicians seem to be more open to the legal recognition of same-sex couples”.

11 Latin America Reports, *How Progressive...*

12 Latin America Reports, *How Progressive...*

13 Latin America Reports, *How Progressive...*

14 Latin America Reports, *How Progressive...*

15 Both the IACHR and the Constitutional Court of Ecuador use the acronym LGBTI (lesbian, gay, bisexual, transgender and intersex) in place of LGBTQ.

16 NPR Latino USA, *After...*

17 CNN World, *Ecuador’s highest court legalizes same-sex marriage*, 13th June 2019, < <https://www.cnn.com/2019/06/13/americas/ecuador-same-sex-marriage-intl/index.html> >, accessed: 4th March 2020.

18 NPR Latino USA, *After...*

to discriminate against workers on sexual orientation”¹⁹. Then, in 2015, Ecuador began legally recognizing same-sex unions, but the „partners were not granted the same legal rights and benefits as married couples”²⁰. Finally, on 12th June 2019, the Constitutional Court of Ecuador extended the right of marriage to same-sex couples in light of an advisory opinion from the Inter-American Court of Human Rights²¹.

The IACHR is not considered a particularly strong human rights court, but its decisions are intended to be binding on all member-states²². This Court was established and organized after the American Convention on Human Rights (the „Convention”) entered into force on 18th July 1978²³. Twenty-five American nations, including Ecuador, have ratified or adhered to the Convention, which is safeguarded by both the IACHR and the Inter-American Commission on Human Rights²⁴. In 2016, the Republic of Costa Rica presented to the IACHR a request for an advisory opinion regarding the interpretation and scope of Articles 11 (2), 18, and 24 of the Convention²⁵. The Court unanimously held that „[t]he State must recognize and ensure all the rights derived from a family relationship between same-sex couples”. Further, by a six-to-one vote the Court held that „States must ensure full access to all the mechanisms that exist in their domestic laws, including the right to marriage, to ensure the protection of the rights of families formed by same-sex couples, without

19 CNN World, *Ecuador’s highest court legalizes same-sex marriage*, 13th June 2019, < <https://www.cnn.com/2019/06/13/americas/ecuador-same-sex-marriage-intl/index.html> >, accessed: 4th March 2020.

20 Library of Congress, *Ecuador: Constitutional Court Upholds Same-Sex Marriage*, 25th July 2019, < <https://www.loc.gov/law/foreign-news/article/ecuador-constitutional-court-upholds-same-sex-marriage/> >, accessed: 4th March 2020; ILGALAC, *ECUADOR RECONOCE LA UNIÓN DE HECHO HOMOSEXUAL COMO UN ESTADO CIVIL*, 22nd April 2015, < <https://www.ilga-lac.org/2015/04/22/ecuador-reconoce-la-union-de-hecho-homosexual-como-un-estado-civil/> >, accessed: 4th March 2020.

21 Corte Constitucional del Ecuador, *Boletín de Prensa*, 12th June 2019, < <https://drive.google.com/file/d/1iimdNTXRXnGgMLzZaqVjlzUfXBGMYCr0/view> >, accessed: 4th March 2020.

22 T.M. Antkowiak, *The Americas...*, p. 437.

23 Corte Interamericana de Derechos Humanos, *I/A Court History*, < <http://www.corteidh.or.cr/historia-en.cfm> >, accessed: 4th March 2020.

24 Corte Interamericana de Derechos Humanos, *I/A Court History*, < <http://www.corteidh.or.cr/historia-en.cfm> >, accessed: 4th March 2020.

25 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 1.

discrimination”²⁶. Following this decision, the Constitutional Court of Ecuador found this ruling to be binding, and subsequently, Ecuador became the first Latin American country to take direct action in implementing the IACHR’s instructions²⁷.

3. Discussion

3.1. An analysis of the advisory opinion (Oc-24/17) from the Inter-American Court of Human Rights

The IACHR’s recent case-law regarding LGBTI rights and protections „has become a crucial driver of social change”²⁸. Notably, with the decisions in its advisory opinion to Costa Rica, the IACHR became the first „international human rights enforcement body [to] acknowledge a right to same-sex marriage”²⁹. Costa Rica had specifically requested the Court to rule on „the protection provided by Articles 11 (2) and 24 in relation to Article 1 of the American Convention to the recognition of the patrimonial rights derived from a relationship between persons of the same sex”³⁰. Further, Costa Rica asked whether there must be a „legal institution that regulates relationships between persons of the same sex for the State to recognize all the patrimonial rights that derive from that relationship”³¹. The Court did not simply answer the questions

26 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 7, 8. Note that the IACHR, in this decision, issued additional rulings on gender identity and expression that are beyond the scope of this paper.

27 M.K. Lavers, *Ecuador Constitutional Court hears marriage case*, 29th March 2019, < <https://www.washingtonblade.com/2019/03/29/ecuador-constitutional-court-hears-marriage-case/> >, accessed: 4th March 2020. On 8th August 2018, the Supreme Court of Costa Rica ruled that sections of the Family Code prohibiting same-sex marriage were unconstitutional. Corte Suprema de Justicia, *Boletín Judicial: Órgano del Poder Judicial*, 26th November 2018, < https://www.imprentanacional.go.cr/pub-boletin/2018/11/bol_26_11_2018.pdf >, accessed: 4th March 2020. However, the Court simultaneously delayed the direct effect of this ruling until April 2020 in order to allow the legislature to take appropriate action.

28 J. Contesse, *Sexual...*, p. 353, 385.

29 K. Loper, *Human...*, p. 273, 286.

30 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 3.

31 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 3.

related to patrimonial rights, finding that „the protection of the family relationship of a same-sex couple goes beyond mere patrimonial rights issues”³². The 133-page advisory opinion uniquely addressed the particular legal standards for the recognition of same-sex relationships and the „mechanisms that [S]tates should use to recognize and protect such relationships”³³.

In addressing these issues, the Court first discussed its role of interpreting and applying the American Convention „to determine the international responsibility of the State under international law”³⁴. Regarding its methods of interpretation, the Court immediately disposes of a strictly textualist theory. Instead, the Court emphasized the living instrumentality of human rights treaties, „the interpretation of which must evolve with time and with the conditions of contemporary life”³⁵. As will be discussed in detail, this method was used for interpreting each applicable Convention provision.

After establishing this proper method of interpretation, the Court analyzed major obligations of the State under the Convention. The general language under Article 1 (1) of the Convention obliges the State to respect and ensure rights „without any discrimination” and, in combination with Article 24, this obligation extends to „all laws enacted by the State”³⁶. This implies a negative obligation on the States – that they „refrain from taking actions that are directly or indirectly aimed at creating situations of (...) discrimination”³⁷. But in situations where private actors or third parties create or facilitate discrimination (rather than the State

32 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 198.

33 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 198; K. Loper, *Human...*, p. 381.

34 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 26.

35 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 58.

36 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 64, quoting and citing Arts. 1 (1) and 24 American Convention on Human Rights.

37 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 61.

itself), the states are also required to „adopt positive measures to reverse or to change” these situations³⁸. Failure by the State to assume these obligations can only be justified through satisfaction of the proportionality test. This test requires the State to show that the difference in treatment has both a legitimate purpose and a „reasonable relationship of proportionality between the methods used and the ends pursued”³⁹.

Applying these general obligations to same-sex couples, the Court was firm: denial or restriction of recognized rights „on the grounds of sexual orientation, gender identity or gender expression” would directly violate Article 1 (1)⁴⁰. While these characteristics are not specifically listed in Article 1 (1), the Court had previously warranted protection on these grounds through the broad phrasing „any other social condition”, finding that the inclusion of this phrase „leaves the grounds of discrimination open in order to recognize other [analogous] categories”⁴¹. Categories protected by Article 1 (1) relate to „permanent personal traits that an individual cannot dispose of without losing his or her identity [and] groups that are traditionally marginalized, excluded or subordinated”⁴². Sexual orientation was determined to be one of these permanent personal traits, and therefore, sexual orientation was said to be a protected category.

In preventing discrimination on these grounds, as well as guaranteeing protection of fundamental rights, responsibilities of the State involve both positive and negative obligations⁴³. However, whether States have

38 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 65.

39 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 66.

40 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 84.

41 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 67.

42 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 66.

43 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 66, citing *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights. Advisory Opinion OC-2/82 of 24th September 1982, Series A No. 2, para. 29 and Advisory Opinion OC-21/14, para 31.*

any obligations to recognize same-sex relationships turns on whether a constitutional right to these relationships exists at all⁴⁴. Put differently, as it pertains to same-sex marriage or relationships, it is not enough that sexual orientation qualifies as a protected class if there is no recognized right. Without a recognized right to same-sex marriage or relationships, the State is not obligated to protect same-sex couples from different treatment regarding these relationships.

Turning to whether this right is recognized, the Court focused on Article 11 (2), which protects individuals „from arbitrary interference with his or her private life or family” in combination with Article 17 (1), which entitles „families” to protection from society and the State⁴⁵. Described in the Convention only as the „natural and fundamental group unit of society”, the term „family” is given no other specific definition⁴⁶. The Court was able to use the Convention’s loose description to define „family” broadly, choosing not to restrict its meaning by the „traditional notion of a couple and their children”⁴⁷. The Court discusses how common it is for meaningful relationships to exist beyond the traditional scope – many ties bind people together outside of the legal context⁴⁸. It specifically cites its precedent which held that family relationships were not limited to those based on marriage, and as an example, noted „there is no doubt that (...) a single-parent family must be protected in the same way [as] the grandparents who assume the role of parents of a grandchild”⁴⁹. The IACHR then points to factors the European Court of Human Rights (ECHR) has deemed relevant in identifying

44 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 66.

45 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 198, citing Arts. 11 (2) and 17 (1) American Convention on Human Rights.

46 Art. 17 (1) American Convention on Human Rights.

47 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 178.

48 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 178.

49 *Advisory Opinion OC-21/14*, 19th August 2014, para. 272; Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 178–179.

„whether a relationship can be said to amount to ‘family life’”⁵⁰. Some factors include living status, the length of the relationship, and demonstrated commitment to each other, each of which can be analyzed in the context of a same-sex relationship⁵¹.

Continuing to define „family”, the Court next looked to Article 17 (2), which recognizes the „right of men and women of marriageable age to marry and to raise a family”⁵². The Court was clear that this phrasing should not be understood as a prohibition to other types of families, despite that in the adoption of the Convention, „there was no discussion on whether same-sex couples should be considered a form of family”⁵³. Rather, the original intention of the States was „to give the terms used a meaning capable of evolving (...) to make allowance for (...) developments in international law”⁵⁴. In applying „evolutive interpretation” the Court asserted that „a restrictive interpretation of the concept of ‘family’ that excludes the emotional ties between a same-sex couple from the inter-American protection would defeat the object and purpose of the Convention”⁵⁵.

In addition to the recognized right to „family life”, the Court recognized derivative rights that are granted to families – specifically married couples – on account of their marriage status⁵⁶. Traditional married

50 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 180, quoting *Mutatis mutandi*, ECHR, *Case of X, Y and Z v. The United Kingdom*, No. 21830/93, Judgment of 22nd April 1997, para. 36, and *Case of Şerife Yiğit v. Turkey*, No. 3976/05, Judgment of 2nd November 2010, para. 96. See also S. Ragone, V. Volpe, *An Emerging...*, p. 451, 472–473, discussing the shift from a recognition of „private life” for same-sex couples into that of „family life”.

51 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 180.

52 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 182, quoting Art. 17 (2) American Convention on Human Rights.

53 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 182, 186.

54 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 187.

55 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 188–189, 193.

56 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 197.

couples benefit from and enjoy these rights, which include „*inter alia*, taxes, inheritance and property rights, rules on intestate succession, spousal privilege (...), authority to [m]ake medical decisions, survivors' rights and benefits, birth and death certificates, (...) workers' compensation benefits, health insurance, and child custody"⁵⁷. The Court found that failure to ensure these rights and benefits for same-sex couples would amount to discrimination, in violation of the Convention⁵⁸.

With sexual orientation included as a protected category in 1 (1), a broad definition of „family” in 11 (2) and 17 (1), and the evolutive interpretation of 17 (2), the Court determined that „the American Convention protects the family ties that may derive from a relationship between persons of the same sex”⁵⁹. This protection involves a twofold obligation: the negative obligation of the States to *abstain* from acts that would violate the rights and freedoms expressed in the Convention as well as the positive obligation to *guarantee* these rights⁶⁰. To guarantee these rights, States must „ensure that [their] legislation is not discriminatory of non-traditional forms of partnership”⁶¹. Further, under Article 2, States are required to „adapt their domestic law in order to give effect to the[se] rights”⁶².

57 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 197.

58 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 197; see also Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 203, quoting *Cf. United Nations, Human Rights Committee, Young v. Australia*, Communication No 941/2000, 18th September 2003, CCPR/C/78/D/941/2000, para. 10.4, and *X v. Colombia*, CCPR/C/89/D/1361/2005, para. 9 – „a difference in treatment in the granting of pension benefits to a partner of the same sex constitutes a violation of the prohibition of discrimination”.

59 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 199.

60 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 202.

61 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 203, quoting *Cf. United Nations, Human Rights Committee, Concluding observations. Ireland*, 30th July 2008, CCPR/C/IRL/CO/3, para. 8.

62 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 202.

Based on these determinations, the Court then discussed the specific methods the member States must take to ensure their domestic laws protect the family ties that derive from same-sex relationships. As part of this discussion, the Court first provided a short summary of different laws that have been found discriminatory in Europe, Mexico City, and various South American member States⁶³. For example, the ECHR found that „distinctions in permitting an uninsured dependent partner access to health insurance are inadmissible if they are based on the sexual orientation of couples”⁶⁴. In Mexico City, the Supreme Court of Justice declared unconstitutional „any law of any federal entity that considers that the purpose of [marriage] is procreation and/or that defines it as an act between a man and a woman”⁶⁵.

Next, the IACHR disposed of various justifications that legislators within Ecuador and these other countries had used to argue that the distinctions were necessary and proportionate⁶⁶. It asserted that the purpose of marriage could not be procreation, as such a purpose would be demeaning for couples who were „unable or unwilling to procreate” for whatever reasons⁶⁷. It also recognized that opposition could be due to philosophical or religious convictions, but contended that „these convictions [could] not be used as a parameter of conventionality because the Court could not use them as an interpretative guide when determining the rights of human beings”⁶⁸. Instead, „in democratic societies there must exist a peaceful coexistence between the secular and the religious

63 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 204–216.

64 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 205.

65 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 206, quoting Mexico. Supreme Court of Justice, First Chamber, 19th June 2015, 1a./J.43/2015.

66 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 217–223.

67 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 221.

68 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 223.

spheres”⁶⁹. In other words, it is the role of the States and of the IACHR to protect religious freedom while maintaining the other rights guaranteed by the Convention. For these reasons, the IACHR declared that „there is no purpose acceptable under the Convention” for which a distinction between heterosexual and same-sex couples could „be considered necessary or proportionate (...) regarding the way in which they can form a family”⁷⁰. Accordingly, the Court held that the legal „establishment of a differentiated treatment” of this sort „does not pass the strict test of equality”⁷¹.

Lastly, the IACHR discussed the differences between the right to marriage and the right to civil union or partnership. The Court declared it nonsensical to implement an institution that „produces the same effects and gives rise to the same rights as marriage, but that is not called marriage” because the only result would be stigmatization against same-sex couples in these types of unions⁷². Such stigmatization was said to rise to the level of discrimination incompatible with the Convention⁷³. Therefore, the Court effectively determined that the States’ discretion to choose between fully recognizing same-sex marriage and creating „formal unions” was no longer acceptable⁷⁴.

However, the Court seemed to backtrack on this broad holding by including an exception for States with „rigorous procedures for legislative reform, which may demand a process that is politically complex and requires time”⁷⁵. For such States, the Court recognized a transitional

69 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 223.

70 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 220.

71 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 220.

72 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 224.

73 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 224.

74 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 224.

75 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 226.

situation – simply put, these States would not be required to immediately adopt this progressive opinion, but to „promote, in good faith, the legislative, administrative and judicial reforms required to adapt their domestic laws, and internal interpretations and practice” over time⁷⁶. Regardless, the Court held that, even during the transitional period, all member States must ensure same-sex couples all the rights derived from marriage; to do otherwise would violate the Convention⁷⁷.

In this landmark opinion, the Inter-American Court of Human Rights recognized that „the principle of human dignity derives from the complete autonomy of the individual to choose with whom he or she wishes to enter into a permanent and marital relationship”⁷⁸. The freedom of this choice „is intrinsic to the most intimate and relevant aspects of (...) identity and life”⁷⁹. Accordingly, the Court unanimously held that the member States were obligated to „recognize and ensure all the rights derived from a family relationship between same-sex couples” in an equal manner to that of heterosexual couples⁸⁰.

76 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 226.

77 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 227; see also Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 228 – „States must ensure access to all the legal institutions that exist in their domestic laws to guarantee the protection of all the rights of families composed of same-sex couples, without discrimination in relation to families constituted by heterosexual couples. To this end, States may need to amend existing institutions by taking administrative, judicial or legislative measures in order to extend such mechanisms to same-sex couples. States that encounter institutional difficulties to adapt the existing provisions, on a transitional basis, and while promoting such reforms in good faith, still have the obligation to ensure to same-sex couples, equality and parity of rights with respect to heterosexual couples without any discrimination”.

78 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 225.

79 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 225.

80 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, para. 7.

3.2. An analysis of the decisions from the Constitutional Court of Ecuador: Case No. 10–18-CN Marriage Between Persons of the Same-Sex & Case No. 11–18-CN Marriage Equality⁸¹

Both decisions issued by the CCE discuss the key elements regarding same-sex marriage that were addressed by the IACHR in Oc-24/17, but the CCE goes into greater depth on most points. Case 11–18 focuses on Article 67 of the Constitution of the Republic of Ecuador, whereas Case 10–18 focuses on Article 81 of Ecuador’s Civil Code (the „CC”) and Article 52 of the Organic Law on Identity and Civil Data Management (the „LOGIDC”); however, both cases touch on each of these provisions at various points in the opinion⁸².

In Case 11–18, the Court begins its opinion by first addressing the current situation that people with sexually diverse identities face in society⁸³. It cites data on the vast amount of young people that identify as sexually diverse and the discrimination encountered by many of them, with 61,14% experiencing some form of violence⁸⁴. The Court uses this data to make the point that „people with sexually diverse identities exist in Ecuador and suffer multiple [types of] discrimination every day, in all places, public and private”⁸⁵. This information sets a tone very similar to that in the IACHR’s opinion and suggests that the Court was not merely addressing a legal issue detached from reality. Rather, the Court was providing answers that would greatly affect the rights of many citizens.

The Court then set out the rules of law governing Ecuador at the time. The Constitution, under Article 67, established marriage as „a union between man and woman”.⁸⁶ Article 81 of the CC defined marriage as „a solemn contract by which a man and a woman unite to live together always,

81 These two cases were decided on the same day and are only available in their original Spanish versions. All translations to English have been made with my best personal efforts.

82 Corte Constitucional del Ecuador, Sentencia No. 11–18-CN/19, 12th June 2019, para. 12; Corte Constitucional del Ecuador, Sentencia No. 10–18-CN/19, 12th June 2019, para. 9.

83 Corte Constitucional del Ecuador, Sentencia No. 11–18-CN/19, 12th June 2019, para. 13.

84 Corte Constitucional del Ecuador, Sentencia No. 11–18-CN/19, 12th June 2019, para. 13.

85 Corte Constitucional del Ecuador, Sentencia No. 11–18-CN/19, 12th June 2019, para. 14.

86 Corte Constitucional del Ecuador, Sentencia No. 11–18-CN/19, 12th June 2019, para. 20.

to procreate, and to mutually support each other”⁸⁷. Further, Article 52 of the LOGIDC defined marriage as „a union celebrated between a man and a woman”, and it additionally prescribed the specific conditions necessary for a pair to have the legal power to enter into marriage⁸⁸. If a couple failed to meet the prerequisite of being one man and one woman, the Civil Registry would be unable to issue them a marriage certificate⁸⁹. Under these rules of law, same-sex couples could not satisfy the prerequisite, and thus lacked the power to contract to marriage⁹⁰.

Based on these provisions and the opinion issued by the IACHR, the CCE sought to answer three questions: (1) whether the opinion of the IACHR, an international instrument of human rights, as recognized by the Constitution, was directly or indirectly applicable in Ecuador; (2) whether the content of Oc-24/17, which recognized the right to same-sex marriage, contradicted Article 67 of the Constitution⁹¹; and (3) if the opinion was applicable in the Ecuadorian legal system, what the legal effects would be in relation to public functions and the operators of justice⁹².

3.2.1. Whether the opinion of the IACHR, an international instrument of human rights, as recognized by the Constitution, was directly or indirectly applicable in Ecuador

Answering this first question, the CCE found that Oc-24/17 was directly applicable in Ecuador for a variety of reasons. First, under Article 417 of the Constitution, international instruments of human rights are directly applicable to the laws of Ecuador⁹³. Second, Article 426 asserts that Ecuador must immediately comply with and apply the rights

87 Corte Constitucional del Ecuador, Sentencia No. 10-18-CN/19, 12th June 2019, para. 9.

88 Corte Constitucional del Ecuador, Sentencia No. 10-18-CN/19, 12th June 2019, para. 9.

89 Corte Constitucional del Ecuador, Sentencia No. 10-18-CN/19, 12th June 2019, para. 10.

90 Corte Constitucional del Ecuador, Sentencia No. 10-18-CN/19, 12th June 2019, para. 10.

91 Case 10-18 Court dedicated its opinion to determining the constitutionality of Articles 81 and 52 of the CC and LOGIDC, respectively, in light of the IACHR’s advisory opinion. Corte Constitucional del Ecuador, Sentencia No. 10-18-CN/19, 12th June 2019, para. 11.

92 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 21.

93 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 26.

enumerated in such instruments because each of those rights „forms part of the Ecuadorian legal system”⁹⁴. Further, the Court specified that the IACHR maintained jurisdiction over member States and that its case decisions, including advisory opinions, are binding precedent⁹⁵. As a member State under the authority of the IACHR, Ecuador had the international obligation to comply, „in good faith, without the ability to ‘invoke the provisions of its internal law as justification of the in-compliance with the treaty’”⁹⁶.

3.2.2. Whether the content of Oc-24/17, which recognized the right to same-sex marriage, contradicted Article 67 of the Constitution, in that it sets out marriage as a „union between man and woman”

Before the Court specifically began addressing this second consideration, it recognized the „unique social importance” of marriage in Ecuadorian culture, using language comparable to that invoked by the IACHR in its description of family⁹⁷. The Convention had left the definition of family open to a broad application by the IACHR, and similarly, Article 67 of the Ecuadorian Constitution established a broad scope of this term, giving Ecuador the instruction to recognize „families in their diverse types”⁹⁸. The CCE also noted that the language in Article 17 (2) of the Convention was almost identical to that used in both Article 67 of the Constitution and Article 53 of the LOGIDC; each of these provisions specifically recognizes the right of men and women to contract to marriage⁹⁹. The Court pointed out the IACHR’s method of interpretation regarding Article 17 (2), but instead of simply adopting this method, the CCE conducted its own analysis into possible methods of interpretation to resolve the meaning of Article 67¹⁰⁰.

94 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 27, 30.

95 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 31-34.

96 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 38, quoting Convención de Viena sobre el derecho de los tratados (1969), Artículos 26 y 27.

97 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 40.

98 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 43.

99 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 43-45.

100 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 49.

The scope of Article 67 „deals with two related, but different institutions: family and marriage”¹⁰¹. Recognizing „families in their diverse types” the Court, like the IACHR¹⁰², listed possible constructions of families, and pointed out specific provisions of the Constitution that provide protections to families, such as reunification¹⁰³, special assistance to single mothers¹⁰⁴, and care for families with physically or mentally disabled members¹⁰⁵. Because the Constitution protects all types of families, „same-sex couples are protected by the Constitution”¹⁰⁶. This right is described as an „end right” that „all people can aspire to without any discrimination”¹⁰⁷. On the other hand, marriage is described as a „means” to a right – „a constitutional right that permits the exercise of the right to a family”¹⁰⁸.

Looking next to the interpretation of marriage as a means to a right, the CCE considered the literal and isolated (i.e. restrictive) interpretation as well as the comprehensive and favorable-to-rights (i.e. pro-rights) interpretation¹⁰⁹. Under the restrictive interpretation, the right of marriage would strictly and solely belong to heterosexual couples, but this reading would present a problem to same-sex couples as it could „bear violations to [other] recognized rights”¹¹⁰. Article 427 of the Constitution establishes that, „in case of doubt” the law should be interpreted in a sense most favorable to granting rights¹¹¹. Because the Court had expressed doubt regarding the restrictive interpretation, it was obligated

101 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 50-51.

102 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 178-179.

103 Art. 40.4 Constitution of the Republic of Ecuador.

104 Art. 69.4 Constitution of the Republic of Ecuador.

105 Art. 47.9 Constitution of the Republic of Ecuador; Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 51-52.

106 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 54.

107 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 55.

108 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 58.

109 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 61.

110 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 67.

111 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 68.

to read Article 67 with a pro-rights interpretation¹¹². Noting its international responsibility to protect human rights, the CCE went so far as to say that the restrictive interpretation of Article 67 would be contrary to the Constitution¹¹³.

The Court then discussed the fundamental obligations of the State to „guarantee without discrimination (...) the rights established in the Constitution and in international instruments”¹¹⁴. Under Article 11 (2), sexual orientation is specifically listed as a protected characteristic, whereas, in the Convention, sexual orientation is protected only by close analogy to the enumerated characteristics¹¹⁵. For this reason, the State has the special obligation to eradicate all inequality or discrimination based on sexual orientation, unless the different treatment could satisfy the proportionality test, which requires „a valid constitutional end, suitability, necessity, and proper proportionality”¹¹⁶.

To declare a valid constitutional end, the State is given a margin of appreciation regarding extralegal, legal, and constitutional considerations¹¹⁷. The CCE discussed possible extralegal ends used to „justify the exclusion of same-sex couples from marriage”, such as the abnormality of homosexuality or personal religious convictions¹¹⁸. The Court quickly disposed of any „abnormality” arguments, deeming them unacceptable due to modern scientific understanding and the constitutional right to personal dignity¹¹⁹. As for religious convictions, the CCE went into great depth. It discussed the Article 66 (8) protection of beliefs and religion, and even cited large provisions from the Catholic Cate-

112 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 68.

113 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 73-75.

114 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 78, quoting Art. 3 (1) Constitution of the Republic of Ecuador.

115 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 80; see Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 67.

116 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 81, 88.

117 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 89.

118 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 90.

119 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 91; Corte Constitucional del Ecuador, Sentencia No. 10-18-CN/19, 12th June 2019, para. 38-39.

chism¹²⁰. Nonetheless, the Court declared two clear mandates regarding these convictions. First, such beliefs could not affect the rights of others or be forcefully imposed on anyone; second, in a democratic society, the State could not recognize „only one form of religious or moral understanding on the whole population”¹²¹. Thus, the extralegal ends could not be considered constitutionally valid¹²².

The possible legal ends are derived from Article 81 of the CC, which establishes marriage as a heterosexual union in which the couple shall live together, procreate, and mutually assist one another¹²³. The Court immediately disposed of „procreation” as a purpose of marriage for the same reasons as the IACHR – this reasoning would extend to any marriage in which the couple is unable or unwilling to have children¹²⁴. The Court found that this result would be absurd¹²⁵. Regarding the other purposes of marriage, living together and assisting one another, the Court asserted that same-sex couples could carry out these purposes in the same manner as heterosexual couples. Therefore, the Court held that the purposes of marriage expressed in Article 81 were not exclusive of same-sex couples¹²⁶.

Lastly, the Court discussed the constitutional end expressed in Article 67, which declares marriage as a union between a man and a woman¹²⁷. Under Article 11 (4), „no legal rule can restrict the content of rights nor constitutional guarantees”¹²⁸, and a legal rule restricting marriage to heterosexual couples would in fact restrict the rights of same-sex couples¹²⁹. Additionally, the Court noted that nowhere in the Con-

120 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 93;

Corte Constitucional del Ecuador, Sentencia No. 10–18–CN/19, 12th June 2019, para. 40.

121 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 94.

122 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 95.

123 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 96.

124 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 98.

125 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 98.

126 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 97.

127 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 101.

128 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 103, quoting Art. 11 (4) Constitution of the Republic of Ecuador.

129 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 105.

stitution was there an explicit exclusion of the right of same-sex couples to marry¹³⁰. Thus, the Court asserted that the only valid constitutional end to be met was the guarantee of equality and prohibition of discrimination¹³¹. With no valid extralegal, legal, or constitutional end met by restricting marriage only to heterosexual couples, the Court found that the first prong of the proportionality test could not be satisfied. Accordingly, restricting marriage to heterosexual couples would be unconstitutional¹³².

Addressing suitability, necessity, and proper proportionality, the Court determined that the proportionality test failed on each element. Suitability requires that „the restriction of a right (...) be a mean that contributes to the reach of a constitutional end”¹³³. Here, the end was to form a family, and the mean was to recognize heterosexual marriage while restricting same-sex marriage¹³⁴. The Court found that restricting same-sex marriage was not a suitable means to protect the rights of forming a family¹³⁵. Regarding necessity, the means must be the least burdensome possible to reaching a constitutionally valid end¹³⁶. The Court provided an example on this point: if a State needed to eradicate a contagious disease, one means of reaching this end could be to kill anyone carrying the disease¹³⁷. While such a means might lead to eradicating the disease, it would be unnecessary and burdensome¹³⁸. Instead, the State could isolate the infected people or work towards a cure¹³⁹. Applying this analogy, the Court contended that the means of restricting same-sex marriage were unnecessarily burdensome; to the contrary, **extending** the right of marriage to same-sex

130 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 106.

131 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 107-108.

132 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 109.

133 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 110.

134 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 111.

135 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 111.

136 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 112.

137 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 112.

138 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 112.

139 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 112.

couples could actually be considered a necessary means to reaching the ends of forming and protecting families¹⁴⁰. With respect to proper proportionality, the Court considered whether there was a cause-and-effect relationship between restricting same-sex marriages and affecting heterosexual couples' access to marriage¹⁴¹. It determined that the restriction against same-sex marriage did not and could not in any way „influence, limit, or restrict the right of heterosexual couples to contract to marriage”¹⁴².

In comparison to the IACHR's brief discussion of the proportionality test in Oc-24/17, the CCE analyzed each element of the test in great detail and ultimately came to the same conclusion as the IACHR – that there is no acceptable purpose for which a distinction between heterosexual and same-sex couples could be considered necessary or proportionate¹⁴³.

After asserting that there is no *prohibition* of same-sex marriage within the Constitution, the Court examined whether there was a *recognition* of the right to same-sex marriage. The right to same-sex marriage is considered an „unenumerated right” and could be incorporated into the Constitution in two ways: through reference to international instruments or derivatively from other express rights¹⁴⁴. In this case, the Court incorporated the right to same-sex marriage through both¹⁴⁵. Under Article 417, „the State must observe the normative jurisprudential and doctrinal development of the mechanisms of international protection of human rights” that are established in authoritative international instruments¹⁴⁶. Recognizing the IACHR's Oc-24/17 opinion, the Court

140 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 113–114.

141 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 122–123.

142 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 122–123.

143 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 81, 88, 125.

144 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 140.

145 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 141–150.

146 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 141.

declared the holdings therein to be incorporated into the Ecuadorian Constitution¹⁴⁷.

Further, the Court found that the right to same-sex marriage was a derivative of certain „open clauses” within both the Constitution and the Convention¹⁴⁸. Open clauses „permit the evolution of rights and the adaptation of the legal system” to protect newly realized rights¹⁴⁹. Article 417 specifically grants the CCE the power to derive rights from open clauses, and Article 98 provides a right for the People to demand new rights¹⁵⁰. Further, Article 29 the Convention allows for new rights to be interpreted from open clauses when they are rights inherent to humanity¹⁵¹. These provisions were used in combination with Article 11 (7) of the Constitution – an open clause which guarantees that recognition of rights „shall not exclude the other rights stemming from the dignity of persons (...) that might be needed for their full development”¹⁵². The right to same-sex marriage was said to stem from the right to personal dignity as described in this Article¹⁵³. Through reference to the IACHR and the derivative recognition from other express rights, the Court held that the right to same-sex marriage was incorporated into the constitutional text¹⁵⁴.

The CCE then analyzed the proper „living interpretation” of human rights treaties in an almost identical manner to the IACHR’s analysis in *Oc-24/17*¹⁵⁵. Specifically, however, the CCE went into great detail as to how the Ecuadorian Constitution had changed and developed over time, providing examples, such as the reconstruction of the provision

147 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 141.

148 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 142.

149 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 144.

150 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 142.

151 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 143.

152 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 142.

153 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 149.

154 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 149-150.

155 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 151; Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 58.

that used to define children as legitimate only if they were conceived through marriage¹⁵⁶. It discussed changes to the CC, which used to prescribe the husband as the head of the home, and the wife as his submissive inferior¹⁵⁷. Then the Court explained „the evolution around the conception of marriage”, tracing the changes to new understandings of people and relationships throughout time and specifically referencing the 26 other countries in the world that recognize the right to same-sex marriage¹⁵⁸. Declaring that same-sex couples’ right to marriage „invokes rights such as dignity, equality, identity, and liberty”, the Court found it necessary to use the living interpretation of the Constitution to afford these rights to same-sex couples who wished to marry¹⁵⁹.

The Court then discussed, in detail, particular rights involved with the recognition of same-sex marriage and the State’s role in protecting these rights. The rights include free development of personality, personal and familial intimacy, identity and its manifestations, and the freedom to contract¹⁶⁰. The margin of action that people and families are given in employing these rights is wide¹⁶¹. „People and families can choose forms of survival, the place of domicile, education for their children, choice of job”, and others¹⁶². The State has an „obligation of abstention” or, a negative obligation, not to intervene with these express constitutional rights and the ways in which people decide to apply them in their lives¹⁶³. Likewise, „the decision to form a family corresponds” to these types of liberties, and, as a means to the valid end of forming a family, the ability to marry „should be a free and voluntary decision of the people and not the State”¹⁶⁴.

156 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 154.

157 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 157.

158 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 159–163.

159 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 165.

160 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 166–198.

161 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 179–180.

162 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 179.

163 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 175–176, 181.

164 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 183.

The Court then reached a question addressed by the IACHR in Oc-24/17 – whether or not same-sex civil unions were a sufficient substitute for marriage¹⁶⁵. Same-sex civil unions had been legalized in Ecuador since 2015, but for the same reasons stated by the IACHR, the Court held that civil unions could not be a complete substitute for same-sex marriage¹⁶⁶. It asserted that the difference gave rise to stigmatization and signaled the idea that same-sex couples were „substandard” to their heterosexual counterparts¹⁶⁷. The CCE „follow[ed] the disposition of the IACHR” and decided to maintain civil unions as one option for both heterosexual and same-sex couples, but allow marriage for both types of couples as well¹⁶⁸.

For all these reasons, the CCE held that Article 67, which defines marriage as a union between man and woman, was complementary to the IACHR’s regulation and interpretation of the Convention in Oc-24/17¹⁶⁹. Thus, the CCE, like the IACHR, recognized the extension of the right of marriage to same-sex partners¹⁷⁰.

3.2.3. If the opinion is applicable in the Ecuadorian legal system, what are the legal effects in relation to public functions and the operators of justice?

Because the CCE found that Oc-24/17 was indeed applicable in the Ecuadorian legal system, the Court reached this final question. Under Article 84 of the Constitution, the State is required to reform the Constitution, laws, and other legal regulations to adapt its system to the protection

165 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 199.

166 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 207; Library of Congress, *Ecuador: Constitutional Court Upholds Same-Sex Marriage*, 25th July 2019, <<https://www.loc.gov/law/foreign-news/article/ecuador-constitutional-court-upholds-same-sex-marriage/>>, accessed 6th March 2020.

167 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 205, quoting Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 224.

168 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 206, 210.

169 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 211.

170 Corte Constitucional del Ecuador, Sentencia No. 11–18–CN/19, 12th June 2019, para. 211.

of human rights¹⁷¹. Further, under its international obligations, the Court must eliminate all rules contrary to the Convention and interpret the regulations of a right in a manner that conforms to the international standards of human rights. Although the Court most likely had the option to wait for legislative regulation on the matter, it was not required to defer to the legislation, especially because the recognition of same-sex marriage deals with equality, discrimination, and the protection of human rights¹⁷².

The Court found that it had the power to act without the legislature based on Article 2 of the Convention, which allows for legislative methods, or methods „of another character” to be used in adapting a system to the protection of rights¹⁷³. These other methods could consist of executive functions or jurisdictional actions taken by competent judges¹⁷⁴. Further, the Court asserted its obligation to „directly and immediately” apply rights derived from the text of the Constitution, human rights instruments, and other administrative authorities¹⁷⁵. The Court specifically asserted that it is not about whether the adaptation takes place by „mere regulatory change or through a legislative procedure”¹⁷⁶. The point is to „make the rights effective, hence the need to adapt in the most efficient and timely manner”¹⁷⁷. If Ecuador failed to observe and apply the rights set forth in Oc-24/17, it would amount to a violation of its international promises¹⁷⁸.

171 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 212-213.

172 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 228; the CCE „most likely” had the option to wait on the legislature according to the decision of the IACHR which allowed for a transition period where the member States could reform their laws and regulations in accordance with Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 226.

173 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 229.

174 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 229.

175 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 254, citing Constitutional Court of Ecuador, *Sentencia No. 098-17-SEP-CC*.

176 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 259.

177 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 259.

178 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 291-293.

To make the rights effective, the Court found it important to provide access to the institution of marriage through the Civil Registry¹⁷⁹. Thus, the Court declared that the Civil Registry has „the obligation to apply the Convention and the interpretation derived from Oc-24/17”¹⁸⁰. In its final instructions, the CCE ordered „the Civil Registry to register the marriage” of the same-sex couples who had brought the case before the Court¹⁸¹.

4. Conclusion

In these decisions, the Inter-American Court of Human Rights and the Constitutional Court of Ecuador both recognized „the crucial importance of the family as a social institution, which emerges from the most basic needs and desires of the human being”¹⁸². A systematic analysis of the American Convention and the Constitution of the Republic of Ecuador led both Courts to a „two-level” conclusion. On the one hand, the Courts found that the heterosexual description of marriage, adopted in Article 17 (2) of the Inter-American Convention as well as in Article 67 of the Constitution of Ecuador, must not be read as a prohibition of a legislative enhancement of marriage to same-sex couples¹⁸³. On the other hand, however, both Courts went much further in constitutional entrenchment of same-sex marriage. They ruled that the legal recognition of same-sex marriage is not only permitted, but also required by numerous established constitutional human rights as a means that allows for the formation and protection of a family, which „seeks to re-

179 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 255.

180 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 255.

181 Corte Constitucional del Ecuador, Sentencia No. 11-18-CN/19, 12th June 2019, para. 300 (3).

182 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 176.

183 As it was noted above, the same position had been adopted by the European Court of Human Rights already in 2010 (judgment of 24th June 2010, *Schalk and Kopf v. Austria*, para. 61-63, confirmed in several subsequent decisions) as well as by several constitutional courts in Western Europe, notably, in the judgment of the Spanish Constitutional Court no. 198/2012 of 6th November 2012 (see < <http://www.tribunalconstitucional.es/ResolucionesTraducidas/198-2012%20of%20November%206.pdf> >, accessed 6th March 2020) which, due to the obvious reasons could have been particularly attractive on the other side of the Ocean.

alize aspirations of safety, connection, and refuge that express the best inclinations of humankind”¹⁸⁴. In other words, both Courts recognized that the „right to same-sex marriage” enjoys a constitutional and supra-legislative rank¹⁸⁵.

Pamela Troya and Gabriela Correa were finally issued a certificate of marriage from the Civil Registry on 5th August 2019¹⁸⁶. The couple was filmed waving an LGBTI flag in the streets of Quito with other activists and supporters after the CCE’s decision was announced¹⁸⁷.

Summary

Though a constitutionally recognized right to same-sex marriage remains the global minority view, in June 2019, Ecuador became the 27th country in the world to recognize this right. Following a binding advisory opinion issued by the Inter-American Court of Human Rights (IACHR), the Constitutional Court of Ecuador (CCE) reinterpreted the Constitution of Ecuador to ensure that same-sex couples be granted the same title, rights, and benefits as their married heterosexual counterparts. The IACHR’s advisory opinion focused on three elements: the developed trend for the interpretation of global laws, the relevant provisions of the American Convention on Human Rights, and the positive obligation of member States derived from the interpretation of these Convention provisions. This article will analyze these elements and discuss the extent to which the CCE relied on the IACHR’s interpretations to arrive at its holding.

Keywords: Same-sex, marriage, constitutional, right, Ecuador, family

184 Inter-American Court of Human Rights, *Advisory Opinion Oc-24/17 on Gender Identity, and Equality and Non-Discrimination Of Same-Sex Couples*, 24th November 2017, para. 176.

185 As it is well known, the same position was adopted by the Supreme Court of the United States in *United States v. Windsor* (570 US 744 (2013)) and finally elaborated in *Obergefell v. Hodges* (576 US ___ (2015)). In Europe, however, the European Court of Human Rights is not yet ready to such move (see *Oliari*, para. 189–194) and it was only the Constitutional Court of Austria which clearly confirmed that same-sex couples do have a constitutional „right to marriage” and not only a right to some form of legal regularization (see judgment of 4th December 2017, G 258–259/2017–9).

186 NPR Latino USA, *After...*

187 NPR Latino USA, *After...*

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