

ADOPTION AND ACCESS TO ORIGINS **What can Ecuador Learn from the Spanish and Argentinian Experiences?**

ADOPCIÓN Y ACCESO A LOS ORÍGENES **¿Qué puede aprender Ecuador de las experiencias de España y Argentina?**

ADOÇÃO E ACESSO ÀS ORIGENS **O que o Equador pode aprender com as experiências da Espanha e da Argentina?**

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Abstract

Ecuadorian legislation regulates the right of adopted persons to access information about their origins in the Organic Code of Children and Adolescents. However, this regulation does not fully develop the content of the right, as other legal systems do. This article explores the Argentinian and Spanish regulations through the analysis-synthesis method, to obtain inputs that may serve as a basis for a proposal for Ecuador. The results of this exploration lead us to highlight that Ecuador's provision fails to observe parental duties and responsibilities, while reinforcing an unequal relationship between adults and children, as it creates a disproportionate protection in favor of biological parents at the expense of the adoptee's identity. The article concludes by questioning: if the legal systems that have thoroughly developed the content of the right to access one's origins still present certain problems and contradictions, to what extent is this right protected in the Ecuadorian legal system?

Keywords: Identity, Children's rights, Family, Parentage, Parental responsibility, State obligations

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Resumen

La normativa ecuatoriana regula el derecho al acceso a los orígenes de las personas adoptadas en el Código Orgánico de la Niñez y Adolescencia. Sin embargo, esta norma no desarrolla el contenido del derecho como lo hacen otras legislaciones. A través del método análisis-síntesis, este artículo explora la regulación argentina y la española con el fin de obtener insumos como base de una propuesta para Ecuador. Los resultados de esta exploración nos conducen a destacar que la norma ecuatoriana inobserva los deberes y responsabilidades parentales, a la vez que fortalece una relación desigual entre adultos y niños, pues genera una protección desproporcionada en favor de los padres biológicos, sacrificando la identidad del adoptado. Por último, se concluye y cuestiona: si en los ordenamientos jurídicos que han desarrollado el contenido del derecho al acceso a los orígenes del adoptado todavía presentan ciertos problemas y contradicciones, ¿en qué medida estaría tutelado este derecho en el ordenamiento jurídico ecuatoriano?

Palabras clave: Identidad, Derechos del niño, Familia, Filiación, Responsabilidad parental, Deberes estatales

Resumo

A legislação equatoriana regulamenta o direito de pessoas adotadas de acessarem suas origens no Código Orgânico da Criança e do Adolescente. Contudo, essa legislação não desenvolve o conteúdo desse direito tão plenamente quanto outros sistemas jurídicos. Por meio de um método de análise-síntese, este artigo explora as legislações argentina e espanhola para obter subsídios para uma proposta de solução para o Equador. Os resultados dessa exploração nos levam a destacar que a legislação equatoriana desconsidera os deveres e responsabilidades parentais, ao mesmo tempo que reforça uma relação desigual entre adultos e crianças. Isso ocorre porque gera proteção desproporcional aos pais biológicos, sacrificando a identidade da pessoa adotada. Por fim, o artigo conclui e questiona o seguinte: se os sistemas jurídicos que desenvolveram o conteúdo do direito de pessoas adotadas de acessarem suas origens ainda apresentam certos problemas e contradições, em que medida esse direito é protegido no sistema jurídico equatoriano?

Palavras-chave: Identidade, Direitos da criança, Família, Filição, Responsabilidade parental, Deveres do Estado

INTRODUCTION AND METHODOLOGY¹

In Ecuadorian legislation, the adoptee's right to identity appears as a principle of adoption: adopted persons have the right to know their status as such, their origin, their personal history, and their consanguineous family, except where there exists express prohibition by the latter (CONA, art. 153.6). This rule raises two problems: (i) it does not make clear how this right should be exercised, and (ii) has permitted the consanguineous family to prohibit the adopted child from knowing them. Despite the article is oriented toward protecting this right, Ecuadorian law has not disaggregated the right to know one's origins as it has occurred in other jurisdictions. Neither the state duties nor the actions to which the adoptee who wishes to access their origins is entitled have been delimited, nor have the content of the right and the information necessary to guarantee it been established. This renders it more akin to a statement of intent rather than a legal obligation *per se*.

This article results from theoretical research developed through doctrinal sources and legal literature. The purpose is to construct, based on logical reasoning, the core of a proposed regulation of the adoptee's right to access their origins in Ecuador (Villabella Armengol 2012, 926). The method employed is analysis-synthesis: we decompose the right under study, as contained in two foreign legislations, to subsequently "recompose it through the integration of its elements and highlight the system of relationships existing between the parts and the whole"² (Villabella Armengol 2012, 937). The two foreign legal systems selected are those of Argentina and Spain. The former was chosen because, due to its political context, Argentine law has been a pioneer in the development of the right to identity. The latter was chosen because, as we will see later, the Spanish legal system contains advanced and cutting-edge legislation on the right to access one's origins. This does not mean, in any way, that this right has not been developed in other legal systems. However, the author of these remarks has had the opportunity to research both legal systems in each country personally. This has enriched the research and the proposal for the Ecuadorian legal system.

THE RIGHT TO KNOW ONE'S ORIGINS

In this section, we examine the two selected jurisdictions in which this right, also referred to as the right to avoid origin deprivation (Diver 2015, 77), has been developed more extensively than in Ecuador: Spain and Argentina.

Spain

In Spain, the right to know one's origins was introduced in 2007 and reinforced in 2015. The judicial decree of adoption is registered in the Civil Registry in the margin of the child's birth registration. Given that this could affect family privacy, a new registration is permitted in which only the birth data and information concerning the person born, the personal circumstances of the adoptive parents, and the pertinent reference to their marriage appear, along with reference to the registry data of the previous registration (book, folio, page), which

1 This paper is part of the dissertation that the author is completing within the Doctorate in Law at Universidad Austral (Buenos Aires, Argentina).

2 This translation and all subsequent translations from Spanish into English are the author's own.

is formally canceled. Any person may access the new registry, “whereas access to the prior cancelled entry is restricted to the adoptee” (Mayor del Hoyo 2019, 357).

This means that, before 2007, the law allowed the adoptee to approach the Civil Registry searching for information about their origins; however, it could occur that the person would not find information regarding the identity of their biological parents for various reasons.³ It was common for the administration to deny access to the information, such that it was the judges, on a case-by-case basis, who ordered the administration to provide the data (Barber Cárcamo 2017, 751). Spanish case law had to rule on several occasions in favor of the right to access adoption files for persons to whom the administration had denied it.⁴ Gómez Bengoechea notes that several arguments were employed in judicial decisions; we highlight the following: (i) data being claimed cannot be considered solely as components of the parents’ personality rights, but rather as common to the relationship between parents and children. Therefore, they form part of the children’s personality rights. Thus, access would be denied not to a third party, but to the rightful holder themselves; (ii) if the identification and filiation of the adoptee’s origin form part of the privacy, the active subject of confidentiality is the adoptee themselves, such that this sphere could not exclude them (Gómez Bengoechea 2007, 147).

In Law 54/2007 (on international adoptions), the Spanish legislature opted to recognize the right of adopted persons to know data concerning their origins held by Spanish public entities. This right, as Mayor del Hoyo explains, must be made effective with assistance from the public entity, which, in turn, is obligated to preserve the information; while collaborating entities are obligated to provide the data at their disposal. Although this law included the same provision in the Civil Code (so that it would also apply to domestic adoptions), the state obligations set forth in Article 12 of the International Adoption Law were not incorporated. This omission resulted in the exercise of the right culminating unsuccessfully. For this reason, through Law 26/2015, Article 180 of the Civil Code was amended to include the right of adopted people to access their origins under the same terms as Law 54/2007 (Mayor del Hoyo 2019, 360).⁵ Thus, paragraphs 5 and 6 provide:

Public Entities shall ensure the preservation of information at their disposal relating to the minor’s origins, in particular information regarding the identity of their progenitors, as well as the medical history of the minor and their family, and it shall be preserved for at least fifty years following the time when the adoption has become final. The preservation shall be carried out for the sole purpose of enabling the adopted person to exercise the right referred to in the following paragraph.

Adopted people, upon reaching the age of majority or during their minority through their legal representatives, shall have the right to know data concerning their biological origins. Public Entities, following

3 The Supreme Court judgment of September 21, 1999, repealed Article 47.1 of the Civil Registry Act, which permitted the mother to disclaim her maternity (anonymous childbirth).

4 E.g., STSJ of the Basque Country, No. 615/2003, of October 31 (JUR 2004(42405); STSJ of the Basque Country, No. 68/2002, of January 21 (JUR 2002/218074); STSJ of the Basque Country, No. 82/2000, of February 2 (JUR 2001/297843); STSJ of the Basque Country, No. 407/2000, of July 14, 2000 (RJCA 2000, 2669); AAP of Barcelona, of February 22, 1996 (AC 1996/232).

5 In Catalonia, the adoptee may, additionally, request the biogenetic data of their progenitors in the interest of their health.

notification to the affected persons, shall provide through their specialized services the counseling and assistance required to make this right effective. For these purposes, any private or public entity shall be obligated to provide to the Public Entities and the Public Prosecutor's Office, when requested, with the necessary reports and records concerning the minor and their family of origin.

The first point to emphasize is the quality of information. The article states that adopted people have the right to know data concerning their biological origins. Although one might think this does not include knowing the identity of the progenitors, Mayor del Hoyo affirms that "there is no doubt" that the adoptee has the right to access the identity of the biological parents. This assertion is grounded in the text of the fifth paragraph, which refers to "the information at their disposal" relating to the minor's origins regarding the identity of their progenitors (Mayor del Hoyo 2019, 362). The second aspect meriting analysis is the reference to "the medical history (of the minor) and of their family." Mayor del Hoyo maintains that when the law speaks of family, it includes siblings, grandparents, etc. Although we believe the provision would be limited to information concerning the progenitors, we consider that the wording creates confusion. If the law refers to non-progenitor relatives, we will concur with the criticism, as medical information of other relatives should not be accessible to the adoptee.

Mayor del Hoyo assesses this provision as excessive. She believes it penalizes the progenitor and the family, depriving them of enjoying their right to privacy. We disagree, as we consider that the position against access to the progenitors' medical history fails to consider an essential element: the reason motivating the adoptee's need to access this information. If the adoptee wishes to know the medical history of their progenitors, it is because they have a legitimate interest in diseases that could be hereditary and, therefore, affect them. This information (the progenitors' medical history) is a secret that Riofrío would classify as "relative"; that is, one to which certain persons may legitimately have access under specific circumstances (Riofrío 2015, 148).

We ask ourselves, how is compliance with this disclosure obligation guaranteed? We do not believe that the provision of Spanish law is oriented toward the adoptee having the right, at any moment in their life, to request the medical history of their biological parents. This would entail contravening the protection of their personal data and privacy. We incline toward the idea that the state has a duty to collect medical information from the progenitors (though typically this pertains to the mother) within the adoption file and that, from that moment forward, the adoptee is entitled to access this information. If the file's contents prove insufficient for the adoptee, they would have the right to contact their mother to inquire about what they deem necessary. The mother, in turn, would have the right to update the information she considers relevant and to refuse to respond if consulted.

This constitutes, then, a legal duty to inform that must be pursued through the counseling of the public official preparing the adoption file. We believe that, if the information is sufficient, it is possible that the adoptee may not even have the need to contact their biological parents. Perhaps that is the most significant effect of the reformed Article 180 of the Spanish Civil Code: influencing the official's conduct to endeavor to compile the highest amount of information within the file, notwithstanding that the adoptee may opt to contact their biological family. A question arises: could the adoptee's children request access to the clinical history or data concerning their grandparents' origins? The Spanish Code makes no reference to adoptees' descendants, despi-

te the existing possibility of medical reasons. Nowadays, this idea would be far from feasible in the Ecuadorian legal context, given that the right to access one's origins has not yet been properly regulated. Additionally, we must address the temporal limitation established by the Spanish article under analysis. Fifty years are established from the adoption for the adoptee to exercise their right to know data concerning their biological origins. Although we consider the Spanish timeframe quite broad, we do not deem it appropriate to establish a time limit for the exercise of this right. If human rights are imprescriptible (Nikken 2010, 70), the adoptee's human right to identity should not be forfeited with the passage of time.

Regarding the state obligation, we note that the public entity's duties are not limited to preserving the data and delivering them to the adoptee upon request. Moreover, should it not possess the information, it must request it from other entities that are, in turn, obligated to provide it. Of course, criticisms exist regarding the scope of adopted persons' right to access their origins in Spain. Mayor del Hoyo maintains that the legislature has rendered this right absolute without it being expressly recognized in the Constitution. This, she adds, would generate contradictions or inconsistencies with the regulation on assisted reproductive techniques (Mayor del Hoyo 2019, 370).⁶ Spanish legislation, Mayor del Hoyo continues, does not balance or reconcile the right to access one's origins with the mother's right to remain anonymous. The author agrees with Vidal Prado, who advocates for a "dose of realism" that recognizes the adoptee's right could deter potential adoptive parents and jeopardize the institution of adoption (Vidal Prado 1996, 268). Accordingly, reconsideration of this right's regulation is proposed to unify criteria and reconcile them with women's rights (Mayor del Hoyo 2019, 374).

Gómez Bengoechea concurs that inconsistency would exist in Spanish legislation. However, she maintains that the Spanish legal system does not contemplate the possibility of investigating one's own origin as a fundamental right. This is due to the relation between known information concerning biological origin and the rights to physical and moral integrity and to free development of personality (Gómez Bengoechea 2007, 295).

Argentina

Argentina has developed the content of the adoptee's right to know their origins within Article 596 of the Civil and Commercial Code (CCC, art. 596).

- (i) The adoptee with sufficient age and degree of maturity has the right to know data related to their origin and may access, when required, the judicial and administrative file in which their adoption was processed and other information contained in judicial or administrative records; (ii) If the person is a minor, the judge may order the intervention of the court's technical team, the protection agency, or the adoptive parents registry to provide collaboration. The adoptive family may request counseling from the same bodies; (iii) The judicial and administrative file must contain the greatest possible amount of data regarding the child's identity and their family of origin relating to that origin, including those pertaining to transmissible diseases; (iv) The adoptive parents must expressly commit to making the adoptee's origins known to them, with a record of that declaration remaining in the file; and (v) in addition to the right to

⁶ Mayor del Hoyo adds that not even a person whose filiation by nature does not derive from these techniques has a guaranteed right to know their paternal biological origin: neither the identity nor the medical history of the father, insofar as while the law mandates the determination of maternity, it does not mandate the determination of paternity.

access the files, the adolescent adoptee is entitled to initiate an autonomous action with the purpose of knowing their origins. In this case, they must have legal assistance.⁷

The article refers to origins without using the term “biological”. This implies that it allows access to all information concerning the adoptee’s past and “refers to life outside the biological family, such as that developed in foster care or institutions” (De Lorenzi et al. 2019, 10). The provision seeks to ensure that origins are not reduced to genetic information or place of birth. It goes further to include personal history and consanguineous family. The purpose of this provision is to broaden the conception of origin, since identity is constructed through biography, and no biography is exhausted by a datum of origin.

The second element is that the provision enshrines the right “to know” without referring to contact. De Lorenzi explains that this occurs because the law is not empowered to create affective bonds between people, nor to compel them to maintain a relationship against their wishes. This does not imply that adoptive parents have the right to conceal or obstruct the child’s access to their origins. The provision requires the parents to expressly undertake to ensure that the adoptee can know their origins. This constitutes a legal duty deriving from parental responsibility. We consider that, while the provision of the Argentine Code tends to favor the adoptee’s rights, its protection of the family of origin is rather excessive. We disagree with De Lorenzi when she mentions that the law is not empowered to generate affective bonds, for, although we know that the law does not have such effects, we believe this position (i) assumes that the adoptee wishes to create such bonds and (ii) considers that such bonds could, in some manner, harm the biological parents.

Regarding the first point, it is commonly thought that the adoptee wishes to contact their consanguineous family for the purpose of reestablishing affective bonds; this view limits the right to identity, since contact would not imply bonds that both parties do not desire. Normative prohibition assumes that, in all cases, the adoptee wishes to make contact to bond effectively, when they merely seek to know themselves. Concerning the second point, the idea that contact between the adoptee and their family of origin could harm the latter is based on the notion that, when biological parents place their child for adoption, they wish to leave their past behind. This position prioritizes, once again, the rights of the family of origin over the adoptee’s right to identity. We consider that this argument should be advanced only in cases where the child is the result of sexual assault and the mother does not wish to maintain a relationship with the child, given that compelling such a relationship may constitute a form of revictimization. In any event, we do not believe the prohibition should be absolute, as the mother could change her mind throughout her life.

WHAT CAN ECUADORIAN LEGISLATION LEARN: FOUNDATIONS FOR A PROPOSAL

Ecuadorian law could develop the content of the right to access one’s origins more extensively. First, the adoptee should access their file when required. This constitutes broad standing that does not require a minimum age but rather proof of sufficient age and maturity. According to Quiñoa, those who support this expansion maintain that the child’s maturity must be evaluated, on a case-by-case basis, by the judge. On the other hand, those who criticize it believe that the child could be harmed when confronted with a biography that is difficult to process (Quiñoa 2023, 310). Given the significance of the information requested and the vulnerability of the adopted

⁷ Author’s translation.

child, the intervention of a specialized technical team should be mandatory and not optional, as the CCC establishes (Quiñoa 2023, 311). We assess this expansion of standing as favorable, since the adopted child does not begin to question their origins from age eighteen onward.

The second point to emphasize is the obligation of administrative and judicial authorities to record in the file the highest possible amount of information. We note that an exhaustive list of requirements is not demanded, as there is no intention to delimit the information contained in the file; the more information, the better. We assess this provision as positive because it could be, in numerous instances, the only source for the adoptee to know part of their biography. The provision would bind not only judicial authorities but also administrative ones. Information about the child's pre-adoptive stage is vital so that, if desired, the adoptee can know their history (Quiñoa 2023, 313). For this reason, we believe that Ecuadorian law would do well to incorporate the provision if it wishes to better guarantee the right to access one's origins.

The third element is the adoptive parents' commitment to ensuring that the child is informed about their origins. Access to origins includes knowledge of the adopted person's history, not only regarding their consanguineous family, but also in foster care institutions that form part of their personal history (De Lorenzi et al. 2019, 10). The provision would obligate adoptive parents to expressly commit to making the adoptee's origins known to them. That declaration would be registered in the adoption file. A question arises: is it a moral or a legal duty? Authors who consider it a moral duty criticize that it constitutes a mere commitment and that the law should have avoided ambiguities and contemplated a sanction for non-compliance to ensure that the adoptee can access their origins (Quiñoa 2023, 314). Others consider it reasonable that no sanction exists because it would signify a vote of no confidence toward adoptive parents (González de Vicel 2015, 99-ss). We agree with those who lean toward the proposition that it is correct for the provision not to include sanctions for failure to comply with the commitment. Administrative and judicial authorities must evaluate the suitability of prospective adoptive parents, and this includes understanding the commitment. If the commitment is breached, the adoptee would be entitled to bring an action against their parents for the caused harm.

We believe that the Ecuadorian legal framework would be receptive to recognizing the adoptee's access to their origins. The Constitution recognizes the child's right to family life in Article 45. This right is linked to identity and does not discriminate against adopted children. In fact, adoption is part of the normative system because it is a protection mechanism that seeks to guarantee the child's right to a family and to enjoy family life. The right to have a family does not have to imply denial of the right to identity. This idea is reinforced by Article 69 of the Constitution, which establishes that, to protect the rights of family members, "[d]aughters and sons shall have the same rights without regard to background of filiation or adoption" (Constitution of the Republic of Ecuador, article 69).

CONCLUSIONS

The right to access one's origins appears to be protected by Ecuadorian law as part of the adoptee's human right to identity.⁸ However, its recognition is insufficient. Legislature (i) has not made clear how this right should

8 Since the enactment of the CRC, Ecuadorian constitutional provisions have sought to protect children's rights. See: Simon Campaña, Farith. 2023. "Ecuador". In *La constitucionalización de los derechos de las niñas, niños y adolescentes en América Latina*, Nicolás Espejo Yaksic and Lovera Parmo (eds.), 169-204. Mexico: Tirant Lo Blanch. And: Simon Campaña, Farith. 2021. *Manual de Derecho de Familia*. Quito: Cevallos.

be exercised, and (ii) it has permitted the consanguineous family to prohibit the adopted child from knowing them. We consider that the prohibition disregards parental duties and responsibilities while simultaneously reinforcing an unequal relationship between adults and children, as it generates disproportionate protection in favor of biological parents. Access to origins should include the possibility of knowing and contacting the consanguineous family. Given that the prohibition is contained in a normative instrument of inferior rank and contradictory to the Constitution, in our view, it would be unconstitutional.

Despite the favorable constitutional framework, this right is not properly safeguarded. We believe that, viewed with optimism, this represents an opportunity for our proposal to benefit from the experience of foreign legislation. This is urgent because if an adopted person does not know their origins, harm, and liabilities are generated. This constitutes another form of abandonment of children who, we must remember, have already been victims of neglect (Berástegui Pedro-Viejo & Gómez Bengoechea 2008, Martínez 2018). As they grow, children integrate more complex understandings of their identity and their sense of belonging to their biological, social, and cultural family and groups (Bennett Woodhouse 1995, 112). In early adolescence, the person's need to know about their origins increases; the adoptee begins to worry about hereditary characteristics or diseases, and they might even fear committing incest. Because it is normally expected that parents will take the initiative in this delicate area, it would be a mistake to assume that the child who does not ask is not curious. Unanswered questions contribute to the development of identity problems.

Secrecy concerning origins has been rejected, both in theory and within legal norms, as it proves insufficient to conceal the truth, as well as harmful to the relations among the subjects comprising the adoption triad (De Lorenzi et al. 2019, 17). Several authors concur on the advantages of informing the adoptee of the truth as soon as possible, as this allows for demonstrating availability for open, honest, and ongoing communication, as well as empathy, understanding, and respect towards their needs (Siegel 2012, Amorós 1987, Berástegui Pedro-Viejo & Gómez Bengoechea 2008, Giberti 1981). There is evidence that, for adult adoptees, access to information about their biological origins can be fundamental in the construction of their identity. While there may be little difference in the comprehensive sense of identity between adoptees and non-adoptees, adoptees believe that their belonging to two families plays an important role in how they think about themselves (Cahn & Singer 1999, Burke 1975, Bustamante 2014). Thus, concealment of origins can prove harmful to the adopted person and provoke an identity crisis. Honesty helps in accepting the dual identity of adoptees and the fundamental character that the biological component has for their formation and strengthening (Pannor & Baran 1984).

The right to access one's origins cannot merely remain as a principle of adoption; its development becomes increasingly necessary. This article has focused on identifying other legal systems (Spanish and Argentinian) from which Ecuadorian law can benefit in developing the content of the right to identity and access to the origins of adopted persons. Of course, the proposal that will follow as the next step in this research, based on the work we have previously carried out, will be grounded not only in the constitutional and conventional basis of this right, but also in a constructive critique of Ecuadorian laws and institutions related to it.

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