



Post mortem declaration of paternity: legal and social perspectives

Declaración de paternidad post mortem: perspectivas jurídicas y sociales

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ABSTRACT

The right to identity and biological origin is a fundamental pillar in the exercise of human rights and in the integral development of children and adolescents. The declaration of paternity post mortem has become an issue of growing relevance in Ecuador, highlighting the need to reconcile respect for fundamental rights with ethical, cultural and family implications. Through an analysis of the current legislation and jurisprudence of Ecuador in comparison with the norms of other countries in the region, legal gaps are identified with respect to the declaration of post mortem paternity and post mortem filiation by assisted human reproduction techniques. The objective of this article is to analyze from a legal and social perspective the implications of the

recognition of post mortem paternity in the Ecuadorian legal system, identifying legal gaps, bioethical challenges and proposing recommendations to strengthen the current regulatory framework. The methodology employed is qualitative through documentary review and critical discourse analysis. The results indicate that Ecuadorian legislation lacks a chapter on the recognition of post-mortem paternity and post-mortem filiation through assisted human reproduction techniques.

RESUMEN

El derecho a la identidad y el origen biológico es un pilar fundamental en el ejercicio de los derechos humanos y en el desarrollo integral de niños, niñas y adolescentes. La declaración de paternidad post mortem se ha convertido en un tema de creciente relevancia en Ecuador, poniendo de manifiesto la necesidad de reconciliar el respeto a los derechos fundamentales con las implicaciones éticas, culturales y familiares. A través de un análisis de la legislación vigente y jurisprudencia de Ecuador en comparación con normas de otros países de la región se identifican vacíos legales con respecto a la declaración de paternidad post mortem y filiación post mortem por técnicas de reproducción humana asistida. Este artículo tiene como objetivo analizar desde una perspectiva jurídica y social las implicaciones del reconocimiento de la paternidad post mortem en el ordenamiento jurídico ecuatoriano, identificando vacíos legales, desafíos bioéticos y proponiendo recomendaciones para fortalecer el marco normativo vigente. La metodología empleada es cualitativa mediante la revisión documental y análisis crítico del discurso. Los resultados indican que la normativa de Ecuador carece de un capítulo que refiera sobre el reconocimiento de paternidad post mortem y sobre la filiación post mortem por técnicas de reproducción humana asistida.

Keywords / Palabras clave

Best interests of the child, Declaration of post mortem paternity, Legal gaps, Right to identity

Derecho a la identidad, Declaración de paternidad post mortem, Vacíos legales, Interés superior del niño.

Introduction

In order to approach the subject in a clear way, it is necessary to start by pointing out what filiation is, since the team of Sierra Abogados & Inversiones (2022) defines it as that link that unites parents and children, in such a way that a civil status is generated, which gives way to rights and obligations.

On the other hand, the Library of the National Congress of Chile (2022) states that filiation is that relationship of lineage in which the participation of the father, the mother or both is seen, and also states that this filiation can be established by nature, by assisted reproduction techniques or by adoption.

3 On the other hand, the RAE (2023) defines this figure as that relationship of a legal nature between two subjects, in which one of them comes from the lineage of the other, this filiation can be by natural or legal causes, which generates rights and obligations to the parties.

Filiation and the rights of children and adolescents are widely regulated in the Ecuadorian legal system through various constitutional and legal norms and international treaties. However, a detailed analysis of the legislation in force in the year 2024 reveals significant regulatory gaps with respect to the recognition of paternity after the death of the presumed father, a situation that has generated legal uncertainty and difficulties in the effective application of fundamental rights.

Article 45 of the Constitution of the Republic of Ecuador (2008) explicitly states that the State has the duty to guarantee life from the conception of the unborn child and also emphasizes that the identity of children and adolescents is guaranteed, the right to have a family and to enjoy the coexistence of the same, as well as the right to be informed of their absent parents and relatives. However, the Magna Carta does not expressly address the particular situation of the recognition of paternity post mortem, which has generated divergent interpretations by the operators of justice.

In accordance with the above, art. 20 of the Childhood and Adolescence Code (2003) states that the State has the obligation to guarantee the right to life from conception, as well as its survival and development. In the same line, article 21 emphasizes that every child and adolescent has the right to know his or her parents and other

family members, while establishing an affective relationship with them. In spite of these guarantees that are indicated in this legal body, the violation of these rights is seen in the cases of recognition of paternity post mortem, due to the fact that there is no regulation or chapter that clearly addresses this problem.

Assisted human reproduction is understood as that technique and set of medical treatments that make pregnancy possible when it is not obtained naturally. These techniques include artificial insemination and in vitro fertilization; artificial insemination is characterized as a simple procedure in which the sperm are introduced into the woman's uterus, as would occur naturally, while in vitro fertilization consists of joining the egg and the sperm and once the embryo is fertilized it is grafted into the woman's uterus (Paraíso, et al., 2021).

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On the other hand, it is important to point out that, it is believed that this assisted reproduction is possible only among the living, however, this perspective changes, due to the fact that, fertilization can originate in a post mortem way, understanding that this term refers to the use of the man's semen after death in order for the woman to become pregnant (Salvador, 2017).

According to the author Herrera (2017) this event has already been possible in several countries:

One of these cases arises in Argentina on November 21, 2011, in which the Family Court number 3 of Morón, Province of Buenos Aires intervenes, in that case the couple was in an assisted reproduction procedure, however, shortly after the husband dies, so the woman requests the transfer of the genetic material that she and her husband had established.

Another case occurred on November 3, 2014, before the National Civil Court No. 3, in which a woman requested semen samples from her dead husband for later use in a post mortem procedure. The third case is given on December 30, 2015, it is resolved by the Civil, Commercial, Lab. and Mining Court number 4 of Santa Rosa, La Pampa, in which the transfer to the living wife of the embryos formed by the sperm of the dead husband and the donated eggs is requested. Finally, the last case also occurs in Argentina on June 13, 2016, as a woman in the company of her in-laws requests that the genetic material of her dead husband be extracted in order to later use it in an assisted reproduction procedure to be able to conceive a child, to which, the national civil court with exclusive competence in family matters

number 87 of the Federal Capital authorizes the request. When examining the legislation of other countries in the region, different regulatory approaches are observed to address the recognition of paternity post mortem. For example, in Colombia, Article 7 of the Code of Childhood and Adolescence (2006) expressly permits genetic testing after the death of the presumed father, establishing specific deadlines and procedures. In contrast, in Peru, although there is no express rule, based on the decision issued by the Constitutional Court in case No. 06572-2006-PA/TC, 2007, this possibility has been admitted in order to guarantee the right to identity and biological truth, setting important precedents (CONSTITUTIONAL COURT, 2007).

In this context, it is essential that the Ecuadorian legal system addresses in a clear, specific, detailed and exhaustive manner the issue of recognition of paternity post mortem. An adequate and updated regulation would provide legal certainty, guarantee the effective exercise of the right to identity of children and adolescents, establish clear and uniform procedures, avoid contradictory interpretations by justice operators, and ensure the consistent application of constitutional principles and international human rights standards. Legal gaps in Ecuadorian legislation regarding Post Mortem Declaration of Paternity: Legal and Social Perspectives
Absence of specific regulation: In Ecuador, the lack of specific regulation on the recognition of post mortem paternity in the Civil Code generates ambiguities in its application. Although the Constitution guarantees the right to identity and the Organic Law on Identity and Civil Data Management allows for the judicial declaration of paternity after death, the absence of a detailed legal framework can lead to inconsistent judicial interpretations. Cases are handled under general filiation provisions, which can result in significant variations in judicial decisions.

In contrast, Spain has more developed legislation in this area. Law 14/2006 on assisted reproductive techniques specifically regulates post mortem fertilization, and case law, such as Supreme Court Ruling 401/2013, has established clear precedents. This ruling allows the determination of post mortem filiation through biological testing, prioritizing the child's right to know his or her biological identity and authorizing exhumation for DNA testing, even without prior consent of the deceased. This difference in the legal and jurisprudential framework between the two countries highlights the need for a more

specific regulation in Ecuador to provide greater legal certainty in these cases.

Lack of clearly defined terms: The Civil Code (2005) establishes that “paternity shall be determined by birth” and that “the child may be recognized by the father before or after birth” (ART. 249). However, no specific time limits are established for initiating the post mortem paternity acknowledgment process. This lack of clarity may generate legal uncertainty and potential inheritance conflicts in the future, especially when long periods of time have elapsed since the death of the presumed father.

3.-Ambiguity in the determination of prior consent: The lack of clear criteria for determining the prior consent of the deceased father reflects a significant legal vacuum in Ecuador. This gap is particularly problematic in situations where relationships are not formalized or documented. In cases of informal, occasional relationships or without clear evidence of the parent's intent, legal ambiguity can lead to complex disputes and inconsistent judicial decisions. This situation contrasts with more developed legislation in other countries, where there are specific protocols for assessing consent in cases of post mortem paternity.

The absence of defined criteria can have important implications for the rights of the child to know his or her biological identity, as well as for inheritance rights and other legal aspects related to filiation. It can also create uncertainty for the families involved and complicate the judicial process. This legal ambiguity underscores the need for legislative reform in Ecuador to establish clear guidelines for evaluating consent in these cases, balancing the rights of the child with the protection of the will of the deceased and the interests of other potential heirs.

Lack of consideration of special situations: The current legislation does not adequately consider exceptional cases that have become more frequent in today's society, such as pregnancies through assisted reproduction techniques, prolonged informal relationships, situations of concealment of pregnancy, among others. This may hinder the fair and equitable resolution of these particular cases, where a deeper and more detailed evaluation of the specific circumstances is required.

Lack of clear guidelines on the best interests of the child: Although the principle of the best interests of the child is enshrined in the Constitution of the Republic of Ecuador (2008) and in international instruments ratified by the country, there are no specific and detailed criteria for its application in cases of post mortem paternity

declarations. This lack of guidelines can lead to subjective interpretations and inconsistent decisions by judicial authorities, putting at risk the welfare and rights of the child involved. 7.-Lack of regulation on genetic testing: With the technological advances in DNA testing, it is essential that the legislation establishes clear and detailed guidelines on its admissibility, scope and procedures for its performance in cases of post mortem paternity declarations. This is crucial to ensure legal certainty, precise determination of filiation and avoid potential future controversies or challenges.

Lack of provisions on inheritance effects: The current regulations do not address in a clear and detailed manner the inheritance effects that post mortem paternity acknowledgment may have.

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Materials and Methods

Within school spaces, the bonds built with peers sustain the academic days, prevailing in some occasions outside the school and building networks with characteristics of a functional community in which its members mutually influence each other. These networks are initially formed on the basis of cultural identification, tastes, interests, common experiences, etc., in such a way that, once consolidated, it becomes possible to build feelings of belonging, affiliation and/or confidentiality, thus generating care networks that will have an impact on the development and well-being of adolescents, inasmuch as:

“Social networks (...) constitute an indispensable element for the health, adjustment and well-being of the individual. The important aspect of support networks is that they are emotionally significant people for the individual and are the ones who potentially provide social support” (Orcasita & Uribe, 2010, p.70).

Aranda & Pando (2013), refer that:

“Two types of networks can be distinguished: the informal (where the existing interactions are mainly through the family, spouse, children, siblings, relatives and friends), and the formal (where the interactions provided are mainly through groups, organizations, social centers, health centers, etc.), and where all of them, to a greater or lesser degree, are important and necessary in any situation, whether critical or not” (p. 240).

From the above, peer care networks provide resources that are difficult to reach from other spaces or actors, since it is with peers that processes of identification, belonging and protection are built in times of adversity, to alleviate experiences of vulnerability or risk and the accompaniment to find solutions to different situations safely according to the needs that arise. Thus, mutual care, while preventing exposure to other possible events of adversity, proposes that the lessons learned from this practice be transferred to other stages of their lives. In this sense, peer care networks also promote self-care, given that the expectation of contributing to the support of others with whom they live implies responsibility and the use of tools for their own benefit, which in turn means that the support of the networks is further strengthened.

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In the case of mutual care networks among adolescent peers, a certain potential for action is contemplated by finding shared characteristics among those involved, ranging from physical, sociocultural and/or psychological conditions, which generate identification and bonding, based on the certainty that they mutually understand each other's conditions, as mentioned by Ardila et al. (2013) "(...) peers have a vision of the sufferer as a similar other, and in this sense, they make present what care is" (p. 466). From this perspective, mutual care networks among adolescent peers are conceived as an element of support and prevention for the experience of psychic suffering, since they can be a source of trust and security for coping with such discomfort, promoting mutual care.

Support or care networks, especially among peers, are an important strategy for reducing the likelihood of risk situations arising in adolescents; however, when viewed from the perspective of the context in question, it is possible to recognize that, although these networks are implicit among them, they may not be closely knit, or at the time they do not have adequate guidance and information to provide timely care for others, leading to situations that invalidate adolescents in their difficult situations, or else they use strategies that put them at risk when caring (Hernández-Nava et al. 2020).

It should be clarified that the sources and characteristics of psychic suffering in adolescents are situated; in particular, this paper addresses the intervention carried out with students from a high school in the municipality of Colón, Querétaro, Mexico. The school has an enrollment of between 230 and 280 students, mostly of rural origin, belonging to communities where most of the inhabitants know each

other; usually the family represents an important reference for life expectations and decision making in the short and medium term. The form of socialization that occurs at school and therefore the possibilities of forming care networks are influenced by community practices, because although there is initially a certain openness to share with those close to them their feelings, thoughts, experiences, etc., sometimes there is some resistance to maintain this confidentiality, and much of the gap that separates peers at this age has to do with the fear of being exposed, pointed out and even betrayed, as these are experiences that they carry from their lifestyles and that they reflect in other spaces of socialization.

In the technical report of the Psychological Attention Service of the campus in the semester prior to the beginning of the COVID-19 pandemic, it is indicated that out of 255 students attended, 54 of them were for academic issues, 55 were attended for school context situations, two more students attended to receive Vocational Guidance, 46 people presented family situations and finally 76 students voluntarily attended to receive the service for personal situations. It is worth noting that according to the figures reported, a large part of the student body attended the service, and it is also observed that in some cases the academic risk is generated as a result of intrapersonal or interpersonal situations. Based on the above, an intervention focused on peer care was proposed as the main objective of this work.

Results

The results obtained highlight the existence of significant regulatory gaps in the Ecuadorian legal system regarding the recognition of post mortem paternity. The absence of a specific, detailed and exhaustive regulation in the Civil Code generates legal insecurity, interpretative ambiguities and difficulties to effectively guarantee the right to identity of children in these exceptional circumstances. This situation contrasts with the approach adopted by other countries in the region, which have more updated and complete regulations in this regard.

From a social and family perspective, the findings show the complexity and depth of the implications of the recognition of paternity after the death of the presumed father. Social stigma, family conflicts, the need for psychological support and the emotional impact on all parties involved are crucial aspects that must be addressed from a holistic, interdisciplinary and culturally sensitive approach. Current legislation

does not provide adequate mechanisms to address these issues, which could exacerbate trauma, violate rights and undermine the overall well-being of those affected, especially the child.

One of the most controversial and complex aspects identified are the bioethical challenges and dilemmas surrounding reproductive rights, particularly in cases of the use of assisted reproduction techniques with genetic material from deceased persons. The tension between fundamental principles such as autonomy, human dignity and the best interests of the child requires rigorous analysis and careful weighing by the State and society. The absence of a clear and detailed regulation on this practice generates a legal vacuum and lack of legal certainty, hindering the effective protection of the rights and interests of all parties involved.

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As for exhumation for DNA testing purposes, although Ecuadorian legislation contemplates this possibility, it lacks specialized regulation that addresses fundamental practical, ethical and cultural aspects. The lack of clear protocols and mechanisms to guarantee respect for the traditions and beliefs of the families involved, as well as the proper handling of biological samples and the confidentiality of genetic information, could generate conflicts, violate rights or violate the dignity of the deceased and their families.

The patrimonial and inheritance implications derived from the recognition of paternity post mortem show the urgent need for a clear, detailed and updated regulation that provides legal certainty and avoids future disputes between heirs and relatives. The divergent and contradictory jurisprudential criteria on this matter reflect the lack of solid and uniform normative guidelines, which could lead to prolonged legal conflicts and violations of the rights of the parties involved.

The results obtained highlight the urgent need for a comprehensive legislative reform in Ecuador that specifically, comprehensively and in a multidisciplinary manner addresses the issue of post mortem paternity recognition. This reform should contemplate not only the legal aspects, but also the social, family and bioethical aspects.

Conclusions

The Ecuadorian legal system presents important normative gaps in relation to the recognition of paternity post mortem. The Civil Code, the main body of law that regulates family relations, lacks a specific chapter or section that addresses this particular situation. This

omission contravenes the principle of legal certainty enshrined in Article 82 of the Constitution of the Republic of Ecuador, which states: “The right to legal certainty is based on respect for the Constitution and the existence of prior, clear, public and enforced legal norms by the competent authorities.”

The lack of defined deadlines and objective criteria for initiating the post mortem recognition process violates the right to effective judicial protection, recognized in Article 75 of the Constitution. This situation can generate divergent judicial interpretations and inconsistent decisions, affecting the predictability of the legal system and access to justice.

The ambiguity surrounding the prior consent of the deceased father poses a conflict with the principle of reproductive autonomy, derived from the right to personal freedom (art. 66 numeral 5 of the Constitution) and the right to make free, responsible and informed decisions on reproductive health and life (art. 66 numeral 10). The risk of stigmatization and discrimination against children born in these circumstances contravenes the principle of equality and non-discrimination enshrined in Article 11, paragraph 2 of the Constitution. Furthermore, it could violate the right to integral development of children and adolescents, recognized in Article 44 of the Constitution.

The need for psychological support and interdisciplinary accompaniment is based on the right to integral health, guaranteed by article 32 of the Constitution, which includes mental and emotional health.

The ethical dilemmas surrounding the use of post-mortem genetic material should be analyzed in light of the right to personal integrity, which includes physical, psychological, moral and sexual integrity (art. 66 numeral 3 of the Constitution). Likewise, the principle of human dignity, recognized as the foundation of constitutional rights, must be considered in the weighing of these cases.

The lack of clear regulation on post-mortem assisted reproduction techniques contradicts the constitutional mandate of article 11 numeral 8, which establishes that the content of the rights shall be developed progressively through norms, jurisprudence and public policies.

The absence of specific provisions on exhumation and DNA testing in these cases may violate the right to personal and collective identity, recognized in Article 66 numeral 28 of the Constitution. It is necessary to develop protocols that guarantee this right in harmony with respect for the dignity of the deceased and the cultural beliefs of the families, in accordance with the plurinational and intercultural nature of the Ecuadorian State (art. 1 of the Constitution).

The existence of divergent jurisprudential criteria in inheritance matters violates the principle of equality before the law (art. 11 numeral 2 of the Constitution) and the right to legal certainty. It is imperative to develop specific legislation regulating inheritance rights in cases of post mortem recognition, in compliance with the duty of the State to guarantee without discrimination the effective enjoyment of the rights established in the Constitution and in international instruments (art. 3 numeral 1 of the Constitution).

The recognition of post mortem paternity in Ecuador requires a comprehensive and sensitive approach that considers not only the legal aspects but also the social, family and emotional implications for all parties involved, especially for the child. It is essential that Ecuadorian legislation be updated and provide clear guidelines on how to weigh and apply the principle of the best interests of the child in these cases, as well as interdisciplinary support mechanisms to ensure a fair, balanced and proportional resolution that safeguards the welfare and rights of all those involved.

The use of assisted reproduction techniques with genetic material from deceased persons to achieve post-mortem paternity recognition raises complex bioethical dilemmas and challenges regarding reproductive rights. A comprehensive and multidisciplinary approach is required to adequately weigh the ethical principles involved, as well as the rights and interests of all parties involved, with special emphasis on the protection of the best interests of the child.

It is crucial that the Ecuadorian legal system addresses in a clear, specific, detailed and exhaustive manner the issue of post mortem paternity acknowledgment. An adequate and updated regulation would provide legal certainty, guarantee the effective exercise of the right to identity of children and adolescents, establish clear and uniform procedures, avoid contradictory interpretations by justice operators and ensure the consistent application of constitutional principles and international human rights standards.

In addition, the principle of the best interests of the child, enshrined in Article 44 of the Ecuadorian Constitution and in the Convention on the Rights of the Child, must be considered as a priority. This fundamental principle should be the guiding principle in all decisions and actions involving minors, including cases of determination of paternal filiation after the death of the presumed father. Judicial and administrative authorities must ensure the comprehensive protection of the rights of children and adolescents, promoting solutions that guarantee their physical, emotional and psychological well-being, as well as their full and integral development.

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