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Reconceptualization of the family concept in Colombia: New socio-legal positions

Reconceptualización del concepto familia en Colombia: Nuevas posturas socio-jurídicas

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ABSTRACT

Keywords:

Diversity Of Families, Adoption, Homoparentality, Single Parenthood, Hetero Parenting.

The current document aims to analyze the concept of family in Colombia from the new social and legal positions on sexual orientation, diversity and adoption, considering as a methodological approach the use of a dialogic paradigm, from a qualitative approach and a hermeneutic method, which allow collecting the theoretical and jurisprudential discourse of various authors in matrices of documentary analysis, information that through the technique of discourse analysis allows reconceptualizing the right. The concept of family has been accepted for a long period of time throughout Colombian history from a religious point of view, based on the heterosexual union of man and woman, a position that for many decades delegitimized other types of families different from the hetero-parental one; However, Colombia has understood in recent decades that beyond the traditional roles of reproduction, protection of life and ecclesiastical values, the concept of family must be subject to continuous changes in the social dynamics, which leads to the conclusion that Colombia is a pluralistic and diverse country, which understands that the law must respond to the new challenges in family matters, understanding that single parenthood and homoparentality, does not deteriorate this institution but transforms it.

RESUMEN

Palabras clave:

Diversidad De Familias, Adopción, Homoparentalidad, Monoparentalidad, Heteroparentalidad.

El actual documento cumple el fin de analizar el concepto de familia en Colombia a partir de las nuevas posturas sociales y jurídicas en materia de orientación sexual, diversidad y adopción, considerando como enfoque metodológico el uso de un paradigma dialógico, desde un enfoque cualitativo y un método hermenéutico, que permiten recoger el discurso teórico y jurisprudencial de diversos autores en matrices de análisis documental, información que a través de la técnica del análisis del discurso permite reconceptualizar el derecho. formar una familia desde una posición sociojurídica, dando como resultado que a través de la historia colombiana, por un gran periodo de tiempo se acogió el concepto de familia desde una visión religiosa, basada en la unión heterosexual del hombre y la mujer, postura que deslegitimó por muchas décadas a otros tipos de familias diferentes a la heteroparental; sin embargo, Colombia ha comprendido en las últimas décadas que más allá de los roles tradicionales de reproducción, protección de la vida y valores eclesiásticos, el concepto de familia debe estar sujeto a cambios continuos en la dinámica social, lo que conlleva a concluir que Colombia es un país pluralista y diverso, que comprende que el derecho debe responder a los nuevos retos en materia de familia, entendiendo que la monoparentalidad y la homoparentalidad, no deteriora esta institución sino que la transforma.

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Introducción

Understanding the different contemporary forms of family requires a reflection on the different milestones that have occurred throughout human history, in relation to social and legal changes that have allowed the modification of the primitive notion of family; from a sociological point of view, the family throughout history has had three essential purposes: the natural, consisting of the preservation of the human species; the moral or spiritual, which allows the creation of affective bonds between its members, solidarity between them and the formation of the individual; and the economic, aimed at satisfying basic needs such as food and housing (Carrasco, 1994).

Just as societies and law are dynamic and evolve over time, the concept of family must also adapt to the socio-cultural changes that occur in different countries, especially in Colombia, where this discussion has been present for the last two decades. Sexual diversity is an issue that, in recent years, has gained strength thanks to its social activism, in addition to the fact that it has been present in human relations since the last century. Sexual diversity is now an integral part of the free development of the personality, leading to socio-cultural changes that directly affect the way contemporary families are viewed and defined.

The new forms of family, such as single-parent and/or homoparental families, do not deteriorate the heteroparental family institution, on the contrary, they transform it (Castellar, 2010), as they contribute with judgements that transform the meaning of orthodox family ties, thus broadening the capacity to understand the new cultural positions, thus allowing for an analysis of the family as a complex social institution.

The dynamics in Colombia that allowed the recognition of the right to form a family for same-sex couples did not come through the legislature; on the contrary, the recognition of these legal powers has

come about through binding Constitutional rulings, which have argued their work on equality and non-discrimination (Marco, 2009).

Materials and Methods

From a qualitative approach, the different jurisprudential criteria regarding the concept of family in Colombia were examined, these criteria have been linked to different theoretical aspects, which allowed the notion of family to be questioned and reconceptualised, taking into account the social and legal changes of the 21st century. In this way, from the postulates of Sandoval (2002), the dialogic paradigm that allows the reconstruction of the social and legal reality in relation to the recognition of the legal capacity of same-sex couples to form families is covered, through the technique of discourse analysis applied to different constitutional sentences.

In accordance with the paradigm addressed, an interpretative reading is created using the hermeneutic method (Sandoval, 2002), in order to understand the meaning of the theoretical issues and legal battles of same-parent and single-parent families against the Colombian legal system and in favour of the recognition of their fundamental right to form a family, always paying attention to safeguarding the principles of equality and non-discrimination.

The information protocols that were used as instruments to operationalise the described technique were the following: First, the jurisprudential analysis matrix (MAJ), which helped to identify the various discourses considered by the Constitutional Court when deciding how to protect and recognise the right of same-sex couples to form families; second, the documentary analysis matrix (MAD), which was created to collect and understand various theoretical perspectives, which allowed to base the reconceptualisation of the concept of family according to the new trends that have been presenting in the social environment since the end of the twentieth century

Results

The end of the 20th century and the beginning of the 21st century in Colombia was marked by the supremacy of the constitutional principles and ideals of the Catholic Church, a period in which the formation of families made up of a single parent, their descendants and/or adoptive parents - single-parent family - or two people of the same sex, their descendants and/or adoptive parents - homoparental family - was considered frowned upon, with the heteroparental family being the only one accepted during this period of time, that is, a family made up of a man and a woman, their ascendants and/or adoptive parents.

Despite the fact that the Political Constitution (1991) in Colombia has been in force since then, and is considered as the one that extended the catalogue of fundamental rights, thus permeating social, economic and political circles, single-parent and homoparental families did not have the right to create any kind of religious or even civil bond because they did not respect the Catholic norms of the concept of family.

Reconceptualisation of article 42 of the Constitution for the recognition of the diversity of families in Colombia.

The family as a multidisciplinary concept can be defined from different perspectives, thus allowing for a more integrated notion; from a biological perspective, the family is composed of blood ties, whose main purpose is the preservation of the species (Gómez, 2013); from a psychological perspective, this concept is interpreted from the perspective of personality development, i.e. as the sharing of a life project between individuals that creates close ties of intimacy and emotional dependence (Gómez, 2013).

According to sociology, a family is an institution that must have at least three members, who must be related to each other either by consanguinity or affinity, the objectives of the family include the social

reproduction of traditions, culture and identity, as well as instilling respect for authority and rules, and the socialisation of general norms and role models (Vela, 2015).

In order to achieve a correct legal interpretation of the concept of family and how this notion has changed over time in Colombia, it is necessary to understand that in law, it is the legislator and the judges of the Republic who are responsible for interpreting and defining the limits of the constitutional postulates; since the advent of the political charter in 1991, the family has been considered as the fundamental building block of society, formed by ties that are natural or legal, by a man and a woman who freely choose to marry or by responsible individuals who decide to create a family, and by the family, which is the fundamental building block of society, formed by ties that are natural or legal, by a man and a woman who freely choose to marry or by responsible individuals who decide to create a family.

Before the 21st century, the only concept of family that existed within the "normal" was based on a heterosexual couple, who had the responsibility to raise their children based on morally accepted principles, among which there was no possibility of constituting a union between two people of the same sex (Cadoret, 2003), which made other types of family invisible and delegitimised.

It was not until 2001, when a Constitutional Magistrate, in a dissenting opinion of the Sentence C-814/01 (2001), germinates the possibility of other types of social nucleus, under the argumentation that the superior article 42, establishes two different hypotheses: the first is that the choice of a man and a woman to marry is voluntary, which is the one that is enclosed in the postulates of the church; the second is that the family can also come into being through the responsible will to create it, however, this does not necessarily have to be expressed only by a heterosexual couple. This last argument was the

fundamental basis for subsequent rulings to bring about a social and legal change in Colombian society.

Due to the above, a discussion has started in Colombia on whether two people of the same sex can constitute a family through their responsible will and whether this will can be reflected in a legal document that allows them to acquire rights and obligations as a couple, just like heterosexual unions; this discussion reached the Constitutional Court in Sentence C-075/07 (2007) where a claim of unconstitutionality was examined, regarding Law 54 (1990), which defines *de facto* unions and the economic regime between permanent couples.

On this occasion, the question arose as to whether Law 54 (1990), by establishing the property regime between permanent couples, restricted and violated the fundamental rights to equality before the law, respect for human dignity, the minimum vital minimum and the free association of members of same-sex couples.

Deciding that the lack of legal recognition of these couples constituted an attack on their dignity by limiting their autonomy and capacity for self-determination by preventing their decision to create a life project together from having patrimonial legal effects. This made it unconstitutional to offer a system of legal protection only to heterosexual couples. Therefore, it was understood that the regulation of *de facto* marital unions and the economic regime between permanent couples should also apply to same-sex couples.

The heteroparental family paradigm was questioned by the Constitutional Court years later, in Ruling C-577/11 (2011) challenging the terms "man" and "woman" as used in various Colombian laws regulating the institution of marriage.

The main defence of the applicants was that Article 42 of the Constitution establishes that a family is formed by natural or legal ties, by the free choice of a man and a woman to marry, or by a

responsible will to do so. This last conjunction, "or", is the one that would make it possible to determine various forms of legal recognition to form a family, among them: by legal or natural ties, by the free choice of a man and a woman to marry or by the will to form a family.

The indeterminacy of the text leads to the conclusion that both a man linked to a man and a woman linked to a woman (same-sex couples) are constitutionally entitled to be recognised, under civil law, as a same-sex parent family. These three ways of forming a family would not imply that this legal institution begins with the link between a man and a woman.

On this occasion, it was clear that heteroparental unions that wished to form legal ties could do so in two different ways: through religious or civil marriage and *de facto* marital union, since these legal figures existed in the Colombian legal system; however, homoparental families, until that moment, only had the *de facto* marital union, thanks to the jurisprudential advances of the Constitutional Court.

In this way, same-sex couples' right to the free development of their personality was violated, they could not freely decide how to form a family, due to the non-existence of a contractual institution other than the marital union, and so it was declared unconstitutional, the expression a man and a woman contained in article 113 of the Civil Code (Law 84, 1873), in order to close the protection gap that contributes to homopareism, the Congress of the Republic was urged to approve, before 20 June 2013, in a methodical and organised manner, legislation on the rights of same-sex couples.

With little time left to pass legislation governing same-sex unions and after realising that the Congress of the Republic had disregarded the constitutional ruling, same-sex couples were ready to go to notaries and courts to formalise their union. However, their hopes were dashed when, on 25 April 2013, the superintendent of notaries and registry

issued a press release stating that notaries would only celebrate solemn civil unions, not religious ones, whose effects were similar to a contract of sale (Redacción El País, 2013).

Observing that the notary's offices did not guarantee their fundamental rights, these couples began to go to the courts to celebrate civil marriages, in some cases, the judges followed the precedent of Ruling C-577/11 (2011), thus leaving the issue of equal marriage in Colombia in uncertainty, which would be resolved later.

Finally, in Ruling SU-214/16 (2016) it gave an in-depth pronouncement on the contractual bond that it stipulated in its precedent of Ruling C-577/11 (2011), making it clear that both men and women are members of the human species and that equality means treating people equally.

To fill the protection gap identified in Judgment C-577/11 (2011), the Constitutional Court declared the legal validity of civil marriage between same-sex couples and extended the effects of its Unification. This was done to address the protection gap.

The above demonstrates that sexual diversity has been present in human relations for a long time in Colombia, moreover, it is currently a socio-legal reality that has been building in the field of law since the end of the 20th century, which has become visible, resulting in modifications that directly affect the family institution, allowing new organisations and roles within the family, which until the 20th century was composed only of the father, the mother and the children.

Based on the latest advances in the social sciences, in the field of diversity and new methods of family construction, the new notions of family that emerge in the new legal order demand a new legal framework in this area that has resonance not only in Colombia but also in the rest of Latin America (Vela, 2015). From the above it can be concluded that the family is an entity that is in constant change. This

change is caused by social dynamics that go beyond the traditional roles of production, reproduction, protection of life and defence of traditional values (Vela, 2015).

Adoption: a matter of reconceptualisation and constitutional weighting.

The entry into force of Decree 2737 (1989) "Código del Menor", introduced in Colombia the rules and procedures regarding adoption, which sought to guarantee protocols and protective measures in favour of minors, in order to allow them access to a family constituted from a couple scenario.

As was the case with same-sex unions at the beginning of the 21st century, adoption was a right denied to homosexual persons who wanted to form a family, on the grounds that they were homosexual; The legal criterion for this denial was that according to the provisions of article 44 of the Constitution, the rights of minors prevailed in the internal order and when there was a conflict with other types of rights, such as the free development of personality and equality, the right of the minor to be part of a family characterised by the dominant Catholic principles of that society prevailed (Political Constitution, 1991).

The first aspect to be analysed in this section is adoption for single-parent families by a homosexual; when examining article 68, numeral 1, of the Code of Childhood and Adolescence (CIA) and contrasting it with its predecessor, article 89 of the Code of Minors, it is discovered that the wording of both articles is almost identical, maintaining the same requirements for adoption: first, to be a capable person, over twenty-five (25) years of age; second, the adopter must be fifteen (15) years older than the adoptee; and third, the adopter must guarantee sufficient physical, psychological, moral and social aptitude. It is therefore clear that Colombian law has allowed single-parent adoption since the 20th century without making an explicit requirement in relation to the sexual orientation of the adopter (López-Medina, 2016).

Even though the requirements for adoption are maintained in their entirety in the Children's Code, there are precedents in the Colombian legal sphere where there is evidence of discrimination by state entities against people who, because of their sexual orientation, were denied the possibility of forming single-parent and same-sex families, as was the case of a foreigner (American) in Ruling T-276/12 (2012) who advanced the adoption process of two minor siblings. This foreigner stated that after completing the administrative procedures for the adoption of the two siblings, a family judge issued a ruling in which he declared that he was the adoptive father of the children, but when the directors of the Colombian Institute of Family Welfare became aware of his sexual orientation, they proceeded to proceed with the restitution of the children's rights.

In this case, the measures of restoration of rights adopted by the ICBF directors were unjustified and disproportionate, as it was not established that the adopter's sexual orientation represented a danger to the children, it was decided that the adopter would receive custody of the children permanently.

From a sociological perspective, the new forms of family, such as single-parent and same-parent families, do not deteriorate the family institution, on the contrary, they transform it (Castellar, 2010), as they contribute with judgements that transform the meaning of orthodox family ties, thus expanding the capacity to understand the new cultural positions, allowing an analysis of the family as a social institution with numerous variations in the light of the changes of modernity. The new types of family ties that have emerged in Colombia as a result of the struggles for rights that have been waged there since the beginning of the century represent a departure from the traditional definition of family and require state institutions to work together to provide protection for the social, cultural and economic rights of these new families.

The adoption of a child by the same-sex partner of the adoptee's biological parent, also known as

complementary adoption or adoption by consent, began to be legalised as of Ruling T-276/12 (2012). These cases, according to López-Medina (2016), profoundly challenge traditional morality because they imply that the child could legally remain in the custody of the same-sex partner of one of the adoptee's biological parents.

In Judgment C-071/15 (2015), the previous postulate was analysed, this time examining the constitutionality of various provisions of Law 1098 (2006) "Childhood and Adolescence Code" that allegedly violate the rights of same-sex couples by discriminating on the basis of sexual orientation and the constitutional concept of family, adopted from Judgment C-57711 (2011).

In relation to the legal problem, it was determined that when a child or adolescent has grown up with his or her biological father or mother, who in turn live with their same-sex partner, and in this environment they have formed strong bonds of affection and solidarity where the upbringing, care and maintenance of the child are shared jointly, then prohibiting complementary or consensual adoption would result in the destruction of these bonds of love, respect and loyalty.

In this sense, when a minor has grown up with the support of his or her biological mother or father and his or her adaptation to the described environment is duly accredited, preventing the legal consolidation of the filial bond would lead to disregarding the minor's right to have a family and, most importantly, not to be separated from it, in accordance with the postulates of article 42 of the Constitution, as it recognises and protects the family formed by the responsible decision to do so.

Therefore, the Constitutional Court decided to condition the enforceability of the rules on complementary or consensual adoption, with the understanding that same-sex couples are also included within its scope of application when the adoption request is for the biological child of their permanent partner; warning that the decision to

approve this type of adoption is based on a case-by-case assessment, depending on the circumstances surrounding the child and her family.

Because same-sex couples were not yet allowed to exercise this right, the possibility of same-sex adoption was briefly discussed in Judgment C-683/15 (2015). It was stated that the denial of an undeniable reality does not eliminate doubts and fears about whether Colombian society was ready to accept same-sex couples with adopted children with empathy and inclusion, but facing their challenges.

Thus, it was necessary for the Colombian state to implement educational programmes on inclusion, sexual diversity and gender equality before ignoring this reality. Policies were also adopted that equalise the conditions for the exercise of rights, not only for same sex parent families but also for minors in a state that allows adoption. However, the Constitutional Court ruled that it could not be accepted that a person's sexual orientation should be confused with ineligibility for adoption.

Taking into account the above, it is clear that any adoption procedure in Colombia must always be aimed at guaranteeing the best interests of the child and the restoration of his or her rights, with the State being responsible for verifying in each adoption case whether the applicant couples, regardless of their sexual orientation, comply with the requirements established in the legal system in a way that provides them with socio-economic stability and an environment of respect, love and well-being for the adoptive parents.

Discussions

The different social movements that were born during the seventies, formed mainly by students and leaders of minority groups, helped to highlight the realities of families and their different diversities, thus, families are no longer seen from a romantic point of view (Carbonell, n.d. From this perspective, it is necessary to cover different topics such as the history of the conception of the family, the way in

which family formation is regulated by law from a diverse stance and the problems that have arisen with so-called diverse families.

Construction of the concept of family through history

The word "family" derives from the Latin *famulus*, meaning "to be a servant or slave", in reference to the fact that in ancient times, especially in Rome, family was equivalent to inheritance, which included not only relatives but also slaves or servants. The concept of family has generated over time various controversies regarding its definition; these controversies date back to the Middle Ages and have not yet reached a unified criterion (Ramos, 2005).

Since people frequently maintained relationships with multiple sexual partners as a result of their primal instincts, which prevented emotional bonds from developing, the definition of family was unclear at the beginning of time. Inbreeding, which is characterised by consanguinity in the formation of families and completely excludes sexual relations between parents and children or between siblings, became the dominant family form in prehistoric social groups among humans (Córdoba et al., 2005).

Matriarchy gradually emerged as the dominant social structure in sedentary and agricultural communities, leading to the development of what is known as uterine kinship because paternal kinship was difficult to establish (López, 2005); with the advent of military activity and trade between different cultures, the role of men in the family increased and women were replaced as head of the family by men (López, 2005).

During the ancient times, the ideals of patriarchy were maintained, due to the fact that the man was the predominant figure in the military part, as well as being in charge of the security of his family and/or people, however, it was not until the appearance of the Roman civilisation, where the relations of affinity

and consanguinity were regulated for the first time by means of legal norms, generating a more precise conception of the family, which, through time, has been modified according to the social and political contexts of each civilisation.

The history and development of the family can be divided into three stages, according to the French psychoanalyst Roudinesco (2005); the first stage, which took place during the Ancient and Middle Ages, saw the family founded through tradition, whose aim was to ensure the transmission of heritage, so that marriages between people were agreements between parents, regardless of the affective and sexual life of the couple.

The second stage, from the Renaissance to the 20th century, is when modern families emerged. During this period, romanticism, carnal desires and the emotional interests of the couple predominated, and the work and education of the children were divided. A clear example of this is France, which in its 1791 constitution assigned marriage to the civil sphere, based on the figure of a private law contract, thus regulating the way to establish civil ties between its citizens, as well as rights and obligations between spouses and the way to end marital life (Muñoz, 2014).

After the most horrific wars in human history took place, there was an interconnection between various cultures, which led to the diversity of ideas and their eventual spread throughout the world, resulting in new thoughts of equality, equity and racial harmony. This is known as the third and final stage, where all members of the family now have greater autonomy to choose their ideals, tastes and beliefs through diversity and free development of personality.

Guidelines that would allow for inclusive and guaranteeing legislation in Latin America

Family law norms have changed significantly in Latin America in recent years, whether they are

positivised in a specific legal text or within a civil code. However, much of this regulation remains remarkably conservative and disconnected from the legal realities and social contexts of each Latin American nation. Given that it largely excludes the homosexual population, ECLAC argues that the legal frameworks of the conception of family in the region are restrictive and move away from a legal approach (Marco, 2009).

It has been observed that Latin American nations with older family laws, even those that have modified them on numerous occasions, such as Argentina, Chile and Colombia, do not have their own code for the application and interpretation of their family laws in this area, in contrast to the laws of Bolivia or Venezuela, which do have their own family codes that help in the application and interpretation of their laws.

In relation to marriage, the tendency in Latin countries is to establish obvious conditions such as free consent between those who contract marriage and some others such as heterosexuality (Marco, 2009); it should be noted that countries such as Argentina have within their legal systems, rules that guarantee civil unions of persons of the same sex, as well as Colombia, which, through the jurisprudence of the Constitutional Court, guarantees these unions and with it, other rights such as inheritance, survivor's pension, adoption, among others.

For the reasons stated above, in 2009, the United Nations - ECLAC published a document by the consultant of the Social Development Division, Marco (2009), in which it was proposed as a guideline for making Latin American legal systems more inclusive and guaranteeing an end to discrimination against homosexual persons, including or modifying legislation on marriage and de facto unions, given that most Latin American states do not have legislation created by the legislature that recognises same-sex unions.

Generic aspects of norms regulating the family in Colombia

Family law, from its beginnings, was limited from a private sphere, thereby generating its regulation to be positivized to a large extent within the civil codes; however, together there are also within the legal systems, laws on family matters in topics such as affiliation, adoption, marriage, common law, among others. The codification of the norms that regulate family law responds to the call of international organizations regarding the need to permeate the family and all its derivatives as an integral part of human rights (Acosta, 2007).

The regulation of family law standards has always belonged to the private sector, and in Latin America it had a great influence on the part of the Napoleonic Code -1804-, which contained legal institutions such as parental power, that is, subordination to the man head of family (Morales, 1990).

In Colombia, the Civil Code is a compilation of norms that regulates various aspects of human relationships, among them, those that assist family members. This compilation of norms was created in 1873, and has been modified several times since 1887 to the present, according to the sociocultural changes that directly affect the legal field.

Article 42, fourth paragraph, of the Political Constitution (1991), establishes that family relationships are based on the equality of rights and obligations of the couple, as well as reciprocal respect between all its members. The civil code, on the other hand, recognizes the equality of rights and duties that exist between spouses in relation to the management and direction of the home.

The Constitutional Court has ruled in favor of the homologation of rights and obligations of homosexual people when forming a family, whether homoparental or single-parent, in matters such as the constitution of non-seizable family assets, the survivor's pension, the non-seizure incrimination

between peers, social security, among others. Although the Colombian Civil Code defines marriage as that celebrated between a man and a woman, it highlights the role of this jurisdictional body in matters of equal marriage.

It is noteworthy that the process through which the rights and obligations of same-sex couples have been recognized in the Colombian State has not involved the creation of norms by the legislative body, since the bills on the subject under study have been archived without adhering to the necessary legislative procedure. Instead, recognition of these rights and obligations has been provided by the courts, specifically through the work of the Colombian Constitutional Court (Marco, 2009).

Conclusions

From a sociological point of view, new family structures, such as single-parent and/or same-sex parents, do not worsen the family institution; rather, they transform it, thus improving our understanding of new cultural positions and allowing us to analyze the family as a social institution with many variations, in line with the social changes experienced in modernity.

The family is an entity that constantly changes as a result of social dynamics that go beyond the traditional roles of production, reproduction, protection of life, values and traditions.

Family law regulations in Latin America have changed significantly in recent years, but many of them remain remarkably conservative and disconnected from local legal systems and social contexts.

Fights for the rights of same-sex couples in Colombia have increased since the turn of the century, giving rise to new types of family ties that challenge the traditional definition of family and force the government to find solutions that

support cultural expression, contribution social and economic vitality of these.

A new legal framework on this issue is necessary in light of the new ideas about the family that are emerging under the new legal system. These ideas have resonance not only in Colombia but also in the rest of Latin America. These ideas are based on new social science concepts such as diversity and new ways of forming families.

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