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Assisted Regulation: Argentine Courts Address Regulatory Gaps on Surrogacy

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Abstract

Surrogacy operates in a regulatory void in Argentina. Despite attempts to legislate this practice, Argentine law contains no univocal rules governing the legality and enforceability of surrogacy agreements. Unsurprisingly, this has not stopped intended parents from pursuing surrogacy; quite the contrary, it has steered them into the courts, thrusting the issue into the realm of judicial policy. Through a comprehensive review and qualitative study of 32 court rulings, I address the judicial scenario regarding surrogacy in Argentina. I describe the profile of litigants who are bringing altruistic gestational surrogacy claims, the legal arguments used by courts, and the types of orders issued. I explain how the judiciary, through judicial review of the current legal framework and the application of international human rights law, including the principle of the best interests of the child, is playing a key role in ensuring access to this form of third-party assisted reproductive technology. Finally, I make the case for regulation by critically assessing these rulings to highlight the intricacies, challenges, and complexities that come with the judicial regulation of surrogacy.

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Introduction

Surrogacy as a form of third-party assisted reproduction continues to be the subject of heated debate. Perhaps because of the ethical, legal, and social concerns that come with this practice, there is a considerable regulatory void in relation to surrogacy arrangements at both the domestic and the international levels.[1] Lawmakers around the globe have abstained from regulating surrogacy in view of the difficulties of reaching agreement on a host of issues, including its legality, questions of parentage, and mechanisms for safeguarding the rights of all parties involved.

This trend of abstentionism is also true for Argentina. Despite many attempts to legislate this practice, Congress has refrained from providing a regulatory framework for gestational or genetic surrogacy, which means that Argentine law contains no univocal rules governing the legality and enforceability of these agreements. Unsurprisingly, the lack of legislation has not stopped intended parents from pursuing this family planning option in the country; quite the contrary, it has driven them to seek legal recourse in courts in the hope of obtaining different forms of assurance. As a result, the distinct and complex legal issues associated with surrogacy in Argentina have now entered the realm of judicial policy.

In this paper, I address how surrogacy arrangements are playing out in Argentine courts by presenting the findings of a comprehensive review of rulings covering this practice. My study reviewed 32 decisions pertaining to surrogacy agreements carried out entirely in Argentine territory, excluding cases of cross-border surrogacy. My sample consisted of decisions published between August 2015 (when the Civil and Commercial Code entered into force) and December 2021 containing the search terms "subrogación," "maternindad subrogada," or "gestación por sustitución." All decisions were downloaded from Thomson Reuters' online legal research service for Argentina; no unpublished decisions were included in the sample.

Based on my findings, I describe the pivotal role of Argentine judges in facilitating access to certain forms of surrogacy in the face of insufficient regulation. At the same time, I highlight the main shortcomings of judicial policy in this field, which speak to the importance of establishing a regulatory framework for addressing the ongoing practice of surrogacy in Argentina.

My analysis is structured as follows. I first provide a succinct overview of the legal instruments that can be understood as applicable to surrogacy arrangements under Argentine law. I then delve into the judicial scenario regarding surrogacy by presenting a qualitative analysis of the opinions included in the sample, emphasizing the legal reasoning used by judges. Finally, I critically assess the case law included in my sample, highlighting the challenges that persist due to both the regulatory vacuum and the ad hoc judicial handling of surrogacy.

Overview of the Argentine legal system

Surrogacy in Argentina is not expressly regulated by law. A provision covering gestational surrogacy was included in the Draft Civil and Commercial Code (*Anteproyecto*) but did not make it through the legislative process. As a result, these agreements are governed by rules contained in three legal instruments of different hierarchy: the Argentine Constitution (as amended in 1994), the Civil and Commercial Code (2014), and Law 26,862 on Medically Assisted Reproduction (2013). All three instruments are uniformly applicable to the entire Argentine territory and must be relied on by all judges in the resolution of disputes.[2]

The legal framework governing surrogacy agreements in Argentina

The Constitution contains two rules that are of special relevance for the debate on surrogacy. Article

19 sets out the *reserva de ley* principle, according to which no individual "shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit."[3] Article 75.22 accords express constitutional hierarchy to the core international human rights treaties ratified by Argentina. The rights contained therein, including the rights to health and to form a family, are considered constitutional rights that complement, and do not repeal, previously enumerated rights.[4]

The Civil and Commercial Code (Law 26,994) codifies the rules of private law pertaining to contracts and family. Articles 1 and 2 of the code stipulate that its provisions must be applied and interpreted in accordance with the Constitution and the human rights treaties to which Argentina is a party.[5] Because of their constitutional status, these treaties have the power to invalidate the rules of private law. In practice, this means that courts must abstain from applying an article of the code to a given case if that would contradict a constitutional or treaty provision.[6]

The Civil and Commercial Code does not explicitly regulate or mention surrogacy; however, several of its provisions could be construed as applying to this practice. On the surface, certain rules could be interpreted as impeding commercial surrogacy arrangements: article 17 indicates that the "rights over the human body" cannot have a commercial value, while articles 56, 279, 344, 386, 958, 1004, and 1014 prohibit, in different ways, acts that may be deemed contrary to public order or morality (*orden público*, *moral y buenas costumbres*).[7] Articles 560 to 564, containing the rules on parentage by assisted reproductive technology (ART), might also be understood as predetermining the parentage of children born through surrogacy. In particular, article 562 on "procreational will" stipulates that "those born by assisted human reproduction techniques are children of the person who gave birth and of the man or woman who has also given their prior, informed and free consent."[8] As a result, this article codifies the principle that motherhood is determined by birth (*mater semper certa est* principle), even in the context of ART.

Finally, Law 26,862 on Access to Medically Assisted Reproduction is also relevant. At its core, this law seeks to guarantee access to ART by setting out a coverage mandate for certain techniques. The National Executive and the Ministry of Health have clarified and restricted the mandate's scope of application through subsequent resolutions.[9] While none of these instruments reference surrogacy, the law's broad definition of "medically assisted reproduction" might accommodate this practice, as it encompasses all "procedures and techniques performed with medical assistance to achieve a pregnancy."[10]

The failed attempt to include surrogacy in the Civil and Commercial Code

The enactment of the Civil and Commercial Code was a protracted political process that involved different stakeholders. The legal scholars charged with drafting the rules of family law had originally pushed for regulating certain aspects of surrogacy, introducing a draft article on the matter in the *Anteproyecto*. Article 562 of the *Anteproyecto* would have authorized only altruistic gestational surrogacy agreements, provided that certain procedural safeguards were met. These requirements included (1) prior judicial authorization of the agreement; (2) a documented inability to conceive or carry a pregnancy to term through other methods; (3) a limit on the number of times a woman could be a surrogate; and (4) that the surrogate candidate have had at least one child of her own.[11] Additionally, article 561 of the *Anteproyecto* (current article 562 of the code) avoided any reference to *mater semper certa est* in the context of ART.[12]

All these rules were ultimately rejected when the *Anteproyecto* was reviewed by the Senate, which

argued that the time was not right for regulating surrogacy since the issue warranted a profound legal, ethical, and interdisciplinary debate.[13]

Surrogacy in courts: Review of judicial decisions

My study reviewed a total of 32 judicial decisions (published from August 2015 to December 2021) covering surrogacy arrangements carried out entirely on Argentine territory. The full list of decisions analyzed can be found in the Annex. At first sight, the sheer number of rulings published in such a short time frame hints to a high prevalence of this practice, despite the fact that it is not expressly regulated. It also suggests that the regulatory void has steered people into family courts, which, by interpreting the current legal framework, have essentially become the gatekeepers of this form of assisted reproduction in the country.

To gain a deeper understanding of this judicial phenomenon, I analyzed all decisions using Siri Gloppen's analytical framework for health rights litigation. Gloppen argues that merely examining court judgments is insufficient for grasping how litigation can have a positive or negative impact on a certain health issue—in this case, surrogacy. Rather, it is crucial to conceptualize the litigation process as consisting of four interconnected stages (claims formation, adjudication, implementation, and social outcomes) and to conduct a detailed analysis of each stage. This involves taking a close look at the type of litigants, their claims and legal basis, the different courts involved, and how the cases differ in their "outputs," among other things.[14]

Focusing on the first two stages of Gloppen's analytical framework, I present the results of a qualitative analysis of all 32 decisions, highlighting the type of litigants who are bringing surrogacy-related claims to courts, the legal justifications used by judges to solve these cases, and the types of orders issued.

Litigants, claims, and orders

Most applicants were heterosexual couples confronting infertility or similar medical conditions that prevented the woman from carrying a pregnancy to term (e.g., hysterectomy), while only a few cases were brought by LGBTI couples. No cases dealt with single parents. In the case of heterosexual couples, the surrogate was generally a family member or immediate relative; for LGBTI applicants, the surrogate was usually a close friend. Surrogates were always a party to the dispute and were usually subjected to home visits and extended interviews by judges.

All claims concerned altruistic gestational surrogacy agreements. Intuitively, and from a legal standpoint, this could be attributed to the influence of the rules of the Civil and Commercial Code and the *Anteproyecto*. As noted, several articles of the code prohibit agreements that may be deemed contrary to morality. In particular, article 17 categorically stipulates that the rights over the human body or its parts "do not have a commercial value, but an affective … or social value and can only be made available by their owner provided that one of these values is respected."[15] Additionally, the *Anteproyecto* made room only for gestational surrogacy. In the absence of explicit regulation or *lex specialis* to the contrary, litigants could have reasonably believed that altruistic gestational surrogacy had a greater likelihood of being authorized by the judiciary.

Litigants turned to the courts at different stages of the medical process: the great majority filed claims before implantation occurred, some did so after implantation but before birth, and a few filed claims after the child had already been born. These differences are a direct result of the regulatory vacuum and have concrete implications for the type of claims made. In the claims filed before implantation, applicants typically sought judicial authorization of the practice or the agreement itself, as well as an assurance that the child would not be registered following the *mater semper certa*

est principle. In the claims filed after implantation, litigants mostly pursued the proper registration of the child, either through a provisional measure to that effect or by rectifying certificates that followed the exact wording of article 562 of the Civil and Commercial Code.

Orders consistently favored the applicants, authorizing implantation in the surrogate or granting provisional measures to ensure the accurate registration of the child. All favorable decisions had *inter partes* effects, except for one collective *amparo* from the City of Buenos Aires. This particular *amparo* granted the applicant's request to register children born through surrogacy without placing the surrogate as a parent, with collective effects for all births following altruistic gestational surrogacy agreements performed in the country that are registered in the City of Buenos Aires. The effects of this *amparo* are thus limited to that jurisdiction and do not extend to other parts of the country.[16]

Of all decisions reviewed, only one case decided by a court of appeals denied the rectification of the birth certificate of a child who had been born through surrogacy. I will address the court's legal justification for rejecting this claim later, but it is relevant to note that this was one of the few cases involving gay applicants who sought the rectification of the birth certificate in a case of altruistic gestational surrogacy.[17]

Legal basis of judgments

Favorable opinions used a variety of legal and policy arguments to either authorize surrogacy or allow for the intended effects of these agreements. Argumentation varied depending on the time of judicial intervention (i.e., before implantation, before birth, or after birth). However, three arguments were common: (1) the value of the *reserva de ley* principle; (2) the direct applicability of human rights treaties included in article 75.22 of the Constitution; and (3) the inapplicability or unconstitutionality of article 562 of the Civil and Commercial Code to surrogacy cases.

Surrogacy and Reserva de Ley. In the absence of regulations on surrogacy, article 19 of the Constitution would suggest that surrogacy must be allowed, as no individual can be "deprived of what [the law] does not prohibit."[18] Nearly all family courts agreed with this statement, concluding that surrogacy had to be authorized because it was not expressly banned by the Civil and Commercial Code or by any other law. Some judges even thought that this practice had "implicit recognition" in the Argentine legal framework by virtue of the code, which recognizes ART as a source of parentage, and Law 26,862's broad definition of "medically assisted reproduction."[19]

One judge went as far as to claim that, per article 19 of the Constitution, there was no basis to justify judicial intervention in cases of surrogacy. The decision argued that if Law 26,862, which regulates access to ART, did not expressly prohibit surrogacy or require prior judicial approval, then there was no need for judges to intervene—at least not before birth. It concluded that surrogacy should be deemed an issue requiring medical (and not judicial) authorization, in conformity with the principles of bioethics.[20]

The only case in the sample that denied the applicant's claim to rectify a birth certificate concluded that there was no regulatory void, arguing that the text of article 562 of the Civil and Commercial Code revealed legislators' clear intention to prohibit this practice. Accordingly, the majority claimed that *reserva de ley* was inapplicable to the case and that parentage could only be "determined by the uterus, regardless of any consent."[21] The minority voted to grant the claim, arguing that the case needed to be decided in light of the *Anteproyecto* and international human rights law.

The direct applicability of international human rights law. The overwhelming majority of opinions turned to international human rights law to authorize altruistic surrogacy arrangements. Most judges

claimed that, per article 75.22 of the Constitution, the regulatory void should be addressed by directly applying human rights treaties.[22] They argued that articles 1 and 2 of the Civil and Commercia Code required judges to interpret and apply rules on parentage, including article 562, in alignment with these treaties.[23]

To authorize surrogacy, courts largely relied on the rights to sexual and reproductive health, to privacy, to form a family, and to enjoy the benefits of scientific progress and its applications. Most opinions used the Inter-American Court of Human Rights' judgment in *Artavia Murillo v. Costa Rica* (2012) to argue the existence of a "human right to procreational will," a "right to access ART to try to procreate," or a "right to become mother through the use of ART." [24] On the basis of *Artavia*, a few decisions held that authorizing surrogacy was the only way to guarantee access to ART to single men, gay couples, and women unable carry a pregnancy to term due to health reasons.[25]

Some opinions further emphasized that courts needed to address surrogacy-related claims from a perspective that considers both gender and human rights, focusing on the rights of the surrogate.[26] Using this rationale, these rulings argued that the surrogate's right to privacy encompassed a right to "make use of their own bodies with a view toward satisfying someone else's reproductive desire."[27]

To order proper registration at birth or shortly thereafter, most courts invoked the provisions of the Convention on the Rights of the Child, including the rights of children to be registered immediately after birth, to preserve their identity, and to judicial protection. [28] Most opinions concluded that departing from the *mater semper certa est* principle was necessary to protect the best interests of the child. Two judges who were asked to intervene before implantation claimed that they were under an obligation to consider the best interests of the "child to be gestated" pursuant to article 3 of the Convention on the Rights of the Child, even if that child was not granted legal personhood under the Civil and Commercial Code.[29]

On article 562 of the Civil and Commercial Code. By incorporating the principle of *mater semper certa est* in the context of ART, article 562 of the code interferes with the typical objective sought by parties to a surrogacy arrangement: ensuring that only the intended parents will be accorded the rights and responsibilities of parentage.

Faced with this obstacle, courts adopted one of three approaches: (1) to ignore the issue of article 562 of the code altogether and focus on the direct applicability of international human rights law; (2) to declare the article inapplicable to the case; or (3) to declare the article unconstitutional on the grounds of contravening the human rights treaties contained in article 75.22 of the Constitution.

At first sight, the difference between approaches (2) and (3) lies in a mere doctrinal debate. Under Argentine constitutional law, before declaring the unconstitutionality of a rule, judges must ascertain whether the provision in question applies to the case. Under this line of reasoning, some opinions argued that judicial review was unwarranted since article 562 was inapplicable to surrogacy scenarios. They asserted that the rule had not been designed to "regulate this type of ART, but only those techniques in which the person who gestates and the person who has expressed their procreational will are the same."[30] Because surrogacy had been removed from the final text of the code, Congress had no reason to deviate from the *mater semper certa est* principle insofar as it had not "envisioned the possibility of separating gestation from motherhood" at the time.[31]

In contrast, those who decided to perform a judicial review of article 562 argued that the rule applied to all children "born by assisted human reproduction techniques" but that applying *mater*

certa semper est to surrogacy cases would be contrary to the effective enjoyment of the "human right to procreational will," the right to form a family, and other entitlements protected in the treaties to which Argentina is a party.[32]

As applied, the differences between these two approaches could be explained by the judiciary's general reluctance to interfere with legislative matters. As pointed out by one judge, "[judicial review], no matter how much it refers to the specific case, has a social impact and undermines the validity of the norm. Equity, for its part, as a general principle of law, merely corrects it and readjusts [the norm] to its purpose in the specific case."[33]

Challenges

While judicial policy may be paving the way for surrogacy agreements in Argentina, this ad hoc, patchwork approach is failing to provide the legal certainty and safeguards that the surrogacy process demands. Certainly, a qualitative analysis of the opinions included in this study reveals that there are some critical issues that courts are either still unable to address through judicial review or that may have to be repeatedly litigated by future applicants. As expressed by one court:

> *There are several challenging situations that can arise and that require regulated solutions: from cases in which the pregnant woman refuses to comply with the agreement and to hand over the child, to the regrettable cases in which the parents intentionally refuse to take care of the child born with some kind of disability … It is neither desirable nor prudent to leave it entirely up to the judge to establish the content of [Argentine law] in such cases, which are becoming increasingly frequent.*[34]

This section will review some of the challenges that are evident from the decisions encompassed in this study, including (1) questions on coverage; (2) the problem on enforcing agreements; and (3) lingering concerns around the exploitation of surrogates.

Concerns with medical coverage

Even if surrogacy might fall under the broad definition of "medically assisted reproduction," it is still missing from Law 26,862 itself and from its implementing resolutions.[35] In this sense, coverage of the various medical procedures involved in surrogacy is likely to be disputed by insurance companies until this practice is addressed by way of legislation and regulation.

Few cases under review pertained to coverage issues. However, one ruling included in the sample vividly illustrates the type of disputes that can arise due to the lack of regulation. The case concerned the denial of coverage for procedures considered essential for gestational surrogacy (in vitro fertilization and the cryopreservation of embryos) for a woman who had undergone a hysterectomy, even though she had not indicated that she intended to enter such an arrangement. According to the insurance company, coverage was unwarranted because the applicant would be able to use those embryos only if she resorted to surrogacy or underwent a uterus transplant, neither of which was expressly authorized by Argentine law.[36] Faced with this challenge, the court noted that judges must not "engage in futurology" but rather stick to the content of the claim: despite the lack of legislation around surrogacy and uterus transplantation, the requested services (i.e., in vitro fertilization and cryopreservation) were expressly included in Law 26,862. That reason alone was enough to mandate coverage.[37]

Even if laudable, this decision suggests that under the patchwork approach to surrogacy, coverage of services that are fundamental to this arrangement not only is left to judicial discretion but might ultimately depend on the way that litigants frame their claims. At the end of the day, the case was successful on its merits because it concerned procedures that were meant to be performed on the applicant and were explicitly provided by law. The results might have been different had the woman

requested coverage of other medical expenses related to surrogacy (e.g., embryo transfer to the surrogate, maternity care of the surrogate, etc.).

Questions on the content and enforceability of surrogacy agreements

The rulings included in this study addressed only a small spectrum of the challenges faced in the surrogacy process, particularly those related to the determination of parentage. Even more, courts were faced only with altruistic gestational surrogacy cases in which all parties were in agreement. This means that even if judges have started to make up for some of the areas that Congress has failed to regulate, most of the ethical and legal risks that come with surrogacy arrangements remain to be addressed.

The content and legal enforceability of the surrogacy agreement itself is one such challenge. In three of the cases studied, litigants specifically asked the courts to validate previously drafted agreements.[38] One of the agreements contained provisions on termination, allocation of costs, posthumous reproduction, and the surrogate's anticipated consent for the correct registration of the child.[39] In these cases, courts only took the agreements as evidence of informed consent but refused to validate their content under the current state of the law. According to one decision, doing the latter would have implied "advancing on personal rights, in fact incoercible, and therefore insusceptible of … any sanction in case of non-compliance."[40] After authorizing implantation, another decision concluded that the subject of the agreement "would be the delivery of the child, which would be insusceptible of specific performance."[41]

One conclusion can be firmly drawn from these opinions: even if litigants obtain the judicial green light for implantation and an assurance of registration, surrogacy remains largely unenforceable. In particular, these decisions suggest that judges would probably be unwilling or unable to enforce agreements in the face of disputes that could be characterized as involving "personal rights"—an extremely broad concept that would encompass disagreements around termination, tort liability, and the surrogate's ability to make her own health decisions, among other things. All of these are distinct issues of surrogacy arrangements that judicial policy is still failing to respond to.

In practice, the judiciary's reluctance to tackle the content of agreements also means that until Congress enacts clear legislation on the matter, written altruistic surrogacy agreements—as tailored as they might be—may be accorded little or no value in this field. Certainly, the rulings reviewed suggest that litigation will probably be necessary to resolve most contractual disputes between surrogates and intended parents.

Lingering concerns regarding the exploitation or abuse of surrogates

I have described how the rules of the Civil and Commercial Code might be construed as prohibiting compensated arrangements, which would explain why only altruistic surrogacy cases have been authorized by courts. Still, legal uncertainty around commercial surrogacy does not prevent its occurrence—in fact, it could be driving compensated arrangements underground and failing to provide safeguards against the exploitation of surrogates experiencing poverty or economic distress.[42]

Two judgments included in the study sample, and which were issued by the same court, illustrate how this might be happening in Argentina. The first ruling was issued in 2017, authorizing implantation in "A," a woman who had three children of her own and wanted to become an altruistic surrogate, after finding no evidence of compensation. Four years later, the same judge authorized "A" to become a surrogate for a different couple. This time, an expert witness testimony vividly spelled out how

"A" had lost her job during the pandemic, had no health insurance, and was supporting herself by selling consumer products, making a monthly income that was well below minimum wage.[43] Even in the face of these signs of financial hardship, the judge ruled out a risk of exploitation because there was no proof of retribution, and, thus, "there [was] no economic purpose involved."[44]

By using compensation as the sole criterion for identifying exploitation, these judgments show that an ad hoc judicial approach to surrogacy possesses limited means to identify and prevent the potential abuses that are associated with this practice. In this sense, the decisions also speak to the need for regulation that goes beyond ex ante judicial review and the usual contractual defenses and that includes permanent "exploitation-avoiding" frameworks (e.g., the informed consent of all parties involved, psychological evaluations, counseling, and even a "fair price" for surrogacy).[45]

Conclusion

As stated by one of the judgments, "Surrogacy ... does not cease to exist because the law does not want to see it."[46] Argentine legislators have long ignored surrogacy, perhaps in an effort to discourage its use. However, the number of rulings included in this study paints a different picture. Far from preventing the use of surrogacy, the regulatory void has turned judges into the sole arbitrators of this form of third-party reproduction. Altruistic gestational arrangements appear to be common, particularly among heterosexual couples experiencing infertility; and claimants seem to be experiencing high rates of success, primarily due to the judiciary's use of international human rights law.

Still, the decisions included in this study may not encompass all the intricacies, difficulties, and challenges of judicial policy in this field. The methodological approach to this study focused on published decisions retrieved from a single search engine, which means that the reality of surrogacy in Argentina could potentially be broader and more complex. Unpublished decisions from other courts may exist, and there might be surrogacy arrangements that never reached the courts, potentially further reinforcing the issues examined in this study.

Additionally, certain cases included in this study could be subject to review by higher courts at both the local and the federal levels, including the Argentine Supreme Court. Hence, there is a considerable degree of uncertainty around how judges will continue to address this issue, particularly if the regulatory void persists.

Altogether, this paper has sought to describe the judicial scenario concerning surrogacy in Argentina and to make a compelling case for regulation. Even if courts are gradually accommodating surrogacy, they still grapple with a number of unresolved questions, and there is no assurance that the judiciary will be able to adequately address them without the guidance of tailored regulations. While some lawmakers have made efforts to reintroduce the topic in legislative debates, there appears to be minimal political motivation to take decisive action on this matter. The seemingly growing number of intended parents pursuing surrogacy, the ethical and legal challenges that come with this practice, and the need to protect all parties involved underscore the pressing need for a well-defined regulatory framework.

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Translation

All translations from Spanish to English were performed by the author.

Annex: List of judgments included in the study sample

1. Juzgado de Familia Nro. 1 de Mendoza (Family Court No. 1 of Mendoza), C. M. E. y J. R. M. c. O.S.D.E. s/ medidas cautelares, September 2, 2015.

2. Tribunal Superior de Justicia de la Ciudad Autónoma de Buenos Aires (Superior Court of Justice of the City of Buenos Aires), *X., T. S y otros s/ información sumaria s/ recurso de inconstitucionalidad concedido*, November 4, 2015.

3. Juzgado de Familia Nro. 1 de Mendoza (Family Court No. 1 of Mendoza), *C. M. E. y J. R. M. s/ inscripción nacimiento*, December 15, 2015.

4. Juzgado de Familia Nro. 9 de Bariloche (Family Court No. 9 of Bariloche), *Dato reservado*, December 29, 2015.

5. Juzgado de Familia Nro. 7 de Lomas de Zamora (Family Court No. 7 of Lomas de Zamora), *H.M. y otro s/ medidas precautorias*, December 30, 2015.

6. Tribunal Colegiado de Familia Nro. 5 de Rosario (Family Court No. 5 of Rosario), *S. G. G. y otros s/ filiación*, May 27, 2016.

7. Juzgado de Familia Nro. 2 de Moreno (Family Court No. 2 of Moreno), *S. P., B. B. c. S. P., R. F. s/ materia a categorizar*, July 4, 2016.

8. Juzgado de Familia Nro. 3 de San Martín (Family Court No. 3 of San Martín), *M., I. M. y otro/a s/ autorización judicial*, August 22, 2016.

9. Juzgado Nacional de 1a Instancia en lo Civil Nro. 8 (Lower Court of First Instance over the District of Buenos Aires), *B., B. M. y otro c. G., Y. A s/ impugnación de filiación,* September 20, 2016.

10. Juzgado de Familia Nro. 7 de Lomas de Zamora (Family Court No. 7 of Lomas de Zamora), *B. J. D. y otros s/ materia a categorizar*, November 30, 2016.

11. Juzgado Nacional de 1a Instancia en lo Civil Nro. 81 (Lower Court of First Instance over the District of Buenos Aires), *S., I. N. y otro c. A., C. L. s/ impugnación de filiación*, June 14, 2017.

12. Juzgado de Familia Nro. 7 de Viedma (Family Court No. 7 of Viedma), *Reservado s/ autorización judicial (f)*, July 6, 2017.

13. Cámara de Apelaciones en lo Contencioso Administrativo y Tributario de la Ciudad Autónoma de Buenos Aires (Court of Appeals in Administrative and Tax Matters of the City of Buenos Aires),

Defensor del Pueblo de la Ciudad Autónoma de Buenos Aires y otros c. GCBA y otros s/amparo, August 4, 2017.

14. Juzgado de Familia Nro. 2 de Mendoza (Family Court No. 2 of Mendoza), *M. M. C. y M. G. J. y R. F. N. s/ medidas autosatisfactivas*, September 6, 2017.

15. Tribunal Colegiado de Familia Nro. 7 de Rosario (Family Court No. 7 of Rosario), *H., M.E. y otros s/ Venias y dispensas*, December 5, 2017.

16. Juzgado de Familia Nro. 2 de Mendoza (Family Court No. 2 of Mendoza), *S. M. S.; T. C. J.; B. P. V. s/ medidas autosatisfactivas*, February 15, 2018.

17. Juzgado de Familia Nro. 6 de San Isidro (Family Court No. 6 of San Isidro), *S., M. J. s/ autorización judicial*, March 20, 2018.

18. Juzgado de 1a Instancia en lo Civil, Comercial y de Familia de 2a Nominación de Villa María (Lower Court in Civil, Commercial and Family Matters of Villa María), *R., R. A. y otros s/ autorizaciones*, June 8, 2018.

19. Juzgado en lo Civil en Familia y Sucesiones de 1a Nominación de Tucumán (Lower Court in Civil, Family and Inheritance Law of Tucumán), *P. A. M. y otro s/ autorización judicial*, June 8, 2018.

20. Juzgado Nacional de 1a Instancia en lo Civil Nro. 87 (Lower Court of First Instance over the District of Buenos Aires), *O. F., G. A. y otro s/ Autorización*, April 3, 2019.

21. Juzgado de Familia Nro. 1 de Pergamino (Family Court No. 1 of Pergamino), *C., C. A. y otros s/ materia a categorizar*, April 22, 2019.

22. Juzgado de Familia de 5a Nominación de Córdoba (Family Court of Córdoba), *V. A. B. y otros s/ solicita homologación*, April 25, 2018.

23. Juzgado de Familia Nro. 2 de Zarate (Family Court No. 2 of Zarate), *F., F. M. y otros s/ solicita homologación*, July 1, 2019.

24. Juzgado de Familia de 6a Nominación de Córdoba (Family Court of Córdoba), *F., C. y Otro*, August 13, 2019.

25. Cámara de Apelaciones en lo Civil y Comercial de Salta (Court of Appeals in Civil and Commercial Matters of Salta), *T. C., E. M.; T., J. I. c. Instituto Provincial de Salud de Salta (I.P.S.) s/ Amparo*, November 6, 2019.

26. Juzgado de Familia Nro. 8 de La Plata (Family Court No. 8 of La Plata), *D., J. E. y otro/a s/ autorización judicial*, April 27, 2020.

27. Cámara Nacional de Apelaciones en lo Civil, Sala I (National Court of Civil Appeals over the District of Buenos Aires, Section I), *S., M. D. y otros c. A., S. S. s/ filiación*, August 28, 2020.

28. Cámara Nacional de Apelaciones en lo Civil, Sala K (National Court of Civil Appeals over the District of Buenos Aires, Section K), *F., R. R. y otro c. G. P., M. A. s/ impugnación de filiación*, October 28, 2020.

29. Juzgado de Familia Nro. 7 de Viedma (Family Court No. 7 of Viedma), *Reservado s/ autorización judicial*, March 31, 2021.

30. Juzgado en lo Contencioso Administrativo y Tributario Nro. 6 de la Ciudad Autónoma de Buenos Aires (Court in Administrative and Tax Matters No. 6 of the City of Buenos Aires), *C., V. D. y otros c. OBSBA s/ salud*, June 24, 2021.

31. Cámara Federal de Apelaciones de Córdoba, Sala A (Federal Court of Appeals of Córdoba, Section A), *S., N. A. y otro c. Obra Social del Poder Judicial de la Nacion s/ Prestaciones médicas*, July 8, 2021.

32. Tribunal de Familia de Jujuy, Sala III (Family Court of Jujuy, Section III), *B., B. D. R. – B., C. R. – B., Y. F. s/ Autorización Judicial*, October 15, 2021.

References

1. Office of the United Nations High Commissioner for Human Rights, "Surrogacy," https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy.

2. Constitution of Argentina (1994), arts. 31, 75.12, 116; Civil and Commercial Code (2014), arts. 1–3.

3. Constitution of Argentina (1994), art. 19.

4. Constitution of Argentina (1994), art. 75.22; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI) (1966), art. 12; American Convention on Human Rights (1969), art. 17; C. Hübner Mendes, R. Gargarella, and S. Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford: Oxford University Press, 2022), p. 33.

5. Civil and Commercial Code (2014), arts. 1–2.

6. M. Hevia and A. Constantin, "Argentina: Untapping the Potential of Private Law Constitutionalisation," in E. Aristova and U. Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (New York: Bloomsbury, 2022), pp. 23–42.

7. Civil and Commercial Code (2014), arts. 17, 56, 279, 344, 386, 958, 1004, 1014.

8. Ibid., art. 562.

9. Decree No. 956/2013 (2013); Ministry of Health Resolution No. 1-E/2017 (2017); Ministry of Health Resolution No. 1044/2018 (2018).

10. Law 26,862 (2013), art. 2.

11. Anteproyecto del Código Civil y Comercial de la Nación, Articulado y Legislación Complementaria ("Draft Civil and Commercial Code") (2012), http://www.colabogados.org.ar/archivos/proyecto-reforma-ccyc-anteproyecto-de-codigo-civil.pdf.

12. M. Herrera, "La lógica del Código Civil y Comercial de la Nación en materia de familia: Reformar para transformar" ("The Logic of the Civil and Commercial Code in Family Matters: Reform to Transform"), *Infojus* (2014).

13. Ibid.

14. S. Gloppen, "Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health," *Health and Human Rights* 10/2 (2008).

15. Civil and Commercial Code (2014), art. 17.

16. Cámara de Apelaciones en lo Contencioso Administrativo y Tributario de la Ciudad Autónoma de Buenos Aires (Court of Appeals in Administrative and Tax Matters of the City of Buenos Aires), *Defensor del Pueblo de la Ciudad Autónoma de Buenos Aires y otros c. GCBA y otros s/amparo*, August 4, 2017.

17. Cámara Nacional de Apelaciones en lo Civil, Sala K (National Court of Appeals in Civil Matters over the District of Buenos Aires, Section K), *F., R. R. y otro c. G. P., M. A. s/ impugnación de filiación*, October 28, 2020.

18. Constitution of Argentina (1994), art. 19.

19. See, e.g., Juzgado de Familia Nro. 1 de Pergamino (Family Court No. 1 of Pergamino), *C., C. A. y otros s/ materia a categorizar*, April 22, 2019; Juzgado Nacional de 1a Instancia en lo Civil Nro. 8 (Lower Court of First Instance over the District of Buenos Aires), *B., B. M. y otro c. G., Y. A s/ impugnación de filiación*, September 20, 2016.

20. Juzgado de Familia Nro. 3 de San Martín (Family Court No. 3 of San Martín), *M., I. M. y otro/a s/ autorización judicial*, August 22, 2016.

21. *F., R. R. y otro c. G. P., M. A. s/ impugnación de filiación* (see note 17).

22. See, e.g., Juzgado de Familia Nro. 2 de Mendoza (Family Court No. 2 of Mendoza), *M. M. C. y M. G. J. y R. F. N. s/ medidas autosatisfactivas*, September 6, 2017; Juzgado de Familia Nro. 2 de Mendoza (Family Court No. 2 of Mendoza), *S. M. S.; T. C. J.; B. P. V. s/ medidas autosatisfactivas*, February 15, 2018; Juzgado Nacional de 1a Instancia en lo Civil Nro. 87 (Lower Court of First Instance over the District of Buenos Aires), *O. F., G. A. y otro s/ Autorización*, April 3, 2019.

23. See, e.g., *M. M. C. y M. G. J. y R. F. N. s/ medidas autosatisfactivas* (see note 22).

24. See, e.g., Juzgado de Familia de 5a Nominación de Córdoba (Family Court of Córdoba), *V. A. B. y otros s/ solicita homologación*, April 25, 2018; *Case of Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica*, Inter-American Court of Human Rights, judgment of November 28, 2012.

25. Juzgado de Familia de 6a Nominación de Córdoba (Family Court of Córdoba), *F., C. y Otro*, August 13, 2019. See also *Defensor del Pueblo de la Ciudad Autónoma de Buenos Aires y otros c. GCBA y otros s/amparo* (see note 16).

26. See, e.g., Juzgado de 1a Instancia en lo Civil, Comercial y de Familia de 2a Nominación de Villa María (Lower Court in Civil, Commercial and Family Matters of Villa María), *R., R. A. y otros s/ autorizaciones*, June 8, 2018; *V. A. B. y otros s/ solicita homologación* (see note 24); Camara Nacional de Apelaciones en lo Civil, Sala I (National Court of Civil Appeals over the District of Buenos Aires, Section I), *S., M. D. y otros c. A., S. S. s/ filiación*, August 28, 2020.

27. *R., R. A. y otros s/ autorizaciones* (see note 26).

28. See, e.g., Juzgado de Familia Nro. 7 de Lomas de Zamora (Family Court No. 7 of Lomas de Zamora), *H.M. y otro s/ medidas precautorias*, December 30, 2015; Juzgado de Familia Nro. 7 de Lomas de Zamora (Family Court No. 7 of Lomas de Zamora), *B. J. D. y otros s/ materia a categorizar*, November 30, 2016; Juzgado Nacional de 1a Instancia en lo

Civil Nro. 81 (Lower Court of First Instance over the District of Buenos Aires), *S., I. N. y otro c. A., C. L. s/ impugnación de filiación*, June 14, 2017; Juzgado de Familia Nro. 8 de La Plata (Family Court No. 8 of La Plata), *D., J. E. y otro/a s/ autorización judicial*, April 27, 2020; Tribunal Colegiado de Familia Nro. 5 de Rosario (Family Court No. 5 of Rosario), *S. G. G. y otros s/ filiación*, May 27, 2016; Juzgado de Familia Nro. 7 de Viedma (Family Court No. 7 of Viedma), *Reservado s/ autorización judicial (f)*, July 06, 2017; Tribunal Colegiado de Familia Nro. 7 de Rosario (Family Court No. 7 of Rosario), *H., M.E. y otros s/ Venias y dispensas*, December 5, 2017.

29. Civil and Commercial Code (2014), art. 19; *H., M.E. y otros s/ Venias y dispensas* (see note 28); *S. M. S.; T. C. J.; B. P. V. s/ medidas autosatisfactivas* (see note 22).

30. *O. F., G. A. y otro s/ Autorización* (see note 22).

31. *H., M.E. y otros s/ Venias y dispensas* (see note 28).

32. Civil and Commercial Code (2014), art. 562; *C., C. A. y otros s/ materia a categorizar* (see note 19).

33. Tribunal de Familia de Jujuy, Sala III (Family Court of Jujuy, Section III), *B., B. D. R. – B., C. R. – B., Y. F. s/ Autorización Judicial*, October 15, 2021.

34. *H., M.E. y otros s/ Venias y dispensas* (see note 28).

35. Law 26,862 (see note 10); Decree No. 956/2013 (see note 9); Ministry of Health Resolution No. 1-E/2017 (see note 9); Ministry of Health Resolution No. 1044/2018 (see note 9).

36. Cámara de Apelaciones en lo Civil y Comercial de Salta (Court of Appeals in Civil and Commercial Matters of Salta), *T. C., E. M.; T., J. I. c. Instituto Provincial de Salud de Salta (I.P.S.) s/ Amparo*, November 6, 2019.

37. Ibid.

38. *F., C. y Otro* (see note 25); *V. A. B. y otros s/ solicita homologación* (see note 24); Juzgado de Familia Nro. 7 de Viedma (Family Court No. 7 of Viedma), *Reservado s/ autorización judicial*, March 31, 2021.

39. *F., C. y Otro* (see note 25).

40. Ibid.

41. *Reservado s/ autorización judicial* (see note 38).

42. M. Hevia, "Surrogacy, Privacy, and the American Convention on Human Rights," *Journal of Law and the Biosciences* 5/2 (2018).

43. *Reservado s/ autorización judicial* (see note 38).

44. Ibid.

45. Hevia (see note 42), p. 386.

M. M. C. y M. G. J. y R. F. N. s/ medidas autosatisfactivas (see note 22).