

## Argentina

# FAMILY, PLURALISM AND EQUALITY: MARRIAGE AND SEXUAL ORIENTATION IN ARGENTINE LAW

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‘Reality is too rich and its contours too complex to be fully seen by the light of a single lamp’

Ilya Prigogine

### Résumé

La grande diversité des modèles familiaux est désormais une réalité sociale. En légalisant le mariage entre personnes de même sexe, l’Argentine a fait un grand pas dans la reconnaissance de cette diversité et elle devint ainsi, en juillet 2010, le premier pays d’Amérique latine à emprunter cette voie. Toutefois, cette réforme demeure inachevée. L’encadrement légal complet de la reproduction assistée fait encore défaut, en matière de nom de famille, c’est encore la primauté du père qui domine et les lois persistent à accorder la priorité à la mère dans les disputes concernant la garde des enfants. Ce texte aborde également la question complexe de la filiation légale.

## I INTRODUCTION

Reality clearly demonstrates that the family takes multiple forms. It shows that besides the nuclear family – which is the principal determinant of civil or family legislation throughout the world and particularly in Latin America – there other modalities of living together which are available to couples, all based on affection. For example, there are persons who do not wish to formalise their

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relationship and live together informally for many years, and there are also longstanding relationships made up of people of the same sex. Is it the case that only matrimonial heterosexual relationships deserve express legal recognition? Should not the law concern itself with – and consequently regulate – what actually occurs at the factual or emotional level, totally independent from its members' beliefs and morphology? What forms of familial organisation should be included in the sociological concept of the family, important to the law in light of the obligatory international doctrine of human rights?

In other words, the concept of the family based on matrimony and two people of different sexes, and the plainly erroneous idea of procreation or 'propagation of the species' as an element or basic requirement for the existence of the family, in fact shares the stage with other familial configurations, still rendered invisible in so many countries.

For exactly this reason, and with the aim of reducing the gap between the law and reality in relation to the regulation of the family, Law 26.618 was enacted in Argentina on 15 July 2010. This law extends the institution of civil marriage to same-sex couples; in other words, it allows every person, regardless of his or her sexual orientation, to marry. Argentina was the first country in Latin America to pass a law of this nature.<sup>1</sup>

Law 26.618 has become known as the law of *matrimonio igualitario* on the understanding that, in light of the basic human rights principles of equality and non-discrimination, the institution of marriage must be accessible to same-sex couples, and that sexual orientation may not be relied upon to exclude certain people from a social institution open to others. A clear-cut constitutional-international analysis (the principle of equality and non-discrimination) was one of the central foundations, or indeed the backbone, of this legal reform.

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<sup>1</sup> It should be noted that another jurisdiction in the region which permits same-sex marriage is the Federal District of Mexico. However, Argentina remains the first country in Latin America to legislate to this effect, as the Federal District's legislation only applies to that one state within Mexico. In Argentina civil legislation is the same for all the provinces, while in the Mexican legal system, each state has the freedom to legislate for itself in respect of substantive as well as procedural civil law matters. On 21 December 2009, the Federal District introduced several reforms to its Civil Code and Civil Practice Code, including the legal recognition of marriage regardless of the sexual orientation of the couple. Essentially, art 146 of the Civil Code was amended to state: 'Marriage is the free union of two people for the realisation of a life in common, in which both seek respect, equality and mutual assistance . . . It must be celebrated before the Judge of the Civil Registry and comply with the formalities stipulated in the present code'. As this amendment follows several pieces of legislation which also extend the institution of marriage to same-sex couples, not only does it modify every reference to the notions of 'man' and 'woman', but it also removes every reference to the 'procreation of children in a free, responsible and informed way' as a proper outcome of marriage (according to Andrés Gil Domínguez, María Victoria Famá and Marisa Herrera *Matrimonio Igualitario. Derecho Constitucional de Familia* (Buenos Aires: Ediar, 2010) p 149ff).

As we will see, Law 26.618 follows, albeit with certain differences, the basic structure adopted in Spain's Law 13/2005 and in other norms dealing with the same subject matter, which permit all couples to marry regardless of their sexual orientation. Accordingly, of the ten<sup>2</sup> countries which allow same-sex marriage in this broad fashion, none undertook a substantial modification of all the aspects of family law affected by this egalitarian law. One of the fears of the reformist movements (ie those in favour of the legal recognition of same-sex marriage) was that such recognition may not be achieved if a comprehensive reform were attempted. It is for this reason that none of the laws passed in the still scarce number of countries around the globe that permit same-sex marriage introduced substantial or radical legislative modifications in each one of the civil law institutions which would have been affected by such laws. Instead, more general reforms were carried out.

As we will see in the course of this chapter, the Argentine reform could be classified as having gone half way. Not only did it produce modifications of a terminological nature, but Law 26.618 also expresses something else in relation to certain family law concepts, albeit with some problems or errors.

In addition, it may be noted that Law 26.618 exists in a highly complex normative context. In Argentina, there is no comprehensive regulation of the use of assisted reproduction techniques; the legal regime concerning children's surnames remains centred around the father, and there are still laws which provide a preference to mothers in custody cases, on the basis that a priori and in the abstract, mothers 'naturally' are better equipped to be entrusted with the care of their children. It was within this context, characterised by certain silences and inequalities, that Law 26.618 came into being. As a result, and as will be analysed briefly below, it brings with it a series of interpretative problems.<sup>3</sup>

Generally speaking, the Law – as is the case in all the foreign legislation regarding this issue – emphasises the recognition of the right of every person to marry, whatever his or her sexual orientation. To this end, it introduced terminological modifications, replacing a number of texts centred on the difference of gender with others that contain neutral principles. In this way, it

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<sup>2</sup> The countries which permit marriage on an equal rights basis are, in chronological order, Holland (2001), Belgium (2003), Canada (2005), Spain (2005), South Africa (2006), Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010) and Argentina (2010). Likewise, some states in the United States permit same-sex marriage, namely: Massachusetts (2004), Connecticut (2008), Iowa (2009), District of Columbia (2009), Vermont (2009), New Hampshire (2010) and Washington DC (2010), as well as the Federal District of Mexico (2009), referred to above.

<sup>3</sup> For more information on the reform of the civil marriage regime in Argentina, we recommend, besides the work already cited and along with so many others, Martin Aldao and Laura Clérico (eds), *Matrimonio Igualitario* (Eudeba, Buenos Aires, 2010); Bruno Bimbi *Matrimonio igualitario. Intrigas, tensiones y secretos en el camino hacia la ley* (Buenos Aires: Planeta, 2010) and Nora Lloveras and Olga Orlandi and Fabian Faraoni *Régimen jurídico del matrimonio civil. Ley 26.618* (Córdoba: Enfoque Jurídico, 2010); AAVV *Nuevo régimen legal del matrimonio civil. Ley 26.618* (Santa Fe: Rubinzal Culzoni, 2010) and Alejandro Ossola *Modificación al régimen del matrimonio. Ley 26.618* (Córdoba: Advocatus, 2010).

avoided the words ‘man’ and ‘woman’, and replaced them with ‘spouse’. Also, and expressly, it modified art 172 of the Civil Code, in which the requirements for a legal marriage are specified. Following the entry into force of Law 26.618, the relevant part of art 172 reads:

‘An indispensable requirement for marriage is full and free consent, personally expressed by the betrothed before the competent authority. Each marriage will give rise to the same obligations and effects, whether the betrothed are of the same sex or of a different sex . . .’<sup>4</sup>

In addition, as well as introducing terminological modifications and other, more significant amendments to various articles of the Civil Code, Law 26.618 reformed a number of the provisions of Law 18.248, concerning people’s names, and Law 26.413, which regulates Civil Registry 26.413.<sup>5</sup> How was this cutting-edge legislative recognition achieved? This question is tackled in a very succinct way in the next section.

## II SOME REFLECTIONS ON THE BACKGROUND TO LAW 26.618

### (a) The concept of the family in constitutional texts: the broad approach as an incentive for the recognition of rights

The law exists within an extensive constitutional context and is therefore able to generate debate in democratic fora, such as the Argentine Congress or Parliament. Unlike so many countries, which in their constitutional texts restrict the recognition of the family to opposite-sex couples,<sup>6</sup> the National Constitution of Argentina has nothing to say about the matter; referring instead, and in an extensive way, to ‘the integral protection of the family’ in its

<sup>4</sup> The former text provided: ‘An indispensable requirement for marriage is full and free consent, personally expressed by the man and the woman before the competent authority. An act which lacks any of these requirements will be of no legal effect . . .’.

<sup>5</sup> Aída Kemelmajer de Carlucci, Marisa Herrera and Eleonora Lamm ‘Filiación y homoparentalidad. Luces y sombras de un debate incómodo y actual’, *Revista La Ley*, Buenos Aires, 2010-E-977.

<sup>6</sup> To cite a number of examples from Latin America, the reform of the 2005 Constitution of Honduras amended art 112 to read as follows: ‘The right of men and women to marry is recognised, where each has that status naturally, as is the legal equality of the spouses . . . De facto unions between persons equally capable of marriage are recognised. The law will establish the conditions upon which such a marriage may have effect. Marriage and de facto unions between people of the same sex are prohibited. Same-sex marriages or de facto unions celebrated or recognised under the laws of other countries law will not be valid in Honduras’. Or more recently, the 2010 Constitution of the Dominican Republic provides in art 55, regarding ‘The Rights of the Family’ that ‘The State will promote and will protect the organisation of the family founded on the institution of marriage between a man and a woman. The law will establish the requirements in relation to contracting for it, the formalities for its celebration, its personal and patrimonial effects . . . The singular and stable union between a man and a woman, free from marital impediments, who form a home, gives rise to rights and obligations in respect of their personal and patrimonial relations, as provided in law’ (subsection 5).

art 14 bis. In this way, the definition of what is understood by ‘family’ is left to be determined by democratic debate (that which occurs within the framework of the legislature or Parliament).

In this sense, it is relevant to recall that, in a judgment dated 20 November 2005, Argentina’s Supreme Court of Justice of the Nation stated: ‘Since 1853 [the date in which the National Constitution was enacted] we have been required to make the Republic of Argentina into a Constitutional State of Law’.<sup>7</sup> On a number of occasions, an issue has been raised about the nature of a state model based on these characteristics, and the response has been that it is a state principally founded upon the concepts of pluralism, tolerance and participation. It has been argued, along these lines, that:<sup>8</sup>

‘The legislators and judges, as representatives of the duly constituted state powers, should, in creating and applying laws, comply with supreme law norms, and, therefore, may not make decisions on the basis of their own discretionary criteria, even if that represents the thinking or absolute desire of the majority. Any belief or conviction – even, we insist, a predominant one – is subject to the same absolute limit: the essential cores of the fundamental, universal and inalienable rights, which tend toward the development of interpretations which reflect the plurality of an open society.’

Therefore, such a state has no official religion, is secular or disestablished and free of any ecclesiastical influence, and the concepts of the state, the law and religion are clearly differentiated. Accordingly, it would not be possible to construct a normative system for such a state on the basis of moral/Christian rules. Instead, such a system must be based on legal rules derived from the Constitution and the international treaties which complement it. These are the key legal tools, and they play a fundamental role for all subordinate law.<sup>9</sup>

It is precisely from this constitutional-international perspective that it has been argued in academic writings that:<sup>10</sup>

‘The variety of the forms in which the family may be constituted represents a significant split from the standard family model based on marriage . . . [O]ther

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<sup>7</sup> Paragraph 14 from the summarised findings of the judgment of Judges Petracchi, Maqueda, Zaffaroni and Lorenzetti (CSJN, 20 September 2005, ‘Casal, Matías E. and other’, LL, 2005-F, 110, with a commentary by Augusto M Morello and Germán González Campaña ‘Reformulación de la casación penal’).

<sup>8</sup> Andrés Gil Domínguez, María Victoria Famá and Marisa Herrera *Derecho Constitucional de Familia* (Buenos Aires: Ediar, 2006) vol II, pp 21 and 22.

<sup>9</sup> For further discussion of the secularisation of family law, we recommend ‘A Secularização do Direito de Família’ in Belmiro Pedro Welter and Rolf Hanssen Madaleno (eds) *Direitos Fundamentais do Direito de Família* (Porto Alegre: Livraria do Advogado, 2004) pp 87ff and Rodrigo Da Cunha Pereira *Direito de Família. Uma abordagem psicanalítica* (Belo Horizonte: Del Rey, 3rd edn, updated and enlarged, 2003) chapters I and II.

<sup>10</sup> Maria Claudia Crespo Brauner ‘O pluralismo no Direito de Família brasileiro: realidade social e reinvenção da família’ in Belmiro Pedro Welter and Rolf Hanssen Madaleno (eds), *ibid* p 259.

forms of relationships are equally deserving of legal protection, in recognition of the principle of pluralism and liberty that personifies postmodern society.’

One of main challenges of contemporary family law is to define and to regulate the concept of the family with the understanding that ‘essentially, it has moved from being a nucleus of finances and reproduction to being a place of affection and love’.<sup>11</sup> This is so much the case that a Brazilian author, Maria Berenice Dias, talks about the right of ‘families’ in the plural, confirming by the use of this expression that there is no single definition of the family – such as the traditional or nuclear family based on marriage between people of the opposite sex – but rather that there are multiple types of family structures.<sup>12</sup>

Undoubtedly, Law 26.618 has profoundly disturbed the concept of the family in Argentine law, modifying the notion of marriage, the most entrenched institution in Argentine legislation and around the world. In other words, this reform requires the revision of deeply rooted ideas, such as that marriage is ‘naturally’ between a man and a woman. With reference, once again, to the doctrine of international human rights, and, particularly, the principle of equality and non-discrimination, it may be understood that the error lies in considering certain social facts as something ‘natural’, forgetting that everything that occurs between human beings has a history, a context and, therefore, a particular interpretation. Following this line of argument, it should be recalled that, for centuries, the expression ‘natural’ was used ‘to justify’ restricting the right to vote to men and denying it to women; a distinction which for a long period now has been unsustainable.<sup>13</sup> Has the time not now arrived in which this revisionist perspective should be applied to the denial of access to certain rights or institutions, such as marriage, based on a person’s sexual orientation? In Argentina, this question has been answered affirmatively, through the enactment of Law 26.618.

### **(b) The force of jurisprudence, ‘judicial activism’ and the system of diffuse constitutional control**

Before the enactment of the law, a number of judgments were handed down regarding the constitutionality of art 172 of the Civil Code (referred to above). That article stipulated that marriage could only be between people of the opposite sex.

<sup>11</sup> Rodrigo Da Cunha Pereira ‘Da união estável’ in Maria Berenice Dias and Rodrigo Da Cunha Pereira (eds) *Direito de Família e o Novo Código Civil* (Belo Horizonte: Del Rey, IBDFAM, 4th edn, 2006) p 220.

<sup>12</sup> According to Dias, the constitutional foundation of the legal recognition of other forms of family organisation revolves around the ‘pluralism’ already referred to, on the understanding that family entities founded on the basis of affection and which give rise to mutual commitments should not be foreign to the law: Maria Berenice Dias *Manual de Direito das Famílias* (Porto Alegre: Livraria do Advogado, 2005) pp 62 and 63.

<sup>13</sup> See Aída Kemelmajer de Carlucci and Marisa Herrera ‘El principio de no discriminación en una reciente sentencia del Tribunal Europeo de Derechos Humanos. Una cuestión en movimiento desde el ámbito regional y una responsabilidad desde el ámbito estatal’ *Revista La Ley*, 6 July 2010, pp 3ff.

Argentina has a diffuse system of constitutional control, which is to say that all judges have the power to decree the unconstitutionality of a norm as it applies to a particular case and not *erga omnes*, as is the case in those jurisdictions which restrict constitutional control to a court or a specialised organ. On this basis, a number of judicial proceedings were commenced by same-sex couples with the intention of obtaining authorisation to marry by means of a declaration of unconstitutionality of the relevant norm (ie art 172) and a consequential judicial order to the civil registry to perform the marriage.

The first case, before the Federal Capital's National Family Court, was dismissed.<sup>14</sup> However, in other cases brought in different jurisdictions (the City of Buenos Aires's Disputes, Administrative and Tax jurisdictions), it was considered that the refusal of a local administrative organ, as the Civil Registry is, to authorise the marriage of same-sex couples violated a series of principles and rights deeply rooted in Argentine constitutional tradition, such as equality and non-discrimination.

In the judgments which found that art 172 was unconstitutional, and which enabled the couples who brought the proceedings legally to marry, a series of different and complementary arguments were made. We highlight the following:

- (1) 'The application for amparo [similar to judicial review] brought against the Government of the City of Buenos Aires, with the aim of requiring the authorities of the Civil and Legal Capacity Registry to celebrate a marriage between two people of the same sex, is upheld as the exclusion of the litigants from the right to marry is based on their sexual orientation, which constitutes a category susceptible to discrimination . . . and the State has failed to show that discrimination on the basis of that category is strictly necessary to achieve a legitimate aim';
- (2) 'It follows that articles 172 and 188 of the Civil Code should be declared unconstitutional to the extent that they prevent two people of the same sex from marrying, as these norms constitute discrimination by the State

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<sup>14</sup> We refer to the case *Rachid María de la Cruz and Another v the National Registry of the State and Capacity of People (precautionary measures)* of 22 June 2007 by the National Civil Court, No 88 of the Federal Capital, the finding in which was confirmed by Tribunal F of the National Civil Appeals Court on 26 September 2007 (published in LL, 2007-F, 487). In the first judgment, it was stated that 'The non-authorization of marriage between people of the same sex is based in positive law and in the very nature of the institution, given that not only a literal reading but also the spirit of article 172 of the Civil Code support this principle' and that 'There is no illegality in denying the right to marry to those who cannot, due to their nature, meet its objectives. This institution is legislated for persons of the opposite sex who engender and educate their children to achieve humanity's continuation, and the objective and reasonable justification for this difference is that the State privileges those unions which provide the basis for a family, which in turn provides the basis for Argentine society'.

based on sexual orientation, and therefore they violate articles 16 and 19 of the National Constitution, and article 11 of the Constitution of the City of Buenos Aires’;<sup>15</sup>

- (3) ‘on the face of it, nowadays articles 172 and 188 of the Civil Code must be contrasted with the constitutional rules which prohibit discriminatory treatment on the basis of sexual orientation (articles 16 and 19, National Constitution; article 11, Constitution of the City of Buenos Aires; article 26 of the International Covenant of Civil and Political Rights; and amongst others, article 2(2) of the International Covenant of Economic, Social and Cultural Rights; in relation to the Covenant, see in particular General Comment No. 20, by the Committee on Economic, Social and Cultural Rights, dated 22/05/09 which states in relevant part: “‘Other status’ as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person’s sexual orientation is not a barrier to realizing Covenant rights . . .”’); and
- (4) ‘If the rights of minorities only extend far enough to ensure that their members are tolerated, then little progress has been in relation to achieving sincere and full respect for peoples’ way of life. From the perspective of the constitutional regime of the City of Buenos Aires, it is clear that there are no good or bad sexual orientations or genders: sexual preference and gender are extra-moral matters. There is no legal framework according to which normal and pathological genders may be established. The point is to accept that liberty and recognition are very important for human dignity’.<sup>16</sup>

The result of this contradictory jurisprudence was that, while some couples were unable to marry as a result of unfavourable judicial determinations, others could. In addition, some judgments sought to overturn those which had authorised same-sex marriage.<sup>17</sup> A situation of jurisprudential ‘chaos’ arose, with completely contradictory judgments being given in relation to similar situations. It was in this context that the debate about the bill to reform the legal regime relating to civil marriage took place; with the result of the reform being that the right to marry was extended to all people, regardless of their sexual orientation.

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<sup>15</sup> The Court of Contentious Administrative and Tax Proceedings, No 15, Ciudad Autónoma de Buenos Aires, 10 November 2009, F A c GCBA, LL, 2009-F, 796.

<sup>16</sup> The Court of Contentious Administrative and Tax Proceedings, No 4, Ciudad Autónoma de Buenos Aires, 22 February 2010, B, D A y Otros c Gcba, La Ley Online.

<sup>17</sup> A judgment given by the National Civil Court no 85 on 8 March 2010 held the following: ‘a marriage celebrated between two people of the same sex before the Register of Civil Status and the Capacity of People is absolutely null and void, it being an act the object of which is contrary to public order, under which the institution of marriage is established, as it does not meet the requirements that art. 172 of the Civil Code imposes for a valid marriage, and it is detrimental to the right of men and women to marry and to found a family’ (JNac Civ, No 85, 8 March 2010, L, E R, La Ley Online).

There is no doubt that invoking this jurisprudential uncertainty constituted a tool followed by various organisations which defend homosexual rights, in that it served as a means of exerting pressure to achieve a final decision for all the nation's inhabitants. And such a decision was made through the passing of Law 26.618. Therefore, the debate was concluded in the most democratic manner possible, through a law which expressly permits people of the same sex to marry. Is it a good law? Does it resolve all the conflicts and questions that may be perceived from a neutral perspective on sexual orientation matters? What does it regulate and how does it regulate? In the following section, we briefly analyse these questions.

### **III THE REFORM OF THE LEGAL REGIME FOR CIVIL MARRIAGE: LAW 26.618**

#### **(a) General considerations**

Without referring to all the substantial changes that would have had to be made to achieve the standard of an egalitarian legal regime in family law and the effects or consequences in other areas of law, it is the case that, in relation to a number of issues, there have been certain, albeit deficient, amendments. This has led to national doctrine (at this stage, jurisprudence has not been extended or committed in this respect) being required to devise interpretative positions generating deep and antagonistic debates which continue to this day.

The objective of this chapter is not to go into great detail in relation to all of the amendments – whether substantive, formal or terminological – which Law 26.618 introduced, but rather to discuss a number of them, emphasising the new issues which the reform has generated. Accordingly, we have selected the following issues affected by Law 26.618: filiation, adoption, custody of children after a breakdown of a relationship and children's surnames, with the aim of presenting a more general perspective about this very important reform.

Of course, these are not the only issues which the reform has created. By way of a quick review, we note for example that the extension of the right to marry to same-sex couples requires a rethinking of impotence as causal of the 'relative nullity' of a marriage, as established by the Civil Code (art 220(3)) or the issue of adultery as one of the faults or subjective grounds for separation and binding divorce (art 202(1ro) of the Civil Code). At least until Law 26.618, both concepts were linked to the notion of intercourse. Consequently, Argentine doctrine argued that the maintenance of sexual relations with a person other than one's spouse was adulterous on the basis that the duty of fidelity had been materially violated, while, on the contrary, sexual relations with someone of the same sex was classified as 'grave slander' (art 202(4) of the Civil Code) because of the factual impossibility of intercourse between two people of the same sex. Can different grounds and rules be applied when a spouse maintains sexual relations with another person, despite there being no

intercourse? Through the application of the egalitarian principle that inspires all of the reform that Law 26.618 introduced, it follows that these 'notions', which are of a 'heteronomic' character, based as they are on the differentiation between the sexes, should be revised.<sup>18</sup>

Another revisionist perspective could also be observed in the family violence laws and, in particular, those which give special protection to women. In 2009, Argentina passed Law 26.485, which provides comprehensive protection to women, and its regulatory decree is 1011/2010. The issue that doctrine raises, in this area, is whether it is possible to extend the application of this law to couples of the same sex, to couples comprised of two women or to those made up of two men if situations arise in which, as generally occurs in cases of gender violence, the weaker partner – the woman – is subordinated by the stronger – the man. Is it not the case that this clear inequality, which should attract special protection for the weaker party, could not also occur in same-sex relationships?<sup>19</sup>

Clearly, as it may be observed, the introduction of an egalitarian or equal rights perspective in relation to gender in civil law is not a simple task, as it affects or impacts upon a large number of laws, many of which the reform did not expressly amend. A series of issues have arisen as a result, to which doctrine and jurisprudence should attempt to respond.

### **(b) Determining the matrimonial filiation of two people of the same sex**

In Argentina, there is no comprehensive regulation of assisted reproduction, despite the frequent use of such techniques and despite the fact that, in accordance with numerous judgments, they are covered by medical insurance. Recently the province of Buenos Aires approved a law that will allow members of any public medical insurance scheme or private prepaid scheme to receive, for free, cover for assisted fertility treatments. In addition, the law authorises social welfare offices to provide assistance in this regard to people without medical insurance.<sup>20</sup> Accordingly, there is a need for a national law which deals with all of the possible variables regarding filiation, rather than simply the issue of cover for assisted reproduction treatment.

The first and most important question to which the reform gave rise is if the presumption of paternity of a mother's husband, as set out in art 243 of the Civil Code, may be extended to the spouse of a woman who gives birth. The fact is that in Argentina, despite the lack of legislation on the use of assisted reproduction treatments alluded to above, the notion that surrogate maternity is prohibited by art 953 of the Civil Code has always been defended. That

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<sup>18</sup> Andrés Gil Domínguez and María Victoria Famá and Marisa Herrera, above n 1, p 531ff.

<sup>19</sup> Ibid, p 549ff.

<sup>20</sup> We refer to provincial law 14.208 enacted on 2 December 2010 and regulated by Decree 2980/2010, of 20 December 2010.

article deems null and void any agreement which has as its object ‘acts which [are] impossible, illicit, contrary to good customs or prohibited by law, or which are against freedom of action or conscience, or that prejudice the rights of a third party’. On that basis, a determination regarding filiation of children of married couples of the same sex could only occur in a marriage comprised of two women.

In relation to this issue, the reform did not introduce any express amendment to the norms regarding filiation, as set out in the Civil Code. It only modified an aspect of art 36 of Law 26.413, which regulates the role and operation of the Civil Registry. That amendment was as follows:

‘The first name and surname of the father and the mother or, in the case of children from marriages between people of the same sex, the name and surname of the mother and her spouse, and the type and number of the respective identity documents.’ (art 36 of Law 26.618)

Therefore, it appears that if a married woman gives birth to a child, and her maternity of that child is established through the act of giving birth (as provided for in art 242 of the Civil Code), filiation would also be determined in this way in the case of a same-sex (female) couple. This interpretation would be reinforced by the application of the latest regulation issued in relation to Law 26.618 that, by way of an ‘interpretative keystone’, stipulates in its last paragraph that:

‘No norm of the Argentine legal system may be interpreted or applied in a way which limits, restricts, excludes or suppresses the exercise or enjoyment of the same rights and obligations, whether in relation to a marriage constituted by people of the same sex or to a marriage comprised of two (2) people of different sex.’ (art 42 of Law 26.618)

Moreover, this interpretation is based on one of the basic principles of filiation by the use of assisted reproduction techniques, namely, the will to procreate. It is this will from which the filial link or designation of filiation, and the consequential parental<sup>21</sup> responsibility, are derived. In this way, recognition of the right to identity is encouraged in a dynamic fashion, that is, the sociological-emotional identity determined by the will to assume actively the duties and rights inherent in parental responsibility<sup>22</sup> by the couple that has decided to care for a child, whether that couple be heterosexual or homosexual. In the case of the presumption of filiation (in a broad sense, without considering in a rigid or binary manner that a person should have a mother in the female form and a father with a man’s body, but should have two points of reference, regardless of the sex of each), the will to procreate as referred to

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<sup>21</sup> Luz María Pagano ‘El apellido de los cónyuges y de los hijos a partir de la ley 26.618’ (2011) 48 *Revista Interdisciplinaria de Doctrina y Jurisprudencia. Revista de Derecho de Familia* (Abeledo Perrot, Buenos Aires).

<sup>22</sup> María Victoria Famá ‘Filiación y homoparentalidad en la ley 26.618 del matrimonio igualitario’ (2011) 48 *Revista Interdisciplinaria de Doctrina y Jurisprudencia. Revista Derecho de Familia* (Abeledo Perrot, Buenos Aires).

above would also be present, through marriage. This would particularly be so when through the development of medical science, a woman may engender or gestate a child with genetic material of her spouse, thereby making it possible for the child to be genetically linked with that spouse. Nevertheless, this interpretation cannot be considered as settled in Argentine doctrine and in practice, at least up until now.

In Argentina, the first case of two married women who have used assisted reproduction techniques has already occurred. During the pregnancy of one of the women, they were married. Upon the birth of their child, Vicente, both went to register him. The understanding of the Civil Registry was that art 36 (of Law 26.618, referred to above) only recognised the filiation of Vicente with the woman who gave birth to him but not with her spouse. This was on the basis that the presumption of paternity that arises in the case of the husband of a mother only applied to a man. Consequently, while it was recorded in the birth certificate that the mother who gave birth was married to another woman, it was not recorded that the child was related to this other woman. Further, the child could not take the surname of the other woman, but rather only the surname of the woman who gave birth to him, she being the only one to whom he would be legally related.<sup>23</sup>

The issue becomes even more complicated in the case of a marriage between two married women in which one conceives a child naturally through sexual relations with a man, who then asserts paternity in relation to the child and an intention to exercise the rights and duties that flow from this voluntary act. In such a case, would the presumption of filiation in favour of the mother's spouse apply, or should priority be given to the man's rights, or should the law allow a person to be legally related to three people, and in this way move beyond the traditional binary system?

Further, it must be recalled that the reform was restricted to the institution of marriage and therefore did not introduce any amendments in relation to unmarried same-sex couples or in relation to the issue of extramarital filiation. The result is an incomplete and unequal system, in that the laws relating to matrimonial filiation must be revised due to Law 26.618, but this is not the case in relation to extramarital filiation. This is another concerning gap in the current legal regime.

All of these issues which have arisen as a result of this reform have not been considered in case-law, only in academic debate. In this debate, the civil registries have adopted the most traditional position, namely, that the presumption of paternity in favour of the husband can only be applied in relation to a heterosexual marriage; and in the case of two women, the spouse should not be recognised as another mother, but rather that she should apply to adopt the child of her partner.

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<sup>23</sup> Andrés Gil Domínguez and María Victoria Famá and Marisa Herrera *Matrimonio Igualitario. Ley 26.618. Derecho Constitucional de Familia*, above n 1, pp 225ff.

We have a number of reservations in relation to these arguments. First, in the case of two married women where a child is born to one but also possesses genetic material from the other, is it reasonable for the woman who did not give birth to have to adopt her own biological child? On the other hand, the principle of the best interests of the child is relevant. A child born into a same-sex female marriage would have a definite legal connection to the spouse of the mother only after a process of adoption, when this could have been achieved earlier through acceptance of an extension of the presumption of filiation (ie so that the presumption would apply not only to paternity but rather to filiation in a neutral and wider sense).

To conclude this section, we refer to a judgment which highlights the new conflicts arising from the use of assisted reproduction techniques, and the traditional binary position, which considers that a person may only have two parents.

In this judgment, handed down by the Family Court of Córdoba, 4th Division, on 28 June 2010,<sup>24</sup> a visitation rights regime was established in favour of the former lesbian partner of the biological mother of a child, conceived through artificial insemination with semen from a man in a homosexual relationship. It should be clarified that all four people involved had wanted and consented to the insemination and the applicant had lived with the child performing her role as a mother, together with the biological mother. The judge stated:

‘[In t]he life history of the child from his conception to his birth . . . the applicant has played a relevant part . . . The desire to be mothers was determinative in the formation of the relationship between S and M, in relation to both the mutual choice the consolidation of the relationship . . . Moreover, the applicant had very close, intimate and affectionate contact with the child in the first years of his life, all of which both parties to the relationship had agreed to.’

Against this factual background, it was highlighted that:

‘ . . . it cannot be validly argued that a human being is only able to develop him or herself within the family, excluded from other affectionate or social ties, which are also essential for the achievement of a fulfilled adult life. Mrs [S] cannot be considered as unconnected to or a stranger to the child’s emotional world and, as a result, to deny her the possibility of making contact with V would not only be prejudicial to the child, as it would impede him from maintaining a relationship with an important person in his life, but there is also no justification for it, especially when the biological mother agreed to and consented to this type of family arrangement from the outset, of which the applicant forms an indivisible part. Considering and respecting the child as a legal subject also means that the behaviour of his role models, who are both necessary and responsible for him, must be coherent and clear, as these persons cannot any longer be considered as

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<sup>24</sup> Family Court no 4, Córdoba, 28 June 2010, ‘A. S. G. v M. V. S. and Another (urgent measures)’ (2011) I *Derecho de la Familia. Revista Interdisciplinaria de Doctrina y Jurisprudencia* (Abeledo Perrot, Buenos Aires) pp 137ff with a commentary by Nora Lloveras ‘Una madre invisibilizada y una madre biológica “visible”: dos madres y la filiación del niño’.

self-contained individuals, but rather have projected themselves onto a third party, the son, permanently marking and incorporating themselves into his life history . . . It follows from this that when V. was born, *in the historical-emotional-individual context that his biological parents chose for him, the decision that they made was not one that concerned only them, as the child was a legal subject with that history and no other.*<sup>25</sup>

However, in addition to setting a broad regime of visitation rights (twice a week and Friday and Saturday in between), the judgment referred to this regime as ‘a maternal or familial contact regime’. In that sense, it was considered necessary to ‘distinguish the blood or legal relationship, from that established through the force of circumstance (or affection) and which enjoys a level of social acceptance, which in turn legitimates it, even though it is unrecognised by law’. The judgment also stated that:

‘ . . . all the parties to this dispute agreed upon the roles that each would fulfil in the family that was to be formed . . . in the case of M and S, a “dual maternity” was agreed upon . . . The applicant took on this role in day to day life, in relation to the care and attention of the child . . . this type of quasi-kinship does not originate from nature but rather as a result of functions performed. In parallel, for some time psychology has defined paternity and maternity in terms of functions performed rather than in relation to the mere fact of nature.’

And the basis of this decision is set out in the ruling, in the following passage:

‘It is because of this that the concept of “socio-affectiveness” is so strong, defined as the necessary element of family relations based on people’s will and desire to maintain emotional bonds that go beyond the law, gradually converting itself, together with the legal and biological criteria into a new criterion for establishing the existence of the parental link. From this point of view, there can be no doubt that Mrs [S] possesses all the qualities that undeniably make her a relative of V, and also that this kinship, connected with the idea of family relationships, is related to a socio-affective motherhood, created by strong and dynamic parental bonds that are reciprocally taken on and accepted by her and the child, but also and simultaneously agreed with his progenitors prior to his birth.’

Consequently, it was concluded that ‘[t]he right of V to have and to receive affection from the person who acted as a “foster mother” in his early years cannot be denied’.

### **(c) Joint adoption by married same-sex couples**

One of the issues that provoked considerable debate prior to, during and even after the enactment of Law 26.618 was whether same-sex couples should be able to adopt.<sup>26</sup> The prominence and importance of the debate which occurs in

<sup>25</sup> Our emphasis.

<sup>26</sup> For more information on this issue, see Marisa Herrera ‘Adopción y “Homo-parentalidad u Homo-fobia” Cuando el principio de igualdad manda’ (2010) *Revista Jurisprudencia Argentina*, fascículo 12, 2010-III, 22 September 2010, Buenos Aires, pp 3ff.

some countries about the access of same-sex couples to maternity/paternity depends upon the breadth or narrowness of the notion of family, as defined by law.

The issue of adoption and sexual orientation arises in a series of different cases, such as: (1) an adoption by an individual, where the person who intends to adopt is homosexual; (2) an integrative adoption, that is, the adoption by a person of the biological or adopted child or children of his or her same-sex partner and (3) joint adoption by two people of the same sex, whether married or in a de facto partnership. In all such cases, to a greater or lesser extent, the persons wishing to adopt have been subject to discriminatory treatment because of their sexual orientation.

From the legislative point of view, the vast majority of states allow single person or individual adoption. Accordingly, in theory, sexual orientation cannot be a valid reason to deny authorisation for adoption. However, in practice there is a clear disapproval of single person adoption in general and particularly in relation to homosexual people (men more than women, because of that still deeply rooted notion of ‘maternal instinct’).

Of all the legislation around the world which extends the institution of civil marriage to all persons, regardless of sexual orientation, all but Portugal allow for joint adoption by same-sex married couples. In some legislation, that recognition is also extended to unmarried couples, whether hetero or homosexual. This is not the case in Argentina. The most recent reform of the institution of adoption, through Law 24.779 of 1997, restricts this legal right to married couples, denying unmarried couples the possibility of adopting (in conformity with arts 312 and 320 of the Civil Code). However, a number of judicial precedents have declared the unconstitutionality of these laws, finding that they violate various rights and principles of human rights, and in particular, the right to equality and non-discrimination, on the basis that what really matters in making the final decision about whether to authorise an adoption or not is the suitability of the petitioners as adoptive parents, and not the formal link which connects them; that is, whether they are or are not married. Would it not be possible to extend this jurisprudential view, in favour of adoption by unmarried opposite-sex couples, to unmarried same-sex couples, through application of the principle of equality which has inspired Law 26.618?

Returning to the analysis of the countries which allow marriage on an equal-rights basis, amongst all of them, initially the relevant Belgian legislation, passed in 2003, specifically excluded adoption by same-sex couples. However, in 2006 this law was substantially amended to allow adoption, on the basis of the principle of equality and the perception that there was a lack of convincing and non-discriminatory arguments in favour of the notion that a child should not be raised and cared for by two people of the same sex.

As was clearly stated in a judgment dated 16 August 2010 of the Mexican Supreme Court of Justice, in which the constitutionality of not permitting married same-sex couples to adopt was debated:

‘There is no basis for affirming that homoparental homes or families possess some anomalous factor the result of which will inevitably be a poor upbringing. Whoever believes the opposite, must provide evidence for their view. Neither the Attorney-General of the Republic, nor anybody else in the world, has presented such empirical evidence, supported by serious and methodologically well-founded research. The burden of proof falls on those who argue, discriminatorily, that a homosexual couple is not equal to or is worse for the health and well-being of minors than a heterosexual couple. In reality, those who hold this belief make a flawed generalisation, on the basis of some anecdotal or limited information, which they elevate to a characteristic of a whole social group. These flawed generalisations are called stereotypes and these constitute, in turn, the erroneous cognitive foundation of social prejudices and intolerance.’

Therefore, if there are no objective and solid arguments against a child being raised by two people of the same sex, or nothing to show that a child will suffer harm as a result of such an upbringing, legislation which restricts this possibility would lead to discriminatory treatment based only on sexual orientation; and this should be regarded with suspicion.

The only country in which same-sex marriage is permitted, but in which these arguments have been disregarded, is Portugal. The relevant law was passed in 2010. In relation to adoption, art 3 of the law provides: ‘The amendments introduced by the present law do not imply that adoption in any of its forms by people married to same-sex partners is legal.’ With the aim of reinforcing this prohibition, the following article affirms: ‘No legal provision regarding adoption may be interpreted in a contrary sense to that set out in the preceding article.’

The second category mentioned above relates to integrative adoption, whether of the biological or the adopted child of one member of a same-sex couple. This issue was considered and resolved favourably in the summarised sentence of the Brazilian Superior Court of Justice on 27 April 2010. The case concerned a woman who had adopted two girls, and who over time had formed a very strong intimate relationship with another woman. That woman became fond of and cared for her partner’s daughters, and wished to adopt them. The judgment found in favour of allowing the adoption, giving priority to the dynamic notion of identity (in the construction of the emotional link developed between the applicant and the girls), and holding on that basis that ‘studies do not indicate any problems arising from the adoption of children by homosexual couples. What is more important is the level of unity and affection in the family environment into which they will be placed’.<sup>27</sup>

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<sup>27</sup> ‘Estudos não indicam qualquer inconveniência em que crianças sejam adotadas por casais homossexuais, importando mais a qualidade do vínculo e do afeto no meio familiar em que serão inseridas’ (author’s translation).

Is sexual orientation a *sine qua non* to exclude a person from paternity/maternity through adoption? If a negative answer to that question is required as a result of the application of the principle of equality and non-discrimination, all legislation which imposes this restriction would be clearly discriminatory.

This is what was highlighted in a report signed by a number of Argentine researchers who work from distinctive viewpoints and professions in topics related to the notion of ‘homoparentality’, and which was presented in the Senate in the course of the debate on the bill in favour of same-sex marriage:

‘The possibility that a boy or girl may suffer in the future because society is discriminatory cannot be raised as an objection to marriage. This objection is truly fallacious and senseless. All of us may or may not experience suffering. Nobody says to blacks or to Jews that they should not reproduce in certain contexts because their children are going to suffer. That argument . . . is associated with the ideal of the pure race, concealed by the invocation of future suffering. The problem belongs to the society that discriminates and not to the person who is discriminated against.’

The report added that:

‘For decades, research has been carried out on the impact on children of family arrangements which vary from the standards set by law as being the most desirable: studies on children of “single mothers”, of divorced parents, of widows and widowers, brought up by grandmothers and grandfathers . . . The results invariably showed that the fundamental variables relevant to the development of one’s personality are influenced by other factors: emotional support and affection, by the atmosphere at home, by respect and responsibility.’

The law analysed in this chapter has followed the permissive stance in favour of joint adoption by same-sex married couples. From the perspective of human rights and particularly the principle of non-discrimination, this is the correct position to adopt.

#### **(d) Child custody in homoparental families**

One of the conflicts that arises with greater frequency in judicial practice and which directly implicates the rights of boys, girls and adolescents, is the issue of their custody after the break-up of their parents, whether those parents are married or unmarried (due to the principle of equality between children of married and unmarried couples). Now, following the reform which is the subject of this chapter, the scope of the conflict has been expanded, bringing within its potential break-ups of same-sex couples.

In Argentine law, as in so many other Latin American countries – even with no age restrictions as is the case in Chile, art 225 of the Civil Code – there is an ongoing preference in favour of the mother in relation to awarding custody of children of a certain age (in Argentina, up to 5 years of age) following the

break-up of a couple. Therefore, in the current legal system, there exists an abstract priority in favour of one of the progenitors: the mother. From the constitutional-international perspective, and for some time now, the validity of this preference has been the subject of considerable doubt. This is on the basis that it violates or at a minimum contradicts a basic and inviolable principle of a democratic state: equality between men and women. This preference hides or is drawn from the deeply rooted idea of the woman-mother as the principal caregiver of children, by virtue of an assumed and natural ‘maternal instinct’. Is it not the case that maternity, as all other roles and functions, is a social construction?

In relation to this, it is useful to refer to an article of the most important international instrument in relation to boys, girls and adolescents, in both international and national jurisdictions. Article 18(1) of the United Nations Convention on the Rights of the Child states that:

‘States Parties shall use their best efforts to ensure recognition of the principle that both parents *have common responsibilities for the upbringing and development of the child*. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.’<sup>28</sup>

On the other hand, one should not lose sight of another and also especially significant international instrument concerned with the rights of women, the Convention on the Elimination of All Forms of Discrimination against Women. Article 16 of the Convention states that:

‘States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: . . . (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.’

In this context, for some time we have been asking ourselves if the preference in favour of mothers is consistent or inconsistent with the aforementioned principle of equality and if the reform introduced by Law 26.618 has introduced a change or improved upon this position, or if, on the contrary, it has reinforced it. The current text of art 206 of the Civil Code (following the reform introduced by Law 26.618) related to the preference in favour of mothers, reads:

‘Following confirmation of separation by a definitive judicial decision, each spouse may freely determine his or her domicile or residence. If there are children which are the responsibility of each, the following provisions relating to the parental responsibility regime will apply. Children of less than five (5) years of age will remain under the mother’s care, unless there are serious reasons to the contrary relating to the minor’s interests. In cases of same-sex marriages, if there is

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<sup>28</sup> The emphasis is ours.

no agreement, the judge will resolve the issue taking into account the minor's interests. Where older children are concerned, and there is no agreement between the relevant spouses, custody will be awarded to the spouse who in the opinion of the judge is most suitable. The progenitors will continue to be subject to all the applicable responsibilities and obligations in respect of their children.'

As we can see, this norm maintains the maternal preference in relation to heterosexual spouses, but where the married couple is comprised of two women, no such preference applies: the parties may agree on who will take custody and if there is no agreement, it is for the judge to decide who is the person most suitable to assume that function. Accordingly, it is a simple matter to understand that the reform has not only wasted the opportunity to revoke the preference in favour of mothers that is inconsistent with fundamental principles of human rights, but that it has also established a type of 'inverse discrimination' in favour of opposite-sex progenitors. Thus, where same-sex parents are involved, there is no specified age limit while, on the contrary, heterosexual parents continue to be bound to this inflexible – and in our opinion, unconstitutional – variable concerning age. As a result of this rule, a father/man who wishes to be awarded custody of a child of his who is younger than 5 must irrefutably prove that he is better equipped to be in charge of the upbringing of his child in order to reverse the legal presumption in favour of the mother/woman (which applies due to the maternal preference already discussed).

In our opinion, there should not be any specified age limit or preference in favour of either parent. Instead, the general rule should be as art 206 provides in the case of same-sex couples: any controversy must be resolved by application of the best interests of the child principle.<sup>29</sup>

Although we do not wish in this chapter to consider in detail the ways in which disputes in relation to the care or upbringing of children may be avoided (whether in hetero or homosexuals couples), we do want to mention that many of these disputes would be done away with if – as is already the case in many countries around the world – the institution of shared upbringing or custody were recognised, this being the system that best aligns with the human rights principles referred to above, which recognise the importance of both parents and that each have an active role in the upbringing of their children. This is what may be deduced from the concept referred to as 'coparentality', promoted by the Convention on the Rights of the Child in a number of its articles.

## **(e) Children's surnames**

### ***(i) Introduction***

In today's society the existence of a person without an identifier that differentiates him or her from everybody else is inconceivable. The equality of

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<sup>29</sup> Aída Kemelmajer de Carlucci and Marisa Herrera 'Matrimonio, orientación sexual y familias. Un aporte colaborativo desde la dogmática jurídica' *Revista La Ley*, 4 June 2010, pp 1ff.

human nature is linked to the right of every person to affirm his or her identity, to be different, something which is consolidated in the development of a person's personality and the resulting social projection. An essential element of this identity is expressed through one's name, the protection of which has been recognised internationally.<sup>30</sup>

In this section, we will be concerned with summarising the position that the law which regulates same-sex marriage has adopted in respect of the spouses' surname and the children who originate from these unions, whether biologically, as the result of assisted reproduction techniques, or through adoption.

In order to comprehend the reform which Law 26.618 introduced in relation to children's surnames more easily, we note that in Argentine law the issue of people's names is governed in general by Law 18.248, which entered into force in 1948. Law 26.618 brought with it a number of express changes to precisely this law.

### ***(ii) Children of married couples***

Law 26.618 retains different sets of rules in respect of the surname of children of married couples depending on whether the spouses are of the same sex or the opposite sex, and treats the first group in a discriminatory fashion. In relation to children of a married opposite-sex couple, the rule set out in art 4 of Law 18.248 applies. That is to say, the children will take the first surname of the father, and only at the progenitors' request will they be given the full surname of the father (both his maternal and paternal surnames) or have the mother's surname added. In other words, the addition of the mother's surname is not obligatory and requires the consent of both spouses. In addition, a child may choose to take his mother's surname upon reaching 18 years of age. This means that if there is no agreement between the spouses, the patriarchal rule remains and the child is registered with the father's surname.

On the other hand, it is provided that children of same-sex married couples will take the first surname of one or other of the parents. At the spouses' request,

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<sup>30</sup> Article 18 of the American Convention on Human Rights (more commonly referred to as the Pact of San José, Costa Rica, signed on 21 November 1969), states that 'Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all . . .'. On the other hand, in relation to childhood and adolescence, Art 8(1) of the Convention on the Rights of the Child provides: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.' Further, as cited above, Art 16(d) of the Convention on the Elimination of All Forms of Discrimination against Women, obliges states parties to 'ensure, on a basis of equality of men and women . . . the same rights and responsibilities as parents . . .'. In Argentina, these articles have a constitutional status, as provided for in art 75(22) of the National Constitution. Therefore, the name as a human right has a superior status that must be respected in the domestic legal order. In addition, it is an element of the right to identity, both in its static and dynamic aspect.

the full surname of the spouse whose first surname the child has been given may be registered, or the surname of the other spouse may be added. If there is no agreement about which surname the child will take, about whether the child's surname should be the full surname of one of the spouse's, or the order of the surnames where the child is to take the surname of both, priority will be given according to alphabetical order. As is the case with children of married opposite-sex couples, the child has the right upon reaching 18 years of age to apply to the Civil Registry to take the full surname of the spouse whose surname the child has, or to take the surname of the other spouse (art 37 of Law 26.618, which amends art 4 of Law 18.248).

Although the possibility which this Law has given rise to only applies to adopted children, doctrine has interpreted it as extending to biological as well as adopted children, taking into account the equal rights principle that governs the condition of children.<sup>31</sup> Applying the principle of the immutability of the name, the norm provides that once a surname has been added it cannot be replaced. On the other hand, the law states that all the children of the same family must carry the same surname; and that surname must be the name given to the oldest child.

### ***(iii) Adopted children***

In contrast to the legal regime in force in a number of countries, Argentine law continues to maintain a dual regime in relation to adoption. This means that full adoption (that which extinguishes all legal linkages with the birth family, except with regard to matrimonial impediments as set out in art 323 of the Civil Code) co-exists with the institution of simple adoption, in which the legal linkage with the original family subsists and the only legal linkage created is that between the adoptee and the adopter or adopters (depending on whether the adoption is individual or joint, as provided for in art 329 of the Civil Code). These differences have an impact or effect on the issue of the surname of adopted children. Basically, although in both full and simple adoptions the adoptee takes the surname of the adopter or the adopters, it is only in the case of a simple adoption that the adoptee can add his or her own surname when he or she reaches the age of majority (which in Argentina has been 18 years of age since 2009, when Law 26.579 decreased the age of majority from 21 to 18).

In a second paragraph, a surviving spouse of a couple which has adopted a child is authorised to request that the adopted child take the surname of his or her previously deceased spouse, provided that he or she can show good reasons for this (art 332 of the Civil Code). If the recognition were subsequent, the same rule applies; that is, once the adopted child reaches 18 years of age, he or she may make an application to the Civil Registry that his or her original surname be added.

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<sup>31</sup> Andres Gil Domínguez, María Victoria Famá and Marisa Herrera *Matrimonio igualitario y Derecho Constitucional de Familia* (Buenos Aires: Ediar, 2010) pp 491ff.

Another law applies to situations in which one member of a married couple has individually adopted a child or children. In the case of a woman married to a man, where the man has not adopted the minor, the minor will take the maiden name of the woman, unless the male spouse expressly authorises the giving of his surname to the minor. In the case of a woman or a man married to a person of the same sex whose spouse has not adopted the minor, the minor will take the maiden name of the spouse who adopted him, unless the other spouse expressly authorises the giving of his or her surname to the minor (art 41 of Law 26.618, which amends art 12 of Law 18.248).

In relation to the simple adoption of the son or daughter of one spouse by the other – also referred to as an integrative adoption – the same rule applies to heterosexual and homosexual marriages (arts 313 and 331 of the Civil Code, which have not been amended by the law under analysis).

In the case of a full adoption, the same rule which applies in relation to children born to married couples applies to the adopted child. Article 326 of the Civil Code is substituted in the following way: the adopted child takes the adopter's first surname or full surname if the adopter so requests. If the adopting spouses are of the opposite sex, at their request the adopted child may take the full surname of the adoptive father or add the first surname of the adoptive mother to that of the adoptive father. Where the spouses are of the same sex, at their request the adopted child may take the full surname of the spouse from whom the first surname comes or may add the first surname of the other spouse to that surname. If there is no consensus between the spouses regarding the surname the adopted child will take, in relation to whether the child should take the full surname of one of them or how the surnames should be ordered, priority will be given according to alphabetical order. In either case, once the adopted child has reached 18 years of age he or she may request this addition (art 326 of the Civil Code, amended by art 16 of Law 26.618).

As this makes clear, the same rule that applies to children of married spouses applies to adopted children, including the different rules which apply to same-sex and opposite-sex marriages. In the case of opposite-sex marriages, the spouses are free to decide whether the child will take the full surname of the adoptive father or that the adopted mother's first surname will be added to that of the father.

Accordingly, the consent of both parents is required, and where there is a lack of agreement, the child will be registered with his or her father's surname. In the case of same-sex marriages, at both spouses' request the adopted child may take the full surname of the spouse from whom the first surname came, or may add the other spouse's first surname to that name. If there is no consensus about the surname the adoptee will take, whether it should be the full surname of one of the spouses, or in relation to the ordering of the surnames, the names will be given priority according to alphabetical order (art 326 of the Civil Code). Put another way, the man's surname is no longer given any priority; instead, the neutral rule of alphabetical order applies. This method of resolving

disagreement between progenitors is a matter of debate, as it reduces the possibility of reaching a decision on the basis of consensus. This is because the parent whose name appears first in the alphabet will not be interested in reaching an agreement, comfortable in the knowledge that his or her name will prevail if there is a lack of consensus. As a result, it has been argued that a more impartial system would be drawing lots, in which the resolution of the conflict is left to chance. Such a system would provide stronger motivation for spouses to reach a mutual decision.

#### IV BRIEF COMMENTS IN CLOSING

As Enrique Mari, a recognised and well-remembered philosopher of Argentine law, brilliantly stated:

‘Legal discourse must, therefore, be understood and evaluated not only by that which it excludes, but also by what it implies through such exclusion.’<sup>32</sup>

The following statement is eloquent and indisputable: social reality demonstrates that there is a great diversity of family forms. The Argentine state has taken a momentous step along the path of pluralism and diversity. In light of the reform introduced by Law 26.618, it appears that Argentine law is willing to narrow the gap between law and reality in relation to the family. The recognition of the right of same-sex couples to marry is a clear indication of this approach, guided by the concepts of equality and pluralism.

This debate has been well promoted, as has been the case with all the great normative changes of recent periods, by the international doctrine of human rights. In this sense, and as the writer, historian and journalist Michael Ignatieff has strongly argued:

‘Human rights language exists to remind us that there are some abuses that are genuinely intolerable, and some excuses for these abuses that are genuinely unbearable.’<sup>33</sup>

Fortunately, for some time now in the law, the ‘traditional’ concept of the family has been questioned. The backdrop to the expansion of the institution of civil marriage to all people, regardless of their sexual orientation, is this reformist and vital viewpoint on the concept of the family, a concept which has always been heavily influenced by extra-legal perspectives such as religion.

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<sup>32</sup> As cited by Carlos M Cárcova ‘Notas acerca de la Teoría Crítica del Derecho’ in Christian Courtis *Desde otra mirada. Textos de Teoría Crítica del Derecho* (Buenos Aires: Eudeba, 2001) p 31.

<sup>33</sup> Cited by Emilio García Méndez ‘Origen, sentido y futuro de los derechos humanos: Reflexiones para una nueva agenda’ (2010) 1 *Revista Internacional de Derechos Humanos* primer semestre 2004 available at [www.surjournal.org/esp/index1.php](http://www.surjournal.org/esp/index1.php) (accessed 13 June 2011).

In summary, decisions to move forward and transform or to hide and silence are political and can be the result of action or omission. Law 26.618 has been a positive and clear step by the legislature (and through it and the public debate generated by the reform, of society in general); that is, a political decision in the best sense of that term. In this way, a necessary policy of inclusion (in relation to all the ways of living as a family) continues to be strengthened and prioritised over and above a policy of exclusion (of only some of those ways). The reform analysed in the course of this chapter had a lot to say in relation to this tension, and tipped the balance in favour of inclusion.