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5 Towards the Constitutionalization of Family Law in Latin America

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1 Introduction: the Constitutionalization of Family Relations

This chapter seeks to address several key rulings handed down by Latin American courts on three issues with a direct impact on family law: sexual orientation, gender identity and filiation. In doing so, we attempt to highlight the emergence of an embryonic process that could be labelled as the *constitutionalization of family relations* or the progressive adjudication of constitutional rights in the field of family law.

Driven by a wave of constitutional reforms that took place during the 1990s and early 2000s, Latin American constitutions began to recognize a series of principles, rules and obligations directly applied to family life. Among others, these constitutions recognize several principles, such as the 'integral protection of the family',[1] the 'special rights/duties of parents toward their children'[2] and the 'equality between children born in and out wedlock'.[3] Some constitutions recognize, moreover, the rights of parents to 'choose the education of their children',[4] as well as the 'inviolability of the home' and the 'intimacy' of family life.[5] Others texts omit these specific rights for parents and recognize, instead, the rights of children to 'be free from abuse and violence'.[6]

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[1] Federal Constitution of Argentina, Art. 14 *bis*; Constitution of Colombia, Art. 42.

[2] Federal Constitution of Brazil, Art. 229; Constitution of Costa Rica, Art. 53, Constitution of Paraguay, Art. 53; Constitution of Colombia Art. 42 (inc. 4).

[3] Constitution of Peru, Art. 6; Constitution of Uruguay, Art. 42; Constitution of Costa Rica, Art. 53; Constitution of Colombia, Art. 42.

[4] Constitution of Chile, Art. 19, Nº 10; Constitution of Peru, Art. 13.

[5] Constitution of Chile, Art. 19, Nº 5, Constitution of Ecuador, Art. 23.8; Constitution of Colombia, Art. 42.

[6] Federal Constitution of Brazil, Art, 227; Constitution of Colombia, Art. 44; Constitution of Uruguay, Art. 41.

These norms have created a particular 'landscape' of three different models of constitutional conceptions of family in Latin America:[7] (a) *a restrictive* model (where only 'natural' men and women are recognized as having the right to marry or enter into *de facto* civil partnerships);[8] (b) *an intermediate* model (where the Constitution provides protection for all forms of family, but only recognizes marriage between a man and a woman);[9] and (c) *a broad model* (where the Constitution establishes an expansive mandate for the 'integral protection of the family', leaving room for all forms of family, marriage or civil partnership).[10]

These constitutional reforms have been complemented by a series of legal modifications in Latin America designed to respond to a plethora of changes in the structure, composition and expectations of family members, inter alia reforms in the field of divorce, the recognition of 'consensual unions' or de facto couples, same-sex marriages, shared custody between parents, restrictions on corporal punishment against children and the legal obligation to satisfy the best interests of the child in any judicial proceeding. Although different in their nature and scope, these progressive reforms have also prompted the emergence of new academic debates in the field of family law, particularly those aimed at integrating a human rights approach into family relations.

1.1 A New Jurisprudence on Family Relations

Accordingly, a growing part of the jurisprudence has to call attention to the analysis of the ways in which Latin American constitutions define and regulate family life, as well as the implications for the constitutional rights of family members.[11] Inspired by what some have framed as the

[7] We take this typology from M. Herrera's, 'La Familia en la Constitución 2020, ¿Qué Familia?', in R. Gargarella (coord.), *La Constitución en 2020: 48 propuestas para una sociedad igualitaria* (Buenos Aires: Siglo Veintiuno Editores, 2011) 85–94.

[8] Art. 112 of the Constitution of Honduras.

[9] Art. 226 of the Constitution of Brazil and Art. 67 of the Constitution of Ecuador.

[10] Art. 14 *bis* of the Federal Constitution of Argentina.

[11] G. J. Bidart Campos, '*El derecho de familia y los nuevos paradigmas, in X Congreso Internacional de Derecho de Familia', Mendoza, Argentina, 20 al 24 de septiembre de 1998, Vol. 5, 1998 (Ponencias profesores invitados)* 16–22; Manuel Chávez Asencio, *Derecho de Familia y Relaciones Jurídicas Familiares* (7th edn, Mexico: Ed. Porrúa, 1998); A. Gil Domínguez, M. V. Famá and M. Herrera, *Derecho constitucional de familia* (Buenos Aires: Ediar, 2006), vol. I.

'constitutionalization of law',[12] family law and child law specialists have begun to incorporate a dogmatic analysis that directly relates to constitutional principles, rules and precedents.[13] Based on this approach, some authors have begun to challenge the foundations of the dogmatic that justified the regulation of family life in terms of both an organic conception of the family and an inegalitarian recognition of individual rights for all family members (particularly, women and children).

Among this emerging jurisprudence, works can be identified that highlight the impact of constitutional reforms on the regulation of families in civil and family law[14] as well as those that focus on the primary impact of international human rights law (widely incorporated in the constitutions of Latin America) on family law.[15] Similarly, some authors are now delving into such issues as the transformation of the biological grounding of parenthood, a matter particularly salient to the granting of parental responsibility.

Academic concerns about the transformations in the allocation of parental rights in the region have largely been fuelled by same-sex

[12] L. Favoreau, *Legalidad y constitucionalidad. La constitucionalización del derecho*, trans. Magdalena Correa Henao (Bogotá: Universidad Externado de Colombia, Instituto de Estudios Constitucionales Carlos Restrepo Piedrahita, 2000); L. R. Barroso, *El neoconstitucionalismo y la constitucionalización del derecho. El triunfo tardío del derecho constitucional en Brasil* (Instituto de Investigaciones Jurídicas, Universidad Nacional Autónoma de México, 2008); L. Ferrajoli, 'El paradigma normativo de la democracia constitucional', in Marcilla Córdoba, Gema, *Constitucionalismo y garantismo* (Bogotá: Universidad Externado de Colombia, 2009).

[13] E. Soto Kloss, 'La familia en la constitución política' (1994) 21-2 *Revista Chilena de Derecho* 217-29; N. Lloveras and M. Herrera (eds.), D. Benavides Santos and A. M. Picado (coords.), *El derecho de familia en Latinoamérica 1. Los Derechos Humanos en las relaciones familiars* (Córdoba: Nuevo Enfoque Jurídico, 2010); A. Álvarez Pertiz, 'Constitucionalización del derecho de familia' (2011) 7*Revista Jurídicas CUC* 27-51.

[14] E. A. Zannoni, *Derecho de Familia* (3rd edn, Buenos Aires: Ed. Astrea, 1998) 22ff.; J. Parra Benítez, 'El carácter constitucional del derecho de familia en Colombia' (1996) 97 *Revista Facultad de Derecho y Ciencias y Políticas*, 47-52; M. L. Calvo Carvallo, 'Familia y Estado: Una perspectiva constitucional' (2000) 15 *Revista Uruguaya de Derecho de Familia* 163-65; J. C. F. J. de la Fuente Linares, 'La protección constitucional de la familia en América Latina' (2012) Rev. IUS 6-29, available at: www.scielo.org.mx/scielo.php?script=sci_arttext&tpid=S1870-21472012000100005

[15] M. Beloff, 'Quince años de la vigencia de la Convención Sobre los Derechos del Niño en Argentina' (2008) 10 *Justicia y Derechos del Niño*11-44; N. Lloveras and M. J. Salomón, 'Los derechos humanos en las relaciones familiares del S. XXI: Los caminos de la jurisprudencia argentina', in Lloveras *et al.*, *El derecho de familia*, 73-115.

unions/marriages and assisted reproduction techniques.[16] Based on the emergence of new family configurations recognized by the law, as well as the growing use of these technologies, part of the jurisprudence has called for a departure from mere 'biological parenthood'.[17] Adopting a tack similar to that of the current configurations of parenthood in both England and Wales[18] and the European system of human rights,[19] these authors have recommended a shift away from natural/biological/adoptive parenthood and the recognition of a broader understanding of parenting. In the case of assisted reproduction techniques, this appears to suggest the recognition of a type of parenthood derived from procreation, as witnessed by their use.[20]

Alternatively, other scholars have focused on the dogmatic transformations in children's autonomy, the exercise of their rights and the incorporation of the best interests of the child as the paramount or primary consideration in all matters affecting them. These works range from an analysis of the incorporation of the United Nations Convention on the Rights of the Child into domestic law,[21] to a critique of prevalent constitutional interpretations on moral and political autonomy of

[16] Especially, in the Colombian and Argentinean cases. See the recent decision of the Colombian Constitutional Court (August 2014) that rejects the decision to deny the adoption of a child, based on the homosexuality of the petitioner. The petitioner was the partner of the child's mother. Corte Constitucional de Colombia, *SENTENCIA SU-617/14*. In the case of Argentina, these debates are prompted by the enactment of Law Nº 26.618 (2010) which recognizes every person's right to marry, regardless of their sex (Art. 2º).

[17] A. Kemelmajer de Carlucci, M. Herrera and E. Lamm, 'Los criterios tradicionales de determinación de la filiación en crisis', in M. Gómez de la Torre Vargas (ed.) and C. Lepin Molina (coord.), *Técnicas de Reproducción Humana Asistida: Una mirada transdiciplinaria* (Santiago: Abeledo Perrot/Thomson Reuters, 2013) 127-63; D. Jarufe Contreras, Las filiaciones 'no biológicas' derivadas de la aplicación de técnicas de reproducción humana asistida (TRHA), in Gómez de la Torre Vargas and Lepin Molina, *Técnicas de Reproducción*, 67-104.

[18] See House of Lords, *Re G (Children)* [2006] UKHL 43. Particularly, Baroness Hale's famous recognition of three forms of natural parenthood: genetic, gestational and psychological.

[19] European Court of Human Rights, *Lebbink* v. *The Netherlands*, Application No. 45582/99 (2005) 40 EHRR 18, para. 37; *Görgülü* v. *Germany*, Application No. 74969/01 (2004).

[20] Kemelmajer de Carlucci *et al.*, 'Criterios tradicionales de determinación de la filiación en crisis', 130. For a contrary opinion, see H. Corral, 'Maternidad subrrogada: Sobre la pretensión de formalizar la filiación mediante la adopción o recepción de su práctica en el extranjero, *ibid.*, 165-88.

[21] E. García-Méndez and M. Beloff, *Infancia, Ley y Democracia en América Latina*, Prefacio by L. Ferrajoli, Segunda (ed.) (Bogotá: Editorial Temis-Ediciones Depalma, 1999), vol. I

children,[22] to those who have attempted to refine the meaning and interpretative use of the best interests of the child.[23] Regardless of some differences in perspective, these authors have defended the moral and legal proposition that children are rights-holders and that these rights establish limits to both state and parental authority, that children have a progressive or dynamic autonomy, and that their voice must be heard and taken into account.

Lastly, in the field of parental rights and duties, the new doctrine of family law in Latin America has provided substantial support for a transformation of both statutes and adjudication, providing a more egalitarian distribution of child-rearing in family life. In some cases, the doctrine has focused on the historical justifications in favour of the organic family, to highlight the power relations exercised by men over women and children alike.[24] In other cases, the new doctrine has concentrated on the need to acknowledge new legal institutions that might strengthen co-responsibility between parents (such as shared custody)[25] as well as in the effects of divorce and separation on the spouses and on the welfare of the child.[26]

[22] D. Lovera and A. Coddou, 'Niño, adolescentes y derechos constitucionales: De la protección a la autonomía', in *Justicia y Derechos del Niño, Nº 11* (Santiago: UNICEF, 2009) 11–54.

[23] M. Cillero, 'El interés superior del niño en el marco de la convención internacional sobre los derechos del niño', in *Justicia y Derechos del Niño, Nº 1* (Santiago: Universidad Diego Portales, 1999) 46–63; Jaime Couso, 'El niño como sujeto de derechos y la nueva justicia de familia. Interés superior del niño, autonomía progresiva y derecho a ser oído' (2006) 3–4 *Revista de Derechos del Niño* 145–66; Domingo Lovera, 'Razonamiento judicial y derechos del niño: de ventrílocuos y marionetas' (2008) 10 *Justicia y Derechos del niño* 45–62; R. Garrido, 'El interés superior del niño y el razonamiento jurídico' (2013) *Anuario de Filosofía y Teoría del Derecho* 115–47.

[24] I. C. Jaramillo, 'Familia', in C. Motta and M. Sáez (eds.), *La mirada de los jueces. Género en la jurisprudencia latinoamericana* (Bogotá: Siglo del Hombre Editores, Washington College of Law, Center for Reproductive Rights, 2008), vol. I, 267–361. For a historical analysis of the conception, legal debates and reform of the family in Colombia, see I. C. Jaramillo, *Derecho y familia en Colombia* (Bogotá: Editorial Universidad de Los Andes, 2013).

[25] F. Lathrop, *Custodia compartida de los hijos* (Madrid: La Ley, 2008); A. Kemelmajer de Carlucci, 'La guarda compartida. Una visión comparativa', in *Revista de Derecho Privado, Instituto de Investigaciones Jurídicas UNAM* (special edn, 2012), 181–6.

[26] N. Espejo and F. Lathrop, 'Dissolution of marriage in Latin America: Trends and challenges', in J. Eekelaar and R. George (eds.), *Routledge Handbook of Family Law and Policy* (New York: Routledge, 2014) 133–7. A more general presentation on parental responsibility is in N. Espejo and F. Lathrop (coords.), *Responsabilidad Parental* (Santiago: Thomson Reuters, 2017).

1.2 Neo-constitutionalism and Constitutional Courts

The constitutionalization of family relations is, in a way, an extension of a specific form of constitutional interpretation, such as the one famously developed by Ronald Dworkin (arguing that the Constitution protects all the rights required by the best conception of the political ideals laid down in it -even if some of those rights are not formally or expressly recognised by that text).[27] The role of courts in finding rights not expressly enshrined in constitutions has been a major issue in the scholarly discussion in civil law countries – under the label of 'neo-constitutionalism'. In the neo-constitutional paradigm judges are paramount, since the legal system must be guaranteed in all its parts through jurisdictional mechanisms. Just as the Constitution of neo-constitutionalism is an 'invasive' or 'meddling' constitution, the judicial task also has to do with many aspects of social life (such as family relations). In this sense, neo-constitutionalism generates an explosion of judicial activity and entails or requires some degree of judicial activism, largely superior to what has been observed previously.[28]

As noted above, the emerging constitutionalization of family relations in Latin America can be observed through a careful reading of several key rulings handed down by constitutional courts on three issues with a direct impact on family law: sexual orientation, gender identity and filiation. Rulings in Argentina, Brazil, Chile, Colombia and Mexico provide particular insight.

The authors view both legislation and constitutional precedent[29] in these countries as good examples of the evolution of the constitutionalization of family law and believe that over the course of the past two decades these

[27] R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996) 72–81.

[28] M. Carbonell (ed.), Teoría del neoconstitucionalismo. *Ensayos escogidos* (Madrid: Trotta-UNAM, Instituto de Investigaciones Jurídicas, 2007); P. Comanducci, *Formas de (neo) constitucionalismo: un análisis metateórico*, 16 Isonomía 89, 100–1 (2002). The authors would like to thank Dr Domingo Lovera for his remarks on neo-constitutionalism in jurisprudence.

[29] In Latin American legal systems, judicial precedents or decisions do not have the same legal value as in the common-law tradition. The normative value of judicial decisions in Latin America depends on several factors, including the jurisdiction where they were adopted (for example, constitutional jurisdiction or civil). The main *proviso* here is that e.g. decisions, perhaps except for those emanating from constitutional courts, often lack the binding power of statutory regulations.

countries have developed a constitutional conception of justice in a fashion that has influenced the regulation of family relations. Due to space constraints, we are unable to refer to every major ruling. Nonetheless, we believe that we have selected the most representative cases and facets, taking special care to include the rights of children in our analysis (matters of gender identity and filiation).

Argentina appears to lead some of the main doctrinal debates in matters of family law (with a Constitution promulgated in 1995). In fact, the nation enjoys the most modern civil legislation in the region, thanks to a new National Civil and Commercial Code that came into force in 2015 following previous attempts at reform over the course of several decades to update Argentina's regulations to reflect progress in precedent. In fact, the country's uniform, generalized case law has allowed Argentina to unreservedly supersede the Civil Code of 1876.

Unlike the Argentinean case, the Chilean Civil Code harks back to 1855. While that code stood as the source of inspiration for much of the Latin American civil codification process of the nineteenth century, that body of law and the country's Constitution, passed in 1980, remain firmly anchored in nineteenth-century criteria in the areas of patrimonial regimes for marriage and civil unions, notwithstanding substantive reforms commencing in the 1990s. For its part, Mexico, like Brazil, is a federal nation, and thus presents a special diversity of civil legislation. Although the Federal Civil Code dates back to 1928 (and the Constitution to 1917), some twenty local Civil Codes coexist with that legislation. This situation makes the study of Mexican law uniquely complex, which is why the precedent emanating from that nation's Supreme Court in constitutional matters is particularly helpful in shedding light on uniform criteria. Moreover, in recent years the court has issued rulings that reinterpret the individual state's civil regulations, providing further insight.

For its part, Colombia enjoys a Constitution from 1991, operating in concert with a Civil Code from 1873. This is supplemented by some of the most abundant and rich constitutional precedents on the continent. Thus, the pronouncements of Colombia's Constitutional Court are regularly the subject of study, review and analysis by legal scholars across the region. Lastly, although Brazil's Constitution of 1988 is somewhat older than the nation's Civil Code (2003), Brazil has developed strong judicial precedent on equality and non-discrimination on the grounds of sexual orientation and marital and parental matters, to which we now refer.

2 Sexual Orientation and Marriage

Let us begin by discussing a group of constitutional decisions on the role of sexual orientation in the process of recognizing the existence of family relationships. Specifically, we will look at rulings on the constitutionality of marriage restrictions for people of different sexes in Colombia, Argentina, Mexico and Chile.

The former three countries present a remarkable collection of precedents on the subject, which, in general, involve decisions handed down on the constitutionality of the laws being challenged. This is not the case in Chile, where we will comment on two judgments which contain no real, substantive pronouncements.[30]

2.1 Colombia

In the case of Colombia, a 26 July 2007[31] ruling by the Constitutional Court declared unconstitutional the expression 'a man and a woman' contained in article 113 of the Civil Code – a regulation defining marriage[32] – recognizing the absence of a contractual figure that would allow same-sex couples to formalize their union.

The court stated that: 'the members of the homosexual couple must have the option to choose, one that they do not currently have, since there is *no institution of a contractual nature* that, in their case, sets forth the legal bond that gives rise to the formal and solemn constitution of their family'. It went on:

> the consideration of the rights of homosexual persons *does not contradict the constitutional recognition* of heterosexual marriage and the family originating in such a rite, nor its express protection, for the simple reason that this recognition and such protection is not diminished by the mere fact that an institution is

[30] We should note that the recognition of the rights of same-sex couples in the region has come from both lawmakers and the constitutional courts. Argentina and Uruguay enjoy legislation that has permitted so-called 'equal marriage' since 2010 and 2013, respectively. Brazil and Colombia, on the other hand, recognize such bonds based on judicial findings to which we will refer below. In Mexico, the situation is different, insofar as only some states have granted such recognition.

[31] C-577/11.

[32] 'Marriage is a solemn contract whereby a man and a woman unite in order to live together, procreate and support each other.'

established to formalize, as a legal bond, the relationship between two persons of the same sex.[33]

The court also stated that 'The Constitution *is not a closed and static order* and much less could it be so in an area ... subject to constant evolution',[34] urging the country's Congress to issue, prior to 20 June 2013, a law that, in a systematic and organized manner, would regulate a contractual institution as an alternative to de facto union.[35]

Lastly, the court extended the effects of this ruling to same-sex couples who, after 20 June 2013, found themselves in one of the following four situations: first, having appeared before a Colombian judge or notary, the civil marriage had been refused on the grounds of sexual orientation; second, had entered into a contract to formalize and solemnize their relationship even when the designation or legal effects of a civil marriage were absent; third, had performed a civil marriage, but the office of vital records refused to register it, and, fourth, all those persons who formalize and solemnize their relationship through civil marriage in the future.

As we can see, this ruling by; the Colombian Constitutional Court declares unconstitutional the civil regulations on marriage, notwithstanding the provision in the national Constitution itself that could bar persons of the same sex from forming that bond.[36]

[33] Paragraph 4.5.3.2 (emphases added). This Court had previously ruled that the system of protections in place for heterosexual couples should be applied to same-sex couples as well, finding that Law 54 of 1990, modified by Law 979 of 2005 was unconstitutional. See Sentencias C-098/96, 7 March 1996 and C-075/07, 7 February 2007.

[34] *Ibid.* (emphasis added).

[35] Regarding the deadline set forth by the court, given that the mandated legal reform had not occurred, in April 2016 the court issued a ruling aimed at: '(i) *overcoming the deficit in protection* identified in Judgment C-577 of 2011, with regard to same-sex couples in Colombia (ii) *ensuring* the exercise of the right to marry, and (iii) protecting the principle of *legal certainty* with regards to a person's *marital status*' (emphases added). Pursuant to Court Communique 17 dated 28 April 2016 regarding the case law standardization ruling on civil marriage between same-sex couples in Colombia [Case File T 4,167863 AC – Ruling SU-214/16 (28 April)], available at www.corteconstitucional.gov.co/comunicados/No.%2017%20comunicado%2028%20de%20abril%20 de%202016.pdf [accessed 5 May 2016].

[36] Article 42.1: 'The family is the fundamental nucleus of society. It is composed of natural or legal ties, based on the free decision of a man and a woman to marry or on the responsible will to create one.'

2.2 Argentina

In the case of Argentina, prior to the enactment of Law 26,618 of 21 July 2010, which enshrines so-called 'equal marriage', there were several judgments – issued both by courts of the first instance and higher courts – which ruled on the constitutionality of regulations limiting marriage to different-sex couples. While some pronouncements rejected the legality of marriages between persons of the same sex, others declared unconstitutional the civil regulations on the exclusivity of heterosexual marriage. Among the latter, the following judgments – which paved the way for legal recognition of same-sex marriage – stand out.

On 10 November 2009,[37] a protective action filed via *amparo* against the government of the City of Buenos Aires was upheld. That ruling declared the articles of the Civil Code limiting marriage to different-sex couples unconstitutional. The decision noted that denying the marriage of two persons of the same sex did not per se constitute an illegality. However, it added that the presumption of legality of the acts of the Government of the City of Buenos Aires did not imply that such actions were legitimate. In this sense, in providing the grounds for the declaration of unconstitutionality, the court stated that the decision would remove 'an *illegitimate obstacle* that limited equality and freedom, impeded the *full development of individuals and their effective participation in the political, cultural, economic and social life of the community*, and encouraged the *perpetuation of homophobic behaviour*'.[38] All of which, the court ruled, was in clear opposition to the Argentine constitutional regime.

Similarly, in a 19 March 2010 ruling, the court declared the unconstitutionality of regulations limiting marriage to different-sex couples and ordered that the marriage of two people of the same sex who had requested an appointment for a marriage ceremony be authorized:

> As noted in the preceding whereas clauses, whether from the perspective of the right to the protection of personal autonomy or from that of the right to equality based on the right to non-discrimination, the regulations on the right to marry ...

[37] *F.A.* v. *GCBA*. Contentious-Administrative and Tax Court # 15 of the Autonomous City of Buenos Aires. Published in: LA LEY 30/11/2009.

[38] Paragraph XVIII (emphases added).

do not meet constitutional requirements insofar as they extinguish that right for the petitioners in the absence of circumstances that could make such a prohibition legally tolerable.[39]

2.3 Mexico

As for Mexico, on 3 June 2015 the National Supreme Court of Justice addressed the sexual orientation of persons wishing to marry by alluding to the regulations on procreation.

The Supreme Court ruled that the law of any federal entity that deems the purpose of marriage to be procreation and/or that defines it as being between a man and a woman, is unconstitutional. The court found that:

attempting to link the requirements for marriage to the sexual preferences of those eligible to access the institution of marriage to procreation is *discriminatory* insofar as it *unjustifiably excludes access to marriage to homosexual couples* whose situation is similar to that of heterosexual couples. The distinction is discriminatory because sexual preference is not pertinent to differentiation in the context of the constitutional imperative.[40]

This judgement consolidated certain previous precedent on the topic and provides a solid foundation for the recognition of marriage by same-sex couples across Mexico.[41]

2.4 Brazil

In Brazil, homosexual unions are currently recognized as a family unit and same-sex marriage is available.

This situation began to consolidate after 5 May 2011 when the Brazilian Supreme Court accepted two declaratory actions of unconstitutionality and recognized homoaffective unions as family entities with the same

[39] *C., M. y otro* v. *GCBA*. Contentious-Administrative and Tax Court # 13. Paragraph 10. Published in: DFyP 2010 (May) (emphasis added).

[40] Paragraph 157 (emphases added). Tesis Jurisprudencial 43/2015. Décima Época. Núm. de Registro: 2009407. Instancia: Primera Sala.

[41] Previously, as was the case in Colombia, this tribunal had ruled that certain provisions that in practice discriminated against same-sex couples were unconstitutional. Thus, in a ruling dated 29 January 2014, the court found that the implicit exclusion of same-sex couples from health and maternity insurance in the context of regulations on social security was unconstitutional (Amparo en Revisión 485/2013 of 29 January 2014).

rights and duties as stable heterosexual unions.[42] In this judgment, the court applied paragraph 2 of Article 5 of the Federal Constitution which states: 'The rights and guarantees expressed in this Constitution do not preclude others from arising from the regime and the *principles* adopted thereby, or from the *international treaties* to which the Federative Republic of Brazil is party.' Insofar as the possibility of interpreting Article 1,723 of the Civil Code in a discriminatory fashion, the court deemed it necessary to resort to the technique of '*interpretation according to the Constitution*' (emphases added).

Since then, precedent has allowed the transformation of stable unions into marriage.[43] Subsequently, on 25 October 2011,[44] the Supreme Court of Justice granted unfettered authorization to marry.

2.5 Chile

In the case of Chile, we will review two rulings: the former relates to the constitutionality of the provision that defines marriage as a contract between a man and a woman; the second deals with the dissolution of marriage on special grounds, to wit, the homosexual conduct of the respondent spouse.

On 3 November 2011,[45] the Chilean Constitutional Tribunal ruled on a petition regarding the alleged unconstitutionality of Article 102 of the Civil Code.[46] This action was prompted by the Court of Appeals of Santiago upon hearing a remedy filed against an alleged violation of the right to equality before the law. The breach of this right was alleged to have

[42] STF, ADI 4.277 e ADPF 132, REl. Min. Ayres Britto, j. 05/05/2011. The effects of this ruling were binding and *erga omnes*. The decision served to reaffirm previous subject matter-related findings, such as a 2001 decision that recognized same-sex unions as a family for the first time in the context of inheritance rights (Rio Grande do Sul, TJRS, AC 70001388982, 7°C. Cív., Rel. Des. José Carlos Texeira Giorgis, j. 14/03/2001). Previously, the Supreme Court had recognized the existence of a de facto partnership for persons joined in same-sex union (STJ, Resp 148.897/MG, 4° T., Rel. Min. Ruy Rosado de Aguiar, j. 10 /02/1998). Moreover, in 2010, that Court had allowed a same-sex couple to adopt two children (STJ, REsp 889.852/RS, 4°T., Rel. Luis Felipe Salomao, j. 27/04/2010).

[43] TJRS, AC 70048452643, 8°C.Cív., Rel. Ricardo Moreira Lins Pastl, j. 27/09/2012.

[44] STJ, REsp 1.183.378-RS, 4° T., Rel. Min. Luis Felie Salomao, j. 25/10/2011.

[45] Case number 1881-10.

[46] The statute reads: 'Marriage is a solemn contract whereby a man and a woman are presently and indissolubly united for life, to live together, procreate, and support each other.'

occurred after a civil registry official refused both to grant an appointment for two men to marry and to authenticate two same-sex marriages performed abroad, one in Argentina, the other in Canada.

The Constitutional Tribunal rejected the petition on grounds of form, noting that the matter at issue was in fact a complex legal provision: marriage. Specifically, the court argued that an 'exclusion of law' prevented it from ruling on this matter because the Constitution itself sets forth that laws are 'a matter of civil codification'[47] and 'any other provision of a general and obligatory nature that sets forth the essential foundations of the legal order'.[48] The Tribunal found that the regulation of marriage – given its nature as a general, mandatory provision of enormous social statute – qualified as a part of the fundamental underpinnings of the civil legal order and therefore, a matter of law, not the Constitution.

As to the grounds for divorce based on homosexual conduct, on 10 April 2014[49] the Constitutional Tribunal issued a ruling rejecting the request for inapplicability on the grounds of unconstitutionality of Article 54, number 4 of the Civil Marriage Law.[50] In effect, the inapplicability of that provision was alleged in a for-cause (*culpa*) divorce proceeding in which the wife accused her husband of homosexual conduct.

The Tribunal noted that the spouse's alleged wrongdoing was an *act or activity* involving homosexual conduct, not one of mere externalized affection or preference towards a person of the other or the same sex. The Tribunal further ruled that the provision in question looks to the serious transgression of the duty of fidelity inherent to marriage as the grounds for divorce. The court also noted, moreover, that in this case, it was the conduct or actions of one of the spouses with persons of the same or different sex–involving sexual contact or significant external manifestations of affection inherent to a marriage– that was at issue. In sum, the Tribunal ruled that the provision did not represent an arbitrary differentiation with respect to other grounds of for-cause (*culpa*) divorce, since all of them – at least on the surface – involve a violation of the duty of conjugal

[47] Article 63, # 3 of the Political Constitution of the Republic of Chile.

[48] Whereas clause 5. [49] Case number 2435-13.

[50] The statute reads: 'A petition for divorce may be filed by one of the spouses as a result of the culpable conduct of the other, so long as such conduct stands as a serious violation of the rights or obligations that marriage imposes, or of the rights and obligations relating to the children, that makes life together intolerable ... This cause may be invoked, among other cases, when any of the following occurs ... 4. Homosexual behaviour.'

fidelity, notwithstanding the fact that any such conduct could furthermore be a criminal offence.

3 Gender Identity

In relation to gender identity, we will address some of the most salient rulings from Colombia and Mexico.[51]

3.1 Colombia

In the case of Colombia, the Constitutional Court has issued three important decisions over the past five years. This case law is particularly relevant as it incorporates the children's rights approach and calls upon the executive to take special measures to protect children's best interests.[52]

First, in a judgment dated 16 July 2013,[53] the court reviewed a case in which a newborn baby's intersex status had not been recorded on the corresponding birth certificate (the space for 'live birth, sex' had been left blank). This flaw prevented the child from being registered with the office of vital records and, consequently, from receiving benefits from the subsidized social security system.

The court stated that: 'the requirement to indicate the male or female gender of the new-born in the generic part of the birth certificate is *legitimate and necessary*'; but that '*The indeterminacy of sex must not*

[51] The authors should note that Argentina enjoys one of the most advanced laws in the world on this topic. That legislation acknowledges gender identity from a comprehensive perspective and allows for name and sex changes without the need for medical evidence, treatment or surgery and provides a series of guarantees to that end (Law 26,743 of 9 May 2012). In Chile there is currently no constitutional precedent or legislation on gender identity. However, an initiative is pending in Congress aimed at regulating this field holistically (Boletín 8924-07).

[52] The first judgment (T-477/95) handed down by this court on the topic was on 23 October 1995 and circulated widely across the region. This ruling dealt with the case of a child whose sex had been adjusted at the age of 6 months, after a dog bite severed his male genitalia. The court affirmed that, in light of human dignity, free development of personality and the right to identity, the express, informed consent of the patient is indispensable to any sex change medical treatment and ordered protection to be granted to the child in the form of comprehensive physical and psychological treatment, following informed consent, and confirmed the order instructing the office of vital records to retain the masculine name with which the boy was initially registered.

[53] T-450A/13.

pose an obstacle to the exercise of the right to legal personality', there being no '*constitutional reason to justify that infants and children whose sex cannot be identified at birth, are not registered and remain hidden from the State and society*'. The court continued:

> The *tension*, on the one hand, between the interest of the State in *identifying and recording citizens* for the purpose of locating them in society and within the family, and ensuring respect for all of their rights and, on the other, the right to an *identity and to a sexual identity for intersexual or genitally ambiguous persons* who are not classified at the time of their birth as men or women, must be *resolved by the legislator without losing sight of the best interest of the child.*[54]

In sum, the court ruled that the denial of healthcare or unjustified delay by the system in meeting the needs of children, especially intersexual youth, is reprehensible, ignores their fundamental rights and is unconstitutional when based on an absence of birth records.

Second, in a decision dated 28 August 2014, the court issued a judgment[55] addressing the situation of a newborn who, according to the medical diagnosis, presented 'sexual ambiguity'. The baby was initially registered as a female. At the age of 5, his parents had managed to change his name to a male one and at 6 years of age went through proceedings to change the child's sex to male, seeking surgical intervention, with which the child allegedly agreed. The court was asked to intervene in light of the delay by public health authorities in authorizing that operation.

The court concluded that the child enjoyed autonomy and that his preferences were required to be taken into consideration. As such, the consent of the parents in his stead for the operation was not pertinent. Nonetheless, the court ruled that the minor child's consent alone was not sufficient grounds upon which the court could *order* a healthcare agency to perform the sex modification or allocation surgery. The court maintained that for such an order to be issued, a correct diagnosis – absent in the instant case – should exist. Therefore, the court affirmed that the healthcare system had violated the child's right to a sexual identity, to healthcare – the right to a diagnosis – and to a dignified life, ruling against the agency for 'failing to *prioritize* the evaluation of the instant case and failing to take the timely and *necessary steps* to ensure that the

[54] Paragraphs 4.5.3, 4.6.1. and 4.6.2 (emphases added). [55] T-622/14.

process of sex reassignment sought by the minor child met the requirements of informed, qualified and continuing consent'.[56]

Lastly, on 13 February 2015,[57] the court addressed the nature of the procedures required to correct an individual's gender identity. In this case, a person who had undergone sex change surgery had requested a name and sex change in existing birth records and other identity documents. The court was asked to intervene insofar as said petition was filed with administrative rather than judicial authorities.

The court stated that the administrative authorities had instituted a practice in which a transgender person could only request a change of sex through a judicial process (voluntary jurisdiction). The court further noted that this 'can pose an *additional obstacle* to the ones transgender people already face in their efforts to be recognized and accepted by the rest of society'. Insofar as the judicial process requires that a person act through counsel, the requirement poses a barrier to access, adding that such a prerequisite 'constitutes discriminatory treatment as compared to cisgender persons whose petitions for similar changes are granted by means of public deed'.[58]

The court concluded that although the measure adopted in this case might have pursued a legitimate constitutional purpose, that is, to provide security and certainty to the changes made by the office of vital records, such requirements were unnecessary considering other means that did not create hardship or discrimination, including changes introduced by means of public deed signed before a civil law notary public.

3.2 Mexico

In the case of Mexico, we will comment on a judgment dated 8 January 2009[59] regarding the case of a person who requested the modification to the name and gender on his birth certificate. The individual had been raised, educated and legally registered as a male, although at birth he presented with ambiguous external sexual organs. However, over the years, the person's secondary sexual features had developed and presented as those of a woman.

[56] Paragraph 2.6.4.1 (emphases added). [57] T-063/15.
[58] Paragraphs 7.2.3–7.2.4 (emphases added).
[59] Amparo directo civil 6/2008. Related to: facultad de atracción 3/2008-PS.

In response to the petition, the court of first instance ordered the civil registry office to amend the corresponding birth record by means of an annotation in the margin and to note a new, female name and gender for the petitioner. The judge did not, however, deem it necessary to modify the original records or to order any publication or certification of the status of the petitioner.

The petitioner, in turn, filed a direct writ of protection via *amparo*, alleging the unconstitutionality of Article 138 of the Federal District's Civil Code which sets forth the procedure for corrections to birth records by means of annotations in the margin.

The Supreme Court noted that although some of the very personal rights involved in this case, such as sexual identity and intimacy, were not explicitly set forth in the Mexican Constitution, they 'implicitly emerge from international treaties signed by Mexico, and, therefore must be construed as rights derived from the recognition of the *right to human dignity*, for only through full respect thereof can we speak of a human being in all his dignity'.[60]

Based on these elements, the court declared the provision unconstitutional. The Tribunal further noted that even though the statute provided a means of amending the birth certificate in terms of name and sex – to bring it into line with reality – the fact was that, by limiting such corrections to an annotation in the margin – given the public nature of such a change – the law constituted 'an intrusion upon the petitioner's privacy and private life, since – the court stresses – the party would in many day-to-day activities be required to reveal his previous status, which, in turn, could lead to discrimination against him in employment or social relations'.[61]

Lastly, on 5 February 2015, a decree was issued that amended and added various provisions to the Civil Code and the Code of Civil Procedure of the Federal District of Mexico with the purpose of legally recognizing gender identity. This law requires that the change be documented on the original birth record and that a new birth certificate be issued reflecting the modified information only. The original record is then kept under seal and may not be published or issued unless so ordered by a court of law or government ministry.

As we can see, this Mexican case is an outstanding example of the impact that constitutional rulings can have on legal reforms.

[60] Page 90 (emphasis added). [61] Pages 98 and 99.

4 Children's Rights to Family Relations

Lastly, we would like to address a set of salient rulings handed down regarding the rights of children in their family relationships. Let us again clarify that due to space constraints we are unable to address every issue associated with these rights and relationships. Thus, we will comment solely on certain judgments involving the constitutionality of provisions on filiation by birth (Chile, Mexico, Colombia and Argentina), adoption (Colombia), caregiving relations (Chile) and multi-parenting (Brazil). In our view, these rulings all reflect the tensions between civil law and the reality of family composition in Latin American today.

4.1 Filiation by Birth

On the topic of filiation by birth, we will comment on a few decisions on the constitutionality of provisions on the causes of action in kinship cases, that is, petitions seeking to establish the identity of the child with respect to his/her biological parents. In Mexico, Chile and Colombia, existing regulations maintain strong language and protections for biological bonds. At the time these laws were enacted, the legislator prioritized the so-called 'biological truth', thus allowing unfettered investigation of paternity and maternity by means of any type of evidence. This approach was in reaction to the original nineteenth-century Civil Code statutes, which allowed for filiation inquiries to be made solely regarding children born in wedlock. Over time, material reality has come to supersede this reliance on biological and/or genetic links, placing an accent on affective and social bonds whose preservation is more relevant than the 'biological truth' revealed by means of a DNA test.

In fact, this information only identifies the person formally (formal identity) and fails noticeably in reflecting other individual and social aspects (material identity). We will refer below to this process of revision of the formal and binary principles of filiation in the context of the discussion of some Brazilian rulings on multi-parenting.

4.1.1 Chile

In the case of Chile, some judgments on the constitutionality of certain filiation-related statutes have been issued. Unlike the experience with the

legal reservation the Tribunal has alleged on marriage-related issues (as noted above), in this case the court has agreed to review the substantive aspects of the provisions at hand.

First, the Chilean Constitutional Tribunal has addressed the provisions regulating a claim of filiation against the heirs of a deceased alleged biological parent. In fact, most of the Tribunal's rulings have to do with this cause of action. The first ruling on the unconstitutionality of regulations pertaining to filiation dates to 2009.[62] In that judgment, the non-applicability of Article 206 of the Civil Code was resolved. The literal wording of the statute limits the possibility of filing a kinship claim against the heirs of the deceased alleged father or mother to cases in which there is a posthumous child, or the father or mother passes away within 180 days of the birth and, moreover, sets a deadline for filing such action.[63]

While we seek to avoid using numerical criteria regarding the rulings that confirm or reject the provision's legitimacy vis-à-vis the Constitution – a count that could lead us to erroneously believe that this question is settled – we note that the Constitutional Tribunal has, in general, used arguments based on fundamental rights such as equality and identity and has invoked principles such as security and legal certainty. The discussion on this question is not fully elucidated at the constitutional level, since there are majority and minority votes that, on both sides of the argument, accept or reject the allegations of unconstitutionality of the aforementioned provision of law.[64]

Regarding the application of *res judicata* in proceedings involving actions of filiation, in a ruling dated 25 July 2014 the Tribunal rejected a petition for unconstitutionality on an alleged violation of the right to identity.[65] Specifically, the petitioner's mother had maintained an intimate

[62] Case number 1340-09, 29 September 2009.

[63] 'If the child is posthumous, or if one of the parents dies within one hundred and eighty days following the birth, the action may be directed against the deceased father or mother's heirs, within a period of three years, counted from the death or, if the child lacks standing, from the time child has reached full competency.'

[64] Ruling in case number 1563-09, 30 August 2011; Case #1537-09, 1 September 2011; Case #1656-09, 1 September 2011; Case #2035-11, 4 September 2012; Case #2105-11, 4 September 2012; Case #2215-12, 30 May 2013; Case #2333-12, 11 June 2013; Case #2195-12, 18 June 2013; Case #2200-12, 18 June 2013; Case #2303-12, 2 July 2013; Case #2408-13, 6 March 2014; Case #2690-14, 25 July 2014; Case #2739-14, 6 August 2015.

[65] Case #2690-14, 25 July 2014.

relationship with the petitioner, and, as a result, became pregnant with the petitioner. Given that the alleged father refused to recognize the child, the mother had omitted an indication of paternity when recording the birth with the civil registry. Nonetheless, the mother had subsequently filed a motion on behalf of her minor son. That motion had been rejected in 2005. The petitioner, who had been aware of these events all his life, upon attaining the age of majority and acquiring active personal standing to sue his biological father, filed a claim for non-marital filiation. In his response, the alleged father filed an objection of *res judicata*, invoking the effects produced by the final and enforceable judgment handed down in the civil courts that had rejected the motion when first filed.

In this case, the Tribunal left the matter somewhat open. Although the court was reluctant to apply the rules of *res judicata* which the defendant invoked, it did reject the petition, stating that 'the question of a possible conflict between *res judicata* in the matter of filiation and the recognition of the human right to identity, when a second lawsuit is filed even after the first suit has been resolved, is a topic that resides at the *level of ordinary justice*, as a matter of *legality* or, at the most, of conventionality'.[66] In this way, the court avoided resolving the question of unconstitutionality.

4.1.2 Mexico

In the case of Mexico, the trend is for greater propinquity between the right to preserve identity and the right to know who the biological parents are. This follows from the line of authority outlined below.

The first judgment in this area is dated 18 October 2006,[67] in which the Supreme Court heard arguments on a theory of contradictory case law. On the one hand, a lower court had ruled that in a paternity investigation suit, the requisite genetic sample could not be taken coercively with the assistance of law enforcement; on the other hand, a separate court found that the right of the minor child to be able to establish his identity prevailed over the right of his parent to refuse to voluntarily provide a blood sample.

In this case, the Supreme Court ruled in favour of the use of force on the grounds of the best interests of the child and the child's right to

[66] Clause 8 (emphases added).

[67] Case theory conflict: 154/2005-PS. Novena Época. Núm. de Registro: 20018. Instancia: Primera Sala.

information on biological origin and the identity of their biological parents. In effect, the court stated:

The importance of this fundamental right to identity lies not only in the possibility of knowing the name and biological origin (ancestry), but rather that, based on that knowledge, firstly the child's right to a nationality can be ascertained and, furthermore, the minor child's constitutional right pursuant to Article 4 to have his/her needs for *food, health, education and healthy recreation, and comprehensive development* met.[68]

Subsequently, in a ruling dated 28 May 2014,[69] the Supreme Court confirmed its position in hearing arguments on a new contradiction of law. The complainant court asserted that the existence of a record containing a filiation posed no obstacle to the admission of genetic testing. The respondent court, however, argued that such evidence was not admissible insofar as paternity had previously been recognized. Were the evidence to be admitted, the court argued, the existing paternity would have to be deemed null and void to ensure that the respondent's rights would not be irreparably be harmed. In sum, the case brought two countervailing rights to the forefront: the right of the child to an identity and the right of the father to privacy.

In this case, the Supreme Court ruled that: 'Within a family it is imperative that a person know who he is, what his name is, what his origin is, who his parents are, in order to exercise *his right to biological identity*', adding that: 'This means that when the reality of a biological bond is not reflected at the legal level, the right of the person (whether a minor child or an adult) to a family must be recognized in keeping with their *blood ties*.'[70]

Lastly, the ruling is categorical as to the impossibility of having two paternities:

In cases in which the petitioner seeks to establish a new legal affiliation, it should be noted that where the provisions of law themselves do not allow or recognize the division and distinction of this set of legal relationships, legal certainty and the best interests of the child require that *only one father–child bond exist*. In other words, there could be *no case of two simultaneous legal paternities*.[71]

[68] Clause 5, Section I (emphases added).

[69] Case theory conflict: 430/2013. Décima Época. Núm. de Registro: 2007454. Instancia: Primera Sala.

[70] Paragraphs 75–6 (emphases added).

[71] Paragraph 84 (emphases added). This issue was confirmed in a judgment of 8 August 2011 (Contradiction Thesis 355/2011, Tenth Period. Circuit Courts), referring to the case of a father who, after having voluntarily recognized his son and performed his functions as such for over eleven years, affirmed that the child was not his son and filed suit against the mother to contest paternity. This request was denied by the trial court, but granted on appeal, leading the mother to seek relief at the Supreme Court.

This position is in opposition to the approach taken in some Brazilian judicial rulings we will examine towards the end of this section (see section 4.4).

4.1.3 Colombia

In the case of Colombia, in a Constitutional Court judgment dated 10 November 2010,[72] we can observe the prevalence of 'substantive' criteria versus 'adjective' (or procedural) criteria in facilitating the processing of a filiation request by redefining the concept of the 'present interest' of the petitioner. Thus, the court ruled that the right to legal personality 'confers on the holder *the power to demand that true filiation prevail over purely formal or fictional filiation*'.[73] In this case, the petitioner had been told in the context of a suit questioning paternity, that his cause of action was doomed to fail on the grounds that he lacked present interest to sue, despite having filed the petition within the twenty-day term after obtaining the results of a DNA test that suggested that it was highly unlikely that the female child he had recognized was in fact his.

The court indicated that while the case could be resolved on grounds of a legally admissible interpretation, violations of fundamental rights could ensue if the statute were construed to mean '*conferring less than optimal effectiveness* on the right to freely decide on the number of children, legal personality, filiation and access to the administration of justice'.[74] Thus, the court indicated that the reasonable interpretation of the tolling [starting of clock for purposes of limitation of action] for 'present interest' in a paternity challenge commenced when the first doubt about the existence of such a filial bond arose once the person had been recognized as a child.

Furthermore, the Colombian Constitutional Court has referred to the tolling of challenges to filiation – although from opposing camps – based on the proportionality of the interpretation of the provision of law. Thus, in a judgment dated 15 February 2012[75] the court found that the constitutionally valid interpretation of a provision 'is one in which the *tolling of the challenge to paternity shall be counted as of the date upon which certainty*

[72] Ruling T-888/10. [73] Paragraph 14 (emphasis added).

[74] Paragraph 24 (emphasis added). [75] Ruling T-071/12.

was obtained by means of a DNA test showing that [the petitioner] was not the biological father'.[76]

In the opposite sense, in a judgment of 28 June 2013,[77] the Colombian Constitutional Court stated that:

> in the specific case, although there is evidence that the petitioner is not the progenitor of the child Juan Diego, his inactivity over the course of eight years suggests that he accepted his role as father of said minor child'; And that 'when confronted with the potential presence of a substantive defect by ignoring the constitutional mandate that states that substance should take precedence over form regarding the law ... *in this case, effectively, the declaration of the tolling of the action is not disproportionate* ... [since] The application of this provision is intended *to protect legal certainty and preserve the stability of ties of kinship.*[78]

4.1.4 Argentina

In Argentina, a judgment of 16 April 2008[79] declared unconstitutional Article 259, paragraph 2, of the Argentine Civil Code in force at the time as it limited the term in which a husband could contest paternity to one year from the date of birth, unless he was unaware of said birth. In the latter case, action would be time-barred at the one-year marker of his becoming aware of the existence of the child.[80] In this ruling, the challenge to paternity within wedlock was admitted, stating that there was no biological bond of parentage between father and daughter.

[76] Paragraph 9.2.2.1 (emphasis added). [77] Ruling T-381/13.

[78] Paragraph 7.3 (emphases added).

[79] Family Court 2, Córdoba. *G., D. E.* v. *F. N. O. y otra.* Published in: Lexis # 70053706.

[80] It should be noted that this provision was repealed with the entry into force in 2015 of the new Civil and Commercial Code of the Nation. Article 590 of the new regulations states:

> Challenging filiation presumed by law. Legitimation and expiration. The action to contest the filiation of the spouse of the person giving birth can be exercised by him or her, by the child, by the mother and by any third party who invokes a legitimate interest.
>
> The child may initiate such action at any time. For other right holders, the action expires if one year elapses from the inscription of the birth or since it was known that the child could not be the child of the person the law presumes him/her to be.
>
> In the event of the death of the direct right holder, the heirs thereto may challenge the filiation if the death occurred before the term established in this article expired. In such case, the action expires for them once the term that commenced during the life of the right holder has expired.

The judgment sets forth that 'the restrictions imposed on individual rights, in the case of the right to establish true filiation, *have a substantial limit that stems from the principles of reasonableness and proportionality*',[81] and stated that the aforementioned article contained an unreasonable limitation that violated the right to know the biological truth, which is a component of the right to personal identity, together with the right to establish legal ties of filiation between persons related by biology, and the right to prove true family status (the dynamic aspect of the right to identity).

4.2 Filiation by Adoption

In Colombia, in a judgment dated 19 February 2016[82] the Constitutional Court settled the case of a woman identified as *Y* who was born as the result of an extramarital relationship between *YSA* and *GCZ*. *AAL* and his spouse *ACZ* had provided for her since, at the time of her birth, her biological mother *(YSA)* was a minor. *Y*'s biological father, *GCZ*, was the brother of her 'foster father' *(ACZ)* and her biological uncle, but had never assumed his parental role. After coming of age, *Y* and *ACZ* decided to legalize their kinship through adoption.[83] While that application was initially rejected by the family court, it was subsequently accepted by another court. The problem arose when the latter ruling provided for *Y*'s surname to be changed to that of her 'social father' and simultaneously ordered the name of the biological mother on the birth record stricken, thereby eliminating the filial and family bond with her mother. In response, *Y* appealed and requested that suppression of the name of her biological mother with whom she had 'carried out normal relations as mother and daughter' be revoked. However, the appellate court reaffirmed the decision, ruling that one of the effects of full adoption is the extinction of all previous blood relationships.

In a noteworthy interpretation, the Constitutional Court stated that the preceding judicial resolutions that thwarted the adoption should have interpreted existing regulations on the adoption of a person of legal age

[81] Section II. 1 (emphases added). [82] Ruling T-071/16.

[83] Article 69 of the Colombian Children and Adolescent Code (2006) allows for the adoption of adults if the adopted party was under the care of the adopting party and that both had lived together for at least two years prior to the adoptee's eighteenth birthday.

more systematically and more harmoniously, particularly since it was never the parties' intent to extinguish the parental bonds between the daughter and the biological mother. The court also noted that 'the adoption sought to recognize a *real bond* that had formed over the years between adoptee and adopter' that would reward '*the love, affection and support* the adopting father had provided to her in her formative years in his efforts to fulfil the obligations of parenting'.[84]

In addition to opening up the idea of social kinship and underscoring the validity of affection-based relationships as a source of civil effects, this decision also calls for a review of the classic impacts of one of the institutions with the strongest groundings in family law: adoption. In this sense, the court established that it cannot disproportionately affect the right to identity and the right to family life, by erasing previous bonds. This element could open the way for the reincorporation of some types of adoption repealed in several Latin American legal systems, under which the legal ties between a child and his/her biological parents (simple adoption) persist.

4.3 Caregiving Relationships

On the topic of the personal care of a child, prior to reforms introduced in 2013, the Chilean Civil Code gave preference to the mother in determining the personal care of children in all cases in which the parents lived apart. In the authors' opinion, that statute ran contrary to the principles of the best interests of the child and to parental equality and, in effect, was subsequently modified by means of Law 20,680 of 2013. That reform corrected this arbitrary discrimination, replacing the provisions of Article 225, paragraph 1 with language that takes into consideration the de facto place of residence of the child, that is, with which parent the child is residing at the time of the separation.

Following the entry into force of Law 20,680, the Constitutional Tribunal has had occasion to rule on the constitutionality of the new language of Article 225 of the Civil Code.[85] Specifically, the Tribunal has

[84] Paragraph 66 (emphases added).

[85] If the parents live apart, they may jointly determine that the personal care of the children belongs to the father or the mother or to both in shared form. Such agreement shall be recorded by public deed or a record issued by any official of the Civil Registry and shall be sub-inscribed in the margin of the birth record of the child within thirty days of issuance.

considered the possibility of establishing shared personal care in the absence of agreement in this regard between the parties. In a ruling on a possible violation of due process and the right to defence, the court stated that the determination of shared personal care is not a matter to be settled by the courts: 'whereas the *imposition of shared personal care is not a matter that falls to the courts to resolve*, insofar as the legislature rightly reserved the topic for situations in which there is agreement between the parents, it is not a matter that can be resolved in an anticipatory judicial proceeding'.[86]

The Tribunal's interpretation in this case is open to debate, given that in 2013 the legislature did not expressly preclude the courts from regulating shared personal care at the request of a party. Considering that parental co-responsibility is not only one of the founding principles of this reform, but also that the new provisions have provided further content to guidance on the best interests of the child in these matters – by repealing 'indispensability' and making application more objective – it would appear that, at the very least, it would be appropriate for a judge hearing a case to order caregiving, should

This agreement shall establish the frequency and freedom with which the father or mother who does not have the personal care will maintain a direct and regular relationship with the children and may be revoked or modified by means of the same solemnities.

Shared personal care is a way of life that seeks to stimulate the co-responsibility of both parents living separately in the upbringing and education of their children in common, through a system of residence that ensures their adequate stability and continuity.

In the absence of the agreement of the first paragraph, the children will continue under the personal care of the father or mother with whom they are living.

In any of the cases set forth in this article, when circumstances require and the best interest of the child makes it appropriate, the judge may assign the personal care of the child to the other parent, or grant it to one of them, if by agreement some form of shared parenting exists. The foregoing should be understood without prejudice to the provisions of article 226.

In no case may the judge base his decision exclusively on the economic capacity of the parents.

Whenever the judge assigns the child's personal care to one of the parents, he shall establish, at his own initiative or at the request of a party, in the same resolution, the frequency and freedom with which the other parent who does not have personal care will maintain a direct and regular relationship with the children, considering their best interest, provided that the criteria set forth in article 229 are met.

Until such a time as a new sub-inscription regarding personal care is cancelled by a subsequent one, any new agreement or resolution will be unenforceable vis-à-vis third parties.

[86] Constitutional Tribunal, Case #2699-14, June 16, 2015 (emphasis added). Clause 24.

circumstances so warrant and so long as it is in furtherance of the child's well-being.

In this realm, we should note that as recently as 12 April 2016,[87] the Chilean Constitutional Tribunal ruled on a matter closely related to personal care. The case involved a petition for inapplicability by a family court judge regarding the custody of two minor children.

The family judge was hearing a request for curatorship filed by the brother of two minor girls on the grounds that they were residing with him – and were under his care – following the death of their father and mother. The judge affirmed that certain articles of the Civil Code imperatively obligated the court to grant custody to the girls' maternal grandfather, who was alive but did not maintain contact or have a relationship with them, unlike the petitioner, who did have an affective bond with them.

The Constitutional Tribunal accepted the case and, in addressing the substance of the matter, deemed that the application of the rules on curatorship would have unconstitutional effects in terms of the impact on the psychological integrity of the minor children and their right to equality before the law. The Tribunal noted that the law views the situation of children of parents who have passed away as different from that of children whose parents are alive, stating that such differentiation is unjustified insofar as they are in the same position: both need the law to identify the person responsible for caring for them. The former would be governed by provisions 'whose requirements make *no reference to the primary consideration that in such matters the best interest of the child should be given merit*, as a right, principle and rule of procedure'.[88]

Lastly, the Constitutional Tribunal suggested that the application of these provisions would profoundly affect the psychological integrity of minor children: 'The possibility of a change in the family environment and the loss of the family and emotional ties they have formed with the person who has cared for them since they were orphaned, would *be detrimental to their psychological integrity and the full development of their capabilities in the future*'.[89]

This ruling is particularly important because it raises a critique of the relevance of certain nineteenth-century civil law statutes. Due to their age, these rules appear to be inconsistent with more modern provisions that

[87] Case #2867-15. [88] Clause 16 (emphasis added). [89] Clause 40 (emphasis added).

address similar situations, such as those relating to the care of minor children if their biological parents are alive.

4.4 Multi-parenting

We will briefly comment now on a limited number of rulings in Brazil and Argentina that are paving the way for 'pluri-parenting' or 'multi-parenting'. They do not refer directly to the constitutionality of a given provision, but do open up previously unchartered dimensions of family law: admitting the possibility that a person may have more than two filial bonds, that is, a redefinition of the binary system inherent to the classic principles of the law of filiation.

In Brazil, this situation has been raised in the judicial realm. An example is the ruling of the Eighth Civil Chamber of the Court of Justice of the State of Rio Grande in 2015, in which recognition was given to 'multi-parenting' following a petition by a married trio consisting of two women and one man who had a 'pact of filiation'. By virtue of this pact, the three petitioners had reciprocally committed to the exercise of family power, inheritance, custody, visitation and sustenance obligations. In this case, the Chamber overturned the decision by the lower court rejecting the request and declared appropriate 'the request for recognition of multi-parenting with regards to the daughter, [ordering] *a correction to be made to the vital records to include the mother's wife as a progenitor, including the respective maternal grandparents*'.[90]

Unlike Brazil, in Argentina, this issue has emerged in the administrative sphere. In 2015, two cases were filed before the civil registry regarding children born by means of human reproduction techniques to two women married to each other. In this case, the person who provided the genetic material was a friend of the couple who also played the role of father; the children were raised by the three adults. In both cases, the corresponding civil registry accepted the recognition proffered by the man and issued a new birth certificate, reflecting the triple bond of filiation.[91]

[90] Eighth Civil Chamber of the Court of Justice of Río Grande Do Sul, styled L.P.R., R.C. and M. B.R. s/Acción civil declaratoria de multiparentalidad, 12/02/2015 (emphasis added) 12. JPOE #70062692876 (# CNJ: 0461850-92.2014.8.21.7000) 2014/CÍVEL.

[91] See M. L. Peralta, 'Filiaciones múltiples y familias multiparentales: La necesidad de revisar el peso de lo biológico en el concepto de identidad' (2014) 68 *Revista Interdisciplinaria de Doctrina y Jurisprudencia Derecho de Familia* 53–70; M. Herrera, C. Duprat and M. V.

5 Conclusions

This chapter has sought to provide an overview of the status of Latin American constitutional rulings on family relations. It is one of our main contentions that these judicial decisions reflect an embryonic process of constitutionalization of family law that seems to be emerging in some countries of this region. In particular, this process seems to be prominent in the constitutional case law of Argentina and Colombia.

As observed in this brief analysis of an array of judicial decisions on such matters as sexual orientation, gender identity and filiation, it appears that the constitutionalization of family law may be opening up innovative and far-reaching avenues for legal reform in an ever-changing area of the law. The process of constitutionalization is particularly important in the development of family law, given the strongly personal component inherent to the field. Modern family law is continually challenged to regulate family relationships in dynamic, complex, and deeply transformative social contexts. In modern societies, unlike the past, individual projects do not develop predominantly in the family. Today, people tend to fulfil their aspirations in contexts that go beyond private family life, leading the 'static' family that most of the civil codes of Latin America contemplated in the nineteenth century to be replaced by a type of family that changes constantly, adapts to the individual plans of its members, and forms part of people's conceptualization as legitimate option, but that does not totally cover or satisfy the individual projects.

These challenges require Latin American legal systems to adjust periodically, to reformulate their rules and provisions based on new founding principles. In this process, the task of the interpreter is fundamental and, especially, that of the courts called upon to declare the conformity of these provisions to the political constitution. In this context, the constitutionalization of family law could play a paramount role in the protection of human rights within family relations; a process that may contribute, among other aspects, to the progressive incorporation of international human rights standards into domestic law.

Pellegrini, 'Filiación e identidad: Principales desafíos del derecho filial contemporáneo en el Código Civil y Comercial de la Nación' (2015) 25 (special edn) *Revista Código Civil y Comercial* 93–110.

Nonetheless, the analysis of this embryonic process of constitutionalization should not be accepted indiscriminately. It is our contention that, while providing positive elements, extended neo-constitutionalism could provide a false sense of legal clarity. Under this new approach, family law only takes possession of its validity when suited or adjusted to the constitutional normativity (super-dogma). However, constitutional principles and fundamental rights are difficult to pin down and on many occasions understanding what the constitutional rules mandate in specific matters can be particularly thorny, thereby requiring further theoretical and normative development.

While family law is necessarily anchored in constitutional law, it should not hold fast to that anchor at the cost of dogmatic (theoretical) and normative laziness. Just as the criminal law has managed to respect core constitutional principles and rights while maintaining a robust doctrinal and normative development, so family law will need to provide a much more solid, precise set of legal principles and rules to justify its own dogma; a new dogma that reflects the transformations needed to spur effectiveness as well as the constitutional confines within which it is called to navigate.