

## Law of the persons

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### 1. Introduction

The human person is at the center of social and legal life. Roman law recognized and acknowledged this truth with the adage "*hominum causa omne jus constitutum est*"<sup>2</sup>. In this paper we propose to make an introduction to the law of the persons in Argentina.

Our approach to the subject will focus on the provisions of the Civil and Commercial Code (Law 26994) which was approved in 2014 and came into force in August 2015. We will take into account the National Constitution and International Human Rights Treaties that relate to persons. We will present the classification of persons in the Code and we will make a synthetic reference to or "moral" "legal persons".

The study of the law of persons will continue with the issue of the beginning of the existence of the human person. The rules relating to capacity, the name and the domicile of a person will be presented. The rules on rights of personality, the end of the existence of the person and proof of marital status will also be reviewed.

### 2. The human person in the Constitution and Human Rights Treaties

The centrality of the human person can be seen in the Constitution of Argentina which recognizes both freedom and equality as fundamental rights. Article 15 refers to freedom, while states that "*In Argentina there shall be no slaves... Any contract for buying and selling people is a crime that will held responsible those who took counsel, and the clerk or the authorizing official. And slaves who by any means enter the territory of the Republic are free*". Article 16 provides that "*Argentina does not support prerogatives of blood or birth: no personal privileges or titles of nobility. All its inhabitants are equal before the law, and admissible to employment without any condition other than ability. Equality is the basis of taxation and public burdens*". This view of freedom is complemented by Article 19 which states: "*Private actions of men which in no way offend public order or morality or injure a third party, are only reserved to God and are exempted from the authority of magistrates. No inhabitant of the Nation shall be obliged to do what the law does not demand nor deprived of what it does not prohibit*".

For its part, Article 75, paragraph 22 of the Constitution gives constitutional status to some international human rights treaties. Thus there is a constitutional concept of "person" because these treaties say that every human being is a person under the law:

a) Article 6 of the Universal Declaration of Human Rights (1948) states that "*Everyone has the right to recognition everywhere as a person before the law.*"

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<sup>2</sup> *Digesto*, L. 2, De statu hominu. 1,5.

b) Article 17 of the American Declaration of the Rights and Duties of Man (1948): " *Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.*"

c) Article 16 of the International Covenant on Civil and Political Rights (1996) states: " *Everyone shall have the right to recognition everywhere as a person before the law.*"

d) The article 1.2 of the American Convention on Human Rights (Pact of San José de Costa Rica, 1969) recognizes that "*person means every human being*" and article 3 reads: "*Every person has the right to recognition as a person before the law.*"

Thus, the notion of "human person" regulated in the Civil and Commercial Code projects effects on the entire legal system<sup>3</sup>. But that regulation must be considered in light of these clear provisions that have constitutional status and that recognize that every human being has the right to recognition as a person before the law. The law does not concede personality to human beings, but "recognize" it as a natural condition. Therefore, it follows that the legal concept of person relates primarily to human beings and can not be manipulated to exclude some human beings from such legal guarantee. Such a manipulation of the notion of personhood would wipe out all the legal protection it deserves the human person and that is guaranteed by international human rights treaties.

### **3. The human person in the new Civil and Commercial Code (Law 26994)**

Book I of the Civil and Commercial Code (CCC) refers to the "General Part" and Title I deals with the issue of the "human person". This title does not contain a definition of human person. It has been said that "the person is presented as a core principle for the irradiation of rights. This phenomenon has been captured in international treaties and constitutions"<sup>4</sup>. The new Civil and Commercial Code adopts the term "human person". Title I of Book I, dedicated to the human person, is divided into 10 chapters, namely:

- Chapter 1: Beginning of the existence of the human person
- Chapter 2: Capacity, which is divided into three sections: Section 1 (General Principles); Section 2 (Minority) and Section 3 (Lack of Capacity). This section 3 is subdivided into five paragraphs: 1st Common principles; 2nd Support systems and the exercise of capacity; 3rd Acts done by persons with restricted capacity; 4th Termination of capacity restrictions; 5th Prodigality.
- Chapter 3: Rights of personality
- Chapter 4: Name
- Chapter 5: Domicile
- Chapter 6: Absence

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<sup>3</sup> See Limodio, Gabriel Fernando, "Introducción al Código unificado" [Introduction to the Unified Code], *El Derecho*, Volume 263, 10/08/2015, nro 13.787, p. 1.

<sup>4</sup> Lorenzetti, Ricardo Luis, "El derecho privado como protección del individuo particular" [Private Law as protection of the individual], *RDPyC*, nro. 7, p. 77, quoted by Rivera, Julio César, "Codificación, Descodificación y Recodificación" [Codification, Decodification, Recodification], *Código Civil y Comercial Comentado*, Julio César Rivera and Graciela Medina (Directors), Thomson Reuters La Ley, Buenos Aires, 2014, Volume I, p. 39.

- Chapter 7: Presumption of death
- Chapter 8: End of existence of the person
- Chapter 9: Proof of birth, death and age
- Chapter 10: Representation and assistance. Guardianship and custody, which is divided into three sections: 1st Representation and assistance; 2nd Guardianship and 3rd Conservatorship.

In this context, some articles are key to understanding the notion of human person assumed by the new Civil and Commercial Code. First of all, the final writing of Article 19 states:

*Article 19. Beginning of existence. The existence of the human person begins at conception.*

For the Code, the legal notion of "human person" fully identifies with the human being. The reference to conception dissipates any discussion about a prenatal stage in which the human being would not be a person. Article 19 is grounded in constitutional provisions and international human rights treaties and is complemented by Article 51 that refers to the inviolability of the human person by reason of his dignity. Thus, it is not acceptable any position that seeks to deny dignity to a human being, or exclude him from the legal protection of personality.

Equally important are the articles related to capacity, because they recognize that "*every human being has the ability to have rights and legal duties*" (article 22).

Thus, we can argue that the Civil and Commercial Code in its version finally enacted and promulgated is part of the humanist tradition of Argentina and the International Treaties on Human Rights, which recognizes:

- that every human being is a person from conception,
- that personality is not an artificial creation of the legislator but a fact of nature that the positive law recognizes and
- that all human beings are human persons under the law.

#### **4. The classification of persons in the Civil and Commercial Code**

The new Civil and Commercial Code distinguishes between "human persons" and "juridical or legal persons". Regarding human persons there is no definition in the text of the Code and every human being is a human person under the law, without distinction. For its part, Article 141 defines legal persons:

*Article 141. Definition. Legal persons are all entities to which the law gives them ability to acquire rights and obligations for the fulfillment of its object and purpose of creation.*

Legal entities are distinguished between public and private corporations. Under Article 146, "*are public legal persons: a) the national government, the provinces, the Autonomous City of Buenos Aires, municipalities, autonomous agencies and other organizations incorporated in the Republic to which the law attributed that character; b) foreign states, organizations to which public*

*international law recognizes legal personality and any other legal entity incorporated abroad whose public character results from its applicable law; c) the Catholic Church. "*

Meanwhile, according to Article 148, "*are private legal persons: a) companies; b) civil associations; c) simple associations; d) foundations; e) churches, denominations, religious communities or entities; f) mutual benefit; g) cooperatives; h) the consortium of condominiums; i) any other referred to in this Code or other laws and its status as such is established or results from its purpose and performance norms*".

## **5. The beginning of the existence of the human person in the Argentine positive law**

To consider the beginning of the existence of human persons in Argentina's positive law we have to analyze a plurality of sources, not only the provisions of the Civil and Commercial Code. So, we present the issue in the Constitution and the international human rights treaties that have constitutional status under the conditions of its validity. Then we analyze the Penal Code and other national laws and provincial constitutions texts that include explicit rules on the protection of unborn life<sup>5</sup>.

### **5.1. National Constitution**

Article 75, paragraph 23 of the Constitution provides a definition of the term *child*, which states that the National Congress will be empowered to issue a special and integral child protection social security system "*from pregnancy until the end of breastfeeding.*" Undoubtedly, this expression clearly indicates that the unborn child is a person, as the Constitution is concerned that there should be protection from before birth.

Under Article 75, paragraph 22 international human rights treaties have received constitutional status. Some of these treaties recognize the legal personality of every human being from conception. Indeed, by ratifying the Convention on the Rights of the Child by Law 23849, Argentina made a number of interpretative declarations, including a declaration referring to what is meant by the term *child*. By law 23849 Article 2, in ratifying the Convention on the Rights of the Child, for Argentina a *child* means "*every human being from the moment of conception until age eighteen.*" Thus, when in 1994 constitutional status was granted to this international treaty under the conditions of its validity, the interpretative statement made by our country acquired constitutional hierarchy. Therefore, the Constitution recognizes the child as a person from conception.

Similarly, Article 1 of the American Convention on Human Rights states that "*person means every human being*" and then recognizes in Article 4 that "*everyone has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception*". Under these provisions it may also be concluded that the existence of the person begins at conception.

The International Covenant on Civil and Political Rights recognizes implicitly the legal status of the unborn when Article 6 paragraph 5 prohibits applying the death penalty to women during pregnancy.

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<sup>5</sup> See Herrera, Daniel A., *La persona y el fundamento de los derechos humanos [The Human Person and the foundation of human rights]*, Buenos Aires, EDUCA, 2012.

## 5.2. Penal Code

The Argentine Penal Code, Book II, Title I, defines crimes against persons. Chapter I (crimes against life) of that Title contains regulations that condemn abortion. Thus, human life before birth is considered a legally protected interest, and abortion is considered as a crime against life and against persons (Articles 85 to 88, Penal Code).

## 5.3. Other laws

There are other national laws recognizing the beginning of the existence of the person at conception. Here are some examples:

a) Law 24,901 (1997), which establishes the system of benefits for people with disabilities, in its article 14 states: "*The mother and the child will be guaranteed from the moment of conception, controls, adequate care and prevention for optimal physical, mental and social development.* "

b) Article 9 of Law 24,714 (1996) about Family Allowances provides: "*Prenatal allowance entail payment of a sum equivalent to the child allowance, to be paid from the moment of conception until childbirth* ".

c) For Law 25,543 (2002) makes it obligatory to offer an HIV test to all pregnant women as part of normal prenatal care, to give possibility of treatment to the mother and her "*unborn son*" (Article 3).

## 5.4. Provincial Constitutions

Several provincial constitutions have recognized protection of human life from conception and reinforced the legal protection of the unborn person. We can mention Buenos Aires (article 12), Catamarca (article 65), Cordoba (article 4), Chaco (article 15), Chubut (article 18), Entre Rios (article 16), Formosa (article 5), Río Negro (article 59), Salta (article 10), San Juan (article 4), San Luis (article 13), Santiago del Estero (article 16), Tierra del Fuego, Antártida and South Atlantic Islands (article 14) and Tucumán (article 146 ).

## 6. The unborn person in the new Civil Code and Commercial Procedure

The Civil and Commercial Code approved by the Law 26994 (BO 10/08/2014) refers to the unborn person in Chapter 1 of Title I, Book I, devoted to the beginning of the existence of the person. It consists of 3 articles: 19 (beginning of the existence of the person), 20 (duration of pregnancy) and 21 (live birth). We discuss these and some other concordant rules.

### 6.1. Article 19 and the unborn person

Article 19 of finally sanctioned Civil and Commercial Code provides:

*"Article 19. Beginning of existence. The existence of the human person begins at conception. "*

This article was axis of one of the major controversies throughout the process of drafting and discussion of the new Civil and Commercial Code. In this regard, there is broad agreement from the first draft to the end, in maintaining the legal tradition that Argentina provides that the existence of the human person begins at conception and therefore in recognizing as "unborn person" the human being in its earlier stage before birth.

The discussion was raised, since the beginning of the reform process, about the situation of non-implanted human embryos conceived through artificial fertilization techniques. The original wording of article 19, which included two different moments for the beginning of life and considered that the non-implanted embryo was not a person, was finally replaced by a consolidated text which establishes that the existence of the human person begins at conception. Consequently, the initial proposal of two starting moments was replaced by a single moment. That is the moment of conception, which as its name implies refers to the first time a person exists. Therefore, if there was any doubt about the status of the human embryo, the final wording should be interpreted as stating that Article 19 makes no difference whether conception occurs inside or outside the womb.

## **6.2. The time of conception**

About the time of conception, the new Civil and Commercial Code provides:

*"Article 20. Duration of pregnancy. Time of conception. Time of conception is the time between the maximum and minimum fixed for the duration of pregnancy. It is presumed, unless proven otherwise, the maximum time that pregnancy lasts is three hundred (300) days and the minimum is one hundred eighty (180), excluding the day of birth. "*

Article 20 has almost no difference with the wording of Articles 76 and 77 of the previous Civil Code (Act 340). The text still has application in situations that may relate to the presumption of wedlock and extramarital affiliation.

The new Code abrogates Articles 65, 66, 67, 68 and 78 of the previous Civil Code that referred to the postponement of disputes during pregnancy and other forms of protection of the mother.

## **6.3. The birth alive condition**

Article 21 of the Civil and Commercial Code provides:

*"ARTICLE 21.- Birth alive. The rights and obligations of the unborn or implanted in women are irrevocably acquired if born alive. If not born alive, it is considered that the person never existed. The live birth is presumed. "*

The provisions of Articles 71, 72, 73, 74 and 75 of the previous Civil Code are subsumed in this article 21. The new code considers that if a person is born dead he never existed. These provisions should not be understood as denying legal personality to the unborn child, because they were ment

to deal with the problema of a fraud in hereditary rights. Authors agree that this provision relates to property rights<sup>6</sup>.

#### **6.4. Capacity of the unborn person**

Under the Civil and Commercial Code the unborn person enjoys the legal capacity accorded by Articles 22 and 23. On the other hand, concerning the exercise of capacity, Article 24 provides that the unborn person is "unable to exercise his capacity" and Article 101 states that "parents" are the representatives of the unborn person.

From the above provisions it can be concluded that the unborn person has legal capacity. Like all people, that capacity may be limited in some cases, but under no circumstances it can be interpreted as an alleged denial of personality.

#### **6.5. Other rules concerning the unborn person**

Article 574 of the CCC provides that "*it is possible for a parent to recognize his unborn child, being subject to birth alive.*" It is a logical consequence of the rule in Article 19 and the condition of live birth has the same explanation that Article 21.

Article 592 also allows preventive contesting filiation presumed by law to the case of marital children: "*Article 592.- Preventive Contesting Filiation presumed by law. Even before the birth of the child, the spouse can preventively challenge the filiation presumed by law of the person to be born ....*". It should be clarified that both the unborn person and his mother may claim sustenance under the law (Articles 664 and 665 CCC).

#### **6.6. The unborn person as a heir**

Among the rules relating to the unborn person we have to mention the article on the heirs:

*"ARTICLE 2279.- Persons who can inherit. Those who can inherit the deceased are:*

- a) existing persons at the time of his death;*
- b) those conceived at the time of his death who are born alive;*
- c) those born after his death conceived through human assisted reproductive techniques, with the requirements of Article 561;*
- d) legal persons existing at the time of his death and the foundations created by his will.*

The conceived persons may inherit if born alive and a special rule it has been set for those conceived by artificial reproductive techniques<sup>7</sup>.

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<sup>6</sup> In the XIX National Congress of Civil Law XIX, in 2003, the Commission n. 1 approved the following statement on the issue of the commencement of personality: "The termination clause set in article 74 of the Civil Code in case of the person born dead should be applied only to the transmission of property rights".

## 6.7. The prohibition of genetic manipulation of the human embryo

Among the rules relating to the unborn person, we must take into account article 57 of the new Civil Code, which provides:

*ARTICLE 57. Prohibited practices. It is prohibited any practice designed to produce a genetic modification of the embryo to be transmitted to his offspring.*

Article 57 forbids germ-line modifications and it is a very important provision to defend human values and the inviolability of the human person. This article is consistent with the interpretation of article 19 that states that the existence of the human person begins at fertilization. When Article 57 speaks of the "offspring" of the embryo, recognizes that any human embryo is a "human person".

## 6.8. The discussion about the term "conception"

Established the principle that the existence of human beings occurs at conception, in Argentina there is a discussion about what is the scope of that term. In this regard, we note the presence of two positions on the matter: the first, maintains that conception occurs at fertilization; the second believes that conception occurs at implantation. We understand that the first position is more consistent with a rational interpretation of existing law and the fundamental principles arising from the international law of human rights.

In the jurisprudential level, the Federal Court of Salta and the Supreme Court of Mendoza have passed sentences in favor of the position that argues that conception must be understood as fertilization<sup>8</sup>. Similarly, there are also many authors who are in favor of the same position<sup>9</sup>.

The controversy has revolved around the interpretation of the judgment "Artavia Murillo" of the Inter-American Court of Human Rights of November 28, 2012, which condemned the State of Costa Rica in a case linked with in vitro fertilization (IVF). The Constitutional Chamber of the Supreme Court of Costa Rica had declared unconstitutional the Executive Decree No. 24029-S of February 3, 1995, issued by the Ministry of Health, allowing IVF. This prompted the complaint to the Inter-American jurisdiction by nine male and female infertile married couples. They claim that the Constitutional Chamber decision affected their rights to privacy and family life and to health. The Court found that, given that the human embryo should not be considered a person under the American Convention, the restriction generated in access to IVF involved a trespass in the above rights. For the Court, when Article 4.1. of the Convention speaks of "conception" must be interpreted to refer to the "implantation".

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<sup>7</sup> See Ferrer, Francisco A. M. "Personas que pueden suceder al causante" [Persons who can be heirs], LA LEY 13/03/2015, 13/03/2015, 1 - LA LEY2015-B, 0 - DFyP 2015 (abril), 06/04/2015, 91, AR/DOC/685/2015.

<sup>8</sup> a) First Chamber of the Supreme Court of Mendoza Province, 30 de julio de 2014 in re n° 110.803, "L., E.H. C/ O.S.E.P. P/ ACCIÓN DE AMPARO P/ APELACIÓN s/ INC."; b) Federal Court of Salta, in re "L.O., A. y otros c. Swiss Medical s/Amparo", 8 de julio de 2013; c) Federal Court of Salta, "M., I. N. c/ OSDE s/AMPARO LEY 16.986", 19/07/2014, FSA 000135/2014.; d) Dissenting opinion of judge Hugo O.H. Llobera, in re "C.K.J. y o c/ M.S.A.S/AMPARO", 1st. Chamber of the Civil and Commercial Court of Appeals, San Isidro, Buenos Aires, 12/11/2013.

<sup>9</sup> Reviriego, Nicolás, in *Código Civil y Comercial de la Nación comentado [Civil and Commercial Code Commented]*, Julio C. Rivera and Graciela Medina (Directors), La Ley, Buenos Aires, 2014, Volume I, p. 125; Tobías, José W., *Código Civil y Comercial Comentado. Tratado Exegético [Civil and Commercial Code Commented. Exegetical Treaty]*, Jorge H. Alterini (Director), La Ley, Buenos Aires, 2015, Volume I, p. 147.

Various criticisms have been made to the judgment of the Interamerican Court<sup>10</sup>. We understand that this decision is not applicable to Argentina and the interpretation of Article 19 of the new Civil and Commercial Code because there is a different context between Argentina and Costa Rica. While this country banned in vitro fertilization, Argentina has a specific law covering IVF by the health system (Law 26862), beyond the major criticisms that we can do to such law. Also, it must be taken into account that in its judgment, the Interamerican Court intentionally left out the most complex problems of IVF as clarified in paragraphs 134 and 135. In addition, Argentina was not a party to the dispute which led to the judgment of the Court and in accordance with Article 68.1. of the American Convention, the States Parties to the Convention undertake the duty to comply with the judgment of the Court in any case to which they are party. Finally, we understand that the decision of the Court on "Artavia Murillo" was contrary to the principle "*pro homine*" is considered established in Article 29 of the American Convention. The interpretation made by the Court in the judgment concerning the legal status of non-implanted embryos resulted in a limitation of their rights, because if until then the common understanding of article 4 of the Convention covered the protection of every human being from the moment of fertilization, today the Court has indicated that such protection has to start at a later time, in the implantation<sup>11</sup>.

These are some of the arguments that lead us to hold that the judgment "Artavia Murillo" of the Interamerican Court is not applicable to the interpretation of Article 19 of the Civil and Commercial Code and that, therefore, the term "conception" should be understood as "fertilization".

## 7. Legal capacity

The human person, for the mere fact of being such, is able to create or enter into legal relations and should be recognized in his legal capacity. In this sense, capacity is regulated in Chapter 2 of Title I of Book I of the Civil and Commercial Code. This chapter begins with a section on General Principles, which in Articles 22 and 23 of the Civil and Commercial Code provides:

*Article 22. Legal Capacity. Every human person has the ability to have rights and legal duties. The law may deprive or limit this capacity on facts, simple acts, or certain legal acts.*

*Article 23. Exercising legal capacity. Every human person can exercise his rights by himself, except as expressly provided in this Code and limitations set in a court judgment.*

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<sup>10</sup> Lafferriere, Jorge Nicolás, Tello Alonso, Juan, "El diagnóstico genético preimplantatorio: de nuevo sobre los límites de "Artavia Murillo" [Preimplantation Genetic Diagnosis: again on the limits of the judgement 'Artavia Murillo'"], La Ley Constitutional Supplement, 2014; Lafferriere, Jorge Nicolás. "Los límites de "Artavia Murillo" en un interesante fallo en protección del embrión humano" [The limits of 'Artavia Murillo' in a judgement concerning the human embryo], Doctrina judicial, La Ley, Year XXX, Number 06, 5/2/ 2014, p. 21-38; Herrera, Daniel and Lafferriere, Jorge Nicolás. "¿Hacia un positivismo judicial internacional? Reflexiones sobre un fallo de la Corte Interamericana de Derechos Humanos y la relativización del derecho a la vida" [Towards a judicial positivism? Reflections on a judgment by the Interamerican Court of Human Rights and the right to life]. La Ley Constitutional Supplement, 9/4/2013, p. 16; De Jesús, Ligia M., Oviedo Álvarez, Jorge Andrés, Piero A. Tozzi, "El caso Artavia Murillo y otros vs. Costa Rica (Fecundación in vitro): la redefinición del derecho a la vida desde la concepcion, reconocido en la Convencion Americana" [The 'Artavia Murillo and Others v. Costa Rica' Case (In Vitro Fertilization): the Redefinition of the right to life from conception recognized by the American Convention on Human Rights], Prudentia Iuris, n. 75, June 2013, p. 135-164.

<sup>11</sup> See María Bibiana Nieto and María Victoria García Delfino, "La aplicación del principio *pro homine* en la determinación del comienzo de la persona humana" [Applying *pro homine* principle in the determination of the commencement of the existence of the human person], Written Contribution, XXIV National Congress of Civil Law (Jornadas Nacionales de Derecho Civil), Universidad de Buenos Aires, September 2013.

These two articles distinguish between "legal capacity", which is the ability to have rights and legal duties, and the ability to exercise legal capacity, which refers to the exercise of rights.

Any restriction to legal capacity should be established by law. Those restrictions should be exceptional and are set to protect the moral and the common good<sup>12</sup>. In case of infringement of those restrictions, the civil sanction is absolute nullity. Between the legal incapacities set by law we can mention the restrictions to contract set out in Articles 1001 and 1002 of the Civil and Commercial Code. Under Article 1002, these incapacities include: "*a) civil servants, for goods whose administration or disposal are or have been entrusted; b) judges, officials and court officers, arbitrators and mediators, in respect of goods related to the processes in which they are involved or have been involved; c) barristers and solicitors in respect of disputed property in processes in which they are involved or have been involved; d) spouses with each other, under the regime of community. The executors who are not heirs can not hold sales contract on the property of testamentary.*"

Instead, incapacity and restrictions in the exercise of rights are set to benefit the person concerned and can be supplied by a representative. The penalty when an incapacity in the exercise of rights is infringed is a relative nullity, which can be confirmed.

Incapacities on exercising legal capacity is set out in Article 24 of the Civil and Commercial Code, which states:

*"Article 24. Persons unable to exercise legal capacity. They are unable to exercise their legal capacity:*

*a) the unborn person;*

*b) the person who does not have the age and degree of maturity, to the extent provided in Section 2 of this Chapter;*

*c) the person who was declared incapable by a court decision, to the extent provided in that decisión."*

In terms of exercising legal capacity, the Civil and Commercial Code distinguishes between representation and assistance. Article 100 establishes that "an incapacitated person by sentence can exercise his rights through his representatives". And Article 101 lists the "representatives": parents, or guardians.

Instead, for people with restrictions to his capacity to exercise his rights, the Code provides for the concept of "assistance", which involves the support measures ("apoyos") designated in the respective sentence (article 102).

Article 103 states that minors, incapable and persons with restricted capacity have the assistance of the Public Prosecutors and Defendants Office<sup>13</sup>. The Public Defendants performance may be judicial or extrajudicial. The judicial performance can be complementary or principal, as stated by Article 103:

*"Article 103:...*

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<sup>12</sup> Llambías, Jorge Joaquín, *Tratado de Derecho Civil. Parte General, [Treaty on Civil Law. General Section]* Volume I, Editorial Perrot, Buenos Aires, 13ra. edition, 1989, p. 396.

<sup>13</sup> Polverini, Verónica, "El Ministerio Público en el Proyecto de Código Civil" [Public Prosecutor and Defendant Office in the Draft Civil Code], *La Ley DFyP* 2014 (october), 01/10/2014, p. 144, AR/DOC/4113/2013

A) *it is complementary in all the processes that involve interests of minors, incapable persons and persons with restricted capacity; the failure to intervene of the Public Defendants Office causes the relative nullity of the act.*

b) *It is primary: i) when the rights of those represented are compromised, and there is inaction of their representatives; ii) when the object of the process is to enforce the duties of the representatives; iii) where there is no legal representative and it is necessary to provide representation.*" (article 103).

For its stand, the Public Prosecutors and Defendants Office extrajudicial performance applies "*in the absence, lack or inaction of the legal representatives, when social, economic and cultural rights are endangered*" (article 103).

We have already referred to the unborn person. In the next paragraphs we present the general provisions on the ability of minors and on the restrictions on exercising legal capacity because of addictions and mental health.

## **7.1. Minority**

### **a) Definition and effects of minority**

The 2nd section of Chapter 2 of Title 1 of Book I of the Civil and Commercial Code is dedicated to the "minor persons." Under Article 25, "a minor is a person who has not attained eighteen years." In addition, the Code calls "adolescent" the person who is older than thirteen (article 25).

As a rule, the minor cannot perform juridical acts by himself. He is incapable to exercise its rights by himself and "*exercises his rights through his legal representatives*" (article 26). The representatives are his "*parents*" or a "*guardian*" (article 101 paragraph b). Considering the minor person to be incapable of exercising its rights was a decision taken to protect him from abuses<sup>14</sup>.

The same Article 26, however, establishes a rule that has been called "progressive capacity." Thus, it provides that the minor "*which features age and degree of maturity can exercise by himself the acts that are permitted by law*". This provision is complemented by the provisions about parental responsibility, which involve "*the set of duties and rights that correspond to the parents over the person and property of the child, for protection, development and comprehensive training as long as he is a minor and he has not been emancipated*"(article 638). Article 639 sets out the general principles governing the institute of "parental responsibility", including "*a) the best interest of the child; b) the progressive autonomy of the child according to his psychophysical characteristics, skills and development. A greater autonomy reduces the representation of parents in the exercise of the rights of children; c) the child's right to be heard and his views taken into account according to his age and maturity.*"

This progressive capacity should be understood as an application of the provisions of the Convention on the Rights of the Child, approved by Argentina by Law 23.849. As the child develops physically and mentally, according to his biological development, will steadily gain greater understanding of his environment and life circumstances<sup>15</sup>.

### **b) Juridical acts that can be performed by minors**

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<sup>14</sup> Borda, Guillermo A., *Tratado de Derecho Civil, Parte General*, [Treaty on Civil Law. General Section], Volume I, 13<sup>a</sup> edition, La Ley, Buenos Aires, 2008, n° 479, p. 451

<sup>15</sup> Tobías, José W., in *Código Civil y Comercial Comentado. Tratado Exegético*, [Civil and Commercial Code Commented. Exegetical Treaty] Jorge H. Alterini (Director), La Ley, Buenos Aires, 2015, Volume I, p. 211.

**Right to legal aid:** Article 26 also establishes the right of the minor to have the assistance of a counselor in case of conflict of interest with his representatives (article 26). This provision is complementary to Article 27, subsection c of the law 26061 of Rights of Children and Adolescents, which led to the concept of "child advocate"<sup>16</sup>.

**Right to be heard:** Article 26 also states that *"the minor is entitled to be heard in any judicial proceeding concerning him and to participate in decisions about his person."* This provision is complemented by the mentioned provision of Article 639 paragraph c relating to parental responsibility and Article 24 of Law 26061. We should also take into account Article 12 of the Convention on the Rights of the Child that affirms: *"Article 12. 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law"*.

**Adolescents and decision-making about their own bodies:** The Civil and Commercial Code regulates differentially the ability of adolescents to make decisions regarding their own bodies. We must distinguish two stages: a) between 13 and 16 years; b) after 16 years. In the first stage, we must distinguish between invasive or dangerous acts and those which are not<sup>17</sup>.

Thus, according to article 26, *"it is assumed that the adolescent between thirteen and sixteen has ability to decide for himself regarding those treatments that are not invasive and do not compromise his health or cause a serious risk to his life or physical integrity..."*.

However, *"if the decision involves invasive treatments that compromise his health or his physical integrity or life, the adolescent must give his consent with the assistance of his parents; the conflict between them is solved taking into account his best interest, on the basis of medical opinion about the consequences of performing or not the medical act"* (article 26 CCC).

The same Article 26 establishes that *"from sixteen years old, the adolescent is considered as an adult for decisions pertaining to the care of his own body."*

**Other acts that can be performed by minors:** From thirteen, adolescents have the capacity to defend themselves in a criminal trial without requiring permission from their parents (article 680), they may recognize wedlock (art. 680). From thirteen, they may exercise parental responsibility for their children. However, the parents of the minor may object to the performance of acts that are harmful to the grandson, and can intervene when the minor parent fails to take action for the grandson proper development (article 644). Also, Article 644 requires the consent of the minor's parents exercising parental responsibility for those acts of great relevance to the child's life, such as free and informed decision for his adoption, surgery that endangers his life, or other acts that can seriously injure his rights (Article 644). Minors can claim support from their parents, requiring the assistance of a special guardian, relative or any officer of the Public Ministry of Children (art. 679).

There are other rules on the exercise of legal capacity by a minor person along the entire civil and commercial code. A special case governed by Article 30 refers to the minor with qualifying professional diploma. In this case, he can exercise his profession on his own without prior authorization and the minor has the administration and disposition of property acquired with his profession and can be on civil or criminal trial linked to it (article 30).

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<sup>16</sup> See Basset, Ursula C. "El abogado del niño: Un estado de la cuestión sobre su designación" [The child's counselor: The State of Affairs over his appointment], *El Derecho Familia*, 2014, Volume 54, p. 3.

<sup>17</sup> See Basset, Ursula C, "El consentimiento informado de menores a tratamientos médicos en el código civil y comercial argentino" [Informed consent of minors to medical treatments in the Argentine Civil and Commercial Code], *El Derecho Familia*, 2014, volume 57, p. 3.

Another exception to the rule of incapacity of the minor may be found in Article 684 of the CCC which states that "the contracts involving small amounts of money held by the son, are presumed to be conducted with the consent of his parents." As for the ability to make a will, the Civil and Commercial Code Article 2464 provides that only adult persons can make a will.

### **c) Majority and Emancipation**

The incapacity of minors ends with majority. The person that has attained 18 years old is entitled to full civic rights and considered legally capable of handling his own affairs. However, it is possible to anticipate full capacity by emancipation, which is limited to the case of marriage. Thus, "*marriage before eighteen years old emancipates the minor*" (article 27 CCN).

In this regard, it should be noted that the minimum age for marriage is 18 years (article 403 paragraph f CCC), but this requirement can be dispensed in two ways. If the child is 16, he can marry with parental consent (article 404). If his parents do not authorize his marriage, he can ask for judicial dispensation. If the minor has not reached the age of 16, he can marry prior judicial dispensation (article 404)<sup>18</sup>.

According to article 27, "*the emancipated person has full capacity to exercise his rights by himself with the limitations set forth in the Code.*" Among the acts that the emancipated person is not legally able to do, not even with judicial authorization, we find: "*a) approval of the accounts of his guardians; b) donation of goods that he had received free of charge; c) guarantee obligations*" (article 28). Meanwhile, according to Article 29, "*the emancipated person requires judicial authorization to dispose of the property received free of charge. The authorization must be granted when the act is of any need or obvious advantage*".

Emancipation is irrevocable (article 27). In case of annulment of marriage, emancipation remains, "*except with respect to the spouse in bad faith to who emancipation ceases from the date on which the judgment passed on res judicata*" (article 27).

## **7.2. Restrictions on exercising legal capacity because of mental health reasons**

In the 3rd Section (Restrictions on capacity) of Chapter 2 of Title I of Book I (General Part) of the Civil and Commercial Code restrictions on legal capacity for reasons of mental health are regulated. In case of minor persons, the rule is incapacity. In the case of restrictions on capacity, the rule is that the person can exercise his legal capacity and that any limitations on capacity are the exception, established by ruling that requires to precise the acts and functions that are limited (arts. 32, 37 and 38 CCC).

### **a) Different types of capacity restrictions**

The Civil and Commercial Code regulates three types of capacity restrictions<sup>19</sup>:

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<sup>18</sup> "The judge must have a personal interview with the future spouses and their legal representatives. The judicial decision must take into account the age and degree of maturity reached by the person, especially related to the understanding of the legal consequences of marriage act. The judge must also assess the opinion of the representatives, if it had been expressed. The dispensation for marriage between the minor and his guardian can only be granted if, in addition to the safeguards provided in the preceding paragraph, the accounts have been approved by the administration. Similarly if the marriage takes place, the guardian loses the allocation that corresponds to the income of the ward in accordance with Article 129 paragraph d)." (article 404)

<sup>19</sup> Martínez Alcorta, Julio A. "El nuevo régimen de restricción ejercicio de la capacidad jurídica" [The new regulation of the capacity restrictions], *El Derecho Familia*, 2014, nro. 55, p. 9; Muñoz, Carlos M., "Personas con incapacidad y con capacidad restringida por razón de discapacidad mental en el Proyecto de Código Civil y Comercial" [Persons with legal incapacity and restricted capacity because of mental health disorders in the Draft Civil Code], *La Ley DFyP 2012* (septiembre), 01/09/2012, 158, AR/DOC/4460/2012.

**Persons with restricted capacity:** Article 32 states: "*The judge may restrict the capacity for certain acts of a person over thirteen years old who has an addiction or a permanent or prolonged mental impairment, of sufficient severity, whenever it deems that the exercise of his full capacity can result in damage to his person or property.*" In this case, the rule is the capacity, and the judicial decision sets the functions and actions that are limited, based on the opinion issued by an interdisciplinary committee. The judgment should set one or more supports to exercise legal capacity and define the modalities of action of the persons designated as supports, either with assistance functions (Article 102) or exceptionally with functions to represent the person (section 101 subsection c).

**Incapacitated person:** This is a case of exception under the last paragraph of Article 32: "*Exceptionally, when a person is absolutely unable to interact with his environment and express his will by any means, medium or appropriate format and the support system is ineffective, the judge may declare his incapacity and appoint a guardian.*" In this case, the person is incapable of exercising his legal capacity, even though the judgment should set the functions and acts that should be limited. He should be given a guardian who acts as his representative (articles 100 and 101).

**Unable:** if a person shows prodigality in the management of his assets and he exposes his spouse, partner or minor children or disabled children to loss of heritage, he can be declared unable under article 48. The prodigal person cannot dispose of his property by himself. In this case, the rule is capacity of the unable persons and the judicial decision must designate a support to assist the unable person in granting disposition inter vivos acts and other acts that the judge sets in his sentence (article 49).

#### **b) Support systems and safeguards**

After presenting the different types of the restrictions on capacity in the new Civil and Commercial Code, we should present the support system that is provided to help those persons exercise their legal capacity.

- According to Article 43, a support is any judicial or extrajudicial measure taken to facilitate the person in need to make decisions about himself, to manage his property and to perform legal acts in general.
- The support functions will be defined by the judge (articles 32 and 38)
- The person who should be designated as a support can be proposed by the applicant (Article 43), although his proposal should be assessed by the judge to "*strive for the protection of the person against possible conflicts of interest or undue influence*" (article 43).
- The task of the support is to promote autonomy and facilitate communication, understanding and expression of will of the person to exercise his rights (article 43)
- The resolution must establish the conditions and effects of support measures and, if necessary, should be registered in the Registry of Civil Status and Capacity of Persons (article 43).

In cases of incapable people, a guardian with representation functions (cfr. Arts. 100 and 101 inc. C) is designated.

For its part, as we have already explained, article 103 declares the role of Public Prosecutor and Defendant Office, which may be judicial (complementary or principal) or extrajudicial.

#### **d) The Convention on the Rights of Persons with Disabilities and the legal capacity**

The Convention on the Rights of Persons with Disabilities (hereinafter CRPD) adopted by Law 26378 (BO 9/6/2008), since December 2014 has constitutional status in Argentina by Law 27044

(BO 12/22/2014). This Convention is an undeniable pattern of interpretation<sup>20</sup> for the analysis of the legal capacity regime established by the Civil and Commercial Code in relation to mental health. The Convention criteria in relation to the legal capacity of persons with disabilities is set out in Article 12 of the CRPD:

*Article 12 - Equal recognition before the law*

- 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
- 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
- 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*
- 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*
- 5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

In this regard, it should be taken into account the General Comment no. 1 of the Committee on the Rights of Disabled Persons created by the CRPD, which noted the importance of the provisions of Article 12 and considered imperative to offer additional guidance on a general observation (Note no. 1 CRPD / C / GC / 1, 19.05.2014). In brief summary, we can say that this General Comment points out the importance of an appropriate balance between autonomy and protection and suggests that the provisions that are substitutes for the will of persons with disabilities should be removed. For the Committee, the person with mental disabilities should exercise by himself his rights, with safeguards and support measures, and without supplanting his own will.

The Civil and Commercial Code regulating the exercise of legal capacity tried to adapt its provisions to the Convention<sup>21</sup>.

#### **d) Procedural Rules of the Civil and Commercial Code**

In relation to the process of capacity, the Civil and Commercial Code incorporates some procedural rules, which can be summarized as follows<sup>22</sup>:

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<sup>20</sup> Cf.: Argentina, Supreme Court, in re "Horacio Giroldi y otro". 7/April/1995, paragraph 11; in re "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad", 14/June/ 2005, paragraph 17; in re "Mazzeo, Julio Lilo y otros s/ Rec. De casación e inconstitucionalidad", 13/July/ 2007, paragraph 20.

<sup>21</sup> See Martínez Alcorta, Julio A. "El nuevo régimen de restricción al ejercicio de la capacidad jurídica" [The New Regime of Restrictions of Legal Capacity], *El Derecho Familia*, 2014, 55/-9; Peyrano, Guillermo F., "La capacidad de hecho y la capacidad de ejercicio en el nuevo Código Civil y Comercial de la Nación. Personas que pueden ser sometidas a restricciones de su capacidad de ejercicio" [Exercising Legal Capacity and the new Civil and Commercial Code. Persons who can be subject of restrictions in their capacity], *El Derecho*, Volume 262, 27/04/2015, nro 13.715.

<sup>22</sup> Peyrano, Guillermo F. "Declaración judicial de incapacidad o de restricciones a la capacidad de ejercicio. La sentencia (exigencias del art. 37 del nuevo Código Civil y Comercial) y el alcance temporal de sus efectos" [Judicial

- 1) There is a broad recognition of the right of the persons involved to participate in the process and to be heard (arts. 31, 33, 35, 36, 43 and concordant CCC).
- 2) The court may order interim measures including restriction of capacity through support or representatives (article 34 CCC).
- 3) The Code incorporates criteria for accessibility and reasonable accommodation of the process according to the situation of the person involved (article 35 CCC).
- 4) The Code confirms and enhances the criterion of interdisciplinary intervention prior to the judicial decision and indicating what are the contents of the opinion of the interdisciplinary committee (arts. 31, 37, 40 CCC)<sup>23</sup>.
- 5) The Code sets the principle of immediacy and the judge's obligation to hold a personal interview with the person before taking any decision (article 35 CCC).
- 6) The person should have access to free legal assistance (article 31 CCC).
- 7) The persons designated as support of the person with restrictions to his capacity must promote his autonomy (article 32 and 43 CCC), encouraging decisions that meet the preferences of the protected person (article 32 CCC), and facilitating communication, understanding and expression of will of the person to exercise his rights (article 43 CCC).
- 8) The Code states the criteria for the judge to discern the designation of supports, to "ensure the protection of persons with respect to possible conflicts of interest or undue influence" (article 43 CCC).
- 9) The Code says that the sentence must be registered in the Registry of Civil Status and Capacity of Persons (article 39) and establishes that the sentence must be reviewed every three years (article 40 CCC).
- 10) The Code ratifies the criteria of the Law 26657 on Mental Health concerning involuntary hospitalization (arts. 31 and 41 CCC).
- 11) The Code regulates advanced directives concerning medical decisions and capacity (arts. 43 and 139 CCC)<sup>24</sup>.

#### **e) Acts performed by the incapacitated person or the person with restricted capacity**

Civil and Commercial Code distinguishes between the performance of acts before and after the the registration of the judicial decision concerning the restriction of capacity.

Regarding acts after the registration of the sentence, Article 44 provides that "*are invalid the acts performed in contrary to the provisions of the ruling and after the registration of the judicial sentence in the Registry of Civil Status and Capacity of Persons by the incapacitated person or the person with restricted capacity*".

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Declaration of incapacity or restrictions on capacity. The judgement (requirements of article 37 of the new Civil and Commercial Code) and the validity of its effects], *El Derecho*, Tomo 263, 15/06/2015, nro 13.748, p. 1; Peyrano, Guillermo F., "Algunos aspectos de los procesos por incapacidad en el nuevo Código Civil y Comercial de la Nación (la legitimación activa, las partes intervinientes, el juez competente y el estatus de la persona durante el trámite)" [Some aspects of the procedures relating incapacity in the New Civil and Commercial Code], *El Derecho*, Tomo 262, 11/05/2015, nro 13.724, p. 1.

<sup>23</sup> Muñiz, Carlos M., "El abordaje interdisciplinario de la Salud Mental. Situación actual a partir de la ley 26.657 y el Decreto 603/2013" [Interdisciplinary Approach of Mental Health. The situation after Law 26657 and Decree 603/2013], *La Ley DFyP* 2014 (march), 03/03/2014, 162, AR/DOC/4184/2013.

<sup>24</sup> Lafferriere, Jorge Nicolás, Muñiz, Carlos, "Directivas anticipadas en materia de capacidad en el nuevo Código Civil y Comercial Unificado" [Advanced Directives in Capacity in the new Civil and Commercial Code], *Revista de Derecho de Familia y las Personas*, *La Ley*, 2015, p. 147, AR/DOC/1411/2015.

With respect to acts prior to the registration, they *"may be declared invalid if they hurt the person with restricted capacity or incapacity, and on of the following conditions is met: a) mental illness was obvious at the time of the performance of the act; b) who performed the act was in bad faith; c) the act is free of charge"* (article 45). Finally, Article 46 regulates the special case of death of a person, stating that *"the acts performed before the registration of the sentence can not be challenged, except that mental illness results from the act itself, that death has occurred after the action for declaration of incapacity or restricted capacity was promoted, the act is free of charge, or it is proved that who made the contract acted in bad faith."*

#### **f) Termination of incapacity and capacity restrictions**

According to Article 47 CCC, the termination of the incapacity or the capacity restrictions occurs after a new court ruling, which must have prior review by an interdisciplinary committee. If the restoration of the person is not total, the same article provides that the judge can extend the list of acts that the person can do alone or with the assistance of his guardian or support.

### **8. Rights of personality**

The notion of human person connects with the notion of human dignity. Human dignity is a perfection in being that implies respecting each person's inherent, inviolable and inalienable value. Dignity is the cornerstone of the Universal Declaration of Human Rights, whose preamble begins with a very strong statement: *"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."* Similarly the first article of the Declaration provides: *"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."* (Article 1). The link between human dignity and human rights appears in several provisions of other international human rights treaties<sup>25</sup>.

In the new Civil and Commercial Code the dignity of the human person is a key principle. Article 51 recognizes: *"The human person is inviolable and under all circumstances is entitled to recognition and respect for his dignity."* This article opens the chapter on rights of personality and is presented as one of the cornerstones for the interpretation of the entire code<sup>26</sup>. In addition, dignity is a fundamental principle of the human rights system and is consistent with Article 1 of the Civil and Commercial Code which states that *"the cases that this Code applies must be resolved according to the laws that are applicable, in accordance with the Constitution and human rights treaties on which the Republic is a party"* and with Article 2 that provides that *"the law should be interpreted taking into account his words, his purposes, similar laws, the provisions arising from human rights treaties, principles and legal values, consistently with the whole system."*

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<sup>25</sup> For example, "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person" (article 5, American Convention on Human Rights; see also article 10 of the International Covenant on Civil and Political Rights), "Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner." (article 6, American Convention on Human Rights), "everyone has the right to have his honor respected and his dignity recognized" (Article 11, American Convention on Human Rights), "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." (article 22, Universal Declaration of Human Rights), "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection" (article 23, Universal Declaration of Human Rights), among many others.

<sup>26</sup> See Saux, Edgardo, "Derechos y Actos personalísimos" [Rights of personality], in Lorenzetti, Ricardo (Director), *Código Civil y Comercial Comentado* [Civil and Commercial Code Commented], Rubinzal-Culzoni Editores, Santa Fe, 2014, Volume 1, p. 275.

Chapter 4 of Title I of Book I of the Civil and Commercial Code presents different dimensions of human dignity involved today in civilian life. Article 52 sets the general rule of protection of rights of personality: "*The person injured in his private life or family life, honor or reputation, image or identity, or impaired in his personal dignity in any way, can claim prevention and compensation for the damage suffered, as provided in Book III, Title V, Chapter 1*". Thus, the dignity of the human person is one of the core principles of the entire legal system and in this way it has been recognized by the new Civil and Commercial Code<sup>27</sup>.

Completing the general rules on rights of personality in the Code, Article 55 refers to the ability to provide consent to acts related with "rights of personality". It states that the consent for the provision of personal rights is admitted if not contrary to law, morals or good customs. This consent is not presumed and should be strictly interpreted and freely revocable.

We will develop very briefly the provisions of the Civil and Commercial Code concerning the rights attached to physical integrity and spiritual integrity<sup>28</sup>.

### **a) Physical Integrity**

Among personal rights related to physical integrity we found the right to life and the right to health. There are numerous provisions of international treaties on Human Rights concerning the right to life. This right includes two dimensions: first, a prohibitive dimension which is expressed in the commandment "not to kill". On the other hand, a "positive" dimension which is expressed as "promoting life". In the new Civil and Commercial Code there is no explicit mention of the right to life, but its protection may be embodied in various provisions, which are also related to the right to health.

First, Article 54 lays down the general principle that "*it is not required to fulfill the contract that aims at carrying out acts dangerous to life or integrity of a person, except that correspond to his normal activities and that are adopted measures appropriate to the circumstances and safety prevention.*" For its part, Article 56 prohibits "*acts of disposal of the body that cause a permanent reduction of its integrity or are contrary to law, morals or good customs, except as may be required for improving the health of the person, and exceptionally of another person, in accordance with the provisions of the law*".

The general rule in this issue is the need for informed consent, because "*no one shall be subjected to tests or clinical or surgical treatment without their free and informed consent, except otherwise provided by law*" (article 59). This article follows almost verbatim the provisions of the law 26529 on patients' rights, which was amended in 2012 by Law 26742. Article 59 defines informed consent for medical and health acts as "*the declaration of will expressed by the patient, issued after receiving clear, accurate and appropriate information regarding: a) his health status; b) the proposed procedure, specifying the objectives; c) the expected benefits of the procedure; d) the risks, discomfort and foreseeable adverse effects; e) specification of alternative procedures and their risks, benefits and damages in connection with the proposed procedure; f) the likely consequences of not performing the proposed procedure or specified alternative; g) in case of*

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<sup>27</sup> Dignity is also a limit to legal autonomy in the regulation of contracts and juridical acts (articles 279 and 1004 CCC).

<sup>28</sup> See Andruet, Armando S. (h) "Derechos y actos personalísimos. Comentarios al Código Civil y Comercial de la Nación" [Rights of personality. Comments on the Civil and Commercial Code], La Ley DFyP 2014 (november), 03/11/2014, 153, AR/DOC/3894/2014; Rivera, Julio César, "Derechos y actos personalísimos en el proyecto de Código Civil y Comercial" [Rights of personality in the Draft Civil and Commercial Code], *Pensar en Derecho*, Facultad de Derecho UBA, n° 0, 2012, pág. 161; Navarro Floria, Juan G., "Los derechos personalísimos en el nuevo Código Civil y Comercial" [Rights of personality in the new Civil and Commercial Code], *El Derecho*, Tomo 262, 18/05/2015, nro 13.729, p. 1.

*suffering an irreversible, incurable disease, or when the person is terminally ill or has suffered injuries that put him in the same situation, the right to refuse surgical procedures, hydration, nutrition, artificial resuscitation or withdrawal of life support, in case they are extraordinary or disproportionate to the prospects for improvement, or produce excessive suffering, or have the sole effect of extending the time of that irreversible and incurable terminal stage; h) the right to receive comprehensive hospice care in the process of his disease or condition. "*

In case that the person is absolutely unable to express his will at the time of care, the Code refers to the person who has been designated in advance (articles 59 and 60). If no one has been designated, the consent "*can be granted by the legal representative, support, spouse, partner, relative or close friend who accompanies the patient, provided that an emergency situation with a certain and imminent risk of harm Severe to life or health*" (article 59). The same article provides that "*in the absence of these, the doctor can dispense with the consent if his performance is urgent and aims to prevent serious harm to the patient.*"

In this regard, the removal of organs to be implanted in other people is governed by special legislation, which is the law 24,193.

A special provision referred to eugenics can be found in Article 57, which prohibits "*any practice designed to produce a genetic alteration of the embryo to be transmitted to his offspring.*"

The Civil and Commercial Code also includes a basic rule relating to medical research on human beings "*through interventions such as treatment, prevention methods, diagnostic or predictive tests, whose efficacy and safety are scientifically unproven*" (article 58 CCC). This article provides that research can only be done if it meets requirements linked to the existence of a research protocol, the qualification of the professionals, the approval of an ethics committee, the authorization of the appropriate public body, comparing risks and charges in relation to the expected benefits, consent, the absence of risk and discomfort to the patient disproportionate in relation to the benefits expected from the research, safeguarding the privacy and confidentiality of information, appropriate medical care and reassuring research participants the availability and accessibility to treatments that research has shown beneficial (article 58).

Article 59 also states that "*a person with disabilities may never be subject to health research without his free and informed consent, to which he should be granted access to the supports needed.*"

For its part, Article 60 provides for the possibility of a patient of giving advance directives regarding his own health and in anticipation of a situation of disability, including the possibility of designating the person or persons to express consent for medical procedures and to exercise his guardianship. This article prohibits euthanasia practices, as provided in Article 11 of Law 26529. Finally, Article 61 refers to decisions regarding the person's own funeral.

## **b) Spiritual integrity**

We will present the norms of the new Civil and Commercial Code that refer to rights of personality associated with spiritual integrity, which involve the protection of image, honor and privacy.

In this regard, Article 53 of the Code updated the provisions of Law 11,723 of Intellectual Property and regulates matters relating to image rights. Thus, Article 53 provides:

*"Article 53. Right to the image. To capture or reproduce the image or voice of a person, in any manner that is done, you need his consent, except in the following cases: a) that the person is participating in public events; b) there is a scientific, cultural or educational priority interest, and sufficient precautions are taken to avoid unnecessary damage; c) it is a regular exercise of the right to report on events of general interest. In case of dead people, the consent can be given by their heirs or by the person designated by the deceased in a living will. If there is disagreement between heirs of the same degree, the judge would decide. Twenty years on from the death, the not-offensive reproduction of the image is free. "*

Regarding the protection of honor, Article 1740 states the scope of a full reparation. This article provides: *"Article 1740.- Full Reparation. The reparation must be full. It consists in restoring the situation of the victim to the state before the harmful event, whether by payment in cash or in kind. The victim can choose the specific reimbursement, except as partially or totally impossible, unreasonably burdensome or abusive, in which case it should be set in money. In the case of damages resulting from injury of honor, privacy or personal identity, the judge may, at the request of a party, order the publication of the judgment or its relevant parts, at the expense of person who caused the damage".*

Finally, the civil protection of privacy can be found in Article 1770 which includes virtually verbatim the provisions of the previous article 1071 bis of the Civil Code (Act 340). The new Article 1770 states: *"Article 1770.- Protection of privacy. Whoever arbitrarily intrudes on a person's private life, publishing portraits, disseminating his correspondence, mortifying his habits or feelings, or disturbing in any way his privacy, should be condemn to cease such activities, in case before did not ceased, and to pay a compensation to be fixed by the judge, according to the circumstances. In addition, at the request of the victim, the judge may ordered to publish the judgment in a journal or newspaper, if this measure is appropriate for adequate compensation. "*

## **9. The name of the human person**

The name is the exclusive designation of each human person. In Argentina the regulation by law of the name of the people took shape through Law 18248 (published in 24/06/1969). Prior to that date, the regime was customary law<sup>29</sup>. With the enactment of the new Civil and Commercial Code (Law 26994), law 18248 was abrogated and new rules were established in relation to the name, in Chapter 4 of Title I of Book I of the Civil and Commercial Code.

### **a) Right and Duty**

As a general principle, Article 62 states that *"the human person has the right and duty to use the name corresponding to him."* There is a continuity between this provision and Article 1 of Law 18248. The name of the person consists of a "first name" and "surname".

### **b) The first name**

The new Civil and Commercial Code uses the term "prenombre" in spanish, to refer to the "first name", and it designates the single element of the name used to identify the person within his family. Article 63 regulates the rules concerning the election of the first name.

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<sup>29</sup> Llambías, Jorge Joaquín, *Tratado de Derecho Civil. Parte General, [Treaty on Civil Law. General Section]* Volume I, Editorial Perrot, Buenos Aires, 13ra. edition, 1989, p. 296.

The choice of the first name corresponds to the parents or the persons to whom they give their consent for such purpose; in the absence or disability of a parent, the election goes to the other; in the absence of both of them, the election must be made by the guardians, the public prosecutor or the officer of the Registry of Civil Status and Capacity of Persons (article 63 paragraph a).

The principle for the election of the first name is freedom of choice. However, there are some constraints in article 63 paragraph b: there is a limit of three “first names”; surnames cannot be elected as “first names”; the “first name” should not be identical to the “first name” of living siblings; Nor can be elected extravagant “first names”. The wording of this paragraph of Article 63 has received some criticism for having oversimplified rules, putting at risk the child's interest. In particular, it has been criticized the elimination of the requirement that the “first name” should not be misleading as to the sex of the person<sup>30</sup>.

Subsection c clarifies that aboriginal names or derivatives of indigenous and Latin American aboriginal voices first names can be elected.

### **c) The surname**

The surname is the common name for members of a family. Civil and Commercial Code introduced at this point significant changes in relation to the rule of law 18248. In this regard, we must distinguish the different types of affiliation.

In the case of the marital affiliation, the spouses choose the surname of their child and if there is no agreement between them, the surname will be determined by lot at the Registry of Civil Status and Capacity of Persons (article 64). The new Civil and Commercial Code breaks with the criterion of the primacy of the paternal surname governing in Argentina. In any case, the same Article 64 states that "at the request of the parents or the person concerned with sufficient age and maturity, ti can be added the surname of another." The choice of the order of the surname made for the first child of the marriage should be maintained for all children of the same marriage.

If the non-marital child is recognized by only one parent, then it bears the name of that parent (article 64). If the non-marital filiation of both parents is determined at the same time, the rule indicated for marriage and children applied. In case the child is recognized subsequently by his parents, they should agree on the surname of the child. If there is no agreement, the judge will decide the order of surnames according to the best interest of the child (article 64).

In the case of a minor without any affiliation, Article 65 states that it must be entered by the official of the Registry of Civil Status and Capacity of Persons with the surname he is using, or failing that, with a common surname. Meanwhile, if the person has sufficient age and degree of maturity and he has no surname inscribed, he may request the inclusion of the surname he is using (article 66).

In the case of adoption<sup>31</sup>, the Code distinguishes between a full adoption or a simple adoption. In the case of full adoption, if it is a full adoption by one person, the adopted child takes the surname of the adopter; if the adopter has double surname, it can be requested that it be maintained (article 626 paragraph a). If it is a full adoption by a married couple, the general rules on the surname of

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<sup>30</sup> Tobías, José W., in *Código Civil y Comercial Comentado. Tratado Exegético, [Civil and Commercial Code Commented. Exegetical Treaty]* Jorge H. Alterini (Director), La Ley, Buenos Aires, 2015, Volume I, p. 664. Tobías understands that many of the requirements of the old system will now be covered under the ban to choose "extravagant" names. The "best interests of the child" (article 3rd, Convention on the Rights of the Child), also constitutes a constitutional limit to the rule of freedom of choice the first name" (page 665).

<sup>31</sup> Concerning the principles of adoption, see Arias de Ronchietto, Catalina E., *La adopción* [The adoption], prologue by Guillermo A. Borda, Buenos Aires, Abeledo-Perrot, 1997.

children born in wedlock are applied. However, paragraph c stipulates that exceptionally, and based on the right to identity, at the request of an interested party it can be requested to add the surname of origin of the adopted child to the surname of the adopter. Finally, paragraph d sets a general principle that in all cases, if the adoptee has the age and degree of maturity, the judge must especially value his opinion.

Meanwhile, paragraph d of Article 627 states that at the request of the adoptee who has the age and degree of maturity or the adopters in case of a simple adoption, they can request to add the surname of origin of the adopted child to the surname of the adopter or adopters. In the absence of express request, the simple adoption is governed by the same rules of full adoption.

Finally, the surname of married persons is governed by Article 67. It has a rule that either spouse may opt to use the surname of the other, with the preposition "from" ("de" in Spanish) or not. In case of divorce or annulment, the person can not use anymore the surname of the other spouse, except that, on reasonable grounds, the judge authorizes it (article 67). Finally, in the case of widowhood, the surviving spouse can still use the surname of the deceased spouse while not remarried, or as long as he has not constituted a convivial union (article 67).

#### **d) Name change**

As a rule, the name can not be changed. However, the possibility of requesting a change of the "first name" or the "surname" because of a "just cause" is regulated in Articles 69 and 70<sup>32</sup>. We must distinguish two possible procedures: administrative or judicial.

The administrative procedure is exclusively reserved for cases provided for in the final part of Article 69, namely: first name change because of gender identity; or for having suffered enforced disappearance or misappropriation, alteration or suppression of civil status or identity. The change of the first name because of gender identity is regulated by law 26743 that allows the change of the first name because of the self-perceived gender identity<sup>33</sup>. For the Code, such cases are just causes, and do not require judicial intervention (article 69 CCC).

For its part, the name change procedure through the courts only applies if there are just causes (article 69). The same article regulates some "just causes", namely: a) the pseudonym, when it had acquired notoriety; b) cultural, ethnic or religious roots of the name; c) the accredited effect of the name on the development of the personality of the person concerned, whatever the cause.

In the case of the name change procedure through the courts, Article 70 declares that the request for a name change must be processed by the more abbreviated procedure provided by local law, with the intervention of the Public Prosecutor and Defendant Office. The Code also sets rules on the publication of notices once a month for two months, about the possibility of making opposition within fifteen working days from the last publication and the obligation of requiring information concerning the existence of precautionary measures (article 70). The sentence must be registered in the Registry of Civil Status and Capacity of Persons and from that moment is effective against third parties (article 70).

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<sup>32</sup> Muñoz, Carlos, "El nombre como proyección jurídica de la identidad y los "justos motivos" para su cambio" [The name as a juridical projection of identity and the 'just cause' for change], RCCyC 2015 (september) , p. 74 , AR/DOC/2628/2015; Pagano, Luz María, "El cambio de nombre y los justos motivos en el Código Civil y Comercial" [Changing the name and just causes in the Civil and Commercial Code], <http://www.nuevocodigocivil.com/wp-content/uploads/2015/06/El-cambio-de-nombre-y-los-justos-motivos-...-por-Luz-Mar%C3%ADa-Pagano.pdf>

<sup>33</sup> See Sambrizzi, Eduardo, "La ley 26.743 de identidad de género" [Law 26743 on Gender Identity], *El Derecho*, Volume 248, 2012, p. 822.

### e) Actions to protect the name

As a result of recognizing that the name is a right and a duty, Article 71 governs the "protective actions" of the name, which are:

- Action for name recognition: in cases where a person is denied in the use of his name, he can file a sue in order to be recognized in the use of his name. The judge may also order the publication of the judgment at the expense of the defendant (article 71 paragraph a).
- Action to obtain the cessation of use of the name, when it is unduly used by another (article 71 paragraph b). In this case, paragraph c) provides for the special case of a name used to designate things or fantasy characters. In this case, if that use causes material or moral damages to the person, the action may claim to cease in the use.

Article 71 says that in every case the person can sue to repair the damage and the judge may order the publication of the judgment. These actions can be exercised exclusively by the interested party; if deceased, by his descendants, spouse or partner, and failing that, by parents or siblings (article 71).

### f) Pseudonym

Pseudonym is the name a person voluntarily assigns to himself in order to be identified with it in certain life activities (artistic, literary, scientific, sports, etc.). In this regard, Article 72 of the Civil and Commercial Code states that the notorious pseudonym enjoys the protection of the name<sup>34</sup>. Thus, the person can access the means of protection against ignorance in the use or usurpation of the pseudonym to the extent that the notoriety of the pseudonym is public and known tested.

## 10. The domicile of the persons

The domicile is the residence of a person for legal purposes<sup>35</sup>. In its civil aspects, it is regulated in Chapter 5 of Title I of Book I of the Civil and Commercial Code. There are two classes of domicile. The general domicile, which becomes effective for the majority of legal relations, and special domicile, that applies to one or more specific legal relationships.

The general domicile is classified, in turn, between real domicile and legal domicile. The real domicile is the place that the human person chooses as his habitual residence (article 73). This residence consists of two elements: one objective, which is the actual residence in one place; one subjective, which is the desire to make this place the legal domicile of the person. While this subjective element is not mentioned in Article 73, it appears in Article 77 when it refers to the change of domicile. In this regard, Article 77 states that "*the domicile can be changed from one place to another. This power can not be constrained by contract or by testamentary provision. The change of domicile is instantly verified by the fact of transferring residence from one place to another with the intention of remaining in it.*"

The other type of general domicile is legal domicile. It is an address compulsory, not voluntary, imposed by law and interpreted restrictively. In Article 74 it is defined as "*the place where the law presumes, without admitting proof to the contrary, that a person resides permanently to exercise his rights and fulfill his obligations.*" Article 74 continues stating the cases of legal domicile, namely: a) civil servants are domiciled in the place where they should perform their duties, if these are not

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<sup>34</sup> Tobías, José W., in *Código Civil y Comercial Comentado. Tratado Exegético*, [Civil and Commercial Code Commented. Exegetical Treaty] Jorge H. Alterini (Director), La Ley, Buenos Aires, 2015, Volume I, p. 705.

<sup>35</sup> Black's Law Dictionary, 9th ed. 2009.

temporary, periodic or single committee; b) military on active duty are domiciled in the place where they are serving; c) the homeless and those who have unknown address, have it in place of their current residence; d) incapable persons have it in the house of their representatives.

Meanwhile, special domicile is one that has application in one or more specific legal relationships. One of these special domiciles is that agreed in a contract for the exercise of the rights and obligations emanating from it (article 75).

A case of special domicile is the professional or commercial domicile, which in the new Civil and Commercial Code is governed by Article 74 which states that if the person holds professional or economic activity is domiciled in the place where he fulfills the obligations arising from such activity (article 74).

As for the effects of domicile Article 78 states that domicile determines the competence of the authorities in legal relations and that the choice of domicile produces the prorogation of jurisdiction. However, there is broad agreement in pointing out that the purpose of domicile exceeds that statement and is relevant to determining the applicable law, jurisdiction, the validity of notifications, the fulfillment of obligations, among other effects<sup>36</sup>.

Finally, Article 76 refers to the case of a person whose domicile is not known and establishes that his domicile is the place where he is in that moment; and if it is ignored, the last known address should be taken into account as the domicile.

## 11. Absence

Regarding the administration of the property of a person, the Civil and Commercial Code regulates the special case in which someone disappears from his home, with no news of him, and without leaving proxy (article 79 CCC). We are in the event of absence, also known as "simple absence" to differentiate it from the presumption of death. The absence may create a situation of prejudice to the absentee property. The Code aims at appointing a guardian to his property. The Code allows the person to designate a "guardian" to property if they required special care (article 79). This same rule should be applied if there is a proxy, but his powers are inadequate or not properly plays the mandate (article 79).

The legitimacy to request a declaration of absence applies to the Public Ministry and to any person having a legitimate interest in the absentee property (article 80). Intervenes the judge of the domicile of the absent person (article 81) and the procedure should include the citation of the absent person by edicts and the intervention of a public defender (article 82). The judge passes sentence after having heard the defense, and if the the legal ends are met, he must declare the absence and appoint a guardian (article 83).

The powers of the guardian involve only those to perform acts of ordinary administration and conservation of goods (article 83) and any act exceeding ordinary administration he must be authorized by the judge. The authorization shall be granted only in case of obvious and urgent need (article 83). As for the fruits of managed assets, Article 83 provides that should be used for the support of the descendants, spouse, partner and ascendants of the absent.

The designation of the guardian ends by: a) the presentation of the missing person or by proxy; b) his death; c) judicially declaration of his presumed death (article 84).

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<sup>36</sup> Tobías, José W., in *Código Civil y Comercial Comentado. Tratado Exegético*, [Civil and Commercial Code Commented. Exegetical Treaty] Jorge H. Alterini (Director), La Ley, Buenos Aires, 2015, Volume I, p. 715.

## 12. Presumption of death

The Civil and Commercial Code governs cases where a judge declares the presumption of death of a person because he has been away from home, with no news of him for a long period of time. In this regard, Chapter 7 of Title I of Book I of the Civil and Commercial Code deals with the "presumption of death".

The legal system is structured around three cases:

**a) ordinary case:** it is governed by Article 85 and includes the absence of a person from his home without news of him for a period of three years. This period should be counted from the date of the last news of the absent (article 85).

**b) Generic extraordinary case:** according to Article 86, the death of an absent person is also presumed if the last time he was found at the scene of a fire, earthquake, act of war or similar event, likely to cause death or participated in an activity involving the same risk, and there is no news of him for a period of two years from the day the event occurred or may have occurred (article 86 paragraph a).

**c) Specific extraordinary case:** according to Article 86, the death of an absent person should be presumed if he was in a ship or aircraft wrecked or lost, and there are no news of his existence within six months from the day that the event occurred or may have occurred (article 86 paragraph b).

The Code contains rules about the procedure and about the scope of the judgment of presumption of death. Regarding the procedure, those who have a subordinate right to the death of the person concerned are entitled to initiate the action (article 87). The competent judge is the one of the domicile of the absent person (article 87).

According to Article 88, the judge must appoint a counselor to the absent or the public defendant should intervene. The judge must summoned him through edicts once a month for six months. The judge must also appoint a guardian to the property of the absent person, if there is no agent with sufficient powers, or if for any reason it does not play the mandate properly. Article 88 also clarifies that it is not required to have previously declared the simple absence of the person.

When the six months period is finished and after hearing the defense, the judge must declare the legal presumption of death if the legal ends are accredited, set the presumptive date of death and order the registration of the judgment (article 89).

Determining the presumptive day of death is relevant to all the effects of the end of existence of the person, such as inheritance. In this regard, the rule comes from Article 90 which distinguishes the presumptive date of death according to the cases:

A) in the ordinary case, the presumptive date of death is the day of the end of the first year and a half;

b) in the first of the extraordinary cases, the day of the event, and if it is not determined, on the average of the period in which it occurred or may have occurred;

c) in the second special case, the last day that there were news of the wrecked ship or lost aircraft.

Article 90 also provides that if possible, the decision must also determine the presumptive time of death; otherwise, it is considered the end of the day declared as presumptive of death.

As for the effects of the declaration of presumed death, the declared goods of the presumed death person should be given to his heirs and legatees (article 91). However, the Code provides for three guarantees for the case the absentee reappears: a) the need for an inventory; b) the registration of the case in the appropriate register; c) the obligation not to sell or encumber property without a judicial authorization (article 91). The effect of the registration runs out after five years from the presumptive date of death or eighty years since the birth of the person (article 92). After the registration period, the successors may dispose of the goods.

In case of recurrence of the absent, the declaration of death has no effect, and the person can claim the return of his goods (article 91). Under article 92, if the absent reappears after the registration period, he can claim: a) the delivery of goods that exist in the state in which they are; b) those goods acquired with the value of the missing; c) the price due to pay; d) fruits not consumed.

### 13. End of existence of the person

Death puts an end to the existence of the human person<sup>37</sup>. This basic truth is recognized by Article 93 of the Civil and Commercial Code that sets the general principle that the existence of the human person ends with death.

Death, from the perspective of law, is a legal fact, that is, an event that has legal consequences involved but does not depend on the will of the person. For civil law, the question is presented as a problem linked to the verification that death has already occurred. Indeed, while death is a mystery, because it is the separation of body and soul, the discussion has centered around the mechanisms to verify death. To verify the decease of a person we must act with moral certainty, with the means usually available by medicine. In this regard, Article 94 provides that "*the verification of death is subject to accepted medical standards, applying special legislation in the case of removal of organs from the corpse.*" Commenting on this statement, Carlos Muñiz says that we must take into account four principles:

- 1) The phenomenon of death and its concept is unique. In this regard, it is forbidden the possibility of considering a person alive for some effects and dead for others.
- 2) It should be considered contrary to the principle laid down in Article 51 a "medical-utilitarian" conception that defines death with an efficiency criterion in order to "maximize" the number of organ transplants. That criterion should be forbidden because it converts the person into an instrument rather than an end in himself, affecting his dignity and integrity.
- 3) The methods to be established for the verification of death must, within due limits to human knowledge, provide moral certainty about the fact of death and not merely a calculation of probability on it, without it being important how high this probability is.
- 4) A person should be considered death only if the cessation of vital functions can be understood by science as irreversible, taking into account the existing modern resuscitation techniques.<sup>38</sup>

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<sup>37</sup> Tobías, José W. *Fin de la existencia de las personas físicas*, [The end of the existence of persons] Buenos Aires, Astrea, 1988; Muñiz, Carlos M., "Fin de la existencia de las personas físicas" [The end of the existence of persons], in *Principios de Derecho Privado*, [Private Law Principles] Limodio, Gabriel (Director), EDUCA, Buenos Aires, 20009, p. 359-424.

Article 94 of the Civil and Commercial Code refers therefore to the law 24193 which, for its part, in Article 23 states when should the person be considered death: *"A person shall be considered dead when verifying cumulatively the following signs, which must persist uninterruptedly six (6) hours after their joint statement: a) irreversible absence of brain response, with complete loss of consciousness; b) absence of spontaneous breathing; c) Lack of cephalic reflexes and finding of non-reactive pinpoint pupils; d) brain inactivity supported by appropriate technical and / or instrumental means to various clinical situations... Verification of the signs referred to in subsection d) is not required in case of total and irreversible cardiopulmonary arrest. "*

A special course is given for the case that the body of a person is not found or can not be identified (article 98 CCC). In this case, if there is certainty that the death actually occurred, the spouse or a relative can initiate the legal proceedings to declare the death and order its registration. It is worth mentioning that this is not a case of presumed death, but a case of a dead person. Article 98 provides that in these cases, the judge may have the death proven if the disappearance occurred in circumstances that death must be taken as true without any doubt.

Finally, in the case of the death of several people in a common disaster or in any other circumstances, Article 95 presumes that they all died at the same time, if it can not be determined otherwise.

#### **14. Proof of marital status and capacity of people**

In Argentina, the function of recording the facts of the marital status of people corresponds to the provinces. However, there are common provisions throughout the country arising from the Civil and Commercial Code and law 26413.

The basic rule is contained in Article 96 which states: *"The birth occurred in the Republic, circumstances of time and place, gender, the name and affiliation of those born, should be proofed by the records of the Registry of Civil Status and Capacity of Persons. Similarly, the death of the deceased in the Republic should be proofed by the same records. Rectifying records should be done according to the provisions of special legislation."*

The special legislation is law 26413. Under this law, all acts or events that give rise to, alter or modify the civil status and capacity of persons, must be registered in the corresponding records of the provinces of Argentina and Buenos Aires (article 1). This law also regulates what are the "records": *"The register shall be made by an entry in a book that can be made with numbered single folios that safeguard the safety requirements, a copy of which will be taken either manually, micro-film, computer file or other similar system. This copy shall be signed by the public official. The original and the copy so obtained shall be treated as public documents, as well as photocopies of items that are issued on the basis of these original records or their copies. The items must be authenticated by a competent authority. Births, marriages, deaths or disabilities are recorded in separate books..."* (article 5).

In the case of birth or death occurring abroad, the Civil and Commercial Code provides that they *"are proofed by instruments granted under the laws of the place where they are produced, legalized or authenticated in the manner required by international conventions, and in the absence of conventions, by the consular provisions of the Republic"* (article 97). For its part, *"certificates of*

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<sup>38</sup> Muñiz, Carlos, "Comentario al art. 94 del Código Civil y Comercial de la Nación" [Commentary on article 9 of the Civil and Commercial Code], *Código Civil y Comercial Comentado [Civil and Commercial Code Commented]*, Alberto Bueres (Director), Editorial Hammurabi, Buenos Aires, 2015 (forthcoming).

*entries made in Argentine consular records are sufficient to prove the birth of the children of Argentines and to prove the death of Argentine citizens" (article 97).*

Article 98 states that if there is no public registry or the records are missing or null, the birth and death of a person can be proved by other evidence. For its part, Article 99 provides that if it is not possible to establish the age of a person by the means indicated in this Chapter, the court must determine the age after consulting experts.