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Constitutional and International-Legal Dimensions of Patient Autonomy in the Practice of the Supreme Court of Argentina

Anatoliy A. Lytvynenko

ORCID ID: https://orcid.org/0000-0002-0036-0677
Doctor of Legal Sciences (PhD)
Lecturer at the Baltic International Academy
Room 216, Valērijas Seiles 4/1, LV-1003, Rīga, Latvia
E-mail: anat.lytvynenko@gmail.com

Jevgenij Machovenko

ORCID ID: https://orcid.org/0000-0003-2930-3526
Doctor of Social Sciences (HP)
Professor at the Department of Public Law
Vilnius University Faculty of Law
Saulėtekio 9 – I block, LT-10222 Vilnius, Lithuania
Phone: (+370 5) 236 61 75
E-mail: jevgenij.machovenko@tf.vu.lt

Constitutional and International-Legal Dimensions of Patient Autonomy in the Practice of the Supreme Court of Argentina

Anatoliy A. Lytvynenko
(Baltic International Academy (Latvia))

Jevgenij G. Machovenko
(Vilnius University (Lithuania))

Summary. The protection of patients' rights in the States of Latin America is rapidly emerging in the last decades both in legislation and in case law. In many court judgments originating from Latin America, patients' rights are very closely tied with constitutional rights of citizens, such as the right to liberty, dignity, inviolability of the person, autonomy and privacy. In this article, the authors explore the relevant case law of the Supreme Court of Argentina, which handed down several influential judgments relating to patient autonomy, mainly relating to the patient's self-determination, as well as a notorious 2015 judgment affirming the legitimacy of withdrawal of life-supporting treatment of a patient in a permanent vegetative state. The authors explore how the Court interprets the provisions of the Constitution of Argentina in relation to the protection of patient autonomy, as well as the application of the international standards of healthcare enshrined in international legal human rights covenants.
Keywords: patients' rights, patient autonomy, constitutional rights, international human rights law, Supreme Court of Argentina.

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Konstituciniai ir tarptautiniai teisiniai pacientų autonomijos aspektai Argentinos Aukščiausiojo Teismo praktikoje

Anatoliy A. Lytvynenko
(Baltijos tarptautinė akademija (Latvija))

Jevgenij Machovenko
(Vilniaus universitetas (Lietuva))

Santrauka. Pacientų teisių apsaugos Lotynų Amerikos valstybėse svarba ir būtinumas pastaraisiais dešimtmečiais sparčiai ryškėja tiek teisėkūroje, tiek teismų praktikoje. Daugelyje iš Lotynų Amerikos teismų priimtų sprendimų pacientų teisės yra labai glaudžiai susiejamos su konstitucinėmis piliečių teisėmis, tokiomis kaip teisė į laisvę, orumą, asmens neliečiamumą, autonomiją ir privatumą. Šiame straipsnyje autoriai nagrinėja atitinkamą Argentinos Aukščiausiojo Teismo praktiką, kelis išskirtinius reikšmingus jo sprendimus, susijusius su paciento savarankiškumu ir apsisprendimu. Iš jų – liūdnai pagarsėjusį 2015 m. sprendimą, patvirtinantį nuolatinės vegetacinės būklės paciento gyvybę palaikančio gydymo nutraukimą. Autoriai tiria, kaip Teismas aiškina Argentinos Konstitucijos nuostatas, susijusias su pacientų autonomijos apsauga, taip pat taikant tarptautinius sveikatos priežiūros standartus, įtvirtintus tarptautiniuose teisiniuose žmogaus teisių paktuose.
Pagrindiniai žodžiai: pacientų teisės, pacientų autonomija, konstitucinės teisės, tarptautinė žmogaus teisių teisė, Argentinos Aukščiausiasis Teismas.

1. Overall remarks

In the Spanish-language literature, there is relatively little discussion of the history of the concept of *informed patient consent*. For example, the author M. Arroyo (2009), when speaking about the institution of informed consent in Spain, states that, until 1960, all legal relations between the doctor and the patient had been regulated by the paternalistic principle, that is, the patient's consent was often irrelevant, since the patient, not being a medical specialist (i.e., because of being a layman), could not contribute anything to the treatment, and, for the first time, the concept of *patient consent* was introduced into the Spanish legislation only in 1979 (Arroyo, 2009, p. 119–120), although the principle of informed consent was introduced into the *General Regulation of the Management and Service of Social Security Health Institutions* (Reglamento General de Gobierno y Servicio de las Instituciones Sanitarias de la Seguridad Social) in 1972 (Artázcoz, 1997, p. 77).

The principles of informed consent in Spanish law, even before the adoption of the legislation on patients' rights, were developed in jurisprudence in the 1990s (García, 1999, p. 149–155). Perhaps this principle was formed in the judgment of the Supreme Tribunal of Spain of March 10, 1959, No. 274, in which a doctor, having started the removal of a patient's inguinal hernia, suspected a sarcoma of the genital organ, and as a result amputated it without asking the consent of the patient or his relatives, and was convicted under Art. 420 of the Spanish Penal Code (Tribunal Supremo, 1959). Other authors derive the principle of informed consent of the patient from constitutional rights – the right to human dignity, the right to self-determination, free development of personality, and the right to health care (Lopez, 2016, p. 129–130). In Colombia, informed consent of the patient was formalized in Law No. 23 of February 18, 1981, better known as the *Medical Ethics Law* (in Spanish, as titled in Colombia: *Ley de Ética Médica*), the principle of which is that a physician may not perform any medical or surgical intervention without the patient's consent (Woolcott-Oyague, 2021, p. 91–92). Thus, Article 15 of the Medical Ethics Law provides that the physician must ask the patient's consent to the use of medical and surgical treatments that the physician considers necessary and that may affect the patient physically and psychologically, except in cases where it is impossible to obtain such consent (Ley 23 de 1981, 1981).

On the other hand, the authors Mendoza and Herrera (2017) noted the very general nature of the norm, since it did not establish guidelines for the doctor's action, for example, in the case of minor patients, or a conflict of interest between the patient's representatives at the end of his or her life (Mendoza and Herrera, 2017, p. 159). The Constitutional Court of Colombia in the judgment No. T-303/16 designates informed consent as a logical consequence of the individual's right to information (since informed consent includes not only the patient's consent to a medical intervention as such, but also the doctor's obligations to duly inform the patient about it), as well as the right to autonomy, based on Articles 16 and 20 of the Constitution of Colombia; moreover, the informed consent of the patient has the character of a principle of autonomy, which materializes other constitutional principles, such as human dignity, free development of personality, individual freedom and pluralism, and, in addition, it is a guarantee of the protection of the right to health and personal integrity (Corte Constitutional, 2016).

It should be noted that the liability of medical staff due to negligence has also been reflected in the judicial practice of Colombia relatively recently: thus, in a judgment of October 14, 1959, the Supreme Court of Justice of Colombia recognized the guilt of the defendant clinic, whose nurses, while preparing a female patient for a blood transfusion procedure, placed bottles of hot water on her legs, which led to a burn of the left foot (Corte Suprema de Justicia, 1959, p. 758–767). The Argentine Society of Pediatrics, in its article "Entre el paternalismo médico y la autonomía de los pacientes: 25 siglos de historia" (2024), dates the development of the concept of patient autonomy to the 1970s, to the same time when significant scientific and technological progress in medicine, as well as the development of anthropological, psychological, social and ethical disciplines, in which the principle of respect for the autonomy of the patient began to manifest itself, which changed the concept of paternalism between the doctors and the patients, which had previously prevailed for centuries (Sociedad Argentina de Pediatria, 2024, p. 2).

However, historical examples of judicial practice mentioning the need to ask for the patient's consent for medical intervention have been known for a very long time. Thus, the Correctional Court of Lyon, France (in French: *Tribunal correctionnel de Lyon*), fined two doctors at the Antiquaille Hospital in 1859 for conducting an experimental treatment of a boy for dermatophytosis by using a syphilitic inoculation without the consent of the parents. Despite the positive result of the treatment, the Court noted that even a needle prick without a person's consent should be considered a bodily injury (battery), and that a doctor is prohibited from using experimental methods of treatment, only except for therapeutic purposes (and the doctors subsequently published a scientific article about a case of treating a patient with the new method), and, in addition, the doctors were not at all sure of the success of this treatment, and could not predict its results (Tribunal correctionnel de Lyon, 1859, p. 88–89).

In a judgment of the Supreme Court of Germany on 31 May 1894, a surgeon performed an unsuccessful operation to resect the bones of the foot of a girl who suffered from tuberculous suppuration of the bones of the mold, and, a month after the operation, the foot had to be amputated due to the spread of the tuberculosis infection. Before the ill-fated operation, the father wanted to take his daughter home, objecting to the operation, but the medical staff had already prepared for the operation, and it was performed nevertheless. The Supreme Court, considering the case in cassation, stated that if the patient refuses, the doctor's obligation to treat the patient ceases, and therefore, a doctor who causes bodily harm, even for therapeutic purposes, acts unlawfully (Article 223 of the Criminal Code); although, on cassation, the case was returned to the court of second instance, where the doctor was subsequently acquitted (Reichsgericht, 1894, p. 375–389).

In Canada, the legal basis for informed patient consent was formulated in the early decades of the twentieth century, but, in most of the early cases, doctors were found not to be in fault on the basis that

they were able to prove that the patient was in an emergency condition, and that they had to perform medical interventions significantly beyond what was agreed upon in advance (Lytvynenko, 2020, p. 264–265). Such cases include *Parnell v. Springle* (1899), *Caron c. Gagnon* (1930), and *Marshall v. Curry* (1933), which all had the same outcome by ending in favor of the physician who acted because of establishing an urgency and dealing with it without the patient's consent (*Parnell v. Springle,* 1899, p. 74; *Caron c. Gagnon*, 1930, p. 155; *Marshall v. Curry*, 1930, p. 260).

In the United States, in *Schloendorff v. Society of New York Hospital* (1914), the New York State Court of Appeals clearly distinguished the legal basis for an action for performing medical intervention without the patient's consent: the cause of action is to be considered as a physical injury (trespass), not as the physician's negligence in performing it; every person of its own mind can decide what to do with his/her own body; and a physician who performs an operation without the patient's consent thereby commits a trespass (*Schloendorff v. Society of New York Hospital*, 1914, p. 130). Subsequently, sixty years later, when the number of lawsuits over informed consent noticeably increased, the California Supreme Court, in its 1972 judgment in the case *Cobbs v. Grant*, came to the conclusion that the tort theory of a personal injury resulting from non-consensual medical intervention works when the patient did not consent to a medical intervention at all. If the patient consented, but an accident occurred during the procedure and the physician failed to disclose it to the patient, the physician is liable for negligence (the tort of negligence in common law jurisdictions) (*Cobbs v. Grant*, 1972, p. 241–242).

It should be denoted that similar court judgments from around all the world, especially older ones, show a move away from the paternalistic concept of medicine to a more liberal model based on patient autonomy. Thus, the general rule is that any medical intervention must be in accordance with the patient's consent, which means its legitimacy, without which, it should be considered as bodily injury. It should be noted that the rather complex historical and legal nature of the basis for medical practice in the past centuries was often built on customary law, i.e., the recognition by society of the right of doctors to practice medicine long before the adoption of legislation on medical practice (Lytvynenko, Machovenko, and Jurkeviča, 2024, p. 126–141).

The main international legal act on the patient rights on the European continent is the *Oviedo Convention* of 1997, Article 5 of which enshrines the principle of autonomy: any medical intervention must be carried out only with the free and informed consent of the patient (*Convention for the Protection of Human Rights and Dignity*, 1997, paragraph 5). In Latin America, such an international legal act does not currently exist, and therefore the principles of patient autonomy are based on domestic legislation, judicial practice, and the rulings of the Inter-American Court of Human Rights. Such principles were set out in the case of *I.V. v. Bolivia* (2016). In this case, the Court described the patient's informed consent as a *sine qua non* in medical practice, based on respect for the patient's autonomy and freedom to make decisions in accordance with his or her own life project (*I.V. v. Bolivia*, 2016, para. 159). The Court further clarified that informed consent should be understood as a prior decision whether to agree to a specific medical procedure, whereby informedness should be understood as a decision obtained freely – i.e., without threats, coercion, improper inducements or incentives, and, after the patient has been fully informed about the medical intervention, which has been adequately understood by the patient, enabling him or her to consent to it. Consent alone is not sufficient – such consent must be prior, free, complete and informed (*I.V. v. Bolivia*, 2016, para. 166). Thus, the 'informed' nature of the patient's consent only occurs if the patient receives and properly understands the information provided to him or her by the physicians. The Court further states that the following information must be given to the patient: 1) an assessment of the diagnosis; 2) the purpose, method, possible duration, as well as the expected benefits and risks of the treatment; 3) possible negative consequences of the treatment;

4) alternative treatments, including those that are less invasive; 5) the consequences of the treatment; as well as 6) what may occur before, during and after the treatment (*I.V. v. Bolivia*, 2016, para. 189). In *Vilchez v. Chile* (2018), the Inter-American Court of Human Rights reaffirmed this position that the need to obtain informed consent not only protects the right of patients to decide freely whether to undergo a medical intervention, but is also a mechanism for implementing a number of human rights guaranteed by the American Convention on Human Rights, namely, personal liberty, the integrity of the person, including health care, and the right to private and family life (*Vilchez v. Chile*, 2018, para. 170).

The jurisprudence of the European Court of Human Rights, as follows from the judgment of the Supreme Court of Argentina, is quite well known in Latin America. For example, in the recent judgment of the European Court of Human Rights in the case of *Pindo Mulla v. Spain* (2024), the Court emphasizes that the right to private and family life also includes autonomy, including in the field of health care, where it is considered a general and fundamental principle, recognized by the rule of informed consent of the patient: thus, a duly informed patient, including as regards whether a treatment will not be applied, has the right to decide freely whether to consent to this treatment or, on the contrary, to refuse it (*Pindo Mulla v. Spain*, 2024, paras. 137–138). In an earlier case, *Csoma v. Romania* (2013), the European Court of Human Rights addresses the 'second limb' of informed consent – specifically, the doctor's obligation to inform the patient about an upcoming medical intervention. Thus, the Court states that it is important for patients who face health risks to have information which would allow them to assess these risks. The Court therefore concludes that Contracting Parties must take appropriate regulatory measures to ensure that doctors consider the foreseeable consequences of a medical intervention and inform their patients of those consequences in advance in such a way that patients can give informed consent (*Csoma v. Romania*, 2013, paras. 41–42).

Patient autonomy is expressed in the Civil and Commercial Code of Argentina as well as in Law No. 26.529 on the *Rights of Patients in their Relations with Health Professionals and Institutions* (2009) (in Spanish: *Ley de Derechos del Paciente en su Relación con los Profesionales e Instituciones de la Salud*). The authors Hevia and Schnidrig (2014) write that patient autonomy derives from Art. 19 of the Constitution of Argentina, which provides for the right of every citizen to personal freedom and autonomy (Hevia and Schnidrig, 2014, p. 517). Based on the 1993 judgment of the Supreme Court of Argentina in the case No. B. 605. XXII., this is the approach used to interpret the patient's right to autonomy in making decisions about his or her health (Corte Suprema de Justicia de la Nación, 1993, p. 479).

In the 2008 judgment of the Supreme Court of Argentina in the case No. G. 2638. XL, it is stated that the purpose of informed consent is to allow the patient to freely exercise his or her will, whether or not to agree to a certain medical practice, and the liability that arises for failure to comply with this requirement is based on the assertion that if the patient had known the risks of this medical intervention, he or she would not have consented to it (Corte Suprema de Justicia de la Nación, 2008, para. 7). According to Article 59 of the Civil and Commercial Code of Argentina, informed consent of the patient should be understood as the patient's free expression of will for a certain medical intervention, which he or she gives after receiving information about: a) the state of health; b) the proposed medical procedure and its objectives; c) the benefits of the medical procedure; d) the foreseeable risks and adverse effects of the procedure; e) information about alternative procedures and their risks, advantages and disadvantages compared to the proposed procedure; f) the consequences of not performing the procedure or alternative treatments; g) the right to refuse surgical procedures and life support measures (artificial hydration, nutrition, etc.) if the person suffers from an irreversible and incurable disease, is in an incurable condition or remains in it due to injuries; h) the right to receive palliative care in the

treatment of the patient's disease. This provision also states that persons with disabilities cannot be subjected to medical interventions without their free consent, and if a person cannot express his or her will, and has never expressed it before, then a close relative can give consent on his or her behalf. In emergencies, a doctor may act without the patient's consent if the doctor's actions are urgent and aimed at avoiding serious harm to the patient's health (Codigo Civil y Commercial de la Nación, 2014, Art. 59).

Article of the Civil and Commercial Code of Argentina No. 60 also provides for the institution of the 'patient's will', according to which, any competent person can give instructions and powers regarding his or her health in case of incapacity, in which the patient can designate the person or the persons duly authorized to give consent regarding the performance of medical procedures. However, this provision completely prohibits any practice of euthanasia (Codigo Civil y Commercial de la Nación, 2014, Article 60) – according to the 2015 judgment of the Supreme Court of Argentina in the case No. CSJ 376/2013 (49-D)/CS1, the termination of life support procedures for a patient who had been in a vegetative state for twenty years apparently should not be considered a practice of euthanasia (Corte Suprema de Justicia de la Nación, 2015, p. 556). According to Art. 7 of Law No. 26.629, there are two types of informed consent: written and oral. In the written form, the patient's informed consent is given in the following cases: a) hospitalization; b) surgical intervention; c) invasive diagnostic and therapeutic procedures; d) those procedures that involve risks, as defined by the provisions of this law; and e) withdrawal of informed consent (Ley de Derechos del Paciente en su Relación…, 2009, Article 7). Informed consent, like refusal of treatment, according to Art. 10 of Law No. 26.629, may be revoked at any time by the patient or his or her representative, which will be recorded in the medical record (Ley de Derechos del Paciente en su Relación…, 2009, Article 10). Finally, Art. 560 of the Civil and Commercial Code states that the assisted reproductive technology center must obtain informed consent of all parties undergoing the use of assisted reproduction techniques, and this informed consent must be renewed each time gametes or embryos are used (Codigo Civil y Commercial de la Nación, 2014, Article 560). It should also be noted that, in a 1980 judgment, the Supreme Court of Argentina authorized the transplantation of a kidney from a minor sister (who was two months away from becoming an adult) to a brother at the request of the parents, since, according to clinical studies, the only possible donor was the 17-year-old sister (Corte Suprema de Justicia de la Nación, 1980, p. 1284). In this case, however, the issue of informed consent was not directly raised, and the consent of the donor to the kidney transplant and her parents was also not in question.

2. Informed Consent in the Practice of Argentine Courts of 1–2 Instances

A recent example of the principle of patient autonomy in the judicial practice of Argentina is the judgment of the National Chamber of Civil Appeals, Room H (Arg. *Cámara Nacional de Apelaciones en lo Civil, Sala H*) of 25 February 2019. The patient, a minor at the time of the operation, suffered from a congenital deformity of the chest (*pectus excavatum*). The operation to correct the deformity was relatively unsuccessful, and the patient subsequently underwent three further operations due to postoperative complications. The patient claimed that the defendant (the doctor) failed to inform him and his representatives about the risks of the surgery. The Court says that information is a patient's right in the legal relationship between the patient and the doctor, and it has become not only an ethical but also a contractual obligation that gives rise to liability in cases of non-fulfilment, and the obligation to inform includes informed consent, the absence of which may lead to the doctor's civil liability when risks materialize that the patient was not informed about them at the appropriate time. Information that should be given to the patient includes diagnosis, prognosis and recommended treatment:

1) The diagnosis must be communicated to the patient after the examination and all necessary tests that allow this diagnosis to be made;
2) The same applies to the prognosis, which must also be communicated to the patient by the doctor, except in certain emergencies;
3) The obligation to inform the patient about the treatment is also important, since it is important for the patient to provide consent, being informed about the medical or surgical therapy, in terms of the possible risks and consequences of this treatment.

The Court also notes that a situation may arise when a doctor treats a patient in full compliance with medical practice, but does not inform him or her. These are two different obligations, for the violation of each of which the doctor is liable. In the first case, the doctor will be guilty of improper performance of obligations (in other words, negligence), and in the second – about the materialization of a risk about which the patient was not informed. The lack of information for the patient in itself, as the Court clarifies, does not cause damages, but it affects the patient's ability to choose alternative treatment. That is, for a certain subject, there were certain possibilities (i.e., in the context of treatment), but the action of a third party (i.e., the doctor who did not provide to the patient the necessary information deprives the patient of this possibility, and entails damages. Thus, the limit of the doctor's liability will be determined in terms of the patient's loss of the ability to make decisions about treatment, and, not in itself, the lack of information. As a result, the court ruled in favor of the plaintiff, but reduced the amount of damages to $ 100,000 (Cámara Nacional de Apelaciones en lo Civil, Sala H, 2019).

The second example of recent case law in Argentina where informed consent of the patient was discussed is the judgment of the Chamber of Appeals of the city of Gualeguaychú (province of Entre Ríos) of March 13, 2020. The patient (plaintiff) was admitted to the hospital (defendant) with a blastoma of the right ovary, as a result of which, a laparoscopic adnexectomy was performed, but, four days later, the patient returned to the same hospital with severe abdominal pain and vomiting; a CT scan revealed pleural effusion and free fluid in the abdominal cavity. The doctor decided to perform a laparotomy, and, during the operation, purulent material of the sigmoid colon and a perforation in the diverticulum were discovered, which necessitated a resection of the intestine in the perforation section and a colostomy. The patient subsequently sued the clinic, by claiming that the first operation caused a perforation of the intestine, while arguing that the rule of informed consent had not been respected and that the doctors had not informed her of the risks of laparoscopic surgery or its negative features compared to the traditional surgery. The Court argued that obtaining informed consent, reflected in Article 59 of the Civil and Commercial Code of Argentina, is closely linked to the very personal rights and self-determination of the patient, and, accordingly, to the protection that the patient's will requires – which is in sharp contrast to the past medical paternalism (under which, the patient's consent could be effectively a fiction). Patient autonomy, the Court believes, should be considered as a Conventional right, since it was the subject of a judgment of the Inter-American Court of Human Rights in the case of *Vilchez v. Chile* (2018), where the Court emphasized the peculiarity of the right to autonomy and the right to make decisions about one's own body and health, and also emphasized the importance of patients receiving information about their health. The Court in this case calls 'informed consent' the basis for medical practice (i.e., treatment and various types of medical interventions), which is founded upon respect for the patient's autonomy and freedom of choice in decisions regarding the state of health. In the opinion of the Court, informed consent ensures the beneficial effect of the rule recognizing autonomy as an inseparable element of human dignity. The Chamber of Appeals further argues that informed consent should be understood as a clear justification for the legitimacy of any 'medical act' (i.e., any treatment, procedure and other medical interventions), based on the autonomy and self-determination of the patient, which overcomes medical

paternalism, including the recognition of respect for and ownership of each person's own body, failure to comply with which may lead to liability of the doctor if typical risks materialize that the patient was not informed about, and failure to comply with the obligation to obtain this informed consent entails liability even if the medical intervention was performed properly. The Court specifies that the written informed consent of the patient consists of a planned explanation by the doctor of all medical procedures to be performed on the patient, written in a clear and precise form and in such terms that the patient (or his/her representative) can understand what is being discussed. If the informed consent is given orally, then the doctor must record in the patient's medical record the date and extent of the medical intervention. In this case, the Court found that informed consent was not given, and decided in favor of the plaintiff (Cámara de Apelaciones (Gualeguaychú), Sala Primera Civil y Comercial, 2020).

Another relevant and interesting court judgment on informed consent is the judgment of the Court of First Instance No. 79 (Buenos Aires) in a civil case dated April 25, 2024. The patient decided to install breast implants at the clinics *Estética Integral S.A.* In 2014, she underwent her first medical intervention under local anesthesia, and the doctor, with whom the plaintiff was previously familiar (he performed her a rhinoplasty), described the procedure as simple and safe. However, the next day, the patient began to feel pain in the chest, after which, she underwent a second operation. The pain did not go away, asymmetry of the breasts developed, as well as the retraction of the mammary gland tissue. After the fifth operation, the implants were replaced, and the doctor attributed the unsuccessful medical interventions to the poor quality of the implants. After the sixth operation, the prostheses were replaced again, and the patient began to believe that her health condition only got worse after all these medical interventions, and, as a result, she decided to lodge a lawsuit. The Court also gave an expanded interpretation of informed consent in Argentina law. According to the Court, the right to health and psychophysical, as the Court puts it, to be precise, *inviolability*, should be understood as constitutional rights based on the constitutional reform of 1994, which gave a constitutional hierarchy (Article 75, para. 22) to all human rights treaties signed by Argentina. Based on this, the Court believes that the duties of the doctor are divided into two orders, and failure to fulfill each of them is negligence on the doctor's part. The first order is related to how the doctor carries out his work on the patient's body, which is carried out in accordance with the rules of this area of 'art', i.e., *de lege artis* – the doctor performing the medical intervention must act with the appropriate technique, knowledge, and experience. The second order is to provide the patient with information about the upcoming medical intervention, and to obtain informed consent from him. Thus, if a doctor fails to obtain informed consent, the doctor has committed malpractice and can be held liable for failure to do so, even if the doctor acted in good faith. The purpose of informed consent, according to the court, is to enable the patient to ask the doctor questions of interest, and to enable the patient to be aware of all risks to the patient's health during the operation. The doctor, in turn, must provide information and give advice, and doctors must, as far as possible, reduce the risks to the patient. The doctor must also inform the patient about the best treatment options and the risks of carrying it out or refusing it, after which, the doctor can ask the patient's consent to this treatment. The patient, who will have to cover the costs of the treatment (unless otherwise provided, for example, by insurance or State compensation) and experience all the consequences of the treatment, must know what risks the treatment carries, what alternatives to this treatment are available, and what the likelihood of success is. The duty of the doctor, in such a case, is to obtain consent and to inform the patient so that the patient can make an informed decision about whether to accept or refuse treatment. In this case, the court found that both the obligation to obtain informed consent and the doctor's duty to treat the patient *de lege artis* were breached by the defendant (Juzgado Nacional de Primera Instancia en lo Civil Nº79, 2024).

3. Practice of the Supreme Court of Argentina

3.1. Concerning performing blood transfusions to patients, not tolerating it owing to their religious beliefs (judgments of 1993 and 2012)

The judgment of the Supreme Court of Argentina, dated April 6, 1993, addressed the issue of the legality of a blood transfusion procedure for a patient whose religious beliefs did not accept blood transfusions. The circumstances of the case were fairly simple: patient M.B. was taken to the Ushuaia Regional Hospital (in Spanish: *Hospital Regional de la ciudad de Ushuaia*) due to gastrointestinal bleeding. The patient refused the blood transfusion procedure, by arguing that, as a representative of Jehovah's Witnesses, he did not consent to such a procedure. As a result, the issue was resolved through the court, which ordered the blood transfusion. An appeal was filed against this judgment, but the Federal Court of Appeals of Comodoro Rivadavia (Arg. *Cámara Federal de Apelaciones de Comodoro Rivadavia*) upheld the judgment of the court of the first instance, which allowed the blood transfusion procedure to be performed. Moreover, the court assessed the patient's actions as a 'slow suicide', which was triggered by the patient's inaction, who did not accept this type of treatment and thus decided to die. The court added in its judgment that the right to life is the highest good, and it cannot be recognized that human freedom is represented in such a way that the patient actually decided to end his life. At the same time, the patient claimed that he had no intention of committing a suicide and wanted to live, but did not want to accept treatment which was contrary to his religious beliefs. In his complaint to the Supreme Court, the patient disagreed with the appellate court's opinion that it was a 'slow suicide', and, according to the patient, he was fully aware of the danger of his decision to refuse treatment. The plaintiff claimed that the blood transfusion violated Article 14 (freedom of religion) and Article 19 (freedom of the person) of the Constitution of Argentina, by calling the procedure carried out against his will a 'coercive act'. At the outset, the Supreme Court (the opinion of Justices Barra and Fayt) refers to Article 19 of Law 17.132 of January 31, 1967, which provides that health care workers must, except in cases provided by Law, respect the will of the patient if he or she refuses treatment or hospitalization (and, based on the text of the law, no exceptions were provided for in the plaintiff's case) (Ley de Ejercicio de la medicina, odontología…, 1967, Art. 19).

The correct interpretation of the above-mentioned provision of the law, according to the Supreme Court, excludes the possibility of subjecting any adult and competent person to any medical intervention without his or her consent. The Court says that man is the axis and center of the entire legal system, and that the person is inviolable, and respect for the person is a fundamental value protected by Law, and human rights have great significance in relation to such respect for this human condition, and the rights that protect dignity and freedom prevail over the progress of certain ways of life that have developed under the influence of technology and a worldview dominated by practical materialism (perhaps, this refers to blood transfusion technologies and other technologies that make it possible to save a person's life, which were unknown just a few decades ago). The Supreme Court asserts that a person has power over his life, body, identity, etc. – i.e., over everything that defines the person's integral reality and personality, which are projected into the legal plane as his/her personality; these are the basic human rights that relate to the freedom and dignity of a person. In turn, the Constitution establishes the general principles protecting the personality of a person, and a person – from the beginning of life to its end – is the 'axis' of the legal system. Regarding the constitutional framework of personal rights, according to the Court, they are related to the right to privacy, conscience, and the right of a person to dispose of his own body. Article 19 of the Constitution states that private actions of people which do not violate the public order and do not harm a third party are intended only for God, and are exempt from the power of judges;

thus, each person is free to dispose of their actions, their body, their life and what belongs to them. The Court then says that the substantial structure of the constitutional norm (i.e., Article 19) is expressed by the individual in the actions by which they are freely expressed: this is how the infrastructure is formed on which the constitutional prerogative enshrined in Article 19 of the Argentine Constitution is based.

This was the position of Judges Barra and Fayt. In the following position of Judges Martínez and Boggiano, the Supreme Court examines the issue of freedom of religion in this regard. The Court recalls an old precedent from 1949, in which the plaintiff student sued the University of Córdoba for the right not to take the oath when receiving his diploma, which, in his opinion, was contrary to his religious beliefs, as he belonged to Evangelical Christians. In that judgment, the Court held that freedom of conscience consists in not being forced to perform certain acts contrary to one's own conscience; it did not consider that the oath, which related to the conscientious performance of a profession, violated the constitutional right to freedom of religion (Corte Suprema de Justicia de la Nación, 1949, p. 139–152).

Referring to other precedents, the Court notes that Article 14 of the Constitution of Argentina guarantees to all its inhabitants the right to freely profess their religion, and freedom of religion has a special value, since humanity has come to it through a very difficult path, and freedom of religion is an inviolable right of the individual; also, in this area, there is immunity from coercion, and the basis of religious freedom lies in the very nature of man whose dignity encourages adherence to the truth. In this case, the situation is that the plaintiff, being an adult, refuses a blood transfusion, considering it sinful, and is aware of all the risks involved. The Court compares the situation with euthanasia, in the case of which, or in similar practices (it should be noted that 'passive euthanasia', or disconnection from life support of a patient in a vegetative state, was found to be legal by the Supreme Court in 2015 (Corte Suprema de Justicia de la Nación, 2015, p. 556)), doctors are participants in an unlawful act, whereas, in the case of a conscious refusal of treatment (i.e., through a blood transfusion procedure – A.L. and J. M.), those who decided to respect the patient's will should not be blamed. Moreover, the Court states, in this situation, the interests of third parties other than the plaintiff himself are not affected, and the patient cannot be forced to act contrary to his/her religious conscience.

The Court continues that the absence of a clear legal norm that would regulate this particular case is irrelevant, since this should be implied in the very concept of personality on which the legal system is based, and recalls that Art. 19 of Law No. 17.132, establishes that specialists (i.e., doctors) who practice medicine must respect the will of the patient if the patient decides to refuse treatment and hospitalization. Therefore, according to Justices Martínez and Boggiano, the plaintiff's appeal should be upheld, and the judgment of the lower court should be overturned. The opinion of Justices Belluscio and Petracchi also reflects the principle of respect for the constitutional rights of the plaintiff: the Supreme Court notes that the lower court could have found that Article 19 of the Argentine Constitution provides the individual with an area of freedom in which the individual can make decisions regarding one's person without interference from the State and individuals, as long as the rights of these individuals are not violated.

Here, the Supreme Court cites a precedent dating back to 1984 which addressed the issue of protecting the right to privacy, where the relatives (the wife and son) of a deceased man sued a publishing house for publishing a photograph in which he was captured in the intensive care unit, and ended up winning the case, and, in this case, the Supreme Court mentions that Article 19 of the Argentine Constitution protects the area of the individual's autonomy, consisting of feelings, behavior, customs, family relations, etc., the disclosure of which may pose a real or potential danger to the private life of an individual. The private life of an individual includes, among other things, bodily integrity, and no one has the right to interfere with the private life of an individual without his/her consent (interference can

only be justified in cases where it is provided for by force of Law, or when it affects higher interests in the protection of the liberties of others, the protection of society, good morals, or prosecution) (Corte Suprema de Justicia de la Nación, 1984, p. 1892–1946). According to the Supreme Court, this principle is fully applicable in the current case, since the religious beliefs, health, physical personality and bodily integrity of the plaintiff are at risk. The possibility that an adult can freely accept or reject interference with his/her private life is a requirement for the existence of the human right to individual autonomy, which, according to the Supreme Court, is the foundation on which constitutional democracy is based.

The court draws some analogies with the American judicial practice, which has proven to be very fruitful in terms of judicial precedents on blood transfusions for patients who reject this procedure due to religious beliefs. Thus, the Court goes on to say that an adult's freedom to make fundamental decisions may be limited if there is an important public interest at stake, and there is only one way to ensure it – specifically, by limiting an individual right. In this sense, the Supreme Court declares that this conclusion coincides with the opinion of the courts in the United States, which denied that the patient's decision (notably, to refuse a blood transfusion – A.L. and J. M..) was made with full insight, and, moreover, it did not affect the rights of third parties or the presence of a public interest that would justify such a limitation.

In this context, the Supreme Court cites the decision of the Court of Appeals of 1972 for the District of Columbia Circuit in *In re Osborne* (it should be mentioned that this case involved the State's interest in saving a person's life) (*In re Osborne*, 1972, p. 372–376), and also notes that other precedents have indicated that the individual's right to privacy, on which the right to refuse treatment is based, is equivalent to the right enshrined in Article 19 of the Constitution of Argentina, and it cannot be limited by the fact that the patient's decision may appear unreasonable from the prevailing point of view of society (here, the Court cites the case of *Application of the President and Directors of Georgetown College, Inc., a Body Corporate* of 1964, decided by the Federal District Court of Appeals for the District of Columbia) (Application of the President and Directors of Georgetown College..., 1964, p. 1010–1018); in other cases, the courts have not taken into consideration the patient's decision because it could endanger the patient's life or the integrity of his/her minor children. In conclusion, the Court maintains that a judicial decision that would allow certain medical treatment to be given to an adult against his/her will would be constitutionally unjustified if the decision is taken in full knowledge of the matter (which is what the plaintiff claimed) and would not affect the rights of third parties (the decision made no mention of the possible impact on the rights of third parties). The Court further maintains that to say the opposite would be to transform the rule of Article 19 of the Constitution of Argentina into an 'empty formula' that could only protect the private sphere of conscience or conduct of little significance that would have no bearing on the outside world. The Court, upon finding that there were no exceptional circumstances or public interest in the case that would allow the plaintiff's freedom to refuse treatment to be restricted, decided that the appeal should be upheld and the contested judgment should be quashed (Corte Suprema de Justicia de la Nación, 1993, p. 479).

The judgment of the Supreme Court of Argentina of June 1, 2012 addressed the issue of the legitimacy of a blood transfusion given to an unconscious patient who, sometime before being hospitalized, had executed a notarized deed refusing to receive a blood transfusion in such situations. The facts of the case were as follows: the plaintiff, whose son was hospitalized at the Bazterrica Hospital in Buenos Aires with a gunshot wound as a result of an attempted robbery, applied to the court of first instance for permission to administer a blood transfusion. The plaintiff's son was in the intensive care unit in a critical condition, being unconscious. The treating physicians considered that the patient required a blood transfusion. However, the patient was a Jehovah's Witness. This congregation is known to oppose blood transfusions, and the patient had already made a notarized statement in 2008 stating that he was

against a transfusion. The patient's wife, also a Jehovah's Witness, was against the patient's father's proposal, by citing the patient's will and asking that it be respected. The court of first instance granted permission, but this judgment was quashed by Chamber A of the National Court of Civil Appeal (in Spanish: *Sala A de la Cámara Nacional de Apelaciones en lo Civil*). The appeal emphasized that the patient had expressed his will in this situation, in which he categorically refused a blood transfusion, despite the danger to his life, and, according to Article 11 of Law No. 26.529, the directive (the so-called 'patient's will') must be accepted by doctors, as it protected the constitutional principle of the patient's freedom of self-determination. It should be noted that the 'patient's will' was made before the entry into force of Law No. 26.529 of 2009 on the rights of patients in their relations with health professionals and institutions (also amended by Law No. 26.742 of 2012) (Derechos del Paciente en su Relación con los Profesionales e Instituciones de la Salud, 2009; Modifícase la Ley N° 26.529 que estableció los derechos del paciente en su relación con los profesionales e instituciones de la Salud, 2012).

The law itself states that every adult and competent person can give directives regarding his or her health, in which he or she can agree to or reject certain types of treatment and make decisions regarding his or her health (ibid., 2009). At first, the Supreme Court denotes that the case differs from the 1993 precedent (Corte Suprema de Justicia de la Nación, 1993, p. 479) because, in that case, the patient was hospitalized in an unconscious state and could not express his will in any way, and, secondly, in 2008, the patient had signed a document, which was certified by a notary, in which he stated that he would not accept "*a transfusion of whole blood, red blood cells, white blood cells, platelets or plasma under any circumstances, even if the medical staff considers them necessary to save [his] life*" (we note that, in the case of 1993, the patient was conscious and did not sign any similar document, but simply expressed his will to refuse a blood transfusion). The Supreme Court notes that there is no reason to doubt the authenticity of the document, and that there is no evidence that the patient did not take into account the significance of this decision and its consequences when expressing his will, nor is there evidence that the patient's will was distorted under pressure from third parties, and therefore, it must be concluded that the patient's will was formulated "with insight, intent and freedom".

In the plaintiff's appeal, it was stated that, after signing this document, the plaintiff's son left the cult and then returned, which could create some uncertainty, but, at the same time, in 2011, he married a representative of the Jehovah's Witnesses, and the wedding took place in the Kingdom Hall of Jehovah's Witnesses, which the plaintiff himself acknowledged. Therefore, the Court concludes that there is no doubt about the validity of the patient's will, and it is necessary to verify whether this decision falls within the scope of personal freedom established by the Constitution of Argentina. The Court refers to the precedent of 1984, where the Court explained that Article 19 of the Constitution establishes a sphere of freedom for a person in which the person can make any fundamental decisions about his or her personality without interference from the State or third parties, unless these decisions violate the rights of third parties. The inviolability of private life, as the Supreme Court continues, includes, among other things, the right to bodily integrity and image, and no one has the right to interfere with a person's private life, or to violate areas of activity not intended for dissemination by them without the consent of the person himself or his or her family members.

Article 19 of the Constitution gives a person the freedom to dispose of his or her life, body, and everything that belongs to him or her; in this case (i.e., in the judgment at stake), it is the matter of the right to dispose of one's own body, which is guaranteed by the aforementioned Article 19 of the Constitution, and the Court recalls, referring to the judgment of 1993, which we have already discussed above, that a person sets the substantial structure of the norm of the Constitution, unfolding life in certain specific actions, through which they are freely expressed. In this case, the Court finds that a whole range

of constitutional rights of a person are at risk – the patient's religious beliefs, health, bodily integrity as well as physical and spiritual personality. On the basis of the above-mentioned rights, it can be argued that if a certain patient decides to agree, or, on the contrary, to reject a certain type of treatment (in this case, a blood transfusion is being discussed), it promotes self-determination and personal autonomy of the patient, and the patient him/herself has the right to make a choice about his/her own treatment, even if it may seem irrational from the outside. The reflection of these constitutional principles was reflected in Law No. 26.529 of October 21, 2009, according to Art. 2 'e' which gives the patient the right to accept or refuse certain treatments, with or without giving a reason, and to revoke the expression of will.

The Court states that an adult's freedom to make 'fundamental decisions' may be restricted if the public interest is at stake, but such circumstances do not arise in this case, and it must be concluded that it will not be constitutionally justifiable to subject an adult patient to some treatment against his own will if the decision (i.e., the decision to refuse a blood transfusion) was taken consciously, and if it would not violate the rights of third parties. This principle means the following: as long as a person, by one's actions, does not violate order, public morality or the rights of third parties, then, these actions belong to the person's private life and should be respected, even if these actions in some way irritate third parties. To think otherwise would be to turn Article 19 of the Constitution into an empty formula that would only protect the private sphere of consciousness or minor actions that have no consequences for the outside world. The Court further determines that there is no evidence in the case that the patient's refusal to receive medical care (i.e., blood transfusion) fits into exceptional circumstances, and there is no corresponding public interest in the case that could allow a different decision to be made. Therefore, the Supreme Court upheld the judgment of the Appellate Court.

3.2. On the legitimacy of disconnecting a patient who has been in a vegetative state for a long time from life support equipment (judgment of 2015)

The judgment of the Supreme Court of Argentina of July 7, 2015, concerned a complex legal (and bioethical) issue, namely, the question of the legitimacy of disconnecting a patient from life support machines, which would obviously lead to his demise. This case partly concerns the issue of 'passive' euthanasia, and the complexity of the case is also dictated by the absence of a direct provision in Law No. 26.529 that doctors may legitimately stop treating such patients (for example, by a court judgment, or at the request of the patient's legitimate representatives).

Thus, Art. 11 of the Law (it was adopted by Law No. 26.742 of May 9, 2012) assumed that every competent patient can give advance directives regarding his/her health, including refusing treatment, and these directives (i.e., the so-called 'patient's will') must be accepted by the attending physician(s), except in cases of euthanasia, which is still prohibited in the country (Modifícase of Law No. 26.529 que estableció los derechos del patiente en su relación with los profesionales e instituciones de la Salud, 2012). In this case, the patient did not give any similar directives, which apparently complicates the legal assessment. The factual circumstances of the case were as follows. In October 1994, patient M.D. was involved in a car accident, receiving a severe craniocerebral injury with loss of consciousness and a polytrauma with post-traumatic epilepsy. The patient was subsequently transferred to a clinic in Buenos Aires, where he underwent several operations, but his condition only worsened, and, in February 1995, doctors stated that the patient was in a permanent vegetative state. Three further reports from different institutes, conducted in 2003, 2006 and 2009, only confirmed this diagnosis. The conclusions stated that the patient was not aware of himself, could not express himself by using any language, and did not show any residual cognitive activity. In addition, one of the reports mentioned that the patient had been in a

vegetative state for more than 15 years with a disconnection of the cerebral hemispheres, destruction of the frontal lobe and severe damage to the temporal and occipital lobes with the involvement of the spinal cord with atrophy. The patient's sisters decided to obtain a court order to stop hydration and enteral feeding, as well as to stop all therapeutic measures that were supporting the life of the patient M.D. As they claimed, the patient was in the LUNCEC clinic, whose representatives did not satisfy the patient's family's requests to stop treatment, while also adding that the patient was "subjected to cruel therapeutic and dysthanastic[1] practices" and that the clinic's refusal was a kind of "*... appropriation of his* [the patient's] *agony, which constitutes therapeutic cruelty through the denial of death as the outcome of life process by imposing extraordinary and disproportionate measures to continue life in an artificial, painful and aggravating way*." They also argued that Law No. 17.132 (the case began before Law No. 26.742 was enacted in 2012) gives a patient the right to refuse treatment, and they had once discussed with their brother the story of Quinlan (a 1976 New Jersey Supreme Court judgment) (*In re Quinlan*, 1976, p. 10–55), who, commenting on the case, claimed that he did not desire such a fate for himself. "*If something happens to me, let me die*," the patient said, according to them.

The trial court decided to deny permission, by ordering the treating physicians to continue palliative care activities. The court points out that there is no clearly expressed will of the patient, and that no legislation has been adopted on this matter; it can be said that the patient's guardians provided good care for him. As for the patient's condition, the court denotes that the patient has no possibility of neurological recovery, and, in such a situation, no one, not even the patient's guardian, can make decisions on further measures to restore legal capacity (if this is, of course, even possible – A.L. and J.M.); in the court's opinion, the patient is not in a terminal condition, despite the fact of being in a vegetative state, and hydration and feeding are not 'methods of treatment', as are the antibiotics that were being administered to the patient, and the patient's death was not inevitable, and what to do in situations like this should be decided by adopting the appropriate laws.

The Superior Court of Justice of the Province of Neuquén (in Spanish: *Tribunal Superior de Justicia de la Provincia del Neuquén*) quashed this judgment (and, at the same time, the court rejected the plaintiffs' appeal), by holding that, after the adoption of Law No. 26.529 of 2009 and its amendments in Law No. 26.742 of 2012, arguing that such a request (i.e., a petition to terminate life-sustaining treatment – A.L. and J.M.) was included in the *Law on the Rights of Patients in Their Relations with Health Professionals and Institutions*, and therefore there was no need for the representatives of the patient M.D. to request the court's permission to do so.

The court of second instance decided that there was a conflict between two rights protected by the Constitution – the right to life and the right to personal autonomy. Regarding the second right (Article 19 of the Constitution), the court points out that the subject (i.e., the person in question) can make decisions, the intended purpose of which is the end of his life, and in this zone (i.e., the zone of his own autonomy), the person is free to choose without the intervention of the State, except in cases where this does not contradict morality, public order, or third parties. The laws on the rights of patients (i.e., Laws Nos. 26.529 and 26.742) ensure the right to autonomy in the last stage of life, which is reflected in the right to refuse treatment, or, conversely, to accept it.

According to the Court of Appeal, the patient's consent may be given not only by him or her, but also by his or her legal representatives, and the patient's representatives in this case could give it, and the mechanism for its implementation is prescribed in the provision of the law on patient rights, and it

[1] *Dysthanasia* is a term in medical law and bioethics, referring to the prolongation of biological life of a dying, critically ill person by technological means, which usually does not have therapeutical effect apart from a mere prolongation of biological life.

does not require a court order. The *ad litem* curator and the representative of the Ministry for Disabled Persons impugned this judgment, by arguing that the decision did not contain convincing evidence, and that the court incorrectly applied the current legislation, deviating from constitutional norms and international legal acts enshrining the right to life and physical, mental and moral integrity.

The Supreme Court calls this case 'transcendental', by emphasizing that it concerns the right to life, health, as well as self-determination and dignity of the patient M.D. Given the complexity of the case, the Supreme Court requested an opinion from the Forensic Corps of the Supreme Court as well as the Institute of Neurosciences of the Favaloro Foundation (in Spanish: *Instituto de Neurociencias de la Fundación Favaloro*). The conclusion showed that the patient had a complete lack of communication, and that in the 1990s he suffered from a number of serious ailments, the patient could not swallow, he was being fed by jejunostomy, there was incontinence of the bladder and rectum. The Court also notes that the conclusions regarding the diagnosis of the patient have varied, but the prognoses about the hopelessness of the condition have been completely consistent.

The Forensic Corps concluded that the level of consciousness was minimal, and the condition of M.D. was irreversible two decades after the accident, while also indicating that only a few patients are able to survive in such a state for 10 years or more. Returning to the current case, the Court interprets the provisions of Law No. 26.529 (Article 2 'e') in such a way that a patient suffering from an incurable disease or being in a terminal stage, or having become so as a result of an injury, having been duly informed, has the right to refuse surgical interventions, artificial resuscitation or the cessation of life-support measures if they are extreme or disproportionate to the fact that the patient's prospects will improve; the patient may also refuse life-supporting measures if the only thing these measures can achieve is, in fact, the prolongation of the irreversible or terminal stage of the disease. From this, the Court concludes that the provisions of Law No. 26.742 enable the patient to refuse medical or biological treatment as a form of his/her self-determination (i.e., autonomy). The next question that should be clarified is whether the patient M.D. suffers from an incurable disease. Technically, it turns out that this is not the case, but the patient suffered injuries in a car accident that left him in an irreversible and incurable condition, as was evident from numerous expert opinions, one of which, cited by the Court, assessed that the patient was hopelessly ill and in a terminal state; therefore, the request to withdraw life-support measures can be formulated within the framework of Article 2 'g' of Law No. 26.529, as amended in by Law No. 26.742 of 2012 (Modificase la Ley N° 26.529 que estableció los derechos del paciente…, 2012).

The Court also considers all life support procedures as a form of treatment that have been recognized as such in the practice of foreign courts, including the judgment of the European Court of Human Rights in the case of *Lambert v. France* (2015), which upheld the decision of the French Council of State (in French: *Conseil d'État*) to stop hydration and individual nutrition of a patient in a condition comparable to that of patient M.D. (*Lambert v. France*, 2015). The Court also notes that the patient never recorded his will in case he ever found himself in such a situation, which can be explained by the fact that the current rules regulating this issue were not yet in force, and such practice was little known in society at that time. The Court recalls that the decision to accept or refuse treatment is an expression of self-determination in accordance with the constitutional imperative. The Court emphasizes that its practice has already established that Art. 19 of the Constitution should be understood not only as a limitation on the State's intervention in the individual's decisions, but also as "a sovereign space for the adoption of free decisions related to oneself".

The Supreme Court refers to its judgment of December 7, 2005 (Case No. M. 1022. XXIX), which states that Argentina's legal system incorporates an anthropological concept of the human person, which does not allow for the reification of human, and rejects any consideration of human other than as a

person, and which envisages human as a state of a subject capable of self-determination. The judgment of 2005 notes: "*No matter how great the differences, it cannot be denied that the ethical line that begins with Aristotle and continues with Saint Thomas* [Aquinas], [Immanuel] *Kant*, [Georg W.F.] *Hegel, etc., shares the essence of the basic concept of the human person, always developing its differences on the same basis, which is what supports the norms of our Constitution of 1853–1860*" (Corte Suprema de Justicia de la Nación, 2005, para. 36). Law No. 26.659 (as amended by law No. 26.742) recognizes the right to self-determination for every person, even in cases such as the case at stake.

The Supreme Court, referring to the judgment of 2012 (see the commentary to this case above), reasons that Art. 19 of the Constitution of Argentina provides for the protection of the individual's right to privacy, which includes the protection of physical integrity. Law No. 26.659 also provides for cases of incapacitated persons and persons who are unable to give their informed consent due to their physical or mental condition. In this case, Art. 6 of this Law determines that consent may be given in accordance with Art. 21 of Law No. 24.193 on Transplantation of Organs and Anatomical Materials (1993) (in Spanish: *Ley de Trasplantes de Órganos y Materiales Anatómicos*) with the order and the priority established therein (Ley de Trasplantes de Órganos y Materiales Anatómicos, 1993, Art. 21). It follows from this that the patient's representatives are those who make the patient's will effective and are interlocutors with the doctors when deciding whether to continue treatment or to terminate it, and the Court emphasizes that, since life and health are purely personal rights, it cannot be said that the legislator has transferred to them the unconditional power to dispose of the life of a patient in an unconscious state.

Thus, based on Article 21 of the Law on Transplantation of Organs and Anatomical Materials (1993), persons who can 'transfer' the patient's informed consent do not act based on their own convictions, but, instead, they express the patient's will; they make decisions not on behalf of the patient, but express their own will. This makes it possible, the Court says, to determine the patient's presumed will, while taking into account both the wishes expressed before collapsing into a state in which the will cannot be expressed, and aspects of the patient's personality, his or her way of life, values, and convictions (here, the Court cites the judgment of the Italian Supreme Court of Cassation of 2007, which expressed such an opinion on what should be taken into account when determining the patient's presumed will (*Corte Suprema di Cassazione*, 2007, para. 7.3). The decision regarding treatment, as the Court continues, should not be based on compassion, but, instead, on the will of the unconscious person, his or her self-awareness (before becoming unconscious), his or her personal ideas of dignity, which, in the Court's opinion, are accurately reflected in Art. 12 of the International Convention on the Rights of Persons with Disabilities. The Court maintains that the rights of the patient M.D. must also be protected and cannot be subject to any discrimination, in accordance with Articles 16 and 19 of the Constitution of Argentina, and the dignity of the human being follows from the legal principle of the inviolability of the person (i.e., Article 19 of the Constitution), which prohibits any treatment of him from a utilitarian point of view, and that is why he enjoys the right to self-determination in the sense of deciding to terminate treatment, or, conversely, to receive medical services and respect for his life, which is recognized and guaranteed by the Constitution. The Court says that the issue is not whether the life of the patient M.D. in his current state deserves to be lived, since the State has no power to determine this: referring to the judgment of 5 September 2006, the Court reiterates: "…*In a State that is proclaimed by law and has as a premise the republican principle of government, the Constitution cannot allow the State to arrogate to itself the superhuman power to judge the very existence of the individual, his life project and its implementation, no matter through what mechanism they intend to achieve this*" (Corte Suprema de Justicia de la Nación, 2006, para. 18).

The Court clarifies that Article 6 of Law No. 26.569 does not authorize guardians to make decisions for the patient based on their own views, and the intervention is limited to giving testimony under oath in order to guarantee the patient's self-determination (according to the authors, if we are talking about giving *testimony*, then it can be assumed that, in the case of incapacitated patients, where the patient's will is *unknown*, the issue should be resolved through the court), which is what happened in this case – both sisters of the patient applied to the court with a petition to stop treatment and all life support procedures, declaring under oath that this was in accordance with the will of their brother, and the Court noted that there are no circumstances in the case that would allow one to doubt that this is the patient's real will. Therefore, the Supreme Court ruled to dismiss the plaintiffs' appeal, considering that the request to stop treatment and life-sustaining procedures was made within the assumptions provided for in Law No. 26.569. The Supreme Court clarifies the issue of patient self-determination, by stating that, in principle, the exercise of the right to accept or refuse treatment does not require the authorization of the court for its implementation, based on the provisions of the Law; referring to Article 19 of the Constitution, the Court says that no resident can be forced to do anything that is not prescribed by law and will not be deprived of something that the law does not prohibit. Therefore, the Supreme Court decided to affirm the judgment of the Court of Appeal, by dismissing the plaintiffs' appeal (Corte Suprema de Justicia de la Nación, 2015, p. 556).

3.3. On the use of genetic material for artificial fertilization (judgment of 2024)

In a recent judgment of the Supreme Court of Argentina dated August 21, 2024 (Case No. CIV 104832/2022/CSl), the issue of the admissibility of a court order for artificial insemination using sperm from a deceased person was considered, in which the Court found that such a procedure was not provided for by the law. In this case, the plaintiff's husband died in 2020, and the plaintiff sought the court's authorization to continue the intracytoplasmic sperm injection program that she had begun during her husband's lifetime. The plaintiff, after 17 years of marriage, had begun this program during her husband's lifetime at the clinic *Seremax Fenix Medicina S.R.L.*, with which an agreement had previously been concluded for performing fertilization using highly-complicated assisted reproduction techniques. The plaintiff claimed that she and her husband had a plan to create a family and that even after his death she wanted to continue the artificial insemination procedure, which is what she asked the court to do. In 2013, the plaintiff's late husband, by means of a public deed, gave her the authority to inquire about everything related to the sperm samples that were given for the purposes of artificial insemination, while the death of the person who gave them does not prevent its validity, especially if he did not commit any acts during his lifetime that would indicate some kind of disagreement with the continuation of the treatment (i.e., continuation of artificial insemination). By this deed, the plaintiff's husband established that the sperm samples in the clinic could be used as many times as necessary. In 2016, the plaintiff and her husband signed an informed consent agreement for the treatment (IVF-ICSI), through which, the clinic received permission to carry out the procedure; the plaintiff also claimed that her husband's will had not changed before his demise, and she requested permission from the court to undergo artificial insemination based not on economic interests, but on her desire to become a mother.

The court of first instance rejected the claim, as did the appellate court (in Spanish: *Sala A de la Cámara Nacional de Apelaciones en lo Civil*). In its reasoning, the court of second instance stated that artificial insemination *post mortem* was not regulated in any way by Law. The court stated that Articles 560–562 of the Civil and Commercial Code of Argentina were applicable to the case, requiring that the will should be expressed in the form of prior, informed and free consent, it cannot be expressed by

representation and cannot be assumed, since it is a very personal right. The plaintiff filed a complaint with the Supreme Court, by appealing to Article 14 bis (on the comprehensive protection of the family) and Article 19 of the Constitution, including the Convention on the Elimination of All Forms of Discrimination against Women. The position of Justice Rosatti expressed the following question: 1) does the use of genetic material put into question the right to life of the person or third parties in question? and 2) is there a rule that regulates the consent of a deceased person to the use of his genetic material for reproductive purposes? The answer to both questions was negative. In part, the answer to the first question indicates that a gamete is not a natural person, it is not a nasciture or an unborn person, and its availability does not threaten a life that does not exist (it has not yet been created), nor the life of the person who created it (this person has already died).

The second question, according to Justice Rosatti, should be considered in two ways. The thesis on the absence of a norm makes it possible to turn to the general criterion of paragraph 2 of Article 19 of the Constitution, according to which, "no one is obliged to do what the law does not order, or to be deprived of what the law does not prohibit", and the literalness of Article 560 of the Civil and Commercial Code of Argentina states that each attempt at assisted human reproduction requires prior informed consent, which must be renewed each time gametes or embryos are used. From this it is concluded: 1) Article 560 of the Civil and Commercial Code of Argentina is applicable in this case, and there is no normative gap, the presence of which would allow referring to Article 19 of the Constitution; 2) the presumption of consent, which the plaintiff wanted to confirm with the permission given during her lifetime by her husband, is prohibited, since there are certain formalities and procedures set out in Article 561; 3) the analyzed norm prohibits prior consent, while the donor's will must be renewed each time gametes or embryos are used. This criterion is confirmed by the existence of free revocation of consent until implantation has been performed (Article 561 of the Civil and Commercial Code of Argentina), which a deceased person, of course, cannot do. The Court also states that the above correlates with the constitutional principles of freedom, dignity and autonomy of will, and, in this case, it is not the will of a living person that is at stake, but the will of a deceased person. Thus, according to the Supreme Court's view (in the opinion of Justice Rosatti), it follows that the right to life of a living or unborn person is in no way called into question, the woman was not discriminated against, since the genetic material of the deceased spouse was involved, the rule governing consent in this context is also applicable to the deceased person, and the prohibition of presumed consent and prior consent of the deceased person comes from the rule itself.

The opinion of Justice Lorenzetti also stresses the importance of the issue considered in this case. In examining the contract for informed consent, the Court notes that both Articles 560–562 of the Civil and Commercial Code of Argentina and Art. 7 of Law No. 26.682 of 5 June 2013 on Comprehensive Access to Medical Procedures and Techniques of Assisted Reproduction (in Spanish: *Ley de Acceso integral a los procedimientos y técnicas médico-asistenciales de reproducción médicamente asistida*), there is a strict requirement to renew consent each time the gametes or embryos are used, and the consent itself must meet the criteria of validity, and informed consent given for the exercise of a very personal right cannot be presumed; in addition, it is freely revocable and has a limited interpretation, and therefore a *post mortem* consent cannot be presumed (Codigo Civil y Commercial de la Nación, 2014, Art. 560–562, Ley de Acceso integral a los procedimientos y técnicas*...,* 2013, Art. 7). "*These requirements*," held the Court, "*are justified, since the will to procreate is the central axis of belonging for this type of assisted reproduction technique*". With regard to the will of a deceased person, the Court notes that Article 19 of the Constitution establishes the sphere of individuality of the individual, including property and non-property rights, which presuppose that a person can voluntarily dispose of them and without restrictions that diminish them. This is about recognizing the area (i.e., in the context of the right to private life) in which

a person has the right to freely, at his/her own discretion, make decisions regarding his way of life; this boundary cannot be crossed by either the State or those who would refer to 'extraordinary legitimation'. The Court emphasizes that the above 'boundary' is based "*on the most memorable historical foundations of human freedom*". However, any restrictions on personal freedom must be interpreted strictly (i.e., solely based on the Law), and the one who refers to it is obliged to prove that this reasonable restriction is based on constitutional legality. The Court clarifies, with regard to the right to privacy, that, in its previous case law, it perceives the right to privacy not only as a limitation on State interference in this area, but as a sovereign sphere for making decisions about oneself.

The Court also refers to the judgment of the Inter-American Court of Human Rights in the 2016 case of *I.V. vs. Bolivia* that the patient's informed consent is an indispensable condition for the practice of medicine and ensures the beneficial effect of a rule (i.e., the rule of Law) recognizing the patient's autonomy as an integral part of human dignity (*I.V. vs. Bolivia*, 2016, para. 159; Hevia and Constantin, 2018, p. 197–203). The same Court has determined that a central element of human dignity is the ability to self-determine, i.e., to choose those circumstances in life that give meaning to one's existence, based on one's preferences and beliefs (*I.V. vs. Bolivia*., 2016, para. 150). A similar definition was already used by the Inter-American Court of Human Rights in the case of *Artavia Murillo y otros (Fecundación in Vitro) vs. Costa Rica* in 2012 (*Artavia Murillo y otros*…, 2012, para. 142; Chía and Contreras, 2014, p. 567–585). The Supreme Court then addresses the issue of the autonomy of the will of the deceased person, and also comes to the conclusion that *post mortem* fertilization should not take place: respect for the autonomy of the will, as the Court finds, also implies that no one, even after death, can be forced to become a father or mother, therefore, taking into account the respect for human dignity, autonomy and self-determination, the rules (i.e., those regulating the issue of artificial fertilization) should be interpreted restrictively.

Thus, in this context, the Court refers to the judgment of the European Court of Human Rights in the case of *Pejřilová v. the Czech Republic* (2022), which confirmed that the use of cryopreserved sperm for artificial insemination, under Czech Law, was available only to couples, and the motivation for this rule was the need to protect the will of the man who gave his consent and the right of the fetus to know its parents (*Pejřilová v. the Czech Republic*, 2022, para. 59). With regard to *post mortem* fertilization, the Supreme Court notes that the presence of embryos and gametes does not mean, in itself, that there was some post mortem 'project' for the birth of children, and the "reproductive will" (in the original, it was spelled as "*voluntad procreacional*") necessarily requires verification of the current will of those who gave their consent. The Court mentions that there was a bill on posthumous kinship (Art. 563), but, since it was never adopted, the Court has no right to replace the legislative body and thus create new rules. Therefore, the Court decided to dismiss the complaint (Corte Suprema de Justicia de la Nación, 2024, p. 1031).

Inferences

In conclusion of this article, it should be noted that:

1. Patient rights are a relatively new phenomenon in the law of Argentina, as well as in many other Spanish-speaking countries. The first court cases on issues of violation of patients' rights appeared in the practice of the Supreme Court in the 1990s. The Law on Patient Rights in Argentina was adopted in 2009 and supplemented in 2012, its main aspect was the emergence of the institution of 'patient's will' and the right to refuse continued life support, even if such a refusal would cause the death of the patient, whose continued life depends solely on life support devices. This principle was discussed in the judgment of the Supreme Court in 2015.

2. Patient autonomy has a constitutional basis (Article 19 of the Constitution of Argentina), as detailed by the Supreme Court in its judgments of 1993 and 2012. Given that informed consent is enshrined in Article 59 of the Civil and Commercial Code of Argentina, as well as much earlier, specifically, in Article 19 of Law 17.132 of 1967, as well as in the provisions of Law 26.529 on Patients' Rights of 2009 (Articles 5–11), and also in Articles 560–562 of the Civil and Commercial Code of Argentina (i.e., consent to the use of genetic material for artificial fertilization), the basis of the patient's consent to medical intervention lies in the area of the right to privacy, which includes the right to bodily integrity, in which a person is independently (provided that he or she is an adult and competent person) capable of making decisions regarding his health. In addition, at the international level, patient autonomy is recognized in judgments of the Inter-American Court of Human Rights and the European Court of Human Rights, and is enshrined in Art. 5 of the *Oviedo Convention* (1997).
3. In the recent years, there have been several important judgments of the courts of first and appellate instances in Argentina, where the courts examined in detail the principle of informed consent and patient autonomy. The courts have clearly established that obtaining informed consent is an essential obligation of the physician before undertaking any treatment or medical procedure. This principle is considered as the legal basis for medical intervention. In this regard, the physician's obligations are divided into two parts: the first is to treat the patient in accordance with the medical art and science, i.e., *de lege artis*, and the second part is to inform the patient sufficiently so that he or she can make an informed decision about whether to undergo a certain treatment or to refuse it. The physician must describe the risks and consequences of the medical intervention, including those that may occur if the patient refuses the treatment. For the violation of each of these obligations, the physician may be held civilly liable; and the very fact that the treatment was carried out in good faith and without negligence does not relieve the doctor from liability if the patient's informed consent was not obtained properly.
4. Patient autonomy implies both the patient's right to consent to a medical intervention and to refuse it. There are situations when a patient is unconscious due to illness or injury, in coma, or in vegetative state, and cannot consent to continuing the treatment, or, conversely, wish to stop it. This was the case in the Supreme Court's judgment of 2015, where the patient had been in a vegetative state for two decades. The Court decided that the current legislation allows guardians (or other authorized persons) to petition to terminate treatment. However, they must proceed from the patient's real will, and not from a sense of compassion. The Court also added that a court judgment is not necessary to terminate life-sustaining treatment. It should be noted that there is no consensus on this issue in the judicial practice worldwide (Lytvynenko, 2020, p. 138–151). Thus, on the one hand, it would give more freedom of action to the patient's relatives; on the other hand, judicial control would make potential abuses impossible. It is also obvious from the judgment that any similar proceedings would be volumetric and would require at least several forensic medical examinations to establish the facts related to the patient's health condition.
5. The aspect of informed consent for the use of gametes for the purpose of artificial fertilization is of special importance, which is enshrined in Art. 560–562 of the Civil and Commercial Code of Argentina. These rules stipulate that, after each case of using gametes, informed consent must be renewed. This principle, which clearly follows from the judgment of the Supreme Court of August 21, 2024 (case No. CIV 104832/2022/CSl), does not allow for the use of gametes posthumously (despite the fact that such a bill existed, but was never adopted). Since the provisions of Art. 560–562 imply that informed consent must be renewed each time gametes are used, a deceased person apparently cannot provide it. At the same time, any certificates or notarial deeds that a person does not object to the use of gametes after his death are not taken into consideration.

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Anatoliy Lytvynenko is a Doctor of Legal Sciences and a Lecturer at the Baltic International Academy (Riga, Latvia). His areas of scientific interest include Civil Law, Theory of Law, Medical Law, History of Law, Ecclesiastical Law, and Human Rights Law.

Anatoliy Lytvynenko yra teisės mokslų daktaras ir Baltijos tarptautinės akademijos (Ryga, Latvija) lektorius. Jo mokslinių interesų sritys – civilinė teisė, teisės teorija, medicinos teisė, teisės istorija, bažnytinė teisė ir žmogaus teisių teisė.

Prof. Dr. (HP) Jevgenij Machovenko is a Professor at the Department of Public Law, Faculty of Law, Vilnius University, and the head of the Legal History Research Center. Areas of scientific interest: History of Law, Theory of Law, Constitutional Law.
Prof. dr. (HP) Jevgenij Machovenko yra Vilniaus universiteto Teisės fakulteto Viešosios teisės katedros profesorius, Teisės istorijos mokslo centro vadovas. Jo mokslinių interesų sritys – teisės istorija, teisės teorija, konstitucinė teisė.