The Legal Status of In Vitro Fertilization in Latin America and the American Convention on Human Rights

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Introduction

Assisted reproductive technologies have generated a worldwide "reproductive revolution;[1]" Latin-America is no exception.[2] Access to reproductive technology, and in vitro fertilization (IVF) in particular, can substantially benefit people's wellbeing. For example, IVF enables infertile women, partially fertile women (menopausal women, as an example), and lesbians to become pregnant. It also makes it possible for single men and women and homosexual couples to have children. IVF is an assisted reproductive technology that consists of fertilizing female eggs with sperm outside of the woman's body in a laboratory. Under IVF the ovulation process is hormonally controlled, eggs are extracted for fertilization, and later, the fertilized eggs are implanted in a woman's uterus.

In Latin America, the legal regulation of IVF is not uniform: its legal status varies from country to country. In Mexico, for example, federal legislation permits assisted reproduction only in cases of sterility that cannot be resolved by another means.[3] Peruvian law recognizes the right to undergo IVF, only when the gestating mother and the genetic

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Translations are original unless otherwise noted.

[1] According to a Report by the European Society of Human Reproduction and Embriology, it is estimated that, since the 1978 birth of Louise Brown (the first child to be born using assisted reproduction technology), 3.75 million children have been born the result of IVF. *See* Press Release, European Society of Human Reproduction and Embryology (ESHRE), Datos sobre la Tecnología de Reproducción Asistida (TRA) (June 2010) *available at* http://www.eshre.eu/binarydata.aspx?type=doc&sessionId=ibyx2n55rppdxl55zdqv0obj/16._ART_fact_sheet_ES.pdf, *cited in* Eleonora Lamm, *La Filiación derivada de las técnicas de reproducción asistida en el Anteproyecto de Código Civil*, J.A. (SJA-2012/06/20-68). p.68

[2] According to a study of the Red Latinoamericana de Reproducción Asistida [Latin-American Assisted Reproduction Network], through 2009, 38,020 assisted reproduction procedures have taken place in the region, 13,410 cycles of intrauterine insemination using the husband's semen and 2430 cycles of intrauterine insemination using donor semen. *See*, Lamm, p.68. ibid.

[3] Reglamento de la Ley General de Salud en materia de Investigación para la Salud, [*Guidelines to the General Health Law on Health Research*], Jan. 6, 1987, [Federal Executive of the Mexican United States], art. 56.

mother are the same person.[4] In most countries though, access to IVF is not specifically regulated, and consequently ends up being left to medical practice.[5] On the other end of the spectrum, Costa Rica is the only country in the region that absolutely bans access to IVF. In 2000, the Constitutional Chamber of the Supreme Court of Costa Rica, invoking article 4.1 of the American Convention on Human Rights, the fundamental legal document of the Inter-American system of human rights (henceforth ACHR),[6] recognized the embryos' right to life. The Constitutional Chamber[7] held that given the great possibility that the embryos would be discarded, IVF should be completely prohibited insofar as it violates the right to life.[8]

Recently, in the 2010 report "Gretel Artavia Murillo and others v. Costa Rica,"[9] the Inter-American Commission of Human Rights (IACHR) concluded that completely prohibiting access to IVF in Costa Rica is incompatible with the ACHR. The commission ruled that the Costa Rica Constitutional Chamber's decision to establish a total ban on access to IVF constitutes an arbitrary interference and is a restriction incompatible with the exercise of the rights of private and family life and the right to form a family—enshrined in articles 11 and 17 of the ACHR.[10] It also held that impeding access to IVF is

[4] Law No. 26842, [*Ley General de Salud*], Jul. 9, 1997, art. 7 (1997).

[5] As we shall see below, this is what occurs, in Argentina, Brazil, Chile, and Ecuador, for example.

[6] Article 4.1 **Right to Life:** Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. [official text] Organization of the American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 1144 U.N.T.S. 123, *available at*: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

[7] *See* CSJN de Costa Rica, Sala Constitucional [Constitutional Chamber] 2000-02306, 15/03/2000, "Acción de Inconstitucionalidad promovida por Hermes Navarro Del Valle" Resolución (2000-02306), slip op. *available at* http://www.nacion.com/ln_ee/2000/octubre/12/sentencia.html. This reasoning is not unique to the Constitutional Chamber; tribunals in other jurisdictions have adopted similar reasoning. In Argentina, for example, *see* CNApel. Civil, sala I, 03/12/1999, "R., R. D. s/ medidas precautorias," La Ley [L.L]. (2001- LL 824).

[8] In other cases, although the courts do not rule against IVF, they do recognize the embryo's right to life, and on this basis, have thrown out men's claims refusing biological paternity and recognized women's right to transfer. This Argentinean case will be discussed further on, *see* Cámara Nacional de Apelaciones en lo Civil [CNApel.C] [National Court of Federal Civil Appeals], Sala J, 13/09/2011, "P., A. v. S., A. C.", Abeledo Perrot no. 1/70071776-9, slip op.

[9] Gretel Artavia Murillo y otros v. Costa Rica, Inter-Am. Comm'n H.R., Report No. 85/10, Case 12.361 (2010). All English quotations cited in this paper are the official translation of the report, *available at http://www.cidh.oas.org/demandas/12.361Eng.pdf*

[10] Murillo, *Idem*, parr. 111.

Article 11. **Right to Privacy** 1. Everyone has the right to have his honor respected and his dignity recognized 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation 3. Everyone has the right to the protection of the law against such interference or attacks. **Article 17. Rights of the Family** 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state 2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention 3. No marriage shall be entered into without the free and full consent of the intending spouses 4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any

discriminatory since it constitutes a burden for a specific societal group: infertile women. Because Costa Rica had not complied with the IACHR recommendation to lift the ban on access to IVF, the Commission brought the case before the Inter-American Court of Human Rights (IACtHR),[11] which is now ready to listen to the parties and resolve the controversy.[12]

A propos the Commission's report and as a prelude to the debate that will take place before the IACtHR, this paper analyzes the legal regimen on the process of IVF. In order to do so, it will critically evaluate the core of the IACHR report, and from this, determine the extent of the right to privacy and the right to life in these Latin American countries. This task is indispensable to observing whether the current legal status of IVF, in Costa Rica and other countries in the region, is consistent with the ACHR.[13]

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children solely on the basis of their own best interests 5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock. [official text]

[11] Murillo *Idem* p. 2.

[12] A salient feature of the debate about IVF is that, despite their differences of opinion, both its detractors and defenders share a common language: both sides appeal to the idea of "dignity" to defend their positions. On one hand, detractors of IVF believe that, given that embryos are people with a right to life, the danger that they die or are discarded before being transferred to the woman's body constitutes a violation to intrinsic human dignity; in Kantian terms, this would imply treating the embryos as merely means, rather than as ends in themselves. On the other hand, defenders of access to IVF also invoke dignity; first, access to IVF provides autonomy to those who require the treatment in order to have children, and denying them access to reproductive technology would be an impermissible infringement on their rights to privacy; denying them access would therefore be unworthy of the treatment that all people deserve. Second, impeding access to IVF for those who require it in order to reproduce is discriminatory and denies their status as people worthy of equal consideration and respect. In other words, following the classification proposed by Reva Siegel for analyzing the case law on abortion in the United States, there appear to be three conceptions of dignity in play 1) "dignity in an expressing respect for [...] the inherent worth of a human life," or, intrinsic worth 2) "dignity as liberty" or "Kantian dignity" the right of people to govern themselves and "not be treated as mere objects or instruments of another's will." 3) "dignity as equality" respect, honor, social status, and the right not to be denigrated, excluded or subordinated.

See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Cahart*, 117 Yale L. J. 1738-1739 (2008). Martha Nussbaum and Rosalind Dixon have also analyzed the debate about abortion from the perspective of dignity, although they adopted a focus on "capabilities," as Nussbaum develops together with Amartya Sen in other works. *See* Rosalind Dixon and Martha C. Nussbaum, *Abortion, Dignity and a Capabilities Approach*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 64, (Beverly Baines, Daphne Barak-Erez & Tsvi Kahana, eds., 2012).

Of course it is not surprising that the discussion about the legal status of IVF should be understood in terms of the idea of dignity. This idea, since the Universal Declaration of the Rights of Man, has been what Jeremy Waldron calls a "legal archetype," that is, a fundamental principle of our legal order. *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House* 105 COLUM. L. REV. 1681 (2005). Dignity also has a central role to play in the constitutions of many countries. The most frequent example cited, maybe due to the influence it has had, is that of the German Constitution. For an analysis of the German Constitution, see Matthias Mahlmann, "The Basic Law at 60 – Human Dignity and the Culture of Republicanism" German Law Journal Vol 11.1, p. 9 (2010). Although Siegel has studied the role of dignity in the abortion debate, it would be an original contribution to do this for the specific debate over IVF; this will be the object of subsequent paper.

[13] Despite the importance of the IACtHR's decision, very few papers have discussed either the report, or the Constitutional Chamber's decision. Hence, this paper makes a substantive contribution to the discussion.

One of the few papers that has discussed the case is that of Ligia M. De Jesus, *Post Baby Boy v. Unites States Developments in the Inter-American System of Human Rights: Inconsistent Application of the American*

This paper has three sections. Section 1 will focus on the argument before the Constitutional Chamber of Costa Rica on the right to life. In order to interpret the existing reasons if there are any for prohibiting or limiting access to IVF on the basis of this right, this section will describe the jurisprudential and legislative developments that the right to life has undergone in Latin American countries. In this section we will also consider questions that have not been contemplated in the IACHR report, namely, women's right to refuse the transfer of embryos to their bodies, and the right of women and men to forbid the use of their embryos without their consent. In particular, we will concentrate on IVF jurisprudence. In section 2, we will analyze the first argument used by the ACHR against the absolute prohibition, that is to say, we will ask whether, effectively, prohibiting or limiting IVF is an illegitimate state infringement of the rights to privacy and family life. Also we will present the criterion of proportionality; both the ACHR and the IACtHR adhere to this criterion for determining whether a state's decision to restrict one right in order to protect another legal asset (deemed comparatively more valuable) can be justified. In section III, the article will focus on the second argument adopted by the IACHR, namely, the question of whether an absolute ban on in vitro fertilization violates the principle of equality and non-discrimination. In particular, we will discuss the minority position of the IACHR, which held that although the ban is not consistent with the ACHR, an absolute ban does not discriminate against women. Finally, in closing, the paper will offer a conclusion and explain how the aforementioned arguments and debates may serve the IACtHR as a source of information in researching the current state of the issue in Latin America.

I. The right to life and in vitro fertilization

Roughly speaking, an argument in favor of absolutely banning access to IVF is based on the state's obligation to respect the right to life. According to this argument, IVF presupposes "conception," a term recognized by the legislation[14] and constitutions of several countries in the region,[15] as well as by the ACHR article 4(1) which establishes that the right to life "shall be protected by law and, in general, from the moment of conception."[16] In line with this reasoning, all pre-embryos as well as embryos, regardless of

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convention´s Protection of the Right to Life from Conception, 17 LAW & BUS. REV. AM 435 (2011) –This paper defends a position similar to the one adopted by the Constitutional Chamber of Costa Rica.

[14] Cód. Civ. art. 76 (Chile 2000). Cód. Civ. arts. 30, 63 and 70 (Argentina 1883). Currently, a parliamentary procedure is underway to approve a reform project for the Argentine Civil and Commercial Code. As per the reform, the General Part of the Code "beginning at existence" art. 19, will establish that there is human existence "from conception within the maternal womb. In the case of assisted reproduction technology, it will begin with implantation in the maternal womb, notwithstanding the provisions of the special law for the protection of the non-implanted embryo." Cód. Inf. & Adol. art. 17 (Colombia 2006). Cód. Civ. art. 2 (Brazil 2002). This article states that the civil rights of a person begin at the time of living birth, but the law safeguards the rights of the *nasciturus* from conception. It does not make reference to the maternal womb. Cód. Niñ. & Adol. art. 2 (Ecuador 2003). Moreover, article 44 of the Constitution establishes the obligation of the state to promote scientific advance, subject to bioethical principles. Law no. 26, Health Law [*Ley Orgánica de Salud*], 423 REG. OF. (Ecuador 2006), art. 214 establishes a prohibition on obtaining human embryos for experimental ends. Cód. Niñ. & Adol. art. 1 (Peru 2000). Cód. Civ. Fed. art. 22 (Mexico 2012).

[15] Chile Const. art. 19 (1980). Peru Const. art. 2 (1993). Ecu. Const. art. 45 (1998), as amended 2008. Braz. Const. art. 5 (1988).

[16] Organization of the American States, American Convention on Human Rights, *supra* note 6: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." [official text]

whether they are inside or outside of the woman's body, are comparable to born human beings and have the right to life, an absolute right that trumps any other right.

This is the argument used by the Constitutional Chamber of Costa Rica to revoke the presidential decree[17] that, under certain conditions[18] allowed access to IVF. The court sustained that, because the human embryo has a right to life, "it is not constitutionally valid that it be exposed to a disproportional risk of death. […]". This risk consisted of the fact that, given current technology, IVF incurs the possibility of the loss of embryos either because they are discarded or become unviable during the procedure. According to the court, because the right to life is at stake, the loss of embryos "cannot be justified by the fact that the aim here is to achieve a human being, granting a child to a couple that would be unable to have one in another way. The essence is that the embryos, whose lives are first sought and then thwarted, are human beings and the Constitution does not allow any distinction among these."[19]

The court recognized that, of course, under natural circumstances there are also embryos that fail to implant themselves, or embryos that, once implanted, are unable to develop; nevertheless, an important difference is that "the application of IVF-ET [In Vitro Fertilization-Embryo Transfer] implies a conscious, voluntary manipulation of the male and female reproductive cells for the purpose of obtaining a new human life, giving rise to a situation in which it is foreknown that, in considerable percentage of cases, the human life will not be able to continue."[20]

The chamber concludes that, although technology may develop to the point that fertilization does not involve taking a human life, "the conditions in which it is currently applied, lead to the conclusion that any elimination or destruction of the conceived [beings]—[either] voluntary or as the result of the inexpertness of the person in charge of the procedure, or the procedure's inexactness—violates the right to life, such that the technology does not agree with constitutional law and for this reason, the regulation in question is unconstitutional by violation of article 21 of the Political Constitution and [article] 4 of the American Convention on Human Rights."[21] In its defense before the IACHR, the State of Costa Rica defended the same position.[22]

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[17] Executive Order no. 27913-S [Costa Rica Executive] [Ministry of Health], 111 Gaztt., Jun. 9, 1999.

[18] *Ibid*. Article 9.- In the cases of in vitro fertilization, the fertilization of more than six eggs per patient per treatment cycle.

Article 10.- All fertilized eggs in a treatment cycle must be transferred to the patient's uterine cavity, [since the] disposal or elimination or embryos, or their preservation for transfer in subsequent cycles to the same patient or to other patients, remains absolutely prohibited.

Article 11.- Contrivances for the manipulation of the genetic code of the embryo, as well as every form of experimentation on it, remain absolutely prohibited.

Article 12.- Commerce in germ cells–eggs and sperm—whether homologous or heterologous, for use in treating patients with assisted reproductive technologies remains absolutely prohibited.

Article 13.- Failure to comply with the provisions established here, authorizes the Minister of Health to cancel the operating health permit and revoke accreditation of the facility that commits the infraction and to immediately refer the matter to the attorney general and to the professional association respectively, in order to impose the proper penalties.

[19] Gretel Artavia Murillo y otros v. Costa Rica, at ¶ 43 *Supra* footnote 9.

[20] *Ibid.*

[21] *Idem.*, p. 9. The position recognizing the legal standing of embryos, nevertheless, is not common for courts, One decision along the lines of the Constitutional Chamber is *Davis v. Davis*. This case deals with the divorce of a couple whose embryos had been frozen. The man refused to consent to the transfer of the embryos to his

In what follows, with the objective of comparing the official Costa Rican position, the absolute ban, with that of other countries in the region, we look at the legal status of IVF, on constitutional and legislative, as well as, jurisprudential levels. We shall see that the Latin American jurisprudence presents three lines of argumentation: (1) an absolute ban on IVF because it violates the right to life (2) permission to access IVF based on the argument that a total ban would violate the rights to privacy and family planning—cases that conditionally permit access to IVF, given cryopreservation or donation of extra embryos are included in this category—and (3) allowing access to IVF on the basis that embryos do not have a right to life.

Let us begin by examining the legal status of IVF. Firstly, among the states that explicitly regulate access to IVF, in its General Health Law, Peru recognizes the right to have access to IVF as a treatment for women's infertility.[23] Similarly, in Mexico married women have access to insemination, given the consent of their husbands.[24] The State of Mexico allows access to IVF under the same condition.[25] Colombia, in turn, seems to allow procreation by means of IVF, since the language of article 42(6) of the National Constitution dictates that children can be conceived with scientific assistance.[26]

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ex-wife or to any other woman. The trial judge found in favor of the ex wife, who argued that the embryo 'as a human being existing as an embryo, in vitro.' *See Davis v. Davis*, 15 FAM. L. REP. 2097, 2103 (Tennessee Circuit Court, 1989), *cited in* Bernard M. Dickens and Rebecca J. Cook, *The Legal Status of in Vitro Embryos*, 111 INT. J. GYNAECOL. OBSTET 91, 92 (2010).
Subsequently, the Supreme Court of Tennessee reversed this decision and held that the law does not consider preembryos as persons. It held that preembryos can be regarded as an "interim category," having its own rules. *See* Davis v. Davis, 842 S. W. REP. 588 (1992).

[22] Gretel Artavia Murillo y otros v. Costa Rica. *Supra* footnote 9. Paragraphs 28-37.

[23] Law No. 26842, *supra* note 4. Article 7: "Every person has the right to have recourse to infertility treatment, likewise to procreate through the use of assisted reproductive technology, provided that the genetic mother and the gestational mother are one and the same person. The application of assisted reproductive technology requires the prior written consent of the biological parents. The fertilization of eggs for any purpose other than procreation, such as the cloning of other human beings, is prohibited."

[24] *See*, *supra* note 3. Article 56: "Research on assisted fertility will be permitted only when applied to solving sterility problems that cannot be resolved in another way, respecting the moral, cultural, and social perspectives of the couple, even when they differ from those of the researcher." *Also see*, Ley General de Salud [Health Law], Diario Oficial [D.O.] Feb. 7, 1984 Article 466. The law also decrees that a prison sentence may be imposed: "The person who, without the consent of the woman, or with her consent if she is a minor or incompetent, artificially inseminates her, is subject to incarceration from one to three years if no pregnancy results from the insemination; if pregnancy does result, a prison term of two to eight years will be imposed." Also *see* art. 68, cl. 4: Human planning services include: (4). Supporting and fomenting research in the areas of birth control, human infertility, family planning, and the biology of human reproduction.

[25] Cód. Civ. Mex. St. art. 4112: Assisted reproduction through artificial insemination methods may only be undertaken given the consent of the woman on whom this procedure will be performed. A married woman may not grant consent to being inseminated without the assent of her spouse. Nor may the minor resulting from this reproductive method be released for adoption.

[26] Colom. Const. art. 42 (1991): "Children within matrimony or outside of it, adopted, conceived naturally or with scientific assistance, have the same rights and duties. The law will regulate the responsibility of the parent." Nevertheless, in Colombia various bills have been presented for regulating assisted reproductive technologies. For example, we find the 1995 bill N° 121, that was not passed. That same year, bill N° 161 tried to regulate the effects of artificial insemination after the death of either genetic parent, but this also did not pass. Finally, in 2003 various bills were introduced, amongst which figure: N° 029 proposing modifications of the Civil Code in reference to assisted reproductive technology, N° 46 about regulating

Additionally, presidential decree 1546/98 was enacted in Colombia, under which the donation of gametes for assisted reproduction technology (amongst them IVF) is regulated by Health Ministry (Ministerio de Salud).[27]

Secondly, on the other hand, there are countries such as Brazil and Chile that have only informal regulations, i.e. there is no express legal regulation. In Brazil, IVF is regulated only through resolutions enacted by the Federal Council of Medicine and subsidiary laws about scientific research on embryos or emergency contraceptives. All of this offers a positive outlook for access to IVF and the limits that exist when balancing it against protecting other interests (i.e., the right to life). The Federal Council of Medicine permits IVF not only for couples, but also for single women. It also prohibits the destruction of embryos, though it does allow their cryopreservation and selection.[28] At the beginning of 2011 the Council issued a new resolution allowing access to IVF for "all competent persons" (which came to include, unwed individuals and homosexual couples).[29] In 2005, a federal law, known as the "Law of Biosecurity," was finally issued, permitting and regulating medically or therapeutically motivated research on: mother cells, embryonic cells, non-viable embryos, and embryos that had been cryopreseved for more than 3 years—all obtained through in vitro fertilization.[30] The situation in Chile is similar. The Chilean Ministry of Health published a report, devoid of legal force, establishing general steps for IVF.[31] This opinion required transferring all created embryos to the mother and prohibiting their cryoperservation. Subsequently, law 19.585 of 1998 regulating kinship, introduced an article to the Chilean civil code about assisted procreation by establishing that "the father and the mother of a child conceived through the application of assisted human reproductive technology are the man and women who committed to it." Finally, in 2006, Chile enacted law 20.120 "on scientific research on the human being, its genome, and prohibiting human cloning." This law establishes protection of the human life from the moment of conception and therefore, forbids human cloning and destroying human embryos for the acquisition of embryonic stem cells.[32]

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contracts for assisted reproductive technology, and N° 100 which proposed a regulations of assisted reproductive technology. None of these was passed.

[27] Executive Order no. 1546/98 [Ministry of Public Health], 43.357 D. O. Aug. 6, 1998, art.50 *in fine*: "[the surveillance and control authorities will request information]… relating to all the procedures using assisted reproductive technology that have been performed in the laboratories." Nevertheless, part of this order was repealed by presidential decree 2493/04.

[28] Resolution no. 1358/1992, Consejo Federal de Medicina [Federal Council of Medicine], §I D. O. U. 16053, Nov. 19, 1992.

[29] Resolution no. 1957/2010, Consejo Federal de Medicina [Federal Council of Medicine], §I D. O. U. 79, Jan. 6, 2011.

[30] Law no. 11.105, Política Nacional de Biossegurança [National Biosafety Policy], §I D. O. U. 1, Mar. 28, 2005.

[31] Resolution no. 1072, Normas Aplicables a la Fertilización in Vitro y la Transferencia Embrionaria [Rules Applicable to in vitro fertilization and embryo transfer], Ministerio de Salud [Ministry of Health], 28 de junio de 1985 (Chile 1985).

[32] Law no. 20.120, Sobre la Investigación Científica en el Ser Humano, su Genoma, y prohíbe la Clonación Humana [On Scientific Research in the Human Being, its genome, and the prohibition of Human Cloning], Ministerio de Salud [Ministry of Health], B. O., Sept. 22, 2006. Article 6: Tissue and organs may only be cultivated for the purpose of diagnostic treatment or scientific research.

In Argentina there is no national law that regulates in vitro fertilization, despite many attempts to formulate one.[33] Given this, provinces are trying to regulate the practice.[34] Currently, the only province that specifically regulates assisted reproduction is the province of Buenos Aires.[35] Lastly, Ecuador does not regulate IVF. The practice is completely "de facto" leaving the ethical-practical challenges of IVF directly in the hands

[33] For example Bills S-00-0761 and S-96-2053 on assisted human production, mainly sought to prohibit the cryopreservation of fertilized eggs, except when preserved until the woman would be able to undergo transfer. They also dictated that access to such treatment would take place only in cases where there would be reasonable chance of success. They allowed the utilization of unused embryos in scientific research. The project set forth that the gametes to be used in the treatment must come from members of the couple. Finally, they suggested redrafting article 70 of the civil code, such that it would include the following: "The fertilized egg outside of the body, before its transfer, is endowed with the legal protection of this code and of the laws that confer human life inherent to unborn persons." Later, bill 905-d-00 on medically assisted human reproduction was proposed. Its main characteristics set out the adoption of embryos and the prohibition against cryopreservation. It also forbade that gametes used in assisted reproduction be used for commerce or experimentation without therapeutic aims. Finally, bill 4451-D-01 on human reproduction has been introduced. Its proposals are very similar to previous ones. It is differentiated by the regimen for cryopreservation of the embryos. Here, cryopreservation is prohibited except in: the death of the mother, medical impossibility for the mother to undergo embryo transfer and in the case of extra-corporeal fertilization, when there are more than three (3) embryos. In all cases, after five (5) years or given ongoing medical impossibility for the mother, the embryos are to be included "in the general law of full adoption." This is based upon the notion that the embryos have a "right to life, being born, to identity, and to a family." Under these rights, the bill asserts, the embryo cannot remain indefinitely in a state of cryopreservation. Finally, experimentation on human embryos for therapeutic ends is permitted given the prior informed consent of the couple and without modification of the genetic or pathologic makeup [patrimonio] of the fertilized egg. Nevertheless, since 2003, in the national level, law 25.673 was enacted, establishing the "National Program of Sexual Health and Responsible Procreation." Article 2 (f) of this law prescribes that the State commits to "guaranteeing the entire population access to information, orientation, methods, and services for sexual health and responsible procreation..." The drafting of this article signifies the beginnings of regulation of assisted fertility technology. Moreover, in the statement of purpose, it cites the World Health Organization in order to interpret what the law means by " right to family planning" and prescribes that "... [this] entails the right of all people to have easy access to information, education and services related to their health and reproductive conduct."

[34] For example, law 418 of the city of Buenos Aires of "Reproductive Health and Responsible Procreation" establishes in article 4 (h,i) specific objectives of: "Guaranteeing different services and health centers, professionals and healthcare operatives trained in sexuality and procreation from a gender perspective and who handle requests relating to infertility and sterility." Tierra del Fuego has law 509 of "Sexual and Reproductive Health" which, surprisingly, establishes text of the city of Buenos Aires law verbatim. The province of Mendoza approved the law of "Program of Reproductive Health" in which article 4 sets out that "information and counseling about infertility" will be provided. Finally, the province of La Pampa has law 1363 entitled "Provincial Program for Responsible Procreation" in which article 3(e) sets out an obligation to provide services "facilitating information and access to necessary resources on the treatment of infertility..."

[35] Law no. 14.208, Reproducción Humana Asistida [Assisted Human Reproduction], Provincia de Buenos Aires [Buenos Aires State], Dec. 2, 2010, [26507] B. O. 6. *Also see*, Executive Order no. 2980/2010, [Health Department] [Buenos Aires State], Jan. 3, 2011, [397] B. O. This law and its regulation recognize infertility as disease according to the criteria of the World Health Organization [WHO]. At the same time, it recognizes Provincial assisted and integral medical healthcare coverage of medical procedures using homologous fertility technology recognized by the WHO. In its specific regulation, the law states that only women between the ages of thirty (30) and forty (40) who can prove two years of established residence can have access to the treatment. Finally, the Province shall act as a monitoring agency over the centers that offer treatments of homologous fertilization.

of doctors. Similarly, situations like that of Ecuador can have a dissuasive effect on the use of IVF, since the medical community may want to avoid societal criticism.[36]

All in all, although many bills have been proposed, in most regional countries, IVF is not expressly regulated by law, even though ethical regulations specific to health care providers may be present. We shall now examine the development of jurisprudence, revealing three lines of argument around the legal status of IVF and embryos.

First there is a current of jurisprudence along the lines of that of the Costa Rican court establishing that the embryos have a right to life and consequently IVF is impermissible. In Argentina, for example, some tribunals have argued that IVF can generate "untransformed embryos" or pronucleate oocytes. When faced with the question of whether pronucleate oocytes constitute human life and rights bearing subjects, courts have adopted the position of a duty to err on the side of prudence; hence pronucleate oocytes are granted the status of personhood just as embryos are. In this way, the justices affirm that, although the procedure seeks to end the trauma of a woman and safeguard her rights and those of the couple (family planning), cryopreservation may constitute "cruel, inhuman, or degrading treatment" according to international treaties protecting the rights of the child. Therefore, existing measures (such as cryopreservation or donation as opposed to discarding it) are insufficient for protecting its right to life and dignity as a life form.[37]

In the ambit of emergency contraception, we find that in Argentina, Peru, Chile and Ecuador absolute protection of the right to life also reins. In these cases, some

[36] Florencia Luna, *Reproducción Asistida, género y derechos humanos en América Latina*, Vol. 4, INST. INTER-AM. DER. HUM. (IIDH) (October 2008), p. 50, http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_125911109/reproduccion_asistida_al.pdf.

[37] In Argentina we find in 1999, "R., R. D. s/ medidas precautorias" which alleged and claimed that untransferred embryos and pronucleate oocytes are unborn persons, and therefore, need a guardian to ensure their protection. Moreover, they argued that cryopreservation leaves the embryos defenseless and harms and impedes their right to life. In response, the appeals court accepted the suit and ordered that a census be taken of all the cryopreserved embryos in the capital and that a guardian be appointed under the direction of the department of the attorney general. CNApel. Civil, sala I, 03/12/1999, "R., R. D. s/ medidas precautorias," La Ley [L.L]. (2001- LL 824). The same criterion was demonstrated by the Cámara Federal de Apelaciones de Salta [Federal Court of Appeals of Salta], 03/09/2010, "R., N. F y otro c/ Obra Social del Poder Judicial de la Nación", Abeledo Perrot no. 20100737, slip op., y Cámara Federal de Apelaciones de Mar del Plata [Federal Court of Appeals of Mar del Plata], 04/05/2010, "Alemany, Lucía y otro c/ Obra Social de Empleados Cinematográficos Mar del Plata", Abeledo Perrot no. 70061246, slip op. On the other hand, cases relating to IVF for therapeutic ends, that is, IVF with the object of saving another life through use of stem cells or by genetic manipulation of the embryo in order to prevent hereditary disease, have also been decided. In "L., H. A. y otra c/ I.O.M.A.", the court ordered insurance provider I.O.M.A. to cover the cost of assisted fertility treatment because the procedure would be most effective for saving the life of the disabled child. *See*, Cámara Federal de Apelaciones de Mar del Plata [CFedMardelPlata] [Federal Court of Appeals of Mar del Plata], 29/12/2008, "L., H. A. y otra c/ I.O.M.A. y otra.", Abeledo Perrot no. 20090394, slip op. Nevertheless, in "S., G. y otro c/ I.O.M.A.", the court emphasized that the legal regimen of the law of assisted fertility recognizes treatment for couples that suffer from infertility and was not designed for curing a genetic defect that impedes them from conceiving healthy offspring. Therefore, since the mechanism violated the dignity of the embryo and its inviolable right to life, the sought for coverage of IVF procedure was denied. *See*, Cámara de Apelaciones en lo Contenciosoadministrativo de Mar del Plata [Court of Appeals in Administrative Disputes], 24/02/2012, "S., G. y otro v. IOMA", J.A. (90-2012-II).

courts have determined that human life exists from the moment of conception, and consequently, use of emergency contraceptive drugs such as "Postinor-2" or "Inmediat" (marketed as Imediat N, in the United States) threaten the right to life of a zygote or embryo. [38]

One objection to the type of case law delineated by the Costa Rican Constitutional Chamber's decision focuses on its interpretation of article 4(1) of the ACHR, one that many other courts and international agencies do not share. Firstly, it ignores the pronouncement of the IACHR in the case of "Baby Boy."[39] According to this decision, ACHR protection of human life is compatible with the legislation of member states permitting abortion. This shows that the right to life is not absolute and must be made compatible with the protection of other rights, such as a woman's right to privacy.[40] Furthermore, in accordance with the

[38] For a legal analysis of emergency contraception in Latin America, *see* Martín Hevia, *The legal Status of Emergency Contraception*, 116 INT. J. GYNAECOL. OBSTET. 87 (2012). *See*, CSJN, 05/03/2002, "Portal de Belén c/ Ministerio de Salud y Acción Social de la Nación s/ amparo", Fallos (2000-325-292). Tribunal Constitucional [Constitutional Court], Nov. 13, 2006, Sentencia no. 7435-2006- PC/TC (Peru) y Tribunal Constitucional [Constitutional Court], Oct. 16, 2009, Sentencia no. 02005-2009-PA/TC (Peru). In 2009, the Constitutional Court of Peru revoked its earlier (2006) decision because of the fact that the drug impedes the natural course of the zygote in the pregnancy, raising a "reasonable doubt" about whether the right to life has been violated. Corte Suprema [S. C][Supreme Court], Apr. 18, 2008, Rol no. 740-07-CDS (Chile). Tribunal Constitucional [Constitutional Court], May 26, 2006, Resolución no. 0014-2005-RA (Ecuador).

[39] In *Baby Boy*, a U.S. organization filed suit to protest the reversal of the conviction of an abortion doctor. Christian B. White y Gary K. Potter v. Estados Unidos de América, Inter-Am.Comm.H.R No. 2141, *Annual Report of the Inter-American Commission on Human Rights: 1980-81*, OEA/Ser.L/V/II.54/doc.9/rev1.

[40] For an interpretation of article 4.1. of the American Convention on Human Rights see, Bascuñan Rodríguez, *La Píldora del Día Después Ante la Jurisprudencia*, 95 Estudios Públicos 74http://www.cepchile.cl/dms/lang_1/doc_3389.html, cited in Paola Bergallo, ARGUMENTOS PARA LA DEFENSA LEGAL DE LA ANTICONCEPCIÓN DE EMERGENCIA EN AMÉRICA LATINA Y EL CARIBE (2011) http://www.cecinfo.org/UserFiles/File/Argumentos%20para%20defensa%20legal%20de%20AE%20%20CLAE%20e%20ICEC%20Dic2011.pdf ("In the context of the debate about the status of the life of the *nasciturus* in the supra-legal law, quoting this provision tries to demonstrate the *nasciturus'* entitlement of a right to life. But the truth is that the meaning of this clause is exactly the opposite. The phrase "and in general, from the moment of conception" complements the duty of protection whose scope is less strict than that of the right to life from which it derives. The expression "in general" was introduced into the original text—in which it had not been contemplated—at the IACHR's suggestion. The Commission reasoned that it was necessary to reconcile existing differences among various legal regimens regarding the legal protection of the *nasciturus.* The Commission's proposal was upheld in the 1969 Special Conference, despite having been the object of criticism and the existence of proposals for modification both to increase protections to the *nasciturus* and to revoke them completely. In light of the historical precedents, it is clear that article 4.1 of the Convention, far from being a rule that unequivocally entitles the *nasciturus* to the right to life, offers a far a less categorical protection. In *Baby Boy*, the claim was based on the American Declaration of the Rights and Duties of Man (1948), the "petitioner claimed that article 1 of the Declaration, establishing that 'every human being has the right to life, liberty and the security of his person,' should be understood in the sense of article 4.1 of the Convention, by which authorizing abortion under the internal law [of a country] would be contrary to the Inter-American System of Human Rights. The Inter-American Commission examined the verifiable drafting history of article 1 of the Declaration, noting that at its genesis mentioning the [term] *nasciturus* had been proposed and rejected, precisely in order not to prejudge the status of internal legislation authorizing abortion. Similarly, the Commission denied that article 4.1 has the scope attributed to it by the claimant, affirming, to the contrary, that the expression "in general" produced the effect of compatiblizing the Convention with internal legislation authorizing abortion."

object and purpose of the American Convention,[41] it has been suggested that the interpretation of Article 4(1) requires that it be given a dynamic interpretation in ways that favor the claimant.[42]

Second, there is case law along the lines of "Baby Boy," establishing that the embryo has a right to life, but that this right is not absolute. This jurisprudence also considers the corresponding rights of the privacy/autonomy of women or the right to a family along with those of the embryo or *fetus*. For example, the Supreme Court of Argentina has recently interpreted the constitutionality of abortion and found that when abortions are performed on pregnancies that are the result of the rape of a mentally disable female or who any other female who merely the victim of a sexual assault, then they are constitutional. The court held that it would be unconstitutional to force a woman to carry a baby to term in these cases. This would constitute "[...] an attack against the most fundamental rights" because it would be a disproportional measure against the principle that would require people to make sacrifices for the benefit of others or some collective good (i.e. protecting the right to life). [43]

Recent cases in Mexico also suggest that the *fetus'* right to life is not absolute, but rather must be weighed against possibly jeopardizing others' rights. An absolute protection of the right to life jeopardizes women's right to health and reproductive autonomy as jurisprudence decriminalizing abortion[44] and guaranteeing the legality of emergency contraception[45] demonstrates. The Mexican Supreme Court has resolved that an absolute right to life for the *fetus* would be unconstitutional.

Finally, there has been a case in Argentina in which access to and state medical coverage of IVF has been allowed, but only on the condition that "un-implanted" embryos be cryopreserved or donated. In this way, argued the court, the right to life and dignity of this life form is respected and in some way protected.[46]

In general, we can also say that legal systems protect the value of life in a graduated manner; they do not attribute the same value to an embryo in vitro as to a fetus or child. Every country manifests this graduated protection with different rules. Some examples are that judgments meted out in cases of abortion and infanticide are different, injuring the

[41] Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force on January 27.
[42] *See* Viviana Gallardo et al. (Arts. 4 and 5 American Convention on Human Rights), Advisory Opinion G 181/81, Inter-Am. Ct. H. R. (ser. A) No. 101, ¶ 16 (Jul. 15, 1981),), *cited in* Cecilia Medina Quiroga, LA CONVENCIÓN AMERICANA: TEORÍA Y JURISPRUDENCIA. VIDA, INTEGRIDAD PERSONAL, LIBERTAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL 73, CENTRO DE DERECHOS HUMANOS (Chile: University of Chile, 2003).
[43] Corte Suprema de la Nación Argentina [CSJN] [National Supreme Court of Justice], 13/3/2012, "F., A. L. s/medida autosatisfactiva", [Expte.] F. 259. XLVI, *available at* http://www.csjn.gov.ar/om/img/f259.pdf.
[44] "Comisión Nacional de los Derechos Humanos et al. v. Jefe de Gobierno et al.", Acción de Inconstitucionalidad No. 146/2007 y 147/2007, Suprema Corte de Justicia de la Nación [Supreme Court] (2008) (Mex.).
[45] "Gobernador Constitucional del Estado de Jalisco v. Poder Ejecutivo Federal et al.", Controversia Constitucional 54/2009, Suprema Corte de Justicia de la Nación [Supreme Court] (2010) (México).
[46] "L., H. A. y otra c/ I.O.M.A. y otra," *supra* note 36 at 10.

fetus is not considered a crime, and increasing amounts of compensation are awarded in case of injury whose growth parallels that of the developing life,[47] among others.[48] In this scenario, the embryo receives weaker protection. This does not imply that it should not be protected at all, for example with a regulation requiring that embryos remain frozen for a certain length of time.

At this stage, it is important to note that, with regards to the Constitutional Chamber of Costa Rica´s type of argument, modern developments include Intracytoplasmic Sperm Injection (ICSI), in which a sperm is put inside a selected ovum to achieve fertilization, and Single Embryo Transfer (SET). In these techniques, only one embryo is produced and transferred into a woman's body. Thus, this method of modern IVF leaves no surplus embryos. As a result, given advance in techniques, total prohibition of IVF for fear of leaving surplus embryos is outdated.

The third line of jurisprudence maintains that, although legislation usually establishes protections of the "unborn," recognizing an interest to protect does not necessarily imply granting constitutional rights. In Brazil in 2008, for example, the Superior Federal Tribunal heard a debate about cryopreservation and discarding embryos.[49]

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[47] For example, *see*, Corte Constitucional [C.C.] [Constitutional Court], May 10, 2006, Sentencia C-355/06, slip op., *available at* http://www.corteconstitucional.gov.co/relatoria/2006/c-355-06.htm, Concepto de Procurador General de la Nación, §71 ¶162. "Regarding this it must be noted that, in principle, the legal system protects the life of a human person, article 11, and in a different manner, protects that of the human embryo, since the one is a being *per se* and the other a potential being. This right is protected by all international human rights instruments and is granted extra protection because it is a right that makes the exercise of all other rights possible. Within this layout, it is necessary to carefully analyze the laws in order to determine which subject is being protected vis-à-vis this right. [...] The protection of life of the embryo or fetus, which is also an obligation of the State, in terms of which principles of human life [to apply] and which protections [are granted] to the pregnant woman, does not imply that such protection should be the same for the **human embryo** as for the **human fetus** as for the **human person**. The protection of the embryo and fetus in the first stages is the protection of conception as a phenomenon that begins life, the protection of potential [life] of the fertilized egg, that clearly conforms with the principle of dignity of a human being from the time that it potentially exists even though not in physical, physiological, social, or legal terms. The protection of the fetus that can live outside of the uterus is the protection of one born and the protection of a person, understood in legal terms, is full protection, that is, the protection [afforded] as the subject of all rights and obligations."

[48] In the Argentine legal system, for example, there are many laws that suggest that the value of human life is incremental, and that the right to life may cede to other protected rights. In other words, it cannot be inferred that the embryo's right to life is the same right as the right to life possessed by a human being. This explains why, for example, in the Argentine legal system the life of an embryo (or a fetus) cedes to more rights than the life of a human being does. One clear example is that of cases of non-punishable abortion: therapeutic abortion and abortion of pregnancy resulting from rape (articles 86 subsections 1 and 2 of the Argentine Penal Code). The very punishments meted for the offense of abortion (article 85 of the Penal Code) suggests that the legal protection of the fetus is less than the one granted to the human being: these sentences are considerably less harsh than those for homicide (article 79 of the Penal Code). Similarly, by hinging the property rights of the embryo upon the contingency of its being born alive (articles 70 and 74 of the Civil Code), the legal system once again suggests that the value of human life is incremental. *See* Marcelo Ferrante, *Sobre la permisividad del derecho penal argentino en casos de aborto*, *in* Paola Bergallo, ABORTO Y JUSTICIA REPRODUCTIVA (Buenos Aires: Editores del Puerto, en prensa).

[49] Superior Tribunal Federal de Brasil [S.T.F.], Acción Directa de Inconstitucionalidad No. 3510, Relator: Min. Ayres Britto, 05.03.2008, D.F., 29.05.2008.

The high court decided that the research, production, and manipulation of embryos do not violate a right to life, because the embryo does not hold such a right. The Superior Tribunal resolved this issue by considering when a person is considered legally dead from a scientific standpoint. The moment of death takes place when "neural functions" are absent. Likewise, since the embryo does not show "even the possibility of acquiring the primary nerve endings that biologically anticipate a human brain in gestation," the embryo does not constitute life even in the potential sense."

In a similar vein, the de-penalization of pregnancy termination in cases of anencephalic fetuses in Brazil and abortion under certain conditions in Colombia, the high courts have granted greater protection to reproductive freedom and women's right to health than to the protections of the right to life of the *nasciturus*. In Brazil, just as the Superior Federal Tribunal held that the absence of cerebral function precludes ascribing potential life to the fetus, so too is it inappropriate to grant constitutional protection to something that has neither life nor potential for life. Similarly, the high court argued that conceiving of the female body as a mere reproductive machine on utilitarian basis violates women's rights and dignity, constituting inhumane and degrading treatment.[50] In Colombia in 1994, the Constitutional Court held that although the *nasciturus* is not considered a person, it still deserves constitutional protection.[51] Twelve years after issuing this decision, the court delved deeper into its interpretation of judicial protection of the *fetus*. In a case from 2006 decriminalizing abortion, the court refined the state's position on the constitutional protection of life. It affirmed that the Colombian constitution protects the value of life, but this does not imply granting the same status to the *fetus* as to born people: constitutional rights are only possessed by born human beings. The state may protect pre-natal life, but only in a way that is compatible with women's dignity.[52] In the ruling, the court argued, "according to what has been shown, life and the right to life are different phenomena. Human life undergoes different stages and is manifested in different ways, these in turn have different legal protections. While in fact granting protection to the *nasciturus*, the legal order does not grant it to the same degree or force as that [granted to] the human person..."[53] In this way, the Court distinguishes between the person and the *fetus*, guaranteeing the former the status of a bearer of the right to life and to the *fetus* a generic constitutional protection of life.

Moreover, regarding whether life begins at fertilization, the Colombian State Council maintained that legal norms defending the right to life protect "natural subjects of law and not life in the abstract, therefore rights do not exist in this form [abstractly], rather

[50] S.T.F., Denuncia de Incumplimiento de Precepto Constitucional [Complaint of Breach of Fundamental Precept] [ADPF] No. 54, Relator: Min. Marcelo Aurélio, 11.04.2012, D.F., 12.04.2012.

[51] In the words of the Court, "The life of the nasciturus embodies a fundamental value, by the hope for its existence as a person that it represents and its manifestly vulnerable state that requires special protection of the State." *See*, C.C., Mar. 17, 1994, Sentencia C-133/94, slip op., *available at* http://www.corteconstitucional.gov.co/relatoria/1994/c-133-94.htm.

[52] "The dignity of the woman precludes considering her as a mere instrument, and the consent necessary for assuming any commitment or obligation is especially important in this case given an issue of such significance as bringing to life another human being, a life that will, in every sense, profoundly affect her own." *See*, *supra* note 46.

[53] *Ibid.*

they must refer to [specific] subjects; consequently, they are identified as rights belonging to someone (a human person, a woman, a child, etc.)."[54] According to the State Council, if the opposite were true, when taken to an absurd extreme, even gametes before fusion would be considered viable legal subjects. Moreover, when "an ovum is fertilized but not implanted, a conflict of interest may arise on religious, ethical, or moral levels; but in these areas, the problem eludes the competence of this jurisdiction, because it no longer has relevance in international law or within Colombian internal law."[55]

In conclusion, although some regional jurisprudence has followed the same lines as the Constitutional Chamber of Costa Rica, the courts have also understood that either embryos do not have a right to life or that even if they do have one, this right must be weighed against other rights, such as privacy, that might hold greater weight in a conflict of rights. This is also the argument of the IACHR, which we will consider in detail in the following section.

II. Right to Privacy and In-vitro Fertilization

The right to privacy[56] is the right to act in ways that do not affect third parties. This right does not only refer to those things that are not, nor should be, accessible to public knowledge; privacy also refers more generally to actions that, if immoral, only are so with respect to the personal values of the agent. Such actions do not outrage public or interpersonal morality. The relationship between the right to privacy and IVF has several dimensions. In this section we will examine the components of this relationship and how they are explored in international jurisprudence. In general, insofar as privacy is not considered an absolute right, the legal assessments of the issue attempt to calibrate the right to privacy and determine its valid scope in people's conduct. The first and most basic of these is the intersection of privacy and autonomy, in which different courts have contemplated what kinds of restrictions to privacy are consonant with a basic respect for freedom of choice. Autonomy is the basis from which private acts, such as IVF, can be undertaken. Second, some litigation around IVF has led to the basic right of forming a family being pitted against both privacy and autonomy, revealing another facet of this issue. Finally, autonomy and privacy are fundamental elements in undertaking obligations; IVF can be contemplated within a framework of the law of contracts in order to shed light on what kinds of duties and expectations hopeful parents hold between one another and with respect to embryos created during IVF procedures.

II.i Privacy and autonomy

The international system of human rights is committed to the principle of individual liberty which values the free choice of life plans and prohibits interference with these plans on the basis that they do not pursue some ideal of human excellence or virtue. The

[54] State Council, Chamber of Administrative dispute, Ref.: Expediente núm. 200200251 01, Actor: Carlos Humberto Gómez Arambula, 5/6/2008.
[55] *Idem*, point 2.2.2.1.
[56] CARLOS SANTIAGO NINO, FUNDAMENTOS DE DERECHO CONSTITUCIONAL 304, 305 (Buenos Aires: Astrea Ed., 1993). We have borrowed the idea of privacy from Nino. [official translation]

dedication to personal autonomy is reflected in various international documents.[57] In the first place, the report issued by the IACHR on the issue of the absolute ban on IVF addressed whether such a prohibition is an impermissible infringement on the right to privacy or not. In order to accomplish this, the commission needed to analyze whether such a ban is consistent with articles 11 and 17 of the ACHR.

Article 11(1) of the Convention establishes that each person has a right to respect for his/her honor and recognition of his/her dignity. According to article 11(2) "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." Article 11(3), in turn, establishes that this right must be protected by law. The Commission noted that, according to the jurisprudence of the IACtHR, article 11 of the ACHR must be interpreted in the broad sense, so that it includes protection of the home, private life, and correspondence.[58] The Commission emphasizes that a primary objective of article 11 is to protect people from arbitrary action by state authorities infringing on the private sphere. The IACtHR has sustained that in these matters "the scope of privacy is characterized by being exempt and immune from abusive or arbitrary invasion or aggression by third parties or by public authorities."[59] Taking the jurisprudence of the European Court of Human Rights into account, the IACHR has also affirmed that "protecting private life, includes a set of factors related to individual dignity, including, for example, the capacity to develop one's own personality and aspirations, determining one's own identity, and defining one's own personal relationships."[60] The European Court has given more concrete meaning to the right to respect for private life; its case-law establishes that the concept of private life, in addition to a person's physical and psychological integrity, also encompasses physical and social elements including the right to personal autonomy, personal development, and the right to establish and develop relationships with other people and with the external world.[61]

The IACHR notes that the European Court has held that protecting human life entails respecting the decision to become a father or mother, including the right to become

[57] For example, articles 4 and 5 of the Declaration of the Rights of Man and of the Citizen set out that "liberty consists in the freedom to do everything which injures no one else" and the "law can only prohibit such actions as are hurtful to society." [official translation]

[58] Gretel Artavia Murillo y otros v Costa Rica, *supra* note 9, ¶ 69, *citing* Escué Zapata Vs. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H. R. (ser. C) No. 167 ¶ 91 (Jul. 4, 2007).

[59] Escher et al. v. Brazil, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 200, ¶ 113 (Jul. 6, 2009); Case of the Ituango Massacres v. Colombia, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 148, ¶ 194 (Jul. 1, 2006); Escué Zapata v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 165, ¶ 95 and Tristán Donoso v. Panamá, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 193, ¶ 55.

[60] María Elena Morales de Sierra v. Guatemala, Case 11.625, Inter-Am. Comm'n H. R., Report No. 4/01, OEA/Ser. L/V/II.95, doc. 7 rev. ¶ 46 (2001). *See*, *inter alia*, Gaskin v. UK, 12 Eur. Ct. H. R. 36 (1989), (relating to the petitioner's interest in accessing infancy and childhood records); Niemetz v. Alemania, Ser. A No. 251-B, párr. 29 (which notes that respect for private life includes the right to "establishing and developing relationships" both on a personal and professional level), *in* Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9, ¶ 72.

[61] Tysiac v. Poland, 45 Eur. Ct. H. R. 42, ¶ 107 (2007); Pretty v. United Kingdom, 35 Eur. Ct. H. R. 1, ¶ 61 (2002), *in* Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9, ¶ 73.

genetic parents.[62] According to the European Court this choice belongs to the important sphere of individual existence and identity in which state discretion should be curtailed.[63] The IACHR also interpreted that "decision of the couples [...] to have biological children is within the most intimate sphere of their private and family life. Furthermore, the way in which couples arrive at that decision is part of a person's autonomy and identity, both as an individual and as a partner. It is therefore protected under Article 11 of the American Convention."[64]

The IACHR report also discusses whether the prohibition is compatible with article 17(2) of the Convention that "right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention."[65] Moreover, article 17(1) of the ACHR establishes that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state." The right to form a family and the protections granted to a family are commonly recognized by other international documents as well.[66] The IACHR sustains this position, stating that the only permissible limitations to this right must not be so restrictive "that the very essence of the right is impaired." [67]

The IACHR holds that, in conjunction articles 11 and 17 of the Convention lead to the conclusions that: [68]

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[62] Two cases have recently been decided by the ECHR. Both of these strengthen the right to become parents on the basis of the right to privacy and autonomy. In "Costa and Pavan vs. Italy" the petitioners successfully argued that Italy permits abortion on the basis of a right for privacy and family life, similary it must allow GDP (pre-implantation diagnosis) in order to prevent the implantation of embryos wth devastating genetic disorders such as Cystic fibrosis. Failing to do so would unfairly infringe on a state protected right to privacy of the parents. The decision is available at http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3086590-3416338.
In a similar ruling from 2011 in "S.H. vs Austria," this same argument from privacy was applied to IVF procedures. Austria permitted those IVF procedures that did not involve using donor sperm. By differentiating on the basis of how the embryo was formed, the petitioners argued, the state breached the fundamental right to privacy. Nevertheless the court noted there was no clear consensus in Europe on issues of gamete donation in IVF and threfore no violation of the European Convention of Human Rights. Moreover, it stated, the rapidly changing science of reproductive technology necessitates that the issue be frequently reviewed. The decision is available at http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3086590-3416338.

[63] Dickson v. The United Kingdom, 2006 Eur. Ct. H. R. 430, ¶ 78, *in* Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9, ¶ 74.

[64] Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9, ¶ 76.

[65] American Convention on Human Rights, *supra* note 6, art. 17, §2.

[66] Article 16(1) of the Universal Declaration of Human Rights establishes the right of men and women to get married and form a family; the third section considers the family as a natural and fundamental element of the society with a right to social and state protection. So too article 23 (2) of the International Covenant of Civil and Political Rights recognizes "the right of men and women of marriageable age to marry and to found a family."

[67] By limitations the IACHR is referring to national law, for instance, determining the marriageable age of the parties. María Elena Morales de Sierra v. Guatemala, *supra* note 58, ¶ 40; Rees v. The United Kingdom, 1987 Eur. Ct. H. R. 106, ¶ 50, *in* Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9 at 2, ¶ 80.

[68] Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9, ¶ 80.

> i) protecting the right to form a family also means protecting the right to decide to become a biological parent and the option of and access to means by which one's decision can be realized [such as the use of in vitro fertilization technologies]
> ii) such a decision is part of the most intimate sphere of private life and is the sole prerogative of each person and/or couple
> iii) any attempt on the state's part to interfere with these decisions must be assessed on the basis of the criteria established in the American Convention.

Based on these conclusions, the IACHR affirms that the prohibition against access to IVF technologies is an infringement on both privacy and the right to form a family. The question then is whether such interference is consistent with the ACHR. Article 16(2) of the Convention establishes that the exercise of such rights granted under the Convention is "subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security,[69] public safety or public order, or to protect public health or morals or the rights and freedoms of others."[70] According to the ICtHR, for a restriction of a right to be legitimate, it (i) must be made in response to "an urgent social need" and directed towards "satisfying an imperative public interest," (ii) must employ the least restrictive alternative, i.e., the available means which least jeopardize the protected right; and (iii) must be "proportional to the interest [that it seeks to protect] and must adjust itself to the achievement of this legitimate objective."[71]

The Commission has established that any restriction is abusive or arbitrary if it is unjust, unforeseeable, or unreasonable.[72] As the IACHR notes, the IACtHR has established that: "the right to privacy is not an absolute right and can be restricted by the states, provided the interference is not abusive or arbitrary. For this analysis, the Court has applied

[69] The expression "necessary in a democratic society" was incorporated into the Inter-American system of human rights by the 1985 Advisory Opinion of the IACtHR (OC-5/85); it had already been adopted by the European Court of Human Rights previously: *see,* Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC- 5/85, Inter-Am. Ct. H.R. (ser. A) No. 4 ¶ 46 (Nov. 13, 1985). On this point, *see* C. M. Quiroga and C. N. Rojas, *Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección*, CEN. DE DER. HUM. 34, 35 (Santiago: Universidad de Chile).

[70] For an analysis of an example of the restriction of one right in order to protect another, *see* Analía Banfi Vique, Oscar A. Cabrera, Fanny Gómez Lugo and Martín Hevia, *The Politics of Reproductive Health Rights in Uruguay: Why the Presidential Veto to the Right to Abortion is Illegitimate*, 12 REVISTA DE DIREITO SANITARIO – JOURNAL OF HEALTH LAW 192 (2011) (In a democratic society the freedoms of the press and association may be limited in order to protect the right to health).

[71] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, *ibid*. Additionally, in the international human rights system we find the Siracusa Principles on the Limitations and Derogation of Provisions of the International Covenant on Civil and Political Rights ("Siracusa Principles"). Although the Siracusa Principles are not binding, they have strong persuasive force because they establish functional guidelines for correctly limiting fundamental human rights enshrined in the United Nations International Covenant on Civil and Political Rights. For instance, the Siracusa Principles have been used as standards by international organizations, such as the World Health Organization. *See* Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

[72] Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9, ¶ 88.

the following criteria: legality, legitimate aim, appropriateness, necessity and proportionality."[73] The IACHR determined that the decision of the Constitutional Chamber of Costa Rica satisfied the requisites of legality (in accordance with Costa Rican legislation, it was appropriate for the court to uphold the constitutionality of the laws),[74] legitimacy of aims (given that the Costa Rican constitution established that "life is inviolable," it was legitimate that, in general, the state take action to preserve life)[75] and appropriateness (objectively, given the interest in protecting life, "there is a causal relation between such an interest and the imposition of controls over the practice of IVF"[76]). It was the requirement of proportionality that gave the Commission pause.

The IACHR examined the regulation of IVF technology in various regional countries. It found that the existence or inexistence of alternative methods depends on the development of scientific advances in the field. The Commission reflected that, although many regional countries include the legal protection of life before birth in their constitutions or legislation, nevertheless, they do permit the practice of IVF. This is the case in Argentina, Chile, Colombia, Guatemala, Ecuador, Panama, Peru and Uruguay.[77] Only Costa Rica directly prohibits IVF technology.

Based on the results, the Commission concluded that there do exist measures for protecting life that are less restrictive of privacy and the right to form a family than an absolute ban on IVF. For example, the Commission suggests that the restriction could be lessened "through some other form of regulation that could produce results that more closely resemble the natural process of conception, such as a regulation that diminishes the number of fertilized ovules."[78] (In fact, Decree Law No. 24029-S, regulating the use of IVF technology, establishes a maximum number of eggs, not permitting the fertilization of more than six of the patient's eggs in one treatment cycle.)

In conclusion, for the IACHR, absolute prohibition is "a restriction incompatible with the American Convention on the exercise of the right to a private and family life and the right to found a family, recognized in articles 11 and 17 of the American Convention, in relation to Article 1(1) thereof."[79]

Despite this conclusion, it is important that the Commission did not fail to observe "that the decision to create or implant human embryos has a social dimension and cannot be considered solely a private matter. The state may adopt proportional measures to protect human embryos from treatment inconsistent with the American Convention, such as wanton destruction, sale or trafficking."[80] In this way, the solution proposed by the Commission is reasonable; namely, it might be reasonable that a state regulate how the technology is being used. Nevertheless, what the Commission actually means when it states that IVF technology can be regulated in ways "that more closely resemble the natural

[73] *Idem*, ¶ 89.
[74] *Idem*, ¶¶ 91-3.
[75] *Idem*, ¶¶ 94-6.
[76] *Idem*, ¶ 98.
[77] *Idem*, ¶ 101.
[78] *Idem*, ¶ 110.
[79] *Idem*, ¶ 111.
[80] *Idem*, ¶ 116.

process of conception, such as a regulation that diminishes the number of fertilized ovules"[81] is far from clear. Certainly, some restrictions would be incompatible with the right to privacy, as we shall now see.

Article 10 of Decree Law No. 24029-S, which regulated the use of IVF in Costa Rica established that "all the fertilized eggs of a treatment cycle should be transferred to the uterine cavity of the patient, the waste or elimination of embryos being absolutely prohibited." Along similar lines, the 1990 German "Law of Protection of the Embryo" and the Italian law 40/2004 limited the number of embryos created in vitro during one cycle to three. As in the Costa Rican decree, these laws require that all the created embryos be transferred to the maternal uterus at the same time. Preserving them or not transferring them is forbidden, just as is doing a "genetic pre-implantation diagnostic" (GDP), which serves to identify abnormalities in the embryo. (The Costa Rican Decree also forbids preserving the embryos for transfer in subsequent cycles— either to the same patient or other patients.[82]) Regulations of this kind, that impose the compulsory transfer of embryos, can jeopardize the health of women—causing an unacceptable incursion on their privacy. For example, the transfer of more than three embryos per cycle can result in multiple simultaneous pregnancies, putting the health of the mother, as well as that of the fetus in-utero at risk. Furthermore, the gestation of abnormal embryos carries risks such as miscarriage or physical of psychological trauma for the woman during childbirth.[83] In other jurisdictions, the courts have been sensitive to these risks. In April of 2009, the Constitutional Court of Italy established that when the transfer puts the women's health at risk, it cannot be obligatorily imposed.[84] Similarly, in Germany, on July 6, 2010, the German Federal Court of Justice considered GDP legitimate and also established that only healthy embryos could be transferred to the women.[85] In other words, inspired by the human rights of women, the rulings of these courts required the legislation to be applied in ways consistent with women's right to health.[86]

II.ii Privacy, autonomy, and the positive/negative right to found a family

[81] *Idem*, ¶ 110.

[82] *See*, Executive Order no. 27913-S [Costa Rica Executive] [Ministry of Health], *supra* note 17, art.10.

[83] Bernard Dickens, *¿Qué implicaciones legales tiene tratar a los embriones como personas nacidas?*, 22 DEBATE FEMINISTA 43, 173 (2011).

[84] C.C, May. 8, 2009, Judgment 151/09, Rules of Medically Assisted Procreation, slip op. (Italy), *available at* http://www.cortecostituzionale.it/giurisprudenza/pronunce/scheda_indice.asp (last updated Aug. 23, 2012). In this ruling, the Court declared the obligation of immediate and simultaneous implantation of all the existing embryos to be unconstitutional, given the potential risk to the health of the woman and possible effects on the health of the future fetus.

[85] Entscheidungen des Bundesgerichtshof [BGH] [Federal Court of Justice], Judgment, 5 StR 386/09, Jul. 6, 2010 (Germany). The legality of GDP is currently in transition in Italy as well as a result of very recent legislation. The prospects seem good for increased acceptance of this technology. See *supra*, note 62.

[86] Bernard Dickens, *supra* note 79. It may be objected that, according to the American Convention on Human Rights, it would be proportionate to impose sanctions on women for their unjustified refusal to receive the frozen embryos. However, this objection is implausible. Since we argue that women have a right to autonomy, sanctions can never be imposed for the rightful exercise of autonomy. A related an important question relates to conscientious objection: could gynecologists refuse to transfer the embryos to the women for reasons related to their political or even religious beliefs? This is an interesting question, but we will not provide an answer to it in this paper. We owe this discussion to a comment by Professor Bernard Dickens.

Beyond the danger that obligatory transfer can pose to a woman's health, it must be emphasized that the compulsory transfer can be an unacceptable burden on women's autonomy. For example, a woman might at first want IVF treatment and then change her mind before the transfer is completed: for example, she might not want to endure pregnancy and prefers to adopt or she might not even still want to be a mother. Forcing her to accept the transfer is an excessive interference with her autonomy as well as a violation of the principle of personal dignity: it would mean imposing an unwanted life plan.[87] In this case, the question arises of whether the woman has a right to refuse to be a mother. The right to found a family, recognized in ACHR article 17(2), also includes the right to not form a family (or not increase it). If this were not the case, the state would be imposing a life plan on a woman that, one, she does not accept, and two, would last her whole life.[88]

The Commission did not consider these questions, perhaps because they were not at issue in the case at hand, in which the Commission only needed to evaluate whether the absolute prohibition of IVF violated the Convention. The petitioners who sought access to IVF were not asking about the scope of its permissible regulation.[89] Moreover, the IACHR report left many other questions unanswered. This is due, in part to the fact that the Commission deals with specific issues and not abstract questions.[90] The questions that the IACHR didn't discuss are mainly related to the different windows of opportunity that

[87] This paper will not address the interesting question of whether, following this logic, the woman whose eggs have been frozen could oppose the transfer of the embryos to the body of another woman. According to the proposed logic, it seems that her opposition would be valid because even though this woman would not carry out the pregnancy herself, if the other woman gave birth, legal responsibilities might still be incurred by the woman whose egg was implanted. This would mean the imposition of an undesired life plan. Alternatively, if the law were to differentiate between biological, gestational, and custodial maternity, then maybe it might be possible for a woman to oppose the legal obligations 'biological maternity' would impose upon her, but she would not be able to oppose the gestation mother's implantation and pregnancy. For an analysis of this possibility *see* Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. Cal. L. Rev. 1115 (2008).

[88] Hevia, Martín y Ezequiel Spector, *El derecho a no formar una familia: A propósito del Fallo P. A. c/ S. A.C. s/ Medidas Precautorias*, Diciembre 2011 REVISTA DE DERECHO DE FAMILIA Y DE LAS PERSONAS 230 (2011).,.

[89] The petition presented to the Commission dealt with the absolute prohibition and consequent violations of rights recognized in the ACHR. The petitioners didn't question the scope of the regulation. *See*, Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9 at ¶¶ 17-27.

[90] Scope and obligation to applying recommendations of the IACHR: ACHR article 51(2). Development of the jurisprudence: *See*, Loayza Tamayo v. Peru, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33 (Sept. 17, 1997); Caballero Delgado and Santana case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 22 (Dec. 8, 1995); Genie Lacayo Case v. Nicaragua, Merits, Reparations, Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 30 (Jan. 29, 1997); Blake case v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 36 (Jan. 24, 1998). In these cases, the IACtHR reveals different interpretations about the scope of the IACHR recommendations. On one hand, it considers that a State does not incur international responsibility for not complying with non-obligatory recommendations, that is, those beyond of the petition in question. It holds that the State Parties to the ACHR must "make every effort to apply the recommendations of a protection organ such as the Inter-American Commission." On the current debate over the scope of the IACHR decisions, see: Filippini, Leonardo et. al, *El valor de los informes finales de la Comisión Interamericana y el Dictamen del Procurador General en el caso Carranza Latrubesse*, Centro de Estudios en Derecho Penal, UNI. DE PALERMO, p. 5 http://www.palermo.edu/derecho/centros/pdf-ictj/caso_Carranza_Latrubesse.pdf, (last updated Aug. 23, 2012).

men and women have for being parents. It was, of course, predictable that these issues would arise sooner or later.

Because women are subject to stricter time constraints on having children than men, the preserved embryos can provide women with their last chances at getting pregnant. Therefore, when a couple who has sought IVF treatment separates, a problem arises if the male opposes his paternity and withholds consent for implanting the embryos. In this scenario, reproductive technology presents an interesting challenge: is there a right to not be a father? Though this issue has not yet been addressed within the Inter-American system, as we shall see, it has been discussed in other international tribunals or high superior local courts.

Let us consider the 2007 decision of the European Tribunal of Human Rights in "Evans v. United Kingdom."[91] Natalie Evans and Howard Johnston became engaged in 2000. In 2001, Evans was diagnosed with ovarian cancer and informed that she could extract her eggs for in vitro fertilization. When the couple separated in 2002, Johnston requested that the embryos be destroyed. Evans objected, stating that because of her infertility, her only opportunity for becoming pregnant and having biological children depended upon the use of these embryos. The European Tribunal of Human Rights decided that the conflict between the woman's right to genetic motherhood and the ex partner's right to refuse genetic parentage [with her] had to be decided in favor of the choice not to be a parent.[92]

The court held that this right should prevail because such a decision was consistent with the policies of the Parliament of Great Britain regarding voluntary paternity. Moreover, the tribunal understood that IVF and natural insemination merit different legal treatment: with natural insemination, the male has no right to impede the implantation and subsequent gestation by requiring a woman to abort or take emergency contraceptives; it is the woman who is able to make such decisions.

By contrast, after a legal battle that extended over 4 years for the control of 11 embryos, in "Nahmani v. Nahmani" the Israeli Supreme Court decided seven to four that Ruth Nahmani, a childless mother separated from her husband, had a right to implant the frozen embryos of her ex-spouse, although he opposed the implantation. The court held that "the interest in parenthood constitutes a basic and existential value both for the individual and for the whole of society" and that "if you take parenthood away from someone, it is as if you have taken away his life."[93] The Israeli court majority seemed to share the minority position of the European Tribunal in *Evans*, which sustained that denying a woman any

[91] Evans v. United Kingdom, 2007 Eur. Ct. H.R. 264, *in* Bernard M. Dickens and Rebecca J. Cook, *supra* note 20.

[92] Regarding this, in Europe some countries already understand disputes about the right of a woman to be a mother and the demands by the father to withdraw consent in this way. For example, in 1998, the Italian Constitutional Court in sentence 347/98 September 22, intervened to establish that in issues of heterologous artificial insemination, the spouse that had validly contracted or, in any case, manifested his prior consent to the assisted fertility of his spouse using semen from an anonymous donor, could not then sue to not acknowledge paternity of the resulting child once conceived and born. Consequently, this criterion was adopted by lower courts. One example is the holding of the Naples Tribunal of June 24th 1999.

[93] Israeli Supreme Court, CFH 2401/95 Nahmani v. Nahmani [1996] IsrSC 50(4) 661. [official translation]

possibility of having a genetic child imposes a "disproportionate physical and moral burden on the woman."[94]

There have also been decisions by local Latin-American courts on this issue. Recently in Argentina, in *P., A. v. S., A. C.*,[95] a couple made an agreement about cryopreserving their embryos through a contract stipulating that, in the case of the dissolution of their marriage, the consent of both spouses would be required in order for a competent authority to determine the embryos' fate. Some of these embryos were implanted and finally, the couple had a child. Sometime later, the couple separated and began divorce proceedings. Later, the mother wanted to have another child using the remaining embryos. Nevertheless the fertility treatment center would not proceed with the implantation because it deemed the man's consent necessary for the procedure. The man, though, opposed the use of the embryos, invoking his constitutional right of freedom to procreate. The court ruled that upon dissolution of the marriage, both parties had agreed to submit the decision to the courts. Given the fact that the man had consented to this agreement, he could not later oppose implantation. Such an opposition would be in bad faith.[96] The tribunal found that the woman had a right to undergo implantation because the embryo had the right to life. The tribunal's conclusion that the woman had a right to implantation was by no means analogous to the Israeli Supreme Court's decision; the Argentine court focused its decision on the embryo's right to life[97] and not the social value of maternity or the benefit to the woman as the Israeli court had done. In other words, it deemed that the body of the woman is only an instrument with respect to the right of the embryo—if there were another way to enforce the embryo's rights, the woman would not have a right to demand implantation. Therefore, the case reaffirms a conception of dignity related to the status of the embryo, but does not in any way affirm the equal status of the woman.

II.iii Privacy and property

The IACHR did not contemplate this issue of IVF from the angle of property rights either.[98] This is not a typical approach in any jurisdiction, although in a few cases

[94] Evans v. United Kingdom, *supra* note 87, dissenting op. judges Ziemele, Spielmann, Türmen and Tsatsa-Nikolovska, ¶ 13.

[95] "P., A. c/ S., A. C. s/ Medidas Precautoria", *supra* note 8.

[96] The tribunal invokes the "doctrine of estoppel" which states that it is in bad faith to act against to one's own previous actions (in this case, the previous action was consenting to the clause that, in case of disagreement between the parties, the courts would determine the fate of the frozen embryos). The court affirmed that the parties "agreed that in the case of dissolution of the matrimonial ties, the consent of both spouses would be required in order for the competent authority to deal with [the issue]. It is striking that, the attitude now adopted by the appellant so clearly displays a contradiction with respect to the position held upon signing the aforementioned contract." Moreover, the court held that the appellant "renounces what was expressly agreed upon in point 7 of the cryopreservation authorization in that upon the supposed dissolution of the tie, the consent required by the IFER would be processed by a competent authority ... The direct consequence of this procedural principle is the doctrine of estoppel, which, in practice, consists of preventing a subject from resorting to a lawsuit in contradiction of his/her own prior legally relevant actions."

[97] Or rather, it focused on compliance with an obligation of means whose contingent result would be the birth of a life.

[98] This right is recognized by the ACHR in article 21 sections 1 and 2: "Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. No one

courts seem to hover around this type of analysis.[99] If the problem is seen through the lens of property rights, the result might be that the frozen embryos belong jointly to the woman and the man as co-owners who each have individual veto power over uses of their property to which they do not both consent. Now if the embryos can be thought of as property, can one party sign a contract with his/her partner renouncing such a property right over them? If these types of contracts were permitted, could one party not-comply, requesting that the embryos not be used and paying damages and reparations for non-compliance? Or conversely, could one party implant the embryos and then compensate by paying damages retroactively? Or is this the kind of contract in which one of the parties[100] could require specific compliance—that is, asking a court to recognize her right to implantation on the basis of the contract, as appears to be the Argentine court's argument favoring the woman? Moreover, in the absence of a contract, can one spouse claim damages and reparations for extra-contractual responsibility based on his/her frustrated expectations that, reasonably, the other had generated by consenting to the cryopreservation of the embryos?

If the response is negative, what distinguishes embryos such that they deserve to be treated differently from other property that can be bought and sold? Is this right to decide paternity a kind of right that Latin-American doctrine calls "*personalísimo*," that is, an inalienable right? Let us see.

In general individuals should comply with their previously undertaken commitments even if they no longer wish to do so, without such compliance violating their personal autonomy. As expressed by article 1197 of the Argentine Civil Code, between the parties, contracts are a law unto themselves. Moreover, if a legal system were not to endow contracts with binding force, it would violate the autonomy of the parties by not considering them responsible beings capable of undertaking commitments (violating, in turn, the principle of human dignity).[101] Along these lines, in the aforementioned case the Argentine Court held that " [...] biological paternity is accepted from the moment in which Mr. S. agreed to undertake assisted fertility treatment knowing the implications and possible consequences assumed by the contract in question, in which he specifically agreed on the procedure to be followed in the case of dissolution of the marriage. The explicit will to procreate was thereby manifest at the time that he submitted his genetic material

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shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."

[99] For example, in *York v. Jones*, the court decided that, in the absence of an agreement to the contrary, a clinic could not refuse to send embryos frozen by the couple and deposited there to another state. *See*, York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989), *cited in* Bernard M. Dickens and Rebecca J. Cook, *supra* note 20.

[100] In general, under this analogy the egg and sperm contributors would be co-proprietors. With regards to specific compliance, that would be for allowing the embryos to be implanted in general (in another gestation mother); a woman could not be required to specifically comply with carrying the foetus, due the impermissible consequences mentioned above of the state forcing a woman to undertake an unwanted life-plan.

[101] CARLOS SANTIAGO NINO, ÉTICA Y DERECHOS HUMANOS 267-301 (Paidos ed.). *See*, in general, CHARLES FRIED, CONTRACT AS PROMISE (Cambridge, Mass.: Harvard University Press, 1981).

knowing that he had done so with the specific purpose of it being used in an insemination procedure." [102]

Now what happens when a person renounces a large part of his/her autonomy, such that this person's range of options is considerably reduced? Imagine that a person makes a contract with a religious group in which she commits to professing Catholicism for life. Would this contract be considered a law between the parties? Can a person renounce her constitutional rights? The answer seems to be no. The constitutional right to freedom of religion (article 12(1) of the ACHR) includes its inverse: the constitutional right not to profess any religion.[103] As different sides of the same coin, both rights are equally important and as constitutional rights they cannot be renounced. Freedom of religion, including no religion, is an important part of autonomy and as such cannot be waived.

This reasoning can be extrapolated to our case. The right to found a family, recognized in article 17(2) of the ACHR includes its inverse, right to not form one; as before, both constitutional rights hold equal importance and cannot be relinquished. Just as a contract cannot be entered into by which one renounces the right to be a father for life, neither can one celebrate a contract by which one renounces the right to not be a father forever. The right to form a family, including the right to not form one (or not to increase one), is vital to autonomy, and as such, cannot be ceded. Along similar lines, in the case of Evans[104] mentioned earlier, the European Tribunal of Human Rights concluded that Johnston's right to not be a parent could not be tacitly waived in advance.

In conclusion, in this section we showed that proportionality justifies the argument of the IACHR, according to which the absolute prohibition on IVF is an arbitrary infringement on the privacy of people. We also showed that, although some regulations may be reasonable, others such as those that require transfer of embryos in every case may be unacceptable. Finally, we considered a hypothesis that the IACHR report doesn't contemplate: whether the man, as well as the woman, has or does not have the right to contractually renounce, in advance, the right to not form a family. In the following section, we analyze whether the IACHR is correct when it affirms that the absolute prohibition is discriminatory.

III. The Principle of Non-Discrimination, Reproductive Autonomy and In Vitro Fertilization

[102] "P., A. c/ S., A. C. s/ Medidas Precautoria", *supra* note 8 at p. 2, 3. This paragraph and the remaing of thise section are based on Hevia & Spector, *supra* note 88.

[103] This follows from the very nature of freedom of religion. By way of example, this was recognized by the European Tribunal of Human Rights in "Kokkinakis v. Grecia" (sentencia del 25.5.1993). Both the IACtHR as well as the Argentine National Supreme Court of Justice concede the importance of jurisprudence from the European Tribunal in interpreting our own international conventions, *See*, from the IACtHR: Fermín Ramírez v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 126 (Jun. 20, 2005). Palamara Iribarme, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 125 (Nov. 22, 2005). *See*, from Corte Suprema de Justicia de la Nación (Argentina) [National Supreme Court of Justice], CSJN, 17/05/2005, "Llerena, Horacio Luis s/ abuso de armas y lesiones", Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-322-2488), slip op.; CSJN, 08/08/06, "Dieser, María Graciela", Fallos (2006-329-3034), slip op.

[104] Evans v. United Kingdom, *supra* note 83.

The concept of discrimination in the Inter-American System of Human Rights is enunciated in articles 1(1) and 24 of the ACHR, in which recognized rights and liberties must be respected without discrimination and with equal protection of law. This concept is based in the definitions found in the International Convention on the Elimination of All Forms of Racial Discrimination and Convention on the Elimination of All Forms of Discrimination against Women.[105] Similarly the IACtHR revealed the unbreakable bond between non-discrimination and the principles of equality before the law, and establishing: "[…] an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination."[106] In accordance with this idea, the control of the legality of laws and policies based on the principle of equality and the principle of non-discrimination also should include those norms which appear neutral or do not seem to be general measures of undifferentiated scope. Both the IACHR and the DESC Committee and the European Court of Human Rights have defined this situation of seemingly neutral laws that do not completely conform to the principles of non-discrimination and equality as indirect discrimination.[107]

For this reason, the IACHR report found that the decision of the Constitutional Chamber of Costa Rica prohibiting access to IVF constituted indirect discrimination. The majority of the IACHR believed the prohibition was discriminatory in its violation of family privacy and hindering a treatment of infertility by: (1) denying scientific progress that would benefit those who are biologically disadvantaged, and (2) having a particular specific and disproportional impact on women. Regarding the first point, the IACHR considered that the prohibition is an illegitimate infringement on the private and family life of the subjects of this discrimination]. Moreover, it weakens the possibility of their overcoming the disadvantage in having children, since although the technology exists to ameliorate the problem, the state refuses to give people access to it. Finally, in some cases, it forces couples to look for alternatives outside of the country, further elevating the costs of treatment and additionally discriminating against those people who cannot afford the costs of such travel.[108] Later, supporting the second point, the IACHR resolved that women and

[105] In all its agencies the Inter-American System of Human Rights has adopted the following definition of "discrimination:" "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [official translation] *See*, Juridical Condition and Rights of the Undocumented Migrants (Arts. 3(1) and 17 American Convention on Human Rights), Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18 (Sept. 17, 2003). María Elena Morales de Sierra v Guatemala, *supra* note 58.

[106] [official translation] Juridical Condition and Rights of the Undocumented Migrants, *idem* ¶ 85.

[107] Access to Justice for Women Victims of Violence in the Americas, Inter-Am. Comm'n H.R., OEA/Ser.L/V//II. doc. 68, rev. ¶ 90 (2007). *See also*, The Yean and Bosico Children v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 130, ¶ 141. In the U.N. system of Human Rights, DESC Committee [CESCR] defines indirect discrimination as "laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination." *See*, Committee on Economic, Social and Cultural Rights [CESCR], General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009). *See*, Hoogendijk v. the Netherlands, Eur. Ct. H.R., (dec.), no. 58461/00, 6 January 2005.

[108] Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9 at ¶¶ 128-30.

their bodies were the objects of the prohibition against in vitro fertilization. This also means that they would be more severely affected by the decision of the Constitutional Chamber. This is the case because with IVF it is women who make the decision to undergo the treatment. In this way, the absolute ban takes away the power of autonomy of a woman over her body and limits her objectives in the area of (reproductive) health,[109] thereby constituting serious discrimination against women.[110]

Disagreeing with the majority opinion on this point,[111] the IACHR minority held that the decision of the Constitutional Chamber is not discriminatory. The minority sustained that the ban is absolute and, therefore, that no one group was the subject of different treatment or that the private life of some was more restricted by this measure than others. The minority opinion held that, for the argument of discrimination to succeed, there must be:(1) a characteristic common to this group that differentiates it from the rest of the society and (2) that this characteristic constitute a disproportional burden for its members.[112] On this basis, the minority concluded that the fact that the prohibition implies an infringement upon family life and takes away tools for ameliorating infertility does not constitute a sufficiently common characteristic for upholding an arbitrary treatment distinct from the rest of the society. This is because there are also other characteristics that are *prima facie* equally arbitrary towards the rest of the society: for example, because of the ruling, access to IVF was arbitrarily denied to homosexual couples who cannot naturally conceive children with their partners, to infertile individuals that alone cannot naturally conceive, and to fertile married couples that have decided not to have sexual relations.[113]

The minority concluded that with respect to discrimination against women, a law impeding access to IVF through an age limit designed for the protection of health and prevention of maternal mortality would also not qualify as "discrimination."[114] According to the minority, this is the case because the dangers of pregnancy increase with age and this constitutes a risk to the health and life of the woman.[115]

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[109] Committee on the Elimination of all Forms of Discrimination Against Women [CEDAW], General Recommendation No. 24, Women and Health (Twentieth session, 1999), U.N. Doc. A/54/38 at 5 (1999), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 271 (2003).

[110] Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9 at ¶¶ 130-33.

[111] Although not through the argument discussed in the previous section about the arbitrary infringement on private and family life.

[112] Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9 at ¶¶ 4-5.

[113] To accomplish this, the minority resorts to a theoretical-practical distinction of infertility. It distinguishes between functional and structural infertility in order to demonstrate that the characteristics objected to by the actors are no the only ones that are arbitrary, and consequently, to hold that their reasons are not the only disproportional burdens. Hence, functional infertility occurs when the woman, man, or both, experience a reproductive organ dysfunction. In contrast, structural infertility occurs when an individual or couple would like to reproduce, but, given the social structure in which they identify, must do so by methods other than sexual relations. Single people and same sex couples are examples of structural infertility *See*, Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 Berkley J. Gender L. & Just. 18, 21 (2008).

[114] Gretel Artavia Murillo y otros v. Costa Rica, *supra* note 9 at ¶ 6.

[115] A state may have the obligation to impose such a restriction if, as a member party of the International Pact of Economic Social and Cultural Rights, it must guarantee the right to the enjoyment of the highest possible level of health (art. 12). *See*, Committee on Economic, Social and Cultural Rights [CESCR], General

Therefore, the minority concluded that the petitioners in the case did not represent a homogeneous discrete group. According to the minority, the reasons that the petitioners argued were discriminatory did not represent the all the types of discrimination faced by the gamut of individuals affected by the prohibition. Similarly, the minority sustained that upholding in vitro fertilization because the petitioners allege that their right to family privacy is violated or that they are impeded from overcoming their infertility would constitute discrimination against the other cases described above.

The objection put forth by the minority to the majority arguments is implausible. It is true that the discrimination denounced by the petitioners can equally hinder other groups' capacity for sexual reproduction. But, what actually follows from the minority argument is that judging a measure to be discriminatory regarding matters of health, i.e. infertility, is not a sufficient justification for overturning the law or judgement.

One could posit that the minority opinion remains correct because there is still no homogeneous group represented. In other words, the absolute prohibition on the right to reproduce by means of assisted reproductive technology discriminates against homosexual couples. Namely, because they are a minority, this prohibition discriminates against a group that is not functionally infertile. The same result occurs in the case of the fertile couple that decides not to reproduce by natural means.

Nevertheless, once again the objection fails because a commitment to reproductive autonomy requires equal respect for all. Restricting reproductive autonomy in cases of infertility by choice and infertile homosexuals demonstrates a lack of commitment to some roles and social positions. The framework of the issue shifts from a focus on discrimination, which has a limited scope, to a focus on autonomy, which broadly affects all human beings. This is the case because all people, women and men, infertile and not infertile individuals are rights bearers of privacy (i.e. personal autonomy). The principle of personal autonomy includes, among other capacities, reproductive autonomy. The right to reproductive autonomy is upheld by the ACHR when it prescribes a right to privacy in article 11(2). If then through personal decision-making, fertile individuals have the capacity and ability to exercise their reproductive rights, why not extend these rights to infertile people in general?

In this way, respecting reproductive autonomy for homosexual couples is also about respecting their decision/social position.[116] Similarly, the case of the fertile couple that decides not to reproduce reflects the product of a decision about their own lives. Therefore, by contrast to the argument presented by the minority, the existence of these other discriminated groups does not point to the absence of a common characteristic. Rather the

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Comment No. 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003).

[116] Reva B. Siegel, *supra* note 12 at 1742, 1743. *See also*, U.S Supreme Court, Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007), the vote of Justice Kennedy.

commonality of the discriminated group is infertility in the general sense, which includes both its functional and structural manifestations.

On questions of birth control and therapeutic abortion, (that is, the reproductive autonomy of fertile people) both the IACHR and the Human Rights Commission[117] as well as some American States,[118] have recognized and guaranteed a right to avoid reproduction using the help of technology—pharmaceutical drugs as emergency contraceptives in cases of rape and surgical intervention in the cases of permissible abortion—on the basis of reproductive autonomy. If the right not to reproduce is upheld, an extension of the same reasoning leads to the inverse: the right to reproduce with the help of technology must be upheld as well.

Supreme Courts and Constitutional Courts in Latin America have protected reproductive autonomy in the aforementioned cases based on an understanding that forcing a woman to carry to term in these circumstances constitutes overly demanding, cruel, or degrading treatment towards her.[119] By framing decisions in these terms, the case law clearly articulates the principle of reproductive autonomy as being one manifestation of the right to self-determination. In these cases the courts manifest their recognition of "the right of individuals to be self-governing and self-defining, and their commensurate right not to be treated as mere objects or instruments of another's will."[120] Since in these cases it has been argued that the right to life deserves less protection than the woman's physical freedom, it would be contradictory to later deny her this same autonomy over her body and over the possibility of her being a mother (or in a man's case, being a father) by an argument that the life of the embryo is suddenly and inexplicably more valuable and must now be protected.

[117] Paulina del Carmen Ramírez Jacinto v. Mexico, Case 161-02, Inter-Am. Comm'n H.R., Report No. 21/07, OEA/Ser.L/V/II.130 Doc. 22, rev. ¶ 1 (2007). *See also,* Access to Justice for Women Victims of Violence in the Americas, *supra* note 101, ¶¶ 2-3.

[118] In the case of contraceptives, for example, Chile has law 20.418 "Información, Orientación y Prestaciones en materia de regulación de la fertilidad" [Information, Guidance, and Services in the Area of Regulation of Fertility] which decrees the free distribution of emergency contraceptives. Since 2003, Argentinan legislation includes Law 25.673 establishing the "Programa Nacional de Salud Sexual y Procreación Responsable" [National Program of Sexual Health and Responsible Procreation]. Colombia allows the unregulated sale of contraceptives. Finally, en Mexico since 2009 law NOM-046-SSA2-2005 "Violencia Familiar, Sexual y contra las Mujeres. Criterios para la Prevención y Atención" [Sexual and Family Violence against Women. Criteria for Prevetion and Assistance] was enacted. This law instructs all public health centers to administer emergency contraceptives to female victims of rape.

[119] C.C., Sentencia C-355/06, *supra* note 46. *See also*, CSJN, "F., A. L. s/medida autosatisfactiva", *supra* note 42; "Gobernador Constitucional del Estado de Jalisco v. Poder Ejecutivo Federal et al.", Supreme Court (Mexico), *supra* note 44; "Comisión Nacional de los Derechos Humanos et al. v. Jefe de Gobierno et al.", Supreme Court (Mexico), *supra* note 43. *See also*, outside of the scope of Latin America, United States Supreme Court [U.S. Supreme Court], Gonzales v. Carhart, 127 S. Ct. 1610 (2007), Planned Parenthood v. Casey, 505 U.S. 833 (1992). *See also*, Supreme Court of Canada, R v. Morgentaler, 1 S.C.R. 30 (1988).

[120] Reva B. Siegel, *supra* note 12 at 1738-9. As we have mentioned in the beginning of this paper, this is the notion of "dignity as liberty" associated with Kantian autonomy.

Therefore, the absolute prohibition of assisted fertility practices is discriminatory toward reproductive autonomy in general and in particular to the exercise of the right to reproduce with technological assistance. [121]

It is also important to note that the absolute prohibition has a further discriminatory effect. Affluent couples can still access IVF by travelling to other countries. In contrast, those couples who cannot afford to travel abroad are more severely affected by the decision of the Constitutional Chamber because, unlike affluent couples, they do not have other available alternatives to become parents. This effect of the absolute prohibition, however, is not mentioned in the IACHR report.

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IV. Conclusion

The arguments presented in this paper show that the Constitutional Chamber of Costa Rica goes against the IACHR and that consequently, the IACtHR should resolve that Costa Rica abandon the prohibition on access to IVF. Our discussion of the juridical status of IVF, nevertheless, reveals that much more is required beyond lifting the ban. In particular, according to what we have shown, any regulation that compels women to accept transfer against their will would impose an unacceptable burden in the light of principles of autonomy and dignity. In principle, a regulation that prohibits men from refusing the non-consensual use of their embryos would also be unacceptable. It is important to emphasize that these conclusions are applicable to legislation that should be currently sanctioned in Costa Rica and many other Latin America countries, as well as norms that will be enacted in the future.

In conclusion, we must bear a fundamental principle of international law in mind: when states assume a commitment by ratifying an international treaty, they must honor it and also must adjust their domestic law and policies to conform with those established by the treaty in question[122]. All Latin American countries have ratified the ACHR. For this reason, they must legislate on IVF taking into account the basic principles of the ACHR, in particular, the right to privacy, the right to found a family (or not to found one) and equality. We hope that the discussions raised in this article have a significant contribution for advancing the realization of IVF legislation that upholds these principles.

[121] This argument does not defend unlimited access to IVF. As the minority held, a regulation that setting an age limit can be considered reasonable in that it protects the health of the mother and avoids maternal mortality since pregnancy risks increase with age.

[122] Vienna Convention on the Law of Treaties, art. 27, *supra* note 41.