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In Vitro Fertilization: The Right to Give Life or Taking the Fundamental Right to Life

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INTRODUCTION

When *in vitro* fertilization (IVF) was first introduced, there was an unwillingness to accept the technology which called for a ban of IVF.¹ Part of the hostility towards IVF technology was the widespread concern of the moral and legal status of a human embryo outside of the womb.² Throughout Latin America, there are some countries that do limit assisted reproduction such as IVF, such as Mexico which only allows assisted reproduction in cases of sterility that cannot be resolved by other means; however most countries do not have any regulation on IVF.³ In March 15, 2000 Costa Rica became the first country to absolutely ban access to IVF.⁴ The Constitutional Chamber of the Costa Rican Supreme Court of Justice held that *in vitro* fertilization violated the right to life and human dignity thus unconstitutional.⁵ The subsequent decision of the Inter-American Court of Human Rights (IACtHR) held that the Costa Rican Supreme Court decision violated the right to privacy and family life, the right to raise a family and the right to equal protection.⁶ To date, Costa Rica is the only country in the Western Hemisphere to have a full ban of *in vitro* fertilization.⁷ According to the Center for Disease Control and Prevention, Artificial Reproductive Technology (ART) includes all fertility treatments in which both eggs and sperm are handled.⁸ *In vitro* fertilization is a type of ART that

¹ Lyria Bennett Moses, *Understanding Legal Response to Technological Change: The Example of In Vitro Fertilization*, 6 MINN. J.L. SCI. & TECH. 505, 522 (2005).

² *Id.* at 509.

³ Martin Hevia and Carlos Herrera Vacaflor, *The Legal Status of In Vitro Fertilization in Latin America and the American Convention on Human Rights*, 36 Suffolk Transnat'l L. REV. 51, 52 (2013).

⁴ *Id.*

⁵ Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice File No. 95-001734-007-CO.

⁶ I/A Court H.R., *Artai Murillo et al v. Costa Rica case, (In Vitro Fertilization Case)* Judgment of November 28, 2012, Series C, No. 257.

⁷ Zach Dyer, *Costa Rica Misses Yet Another Deadline to Lift Ban On In Vitro Fertilization*, 18 Dec. 2013. <http://www.ticotimes.net/2013/12/19/costa-rica-misses-yet-another-deadline-to-lift-ban-on-in-vitro-fertilization>.

⁸ Division of Reproductive Health, National Center for Chronic Disease Prevention and Health Promotion. <http://www.cdc.gov/art/Policy.htm>.

joins a woman's egg and a man's sperm in a laboratory dish, *outside the body*.⁹ (Emphasis added). The two decisions raise the question of whether the creation of life is more important than an embryo that may or may not develop into a person.

This paper will explore the interplay of the numerous rights given in the American Convention on Human Rights (ACHR) looking at the Case of *Artai Murillo et al v. Costa Rica*, hereinafter *In Vitro Fertilization Case*. This will include a look into the right to life, the right of privacy, the right to protection, and the right to found a family. There will then be an examination of measures Costa Rica has taken to follow the IACtHR decision.

I. The Right to Life as the Common Standard

In 1948, the American Declaration of the Rights and Duties of Man set the right to life as the common standard for achievement of all states under Article 3 providing that "everyone has the right to life, liberty and security of person."¹⁰ This notion was reiterated in the Universal Declaration of Human Rights (UDHR).¹¹ The question of the Right to Life is the root of Costa Rica's ban of IVF. The main argument the Costa Rican government made to the Constitutional Chamber was that IVF is a violation of the right to life and of human dignity.¹² The Constitutional Chamber ultimately determined that IVF is a manipulation of human embryos for experimental ends and to discard human embryos without implanting the embryos into the uterus of the mother is unethical.¹³ The human embryo is a person from the moment of conception and

⁹ U.S. Dept. of Health and Human Services, National Institutes of Health. <http://www.nlm.nih.gov/medlineplus/ency/article/007279.htm>.

¹⁰ American Convention of the Rights and Duties of Man Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Colombia, art. 3, Mar. 30-May 2, 1948. ¶ VIII.

¹¹ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217A (III) (1948).

¹² Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice File No. 95-001734-007-CO. ¶ IV.

¹³ *Id.* at ¶ VIII.

therefore cannot be treated like an object, for investigative purposes.¹⁴ Further, it is also not constitutional to expose the human embryo to a disproportionate risk of death.¹⁵

The reasoning behind the Constitutional Chambers decision lies in Article 21 of the Costa Rican Constitution stating “Human life is inviolable”¹⁶ therefore the value of life must be protected along with all its manifestations. Further the Constitutional interpretation on the right to life, “without human existence, it is senseless to talk about rights and liberties... the right belong [to a human being] precisely for being alive.”¹⁷ The Right to Life must be ensured by the state, however as stated above, without life there is no right to that life.

The dissenting opinion recognized that there is a manipulation of the human embryo however there is also an implicit right to human reproduction, derived from the right to liberty and self-determination, a right to privacy and the right to found a family, nevertheless the right to reproduction encompasses a collective right to life, to the mother and the human embryo.¹⁸ The fact that only a maximum of six eggs may be fertilized and should those six embryos not be implanted into the mother, they will be conserved for the next cycle protects the right to life and dignity.¹⁹ The fact that some embryos may not be implanted into the mother or the pregnancy does not go to term is a natural circumstance.²⁰ The dissenting opinion is how the Inter-American Court of Human Rights thereafter leans, balancing the different rights previously mentioned.

¹⁴ *Id.* at ¶ IX.

¹⁵ *Id.* at ¶ IX

¹⁶ Constitution of the Republic of Costa Rica, 7 Nov. 1949, (amended 15 July 2003), article 21 (Costa Rica).

¹⁷ Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice File No. 95-001734-007-CO. ¶ IX

¹⁸ Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice File No. 95-001734-007-CO. Dissent ¶ II.

¹⁹ Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice File No. 95-001734-007-CO. Dissent ¶ II.

²⁰ Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice File No. 95-001734-007-CO. Dissent ¶ II.

A. Interpretation of the Right to Life in the American Convention on Human Rights

Latin American and Caribbean countries have generally agreed to interpret the provisions of the American Convention on Human Rights literally in a non-restrictive manner.²¹ The ACHR requires that all member states “undertake to adopt in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.” In Costa Rica, Article 7 of the Constitution holds that once an international treaty has been ratified, that treaty prevails over national law including constitutional law.²²

Article 4(1) of the American Convention on Human Rights (ACHR), provides that “Every person has the right to have his life respected. This right shall be protected by law, and *in general*, (emphasis added) from the moment of conception. No one shall be arbitrarily deprived of his life.”²³ Interpreting article 4(1), the ACHR gives existence to the right to life and creates an obligation on the part of the state to respect this right and give consequences for the deprecation of this right.²⁴ The interpretation may also suggest that the right to life is not absolute and must be harmonized with the protection of other rights, such as a woman’s right to privacy. Furthermore, 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.²⁵

Looking at the meaning of the term “in general” in the text of article 4(1) of the ACHR, the question becomes when the exception to “the moment of conception” comes into play. The

²¹ Ligia M. De Jesús, *Treaty Interpretation on the Right to Life Before Birth by Latin American and Caribbean States: An Analysis on Common Int’l Treaty Obligations and Relevant State Practice at Int’l Fora*, 26 EMORY INT’L L. REV. 599, 601-602 (2012).

²² Constitution of the Republic of Costa Rica, 7 Nov. 1949, (amended 15 July 2003), article 7 (Costa Rica).

²³ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673, art. 4 (1970), *entered into force* 18 July 1978.

²⁴ Alvaro Paul, *Controversial Conceptions: The Unborn and the American Convention on Human Rights*, 9 Loy. U. Chi. Int’l L. Rev. 209, 244 (2012) (discussing the interpretation of article 4(1) in relation to the unborn child).

²⁵ Hevia, *supra* note 3 at 63.

meaning of “in general” has been defined in other cases that have been heard under the IACtHR. Looking at signatories of the ACHR, there is some variety in the interpretation of article 4(1).

Mexico has found that with respect to article 4(1), “‘in general’ does not constitute an obligation to adopt or keep in force legislation to protect life ‘from the moment of conception,’ since this matter falls within the domain reserved to the states.”²⁶ Moreover, Mexico has held that an absolute right to life for the fetus would be unconstitutional because an absolute protection of the right to life jeopardizes women’s right to health and reproductive autonomy.²⁷ Mexican views on the protection of the right to the woman’s health and reproductive autonomy is demonstrated in their jurisprudence decriminalizing abortion, and guaranteeing the legality of emergency contraception.²⁸ While acknowledging this right, the country has also stressed the need to protect prenatal survival, health and development from conception and during life in utero.²⁹ In El Salvador, by contrast, has found that “life exists from the moment of conception and that the right to life is the source of all other rights”³⁰ giving no regard to the expression “in general.” The Dominican Republic, a third signatory to the ACHR, also confirms its belief that “everyone has a *fundamental and inalienable right to life* and that this right to life begins at the moment of conception.”³¹ Other Latin American countries tend to follow the conservative views that the right to life begins at the moment of conception.

In the *In Vitro Fertilization* case, the court first relied on the ordinary meaning of “in general” based on the definition of the *Diccionario de la Real Academia Española* (Dictionary of the Royal Spanish Academy) finding possible exceptions as part of the definition.³² The

²⁶ Hevia, *supra* note 3 at 63.

²⁷ Hevia, *supra* note 3 at 63.

²⁸ Hevia, *supra* note 3 at 63.

²⁹ De Jesús, *supra* note 21 at 613-614.

³⁰ De Jesús, *supra* note 21 at 601-602.

³¹ De Jesús, *supra* note 21 at 601-602.

³² I/A Court H.R., *In vitro fertilization case*, Judgment of November 28, 2012, Series C, No. 257. ¶ 188, 189.

dictionary is the official royal institute responsible for overseeing the Spanish language and rightly used as Costa Rica is a Spanish speaking country.³³ The exceptions found within the definition of “in general” lead to the presumption that although life may be respected from the moment of conception, it is not suggested that life may be thrown away carelessly. There may be times when a right so fundamental to freedom may weigh in favor of including the exception when interpreting article 4(1), in this case, when a man and woman want to create a new life through IVF. This is the view that Mexico has taken as discussed above and which the minority opinion discussed in the Costa Rican Constitutional Chamber decision

In the *In Vitro Fertilization* case, the Court found that “in general” indicates a possible anticipated exception in a particular rule with no specified exception.³⁴ This interpretation also tends to follow with Mexico views and the minority view of the Costa Rican Constitutional Chamber.

B. Right to Found a Family

The right to establish a family has been recognized internationally since the United Declaration of Human Rights (UDHR) of 1948.³⁵ Under article 16 of the UDHR, the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. It further provides for the right to marry and found a family “without any limitation due to race, nationality or religion.”³⁶ This right has also been recognized by the International Covenant on Civil and Political Rights, article 23.³⁷ International documents such as the American Convention on Human Rights grant the right to form a family and the protections granted to a family are

³³ Real Decreto 1109/1993, 9 July, por el que se aprueba los Estatutos de la Real Academia Española [For which statutes of the Royal Spanish Academy are approved]. Juridical news, retrieved 27 April 2012.

³⁴ I/A Court H.R., *In vitro fertilization case*, Judgment of November 28, 2012, Series C, No. 257. ¶ 188, 189.

³⁵ Moses, *supra* note 1 at 518.

³⁶ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) article 16(1) (1948).

³⁷ International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, entered into force 23 Mar. 1976 [the provisions of article 41 (Human Rights Committee) entered into force 28 Mar. 1979].

included in Universal Declaration of Human Rights in article 16(1) and the International Covenant on Civil and Political Rights in article 32(2).

The rights of the family are also established in the ACHR under article 17 wherein, “the right to raise a family shall be recognized... insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.”³⁸ The IACtHR has held that the family’s right to protection entails the development and strength of the family unit.³⁹

“Forcing a woman to accept the transfer of an embryo, it is an excessive interference with her autonomy as well as a violation of the principle of personal dignity.”⁴⁰ Other geographical areas also see the right to form a family as a fundamental human right. 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 was resolved in favor of the choice not to be a parent, which is consistent with policies of voluntary paternity.⁴¹ In Israel, 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.⁴² The possibility that a woman may not have a genetic child “imposes a disproportionate physical and moral burden on the woman.”⁴³

Other countries have found that while there is a constitutional right of freedom to procreate, as in Argentina, the body of the woman is only an instrument with respect to the right of the embryo.⁴⁴ In the case of Argentina, *P., A. v. S., A. C.*, a couple agreed to cryopreserving their embryos with a stipulation in case of divorce, that consent of both spouses would be

³⁸ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673, article 4 (1970), *entered into force* 18 July 1978.

³⁹ *In vitro fertilization case*, ¶ 145. (Citing *Case of Gelman v. Uruguay*).

⁴⁰ Hevia, *supra* note 3 at 76.

⁴¹ Hevia, *supra* note 3 at 77.

⁴² Hevia, *supra* note 3 at 77.

⁴³ Hevia, *supra* note 3 at 78.

⁴⁴ Hevia, *supra* note 3 at 79.

required to determine the outcome of the embryo.⁴⁵ The couple eventually divorces and the woman tries to use the remaining embryos to have a child.⁴⁶ The Court held 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 right, the woman would not have a right to demand implantation.”⁴⁷ The Argentinian decision reads article 4(1) to life beginning at the moment of conception, without giving significance to the “in general” language of the article. In the Colombian Constitution the *nasciturus* is not considered a person but still deserves constitutional protection.⁴⁸ This is because constitutional rights are only possessed by born human beings.⁴⁹ The State *may* protect pre-natal life, but only in a way that is compatible with a woman’s dignity.⁵⁰

Taking a look at international documents such as the American Convention on Human Rights, grant the right to form a family and the protections granted to a family are included in Universal Declaration of Human Rights in article 16(1) stating: “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution”⁵¹ and the International Covenant on Civil and Political Rights in article 23(2) stating: “The right of men and women of marriageable age to marry and to found a family shall be recognized.”⁵²

⁴⁵ Case 12.361, Inter-Am. Comm’n H.R., Report No. 85/10 (2010).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Hevia, *supra* note 3 at 77.

⁴⁹ Hevia, *supra* note 3 at 77.

⁵⁰ Hevia, *supra* note 3 at 77.

⁵¹ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) article 16(1) (1948).

⁵² International Covenant on Civil and Political Rights (New York, 16 Dec. 1966) 999 U.N.T.S. 171 and 1057 U.N.T.S. 407, art. 23(2), entered into force 23 Mar. 1976.

The Inter-American Commission on Human Rights has recognized and guaranteed a right to avoid reproduction using technology on the basis of reproductive autonomy.⁵³ The understanding is that forcing a woman to carry to term in certain circumstances such as rape or permissible abortion, may be overly demanding, cruel, or degrading to her.⁵⁴ In cases of rape or permissible abortion, case law articulates the principle of reproductive autonomy as being one manifestation of the right to self-determination.⁵⁵ 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.

At the base of the right to found a family is the development of that family through procreation. Denying a woman any possibility of having a genetic child imposes a disproportionate physical and moral burden on the woman.⁵⁶ Looking at the protection of the right to life with the small exceptions that may arise, and a family's right to form a family, the exception favors the formation of the fundamental right of founding a family.

Woman must make the decision to undergo IVF and the absolute ban takes away a woman's power of autonomy over her body, and limits her objectives in the area of reproductive health. Prohibition is thus discriminatory by denying scientific progress that would benefit those who are biologically disadvantaged and specifically and disproportionately affecting women.⁵⁷ It is worth reiterating that the ACHR finds that the family is a natural and fundamental group in society, a right so fundamental that it enters into the private sphere of an individual's life.

⁵³ Paulina del Carmen Ramírez Jacinto v. México, Case 161-02, Inter-Am. Comm'n H.R., Report No. 21/07, OES/Ser.L/V/II.130 Doc. 22.

⁵⁴ Hevia, *supra* note 3 at 86.

⁵⁵ Hevia, *supra* note 3 at 86.

⁵⁶ Hevia, *supra* note 3 at 78.

⁵⁷ Hevia, *supra* note 3 at 83.

Taking the view of the Commission, the opposite should also apply: “the right to reproduce with the help of technology should also be allowed.”⁵⁸

C. Prenatal Right to Life

The Convention on the Rights of the Child (CRC) and the ACHR both recognize and protect the unborn child’s right to life and health in a comprehensive manner.⁵⁹ The CRC gives rights before as well as after the birth of a child in the preamble of the convention: “child, by reason of his physical and mental immaturity, needs special safeguards, including appropriate legal protection, *before* as well as after birth.”⁶⁰ Article 6(2) the CRC requires that states parties ensure to the maximum extent possible the survival and development of the child.⁶¹

Under the CRC a child, in general, is considered any human being below the age of eighteen.⁶² The CRC does not however have an explanation as to when the human being first begins to have the right as a child.⁶³ Many Latin American Countries who are signatories to the CRC as well as to the ACHR have accepted the view that a person is considered a human being at the moment of conception. Not only does that CRC give specific rights for a person under the age of 18, it also enforces the protection of those persons that are not yet fully able to fend for themselves. Rights to children and those not yet born are also recognized in other international treaties. The right to prenatal health is recognized by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social, and Cultural Rights and the Protocol of San Salvador.⁶⁴ The right to the life

⁵⁸ Hevia, *supra* note 3 at 86.

⁵⁹ De Jesús, *supra* note 21 at 601-602. (Discussing treaties that Latin American states have ratified).

⁶⁰ Convention on the Rights of the Child (New York, 20 Nov. 1989) 1577 U.N.T.S. 3, 28 I.L.M. 1448, preamble (1989), *entered into force* 2 Sept. 1990.

⁶¹ Convention on the Rights of the Child (New York, 20 Nov. 1989) 1577 U.N.T.S. 3, 28 I.L.M. 1448, article 6(2) (1989), *entered into force* 2 Sept. 1990.

⁶² De Jesús, *supra* note 21 at 607.

⁶³ De Jesús, *supra* note 21 at 601-602.

⁶⁴ De Jesús, *supra* note 21 at 601-602. (Discussing treaties that Latin American states have ratified).

of an unborn child can also be seen in the United Nations Declaration on Human Cloning, which has been signed by many Latin American countries with a focus on protecting human dignity and human life.⁶⁵ Additionally, the Universal Declaration of Human Rights, although not international law, states in article 25(2) that “motherhood and childhood are entitled to special care and assistance.”⁶⁶ The Universal Declaration of Human Rights also implicitly protects the unborn child by providing health services and social security for expectant mothers.⁶⁷

Tying in the international laws, the Vienna Convention, under article 31(3)(c) establishes that relevant rules be taken into account in relation between the parties for treaty interpretation purposes.⁶⁸ The various views that Latin American countries, although slightly skewed have nevertheless have established the protection of life from the moment of conception; this in turn aligns with article 31(3)(c) of the Universal Declaration of Human Rights through the signing of the various international treaties providing that life begins at the moment of conception in some way or other.

In Central America, the countries have enforced the protections of the unborn child in the Declaration of the Central American Presidents and the Prime Minister of Belize on the International Conference on Population and Development wherein the states agreed that “[t]he family must be based on respect for life as of its conception and the union of man with a woman as it is established by our customs.”⁶⁹

Focusing on Costa Rica, the country, although in support of the Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, did not find

⁶⁵ De Jesús, *supra* note 21 at 603.

⁶⁶ Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III) article 25 (1948).

⁶⁷ De Jesús, *supra* note 21 at 605.

⁶⁸ De Jesús, *supra* note 21 at 606.

⁶⁹ Susan Yoshihara, *Lost in Translation: The Failure of the International Reproductive Rights Norm*, 11 AVE MARIA L. REV. 367, 398 (2013)

“sexual and reproductive health to be a new human right” and does not find implicitly a “relativization or negation of the right to life, which we regard as the source of all rights.”⁷⁰

Under the ACHR, as previously stated, article 4(1) every person has the right to have his life respected... from the moment of conception. Taking away the “in general” language, previously discussed of article 4(1), gives an absolute right of life from conception. An argument in favor of the ban on IVF for Costa Rica rests on the *travaux preparatoire*, which shows that Costa Rica affirmed the view that life was protected from the moment of conception.⁷¹ Under article 31 of the Vienna Convention on the Law of Treaties, *travaux preparatoire* is a secondary source that holds less weight than the actual treaty,⁷² but is nevertheless used when there is some ambiguity in the meaning of a law.⁷³ Another way to understand what the ACHR means with article 4(1) would be to look at the *travaux preparatoire* when there is an unreasonable answer or no answer at all within a treaty then the preparatory work and related drafting documents can supplement the process and clarify ambiguities.

Reviewing to the preparatory documents of the ACHR, the records would indicate that there were certain countries that opposed the “exception to the protection of the right to life.”⁷⁴ Costa Rica was concerned with the death of a high proportion of embryos which constitutes a violation of the right to life.⁷⁵ The state has a legitimate interest in protecting this legal right as stated in ACHR, the issue becomes whether the “discarded” embryos have the same right as those embryos that are transferred into the mothers body and do not develop. All the above mentioned discussion

⁷⁰ Yoshihara, *supra* note 69, at 398.

⁷¹ De Jesús, *supra* note 21 at 607.

⁷² Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331, article 31, entered into force 27 Jan. 1980.

⁷³ Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) 1155 U.N.T.S. 331, article 32, entered into force 27 Jan. 1980.

⁷⁴ Alvaro, *supra* note 24, at 224.

⁷⁵ Alvaro, *supra* note 24, at 230.

The argument of the Constitutional Court of Costa Rica is that IVF violates human embryos' right to life. Their position is that the right to life is the greater good over an individual's desire to be a biological parent, stressing the dignity of human person from conception.⁷⁶

i. The Argument of Abortion Rights in Relation to *In Vitro* Fertilization

Initially, reproductive health was a concept aimed at limiting pregnancy and childbirth, and included fertility regulation from the beginning.⁷⁷ "Fertility regulation is central to all other aspects of reproductive health. It has a bearing on, for example, the prevention of sexually transmitted diseases, the consequences of unwanted pregnancy, infertility, sexuality, child survival, and safe motherhood."⁷⁸ In 1972 the World Health Organization established a program on human reproduction promoting abortion as part of reproductive health.⁷⁹ Although in subsequent conferences, such as the Conference at Cairo and Beijing, the right to have an abortion was not recognized, abortion did become part of reproductive health care where abortion was lawful.⁸⁰

The World Health Organization (WHO) endorses the right to abortion as part of an international right to health however there is no customary international law that recognizes a human right to take the life of an unborn child through abortion or mandates the legalization of abortion. The Convention on the Elimination of All Forms of Discrimination against Woman (CEDAW), which has been ratified by almost all Latin American countries, gives the right to

⁷⁶ *Public Hearings of the 133 Period of Sessions, Case 12.361 and Petitions 1368/04, 16/05, 678/06, 1191/06-In Vitro Fertilization, Costa Rica*, INTER-AMERICAN COMMISSION ON HUM. RTS. (Oct. 28, 2008).

⁷⁷ Yoshihara, *supra* note 69, at 377.

⁷⁸ Yoshihara, *supra* note 69, at 377. (Adopted at the 1994 Conference in Cairo).

⁷⁹ Yoshihara, *supra* note 69, at 369.

⁸⁰ Yoshihara, *supra* note 69, at 369.

prenatal health under article 12(2); it does not actually create abortion rights.⁸¹ Nevertheless the committee of the CEDAW has interpreted the CEDAW to include abortion rights and therefore has urged many countries to legalize or liberalize abortion laws.⁸² The conferences at Cairo and Beijing, which came from the need for legal equality for men and women, addressed the creation of international abortion rights, health impact of unsafe abortion as a major public health concern, encouraged states to research, review national laws containing prosecution of illegal abortions, and address the issues of abortion.⁸³

At the Fourth World Conference on Women, on sexual health, the discussion of human rights of women included their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationship between women and men in matters of sexual relations and reproduction including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behavior and its consequences.⁸⁴

Part of the movement discussed at the conferences included a two prong strategy that would first, try to establish a right to maternal health that did not explicitly include abortion but could be reinterpreted in the future as including such a right and second, laying the groundwork for that future reinterpretation by getting United Nations development and legal experts to make the connections between maternal health and legal, accessible abortion through non-binding reports, statements and resolutions.⁸⁵

⁸¹ Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 Dec. 1979) 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980), *entered into force* 3 Sept. 1981.

⁸² De Jesús, *supra* note 21 at 662.

⁸³ De Jesús, *supra* note 21 at 620-621.

⁸⁴ Yoshihara, *supra* note 69, at 381.

⁸⁵ Yoshihara, *supra* note 69, at 383.

Discussing article 62 of the ACHR, the IACtHR may issue legally binding decisions on all matters relating to the interpretation or application of the American Convention.⁸⁶ Law permitting abortion without restriction as to reason was compatible with the right to life protection under the American Declaration of the Rights and Duties of Man, given the legislative history of the Declaration.⁸⁷

Through this interpretation, with the argument of interpreting the ACHR as allowing abortion should not be understood as a restriction of the right to life but as an enhancement of other guaranties such as the respect of privacy.⁸⁸ The United States Supreme Court has asserted that abortion falls within the area free from the State's intervention created by the right to privacy.⁸⁹

Although there has been pressure to legalize abortion or at the very least not be prosecuted for abortion in Latin American Countries, there have been nonbinding judgments, recommendations and comments regarding compliance of abortion.⁹⁰ Even so, Latin American and Caribbean States are generally in opposition to the creation of abortion rights much less for abortion rights abroad. In the *In Vitro Fertilization* case, the State argues it has a duty to protect human life from in vitro fertilization techniques that cause predictable embryonic death and continued, recognizing the embryo's legal personhood under domestic laws as well as its understanding that the right to life of embryos prevails over individual desires to produce biological children.⁹¹ In sum, the argument of the State, as previously discussed, stated that the

⁸⁶ De Jesús, *supra* note 21 at 626. (Discussing footnote 191)

⁸⁷ De Jesús, *supra* note 21 at 614.

⁸⁸ Alvaro, *supra* note 24, at 226

⁸⁹ Alvaro, *supra* note 24, at 226. (Citing *Roe v. Wade*, 410 U.S. 113 (1973)).

⁹⁰ De Jesús, *supra* note 21 at 623-625.

⁹¹ I/A Court H.R., *In vitro fertilization case*, Judgment of November 28, 2012, Series C, No. 257.

practice of IVF violates human embryos' right to life, allowing IVF would therefore violate Costa Rica's obligations to the child under international human rights law.⁹²

"There may be cases in which the right to life might not be protected, but the respect to the right to life has no exception according to the ACHR.⁹³ This interpretation would allow for cases where the protection of the unborn's right to life is not granted because the *nasciturus* may perish if his or her mother is in need of undergoing some necessary life-saving medical treatments."⁹⁴

D. Right to Privacy

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.⁹⁵

Article 11 of the American Convention on Human Rights gives everyone the right to have his honor respected and his dignity recognized.⁹⁶ Article 11 further states: "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. Everyone has the right to the protection of the law against such interference or attacks."⁹⁷ The right to privacy granted in the ACHR must be interpreted in the broad sense, so that it includes protection of the home, private life, and correspondence.⁹⁸

⁹² I/A Court H.R., *In vitro fertilization case*, Judgment of November 28, 2012, Series C, No. 257.

⁹³ Alvaro, *supra* note 24, at 226.

⁹⁴ Alvaro, *supra* note 24, at 224. (Discussing the interpretation of the text to article 4 of the ACHR).

⁹⁵ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673, article 11(2)(3) (1970), *entered into force* 18 July 1978. (Establishing the law of the Declaration of the Rights of Man and the Citizen setting out the original rights.)

⁹⁶ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673, article 11 (1970), *entered into force* 18 July 1978.

⁹⁷ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673, article 11(2)(3) (1970), *entered into force* 18 July 1978.

⁹⁸ I/A Comm'n H.R., Case 12.361, Report No. 85/10 (2010) (citing *Escué Zapata v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H.R. (ser. C) no. 167 Para 91 (4 July 2007)).

The Inter-American Commission on Human Rights, article 11 protects the right “to have biological children within the most intimate sphere of their private and family life,” and how “couples arrive at that decision is part of a person’s autonomy and identity, both as an individual and as a partner.” A primary objective of article 11 is protecting people from arbitrary action by state authorities infringing on the private sphere. “The scope of privacy is characterized by being exempt and immune from abusive or arbitrary invasion or aggression by a third party or by public authorities.”⁹⁹

Looking at other international courts, the European Court has concluded that protecting human life entails respecting the decision to become a father or mother, including the right to become genetic parents.¹⁰⁰ This choice belongs to the important sphere of individual existence and identity in which state discretion should be curtailed.

The Court has indicated that motherhood is an essential part of the free development of a woman’s personality and therefore the Court considers that the decision of whether or not to become a parent is part of the right to private life.¹⁰¹ It includes, in this case, the decision of whether or not to become a mother or father in the genetic or biological sense.¹⁰² Right to private life is related to 1) reproductive autonomy, and 2) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right. This right is violated when the means by which a woman can exercise the right to control her fertility are restricted.¹⁰³

⁹⁹ Hevia, *supra* note 3 at 70. (looking at I/A Court H.R., *Escher et al v. Brazil*, Judgment of 6 July 2009, Series C, No. 200.

¹⁰⁰ Hevia, *supra* note 3 at 70. (discussing footnote 60).

¹⁰¹ *In vitro fertilization case*, at ¶ 143.

¹⁰² *In vitro fertilization case*, at ¶ 144.

¹⁰³ *In vitro fertilization case* at ¶. (citing the Convention For the Elimination of All Forms of Discrimination Against Women)

For a restriction of a right to be legitimate, it must: be made in response to “an urgent social need” and directed towards “satisfying an imperative public interest”; employ the least restrictive alternative, i.e., the available means which least jeopardize the protected right; and be “proportional to the interest that it seeks to protect and must adjust itself to the achievement of this legitimate objective.”¹⁰⁴

The right to privacy is not an absolute right and can be restricted by states, so long as the interference is *not* abusive. To determine if the interference is abusive, look to: legality, legitimate aim, appropriateness, necessity and proportionality.¹⁰⁵

“The decision to create or implant human embryos has a social dimension and cannot be considered solely a private matter. State may adopt proportional measures to protect human embryos from treatment inconsistent with the convention, such as wanton destruction, sale or trafficking” so it may be reasonable for a state to regulate how the technology be used.¹⁰⁶

The right to privacy that is granted to individuals under the ACHR must be allowed. The right is in conjunction with the right to found a family and is such a fundamental right that the State should not interfere with the right to privacy.

II. Balancing the Rights Guaranteed in the American Convention on Human Rights

The IACtHR accepts that there must be protection of the embryo and there is a danger of manipulating human life, however these concerns must be balanced with other human rights. The Right to Life must be ensured by the state, however as stated above, without life there is no right to that life. IACtHR decided that although “there may be death of a high proportion of embryos

¹⁰⁴ *Id.* at 72 discussing footnote 68.

¹⁰⁵ Hevia, *supra* note 3 at 72.

¹⁰⁶ Hevia, *supra* note 3 at 70. (Looking at I/A Court H.R., *Escher et al v. Brazil*, Judgment of 6 July 2009, Series C, No. 200.

that may constitute a violation of the right to life” it nonetheless violates the right to privacy, family life, and equality.¹⁰⁷

On the other hand, there is a right to scientific progress. It has been held that reproductive problems for conception are a legitimate health problem. There must be equal protection between a healthy woman and a woman that has reproductive problems. Nevertheless, states generally agree to interpret provisions of their own international obligations, literally in a non-restrictive manner including positive state obligations to secure pre-natal rights to life, health, personal integrity and development for all unborn children through domestic law and public policy.¹⁰⁸

Reading articles 11 and 17 of the ACHR, it leads to protecting the right to form a family which includes 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. Such a decision is part of the most intimate sphere of private life and is the sole prerogative of each person and/or couple. Any attempt by the state to interfere with these decisions must be assessed on the basis of the criteria established in the American convention¹⁰⁹ therefore prohibition against IVF technologies is an infringement on both privacy and right to form a family.

The Right to Equal Protection is another right granted by the American Convention on Human Rights and which was addressed in the IACtHR decision of the *In Vitro Fertilization*

¹⁰⁷ Alvaro, *supra* note 24, at 224. (Citing the articles being violated under the American Convention on Human Rights and discussing articles 11(2), 17(2), 24).

¹⁰⁸ De Jesús, *supra* note 21, at 634.

¹⁰⁹ Hevia, *supra* note 3 at 71. (Discussing note 29).

case. Article 24 states “all persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”¹¹⁰

The Inter-American Commission on Human Rights has defined indirect discrimination as seemingly neutral laws that do not completely conform to the principles of non-discrimination and equality¹¹¹ and the IACtHR has identified 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. To deny a woman to have a child is discrimination based on her reproductive health. This denial is not only in contradiction to the right to equal protection but also go against the right for reproductive health which was previously discussed.

III. Enforcement of an Inter-American Court of Human Rights Decision

The organization of American States (OAS) monitors human rights in all 35 independent states of the Americas.¹¹² Of the 35 states, 25 states have ratified or adhered to the ACHR and are bound by the jurisdiction of the IACtHR.¹¹³ In addition to having jurisdiction, the IACtHR also monitors state compliance of its rulings as well as requiring states to provide the Court with a report on the measures adopted to comply with the Courts decision.¹¹⁴ The Court has also recently held closed hearings on compliance.¹¹⁵ The Court issues its own compliance reports and

¹¹⁰ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673, article 24 (1970), *entered into force* 18 July 1978.

¹¹¹ Hevia, *supra* note 3 at 82, 83.

¹¹² *Member States*, Organization of American States, http://www.oas.org/en/member_states/default.asp (last visited May 10, 2014).

¹¹³ I/A Court History, <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh> (last visited May 10, 2014).

¹¹⁴ *In Vitro Fertilization Case* at ¶ 380.

¹¹⁵ *Litigation in the Inter-American System*, The Center for Justice and International Law, <http://cejil.org/en/categoria/estrategias/litigaion-within-inter-american-system> (last visited May 10, 2011).

orders the state to again report on compliance within a set period, further the Court retains jurisdiction until there has been full compliance with the Courts original decision.¹¹⁶

In the *In Vitro Fertilization* case, the decision held, among other things, that Costa Rica had to comply with the Courts decision and had to submit a report within one year of the judgment as to the measures that the State had adopted.¹¹⁷ Legislation failed to reach a quorum to vote on the bill that would reverse ban on the fertility practice.¹¹⁸

Costa Rica has taken measures to be in compliance with the Courts decision. The Legislative Assembly drafted a proposed law in April 2, 2013: Law of In Vitro Fertilization and Transference of Human Embryos.¹¹⁹ In part, this proposed legislation allows the transfer of up to two embryos into a woman for each reproductive cycle under most circumstances¹²⁰ however as of May 2014 there has yet to be a vote on the proposed law. There have been cases brought before the Supreme Court of Costa Rica to allow IVF; in the First Chamber of the Supreme Court of Justice¹²¹ and in the Constitutional Chamber to begin the practice of in vitro fertilization once more.¹²²

A writ of *amparo* is a procedure where the court extends its protection to individuals whose constitutional rights have been violated by governmental officials.¹²³ *Amparo* roughly

¹¹⁶ Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP.PROBS. 37, 44 (2008).

¹¹⁷ *In Vitro Fertilization Case* at ¶ 381, sub-¶ 2, 9.

¹¹⁸ Dyer, *supra* note 7.

¹¹⁹ Proposed Ley de Fecundación in vitro y transferencia de Embriones Humanos, [In Vitro Fertilization and Transfer of Human Embryos, proposed law] 13 April 2013, Asamblea legislativa de la República de Costa Rica, Poder Ejecutivo.

¹²⁰ Proposed Ley de Fecundación in vitro y transferencia de Embriones Humanos, [In Vitro Fertilization and Transfer of Human Embryos, proposed law] 13 April 2013, article 15, Asamblea legislativa de la República de Costa Rica, Poder Ejecutivo.

¹²¹ Case No. 08-000178-1027-CA of May 7, 2009, First Chamber of the Supreme Court of Justice, decision no. 000465-F-S1-2009.

¹²² Judgment no. 2014003715 of March 14, 2014, delivered by the Constitutional Chamber of the Supreme Court of Justice, File no. 13-013503-0007-CO.

¹²³ Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249, 260 (1985-1986).

translates to protection or support.¹²⁴ Writ of *amparo* seeks a suspension of the unlawful conduct, in a speedy way usually where the facts and the law that is violated is clear.¹²⁵ The Costa Rican Constitution guarantees the writ of *amparo* to every person. “Every person has the right to present... writs of *amparo* to maintain or reestablish the enjoyment of other rights conferred by this Constitution as well as those of fundamental nature established in international instruments on human rights, enforceable in the Republic.”¹²⁶

Since the IACtHR, November 28, 2012 decision, there have been several writ of *amparos* filed with the Constitutional Chamber. While individuals have wanted to exercise their rights provided by the IACtHR, the Constitutional Chamber has been cautious on rendering any decision that may conflict with the IACtHR decision or that may be contrary to current or proposed IVF State laws. The latest case of March 14, 2014 before the Constitutional Chamber, held that because the regulation of *in vitro* fertilization is a fundamental right it must be regulated through law, without law there is no possible application of *in vitro* fertilization through the courts.¹²⁷ The Constitutional Chamber did recognize that the practice of IVF may be a right in the Chamber but due to regulations that must be imposed through formal law; the Constitutional Chamber has no authority to grant the practice of IVF at this time.¹²⁸

There has been speculation as to what organ of the state should comply with the IACtHR order, should it be the Constitutional Chamber that must first endorse the chamber, although there has already been decisions stating they will not decide any practice regarding IVF, or must

¹²⁴ MERRIAM-WEBSTER’S SPANISH-ENGLISH DICTIONARY (4th ed. 1998).

¹²⁵ Robert S. Barker, *Constitutional Adjudication in Costa Rica: A Latin American Model*, 17 U. MIAMI INTER-AM. L. REV. 249, 260 (1985-1986).

¹²⁶ Constitution of the Republic of Costa Rica, 7 Nov. 1949, (amended 15 July 2003), article 48 (Costa Rica).

¹²⁷ Judgment no. 2014003715 of March 14, 2014, delivered by the Constitutional Chamber of the Supreme Court of Justice, File no. 13-013503-0007-CO. ¶ IV.

¹²⁸ Judgment No. 2000-02306 of March 15, 2000, delivered by the Constitutional Chamber of the Supreme Court of Justice File No. 95-001734-007-CO. ¶ IV. (There may be additional Writ of Amparos filed with the Constitutional Chamber for each individual who has suffered from the noncompliance of IVF practice however it is likely that the court will continue to decide in conformity with this decision.)

the Costa Rican citizens wait until congress and the executive branch agree on the law.¹²⁹ Nevertheless, the Costa Rican Social security Administration is reporting that education has begun on the implementation of IVF.¹³⁰

Unfortunately, there has always been a problem with the implementation of international court's rulings. There is no enforcement agency that has the authority to force States to follow courts decisions. Sanctions may be imposed such as in the *In Vitro Fertilization* case¹³¹ however there is little more than can be done. The case filed with the Constitutional Chamber is a step towards seeking implementation of the IACtHR however little more can be done than to wait for the Costa Rican Congress to accept a law that will be in accord with the IACtHR decision and will also stay within the catholic-centric beliefs that many in Congress have.

The three models for regulating IVF are first, absolutely banning IVF because it violates the right to life; second, allowing access to IVF in certain cases because a total ban would violate the rights to privacy and family planning; and third, allowing access to IVF because embryos do not have a right to life.¹³²

CONCLUSION

With many conservative beliefs held around Latin America, the IACHR and the IACtHR are expanding rights of women while staying mindful of the catholic-centric beliefs of many of the parties to the ACHR. The purpose of the IACtHR is the interpretation of the ACHR and "exercises its functions in accordance."¹³³ Costa Rica ratified the ACHR, which came into force

¹²⁹ Maria del Pilar Lopez and Esteban Monge, *IVF and clinical research still on hold*, World Intellectual Property Review (Jan. 6, 2014). <http://www.worldipreview.com/article/ivf-and-clinical-research-still-on-hold>.

¹³⁰ *Id.*

¹³¹ *In Vitro Fertilization Case* at ¶ 378.

¹³² Hevia, *supra* note 3 at 57.

¹³³ I/A Court H.R., Statute of the I/A Court, Article 1, adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No.448).

on July 18, 1978.¹³⁴ Article 7 of the Costa Rican Constitution holds that once an international treaty has been ratified, that treaty prevails over national law including constitutional law.¹³⁵ Further, per Article 105 of the Costa Rican Constitution, national law may still be contrary to the constitution so long as it is in accordance with principles of international law.¹³⁶ Unfortunately Costa Rica, to date, has not implemented the IACtHR's decision of November 28, 2012.

The right to life may not always be protected but the respect to the right to life has no exception according to the ACHR. It further appears that the IACHR may have granted "legal personality" to the unborn and the capacity for the unborn to be injured, the commission also appears to give states the discretion to determine the protection given to the unborn.

The current proposed legislation allows the transfer of up to two embryos in the women for each reproductive cycle and for certain qualified reasons, such as advanced reproductive age and embryonic stage, the transfer of up to three embryos¹³⁷ however, this legislation is still pending. The recently elected Congress in Costa Rica will not enter office until mid-May 2014, so there is no belief that legislation regarding IVF will be discussed nor much less decided as to the controversial topic of IVF.¹³⁸ While congress takes its time to agree upon legislation as to IVF, there will be a continuance of Writ of *Amparos* to the Constitutional Chamber of the Supreme Court as there has been since the decision of the IACtHR was made.

Ultimately it appears that although there is a grant to the Right to Life, there must be proportionality to justify other Human Rights violations. The *creation* of life, appears to allow

¹³⁴ American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9I.L.M. 673 (1970), *entered into force* 18 July 1978.

¹³⁵ Constitution of the Republic of Costa Rica, Nov. 7, 1949, (amend. July 15, 2003), article 7 (Costa Rica).

¹³⁶ Constitution of the Republic of Costa Rica, Nov. 7, 1949, (amend. July 15, 2003), article 105 (Costa Rica).

¹³⁷ Proposed Ley de Fecundación in vitro y transferencia de Embriones Humanos, [In Vitro Fertilization and Transfer of Human Embryos, proposed law] 13 April 2013, article 15 ¶ 13, Asamblea legislativa de la República de Costa Rica, Poder Ejecutivo.

¹³⁸ Maria del Pilar Lopez and Esteban Monge, *IVF and clinical research still on hold*, World Intellectual Property Review (Jan. 6, 2014). <http://www.worldipreview.com/article/ivf-and-clinical-research-still-on-hold>.

for justification for the narrowly defined “right to life” as expressed in the Costa Rica Constitution without violating the Right to Life, with the definition of Life defined by the IACHR, thus perhaps not violating any human rights granted in the ACHR. The only thing to do at this time is to wait for legislation to pass.