THE LEGAL STATUS OF IN VITRO FERTILIZATION IN LATIN AMERICA AND THE AMERICAN CONVENTION ON HUMAN RIGHTS

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I. 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 well-being. IVF is an assisted reproductive technology that involves fertilizing female eggs with sperm outside of a woman's body in a laboratory. In IVF, the ovulation process is hormonally controlled; eggs are extracted for fertilization, and later implanted in a woman's uterus. IVF enables infertile women,

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1. According to the European Society of Human Reproduction and Embryology, since the 1978 birth of Louise Brown, the first child to be born using assisted reproduction technology, it is estimated 3.75 million children have been born as the result of IVF. 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.

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 2,430 cycles of intrauterine insemination using donor semen. *See generally* Eleonora Lamm, *La importancia de la volantad procreacional en la nueva categoria de filiacion derivada de las tecnicas de reproduccion asistida*, 24 REVISTA DE BIOÉTICA Y DERECHO 76 (2012), available at http://www.ub.edu/fildt/revista/pdf/RByD24_Master.pdf.

partially fertile women (e.g., menopausal women), and lesbians to become pregnant. It also allows single men and women, and same-sex couples to have children.

The legal regulation of IVF is not uniform throughout Latin America. Some countries do regulate access to IVF. For instance, Mexico permits assisted reproduction only in cases of sterility that cannot be resolved by another means,[3] while Peru requires the gestating mother and the genetic mother to be the same person.[4] Most countries, however, do not regulate access to IVF at all, and consequently, it ends up being left in the hands of the medical community.[5] On the other end of the spectrum, only Costa Rica absolutely bans access to IVF. In 2000, invoking article 4(1) of the American Convention on Human Rights (Convention), the Constitutional Chamber of the Supreme Court of Costa Rica recognized the right to life of embryos.[6] The Constitutional Chamber[7] concluded, given the high probability that the embryos would be discarded in the process, IVF should be completely prohibited because it violates the right to life.

Recently, in *Gretel Artavia Murillo v. Costa Rica*,[8] the Inter-American Commission of Human Rights (Commission) concluded that Costa Rica's complete prohibition on IVF violates the Convention. The Commission ruled the total ban is an arbi-

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3. Reglamento de la Ley General de Salud en materia de Investigación para la Salud, [Regulations to the General Health Law on Health Research], art. 56, Diario Oficial de la Federación [DO], 6 de Enero de 1987 (Mex.).

4. Ley General de Salud N° 26842 [General Health Law No. 26842], art. 7 (Peru).

5. This is what occurs, for example, in Argentina, Brazil, Chile, and Ecuador.

6. Article 4(1) provides: "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." American Convention on Human Rights, art. 4(1), Nov. 21, 1969, 1144 U.N.T.S. 143 [hereinafter American Convention].

7. Sala Constitucional De La Corte Suprema De Justicia [Constitutional Chamber of the Supreme Court of Justice], 15 de marzo de 2000 (Costa Rica); *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. Case 12.361, Inter-Am. Comm'n H.R., Report No. 85/10 (2010), *available at* http://www.cidh.oas.org/demandas/12.361Eng.pdf.

trary interference, and a restriction incompatible with the exercise of the rights of private and family life and the right to form a family that are enshrined in articles 11 and 17 of the Convention.[9] Moreover, impeding access to IVF is discriminatory as it constitutes a burden for a specific societal group: infertile women. Because Costa Rica did not comply with its recommendation to lift the ban, the Commission submitted the case to the jurisdiction of the Inter-American Court of Human Rights (Court), which is now ready to listen to the parties and resolve the controversy.[10]

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9. *Id.* ¶ 111. Article 11 provides:

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.

American Convention on Human Rights, *supra* note 6, art. 11(2).

Article 17 provides:

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 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.

Id. art. 11(2).

10. *Id.* at 2. A salient feature of the debate about IVF is that its detractors and defenders share a common language: both sides appeal to the idea of "dignity" to defend their positions. On the one hand, detractors of IVF believe, given that embryos are people with a right to life, the danger that they will die or be discarded before being transferred to the woman's body constitutes a violation of intrinsic human dignity. In Kantian terms, the embryos are treated merely means, rather than as ends in themselves. On the other hand, defenders of access to IVF also invoke dignity. First, they argue access to IVF provides autonomy to those who require the treatment in order to have children, while denial of access impermissibly infringes on their rights to privacy, and is unworthy of the treatment that all people deserve. Second, they argue impeding access to IVF for those who require it in order to reproduce

This paper analyzes the legal status of IVF in Latin America. In doing so, it critically evaluates the core of the Commission's report in *Gretel Artavia Murillo*, and determines the extent of the right to privacy and the right to life in Latin American countries. It examines whether the current legal status of IVF, in Costa Rica and other countries in the region, is consistent with the Convention.[11]

This paper considers the argument before the Constitutional Chamber of Costa Rica on the right to life. In order to deduce the existing reasons—if there are any—for prohibiting or limiting access to IVF on the basis of this right, this section describes the jurisprudential and legislative developments that the right to life has undergone in Latin American countries. We will also consider questions that have not been contemplated in

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is discriminatory, and denies them status as people worthy of equal consideration and respect.

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 as 'life,'" or dignity as "the inherent worth of a human life"; (2) "dignity as 'liberty,'" or "dignity resembl[ing] Kantian autonomy," i.e., "the right of people to be self-governing and self-defining, and their commensurate right not to be treated as mere objects or instruments of another's will"; and (3) "dignity as 'equality,'" or dignity as "respect, honor, and standing, and . . . the right of persons not to be denigrated, subordinated, or excluded." Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1738-39 (2008). Martha Nussbaum and Rosalind Dixon also have analyzed the debate about abortion from the perspective of dignity, though they adopted a focus on "capabilities," which Nussbaum develops together with Amartya Sen in other works. *See* Rosalind Dixon & Martha C. Nussbaum, *Abortion, Dignity and a Capabilities Approach*, *in* FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES 64 (Beverly Baines, Daphne Barak-Erez & Tsvi Kahana eds., 2012).

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," i.e., a fundamental principle of our legal order. *See generally* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005). Dignity also has a central role in the constitutions of many countries. The most frequent example cited, perhaps because to the influence it has had, is 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*, 11 GERMAN L.J. 9 (2010), *available at* http://www.germanlawjournal.com/index.php?pageID=11&artID=1226.

11. Despite the importance of the Court's decision, very few papers have discussed either the report, or the Constitutional Chamber's decision. For one of the few papers discussing the case, see generally Ligia M. De Jesus, *Post* Baby Boy v. United States *Developments In The Inter-American System of Human Rights: Inconsistent Application Of The American Convention's Protection Of The Right To Life From Conception*, 17 LAW & BUS. REV. AM. 435 (2011).

the Commission's 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. Then, we will analyze the first argument used by the Commission 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 Convention and the Court 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. Next, the article will focus on the second argument adopted by the Commission, 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 Commission, which held that although the ban is not consistent with the Convention, 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 Court as a source of information in researching the current state of the issue in Latin America.

II. THE RIGHT TO LIFE AND IN VITRO FERTILIZATION

A. The Constitutional Chamber's Decision

The 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[12] and constitutions[13] of several

12. CÓD. CIV. art. 76 (2000) (Chile); CÓD. CIV. arts. 30, 63 and 70 (1883) (Arg.). 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" 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." Cod. Inf. Adol. art. 17 (2006) (Colom.). C.C. art. 2 (2002) (Braz.). 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). Article 44 of the Constitution establishes the obligation of the state to promote scientific advance, subject to bioethical principles.

countries in the region, as well as by article 4(1) of the Convention, which establishes the right to life "shall be protected by law and, in general, from the moment of conception."[14] Thus, all pre-embryos and embryos, regardless of whether they are inside or outside of the woman's body, are comparable to born human beings, and have the right to life. This is an absolute right that trumps any other right.

The Constitutional Chamber of Costa Rica employed this line of reasoning to invalidate a presidential decree allowing access to IVF under certain conditions.[15] 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 of death arises from the potential that embryos may be discarded, or become unviable, during the procedure. The court declared 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." This was because, "the embryos, whose lives are first sought and then thwarted,

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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).

13. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19 (1980). Peru Const. art. 2 (1993). Ecu. Const. art. 45 (1998), as amended 2008. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (1988) (Braz.).

14. *Supra* note 7.

15. Executive Order no. 27913-S [Costa Rica Executive] [Ministry of Health], 111 Gaztt., Jun. 9, 1999. Executive Order no. 24029-S [Costa Rica Executive] [Ministry of Health], 45 Gaztt. Mar. 3, 1995 provides:

> Article 9.- In the cases of in vitro fertilization, the fertilization of more than six eggs per patient per treatment cycle.
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> 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.
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> 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.
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> 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.
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> 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.

are human beings and the Constitution does not allow any distinction among these."

The Chamber did recognize, under natural circumstances, embryos sometimes fail to implant themselves, or if implanted, are unable to develop. Yet, it saw an important difference: "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."[16] The Chamber concluded that, although technology may develop to the point where 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.[17]

Before the Commission, Costa Rica defended the same position.[18]

In what follows, this paper examines the legal status of IVF with the goal of comparing the official Costa Rican position—the absolute ban—with the positions of other countries in the region. Latin American jurisprudence generally presents three models for regulating IVF: (1) absolutely banning IVF because it violates the right to life; (2) allowing access to IVF in certain cases because a total ban would violate the rights to privacy and

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16. *Supra* note 8.

17. *Id.* 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, No. E-14496, 1989 WL 140495 (Tenn. Cir. Ct., Sept. 21, 1989). 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 ex-wife or to any other woman. The trial judge found in favor of the ex wife, who argued the embryo was a human being existing as an embryo, in vitro. *See id.*

See Davis v. Davis, 15 FAM. L. REP. 2097, 2103 (Tennessee Circuit Court, 1989). 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.2d 588 (Tenn. 1992).

18. *Supra* note 8, at paras. 28-37.

family planning[19]; and (3) allowing access to IVF because embryos do not have a right to life.

B. The Regional Backdrop

1. The Legal Status Of IVF Across The Region

Let us begin by examining the legal status of IVF. First, there are states that explicitly regulate access to IVF. Peru allows infertile women access to IVF as a treatment.[20] Similarly, in Mexico, married women have access to insemination, given the consent of their husbands.[21] Colombia, in turn, tentatively allows procreation by means of IVF; article 42(6) of its Constitution dictates that children can be conceived with scientific assistance.[22] Colombia's Health Ministry regulates the donation

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19. Cases that conditionally permit access to IVF, cryopreservation, or donation of extra embryos are included in this category

20. *Supra* note 4. Article 7 provides:

> 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.

21. *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." *See also* 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." *See also* 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. The State of Mexico allows access to IVF under the same condition. 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

22. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 42. Article 42 provides: "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

of gametes for assisted reproduction technology, including IVF.[23]

Second, there are states that only informally regulate access to IVF. Brazil regulates only through resolutions enacted by the Federal Council of Medicine, and subsidiary laws about scientific research on embryos or emergency contraceptives. 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.[24] In early 2011, it issued a resolution allowing access to IVF for "all competent persons," a phrase that came to include unwed individuals and same-sex couples.[25] Additionally, a 2005 law, known as the "Law of Biosecurity," permits and regulates medically or therapeutically motivated research on cells and embryos obtained through IVF, including mother cells, embryonic cells, non-viable embryos, and embryos that had been cryopreseved for more than 3 years.[26] All of this offers a positive outlook for access to IVF, and the limits present when it is balanced against protecting other interests like the right to life.

The situation in Chile is similar. The Chilean Ministry of Health published a report, devoid of legal force, establishing general steps for IVF.[27] The report required transferring all created embryos to the mother, and prohibiting their cryopreservation. In 1998, Chile enacted law 19.585 regulating kinship, and

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

23. L. 1546/98, augusto 6, 1978, 43.357 Diario Oficiel [D.O.] (Colom.). Article 50 provides: "[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.

24. Resolução No. 1358/1992, Conselho Federal de Medecina [CFM] [Federal Council of Medecini], la 11 de Novembro de 1992, Diario Oficial da Uniũo [D.O.U.] de 19.11.1992 (Braz.).

25. Resolução No. 1957/2010, Conselho Federal de Medecina, [CFM] [Federal Council of Medicine], de Dezembro de 2010, Diario Oficial da Uniao [D.O.U.] de 6.1.2011 (Braz.).

26. Lei No. 11-105, de 28 de Março de 2005, Diario Oficial da Uniao [D.O.U.] de 28.3.2005 (Braz.).

27. Resolucion No. 1072, Ministerio de Salud [Ministry of Health], Junio 28, 1985, Diario Oficial [D.O.] (Chile).

established that "the father and the mother of a child conceived through the application of assisted human reproductive technology are the man and woman who committed to it." In 2006, it enacted law 20.120 "on scientific research on the human being, its genome, and prohibiting human cloning." This law protects human life from the moment of conception, and therefore, forbids human cloning and destroying human embryos for the acquisition of embryonic stem cells.[28]

Finally, there are states that do not expressly regulate IVF, though ethical regulations specific to health care providers may be present. In Argentina, there is no national law that regulates IVF, despite many attempts to formulate one.[29] Provinces inde-

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28. Ley No. 20.120, Septiembre 7, 2006, Diario Oficial [D.O.] (Chile). Article 6 provides that tissue and organs may only be cultivated for the purpose of diagnostic treatment or scientific research. *Id.*

29. 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 unimplanted 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 embryos. In all cases, after five 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

pendently are trying to regulate the practice.[30] Currently, the only province that specifically regulates assisted reproduction is the province of Buenos Aires.[31] Ecuador also does not regulate IVF. The practice is completely "de facto," leaving the ethical and practical challenges of IVF directly in the hands of doctors.[32]

2. *The Reasoning Underlying The Different Regional Views*

With respect to the development of jurisprudence in the region, there are three lines of reasoning stemming from the legal status of IVF. First, there is the belief, similar to that espoused by the Constitutional Chamber of Costa Rica, that embryos have a right to life, and consequently, IVF is impermissible. Absolute protection of the right to life also reigns in Argentina, Peru, Chile, and Ecuador. In Argentina, for example, some

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"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."

30. 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. Law 6.433, Provincia de Mendoza [Province of Mendoza], Oct. 22, 1996 Boletin Oficial [B.O.] (Arg.). 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. . ."

31. Law No. 14.208, Provincia de Buenos Aires [Province of Buenos Aires], Dec. 2, 2010, Boletin Oficial [B.O.] (Arg.); *see also* Decreto No. 2980/2010, Ministerio de Salud de la Provincia de Buenos Aires [Ministry of Health of the Province of Buenos Aires], Jan. 3, 2011, Boletin Oficial [B.O.] (Arg.). 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 30-40 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.

32. Situations like this can have a dissuasive effect on the use of IVF, since the medical community may want to avoid the societal criticism that may ensue from adopting a controversial practice. *See* FLORENCIA LUNA, INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS, REPRODUCCION ASISTIDA, GENERO Y DERECHOS HUMANOS EN AMERICA LATINA 50 (2008).

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 erred on the side of prudence. Hence, pronucleate oocytes have been granted the status of personhood just as embryos have been. In this way, although the procedure seeks to end the trauma of a woman's infertility and safeguard the rights of family planning, cryopreservation may constitute "cruel, inhuman, or degrading treatment" according to international treaties protecting the rights of the child. Existing measures such as cryopreservation or donation are insufficient for protecting its right to life and dignity as a life form.[33] In these cases, some courts have determined that human life exists from the moment of conception, and consequently, use of emergency contraceptive drugs such as "Postinor-2" or

33. 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. Camara Nacional de Apelaciones en lo Civil de la Capital Federal [CN Civ.] [National Court of Civil Appeals of the Federal Capital], 03/12/1999, "R., R.D.s./medidas precautorias," La Ley [L.L.] (2001-LL 824) (Arg.); *see also* 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. (Arg.); 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. (Arg.).

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. (Arg.). Nevertheless, in *S., G. y otro c/ I.O.M.A.*, the court emphasized that 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. I.O.M.A.*, J.A. (90-2012-II) (Arg.).

"Inmediat" (marketed as Imediat N, in the United States) threatens the right to life of a zygote or embryo.[34]

One objection to this line of reasoning is its interpretation of article 4(1) of the Convention, which is not universally shared. For example, in *Baby Boy*,[35] the Commission concluded protection of human life under the Convention is compatible with the legislation of member states permitting abortion. This suggests 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.[36] Furthermore, in accordance with the object and purpose of the Convention,[37] 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.[38]

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34. For a legal analysis of emergency contraception in Latin America, see generally Martín Hevia, *The Legal Status Of Emergency Contraception*, 116 INT. J. GYNAECOL. OBSTET. 87 (2012). 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. *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) Tribunal Constitucional [Constitutional Court], Oct. 16, 2009, Sentencia no. 02005-2009-PA/TC (Peru). 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).

35. Case 2141, Inter-Am. Comm'n H.R., Report No. 23/81, Mar. 6, 1981, OEA/Ser. L/V/II.54, Doc. 9, rev. 1.

36. *See id.* In *Baby Boy*, a U.S. organization filed suit to protest the reversal of the conviction of an abortion doctor. 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 compatibilizing the Convention with internal legislation authorizing abortion." Antonio Bascunan Rodríguez, *La Pildora del Día Despues Ante la Jurisprudencia*, 95 Estudios Publicos 74 (2004).

37. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331.

38. *See* Viviana Gallardo Advisory Opinion G 101/81, July 15, 1981, Inter-Am. Ct. H.R. (ser. A) No. 101, ¶ 16.

Second, other jurisprudence along the lines of *Baby Boy* also establishes that the embryo has a right to life, but not an absolute one. This line of reasoning considers the corresponding rights of the privacy and 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 disabled female, or any other female who is 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 some individuals to make sacrifices for the benefit of others or some collective good (i.e. protecting the right to life).[39]

Recent cases in Mexico also suggest that the right to life of the fetus is not absolute, but must be weighed against possibly jeopardizing others' rights. The Mexican Supreme Court has resolved that an absolute right to life for the fetus would be unconstitutional. An absolute protection of the right to life jeopardizes women's right to health and reproductive autonomy, as demonstrated by the jurisprudence decriminalizing abortion,[40] and guaranteeing the legality of emergency contraception.[41]

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, the court reasoned the right to life and dignity of this life form is respected, and in some way, protected.[42]

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39. Corte Suprema de la Nación [CSJN] [National Supreme Court of Justice], 13/3/2012, "F., A. L. s/medida autosatisfactiva," [Expte.] F. 259. XLVI.

40. "Comisión Nacional de los Derechos Humanos v. Jefe de Gobierno," Acción de Inconstitucionalidad No. 146/2007 y 147/2007, Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court] (2008) (Mex.).

41. "Gobernador Constitucional del Estado de Jalisco v. Poder Ejecutivo Federal," Controversia Constitucional 54/2009, Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court] (2010) (Mex.).

42. Camara Federal de Apelaciones [C Fed.] [Federal Court of Appeals], 29/12/2008, "L., H. A. y otra c/ I.O.M.A. y otra.," Abeledo Perrot no. 20090394, slip. op. at 10 (Arg.).

In general, we can say that these 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 fetus is not considered a crime, and in the case of injury, the amount of compensation awarded increases in proportion to the development of life,[43] among other things.[44] In this scenario, the embryo receives weaker protection than the fetus. This does not imply that it should not be protected at all, for example, with a regula-

43. For example, *see*, Corte Constitucional [C.C.] [Constitutional Court], May 10, 2006, Sentencia C-355/06, slip op. Concepto de Procurador General de la Nación, §71 ¶162. "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."

44. 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* ABORTO Y JUSTICIA REPRODUCTIVA (Paola Bergallo ed., 2011).

tion 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's line of reasoning, 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 the advances in technology, a total prohibition of IVF for fear of leaving surplus embryos is outdated.

The third line of reasoning maintains that, although legislation usually establishes protections of the "unborn," recognizing an interest to protect does not necessarily imply granting constitutional rights. In Brazil, for example, the Superior Federal Tribunal heard a debate about cryopreservation and discarding embryos.[45] 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 court resolved this issue by examining when a person is considered legally dead from a scientific standpoint. The moment of death takes place when "neural functions" are absent. Because an 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."

Similarly, with 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, in accordance with the Superior Federal Tribunal holding 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 a utilitarian conception of the female body as

45. 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. S.T.F. No. 3510, Relator: Min. Ayres Britto, 05.03.2008, D.F., 29.05.2008 (Braz.).

a mere reproductive machine violates women's rights and dignity, constituting inhumane and degrading treatment.[46]

In Colombia in 1994, the Constitutional Court held that although the *nasciturus* is not considered a person, it still deserves constitutional protection.[47] 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 a born person: 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.[48] In the ruling, the court reasoned:

> 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.[49]

In this way, the Court distinguished 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 they must refer to [specific] subjects; consequently, they are identified as rights belonging to someone (a

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46. S.T.F. No. 54, Relator: Min. Marcelo Aurelio, 11.04.2012, D.F., 12.04.2012 (Braz.).

47. 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." Corte Constitucional [C.C.] [Constitutional Court], Marzo 17, 1994, Sentencia C-133/94, slip. op. (Colom.), *available at* http://www.corteconstitucional.gov.co/relatoria/1994/c-133-94.htm.

48. *See supra* note 43. "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." *Id.*

49. *Id.*

human person, a woman, a child, etc.)."[50] 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."[51]

In conclusion, although there has been support for the reasoning of the Constitutional Chamber of Costa Rica, there also has been support for the idea that the right to life of an embryo must be weighed against other rights, such as privacy. This is the argument of the Commission, which we will consider in detail in the following section.

III. The Right to Privacy and In Vitro Fertilization

The right to privacy is the right to act in ways that do not affect third parties.[52] This right refers not only to those things that are not, and should not be, accessible to public knowledge, but also more generally to actions that, if immoral, only are so only 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. This section examines these dimensions, and their status in international jurisprudence.

The first and most basic of these dimensions is the intersection of privacy and autonomy. Autonomy is the basis upon which private acts such as IVF can be undertaken, and courts have contemplated the kinds of restrictions on privacy that are consonant with a basic respect for freedom of choice. The second dimension is the intersection of privacy and the right to form a family. Some IVF-related litigation has pitted these concepts against each other. The third dimension is the intersection between privacy and the undertaking of obligations. IVF can be contemplated within the framework of the law of contracts in order to shed light on the kinds of duties and expectations hope-

50. State Council, Chamber of Administrative Dispute, Ref.: Expediente Núm. 200200251 01, Actor: Carlos Humberto Gómez Arambula, 5/6/2008.

51. *Id.*

52. Carlos Santiago Nino, Fundamentos De Derecho Constitucional 304-05 (1992). We have borrowed this conception of privacy from Nino.

ful parents have between each another, and with respect to embryos created during IVF procedures.

A. *Privacy and Autonomy*

The international system of human rights is committed to a principle of individual liberty that values the free choice of life plans. It also prohibits interference with these plans on the belief that they do not pursue some ideal of human excellence or virtue. This dedication to personal autonomy is reflected in various international documents.[53] The Commission's report in *Murillo* addressed whether such a prohibition is an impermissible infringement on the right to privacy. The Commission analyzed whether such a ban is consistent with articles 11 and 17 of the Convention.

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. Article 11(2) provides: "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 the law must protect this right. In *Murillo*, the Commission noted, under the Court's jurisprudence, article 11 must be interpreted in the broad sense, so that it includes protection of the home, private life, and correspondence.[54] The Commission emphasized that a primary objective of article 11 is protecting people from arbitrary action by state authorities infringing on the private sphere.

The Commission thus concluded that "decision of the couples . . . to have biological children is 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."[55] The decision therefore is protected under Article 11 of the Convention.[56] In these matters, the Court had sustained "the scope of privacy is

53. For example, articles 4 and 5 of the Declaration of the Rights of Man and of the Citizen set out, respectively, "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."

54. *Supra* note 8, ¶ 69 (citing Escué Zapata v. Colombia, Merits, Reparations and Costs, Judgment, Inter-Am Ct. H. R. (ser. C) No. 167 ¶ 91 (Jul. 4, 2007)).

55. *Id.* ¶ 76.

56. *Id.*

characterized by being exempt and immune from abusive or arbitrary invasion or aggression by third parties or by public authorities."[57] Considering the jurisprudence of the European Court of Human Rights, the Court also had 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."[58] The European Court has given more concrete meaning to the right to respect for private life, and its decisions establish that the concept of private life, in addition to a person's physical and psychological integrity, encompasses physical and social elements. These elements include the right to personal autonomy, personal development, and the right to establish and develop relationships with other people and with the external world.[59] Furthermore, 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.[60] Thus, this choice

57. 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; Tristán Donoso v. Panamá, Preliminary objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 193, ¶ 55.

58. 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* 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 (noting respect for private life includes the right to "establishing and developing relationships" both on a personal and professional level).

59. *See* Tysiac v. Poland, 45 Eur. Ct. H. R. 42, ¶ 107 (2007); Pretty v. United Kingdom, 35 Eur. Ct. H. R. 1, ¶ 61 (2002).

60. 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, similarly it must allow GDP (pre-implantation diagnosis) in order to prevent the implantation of embryos with 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 therefore no violation of the European Convention of

belongs to the important sphere of individual existence and identity in which state discretion should be curtailed.[61]

The Commission report also discusses whether an absolute ban on IVF is compatible with article 17. Article 17(2) provides that 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."[62] Article 17(1) 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.[63]

The Commission stated that limitations on this right must not be so restrictive "that the very essence of the right is impaired."[64] It determined, when read together, articles 11 and 17 lead to the following conclusions:

> 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 by the state to interfere with these decisions must be assessed on the basis of the criteria established in the American Convention.[65]

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.

61. *Supra* note 8, ¶ 74 (citing Dickson v. The United Kingdom, 2006 Eur. Ct. H. R. 430, ¶ 78).

62. American Convention, *supra* note 7, art. 17, § 2.

63. 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."

64. By limitations the Commission is referring to national law, for instance, determining the marriageable age of the parties. Other courts or regional courts also argue that a state should not limit individuals' life decisions through legislation in such a way that "the very essence of the right is impaired." María Elena Morales de Sierra v. Guatemala, *supra* note 58, ¶ 40; Rees v. The United Kingdom, 1987 Eur. Ct. H. R. 106, ¶ 50.

65. *Supra* note 8, ¶ 80.

Based on these conclusions, the Commission declared the prohibition against access to IVF technologies is an infringement on both privacy and the right to form a family.

The question then as whether such interference is consistent with the Convention. Article 16(2) 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,[66] public safety or public order, or to protect public health or morals or the rights and freedoms of others."[67] According to the Court, 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."[68]

The Commission established that any restriction is abusive or arbitrary if it is unjust, unforeseeable, or unreasonable.[69] It notes the Court has established that "the right to privacy is not

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66. The expression "necessary in a democratic society" was incorporated into the Inter-American system of human rights in 1985; 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. 5 ¶ 46 (Nov. 13, 1985); *see also* C. M. QUIROGA & C. N. ROJAS, SISTEMA INTERAMERICANO DE DERECHOS HUMANOS: INTRODUCCIÓN A SUS MECANISMOS DE PROTECCIÓN, 34-35 (2007).

67. For an analysis of an example of the restriction of one right in order to protect another, see Analía Banfi Vique et al., *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) (arguing the freedoms of the press and association may be limited in order to protect the right to health in a democratic society).

68. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, *supra* note 66. 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). *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). 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.

69. *Supra* note 8, ¶ 88.

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 the following criteria: legality, legitimate aim, appropriateness, necessity and proportionality."[70] The Commission 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),[71] 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),[72] 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").[73] It was the requirement of proportionality that gave the Commission pause.

The Commission examined the regulation of IVF technology in various regional countries. It found the existence or inexistence of alternative methods depends on the development of scientific advances in the field. It reflected that, although many regional countries include the legal protection of life before birth in their constitutions or legislation, they do permit the practice of IVF. This is the case in Argentina, Chile, Colombia, Guatemala, Ecuador, Panama, Peru, and Uruguay.[74] 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, it 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."[75] For the Commission, an absolute prohibition is "a restriction incompatible with the . . . Convention on the exercise of the right to a private and family life and the right to

70. *Id.* ¶ 89.
71. *Id.* ¶¶ 91-93.
72. *Id.* ¶¶ 94-96.
73. *Id.* ¶ 98.
74. *Id.* ¶ 101.
75. *Id.* ¶ 110. In fact, Costa Rica's 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

found a family, recognized in articles 11 and 17 of the . . . Convention, in relation to article 1(1) thereof."[76]

Importantly, the Commission observed "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 Convention, such as wanton destruction, sale, or trafficking."[77] In this way, its solution is reasonable; namely, it might be reasonable for a state to regulate how the technology is being used. Nevertheless, what the Commission actually means when it says IVF technology can be regulated in ways "that more closely resemble the natural process of conception, such as a regulation that diminishes the number of fertilized ovules"[78] is far from clear. Certainly, some restrictions would be incompatible with the right to privacy.

Article 10 of Decree Law No. 24029-S, which regulates 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.)[79]

Regulations of this kind, imposing compulsory transfer of embryos, can jeopardize the health of women, causing an unacceptable incursion on their privacy. 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. The gestation of abnormal embryos

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76. *Id.* ¶ 111.

77. *Id.* ¶ 116.

78. *Id.* ¶ 110.

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

also carries risks such as miscarriage or physical of psychological trauma for the woman during childbirth.[80]

In other jurisdictions, the courts have been sensitive to these risks. In April of 2009, the Constitutional Court of Italy concluded that when the transfer puts the women's health at risk, it cannot be obligatorily imposed.[81] Similarly, in Germany, on July 6, 2010, the German Federal Court of Justice concluded GDP is legitimate, and established that only healthy embryos could be transferred to the women.[82] 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.[83]

B. Privacy and the Right to Form a Family

Beyond the danger that an 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. She might not want to endure pregnancy and prefer 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

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

81. Corte Cost., 8 maggio 2009, n. 151/09, slip op., *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.

82. Bundesgerichtshof [BGH] [Federal Court of Justice], Jul. 6, 2010, No. 5 StR 386/09 (Ger.). 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 61.

83. Dickens, *supra* note 82. 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.

mean imposing an unwanted life plan.[84] In this case, the question arises whether the woman has a right to refuse to be a mother. The right to found a family, recognized in article 17(2) of the Convention, also includes the right not to 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 she does not accept, and would last throughout her whole life.[85]

The Commission did not consider these questions in *Murillo*, perhaps because they were not at issue in the case, and it 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.[86] The report left many other questions unanswered. This is partly because the Commission deals with specific issues and not abstract questions.[87] The questions the Commission did

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84. 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).

85. 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).

86. The petition presented to the Commission dealt with the absolute prohibition and consequent violations of rights recognized in the American Convention. The petitioners did not question the scope of the regulation. *See supra* note 8, at ¶¶ 17-27.

87. For an analysis of the obligation to apply recommendations of the Commission, see *supra* note 8, art. 51(2). ACHR article 51(2). As regards the standard of 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 Court reveals different interpretations about the scope of the Commission's 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 American Convention 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 Commission's decisions, see: Filippini, Leo-

not discuss are related mainly to the different opportunities men and women have for becoming parents. These issues will 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 becoming 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? Although this issue has not been addressed yet within the Inter-American system, other international tribunals have discussed it.

Consider *Evans v. United Kingdom*, a 2007 decision of the European Tribunal of Human Rights.[88] Natalie Evans and Howard Johnston became engaged in 2000. In 2001, Evans was diagnosed with ovarian cancer, and informed she could extract her eggs for IVF. 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 had to be decided in favor of the choice not to be a parent.[89] The court held 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

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nardo 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).

88. Evans v. United Kingdom, 46 EHRR 34 (2007).

89. 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 24, 1999.

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. Rathter, the woman is able to make such decisions.

In contrast, in *Nahmani v. Nahmani*, after a legal battle that extended over four years for the control of eleven embryos, 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 despite his opposition. 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."[90] The majority seemed to share the minority position of the European Tribunal in *Evans*, which concluded that denying a woman any possibility of having a genetic child imposes a "disproportionate physical and moral burden on the woman."[91]

Latin American courts also have weighed in on this issue. In Argentina, in *P., A. v. S., A. C.*,[92] a couple entered into an agreement about cryopreserving their embryos, stipulating, 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 the couple had a child. Sometime later, the couple separated, and began divorce proceedings. Later, when the mother wanted to have another child using the remaining embryos, the fertility treatment center would not proceed with the implantation because it deemed the man's consent necessary for the procedure. The man opposed the use of the embryos, invoking his constitutional right of freedom to procreate.

The court ruled, upon dissolution of the marriage, both parties had agreed to submit the decision to the courts. Given the man had consented to this agreement, he could not later oppose implantation. Such an opposition would be in bad faith.[93] The

90. CFH 2401/95 Nahmani v. Nahmani 50(4) IsrSC 661 [1996] (Isr.).

91. Evans v. United Kingdom, *supra* note 87.

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

93. 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

tribunal concluded that the woman had a right to undergo implantation because the embryo had the right to life. This conclusion was by no means analogous to the Israeli Supreme Court's decision. Rather than focus on the social value of maternity or the benefit to the woman, as the Israeli court had done, the Argentine court focused on the embryo's right to life.[94] In other words, it deemed 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. This 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.

C. *Privacy and Property*

The Commission did not contemplate the intersection of privacy and property in its report.[95] Admittedly, this aspect of the IVF debate has not been raised in any jurisdiction, though the analysis in a few court cases seems to hover around it.[96] If IVF is viewed 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, each having individual veto power over the uses of the property to which he or she does not consent.

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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."

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

95. This right is recognized by the American Convention 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 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."

96. *See generally* York v. Jones, 717 F. Supp. 421 (E.D. Va. 1989) (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).

If embryos can be thought of as property, can one party sign a contract with his or her partner renouncing the right over them? If these types of contracts were permitted, could one party not comply, paying damages and reparations for non-compliance? Conversely, could one party implant the embryos and then compensate the other by paying damages retroactively? Or, is this the kind of contract in which one of the parties could require specific compliance?[97] Moreover, in the absence of a contract, could one spouse claim damages and reparations for extra-contractual responsibility based on his or her frustrated expectations that had been reasonably generated by consenting to the cryopreservation of the embryos? If the response to these questions is negative, what allows embryos to be treated differently from other property that can be bought and sold? Is the right to decide paternity a kind of inalienable right that Latin American doctrine calls "*personalísimo*"?

In general, individuals should comply with their previously undertaken commitments without violating their personal autonomy. As expressed by article 1197 of the Argentine Civil Code, contracts are a law unto themselves between parties. If a legal system were not to endow contracts with binding force, it would violate the autonomy of the parties because the parties would not be considered responsible beings capable of undertaking commitments. This, in turn, would violate the principle of human dignity.[98] Relatedly, the Argentine Court has reasoned:

> [B]iological paternity is accepted from the moment in which [the man] 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 knowing that he had done so with the specific purpose of it being used in an insemination procedure."[99]

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97. 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 *fetus*, due the impermissible consequences mentioned above of the state forcing a woman to undertake an unwanted life-plan.

98. CARLOS SANTIAGO NINO, ÉTICA Y DERECHOS HUMANOS 267-301 (2003); *see generally* CHARLES FRIED, CONTRACT AS PROMISE (1981).

99. "P., A. c/ S., A. C. s/ Medidas Precautoria", *supra* note 7 at p. 2-3. This paragraph and the remainder of this section are based on Hevia & Spector, *supra* note 87.

What happens when a person renounces a large part of his/her autonomy? Imagine a person who 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, expressed in article 12(1) of the Convention, includes its inverse: the constitutional right not to profess any religion.[100] 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 the issue of IVF. The right to found a family, recognized in article 17(2) of the Convention, includes its inverse, the right to not form one. Both constitutional rights hold equal importance, and cannot be relinquished. Just as one cannot enter into a contract renouncing the right to be a father for life, one cannot enter into a contract renouncing the right not to be a father for life. The right to form a family, including the right not to form one (or not to increase one), is vital to autonomy, and cannot be ceded.[101]

D. Summary

In sum, proportionality justifies the Commission's position, according to which the absolute prohibition on IVF is an arbitrary infringement on the privacy of people. Some regulations on IVF may be acceptable, while others such as those that require transfer of embryos in every case may be unacceptable.

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100. 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 Inter-American Court of Human Rights 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 *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)*; 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. (Arg.); CSJN, 08/08/06, "Dieser, María Graciela", Fallos (2006-329-3034), slip op. (Arg.).

101. Similarly, in the case of *Evans* 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. Evans v. United Kingdom, *supra* note 83.

Notably, the Commission report does not address an important aspect of the IVF debate: whether the man, as well as the woman, has the right to contractually renounce, in advance, the right to not form a family. The next section analyzes whether the Commission was correct in concluding that an absolute prohibition is discriminatory.

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

Articles 1(1) and 24 of the Convention recognize rights and liberties must be accorded equal protection under law. This concept derives from 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.[102] The Court has identified "an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination," and declared: "States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination."[103] In accordance with this idea, laws and policies based on the principles of equality and non-discrimination should include those norms that appear neutral, or do not seem to be general measures of undifferentiated scope. The Commission, the Committee on Economic, Social and Cultural Rights (CESCR), and the European Court of Human Rights have defined indirect discrimination as seemingly neutral laws

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102. 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.

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); *see also* María Elena Morales de Sierra v Guatemala, *supra* note 58.

103. Juridical Condition and Rights of the Undocumented Migrants, *supra* note 102, ¶ 85.

that do not completely conform to the principles of non-discrimination and equality.[104]

For this reason, the Commission report in *Murillo* concluded the absolute prohibition on access to IVF constituted indirect discrimination. The Commission majority believed the prohibition discriminated by denying scientific progress that would benefit those who are biologically disadvantaged, and specifically and disproportionally affecting women. Regarding the first point, the Commission found the prohibition to be an illegitimate infringement on the private and family life of those who seek access to IVF. By refusing access to IVF, Costa Rica diminishes the probability that those who cannot have children will overcome their disadvantage. In some cases, it forces couples to look for alternatives outside of the country, further elevating the costs of treatment, and discriminating against those who cannot afford the costs of such travel.[105] Regarding the second point, the Commission found that women and their bodies were the objects of the prohibition on access to IVF, and would be more severely affected by the ban. A 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.[106] This constitutes serious discrimination against women.[107]

The Commission minority concluded the prohibition on access to IVF is not discriminatory.[108] The minority believed no

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104. 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 (Sept. 28, 2005). 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, of the International Covenant on Economic, Social and Cultural Rights) No. 20, Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2) U.N. Doc. E/C.12/GC/20 (2009); *see also*, Hoogendijk v. the Netherlands, Eur. Ct. H.R., (dec.), no. 58461/00, 6 January 2005.

105. *Supra* note 8, at ¶¶ 128-30.

106. Committee on the Elimination of all Forms of Discrimination Against Women [CEDAW], General Recommendation No. 24, Women and Health (20th sess., 1999).

107. *Supra* note 8, at ¶¶ 130-33.

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

one group was the subject of different treatment, or that the private life of some was restricted more than others. For the discrimination argument to succeed, the minority believed there must be a characteristic common to the group that differentiates it from the rest of the society, and disproportionally burdens its members.[109] On this basis, the minority concluded that although the prohibition implies an infringement upon family life, and takes away tools for ameliorating infertility, 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 toward the rest of the society. For example, because of the ruling, access to IVF was arbitrarily denied to same-sex couples, infertile individuals, and fertile married couples that have decided not to have sexual relations.[110] The minority also concluded that a law impeding access to IVF through an age limit would not qualify as "discrimination."[111] This is because the dangers of pregnancy increase with age and this constitutes a risk to the health and life of the woman and to the *fetus* as well[112]

Ultimately, the minority concluded the petitioners did not represent a homogeneous discrete group. According to the minority, the reasons that the petitioners argued were discriminatory did not represent all the types of discrimination faced by the gamut of individuals affected by the prohibition. Similarly,

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109. *Supra* note 8, at ¶¶ 4-5.

110. 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 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).

111. *Supra* note 8, at ¶ 6.

112. 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. *See* Committee on Economic, Social and Cultural Rights [CESCR], General Comment No. 14, The right to the highest attainable standard of health (22d sess., 2000), U.N. Doc. E/C.12/2000/4 (2000).

the minority sustained that upholding IVF 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 the discrimination denounced by the petitioners can equally hinder other groups' capacity for sexual reproduction. What actually follows from the minority argument though is that judging a measure to be discriminatory regarding matters of health is not a sufficient justification for overturning the law or judgment. One could posit that the minority opinion remains valid 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 same-sex couples. Hence, 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, the objection fails because a commitment to reproductive autonomy requires equal respect for all. Restricting reproductive autonomy in the cases of infertility by choice and same-sex couples 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 Convention 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?

Respecting reproductive autonomy for same-sex couples is also about respecting their relationships and identities.[113] Similarly, the case of the fertile couple that decides not to reproduce reflects the product of a decision about their own lives. There-

113. Siegel, *supra* note 11, at 1742-43.

fore, 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 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, (i.e., the reproductive autonomy of fertile people) both the Commission and the Human Rights Commission[114] as well as some American States,[115] have recognized and guaranteed a right to avoid reproduction using 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.[116] 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-

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114. 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.

115. 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.

116. *See supra* note 43; *see also supra* notes 40-41. For decisions outside of Latin America, see generally Gonzales v. Carhart, 550 U.S. 124 (2007); Planned Parenthood v. Casey, 505 U.S. 833 (1992); R. v. Morgentaler, 1 S.C.R. 30 (1988).

governing and self-defining, and their commensurate right not to be treated as mere objects or instruments of another's will."[117] Because, in these cases, it has been argued 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 the possibility being a mother (or in a man's case, being a father) by arguing the life of the embryo is suddenly and inexplicably more valuable and must now be protected. Thus, the absolute prohibition of assisted fertility practices is discriminatory toward reproductive autonomy in general, and the exercise of the right to reproduce with technological assistance in particular.[118]

It is also important to note that the absolute prohibition has another discriminatory effect. Affluent couples still can access IVF by traveling to other countries. In contrast, those couples that 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 Commission's report.

V. CONCLUSION

The Court should resolve that Costa Rica abandon its prohibition on access to IVF. Much more is required beyond lifting the ban, however. 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 also would be unacceptable. It is important to emphasize 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

117. Siegel, *supra* note 11, at 1738-39. As previously mentioned, this is the notion of "dignity as liberty" associated with Kantian autonomy.

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

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.[119] All Latin American countries have ratified the Convention. For this reason, they must legislate on IVF by taking into account its basic principles, in particular, the right to privacy, the right to found a family (or not to found one), and equality.

119. Vienna Convention on the Law of Treaties, *supra* note 36, art. 27.