

# CONCEPTION, FERTILIZATION AND THE ONSET OF HUMAN PERSONHOOD: A NOTE ON THE CASE *ARTAVIA MURILLO ET AL. v. COSTA RICA*

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## *Abstract*

*In this critical note it is argued that one of the crucial arguments of the recent judgment by the Inter-American Court of Human Rights in *Artavia Murillo* fails and shows a common conceptual confusion in legal argumentation. The Court considers that the word “conception” in paragraph 4(1) of the American Convention on Human Rights must be understood as “implantation,” and not, as claimed by one part of the doctrine and the minority opinion in this case, as “fertilization.” The normative consequence of this interpretation is that preimplantation embryos (for example, embryos in vitro) do not enjoy the legal protections established by the Convention, that is, the protection (in general) of a right to life. The main argument for this interpretation is that a preimplantation embryo is not viable unless it is implanted in the uterus. The argument is fallacious, since it attempts to support a normative conclusion on scientific, empirical premises alone.*

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**Resumen**

*En esta nota crítica, se crítica uno de los argumentos cruciales de la reciente sentencia de la Corte Interamericana de Derechos Humanos, Artavia Murillo. Este argumento muestra una confusión frecuente en la argumentación jurídica. La Corte considera que el término “concepción”, en el párrafo 4.1 de la Convención Americana de Derechos Humanos debe ser interpretado como “implantación”, y no (como sostiene parte de la doctrina y el voto en minoría de este mismo fallo) como “fertilización”. La consecuencia normativa de esta interpretación es que los embriones pre-implantatorios (por ejemplo, los embriones in vitro) no gozan de las protecciones legales de la Convención, básicamente, la proyección (en general) de un derecho a la vida. El argumento principal para esta interpretación es que un embrión pre-implantatorio no es viable salvo que se implante en el útero. El argumento es falaz, dado que intenta sustentar una conclusión normativa solamente en premisas científicas de carácter empírico.*

**1. INTRODUCTION**

For those of us who think that human embryos – at least prior to implantation – are not moral persons and therefore have no right to life, the recent Inter-American Court of Human Rights decision *Artavia Murillo et al. v. Costa Rica* represents a decisive advance.<sup>1</sup> In this decision, the Court interprets Article 4(1) of the American Convention on Human Rights, according to which: “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.” The Court considers that the word “conception” in this paragraph must be understood as “implantation,” and not, as claimed by one part of the doctrine and the minority opinion in this case, as “fertilization.” The normative conclusion of this interpretation is that preimplantation embryos (for example, embryos *in vitro*) do not enjoy the legal protections established by the Convention, that is, the protection (in general) of a right to life. As a consequence of this ruling, the Court annulled the prohibition of *in vitro* fertilization previously established by the Constitutional Chamber of Costa Rica.

The Court’s conclusion is, in my opinion, the right one. Nevertheless, not all the arguments used in the ruling to support it are equally sound. Interestingly, the main argument of the Court is not strictly a legal argument. As it often happens, philosophical, ethical, and empirical considerations play a crucial role. This is why a critical assessment of legal decisions requires a philosophical (in this case, bioethical) analysis. My purpose in this note is to show that one of the main arguments in this

<sup>1</sup> IACtHR (Judgment) 28 November 2013, *Artavia Murillo y Otros (“Fecundación in Vitro”) vs. Costa Rica*.

transcendental decision of the Inter-American Court of Human Rights fails and reveals a basic conceptual confusion.

## 2. ONE IMPORTANT ARGUMENT IN ARTAVIA

The Court divided the arguments supporting the claim that “conception” means “implantation” into different classes of interpretation according to: (i) the ordinary meaning of the terms, (ii) a systematic and historical interpretation, (iii) an evolutive interpretation, and (iv) a teleological interpretation (according to the object and purpose of the Convention). I will focus on the first type of interpretation, where the central argument appears. This argument is central in the sense that it is necessary for justifying the interpretation of “conception” as “implantation,” in turn, the most relevant aspect of the decision. The three other kinds of considerations (historical, evolutive, and teleological) are, in themselves, insufficient for guaranteeing a specific interpretation. As I shall suggest at the end of this note, these sections are important for supporting the compatibility between the preferred interpretation (conception = implantation) and the history, evolution, and purposes of the Convention; they may well be sufficient for finding that the Costa Rican Constitutional Chamber’s decision prohibiting *in vitro* fertilization is contrary to the purposes of the Convention. But they do not show that it would be impermissible for a member State to interpret “conception” as “fertilization.” Even if, as the Court sustains, all the international case law on human rights coincides in not granting embryos the same legal status as persons already born, this difference can be attributed exclusively to the clause “in general” of Article 4(1), and not to the definition of “conception.” My interest lies in analysing the latter, that is, the reasons why the Court chooses to interpret “conception” as “implantation in the woman’s uterus” and not as “fertilization” (the union or syngamy between the egg and the sperm).

The argument that the Court presents regarding the definition of “conception” is contained, basically, in the following text:

“Despite the foregoing, the Court considers that it is appropriate to define how to interpret the term “conception” in relation to the American Convention. In this regard, the Court underscores that the scientific evidence agrees in making a difference between two complementary and essential moments of embryonic development: fertilization and implantation. The Court observes that it is only after completion of the second moment that the cycle is concluded, and that conception can be understood to have occurred. Taking into account the scientific evidence presented by the parties in this case, the Court notes that, even though, once the egg has been fertilized, this gives rise to a different cell with sufficient genetic information for the potential development of a “human being,” the fact is that if this embryo is not implanted in a woman’s body its possibilities of

development are nil. If an embryo never manages to implant itself in the uterus, it could not develop, because it would not receive the necessary nutrients, nor would it be in a suitable environment for its development (*supra* para. 180).<sup>2</sup>

“Thus, the Court considers that the term “conception” cannot be understood as a moment or process exclusive of a woman’s body, given that an embryo has no chance of survival if implantation does not occur. Proof of this is that it is only possible to establish whether or not pregnancy has occurred once the fertilized egg has been implanted in the uterus, when the hormone known as “chorionic gonadotropin” is produced, which can only be detected in a woman who has an embryo implanted in her. Prior to this, it is impossible to determine whether the union between the egg and a spermatozoid occurred within the body or whether this union was lost prior to implantation.”<sup>3</sup>

The conclusion of this argument is, as we have seen, that “conception” must be understood as “implantation” and not as “fertilization.” At stake, we must recall, is from which moment will the law, in general, grant legal protection to a human life, considering it a person with a right to life. What are the reasons for arriving at this conclusion? Allow me to reconstruct the argument more clearly. The central structure of the argument can be reduced to the following statements:

- (a) if the embryo is not implanted then it is not viable;
- (b) conception must be something in which the body of the woman is involved;
- (c) prior to implantation, it is not possible to determine whether pregnancy has occurred or whether an egg has been fertilized;
- (d) “conception” must be understood as “implantation” and not as “fertilization.”

### 3. THE PROBLEM OF THE ARGUMENT

Can we construct an argument from these four statements? It is clear that (d) must be understood as the conclusion and the others as premises (that, in turn, may or may not be intermediary conclusions).

The first point to note is that (b) is already sufficient for demonstrating (d), at least if we assume that the only alternatives for understanding “conception” are “implantation” and “fertilization.” The reason is simple: if (b) is true, and it is true that prior to implantation it is possible for the woman’s body not to be involved (because fertilization occurs *in vitro*, for example), then (d) must be true. The problem is that, unless we have independent reasons to believe (b), the argument begs the question. A

<sup>2</sup> IACtHR (Judgment) 28 November 2013, *Artavia Murillo y Otros (“Fecundación in Vitro”) vs. Costa Rica*, para. 186.

<sup>3</sup> IACtHR (Judgment) 28 November 2013, *Artavia Murillo y Otros (“Fecundación in Vitro”) vs. Costa Rica*, para. 187.

proponent of understanding “conception” as “fertilization” would simply reject (b) – that direct involvement of the woman’s body is a necessary condition for conception.<sup>4</sup> No such independent argument appears in the text. The argument in favour of (d) must, then, be based on (a) and (c).

Statement (a) holds that the embryo, if not implanted, is not viable. The decision even suggests that this is sufficient (without needing (c)) for proving the conclusion (d). Now, why is the fact that an embryo is not viable unless it is implanted relevant for claiming that only once it has been implanted does it deserve legal protection? Let us imagine a shipwrecked castaway in the middle of a large lake. This person will die if she cannot swim to shore, where she might, possibly, find food and shelter. Legal protection is not withheld from her because of the fact that her existence depends, among other things, on reaching the shore. Had someone in a helicopter seen her, he would not have permission to kill her, even if he were unable to actually save her. To make this example more analogous to the case of the embryo *in vitro*, let us imagine that the only way for the castaway to reach shore, and thereby possibly save herself, would be for the helicopter pilot to actually rescue her and bring her to shore. Again, obviously this fact does not grant the pilot permission to kill the castaway, and he might even have an obligation to save her.

One might raise an objection to my comparison by claiming that the castaway is already a person with a right to life, which is not at all obvious in the case of the preimplantation embryo. Nevertheless, we cannot assume that the preimplantation embryo is not a person with the right to life (or the converse). The point is that claiming that the preimplantation embryo will die if it is not implanted is not sufficient for claiming that it does not have a right to life. There are other kinds of beings (like our castaway) who will also die if something beyond their control fails to occur and whose right to life is, nevertheless, not for this reason abrogated. The reason for which the life of the castaway is legally protected (so that the pilot may not kill her, and might even be required to save her) is that she is a person (and therefore has a right to life). The reason why, according to many, preimplantation embryos lack legal protection is that they are not persons. But, what the Court’s argument supposedly proves is, precisely, whether embryos have a right to having their lives protected or not. The fact that they will not survive if not implanted does not provide a reason to believe that they do not have a right to life any more than the fact the castaway will not survive if she does not reach the shore does not prove that she lacks such a right.

Let us now consider c). As we have seen, c) states that it is not possible to know whether pregnancy has occurred or whether a preimplantation embryo exists before implantation has occurred and some detectable hormone has been released. This fact is fully irrelevant for determining whether the preimplantation embryo should have legal protection or not. The castaway might also have been undetectable until reaching

<sup>4</sup> One could even argue that, indirectly, the woman’s body is indeed involved, in the sense that the egg was produced by her body.

the shore and not for this reason does she cease to be a person deserving legal protection. The embryo, in turn, is undetectable before implantation if the fertilization has occurred naturally. By contrast, in the case of *in vitro* fertilization, the fertilized egg is perfectly detectable.

Are there better arguments for justifying the final decision of the Court (declaring the prohibition of *in vitro* fertilization in Costa Rica incompatible with the Convention)? The purpose of this note is not to suggest possible arguments. In fact, I think that the Court's decision offers some plausible arguments. For example, it is possible to claim that (regardless of the interpretation of the term "conception" adopted) the protection of the human being "from conception" is not absolute, but "in general," entailing that this protection must be compatible with the protection of other rights enshrined in the Convention, such as the right of the parents' privacy, the right to procreate, the right to personal integrity, among others. Converting the protection of human life into an absolute right, rather than a right "in general," violates the balance between rights protected by the Convention.<sup>5</sup>

More important to my purpose here is to emphasize two final points. First, an argument of a juridical-normative kind cannot be supported (exclusively) by empirical premises. The Court suggests that the two possible conflicting interpretations are supported by "current" scientific "schools of thought".<sup>6</sup> However, no such substantive disagreement can exist in biology. Biological science can only describe and explain the different stages of embryonic development. Nothing normative can be extracted from this alone without committing a naturalistic fallacy. Claiming that one of the current scientific schools identifies conception with implantation (or with fertilization) implies either mistakenly ascribing some normative content to science or mistakenly identifying a terminological issue with a real one.

Second, what is truly relevant for the Court's decision in the case is not whether conception occurs with fertilization or with implantation, but rather from which moment do we consider that a human being (from the biological point of view) deserves legal protection, in the sense of possessing a right to life, and if, at early stages

<sup>5</sup> IACtHR (Judgment) 28 November 2013, *Artavia Murillo y Otros ("Fecundación in Vitro") vs. Costa Rica*, paras. 272–304. In these paragraphs, the Court explains why "the sacrifice of the rights involved in this case was excessive in comparison to the benefits referred to with the protection of the embryo." (para. 273).

<sup>6</sup> IACtHR (Judgment) 28 November 2013, *Artavia Murillo y Otros ("Fecundación in Vitro") vs. Costa Rica*, para. 180: "The Court observes that in the current scientific context there are two different interpretations of the term "conception." One school of thought understands "conception" as the moment of union, or fertilization of the egg by the spermatozoid. Fertilization results in the creation of a new cell: the zygote. Certain scientific evidence considers the zygote as a human organism that contains the necessary instructions for the development of the embryo. Another school of thought understands "conception" as the moment when the fertilized egg is implanted in the uterus. The implantation of the fertilized egg in the mother's uterus allows the new cell, the zygote, to connect with the mother's circulatory system, providing it with access to all the hormones and other elements necessary for the embryo's development."

of development, this right is strong enough to displace other rights enshrined in the Convention (such as the rights to privacy and equality, among others).

#### 4. CONCLUSION

I have not attempted to provide a complete analysis of *Artavia Murillo*, but rather to object to one of its crucial arguments. This objection is important, not only because the argument is part of an important Inter-American Court of Human Rights decision, but also because it reveals a common mistake in legal argumentation, especially when dealing with medical or bioethical issues: adopting normative-juridical positions claiming that these are based in scientific or, more generally, empirical considerations.<sup>7</sup> Appealing to empirical data backed by science can give our position greater persuasive power, but does not necessarily endow it with greater argumentative soundness.

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<sup>7</sup> The mistake is completely independent from the content of the decision. In fact, we can find the same kind of mistake in court decisions defending the opposite view: that “conception” must be interpreted as “fertilization” (see for example “Portal de Belén – Asociación Civil sin Fines de Lucro c/ Ministerio de Salud y Acción Social de la Nación s/ amparo,” CSJN (Argentina), 2002).