



When does Human Life Begin? Bioethics and the Inter-American Court of Human Rights

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Abstract

This article analyses and confronts the absolute and fundamental right to life versus the right to assisted reproduction outside the uterus (In Vitro Fertilization). The case of Costa Rica and the Inter-American Court of Human Rights is specifically studied. Likewise, the article intends to confront, both the problem of the inviolability of human life, enshrined in the Political Constitution of Costa Rica as well as, the objectification of the human embryo according to the interpretation that the Inter-American Court of Human Rights gives to the article 4.1 of the American Convention on Human Rights and try to answer the question of when biological human begins and when legally it begins.

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Introduction

The constitutional right to life is specified in Article 21 of the Political Constitution of Costa Rica (Constitution). However, this has been subjugated by the decision of the Inter-American Court of Human Rights (Court), which condemned Costa Rica to approve the population's access to In Vitro Fertilization (IVF).

Likewise, the Constitution establishes that Costa Rica (CR) "is a free and independent republic" (Article 1), in addition, sovereignty is enshrined in

Article 2: "Sovereignty resides exclusively in the nation". Following the above, CR is, about other international legal systems, independent and sovereign. However, some authors accept the thesis that the domestic legal system is separate and distinct from the international legal system, suggesting that both legal systems are in a position of parity, and therefore, there should be no superiority of one over the other.

There is the thesis that states are obliged to abide by the jurisdiction of international courts, therefore, the resolutions of the Court would be mandatory, the

Costa Rican State would have limits to its sovereignty, these limits would be given by the adhesion of CR to international organizations, in this case specifically, the Inter-American Court of Human Rights (Court), the American Convention on Human Rights (Convention) and the Inter-American Commission on Human Rights (Commission).

This implies adapting the domestic legal system to the international order expressly or automatically. On the other hand, the Constitution establishes that public treaties, approved by the Legislative Assembly, have superior authority over laws and become part of the internal law of CR.

Thus, in matters related to human rights and the international legal order, sovereignty finds its limits, as these agreements prevail over the domestic system, and the judgments of international courts can annul those of domestic courts. All this even though the Constitution establishes that no one can arrogate sovereignty to himself and that this constitutes a crime of treason. This crime is not typified in the Criminal Code of Costa Rica.

But what happens when a court, for ideological reasons, objectifies the human person? What happens when, to defend other rights, he deprives the person of his most elementary right, of the one without which the other rights cannot be exercised?

Next, we will analyse how an international court, ignoring all logical and scientific reasoning, decides, in an authoritarian way, making abusive use of interpretations and being a judge of science, to objectify the human person.

The Supraconstitutional Control of the Court

Costa Rica is a signatory to the Convention and was the first country to ratify the Court as its highest interpreter. Article 4.1 of this Convention establishes that: "Everyone has the right to have their life respected. This right shall be protected by law and, in general, from the moment of conception. No one can be arbitrarily deprived of his life." This right to life is also enshrined in Article 21 of the Constitution: "Human life is inviolable". Likewise, in civil matters, Article 31 states that "The existence of a natural person is considered to have been born, for all

intentions and purposes, from 300 days before birth."

In Costa Rica, the Constitutional Chamber (Chamber) is the highest court, founded to guarantee, among others, the dignity of people. Additionally, it exercises constitutional control over the Costa Rican State and its people. In this way, its decisions are not subject to appeal internally. This constitutional control is limited to that dictated by this Court, so that ordinary Costa Rican legislation is subject to the Court's rulings, since a supra-constitutional right is established by the Constitution itself.

For its part, the Chamber, since its inception in 1989, has been faithful both to the fundamental rights of Costa Ricans and to the protection of the human rights that shelter them, understanding the right to life as a fundamental human right. In this sense, for Armijo, these rights have a dual character, as they are specific to each individual, guaranteeing both individual and collective protection. Likewise, this author mentions that human rights and fundamental rights are often assumed to be synonymous.

The Artavia Murillo Case and Others

In 1995, under the mandate of President José María Figueres Olsen, an executive decree was issued, which approved and regulated IVF in CR, among others, establishing that it is authorized only between spouses and the use of a maximum of six eggs per patient in the treatment cycle.

On April 7, 1995, Hermes Navarro del Valle filed an action of unconstitutionality against that decree, arguing that each embryo discarded is a human person and that the right to life is inherent to every human person. Navarro concludes that fertilized eggs are human persons, whose right to life cannot be taken away or diminished. On May 16 of the same year, the Chamber proceeded with this action, which was resolved in March 2000.

In January 2001, Gerardo Trejos presented a petition to the Commission alleging the international responsibility of the Costa Rican State, a case known as Artavia Murillo et al. In it, he argues that reproductive rights are fundamental rights; he also states that IVF does not threaten human life and that reproductive rights take precedence over all others. Trejos argues

that private and family life are fundamental rights, discriminated against by the resolution of the Chamber by prohibiting couples from procreating .

In February 2001, the petition was received, and the Commission opened the case, informing the State of the resolution and giving it three months to make a decision. The State alleges that the action is inadmissible and claims to be in accordance with Article 4(1) of the Convention . In the counter-response, Trejos reiterates his initial and broad request that must be compared with Article 32 of the Convention . After due process, in 2004, the Commission declared admissibility and competence and, in turn, resolved as inadmissible the claims of some articles mentioned by the petitioner Trejos, and admitted Articles 1, 2, 11, 17, and 24 of the Convention for study .

The Commission analysed the case with the respective reports requested from the State and resolved, in 2010, in the report on the merits , that the State violated the rights enshrined in Articles 11(2), 17(2), and 24 of the Convention in relation to Articles 1(1) and 2 under study. In addition, it recommends lifting the prohibition along with harmonizing the legislation with the violated articles and compensating the victims for the damages caused.

When CR failed to comply with these recommendations, after three extensions, the Commission referred the case to the Court in 2011. In 2012, it resolved, with four votes in favor and one dissenting vote for articles 5.1, 7, 11.2 and 17.2, in relation to the article. 1.1 of the Convention. The Court condemns CR to eliminate both the prohibition of IVF and any impediment to access to this technique.

Costa Rica once again failed to comply (by not taking any measures imposed by the Court) from 2012 to 2015. Through Executive Decree No. 39210-MP-S in 2015, IVF was approved again. Then, an Action of Unconstitutionality was filed against this decree before the Chamber, which was resolved in 2016, and this decree was annulled as unconstitutional. Given this decision of the Chamber, the Court resolves that Executive Decree No. 39210-MP-S remains in force.

In both judgments of the Court, both that of 2012 and that of 2016, there is a dissenting vote by Judge

Eduardo Renato Vio Grossi, in the first he reiterates the importance of putting at stake the right to life and the beginning of it. Judge Vio Grossi expresses his concern that it is the Court that defines the beginning of life, and stresses that it is the States that must regulate the normative issue, not the Court, since this affects the entire Inter-American Human Rights System. In the 2016 dissenting opinion, this judge concluded that the court had violated two articles of the Convention and breached the norms of Customary International Law by intervening in Costa Rica's internal controversy.

The Legal Reification of the Human Embryo

The Court affirms that, a) the right to life is not absolute (para. 258), b) that “the embryo cannot be understood as a person for the article. 4.1”, c) “Implementation, within the meaning of Article. 4.1, takes place from the moment the embryo is implanted in the uterus”, d) “in general” is understood to mean that the protection of the right to life is not “absolute” but is “gradual and incremental” (para. 264), so that the rights referred to in the Convention are from implantation.

The Court defines two clear moments in embryonic development: fertilization of the egg by a sperm and implantation (para. 186). He also states that there is no consensual definition of the moment of the beginning of life and, therefore, he decides to make his own analysis. Moreover, it does not accept that metaphysical attributes define the question of the beginning of life, nor that fertilized eggs are a full (human) life (para. 185). Instead, it argues biological issues, such as the null chances of the embryo living if it is not implanted, the chemical changes detectable in the woman after implantation, and accepts this as sufficient “scientific evidence” to decide that life begins at the moment of implantation (para. 187).

The terms fertilization and conception have been universally adopted as synonyms; these terms refer to the union of the female and male gametes that inaugurate a new life, with it the corporeality and the concept of person begin. The fertilization of an egg by a sperm is a fundamental biological fact that determines the beginning of a life, to deny this biological reality is to deny the validity of the facts demonstrable by scientific methods. A legal differentiation between fertilization and conception does not change the nature of

the scientific fact of the beginning of human life, since life is a physiological process without pauses.

For their part, the terms “person” and “human being” are understood as synonyms, both for the Convention and for the American Declaration, for the Chamber the embryo is “person” and is “human being”, but the Court affirms that it is not feasible for the embryo to be the holder and exercise the rights as a “person” and as a “human being”, since it points out that conception occurs in the woman’s body (para. 186) in such a way that the a pregnant woman is the holder of the right, not the embryo (para. 222), so in its “historical” interpretation, the Court states that “it is not appropriate to grant the status of person to the embryo” (para. 223).

The Court omits the full and natural rights of the non-nested human embryo and leaves it in limbo, objectified, protected, but without the right to life. Nor does it recognize the human status of nested embryos, because it distances the interest of safeguarding prenatal life from the right to life (para. 260). Thus, the human embryo is not a person according to the interpretation of Article 4.1 of the Convention.

For Adriasola , it is clear that the embryo is not a person from the legal perspective of the Inter-American System of Human Rights, it is not a subject of law or holder of a right to life, consequently, it does not have the dignity of the human person. He has, according to this author, a dignity conferred; therefore, it is difficult to reach an agreement on the minimum moral standard of protection, since his dignity would not be intrinsic but rather subordinate. Barker , for his part, affirms that, since Costa Rica is the maximum protector of human rights, it suddenly finds itself a violator of such rights for defending the most basic and fundamental of rights: the right to life itself. Ironically, these rights are inverted by explicitly manipulating the definition of the beginning of life and its right, subordinating it to secondary rights. For Bohórguez and Aguirre , international treaties in relation to human dignity have different intensities when they are applied to “specific cases,” when they have been used in the Court’s resolutions, or as they emphasize when “they were no longer used,” which is why he suggests including the role of the Commission in the analysis. As Mr. Grossi aptly put it,

the Court should not assume the function of the Commission, as it has done.

For Kass , the zygote and early embryonic states are alive, metabolizing, breathing, and responding to changes in their environment; they also divide and grow, so while eggs and sperm are living cells, they do not result in living things, like zygotes, thus starting a living being that is unique in its genetic identity. For Luke , the body is the means to participate in the visible world. The author makes a differentiation between body and corporeality; the former refers to objective reality, while the latter refers to the subject. The body refers to something merely material and corporeality is the reflection of man’s interior.

The embryo before implantation, *ab initio*, has divided several times and has taken its nutrients from its natural environment, the uterus of the surrogate mother, even if it has not been implanted. Once implanted, it will continue to receive nutrients from its mother, as it does during the breastfeeding period after birth, so this argument of the Court lacks any biological reasoning, since it is the natural gestation system of the human species. This means that implantation is only part of the continuous process of embryonic development.

As mentioned in constitutional vote 4423-93, the existence of the human person is inherent to the human person, so that human life is inviolable. It was clearly described by the magistrate judge of the Chamber, who was ironically a judge of the Court in its first formation Rodolfo Piza-Escalante: when a sperm fertilizes an egg, we are facing a new individual. Considering this new individual a human person. So denying that respect to the human person just because they are in their early stages of development implies discrimination based on their age and the presumption that not all human individuals deserve such protection. For his part, Andruet mentions that the right to life should not be conditioned by the age of the person being protected. In this same sense, Spaemann and Odonovan mention that human beings have certain specific attributes to be people, but it is not the attributes that are people, but those who possess them. The concept of person is strictly linked to its inviolability. Therefore, the status of person is the only one that is not conferred by society, but is granted by nature itself.

For its part, Chamber does not admit the objectification of the human person; it questions whether what is scientifically possible is compatible with the norms and principles that protect human life. It also deliberates on the extent to which it can be admitted that the human person is the object or result of technical procedures. The ethical criterion that must prevail, according to the Chamber, is that the human being is not a means, but is worth in himself; in other words, he is an end in himself. This resolution, it affirms that the human embryo is a person from the moment of conception and understands conception from the moment of fertilization.

Rights Conferred

For the Court, the right to life of the embryo is not absolute, but other rights must be weighed, especially that of the mother. To this end, it differentiates between the interest in protecting prenatal life and the right to life, since the interest in protecting the right to life must be harmonized with other non-fundamental rights, “especially that of the mother” (para. 260).

Similarly, for the Court, the prenatal right or legitimate interest in protecting prenatal life is different from the right to life, such a differentiation does not fit within philosophical reasoning, it is simply an illusory question because, even in the worst utilitarian scenario, the human blastocyst is human in origin and potentiality, with an inherent dignity. Still, the Court chose to give it a conferred dignity. In the event of a conflict with the intrinsic dignity of the human being, he will always be at a disadvantage.

The Court mentions that the rights to life of the unborn are rights conferred, given through the mother, to which Zamora affirms that the Court dictates an unappealable, absolute judgment, supplants science, “ventures for the least restrictive thesis regarding the defense of life.” The Court only reviews and points out what assists it, but does not take into account the counterparty. In an obvious and forced way, it accommodates the legal machinery and is biased, opting “to give priority to the dictation of its particular ideological criteria”, as Zamora mentions.

As early as 1987, Bonnicksen claimed that IVF was a matter of technology for women and, as such,

should be viewed from a political and women’s rights perspective. Upon reviewing the six examples provided by the Court to justify IVF, it is observed that there are only three examples from ratifying member countries: Colombia, Argentina, and Mexico. All correspond to examples of abortion for exceptional causes, and none refer to the embryo (paras. 260-262). This interpretation is not legitimate and on the contrary it is corruption of the law because it degrades man and his mutual coexistence, in this sense good or evil does not depend on the vote of the majority, since there would be no constant norms in time and everything would be relative to societies and time.

Abuse is not Use, but Corruption

The rights of the embryo are acquired gradually and incrementally, as embryonic development takes place (para. 264). The Court, referring to the Commission, affirms that there is international recognition of the “concept of gradual and incremental” (para. 163), moreover, it considers that the widespread practice of IVF in member countries is “associated with the principle of gradual and incremental protection”, and concludes that since such practice is permitted, the embryo cannot be understood as a person (para. 256). Having accepted that the protection of unborn life is not absolute but gradual and incremental and relative to other rights, it is concluded that the phrase “in general” in the article. 4.1 refers to the protection of other rights, gradual and incremental, of the prenatal stages (para. 264), leaving the unborn child without absolute protection.

The court interprets the word “in general” as a synonym for “not in all cases” (para. 264) very different from the Royal Spanish Academy of Language (RAE), which accepts “in general” as an expression so as not to “specify anything”. It is a new interpretation in the law of unborn life, in “general” it is not taken in its literal sense, which would be comprehensive, but as “exclusive”, that is, sometimes yes, but sometimes not.

For the Court, the embryo is “something” not “someone”, since it does not have a full life, it is not a person, it cannot be understood as a human being, so that, by stripping the embryo of these attributes, it does not fit within “anyone” (Article 4.1, of the Convention) because according to the RAE, the word “nobody”

refers to any person. Thus, the dignity of the unborn child has been stripped without specifying when he or she can become a person (para. 264), so the Court accepts the thesis that protecting the right to life is not the same as guaranteeing the right to life (para. 311).

The status of the human person is not something that can be acquired gradually, just like corporeality, specificity and dignity. Interpreting a custom and redefining a phrase as “in general” and accommodating it to an interpretative criterion constitutes in itself an abuse, so the right to life is not something that is acquired gradually or incrementally, since it is either something you have or you do not have, so it should not be conditioned to age or stage of development.

The Principle of Proportionality and in Dubio Pro Embrio

For the Court, there is no disproportionality in the death of embryos in IVF, as pointed out by the Chamber (para. 313). In response to the Chamber’s argument on the disproportionality of embryo loss in IVF, the Court admits that, after consulting experts, it is very difficult to know how many embryos are lost naturally. It states that it is not up to it to know how many embryos are lost, “to know that embryos are lost both in vitro and in vitro as in the womb is sufficient” for the Court (para. 309). However, this court notes a statement by an expert who points out that, naturally, no more than two or three embryos out of ten manage to survive, which is a resounding contradiction to his own statements in the sense that there is no way of knowing how many embryos are lost in natural fertilization (para. 310).

What is clear is that there is no way to know how many embryos are lost naturally, because, through current pregnancy diagnosis techniques, they are not detectable in the first days. Since, in the face of doubt, about the protection of a human right, such as respect for unborn human life, the interpretation to be applied must be the most restrictive towards the protection of the right (in dubio pro embrio) and in this case, the most restrictive must be the risk of embryonic deaths through IVF, as argued by the Chamber.

Conclusion

Accepting the Court’s ruling is not the difficulty; that is part of the legal order, but, in this specific case, the Court dictates the way in which a certain judgment should be made. The Court annuls a resolution of the Chamber and, with effect, an executive decree, which is an intrusion into the domestic legal system, as expressed by Judge Vio Grossi, in the sense that the Court is assuming a normative function that belongs to the Commission [1-10].

A vital affirmation is that the right to life is fundamental and absolute, *iuris et de iure*, it is not an intermittent right, relative to that of the mother, of autonomy, of family life or private life as the judges have insisted. It is not possible to acquire it gradually and incrementally, the right to life of the embryo is inherent in its very existence, *lato sensu*, as a human being in origin and end. The Court did not consider that Article 4.1 of the Convention was violated, but rather the right of women to have children, so that to justify this right, it had first to strip the embryo of its human dignity, disregarding it as a person [11-15].

This analysis reveals that, in its argumentation, the Court objectifies the human person and accommodates biased opinions in its favor, thereby determining, within a mixture of “scientific facts” and “jurisprudence”, the biological and legal status of the human embryo. The Court has relativized the supreme right to life. It equates it with other non-fundamental rights, which it ennobles above the right to life, objectifying not only the non-implanted embryo, but also intrauterine life in general [16-24].

This brief shows that the Court has ignored and discredited any biological and philosophical conception that does not favor it to interpret the right to life, accepting specific scientific literature, as sufficient and absolute evidence, to decide on the biological fact of the moment of the beginning of human life, of the number of embryos that are lost naturally, on the continuity of the human body and of nascent human life as a biological and ontological reality which is possessed or not possessed, since the body is a biological unit and a continuum [25-29].

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