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# Inverting Human Rights: The Inter-American Court versus Costa Rica

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## ARTICLES

# Inverting Human Rights: The Inter-American Court versus Costa Rica

Robert S. Barker\*

*Costa Rica has for many years been deeply and genuinely committed to the worldwide rule of law and, in particular, to the protection of human rights through the inter-American legal system and to the jurisprudence of the Inter-American Court of Human Rights.*

*In the year 2000 Costa Rica's Constitutional Chamber declared unconstitutional the country's program of in-vitro fertilization, primarily because the program violated the right to life as guaranteed by the national Constitution and by international conventions, in that the in-vitro fertilization process exposed large numbers of embryos to death, as only a very small percentage of in-vitro fertilizations resulted in live births.*

*The following year a Costa Rican citizen brought proceedings against his country before the Inter-American Commission on Human Rights, arguing that the decision of the Constitutional Chamber violated the right of privacy, the right to raise a family, and other rights guaranteed by the American Convention on Human Rights. The Inter-American Commission agreed with the complainant, and, after unsuccessful attempts to negotiate a change in Costa Rica's policy, referred the matter to the Inter-American Court of Human Rights.*

*In 2012, the Inter-American Court, by vote of five-to-one, decided that the 2000 decision of Costa Rica's Constitutional Chamber was a violation by Costa Rica of the American Convention on Human Rights.*

*The work that follows analyzes and evaluates the decisions of the Constitutional Chamber and the Inter-American*

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*Court, and discusses the juridical aftermath of those decisions.*

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## I. INTRODUCTION

For many years, Costa Rica has been deeply and strongly committed to the worldwide rule of law and, in particular, to the protection of human rights through the Inter-American juridical system. Costa Rica abolished its army in 1948,<sup>1</sup> and its constitution prohibits its re-establishment.<sup>2</sup> The Constitution also provides that the country's international agreements prevail over its statutes.<sup>3</sup> Costa Rica was the first country to ratify the American Convention on Human Rights,<sup>4</sup> and the Constitutional Chamber (*Sala Constitucional*) of the Costa Rican Supreme Court has held that the Inter-American Court of Human Rights is the definitive interpreter of the American Convention on Human Rights, and that that Court's interpretations

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<sup>1</sup>RALPH LEE WOODWARD, JR., *CENTRAL AMERICA: A NATION DIVIDED*, 227 (Thomas E. Skidmore ed. 3d ed. 1999) (“Figures made notable structural changes during the period of junta. Most significantly, he began the process of dissolving the Costa Rican army.”).

<sup>2</sup> “The Army as a permanent institution is abolished. There shall be the necessary police force for surveillance and the preservation of the public order. Military forces may be organized only under a continental agreement or for the national defense; in either case, they shall always be subordinate to the civil power; they may not deliberate or make statements or representations individually or collectively.”

Constitución Política de la República de Costa Rica de 1949 y Sus Reformas [Constitution], art. 12 (Costa Rica) (Georgetown University Political Database of the Americas), available at <http://pdba.georgetown.edu/Constitutions/Costa/costa2.html>; CONSTITUTION OF THE REPUBLIC OF COSTA RICA, November 7, 1949, art. 12 (Comisión Nacional para el Mejoramiento de la Administración de Justicia trans., 2d ed. 2001) [hereinafter Costa Rican Constitution] (unless otherwise indicated, all references to the Costa Rican Constitution are to the English language text of this official bilingual edition).

<sup>3</sup> “The power to legislate resides in the people, which delegates this power, by means of suffrage, to the Legislative Assembly. Such a power may not be waived or subject to limitations by any agreement or contract, either directly or indirectly, except in the case of treaties, in accordance with the principles of International Law.” Costa Rican Constitution, *supra* note 2, at art. 105; “Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have authority over the laws from enactment or from the date that they designate.” Costa Rican Constitution, *supra* note 2, at art. 7.

<sup>4</sup> The Convention was signed in November 1969. Costa Rica deposited its instrument of ratification with the General Secretariat of the Organization of American States on April 8, 1970. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 17955 U.N.T.S. 1 [hereinafter American Convention].

are binding on Costa Rican courts.<sup>5</sup> Indeed, in 1992, Costa Rica's Constitutional Chamber invalidated a provision of the country's Constitution as contravening the American Convention on Human Rights.<sup>6</sup> The country's commitment to the international legal order is so thorough, that in 2004, the Constitutional Chamber determined that declarations by the country's President and Foreign Minister giving moral and diplomatic (but not material) support to the anti-Saddam coalition then forming against Iraq's dictator, violated Costa Rica's permanent neutrality – a principle of constitutional status – and the country's obligation “not to associate its foreign policy with belligerent actions outside of, and even if parallel to the United Nations system.”<sup>7</sup> The Constitutional Chamber then ordered the Executive Branch to remove Costa Rica's name from the list of countries supporting the anti-Saddam coalition.<sup>8</sup>

It is against this background of deep commitment to international, and particularly Inter-American law, and, indeed, in keeping with that commitment, that Costa Rica's Constitutional Chamber, on March 15, 2000, asserted the right to life<sup>9</sup>, as guaranteed both by the national Constitution and by the American Convention on Human Rights, only to be told in 2012, by the Inter-American Court of Human Rights, that the Chamber's defense of the right to life was

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<sup>5</sup> In a 1995 decision, the Constitutional Chamber held that: . . . if the Interamerican Court of Human Rights is the natural organ for the interpretation of the American Convention on Human Rights . . . then the force of the decision interpreting the convention and judging national laws in the light of the norm [of the American Convention], be it in a contentious case or a mere advisory opinion, will have . . . the same value as the norm interpreted. Sala Constitucional, Voto No. 2313-95, de las 16:18 horas del 9 de mayo de 1995 (May 9, 1995), slip op. at 7.

<sup>6</sup> Sala Constitucional de la Corte Suprema de Justicia, Voto No. 3435-92 de las 16:20 horas del 11 de noviembre de 1992. For additional discussions of the relationship between International Law (particularly Inter-American law) and Costa Rican domestic law, see ROBERT S. BARKER, CONSTITUTIONAL ADJUDICATION: THE COSTA RICAN EXPERIENCE, 142-47, 149-50 (Vandeplas Publishing 2008).

<sup>7</sup> Sala Constitucional, Res. No. 2004-09992, de las 14:31 horas del 8 de septiembre de 2004 (Sept. 8, 2004), slip op. at 50-51.

<sup>8</sup> *Id.*

<sup>9</sup> Sala Constitucional, Res. No. 2000-02306, de las 15:21 horas del 15 de marzo de 2000 (Mar. 15, 2000) [hereinafter Sala Constitucional, Res. No. 2000-02306].

itself a violation of various other human rights guaranteed by the American Convention.<sup>10</sup> What follows here is an explanation and evaluation of this human rights controversy within the Inter-American legal system.

## II. THE IN VITRO FERTILIZATION DECREE

On February 3, 1995, the Government of Costa Rica, by Executive Decree, authorized the practice of in vitro fertilization. The Decree defined in vitro fertilization as “all those artificial techniques in which the union of the ovule and the spermatozoid is achieved by a form of direct manipulation of the generating cells under laboratory conditions.”<sup>11</sup> The decree provided further:

**Article 9.** – In cases of *in vitro* fertilization, fertilization of more than six of the patient’s ova per treatment cycle is strictly prohibited.

**Article 10.** – All ova fertilized in a treatment cycle shall be transferred to the patient’s uterine cavity; disposing of or destroying fertilized ova or preserving them to be transferred into the same patient in later cycles or into other patients, is strictly prohibited.

**Article 11.** – Manipulation of the embryo’s genetic code, or any other experimentation on the embryo, is strictly prohibited.

**Article 12.** – Marketing either homologous or heterologous reproductive cells – eggs and sperms – to be used in treating patients by means of assisted reproductive techniques, is strictly prohibited.<sup>12</sup>

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<sup>10</sup> *Id.* at ¶ 36.

<sup>11</sup> The decree was signed by the President of the Republic, José M. Figueres Olson, and the Minister of Health, Herman Weinstok. Exec. Order No. 24029-S, art. 2 [Costa Rica Executive] [Ministry of Health].

<sup>12</sup> *Gretel Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, Case 12.361, Inter-Am. Comm’n H.R., Report No. 85/10, ¶41 (2010) [hereinafter *In Vitro Fertilization v. Costa Rica Report*].

### III. THE DECISION OF THE CONSTITUTIONAL CHAMBER

On April 7, 1995, Hermes Navarro del Valle, a Costa Rican citizen, challenged the Decree by bringing an action of unconstitutionality before the country's Constitutional Chamber.<sup>13</sup> While the action of unconstitutionality was pending, Navarro del Valle brought an action of amparo, also before the Constitutional Chamber. The Chamber consolidated the two actions. The principal argument of the petitioner, Navarro del Valle, was that the Executive Decree, by permitting the destruction of human life – in that a large percentage of the human embryos created by the procedure are in fact discarded or otherwise put beyond the protection of the law – violated both the Costa Rican Constitution and various international (including Inter-American) conventions to which Costa Rica was then (and today remains) a party.<sup>14</sup>

More specifically, and of particular relevance to this case, the petitioner invoked Article 21 of the Costa Rican Constitution, which provides that “[h]uman life is inviolable,”<sup>15</sup> and the following provisions of the American Convention:

#### Article 4. Right to Life

1. 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.<sup>16</sup>

#### Article 1. Obligation to Respect Rights

2. For the purposes of this Convention, ‘person’ means every human being.<sup>17</sup>

Further, Petitioner invoked Article 6 of the International Covenant on Civil and Political Rights, which provides, in pertinent part:

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<sup>13</sup> *Id.* at ¶ 39.

<sup>14</sup> *Id.* at ¶ 40 & 43.

<sup>15</sup> Costa Rican Constitution, *supra* note 2, at art. 21.

<sup>16</sup> American Convention, *supra* note 4, at art 4.1.

<sup>17</sup> *Id.* at art. 1.1.

“Every human being has the inherent right to life. This right shall be protected by law. No one should be deprived of his life.”<sup>18</sup>

As evidence, Petitioner presented reports of the IV, or “Melbourne,” Conference on In Vitro Fertilization as well as various other international conferences, all of which showed that only a very small percentages of in vitro fertilizations resulted in live births.<sup>19</sup>

On March 15, 2000, the Constitutional Chamber decided, by vote of five-to-two, that the Executive Decree in question violated Article 21 of the Costa Rican Constitutional and Article 4 of the American Convention on Human Rights.<sup>20</sup>

The Chamber was convinced that the practice of in vitro fertilization not only did violence to human life, but that the statistics adduced by the petitioner showed the inability of government regulation to avoid such results, and stated that the protective provisions of the Costa Rican Executive Decree could not be expected to prevent the enormous loss of life associated with in vitro fertilization.<sup>21</sup>

The reasoning of the Constitutional Chamber is summarized in the following excerpts from its opinion, delivered by its President, Magistrate Rodolfo E. Piza Escalante:

When the spermatozoid fertilizes the egg, that entity is converted into a zygote and from there to an embryo. The most important characteristic of this cell is that everything that will permit it to evolve to the individual is already there in place, all the information necessary and sufficient to define the characteristics of a new human being appear united in the meeting of the twenty-three spermatozoid chromosomes and the twenty-three ovular chromosomes . . . .In short, what has been conceived is a person, and we are dealing with a living being, with the right to be protected by the legal order.<sup>22</sup>

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<sup>18</sup> International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 6 § 1.

<sup>19</sup> Sala Constitucional, Res. No. 2000-02306, *supra* note 9.

<sup>20</sup> *Id.* at 15.

<sup>21</sup> *Id.* at 1-2.

<sup>22</sup> *Id.* at 11.

The Chamber proceeded to find that protection in various “international instruments in effect in Costa Rica and [the country’s] Political Constitution, beginning with the American Declaration of the Rights and Duties of Man: “Every human being has the right to life, liberty, and personal security.”<sup>23</sup>

The Chamber then quoted Article 1.2 of the American Convention on Human Rights, which declares that “person” means “every human being.”<sup>24</sup> The Chamber also quoted Article 3, which provides that “every person has the right to recognition as a person before the law.”<sup>25</sup> The Chamber further stated: “There do not exist human beings of any other juridical category; we are all persons and the first thing that our juridical personality demands of others is the recognition of the right to life, without which the [juridical] personality cannot be exercised.”<sup>26</sup>

The text of the Pact of San José [that is, the American Convention on Human Rights] points out in Article 4.1: “Every person has the right to have his life respected. This right will be protected by law and, in general, from the moment of conception. No one may be deprived of life arbitrarily.”<sup>27</sup>

The heart of the Chamber’s opinion is the following:

[T]he application of the Technique of In Vitro Fertilization and Embryonic Transfer, even with . . . [the restrictions contained in the Executive Decree] is an attack on human life. The human embryo is a person from the moment of conception, and thus cannot be treated as an object for purposes of research, be subjected to a selection process, preserved by freezing, and, what is fundamental for the Chamber, it is not constitutionally legitimate that it be exposed to a disproportionate risk of death.<sup>28</sup>

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<sup>23</sup> American Declaration of the Rights and Duties of Man (Approved by the Ninth International Conference of American States, Bogotá, Colombia, May 2, 1948), art. I.

<sup>24</sup> American Convention, *supra* note 4, at art. 1.2.

<sup>25</sup> *Id.* at art. 3.

<sup>26</sup> *Id.*

<sup>27</sup> Sala Constitucional, Res. No. 2000-02306, *supra* note 9, at 12.

<sup>28</sup> *Id.* at 14.

In addition to deciding that the in vitro fertilization decree violated the right to life as guaranteed by the Costa Rican Constitution and the American Convention on Human Rights, the Constitutional Chamber concluded that the Decree violated the constitutional principle of *reserve legal*, that is, the principle that norms regulating the exercise of fundamental rights may be enacted only by statute passed by the Legislative Assembly, and not, as was the case here, by a decree promulgated by the President and a Cabinet minister.<sup>29</sup>

Magistrates Carlos M. Arguedas and Ana Virginia Calzada dissented. Their opinion, which cited no legal authority, constitutional or international, invoked rights to human reproduction, to self-determination, and to found a family, and concluded that the safeguards contained in the Executive Decree (especially the prohibition of fertilizing more than six eggs per patient per cycle, and the requirement that all fertilized eggs be implanted in the uterus of the mother) mean that the unsuccessful transplantations are the result of natural circumstances, and not of any attack on human life.<sup>30</sup>

The Constitutional Chamber, which is one of the four chambers of Costa Rica's Supreme Court of Justice, is the final national authority on questions of constitutional law and international human-rights treaty law.<sup>31</sup>

#### IV. THE DECISION OF INTER-AMERICAN COURT OF HUMAN RIGHTS

On January 19, 2001, Gerardo Trejos Salas, a Costa Rican citizen, submitted a petition to the Inter-American Commission on Human Rights. The petition asked for the Commission to bring an action against Costa Rica before the Inter-American Court of Human

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<sup>29</sup> *Id.* at 9-10. The principle of “*reserva de ley*,” or “*reserva legal*” is that, in Costa Rica, norms limiting the exercise of fundamental rights may be imposed only by statutes duly enacted by the Legislative Assembly, and not by other means, such as Executive Decrees. This principle is based on the Constitutional Chamber's interpretation of Article 39 of the Constitution. *See, e.g.,* Sala Constitucional, Voto No. 3173-93 slip op. at 3-4 (July 6, 1993).

<sup>30</sup> Sala Constitucional, Res. No. 2000-02306, *supra* note 9, at 15-16.

<sup>31</sup> Costa Rican Constitution, *supra* note 2, at art. 10; Ley de la Jurisdicción Constitucional [Law of Constitutional Jurisdiction], Ley No. 7135 de octubre de 1989 (Oct. 11, 1989), arts. 4, 13, 14.

Rights based on the theory that the decision of Costa Rica's Constitutional Chamber in the in vitro fertilization case constituted a violation by Costa Rica of various provisions of the American Convention on Human Rights. The complaint was brought on behalf of eighteen Costa Rican individuals. They alleged that following the Constitutional Chamber's absolute ban on the practice of in vitro fertilization, they were injured by their inability to conceive children.

After receiving documentary evidence and live testimony, the Inter-American Commission on Human Rights, in its Report dated July 15, 2010, concluded that "the Costa Rican State violated the rights recognized in articles 11(2), 17(2), and 24 of the American Convention on Human Rights, in relation to the obligations undertaken in articles 1(1) and 2 thereof." After efforts to reach a voluntary settlement were unsuccessful, the Commission, by letter of July 29, 2011, submitted the case, now designated "Case No. 12.361, *Gretel Artavia Murillo, et al (In Vitro Fertilization) Costa Rica*, to the jurisdiction of the Inter-American Court of Human Rights "in order to get justice for the victims." ("Victims" was the term used by the Commission, and later by the Inter-American Court of Human Rights to identify the eighteen persons on whose behalf Mr. Trejos Salas brought his petition.)<sup>32</sup>

The provisions of the American Convention alleged by the Commission to have been violated by Costa Rica read as follows:

#### Article 11. Right to Privacy

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

#### Article 17. Rights of the Family

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

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<sup>32</sup> *In Vitro Fertilization v. Costa Rica*, letter of July 29, 2011, available at <https://www.cidh.oas.org/demandas/12.361Eng.pdf>.

principle of nondiscrimination established in this Convention.

#### Article 24, Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

#### Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

#### Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.<sup>33</sup>

It is worth noting that during the proceedings before the Inter-American Commission (which, of course, preceded the submission of the matter to the Inter-American Court), Costa Rica contended that the Constitutional Chamber's decision did not prohibit *all* in vitro fertilization in Costa Rica; that is, that if in vitro fertilization were undertaken under circumstances in which human embryos were not subjected to a disproportionate risk of death, discarding, or other inappropriate treatment, nothing in the Constitutional Chamber's decision would prohibit in vitro fertilization. In response, the

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<sup>33</sup> American Convention, *supra* note 4, at arts. 1, 2, 11, 17, 24.

petitioner and the victims argued, and presented evidence to the effect that such non-risky in vitro fertilization was not practicable. The Commission agreed with petitioner's argument (as did, we shall see hereinafter, the Court), thus effectively affirming the Costa Rican Constitutional Chamber's conclusions that in vitro fertilization necessarily creates a great risk to pre-born human life.<sup>34</sup>

On November 28, 2012, the Inter-American Court decided, by vote of five-to-one, that the Costa Rican Constitutional Chamber's in vitro fertilization decision constituted a violation by Costa Rica of Articles 5.1, 7, 11.2, and 17.2, in relation to Article 1.1 of the American Convention, to the injury of the persons named in the complaint as victims.<sup>35</sup> Articles 5.1 and 7 of the American Convention, not hereinabove quoted, provide as follows:

#### Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.

#### Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.

[The remainder of article 7 deals with criminal procedural rights and the prohibition of imprisonment for debt, matters clearly unrelated to the Costa Rican case.]<sup>36</sup>

In framing the issues, the Court established a setting in which the right to life, the essence of the Constitutional Chamber's decision, was submerged, indeed drowned, in an ocean of what are, at most, secondary rights. The Court said: "[T]he present case deals with a particular combination of different aspects of private life, which relate to the right to found a family, the right to physical and

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<sup>34</sup> *In Vitro Fertilization v. Costa Rica Report*, *supra* note 12, at ¶43.

<sup>35</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶317 (Nov. 28, 2012).

<sup>36</sup> American Convention, *supra* note 4, at arts. 5, 7.1.

mental integrity, and specifically, the reproductive rights of persons.”<sup>37</sup>

The right to life becomes, in the Court’s framework, “the right to private life,” which, in turn, is related to (i) reproductive autonomy, and (ii) the access to reproductive health services, which, then involves the right of access to the medical technology necessary for the exercise of that right.<sup>38</sup> The Court continues:

The right to reproductive autonomy is also recognized in article 16(e) of the Convention on the Elimination of all forms of Discrimination against Women, according to which women enjoy the right to decide freely and responsibly the number of her children and the interval[s] between their births, and to have access to information, education, and the methods that permit them to exercise these rights.” This right is injured when the methods by which a woman may exercise the right to control her fertility are obstructed. Thus, the protection of the private life includes respect for the decisions to become father or mother, including the decision of the couple to become genetic parents.<sup>39</sup>

In the midst of such discussion, the right to life of the unborn child becomes, at best, subordinate to the wishes of others; at worst, it becomes irrelevant.

The Court dismissed the Constitutional Chamber’s conclusion that life begins at conception by stating that there are differences of biological, medical, ethical, philosophical, and religious opinion on this question, and there is no international juridical consensus as to when human life begins.<sup>40</sup> However, according to the Court, since the chances of an embryo surviving before implantation are nil, human life does not begin until implantation.<sup>41</sup> The Court concludes

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<sup>37</sup> *Artavia Murillo et al. (“In Vitro Fertilization”) v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶144 (Nov. 28, 2012).

<sup>38</sup> *Id.* at ¶146.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at ¶174-186.

<sup>41</sup> *Id.* at ¶186-187.

that the absence of contrary precedents in the Inter-American System confirms that it is not proper to confer the status of person on the embryo.<sup>42</sup>

The court's analysis here is reminiscent of that of the United States Supreme Court's treatment of personhood in *Roe v. Wade*,<sup>43</sup> in which the Court concluded that there were differences of opinion on the subject, and that since all constitutional references to "persons" were to those already born, the Court could not conclude that an unborn child was a person. The Court, while disclaiming any attempt to decide whether an unborn child was a person endowed with rights, proceeded on the implicit but conclusive presumption that the unborn child has no rights. Both cases (*In Vitro Fertilization v. Costa Rica* and *Roe v. Wade*) are strikingly similar to the infamous case of *Dred Scott v. Sandford*,<sup>44</sup> in which the United States Supreme Court concluded that since all constitutional references to "citizens" referred to persons who were in 1787 white, a black person was not and could not become a citizen for constitutional purposes.

#### V. THE DISSENTING VOTE OF JUDGE VIO GROSSI

Judge Eduardo Vio Grossi was the only dissenting vote on the Inter-American Court.<sup>45</sup> His opinion begins where the Court's opinion should have begun; that is, with the right defended by the Costa Rican Constitutional Chamber in its decision – the right that necessarily precedes all other human rights and that is the first right guaranteed by the American Convention – the right to life.<sup>46</sup> Article 4.1 of the American Convention, set forth hereinabove, merits repetition:

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<sup>42</sup> *Id.* at ¶223.

<sup>43</sup> *Roe v. Wade*, 410 U.S. 113, 156-158 (1973).

<sup>44</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 403-19 (1857).

<sup>45</sup> *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, 1-21 (Grossi, E., dissenting) (Nov. 28, 2012), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf) [hereinafter *In Vitro Fertilization, Grossi*].

<sup>46</sup> *Id.* at 6.

#### Article 4. Right to Life

1. 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.<sup>47</sup>

Judge Vio Grossi analyzes the words, “and, in general”<sup>48</sup> (which the Court’s majority reads as creating an exception to the protection afforded human life by Article 4.1) and shows, convincingly, that: “[T]he expression ‘and, in general,’ makes no reference to an exception, to an exclusion. Quite the opposite, the expression is inclusive. It makes applicable the obligation, to protect the right to life of every person by law, from the moment of conception.”<sup>49</sup>

As for the term “conception” that is used in article 4.1 and interpreted by the majority to exclude those not implanted, Judge Vio Grossi reviews the general (Spanish) meaning of the word at the time of the signing of the American Convention<sup>50</sup> and concludes that:

[T]he term ‘*conception*’ employed in article 4.1 of the Convention should be juridically interpreted, above any other consideration, as the fertilization of the egg by the spermatozoid. That and nothing else, is what was agreed to in 1969, upon the signing of the [American] Convention [on Human Rights] and that is still juridically the sense of the term . . . .<sup>51</sup>

Judge Vio Grossi reviews the jurisprudence of the Inter-American Court and concludes that its decision in the present case constitutes a breach of precedent in that it limits the scope of the right to life, limits the applicability of Article 4.1, and subjects the right to life to various other, often undefined, considerations.<sup>52</sup> Judge Vio Grossi subjects his own interpretations, as well as those of the majority, to careful, thorough examination.

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<sup>47</sup> American Convention, *supra* note 4, at art. 4.1.

<sup>48</sup> *In Vitro Fertilization*, Grossi, *supra* note 45, at 5-6.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> *Id.* at 12-14.

<sup>51</sup> *Id.* at 9.

<sup>52</sup> *Id.* at 13-21.

Perhaps the essence of the dissent is expressed early in Judge Vio Grossi's opinion, when he states that the majority, by relying on other rights guaranteed elsewhere in the Convention, has "minimized or subordinated everything that has to do with the "*right to life*" to other . . . rights . . . This has a very relevant practical effect, in the final analysis, of giving a privileged position to those other rights over the "*right to life*."<sup>53</sup>

The next question, judicially speaking, is what is the legal effect of the decision of the Inter-American Court?

The decision of the Inter-American Court has provoked considerable discussions in Costa Rica; however, at this writing, no legislative action has been taken in response to the Court's judgment.<sup>54</sup>

#### VI. ENFORCEMENT OF THE INTER-AMERICAN COURT'S DECISION

On December 20, 2013, Boris Molina Acevedo and other Costa Rican citizens who had been successful petitioners (identified as "victims") in the proceedings before the Inter-American Court, brought an amparo proceeding in Costa Rica's Constitutional Chamber, invoking the judgment of the Inter-American Court and asking the Constitutional Chamber to order the appropriate Costa Rican governmental officials to comply with the judgment of the Inter-American Court. The Constitutional Chamber, by a vote of five-to-two, rejected the petition.<sup>55</sup> The opinion of the Chamber, written by Justice Luis Fernando Salazar Alvarado, stated *inter alia*:

The judgments of the Inter-American Court of Human Rights have full value in this country; and, in dealing with Human Rights, international instruments '*have not only a value similar to that of the Political Constitution, rather insofar as they confer*

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<sup>53</sup> *Id.* at 4.

<sup>54</sup> For a report on the efforts of some legislators, see Gerardo Ruiz, *Proyecto Sorpresa de FIV Avanza en Ausencia de Detractores*, LA NACIÓN (Sept. 21, 2013), [http://www.nacion.com/nacional/politica/Proyecto-sorpresa-FIV-ausencia-detractores\\_0\\_1365663468.html](http://www.nacion.com/nacional/politica/Proyecto-sorpresa-FIV-ausencia-detractores_0_1365663468.html).

<sup>55</sup> Sala Constitucional, Res. No. 2014-001424 de las 11:40 horas del 31 de enero de 2014 (Jan. 31, 2014).

*greater rights or guarantees to persons, they prevail over the Constitution.*<sup>56</sup>

However, the Chamber noted that the Inter-American Court, in its judgment in the *in vitro* fertilization case, stated that it would itself “supervise full compliance with the Judgment, in the exercise of its powers and in fulfillment of its duties under the American Convention on Human Rights, and will declare the present case concluded once the [Costa Rican] State has complied with the provisions of the judgment.”<sup>57</sup>

The Chamber observed that under the American Convention on Human Rights, and the statute and Regulations of the Inter-American Court, that Court itself is empowered to supervise compliance with its judgments. The Chamber concluded, “the relief requested by the petitioner is not within the scope of the competence of this [*i.e.*, the Constitutional] Jurisdiction, since it is not for this Chamber to provide supervision of compliance with the judgments of the Interamerican Court of Human Rights.”<sup>58</sup>

Magistrate Fernando Castillo Viquez wrote a concurring note,<sup>59</sup> and Magistrates Ernesto Jinesta Lobo and Nancy Hernández López each wrote a dissenting opinion.<sup>60</sup>

The jurisprudence of the Constitutional Chamber concerning the relationship between Costa Rican Constitutional Law, as expressed by the Constitutional Chamber itself, and Inter-American Human Rights Law, as expressed by the Inter-American Court of Human Rights, is extensive, intricate, and, indeed, fascinating; however, most of that jurisprudence is beyond the scope of this article. For now, it is sufficient to note that, according to Costa Rica’s highest judicial constitutional authority, the Constitutional Chamber, the judgment of the Inter-American Court is binding in Costa Rica, but the enforcement of that judgment is not within the competence of the Costa Rican judiciary.

Regardless of the juridical effect of the Inter-American Court’s decision, the political effects are significant and continuing. The

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<sup>56</sup> *Id.* at 3-4 (emphasis in original).

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> *Id.* at 19.

Legislative Assembly has considered various proposals, but has not adopted any legislation in response to the Court's decision and directive. The President of the Republic has said that if the Assembly continues to fail to act, the Executive might deal with the matter by decree.<sup>61</sup> However, any such executive decree would create yet another constitutional controversy. In its 2000 decision, the Constitutional Chamber determined that, in addition to violating constitutional and treaty guarantees of the right to life, the Executive Decree issued by the President and the Minister of Health violated the constitutional principle of "*reserva de ley*" (the constitutional rule that certain matters, such as in vitro fertilization, can be regulated only by a statute enacted by the Legislative Assembly and not by Executive branch action alone). Thus, if Costa Rica's President and the appropriate cabinet minister were to issue a decree providing for, or otherwise regulating in vitro fertilization, the constitutionality of such a decree, whatever its precise content, would be doubtful.

## VII. CONCLUSION

The current controversy is full of ironies. The author of the Costa Rican Constitutional Chamber's opinion on in vitro fertilization, Magistrate Rodolfo E. Piza Escalante, was a Judge of the Inter-American Court of Human Rights from 1979 to 1988 and, indeed, was the first President of that Court, serving in that position from 1979 to 1981. Costa Rica's Constitutional Chamber, which over the past three and a half decades has done more than any other national court to defer to and elevate the jurisprudence of the Inter-American Court of Human Rights, now finds itself characterized by that very Court as a human rights violator. The greatest irony, however, is that an international court assigned to protect human rights ignores, or reduces to insignificance the most basic of human rights -- the right to life; manipulates beyond recognition the explicit treaty definition of that right; and nullifies that right by subordinating it to what are at most, secondary rights.

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<sup>61</sup>Zach Dyer, *Medical Pot, Gay Civil Unions, and IVF Among Costa Rica President's Priorities for Upcoming Legislative Session*, THE TICO TIMES NEWS (July 29, 2015), <http://www.ticotimes.net/2015/07/29/medical-pot-gay-civil-unions-vitro-among-costa-rica-presidents-priorities-upcoming-legislative-session>.

At this writing, Costa Rica has not adopted a plan legalizing in vitro fertilization. Various proposals in the Legislative Assembly have not prospered, and the President has suggested that he will, if necessary, establish in vitro fertilization by decree (despite the obvious problem, identified by the Constitutional Chamber, of *reserva de ley*.) Whatever may be the outcome of the present impasse, events to date raise the large question of whether any country, even a small one with an exemplary record of respect for human rights, will be allowed to persist in the defense of the most basic of all human rights, the right to life.

*Note:* On September 10, 2015, the President of Costa Rica, Luis Guillermo Solís Rivera, the Minister of the Presidency, Sergio Iván Alfaro Salas, and the country's Minister of Health, Fernando Llorca Castro, issued a decree re-establishing in vitro fertilization in Costa Rica and regulating that procedure.<sup>61</sup> The decree expressly acknowledges that it is issued pursuant to the judgment of the Inter-American Court of Human Rights. Does the decree, by its provenance, violate the requirement of *reserva de ley*? Perhaps. However, given the country's elevation of Inter-American human rights law to constitutional status, and the Constitutional Chamber's deference to the Inter-American Court, the decree is likely to withstand such a challenge. In any event, the deleterious effects on human rights of the events to date are likely to remain for some time.<sup>62</sup>

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<sup>62</sup> Decreto No. 39210-MP-S del 10 de Septiembre de 2015.