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# The Lingua Franca of Reproductive Rights: The American Convention on Human Rights and the Emergence of Human Legal Personhood in the New Civil and Commerce Code of Argentina

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THE LINGUA FRANCA OF REPRODUCTIVE RIGHTS: THE  
AMERICAN CONVENTION ON HUMAN RIGHTS AND THE  
EMERGENCE OF HUMAN LEGAL PERSONHOOD IN THE NEW CIVIL  
AND COMMERCE CODE OF ARGENTINA

*Martín Hevia and Carlos Herrera Vacaflor*

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## I. INTRODUCTION

The debate in law around the moment that legal personhood comes into being within a legal order strongly impacts the enjoyment of reproductive and sexual rights of individuals in Latin America. In the courts, for example, this debate, has translated into limits on the exercise of emergency contraception by women or couples, and consequently defining the scope of sexual rights.<sup>1</sup> Similarly, the debate has propelled civil society organizations, such as religious or conservative groups and human rights NGOs, to advocate for a specific determination of when legal personhood begins and what its effects should be on certain practices such as emergency contraception or assisted reproductive techniques.<sup>2</sup> Furthermore, such debates have exposed the disagreements around regulation of this issue between state branches of power in different Latin American countries.<sup>3</sup>

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<sup>1</sup> Martín Hevia, *The Legal Status of Emergency Contraception in Latin America*, 116 INT'L J. OF GYNECOLOGY & OBSTETRICS 87 (2012).

<sup>2</sup> See, e.g., Aníbal Faúndes, Luis Távara, Vivian Brache, & Frank Alvarez, *Emergency Contraception under Attack in Latin America: Response of the Medical Establishment and Civil Society*, 15(29) REPRODUCTIVE HEALTH MATTERS 130 (2007); Fernando Muñoz León, *Morning After Decisions: Legal Mobilization Against Emergency Contraception in Chile*, 21 MICH. J. OF GENDER & L. 123 (2014).

<sup>3</sup> E.g., 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; Corte Suprema de la Justicia [Supreme Court of Justice of Costa Rica] [Constitutional Chamber], Mar. 15, 2000, Sentencia 2000-02306, Exp. 95-001734-0007-CO (the executive orders and the Supreme Court judgment show the

A salient element of these debates is that all the parties, on either side of the ideological spectrum, have structured their claims around a global language that is, to a great extent, entrenched in contemporary politics: the language of (human) rights.<sup>4</sup> The American States, with important exceptions, have entered into a transnational understanding comparable to a lingua franca of human rights adopted as the American Convention on Human Rights.<sup>5</sup> Because all of the State Parties agree to abide and govern through this language of rights within the system, individuals from these American States have discovered an institutional opening for raising rights claims in the state or even international institutions.<sup>6</sup> Notwithstanding this, the use of this language does not amount to a global language of understanding, but rather it offers individuals a vocabulary “to get in the door and then speak[] instrumentally or ethically.”<sup>7</sup>

With a basis in this instrument, the language of rights applied to reproductive health has given place to different dialects framed on ontological or metaphysical perspectives,

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disagreement between the different branches on when legal personhood begins, and hence legal protections and effects on the legal regime of assisted human reproduction. In the case of Costa Rica, while the Executive regulated in vitro fertilization, the Supreme Court judged that the permissibility of this treatment violated the right to life of embryos.).

<sup>4</sup> JÜRGEN HABERMAS, *RELIGION AND RATIONALITY: ESSAYS ON REASON, GOD, AND MODERNITY* 153-54 (Eduardo Mendieta ed., 1st ed. 2002).

<sup>5</sup> American Convention on Human Rights art. 4(1), Nov. 21, 1969, 1144 U.N.T.S. 143 [hereinafter American Convention] (the important exceptions refer to Canada and the United States, stating that while both countries are part of the Organization of the American States, neither has ratified the American Convention).

<sup>6</sup> David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 103 (2002).

<sup>7</sup> *Id.*

which have, in turn, structured the debate on when life begins, generally, in absolute terms. For instance, human embryos have been described as full legal persons entitled to rights, and consequently, legislatures and courts have awarded them full protection of the law, disregarding women's reproductive health rights or minority rights.<sup>8</sup> Conversely, (and simultaneously), these embryos have also been conceptualized, under such dialects, as mere organisms with potential legal claims and no recognized rights at all.<sup>9</sup>

The disagreements around the articulation of these dialects, which are constructed on the basis of the language of human rights, depict a cultural or moral reading of the rights being championed or a moral reading evaluating what should not be considered valuable.<sup>10</sup> In this sense, there are groups that advocate an absolute right to life under a metaphysical or teleological conceptualization.<sup>11</sup> Similarly, there are other groups that advocate, under liberal foundations, that the right to life cannot be recognized whatsoever or, if recognized, it should not enjoy a protection

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<sup>8</sup> For instance, that has been the case in Mexico, where some State constitutions have recently been amended so as to recognize a right to life from conception. See *Contitución Política del Estado Libre y Soberano de Baja California [C.P.B.J.]*, as amended, art. 7, *Periódico Oficial [DO]*, 21 de Marzo de 2014 (Mex.).

<sup>9</sup> See S.T.F. Petition No. 3510, Relator: Carlos Ayres Brito, 29.05.2008, 96, *Diário Da Justiça [D.J.]*, 28.05.2010, 134 (Braz.) (on the constitutionality of the Biosecurity Act, where the Supreme Court recognizes no rights to embryos.).

<sup>10</sup> See, e.g., Jorge Contesse, *Universally Speaking? The Cultural Challenge to Rights and Constitutionalism*, 77 *REVISTA JURÍDICA U.P.R.* 267 (2008).

<sup>11</sup> See, e.g., Ligia M. de Jesús, *Artavia Murillo v. Costa Rica: The Inter-American Court on Human Rights' Promotion of Non-existent Human Rights Obligations to Authorize Artificial Reproductive Technologies*, 18 *UCLA J. OF INT'L L. & FOREIGN AFF.* 275 (2014).

to the detriment of the enjoyment of rights of other affected individuals.<sup>12</sup>

In 2012, as a way of deciding the fate of this debate in the context of Costa Rica, the Inter-American Court of Human Rights (IACtHR) identified that the employment of these dialects had been governing this disagreement and claimed the need for change.<sup>13</sup> The IACtHR, analyzing how to frame the discussion on when human life begins, maintained the following:

Some of these opinions may be associated with concepts that confer metaphysical attributes on embryos. Such concepts cannot justify preference being given to a certain type of scientific literature when interpreting the scope of the right to life established in the Convention, because this would imply imposing specific types of beliefs on others who do not share them.<sup>14</sup>

In its judgment, the IACtHR decided that a reasonable interpretation on when life begins must not impose one particular moral understanding of rights on everyone.<sup>15</sup> On

<sup>12</sup> See, e.g., Fernando Zegers-Hochschild, Bernard M. Dickens, & Sandra Dughman-Manzur, *Human Rights to In Vitro Fertilization*, 123 INT'L J. OF GYNECOLOGY & OBSTETRICS 86, 88 (2013); Bernard Dickens & Rebecca Cook, *The Legal Status of Embryos*, 111 INT'L J. OF GYNECOLOGY & OBSTETRICS 91 (2010).

<sup>13</sup> *Artavia Murillo et al. v. Costa Rica*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 185 (Nov. 28, 2012) [hereinafter *Artavia Murillo et al. v. Costa Rica*]. For a detailed discussion of the case, see Martín Hevia & Carlos Herrera Vacaflor, *From Recognition to Regulation: Access to In Vitro Fertilization and the American Convention on Human Rights*, 25 FLA. J. OF INT'L L. 587 (2013).

<sup>14</sup> *Artavia Murillo et al. v. Costa Rica*, ¶ 185.

<sup>15</sup> *Id.* ¶ 191.

the contrary, it should reconstruct the metaphysical or ontological considerations about the controversy in a systematic way, on the basis of the legal system to which these conceptualizations belong.<sup>16</sup> Furthermore, the IACtHR, also speaking from the language of rights, maintains that considerations of when human life begins, whichever dialect they are based on, should “keep abreast of the passage of time and current living conditions.”<sup>17</sup> In the context of assisted reproductive techniques, the IACtHR requires that the narrative of reproductive health rights be spoken from the language of rights (regardless of the dialect employed), must not lose sight of the legal system to which they belong (both the internal and international legal order), and needs to address the current necessities and problems of individuals.<sup>18</sup>

Intending to keep aloof of the theoretical reflections around the use (or abuse) of the language of rights, this article will draw on that language as a framework for studying the recent developments of the debates around the beginning of legal personhood and assisted reproductive techniques (ARTs) in Argentina. Recently, the National Congress of Argentina has approved the unification of the National Civil Code with the National Commerce Code, a legal reform that became operative in August of 2015.<sup>19</sup> This important legal reform entailed several changes to the general principles of private law and family law. In fact, in the congressional (and media) debates around the drafting and approval of the reformed Code, the determination of

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 245.

<sup>18</sup> *Id.* ¶ 191.

<sup>19</sup> Law No. 26.994, Oct. 1, 2014, B.O. 32985 (Arg.).

when legal personhood begins, and what are its effects for the legal regime of ARTs have been among the issues that provoked heated disagreements.<sup>20</sup> What has been the object of these debates around the beginning of legal personhood and ARTs in the new Argentinean Civil Code? Did Argentinean Representatives learn anything from the experience of past debates in the region on how to regulate the beginning of legal personhood and ART's in a way that respects and protects human rights of individuals? This article will argue that the text of the new Civil and Commerce Code failed to accommodate discourses about when life begins under a reasonable lingua franca of human rights. In light of that, we will propose a reading of the text that is consistent with human rights case law.

For the purposes of presenting this argument, the article will be organized as follows: Section II will first present how the former civil code used to structure the beginning of legal personhood, and the position adopted by the drafters of the reform. This presentation will allow a comparison of the courts' understanding and conservative actors' use of the language of rights for structuring "when life begins" in the Argentine legal tradition. Next, this Article will discuss an explanation on how such determination on the beginning of legal personhood framed

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<sup>20</sup> Other major disagreements include whether or not the Code should rule on state responsibility - it doesn't - and the legal status of contracts concluded in a currency other than Argentine pesos. See, e.g., Martín Hevia, *Controversias del Nuevo Código Civil*, CLARÍN (Aug. 5, 2015), [http://www.clarin.com/opinion/Codigo\\_Civil\\_y\\_Comercial-responsabilidad\\_del\\_Estado-fertilizacion-depositos\\_bancarios\\_0\\_1406859346.html](http://www.clarin.com/opinion/Codigo_Civil_y_Comercial-responsabilidad_del_Estado-fertilizacion-depositos_bancarios_0_1406859346.html); Martín Hevia, *En Manos de la Corte*, BASTIÓN DIGITAL (Aug. 19, 2015), <http://ar.bastiondigital.com/notas/en-manos-de-la-corte>.

the exercise of reproductive rights through, for instance, assisted reproductive techniques. Lastly, this section will conclude by showing that before the approval of the new Civil and Commerce Code, there were two dialects of rights governing the debate on when life begins.

Section III critically analyzes the outcome of such debates at the National Congress on the reform of the Civil Code. In this section, the article will discuss how the beginning of legal personhood is prescribed in the current Civil and Commerce Code and its effects on the legal regime of ARTs. Furthermore, Section III will show the perils entrenched in the language of the new articles, in that they grant judges broad discretionary power for determining the scope of each article's mandate. In reaction to this, Section III will present the jurisprudence of the IACtHR as a binding doctrine for local judges when deciding the scope of individual enjoyment of reproductive rights.

Section IV critiques the legislative decision to prescribe a legal concept in private law such as the "beginning of existence."<sup>21</sup> By contrast, this section proposes that any legislative decision to prescribe a legal concept of this nature within private law should specifically focus on when legal personhood has legal effects in private law, and not extend beyond this scope. In this case, the article will argue that legal personhood should refer to when born human beings become subjects of legal regulation and protection. Under this thesis, a Civil and Commerce Code governing private relations between individuals would not have to deal with the recognition of rights to embryos and pronucleate oocytes, or the evaluation of scientific data for determining

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<sup>21</sup> CÓDIGO PROCESAL CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. PROC. CIV. Y COM.] [CIVIL AND COMMERCIAL PROCEDURE CODE] art. 19 (2012) (Arg.).

when legal personhood commences. Rather, the thesis maintained in Section IV would facilitate a better understanding of the role of the articles prescribed in the Civil and Commerce Code on the legal regime of ARTs in Argentina, as well as the fulfillment of human rights obligations assumed by the State to its individuals.

Finally, Section V summarizes the findings of the article and presents a conclusion.

## II. THE BEGINNING OF EXISTENCE: THE ROLE OF THIS CONCEPT IN THE ARGENTINEAN FORMER CIVIL CODE AND IN THE DRAFT OF THE NEW CIVIL AND COMMERCE CODE

The legal issue of when legal personhood begins for the purpose of private law (i.e. legal parenthood, assisted reproductive techniques, or emergency contraception) has been framed in Argentina's former and current Civil Code as "the beginning of existence."<sup>22</sup> This section attempts to disperse some of the haziness within the legal question of "the beginning of existence" and focus on how judicial interpretation of this issue in the former Civil Code initially affected access to assisted reproductive techniques. Furthermore, this section will draw attention to the core developments propelled by a Commission of Jurists regarding the "beginning of existence" in their draft to the reform of the Civil and Commerce Code, as well as some critiques to this draft expressed in the congressional debates of the reform.

The analysis on "the beginning of existence" in Argentina's Civil Codes will proceed in two parts. First, this

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<sup>22</sup> *Id.*; CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] art. 70 (1883) (Arg.).

section will focus on what the former Civil Code (from 1869) could have possibly imagined about assisted reproductive techniques, and what, in fact, the courts interpreted the Civil Code to say about embryos, rights, and assisted reproductive techniques. This section will draw attention to the fact that petitioners have framed their demands for the regulation of and restrictions on access to ARTs under a language of rights, but that are underpinned in a metaphysical or ontological dialect; the courts have conceded such demands.

The second part will describe how an appointed Commission of Jurists for the drafting of a new Civil and Commerce Code harmonized assisted reproductive techniques with the legal issues embedded in “the beginning of existence” articles. Additionally, this second part will present some of the critiques associated with this draft of the new Civil and Commerce Code, which were expressed during its evaluation in the congressional debates. This second part will argue that, while some interesting developments guaranteeing access to assisted reproductive techniques were achieved, the framing of this issue in the Code still allows for interpretations that potentially threaten individual human reproductive rights. Lastly, this part will conclude by showing how the proposed regulation by the Commission of Jurists on when life begins was meant to reconstruct different dialects coming from the language of rights on the matter, and hence, serves as a way of accommodating these languages under a single narrative of reproductive rights in private law.

#### A. ACCESS TO ASSISTED REPRODUCTION TECHNIQUES UNDER THE 1869 ARGENTINEAN CIVIL CODE

Efforts for determining when existence begins in the Argentine legal order has been a recurring issue and practice

in Argentinean legal consciousness since 1869, when the National Congress approved the Civil Code drafted by Dalmacio Vélez Sársfield.<sup>23</sup> In his initial comparative law undertaking, identifying and prescribing all possible legal issues in private law, the author decided to prescribe “the beginning of existence of persons before being born”:

ARTICLE 70: The existence of personhood begins from the moment of conception in the maternal womb. These persons, before being born, may acquire certain rights as if they would have already been born. Such rights are irrevocably acquired if those conceived in the maternal womb were born with life, even if such livelihood lasted moments after being separated from the mother.<sup>24</sup>

With relation to what is prescribed in this article, the former Civil Code also established, in Article 51, that every being that presents “human characteristics” shall be considered a “person.”<sup>25</sup> Along this reasoning, the former Civil Code stated in Article 63 that unborn beings conceived

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<sup>23</sup> Law No. 340, Sept. 25, 1869.

<sup>24</sup> Cód. Civ. art. 70 (Arg.).

<sup>25</sup> Cód. Civ. art. 51 (Arg.). In the footnote to Article 70, Vélez Sársfield, the codifier, says that, “in order to be considered a person, the child must be born ‘a human creature.’” The codifier adds that “in order to be capable of [having] rights, the child must present externally recognizable characteristic signs of humanity; or must be, according to the Roman characterization, neither monstrous nor prodigious; but a mere deviation from the normal forms of humanity, for example an extraneous or deficient limb, does not inhibit the capacity to possess rights.” The text quoted by the codifier do not tell us by which signs to recognize a human creature. It seems that the “pate ought to resemble the [standard] human form.” *Id.* art. 70.

in a maternal womb shall be considered “unborn persons.”<sup>26</sup> The principle embedded in these articles states that unborn beings might acquire legal personhood and become rights-bearers.<sup>27</sup> Furthermore, the language of this article shows that Velez Sarsfield sought to recognize legal protections for unborn beings, regardless of the viability of the pregnancy.<sup>28</sup>

In light of the advances of reproductive science and the access to ARTs, the language of these articles left a legal void, since there was no legal certainty as to whether the practice of these techniques contradicted the system of articles on the beginning of life. Notwithstanding, given that *in vitro* fertilization involves the generation of an embryo outside of the maternal womb, a literal interpretation would mean that such organism is not an unborn person, at least until it is inserted in the maternal womb. Contrary to this interpretation, case law from Argentina has interpreted embryos and pronucleate oocytes as “unborn humane persons” that have rights capable of trumping the exercise of individual’s reproductive rights to access ARTs.<sup>29</sup>

The main example of this framing of the issue is *R., R. D. s/ medidas precautorias*, a 1999 National Appellate Chamber for Civil Matters case that shows an effort by the courts to

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<sup>26</sup> *Id.* art. 63.

<sup>27</sup> *Id.* art. 70.

<sup>28</sup> For a discussion of the legal status of anencephalic pregnancies in Argentina, and an analysis of recent case law in several jurisdictions, see Rebecca J. Cook, Joanna N. Erdman, Martín Hevia, & Bernard M. Dickens, *Prenatal Management of Anencephaly*, 102 INT’L J. OF GYNECOLOGY & OBSTETRICS 304, 306 (2008).

<sup>29</sup> Cámara Nacional de Apelaciones en lo Civil, Sala I [CNCiv.] [National Court of Civil Appeals], 03/12/1999, “Rabinovich Ricardo David s/ medidas precautorias,” *Jurisprudencia Argentina* [J.A.] (2000-III-630) (Arg.) [hereinafter Rabinovich Ricardo David – CNCiv.].

harmonize the legal issue of the beginning of the existence of personhood prescribed in the former Civil Code with ARTs treatments.<sup>30</sup> The case considered the petition of Dr. Rabinovich, demanding legal protections for embryos and pronucleate oocytes that are the object of assisted reproductive techniques and treatments such as cryopreservation.<sup>31</sup> In the Chamber's reasoning, the former Civil Code and international human rights treaties, such as the American Convention on Human Rights, allow for the interpretation that embryos and pronucleate oocytes have human personhood.<sup>32</sup>

The Court's approach to the issue explains two important points. First, the Chamber bases its reasoning on international human rights law. This was made possible given that, under Article 75(22) of Argentina's Constitution, certain international human rights treaties gain constitutional status, and consequently, human rights provisions within these treaties are considered recognized rights.<sup>33</sup> In turn, Article 4.1 of the American Convention on Human Rights represents a legal tool that, under a certain interpretation, may yield the result that embryos are right-holding persons and, conversely, that their rights merit State protection. Article 4.1 states: "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>34</sup> As a consequence of embryos being recognized as "unborn persons" and holders

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<sup>30</sup> *Id.* at 451.

<sup>31</sup> *Id.* at 412.

<sup>32</sup> *Id.* at 444.

<sup>33</sup> Art. 75(22), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) [hereinafter CONST. NAC.].

<sup>34</sup> American Convention art. 4(1).

of a right to life, the Court also recognized their right to physical and psychological integrity under Article 5(1) of the American Convention.<sup>35</sup> This is possible given the language in which this right is framed, which states, "Every person has the right to have his physical, mental, and moral integrity respected."<sup>36</sup> Hence, as a matter of international human rights law, the court recognized that such organisms have a right to life and a right to physical and psychological integrity.

A second, related point is that the Chamber's reasoning appeals, to a great extent, to the lingua franca of rights agreed upon within the Inter-American legal system. The Chamber could have rested its decision entirely on the provisions from the former Civil Code and on the fact that, at the moment of its decision, there was no other federal statute addressing such a private law matter.<sup>37</sup> However, as explained previously, the court delved into international human rights law and delivered its sentence speaking from a common language of rights, as accorded under Argentina's Constitution. Furthermore, the court uses such language to introduce its ontological understandings on the matter of when life begins and whether to recognize rights of embryos or not. This is expressed, as the Chamber maintains, because embryos undoubtedly present a unique genetic code that serves as evidence of determinate individuality and biological potentiality of developing into a person.<sup>38</sup> In this sense, the Courts use of the language of rights in justifying their decisions and reveal a specific dialect within the lingua franca of rights in the Inter-American System of Human

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<sup>35</sup> *Rabinovich Ricardo David – CNCiv.*, *supra* note 29, at 416.

<sup>36</sup> American Convention art. 5(1).

<sup>37</sup> *Rabinovich Ricardo David – CNCiv.*, *supra* note 29, at 414.

<sup>38</sup> *Id.*

Rights as they introduce a moral construction of the rights recognized.

As a consequence of this reasoning, the Chamber ordered that the embryos and pronucleate oocytes that remain cryopreserved should not be used without the court's permission.<sup>39</sup> The court also prohibited the extermination or experimentation on these embryos and pronucleate oocytes.<sup>40</sup> Lastly, it also ordered a census of each individual cryopreserved embryo and assigned a children's public defender to each for its protection.<sup>41</sup>

The reasoning in this judgment, given the lack of specific national legal regulation on assisted reproduction techniques, became a source of reference among different judicial authorities considering similar controversies.<sup>42</sup> Interestingly, all of these cases show the influence from the *R., R. D. s/ medidas precautorias* case, in the sense that they all refer back to international human rights law as a base for arguing that a rights-holding person exists beginning from conception. Hence, tribunals have relied on the former Civil

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<sup>39</sup> *Id.* at 451.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 451.

<sup>42</sup> See, e.g., Cámara Federal de Apelaciones de Mar del Plata [CFed. Mar del Plata] [Federal Court of Appeals of Mar del Plata], 29/12/2008, "L., H. A. et al. c. Instituto de Obra Médico Asistencia & Others," [S.J.A.] (2009-10-06-2009) (Arg.) [hereinafter L., H. A. et al. - CFed. Mar del Plata]; Cámara Federal de Apelaciones de Salta [CFed. Salta] [Federal Court of Appeals of Salta], 03/09/2010, "R., N. F. et al. c. Obra Social del Poder Judicial de la Nación," Abeledo Perrot (2010-07-37) (Arg.) [hereinafter R., N. F. et al. - CFed. Salta]; Cámara de Apelaciones en lo Contencioso Administrativo de Mar del Plata [CApel.CC Mar del Plata] [Administrative Claims Chamber of Appeals of Mar del Plata], 24/02/2012, "S., G. et al. c. I. O. M. A.," Jurisprudencia Argentina [J.A.] (2012-II-90) (Arg.) [hereinafter S., G. et al. - CApel.CC Mar del Plata].

Code and international human rights law to argue that embryos or pronucleate oocytes have legal personhood from the moment of conception, either in or outside of the maternal womb.

The *R., R. D. s/ medidas precautorias* case shows how the structuring of the legal regime for ARTs is sustained primarily on what is prescribed in the former Civil Code as the beginning of the existence of personhood. Particularly, these courts based their reasoning without properly considering that the former Civil Code provides no legal solution to conception occurring outside of the maternal womb for the purposes of establishing the moment of conception. On the contrary, this reasoning seems to stem from an *in dubio pro life* presumption, where the mere existence of human characteristics suffices for awarding such organisms with the protections of human rights.<sup>43</sup>

This has been the legal tradition in Argentinean legal order. Courts would usually consider the former Civil Code to be the ultimate source of the law for deciding the fate of private law controversies.<sup>44</sup> This practice was explained on the basis of the influences of the continental legal tradition and French legal formalism in the post-revolutionary period.<sup>45</sup> With this context in mind, the principles and values embedded in the National Constitution were applied by courts primarily on controversies about the political organization of the State, but not for the reasoning of private

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<sup>43</sup> *Rabinovich Ricardo David – CNCiv., supra note 29, at 416.*

<sup>44</sup> *E.g., Martín Böhmer, Democracia de Poderes a la Argentina: Democracia en las Formas, Monarquía en el Fondo, in EL PAÍS QUE QUEREMOS: PRINCIPIOS, ESTRATEGIA, Y AGENDA PARA ALCANZAR UNA ARGENTINA MEJOR (Sergio Berenztein et al. eds., 2006).*

<sup>45</sup> *Id.* (for a discussion on the influence of the French formalist tradition in Argentina).

law disputes.<sup>46</sup> This context explains how the fate of certain practices, such as the access to ARTs, was decided on the basis of the contents of the former Civil Code and was not balanced by the human rights and State obligations prescribed in the National Constitution.

On this last issue, for instance, the *R., R. D. s/ medidas precautorias* case did not consider the human rights of individuals seeking ARTs in the exercise of their reproductive rights, right to family, or right to privacy. Additionally, the court also failed to consider the autonomy principle embedded in Article 19 of the National Constitution, which states that the State shall not interfere with the private acts of individuals whenever these acts are not prohibited by law.<sup>47</sup> Regretfully, such omission in the reasoning of the case serves as example of how private law controversies, where adjudicated under the former Civil Code as the principal source of law, disregard some of the more hierarchical sources, such as the National Constitution or international human rights law case law and doctrine.

The narrative of reproductive rights, as structured in Argentinean institutions (i.e. Civil Code, Private Law Courts), had been governed by a dialect of rights with an ontological basis.<sup>48</sup> Under this language of rights, embryos were found to be “unborn human persons” with rights and, conversely, the State had an obligation to guarantee absolute protection of their rights.<sup>49</sup> Such absolute protection of embryos’ right to life meant prohibiting the destruction, experimentation, or

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<sup>46</sup> Ricardo Luis Lorenzetti, *CÓDIGO CIVIL Y COMERCIAL DE LA NACION COMENTADO: TOMO I 36-37* (Santa Fe: Rubinzal-Culzoni ed., 2014).

<sup>47</sup> Art. 19, CONST. NAC. (Arg.).

<sup>48</sup> *CÓD. PROC. CIV. Y. COM. art. 19 (Arg.); CÓD. CIV. art. 70 (Arg.)*.

<sup>49</sup> *Rabinovich Ricardo David – CNCiv., supra note 29*.

cryopreservation of them, as well as limiting access to ARTs.<sup>50</sup> The Court's determination also meant limiting individual's enjoyment of their right to form a family and their right to enjoy the benefits of scientific progress, but it also limited physicians' or scientists' right to work and their right of association.<sup>51</sup> The ontological basis was also used to justify restrictions on access to emergency contraception.<sup>52</sup> However, in the context of the reform of the Civil and Commerce Codes, a different resisting dialect, also channeled through the language of rights, found an institutional setting with the purpose of accommodating individuals' right to form a family and brought legal clarity to legal parenthood issues that were emerging as a consequence of ARTs.

B. THE BEGINNING OF EXISTENCE IN THE DRAFT OF THE NEW CIVIL AND COMMERCE CODE

In 2011, a Commission of Jurists, whose members were Justice Ricardo Lorenzetti (President of the Supreme Court of Justice), Justice Elena Highton de Nolasco (Vice-President of the Supreme Court of Justice), and former Justice Aída Kemelmajer de Carlucci, were entrusted by President Cristina Fernández de Kirchner with the work of reforming the Civil and Commerce Code of Argentina.<sup>53</sup> In 2012, they delivered a

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<sup>50</sup> *Id.* at 11-12.

<sup>51</sup> *Id.* at 11.

<sup>52</sup> *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/03/2002, "Portal de Belén Asociación Civil sin Fines de Lucro c. Ministerio de Salud de la Nación/ANMAT," [J.A.] (2002-III-472) (Arg.) [hereinafter Portal de Belén Asociación Civil sin Fines de Lucro - CSJN]. For a discussion of the case law on emergency contraception, see Hevia, *supra* note 1.

<sup>53</sup> Executive Decree No. 191/2011, Feb. 28, 2011, B.O. 32101 (Arg.).

draft for consideration by President Fernández, who then presented a (somewhat) amended version to the National Congress.<sup>54</sup>

The reasons expressed by the Commission of Jurists' for introducing reforms to the former Civil Code included an express statement that private law matters should not be governed solely by what is prescribed in the Code, but also by human rights treaties that the State has adopted as part of the National Constitution.<sup>55</sup> This governing principle, calling for the *constitutionalization of private law*, sought on the one hand, to harmonize the classic divide between public and private law and human rights, and on the other hand, to create a more binding obligation on judges for the application and enforcement of State human rights obligations in private law controversies.<sup>56</sup>

Regarding the governance of reproductive rights in the context of private law situations or relations, the Commission of Jurists decided that it was relevant for the new Civil and Commerce Code to "set" the beginning of human personhood.<sup>57</sup> To that end, the draft of the Commission of Jurists established in Article 19,

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<sup>54</sup> *Modificaciones del Poder Ejecutivo Nacional al Anteproyecto de Reforma del Código Civil elaborado por la Comisión de Reformas*, NUEVO CODIGO, <http://www.nuevocodigocivil.com/wp-content/uploads/2015/02/7-Fundamentos-de-los-cambios-introducidos-por-el-P.E.N..pdf> (last visited Jan. 13, 2016).

<sup>55</sup> Art. 75, § 22, CONST. NAC. (Arg.).

<sup>56</sup> *Fundamentos del Anteproyecto de Código Civil y Comercial de la Nación*, NUEVO CODIGO 4, <http://www.nuevocodigocivil.com/wp-content/uploads/2015/02/5-Fundamentos-del-Proyecto.pdf> (last visited Jan. 13, 2016).

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

ARTICLE 19. The existence of human personhood begins with the conception in the maternal womb. In the case of exercise of assisted reproductive techniques, it begins with the implantation of the embryo on the woman, notwithstanding that which a special Statute may prescribe for the protection of the non-implanted embryo.<sup>58</sup>

Given this new opportunity to legislate when human personhood begins, the draft redacted by the Commission of Jurists chose to set a principle slightly similar to the one of Sarsfield's Code. In general, for the purposes of private law, the existence of a human legal person begins at the moment of conception in the maternal womb. However, the Commission of Jurists was aware of the need to contemplate the practice of ARTs under Argentine private law. To that end, the proposed Article 19 established a distinction between ARTs and natural reproduction. For the latter, the beginning of legal personhood seemed to be at the moment of conception in the maternal womb; whereas for ARTs it was determined at the moment of implantation in the woman. Do conception and implantation refer to different moments for determining when legal personhood begins? What drives this distinction?

The distinction prescribed in Article 19 of the draft of the Civil and Commerce Code could be interpreted as establishing two different moments where legal personhood

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<sup>58</sup> PROYECTO CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [PROYECTO CÓD. CIV. Y COM.] [DRAFT CIVIL AND COMMERCE CODE] art. 19 (2012) (Arg.), [www.nuevocodigocivil.com/wp-content/uploads/2015/texto-proyecto-de-codigo-civil-y-comercial-de-la-nacion.pdf](http://www.nuevocodigocivil.com/wp-content/uploads/2015/texto-proyecto-de-codigo-civil-y-comercial-de-la-nacion.pdf) (last visited Jan. 13, 2016).

begins. For natural reproduction purposes, legal personhood begins at the moment of conception in the maternal womb.<sup>59</sup> Alternatively, for ARTs purposes, the beginning of legal personhood occurs at the moment the embryo is implanted in the woman. This distinction suggests that law could be recognizing legal personhood and legal protections for life developed under natural processes of reproduction prior to the establishment of these rights for embryos in ARTs. This is because an embryo may be considered conceived because of the mere fact of being inside the maternal womb by implantation. Argentina's Supreme Court of Justice recognized this reading in a case where it declared the unconstitutionality of commercialization and distribution of emergency contraception.<sup>60</sup> The Court established in this old jurisprudence that conception occurs at the moment of fertilization between ova and sperm.<sup>61</sup> Thus, it would seem that conception for purposes of contraception and ARTs is understood to begin at different biological moments, which would render a distinction in their legal status for the Civil Code. In support of this reasoning, the draft of the Civil and Commerce Code further prescribes that non-implanted embryos may have a legal status that is yet to be determined by a special law;<sup>62</sup> conversely, this reflects that the legal status of embryos conceived in the maternal womb is clear and is protected by law.

In light of this, what drives this distinction? Is this proposed new regulation coming from a language of rights?

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

<sup>60</sup> *Portal de Belén Asociación Civil sin Fines de Lucro – CSJN, supra* note 52.

<sup>61</sup> *Id.*

<sup>62</sup> PROYECTO CÓD. CIV. Y COM. art. 19 (Arg.), [www.nuevocodigocivil.com/wp-content/uploads/2015/texto-proyecto-de-codigo-civil-y-comercial-de-la-nacion.pdf](http://www.nuevocodigocivil.com/wp-content/uploads/2015/texto-proyecto-de-codigo-civil-y-comercial-de-la-nacion.pdf) (last visited Jan. 13, 2016).

What is the Commission of Jurists trying to communicate about this distinct value of the development of life in natural reproduction and ARTs?

It could be argued that the Commission of Jurists prescribed this distinction and cast doubt on the need to recognize legal status or legal protection for non-implanted embryos for the purpose of deterring judicial reasoning like that described in the *R., R. D. s/ medidas precautorias* case. Under this thesis, the distinction would respond to the need for not obstructing access to ARTs, including services as cryopreservation, without the legal uncertainty that anyone could later claim the right to life and physical integrity of embryos. Hence, unless the embryos formed have been implanted in the woman, individuals are free to form embryos and even cryopreserve them without the obligation to immediately use all of them.

Alternatively, the motives of the draft by the Commission of Jurists explain that determining a special regulation for when human personhood begins in the case of ARTs responds to regulating the issue of legal parenthood.<sup>63</sup> In this sense, it is important to consider the case law spurred in private law that discusses the issue of paternity and even property rights for the disposition of embryos in ARTs.<sup>64</sup>

In *P., A. v. S., A. C.*, a separated couple entered into a judicial dispute over the right of the woman to implant embryos in her body without the consent of her ex-

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<sup>63</sup> *Fundamentos del Anteproyecto de Código Civil y Comercial de la Nación*, NUEVO CODIGO 27, <http://www.nuevocodigocivil.com/textos-oficiales-2/> (last visited Oct 15, 2015).

<sup>64</sup> For a discussion of property rights on embryos and other related issues, see generally Hevia & Herrera Vacaflor, *supra* note 13.

husband.<sup>65</sup> They both contributed their gametes for the formation of embryos at a moment when they were still married, and entered into a contract with an ART Institute for the cryopreservation of the embryos.<sup>66</sup> Under that contract, the married couple agreed that, in case they separated, judicial intervention would be employed if either of the parties refused to consent to the other's use of the embryos.<sup>67</sup>

The judges discussed the woman's right to use the embryos without the consent of her former husband, as well as his right not to become a parent.<sup>68</sup> In their judgment, the Appeals Chamber reasoned that the former husband's denial of the contract and his "procreational will" given at the moment of the *in vitro* fertilization (IVF) treatment ignores the nature of the embryos and contradicts the principle of estoppel in Argentinean private law.<sup>69</sup> Furthermore, the Appeals Chamber maintained that the former husband's defense that he no longer wanted to be a parent was implausible.<sup>70</sup> The judges reasoned that the husband's genetic parenthood was already established at the moment he agreed to the IVF treatment.<sup>71</sup> Moreover, his agreement to such treatment also meant that he was aware of the consequences for the embryos, in the event that the couple separated.<sup>72</sup> In conclusion, the former husband's willingness to submit to the

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<sup>65</sup> Cámara Nacional de Apelaciones en lo Civil, Sala J [CNCiv.] [National Court of Civil Appeals], 13/09/2011, "P., A. c. S., A. C.," La Ley [L.L.] (2011-E-435) [hereinafter P., A. c. S., A. C. - L.L.].

<sup>66</sup> *Id.* at 438.

<sup>67</sup> *Id.* at 437.

<sup>68</sup> *Id.* at 437-39.

<sup>69</sup> *Id.* at 438-39.

<sup>70</sup> *Id.* at 439.

<sup>71</sup> *Id.* at 438-39.

<sup>72</sup> *Id.* at 438.

IVF treatment and consequent agreement to the contractual provisions disabled him from exercising a future refusal, as well as from exercising his right not to become a legal parent.<sup>73</sup>

With regard to the right of the woman to have the embryos implanted in her body, the judges authorized the procedure under what could be understood as the “right of the embryos to be born with life.”<sup>74</sup> Under this reasoning, the Chamber had to first argue that cryopreserved embryos could be recognized as “unborn human persons” and then argue that these embryos are right-holders to life.

The court justified the woman’s right to use the embryos by arguing that cryopreserved embryos are unborn human persons with rights, as recognized by the former Civil Code.<sup>75</sup> However the Chamber was aware that the former Code did not establish anything about conception occurring outside the maternal womb.<sup>76</sup> In turn, the judges argued that it should be understood that conception can occur outside the maternal womb, since the codifier could not possibly know that science would achieve such a thing in the future.<sup>77</sup> This is so, given that embryos are organisms that have human characteristics and have been conceived, although not in the maternal womb, as established in Article 70.<sup>78</sup> The judges also argued

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<sup>73</sup> See I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008) (on the distinctions between genetic parenthood and legal parenthood).

<sup>74</sup> Martín Hevia & Ezequiel Spector, *El derecho a no formar una familia: a Propósito del Fallo “P., A. v. S., A. C. s/ medidas precautorias”*, in REVISTA DE DERECHO DE FAMILIA Y DE LAS PERSONAS 230 (2011).

<sup>75</sup> See *P., A. c. S., A. C. – L.L.*, *supra* note 65.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Cód. Civ. art. 70 (Arg.).

that conception should be interpreted as fertilization, as the Supreme Court did in its judgment on the unconstitutionality of the manufacture, distribution, and commercialization of emergency contraceptive medicine.<sup>79</sup>

Once it was established that the embryo is an unborn human person, the judges consequently rested their reasoning on the *R., R. D. s/ medidas precautorias* case rationale in order to conclude that embryos have a right to life and physical and psychological integrity.<sup>80</sup> In other words, the judges in this case awarded the woman the right to implant the embryos and, hence, become a mother, on the basis of an apparent right of the embryos to be born with life.<sup>81</sup>

In attending to the emergence of such case law, the Commission of Jurists deemed it necessary to provide legal prescriptions in their draft of the Civil and Commerce Code that addressed the issue of parenthood in ARTs.<sup>82</sup> To such end, the beginning of the existence of legal personhood in ARTs begins with implantation of the embryo in the maternal womb. Different reasons drive this new determination. To begin with, it could be interpreted that until implantation, there is no legal interest awarded to the embryo by the draft of the Civil and Commerce Code. Consequently, judges would not be able to follow the analyzed stream of case law that understands that there is legal parenthood by individuals who engage in IVF merely for the fertilization occurring in the formation of the embryo. Similarly, it would prevent arguments that award rights to the embryo prior to

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<sup>79</sup> *Portal de Belén Asociación Civil sin Fines de Lucro – CSJN, supra* note 52.

<sup>80</sup> *Rabinovich Ricardo David – CNCiv., supra* note 29.

<sup>81</sup> *Hevia & Spector, supra* note 74.

<sup>82</sup> *Fundamentos del Anteproyecto de Código Civil y Comercial de la Nación, supra* note 63.

implantation, and hence, would not allow for the recognition of an embryo's right to be born and force legal parenthood on an individual who does not want implantation to occur.

In fact, other provisions in the draft of the Civil and Commerce Code also address possible contingencies between legal parenthood and the practice of ARTs.<sup>83</sup> Article 560 prescribes that health institutions providing ART services must obtain previous, free, and informed consent from individuals who seek the treatment, and that these institutions must renew this consent every time there is a use of the gametes or embryos.<sup>84</sup> Additionally, it establishes that individuals who are undergoing ART treatments can revoke their consent as long as conception or implantation of the embryo in the woman has not occurred.<sup>85</sup> As a result of these articles, the Commission of Jurists' draft established that legal parenthood would not be determined genetically;<sup>86</sup> that is, legal parenthood is determined independently of whose gametes were used for achieving reproduction. Instead, the Commission created the concept of "procreational will."<sup>87</sup> Under this concept, legal parenthood is established on the basis of the individual's intention to form a family, rather than the biological nexus with the newborn.<sup>88</sup> This concept also seeks to stress the importance of the will of the individuals who wish to form a family, rather than their biological capacity to reproduce. In this sense, the

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<sup>83</sup> See generally PROYECTO CÓD. CIV. Y COM. (Arg.), [www.nuevocodigocivil.com/wp-content/uploads/2015/texto-proyecto-de-codigo-civil-y-comercial-de-la-nacion.pdf](http://www.nuevocodigocivil.com/wp-content/uploads/2015/texto-proyecto-de-codigo-civil-y-comercial-de-la-nacion.pdf) (last visited Jan. 13, 2016).

<sup>84</sup> *Id.* art. 560.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* art. 561.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

determination of legal parenthood without regard to biological connection respects the exercise of the right to form a family by same-sex couples recognizing their autonomy and participation in society without discrimination.

Thus, the current development in Argentinean case law on legal parenthood and ARTs, and the legal developments prescribed in the draft of the Civil and Commerce Code, provide a reason as to why the draft included a distinction regarding the beginning of the existence of legal personhood in ARTs. More importantly, these legal developments showed the need for legal clarity and determination of the effects ARTs had on establishing legal parenthood. On a different note, what does this distinction about when legal personhood begins communicate to the Argentinean Legal System? It could be argued that under the governing principle of *constitutionalization of private law*, the Commission of Jurists aimed to nudge judges, policy-makers, and individuals to contemplate and act in conformity with the international human rights and constitutional rights provisions. Furthermore, it could be argued that under such governing principle, the Commission of Jurists sought to invite Argentineans to embrace a lingua franca of rights among each other at the moment of entering into relations that may trigger legal effects in private law. In this sense, the new regulation on when legal personhood begins and its focus on ARTs as drafted by the Commission of Jurists are channeled through a language of rights. The legal effects of what is prescribed in Article 19 discloses that individuals have a right to form a family and a right to benefit from the scientific progress, and it also concedes that there may be

rights claims about the non-implanted embryos.<sup>89</sup> In contrast to what has been established in the case law analyzed previously, the Commission of Jurists proposed a new regime for ARTs out of a certain dialect of rights that understands absolute protection of an embryo unreasonably restricts individuals' rights.<sup>90</sup> Hence, the language of rights embedded in Article 19 accommodated different rights claims and discourses on how reproductive rights should be regulated.

These legal developments addressed by the Commission of Jurists' draft to the new Civil and Commerce Code were discussed in the National Congress.<sup>91</sup> In this institutional setting, the dialect of rights advanced by the Commission of Jurists attracted critiques from conservative groups that also framed their observations using the language of rights, but in a dialect that relies on metaphysical bases.

For instance, the Argentinean Episcopal Conference critiqued the decision of the Commission not to recognize legal value and personhood to the non-implanted embryo.<sup>92</sup>

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<sup>89</sup> Eleonora Lamm, *El Embrión in Vitro en el Proyecto de Reforma de Código Civil y Comercial*, in *DERECHO DE LAS FAMILIAS, INFANCIA, Y ADOLESCENCIA: UNA MIRADA CRÍTICA Y CONTEMPORANEA* 413-416 (Marisa Graham & Marisa Herrera, eds., 2014).

<sup>90</sup> *Fundamentos del Anteproyecto de Código Civil y Comercial de la Nación*, *supra* note 63.

<sup>91</sup> Resolución de la H.C.D.N., *Resolution of the Honorable Chamber of Representatives of the National Congress*, <http://ccycn.congreso.gob.ar/resolucion.html> (on the command to discuss the draft of the Commission of Jurist of the Civil and Commerce Code for its approval).

<sup>92</sup> Conferencia Episcopal Argentina [Argentina's Episcopal Conference], *Reflexiones y Aportes sobre algunos temas vinculados a la Reforma del Código Civil, Comisión Bicameral para la Reforma, Actualización, y Unificación del Código Civil y Comercial de la Nación, Ponencias Buenos Aires*,

In the opinion of the Argentinean Episcopal Conference, life (and legal personhood) begins at the moment of conception;<sup>93</sup> this opinion highlights the fact that there is no ontological distinction between being conceived in the maternal womb or outside of the maternal womb. Hence, the location where the embryos are conceived does not alter their human condition because they each represent a determinate individuality.<sup>94</sup> In regard to this, Lafferriere argues that the draft seems to recognize, to some extent, the scientific evidence that the individual human condition begins at the moment of fusion between gametes.<sup>95</sup> However, in order to accommodate the needs of contemporary society (i.e. the practice of ARTs unregulated), the non-implanted embryo was not given legal status.<sup>96</sup> Hence, Lafferriere maintains that the distinction proposed by the draft of the Civil and Commerce Code is knowingly arbitrary in its recognition of the human characteristics of the non-implanted embryo, and guided by the economic interests of the biotechnology industry.<sup>97</sup>

As a consequence, Lafferriere and the Argentinean Episcopal Conference further argued that such arbitrariness could not withstand scrutiny in the face of Argentina's

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[http://ccycn.congreso.gob.ar/export/hcdn/comisiones/especiales/cbunificacioncodigos/ponencias/buenosaires/pdfs/050\\_Arancedo\\_Mons\\_Pensamiento\\_y\\_Aportes.pdf](http://ccycn.congreso.gob.ar/export/hcdn/comisiones/especiales/cbunificacioncodigos/ponencias/buenosaires/pdfs/050_Arancedo_Mons_Pensamiento_y_Aportes.pdf) [hereinafter Argentina's Episcopal Conference].

<sup>93</sup> *Id.* at 5.

<sup>94</sup> *Id.*

<sup>95</sup> JORGE NICOLÁS LAFFERRIERE, PONENCIA DEL CENTRO DE BIOÉTICA, PERSONA Y FAMILIA 6 (2012), [http://www.unav.edu/matrimonioyfamilia/observatorio/uploads/30089\\_Centro-Bioetica\\_Ponencia-2012.pdf](http://www.unav.edu/matrimonioyfamilia/observatorio/uploads/30089_Centro-Bioetica_Ponencia-2012.pdf).

<sup>96</sup> *Id.* at 6-7.

<sup>97</sup> *Id.* at 6.

international human rights obligations.<sup>98</sup> Through the lingua franca of human rights, the Episcopal Conference maintained that Argentina's ratification of the Convention on the Rights of the Child supported the Episcopal Conference's interpretation that non-implanted embryos should be legal persons.<sup>99</sup>

Under Article 1, the Convention on the Rights of the Child defines a child as a human being of less than eighteen years of age, unless internal law of a State Party recognizes adulthood before that age.<sup>100</sup> Upon ratification of the treaty, Argentina exercised an interpretative declaration stating: "child means every human being from the moment of conception up to the age of eighteen."<sup>101</sup> Hence, the Episcopal Conference holds that the Argentinean declaration makes no distinction with regard to where conception occurs and confirms that the beginning of legal personhood under Argentinean internal law is at the moment of conception.<sup>102</sup>

Consequently, the Episcopal Conference began drawing attention to the unjust discrimination embedded in the distinction prescribed in Article 19 of the draft of the Civil and Commerce Code. Notwithstanding the problems that this may have raised about affording legal personhood to the non-implanted embryo for family law and private law, the Episcopal Conference maintained that the best solution was not to ignore the embryo's right to dignity and right to life, which is a part of their human condition.<sup>103</sup> In conclusion,

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<sup>98</sup> *Id.* at 8; Argentina's Episcopal Conference, *supra* note 93, at 5-6.

<sup>99</sup> *Id.* at 5-6.

<sup>100</sup> Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44.24, art. 1 (Nov. 20, 1989).

<sup>101</sup> Law No. 23849, Art. 2, Oct. 16, 1990, B.O. 269983 (Arg.).

<sup>102</sup> Argentina's Episcopal Conference, *supra* note 93, at 5-6.

<sup>103</sup> *Id.* at 6.

conservative groups again advocated for the absolute protection of the embryo as constituting a human person with rights grounded in the language of rights.

In light of these critiques surrounding Article 19, as well as others presented around the country, in 2013, the National Congress reformed the draft of the Civil and Commerce Code of the Commission of Jurists.<sup>104</sup> Under the political will of the majority party in the National Congress, the text of Article 19 was reformed using language that failed to keep up with the current practices of individuals regarding their reproductive rights.<sup>105</sup>

Thus far, this section presented the debate for structuring a narrative for reproductive rights in Argentinean legal order. In this debate, this section described the participation of the former and the draft of the Civil and Commerce Code as interpreted by courts, jurists, and social movements. An analysis of the interaction of the different voices in this debate reveals the fact that opposing perspectives on the exercise of reproductive rights channel their arguments through the same lingua franca of human rights, with the peculiarity that these groups construct their language under different dialects.

On the one hand, using metaphysical or ontological arguments, courts and conservative groups advocated for the absolute protection of embryos, disregarding individual's right to form a family or enjoy the benefits of scientific progress. On the other hand, a Commission of Jurists, in view of the case law that was spurred on the basis of the former

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<sup>104</sup> *Código Civil: polémicas por la Existencia y el artículo 19*, CBA24N (Oct. 1, 2014), <http://www.cba24n.com.ar/content/codigo-civil-polemicas-por-la-existencia-y-el-articulo-19>.

<sup>105</sup> *Id.*

Civil Code and international human rights law, understood that it was important to keep Argentinean legal order abreast of the current living conditions of individuals and provide legal solutions for contemporary problems. To such end, the use of embryos merited regulation in their draft of the Civil and Commerce Code in order to respect individuals' legal parenthood claims, but the Commission also recognized that the Congress could later award legal protections to non-implanted embryos. In this sense, under the principle of the *constitutionalization of private law*, the Commission of Jurists sought to accommodate competing interests that past case law had adjudicated without clear legal rules.

The next section will critically analyze the outcome of this debate: the approval of Article 19 of the Civil and Commerce Code and its effects for the legal regime of ARTs. This analysis will shed light on the regressive legislative decision adopted by the National Congress and the challenges for structuring a narrative for reproductive rights that abides with international human rights law, as established in *Artavia Murillo v. Costa Rica*.<sup>106</sup>

### C. ARGENTINA'S NEW CIVIL AND COMMERCE CODE: ARTICLE 19 AND THE ENJOYMENT OF REPRODUCTIVE RIGHTS

At the end of the congressional debates over the draft of the Civil and Commerce Code presented by the Commission of Jurists, the majority party introduced modifications. Some of these reforms were approved by other Congressional minority political parties, but other reforms responded to core political perspectives of the majority party. However,

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<sup>106</sup> See Hevia & Herrera Vacaflor, *supra* note 13.

there had been consensus on the drafted text of Article 19. Surprisingly, at the last moment, the majority party included a change to Article 19. The change was surprising, even for representatives of the majority party.<sup>107</sup> In fact, strangely, when the final draft of the Civil and Commerce Code was introduced for its approval in the Senate, senators from the opposing and majority party expressed the need to further reform Article 19, possibly during its discussion in the House of Representatives.<sup>108</sup> Nevertheless, the House of Representatives left Article 19 unchanged.<sup>109</sup>

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<sup>107</sup> According to media coverage, the change in the text was due to concessions made by the National Government to the Catholic Church. See *Código Civil: con cambios que pidió la Iglesia, apuran la sanción*, CLARÍN (Sept. 28, 2014), [http://www.clarin.com/edicion-impresa/Codigo-Civil-cambios-Iglesia-sancion\\_0\\_1220877916.html](http://www.clarin.com/edicion-impresa/Codigo-Civil-cambios-Iglesia-sancion_0_1220877916.html); Mariano De Vedia, *La Reforma del Código Civil va a debate con el aval de la Iglesia*, LA NACIÓN (Sept. 29, 2014), <http://www.lanacion.com.ar/1731221-la-reforma-del-codigo-civil-va-a-debate-con-el-aval-de-la-iglesia>.

<sup>108</sup> República Argentina Versión Taquigráfica (Provisional) Cámara De Senadores De La Nación, 19<sup>th</sup> Reunión, 9<sup>th</sup> Sesión especial 135, 139-140 (Nov. 27-28, 2013) (Congressional Debate on the Reform, Actualization and Unification of Civil and Commerce Codes of the Nation) (Arg.). Miguel Angel Pichetto, the Leader of the Majority Party in the Senate (Frente para la Victoria) expressed, “The second theme I want to mention, and I do not want to bore you with numbers, is that the article 19 does not satisfy me either. I have a secular belief; that is, the things that are of the State belong to the State and the things that are of God belong to God. . . . I hope that this [article 19] be corrected in the House of Representatives [at the time they decide the approval of the Civil and Commerce Code]” (author’s translation). With a similar critique, Gerardo Morales, the Leader of the First Minority Party in the Senate (Unión Cívica Radical) also claimed, “If there is not conceptual clarity in [this version of] article 19, then we are not contributing anything. The previous text of article 19 did give a conceptual clarity, as it stated that there is beginning of life in cases of assisted human reproduction when

Under these new modifications, the new text of Article 19 prescribes, “ARTICLE 19. Beginning of Existence. The existence of human personhood begins at conception.”<sup>110</sup> Despite the political consequences raised by this final reform to Article 19, this change in the text also resulted in legal consequences for ARTs. The final version of Article 19, approved by the National Congress, reintroduced the legal uncertainty of whether embryos should be considered legal persons with protected rights.<sup>111</sup> Furthermore, this final and approved version of Article 19 demonstrates that the debate at the National Congress was won by the metaphysical or ontological language of rights-based attributions for arguing when life begins. The regression in the explicit recognition of the normative term “implantation” and the distinction between biological and assisted reproduction along the debate (see Table 1) shows that the juridical logic of the Commission of Jurists was not fully regarded, nor were voices raised in their defense by legislators.

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the embryo is in the maternal womb. Then, [this final version of article 19] fall short in this respect” (author’s translation). *Id.*

<sup>109</sup> CÓDIGO CIVIL Y COMERCIAL DE LA NACIÓN [CÓD. CIV. Y COM.] [CIVIL AND COMMERCE CODE] art. 19 (2015) (Arg.).

<sup>110</sup> *Id.*

<sup>111</sup> RICARDO LUIS LORENZETTI (DIR.), CODIGO CIVIL Y COMERCIAL DE LA NACION COMENTADO: TOMO I 89-91 (Rubinzal-Culzoni Ed., 1st Ed. 2014).

Table 1<sup>112</sup>

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| <p>ARTICLE 70<br/>(Former Civil Code)</p> <p>The existence of personhood begins from the moment of conception in the maternal womb. These persons, before being born, may acquire certain rights as if they were already born. Such rights are irrevocably acquired if those conceived in the maternal womb were born with life, even if such livelihood lasted moments after being separated from the mother.</p> | <p>ARTICLE 19<br/>(Civil and Commerce Code drafted by Commission of Jurists)</p> <p>The existence of human personhood begins with the conception in the maternal womb. In the case of exercise of assisted reproductive techniques, it begins with the implantation of the embryo in the woman, notwithstanding that which a special Statute may prescribe for the protection of the non-implanted embryo.</p> | <p>ARTICLE 19<br/>(Civil and Commerce Code of Argentina)</p> <p>The existence of human personhood begins at conception.</p> |
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<sup>112</sup> The translation of these articles is our own.

Under this new reality, defining the beginning of existence of legal personhood generally at the moment of conception failed to address the legal issues brought up in the case law on ARTs. In light of this legal uncertainty, what interpretation should be given to the term “conception”? What are the legal effects of this final reform on the legal regime of ARTs? Would the embryo be considered a legal person with rights? Which rights would embryos have: the right to life and the right to be born? If cryopreservation is found to affect the embryos’ right to be born, could women be forced to have all of their embryos implanted? This section will present a critique to the final text of Article 19 of the new Civil and Commerce Code, as approved by the National Congress, based on the fact that it ignores the legal developments set in international human rights law.

The term conception should be interpreted following discourse based on a language of rights advocated by the different groups that participated in drafting the Civil and Commerce Code. One important reason for structuring this debate under the language of rights stems from the governing principle of this Civil Code: the *constitutionalization of private law*. Under this principle, private law matters involving the enjoyment of reproductive rights by individuals must be interpreted with attention to the human rights obligations adopted by Argentina in signing international human rights treaties.<sup>113</sup>

With this principle in mind, interpretations around the term conception should take into consideration, in particular, what the American Convention on Human Rights has prescribed on the subject. As has been analyzed throughout this article, Article 4(1) of the American Convention has been

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<sup>113</sup> LORENZETTI, *supra* note 111, at 29-31.

used for arguing in favor of absolute protection of the embryo. In 2012, the IACtHR has issued the sentence in *Artavia Murillo v. Costa Rica*, in which the scope of Article 4(1) was determined, especially the term conception, in the context of an absolute prohibition on access to *in vitro* fertilization dictated by Costa Rica's Supreme Court.<sup>114</sup>

IACtHR's determination of the scope of the term conception regarding when persons have a right to life is relevant for interpreting Article 19 of the Argentinean Civil and Commerce Code for at least two reasons. Firstly, Argentina's Supreme Court has established that, when interpreting an international human rights obligation assumed by Argentina under the American Convention on Human Rights, the doctrine established by IACtHR jurisprudence is the most authoritative voice, and conversely, it should be applied and incorporated in courts' reasoning.<sup>115</sup> In this sense, using the case of *Almonacid Arellano v. Chile*, the IACtHR has established that the judicial branch of State Parties of the American Convention must apply both the American Convention on Human Rights, as well as an authoritative interpretation of the rights therein, as set forth

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<sup>114</sup> *Artavia Murillo et al. v. Costa Rica*, *supra* note 13.

<sup>115</sup> Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 13/07/2007, "Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad," Fallos (2007-330-3248) (Arg.). *See also* Corte Suprema de Justicia de la Nación [CSJN][National Supreme Court of Justice], 27/11/2012, "Rodríguez Pereyra, Jorge Luis y otra c. Ejército Argentino s/ daños y perjuicios," Fallos (2012-335-2333) (Arg.) (the Supreme Court, reinstating the doctrine established by the IACtHR, declared that Argentina's Judiciary not only has an obligation to exercise a judicial review with basis on the National Constitution but also on the basis of the American Convention on Human Rights. Thus, courts in exercising their judicial review must apply and interpret international human rights treaties ratified by Argentina.).

by the IACtHR.<sup>116</sup> Thus, whenever courts in Argentina must face interpreting the term conception in Article 19 of the Civil and Commerce Code, they must do so in accordance with the jurisprudence set by the IACtHR in *Artavia Murillo v. Costa Rica*.

Secondly, under the principle of *constitutionalization of private law*, any private law judicial controversy regarding access or practices in the context of ARTs and embryos under Article 19 of the approved Civil and Commerce Code should apply the doctrine established in *Artavia Murillo v. Costa Rica* as an authoritative legal material. In this sense, the expression of motives set by the drafters of the Civil and Commerce Code maintained that the regulation established for the protection of the human person (i.e. Article 19) is reconstructed with attention to Argentina's international human rights obligations.<sup>117</sup> Hence, whenever judges reason on what interpretation should be given to the term "conception" in order to determine if an embryo is a human person with rights protections, the court must consider what the IACtHR has declared on what "conception" means under the American Convention.

On the basis of the analysis presented, what was the scope given to the term "conception" by the IACtHR? In *Artavia Murillo v. Costa Rica*, the IACtHR established when life begins for the purposes of determining which entities are

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<sup>116</sup> *Almonacid-Arellano et al. v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶¶ 125-128 (Sept. 26, 2006) [hereinafter *Almonacid-Arellano et al. v. Chile*].

<sup>117</sup> PROYECTO CÓD. CIV. Y COM. § Aspectos Valorativos [Valorative Aspects of the Project of Civil and Commercial Code] (Arg.), <http://www.nuevocodigocivil.com/textos-oficiales-2/>.

not entitled to a right to life under Article 4(1) and Article 1(2), which states “person means every human being.”<sup>118</sup>

In *Artavia Murillo v. Costa Rica*, the IACtHR discussed the Costa Rican Supreme Court sentence declaring the absolute prohibition of access to IVF under the argument that IVF practices violate the right to life and human dignity of embryos.<sup>119</sup> Consequently, the IACtHR had to determine the following issues: (i) whether embryos were persons under the American Convention, and thus, were entitled to the protection under the right to life; and (ii) if the absolute protection was a proportionate limit on individual’s rights for the embryo’s right to life.<sup>120</sup>

With regards to the first issue, the IACtHR had to determine the legal status of the embryo in order to assess if the embryo should be considered a person and thus, entitled to a right to life. To such end, the IACtHR referenced Article 4(1), which establishes the following: “Every person has the right to have his life respected. This right shall be respected by law and, in general, from the moment of conception . . . .”<sup>121</sup> In light of this, the IACtHR interpreted Article 4(1) and assessed when life begins under the term “moment of conception” through four different interpretative hermeneutics: (1) interpretation in accordance with the ordinary meaning of the terms; (2) systematic and historical interpretation; (3) evolutive interpretation; and (4) the most favorable interpretation, the object and purpose of the treaty.<sup>122</sup>

<sup>118</sup> American Convention art. 1(2).

<sup>119</sup> *Artavia Murillo et al. v. Costa Rica*, *supra* note 13, ¶ 2.

<sup>120</sup> *Id.* ¶¶ 171, 272.

<sup>121</sup> American Convention art. 4(1).

<sup>122</sup> See generally *Artavia Murillo et al. v. Costa Rica*, *supra* note 13, ¶¶ 174-264.

1. INTERPRETATION IN ACCORDANCE WITH THE ORDINARY MEANING OF THE TERMS

The IACtHR admitted that the term “conception” at the moment of the drafting of the American Convention could not have possibly contemplated practices such as IVF because these practices did not exist.<sup>123</sup> Conversely, the current state of the art in scientific and juridical literature has found two major trains of thought for explaining the term “conception.”<sup>124</sup> One side of the literature maintains that it is the moment of fertilization, that is, the union or fertilization of the egg by the spermatozoid.<sup>125</sup> The other side of the literature understands “conception” to be the moment when the fertilized egg is implanted in the uterus.<sup>126</sup> With attention to such disagreements, the IACtHR is aware that most accounts of when life beings, or considerations on whether embryos or pre-embryos constitute a human being, rest on conceptualizations that grant metaphysical or ontological attributes to embryos. Such accounts, the IACtHR understands, cannot prevail over other kinds of literature explaining whether embryos are human beings, because doing so would imply the imposition of certain beliefs on others who do not share them.<sup>127</sup>

In light of this, the IACtHR reasoned that even though the embryo represents a “different cell with the sufficient genetic information for the potential development of a human being,” such development could not happen

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<sup>123</sup> *Id.* ¶ 180.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* ¶¶ 174-264

<sup>127</sup> *Id.* ¶ 185.

independently of a uterus.<sup>128</sup> The scientific literature presented caused the IACtHR to determine that, without implantation in a uterus, an embryo cannot acquire the necessary nutrients for its development.<sup>129</sup> Hence, the IACtHR ascertains that conception should be interpreted at the moment of implantation, which is when the embryo can develop into a human being.<sup>130</sup> In other words, the non-implanted embryo would not constitute a subject protected by Article 4(1) of the American Convention.<sup>131</sup>

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<sup>128</sup> *Id.* ¶¶ 186-187.

<sup>129</sup> *Id.* ¶ 186

<sup>130</sup> *Id.* ¶¶ 186-189.

<sup>131</sup> For a critique of this argument, see Eduardo Rivera López, *Conception, Fertilization and the Onset of Human Personhood: A Note on the Case Artavia Murillo et al. v. Costa Rica*, 6 INTER-AM. & EUR. H. R. J. 54, 59 (2013). Rivera López agrees with not recognizing legal personhood for in vitro embryos, but argues that the discussion about the recognition of legal personhood is a normative argument; thus, it cannot be based solely on scientific information:

[A]n argument of a juridical-normative kind cannot be supported (exclusively) by empirical premises. The Court suggests that the “current” scientific “schools of thought” support two possible conflicting interpretations. 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. . . . 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

## 2. SYSTEMATIC AND HISTORICAL INTERPRETATION

Once the IACtHR determined that conception should be interpreted as the moment when the embryo is implanted in a uterus, the Court analyzed whether the implanted embryo should be recognized with an absolute protection of the right to life, as the Supreme Court of Costa Rica had established. The Court understood that the interpretation of the protections under Article 4(1) should be analyzed with attention to the legal system to which it belongs.<sup>132</sup> In this sense, a systematic interpretation of the meaning and scope of the right to life should take into account what international human rights have established on the matter.<sup>133</sup> For such purposes, on the one hand, the IACtHR historically interpreted what the drafters of Article 4(1) of the American Convention intended to protect. On the other hand, the IACtHR also interpreted what other human rights systems (i.e. the Universal Human Rights System, the European Human Rights System, and the African Human Rights System) have contributed to the interpretations of the right to life in the context of reproductive rights. The Court's findings showed, firstly, that despite the intention of some drafters to eliminate the provision of "from the moment of conception"

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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 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).

*Id.*

<sup>132</sup> *Artavia Murillo et al. v. Costa Rica*, *supra* note 13, ¶ 191.

<sup>133</sup> *Id.*

or “in general,” such efforts were fruitless.<sup>134</sup> Secondly, throughout a review of the different existing international human rights systems, the IACtHR found that courts and human rights instruments have recognized neither an absolute protection nor an absolute right to life for embryos.<sup>135</sup> Instead, courts have identified that embryos have potential development and, conversely, they have recognized legal protection in balance with the human rights protections recognized in such treaties to the pregnant woman or the individuals who seek to form a family.<sup>136</sup> Thus, the IACtHR understands that embryos, either implanted or not, have no recognized absolute protection of a right to life.<sup>137</sup>

### 3. EVOLUTIVE INTERPRETATION

The IACtHR also considers that when interpreting the scope of the right to life in the context of IVF, one must comprehend that “human rights treaties are living instruments, whose interpretation must keep abreast . . .

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<sup>134</sup> *Id.* ¶ 221; see also Christian B. White & Gary K. Potter v. Estados Unidos de América, Inter-Am. Comm’n H.R., Report No.23/81, OEA/Ser.L./V/II.54, doc.9 rev. 1 (1980-1981) (The expression “in general” was introduced into the original text—in which it had not been contemplated—at the IACtHR’s suggestion. The Commission reasoned that it was necessary to reconcile existing differences among various legal regimens regarding the legal protection of the *nasciturus*. However, it is clear that Article 4.1 of the Convention, far from being a rule that unequivocally entitles the *nasciturus* to the right to life, offers a far less categorical protection.).

<sup>135</sup> See generally *Artavia Murillo et al. v. Costa Rica*, *supra* note 13, ¶¶ 225-243.

<sup>136</sup> See generally *id.*

<sup>137</sup> *Id.* ¶ 244.

current living conditions.”<sup>138</sup> This evolutive interpretation entails a comparative law analysis on how other international human rights jurisdictions have dealt with similar questions and interpreted right to life provisions in the context of IVF.<sup>139</sup> Similarly, it also demands a comparative law analysis on how countries have regulated IVF practices and what legal status has been recognized for the embryo.<sup>140</sup>

With regard to the interpretation of the scope of the right to life under IVF practices in other human rights systems, the IACtHR analyzed several cases brought to the European Court of Human Rights claiming the protection for the embryos’ right to life and human dignity.<sup>141</sup> In this analysis, the IACtHR concluded that, in the European Human Rights System, embryos were recognized with a potential to develop into persons, but that such status did not amount to recognition of a right to life or a “right to life of the unborn child.”<sup>142</sup> Similarly, for the purposes of the Inter-American Human Rights System, non-implanted embryos cannot be recognized as entitled to a right to life.

In relation to how IVF has been regulated and the legal status awarded to the embryo in the Inter-American System of Human Rights, the IACtHR concluded that, at the moment of sentencing, most State Parties did not have specific regulation on the matter.<sup>143</sup> Notwithstanding this, Chile, Brazil, and Perú had specific regulations stating that IVF practice needed to be exercised solely with the intention to

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<sup>138</sup> *Id.* ¶ 245.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See generally id.* ¶¶ 247-253.

<sup>142</sup> *Id.* ¶ 252.

<sup>143</sup> *Id.* ¶ 256.

procreate.<sup>144</sup> Brazil, in particular, has regulations establishing that in order to protect the right to health of the individual from supernumerary pregnancy, a maximum of four embryos can be implanted in a uterus.<sup>145</sup> Hence, the IACtHR concluded that, since the IVF is permitted in all countries of the Inter-American System except Costa Rica, IVF is compatible with what is established in Article 4(1).<sup>146</sup>

#### 4. THE MOST FAVORABLE INTERPRETATION AND THE OBJECT AND PURPOSE OF THE TREATY

Lastly, the IACtHR conducts a teleological interpretation of Article 4(1) of the American Convention.<sup>147</sup> Along its reasoning, the Court has found that there is an obligation to protect a right to life, but the term “in general” alludes to the possibility that in the event of a conflict between rights, such protection should not be interpreted as absolute.<sup>148</sup> Contrary to what the Supreme Court of Costa Rica has decided, an absolute protection of the right to life cannot be possible under a most favorable interpretation since it may lead to disproportionate limits on the human rights of other affected individuals. Consequently, given that the object and purpose of the American Convention is the protection of every person’s human rights, the “broadest protection” in favor of an absolute protection of the right to life is contrary to the object of the Convention. Conversely, the IACtHR has analyzed comparative constitutional case law from State Parties to the Convention where a balancing

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<sup>144</sup> *Id.* ¶ 255.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* ¶ 256.

<sup>147</sup> *Id.* ¶ 257.

<sup>148</sup> *Id.* ¶ 258.

between human rights in conflict was exercised.<sup>149</sup> The IACtHR concluded that the term “in general” in Article 4(1) alludes to the requirement to practice a balancing reasoning whenever there is a conflict between competing rights, that is, the right to life of an embryo or unborn life and the human rights of a woman.<sup>150</sup>

In conclusion, the Court’s doctrine in *Artavia Murillo v. Costa Rica* determines that the non-implanted embryo is not a subject of law protected under the right to life in Article 4(1) and that any rights protection argument raised in defense of embryos cannot be categorical, but rather must be balanced with the affected rights of the woman or affected individuals.<sup>151</sup> Thus, Argentinean courts should adopt this doctrine of the term “conception” when interpreting ARTs practices and its consequences on the protection of the human person as prescribed in the new Civil and Commerce Code. With this conclusion in mind, decisions such as *P., A. v. S., A. C. or R., R. D. s/ medidas precautorias* would be contrary to the doctrine set by the IACtHR and Argentinean legal order. Consequently, no protection of the law to the non-implanted embryo could limit the right of individuals to form a family, or to enforce legal parenthood on the individual who refuses implantation of the embryo.

### III. AN ARTAVIA MURILLO V. COSTA RICA READING OF ARTICLE 19 OF THE NEW CIVIL AND COMMERCE CODE

As has been discussed above, Article 19 expresses that the existence of the human person begins at the moment of

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<sup>149</sup> *Id.* ¶¶ 260-262.

<sup>150</sup> *Id.* ¶ 258.

<sup>151</sup> *Id.* ¶ 264.

conception. The term “conception” has also been analyzed under the interpretation of the IACtHR in *Artavia Murillo v. Costa Rica*. In this sense, this section has so far argued that under international human rights obligations, Argentinean courts should follow the case law established by the IACtHR. Notwithstanding this, how does the IACtHR’s finding in *Artavia Murillo v. Costa Rica* represent a different dialect of rights from the other dialects dismissed as being based on metaphysical or ontological understandings? Furthermore, how can the IACtHR interpretation of the meaning and scope of the right to life help harmonize Article 19 with the other regulations on the protection of the human person, as prescribed in the Civil and Commerce Code? Lastly, could the reasoning of the IACtHR be interpreted as a critique that spurs the need to draft when life begins into the Civil and Commerce Code? Could the reasoning of the IACtHR give a hint to the Argentinean legal tradition that what the law should focus on is legal personhood and its effects on third parties?

The IACtHR represents the most authoritative legal institution in charge of defining the meaning and scope of the lingua franca of human rights, accepted by most American States, and instrumented through the American Convention on Human Rights.<sup>152</sup> As identified by the Court, the debate on when life begins involves a great deal and many different kinds of literature.<sup>153</sup> In assessing this literature, the IACtHR seems to conclude that scientific or legal literature conceptualizing metaphysical or ontological attributes to early stages of life development fails to give equal respect

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<sup>152</sup> *Almonacid-Arellano et al. v. Chile*, *supra* note 117, ¶ 185; *P., A. c. S., A. C. - L.L.*, *supra* note 65.

<sup>153</sup> *Artavia Murillo et al. v. Costa Rica*, *supra* note 13, ¶ 185.

and consideration to all other affected persons on the debate of when life begins. In this sense, such literature should not be considered a proper source for explaining when life begins because it would entail the imposition of certain beliefs and understandings of the world onto others who do not share them.

But this is not the sole reason. The debate about when life begins and its effects on the individual rights of others does not occur in isolation. Rather, the Court points out, such debate happens in a larger context, which is the developing narrative of reproductive rights of individuals.<sup>154</sup> To such end, the Court has recognized that in determining the extent of the right to life of embryos, the scope left for the enjoyment of other recognized rights, such as the right to form a family or not to become a legal parent, should also be given equal consideration.<sup>155</sup>

For these reasons, a dialect of rights that gives equal consideration and respect to all individuals that integrate the Inter-American System of Human Rights must be aware of (i) what other systems have said about when life begins and how pre-natal life should be protected; (ii) how other systems and countries have interpreted the right to life with regards to ARTs in order to keep abreast of current lifestyles; and (iii) how these systems and countries have balanced right to life arguments for the protection of pre-natal life and other rights in conflict. Hence, the dialect of rights used by the Court to sustain the conclusion that the embryo should not be considered a person with the protection of the right to life reasonably accommodates, to some extent, the competing interests in this debate. The rights of individuals to form a

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<sup>154</sup> *Id.* ¶ 146.

<sup>155</sup> *Id.*

family, have access to IVF, or enjoy their right not to form a family is reasonably protected, but also, as of the moment of implantation, the Court recognizes that there may be legal protections awarded to that prenatal life, provided that the scope of such protection is balanced with the conflicting rights of individuals.

This dialect chosen by the IACtHR for sustaining its decision in *Artavia Murillo v. Costa Rica* may also be applied in Argentina's internal law for harmonizing the lack of legal clarity embedded in the approved Article 19. In this sense, a systematic interpretation of the regulation on the human persons in the new Civil and Commerce Code demands that the term "conception" be harmonized with Article 20. Under this article, the Civil and Commerce Code determined the period of conception, which runs between the maximum and minimum periods of time set during a pregnancy.<sup>156</sup> Furthermore, Article 21 of the Code establishes that the rights and obligations of the "conceived" will be irrevocably acquired, only if born with life.<sup>157</sup> An interpretation of the meaning of these articles means that there are potential rights and obligations claims afforded to prenatal life during pregnancy, but these rights and obligations become operative only provided that successful birth occurs. Moreover, Article 20 specifically states that there cannot be conception without pregnancy.<sup>158</sup> Under this reading, conception must be interpreted as the moment of implantation, since it is at this moment when it is considered that pregnancy is achieved.<sup>159</sup> This point clarifies that conception can exclusively occur in

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<sup>156</sup> Cód. Civ. y Com. art. 20.

<sup>157</sup> *Id.* art. 21.

<sup>158</sup> *Id.* art. 20.

<sup>159</sup> *Artavia Murillo et al. v. Costa Rica*, *supra* note 13, ¶ 187.

the uterus of an individual and, conversely, a non-implanted embryo cannot be considered conceived.<sup>160</sup>

In addition to this, it is also important to pay attention to other relevant regulations that are operative in Argentina. Legislation enacted during 2013 prescribed regulations for establishing a legal regime of ARTs in the country.<sup>161</sup> Statute No. 26.826, which prescribed integral access to assisted reproductive techniques in Argentina, determined that individuals who seek IVF treatments might revoke their consent prior to the implantation of the embryo.<sup>162</sup> This statute also allows and commits the State to provide cryopreservation of gametes and embryos to individuals who seek ARTs at that moment or in the future.<sup>163</sup> In light of this new legal framework for ARTs, the non-implanted embryo was recognized as having no legal value and, furthermore, cryopreservation or donation of gametes for IVF purposes were recognized as lawful practices.<sup>164</sup>

Finally, the legislative decision to enact a Civil and Commerce Code that determines when life begins could be further critiqued. In this sense, the IACtHR has accepted that there is no definitive formula for determining when this occurs.<sup>165</sup> A Civil and Commerce Code should not prescribe concepts such as "person" or "conception" on a biological, metaphysical, or ontological understanding; on the contrary, such concepts are normative concepts and, thus, should be

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<sup>160</sup> Aída Kemelmajer de Carlucci, Marisa Herrera, & Eleonora Lamm, *La obligación de ser padre impuesta por un tribunal*, REVISTA JURIDICIA ARGENTINA LA LEY 441 (2011).

<sup>161</sup> Law No. 26862, Jun. 25, 2013, B.O. 32667 (Arg.).

<sup>162</sup> *Id.* art. 7.

<sup>163</sup> *Id.* art. 2.

<sup>164</sup> Executive Decree No. 956/2013, art. 2, Jul. 23, 2013, B.O. 32685 (Arg.).

<sup>165</sup> *Artavia Murillo et al. v. Costa Rica*, *supra* note 13, ¶ 185.

defined in juridical terms.<sup>166</sup> Thus, a Civil Code should define when the Argentine legal system recognizes the legal status of personhood to a being in order to determine rights and obligations. In fact, a comparative private law analysis in the Inter-American region shows that countries such as Colombia or Brazil recognize that legal personhood begins at the moment of birth with life, where rights and obligations are acquired.<sup>167</sup> In this sense, the Civil and Commerce Code of Argentina could have dispensed the need to regulate when life begins, and instead determined when legal personhood begins as it has done in the current Article 21. Recognition of legal personhood under these terms gives better legal clarity to the private law legal order and avoids litigation claiming the respect of Argentina's international human rights obligations.

#### IV. CONCLUSION

The new Civil and Commerce Code of Argentina has managed to contemplate solutions or default rules for most past and current contingencies that may arise in private law relations in Argentina. Most importantly, the new Civil and Commerce Code of Argentina includes Argentina's international human rights obligations as commitments that shall also be respected by individuals when entering into private law relations with one another. With this overarching principle in mind, no doubt, the inclusion and regulation of

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<sup>166</sup> Rivera López, *supra* note 133, at 59.

<sup>167</sup> CÓDIGO DE LA INFANCIA Y LA ADOLESCENCIA (CHILDHOOD AND ADOLESCENCE CODE) [COD. INF. ADOL.] art. 17 (2006) (Colom.); CÓDIGO CIVIL [C.C.] art. 2 (2002) (Braz.).

ARTs in the Civil and Commerce Code of Argentina is a step forward in the fulfillment of individual human rights.

Notwithstanding, this article studies how the new private law governing legislation gestated and emerged in the context of reproductive rights, particularly, the regulation of ARTs. To this end, the article analyzed three moments in time. As a preliminary step, it studied what informed the drafters' proposed regulation on ARTs. Such a study involved identifying how the former Civil Code and the jurisprudence structured the legal regime for access to and practice of ARTs. Correspondingly, the article showed how the draft of the new Civil and Commerce Code sketched by the Commission of Jurists decided to propose a regulation in response to past judicial interpretation that severely limited access to ARTs. Lastly, this article shed light on the consequences set out in the end result. Namely, this article revealed that the current Civil and Commerce Code, to a great extent, did not incorporate proposed regulations drafted by the Commission of Jurists, and consequently left the legal regime of ARTs under-regulated, with several legal uncertainties, and with referrals for special legislation that could severely restrict the universe of possible ART treatments.

Throughout this analysis in time, this article disclosed that during the formative process of the current Civil and Commerce Code, different framings of "when human personhood existence begins" were advocated, but all of these were grounded in a language of rights. As was affirmed throughout this article, the legislative decision to determine when life begins brought about the discussion of at which moments an organism can be awarded the legal status of human personhood entitled to a right to life and the protection of the law. Hence, the article has shown that some groups that advocated for framings on this issue considered

the embryo in all its developmental stages as a full human person entitled to rights, while other groups did not consider it to be a person at all. Most importantly, this debate in the context of the Civil and Commerce Code reform was sustained in the lingua franca of human rights, agreed in the Inter-American Human Rights System, namely, the American Convention on Human Rights. In response to this fact, this piece has argued that a proper framing of such legal status must not entail moral or ontological foundations that would render the imposition of a belief or life plan on others. Moreover, at the moment of framing such legal status, a discourse for a certain framing based on the language of rights must take into consideration the legal system in its entirety and be able to keep abreast with current living practices of individuals.

The Inter-American Court of Human Rights' decision in *Artavia Murillo v. Costa Rica* proves to be a legal solution moving in the direction of solving the framing challenges observed in the drafting of the Civil and Commerce Code. Furthermore, and considering the legal uncertainties embedded in the current Civil and Commerce Code with regards to the legal regime of ARTs, this article has shown that courts must interpret the text of the Code following the *Artavia Murillo v. Costa Rica* precedent. In fact, many predict that this will occur because national courts have begun to increase compliance with international human rights regimes.<sup>168</sup> However, as we suggested, this will necessarily be

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<sup>168</sup> See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273(1997); Emilia Justyna Powell & Jeffrey K. Staton, *Domestic Judicial Institutions and Human Rights Treaty Violation*, 53 INT'L STUD. Q. 149 (2009); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Alexandra Huneus, *Courts Resisting Courts: Lessons from the*

the case because the debates surrounding the beginning of human legal personhood in Argentina are a reflection of the fact that the lingua franca of the American Convention on Human Rights has been invoked to defend both views.

With this challenge ahead, judges and lawyers, among other equally important actors, may play, and have so far played, an important role in continuing this debate. Thus, in turn, this article calls for human rights lawyers and reproductive rights advocates to take on the role of reminding courts about the principles and values developed in the case law of the Inter-American Courts, which is fundamental.<sup>169</sup>

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*Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011) (arguing that when the Inter-American Court issues remedial orders, national courts may have institutional reasons not to comply).

<sup>169</sup> See Hevia & Herrera Vacaflor, *supra* note 13, at 482.