

**A Legal Perspective on the Human Right to Life in
Venezuela**
A focus on Childhood

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“There are many wonderful things, and nothing is more wonderful than man.”

Antigona, Sofocles, 442 b.C.

Introduction

The following Article is intended to offer a legal perspective on: (i) Right to Life of the unborn child and (ii) human conduct incompatible with that right; as well as current legal status of these rights in Venezuela. The analysis, though properly legal, starts out through its reflection on the profound nature of the subjects studied.

I. The Right to Life

Article 43 of the Constitution of the Bolivarian Republic of Venezuela establishes that: “The right to life is inviolable”¹ and that its exercise applies to “all human beings.”² This right is not conceded by society in order to protect certain *goods*; rather it is a recognition of *the social human nature* which requires society to respect, safeguard and value life. This is because a being who reflects on and esteems his own existence, who has a deep passion for discovering the meaning of life and conducts his own existence,³ deserves undoubtedly to be called “human person.”

This expression of common language – which is not stated in legal terms – reveals that in the human person converges every feature of nature that allows him to be valued for himself and not for other reasons: before any other person’s intervention,⁴ the human person is an end

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¹ And it continues: “No law shall provide for the death penalty and no authority shall apply the same. The State shall protect the life of persons who are deprived of liberty, serving in the armed forces or civilian services, or otherwise subject to its authority.” Art. 43, Constitution of the Bolivarian Republic of Venezuela, 1999. Hereinafter “CBRV”.

² The Universal Declaration of Human Rights, art. 4. The United Nations, Universal Declaration of Human Rights, 1948.

³ “El hombre (...) es el único ser en el que la vida posee capacidad de ‘reflexionar’ sobre sí mismo, capaz de autodeterminación, y es el único ser capaz de descubrir el sentido de la cosas y de la vida y de protagonizar de algún modo su propio morir. Esta persona vale en sí misma y por sí misma y no en razón de otra cosa; único ser visible que no pertenece a la categoría de los bienes útiles o instrumentales y por ende se resiste a ser tratada como medio.”

[“ Man (...) is the only being capable of “reflection” upon himself, capable of self-determination, and he is the only being able to discover a true sense of things and of life and to leads in any way his own life. This person has value in himself and not by reason of other considerations; unique, to be seen apart from the category of instrumental goods and so resists to be treated as means”] Author’s translation

GARCÍA, JOSÉ JUAN, *Enciclopedia filosófica digital "Philosophica"*, voz "Bioética". En <http://www.philosophica.info/voces/bioetica/Bioetica.html#toc1>; (last visited 13/04/2016).

⁴ “Others”: other human beings, the legal “persons”, corporations – which are entitled to legal personhood conceded by the Government.

and not a means.⁵ The individual human being, as previously stated, must lead his own existence: before others, man is an end unto himself and is able to choose his own end. Thus, the ideas of liberty and safety are rights connected to the right to life.⁶

Furthermore, regarding the legal status of “persona jurídica natural” the Venezuelan Civil Code dictates that “*All individuals of the human species are natural persons.*”⁷ This is an *instrumental legal category*, which follows from the existence of the human person (who is certainly the holder of legal personhood). More specifically, we categorize it as an *instrumental legal category* because it is a means to recognizing the qualities of the rights and duties that every human person has. Accordingly, it is not a requirement to be recognized as “natural legal person” to be a human person, but rather every individual of humankind deserves recognition of their legal personhood.⁸

We also know from experience that there are individuals who need special protection and defense of human rights and, very often, the right to life. Among these “weak individuals” are criminal defendants, the elderly, pregnant women, and unborn children. This Article is devoted to the situation of the latter.

II. The Child

To begin with, we must say that the reasons for protecting human persons starting from conception are not only legal, but flow from the common reflection of humanity around its own nature and about its consequent dignity. An excellent expression of this is precisely the desire to protect life through the *rule of law*.

That “human nature” of which we are speaking, that makes us be rational, free, etc., is owned by children from the moment of conception. Birth, as a natural biological fact, does not add anything to this individual that he does not have as its own since his conception: “humanity” is not something that appears in the child after at the beginning of his life at conception. That the neural crest has appeared or that division of the zygote into twins is no longer possible does not mean that what existed before was not a human life:

“The biological meaning of fertilization is precisely the initiation a new individual. The zygote biologically means the initial structure of a new individual: in it a new genetic message is constituted and begins to emit itself. In it emerges a new program of individual life, with a new center coordinating their vital functions that leads to the construction of an organism. It is a corporeal totality that intrinsically tends to a

⁵ “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Preamble of the Universal Declaration of Human Rights.

⁶ “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.” Universal Declaration of Human Rights, Art. 4.

⁷ “Every individual of humankind is a [natural legal] person.” [Author’s Translation]. Natural legal person as opposite to Legal person – corporations. Código Civil Venezolano, Art. 16. (hereinafter “CCV”). Gaceta Oficial N° 2.990 Extraordinario, July 26th 1982.

⁸ This is the reasoning behind a proper interpretation of Art. 17 of CCV (“*El feto se tendrá como nacido cuando se trate de su bien; y para que sea reputado como persona [jurídica], basta que haya nacido vivo.*” [Fetus will be considered as born when it aims to his own good; and to be considered as legal person will be enough that he is born.]) From this text: (i) it cannot be inferred that fetus is not a human person; (ii) nor is the unborn is protected in reason of his potential birth, but in reason of his human nature. We will offer a deeper analysis of this article in pages ahead.

complete development, requiring only the presence of a favorable environment to become an adult human being. He is already a man from the beginning because what defines him is not his morphology or the functions that he is capable of performing, but his constitution as an individual reflected in the new genome whose information begins to be emitted in the environment itself: the totipotent cell."

The preceding quotation illustrates that life begins with fertilization. Therefore, violating a child's rights arguing that he has not yet developed (e.g. allowing abortion until certain date of gestation) lacks a reasoned foundation.

A fundamental characteristic of a human person is that he **develops**. He is a being **in development**. And we do not say it is only human in this or that stage of the development process; the decisive factor is not the development phase, but who is the subject of this development. It does not grow to become human, but it is the human who grows. And just as there is **only one subject**, there is a single, indivisible, and continued process that goes from fertilization to death.

On this fundamental aspect of "development," the Vice President of the Committee on the Rights of the Child of United Nations⁹ has affirmed:

Sobre este aspecto fundamental del "desarrollo" dice la Vicepresidenta del Comité de Derechos del Niño de la ONU : "Sólo se puede reconocer al niño como persona si admitimos sus características propias, es decir, que esta persona [humana] niño o niña, con derechos, **tiene también una necesidad de cuidados particulares y específicos, [porque] se transforma progresivamente. Esto exige de los padres, adultos y del Estado una respuesta adaptada a esta transformación**, según la edad y madurez del niño." (Author's emphasis).¹⁰

For all these reasons, it is particularly harmful and unjust that the Government or society or family infringes on or does not guarantee the right to life of the unborn child. Since the person who causes harm bases his argument on these very facts -the vulnerability and dependence on others- that form the foundation of their care obligations is an offense against those who should be protected.

So far we have discussed (i) why the child's life begins with fertilization, (ii) why the child is a human person, and (iii) why it needs special protection from their family, society, and the Government.

These conclusions have been adopted in different ways and embodied in legal standards, both by international conventions and by the Venezuelan legislature.

⁹Rosa María Ortiz, on the occasion of the 20th anniversary of the Convention on the Rights of Child. Conference: ORTIZ, ROSA MARÍA, *A los 20 años de la Convención sobre los Derechos del Niño. Pasos hacia su comprensión y aplicación efectiva*. p. 32.

¹⁰You can only recognize the child as a person if we admit its own characteristics, that is, that this person [human] child with rights, **also has a need for particular and specific care, [because] it is progressively transformed. this requires of parents, adults and the State an appropriate response to this transformation**, according to the age and maturity of the child. [Author's emphasis]. PERDOMO, JUAN RAFAEL (Coord.); *VI Foro Derecho de la Infancia y de la Adolescencia*. Tribunal Supremo de Justicia y la Fundación Gaceta Forense. Caracas, 2011.

Thus, the regulatory body on the rights of the unborn child is authorized by:

- a) The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela- "...which have a constitutional rank, and prevail over internal legislation"¹¹; and
- b) The Constitution of the Bolivarian Republic of Venezuela of 1999 and the Act for Protection of Children and Adolescents of 2007 (Ley Orgánica para la Protección Niños, Niñas y Adolescentes de 2007)¹²

Among the international law regulations, the following stand out:

The Declaration of the Rights of the Child of the UN¹³ establishes on the rights of children: "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth..." Here it is evident that the reason for greater protection granted to an unborn child is due to his lack of physical and mental maturity; thus, this lack of maturity cannot be any excuse for threatening life before birth.

The American Convention on Human Rights¹⁴ ("Pact of San José") says in the first paragraph of Article 4: "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."¹⁵ It is clear that, for State Parties of the convention, life is conceived as a value that must be protected; to do otherwise would be exceptional. It has been said "and, in general, from the moment of conception" does not introduce such an exception that denies the right declared. We should add that "For the purposes of this Convention, person is every human being."¹⁶

On the Pact of San José, it should be noted that it was denounced by the Venezuelan government. However the likely unconstitutionality of this event,¹⁷ assuming arguing that Venezuela was not a party to the Treaty in question, the Pact of San José remains a key

¹¹"The treaties, pacts and conventions relating human rights which have been executed and ratified by Venezuela have a constitutional rank, and prevail over internal legislation, insofar as they contain provisions concerning the enjoyment and exercise of such rights that are more favorable than those established by this Constitution and the laws of the Republic, and shall be immediately and directly applied by the courts and other organs of the Public Power." CBRV, Art. 23.

¹²La Ley Orgánica para la Protección del Niño y del Adolescente (hereinafter LOPNNA) was sanctioned in 1998, and entered into force in 2000, recognizing without discrimination all children and adolescents as full subjects of rights and duties, according to the principles of Absolute Priority and Higher Interest. In 2007, the Act was amended in part "...in order to adapt it to the Constitution of the Bolivarian Republic of Venezuela (1999), which recognizes the constitutional status of the Convention on the Rights of the Child" as expressed in the exposition of reasons (exposición de motivos) for the LOPNNA. Published in Gaceta Ordinaria No. 6.185 of June 8, 2015 concerning the partial reform of the Criminal Responsibility System for Adolescents.

¹³ November 20, 1959.

¹⁴ November, 1969.

¹⁵ Author's translation.

¹⁶ Art. 1, 2.

¹⁷On the unconstitutionality of the denunciation: FERNÁNDEZ, FERNANDO; ¿Es constitucional el retiro del Pacto de San José? ¿Qué hacer?; available at: <http://www.amnistia.org/profiles/blogs/es-constitucional-el-retiro-del-pacto-de-san-jos-qu-hacer>

instrument, as Title II, Chapter I of the CBVR establishes (i) the principle of progressiveness of human rights (Art. 19¹⁸), according to which human rights which have been recognized and that their exercise and enjoyment are inalienable, indivisible, and non-derogable; and (ii) that the lack of legal provision does not impair the exercise of these rights (Art. 22 and 27), since by their very nature they do not require statements in order to be protected.

The American Declaration of the Rights and Duties of Man states " Everyone has the right to life, liberty and security of his person" (Art. 1).¹⁹ And the **Convention on the Rights of the Child**, adopted by the UN General Assembly,²⁰ states "... a child means every human being below eighteen years of age ..." (Art. 1). It is noteworthy that the conceived child falls into this category.

With regard to Venezuelan legislature, some provisions deserve special attention:

Art. 1 of the LOPNNA provides that "This Act is to guarantee to all children and adolescents who are in the country the exercise and full enjoyment of their rights and guarantees through the comprehensive protection that the State, society and families should provide from the moment of conception."²¹ There is no doubt, therefore, that the law in Venezuela guarantees and protects the life of the unborn as well as recognizes its character as a child.

Moreover, according to Art. 78 of the Constitution of 1999, the child is a full subject of the law.²² Therefore, although there is no specific policy statement, these provisions of the Constitution and the LOPNNA must be interpreted together to mean that the conceived child is "natural legal person." If human nature is recognized and if it is called a "child" explicitly from the moment of conception (Art. 1 LOPNNA), natural legal personhood is clear (Art. 78 Constitution). In Venezuela there is not a category of law such as the "pre-embryo" conceptualized as "non-person" or "legal-non-subject."

Thus, based on Article 17 of the Civil Code ("The fetus will be treated like one who is born when his well being is at stake; and to be deemed a person [legal], it is enough for one to be born alive."²³): it cannot be inferred that the fetus is not a human person; nor that the unborn

¹⁸“Article 19: The State shall guarantee to every individual, in accordance with the progressive principle and without discrimination of any kind, no renounceable, indivisible and interdependent enjoyment and exercise of human rights. Respect for and the guaranteeing of these rights is obligatory for the organs of Public Power, in accordance with the Constitution, the human rights treaties signed and ratified by the Republic and any laws developing the same.”

¹⁹Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948

²⁰November, 1989.

²¹“Esta Ley tiene por objeto garantizar a todos los niños, niñas y adolescentes, que se encuentren en el territorio nacional, el ejercicio y el disfrute pleno y efectivo de sus derechos y garantías, a través de la protección integral que el Estado, la sociedad y las familias deben brindarles **desde el momento de su concepción.**”

²²“Children and adolescents are full legal persons and shall be protected by specialized courts, organs and legislation, which shall respect, guarantee and develop the contents of this Constitution, the law, the Convention on Children's Rights and any other international treaty that may have been executed and ratified by the Republic in this field. The State, families and society shall guarantee full protection as an absolute priority, taking into account their best interest in actions and decisions concerning them. The State shall promote their progressive incorporation into active citizenship, and shall create a national guidance system for the overall protection of children* and adolescents.”

²³ Author's translation

child is protected by their possible birth or viability;²⁴ instead, it is because of his human nature: it is a child. Thus, we are of the opinion held by Gorrondona Aguilar, according to which our civil system recognizes their natural legal personhood upon conception. In addition, the system of the Civil Code has two other rules: that all its rights and obligations must always be “for their good”²⁵ and that the effects of his personhood are subject to the conditions resulting of not being born dead.²⁶ If stillborn, there is a legal fiction-- *iuris et de iure* – which does not admit evidence to the contrary: that the human person in question never existed.²⁷

Furthermore, one should also take into account the superiority of the provisions of the Constitution and of LOPNNA before the Civil Code of 1982, as applied to the specific case of the unborn child. The first (Art. 78, Constitution), because it is constitutional; the second, because being the same legal status--both are " organic " laws--the LOPNNA comes later (Article 17 of the Civil Code is from 1916) and also specifically regulates the child's situation. Moreover, the character of subsequent legal standard gains special importance in light of the progressive nature of human rights, one of which is “Everyone has the right to recognition of their legal personhood” as acknowledged by the Art. 3 of the Pact of San Jose.

To conclude concerning the legal status of the unborn, it is fully recognized by Venezuelan law. However (i) due to the age of the Civil Code regime, (ii) and due to the lack of legislation on the matter, this issue is ignored in practice (judicial, legal, political...); resulting in disturbing inconsistencies and passive enabling of serious activities contrary to their rights, explained in Section VI, *infra*.

Another question can be stated thus: “If it is recognized that the unborn child is a human person, even by standards of supraconstitutional range; why does the opinion of civil law experts assume that natural legal personhood begins at birth, based on Art. 17 of the Civil Code?” When this rule was drafted (in 1916) the pros and cons to consider were probably different. Today the letter of the law is confusing, especially if it is not interpreted in the light

²⁴HUNG VALILLANT, FRANCISCO; *Derecho Civil I*. 4th edition; Hermanos Vadell, Caracas, 2009. p. 79.

²⁵For example, he cannot inherit more debts than assets.

²⁶AGUILAR GORRONDONA, JOSÉ LUIS. *Derecho Civil Personas*. 12^a. edición revisada de 1995, published by UCAB (Universidad Católica Andrés Bello), Caracas. Note6 Chapter IV, p. 54.

²⁷In a similar vein in France has been said that:

en principio, la personalidad, que presupone el nacimiento, comienza con este nacimiento, siempre que el niño nazca vivo y viable (...) No obstante, en favor de su ser humano la personalidad se remonta a la fecha de la concepción todas las veces que esa retroactividad sea para el interés de la persona en cuestión.

[in principle , personality, which presupposes birth, begins with the birth, provided the child is born alive and viable (...) However, for his human personality back the date of conception every time that retroactivity is for the interest of the person concerned.] (Author’s Translation).

While this retroactivity reveals a suspensive concession of legal personality in favor of the unborn, it is clear that protection is granted in view of its humanity, not the possible birth. Therefore, the law of that country, based adage *infans conceptus pro nato habetur quoties de eius commodis agitur* ha considerado has considered (in 1957) "homicidio involuntario las lesiones causadas a un niño en el seno de la madre y que han tenido por consecuencia causar la muerte del niño que no era [o no había nacido] ni vivo ni viable...". “manslaughter injuries to a child in the mother's womb and who have consequently cause the child's death was not [or was not born] ... neither alive nor feasible.” [Author’s Translation]. Regardless of whether the law in this regard is currently applied in that country , the doctrine cited brings light on the reality studied.MARTY, GABRIEL Y RAYNAUD, PIERRE. *Droit Civil*. 3^{era} editon. Editorial Sirey, París, 1976. pp. 14-15.

of all the legal order. What is clear is that this system is not an absolute hindrance, for human and civil rights of the unborn child are protected. This does not deny that the interpretation of the majority doctrine is indeed inadequate.

Along those lines, some civilist doctrinaires, of unquestionable ability and competence, have not taken into account this binomial: "art. 1 LOPNNA+ art. 78 CRBV":

(a) Francisco Hung Vaillant: "The protection of the unborn (...) follows from the text of Art. 633, 840, 925 and 1443 of the Civil Code. These rules should not be seen in the sense of recognizing a partial capacity of the conceived on the basis of a fiction, but the foundation of protection lies in the possibility of birth and its object is temporary and future rights, not existing rights."²⁸

(b) Oscar E. Ochoa G. believes that "Until the moment of birth, the child does not have a distinct and individual self. During the period of gestation the embryo - fetus is *pars viscerum matris* (part of the womb of the mother), that is an integral part of the biological body the mother. The child does not acquire personhood until the time they cut the umbilical cord, which gives autonomy."²⁹ While some points relating to this issue are under discussion, this view ignores provisions of the utmost importance for proper understanding of the legal system (i.e.: the afore mentioned).

(c) María Candelaria Domínguez G., clearly establishes that at conception "life and genetic individuality of the new being begin" and states that Article 17 of the CCV "gives protection in tribute to his natural existence."

Nonetheless, she considers that the protection of the right to life enshrined in Article 43 of the CBRV does not apply to the unborn, "any time the latter technically refers to the life of the person [legal] (...) it was observed in such discussions of the National Constituent Assembly [1999] a confusion between protection to life of the unborn and protection to the life of a person."³⁰ The author comes to this unhappy conclusion based on that "the unborn certainly is not person or legal subject until his birth...". To support this opinion, she quoted Spanish

²⁸Author's Translation. The original text reads as follow: "*La protección de los no concebidos (...) se desprende del texto de los arts. 633, 840, 925 y 1.443 del Código Civil. Las normas citadas no deben entreverse en el sentido de reconocer una capacidad parcial al concebido sobre la base de una ficción, sino que el fundamento de la protección estriba en la posibilidad del nacimiento y su objeto son los derechos eventuales y futuros, no los derechos actuales.*" HUNG VALILLANT, FRANCISCO; *Derecho Civil I*. 4th edition; Hermanos Vadell. Caracas, 2009. p. 79.

²⁹Author's Translation. The original text reads as follow: "*Hasta el momento del nacimiento, el hijo no tiene una individualidad distinta y propia. Durante el periodo de gestación el embrión-feto es pars viscerum matris (parte de las entrañas de la madre), es decir parte integrante del organismo biológico de la madre. El hijo no adquiere personalidad sino desde el momento de ser cortado el cordón umbilical con cuyo corte de da autonomía.*" OCHOA G., OSCAR E. *Personas. Derecho Civil I*. Edited by Universidad Católica Andrés Bello. Caracas, 2006. p. 183.

³⁰Author's Translation. The original text reads as follow: "*toda vez que este último técnicamente se refiere a la vida de la persona [jurídica]. (...) se observó en tales discusiones de la Asamblea Nacional Constituyente [de 1999] una confusión entre la protección a la vida del concebido y la protección a la vida de una persona*". DOMÍNGUEZ G., MARÍA C. *Acerca del artículo 76 de la Constitución de la República Bolivariana de Venezuela*. Published as part of: "Libro homenaje al profesor Alfredo Arismendi A.", published by Instituto de Derecho Público de la Universidad Central de Venezuela. Ediciones Paredes, Caracas, 2008.

constitutional jurisprudence according to which “the unborn child is not, strictly speaking, holder of the right to life;”³¹ manifestly denying the regulatory binomial explained above.

III. The Child and His family

In the same way the child’s well being cannot be sought outside his family; rights of the child cannot be found outside rights of the family.

Understanding the fundamental character of the family as origin and teacher of physical and spiritual life of the child, which depends entirely on the host and their care - family law has established that the natural family obligations regarding the child are concretized in constitutional and legal norms, treaties, etc.

As a consequence, law does not only provide the family care as a precious end in itself, but assumes it as primarily responsible for implementing the rights of children. Furthermore, “children and adolescents have the right to live, be raised and develop in the protection of their original family...”³² And so the right to life of the child is inseparable from their right to be raised in his family. Thus if the latter is violated, the first becomes nugatory. Abandonment of the child invariably puts his life at risk: it may cause his death, or countless physical and moral damages which will imperil his future.

In addition, we will proceed to explain the legal framework of International Law and Municipal Law – that in the case of Venezuela arises as the reception and development of *ius cogens*.

The Declaration of the Rights of the Child (1959) states “The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother.”³³ That is, relating to the rights of early childhood, parents are immediately required to comply with these rights because their care is irreplaceable, for instance, mother’s care of herself during pregnancy, in view of child care.

The Convention of the Rights of Child (1989), in its fifth and sixth paragraph of the Preamble states: “Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members, and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community. Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”

It is expressly stated that the family “should receive protection and assistance necessary to fully assume their responsibilities.” We believe that family should be attended not only by

³¹ Author’s Translation. The original text reads as follow: “*el nasciturus no es, en sentido estricto, titular del derecho a la vida*” Ibidem.

³² Art. 75, CBRV.

³³ Principle VI.

some public policy, but above all through legal norms to set forth the unlawfulness of certain activities. For example, you cannot help the family to assume its responsibilities in raising their children when the manipulation of embryos (products of artificial procreation methods – a topic that will be discussed later) is not prohibited.

Venezuela's 1999 Constitution crystallizes the guidelines of international law on the subject. Below are the provisions concerning this, listing the various statements of established rights.

Article 75

- [1] The State shall protect families as a natural association in society, and as the fundamental space for the overall development of persons.
- [2] Family relationships are based on equality of rights and duties, solidarity, common effort, mutual understanding and reciprocal respect among family members.
- [3] The State guarantees protection to the mothers, fathers, or other persons acting as heads of household.
- [4] Children and adolescents have the right to live, be raised and develop in the protection of their original family. When this is impossible or contrary to their best interests, they shall have the right to a substitute family, in accordance with law.
- [5, on adoption] (...) ³⁴

Article 76

- [6, on the right to raise a family] ³⁵ (...)

³⁴ CBRV. Art. 75:

The State shall protect families as a natural association in society, and as the fundamental space for the overall development of persons. Family relationships are based on equality of rights and duties, solidarity, common effort, mutual understanding and reciprocal respect among family members. The State guarantees protection to the mother, father or other person acting as head of a household. Children* and adolescents have the right to live, be raised and develop in the bosom of their original family. When this is impossible or contrary to their best interests, they shall have the right to a substitute family, in accordance with law. Adoption has effects similar to those of parenthood, and is established in all cases for the benefit of the adoptee, in accordance with law. International adoption shall be subordinated to domestic adoption.

³⁵ Article 76:

Motherhood and fatherhood are fully protected, whatever the marital status of the mother or father. Couples have the right to decide freely and responsibly how many children they wish to conceive, and are entitled to access to the information and means necessary to guarantee the exercise of this right. The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception, throughout pregnancy, delivery and the puerperal period, and guarantees full family planning services based on ethical and scientific values. The father and mother have the shared and inescapable obligation of raising, training, educating, maintaining and caring for their children*, and the latter have the duty to provide care when the former are unable to do so by themselves. The necessary and proper measures to guarantee the enforceability of the obligation to provide alimony shall be established by law.

[7] The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception and throughout pregnancy, delivery and the postnatal period

[8, on family planning³⁶] (...)

[9]The father and mother have the shared and inescapable obligation of raising, training, educating, maintaining, and caring for their children,

[10, on elderly caring] (...)

[11]The necessary and proper measures to guarantee the effectiveness of the obligation to provide nourishment shall be established by law.

Article 78

[12] Children and adolescents are full legal persons and

[13]shall be protected by specialized courts, organs and legislation, which shall respect, guarantee and develop the contents of this Constitution, the law, the Convention on Children's Rights and any other international treaty that may have been signed and ratified by the Republic in this field.

[14]The State, families, and society shall guarantee full protection as an absolute priority, taking into account the child's best interest in actions and decisions concerning them.

[15]The State shall promote their progressive incorporation into active citizenship, and shall create a national guidance system for the overall protection of children and adolescents.

Particularly, the **Statue for Protecion of Children and Adolescents** develops the same constitutional disposition in its arts. 4-A, 5 and 26³⁷.

These statements do not require further explanation in general. **What is essential is to return the unborn due attention and recognition**, because, in some way, the lack of guaranteed rights for the child has been institutionalized, even though the child suffers the greatest harm when these rights are not respected.

Let us reflect on **the scope of constitutional rights enumerated specifcly for the unborn**. (The numbers given correspond to each article in the Venezulan constitution.) Although, for the sake of example, several activities contrary to these rights will be mentioned, they will be dealt with in a separate section below.

³⁶ Which will be adressed latter, *infra*.

³⁷Which deals respectively with the principle of responsibility of the family, society and the Government; the general obligations of the family in raising children and adolescents; and the right to live, be raised and develop in a family.

The unborn child needs not only his family, particularly his parents, for their development [1], but their absence in the early days of his life - after fertilization - poses a serious risk to his life, health and other rights. That absence occurs either because fertilization is artificially produced outside the body of the mother, or because the mother is subjected to treatments hostile to the life of the unborn, etc. As a summary of this paragraph: **the unborn is entitled to a fundamental space for development which is the family of origin, and specifically the womb.** And when that is denied for any reason, a fundamental right is violated. In this sense, the right to live and be raised in the family of origin is brought into play [4]: that the unborn undergo a gestation outside the womb (surrogate womb), that fertilization be made by a third anonymous person's gametes as a service contracted by an infertile person, etc., are situations in violation of this human right.

Moreover, [2] activities against human right to life of the unborn result from the lack of respect from the family to its most vulnerable members. Both parents and the unborn are worthy human persons, ends in themselves and subjects of their own rights [12]. The existence of rights or particular circumstances of the mother are not reasons enough to "suspend guarantees" of the unborn. Thus, neither poverty nor adolescence, nor the painful case of rape are "exceptions" for the protection of child rights: he is a person, a good in and of himself, worthy of being loved, whatever these other issues, although they are sensitive.

In Venezuela, there is express protection for "motherhood in general from the moment of conception, during pregnancy, childbirth, and the postpartum period..." [7]. And motherhood entails the relative affiliation: there is a child conceived.

Moreover, an important truth that must be emphasized is that the cause of that motherhood is the existence of a new person, her child. **That is, fatherhood and motherhood are relative goods, insofar as the person of the child is a good in itself [6].** Fatherhood and motherhood come from the procreation of a new person and are characteristics, not isolated goods. **Therefore, the right to procreate (being a parent) can not absolutized over the person of the child.** Since the dignity of the child is the foundation of the right to procreate him.³⁸[8]

[14] Finally, the Constitution provides that the protection of the child is an "**absolute priority**" and that the actions and decisions concerning them their "**best interests**" should be foundation for of interpretation and enforcement. These legal concepts are widely developed in the LOPNNA.³⁹ In addition, they became part of the Constitution and national legislation

³⁸ The consequences that flow from this " premise " - the child is more valuable to the situation or " fact" of parenthood- are especially relevant in the field of artificial procreation; topic to be discussed later, below.

³⁹ **Artículo 7.** Prioridad absoluta.

El Estado, las familias y la sociedad deben asegurar, con prioridad absoluta, todos los derechos y garantías de los niños, niñas y adolescentes, La prioridad absoluta es imperativa para todos y comprende:

a. Especial preferencia y atención de los niños, niñas y adolescentes en la formulación y ejecución de todas las políticas públicas. b. Asignación privilegiada y preferente, en el presupuesto, de los recursos públicos para las áreas relacionadas con los derechos y garantías de los niños, niñas y adolescentes y para las políticas y programas de protección integral de niños, niñas y adolescentes. c. Precedencia de los niños, niñas y adolescentes en el acceso y la atención a los servicios públicos. d. Primacía de los niños, niñas y adolescentes en la protección y socorro en cualquier circunstancia.

[Article 7. Absolute priority.

The State, families and society must ensure, with absolute priority, all the rights and guarantees of children and adolescents , the priority must be for everyone and includes:

since the Convention on the Rights of the Child of the UN, specifically its Art. 3: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

The reason for which the best interests of the child shall be a primary consideration lies in "his specific condition as a developing person,"⁴⁰ dependent on others --especially his family-- for his full development. Thus, "Applying the Best Interests of Children and Adolescents, when there is a conflict between the rights and interests of children and adolescents from other equally legitimate rights and interests, the former shall prevail."⁴¹ It is a legal requirement to begin from these principles when legislating or judging about the good of the unborn child.

a. Special preference and attention of children and adolescents in the formulation and implementation of all public policies. b. Privileged and preferential allocation in the budget, public resources to areas related to the rights and guarantees of children and adolescents and for policies and programs for comprehensive protection of children and adolescents. c. Precedence given to children and adolescents in access and attention to public services. d. Primacy of children, and adolescents in the protection and relief in all circumstances.](Author's Translation)

Artículo 8. Interés Superior de Niños, Niñas y Adolescentes.

El Interés Superior de Niños, Niñas y Adolescentes es un principio de interpretación y aplicación de esta Ley, el cual es de obligatorio cumplimiento en la toma de todas las decisiones concernientes a los niños, niñas y adolescentes. Este principio está dirigido a asegurar el desarrollo integral de los niños, niñas y adolescentes, así como el disfrute pleno y efectivo de sus derechos y garantías.

"Parágrafo Primero: Para determinar el interés superior de niños, niñas y adolescentes en una situación concreta se debe apreciar: a. La opinión de los niños, niñas y adolescentes; b. La necesidad de equilibrio entre los derechos y garantías de los niños, niñas y adolescentes y sus deberes; c. La necesidad de equilibrio entre las exigencias del bien común y los derechos y garantías del niño, niña o adolescente; d. La necesidad de equilibrio entre los derechos de las demás personas y los derechos y garantías del niño, niña o adolescente; e. La condición específica de los niños, niñas y adolescentes como personas en desarrollo.

"Parágrafo Segundo: En aplicación del Interés Superior de Niños, Niñas y Adolescentes, cuando exista conflicto entre los derechos e intereses de los niños, niñas y adolescentes frente a otros derechos e intereses igualmente legítimos, prevalecerán los primeros.

[**Article 8.** Best Interests of Children and Adolescents.

The Best Interest of Children and Adolescents is a principle of interpretation and application of this law, which is binding in making all decisions concerning children and adolescents. This principle is aimed at ensuring the comprehensive development of children and adolescents, as well as full and effective enjoyment of their rights and guarantees.

First Paragraph: Determining the best interests of children and adolescents in a particular situation should take into account: a The opinion of children and adolescents; b The need for balance between the rights and guarantees of children.. adolescents and their duties; c the need for balance between the demands of the common good and the rights and guarantees of the child or adolescent.. d the need for balance between the rights of others and the rights and guarantees child or adolescent, and the specific condition of children and adolescents as developing persons.

Paragraph Two: In application of the Best Interest of Children and Adolescents, when there is a conflict between the rights and interests of children and adolescents from other equally legitimate rights and interests, the former shall prevail.](Author's Translation)

⁴⁰Art. 7.e, LOPNNA.

⁴¹Author's Translation . Original text reads as follow: "En aplicación del Interés Superior de Niños, Niñas y Adolescentes, cuando exista conflicto entre los derechos e intereses de los niños, niñas y adolescentes frente a otros derechos e intereses igualmente legítimos, prevalecerán los primeros." Paragraph Two, Art. 7, LOPNNA.

IV. Legal Protection of Pregnant Women

We will briefly discuss this point because of its intimate relationship to the right to life, both mother's and child's. Precisely because of its relation to the right to life, the constituent of 1999 mandates that motherhood and fatherhood are protected in the following terms: "Motherhood and fatherhood are fully protected, whatever the marital status of the mother or father (...) The State guarantees overall assistance and protection for motherhood, in general, from the moment of conception, throughout pregnancy, delivery and the puerperal period (post partum)..."⁴²

This disposition prompted homeland legislature to enact the Law for the Protection of Families, Maternity and Paternity in 2007.⁴³ In it, among other things, a system of labor protection of paternity is decided, based on the equality of the duties of both parents for the children. Thus the protective regime that already existed in labor legislation on maternity was completed. In 2012, the Labour Act⁴⁴ epitomized the rules on labor protection for parents in Title VI on the "Family Protection in the Social Process of Labor."

In short, the protection of the pregnant woman is made (i) by general rules that protect human rights, which involve the possibility of guarantee by constitutional protection and (ii) by the labor legislation.

We could cite the following rights under labor legislation for pregnant woman and the child's father:

- The employer is prohibited from requiring medical examination to diagnose pregnancy (**art. 332**).
- "The working woman during pregnancy is exempt from performing any task or activity that could endanger her life and her son or daughter in the making"⁴⁵ (**art. 333**).
- Pregnant women should be transferred from a workplace to another site when is suspected that working conditions may affect the normal development of pregnancy, without deteriorating her working conditions (**art. 334**).
- Tenure from the start of pregnancy and two years after birth. The same applies to working during two years following the family placement of children under three years (**art. 335**).
- Inalienable rest during pre- and post- natal period (6 and 20 weeks respectively) of the mother (**art. 336 and 337**), paid by Social Security.

⁴²Art. 76, CBRV.

⁴³Ley para la Protección de las Familias, la Maternidad y la Paternidad. Gaceta Oficial N° 38.773, september 20th 2007.

⁴⁴Ley Orgánica del Trabajo, los Trabajadores y las Trabajadoras, Gaceta Oficial N° 6.076 Extraordinario del 7 de mayo de 2012.

⁴⁵Author's Translation. The original text reads as follow: "La trabajadora en estado de gravidez estará exenta de realizar cualquier tipo de tarea o actividad que pueda poner en peligro su vida y la de su hijo o hija en proceso de gestación"

- Paternity leave of fourteen days from the birth of their child or from the date of family placement (**art. 339**).
- The father enjoys special protection from dismissal during pregnancy of his partner until two years after birth. The same is true in case of family placement of children under three years (**art. 339**).
- A worker's license for the adoption of a child under three years of age, twenty-six weeks after the entrance of the adopted child at his/her home (**art. 340**).
- Center early childhood education nursery room: The employer who employs more than twenty workers must maintain a center of early childhood education that has a nursing room, where attention and adequate training are guaranteed to the workers' children from three months to six years (**art. 343**). You can also keep in mind that, instead of maintaining the center by the employer, you may pay the tuition of children involved in a similar institution (**art. 344**).
- "No difference on salary incomes can be set between the salary of the worker during pregnancy or during the lactation period and the other equal work in the same body of work"⁴⁶ (**art. 346**).
- Special protection in case of disability or illness: the worker who has one or more children with a disability or illness that hinders him from fending for himself, will be protected from dismissal permanently (**art. 347**).

V. Conduct Against Law

We will dedicate this part to analyzing various activities that threaten not only the right to life of the unborn, but also other rights that are recognized in favor of the child.

1. Induced Abortion

In Venezuela abortion is a criminal conduct regulated by Chapter IV "of induced abortion"⁴⁷ of the Venezuelan Criminal Code.⁴⁸

Various cases of induced abortion as well as other aggravating and mitigating circumstances are typified⁴⁹:

⁴⁶Author's Translation. The original text reads as follow: No se podrá establecer diferencia entre el salario de la trabajadora en estado de gravidez o durante el período de lactancia y el de las o los demás que ejecuten un trabajo igual en la misma entidad de trabajo

⁴⁷Título IX "De los delitos contra las personas", Libro Segundo "De las diversas especies de delito".

⁴⁸April 13th 2005, Gaceta Oficial de la República Bolivariana de Venezuela N° 5.763 Extraordinario.

⁴⁹From Criminal Code:

CAPÍTULO IV

DEL ABORTO PROVOCADO

Artículo 430. La mujer que intencionalmente abortare, valiéndose para ello de medios empleados por ella misma, o por un tercero, con su consentimiento, será castigada con prisión de seis meses a dos años.

Artículo 431. El que hubiere provocado el aborto de una mujer, con el consentimiento de ésta, será castigado con prisión de doce a treinta meses.

Si por consecuencia del aborto y de los medios empleados para efectuarlo, sobreviene la muerte de la mujer, la pena será de presidio de tres a cinco años; y será de cuatro a seis años, si la muerte sobreviene por haberse valido de medios más peligrosos que los consentidos por ella.

1. procured by the pregnant woman herself (Art 430) ;
2. caused by third party with the consent of the pregnant woman (Art 431) ;
3. caused by a third party without the consent of the pregnant woman (Art 432) ;
4. considers the possibility that, in addition to the abortion, death of the pregnant

Artículo 432. El que haya procurado el aborto de una mujer, empleando sin su consentimiento o contra la voluntad de ella, medios dirigidos a producirlo, será castigado con prisión de quince meses a tres años. Y si el aborto se efectuare, la prisión será de tres a cinco años.

Si por causa del aborto o de los medios empleados para procurarlo, sobreviniere la muerte de la mujer, la pena será de presidio de seis a doce años.

Si el culpable fuere el marido, las penas establecidas en el presente artículo se aumentarán en una sexta parte.

Artículo 433. Cuando el culpable de alguno de los delitos previstos en los artículos precedentes sea una persona que ejerza el arte de curar o cualquiera otra profesión o arte reglamentados en interés de la salud pública, si dicha persona ha indicado, facilitado o empleado medios con los cuales se ha procurado el aborto en que ha sobrevenido la muerte, las penas de ley se aplicarán con el aumento de una sexta parte.

La condenación llevará siempre como consecuencia la suspensión del ejercicio del arte o profesión del culpable, por tiempo igual al de la pena impuesta.

No incurrirá en pena alguna el facultativo que provoque el aborto como medio indispensable para salvar la vida de la parturienta.

Artículo 434. Las penas establecidas en los artículos precedentes se disminuirán en la proporción de uno a dos tercios y el presidio se convertirá en prisión, en el caso de que el autor del aborto lo hubiere cometido por salvar su propio honor o la honra de su esposa, de su madre, de su descendiente, de su hermana o de su hija adoptiva.

[CHAPTER IV

THE INDUCED ABORTION

Article 430. The woman who intentionally aborting, using for this purpose means used by itself or by a third party with his consent, shall be punished with imprisonment from six months to two years.

Article 431. Anyone who has provoked abortion of a woman with her consent, shall be punished with imprisonment from twelve to thirty months.

If a result of abortion and the means employed to make that adjustment, results in the death of the woman, the penalty shall be imprisonment of three to five years; and it will be four to six years, if death occurs by having used most dangerous means that caused her harm.

Article 432. Anyone who has attempted to induce abortion on a woman using without her consent or against her will, or used means aimed at producing it, shall be punished with imprisonment from fifteen months to three years. And if abortion is effected, he shall be imprisoned for three to five years.

If because of abortion or the means to procure it brings about the death of the woman, the penalty shall be imprisonment from six to twelve years.

If the guilty person is the husband, the penalties provided for in this Article shall be increased by one sixth.

Article 433. When one guilty of any of the offenses under the preceding articles is a person exercising the art of healing or any other profession or art regulated in the interest of public health, if the person has indicated, facilitated, or employed means with which it has sought the abortion that has caused death, penalties apply law with increased one-sixth.

The condemnation will always result in the suspension of the exercise of art or profession guilty, for time equal to the sentence.

There will not be any penalty for the doctor who induces abortion as an indispensable means to save the life of the mother.

Article 434. The penalties established in the preceding articles shall be reduced by the proportion of one to two thirds and the prison will become prison, in the event that the author of abortion it was committed to save his own honor or honor of his wife, his mother, his descendant, his sister or his adopted daughter]

(Author's Translation)

woman (Art. 431 and 432) will be caused;

5. it is an additional offense if the third person of the Arts. 431 and 432 is the husband⁵⁰ of the pregnant woman (Article 432 *in fine*);
6. it is an additional offense if the one guilty of the crimes in Arts. 430 to 432 is health professional (Art. 433);
7. The assumed exemption from punishment for “the doctor who induces abortion as an indispensable means to save the life of the mother in labor” (Art. 433 *in fine*);
8. there are extenuating circumstances if the abortion was committed for the sake of saving one’s own honor or the honor of one’s wife, mother, offspring, sister or adopted child (Art.434).

a) Common Features on All Cases

Concerning the definition, José Rafael Mendoza T. states that “... abortion is the malicious disruption of the physiological process of pregnancy,” and then clarifies that, “The process of pregnancy includes the entire time between fertilization and birth, and it differs from the legal concept of abortion and medical concepts...”⁵¹ The doctrine of this author is concordant with what later would be articulated, in some way, in the Pact of San Jose in the 1999 Constitution and especially in the LOPNNA 1998: “This Act is to ensure all children (...) the exercise and full and effective enjoyment of their rights and guarantees (...) from the moment of conception.”⁵²

On the nature of the crime of abortion, for all the above, it must be said that it is a crime in which the victim is the conceived; the object of the crime is the life of the unborn. In addition, the Venezuelan legislature places it among the crimes against the person. And this is the real nature of abortion, in the opinion of Francesco Carrara.⁵³ It could not be conceived otherwise, given that the Venezuelan legal system has the child as a person who deserves protection from the moment of conception.

There are four elements of the criminal conduct:⁵⁴

- (a) The existence of a pregnancy in the terms indicated; so this requirement can thus be conceptualized this way: there has been fertilization, and abortion is performed

⁵⁰For posterior analysis it must be bear in mind that the CBRV provides in art. 77 that: “Marriage, which is based on free consent and absolute equality of rights and obligations of the spouses, is protected. **A stable de facto union between a man and a woman which meets the requirements established by law shall have the same effects as marriage**” (Emphasis added) . That is, that the cohabitants in these terms shall have the same rights as married , and where " husband " or "wife" read applies , mutatis mutandis , “cohabiting”.

⁵¹Author’s Translation. Original text reads as follow: "...el aborto es la interrupción maliciosa del proceso fisiológico de la preñez." y enseguida aclara que "El proceso de la preñez comprende todo el tiempo que media entre la fecundación y el alumbramiento, y en esto difiere el concepto jurídico del aborto y su concepto médico..." MENDOZA T., JOSÉ RAFAEL.; Curso de Derecho Penal Venezolano, tomo VII, 1st ed. Caracas, 1964. p. 65.

⁵²Art. 1.

⁵³Cited by MENDOZA T., JOSÉ RAFAEL. ob. cit.; p. 71, note 2.221.

⁵⁴MENDOZA T., JOSÉ RAFAEL. ob. cit.; p. 72.

between fertilization and birth.

(b) The disruption of the physiological process. In other words, what is most serious is not the removal from the uterus, but the death of the unborn.

(c) The Employment of suitable means meant to produce the abortion, such as mechanical means, surgical, drugs, etc.

(d) The intent to commit. It refers to the intent that there should be in a crime.

Moreover, it is noteworthy that the penalty for abortion under the Criminal Code is between six months and two years for the first case; from twelve to thirty months for the second case; and three to five years for the third case "3" (which are cases in which the only victim is the unborn). This contrasts with the penalties for the crimes of murder (twelve to eighteen years⁵⁵) or --more similar yet-- filicide (a parent killing a child - twenty-eight to thirty years⁵⁶). We attribute this to the fact that, when this article was written (1889)⁵⁷ it was not known for certain how the life of the unborn developed from the first moments; even authors speak of the conceived as incomplete and uncertain person. This scientific doubt does not exist today. The medical research has already said a lot about these issues, and criminal law has to adapt to the better understanding of reality we have today. Now we offer a significant excerpt from a medical journal:

The zygote [the conceived just after fertilization] is a human being, with the program activated to become an adult organism. The fathering of the parent or artificial insemination, which is initiated by mutual recognition and mutual activation of the paternal and maternal, which are mature and are activated in the proper medium, ends after a delicate process, the formation of a cell with a characteristic phenotype, the zygote, or individual that starts its life cycle. The zygote is the only totipotent unicellular able to develop into a whole organism. The zygote is more than the fusion of the gamete contributed by the father and mother. The various components of the cell interior must be organized appropriately for the first division, with which it begins to develop, becoming a bi-cellular embryo. The cell with the zygote phenotype is equipped with a cellular organization that makes it an individual reality separate from the gametes, or biological starting materials. Or put another way: the cell phenotype zygote is a living being and not just a living cell.

During the hours following the merger of the two cells, the genetic material of both parents is prepared, as well as the cell membrane (by fusing fragments of different types of membranes of sperm and ovum) to result in the peculiar membrane of the zygote by modifying its structure and chemical composition; and intracellular components are arranged such that the resulting zygote, far from being a symmetrical sphere, is polar and has traced the axes that will establish the body structure: head-tail axis and dorso-ventral.⁵⁸

⁵⁵Criminal Code, Art. 405

⁵⁶Art. 406 *ibidem*.

⁵⁷Article 430 of the Venezuelan Criminal Code "is a copy of Art. 381 of the Italian Criminal Code of 1889, which had a background in art. 501 of the Italian Criminal Code of 1859 Sardinian and Tuscan 321 of 1853" in MENDOZA T., JOSE RAFAEL, ob. cit., p.76.

⁵⁸Author's Translation. Original text reads as follow:

El cigoto [el concebido, justo después de la fecundación] es un ser humano, con el programa activado para llegar a constituirse en un organismo adulto. El engendrar de los padres, o la

The abortion, according to common sense, is filicide. And although it is often inculpable by ignorance of those involved, due to a distorted public opinion or dishonest public policy or negligent medical indications, many other times it is a treacherous crime against one's offspring, a defenseless unborn person.

b) Particular cases

Particular cases of abortion do not add very much to the understanding of the problem, nor do they dispute that the life of the unborn is protected.

The case "7" - circumstances of exemption from punishment for "the physician who induces abortion as an indispensable means to save the life of the mother" (Article 433 *in fine*) - however, needs careful explanation because of the possibility that is misunderstood; based on biased criteria that do not reflect the will of the legislature.

This act of healthcare is not a crime because of the absence of mal intent (which is required in all criminal trials) created by the necessity of saving one life or the other. This does not belittle at any time the right to life of the unborn. Francisco Ochoa explains this: "This exclusion of liability is clear, because there can be no crime where there has been no intention to produce a bad result."⁵⁹ José Rafael Mendoza shares with Francesco Carrara the doctrine that "here emerges clearly the state of necessity, this situation demands the sacrifice of one life to save another..." and that "the jurist can not find [here an] element of intent or guilt. The prohibition on killing is subject to the exception of need."⁶⁰ "The justification is to save the life of the mother."⁶¹

2. Artificial Procreation (AP)

The first thing someone might ask after reading this subtitle --about such a sensitive subject--

fecundación artificial, iniciada con el mutuo reconocimiento y la mutua activación de los gametos paterno y materno, maduros y en el medio adecuado, acaba tras un delicado proceso, en la formación de una célula con un fenotipo característico, el cigoto, o individuo que inicia su ciclo vital. El cigoto es la única realidad unicelular totipotente capaz de desarrollarse a organismo completo. el cigoto es más que la fusión del gameto aportado por el padre y el aportado por la madre. Los diversos componentes del interior celular se han de ordenar de forma adecuada para la primera división, con la que empieza a desarrollarse, convirtiéndose en embrión bicelular. La célula con el fenotipo cigoto está dotada de una organización celular que la constituye en una realidad propia y diferente de la realidad de los gametos, o materiales biológicos de partida. O dicho de otra forma: la célula con fenotipo cigoto es un viviente y no simplemente una célula viva.

Durante las horas que siguen a la fusión de ambas células, el material genético de los dos progenitores se prepara y también la membrana celular (mediante la fusión de fragmentos de diferentes tipos de membranas del espermio y del óvulo), para dar la membrana peculiar del cigoto mediante la modificación de su estructura y en su composición química; y los componentes intracelulares se organizan de tal forma que el cigoto resultante, lejos de ser una esfera simétrica, es polar y tiene trazados los ejes que establecerán pasado el tiempo la estructura corporal: ejes cabeza-cola y dorso-ventral.

MONGE, MIGUEL ÁNGEL (Ed.); *Medicina Pastoral*; cap. II: *La vida biológica del hombre*; López Moratalla, Natalia; 3ª edición, Pamplona, 2003. p. 88.

⁵⁹OCHOA, FRANCISCO; *Exposición del Código Penal Venezolano*; Maracaibo, 1888; N° 410, p. 401. cited by MENDOZA T., JOSÉ RAFAEL, *ob. cit.*, p 96

⁶⁰MENDOZA T., JOSÉ RAFAEL, *ob. cit.*, pp. 98 y 99.

⁶¹MENDOZA T., JOSÉ RAFAEL, *ob. cit.*, p. 100.

what about this could be unlawful?

During the AP, there is a main actor who is not usually taken into account: the child conceived artificially.

In this subtitle, then, we (i) analyze the legal nature of these activities, and (ii) at the same time expose the favorable or unfavorable relationship these practices have with the right to life, in the light of the constitutional,⁶² legal, and sublegal issues relating to the topic. We rely largely on the opinion of Argentinian jurist Roberto Andorno.⁶³ It is worth noting how much the use of biotechnologies in AP has not been specifically or satisfactorily regulated by Venezuelan law,⁶⁴ although the relevant legal doctrine is of paramount importance.

As starting points for understanding the legal nature of the different types of AP and, above all, its stakeholders --parents and child-- the first thing is to distinguish between a "person" and a "good."⁶⁵ These two categories of law make up their "*Summa división*," their fundamental division in their treatment of the world. The second is what fatherhood and motherhood are in the environment of the changes introduced by AP.

Distinction Between a "Good" and a "Person"

<Goods> have in law an <instrumental> significance. They are always a means at the service of the person. The <utility> and <appropriability> are two inseparable characters of <legal things>. Ergo, they are different from the person not only in terms of nature, but also in terms of potential treatment.

In terms of nature, they are different because goods are defined by exclusion. That which is not a person, is a good. Regarding potential treatment, the *summa divisio* of law presupposes that our behavior towards each of these two realities cannot be the same: we can use something like instrument or means to serve the purposes we intend, but can not, however, use a person, taking for our own use that which is the most personal of her being, for that would reduce her to the status of things, an <objectification>.⁶⁶

⁶²Specially the ones analysed in pages 9-11, *supra*.

⁶³*La distinción jurídica entre las personas y las cosas a l'èpreuve des procrestions artificielles*. Prefacio de F. Chabas. Tomo 263 de la "Bibliothèque de droit privé", published by "Librairie générale de droit et de jurisprudence, E.J.A."; Paris, 1996.

Roberto Andorno (Santa Fe, Argentina, 1961) is Doctor of Law from the University of Buenos Aires (1991) and Paris XII (1994), in both cases on issues related to the ethical and legal aspects of assisted fertilization. On the above work, we share his way to outline the issue and its legal judgment. However, we do not share at all its philosophical foundations. We agree that there is a certain philosophical foundation, but in some ways we would rely on other methods or streams.

⁶⁴There are two provisions in the Act for the Protection of Families Fatherhood and Motherhood (*Ley para la Protección de las Familias, la Paternidad y la Maternidad*), specifically Articles 10 and 20 in which it is sent to (i) the Government provide and disseminate programs on sexual and reproductive rights, including strategies family planning [Art. 19] and (ii) the Ministry -organ the Executive- Power competent in Health provide assisted reproduction services. On the constitutionality and scope of these rules will be discussed at the end of the section on AP, *infra*.

⁶⁵ Here is a brief approach to the subject is made. See for deepening the work already cited in the previous note Andorno, R.

⁶⁶Author's Translation. Original text reads as follow:

Las <cosas> poseen en el Derecho una significación <instrumental>. Ellas son siempre un medio al servicio de la persona. La <utilidad> y la <apropiabilidad> son dos caracteres inseparables de las cosas

From the just quoted text, we can conclude that:

- (i) A thing is something per se “instrumental”
- (ii) A person is the focus of the law
- (iii) The purpose of law is to ensure the dignity of the person

Then, when an activity uses a person as a means to achieve purposes outside their own (i.e. develop freely in search of happiness), it is an unlawful behavior, disrespectful to personal dignity: it is a objectifying activity.

AP --we refer also to similar methods and other related uses-- proves to be an occasion of instrumentalization of embryonic life. But what has the child treated as a thing done? It is an instrument which is manipulated to satisfy a "wish" of one or two people "to be parents." This desire is aimed at achieving a fact (parenthood) and the whole process is aimed at this fact. This is precisely the problem: the acts and decisions put in motion do not take into account the other person involved, the child, who is not recognized in practice, and it is assumed unimportant that the child is subjected to a series of actions contrary to their right to life.⁶⁷

Before referring to the specific violations of law, we must discuss the legitimacy or illegitimacy of AP. We believe that separating procreation from sex, by means of artificial manipulation of the initial processes of human life, is an act that (i) objectifies the human person and (ii) strips away the natural guarantee of dignity. The first, because a power of indiscriminate disposal on the conceived is exercised. The second because human sexuality, because of its inevitable orientation toward forming a family, is the natural guarantee of the dignity of the child: the child so conceived is valued in itself, is the child of those who procreate, and enjoys a certain identity, and inherits the characteristics of their parents. He is not subjected to biological manipulation, nor is he chosen from among a group of embryos cultured for being the healthiest.

The child must be valued as such and not as a satisfactory product, valued according to his degree of adaptation to the specifications of the contract for which his manufacture commissioned.

With these disquisitions, we are not moving away from legal analysis, though it is also a moral analysis, but we illustrate the reality under study. In fact, the nature of these realities is the fundamental reason of the protection given with the recognition of the rights already studied:

en tanto que «cosas jurídicas». Ergo, ellas se diferencian de la persona no solo en cuanto a su naturaleza, sino también en cuanto a su tratamiento del que pueden ser objeto.

En cuanto a su naturaleza, porque las cosas son definidas por exclusión: eso que no es una persona, es una cosa. En cuanto al tratamiento del que pueden ser objeto, porque la summa divisio del Derecho presupone que nuestra conducta respecto de cada una de estas dos realidades no puede ser la misma: nosotros podemos utilizar una cosa como instrumento o medio para atender los fines que nos proponemos; pero no podemos, en cambio, utilizar una persona, apropiarnos de eso que ella tiene de más íntimo de su ser, porque ello equivaldría a rebajarla al rango de las cosas, a la «cosificación».

ANDORNO, R. ob. cit., punto 56., p. 34-35.

⁶⁷It is not asserted here that every person or couple who attends services IVF do with knowledge of its attendant ills and with malicious intent . But IVF involves certain dangers and violations of law, seek consciously or not.

the inviolable right to life of every person;⁶⁸ the right to “live, grow up and develop within the family of origin”⁶⁹ and all that Venezuelan law guarantees the child “from the moment of conception.” Moreover, it is not responsible parenthood to subject the child to AP.

Legal Concept of Fatherhood and motherhood

Fatherhood and motherhood are identified with the parent-child relationship. This relationship is called parenthood when it comes to parents and affiliation when it comes to child.⁷⁰

The affiliation is thus the family relationship between parents and child, by first degree consanguinity in direct line of descent.⁷¹ This is particularly relevant to the notion of identity.

It is said that personal identity is both a "set of features of an individual that characterize it against others" (social identity) as the "conscience that a person has to be herself and different from others" (character to be a course of self-knowledge).

A constitutive feature of identity is of whom one is a child. What we want to underline in saying this is that the affiliation is determined by the biological identity of the person.⁷²

In this vein, the act of procreation is the simultaneous cause of (i) the existence of a child, (ii) the relationship of affiliation thereof, (iii) the biological identity of the child and his legal identity (which lies in the biological foundations⁷³), and (iv) the obligation to raise, train, educate, sustain and assist the child.⁷⁴

There is one exception in Venezuela that biological identity is the determinant of the legal affiliation. This is the case of adoption: “the adoptee or adopted receives the status of child and the adopter the status of parent.”⁷⁵ The adoption does not imply that the affiliation of persons may be subject to the principle of autonomy of the will, the groundless consent of biological parents in favor of potential adopters; but an “institution of protection whose aim is to provide the child or adolescent, suitable for adoption, a surrogate, permanent and

⁶⁸ Art. 75, CBRV.

⁶⁹ Art. 43, CBrV.

⁷⁰ FLH, p. 298. tomo II.

⁷¹ FLH, p. 295, tomo II.

⁷² Decision of "Sala Constitucional del Tribunal Supremo de Justicia" case "Consejo Nacional de Derechos del Niño y del Adolescente (CNDNA)", 14/08/2008, Decision N° 1443.

⁷³ In their motivations to decide the judgment No. 1443 of 14/08/2008 of the Constitutional Chamber of the Supreme Court, the interpretation of constitutional norms is binding on all other courts rightly decides the matter:

aprecia esta Sala que siempre y cuando exista una dualidad de identidades, es decir una contradicción entre la identidad biológica y la legal y, sea posible el conocimiento cierto de la identidad biológica de los ascendientes, ésta debe prevalecer sobre la identidad legal, por cuanto es aquella la que le otorga identidad genética y del conocimiento del ser al hijo respecto a sus ascendientes biológicos.

This court appreciates that as long as there is a duality of identities, (i.e. a contradiction between biological and legal identity) if it is possible to be certain of the biological identity of the ancestors, it must prevail over the legal identity, since it is that which gives genetics and knowledge of being the child regarding his biological ancestors identity. (Author’s Translation)

⁷⁴ Ibid.

⁷⁵ LOPNNA, Art. 425.

appropriate family” which is based on the best interests of the individual child.

To summarize, all AP techniques that violate human rights and constitutional and other legal provisions of public order in family matters should be outlawed. Lopez Herrera is of the opinion that contracts related to AP are invalid because they are contrary to public order and morality, namely, that they violate human dignity by trafficking the “seeds of life,” when the extra conceived embryos are not implanted, etc.⁷⁶ This only excludes the supposed homologous artificial insemination, which would be valid in law between spouses.

Violations to the Right to Life of the Unborn

Now, we present several specific cases – in Venezuela -- of violations to the right to life of the unborn associated with AP. It is noteworthy that these harmful activities either (i) are intrinsically part of AP, or (ii) would be impossible to carry out outside the context of the AP.

a. Subjecting the Child to a High and Certain Risk of Death

In cases of in vitro fertilization and all similar procedures (“ICSI,” womb for rent, etc.); i.e., which artificially cause fertilization outside the body of the mother, it is clear that the vast majority of embryos--children conceived-- are prevented from developing. This is because: (i) More eggs than those transferred were fertilized, and the rest are either “cryopreserved” or only those of certain sex or health condition are transferred, (ii) The pregnancy rate after transfer varies by 30% depending on whether the gametes or embryos were fresh or frozen, age of mother, etc., (iii) In addition, the embryos are transferred to the woman almost always in amounts greater than one. We know that the percentage of births to one child (no twin or triplets, etc.) is about 60%. Therefore the rest of transferred embryos die.

The precision of the numbers is not decisive for our purpose. **The fact is that method of artificial conception places children, people from conception, at a high risk of death.**

This is or can be known easily by the applicants of these services and doctors who provide them. Consequently, they do not seek the child itself, but having a child --any of the many-- that will be artificially conceived, regardless of others. This attitude could shape the mindset required for the crime of abortion, which also caused in most cases the reality of the damage: the death of the unborn child.

b. Deposit – Embryo cryopreservation⁷⁷

The remaining embryos in an IVF cycle or the like, are cryopreserved in liquid nitrogen. They are used in future cycles or are “donated.” Embryos are even frozen in light of parents undergoing medical treatments that will cause infertility, such as chemotherapy or

⁷⁶LÓPEZ HERRERA, FRANCISCO; *Derecho de Familia*; 2da ed. actualizada. Caracas, 2006. "Análisis de los actos jurídicos en cuestión", on "Nuevas técnicas para originar vida humana"; tomo II., pp. 455-472.

⁷⁷It happens for example in Livv Fertilab and clinics in Caracas and Maracaibo respectively. The websites of "service" in question are:

http://www.fertilab.net/servicios/congelacion_de_embriones/que_es_la_congelacion_de_embriones_1 and <http://www.livv.com/metodo.html#linea6>.

radiotherapy.

Concerning this, we must say: (i) that the human person is not a lawful object of "deposit" (the unlawfulness of trafficking individuals or gametes will be discussed below). (ii) By controlled freezing truncating its development, the right to life is suspended, and the embryo is subjected to probable death, since the capacity of embryo implantation after cryopreservation invariably decreases.⁷⁸

(iii) Parents have by law obligations and responsibilities towards their children. Custody -- derived from the human rights widely analysed here-- constitutes a set of rights and duties of parents in relation to children, the object of which is the care, development, and education of children.⁷⁹ Moreover, without the proper exercise of parental authority, the life of the unborn is seriously endangered. Parental custody is not an option, it is a matter of public policy. Ergo, parents cannot, in law, suspend the duties of law through a deposit agreement, even less in these conditions, which can cause serious injury or death to the child.

c. Embryo Donation⁸⁰

Web portals of IVF clinics offer the possibility to transfer an embryo with gametes of another couple to a female, upon the "donation" or "negotiation" of an agreement that the two couples (offeror and recipient) come to about the embryo.

The legal issues here are basically the same as paragraph "b" above on "deposit" of embryos.

d. Sex Selection or Healthy Embryo Selection Through Pre-implantation Genetic Diagnosis (PGD) ⁸¹

Sex selection occurs when, after being fertilized, one or two cells from the blastocyst (embryo) are taken and examined by FISH method ("fluorescence in situ hybridization"). Thus, a more or less complete chromosomal analysis, as desired, is obtained. Then embryo selection

⁷⁸Cf. "Assisted Reproductive Technology Success Rates" in the U.S.A. of 2004: <http://ftp.cdc.gov/pub/publications/art/2004ART508.pdf>.

⁷⁹Art. 347, LOPNNA.

⁸⁰It happens, for instance, in Fertilab. The website setting out the panorama is: <http://www.fertiaguerrevere.com/donacion-de-gametos>.

⁸¹"Pre-implantation genetic diagnosis (PGD) is an established alternative to pre-natal diagnosis, and involves selecting pre-implantation embryos from a cohort generated by assisted reproduction technology (ART). This selection may be required because of familial monogenic disease (e.g. cystic fibrosis), or because one partner carries a chromosome rearrangement (e.g. a two-way reciprocal translocation). PGD is available for couples who have had previous affected children, and/or in the case of chromosome rearrangements, recurrent miscarriages, or infertility. Oocytes aspirated following ovarian stimulation are fertilized by in vitro immersion in semen (IVF) or by intracytoplasmic injection of individual spermatozoa (ICSI). Pre-implantation cleavage-stage embryos are biopsied, usually by the removal of a single cell on day 3 post-fertilization, and the biopsied cell is tested to establish the genetic status of the embryo. Fluorescence in situ hybridization (FISH) on the fixed nuclei of biopsied cells with target-specific DNA probes is the technique of choice to detect chromosome imbalance associated with chromosome rearrangements, and to select female embryos in families with X-linked disease for which there is no mutation-specific test. FISH has also been used to screen embryos for sporadic chromosome aneuploidy (also known as PGS or PGD-AS) in order to try and improve the efficiency of assisted reproduction; however, due to the unacceptably low predictive accuracy of this test using FISH, it is not recommended for routine clinical use." en US National Library of Medicine National Institutes of Health". Available at: <http://www.ncbi.nlm.nih.gov/pubmed/20809319>.

happens as they choose which one is transferred and which not. In addition, this technique (PGD) ensures that about 20% of embryos involved will degenerate and die. We copied verbatim from the website of a clinic in Venezuela, which calls for these "limitations" of PGD; but these violations are an integral part of it:

- Do not make a cycle of PGD without a minimum of 10 ova.
- There is a percentage of embryos that can not withstand the embryo biopsy and degenerate or end their development.
- 80% of biopsied embryos reached blastocyst [i.e., which are those that develop].
- PGD is not an alternative to prenatal diagnosis, but as an option to minimize the probability of initiating pregnancies carrying fetuses with genetic abnormalities.⁸²

It is expressly stated in the quotation that PGD is used as a eugenics study that seeks only to allow children that seem fit, either because it is the child of the desired sex or because it is not likely to suffer any disease.

The law characterizes the child as a person, an end in itself, subject fully to the rights and benefits of special protection. This eugenic activity makes clear that the child is taken as a means to satisfy a "need" –which is really futile-- similar to a product tailored to meet certain requirements rather than a child, whose dignity is independent of its sexual or health condition.

In another case where it is evident that, in the process of IVF and similar processes, children die who are conceived as a result of activities undertaken on them by the technical team, with the certainty that this actions threatens his life. The mindset of the crime of abortion is also like this mindset.

e. Womb for "rent"

This particular activity is the most complex, and can be summarized as follows: a woman gives birth to a child conceived in vitro with another couple's⁸³ gametes in order to give them the child, whose gestation she was hired for.

This implicates a violation of rights (i) of the child and (ii) of the pregnant mother.

The subjects involved in this behavior are the "biological" parents, the woman who is leased, and sometimes an intermediary institution.

The first thing to clarify is that "... the child, for the full and harmonious development of his personality, should grow up within the family, in an atmosphere of happiness, love and

⁸² Auhtor's Translation. Original text reads as follow:

No se debe realizar un ciclo de DGP si no se dispone de un número mínimo de 10 ovocitos.

Existe un porcentaje de embriones que no resisten la Biopsia embrionaria y que degeneran o detienen su desarrollo.

El 80 % de los embriones biopsiados llega a Blastocisto [es decir, que son los que se desarrollan].

El DGP no es una alternativa al diagnóstico prenatal, sino como opción de reducir al máximo lprobabilidad de iniciar gestaciones de fetos portadores de anomalías genéticas.

⁸³ It may happen that the ovum belongs to the woman hired. However for the analysis we are not interested in taking into account that option in this section. Then it would be clear that there is her own child, forgoing motherhood based on a contract, an act that is null, as will be said later.

understanding..."⁸⁴; he also has the right to "live, be raised and develop in their family of origin." These rights entail a duty for parents, which are protected as a matter of public order: "The father and mother have duties, responsibilities and shared, equal and inalienable rights to raise, train, educate, preserve, monitor, maintain and assist their children, financially, morally and emotionally."⁸⁵

The child, as a person rather than a thing, is not an object available for sale by any agreement, free or costly. We consider that to dispose of the place of gestation is not something different from disposing of the complete person, all his being; since to dispose of the complete body of a living person is to dispose of it in its entirety.

In addition, the biological mother, by transferring by the will of the parties her duty to raise -- now established in the duty of gestation of the mother-- renounces and disposes of her maternal duties, which is legally impossible. Both are their mothers in a sense; thus, the damage to the child, who will be in a limbo between two women, materializes.

How are both women mothers? To find an answer, this constitutional provision enlightens the debate: "The State shall guarantee assistance and comprehensive maternity protection in general from the moment of conception, during pregnancy, childbirth and the postpartum period."⁸⁶ This contains a latent notion of motherhood that conceives of all stages as a protected unit. In that vein, we disagree with any affirmation of this kind: "biological motherhood" is so-called only relative to contributions of the egg genome. The biological process of motherhood brings about both pregnancy and childbirth. Hence the common language defines mother as "(i) woman or female animal who has given birth to another being of the same species and in the second instance (ii) Woman or female animal who has conceived."⁸⁷ In the case of subrogation of a woman (hired) in the duties of gestation of another (the contractor), the "hired" is truly the mother in a certain sense.

Regarding the fact that pregnancy and childbirth are conceived as an integral part of motherhood, Article 197 of the CCV states, "Maternal filiation results from birth, and is proved by the record of the declaration of birth recorded in the books of Civil registry, identifying the mother."⁸⁸ It was understood when drafting this rule that it was not possible for motherhood to be divided between two women: one the genetrix and another gestatrix; but this does not mean that both situations conform to the idea of motherhood.

It does not accord with law to subject a child to such a situation regarding its identity and affiliation. In fact, there are cases of litigation between gestatrix and genetrix. It has been decided in favor of the mother who provides the egg as "biological mother" against the birth

⁸⁴Convention of Rights of the Child, 1989.

⁸⁵LOPNNA; Art. 5.

⁸⁶Author's Translation. Original text reads as follow: *"El Estado garantizará asistencia y protección integral a la maternidad, en general a partir del momento de la concepción, durante el embarazo, el parto y el puerperio"*

⁸⁷Diccionario de la Real Academia Española.

⁸⁸Author's Translation. Original text reads as follow: *"La filiación materna resulta del nacimiento, y se prueba con el acta de la declaración de nacimiento inscrita en los libros del Registro Civil, con identificación de la madre."*

mother.⁸⁹ We insist that a deep understanding of the matter has not been reached with these decisions.

On the situation of women hired to be the gestatrix, we say with Andorno, "The woman who gives birth seems to act not as a true mother, as a person, but above all as a thing, like a machine that manufactures the child to deliver it later to the requesting partner. In fact, she gives the impression of playing here a role of 'production tool', because she makes available to third parties that which is most intimate of her being, what in the background distinguishes her as a woman. Gestational capacity in this sense, an American author argues, where certain human activities are closely related to the subject, trying to separate and dispose of them is tantamount to admitting a 'loan' of the person."⁹⁰.

f. Anonymous "Donation," "Sale" and "Deposit" of gametes: anonymous paternity and maternity

Lopez Herrera, on the issue of the legitimacy of the "donation and sale of ovum or sperm" ⁹¹ states that they are void in regard to its object (1.155 CCV) and to its aim or purpose (1.157 CCV). Both of which are against public policy (public order and good mores) for the following reasons:

- Its object is the gametes. About this the quoted author states "... just as the human person exists outside of commerce, (...), and therefore cannot be donated or sold, it must be admitted that something similar has to happen with the germ of the life that all woman and men carry in themselves. It is not and cannot be considered similar to a donation or sale of other organs, (...) because although organ donation concerns the conservation or improvement of life, it has nothing to do with reproduction of the individual, or with the moral and legal responsibilities that entails."⁹²
- The aim or purpose of the anonymous gametes donation or sale, is an illegal evasion of the donor's (or seller's) paternal duties over the child or children that will be conceived with those gametes. The anonymous seller or donor can shelter under the unacknowledgment of his/her identity and avoid paternal duties. The evils of such a purpose are addressed in

⁸⁹Decision of the "Tribunal Tercero de Primera Instancia de Juicio de Protección de Niños, Niñas y Adolescentes de la Circunscripción Judicial del Área Metropolitana de Caracas y Nacional de Adopción Internacional", 09/01/2013, Case Reference: AP51-V-2012-008654.

That decision is laboriously achieved, especially when referring to the understanding of family life in question, mixing proper with improper reasons.

⁹⁰ Author's Translation. Original text reads as follow: "Aquella mujer que da a luz parece actuar no como una verdadera madre, como una persona, sino sobretodo como una cosa, como una máquina que fábrica al niño para entregarlo después a la pareja solicitante. De hecho, la mujer da la impresión de jugar aquí un rol de 'útil de producción', debido a que ella pone al servicio de terceras personas aquello que posee de más íntimo en su ser, aquello que en el fondo la distingue en tanto que mujer: su capacidad gestacional. En este sentido, una autor americano sostiene que, siendo que ciertas actividades humanas están íntimamente ligadas al sujeto, pretender separarlas para disponer de ellas equivaldría a admitir un 'comodato' de la persona Andorno, ob. cit., N° 466, p. 261.

⁹¹López Herrera, Francisco; ob. cit.; Tomo II, p. 460.

⁹²Author's Translation. Original text reads as follow: "... así como la persona humana está fuera de comercio, (...), y, por ende, no puede ser objeto de donación ni de venta, debe admitirse que algo similar tiene que acontecer con el germen de la vida que cada mujer y cada hombre llevan en sí. No es ni puede ser considerado este como un caso similar a la donación o a la venta de otros órganos (...), que si bien conciernen a la conservación o al mejoramiento de la vida, nada tienen que ver con la reproducción del individuo, ni con las responsabilidades morales y legales que ello implica". *Ibidem*, p. 461.

the letter "g" following.

On the deposit agreement of gametes ("sperm and egg bank"), we must say that this suffers morally as well for the same reasons, for sharing same purpose and cause.

g. AP in absence of one of the parents

The existence of gametes banks of anonymous donors makes it possible to breed children who, from their conception, will not enjoy --in fact or in law-- two parents, but only one. This occurs strictly in two cases: (i) in a PA with gametes of a contractor and a deceased and (ii) in a PA with gametes of a contractor and an anonymous donor.

In both cases a child will never have one of his parents, which is a clear harm to his best interests. This is a clear example on how parenthood is taken as a "superior" good, preferred over those of the child by giving superior value to the desire of conceiving.

The case "(i)" is demonstrated perfectly by IVF or FAHo made with gametes of dead husband or domestic partner. This happened in the case "Y. Nuñez"⁹³ in the Constitutional Chamber of the Supreme Court, who by constitutional protection manages to be allowed to perform IVF with gametes of her deceased husband. Apart from the various substantive errors in the sentence, beginning with its misplaced analysis with regard to *ultra petita*,⁹⁴ its main lack of clarity consisted of (i) on the one hand, a right to procreation for the widow --above best interests of the child—and (ii) secondly, nullifying the rights of concepturus concerning his father, justifying that it as a manifestation of the will of the husband--in life--that implies consent that his wife is fertilized after his death.

On the case "(ii)," it happens that clinics offering IVF also advertise the following scenario, and we quote: "*Single women who have not been able to carry out their reproductive plans or simply do not have a companion in their lives also come to our unit.*"⁹⁵

In short, both practices are to be prohibited because they presuppose a contravention of the human rights of the child to be so conceived.

h. Selection of the gametes' features

This is a direct consequence of point "f" supra, and is a heterologous AP, which aims to choose the phenotype of the future child. This conduct brings with it the evils of anonymous "donation," "sale" and "deposit" of gametes; in addition to the intrinsic evil of having rights and duties relating to procreation in order that the product-child obtain the desired appearance.

For example, in a AP unit in Caracas, it is stated on their website:

⁹³Decision of Sala Constitucional del Tribunal Supremo de Justicia, 27/07/2006, Decision N° 1456.

⁹⁴As affirmed by H. Jude Pedro R. Rondón H. In his dissentment to the decision.

⁹⁵Auhtor's Translation. Original text reads as follow: "También acuden a nuestra unidad mujeres solteras que no han podido llevar a cabo su proyecto reproductivo o mujeres que simplemente no consideran una pareja masculina en su ecuación de vida."

It counts on healthy egg donors (ovum donation service), aged between 20 to 25 years and with excellent quality eggs. Our donors of semen (sperm donation service) are acquired via www.allucryobanks.com and are equally anonymous donors. The patient or partner can access a catalog through which he or she can choose the physical characteristics he or she wants for his or her baby⁹⁶

Law and jurisprudence related to AP

While there are several written laws that assume the techniques of AP are facts, there is no law that manifests an intention of the legislature to understand the reality and then adjust the law-- the AP.

To provide a brief analysis of the positive law on the subject, we will use the exhibition of two important decisions as a method, and treatment of the law that is in them.

Decision 1. On July 27, 2006, the Constitutional Chamber of the Supreme Court of Justice ruled in the case "Yamilex Nuñez de Godoy." The desire of the plaintiff was that the IVF cycle be completed in her with the cryopreserved gametes of her late husband. The claim was upheld based on (i) a so-called right to procreate and (ii) in the expression of will of the deceased husband in life that IVF be performed.

Such right to procreate was based on the "right to comprehensive protection of motherhood and fatherhood" of Art. 76 CRBV.

And the legal force of the expression of will in life given by the deceased husband was based on the provision of Art. 1 of the Law on Organ Transplants and Anatomical Materials in Human Beings 1992:

Transplantation or disposal of organs, tissues, derivatives or anatomical materials from humans, for therapeutic purposes, research, and teaching, is governed by the provisions of this Act. Excluded from the requirements of this Act, are hair and nails, as well as blood and blood components, ovaries, eggs and sperm. But in these cases an acceptance of donor and recipient should always be sought; if the latter is unable, relatives referred to in Article 17.⁹⁷

⁹⁶Author's Translation. Original text reads as follow:

cuenta con donantes de óvulos (servicio de donación de óvulos) sanas, con edades comprendidas entre los 20 a 25 años y con óvulos de excelente calidad. Nuestros donantes de semen (servicio de donación de semen) son adquiridos vía www.allucryobanks.com, son donantes igualmente de carácter anónimo y la pareja o paciente contará con un catálogo mediante el cual podrá escoger las características físicas que desea para su bebé.

En <http://www.fertiaguerrevere.com/donacion-de-gametos>.

⁹⁷Author's Translation. Original text reads as follow:

"El transplante o la disposición de órganos, tejidos, derivados o materiales anatómicos provenientes de seres humanos, con fines terapéuticos, de investigación y de docencia, se rige por las disposiciones de esta Ley. Se excluyen de los requisitos de esta Ley, los cabellos y las uñas. También la sangre y sus componentes, ovarios, óvulos y esperma pero en estos casos deberá siempre solicitarse la aceptación del donante y el receptor, si este último no pudiera, de los parientes previstos en el artículo 17."

Decision 2. On January 9, 2013 the “Third Court Trial Protection of Children and Adolescents of the Judicial District of Caracas Metropolitan Area, National and Intercnation Adoption” declared the case “Lyrruth Perez and Antonio Vaccaro vs. Jamileth Barboza.” It was a process of “maternity inquisition” in the case of a “surrogacy.” The claim of the plaintiffs was that the affiliation of the child birthed by J. Barboza was established on the basis of its genome (gametes were L. Pérez and A. Vaccaro). This was upheld.

The court intends to clarify concepts with excessive and midguided development and concludes by assuming contradictory criteria:

- (i) “In conclusion, based on the best interests of the child, the figure of the surrogate womb must be rejected and proscribed in every event”
- (ii) “It could well be a wake-up call to the medical institutions to refrain from procedures essentially culminate in a double motherhood, for the matter is one of public order and as such is outside of autonomy and can not be treated as a kind of 'fertilization à la carte'. (...) It is therefore recommended that it be formally proscribed with penalties. It is logical that if the Law on Organ Transplants, Tissues and cells in Humans [2011] criminally penalizes the trade of organs to prevent human beings from being denigrated for economic reasons to the detriment of their health, we arrive at an equivalent situation, which seeks justification in that said special law expressly excludes blood, sperm and 'eggs' (art. 1).”
- (iii) “In conclusion, the judge considers that in the present case ‘subrogated’ maternity is valid, insofar as its objective is to help human beings to fulfill their expectations, since it gives them the possibility of conceiving and raising a child that is his genetically, even if it was born in another womb..”
- (iv) “... to accept the substitute gestation (surrogate), it must necessarily be altruistic and based strictly on the inability to gestate; therefore it should not become surrogacy in an unscrupulous practice of those who pursue the objective of obtaining money in exchange for a womb provided, and so it is declared.”⁹⁸

* * *

⁹⁸ Author’s Translation. Original text reads as follow:

- (i) “ En conclusión, con base en el interés superior del menor, la figura del vientre subrogado debe ser rechazada y a todo evento proscrita”,
- (ii) “Bien se podría hacer un llamado de atención a las instituciones médicas para que se abstengan de realizar procedimientos que en esencia culminan en una doble maternidad, pues la materia es de orden público y por tal ajena a la autonomía de la voluntad y no puede ser tratada como una suerte de 'fecundación a la carta'. (...) por ello se recomienda su proscripción formal con tintes de penalización. Y es lógico, que si la Ley de Trasplantes de Órganos, Tejidos y Células en Seres Humanos [de 2011] sanciona penalmente el comercio de órganos para evitar que el ser humano se denigre por motivos económicos en perjuicio de su salud, aquí se llega a una situación equivalente, que se pretende justificar porque dicha ley especial excluye expresamente la sangre, esperma y 'óvulos' (art. 1).”
- (iii) “En conclusión, considera ésta juzgadora que en el presente caso la maternidad “sub- rogada”, es válido, en la medida que su objetivo sea ayudar al ser humano a cumplir sus expectativas, pues les brinda la posibilidad de concebir y criar un hijo genéticamente suyo, aunque haya sido gestado en otro vientre.”
- (iv) “...de aceptarse la gestación substituta (subrogada) esta debe ser, necesariamente altruista y por estricta imposibilidad de gestar, por ende no debe convertirse la maternidad subrogada en una práctica inescrupulosa de quienes persigan como objetivo obtener dinero a cambio de un vientre prestado, y así se declara.”

The first decision summary demonstrates a real example of a letter “g” situation. At no time do they value the right to life of the unborn child or his character as a full subject of rights. This ignores the guarantee of human rights enshrined in the CRBV and the LOPNNA, which we have already discussed.

In the second decision analyzed, although the best interest of the minor (a fundamental point for a correct legal analysis) is mentioned, the decision suffers from serious contradictions.

In conclusion, there is a need for legislation that arises from an in-depth study of the reality of PA, and which is guided on pain of nullity for human rights indicated in the subtitle of “II” the “IV” of this work.

* * *

Moreover, there are four rules that governs aspects surrounding AP, but without going into the merits:

1. **Article 204 of the Civil Code:** “The husband cannot disown a child claiming his impotence, unless it is manifest and permanent. // Neither is disowning permitted when conception has taken place through the artificial insemination of the woman with her husband's permission.”⁹⁹

Here, above all, the establishment of paternity of children conceived in marriage is protected, if there was artificial insemination. It is not intended to broadly regulate the PA, nor does it finally have the rule to recognize it as lawful.

2. Article 20 of the Law for the Protection of Families, Maternity and Paternity¹⁰⁰ of 2007: “Medical services for assisted reproduction: The Ministry of popular power with competence in health, will include within its care units the service of assisted reproduction, provided specialized personnel, laboratories and high-tech equipment, targeting women and men who present limitations in fertility, in order to guarantee the right to maternity and paternity.”¹⁰¹

This is the standard that most directly regulates AP, in the sense that it determines that the service is provided in public health entities, as indeed happens. This special law aims to develop the protection of parenthood enshrined in the Constitution. We believe that this is part of a false assumption: to take as lawful the “assisted

⁹⁹Author’s Translation. Original text reads as follow: “El marido no puede desconocer al hijo alegando su impotencia, a menos que sea manifiesta y permanente./ El desconocimiento no se admitirá, aun en ese caso, cuando la concepción ha tenido lugar por la inseminación artificial de la mujer con autorización del marido.”

¹⁰⁰Ley para la Protección de las Familias, la Maternidad y la Paternidad. Gaceta Oficial N° 38.773 del 20 de septiembre de 2007.

¹⁰¹Author’s Translation. Original text reads as follow: “Servicios médicos para la reproducción asistida: El ministerio del poder popular con competencia en materia de salud, incluirá dentro de sus unidades asistenciales el servicio de reproducción asistida, dotado del personal especializado, laboratorios y equipos de alta tecnología, dirigidos a mujeres y hombres que presenten limitaciones en su fertilidad, con el objeto de garantizarles el derecho a la maternidad y a la paternidad.”

reproduction” rather than to analyze reality and the legal and social consequences or what illegal activities are caused. It is not explained in any point of this law what “assisted reproduction,” is or what practices are available to be included in this “service.”

Furthermore, this standard is supported by one goal: “to guarantee the right to maternity and paternity.” This is contradictory because, as has been shown throughout this writing, the AP supposes to uphold parental rights while ignoring both the rights of the child, as well as the correlative parental duties.

We believe that --in view of the activities against aforementioned right-- this rule violates the human right of unborn to life, and therefore the public order and good mores. In that sense, Lopez Herrera, in 2006 (one year before the promulgation of the standard under study) says, “except for agreements that are held in connection with artificial insemination [strictly speaking, introduction of the gametes of the husband within the body of the wife] of the wife with her husband's sperm, all legal forms used or usable for such insemination procedure, as well as those relating to in vitro fertilization and the use of surrogates, are absolutely null and they lack any legal effect.”¹⁰²

3. Article 1 of Act on Donation and Transplantation of Organs, Tissues and Cells in Human Beings:¹⁰³

Purpose: The purpose of this Act is the regulation of procedures for therapeutic purposes, research, or teaching; for donation and transplantation of organs, tissues and cells in humans, within the national territory and based on the right to health provisions of the Constitution, laws, treaties, agreements and international conventions signed and ratified by the Bolivarian Republic of Venezuela.

Excluded from the object of this Act, embryonic stem cells, ovaries, eggs and sperm and blood and its components except hematopoietic progenitor cells.¹⁰⁴

The exclusion in this statement is to be understood in the sense that the gametes are a special category of “things,” because they are “seeds of life” and not a lower category subject to fewer formalities than other human organs. And if the organs, as body parts of the person, are under a strict and *sui generis* legal regime; much more will be human tissues containing within themselves the potential to create a complete human being.

¹⁰²LÓPEZ HERRERA, FRANCISCO; ob. cit.; tomo II, p. 464-465.

¹⁰³Ley Sobre Donación y Trasplante de Órganos, Tejidos y Células en Seres Humanos. Gaceta Oficial N° 39.808, 25 de noviembre de 2011.

¹⁰⁴Author's Translation. Original text reads as follow:

Objeto: El objeto de la presente Ley es la regulación de los procedimientos con fines terapéuticos, de investigación o de docencia para la donación y trasplante de órganos, tejidos y células en seres humanos, en el ámbito del territorio nacional y con base al derecho a la salud previsto en la Constitución, las leyes, los tratados, pactos y convenios internacionales suscritos y ratificados por la República Bolivariana de Venezuela.

Se excluyen del objeto de esta Ley, las células madre embrionarias, ovarios, óvulos y esperma, así como la sangre y sus componentes, excepto células progenitoras hematopoyéticas.

Therefore, it is clear that there is a legislative vacuum in the sense that it avoided giving the same treatment to the gametes as to the organs, but without establishing a legal regime for the gametes.

In favor of this, the Art. 1 of the Law on Organ Transplants and Anatomical Materials in Human Beings of 1992 was reformed in 2011.

Before the amendment, the part of the article which excluded the gametes from the general system for human organs established: "Excluded from the requirements of this Act, are hair and nails, as well as blood and blood components, ovaries, eggs and sperm. But in these cases an acceptance of donor and recipient should always be sought; if the latter is unable, relatives referred to in Article 17."¹⁰⁵

Hence it could be understood that the provision of gametes was only subject to express agreement between the parties. That is the aforementioned case "Yamilex Nuñez" in 2006, before the reform.

This interpretation was also wrong, because a holistic reading of the law in question shows that there cannot be donors or recipients of gametes, as there is blood, because in that legal text, donor and recipient is defined in the following terms:

Art 2 (...) 3) DONOR. The man who, during his lifetime or after his death, either by his own will or their relatives, from whom are extracted organs, tissues, derivatives or anatomical materials in order to use them for transplant in other human beings or therapeutic targets 4) RECIPIENT: the human being, in whose body may be implanted organs, tissues, derivatives or any other anatomical material by therapeutic procedure.¹⁰⁶

From the purpose of the 1992 Act, it can be understood that there is no place for a donor of gametes, because they are not intended for transplant or therapeutic targets for the receiver; when gametes are donated to AP techniques, they are intended to begin a new human life.

Article 40 of the Act Against Organized Delinquency and Financing of Terrorism¹⁰⁷ defines:

Unlawful Genetic manipulation: Anyone who, as an integral part of an organized crime group, handles human genes, will be punished or imprisoned

¹⁰⁵ Author's Translation. Original text reads as follow:

Se excluyen de los requisitos de esta Ley, los cabellos y las uñas. También la sangre y sus componentes, ovarios, óvulos y esperma pero en estos casos deberá siempre solicitarse la aceptación del donante y el receptor, si este último no pudiera, de los parientes previstos en el artículo 17.

¹⁰⁶ Author's Translation. Original text reads as follow:

Art. 2 (...) 3) DONANTE: El ser humano a quien, durante su vida o después de su muerte, bien sea por su propia voluntad o la de sus parientes, se le extraen órganos, tejidos, derivados o materiales anatómicos con el fin de utilizarlos para trasplante en otros seres humanos, o con objetivos terapéuticos. 4) RECEPTOR: El ser humano, en cuyo cuerpo podrán implantarse órganos, tejidos, derivados o cualquier otro material anatómico mediante procedimiento terapéuticos

¹⁰⁷ Ley Orgánica Contra la Delincuencia Organizada y Financiamiento al Terrorismo. Gaceta Oficial N° 39.912 del 30 abril de 2012.

for six to ten years. If human ovum are fertilised for purposes other than procreation or therapy, or if he/she performs acts of cloning or other procedures to the genetic modification, he/she shall be punished or imprisoned for eight to twelve years. // If he/she is using genetic engineering to produce biological weapons or exterminate the human species, he/she will be punished or imprisoned for twenty five to thirty years in prison.¹⁰⁸

The standard is a protective order against a particular activity, i.e. illegal genetic manipulation. It not intended as lawful qualification of the AP.

3. Emergency Contraception, "EC"

So-called EC is the use of different pharmacological means aimed to prevent the continued development of the unborn.

To begin, we will discuss it under the the terms that appear in the "Official Text for comprehensive care for sexual and reproductive health"¹⁰⁹ ("Official Text") elaborated by the Ministry in charge of Health in 2003.

In Health Ministry policies

This concept of EC is provided within the Official Text: "They are (i) methods of family planning, (ii) that can prevent an unwanted or unplanned pregnancy, (iii) up to 5 days after unprotected intercourse."¹¹⁰

Points "ii." and "iii." make up a terrible fallacy, since they put forward a false argumentative basis to allow abortion to be socially accepted because of ignorance.

The conception of the new child happens at the time immediately following sexual intercourse and continues well past five days later.¹¹¹ Ergo, it is clear that the techniques of the so-called

¹⁰⁸ Author's Translation. Original text reads as follow:

Manipulación genética ilícita: Quien como parte integrante de un grupo de delincuencia organizada manipule genes humanos, será penado o penada con prisión de seis a diez años. Si fecunda óvulos humanos con fines distintos a la procreación o terapéuticos o realiza actos de clonación u otros procedimientos dirigidos a la modificación genética, será penado o penada con prisión de ocho a doce años. // Si utiliza la ingeniería genética para producir armas biológicas o exterminadoras de la especie humana, será penado o penada con prisión de veinticinco a treinta años de prisión.

¹⁰⁹ Norma oficial para la atención integral de la salud sexual y reproductiva. This legal text is compounded by various "volumes" published by Health and Social Development Ministry as mandated by Resolución N° 363 del June 3, 2003 published in Gaceta Oficial N° 37.705 of 5th June 2003. The document is available in the following link: http://venezuela.unfpa.org/documentos/ssr_norma_inicio.pdf.

¹¹⁰ Author's Translation. Original text reads as follow: "Son (i) métodos de planificación familiar, que (ii) pueden prevenir un embarazo no deseado o no planificado, (iii) hasta 5 días después de una relación sexual sin protección."

¹¹¹ As highlighted by Valencia Llerena:

Sperm have been reported in the fallopian tube 5 minutes after insemination. Likewise, the total number of sperm in the tube is directly proportional to inseminated number and population of tubal sperm stabilizes in 15 minutes (...). The cervical mucus half cycle is alkaline and sperm that access the endocervical canal remain viable for many hours, and probably up to 7 days.

Se han reportado espermatozoides en la trompa de Falopio 5 minutos después de la inseminación; así mismo, el número total de espermatozoides en la trompa es directamente proporcional al número inseminado y la población de espermatozoides tubarios se estabiliza en 15 minutos. (...) El moco

“emergency contraception” are rather techniques of early abortion and merely marketed with euphemisms.

The Official Text continues its medical guide:

One of the most controversial aspects is the mechanism of action of emergency contraception, and it is very clear that it does not prevent implantation, which is the only event medically accepted to define the beginning of pregnancy, as before that event no diagnostic or medical certainty or legal certainty that it exists, therefore "they are not abortifacients." The mechanism of action will delay or prevent ovulation, it is very important to make it very clear, because this point is what has brought ethical and moral problems that have prevented its use in several countries to consider abortion methods.

We consider that the use of emergency contraception can help greatly in reducing infant mortality rates by reducing unwanted pregnancies, high-risk, and especially induced abortion. It is applied to those women who have been victims of sexual assault, women who have forgotten to use a regular method of contraception or have used it incorrectly.

Indications [cases that determine its use]:

- Unprotected sex
- Rupture or slippage of condoms
- Forgetting two or more ACO pills
- More than a week elapsing after which the monthly injection (Mesigyna, Depo-Provera) should have been applied.
- Rape or sexual abuse.¹¹²

cervical a la mitad de ciclo es alcalino y los espermatozoides que tienen acceso al canal endocervical permanecen viables por muchas horas, y probablemente hasta por 7 días. (Original text)

VALENCIA LLERENA, IVÁN; Fisiología de la Reproducción Humana. The document is available in the following link: http://www.redlara.com/aa_espanhol/database_livros_detalhes2.asp?cadastroid=110.

¹¹² Author's Translation. Original text reads as follow:

Uno de los aspectos mas importantes, por lo controversial, es el que se refiere, al mecanismo de acción de la anticoncepción de emergencia; quedando muy claro que no impiden la implantación, que es el único evento médicamente aceptado, para definir el inicio de embarazo, ya que antes de ese evento no hay certeza diagnóstica ni médica, ni legalmente aceptable de que éste exista, por lo tanto “no son abortivos”. El mecanismo de acción va a retrasar o evitar la ovulación; es muy importante dejarlo bien claro, por cuanto este punto es el que ha traído los problemas éticos y morales que han impedido su uso en varios países al considerarlos métodos abortivos.

Consideramos que el uso de la anticoncepción de emergencia puede contribuir grandemente en la reducción de la mortalidad infantil al disminuir los índices de embarazos no deseados, los de alto riesgo y en especial el aborto inducido. Es aplicado para aquellas mujeres que han sido víctimas de agresión sexual, mujeres que han olvidado usar un método anticonceptivo regular o lo han usado de manera incorrecta.

Indicaciones [casos en que de determina su uso]:

- Relaciones sexuales no protegidas
- Ruptura o deslizamiento del condón
- Olvido de dos o más píldoras de ACO
- Haber transcurrido más de una semana en la cual debía haberse aplicado la inyección mensual (Mesigyna, Depoprovera).
- Violación o abuso sexual

The text indicates the use of two methods: (i) hormonal oral contraceptives: with active ingredients levonorgestrel and ethinyl estradiol and (ii) Intrauterine devices (IUD) that release copper.

The main defense for the use of these methods is that they do not prevent implantation of the blastocyst (the child in their first days after conception: "... between 4 and 5, is the last day when the implantation of the blastocyst begins." ¹¹³).

This is completely false. If fertilization had not occurred, there would be no embryo at all (here we call the embryo the child from conception until birth), or implantation. It is only in the case where fertilization has occurred [and therefore a new full child subject of rights has appeared, Arts. 1 LOPNNA and 78 CBRV] that it is useful to take an emergency abortifacient.¹¹⁴

On the active mechanism of hormonal methods

Flórez states:

It is recognized universally that the almost complete contraceptive efficacy of hormonal drugs is due to their joint action at all levels: Hypothalamic-pituitary function, ovarian, and-tube endometrium-vaginal. (...) The progestogen¹¹⁵ also causes thickening of the cervical mucus, which disturbs the pervasiveness and motility of

¹¹³ Diaz-Flores et alii has affirmed that;

... And the bioactive proteins in uterine stage preimplantation rise to day 3 of pregnancy with a peak ... [cites] ... Moreover, it has been shown that both cytokines are secreted by the pre-implantation human embryo. The fact receptor interleukin been located in the endometrial tissue and interleukin in the embryo, suggesting the existence of a cytokine - receptor that is performed at the time of accession, interaction this fact highlights the importance of interleukin system in this critical stage of gestation. Based on these observations it has been suggested that the system of IL -1 [interleukins] may have an important role in the process of embryo implantation .

...así como las proteínas bioactivas uterinas en la etapa de pre-implantación se elevan al día 3 de preñez con un pico... [cita] ...Por otra parte, se ha demostrado que las dos citocinas son secretadas por el embrión humano preimplantado. El hecho de haberse localizado al receptor de la interleucina en el tejido endometrial y a la interleucina en el embrión, sugiere la existencia de una interacción citocina-receptor que se lleva a cabo en el momento de la adhesión, este hecho pone de manifiesto la importancia del sistema interleucina en esta etapa crítica de la gestación. Con base en estas observaciones se ha sugerido que el sistema de IL-1 [interleucinas] puede tener una participación importante en el proceso de la implantación embrionaria. (Original text)

DIAZ-FLORES, MARGARITA; BAIZA-GUTRAN, LUIS ARTURO; HICKS, JUAN JOSÉ. Los nuevos moduladores endometriales en el embarazo temprano. Gaceta médica de México, México, 1996, Vol. 132 Num. 5 Sep-Oct, p. 524-525

¹¹⁴Even scientific studies conducted by organizations that promote its conduct affirms so:

To make an informed choice, women must know that ECPs—like all regular hormonal contraceptives such as the birth control pill, the implant Implanon, the vaginal ring NuvaRing, the Evra patch, and the injectable Depo-Provera,⁴¹ and even breastfeeding— prevent pregnancy primarily by delaying or inhibiting ovulation and inhibiting fertilization, but may at times inhibit implantation of a fertilized egg in the endometrium. At the same time, however, all women should be informed that the best available evidence is consistent with the hypothesis that levonorgestrel and ulipristal acetate ECPs' ability to prevent pregnancy can be fully accounted for by mechanisms that do not involve interference with post-fertilization events. That is the information we provide on the Emergency Contraception Website (not-2-late.com) and the Emergency Contraception Hotline (1-888-NOT-2-LATE).

TRUSSELL, JAMES. Head Director "Population Research", Princeton University. Mechanism of Action of Emergency Contraceptive Pills. Mayo,2010.

¹¹⁵Ethinyl estradiol is an artificial estrogen and progestogen levonorgestrel is artificial .

sperm. As a complement, the hormonal imbalance caused by the contraceptive alters the endometrium, which causes glandular atrophy and pseudotemporal reaction in the stroma, which prevent nesting blastocyst, and alters tubal motility.¹¹⁶

The involvement of motility determines that the fertilized egg is later delayed in its arrival to the endometrium, and if it arrive late, it dies.

In short, emergency hormonal contraception has three effects. “1. To prevent ovulation; 2. To prevent fertilization (union of sperm and egg); 3. To prevent the nesting of the fertilized egg [child] in the uterine cavity. The effects 1 and 2 are contraceptives, 3 is abortifacient.”

On the active mechanism of "IUD".

IUD “Are devices, (...) which are inserted into the uterine cavity and act to produce a mechanical effect or local irritation and produce a state of inflammation of the uterine mucosa, which alters egg implantation [fertilized egg.]; it can also alter the transport mechanism of the sperm, preventing fertilization (contraceptive effect). Its main effect is antiimplantatorio and therefore early abortion...”¹¹⁷

Therefore, the Official Text provides that the IUD is used in two cases: “In those considering long-term contraception, and when women can not use the Yuzpe method [hormonal], because it has been more than 72 hours.”¹¹⁸ At that point, we are aware that the embryo has been developing for three days.

The abortifacient effect of those methods is also checked in that their effectiveness is significantly reduced as more days pass after intercourse. The Official Text says, referring to the two methods which it uses: “EFFECTIVENESS. They have a 75% efficiency in preventing unplanned pregnancies”¹¹⁹

¹¹⁶Author’s Translation. Original text reads as follow:

Se admite de forma universal que la eficacia anticonceptiva casi completa de los fármacos hormonales se debe a su acción conjunta a todos los niveles: la función hipotálamico-hipofisaria, la ovárica y la tubo-endometrio-vaginal. (...) El gestágeno¹¹⁶, además, produce un engrosamiento del moco cervical que perturba la penetrabilidad y la motilidad de los espermatozoides. De forma complementaria, el desequilibrio hormonal provocado por el anticonceptivo altera el endometrio, en el que ocasiona atrofia glandular y reacción pseudotemporal en la estroma, que impiden la anidación del blastocisto, y modifica la motilidad de las trompas

FLÓREZ, JESÚS. Farmacología humana. 3era. Ed., Masson, S.A., Barcelona 1997, p 886.

¹¹⁷Author’s Translation. Original text reads as follow:

Son aparatos, (...) que se introducen en la cavidad uterina y actúan produciendo un efecto mecánico o irritativo local. Producen un estado de inflamación de la mucosa uterina que altera la implantación del huevo [óvulo fecundado]; puede alterar, también, el mecanismo de transporte de los espermatozoides, dificultando la fecundación (efecto anticonceptivo). Su efecto fundamental es antiimplantatorio y, por tanto, abortivo precoz...

Ibidem, p. 301.

¹¹⁸Author’s Translation. Original text reads as follow: “–En aquellas que consideren anticoncepción a largo plazo. –Cuando la mujer no pueda utilizar el método de Yuzpe [hormonal], porque han transcurrido más de 72 horas”

¹¹⁹Author’s Translation. Original text reads as follow: “EFICACIA: Tienen un 75 % de eficiencia en la prevención de embarazos no planificados”

That Official Text is an administrative act (sub-legal) and not subject to publicity in the Official Gazette of the Republic and issued by provision of a rule contained in a resolution of the Health Ministry with jurisdiction. And it is through a subterfuge that is intended to ignore the constitutional and legal rights that protect the child from conception, and that do not allow abortion even in cases in which the Standard has as cases under “emergency contraception.” Obviously, this legal text suffers from unconstitutionality and illegality, because it subjects people to unconsciously commit abortions due to negligent and biased counseling and health institutions, both public and private.¹²⁰

Presence in market and use by individuals

Apart from the institutional use given to EC, which is more serious because it gives an image of lawfulness through a fallacious document (the Standard), we have the reality that oral contraceptive drugs (easy to use outside a health institution) are sold in the whole national market, without prescription.

Further more, despite the fact that this drug is abortive, these drugs have been included in the list of essential drugs by both WHO (World Health Organization of the UN) and the “National Essential Drug List”¹²¹.

The lawful marketing of EC in Venezuela depends on the approval of the Health Register for Proprietary Medicinal Products,¹²² the responsibility of an entity of the Public Administration, which is subject to compliance with the Constitution and laws. Therefore, the approval of these drugs must be declared void because they are unconstitutional, either by the Administration itself or by the Judicial Branch.

Moreover, from a social point of view, it is extremely harmful that these ECs appear harmful and that they are promoted by both the public apparatus and their producers, deceiving the public into using these means without knowledge of the actual abortive consequences.

¹²⁰The legal text orders that:

The scope of this Manual constitutes the Services of Public and Private Health and regulates the provision of services and development of all the activities offered in comprehensive services in sexual and reproductive health of adolescents and is mandatory.

El campo de aplicación de este Manual lo constituyen los Servicios de Salud Públicos y Privados y regula la prestación de servicios y desarrollo de todas las actividades que se brindan en los servicios de atención integral en salud sexual y reproductiva de las y los adolescentes y es de obligatorio cumplimiento.” (Original text)

Tomo III., punto 3.3.

¹²¹Resolution N° 587, Ministry of popular power for Health, published in Gaceta Oficial N° 40.777, 29th october, 2015.

¹²²Reform to the Regulation of the Law on practice of Pharmacy (“Reforma del Reglamento de la Ley de Ejercicio de la Farmacia”) through Decreto N° 2.932 en la Gaceta Oficial Extraordinaria N° 4.582, 21st may 1993. Art. 53 orders that Foreign nationals pharmaceuticals or, for human, internal or external use, need for dispensing prior registration at the National Institute of Hygiene Rafael Rangel without which it will be considered nostrums of prohibited sale” *“Los productos farmacéuticos nacionales o extranjeros, para uso humano, interno o externo, necesitan para su expendio el registro previo en el Instituto Nacional de Higiene “RAFAEL RANGEL”, sin el cual serán considerados remedios secretos de venta prohibida”.* (Original Text)

VI. Conclusions

- 1) Natural legal personhood should be recognized for every individual of the human species ("person" in a non-legal sense), and the conceived child, as an individual being, should have such personhood recognized. Otherwise, the legal order does not adapt to reality, and serious damage is done. This damage undermines us deeply as a society and requires prompt legislative attention.
- 2) "The child can only be recognized as a person if we admit his or her own characteristics, that is to say, that this human [...] person goes through a gradual transforming process ... This requires of the parents, adults and the State an adapted response to this transformation, according to the age and maturity of the child."¹²³ Vulnerability and dependence of conceptus are the reason for their response, and should not be the center of the argument that denies his personhood, since this categorization [as a person] comes from possessing a human nature, not from invulnerability or independence.
- 3) Based on the systematic interpretation of art. 78 Constitution, Art. 1 LOPNNA and art. 17 of the CCV it can be argued that the conceived child has a natural legal personhood and is a full subject of rights from the moment of conception in view of its fully human nature, and that the effects of this legal status are subject to the condition of not being born dead (Aguilar Gorrondona).

We feel that it is increasingly necessary to rethink art 17 of the CCV, because in the 100-year life of the law, the unborn child has had a particularly great need for clear, unambiguous protection.

Based on the standards cited in this conclusion "3" we affirm our view on the unconstitutionality and illegality of art. 20 of the Law for the Protection of Families, Motherhood and Fatherhood; which leads to the Government offering AP services in the imprecise terms explained above.

- 4) Careful observance of the rights of children from their family (especially their parents) and the correlative duties toward the infant is essential for proper legal order in the particular cases of the matter. These are assumptions of a proper development and protection of the life of the unborn. We refer particularly to (i) the right to live, be raised and develop in their family of origin and (ii) the concomitant obligations to parental authority. Due to errors in this important task, the following areas have been seriously damaged: paternity and maternity, establishment of filiation, PA, etc.
- 5) Legislation arising out of a deep study of the reality of the AP is needed, and should be guided on pain of nullity for human rights as outlined above. Paramount attention should be directed to the dangers and concomitant damage of most methods of AP,

¹²³ Author's Translation. Original text reads as follow:

Sólo se puede reconocer al niño como persona si admitimos sus características propias, es decir, que esta persona [humana] niño o niña, (...) se transforma progresivamente. Esto exige de los padres, adultos y del Estado una respuesta adaptada a esta transformación, según la edad y madurez del niño. PERDOMO, JUAN RAFAEL (coord.); VI Foro Derecho de la Infancia y de la Adolescencia. Edited by Tribunal Supremo de Justicia and Fundación Gaceta Forense. Caracas, 2011. Conference of: Rosa María Ortiz, A los 20 años de la Convención sobre los Derechos del Niño. Pasos hacia su comprensión y aplicación efectiva. p. 32.

because it consists of an indiscriminate disposal of life conceived. The AP leaves room for the objectification of the person conceived and the plunder of natural guarantees of their dignity. The child is exploited for the satisfaction of a "desire" of one or more people to be parents-- a desire which is enthroned as the right to paternity and ignores that the right to form a family is limited by the rights of children and their best interests, and that it is not [this right to form a family] a simple consequence of the right to free development of personality.

- 6) AP techniques are also frequent occasions of objectification of: ("i") the persons of parents and institutions themselves ("ii") and family, and ("iii") sexuality as a procreational reality. (i) Fatherhood is blurred between multiple persons: gestatrix, Genetrix, anonymous gamete donors, the "lessor's" womb and "lessees" ... (ii) The family is no longer seen as a stable project and commitment of two people, involving reciprocal belonging and care (obligations). This is tainted by the fact that two thirds of conceived children will not be born. (iii) Sexuality as procreational reality (the potential paternity and maternity of people) no longer appears comfortable within the domestic walls, but generated more often by anonymous, irresponsible and ignorant [gamete donors].
- 7) Generally both pregnancy and childbirth as the contribution of genetics are integral parts of the same reality: motherhood. Therefore, one out of many consequences is that the exercise of the practice of "renting wombs" is really subjecting the child to a filiation limbo.
- 8) We conclude with Lopez Herrera that "just as the human person cannot be marketed, (...), and therefore cannot be donated or sold, it must be admitted that something similar has to happen with the germ of life..."¹²⁴ (gametes). This statement is further strengthened by the enactment of the Law on Donation and Transplantation of Organs, Tissues and Cells in Human Beings of 2011, which eliminated the provision in the 1992 law that excluded the ovaries, eggs and sperm requirements, always providing that restrictive legal acceptance of donor and recipient is requested.
- 9) Due to the activity of the Public Administration regarding the "Emergency Contraception" (type of early abortion) (a) this is offered in the domestic market -- from health permits issued by the Administration-- and, further, (b) regulatory provisions aimed at its effective application (according to the "official standard for comprehensive care for sexual and reproductive health" and the "National List of Essential Drugs") bring about a serious violation of the legal order discussed in this paper, and consequently the rule of law that governs the organs and agencies of government. It is necessary to repudiate this policy and demand its end.

¹²⁴Author's Translation. Original text reads as follow: "así como la persona humana está fuera del comercio, (...), y, por ende, no puede ser objeto de donación ni de venta, debe admitirse que algo similar tiene que acontecer con el germen de la vida..." LÓPEZ HERRERA, FRANCISCO; ob. cit.; Tomo II, p. 461.