

# **Human embryo in Latin American legislation after the Artavia Murillo ruling**

**By Delfina Colombres Garmendia<sup>1</sup>**

**March 2020**

## **1. Introduction**

On March 15, 2000, the Supreme Court of Justice of Costa Rica declared the unconstitutionality of the Executive Decree 24029-S issued by the Ministry of Health, which had authorized the practice of In Vitro Fertilization (IVF) in marriages and regulated the execution of this technique. On that occasion, the Constitutional Chamber of the Supreme Court affirmed that IVF practices threaten the life and dignity of the human being, since “the human embryo is a person from the moment of conception; therefore, it cannot be treated as an object for research purposes, be subjected to selection processes, or preserved in a freezer, and what is most important to this Chamber, it is not constitutionally legitimate that an embryo be exposed to a disproportionate risk of death.<sup>2</sup>”

After the annulment of the Executive Decree, nine couples filed a petition to the Inter-American Commission, alleging the violation by the State of Costa Rica of a series of rights protected in the American Convention on Human Rights (CADH), such as the right to honour and dignity, the duty to adopt provisions of domestic law, equality before the law, judicial protection, family protection, right to life, right to personal integrity, right to personal liberty and judicial guarantees, thus giving origin of the case “Artavia Murillo et al. Costa Rica”.

On November 28, 2012, the Inter-American Court of Human Rights (IACHR) issued a judgment, considering that the judicial annulment of the Executive Decree by the Costa Rican Supreme Court constituted an arbitrary interference in the rights to private and family life, by a on the one hand, and on the right to form a family, on the other, in relation to the principle of equality, all rights enshrined in the American Convention on Human Rights, jointly decreeing the responsibility of the State of Costa Rica, and various reparations under its charge.

## **2. Precedent seated by Artavia Murillo**

---

<sup>1</sup> Lawyer graduated from National University of Tucuman. Diplomat on Moral Foundations of Law by The

<sup>2</sup> [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf)

The IACHR decided in its ruling that the concept of "person", "conception" and "human being" are terms "whose scope must be assessed from the scientific literature", and that the Supreme Court of Costa Rica "opted for one of the scientific positions on this subject to define at what moment life begins "because it understood" that the conception is the moment in which the ovule is fertilized and assumed that from that moment there was a person entitled to the right to life<sup>3</sup> ", making it clear that person and conception are concepts debated in the scientific world, and that the IACHR does not coincide with the definitions of said concepts supported by the Costa Rican Court.

Likewise, the IACHR concluded that "the embryo cannot be understood as a person for the purposes of Article 4.1 of the American Convention" and that the "conception" mentioned in Article 4.1 "takes place from the moment the embryo is implanted in the womb, which is why, prior to this event, there would be no place for the application of article 4 of the Convention ", further arguing that the protection of the right to life "is not absolute, but is gradual and incremental according to its development, due to the fact that it does not constitute an absolute and unconditional duty, but implies understanding the origin of exceptions to the general rule<sup>4</sup>."

The IACHR left its position on the scope of protection of the right to life granted by the ACHR, leaving it established that human life in an embryonic state is not protected by said regulatory body, and delegating to the discretion of each state member the legal treatment of the human embryo.

### **3. Status of legislation on assisted human reproduction techniques in Latin American countries that are signatory states of the ACHR**

#### **i. Argentina**

In 2013, after the IACHR's ruling in *Artavia Murillo*, Argentina sanctioned the 'Assisted Human Reproduction Law' N° 26.862<sup>5</sup>. This standard allows and regulates various fertilization and implantation possibilities, and enables cryopreservation of genetic material and embryos.

The purpose of the law is "to guarantee integral access to medically assisted reproduction procedures and medical technical techniques", which are understood as "the procedures and techniques performed with medical assistance to achieve a pregnancy", within which it includes "techniques of low and high complexity, which can

---

<sup>3</sup> [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf) - párrafos 176 y 177

<sup>4</sup> [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_257\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf) - párrafo 264.

<sup>5</sup> <http://servicios.infoleg.gob.ar/infolegInternet/anexos/215000-219999/216700/norma.htm>

include the donation of gametes and / or embryos", and the procedures and techniques to be developed in the future authorized by the application authority.

The law provided for mandatory coverage of artificial procreation techniques by all institutions of the health system, which can be accessed by any person who has given their consent, revocable until the implantation of the embryo in women, to low or high complexity techniques, that can include the donation of gametes and/or embryos, in order to achieve a pregnancy. The law does not set almost any limit to the techniques and the determination of requirements and techniques is delegated to the enforcement authority.

This law failed to grant regulation to non-implanted embryos, leaving a legal vacuum regarding them.

- **Bill**

On April 5, 2019, a bill titled "Law for the Protection of Non-Implanted Embryos" <sup>6</sup>, signed by Deputy Daniel Filmus, among others, was presented to the Chamber of Deputies of Argentina.

The project welcomes the position of the IACHR in the Artavia Murillo ruling regarding the status of the embryo, agreeing that it cannot be considered a person. In turn, it associates conception to nesting, when defining it as "implantation of the fertilized ovum in the walls of the uterus", reason why outside this scope it does not have the legal protection nor the status of person.

In a brief summary, the project seeks to facilitate the selection of embryos and their use for research purposes, as it legalizes the selection of embryos by preimplantation genetic diagnosis, while allowing the discarding of remaining embryos by decision of the applicants of the technique or for having been discarded in the preimplantation diagnosis. Finally, it allows the use of embryos for research purposes, either by decision of the applicants of the technique or by the end of cryopreservation, which has a maximum limit of ten years.

In turn, the project has some restrictive measures, such as the provision that states that a maximum of one embryo can be transferred, or two or exceptionally three embryos, and the prohibition of commercialization of embryos and post mortem fertilization.

Currently, health centres dedicated to assisted human reproduction techniques in the country, at the time of deciding on the future of non-implanted embryos, await a judicial ruling that indicates the way to proceed, due to the legal void in the matter, and that the "Assisted Human Reproduction Law" passed in 2013 failed to fill.

---

<sup>6</sup> Expte. 1541-D-2019, TP 31/2019

## **ii. Bolivia**

This country does not currently have a legal regulation of TRA. However, on March 13, 2019, the project entitled "Law for assisted human reproduction" <sup>7</sup> was presented at the Bolivian Congress. He is currently in treatment.

The bill provides that "assisted human reproduction techniques may only have the purpose of human reproduction, the strict protection of the parents' health, and the viability of the person to be born." At the same time, it proposes that the Unified Health System should incorporate as a compulsory benefit the comprehensive coverage of said techniques.

With regard to cryopreservation of embryos, the project only mentions generically that "the use of these techniques outside the woman's body, such as in vitro fertilization, cryopreservation or others will be admissible as long as they are therapeutically necessary, effective for the end of procreation, that they pose the most risk low for health, are framed within the parameters of bioethics, and are not contrary to the constitution and laws." That is, it does not make any specific provision on whether the embryo will be considered a person or not, the term of its conservation, limits on the transfer of embryos, etc.; therefore, if these issues arise they will be solved at the discretion of the parties involved.

## **iii. Brazil**

This country was one of the pioneers in regulating the TRHA in Latin America. Even before the Artavia Murillo ruling, Brazil had already allowed and regulated IVF by the Federal Council of Medicine, an autonomous body of the Ministry of Labor, which establishes professional regulations for doctors throughout the country, administers licenses and applies the code of medical ethics<sup>8</sup>.

The resolution of the Federal Council of Medicine regulated the freezing of sperm, ovules and embryos, together with post-mortem fertilization, with the prior authorization of the applicant at the time of death.

The regulation limits the number of embryos that can be used according to the age of women who undergo these techniques. For patients up to 35 years old, the maximum number of embryos to be transferred is two, those between 36 and 39, will be entitled to three, and those over 40, to four.

In addition, the Federal Council of Medicine reinforced the prohibition of selection of embryos to choose the sex or other biological characteristics of the fetus. It also established a ban on the sale of sperm, eggs or embryos and the rent of bellies. Only women who have up to a second degree of kinship with the patient may give up their

---

<sup>7</sup> <http://www.diputados.bo/leyes/pl-n%C2%B0-1812019-2020-PL-Nº-181/2019-2020>

<sup>8</sup> <https://www.lanacion.com.ar/ciencia/brasil-regula-la-fertilizacion-asistida-nid1339388>

uterus for pregnancy, not being able to mediate the lucrative or commercial nature in said assignment.

With regard to embryos that have not been implanted , the regulations generally provide that medical centres that practice these techniques will be responsible for the unused genetic material.

#### **iv. Chile**

Although in vitro fertilization is not regulated in this country, nor is there a reproductive medicine law, in 2004 the Chilean state entered into an agreement with the Health Services of various regions in order to incorporate in vitro fertilization techniques, and cryopreservation of embryos services. Also, in 2015, the National Ministry of Health developed a Clinical Guide for the Study and Treatment of Infertility, within the framework of the National Women's Health Program.

- **Bill**

On January 25, 2018, the “Bill to regulate embryo cryopreservation”<sup>9</sup> was presented by deputy Miguel Ángel Alvarado Ramírez. Currently, the project is in the health commission of the Chamber of Deputies.

Its articles provide for a limitation in the transfer of embryos to “a maximum of two embryos or cryopreserved pronucleous to each woman in each reproductive cycle, allowing the freezing of those that were not used”.

It also provides a period of conservation of the embryos for three years in case the countries or donors do not appear or do not respond after three years since the embryos were frozen. Given this situation, it provides that the embryos be donated to other people with infertility problems. And if at four years no woman has implanted the embryos, they will go to national donation, governed by the organ donation law.

With regard to the fate of the embryos and their cryopreservation, the project provides that they may be kept for a period of four years "or until such time as it is considered by medical officers, that the recipient does not meet the requirements for the practice of assisted reproduction technique ”.

The different possible destinations for cryopreserved embryos will be: a) its use by the woman herself or her spouse, b) donation for reproductive purposes, c) donation for research purposes, d) the cessation of its conservation and destruction, which will precede once the maximum period of 4 years of conservation established in the bill has been completed, since its freezing, without donors having opted for any of the first three options, e) if there is more than one frozen embryo, parents may give different destinations to each of them. These provisions are in broad contradiction with Law 20.120 on scientific research in humans, which expressly provides in its art. 6 that "in

---

<sup>9</sup> [https://www.camara.cl/pley/pley\\_detalle.aspx?prmID=12124&prmBoletin=11604-11](https://www.camara.cl/pley/pley_detalle.aspx?prmID=12124&prmBoletin=11604-11) – Boletín N° 11604-11

no case can human embryos be destroyed to obtain the stem cells that give rise to said tissues and organs<sup>10</sup>."

Finally, it should be noted that the bill does not mention at any time the possible rights of which the human embryo could be the owner, and leaves it outside any legal protection when considering it in its art. 4 as a "group of cells resulting from the progressive division of the oocyte from the time it is fertilized up to 14 days at the latest".

## **v. Costa Rica**

The IACHR ordered the State of Costa Rica to carry out the following reparations in the Artavia Murillo judgment: i) to take the appropriate measures so that the prohibition of in vitro fertilization is lifted as quickly as possible and so that the persons who wishing to use such assisted reproduction technique can do so without finding impediment to the effect; ii) regulate the aspects that it considers necessary for its implementation and establish inspection and quality control systems of the institutions or qualified professionals that develop this type of assisted reproduction technique, and iii) the Costa Rican Social Security Fund should gradually include availability of in vitro Fertilization within its infertility programs and treatments in its health care, in accordance with the duty of guarantee regarding the principle of non-discrimination.

To meet the first two requirements, the Legislative Assembly of the Republic of Costa Rica discussed four bills in order to regulate IVF and assisted human reproduction techniques. All the projects submitted were rejected by the legislative representatives<sup>11</sup>, and are currently archived, which clearly demonstrates that Costa Rica has the will to protect human life from its earliest stage of development, safeguarding the right to life of embryos. The decision of the IACHR in 2012, however, has forced this country to retreat in the recognition and protection of the unborn person, redefining the terms adopted by the States parties when signing the American Convention on Human Rights.

- **Decree 39210 MP-S<sup>12</sup>**

In the hearing on compliance with the judgment of the Artavia Murillo case held in June 2015 by the IACHR, the State of Costa Rica reported on decree 39210 MP-S called "Authorization to perform the technique of assisted reproduction of fertilization in vitro

---

<sup>10</sup> <https://www.leychile.cl/Navegar?idNorma=253478>

<sup>11</sup> [http://www.asamblea.go.cr/Centro\\_de\\_informacion/Consultas\\_SIL/SitePages/ConsultaProyectos.aspx](http://www.asamblea.go.cr/Centro_de_informacion/Consultas_SIL/SitePages/ConsultaProyectos.aspx)

<sup>12</sup> [http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm\\_texto\\_completo.aspx?param1=NRRTC&nValor1=1&nValor2=81332&nValor3=103662&strTipM=TC](http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRRTC&nValor1=1&nValor2=81332&nValor3=103662&strTipM=TC)

and embryo transfer”, issued by the President of the Republic and the Ministry of Health, which regulates the implementation of IVF techniques.

The decree authorizes the practice of IVF for both couples and single women, and limits the transfer of embryos to the woman's uterus to two per reproductive cycle. With respect to non-transferred embryos, it provides that they will be preserved for future reproductive cycles of the beneficiary couple or woman, or to be donated. In turn, it strictly prohibits the disposal of embryos, their commercialization, experimentation, genetic selection, fission, genetic alteration, cloning and destruction. Nor does it allow post-mortem insemination or transfer, unless expressly informed consent had been provided.

The sanction of this decree was due, in large measure, to the continuing pressures exerted by the Inter-American Court on the State of Costa Rica. However, days after entering into force, the Constitutional Chamber of the Supreme Court of Justice, annulled the decree because of its unconstitutionality, considering that the Legislative Assembly should be responsible for issuing the law that imposed the IACHR's ruling on the State of Costa Rica.

This sentence of unconstitutionality, in fact, meant the continuity of the prohibition of IVF in the country, subjecting its permission to the previous existence of a legal regulation.

This situation generated a new action before the IACHR, which resolved that executive decree 39210-MP-S remain in force in order to prevent the exercise of the right to decide whether to have biological children through the technique of IVF. This, notwithstanding the fact that the legislative body issues some subsequent regulation following the standards indicated in the Artavia Murillo judgment. At the same time, it decided that “the executive decree of September 11, 2015 be kept in force, notwithstanding that the legislative body issues some subsequent regulation” and in turn that “it should be understood that IVF is authorized in Costa Rica and, of immediately, the exercise of this right must be allowed both at private and public level<sup>13</sup>”.

The latter resulted in a violation of the sovereignty of the State of Costa Rica and the principle of division of powers, since, despite all the provisions of the domestic judicial and legislative bodies, the IACHR ordered that it should be understood that IVF was authorized in Costa Rica and the decree that had been repealed remained in force.

Recently, in July 2019, the authorities of Costa Rica opened the High Complexity Reproductive Medicine Unit, under the Costa Rican Social Security Fund, to perform in vitro fertilization procedures for free, which is part of compliance with the third

---

<sup>13</sup> <https://www.elpais.cr/2016/03/01/corteidh-valida-decreto-que-regula-la-fecundacion-in-vitro-en-costa-rica/>

reparation ordered in the IACHR's ruling to the country<sup>14</sup>. Also, in the same month, the IACHR again sent a delegation to Costa Rica to verify the status of compliance with the Artavia Murillo<sup>15</sup>, judgment, which "highlighted the will of the State of Costa Rica to comply with the judgments of the IACHR".

## **vi. Mexico**

The TRA and the bioethical implications that these procedures entail have not been regulated in Mexico, although there are clinics that offer from in vitro fertilization to the surrogacy of bellies<sup>16</sup>.

There is no standard to regulate these practices, since all initiatives have been prohibited by the TRA.

## **vii. Peru**

Although the General Health Law No. 26,842<sup>17</sup> has been in force since 1997, which establishes the right of people to procreate through the use of assisted human reproduction techniques, there is currently no law in the country that regulates access to These techniques are comprehensive, but there are articles dispersed in various laws in a disorganized manner that seek to guarantee certain rights related to infertility.

Law 26.842, indicates in its article 7 that *"every person has the right to resort to the treatment of his infertility, as well as to procreate through the use of assisted human reproduction techniques, provided that the condition of the genetic mother and the gestational mother falls on the same person"*. In turn, it provides that *"fertilization of human eggs for purposes other than procreation is prohibited, as well as the cloning of human beings."* That is, the law allows the use of assisted human reproduction techniques, without making further reference to the subject, nor establishing more limitations than those mentioned in the brief article.

### **Draft Law:**

Currently, two bills related to assisted human reproduction<sup>18</sup> techniques are pending in the Peruvian Congress. They were presented in 2018, and are currently being treated in the Justice and Human Rights and Health and Population Commissions of the National Congress.

---

<sup>14</sup> <http://laestrella.com.pa/vida-cultura/ciencia/costa-rica-abre-centro-fecundacion-vitro-cumple-fallo-corteidh/24130379>

<sup>15</sup> [http://www.corteidh.or.cr/docs/comunicados/cp\\_27\\_19.pdf](http://www.corteidh.or.cr/docs/comunicados/cp_27_19.pdf)

<sup>16</sup> <http://www.cucs.udg.mx/noticias/archivos-de-noticias/tecnicas-de-reproduccion-asistida-sin-legislacion-en-mexico>

<sup>17</sup> <http://www.digemid.minsa.gob.pe/UpLoad/UpLoaded/PDF/LEYN26842.pdf>

<sup>18</sup> <http://www.congreso.gob.pe/pley-2016-2021>

The first project, presented on September 7, 2018 by Congressman Richard Acuña Nuñez, is entitled “Law that guarantees access to assisted human reproduction techniques<sup>19</sup>.” It proposes to recognize infertility as a disease, in order to obtain mandatory coverage by both state and private health insurance. At the same time, it seeks to guarantee integral access to persons of legal age who suffer from duly verified infertility to assisted human reproduction techniques officially recognized by the World Health Organization.

With regard to cryopreservation of embryos, the project provides in its art. 7 that “they can be cryopreserved for reproductive purposes only”, while “the commercialization of embryos and cryopreserved gametes is prohibited.”

The taxpayers of the obligations established in the project are the Ministry of Health through Comprehensive Health Insurance, Social Health Insurance and private medical insurance companies. The comprehensive coverage of the approach, diagnosis, medications and supportive therapies in the techniques of: 1) Artificial insemination will be mandatory. 2) In Vitro fertilization and intracytoplasmic sperm injection with the person’s own sperm or donor gametes and with embryo transfer and; 3) Intratubal transfer of gametes. The cryopreservation of gametes and / or embryos is also included.

The second bill was presented by Congresswoman Luciana León Romero on October 11, 2018, under the title “Law regulating the use and access to treatment of assisted human reproduction<sup>20</sup>”. It provides that the prohibition of fertilization of eggs or human embryos for any purpose other than human procreation, while allowing under certain collections motherhood by subrogation.

It states that cryopreserved gametes and embryos should be used only by the users themselves, or for donation for reproductive purposes. In turn, the project limits the transfer of embryos to the maternal uterus to one per cycle, for a maximum of four cycles, and two embryos may be transferred in case of express medical indication.

With respect to cryopreservation of gametes and embryos, the corresponding informed consent will be required for its cessation, which may be modified at any time. In the case of embryos, authorized medical centres will request, at least every three years, those interested, at least, to renew or modify the previously signed consent.

### **viii. Uruguay**

Uruguay sanctioned in the year 2013 the law N° 19.167 denominated “Techniques of assisted human reproduction<sup>21</sup>”.

This law distinguishes in its art. 5 procedures for assisted human reproduction of high and low complexity, in order to differentiate their coverage by the National Integrated Health System. It defines as procedures of low complexity those procedures based on

---

<sup>19</sup> Bill03313/2018-CR

<sup>20</sup> Bill 03542/2018-CR

<sup>21</sup> <https://legislativo.parlamento.gub.uy/temporales/leytemp2411791.htm>

which the union between the ovum and sperm carried out within the female genital tract. These techniques or procedures are included in the comprehensive assistance programs that must be provided by public and private entities that make up the National Integrated Health System and will be financed by it, when the woman is not over 40 years old. On the other hand, the techniques or procedures of high complexity "are those by virtue of which the union between ovule and sperm takes place outside the female genital apparatus, transferring to it the resulting embryos, whether they are cryopreserved or not." These techniques will be partially or totally subsidized up to a maximum of three attempts, through the National Resources Fund.

With respect to embryo transfer, art. 11 of the law provides that "only two embryos may be transferred to the uterus per cycle, for a maximum of three cycles, unless expressly indicated by the doctor, in which a maximum of three embryos may be transferred".

Cryopreservation of embryos is regulated by article 18 of regulatory decree No. 84/015<sup>22</sup>, which provides that "embryos not transferred will be preserved for two years (...). In the event that the woman for biological reasons cannot receive the embryos during the aforementioned periods, cryopreservation of embryos may be maintained for a longer period of time (...)". However, the final destination of the embryos is not provided for in law 19,167 or in their respective regulatory decrees<sup>23</sup>, which provide for the sanction of a subsequent legal rule that regulates their destiny, which did not occur so far.

#### **4. Conclusion**

The general tendency that is currently observed in the countries analysed is the general respect for human life and the protection of the embryo, even before its implantation in the womb. Although some countries already have laws that allow TRHA, in which there is a pending bill, there is a reluctance to leave human life unprotected in its initial stage.

The ruling of the IACHR in Artavia Murillo revealed the undue interference of the Court in the internal affairs of Costa Rica, while at the same time violating the sovereignty and division of powers of said country by requiring the permission of the TRHA even when it was not voted by the representatives of the people in the Legislative Power, imposing at the same time the fulfilment of its own conception on the beginning of the human life.

We consider that the IACHR fails to consider the culture of respect for human life that prevails in Latin America, trying to impose a progressive vision of reproductive rights over the right to life of every human being has from the moment of conception, as enshrined the art. 4.1 of the American Convention on Human Rights itself.

---

<sup>22</sup> <https://legislativo.parlamento.gub.uy/temporales/leytemp2411791.htm>

<sup>23</sup> <https://www.elpais.com.uy/que-pasa/vida-congelador.html>