

# Case Note: Indirect Discrimination, Reproductive Rights and the *In Vitro* Fertilisation Ban

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In December 2012 the Inter-American Court of Human Rights (the Court) published its decision in a case challenging Costa Rica's 12-year absolute ban on all *in vitro* fertilisation (IVF) practices. The ban, implemented in 2000, applied to all citizens and prohibited access to IVF techniques within the country. Couples who were in the middle of IVF procedures were forced to stop all treatments or to choose to travel abroad to pursue further treatments. In 2004, ten couples petitioned the Inter-American Commission on Human Rights (the Commission), alleging that the ban violated the right to private and family life, the right to found a family, and the principle of non-discrimination enshrined in the American Convention on Human Rights (the American Convention). The Commission asked Costa Rica to end the ban, but they failed to do so and the Commission referred the matter to the Court. The bulk of the Court's opinion tackles questions regarding the right to life and at what point an embryo or foetus becomes protected under the American Convention, but it also devotes some analysis to the question of indirect discrimination, thereby making important in-roads into equal access to reproductive health treatments and protecting the autonomy of couples to make decisions regarding when and how to have a child.

## 1. Case Background

In 2000, the Constitutional Chamber of the Costa Rican Supreme Court ruled that the

practice of *in vitro* fertilisation (IVF) was unconstitutional and imposed an absolute ban on all IVF practices.<sup>2</sup> The Constitutional Chamber's decision was in response to a Presidential Decree, signed by the then-President J.M. Figueres in 1995, that had authorised IVF for married couples and regulated its practice.<sup>3</sup> In the five years between the decree and the Constitutional Chamber ruling, couples underwent IVF procedures and 15 babies were born in Costa Rica as a result of these procedures.<sup>4</sup>

The decision of the Constitutional Chamber in 2000 halted attempts to create biological offspring for several couples, many of whom were beginning or in the middle of necessary treatments for IVF. The only Latin American state to impose such an absolute ban, Costa Rica's decision was soon challenged by a group of couples who were undergoing or planning to undergo IVF at the time of the ban.<sup>5</sup> After the imposition of the ban, couples were either unable to pursue the only possible path to procreation or were forced to go abroad to seek treatment. Travelling to undergo IVF is a complicated and costly undertaking, and one that is available only to those couples with sufficient resources to do so. As a result, many couples waiting to undergo IVF at the time of the ban were left with no recourse, and no ability to conceive a biological offspring.<sup>6</sup>

When the Commission was petitioned in 2004, it found that the absolute ban on IVF

was an arbitrary interference into the right to private and family life, the right to found a family, and the right to equality.<sup>7</sup> Additionally, the Commission found that the ban disproportionately impacted women.<sup>8</sup> In 2010, the Commission issued a series of recommendations to Costa Rica, asking them to end the absolute ban that was violating the above rights.<sup>9</sup> In the absence of real, implemented change, one year later the Commission submitted the case to the Court.<sup>10</sup>

## **2. Recapitulation of Inter-American Non-discrimination Case Law**

The Court examines three primary rights in their decision: the right to life, the right to private and family life, and the right to found a family, as well as the principle of non-discrimination enshrined in the American Convention.<sup>11</sup> Article 1 of the American Convention requires states to respect and ensure the enshrined rights, without discrimination regarding “race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.<sup>12</sup>

The Commission and the Court have frequently held that non-discrimination is a fundamental principle of the human rights system. Although the American Convention does not define discrimination, the Court uses the definition contained in the International Convention on the Elimination of All Forms of Racial Discrimination, which defines discrimination as any “distinction, exclusion, restriction or preference,” based on enumerated grounds such as race, sex, religion, or “other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons (...) of all rights and freedoms”.<sup>13</sup> Importantly, this definition, which has been used by the Court in other decisions, does

not explicitly include disability or health status as a prohibited ground for discrimination. Thus, the Court was asked to rule if those grounds were covered by the words “all other status”.

According to the Court’s case law, laws and policies can be discriminatory when distinctions among social groups arise and lack “objective and reasonable justification”.<sup>14</sup> Reasonableness is determined on a case-by-case basis, and this involves the consideration of legality, suitability, the existence of a legitimate aim and/or less restrictive means, and a proportional balancing of public and private interests.<sup>15</sup>

Under inter-American jurisprudence, indirect discrimination may arise when a law or policy that appears neutral has a disproportionate impact on certain sectors of the population in exercising their rights under the American Convention, on the basis of prohibited grounds.<sup>16</sup> A law or policy may have a disproportionate and therefore discriminatory effect when its objective or impact disadvantages certain groups in society.<sup>17</sup>

In order to comply with standards of non-discrimination, the Court has held that states are obliged not to:

“[I]ntroduce discriminatory regulations into their laws, to eliminate regulations of a discriminatory nature, to combat practices of this nature, and to establish norms and other measures that recognise and ensure the effective equality before the law of each individual.”<sup>18</sup>

While the primary inquiry of the Court in the IVF decision related to interferences with the right to private and family life, and the right to life, in relation to discrimination they ultimately concluded that the

absolute ban did have a disproportionate discriminatory impact on infertile individuals, women, infertile men, and couples with limited economic resources.

### 3. The Decision

The primary argument in the Court's decision focuses on the question of the right to life.<sup>19</sup> In the Constitutional Chamber judgment, the Chamber reasoned that the right to life was of utmost importance and should be protected above other implied rights, such as the right to found a family and the right to private and family life. In 2000, the Constitutional Chamber held that life begins when the egg is initially fertilised, even prior to implantation in the mother's uterus. Because IVF necessarily involves the destruction of non-viable fertilised eggs, under the state's interpretation the embryo's right to life would be violated by the practice of IVF. By contrast, the Court held that conception occurs only after successful implantation of an embryo, not merely fertilisation, disputing state claims that the right to life protection prevails over protecting a couple's right to private life or right to found a family.<sup>20</sup> In doing a balancing test the Court found that protection of life at early stages of conception was a legitimate state aim. They then examined the proportionality of the absolute ban, weighing the private and state interests involved. While the Court found protecting the right to life for the earliest stages of life to be a legitimate aim, it held that this protection was gradual and incremental, that personhood did not take effect until implantation and that there were less restrictive measures available to protect life and regulate IVF practices.<sup>21</sup>

Because the right to life does not imply an absolute right to protection for non-implanted embryos, the IVF ban was ultimately found

to be an overly broad provision<sup>22</sup> that has a discriminatory, disproportionate impact on women and infertile couples in the exercise of their rights to private and family lives, and to found a family.<sup>23</sup> To determine the proportionality of the ban, the Court balanced the severity of the interference into the right to private and family life and the legality of the disproportionate impact of the ban.<sup>24</sup>

The Commission and the victims alleged that the ban discriminated against women and against people with reproductive disabilities, highlighting the clear distinction that the ban created between married couples who conceive naturally and infertile married couples who rely on assisted reproductive techniques.<sup>25</sup> In response, the state argued that the ban was justified and proportional in pursuing the legitimate aim of protecting embryonic life.<sup>26</sup> While the facially neutral ban impacted infertile couples distinctly, the state claimed that infertility was not a recognised social condition which would merit protection under the American Convention.<sup>27</sup> The state alleged that infertility was not a recognised disability or disease that required the provision of medical treatment in the form of IVF procedures.<sup>28</sup> In order to determine whether the ban constituted a violation of rights, the Court conducted an analysis of the severity of the interference into the right to private and family life and other involved rights as well as an analysis of the disproportionate impact of the ban.

In analysing the severity of the state's interference into the right to private and family life the Court looked at the impact of the ban on couples' lives. The Court considered the stress and expense related to travelling out of Costa Rica to obtain services, the effective removal of decisions related to family and reproductive choices from married adults, and the psychological effect of the ban on couples

and individuals. Ultimately, the Court found that the ban was indeed a severe interference into the exercise of the right to private and family and the right to found a family.<sup>29</sup> Subsequently, an analysis of the disproportionate impact of this severe interference on infertile men and women was conducted.

The Court examined indirect discrimination relating to disability, gender and economic situation, concluding that the ban had an impermissible disproportionate impact on people with disabilities, women, infertile men, and couples with insufficient economic resources.<sup>30</sup> Discrimination, the Court explained, occurs when states create arbitrary differences that undermine human rights and can occur indirectly when an otherwise neutral law has a disproportionate effect on one group of individuals in the exercise of their protected rights.<sup>31</sup>

Relying on the Convention on the Rights of Persons with Disabilities, ratified by Costa Rica in 2008,<sup>32</sup> the Court concluded that infertility is a disability necessitating access to treatment and techniques that can help resolve the resulting reproductive health problems. According to the Court, disability is not simply a physical or psychological deficiency, but rather the interaction between this deficiency and the social barriers that impede the effective exercise of rights by the disabled.<sup>33</sup> Infertility, as defined by the World Health Organization, is a reproductive disorder resulting in the inability to conceive a biological child after twelve months.<sup>34</sup> The Court held that infertility as a medical condition constitutes a functional limitation to those suffering from it, and is a recognised medical infirmity therefore requiring infertile individuals to be protected under rights of disabled individuals, including access to techniques that could help them overcome their condition.<sup>35</sup> Because the Court held

that reproductive failure constituted a disability, it allows for the possibility of reproductive disability being considered a “social condition” for the purpose of the enumerated grounds contained in the prohibition against discrimination in the American Convention.<sup>36</sup> The Court explained that societal barriers to infertility, such as the absolute ban on IVF, put infertile individuals in a more vulnerable position, meriting special protections from the state.<sup>37</sup> The Court found that the absolute ban prohibited infertile couples from accessing these treatments and from effectively exercising the right to found a family and the right to private and family life, therefore having a disproportionate effect on those couples and constituting indirect discrimination.<sup>38</sup>

In an interesting analysis of the indirect discrimination relating to gender, the Court examined traditional gender stereotypes and how infertility affects the perception of those afflicted individuals in society. For women, the ban has a disproportionate effect not only because the procedures are invasive to a woman’s body, but also because they often have severe social consequences.<sup>39</sup> As women are seen as the nurturers and mothers in society, it is often shameful to be unable to produce a child and women are often blamed for this inability.<sup>40</sup> Furthermore, the Committee for the Elimination of Discrimination Against Women has held that protecting a foetus at the expense of the mother’s health constitutes discrimination.<sup>41</sup> The Court considered that in the present case, the ban, which protects embryos without consideration for the mother’s disability, appears to constitute this kind of discrimination.<sup>42</sup> The absolute ban on IVF undermines the woman’s mental and emotional health, her societal status, and her place in the family in order to protect an embryo that has yet to be implanted into her uterus.<sup>43</sup> Similarly, the

Court also considered male victims' testimonies regarding the detrimental effect that the infertility had on their identities and conceptions of self-worth.<sup>44</sup> While this argument is based almost entirely in societal stereotypes, the Court ultimately finds that it is precisely because of these stereotypes that the state's interference has a disproportionate impact on women and infertile men.<sup>45</sup>

Finally, the Court looked briefly at indirect discrimination and economic class. Of the nine couples involved in the case, many could not afford to pursue treatment abroad and had no possibility of conceiving biological offspring, while those with sufficient resources could go abroad to obtain IVF.<sup>46</sup> When compared to similarly situated couples with the resources to seek treatment abroad, the affected couples with insufficient economic resources are disproportionately impacted by the absolute ban.<sup>47</sup>

While the analysis of indirect discrimination in the Court's decision is considerably shorter than the analysis of the right to life, the Court did find indirect discrimination through disproportionate impacts on couples suffering from infertility, women, infertile males, and infertile couples with few economic resources. The Court's recognition of infertility as a disability requiring specific protections for disabled persons is an important step in ensuring that individuals with reproductive health problems have access to necessary treatments, allowing them autonomy over decisions about how and when to procreate. Furthermore, recognising the societal impact that infertility has on men broadens protections for men's rights in the areas of reproductive and family rights. Finally, while the Court limits its analysis of economic discrimination to specific circumstances, its opinion strengthens the idea of equal access to medical and other treatments

necessary for the disadvantaged to enjoy equal enjoyment of rights.

Reparations included the immediate removal of the ban, implementation of less-restrictive regulations relating to IVF practices, provision of mental health treatment, implementation of educational programs related to assisted reproductive techniques and monetary damages.<sup>48</sup> The Court ordered Costa Rica to implement all necessary measures and regulations in order to ensure that those individuals who desire to undergo IVF can access treatment.<sup>49</sup> Additionally, the Court ordered the Costa Rican Social Security Fund to include the availability of IVF within its programmes, in conformity with the prohibition of discrimination.<sup>50</sup> Included in these orders is a reporting requirement, which mandates that the state must report to the Court every six months regarding measures implemented to ensure available services to those requiring IVF.<sup>51</sup>

#### 4. Conclusion

This decision brought inter-American jurisprudence on reproductive rights and the right to private and family life in line with the European Court of Human Rights' jurisprudence on the subject. While the ability to decide when and how to have a child is fundamentally protected under the right to private and family life, the European Court of Human Rights has also found that states do have an interest in protecting life in its earliest stages, including restricting and regulating IVF practices.<sup>52</sup> This state interest, however, does not allow an absolute ban on IVF techniques that prohibit couples from utilising necessary treatments to produce biological offspring. As a result, the Court ordered Costa Rica to immediately remove the ban, create less restrictive regulations relating to the practice of IVF, provide mental health treatment for

the victims involved, promulgate educational programmes regarding reproductive rights and assisted reproductive techniques, and award monetary damages to the victims.

Unfortunately, while this decision will significantly improve access to reproductive health techniques for infertile couples, it still limits access to IVF to adult, married couples only. Following European jurisprudence, the Court indicated that a permissible regulation may be to restrict IVF practices to married couples only, and feasibly to ban third party egg or sperm

donations for use in IVF. Arguably, this would still have a disproportionate discriminatory impact on men and women who wish to be third party donors and infertile individuals who are not in a recognised, monogamous relationship. While it remains to be seen how Costa Rica will regulate IVF in the future, the recent decision allows the possibility that independent adults can legally be prohibited from making decisions on whether they want to donate eggs and/or sperm as well as prohibiting single or unmarried individuals from obtaining access to IVF.

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2 Inter-American Court of Human Rights (IACtHR), *Caso Artavia Murillo y Otros (Fecundación IN VITRO) v Costa Rica*, (IACtHR, IVF Decision) Preliminary Objections, Merits, Reparations and Costs, Judgment of November 28, 2012, Paras 71-72; Center for Reproductive Rights, *Inter-American Court of Human Rights Declares Costa Rica's Ban on In Vitro Fertilization A Human Rights Violation*, 12 December 2012.

3 IACtHR IVF Decision, above note 2, Paras 68-71.

4 *Ibid.*, Para 70.

5 *Ibid.*, Para 67.

6 *Ibid.*, Paras 85-125.

7 Inter-American Commission on Human Rights (The Commission), *Gretel Artavia Murillo et al v Costa Rica*, Merits Report No 85/10, Case 12.361, 14 July 2010, Paras 111-134.

8 *Ibid.*, Para 128.

9 IACtHR IVF Decision, above note 2, Paras 1 and 84.

10 *Ibid.*, Para 1.

11 Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Articles 1(1), 4(1), 11 and 17.

12 *Ibid.*, Article 1(1).

13 IACtHR, *Judicial Condition and Rights of the Undocumented Migrants*, Advisory Opinion, OC-18/03, 17 September 2003, Para 85.

14 IACtHR, *Case of YATAMA v Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, 23 June 2005.

15 IACtHR, *Escher et al v Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 6 July 2009, Series C No. 199, Para 129; IACtHR, *Tristan-Donoso v Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 27 January 2009, Series C No. 193, Para 76.

16 IACtHR, *Case of the Girls Yean and Bosico*, Judgment of 8 September 2005, Series C No. 130, Para 141; United Nations, Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-discrimination in economic, social and cultural rights (Article 2, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights), 2 July 2009; Declaration on Principles of Equality, The Equal Rights Trust, London 2008, Principle 5.

- 17 The Commission, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser. L/V/II. doc. 68, 20 January 2007, Para 93.
- 18 See above, note 14, Para 184.
- 19 IACtHR IVF Decision, above note 2, Paras 163-264.
- 20 *Ibid.*, Para 264.
- 21 *Ibid.*
- 22 *Ibid.*
- 23 *Ibid.*, Para 314; see also Paras 294-304.
- 24 *Ibid.*, Para 276.
- 25 *Ibid.*, Paras 265-267.
- 26 *Ibid.*, Para 270.
- 27 *Ibid.*, Paras 270-271; and above note 11, Article 1(1).
- 28 *Ibid.*, Para 271.
- 29 *Ibid.*, Paras 277-284.
- 30 *Ibid.*, Para 276.
- 31 *Ibid.*, Paras 285-286.
- 32 Convention on the Rights of Persons with Disabilities, 13 December 2006, A/Res/61/106, Annex 1.
- 33 IACtHR IVF Decision, above note 2, Para 292.
- 34 *Ibid.*, Para 288.
- 35 *Ibid.*, Para 291-293.
- 36 *Ibid.*
- 37 *Ibid.*, Para 292.
- 38 *Ibid.*, Para 293.
- 39 *Ibid.*, Paras 299 and 295-296.
- 40 *Ibid.*, Paras 295-296.
- 41 *Ibid.*, Para 297.
- 42 *Ibid.*
- 43 *Ibid.*, Para 297-298.
- 44 *Ibid.*, Para 301.
- 45 *Ibid.*, Para 302.
- 46 *Ibid.*, Paras 85-125 and 303-304.
- 47 *Ibid.*, Para 303.
- 48 *Ibid.*, Para 381.
- 49 *Ibid.*, Para 336-338.
- 50 *Ibid.*, Para 338.
- 51 *Ibid.*
- 52 European Court of Human Rights, *Pretty v The United Kingdom*, Application 2346/02, 29 April 2002; *Evans v United Kingdom*, Application 6339/05, 1 April 2007; *Dickson v the United Kingdom*, Application 44362/04, 4 December 2007.