

INTERAMERICAN COURT OF HUMAN RIGHTS

CASE No. 12.361

GRETEL ARTAVIA MURILLO *ET AL*

(IN VITRO FERTILIZATION)

AMICUS CURIAE BRIEF

CATHOLICS FOR CHOICE

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1 INTRODUCTION

Catholics for Choice (CFC) is pleased to submit this brief of *amicus curiae* to the Inter-American Court of Human Rights in support of the petitioners in case No. 12.361 Gretel Artavia Murillo *et al.* (“In vitro fertilization”), and we applaud the Court’s willingness to consider the challenge to Costa Rica’s absolute ban on in vitro fertilization (IVF).

Based in Washington, DC, CFC supports reproductive health policies that are based on justice, reflect a commitment to women’s well-being and respect, and affirm the capacity of women and men to make moral decisions about their lives. CFC has worked extensively during the past four decades to advance a comprehensive understanding of Catholic teaching on matters related to reproductive health and rights in Latin America, as well as church teachings on religious pluralism, the role of religion in society and, concurrent with the development of new reproductive technologies, teachings relevant to the morality of IVF.

In Costa Rica, a democratic country where three out of four people claim Catholicism as their faith, the church has had a profound effect on laws and policies involving many aspects of sexuality and reproduction. Church leaders have notably been active in opposing the easing of Costa Rica’s absolute prohibition of in vitro fertilization. This opposition does not reflect the attitude of the majority of Costa Ricans, 55 percent of whom support the legalization of IVF according to an August 2012 poll conducted by Unimer for *La Nación*¹.

Catholics for Choice supports public policies and governing structures that make a clear separation between church and state. While religious organizations, as part of civil society, have the right and responsibility to express their views in public, members of the judiciary and other policymakers have the responsibility to evaluate the positions put forward by members of the Catholic hierarchy in the same way that they would evaluate public policy positions put forward by any other interested party. Do the positions contribute to the common good? Are they based on solid, provable facts? Do they unnecessarily infringe or impose on the rights and freedoms of others? Are they equitable? Have the people who will most directly feel the consequences of the policy been consulted?

This brief discusses some of the most important Catholic principles, teachings and traditions that recognize an individual's moral freedom to make decisions regarding human reproduction and that support the rejection of the absolute ban on IVF in Costa Rica. The brief also examines Catholic social justice values and teachings related to religious pluralism, respect for other religious traditions and the role of religion in society.

2 CHURCH TEACHINGS ON MORAL DECISION MAKING AND HUMAN REPRODUCTION:

MORE COMPLEX THAN USUALLY BELIEVED

The institutional Catholic church holds that the termination of human life, beginning from conception, is an objectively grave moral evil and is always forbidden. However, this has not always been the official or even the widely accepted Catholic position, and there is much in Catholic teaching that moderates that view, such that determining the morality of assisted human reproduction takes on additional dimensions. The absolutism believed to characterize Catholic teachings on moral decision making and assisted human reproduction cannot withstand a comprehensive and nuanced understanding of church doctrine, which would allow for IVF to be legalized and for individuals to exercise their moral autonomy to choose to have the procedure.

2.1 Catholic teaching regards the well-formed conscience as the final arbiter in moral decision making

At the heart of church teachings on moral matters is the deep regard for individual conscience. According to the *Catechism of the Catholic Church*, "a human being must always obey the certain judgment of his conscience."² The church takes conscience so seriously that, as Father Richard P. McBrien wrote in his encyclopedic reference and teaching guide on Catholicism, even in cases of a conflict with the moral teachings of the church, Catholics "not only may but *must* follow the dictates of conscience rather than the teachings of the Church."³ (Italics in the original.)

Casual disagreement, of course, is not sufficient grounds for contradicting moral teachings. Catholics are obliged to know and consider thoughtfully and seriously Catholic teachings. After all, Father McBrien writes, "the Church, as the Temple of the Holy Spirit, is a major resource of ... moral direction and leadership. It is the product of centuries of experience, crossing cultural, national, and continental lines."⁴ But in the end, a well-formed conscience reigns. One of the most influential church thinkers,

St. Thomas Aquinas, said that it would be better to be excommunicated than to act in a way that contradicted one's conscience.⁵

2.2 The church acknowledges it does not know when a zygote, pre-embryo, embryo or fetus becomes a person

While the institutional Catholic church has, throughout its history, consistently considered the termination of human life sinful, the reasons for judging it as sinful have changed over time. Through most of history, the church did not pay much attention to the termination of human life before birth except as an issue of sexual morality. In fact, the church's early moral condemnation of the intentional termination of pregnancy was based not on the idea that a developing human life is a person, but rather on the belief that only people who engaged in forbidden sexual activity would seek to abort.

Today, some church leaders may speak of the selective reduction of human embryos developed through fertility treatments as analogous to abortion. When they do so, it is an informal, emotional, shorthand way of expressing opposition to IVF. Referring to selective reduction as abortion may indeed reflect that particular church leader's view; however, church doctrine does not officially teach that selective reduction or abortion is murder because there is no doctrinal position on when a developing human obtains a soul and, therefore, becomes a person. In fact, in its definitive statement on abortion, the 1974 "Declaration on Procured Abortion," the Vatican acknowledged that it does not know when the fetus becomes a person, saying "there is not a unanimous tradition on this point and authors are as yet in disagreement."⁶ The Vatican affirmed this lack of unanimity in its 1987 "Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation," stating "the Magisterium has not expressly committed itself to an affirmation of a philosophical nature" in response to the question "how could a human individual not be a human person?" in reference to developing human life.⁷

It is worth noting that the US Supreme Court decision in *Roe v Wade* explored this question at some length, finally concluding that the Court "need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

2.3 The teaching on in vitro fertilization is not infallible, and Catholics have the right to dissent from non-infallible church teachings

In the modern church, there is a great diversity of opinion regarding infallibility, a notion that is relatively new to Catholicism. It is, however, clear that the Vatican's central teaching on IVF, the 1987 "Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation," has not been declared to be infallible and therefore cannot correctly be considered an infallible teaching.

Furthermore, dissent from church teachings is permissible, and the church has a long tradition of disagreement among its members on official teachings, interpretations of those teachings, and ways that those teachings are expressed. At various points during the church's history, the church has recognized views that were at one time in opposition to official teachings. Theologians whose opinions at one time clashed with prevailing papal views and were later recognized include St. Thomas Aquinas, the biblical scholar Marie-Joseph LaGrange, John Courtney Murray and Henri Lubac, who was singled out for special praise by Pope John Paul II some years after his views were criticized by Pope Pius XII.⁸

"Although the Catholic's first and proper instinct is to be guided by the official teachings as presently understood and interpreted," writes Father McBrien, "one must nonetheless take into serious account the theological work that continues to be produced alongside, and sometimes even over against, these conventional interpretations."⁹

2.4 Canon laws calling for automatic excommunication for the termination of fetal life make significant exceptions

The Vatican uses the canon law on procured abortion to describe the penalties for undergoing an IVF procedure in which embryos are created and subsequently destroyed. The destruction of such embryos is considered equivalent to abortion, and church law cites obtaining an abortion among the offenses that incur *latae sententiae* (automatic) excommunication. However, excepted from this consequence are those who:

- are under 17 years of age;
- were ignorant of the church's teaching;
- acted under compulsion of "grave fear, even if only relative, or by reason of necessity or grave inconvenience;"

- were unaware of the penalty;
- acted without full imputability.¹⁰

This last exception includes the person who acted based on “an erroneous conscience or a sincere good faith conviction ... that abortion is permissible in certain circumstances.”¹¹

The vast majority of Catholics are ignorant of the church’s teaching on IVF, are unaware of the penalties prescribed by Canon law, or act “without full imputability.” As such, according to the church’s own legal code, many Catholics who undergo IVF treatment in which embryos are destroyed would not incur *latae sententiae* excommunication. Furthermore, there are no articles of Canon law that deal directly with IVF (or the use of other assisted reproductive technologies) as such.

2.5 Catholics share in the development of church teaching through the principle of reception

The teaching authority of the church is trinitarian. It is not based solely on statements of the hierarchy, but also includes the scholarly efforts of theologians and the lived experience of Catholic people. “Since the Church is a living body,” the Vatican has declared, “she needs public opinion in order to sustain a giving and taking between her members. Without this, she cannot advance in thought and action.”¹²

The importance of lay Catholics’ experience in the establishment of church law is exemplified in another relatively unknown but theologically sound legal concept: reception. The principle of reception, “broadly stated, asserts that for a [church] law or rule to be an effective guide for the believing community it must be accepted by that community,” notes Father James Coriden, former president of the Canon Law Society of America. Reception originated in the 12th century in the *Decretum*, the first compilation of church law that was accepted as authoritative within the church. In them, the monk John Gratian wrote that church laws:

...[A]re instituted when they are promulgated and they are confirmed when they are approved by the practices of those who use them. Just as the contrary practices of the users have abrogated some laws today, so the (conforming) practices of the users confirm laws.¹³

Through the centuries, Coriden points out, church law experts have, with diverse arguments and with varying degrees of vigor, reaffirmed an understanding that “the obligatory force of church law is affected by its reception by the community.”¹⁴

Like the concept of the primacy of conscience, the principle of reception does not mean that Catholic law is to be taken lightly and rejected without thoughtful and prudent consideration. "Reception," Coriden has said, "is not a demonstration of popular sovereignty or an outcropping of populist democracy. It is a legitimate participation by the people in their own governance."¹⁵

While no one would suggest that the findings of opinion polls have the moral strength of church teachings, on questions of reproduction such as IVF, the consensus of the faithful, or *sensus fidelium*, cannot be said to support the hierarchy's position. Catholics all over the world have soundly rejected the hierarchy's ban on IVF, such that only a minority of Catholics can be found to agree with church leaders. When it comes to IVF, dissent from the doctrinal teaching is the majority position.

2.6 The Catholic system of probabilism supports Catholics' right to dissent from church teachings, and many Catholics dissent from the teaching on IVF

While virtually unknown to most Catholics, the centuries-old concept of probabilism is the safeguard within the church that protects individuals from teachings that are wrong or are in development, as long as one can find sound reasons for a differing position. Probabilism applies to situations where a rigorous consensus breaks down and people begin to ask when they may in good conscience act on the liberal dissenting view. As moral theologian Daniel Maguire has written, probabilism gives "Catholics the right to dissent from hierarchical church teaching on a moral matter, if they could achieve 'solid probability.' ...[It] is not based on permission, and it cannot be forbidden. No moral debate is beyond the scope of a probabilistic solution. Probabilism allows one to dissent from the secondary through appeal to the primary teaching of the Spirit of God. It is dangerous, of course, but it is also biblical and thoroughly Catholic."¹⁶

Catholics are known to use IVF to conceive¹⁷; in fact, many Catholics consider the use of IVF to conceive the realization of the Biblical commandment to "be fruitful and multiply." Catholics also contend that God would not have allowed for the creation of the IVF procedure if he did not intend to help those who are unable to conceive by other means. Furthermore, Catholics in the United States have expressed strong support for stem cell research using embryos created during IVF procedures.¹⁸

3 CHURCH TEACHING ON SOCIAL JUSTICE

The Catholic church has an evolving tradition of the “preferential option for the economically poor,” a teaching that was highlighted in the 1991 encyclical of Pope John Paul II, *Centesimus Annus* (On the hundredth anniversary of *Rerum Novarum*). In his encyclical, Pope John Paul II emphasizes the church’s “constant concern for and dedication” to the poor, and recalls Pope Leo XIII’s call for states to “remedy the condition of the poor in accordance with justice.”

In light of the church’s preferential option for the poor, individuals and policymakers should consider the issue of infertility from the viewpoint of the poor. At present in Costa Rica, as a result of the absolute ban on IVF, only those who can afford to travel outside of the country and pay many thousands of dollars for treatment have the possibility of overcoming their inability to procreate.

4 CATHOLIC ARGUMENTS IN SUPPORT OF PLURALISM AND THE SEPARATION OF CHURCH AND STATE: CATHOLIC TEACHING CALLS FOR RESPECT FOR THE FREEDOM AND BELIEFS OF OTHER FAITH GROUPS; THE CHURCH NEED NOT DICTATE PUBLIC POLICY.

Article 75 of the Costa Rican constitution designates Roman Catholicism as the state religion. However, in the same article the state is explicitly commanded not to impede the free exercise of other religions. A ban on IVF based on a restrictive interpretation of Catholic teaching violates the constitutional rights of the 24 percent of the Costa Rican population that does not identify as Catholic. Such a ban also ignores Catholic teaching on religious pluralism and the role of the church in society.

Despite efforts to conform public policies to its teachings, church teaching clearly demands that Catholics respect the views of other faith groups, and the church accepts the principle of church-state separation. According to the Vatican II document *Gaudium et Spes*, Catholics “should recognize the legitimacy of differing points of view about the organization of worldly affairs and show respect for their fellow citizens.”¹⁹ This is particularly significant in cases where one religion’s position is far apart from many others, as is the case of the Catholic church’s position on sexuality and reproductive health. On these issues, the official Catholic church’s views are more conservative than any other major world religion. For example, the complete ban on artificial contraception, even for married couples, has been rejected by all other major faith groups, just as it has been by most Catholics.

In a pluralistic society in which many major faith groups recognize the morality of IVF, Catholics need not work to legally restrict access to the procedure. Current Catholic theology makes a clear distinction between the moral teachings of the Catholic church and the right of legislators to use prudential judgment in developing public policy. To quote Vatican II again: "It is of supreme importance, especially in a pluralistic society, to work out a proper vision of the relationship between the political community and the Church.... The political community and the Church are autonomous and independent of each other in their own fields."²⁰

5 SUMMARY AND CONCLUSION

Even in a predominantly Catholic country like Costa Rica, laws governing access to IVF should not adhere to the official Catholic position. There are several reasons why.

First, church teaching and tradition themselves leave room for the support of a more liberal position on IVF. Core Catholic tenets include the primacy of conscience and the right to dissent. Furthermore, the church acknowledges that it does not know when a zygote, and embryo or a fetus becomes a person, and it has not declared its current position on assisted reproduction to be among infallible teachings.

Second, many Catholics themselves do not support in thought or action the position of the church on IVF. As mentioned in the Introduction, a poll conducted on behalf of the newspaper *La Nación* found that a majority of the population of Costa Rica, which is majority Catholic, support the legalization of the IVF procedure.²¹

Third, article 75 of the Constitution of 1949 guarantees freedom of religion. This is particularly significant given that the Catholic church's position on reproductive matters, including IVF, is more conservative than any other major faith group. Imposing one faith's view onto public policy restricts the freedom of religion of all others.

This review of relevant information regarding the church, IVF and the state exposes the freedom policymakers have in crafting laws that respect the capacity of those who wish to conceive a child to make good their own decisions as to what is the correct path for them.

Almost 40 years ago, US president John F. Kennedy described his own determination to keep in appropriately distinct spheres his religiously based beliefs from the demands of democracy and pluralism: "I do not speak for my church on public matters, and the church does not speak for me. Whatever issue may come before me as President if I should be elected—on birth control, divorce, censorship, gambling, or any other subject—I will make my decision in accordance with these views, in accordance with what my conscience tells me to be in the national interest, and without regard to outside religious pressure or dictates. And no power or threat of punishment could cause me to decide otherwise."

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