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**THE RIGHT TO *IN VITRO* FERTILIZATION IN BRAZIL:  
A JURIDICAL-LITERARY ANALYSIS IN THE LIGHT  
OF *BRAVE NEW WORLD***

**GABRIELLE BEZERRA SALES SARLET<sup>1</sup>**

**TRANSLATED BY FELIPE ZOBARAN**

**ABSTRACT:** This paper consists of a juridical-literary analysis of the current conditions in the Brazilian context for the exercise of reproductive rights and, in particular, the right to in vitro fertilization (IVF). This practice is studied based on the decision of the Inter-American Court in the emblematic case of *Artavia Murillo and others versus Costa Rica*, in order to show the inseparability of theory and practice, especially with regard to the area of rights and guarantees at the domestic and international levels of protection. In light of the novel *Brave New World*, this article analyzes the content of the last resolution by the CFM – Federal Medical Council of Brazil, and the rules that make up the protective system in general, which directly affect reproductive autonomy in Brazil. The analysis is made through theoretical research, eminently bibliographical and exploratory.

**KEYWORDS:** Human Rights; Literature; Bioethics; Assisted reproduction; Reproductive Autonomy.

**INTRODUCTORY NOTES**

The current Brazilian normative system, anchored in the Federal Constitution of 1988, made it possible to establish some of the most relevant measures of a protective character to the human person in recent

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<sup>1</sup> Bachelor's and Master's degree in Law at Universidade Federal do Ceará (UFC). PH.D. in Law at Augsburg University (Germany). Post-Doctorate degree in Law at University of Hamburg (Germany). Former intern researcher at Max-Plank-Institut für ausländisches und internationales Privatrecht Hamburg. Post-doctorate degree in Law at Pontifícia Universidade Católica do Rio Grande do Sul (PUCRS). Professor of Law at the Law School of Centro Universitário Ritter dos Reis (Uniritter). Porto Alegre (RS), Brasil. CV Lattes: [lattes.cnpq.br/9638814642817946](https://lattes.cnpq.br/9638814642817946) ORCID: <https://orcid.org/0000-0003-3628-0852>. E-mail: [gabriellebezerrasaes@gmail.com](mailto:gabriellebezerrasaes@gmail.com).

times and, in general, to the most vulnerable people, especially in opening up to the international sphere of human rights protection and acting as a member of the inter-American system, it created and welcomed distinct spheres that align and complement each other to guarantee rights (Sarlet, 2017, pp. 58-83). In spite of this cultural turnaround and these normative, political and social developments, there is a situation marked by deep violations in the country, which makes it increasingly necessary to undertake multiple efforts to achieve human and fundamental rights.

In order to analyze the conditions under which reproductive rights can be exercised in the Brazilian context, the present paper, in addition to theoretical and normative frameworks, has tried to privilege the contemporarily contained in the book *Brave New World* regarding the recognition of the right to artificial fertilization by the Inter-American Court of Human Rights in the case of Artavia Murillo and others versus Costa Rica. Thus, in order to study the relevance of art, in general, and of literature (Ost, 2007, p.11), in particular, in order to study the legal phenomenon, we sought to analyze the issues that affect autonomy with the aim of demonstrating the inseparability of theory and practice, especially with regard to the area of rights and guarantees, whether in the domestic sphere or in the global international sphere of protection.

Through literature, there is an expansion of the metalinguistic field of Law, since it updates the jurist / reader's senses to overcome the snares of formalism (Silva, 2001, p 30). It is also worth noting the position of Antonio Candido, for whom there is a human right to literature and, through its effectiveness, the right to access the fantastic universe, allowing mental organization and the process of humanization itself (Candido, 1995, p.37). In fact, law and literature are species of the world of culture and, therefore, both of them are attempts to organize the chaos derived from social conflicts, generating a movement of formatting the current world into the world as it should be. The Law, by the way, is projected with the aptitude to capture the world of culture, which is portrayed by Literature, which, when it acts, is one of the mirrors of Society, because it evokes spaces and temporalities sometimes unveiled, revealing even a multiplicity of experiences of identification of the self and of recognition of the other in a propitious web for the ethics of otherness.

Literature sometimes acts as a mechanism of denunciation, of contestation, characterizing its subversive nature, since it is not exhausted in the body of the literary text, and goes beyond the meaning of words to the core of emotions. Since it is not restricted to temporality, literature projects itself into a network of representations of the human being that, unconsciously, makes the idea of universalization more feasible, informing the future from experiences lived in the past. Literature, therefore, clarifies some areas of the jurist / reader's perception that, in some sense, are considered taboo. This article proposes, based on the emphasis produced by the prism of law in literature, to adopt it because it is the most fruitful form of education in order to understand human rights, as it has shown different results to its readers and practitioners, such as the improvement of the critical sense and the formation of a sense of otherness and, among others, the strengthening of the idea of solidarity and responsibility in the reconstruction of one's environment.

The use of this methodology allows the jurist / reader to be instigated to become the protagonist of the affirmation of human and fundamental rights, grounding the bonds of regional and universal belonging and, thus, emancipating themselves from their more deeply rooted preconceptions to act in justification of their performance beyond the logical-formal circuit. Art, and specifically literature, take the human being out of indifference, throwing them into a fictional space that enables plural identifications and, in view of this, extends the inclusive horizon (Godoy, 2008, p.25). The prime angle for this paper is that of Law in Literature, in spite of other approaches (Fernandes, 2009, p.10), such as Law as Literature or Law of Literature. The investigation, thus, is done through the use of the perspective of Law in Literature, which is synthetically based on the justification of themes, concepts, procedures and institutes from the reflective reading of a literary work. Through it, it becomes possible to subvert patterns of alienation behavior and autonomy deficit, individually and collectively.

The article consists of a theoretical, eminently bibliographical and exploratory research, in particular based on a radiography of the contemporary Brazilian panorama regarding the use of biotechnology and

the effectiveness of reproductive rights, having as a methodological option the dialogic perspective, with emphasis to the Brazilian Constitution, the global system and the inter-American system for the protection of human rights, and finally, due to the gaps in the official normative system, to the content of the last resolution of the Federal Council of Medicine of Brazil (CFM, 2017).

### **BRAVE NEW WORLD AND THE LEGAL RATIONALE ON CONTEMPORARY HUMAN REPRODUCTION**

The novel's plot takes place in London, in the year 2540, and, according to the fictional calendar, in 632 AF, that is, *anno fordi*, or after Ford. It is one of the most acclaimed and censored novels in the twentieth century, onto which Huxley projected his personal experience from a world between wars and, therefore, describes a disappointed view of the supposed advances and future promises by the scientific discourse. By then, in the plot, the world population had been restricted to two billion people by reason of rigid population control, based, among other things, on the mockery of family, marriage, religion, monogamous sex, and natural pregnancy. Based on the functionalization of the human being to the State, the supposed "Civilization" was based on a triad: community, identity and stability. The inhabitants were produced in laboratories through ectogenesis<sup>2</sup>, and the social system of stratification was maintained, in restricted lines, through the use of the induction of consciousness, especially due to the application of the so-called Neo-pavlovian method; through the apology to promiscuous sex and, in the case of lower castes, through the use of the Bokanovsky's technique, which allowed the production of at least 96 identical twins from a single fertilized human egg.

The masses are evidenced as superior to the individual and, for the purpose of social equilibrium, there is the use of soma, which consisted of an opiate drug, being a resource for continuous numbness and, therefore, state guarantee of general torpor. The problem of happiness is understood

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<sup>2</sup> In order to better understand the real possibilities of ectogenesis in the material world. Available on: <<https://www1.folha.uol.com.br/ciencia/2017/04/1878463-cientistas-desenvolvem-utero-artificial-para-ajudar-bebes-prematurados.shtml>>. Accessed in: 9 jun. 2018.

as a task of the State to make people love servitude and, through the technique of suggestion, to identify irreparably with the functions to be performed in the social context, that is, to identify themselves from an umbilical link with work in explicit denial of idleness, as an indelible mark of identity.

Social control undeniably achieves in this futuristic-fictional work the apex by reason of the appeal to distinct literary resources and the idea of building webs of symbolic meaning for an individual identity that is inseparable from the masses. And, to that end, there is the use of the so-called hypnopedia moral teaching, which consisted in the use of hypnosis in children. The narrative also highlights sex and the rampant consumption of goods as an option for, as a form of immediate satisfaction, avoiding the cultivation of emotions and critical thoughts. There is an equation in which political and economic freedom is inversely proportional to sexual freedom, particularly by virtue of the substitution of reproduction for the production of human beings from the eugenic perspective (Schwartz, 2014, pp. 301-305) for reconciliation with a previously determined destiny.

There was stratification between Alpha, Beta, Gamma, Delta and Epsilon people, as an essential requisite for social stability, in which the mass conception was balanced and maintained to the extent of the fragmentation of social ties and, consequently, the exaltation of individualism, despite the ideology that it would always be preferable to sacrifice one to the corruption of many. Primordial characteristics of this capitalist, industrial and technological society were: anxiety, psychic vulnerability, transparency and confession. In that context, child sexuality was highly prized and even encouraged, while parenting bonds were considered disposable and disgusting. Huxley also emphasizes the subsistence of wild instincts, or rather pre-civilization instincts, such as the monogamous instinct that affects the lives of some of the protagonists and thus distances them from the motto of Fordian society, in which “everyone belongs to everyone else”.

Bernard Marx, in perfect allusion to Karl Marx, one of the protagonists of the work, was an alpha-plus psychologist, a specialist in hypnopedia, disillusioned, excluded from the groups of his caste, since he

presented behavior and phenotype incompatible with its origin due to some error in his conception and subsequent gestation. He is a character whose discontent cannot be remedied by the use of soma and that perceives a total uprooting in relation to society, even in relation to the members of the higher strata.

The fictional shift reaches its climax as the characters Bernard and Lenina visit a savage reservation in New Mexico. Considered an archaeological site, that is, a wild place where there were still old people, marriages, natural pregnancies and religious ceremonies that, tolerated within certain contingencies, at first served to point to a past overcome by the civilizational trajectory. On this journey they meet John, who is the son of Linda and of the DHC (Director of Hatcheries and Conditioning), that is, a half-savage type, who had learned to read from the works of Shakespeare and who has a romantic, passionate personality, living in conflict for considering his mother's behavior immoral. Linda, who in the past had disappeared into the reserve, remained until the end of her life in a permanent state of anxiety crises that only reach a certain appeasement through high doses of soma and frenetic sexual experiences.

In the narrative structure it is important to point out the moment when John goes to London with Bernard and Lenina, for whom he nurtures ambiguous and controversial feelings. Through John's continued exhibition as a savage, rare, tamed animal, Bernard achieves the notoriety he sought and, in this way, is convinced in terms, but, ultimately, deposes the DHC in consequence of the revelation of his past. In the course of the plot, John is arrested by the peacekeeping police along with Bernard, and brought to the world Administrator, where they discuss the end of beauty, art, and unnecessary reference to God and religion. Hence, basing his disappointment on the concept of happiness as the total absence of suffering, John decides for the condition of unhappiness and imposes himself, particularly on account of the guilt towards his mother, at first, to self-exile as well as to later asceticism, and, eventually, commits suicide. John unequivocally manifests an oedipal behavior that is drawn from multiple passages of the work.

**REPRODUCTIVE RIGHTS IN THE LATIN AMERICAN AND BRAZILIAN CONTEXT IN COMPARISON TO THE POSITIONING OF THE INTER-AMERICAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS**

Seventy years ago the United Nations, sharing its efforts with various countries, especially the so-called Allies, to emulate a new normative framework of rights and guarantees to all humanity, adopted the Universal Declaration of Rights, which, as a legacy of World War II, sought to recognize a kind of global citizenship anchored in human dignity (Beyleveld, Brownsword, 2004, 26-27). This declaration basically set out the essential content of the so-called human and fundamental rights, instituting a new perspective and thus forging the category of human rights despite the idea of natural rights or rights of men, strengthening the international dimension in order to ensure a new level of protection to the human being. It is an attempt to erect a bundle of effective guarantees beyond the liberal approach, reaching, as a result of its agreements, pacts and conventions, which were subsequently signed, particularly through the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, creating an integral approach in the construction and assertion of essential rights that should be ensured to the extent of equality, dignity and freedom of all, regardless of the diversity of creed, race, ethnicity, gender, etc.

Indeed, the implementation of regional systems and the characterization of human rights introduced a unique way of assessing the juridical phenomenon based on the *pro homine* principle, encompassing universality, indivisibility, interdependence and interrelationship through conventional and unconventional mechanisms of monitoring. Clearly, however, it was not sufficient to guarantee its intentions due to the contemporary world ethos and the present palette of violations (Han, 2014, p. 26).

## **LATIN AMERICA AND THE STATE OF ART REGARDING RIGHTS AND WARRANTIES**

In this international panorama, complex and extremely heterogeneous Latin America (Williamson, 2009, pp. 84-85) presents a set of common characteristics among the countries, which are the significant social, political, economic and environmental changes occurred in recent years (PNUD, 2017). It is also possible to highlight the region's traditional appeal to dictatorships, the recent democratization process of most countries and, thus, the marked degree of immaturity and incipient emancipation of the populations for the exercise of citizenship, in addition to the institutional crises that have recently plagued the community of countries. This violent scenario, composed of former colonies, translates itself into a space of social inequalities, discrimination and abandonment of vulnerable groups, that is, expressing an abyssal gap between the different social classes and a permanent state of violation of human rights that impose harsh challenges for economic and social development (Aegon, 2017).

In this way, a radical distance from the completion of the Goals set to 2030 by the United Nations Organization (hereinafter UN) is put in place, since, in a diffused way, there is an undisguised precariousness regarding the eradication of poverty and hunger, the guarantee of quality education, clean water, basic sanitation, respect and gender equality, etc. (PNUD, 2015). As for human development, Chile, the first Latin American in the ranking established by the United Nations Development Program (UNDP) in 2017 (PNUD, 2017), ranks 38th overall, with Argentina and Uruguay, second and third countries in the list, occupying the 45th and 54th positions, respectively, showing a real mismatch with the developed countries with regard to, e.g., the expectation and quality of life, the average number of years studied and per capita income (PNUD, 2017).

In recent years, however, there has been a change in this continental archetype due to the implementation of public inclusion policies aimed at eradicating extreme poverty, lowering maternal and infant mortality rates, expanding access to higher education, among others, which, in general, favored a new framework for political education and for the realization of human and fundamental rights, removing many population groups from

the condition of invisibility and guaranteeing minimum living conditions, above the poverty line. These changes occurred due to the implementation of public policies that shaped not only economic growth (income), but also some cultural achievements in the social, employment and educational sphere (besides income) (PNUD, 2017).

The lives of the citizens in Latin America, however, are still marked by a strong sense of fragility compared to the achievements made so far. This reflects a permanent tension between autonomous life projects, decisions and institutional roadmaps aimed at increasing income and material well-being. There is also the ruin of the state apparatus in relation to widespread corruption and the lack of public security, particularly in the outlying areas of large urban centers, further enhancing instability and thus making it impossible for the social sphere to strengthen social ties and institutional elements of development that have yet to be revised and constructed. In spite of the social innovations of the last 15 years and, nevertheless, the need for the resignification of institutions that are strengthening in a broad democratic space in order to set them in tune with the discourses produced by popular leaderships, this capacity for renewal must be extended to all dimensions of well-being that certainly contributes to a complete life and, consequently, in full agreement with the content of human and fundamental rights, including the reproductive ones.

The countries of the region, as a rule, face the double challenge of developing creative and inclusive economies, promoting the creation of social protection systems, and the expansion of care systems (Mello, 2016, pp. 86-120), gender equality, as well as the development of a better quality of employment and skills required by the labor market, the protection of indigenous populations and indigenous peoples, the eradication of domestic and family violence, slave labor, gender identity discrimination, and racism, along with better access to inputs, physical and financial assets. What stands out, in general, is the lack of respect for the issue of sexual rights, and especially of reproductive rights (Neuner, 2014, p. 459-607), since the continent is still notable for neglecting the rights such as

access to free and safe prenatal care, among others. Therefore, it is urgent, mainly through education in human and fundamental rights and actions regarding the system of protection of human rights, to promote structures that allow multidimensional progress and guarantees for all, without distinction, the conditions for their development in safe and sustainable levels (Sen, 2009, 40).

In the face of the Latin American reality, one can notice that the work of Huxley, written in a crude and even terrifying and cynical way, presents an incontestable present. In this sense, the dissociation between sexuality and reproduction and, consequently, the exaltation of the former to the detriment of the latter cannot be ignored, as is the case today, in which the poor and illiterate portion of the Latin American population still maintains as a kind of repository of humans for the maintenance of the status quo of the incapable elite forged from eugenic ideals.

**THE CITIZEN CONSTITUTION, THE EFFECTIVENESS OF HUMAN AND FUNDAMENTAL RIGHTS IN POST-88 BRAZIL, AND THE MYTH OF THE BRAVE, CIVILIZED NEW WORLD**

In 1988, as a result of the consecration of the struggle against dictatorship and the return to democracy, the new Federal Constitution was proclaimed in Brazil – known as the Citizen Constitution, for its emphasis on rights and fundamental guarantees, its normativity based on transparency and the principle of responsibility for the composition of full solidarism. It expresses the culmination of a broad struggle from intense social mobilization for the re-democratization of the country. The Citizen Constitution is a commitment to democracy, the Democratic State of Law, the dignity of the human person, the guarantee of fundamental rights and human rights, tolerance, pluralism and the multiple forms of exercising citizenship. It is worth emphasizing the rationale of the institute of Popular Initiative that expresses in a significant way the democratic motto used by the constituent legislator to undertake the composition of the current patch-work of the constitutional devices. The new Constitution thus spelled out the promise of a democratic process that would pave the

way for an egalitarian country, without discrimination of any kind and particularly guarantor of human and fundamental rights. Thirty years on, that hope enunciated has not yet come true, and there are many challenges to affirming its democratic assumptions, especially as regards human and fundamental social rights (Alexy, 2009: 47).

In any case, the Latin American and particularly Brazilian evolution in the normative level was indisputable, including the insurance of a broad range of rights and guarantees (Díez-Picazo, 2005, 215), beyond those already established and, to this extent, the new constitution expanded the scope of protection as opposed to what formerly guided the legislation of the country, and accounted for avant-garde aspects in the protection of the human person (Novais, 2015, pp. 53-54). Being oriented by a sound principality (Ridola, 2014, p. 49), the original constituent introduced into the normative system of the country the concept of responsible paternity and maternity, priority protection to the family, the child and the adolescent, etc.

Furthermore, reference should be made to the content of Constitutional Amendment 45, which changed the way in which treaties and human rights conventions were received in Brazil by including §30 in article 5 of the Federal Constitution / 88, applying the constitutional normative force to these international documents approved in the manner of constitutional amendment. Indeed, human rights norms have gained in an effective sense in the national order and thus gained both applicability and effectiveness, which, in turn, illustrates what Piovesan (2012, 27) pointed out as a process in which constitutional law and international law humanize each other.

As an example, the Declaration of Human Rights, in article 12, establishes: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”. Thus, family planning, which has, as one of its dimensions, reproductive rights, was inserted constitutionally as a result of the free decision of the couple, without interference from official or private bodies, and has been recognized by many international

documents as an elementary right. Of particular note is the content of the Cairo International Conferences on Population and Development, and of Beijing, on the rights of women, covenants which, by recognizing reproductive rights as human rights, have positioned themselves on a path of clear evolution. In fact, the essential content of such declarations is based on the freedom of reproductive choice, involving the right to access to the conditions of procreation, including new reproductive technologies, as well as the right not to reproduce, even in relation to access contraceptive methods.

By the way, the Brazilian Constitution, in article 60, explains: “The social rights are education, health, work, housing, leisure, security, social security, maternity and child protection, assistance to the homeless, in the form of this Constitution”. In this way, it protects motherhood and health (Figueiredo, 2007, p.174-175) as social rights included in the title referring to fundamental rights and guarantees and also provides in article 226, § 7, which: “Based on the principles of the dignity of the human person and responsible parenthood, family planning is a free decision of the couple, and it is the responsibility of the State to provide educational and scientific resources for the exercise of this right, of official or private institutions” (Souza, 2014). In Brazil, with regard to the social plan (Forrerster, 1997, p.15), the guidelines of society were altered from the time of re-democratization, intensifying in the period before the enactment of the Constitution, inasmuch as the after the long dictatorial years, and under the aegis of neo-constitutionalism and post-positivism, it provoked a rupture, the most significant effect of which was undoubtedly the enthronement of the principle of the dignity of the human person in the constitutional system Brazilian. At that time, it becomes possible to declare that, in Brazil, family planning is an autonomous fundamental right.

Law 9.263 / 96 establishes family planning as the right of every citizen, especially when defining it as the set of measures of fertility regulation that guarantees equal rights of constitution, limitation or increase of offspring by women, men or couples. And in the sole paragraph of article 2 the law ensures that it should be prohibited to use

the actions referred to in the article heading for any type of demographic control. Family planning is therefore affirmed as a set of actions of integral health care and of global care for men, women and the couple. In fact, actions must be preventive and educational, striving for equal access to the information, means, methods and techniques available for the regulation of fertility. As far as constitutionality is concerned, it is important to underline that the Constitution protects the most varied models of family formation and gives the “couple” the free exercise of the right to family planning (Article 226, § 70).

On the other hand, the Civil Code, in article 1597, in dealing with the use of medically assisted reproductive techniques, addresses them in the section on the presumption of affiliation in marriage, and does not innovate much in regard to parenthood, since legal equality of children had already been established by the Constitution (Article 127, § 60) and by the Statute of the Child and the Adolescent – ECA (articles 26 and 27). Anyway, it was reaffirmed in article 1596, and in the list of presumptions of children conceived in the course of marriage (article 1597), that there was an expansion, including children born by homologous artificial fertilization, even if the husband died, or in the case of “surplus embryos”, as well as heterologous artificial fertilization with the consent of the husband (subsections II – V). In this sense, it should be remembered that the legislator made the Denial of Paternity Action imprescriptible (article 1601).

On the basis of the family law enshrined in the Civil Code, those born through scientific methods, such as homologous artificial insemination, even if born after parent death, are recognized as children (CC 1.579, subsection III). As far as the right to inheritance is concerned, however, the equality of membership has not been fully preserved, especially as regards the prediction of hereditary right in the legitimate succession.

And here fiction is closely related to contemporary reality, since the production of humans in series seems to take away part of their social significance and their aptitude for the status of subject of law, from in vitro conception to the recognition of inheritance rights in circumstances,

a clear reformulation of the hierarchy of offspring. In fact, while acknowledging the presumption of affiliation in post-mortem conception cases, civil law did not recognize the right of such child to succeed legitimately. Recently, at the 8th Civil Law Conference, in statement 633, the content of article 1,597 was reaffirmed, stating that: “it is possible for the widow or surviving companion to access the assisted reproductive technique posthumously – through substitution maternity, provided that there is express consent expressed in life by his wife or partner.” (Conjur, 2018) Thus remaining silent, in general, with regard to inheritance rights.

Consistent with the promise of a civilized and aseptic world in terms of literary narrative, one should not forget the current disregard for issues of sexual and reproductive rights, especially by dissociating them and, to a large extent, hardly ensuring access to contraceptive methods and methods of legitimate abortion enshrined in criminal legislation<sup>3</sup>. In addition, this pattern of lack of assistance to the vulnerable population has been on the international human rights agenda since the 1990s and continues to be the subject of public policies in the country, according to international recommendations, without significant advances (Sarlet, 2018, p. 143-174).

In an approach specifically focused on the reproductive rights situation, Brazil has recently been condemned by the Committee on the Elimination of Discrimination against Women (CEDAW) in the emblematic case of Alyne da Silva Pimentel Teixeira, despite advances in the area of assisted reproduction. This is the first case of conviction for a maternal death, and from it the precarious conditions of the realization of reproductive rights, especially the rights of black and poor parturient women to safe motherhood and indiscriminate access to services of quality health care in the national setting. Insofar as Alyne’s death came to public attention in 2002, the national environment remained uncovered as much about the deepening of prejudice as about all the forms of guilt with which the state takes care of reproductive health in Brazil (Centro, 2017).

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<sup>3</sup> See the Brazilian government’s violence mapping report – Atlas da violência (BRASIL, 2017).

On the other hand, the use of assisted reproduction techniques, regulated by the Federal Council of Medicine (CFM) Resolution 2.168 / 2017, has grown consistently in the country, according to the recent data of the 11th Report of SISEMBRIO. This is related to the complexity of the reports on violations of rights in Brazil, as well as to the social hierarchy of Huxley's work. This is shown by the 11th National Embryo Production System Report prepared by the National Agency for Sanitary Surveillance (Anvisa), which compiled the numbers of the procedures carried out in 2017. This information was collected in 146 registered services in all Brazilian regions, also known as assisted human reproduction clinics, and show that since the initial report, 78,216 embryos have been successfully manipulated, most of which are found in the Southeast and South regions. In the national ranking, the states of São Paulo, Minas Gerais, Paraná, Rio de Janeiro and Rio Grande do Sul stand out for the greater productivity in this segment. The report also reports that the average rate of artificial cleavage in Brazilian clinics was 96%. The values presented were compatible with those recommended in the literature, that is, above 80%. The average fertilization rate was around 73%. The percentage is thus adequate to the values suggested in the international literature, ranging from 65% to 75% (Anvisa, 2018).

Under another perspective, maternal mortality rates, due to sequelae of clandestine abortion or due to obstetric violence, continue at unjustifiable levels (Diniz and Medeiros, 2013). Although the use of drugs is still the main route of abortion, post-abortion hospitalization and the perpetuation of sequelae are not uncommon, especially when the induction technique is used. In this way, and particularly because of the high public health costs, due in large part to the strict prohibition rule, lack of appropriate information and assistance to women of reproductive age, it is generally inferred that there is an extra high degree of vulnerability of the population, especially the poorer classes. In addition, some consequences should be considered in the current crisis scenario, in which the increase in poverty levels coupled with low schooling, the

population's lethargy about reproductive rights, and lack of transparency regarding abortion as a public health issue in the Brazilian State (PNUD, 2018).

**RESOLUTION 2168/2017 OF THE FEDERAL COUNCIL OF MEDICINE – CFM**

Brazil still has an understanding in the field of health that is markedly guided by the medical perspective (Raffin et al, 2011, p.65), lacking regards to the contribution of bioethical thought (Goldim, 2018, p.17), which served, among other things, to denounce the preponderance of this approach and the nefarious effects of the hierarchy of the doctor-patient relationship. In fact, although the reception of the bioethical discourse (Oliveira, 2006, page 23) in Brazilian lands was broad, especially at the end of the twentieth century, it was not enough to exclude the hegemony of CFM by dictating and editing regulations in the area of national health. Given the legislative gaps and because of them, the CFM has been the editor of the parameters of action in paradigmatic situations that involve the end and the beginning of life in a frank performance as a legislator, regardless of any auscultation to the yearnings of the population. Such gaps point to possible alienation of the population in tune with the dystopia analyzed.

The main points of the resolution are: the expansion of the use of maternity technique by substitution, the adaptation of the deadline for the discard of embryos to what was established by the Biosafety Law and the expansion of the use of techniques of assisted reproduction to gay couples and cancer patients. One of the main changes brought about is the possibility of temporary cession of the uterus by relatives in descending degree of kinship, such as daughters and nieces. By the previous resolution, only mother, grandmother, sister, aunt and cousin could participate in the maternity process by substitution. Also under the new rules, single people are entitled to use this resource. According to the current resolution, the number of embryos that can be transferred due to the woman's age remained unchanged, i.e., up to 35 years of age (at most two embryos); between 36 and 39 years (up to three); and 40 years or older (limit of four),

in order to avoid multiple pregnancies. The reduction of embryos and their commercialization, as well as the selection by biological characteristics, are prohibited, and the embryo is allowed to be tested for genetic diseases. Post-mortem gestation remains permitted, subject to prior authorization.

Another important point is the permission of voluntary donation of eggs, affecting the traditional shared donation in which a woman in treatment could, in exchange for the gratuity of the service, donate part of her eggs to another woman who was also in treatment. This form of sharing that characterized the history of assisted reproduction in Brazil was usually undertaken by women with high purchasing power who benefited from the eggs of other more impoverished ones, and thus, social inequality becomes evident, translating radical aspects that transform the idea of gratuity into a kind of simulacrum. With the new resolution, it is unfortunately permissible for a woman to get her treatment for free without having to donate part of her eggs if she can get another woman to donate instead, increasing the possibilities of commercialization under the idea of donation. In this perspective of extending the methods of assisted heterologous reproduction and even to undertake the rejuvenation of eggs through mitochondrial transplantation, whereas once there was silence in this area, women over 50 years of age, in exceptional situations justified by the doctor and conscious risks may also require the use of assisted reproduction techniques. Finally, according to the CFM, the growth of cancer cases in Brazil and the current changes in the family mosaic were the main reasons for this level of expansion.

#### **THE CASE OF ARTAVIA MURILLO AND OTHERS VS. COSTA RICA, AND THE HUMAN RIGHT TO FERTILIZATION IN THE INTER-AMERICAN SYSTEM**

At the same time, it should be recalled that, according to PAHO, Pan American Health Organization, sexual and reproductive health implies that “people can enjoy a satisfactory, safe and responsible sexual life, as well as the ability to reproduce and freedom to decide whether, when and how often to reproduce” (Wordpress, 1996). Reproductive health also implies the rights of men and women to be informed and thus to be able to

have broad access to multiple methods of fertility regulation (Opas, 2017) for the free exercise of their sexual and reproductive autonomy.

In relation to the actual case, which is measured by the regulation of in vitro fertilization (IVF), the approach to in vitro embryo status and reproductive human rights, it is important to mention that in 2000 the Supreme Court of Costa Rica declared the unconstitutionality of decree n. 24026-S, which regulated the assisted reproduction techniques (ART) in that country, stating that: “the human being has the right to life from conception according to article 4.1 of the American Convention on Human Rights and, in this sense, deserves the protection of the State”. It further declared the legal personality of the cryopreserved embryo, which should be obligatorily and integrally transferred without loss or discard. This fact prevented the use of IVF in that State and, in this way, the private service center that had been operating since 1995 and that already counted with an average of 16 births, ended their activities and the patients had their treatments interrupted. The penalties for those who disobeyed that decision were criminal in nature, similar to those of homicide.

Thus, after finding that it was a final decision, the victims appealed to the Inter-American Commission on Human Rights in 2001, which, in response to the complaint, issued some recommendations to the State of Costa Rica in 2010. The commission stated the need for drafting a law guaranteeing access to IVF and the eradication of discriminatory institutional policy to the detriment of people with infertility. The Legislative Assembly of Costa Rica, in turn, presented a bill that, among other things, provided that all fertilized eggs in a treatment cycle should be transferred to the woman who produced them and, in cases of restriction, discard or destruction of embryos, the penalty should be imprisonment of 1 to 6 years. PAHO spoke about the content of this project, emphasizing the risks of multiple pregnancy, spontaneous abortion, obstetric complications, premature births and neonatal morbidity, preeclampsia, myocardial infarction, thrombosis and pulmonary edema. The Commission presented the case to the Inter-American Court of Human Rights. It is appropriate to mention that in

2012, in a pioneering way, the Inter-American Court of Human Rights (IACHR) took a position on the subject, understanding that there was a violation of human rights to private and family life, personal integrity, health, the right to antidiscrimination (Rios, 2008: 37), the right to self-determination and the right to access to technological development. It also stated that there was a disproportionate nature of the measures applied by the Court in that country with regard to the rights of the victims. It clarified that States are obliged to implement public policies aimed at reproductive autonomy, reaffirming the idea of reproductive health as “the right of men and women to be informed of free choice and access to methods of fertility regulation that are safe, technically effective, affordable and viable”. It thus recognized, in these terms, a human right to fertilization.

The sentence, in the sense of auxiliary or complementary protection, expressed the recognition of the general duty of reparation (*restitutio in integrum*) and reparation of consequences, that is, in compensatory pecuniary measures, psychological rehabilitation (psychological treatment offer for 4 years), publication of the sentence (measures of satisfaction), guarantees of non-repetition (public policies), the duty to undertake educational and enlightenment campaigns on reproductive health and rights, and compensation for material damages for victims who had traveled abroad to have access to IVF) and due to immaterial damages. Concerning the content of Article 4 of the American Convention on Human Rights (San Jose Pact), it distinguished two moments in its interpretation: fertilization and implantation, differentiating embryo *in vivo* and *in vitro* and clarifying that the embryo only has the biological potential of being a person after the implantation in the uterus. Therefore, according to this decision, the term conception, as mentioned in the convention, does not apply to cryopreserved embryos, and then also emphasized that the expression “in general” admonishes the fact that it does not have absolute protection (Court, 2011).

#### **FINAL CONSIDERATIONS**

After thirty years of promulgation of the Citizen Constitution in Brazil, which, among other advances, attempted to undertake a normative

system consistent with the construction of a responsible, and especially more inclusive, panorama of solidarity, it is pertinent to affirm that, as far as reproductive rights are concerned, there is still much to the contemporary jurist's consideration. The Brazilian context demands, in addition to all the changes arising from the new constitutional paradigm, receptive and concrete positions regarding the calls for recognition evoked from the current composition of civil society.

It is important, therefore, to recall that, particularly with regard to identity, the search for the effectiveness of the right to anti-discrimination is becoming more and more nuclear and urgent, in this respect, the establishment of opportunities for free dialogue that, in a lucid perspective, help to approximate legal norms in relation to the demands of the mosaic of plural identities, marked by the certainty that the right to difference is, in fact, the essential counterpoint to the right of equality. Strictly speaking, the full exercise of sexual and reproductive rights also consists in asserting itself as an expression of the right to identity, due to the free development of the personality, especially in the sense of making prevail, in an isomeric way, the concept and the materialization of the dignity of the human person.

As it can be seen, ensuring human and fundamental rights, necessarily without forgetting its necessary correspondence with the challenges posed by the affirmation of sexual and reproductive rights established in the Federal Constitution, is still a great challenge in the Latin American continent and in the Brazilian state (Fachin, 2012, p. 49), especially in situations of institutional crises such as the contemporary one, in which the Executive has been using mechanisms of exception for the supposed maintenance of governability, combined with the lethargy of the population, the discrediting of the legislature and the undeniable commitment of the legitimacy of the judiciary. It is imperative to use methods that, beyond the common standard, can offer new parameters of analysis of the current context, sensitizing mainly the Law practitioners to the confrontation and the combat of discriminatory practices. In this opportunity, one can perceive the approach of Law in literature as of great value for the confrontation of complex and controversial situations such

as those that shape the Latin American panorama and, especially, the Brazilian one, with regard to reproductive rights.

Another important aspect that must be weighed and that is clearly related to Huxley's work, besides the profound social inequality and institutional racism in Brazil, is in relation to the undisputed power of the media in the formation of opinions and the massive intervention of technology in the daily life of the people, regardless of social class, in the conformation of reproductive desires. In any case, through the intertwining of the notions derived from the literary work and the positioning of the Inter-American Human Rights Protection System in the *Artavia Murillo and others vs. Costa Rica* case, with those extracted from the current national panorama, the extreme complexity of the approach on the subject attempting to exercise their reproductive rights, especially in the face of biotechnological innovations. It cannot be ignored that parenthood is expressed as one of the most delicate areas of Humanity in that it involves a bundle of rights that intertwine in an extremely distinct way between human groups and that concerns the desire for immortality. It is deduced from Huxley's work, but equally important from the scarcity of regulation in Brazil and from the continuous and, in a certain way, tyrannical actions by the CFM through its resolutions. However, what cannot be forgotten is that reproductive health practices are the result of political choices that should be derived from a broad participation of the population, duly informed and alert to the risks of commercialization and perpetuation of what is dictated by the medical paradigm or pre-fabricated by the media at the service of the world pharmaceutical industry, that is, the population should have the right to stand out of the mists of the civilizing myth.

The analysis of Huxley's work points to the use of ideologies in people's daily lives and thus to the manipulation for the composition of a deeply unequal political scenario marked by a strong social stratification structured for the engendering of totalitarian regimes. The current Brazilian panorama, in this sense, provides manipulation regarding both the quantity and quality of information provided, especially in relation to the use of biotechnologies, and in what favors the conformation of an enraptured, lethargic and apathetic population in relation to risks

involved and the demystification of the scenario in which they are submerged. Lastly, it is not late to stress that reproduction and production are distinct and unmistakable terminologies which, when applied to the generation of a human beings, must be in close harmony with the principle of the dignity of the human person and with the right to free expression personality to express both the idea of solidarity and responsibility in the composition of a more inclusive, more conscious and responsible society, being freer and more just.

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