

# WHAT A ‘PRIVATE LIFE’ MEANS FOR WOMEN

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## ABSTRACT

The Inter-American Court of Human Rights has emphasised the right to privacy as it includes an obligation not to interfere in private life. As the Court has expanded upon the definition of the right to privacy, it has determined that as much as there is an inherent negative obligation for the state to respect the right to privacy, there is equally a positive duty for the state to protect and promote the right to private life. In the context of women’s rights, where a considerable number of rights violations occur in the private sphere, regulation of private life in the form of protection from discrimination and violence is fundamental to the promotion of women’s human rights. However, as it stands, regulation in the private sphere is most often concerned with interference in women’s decision-making and autonomy. While the Court has included in the definition of the right to privacy provisions for women such as reproductive health services, it has failed to apply this definition to subsequent women’s rights violations. Despite developments in rhetoric, the Inter-American Court has been reluctant to traverse the divide that exists between the public and private spheres, which can ultimately prove detrimental to the advancement of women’s enjoyment of their rights in the region.

## 1. INTRODUCTION

The Inter-American Court of Human Rights (IACtHR) has, on several occasions, highlighted the right to privacy as it implies an obligation not to arbitrarily interfere in an individual’s private life. However, as the IACtHR has expanded upon the definition of the right to privacy, it has increasingly implied that not only

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is there an inherent negative obligation for the state to respect the right to privacy, but there is conversely a positive duty for the state to protect and promote the right to private life.<sup>1</sup> In the context of women's rights, where a significant amount of rights violations occur in the private sphere, the relationship between privacy and private life as it is protected by Article 11 of the American Convention on Human Rights (ACHR) and interpreted by the Inter-American Court of Human Rights, advances the potential for women to seek justice.

This research employs feminist legal theory as the critical lens by which to examine the Court's reasoning when applying Article 11 of the ACHR, the right to privacy and the right to private life. An exploration of theory exposes the way in which public/private reasoning and rhetoric on behalf of the Court allows states to elude their positive obligations to prevent human rights violations in the private sphere. The objective of this research is three-fold: first, to review the IACtHR's interpretation of the right to privacy and private life as it has evolved to address both public and private matters; second, to illustrate how a public/private divide in terms of rights protections disproportionately allows for the violation of women's rights; and third, to argue for an understanding of the right to private life as allowing for private decision-making, and when necessary, state interference in the form of public provisions. In order to develop reasoning to support the claim for state intervention in the private sphere in regards to women's rights, and more specifically women's reproductive rights, a recent case, *Artavia Murillo et al. v. Costa Rica*<sup>2</sup> is reviewed in regards to the Court's contemporary reasoning of the right to private life, especially in terms of women, the family and autonomy. Finally, the reasoning used by the Court in *Artavia Murillo et al. v. Costa Rica* is applied to a recent provisional measure issued by the Court, with the intention of highlighting missed opportunities as well as inconsistencies in how women's rights in the private sphere are interpreted.

## 2. RIGHT TO PRIVACY AND RIGHT TO PRIVATE LIFE

The right to privacy is enshrined in numerous international human rights instruments<sup>3</sup> with emphasis consistently being placed on the right to privacy as a civil and political right.<sup>4</sup> In the Inter-American System of Human Rights the

<sup>1</sup> H. Shue, "Mediating Duties", 98(4) *Ethics* (1988) 688–690.

<sup>2</sup> IACtHR (Judgment) 28 November 2012, *Artavia Murillo et al. v. Costa Rica*.

<sup>3</sup> United Nations Universal Declaration of Human Rights, 10 December 1948, GA Res. 217AIII, Article 12; United Nations International Covenant on Civil and Political Rights, 16 December 1966, Res. 2200A(XXI), Article 17; European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms), 4 November 1950, Article 8.

<sup>4</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A feminist analysis* (Manchester, Manchester University Press 2000), p. 203–207.

right to privacy is protected in Article 11 of the American Convention on Human Rights (ACHR):

- “1. Everyone has the right to have his honour respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.
3. Everyone has the right to the protection of the law against such interference or attacks.”

Understanding privacy as a civil and political right implies that the onus on the state is one of respect for the individual that, therefore, requires protection from arbitrary or intrusive interference by the state. However, ACHR Article 11 expands on the boundaries of 'privacy' by defining it as inclusive of both family and home. Although the original intention of this right may have been to protect the individual from state interference, the language of the right allows for further interpretation, where the right to private life has the opportunity to gain protections more often afforded in the public realm. The following section examines how the IACtHR has defined the right to privacy, and subsequently applied the right to privacy in both the public and private spheres.

## 2.1. THE RIGHT TO PRIVACY, GENERALLY

The Inter-American Court of Human Rights has elaborated upon the right to privacy in its jurisprudence, with specific attention being paid to defining the right to private life. In *Ituango Massacres v. Colombia*,<sup>5</sup> a case dealing with the State of Colombia's failure to interfere in order to prevent a violent massacre by an armed group, the IACtHR found a violation of the right to privacy, despite the fact that the Inter-American Commission on Human Rights (IACommHR) and the representatives for the petitioner had not submitted this argument. In this case the IACtHR interpreted the right to private life as including the recognition of “a personal sphere that must be protected from interference by outsiders and that personal and family honour and the home must be protected against such interference.”<sup>6</sup> Additionally, the Court considered “that the sphere of privacy is characterized as being exempt from and immune to abusive and arbitrary attack by third parties or the public authorities. In this regard, an individual's *home and private life are intrinsically connected, because the home is the space in which private life can evolve freely.*”<sup>7</sup> By clarifying the *intrinsic* connection that exists

<sup>5</sup> IACtHR (Judgment) 1 July 2006, *Ituango Massacres v. Colombia*.

<sup>6</sup> *Ibid.*, para. 193.

<sup>7</sup> *Ibid.*, para. 194 (emphasis added).

between home and private life, the IACtHR reinforced ideas surrounding personal autonomy and development in the home. However, the concern in this case was to define privacy as it requires a negative obligation for the state to refrain from arbitrary interference in the private sphere.

*Tristán Donoso v. Panamá*,<sup>8</sup> a case about wiretapping and telephone spying, reviewed Article 11 as it applies to protection of privacy in regard to correspondence, where the Court extended the right to privacy to include forms of communication, and specifically telephone conversations. In this case, the interpretation of Article 11 required the state to refrain from interference in the private sphere. *Fontevecchia and D'Amico v. Argentina*,<sup>9</sup> a case relating to freedom of expression and a civil sentence imposed on local journalists, elaborated even further by defining privacy as a right that may include “the freedom to make decisions related to various areas of a person's life, a peaceful personal space, the option of reserving certain aspects of private life, and control of the dissemination of personal information to the public.”<sup>10</sup> In *Fontevecchia D'Amico v. Argentina*, the Court expanded privacy to incorporate decision-making, which included the right to make decisions related to a person's life. In doing so, the Court recognized the inherent connection between decision-making in the private sphere, and the positive duty for states to reinforce private decision-making by implementing public provisions that enable those decisions.

Each of the above-mentioned cases approaches the right to privacy as it asserts a negative obligation for the state not to interfere with the inner-workings of private life, or in other words, the “private sphere”. While the Court's language evolved to protect privacy in terms of communication and decision-making, the cases above did not address violations that were specific to women and can therefore not accurately illustrate how the Court interprets violations of the right to women's privacy. However, the cases above do highlight the Court's interpretation of the right to privacy in general terms, where the conclusion can be made that the reasoning utilised by the IACtHR reinforces a division of the world into two distinct spheres: public and private, where the public sphere is appropriate for the imposition of justice, and the private sphere is left untouched.<sup>11</sup> The IACtHR has taken significant steps to develop rhetoric that seeks to understand the implications of private life for women. However it has not been entirely successful in interpreting the right to privacy in such a way that the private sphere is regulated and subsequently requires positive action on behalf of the state.

<sup>8</sup> IACtHR (Judgment) 27 January 2009, *Tristán Donoso v. Panamá*, para. 55.

<sup>9</sup> IACtHR (Judgment) 29 November 2011, *Fontevecchia and D'Amico v. Argentina*.

<sup>10</sup> *Ibid.*, para. 48 (emphasis added).

<sup>11</sup> S. Moller Okin, *Justice, Gender and the Family* (New York, Basic Books 1989), p. 126.

## 2.2. THE RIGHT TO PRIVACY FOR WOMEN

As reviewed in the above cases, the Court has worked to broaden the concept of privacy, but has been disinclined to impose positive obligations on the state in order to promote regulation of the private sphere. This section examines the right to privacy as it has been applied in cases that include a sex/gender element, with specific emphasis being placed on how the right to privacy, in some instances, requires state interference in the private sphere. In *Rosendo Cantú et al. v. Mexico*,<sup>12</sup> the Court considered that because the case involved the rape of a woman, the right to sexual life, as well as the right “to establish and develop relationships with other human beings”, were integral in defining what a private life means for women.<sup>13</sup> The Court expanded upon this definition by stating that the petitioner’s rape not only violated fundamental aspects and values of private life, but also “represented an intrusion in her sexual life, and annulled her right to decide freely with whom to have intimate relations, causing her to lose complete control over this most personal and intimate decision [...]”<sup>14</sup> In *Rosendo Cantú et al. v. Mexico*, the Court established a relationship between the right to private life and the right to personal integrity, as it is protected within the right to humane treatment under Article 5(1) of the ACHR.<sup>15</sup> In doing so, the IACtHR once again expanded upon the right to privacy definition, this time giving the right a greater capacity to require state interference. In this case the representatives brought the claim that the right to personal integrity encompassed the state obligation to enact positive measures to guarantee the right.<sup>16</sup> The Court concurred that the state of Mexico had violated the right to personal integrity, and in doing so expanded the definition of the right to privacy to include positive measures to protect elements of the right to private life when the private life violation is a result of a violation of the right to personal integrity.

In *Atala Riffo and Daughters v. Chile*, the IACtHR reiterated its interpretation of the right to privacy as “an ample concept that is not subject to exhaustive definitions and includes, among other protected realms, the sex life and right to establish and develop relationships with other human beings.”<sup>17</sup> Because this case focused on the parental rights of a female homosexual, the Court expanded the right to privacy definition once again, to include “the way in which an individual views himself and to what extent and how he decides to project this view on others.”<sup>18</sup> Furthermore, the Court addressed a “stereotyped vision on the scope

<sup>12</sup> IACtHR (Judgment) 31 August 2010, *Rosendo Cantú et al. v. Mexico*, para. 119.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*, para. 131.

<sup>16</sup> *Ibid.*, paras. 125, 131.

<sup>17</sup> IACtHR (Judgment) 24 February 2012, *Atala Riffo and Daughters v. Chile*, para. 162.

<sup>18</sup> *Ibid.*

of Ms Atala's sexual life",<sup>19</sup> as being cause for state arbitrary interference in her private life.

*Rosendo Cantú et al. v. Mexico* and *Atala Riffo and Daughters v. Chile* were fundamental in providing the Court with the forum to push the right to privacy and private life in a direction where the distinction between public and private spheres becomes less clear. For example, in *Rosendo Cantú et al. v. Mexico*, the right to privacy was expanded by the Court to include state protection in terms of personal integrity. It can be argued that the only effective way to protect personal integrity in light of this case would be to order the state to interfere to prevent a culture of violence against women; interference that requires a positive duty on the state. Similarly, the Court's reasoning in *Atala Riffo and Daughters v. Chile* relied in part on the argument that the stereotyping of individuals, in this case a lesbian woman, had resulted in a violation of the right to privacy, where again, a positive duty would exist for the state to address a pervasive attitude that stereotypes individuals of certain sexual orientations. Although the Court does not directly conclude that state inaction (lack of interference) is an underlying cause for the above violations of privacy and private life, the reasoning used by the Court can be interpreted as critical of the state's efforts to protect the right to privacy by being effectively inactive. In using this argument, it can then be inferred that the Court understands the implications of (1) dividing rights into public and private spheres when there is in fact no clear boundary, and (2) relegating women's rights to privacy to the private sphere, where not only is the right to private life unregulated by the state, but it is also ignored as it relates to systemic causes that combine to impede women's privacy rights.

A critique of the above cases reveals the Court's hesitance when it comes to drawing connections between the right to privacy and underlying causes of privacy violations. This disconnect can be attributed to flaws inherent to the distinction between public and private spheres, where privacy is regulated as it is a civil and political right, and where those acts that serve to violate the right to privacy are often caused in the private sphere. To refer to an example from above, according to the IACtHR, Ms Atala's right to privacy was violated partially as a result of stereotypes that were based on her sexual orientation. These stereotypes were perpetuated and reinforced in the public *and* private spheres, yet the Court found a violation of privacy due to the state's arbitrary interference in Ms Atala's private life. Using this argument, the state is then free to interpret the remedy as one that involves non-interference, whereas if the Court had examined the cause of the privacy violation as being part of a sociocultural pattern that discriminates against homosexuals based on misguided stereotypes, the state's responsibility would entail regulation of the private sphere to eliminate such stereotypes. When the Court finds a violation of the right to privacy it does so with reference to the

<sup>19</sup> Ibid., para. 167.

cause of the violation, which, as noted, often takes place in the private sphere. However, when the Court solely relies on a violation of a civil and political right to call attention to causes originating in the private sphere (most often violations of economic, social and cultural rights), the state does not have a strong incentive to address underlying causes because of norms that require state non-interference with civil and political rights, or those rights protected in the public sphere.

The public/private dichotomy, when applied to the division of human rights provisions, lines up in such a way that rights violations that occur in the private sphere, such as inequality, discrimination and violence against women, evade state and human rights scrutiny. Women are disproportionately associated with the private sphere, and as such, their enjoyment of human rights is oft left unregulated and unprotected by the state. Although the Court has taken significant steps in identifying the causes of private life violations, the assumption of public and private spheres, coupled with norms associated with negative and positive state obligations, respectively, creates a situation where rights that are significant to women are ignored. The following section explores this conflict, and develops a feminist legal critique to explain how the Court's acceptance of a public/private divide is detrimental to the advancement of women's rights in the Inter-American region.

### 3. WOMEN IN THE PRIVATE SPHERE

The public/private ideology assumes that the world is divided into public and private spheres, where law, and more specifically civil and political human rights, is located within the public sphere and regulated by the state, and the private sphere is left, for the most part, unregulated. The public/private dichotomy is both descriptive and normative, meaning that descriptively women are associated with the private sphere, and normatively the public/private divide allows state governments to be free of responsibility for the private arena.<sup>20</sup> A feminist critique of the public/private dichotomy finds the idea of a public and private divide problematic because it is an inadequate argument upon which to establish individual freedom (to be free from state interference) and the role of the state (interference/regulation).<sup>21</sup> This section explores the implications of the public/private dichotomy as it affects enjoyment of women's rights in the Inter-American Court of Human Rights. More specifically, this section focuses on cultural associations of women and motherhood in order to understand how and why the public sphere has been inhospitable to women.

<sup>20</sup> N. Lacey, *Unspeakable Subjects* (Oxford, Hart Publishing 1998), p. 73–78.

<sup>21</sup> *Ibid.*, p. 78.

### 3.1. FEMINIST LEGAL THEORY AND THE PRIVATE SPHERE

The public/private dichotomy in international law is divided based on sex and gender. Historically, the public realm has been associated with the male world, which is synonymous with matters such as politics and law.<sup>22</sup> Conversely, women's activities are typically understood to exist in the private sphere, where the family, home and other 'private' matters reside. This division of male/female, public/private, and to be more clear, state/civil society, market/family, self/other and logic/emotion is reflected in the application of international human rights law, where the state defines its role as being relevant to the first half of each of the above dualisms.<sup>23</sup> In dividing the public and private spheres there are significant consequences for women, and this is because violence and discrimination sustained by women often occurs in the private sphere, and more specifically the home.<sup>24</sup> When women's rights violations occur in the private sphere, the state has historically neglected to address these violations, as they are understood to be part of a self-regulated arena, where social and cultural norms dictate their own form of regulation.

Nicola Lacey argues that state abstention from private matters that require attention, such as domestic violence, is actually a form of regulation in itself. Lacey determines that the "decision *not* to regulate made by the state or other institutions with the power to do so is every bit as much a political decision as are decisions *to* regulate."<sup>25</sup> When the state effectively cleans its hands of responsibility for violations in the private sphere, harms to women are neglected. Karen Engle has argued that the private sphere is not inherently bad for women, and that perhaps because women's lives are ignored in the private, a space may be created to accommodate private decision-making, which in the context of the Inter-American region could include decisions surrounding abortion and sexual and bodily freedom.<sup>26</sup> Engle relies on the right to privacy as it infers a state obligation of non-interference, in order to provide rights to women, and she is cautious about relying on state regulation of the private sphere as serving to provide those rights.<sup>27</sup> Engle's reasoning is beneficial in that it recognizes women's autonomy in terms of deciding when and for what purpose state interference is required in private life. Although she is tentative about the implications of state interference within the private sphere, her claim acknowledges women's decisions as existing

<sup>22</sup> Charlesworth and Chinkin, *supra* n. 4, p. 56–59.

<sup>23</sup> G. Lloyd, *The Man of Reason: "Male" and "Female" in Western Philosophy* (London, Routledge 1993), p. 56, and Lacey, *supra* n. 20, p. 78.

<sup>24</sup> Charlesworth and Chinkin, *supra* n. 4, p. 149.

<sup>25</sup> Lacey, *supra* n. 20, p. 75 (emphasis added).

<sup>26</sup> K. Engle, 'After the collapse of the public/private distinction: strategizing women's rights', in D. Dallmeyer (ed.), *Reconceiving Reality: Women, and International Law* (Washington DC, American Society of International Law 1993), p. 143.

<sup>27</sup> *Ibid.*



in the private, which allows for an interpretation of the public as coming in the form of public provisions that enable women to exercise that private decision. Finally, Catharine MacKinnon draws conclusions about the effects of the public/private distinction on the “so-called generations of human rights.”<sup>28</sup> MacKinnon asserts that the first generation of rights, those civil and political rights, defines public order, where “empowered men” exercise these rights against one another.<sup>29</sup> In contrast, economic and social rights, rights of which both women and men are deprived, are regarded as second-generation, with a scope that is considered to be “more private: social, not political, and often not readily enforceable or implementable in the usual form rights take.”<sup>30</sup> MacKinnon’s claim that second-generation rights are considered to be less enforceable is undeniable, and this division of rights enforcement has a disproportionate impact on women’s rights protections. This hierarchy of rights is clear where the right to privacy, a first-generation right that requires limited regulation, is used by the Court to protect women’s reproductive health, rather than the second-generation right to health<sup>31</sup> that would require state action/regulation in the form of public provisions.

A review of feminist legal theory in terms of the public/private dichotomy reveals underlying conceptions of how law is interpreted and applied. Applying these arguments to the cases mentioned in the first section, provides a deeper understanding of how international law and state obligations collaborate, especially in the context of women’s association with the private sphere. The Inter-American Court has taken steps to expand state accountability,<sup>32</sup> but the boundaries established by the public/private divide are evident as the Court continues to focus on those first-generation human rights violations, those rights that as MacKinnon puts it, are most often used by “empowered men”.

### 3.2. WOMEN IN THE PRIVATE SPHERE: LOOKING CLOSER

Placing theory within its larger context is integral to understanding how and why the public sphere has been inhospitable to women in general terms. A deeper understanding of stereotypes concerning women’s role in society serves to elucidate the Inter-American Court’s interpretation of women’s rights. Discrimination against women in Latin America is intrinsically linked to stereotypes surrounding women’s roles in the private sphere, where a majority of

<sup>28</sup> C. MacKinnon, *Are Women Human? and other international dialogues* (Cambridge, Belknap Press of Harvard University Press 2006), p. 5.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17 November 1988, Ser. 169, Article 10.

<sup>32</sup> IACtHR (Judgment) 29 July 1988, *Velásquez Rodríguez v. Honduras*.

women conform to norms defined within *marianismo*,<sup>33</sup> and where traditionally women do not contribute economically to the household, but are instead responsible for fulfilling their duties of “motherhood”.<sup>34</sup> These stereotypes are perpetuated in the private sphere, and then reinforced in the public through law, religion and other social and cultural institutions. Women’s role as primarily that of mothers is one that exists in the private sphere, and in contrast to other areas of women’s lives, has been the target of much state scrutiny. Unlike violence against women and inequality issues, women’s role as mothers has been the subject of state regulation, especially in the context of limiting access to reproductive rights and autonomous decision-making. The concept of motherhood and family is one that is worth unpacking, as it directly pertains to the final section. The role of the family is protected within the American Convention on Human Rights, where Article 17(2) protects “the right of men and women of marriageable age to marry and to raise a family”, and Article 4(e) of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, which protects a woman’s right to “have the inherent dignity of her person respected and her family protected.”<sup>35</sup> Motherhood is mentioned by the Inter-American Court in *Gelman v. Uruguay*<sup>36</sup> in reference to “freedoms entailed in maternity [...] which form an essential part of the free development of the female personhood.”<sup>37</sup> Motherhood, as it relates to the development of family life, is an experience specific to women that exists in the private sphere, that is both regulated and protected by law, but is done so by reinforcing stereotypes that assume motherhood is a fundamental element of a woman’s development. In the example of motherhood, the law has been comfortable with promoting in the public sphere the concept of women as mothers, which essentially reminds women that their role is limited to the private, but is susceptible to arbitrary interference when it comes to issues surrounding motherhood, such as abortion, access to contraception and decision-making in terms of reproductive rights.

The final section examines the IACtHR and its recent views surrounding the right to privacy, private life, and the role of women. *Artavia Murillo et al. v. Costa Rica* serves to elucidate the Court’s reasoning in terms of when it is acceptable to blur the divide between the public and private spheres, especially in regard to the right to form a family, as well as the implications that come with applying

<sup>33</sup> *Marianismo* is the counterpart to *Machismo*. *Marianismo* plays on female gender roles and enforces the idea that women display their femininity through traits of modesty, purity, faithfulness, submissive behaviour and by embracing the responsibilities of motherhood. The term is directly linked to Catholicism and the Virgin Mary. See S. Chant and N. Craske (eds.), *Gender in Latin America* (London, Latin America Bureau 2003), p. 9.

<sup>34</sup> This is a generalization of the experience of Latin American women, and is not intended to speak to the women of Latin America as a whole. See Chant and Craske, *ibid.*, p. 10.

<sup>35</sup> Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belém do Pará”, 9 June 1994, 24<sup>th</sup> Session, Article 4(e).

<sup>36</sup> IACtHR (Judgment) 24 February 2011, *Gelman v. Uruguay*.

<sup>37</sup> *Ibid.*, para. 97.

a positive duty for the state to act on protecting a right that exists in the private sphere.

#### 4. WHAT A PRIVATE LIFE MEANS FOR WOMEN, NOW

As has been illustrated above, the Inter-American Court of Human Rights has evolved in its definition of the right to privacy, and subsequently its definition of the right to private life. As a result, the concept of privacy has expanded to include violations occurring in both public and private spheres, although this interpretation does not necessarily include an obligation for the state to interfere. Despite progress in advancing the right to private life, the Court has been reluctant to traverse the omnipotent public/private divide, effectively setting aside the root causes of rights violations by reinforcing an ideal of non-interference in the private sphere. As has thus far been detailed, hesitation to frame women's rights violations in their broader context as existing in both the public and private spheres, has created an environment where the Court perpetuates norms that leave rights particularly essential to women unregulated, and therefore unprotected.

Although maternity and motherhood are very much associated with the private sphere, the Court has expanded its interpretation of the right to private life to include the right to form a family. In doing so, the IACtHR has placed a duty on the state to interfere in the private sphere in order to fulfil a positive duty to fulfil the human right to form a family. The case of *Artavia Murillo et al. v. Costa Rica*<sup>38</sup> is a reproductive rights case that examines the right to form a family in the context of a state obligation to allow *in vitro* fertilization. This case highlights the Court's most recent interpretation of the right to privacy, with specific references to women's roles as mothers in the private sphere.

##### 4.1. *ARTAVIA MURILLO ET AL. V. COSTA RICA*

The case of *Artavia Murillo et al. v. Costa Rica* is a reproductive rights case concerned with access to *in vitro* fertilization (IVF). The state of Costa Rica banned IVF in the year 2000,<sup>39</sup> and did so on the grounds that an executive decree authorizing IVF in 1995 was unconstitutional as it violated the right to life.<sup>40</sup> The Inter-American Commission of Human Rights submitted the case to the Court, where it emphasized that such a restriction on IVF procedures had a disproportionate impact on women.<sup>41</sup> In its reasoning for determining that the

<sup>38</sup> IACtHR (Judgment) 28 November 2012, *Artavia Murillo et al. v. Costa Rica*.

<sup>39</sup> *Ibid.*, para. 2.

<sup>40</sup> *Ibid.*, paras. 68, 71, note 82.

<sup>41</sup> *Ibid.*, para. 2.

state had violated the right to private life, the IACtHR considered the right to private and family life and the right to personal integrity as they relate to personal autonomy, sexual and reproductive health, the right to enjoy the benefits of scientific and technological progress, and the principle of non-discrimination.

In *Artavia Murillo et al. v. Costa Rica*, the IACtHR interpreted the scope of Article 11 and the right to privacy and private life as being inherently linked to Article 7 of the American Convention, which includes a “concept of liberty in a broad sense as the ability to do and not do all that is lawfully permitted.”<sup>42</sup> The intention of this argument was to reinforce the ideal that persons have the “right to organize, in keeping with the law, his or her individual and social life according to his or her own choices and beliefs.”<sup>43</sup> The Court further elaborated upon this relationship by including in the concept of liberty the “possibility of all human beings to self-determination and to choose freely the options and circumstances that give meaning to their life, according to their own choices and beliefs.”<sup>44</sup> The rhetoric developed surrounding liberty and privacy is strong in this judgment, with direct reference to liberty as including the right to self-determination. This reasoning is significantly more insightful than the Court’s previous interpretations of privacy because the Court recognizes that regulation of the private sphere does not require interference into autonomy in such a way that disrupts the freedom to choose. In addition, the Court recognized the close relationship between Article 11 of the American Convention, and Article 17,<sup>45</sup> which acknowledges the central role of the family and family life in a person’s existence, and in society in general. While this case is a reproductive health rights case, the Court chose to focus on the elements of the case that referred specifically to family rights, with specific emphasis being placed on the development and strengthening of the family unit. In this judgment the IACtHR defines private life as the following:

“The protection of private life encompasses a series of factors associated with the dignity of the individual, including, for example, the ability to develop his or her own personality and aspirations, to determine his or her own identity, and to define his or her own personal relationships. The concept of private life encompasses aspects of physical and social identity, including the right to personal autonomy, personal development and the right to establish and develop relationships with other human beings and with the outside world. The effective exercise of the right to private life is decisive for the possibility of exercising personal autonomy on the

<sup>42</sup> Ibid., para. 142. See Article 7(2) of the American Convention: “No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”

<sup>43</sup> IACtHR (Judgment) 28 November 2012, *Artavia Murillo et al. v. Costa Rica*, para. 142.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid., para. 145. See Article 17(1) of the American Convention: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”

future course of relevant events for a person's quality of life. Private life includes the way in which an individual views himself or how he decides to project his views toward others, and is an essential condition for the free development of the personality."<sup>46</sup>

The definition goes on to interpret the right to private life as being related to "(i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right."<sup>47</sup> In extending the right to private life to include reproductive autonomy, the Court concluded that "the protection of private life includes respect for the decisions both to become a mother or a father."<sup>48</sup> In this provision the Court acknowledges the positive obligation on the state to provide public provisions in order to exercise the right to private (reproductive) life, which requires not only women's rights to exercise autonomy as a decision-maker, but also the distribution of provisions in the form of medical technology. This element of the definition infers that the right to private life, and therefore reproductive autonomy, is not solely the act of deciding when, how and if to have a family, but that it also requires action by the state, in terms of public provisions to enable access to services, so that decision-making in the private sphere can be enacted in the public.

The above definition of the right to private life is by far the most comprehensive developed by the IACtHR to date. The definition itself certainly advances the right to private life, specifically in how it relates personal development and autonomy, and determines that reproductive autonomy is necessary to the achievement of the right to private life. Additionally, the definition makes mention of the public/private dichotomy by asserting a right "to establish and develop relationships with other human beings and *with the outside world*."<sup>49</sup> This element of the definition seems to imply an understanding on the part of the Court of the characteristics of those lived experiences in the private and public sphere, by inferring that a private life is very much intertwined with the "outside world."

However, while the rhetoric in the above definition appears to be extensive, its application is not entirely as assertive. In concluding that the state had violated the right to privacy and private life, the Court confirmed that the decision of whether or not to become a parent is an element of the right to private life. In developing this argument the Court then relied on a stereotyped vision of women as mothers to assert that "motherhood is an essential part of the free development of a woman's personality." By relying on motherhood as a catalyst by which to

<sup>46</sup> Ibid., para. 143.

<sup>47</sup> The Court references the Convention for the Elimination of all forms of Discrimination Against Women 1979, 18 December 1979, Res. 34/180, Article 16(e) to define reproductive autonomy as the right of women "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights."

<sup>48</sup> IACtHR (Judgment) 28 November 2012, *Artavia Murillo et al. v. Costa Rica*, para. 146.

<sup>49</sup> Ibid., para. 143 (emphasis added).

develop its argument, the Court was successful in avoiding the application of its own definition of the right to private life in this case, especially as it is a reproductive health rights case. In order to explore this claim further, it is helpful to speculate on how the Court, referring to the reasoning developed in *Artavia Murillo et al. v. Costa Rica*, would apply elements of the right to privacy to a reproductive right that is more controversial, such as abortion.

In 2013, the IACtHR issued a provisional measure<sup>50</sup> to the state of El Salvador in a situation where a pregnant and ill woman, “B”, had been denied an abortion by the state, despite the fact that the pregnancy threatened her life and the foetus was anencephalic, which would not allow it to survive outside the womb.<sup>51</sup> The woman’s attempts to acquire an abortion had been unsuccessful as a direct result of the state’s interference in her right to private life, and subsequent rights to personal autonomy and personal development. The definition of the right to private life developed in *Artavia Murillo et al. v. Costa Rica* had the potential to be of great use in this provisional measure, particularly as the situation in El Salvador clearly violated reproductive autonomy and access to reproductive health services, yet the Court made no effort to apply the right to privacy and private life to the violation in El Salvador. The IACtHR recognized violations of the American Convention Articles 4(1) and 5(1),<sup>52</sup> where the imperative concern was that of saving the life of “B.” In its provisional measure, the Court did not interpret the violation as requiring state interference in terms of the right to privacy, whereas in *Artavia Murillo et al. v. Costa Rica*, the Court judgment determined that interference within the private sphere was essential in order to protect the rights to reproductive autonomy and reproductive health services. Each of the circumstances required state action in order to protect the right to privacy, but in the case of “B”, the Court chose not to expand upon Article 5(1) to include the protection of private life,<sup>53</sup> and therefore, did not cross the public/private divide.

<sup>50</sup> IACtHR (Provisional Measures Order) *B. v. El Salvador*. “B” is used to protect the identity of the victim, “Beatriz”. The IACtHR provisional measure duty is outlined in Article 63(2) of the American Convention: “In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration . . .”

<sup>51</sup> CEJIL (Center for Justice and International Law), “Inter-American Court of Human Rights orders the Salvadoran State to save the life of “Beatriz”, 31 May 2013, <cejil.org/en/comunicados/inter-american-court-human-rights-orders-salvadoran-state-save-life-beatriz>.

<sup>52</sup> See Organization of American States, American Convention on Human Rights, 22 November 1969, OAS Treaty Series, No. 36, Article 4(1): “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life; and 5(1): 1. Every person has the right to have his physical, mental, and moral integrity respected.”

<sup>53</sup> IACtHR (Judgment) 31 August 2010, *Rosendo Cantú et al. v. Mexico*. The Court determined the indivisibility of Article 5(1) and the right to private life in this case.

## 5. CONCLUSION

The Inter-American Court of Human Rights has progressively evolved in its definition of the right to private life, which has subsequently played a role in advancing the potential for women's human rights protections in the private sphere. However, despite developments in rhetoric, in practice the Court has been reluctant to bridge the gap that exists between the public and private spheres. In terms of women's rights protections, the right to privacy is one that on paper appears to protect women's interests in terms of personal development and autonomy, but in practice the Court and the state have intervened when it comes to issues such as reproductive rights, which is not the case with other rights violations such as discrimination and domestic violence. While the Court has determined in its judgments that the state does have a positive obligation to interfere in the private sphere, in the context of women, it has done so as a condition to regulate women's autonomy. The *Artavia Murillo et al. v. Costa Rica* case raises questions about the Court's reasoning in regard to the public/private divide and the "so-called generations of rights", by illustrating the perspectives used by the Court to determine when it is acceptable to interfere/regulate economic, social and cultural rights, and when it is not. One can infer, based on the conclusions drawn in this research, that women in the private sphere can expect the Court to promote state regulation of the private sphere in those instances where the violation at hand is of the public interest, thereby relocating women's rights to privacy from the private to the public sphere, where the state is more comfortable with regulation.