WRITTEN OBSERVATIONS IN THIRD PARTY INTERVENTION

Submitted to the European Court of Human Rights

In the case

Adelina PARRILLO versus Italy,

N° 46470/11

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The application concerns a woman who in 2002, at the age of 48, decided together with her husband to have children by means of medically assisted procreation (MAP). Five embryos were created for this purpose and frozen for future implantation, the applicant suffering from endometriosis. In 2003, the applicant lost her husband and gave up the pursuit of the implantation of the embryos. Eight years later, in 2011, dissatisfied that Article 13 of Act 40/2004 (Act 40) forbids the destruction and donation of human embryos for scientific research, the applicant applied directly to the ECtHR alleging that her property rights over the five frozen embryos (Article 1 of Protocol No. 1 to the Convention) and her right to private life (Article 8 of the Convention) had been breached by Italy.
This case places the Court in the time of the scandalous Italian embryologist Severino Antinori. From 1994 onwards, he assisted a 62-year old woman from Rome to have a child and claimed to have assisted in the conception of three children by reproductive cloning.[1] Act 40 was adopted to put an end to what was called the "far-West reproductive", and it was necessary because of the complete failure of the medical profession and the biotechnology industries to self-regulate. The ethical issues and the financial interests were and remain, too high. The legislature therefore had to intervene to put an end to the abuses and to set ethical standards. This Act has greatly affected the economic sectors of MAP and biotechnology; it has equally caused an ethical debate.

The present case, *Parrillo v. Italy,* is an example of the convergence of liberalism in both its moral and economic dimension. Moral liberalism (the radical party) and economic liberalism (the biotechnology industry) work jointly towards deregulation and the removal of the protection afforded to the human embryo under the principle of dignity. With this *Parrillo* case, the Court is called on to decide whether, within this domain, the liberal approach should supplant the ontological conception of human rights based on the inherent dignity of each human being which inspired the drafting of the Convention.

On the admissibility

Given the judgment delivered in the case of *Costa and Pavan v. Italy*[2] on the question of admissibility, the ECLJ does not consider it useful to develop an analysis on this point. However, we draw the attention of the Court to the existence of a preliminary question referred by the court of Florence to the Italian Constitutional Court on the prohibition of research on supernumerary embryos. This case is pending.

On the merits

In summary, the ECLJ sets out that Act 40 recognises the human embryo *in vitro* as a *subject of law*, in the same way as the other *subjects involved* in MAP and aims to guarantee its right to life. To this end, it forbids the deliberate destruction of conceived embryos (destruction by preimplantation genetic diagnosis (PGD) or by scientific research) and prescribes the freezing of embryos which have not (yet) been implanted. The choice of the Italian legislature is supported by numerous European rules. The Court leaves to each State the responsibility to determine when the protection of the right to life begins, and grants the protection of the Convention to the embryo or the foetus from the moment domestic law grants this protection.

[1] "Antinori toujours 'accoucheur de grands-mères'" < http://www.leparisien.fr/societe/antinori-toujours-accoucheur-de-grands-meres-19-01-2010-782984.php> (date accessed: 29 November 2013).
[2] *Costa and Pavan v. Italy*, N° 54270/10, 28 August 2012.

Therefore, the Convention applies to *in vitro* embryos which benefit from the protection of the measures of Italian law. Given that embryos are *subjects*, they cannot be *things* or objects of a right *in rem,* and cannot be deliberately destroyed. Abortion allows the destruction of embryos *in utero* in order to protect the right to life and health of the mother. The destruction of embryos *in vitro* is not necessary to protect a comparable, concurrent right, such as the right to life of the mother. The legal principle of the primacy of the human being clearly contradicts the justification of the destruction of embryos *in vitro* in the interest of science. The fact that the majority of European States allow destructive embryonic research is not conclusive because this does not resolve the preliminary question of the nature and the protection of the embryo as a matter of domestic law. Thus, the existence of a quasi-consensus does not create a conventional obligation to legalise such a practice. Therefore, from the moment when the Italian legislature agreed to recognise the embryo *in vitro* as a subject and the principle of primacy of the human being is applicable, it became impossible to grant the applicant's requests.

It is necessary first to define "the object" of the right it relates to – the embryo – (I), before examining the very consistency of the rights and freedoms claimed (II).

I. THE EMBRYO: DEFINITION AND PROTECTION

1. The definition of the embryo

There is no doubt that the embryo exists from the moment of fertilisation, regardless of whether this fertilisation is *in utero* or *in vitro*.

Under Italian law, the embryo exists from the moment of conception (Art. 1, Act 40). This does not require a certain stage of development of the embryo or its implantation, as the applicant claims: conceived does not mean implanted. This is why this Act forbids PGD - to protect life from the moment of conception, without distinction as to where it is found, *in vitro* or *in utero*.

The Parliamentary Assembly of the Council of Europe (PACE) has on several occasions stated this definition. In 1979, PACE affirmed "*the rights of every child to life from the moment of conception*[3]" and the obligations of governments in this regard. In Recommendation 1046 (1986), PACE states that the embryo exists from the moment of fertilisation: "*considering that, from the moment of fertilisation of the ovule, human life develops in a continuous pattern, and that it is not possible to make a clear-cut distinction during the first phases (embryonic) of its development, and that a definition of the biological status of an embryo is therefore necessary*" (§ 5). Similarly, in Recommendation 1100 (1989) of 2nd February 1989, PACE states that "*the human embryo, though displaying successive phases in its development which are designated by different terms … displays also a progressive differentiation as an organism and nonetheless maintains a continuous biological and genetic identity*" (§ 7).

The Grand Chamber of the Court of Justice of the European Union (CJEU), in the *Brüstle/Greenpeace eV* judgment in the case C-34/10, delivered on the 18th October 2011, defined the embryo in response to a question of the German Federal Court of Justice relating to the interpretation of the Directive on the legal protection of biotechnological inventions[4]. The

[3] Recommendation 874 (1979) of the Parliamentary Assembly of the Council of Europe of 4th October 1979 relating to a European Charter on the Rights of the Child.
[4] Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions.

Federal Court questioned if the term embryo covers "*all stages of the development of human life, beginning with the fertilisation of the ovum*" or if "*the attainment of a certain stage of development [must] be satisfied*". The CJEU judged, in light of the context of the Directive and its pursued aim, that the "*human embryo*", in the sense of Article 6, paragraph 2, sub-section c), of the directive should be broadly interpreted and that, in particular, every human ovum should, from the moment of its fertilisation, be considered as a "human embryo" within the meaning and for the purposes of this provision, as fertilisation is likely to trigger the development process of a human being[5]. The fact that the embryo is *in vitro* or *in utero* is irrelevant. Therefore, it is from the moment when they acquire the capacity to trigger the development process of a human being that the cells in question benefit from the legal protection granted in respect of human dignity. It is precisely to prevent States, in defining the human embryo in various ways, from variably applying European law and depriving the human embryo of its protection that the Grand Chamber of the Luxembourg Court gave this definition the quality of an autonomous concept of European law.

2. The nature and the legal protection of the embryo

a. In domestic Italian law: the embryo is a "subject"

In Italy, the embryo is a "*subject*", it is "*another*". It is not necessary in order to be a subject to be a perfectly formed physical person or to have legal personality. It is primarily the desire to promote life by allowing infertile couples to have children, and to protect the human embryo, which are at the heart of Act 40. Article 1 provides, as the foundation of the legislation on MAP, the recognition of the rights of the conceived embryo:

> "*In order to facilitate the solution of reproductive problems arising from human sterility or infertility, the recourse to medically-assisted reproduction is allowed in line with the conditions and according to the procedures laid down by this law, which ensures the rights of all the persons involved* ***including that of the conceived foetus***".

The Italian legislation therefore indisputably recognises the conceived embryo as a subject of law. Act 40 as a whole, and its implementing regulations, are aimed at organising MAP in respect of the rights and the life of the embryo.

To prevent the destruction of embryos, the Act prohibits: PGD; destructive embryonic research; the conception of embryos for commercial or industrial purposes; or for the purposes of studies, experimentation and research. Embryonic research is forbidden, because it implies their destruction.

The Act aims to guarantee a high degree of protection of the right to life of the embryo by limiting the number of embryos which can be conceived and obliging their implantation as soon as possible[6]. Similarly, cloning, the creation of hybrids and chimeras etc. is forbidden (see the complete English translation of Act 40 in the appendix). It is because the embryo is a subject that these prohibitions are punished by prison sentences. Destructive embryonic research is forbidden in the same way as the removal of organs from a living subject, where this removal causes death.

On the other hand, clinical and experimental research are permitted as long as it benefits the embryo, such as where it is for therapeutic or diagnostic purposes, without harming the health

[5] The same quality of the "human embryo" must equally be recognised, according to the CJEU, in relation to embryos created by cloning and parthenogenesis, that is to say the non-fertilised human ovum, in which the nucleus of a mature human cell has been implanted, as well as a non-fertilised human ovum induced to divide and to develop by means of parthenogenesis. Indeed, for the CJEU, even if these organisms have not been, strictly speaking, fertilised, they are, by virtue of the technique used to obtain them, likely to trigger the development process of a human being similar to the process whereby an embryo is created through the fertilisation of an ovum.

[6] This Article was declared unconstitutional by decision N° 151 of 1st April 2009 of the Italian Constitutional Court regarding the phrase "for a sole and present implantation, but in any case not more than three."

or the development of the embryo and if there are no alternative methods available (Article 13 § 2).
The freezing of embryos *in vitro* is allowed in order to preserve the life of the embryos when their transfer to the uterus cannot take place due to demonstrated serious reasons of *force majeure* related to the state of health of the mother, reasons that could not have been foreseen at the moment of fertilisation (Article 14§ 3).

The prohibition of the destruction of embryos *in vitro* is consistent with the tolerance of abortion, as the foundational principles of the different Acts relating to MAP and to abortion are the same: Article 1 of Act 194/1978 on motherhood and abortion, re-enacted by Act 40, recognises "*the social value of motherhood and of human life from its beginning*". Article 2 provides that the State must do everything possible to prevent abortion.
Thus, the prohibition of the destruction of embryos *in vitro* is fully consistent with the general rule of Italian law relating to abortion. The difference is the fact that the reasoning which justifies the derogation from the protection of the life of the embryo *in utero* – the preservation of the health and the life of the mother – does not exist in relation to the embryo *in vitro*. Similarly, the fact that research on embryonic stem cells[7] from abroad is not forbidden in Italy does not constitute an inconsistency, as the aim of Act 40 is to prevent the deliberate destruction of *in vitro* embryos which have been conceived in Italy and not to prevent research on embryonic stem cells (which are not/no longer embryos).

Concerning the nature and the protection of the embryo, it must be noted that Italian Law (as well as the Court) neither differentiates between the embryo *in vitro*, the embryo *in utero*, nor according to it's stage of organic development - putting aside the question of the legal limitation period applicable to abortion, which does not relate to the scope of the right to life, but to that of the derogation from the right to life.

In numerous other provisions of the Italian Civil Code the human embryo is considered as "*someone*" and not "*something*" (see Articles 1, 254, 320, 462 and 784 of the Civil Code).

The Italian Constitutional Court has never denied the humanity of the unborn child. Indeed, in decision no. 27, of the 18th of February 1975 - which related to abortion - the Court specified that "*the protection of the unborn child has a constitutional foundation, namely Article 2 of the Constitution which guarantees the inviolable human rights, among which one can include the legal status of the unborn child.*" This further confirms the fact that the embryo is not a thing. In a judgment of the 2nd of November 1997, the Constitutional Court explained the scope of this right by affirming, on several occasions, the right to life of the unborn child and by specifying that the legal possibility of its destruction is justified, not by the fact that the embryo is not a human being, but because the woman finds herself in a state of necessity resulting in a conflict between the rights of the child and her rights to life and health. In essence – according to the Court– a fair balance has to be struck between the rights of the different subjects, without denying the human identity of the unborn child. This position is identical to that developed by the ECtHR.

Act 40 is the continuation of the opinions of the National Bioethics Committee. In its opinion of the 22nd of June 1996, "*The Committee has unanimously come to recognise the moral duty to treat the human embryo, since fertilisation, according to criteria of respect and protection*

[7] Embryonic stem cells are the cells which form following the first divisions of the zygote. They are totipotent until they divide into eight cells: taken in isolation, each is capable of forming an entire organism. The embryonic stem cells of the zygote (beyond 8 and below 32) are pluripotent and are capable of forming all the tissues of the body (but not a whole person).

that must be adopted towards human beings". Similarly, in its opinion of the 14th of April 2003 on research using human embryos and stem cells, the Committee confirms that "*human embryos are human lives in their own right*" and that therefore, it is "*always a moral duty to respect and protect their right to life, regardless of the manner in which they have been conceived and regardless of the fact that some of them could be classed – with a dubious term as it lacks ontological value – supernumerary*".

Thus, while Italy strictly regulates MAP and prohibits the destruction of embryos it is not in the name of a sociological – and therefore relativistic – concept of morality, which could be challenged by another majority conception of morality, in the eyes of the Court. Under Italian law, the prohibition of PGD and embryonic research is justified by several objective compelling reasons, in particular, the protection of the embryo – as a subject – and the prohibition of eugenics. The embryo is not a "concept"[8], it is not a moral value, but a subject, and it is a third-party, therefore "another" within the sense of the Convention. As it is a subject its value cannot be put into perspective - it has the same rights as all other subjects concerned.

b. Under the European Convention on Human Rights

The Court makes the Convention's protection of the embryo/foetus contingent on the point at which life begins as governed by domestic law but, it does not grant complete discretion to the national jurisdiction, as under the conventional order there is in principle a potential protection for the embryo.

- The Court authorises States, within the limit of their margin of appreciation, to determine "*the starting point of the right to life*"[9] in their domestic legal system. Determining the starting point of the right to life is a matter of both fact and law. The question of fact is relative to the point at which the life of the person begins which, in turn, determines the question of law relative to the point at which the right to life begins. In the case of *A.B.C. v. Ireland*, the Court ruled that there was no European consensus as to the scientific or legal definition of the starting point of the life of a person, which as a consequence grants States a margin of appreciation as to the definition of the starting point of the *right* to life: *"[given] that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a 'person' to be protected for the purposes of Article 2".*[10] Note that the "*legal definition of the beginning of life*" is none other than "*the starting point of the right to life*".
In the case of *Vo v. France*, the Grand Chamber specified that "*it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person … require protection in the name of human dignity*"[11]. However, it can be "*legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life*"[12], simply because the State can determine the moment from which an unborn child is a *person* benefitting from the protection of the Convention.This determination is initially a question of fact: the determination of the beginning of life.

[8] Contrary to what the section says in the case of *Costa and Pavan.*
[9] *Vo v. France*, [GC], N° 53924/00, 8 July 2004, paragraph 82. Hereafter *Vo.*
[10] *A. B. C., v. Ireland*, [GC], N° 25579/05, 16 December 2010, paragraph 237. Hereafter *A. B. C.*
[11] *Vo*, paragraph 84.
[12] *A. B. C.*, paragraph 222, confirms *Vo*.

- The Court refers the question of the starting point of life to domestic law and has never judged that – under the Convention – the embryo *in vitro* or *in utero* is not a person. The Court has consistently refused, since the cases of *Brüggemann and Scheuten v. Germany*[13] and *H. v. Norway*[14], to exclude, in principle, the unborn child from the scope of the Convention and to find that it is not a person within the meaning of Article 2 of the Convention. This is a subtlety to be perceived, which allows to understand the relationship between the internal and conventional orders: the Court allows States not to provide total protection *ratione temporis* to prenatal life within their internal order, but under the conventional order, the Court does not deprive prenatal life of any protection, because unlike national laws that permit abortion for a certain period "*Article 2 of the Convention is silent as to the temporal limitations of the right to life*[15]". If the Convention did not protect prenatal life, there would be no place to recognise the States' margin of appreciation, because any margin of appreciation is necessarily included in the framework of a pre-existing obligation. Judge Jean-Paul Costa explains "*[h]ad Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision*."[16] Indeed, the Court does not lack jurisdiction *ratione materiae* to assess the existence of an interference with the life of an embryo or a foetus; it has also never held that an application relying on Article 2 is manifestly ill founded in respect of stillborn children[17].

In the case *Evans v. United-Kingdom*, the Court noted that "*Under English law … an embryo does not have independent rights or interests and cannot claim – or have claimed on its behalf – a right to life under Article*" (§ 54). The Court accordingly concluded that "*the embryos created by the applicant and J. do not have a right to life within the meaning of Article 2 of the Convention*" (§ 56).

In contrast, the choice made by the Italian legislature is to recognise the embryo as a subject and to therefore grant it a wide protection of the right to life. The Court must draw the following conclusion based on its own reasoning: when domestic law recognises the embryo or the foetus as a *person* or a *subject*, the Court must be consistent and, taking this into account, should therefore grant it the protection of the Convention (in accordance with the doctrine of conditional applicability of the Convention)[18].
This is consistent with Article 53 of the Convention which notes the principle that States are free to offer superior human rights protection[19], as well as Article 27 of the Oviedo Convention which indicates that none of the provisions of the Convention can be interpreted "*as limiting or otherwise affecting the possibility for a Party to grant a wider measure of protection with regard to the application of biology and medicine than is stipulated in this Convention*". Clearly, Italy may grant the embryo a superior protection than the minimum required by the Rome and Oviedo Conventions and that which is granted by other member States. Consensus in favour of a weaker protection cannot compel a State to reduce the protection which it grants. The reference to consensus can only serve to increase the overall level of the protection of rights, not to reduce it. In this regard, it is appropriate to emphasise that it falls to the Court to

[13] *Brüggemann*, paragraph 60.
[14] *H. v. Norway,* N° 17004/90, 19 May 1992.
[15] *Vo*, paragraph 75.
[16] Separate opinion in *Vo* at paragraph 10.
[17] *Mehmet Şentürk et Bekir Şentürk v. Italy*, N° 13423/09*,* 9 April 2013, § 107.
[18] G. Puppinck, "L'arrêt *Costa et Pavan c. Italie* et la convergence des droits de l'homme et des biotechnologies"*, Revue Générale de Droit Médical*, n° 49, December 2013 (text not available in English).
[19] "*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any agreement to which it is a party."*

ensure a consistent interpretation of these two conventions (Article 29 of the Oviedo Convention).

c. In European and international law

The choice of the Italian legislature is also supported by European and international law. At the very least, in no case can it be argued that the rules of European and international law would require the reduction of the protection of which the embryo *in vitro* benefits under Italian law.

The Oviedo Convention provides in Article 18 that "[w]*here the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo. The creation of human embryos for research purposes is prohibited.*"
The Explanatory Report of the Oviedo Convention states that "[t]*he Convention does not define the term "everyone" (in French "toute personne"). (…) In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention*" (§ 18). The Report adds that "[t]*he Convention also uses the expression "human being" to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began*" (§ 19). No distinction is made between the embryo *in vivo* and *in vitro* - both benefit from this protection.
The Explanatory Report of the Additional Protocol to the Oviedo Convention states that "*research on embryos in vitro is excluded* [from the scope of application]*, this type of research being covered by Article 18 of the Convention*" (§ 19). Thus, the fact that this Protocol does not apply to research on embryos *in vitro*, does not therefore mean that the protection they enjoy under the Oviedo Convention has been withdrawn.

The Parliamentary Assembly of the Council of Europe (PACE) has adopted a number of Resolutions and Recommendations granting genuine protection to the embryo. Here are the most relevant extracts:
- In Recommendation 874 (1979) relating to a European Charter on the Rights of the Child, PACE notes that "[c]*hildren must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs;*" and recognises "[t]*he rights of every child to life from the moment of conception … and national governments should accept as an obligation the task of providing for full realisation of such rights.*"
- In Recommendation 1046 (1986) on the use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes, PACE stated that "*human embryos and foetuses must be treated in all circumstances with the respect due to human dignity, and that use of materials and tissues therefrom must be strictly limited and regulated (see appendix) to purposes which are clearly therapeutic and for which no other means exist;*" (§10) and therefore recommends that the Committee of Ministers "*forbid anything that could be considered as undesirable use or deviations of these techniques, including … research on viable human embryos* [and] *experimentation on living human embryos, whether viable or not*" (§14).
- In Recommendation 1100 (1989) on the use of human embryos and foetuses in scientific research, PACE recommended that the Committee of Ministers define a framework of principles within which:
"*4. In accordance with Recommendations 934 (1982) and 1046 (1986), investigations of viable embryos in vitro shall only be permitted: for applied purposes of a diagnostic nature or for preventative or therapeutic purposes;*

21. The intentional creation and/or keeping alive of embryos or foetuses whether in vitro or in utero for any scientific research purpose, for instance to obtain genetic material, cells, tissues or organs therefrom, shall be prohibited".
- In Resolution 1352 (2003) on human stem cell research, PACE affirms that "*The destruction of human beings for research purposes is against the right to life of all humans and against the moral ban on any instrumentalisation of humans*" (§10) and consequently calls on member States: "*to promote stem cell research as long as it respects the life of human beings in all states of their development … to respect the decision of countries not to take part in international research programmes which are against ethical values enshrined in national legislation and not to expect such countries to contribute either directly or indirectly to such research;* [and] *to give priority to the ethical aspects of research over those of a purely utilitarian and financial nature*".

It is also appropriate to highlight Principle 17 § 1 of the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), published in 1989: "[n]*o act or procedure shall be permitted on any embryo in vitro other than those intended for the benefit of the embryo and for observational studies which do no harm to the embryo.*", as well as the report of the Steering Committee on Bioethics (CDBI) on the Protection of the Human Embryo *in vitro* (CDBI-CO-GT3 (2003) 13) stating that "*even if positions differ on the status of the embryo and the creation of embryos in vitro, there is general agreement on the need for protection…* [the] *measures provided usually offer protection of the embryo in vitro from the fertilisation stage onwards. … One of the aims of protection is to ensure that the embryo is not subjected to experimental procedures that could damage it or put at risk its developmental potential*."

Finally, one should note Recommendation R (90) 3 of the Committee of Ministers (CM) concerning medical research on human beings at the end of which the CM said it was "*convinced that medical research should never be carried out contrary to human dignity*".

The Court of Justice of the European Union (CJEU) based its interpretation of Directive 98/44/CE on the principle of respect for human dignity in order to justify the prohibition of the patentability of practices involving the destruction of embryos. This principle appears not only in European Union law (Articles 2 and 21 of TFEU, Chapter I of the Charter of Fundamental Rights of the European Union), but equally in other international instruments (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention against Torture). On this point, the Advocate General Yves Bot emphasised in his Opinion of 10th March 2011 that the principle of respect for human dignity must "*be applied not only to an existing human person, to a child who has been born, but also to the human body from the first stage in its development, i.e. from fertilisation*" (§ 96).

Framework Programme for Research and Technological Development: Every budgetary negotiation for the Framework Programme for Research of the European Union (FP) gives rise to intense discussions regarding the European public funding of embryonic research[20]. Within the current programme (FP 7 2007-2013), the Commission made a commitment, in a Declaration dated 30th December 2006, not to submit "*proposals for projects which include research activities which destroy human embryos, including for the procurement of stem cells*" (§ 12).
Regarding the next framework programme, a European Citizens' Initiative ("*One of Us*"), which has gathered 1,875,000 signatures in Europe (of which 450,000 are from Italian

[20] G. Puppinck, "Bioéthique et gouvernance dans l'Espace européen de la recherché", *Revue Générale de Droit Médical*, n° 22 March 2007, pp. 201-235 (text not available in English)

citizens), asks the European Union to adopt rules explicitly excluding this type of public European financing. Otherwise, the European Union would be in the paradoxical situation of financing research which is illegal in several European countries and considered to be detrimental to human dignity by the CJEU. A financing decision could be made the object of an application for judicial review before the CJEU on the basis of Article 263 TFEU, and be censured by it on the basis of the principle of respect for human dignity.

Only a rejection of the application ensures the consistent application of the European Convention on Human Rights, the Oviedo Convention and European law as interpreted by the CJEU. This is normal, as European legal rules are founded on the common principles of respect for life and human dignity. These principles are also shared by Italian law and the Parliamentary Assembly of the Council of Europe.

II. THE RIGHTS RELIED ON BY THE APPLICANT

Relying on Article 1 of Protocol 1 of the Convention, the applicant argues that Act 40 forbids her from donating her embryos for the purposes of scientific research. Invoking equally Article 8, she sees this prohibition as a violation of her right to respect for private life. In an initial decision, the Court judged that the alleged claim of a violation of Article 10 of the Convention, in which the prohibition would violate the freedom of scientific research, should be rejected for incompatibility *ratione personae*.

1. On the alleged violation of Article 8

The Court has to date ruled in this field from two perspectives: that of abortion and that of MAP.

a. In its case-law relating to abortion

The Court has found a violation of the Convention on account of a difficulty in accessing an abortion only in situations of pregnancies resulting from rape or causing a risk to the physical (not psychological) health and the life of the woman. The Court has never ruled on the conventionality of abortions of convenience. On the other hand, it has stated on several occasions that the Convention does not confer a right to an abortion "of convenience", that is one solely motivated by the wishes of the woman and not by a right or conventional interest concurrent with that of the unborn child[21]. Thus, regarding the autonomy of the woman, which falls within the scope of Article 8 relating to the protection of private life, the Court has stated on several occasions, since the decision *A.B.C. v. Ireland*[22], that "*Article 8 cannot … be interpreted as conferring a right to abortion*" [23].
The Court has always required that the destruction of the embryo or the foetus in the context of abortion be justified by a concurrent interest guaranteed by the Convention[24], without which there would not be proportionality. We do not see any right or interest guaranteed by the Convention – which the applicant would be entitled to – that would justify an obligation on the part of Italy to allow the donation of embryos with a view to their destruction.

[21] G. Puppinck, "Abortion and the European Convention on Human Rights" (July 1, 2013). *Irish Journal of Legal Studies*, Vol. 3(2) 2013, p 142. Available at SSRN: http://ssrn.com/abstract=2320539.
[22] *A. B. C.*, § 214.
[23] *P. and S. v. Poland*, N° 57375/08, 30 Oct. 2012, § 96.
[24] *A. B. C.,* § 249, *R. R. v. Poland,* N° 27617/04, 26 May 2011, § 187: *P. and S. v. Poland,* § 99; *Tysiac v. Poland,* N° 5410/03, 20 March 2007, § 116, hereafter *Tysiac.*

In relation to the interests of science, which concern the applicant, it should be noted that if, in relation to abortion, the preservation of the life or the health of the mother can prevail over the respect due to the embryo, the interest of science or society does not prevail over the respect due to the embryo by virtue of the principle of the primacy of the human being, guaranteed particularly by Article 2 of the Oviedo Convention, according to which "[t]*he interests and welfare of the human being shall prevail over the sole interest of society or science*". The Explanatory Report of the Oviedo Convention states that "[o]*ne of the important fields of application of this principle concerns research, as covered by the provisions of Chapter V of this Convention*" that is to say in particular research on embryos *in vitro* (Article 18). The fact that supernumerary embryos are condemned to die does not render legitimate their destruction within biotechnological and industrial research. In this regard, the CJEU has refused to be swayed by arguments based on the benefits that medicine and industry could gain from such techniques. Advocate General Yves Bot drew a striking parallel between these techniques and those used during the Civil War in the former Yugoslavia in the murder of prisoners of war in order to remove organs. For the CJEU, as for the Oviedo Convention, the ends do not justify the means.

b. <u>In its jurisprudence relating to MAP</u>

In all the MAP cases judged to date by the Court (*Evans v. United Kingdom*[25], *Dickson v. United Kingdom*[26], *S.H. v. Austria*[27], *Costa and Pavan v. Italy*[28], *Knecht v. Romania*[29]) the applicants wished to have a child. The Court was able to recognise an interference with their private and family life because <u>the law was an obstacle to the realisation of the parental plan of the couple or the mother.</u> In the present application, this is not the case. There is no interference in the private or family life of the applicant. The State was not opposed to the realisation of her parental plan; the deliberate destruction of embryos in the biotechnological context is neither part of a parental plan, nor private or familial life.

In addition, the State cannot be held responsible for the non-implantation of embryos and their freezing *ad vitam aeternam*. The reason in this case is the tragic death of the father and the decision of the mother not to pursue the gestation of the embryos, although Italian law allows *post mortem* gestation.
In any event, it should be noted that the Italian State has tolerated the creation of embryos for the sole purpose of implantation for the purposes of birth, thus allowing the realisation of the parental plan. The State has never allowed the applicant to change the purpose of these embryos. If the decision of the applicant to no longer implant her embryos pertains to her private and family life, the fact of disposing of these embryos, or of donating them to research, does not pertain to private or family life. The legal framework which was in place prior to Act 40 would not have allowed her to donate her embryos to research.

Moreover, the final report of the Study Commission on the Cryopreservation of Embryos in Medically Assisted Procreation Centres of 8th January 2010 stated that "*The legal prohibition of the destruction of embryos is to be understood in the sense that the cryopreservation can only be interrupted in two cases: when it is possible to implant the defrosted embryo in the uterus of the mother <u>or of a woman willing to welcome it,</u> or when it is possible to scientifically*

[25] *Evans v. United Kingdom* [GC], N° 6339/05.
[26] *Dickson v. United Kingdom* [GC], N° 44362/04.
[27] *S. H. v. Austria,* N° 57813/00, 1st April 2010 and GC 3 November 2011.
[28] *Costa and Pavan v. Italy*, N° 54270/10, 28 August 2012.
[29] *Knecht v. Romania*, N° 10048/10, 2 October 2012.

certify its natural death or its permanent loss of vitality as an organism". Thus, the prohibition of heterologous IVF would not necessarily preclude the adopting of supernumerary embryos which would therefore not be condemned to destruction. The National Bioethics Committee gave a favourable opinion in relation to the adoption of supernumerary embryos on 18th November 2005. Taking account of the evolution of sociological and scientific practices, the practice of embryo adoption can be developed. Similarly, the law is this field is rapidly evolving.

Indeed, as the applicant party claims, the only way to establish a right of the mother to the destruction of embryos is to argue that embryos are "things" and that they can therefore be made the object of a property right.

2. On the alleged violation of the right to property (Article 1 of Protocol no. 1)

Embryos *in vitro* are neither "*possession*" within the meaning of the Convention, nor in the domestic law. If the embryo was merely a thing, "a mass of cells", any legal rules aimed at its protection, as well as the case-law of the Court, would be meaningless. If they were merely a thing, it would be possible to sell them, to create embryos for research and to deprive them of all appropriate protection, contrary to Article 18 of the Oviedo Convention. The Court has refused to create an intermediate category between the *subject* and the *thing*. Neither the Rome Convention, nor that of Oviedo envisages such a category.
The Court states that the concept of "*possession*", while having an autonomous meaning, includes all that which has an economic value[30]. In addition, the "property" must be conferred by domestic law[31]. The "*possession*" must be real/actual[32], because the Convention does not guarantee the right to acquire possession[33]. The applicant must claim to have at least a "*legitimate expectation*" of obtaining the effective enjoyment of a property right and for that she must prove the existence of a sufficient legal basis within the domestic law, which is not the case in this instance.
For Directive 98/44/EC of 6th July 1998 and the CJEU, the issue posed by patents falls particularly on the appropriation that the patent allows on a product or element of the human body. The European States have noted in this directive "... *patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person … it is important to assert the principle that the human body, at any stage in its formation or development, including germ cells … cannot be patented*" (Recital 16).

We recall that Recommendation 874 (1979) of PACE of 4 October 1979 states that "[c]*hildren must no longer be considered as parents' property, but must be recognised as individuals with their own rights and needs*" and adds shortly after that "[t]*he rights of every child to life from the moment of conception … and national governments should accept as an obligation the task of providing for full realisation of such rights.*" This remains true.

[30] The right of property, the claim *lato sensu* having a sufficient basis in domestic law, actions, intellectual and industrial property rights, the customer, the specific use of property, pension, property right.
[31] *S v. United Kingdom*, N° 11716/85, 14 May 1986, § 5 (occupying a property without a right sanctioned by domestic law is not protected by the Convention) or *Pistorova v. Czech Republic*, N° 73578/01, 26 October 2004, § 38.
[32] *Marckx v. Belgium*, 13 June 1979, § 50.
[33] *Slivenko and others v. Latvia*, [GC], N° 48321/99, § 121.

III. IN THE ALTERNATIVE

1. The margin of appreciation

a. Difficult moral and ethical questions

Above all, "*the Court would emphasise that there is no obligation on a State to enact legislation of the kind and to allow artificial procreation*"[34]. States do not have a positive obligation to legalise artificial procreation and *a fortiori* to legalise the deliberate destruction of embryos *in vitro*. Constantly, the Court has stated that where a "*case raises sensitive moral or ethical issues, the margin will be wider*".[35] "*[T]he decision as to the principles and policies to be applied in this sensitive field must primarily be for each State to determine*" [36] and "*the Court does not find that the absolute nature of the Act is, in itself, necessarily inconsistent with Article 8 … [if it] served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case-by-case basis*" [37].
In the case *Open Door v. Ireland*, the Court acknowledged that "*the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life*".[38] "*The State's margin in principle extends both to its decision to intervene in the area and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests*."[39] The policy choice of the legislature is limited due to the fact that it cannot be "*manifestly without reasonable foundation*"[40].

b. Consensus and comparative legislation in Europe

The question of the status of the embryo necessarily influences those of the rights of the embryo and over the embryo. The Grand Chamber draws the consequence of this link when it states that "*the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.*"[41] Very logically "*It follows that, even if it appears from the national laws referred to that most Contracting Parties [allow] abortion, this consensus cannot be a decisive factor … notwithstanding an evolutive interpretation of the Convention*" (§ 237). Even assuming the existence of a large consensus supporting pro-embryonic research, this does not resolve the distinct and preliminary question of the legal status of the embryo which is a matter of domestic law.

c. A broad national debate

Act 40, which was adopted at the end of parliamentary proceedings that took place over the course of successive governments, originated from a popular initiative which, in 1995, had called for the designation of the unborn child as a legal subject. After the adoption of the Act,

[34] *S. H. v. Austria,* N° 57813/00, 1st April 2010, § 74.
[35] "Where the case raises sensitive moral or ethical issues, the margin will be wider" (§ 77) … "therefore, since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one"(§ 81).
[36] *Evans*, aforementioned, § 85.
[37] *Evans*, aforementioned, § 89.
[38] *Open Door v. Ireland* , N° 14234/88; 14235/88, A246-A, § 68.
[39] See *S.H. v. Austria*, § 97; Evans, § 82; Knecht, § 59.
[40] *Dickson v. United Kingdom*, [GC], 4 December 2007, N° 44362/04, § 78.
[41] *A. B. C.* § 237.

four referendums seeking the annulment of certain provisions of the Act were submitted to popular vote on 12th and 13th June 2005. These referendums were a failure for those who initiated them: only 25.9% of eligible voters having voted, quorum was not reached. Opponents of the referendum had urged people not to vote. Finally, these referendums had the merit of extending the debate on Act 40 validated the choice of the legislature. Thus, few texts have been debated as much in Italy as Act 40. These debates took place in conformity with European standards resulting from Article 28 of the Oviedo Convention[42].

2. Other considerations

a. The option of embryo adoption by another couple

The final report of the "Study Commission on the Cryopreservation of Embryos in Medically Assisted Procreation Centres" of the 8th January 2010 states that "*The legal prohibition of the destruction of embryos is to be understood in the sense that the cryopreservation can only be interrupted in two cases: when it is possible to implant the defrosted embryo in the uterus of the mother or of a woman willing to welcome it, or when it is possible to scientifically certify its natural death or its permanent loss of vitality as an organism*". Thus, the prohibition of heterologous IVF would not necessarily prevent the adoption of supernumerary embryos; that is obvious. The National Committee on Bioethics pronounced on 18th November 2005 an opinion favourable to the adoption of supernumerary embryos. Taking account of the evolution of sociological and scientific practices, the practice of embryo adoption can be developed. Similarly, the law in this field is rapidly evolving.

b. Unsuccessful research

Finally, from a practical point of view, it is appropriate to know that human embryonic stem cell research, which has been ongoing since 1998, has, to this day, been unsuccessful. Embryonic stem cells have caused tumours and produced a high rate of immunological rejection when transplanted. To date, scientists have largely abandoned this research in favour of research on adult stem cells - cells derived from cord and placental blood and iPS cells, research which won Professor Yamanaka the Nobel Prize and renders "*null and void research on the human embryo*"[43]. Even from a utilitarian point of view, destructive research on the embryo is no longer as interesting as it appeared in the past. Private investors have largely withdrawn from this sector and the laboratories which are still active seek to recover their investment by no longer using the embryo for therapeutic research but for pharmaceutical and cosmetic testing.

[42] Public Debate - *Parties to this Convention shall see to it that the fundamental questions raised by the developments of biology and medicine are the subject of appropriate public discussion in the light, in particular, of relevant medical, social, economic, ethical and legal implications, and that their possible application is made the subject of appropriate consultation.*
[43] Professor Alain Privat, *Le Figaro*, 20/10/12.