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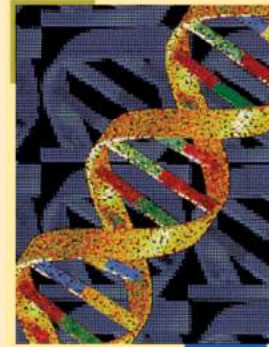
Law and the Human Genome Review

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Revista de Derecho y Genoma Humano



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The European Court of Human Rights' judgment in the case Parrillo v. Italy*

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Resumen / Abstract: En este artículo se analiza la sentencia del Tribunal Europeo de Derechos Humanos en el caso Parrillo c. Italia (2015), en la que el Tribunal rechazó la solicitud de una mujer italiana (Sra. Parrillo), alegando el derecho a donar sus embriones congelados a la investigación científica. La Corte se negó a incluir este derecho dentro de la protección de la "vida privada y familiar" prevista en el artículo 8. Este trabajo ofrece una visión general de la regulación de las tecnologías de reproducción asistida en Italia, explorando cómo la ley n.º. 40/2004 ha sido modificada por la jurisprudencia del Tribunal Constitucional italiano. A continuación, examina la decisión del Tribunal de Estrasburgo, especialmente desde el punto de vista de la relación entre derecho y ciencia, y se centra en la definición jurídica del vínculo entre los embriones congelados y sus «potenciales padres». Finalmente, describe y analiza la decisión

* Article received on November 16, 2016 and accepted for publication December 12, 2016.

nº. 84/2016 del Tribunal Constitucional italiano, poco después del caso Parrillo, que rechazaba una denuncia similar relativa a la donación de embriones criopreservados para investigación científica.

This paper analyses the European Court of Human Rights' judgment in the case *Parrillo v. Italy*, (2015), in which the Court rejected the application of an Italian woman (Mrs. Parrillo), claiming the right to donate her frozen embryos to scientific research. The Court refused to include this right into the protection of "private and family life" provided by ECHR art. 8. The paper provides for an overview of ART legal regulation in Italy, exploring how law n. 40/2004 has been changed by the Italian Constitutional Court's jurisprudence. It then considers the Strasbourg Court's decision, especially from the point of view of the relation between law and science and focusing on the legal definition of the link between frozen embryos and their "potential parents". Finally, it describes and analyzes decision n. 84/2016 of the Italian Constitutional Court, coming soon after the *Parrillo* case, which rejected a similar complaint, regarding cryopreserved embryo donation to scientific research.

Palabras clave / Keywords:

Tecnologías de reproducción asistida / Embrión / Tribunal Europeo de Derechos Humanos / Normativa italiana.

Assisted Reproductive Technologies / Embryo / European Court of Human Rights / Italian regulation.

1. The facts

In 2002 Mrs. Parrillo, an Italian citizen, and her partner underwent *assisted reproductive technologies*. Five embryos were obtained from IVF procedures and cryopreserved but, unfortunately, in 2003, Mrs. Parrillo's partner died in a bomb attack in the Iraqi city of Nasiriya, where he was making a movie, together with other 27 person killed and almost 60 people injured.

Mrs. Parrillo decided not to have the embryos implanted, but to donate them to scientific research. The hospital refused to release them as, according to art. 13 of law n. 40 of 2004 (law regulating assisted reproductive technologies¹), the use of embryos for scientific research is

¹ See Legge 19 febbraio 2004, n. 40, *Norme in materia di procreazione medicalmente assistita*, in G.U., 24 February 2004, n. 45.

forbidden, unless it is aimed at "therapeutic or diagnostic purposes" to "protecting the health and development of the embryo"².

After the exhaustion of domestic remedies, Mrs. Parrillo filed an application with the European Court of Human Rights against the Italian Republic, alleging the violation of art. 8 (right to respect for private and family life) and of art. 1 of protocol n. 1 (protection of property) of the European Convention of Human Rights [ECHR]. The first complaint (art. 8) has been rejected, while the second (art. 1 of protocol 1) has been declared inadmissible³.

This paper will analyze the European Court decision of 2015, starting from the Italian regulation of assisted reproductive technologies and ending with the decision of the Italian constitutional Court n. 84 of 2016, following the Strasbourg Court pronouncement and regarding the same issue: the possibility to donate cryopreserved embryos to scientific research.

2. The Italian legal regulation of assisted reproductive technologies

In 2004, the Italian Parliament approved law n. 40 regulating assisted reproductive technologies [*hereinafter: ART*]. Shortly after its approval, in June 2005, a referendum was held to abrogate some of its articles, but the voter turnout was below the required 50% threshold⁴.

² See law n. 40/2004, art. 13: "1. Any experiment on a human embryo is forbidden. 2. Clinical and experimental research on a human embryo shall be authorized only on condition that it is performed exclusively for therapeutic or diagnostic purposes with the aim of protecting the health and development of the embryo and that no alternative methods exist" (English translation quoted by the Strasbourg Court decision). With regard to ART legal regulation in Italy, see CASONATO, Carlo, *Introduzione al Biodiritto*, Giappichelli ed., Torino, Italy, 2012; on the relation between law and biotechnology and criminal law, both from a general point of view and focusing on the Italian law n. 40/2004, see ROMEO CASABONA, Carlos María, "Criminal Policy and Legislative Techniques in Criminal Law on Biotechnology", *Revue internationale de droit penal*, Vol. 82, 2011/1, DOI: 10.3917/ridp.821.0083.

³ See European Court of Human Rights, Grand Chamber, case of *Parrillo v. Italy*, Application no. 46470/11, 27 August 2015; PENASA, Simone, "La decisión del TEDH en el caso 'Parrillo v. Italia': la donación de embriones a la investigación científica. Entre identidad biológica de la mujer y protección del 'potencial de vida' del embrión", *Derecho de Familia*, Vol. 1, 2016, pp. 194-206.

⁴ The results of the referendum are available at the website of the ITALIAN MINISTRY OF INTERIOR: <http://elezionistorico.interno.it/index.php?tpel=F&dtel=12/06/2005&tpa=Y&tpe=A&lev0=0&levsut0=0&es0=S&ms=S> [Last accessed: November 10 2016].

Although the law has not been repealed by referendum, it has been changed by the Italian Constitutional Court, which has deemed it unconstitutional on several occasions.

One of the most controversial issues surrounding law n. 40 was the balancing of competing interests, focusing on the protection of embryos, at the expenses of parents' rights and women's health⁵.

Art. 1 of law n. 40 clearly takes into consideration and guarantees the rights of all subjects, including the unborn; to this aim, it contained many provisions limiting the possibility of creating spare embryos left over from fertility treatments.

Art. 14 prohibited cryopreservation of embryos (except where they could not "be implanted into the uterus for reasons of serious and proven *force majeure* affecting the state of health of the woman concerned which were unforeseeable at the time of fertilization", in this case the law provided that "cryopreservation of the embryos shall be authorized until the date of transfer, which shall be effected as soon as possible"⁶) and limited the creation of embryos to a number that was "absolutely necessary for a unique, contemporary facility, not exceeding three".

These provisions have been deemed unconstitutional by the Italian Constitutional Court which, with decision n. 151 of 2009, stated that art. 14 infringed art. 32 ("right to health") and art. 3 (principle of equality) of the Constitution. Limiting the creation of embryos to a certain number, in fact, could affect women's health, forcing them to undergo several ART procedures, in case of unsuccessful previous treatments, putting their health at risk and proposing identical treatment for dissimilar situations⁷. The Constitutional Court's decision thus introduced an exception from the prohibition on cryopreservation provided by art. 14.

⁵ See law n. 40/2004, art. 1: "In order to remedy reproductive problems arising as a result of human sterility or infertility, recourse may be had to medically assisted reproduction in the conditions and in accordance with the procedures provided for by this Law, which guarantees the rights of all the persons concerned, including those of the subject thus conceived", *ivi*.

⁶ *Ibid.*

⁷ See Corte costituzionale, decision n. 151/2009, English translation available at: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/CC_SS_151_2009_EN.pdf [Last accessed: November 10 2016]; BRAGANO, Giuseppe / GIANNOLI, Luca, "The Italian Constitutional Court modifies Italian legislation on assisted reproduction technology", *Reproductive BioMedicine Online*, No. 3, Vol. 20, 2010, pp. 398-402, doi: 10.1016/j.rbmo.2009.11.025.

Art. 1 stated that access to ART was aimed at facilitating "resolution of problems stemming from infertility or reproductive human infertility", limiting the right of couple with genetic risk to undergo ART procedures, unless they were sterile or infertile. In 2015, the Constitutional Court ruled that this prohibition provided by art. 1 was unconstitutional (decision n. 96/2015)⁸. Even in this case, the Court found an infringement of both art. 32 and art. 3 of the Constitution, recalling the decision of the European Court of Human Rights *Costa and Pavan v. Italy* (2012). In that case an Italian couple, which was healthy carrier of cystic fibrosis, had claimed the right to access to ART to conceive a child unaffected by this genetic disease and the European court had stated that there had been an infringement of art. 8 of ECHR⁹.

Finally, in 2014 the Italian Constitutional Court held that the prohibition of heterologous medically assisted reproductive technologies was unconstitutional, being a violation of the right to found a family, without a proper balancing between the interests at stake and discriminating against couples needing a gamete donation to conceive a child¹⁰.

It has to be noted that, although in Italy only the Constitutional Court has the power to assess the unconstitutionality of law, lower courts have provided for a wide construction of law n. 40/2004, including rights which had not been considered by the Parliament. For example, this was the case of Florence, Bologna or Cagliari courts, granting access to pre-

⁸ See *Corte costituzionale*, decision n. 96/2015, English translation available at: http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S96_2015_en.pdf [Last accessed: November 10 2016].

⁹ See European Court of Human Rights, case of *Costa and Pavan v. Italy*, Application no. 54270/10, 11 February 2013.

¹⁰ See *Corte costituzionale*, decision n. 162/2014, English translation available at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/162-2014_en.pdf, [Last accessed: November 10 2016]; Biondi, Stefano, "Access To Medical-Assisted Reproduction And Pgd In Italian Law: A Deadly Blow To An Illiberal Statute? Commentary To The European Court On Human Rights' Decision *Costa And Pavan V Italy* (ECtHR, 28 August 2012, App. 54270/2010)", *Medical Law Review*, No. 3, Vol. 21, 2013, pp. 474-486, doi: 10.1093/medlaw/fwt010; PENASA, Simone, "The Italian regulation on Assisted Reproductive Technologies facing the European Court of Human Rights: the case of *Costa and Pavan v. Italy*", *Revista de Derecho y Genoma Humano / Law and the Human Genome Review*, No. 37, 2012, pp. 155-78.

implantation diagnosis even before ruling n. 96/2015 of the Constitutional court¹¹.

The judicial dialogue among the Italian courts, the Italian Constitutional Court and the European Court of Human Rights brought about a profound change in the legal regulation of ART in Italy, prompting a different balancing of rights, especially when women's health rights were at stake.

When coming to the use of spare embryos for research, however, things seem to have been treated differently, as it has been shown by the decision of the Italian Constitutional Court n. 84/2016, which came shortly after the decision of the decision of the Strasbourg Court and which will be analyzed in the fourth paragraph of this paper.

3. The European Court of Human Rights decision in *Parrillo*

The European Court of Human Rights' decision in *Parrillo* was a complex one, including some unanimous decisions, a majority decision, two concurring opinions (Judge Pinto De Albuquerque and Judge Dedov), one joint partly concurring opinion (Judges Casadevall, Raimondi, Berro, Nicolaou and Dedov), one joint partly dissenting opinion (Judges Casadevall, Ziemele, Power-Forde, De Gaetano and Yudkivska), one partly dissenting opinion (Judge Nicolaou) and one dissenting opinion (Judge Sajó).

The opinions delivered by the judges did not address only the issue of embryo research, focusing also on procedural issues, like the exhaustion of domestic remedies and the failure to meet the six-month time limit provided by article 35 § 1 of the European Convention on Human Rights [ECHR]. Besides, the applicant alleged a violation of art. 8, complaining that the prohibition of embryos' donation to scientific research infringed

¹¹ The Italian lower Courts' decisions are available at the website of *Trento Research Group BioDiritto* <http://www.biodiritto.org/index.php/item/480-dossier-come-%C3%A8-cambiata-la-legge-40-2004-2014> [Last accessed: November 10 2016]; Jorqui, María, "El Tribunal de Cagliari (Italia) da luz verde al diagnóstico genético preimplantatorio", *Revista de Derecho y Genoma Humano / Law and the Human Genome Review*, No. 27, 2007, pp. 137-177. See also *Biolaw Journal – Rivista di BioDiritto*, No. 2, 2014, regarding law n. 40/2004, available at: <http://www.biodiritto.org/lojs/index.php?journal=biolaw&page=issue&op=view&path%5B%5D=2%2F2014&path%5B%5D=showToc>.

her right to respect for private life¹². Relying on Article 1 of Protocol No. 1 to the Convention, Mrs. Parrillo also submitted that she had a right of ownership of her embryos and that this right had been infringed by the State, without any public-interest ground¹³.

3.1. The exhaustion of domestic remedies and compliance with the six-month time-limit

The Court rendered unanimous ruling with regard to the issue of the exhaustion of domestic remedies, which had been questioned by the Italian Government, considering that a similar question had been raised by the tribunal of Florence and was, at that time, pending on the Constitutional Court and that a law conflicting with European Convention should have been submitted to the Constitutional Court.

The Court dismissed this argument recalling that, although the law ratifying the European Convention on human rights in the Italian legal system enjoys a supra-legislative rank, between an ordinary law and the Constitution and the Constitutional Court has the power to state that a law is unconstitutional because it infringes the Convention, there is no direct access to the Constitutional Court.

Even the Italian Government's objection regarding the compliance with the six-month time-limit has been rejected, considering that this period starts to run only when "the situation complained of has come to an end". The majority opinion concluded that, although law n. 40/2004 entered into force after the death of Mrs. Parrillo's partner, it had an impact on her private life and it had to be considered as a continuing

¹² The relevant parts of Article 8 provide: "1. Everyone has the right to respect for his private ... life ... 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

¹³ Article 1 of Protocol No. 1 to the Convention provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

interference with her rights, thus refusing to consider the time period running only from the date on which the law came into force.

The partly dissenting opinion of Judge Nicolaou, instead, considered that the tenuous link between the applicant and the frozen embryos affected the application, which should have been dismissed for exceeding this time limit. The nature of the relation between the applicant and the embryos has been debated by the majority opinion, as well as by the concurring and dissenting opinions and it can be considered a crucial point.

3.2. Alleged violation of article 8: right to respect for private and family life

On the merit, with regard to article 8, the Court considered three main points.

The first point regarded the applicant's victim status, which had been questioned on the basis of the time elapsed between her partner death and the entry into force of law n. 40. This profile had already been considered with regard to the compliance with the six-month limit, in particular by the partially dissenting opinion of Judge Nicolau. The Court reiterated the same arguments developed to respond to the objection regarding time limit and ruled that the Italian legislation had a direct impact on the will of the applicant to donate the embryos to research. To this aim, the Court considered the importance of the "biological link between the applicant and her embryos and the plan to start a family".

The second point regarded the violation of article 8 of the Convention, with regard to the applicant's private life. For the first time, the Strasbourg Court had to decide whether the donation of spare embryos to scientific research was to be included in ECHR Article 8 protection of the right to respect for private and family life.

The Italian Government had objected that art. 8 applied only indirectly in this case, since the applicant had no intention of proceeding with embryos transfer to generate a pregnancy, but "only" to donate them to scientific research. Besides, the Government claimed that even if there had been an infringement of the applicant's private life, the State was pursuing a legitimate aim, embryo protection, which is in line with the Italian legal framework, putting together abortion and the ban to research of embryos.

Both these points have been questioned by the claimant, who argued that her right to private life had been violated by the ban and pointed out the inconsistencies of the Italian legal system, which regulates both abortion and the importation and use of stem cell lines use in Italian laboratories.

The majority opinion delivered by the Court made an extensive use of legal comparison, taking into consideration the international legal framework (quoting for example: *Murillo and Others v. Costa Rica* judgment of the Inter-American Court of Human Rights, 28 November 2012), national legal systems and also the documents and opinions delivered by political (like, for example, the European Parliament or the Parliamentary Assembly of the Council of Europe) as well as by ethical bodies and committees (like the European Group on Ethics and Science in New Technologies (EGE), the Opinion of the Italian National Bioethics Committee on adoption for birth ("ADP") (18 November 2005) and Report of the Unesco International Bioethics Committee (IBC) on the ethical aspects of human embryonic stem cell research (6 April 2001).

The court recalled also the European citizens' initiative "One of us", which aimed at advancing the protection of human life from conception, although the European commission on 2014 did not upheld this proposal.

Even when considering the Italian legal system, the European Court made reference to a complex legal framework. Law n. 40 of 2004 has been deemed unconstitutional on many occasions, changing over time. Besides, even before the Constitutional judgments occurred – as said before –, some courts had favored a broad construction of law n. 40/2004, consistently with constitutional values.

The Strasbourg Court recalled also the opinion of the Italian National Bioethics Committee, on abandoned cryopreserved embryos, which had endorsed "adoption for birth", i.e. the adoption of surplus embryos; although it has to be reminded that five "concurring" or "dissenting" opinions were filed on that occasion by some members of the Committee¹⁴.

¹⁴ See the opinion of the Italian National Bioethics Committee, *L'adozione per la nascita (apn) degli embrioni crioconservati e residuali derivanti da procreazione medicalmente assistita (P.M.A.)*, 18 November 2005 (available at the website of the Italian National: <http://presidenza.governo.it/bioetica/testi/APN.pdf> [Last accessed: November 10 2016]).

This international and national legal, political and ethical framework is taken into consideration by the Court to show that there is no consensus on the use of human embryos for scientific research.

The Court considered that the applicant no longer intended to start a family, thus excluding any infringement of the right to respect for family life. Nevertheless, the Court concluded that art. 8 protection of private life encompassed the right to decide the fate of spare embryos.

To this end, the Court adopted a wide interpretation of art. 8, recalling the right to become or not become parents (quoting its previous decisions in *Evans*¹⁵ and *A, B and C v. Ireland*¹⁶) and stressing the existence of a link between the embryos and the recurrent, based on the fact "that the embryos contain the genetic material of the person in question and accordingly represent a constituent part of that person's genetic material and biological identity". This point has been repeatedly affirmed by the Court and it has also been questioned by the partly dissenting opinion of Judges Casadevall, Ziemele, Power-Forde, De Gaetano and Yudkivska which, although sharing the view that there has been no violation of art. 8 of the ECHR, rejected the inclusion of the right to decide the fate of embryos into art. 8 protection. According to this opinion, embryos are "a separate and distinct entity albeit at the very earliest stages of human development" and defining them in the light of another subject's identity is seen as an objectification: "a positivist and reductionist view of the human embryo".

This same issue was raised by the concurring opinion of Judge Pinto De Albuquerque, which found a contradiction between the rejection of the application and the definition of embryos as a "constituent part" of the recurrent biological identity. Recalling the need for respect of dignity of human embryos, the judges defined as "incompatible with the Convention" their use (and destruction) to obtain embryonic stem cells. Similarly, the concurring opinion of Judge Dedov recalled the "absolute" right to life, stating that it was "unnecessary to explain why

¹⁵ See European Court of Human Rights, case of *Evans v. The United Kingdom*, application no. 6339/05, 10 April 2007.

¹⁶ See European Court of Human Rights, case of *A, B and C v. Ireland*, application no. 25579/05, 16 December 2010; BUSATA, Lucia, "La sentenza A, B e C c. Irlanda: la complessa questione dell'aborto tra margine d'apprezzamento, consenso e (un possibile) monito", *Diritto Pubblico Comparato ed Europeo*, 2011-II, pp. 445-454, DOI: 10.1443/32814.

a murderer, a disabled person, an abandoned child or an embryo should be kept alive" thus excluding that the margin of appreciation came into it. From this perspective, the link between the applicant and the embryos is questioned and deemed almost non-existent, stating that Mrs. Parrillo's rights would not be affected "if the embryo were donated to another woman anonymously".

Even the joint partly dissenting opinion of Judges Casadevall, Ziemele, Power-Forde, De Gaetano And Yudkivska focused on this point, founding "disconcerting" the reasoning of the majority opinion and stating that embryos cannot be "reduced to constituent parts of anyone else's identity—biological or otherwise".

Nevertheless, the Court concluded that "the right invoked by the applicant to donate embryos to scientific research is not one of the core rights attracting the protection of Article 8 of the Convention as it does not concern a particularly important aspect of the applicant's existence and identity".

The Court and the parties have also focused on the margin of appreciation, whose breadth has been debated.

The Court agreed with the Italian Government, arguing that State choices regarding embryo research fall within their margin of appreciation.

The Court goes further and explains the factors to be taken into account to define the margin of appreciation with regard to art. 8. First, an "important facet of an individual's existence or identity" must be at stake: according to the Court there is no consensus to this regard and the Court itself agrees that as far as the applicant's claim does not concern "prospective parenthood", it does not affect the core rights protected by art. 8. Second, when "delicate moral and ethical questions" are at stake, the margin of appreciation is wider. Third, the Court recalls the comparative-law materials and the Council of Europe and European Union documents (like, for example, the Oviedo Convention), conferring a wide discretion to the States and presuming a plurality of views, with

regard to human embryos research¹⁷. In other words: there is a lack of European consensus on this subject and it follows that there is a wide margin of appreciation¹⁸.

Only the dissenting opinion of Judge Sajó expressed the view that the choice concerning the destiny of frozen embryos deals with "an intimate aspect" of the applicant's life, being an exercise of the right to self-determination, although recognizing that the margin of appreciation is wide because of the lack of consensus. Unlike the previous opinions, Judge Sajó considered that the blanket ban provided by the Italian law was in contradiction with the possibility of abortion and of using stem cells lines in laboratories and that that there had been no inclusive debate before the adoption of these norms.

3.3. *Alleged violation of article 1 of protocol no. 1 to the convention: protection of property*

With regard to the alleged violation of article 1 of Protocol no. 1 to the Convention, the Court unanimously declared that the complaint was inadmissible. The Government and the applicant had interpreted this provision according to " and that "embryos conceived by *in vitro* fertilization could not be regarded as 'individuals'".

The Court, although recognizing that the term "possession" within the meaning of Article 1 of Protocol No. 1 had to be interpreted autonomously and without assessing the question of where life begins, refused to define embryos as "possessions", considering the economic scope of that provision.

¹⁷ See PERERA SÁEZ, Carolina / VERGARA LACALLE, Óscar, "Embriones supernumerarios en las técnicas de reproducción humana asistida. ¿Qué hacer con ellos? Análisis jurídico y ético de las opciones legales en España", *Revista de Derecho y Genoma Humano / Law and the Human Genome Review*, No. 43, 2015, p. 75 recalling the debate on embryo research in a comparative perspective and in particular in the Spanish legal system.

¹⁸ ZAGREBELSKY, Vladimiro, "Parrillo c. Italia'. Il destino degli embrioni congelati tra Convenzione europea dei diritti umani e Costituzione", *Diritti umani e diritto internazionale*, Vol. 3, 2015, p. 612.

4. After Parrillo: decision n. 84 of 2016 of the Italian Constitutional Court

On 7 December 2012, a Court in Florence had raised the question of constitutionality of art. 13 of law n. 40/2004, also with regard to the ban on donating surplus embryos to scientific research. On 19 March 2014, the examination of the question was adjourned by the President of the Constitutional Court, pending the decision of the Grand Chamber on the *Parrillo* case. After the decision of the European court occurred, the Italian Constitutional Court, dismissed the application ruling that the question was inadmissible (decision n. 84 of 2016¹⁹).

To foresee the possibility of donating frozen embryos to research, the Court should have written an "expansive" judgment, adding some words to law n. 40/2004: a solution which is possible, but which is precluded with regard to issues requiring the use of discretionary power by the Parliament.

The claimants wanted to donate their frozen embryos to scientific research and, unlike the *Parrillo* case, these embryos would be "inevitably be destined for self-destruction", some of them being affected by a disease (exostosis) and some of them being not subjected to biopsy. The applicants argued the unconstitutionality of law n. 40/2004, since it had not made any distinction between ill and healthy cryopreserved embryos, prohibiting their use for research *tout court*. This passage is important and marks the difference with the *Parrillo* case, because none of these embryos are supposed to be implanted.

As it has already be recalled, law n. 40 del 2004 aimed at limiting and even avoiding the creation of surplus embryos and forbade both cryopreservation (unless "reasons of serious and proven force majeure affecting the state of health of the woman") as well as "the creation of a higher number of embryos than that strictly required for a single and simultaneous implantation".

¹⁹ See *Corte costituzionale*, decision n. 84/2016, English translation available at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S84_2016_EN.doc [Last accessed: November 10 2016]; PICCCHI, Cinzia, "La procreazione medicalmente assistita tra biologia e volizione, nella sentenza n. 84 del 2016 della Corte costituzionale", *Studium Iuris* (forthcoming).

The Constitutional court acknowledged that its jurisprudence had brought about some major changes: the existence of much more cryopreserved embryos and the fact that many of them are affected by diseases. To this aim, the court recalled its previous jurisprudence regarding law n. 40: in particular, decision n. 151/ 2009, in which the Court stated that art. 14 infringed art. 32 ("right to health") and art. 3 (principle of equality) of the Constitution²⁰ and decision n. 96/2015 where the Constitutional court held art. 1 of law n. 40 as unconstitutional, limiting the right of couples with genetic risk to undergo art procedures to select healthy embryos²¹.

Nevertheless, with regard to the issue of embryos' donation to scientific research, the Court refused to consider the constitutionality of the law, dismissing the complaint on the basis that "the choice made by the contested legislation is one of such considerable discretion, due to the axiological issues surrounding it, that it is not amenable for review by this Court". According to the Constitutional Court, the "tragic choice" between the respect for the principle of life and the requirements of scientific research pertains to the Parliament.

The Constitutional Court approached for the first time the balancing between embryo's protection and scientific research, taking as a starting point the "anthropological dignity recognized to it".

Besides, the Courts recalled the divisions "on an ethical and scientific level", listing a series of arguments which shows the lack of consensus on this issue.

The European Court of Human Rights' decision of 2015 was evoked many times by the Constitutional Court, to indicate the lack of a "broad European consensus" on this subject and the existence of a wide margin of appreciation by the States.

The discretion surrounding the use of leftovers embryos for scientific purposes suggests that it should be addressed by Parliament, assessing the appropriateness of the use of embryos for research and considering all the possible solutions (only diseased embryos should be used? how

²⁰ *Supra*, note 7.

²¹ *Supra*, note 8.

should informed consent be expressed? etc.); but it has to be noted that the Constitutional Court indicates that the choices of Parliament must be taken on the basis "(...) of 'scientific evidence' and the extent to which it is endorsed on supranational". This is a very important point, which is in line with previous pronouncements of the Constitutional Court, drawing the line between law and science, for example in the leading case n. 282 of 2002, recalling the role of medical "autonomy and responsibility".²²

Nevertheless, this statement seems not completely consistent with the opinions quoted by the Court itself, recalling for example the possibility of regressing adult somatic cells to the stage close to embryonic as an alternative outcome. This same technique was recalled by the dissenting opinion of Judge Sajo in the Parrillo decision, as an alternative to the use of frozen embryos for scientific purposes, but it should be remembered that this assumption is not based on scientific consensus.

Both Courts and Parliaments should take into account this issue very seriously.

5. Conclusion

Thirty years after the legalization of abortion (see law n. 194/1978 in Italy²³) and after the best known Supreme Courts' decisions on this issue²⁴, the debate surrounding human embryos is still heated and divisive.

ART open up new possibilities, providing new definitions of concepts like "family", "mother" and "father" and changing the role played by "parents" and "gamete donors".

²² See MACIOTTI, Matteo / PENASA, Simone / TOMASI, Marta, "Consent, Privacy And Property In The Italian Biobanks Regulation: A Hybrid Model Within The EU?", *Ethics, Law and Governance of Biobanking*, MASCALZON, Deborah (Ed.), Springer, Dordrecht, 2015, p. 68.

²³ See law 22 May 1978, n. 194, *Norme per la tutela sociale della maternità e sull'interruzione volontaria della gravidanza*, in *G.U.* 22 May 1978, n. 140 (Law on the social protection of motherhood and the voluntary termination of pregnancy, English translation available at: http://www.columbia.edu/ito/history/degrazia/courseworks/legge_194.pdf [Last accessed: November 10 2016].

²⁴ See for example US Supreme Court, *Roe v. Wade*, 410 U.S. 113 (1973); Italian Constitutional Court, decision n. 27/1975 and French *Conseil constitutionnel*, Decision 74-54 DC of 15 January 1975 (English version available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/7454DCa7454dc.pdf>).

Fertilization may occur outside the female body and, unlike in the case of abortion, women and men may be considered on the same footing, with regard to the right to become or not become a parent, until embryo transfer occurs²⁵.

ART made possible the existence of surplus embryos, which may be healthy or diseased: a number of them will never be used to generate a pregnancy and will be cryopreserved indefinitely, or destroyed.

Ethical, scientific and legal complexities surround the issue of embryos' donation to scientific research and, more generally speaking, the fate of frozen embryos. Both the European Court of Human Rights and the Italian Constitutional Court stressed the lack of consensus on this topic which is, in fact, very complex and should be addressed primarily by Parliaments.

The moral and legal controversies surrounding ART regard not only embryos but other issues as well concerning, from a more general point of view, the relation between law and science. This is a crucial point, since scientific advancements as well as social changes create new areas of freedom, which are characterized by ethical complexity and which require new legal approaches.

The Strasbourg Court, for example, refused to describe the link between the applicant and "her" embryos in terms of "possession" and the decision was unanimous to this regard. Embryos are not "goods" to be regulated in terms of "ownership"; nevertheless there is a link between them and the "potential parents", which should not be disregarded, but defined in new ways.

New definitions are probably required, taking into consideration that many factors come into play when adopting legal regulation. The attitude towards human embryos depends on the ethical position adopted: if their inherent dignity is considered as an absolute and prevailing value, legal systems will prohibit any scientific use of them.

Where research is allowed, embryos might be considered differently depending on their destination: pregnancy or cryopreservation. Many cryopreserved embryos will never become human beings: this was the

²⁵ See for example *Evans v. The United Kingdom*, *supra* at note 15.

case argued in front of the Italian Constitutional Court, regarding diseased embryos, which will not be implanted, nor "adopted".

New attitudes and definitions are needed, to express the relation between frozen embryos and the only persons who have a biological and emotional link with them (the "potential parents"), which should be based on the principle of informed consent.

It seems strange, for example, that the Strasbourg court did not focus on the consent of Mrs. Parrillo's deceased partner, considering it only marginally (§ 196), and rather concentrating on the ethical controversies surrounding human embryos.

Ethically controversial issues will be brought to the attention of courts over time, because of scientific advancements and of social changes, demanding legal responses.

Parliaments will make different choices, but a correct approach to these issues is crucial, since legal systems are increasingly required to dialogue with science.

From this perspective, it is important that ethical as well as scientific arguments are considered, remembering that these are two different domains, with many reciprocal connections but defining different approaches. Ethics deals more with pluralism and thus with different possible positions, which may be equally legitimate; while scientific evidence, which is determined by international rules, generally does not include pluralism as a basic value legitimating different conclusions.

Lawyers should take this approach as a starting point, prompting the dialogue between law and science.