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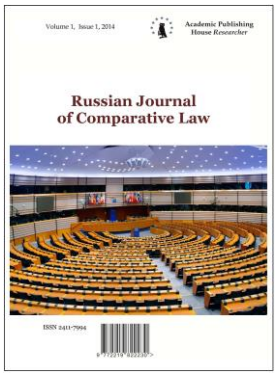

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The Human Embryo in the Case-Law of the European Court of Human Rights

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Abstract

This paper presents an analysis of the case-law of the European Court of Human Rights regarding the status of a human embryo. At the beginning, the author makes an overview of the legal documents on the subject-matter produced by intergovernmental organisations on both universal and regional levels. The overview covers also a national legislation of Australia, China, Japan, United States and most of the European states. Further the paper elaborates on the decisions and judgments of the European Court adopted for the last fifty five years. The summary of this case-law is provided in a chronological order from the oldest to the newest one. Finally, the author comments on the practice of the European Court of Human Rights with regard to the issue of the human embryo legal position. The case-law in question certifies that human embryo cannot be considered "a thing", but at the same time it is still not "a person" for the purposes of the Article 2 of the Convention.

Keywords: European Court of Human Rights, European Convention on Human Rights, Court, Convention, human embryo, abortion, embryo research.

> *«If the term „everyone" in Art. 2 ECHR included embryos, research with human embryos, including the mixing of a human embryo with an animal embryo, which ends with the destruction of the embryo would be prohibited»* [1].
>
> Marion Weschka

1. Introduction

Recently the Grand Chamber of the European Court of Human Rights (hereinafter also the Court) issued a judgment in the case of *Parrillo v. Italy* [2], which concerns the issue of human embryo research. This is not the first judgment of this Court, where it has dealt with a sensitive question of a legal status of a human embryo. The issue of the protection of life of an unborn child was a subject to a large discussion, *inter alia*, in a majority of cases concerning abortion. The topic also relates to certain aspects of the right to private life.

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The aim of this paper is to answer the question, what is an attitude of the European Court to the position of a human embryo. Is it a property of parents, that should be protected under Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter also the 'Convention') or is it a person, whose life deserves protection under Article 2 of the Convention?

The current study consists of three main parts. At the beginning, the author will focus on the approaches taken by different international organisations and states towards regulation of the research on human embryos. The overview of such approaches will give us a possibility to understand whether there exists a consensus toward the subject-matter and how the issue is regulated all over the world. The European Court of Human Rights does not act in a vacuum; it thoroughly follows legal tendencies not only in the Council of Europe (hereinafter also the 'CoE') Member States, but also in other countries and intergovernmental organisations. Then the paper will concentrate on the outline of the up to date Court's case-law relating to a human embryo position. The judgments and the decisions will be provided in a chronological order in view of the fact that the Convention is a living instrument, which reflects changes in society. Finally, the author will provide a reader with her reflections on the problem of whether the protection of human rights of a person begins with the day of birth or already from the moment of conception.

2. Materials and methods

The main sources for writing this article became the case-law of the European Court of Human Rights, monographs on the subject-matter, journal publications and Internet archives. The study used the basic scientific methods such as the historical method, analysis, synthesis and the method of comparative law. The use of historical method allowed to describe the practice of the Court regarding the human embryo status in a chronological order. Analysis and synthesis always complement one another. Every synthesis is built upon the results of a preceding analysis, and every analysis requires a subsequent synthesis to verify the results. The author applied these two methods throughout the paper. The method of comparative law served as a tool for defining the difference in views on the subject from the sides of the states and intergovernmental organisations.

3. Discussion

1. Regulation of human embryo research in the world

The topic of the status embryo is closely connected with the question of human embryo research. As we will see further, the positions of the main subjects of international law (states and intergovernmental organisations) in this regards are quite polar. If one considers an embryo to be already a human, there can be no any research opportunities with this regard. When one contemplates that it is not a human being yet, then the research using human embryos may become possible. Each rule, nonetheless, has its exceptions. There exist states, which prohibit research on embryos, but allow for abortions (for example, Italy). Similarly, there are countries, where abortions are strictly prohibited and at the same time some medical experiments on humans are permitted (This is the case of Poland).

The prohibition on human embryo research on national level varies considerably from the state to the state [3; 4; 5; 6]. Moreover, the policies in this respect are not stable and change in time [7; 8]. Politics and approaches taken by significant international intergovernmental organisations strongly influence the position of states [9]. At the international level, many such organisations have undertaken efforts to regulate human embryo research. Nevertheless, only a few of them have been successful and only to a limited extent.

The United Nations, its bodies and related to it organisations have issued a number of declarations relating to the subject-matter. None of them is, however, of binding nature. Being the source of soft-law they are difficult to enforce. An excellent example is the **Universal Declaration on the Human Genome and Human Rights**, which in its preamble specifies that "research on the human genome … should fully respect human dignity, freedom and human rights" [10]. This declaration does not prohibit human embryo research directly, but calls only for the respect of human dignity.

The **International Declaration on Human Genetic Data** [11] of 2003 in its Article 5 specifies that human genetic data and human proteomic data may be collected, processed and stored. Though the purposes of the uses of this data are restricted and include a few reasons, namely, diagnosis and health care, scientific research, forensic medicine and legal proceedings.

Apart from this, the data may be utilised for any other purpose consistent with the Universal Declaration on the Human Genome and Human Rights and the international law of human rights.

More specifically, the **Declaration on Human Cloning** [12] introduces a ban on cloning of human beings. This document is also of a soft-law nature. Observers reiterate that this declaration is "a weak, non-binding political statement" [13]. Similar status has also the UNESCO **Universal Declaration on Bioethics and Human Rights** [14] adopted the same year. Additional information on the subject also draws from universal professional standards of the World Medical Association (WMA) [15] and the International Society for Stem Cell Research [16].

On the European continent, the two strongest regional organisations dealing with the subject of human embryo and human rights are *the Council of Europe and the European Union*. Regarding the first of them, the Parliamentary Assembly of the Council of Europe in 1986 adopted the **Recommendation 1046 (1986)** [17], which forbids any creation of human embryos for the purposes of research. It 1989 it confirmed this approach by adopting the **Recommendation 1100 (1989)** [18].

On 4 April 1997, the CoE had adopted the first legally binding international text, which partially regulates the area of human embryo research, namely the **Convention on Human Rights and Biomedicine** ("Oviedo Convention") [19]. In accordance with Article 2 of this treaty the interests of the human being shall prevail over the interest of science. Article 18 of the Convention specifies that creation of human embryos for research purposes is prohibited. In the states where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo. The meaning of the phrase "adequate protection" is not provided. The Oviedo Convention entered into force in December 1999. It was ratified by 29 out of 47 CoE member states [20]. Most of them have membership in the EU. Germany, the United Kingdom and Russia are not the parties to this international treaty. For the Czech Republic the treaty entered into force already in 2001 [20].

In 2007, the **Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research** gained entry into force. This document is quite vague and envisions that research shall not involve risks and burdens to the human being disproportionate to its potential benefits. It is unclear who is responsible for evaluation of such proportionality. Currently, only 10 CoE member states have ratified this document [21]. The Czech Republic is not among them.

One of the newest texts on the subject is the **Resolution 1934 (2013)** of the CoE Parliamentary Assembly on ethics in science [22], which in para. 3 welcomes the UNESCO initiative to establish the World Commission on the Ethics of Scientific Knowledge and Technology (COMEST) with the view of engaging in ongoing ethical reflection and exploring the possibilities of drafting and periodically reviewing a set of fundamental ethical principles based on the Universal Declaration of Human Rights.

The European Union also has a comparably wide range of documents dealing with the research on human embryo. In accordance with Article 3 of the **Charter of Fundamental Rights of the European Union** [23] the reproductive cloning of human beings is prohibited. The European Group on Ethics and Science in New Technologies (EGE) at the European Commission adopted a number of opinions [24, 25] on the matter. In particular, it specifies that stem cell research aims to alleviate severe human suffering, however, it should comply with ethical and legal requirements [25]. Accordingly, the EU declines to finance human embryo research leading to the destruction of human embryos [26].

In the other continents, e.g. in Africa and America, the regional intergovernmental organisations also were established with the goal to protect human rights and to promote human dignity. Each of the human right treaties produced by the bodies of the African Union and the Organisation of American States contain provisions on protection of human life. As to the matter of regulation of the human embryo research, the **African Union** does not have any specific legal document for it [27]. The author was not able to find any particular treaty regulation on a legal status of human embryo also within the frames of the **Organisation of American States**. Some aspects of the topic may be found in the case-law of the **Inter-American Court of Human Rights**. In its judgment in the case of *Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica* [28], the Inter-American Court has conducted an analysis of the existing in the world instruments regulating the legal status of embryo. In concluded that the human embryo, prior to implantation,

is not covered by the terms of Article 4 of the American Convention on Human Rights (the right to life) [28]. It added that the risk of embryonic loss is present both in IVF and in natural pregnancy.

Let us take a brief look at the diversity of approaches taken by the various state legislative bodies in adjusting human embryo research. In **Australia**, Research Involving Human Embryos Act 2002 has been amended many times [29]. The last changes brought the law of 2014 [30] setting forth criminal responsibility for a number of offences, e.g. use of excess ART embryo and activities involving use of human eggs. The Australian National Health and Medical Research Council allow research on embryos only on condition of licences.

In **China** there are no binding laws prohibiting any type of research on human embryos. The Ministry of Science and Technology and the Ministry of Health of China in 2003 adopted the Ethical Guiding Principles on Human Embryonic Stem Cell Research [31]. Principle 4 states: "Any research aiming at human reproductive cloning shall be prohibited." Nonetheless, this document lacks enforcement mechanisms.

Similar is the situation in **Japan**. The Japanese legislative body has not issued any laws regulating human embryo research to date, although the ministries produced a number of soft-law documents [32]. One of them is Guidelines on clinical research using human stem cells [33]. This document is in general permissive with respect to many types of research including human embryonic cells.

Laws of the **United States** do not prohibit research on human embryos directly. Nonetheless, since 1996 a ban on the use of US Department of Health and Human Services funds for research on the creation of human embryos and research that involved the injury or destruction of human embryos has existed in practice [34]. Every fiscal year the US Congress has passed bills, which totally banned all federal government funding of human embryo research. This ban was partially reversed in 2001 when the National Institutes of Health announced it would fund selective research on human pluripotent stem cells [35]. Today, in view of the progress of science in the world, there is a strong debate in the US as to the need of such research support.

In **Europe**, despite membership of the states in significant intergovernmental organisations such as the European Union (EU) and the Council of Europe (CoE), there is also no consensus with regard to research on human embryo. Summary on regulation of stem cell research in some EU countries may be found on the web of EuroStemCell [36]. In addition, Research division of the European Court of Human Rights for the purposes of rendering judgment in the above mentioned case of *Parrillo v. Italy* conducted a comparative analysis of the legislation of the *CoE Member States* concerning prohibition or permission of research involving human embryo. These comparative law materials show that the legislation of Belgium, Sweden and the United Kingdom allow scientific research on human embryos and the creation of embryos for that purpose (*Parrillo case,* cited above, § 69). In some other countries, such as the Czech Republic, France, Greece, Hungary, the Netherlands, the creation of embryos for scientific research is banned; nevertheless, research using surplus embryos is generally allowed under certain conditions (*Parrillo case,* cited above, § 70). The law of Andorra, Latvia, Croatia and Malta expressly prohibits any research on embryonic stem cells. Meanwhile in Austria, the statutory ban concerns only "totipotent" embryonic cells (*Parrillo case,* cited above, § 74). In many countries, human embryo research is not regulated, but practice shows that such research is conducted. This is the case of Russia, for instance (*Parrillo case,* cited above, § 76).

The outline of this study on the regulation of human embryo research and the legal status of an embryo in the international organisations and the states shows that the approaches introduced by them are rather diverse. The subjects of international law may now consonantly answer to the question of whether the life of a person should be protected from the moment of conception and the destruction of an embryo is impermissible under all circumstances. Given the title and the main objective of the paper, we continue with an examination of the practice of the European Court of Human Rights.

2. Overview of the Court's case-law regarding a status of human embryo

The Court had elaborated on the legal status of human embryo in a number of its cases. Not all of them concerned directly the embryo's right to life. Furthermore, the Court has never recognised the embryo as a direct victim of a breach of the Convention. Most of the cases at issue related to the right of parents to have or not to have children. It was recognised that though

expressly not specified in the Convention, this right is within the scope of Article 8 of the Convention [37].

Compatibility of abortion with the right to life (Article 2) was subject to the Court examination almost from the very beginning [38]. However, in sixties and seventies there were no judgments, but only the decisions to the topic as the complaints in this regards were raised *in abstracto* [39]. For example, in the case of *Brüggemann and Scheuten v. Germany* [40] the European Commission of Human Rights, given the context of the application, did not find it necessary to decide, whether the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention.

In eighties, the issue of abortion and life of an unborn child was raised before the Court by the applicants in the context of the right to effective remedy. This case concerned the group of people campaigning against abortion [41]. When solving the case, the Court, nevertheless, did not decide neither on Article 2, nor on Article 8 of the Convention.

The judgment of the Court in the well-known case of *Open Door and Dublin Well Woman v. Ireland* [42] relating to the right to impart information on abortion was given in 1992. The applicants alleged that the national courts' injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed their rights under Article 10 of the Convention. The Irish government contested these claims should be interpreted against the background of, *inter alia*, Article 2 of the Convention. In this regard, the Court observed that "at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2…" [42] and refused to deal with these claims.

The notion "human embryo" has appeared in the practice of the Court in 1994 in the case of *Phyllis BOWMAN and the Society for the Protection of Unborn Children (SPUC) v. the United Kingdom* [43]. The applicants in this case did not, however, complain of a violation of their parental rights. The case concerned the issue of freedom of expression. Mrs Bowman distributed leaflets stating "We are not telling you how to vote but it's essential for you to check Candidates' voting intentions on abortion and on *the use of the human embryo as a guinea-pig*." The leaflet contained information on the three candidates from the major political parties and outlined their publicly stated views on the subject-matter. On the basis of this, Mrs Bowman was charged for promoting or procuring the election. Before the Court the applicants allege inability to express freely their opinion on the issue as contrary to Article 10 of the Convention. The part of the application submitted in respect of the Society for the Protection of Unborn Children (SPUC) was declared inadmissible *ratione personae* in view of the fact that it was never a subject to domestic proceedings and could not claim to be a victim of a violation of the Convention.

The complaints of Mrs Bowman under Article 10 of the Convention were admissible and the Court has dealt with them in a judgment given a few years later [44]. It has found a violation of this provision of the Convention noting that states have certain margin of appreciation in striking balance between rights to free elections and freedom of expression. Nevertheless, the law in question operated as total barrier to applicant's publishing information with a view to influence voters in favour of anti-abortion candidate and therefore the restriction was disproportionate. In this judgment, the Court did not express any opinion as to possible legal status of an embryo focusing purely on the freedom of expression without analysing the truthfulness and legality of the content of leaflets.

In 2004 the Grand Chamber of the Court gave a judgment in the case of *Vo. v. France* [45], the milestone case with regard to the possible protection of life of an unborn child. Deciding it, the Court was given an opportunity to hold whether the provisions of Article 2 of the Convention extend also to human embryos. The applicant in the instant case submitted that there had been a breach of the right to life on the ground that the conduct of a doctor responsible for the death of her child *in utero* was not classified as homicide.

The Court conducted a detailed analysis with regard to the issue of the beginning of life within the meaning of the Convention and whether the unborn child has such a right. It noted that "Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define "everyone" ("toute personne") whose "life" is protected by the Convention" (*Vo case*, cited above, § 75). Further the Court specified that "*…the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention* and that if the unborn do

have a "right" to "life", it is implicitly limited by the mother's rights and interests" (*Vo case*, cited above, § 80). It observed that the issue of when the right to life begins comes within the margin of appreciation of the CoE member states. As regards to France, the unborn child lacks a clear legal status in its law. Nonetheless, it does not mean that a human embryo is deprived of all protection. According to the Court, the applicant had a possibility to lodge an action for damages against the French authorities on account of doctor's alleged negligence. In view of this, it was concluded that "…even assuming that Article 2 was applicable in the instant case…, there has been no violation of Article 2 of the Convention" (*Vo case*, cited above, § 95).

The judgment was accompanied with a number of separate opinions. Judges Rozakis, Caflisch, Fischbach, Lorenzen and Thomassen submitted that given the fact that the protection of an unborn child is far narrower in scope that the one given to a child after birth, Article 2 of the Convention is inapplicable in this case [46]. In its dissenting opinion Judge Ress wrote: "Since *I consider that Article 2 applies to human beings even before they are born*, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the foetus against the negligent acts of third parties, I find that there has been a violation of Article 2 of the Convention" [47]. Judges Mularoni and Strážnická when further observing that "Article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted. This is made necessary by the potential that exists for genetic manipulation and *the risk that scientific results will be used for a purpose that undermines the dignity and identity of the human being*" [48]. Therefore, in their opinion, the Court should have found an infringement of the Convention.

In the case of *Znamenskaya v. Russia* [49] the Court decided on the status of a stillbirth. In the thirty-fifth week of the applicant's pregnancy, the embryo asphyxiated in her womb. The birth certificate issued by the authorities contained a name of Mr Z., the applicant's husband, indicated as a father of the stillbirth. The applicant contested before domestic courts this registration entry asking for amendment in the birth register that would specify the name of biological father of unborn child, Mr G. The existence of a relationship between the applicant and G. was undisputed and his paternity was not contested. The courts, however, refused to examine the case as a civil action on the ground that the child had not acquired civil rights.

The Court observed that bearing in mind that the applicant must have developed a strong bond with the embryo, an inability to conduct changes in the birth certificate undoubtedly affected her private life guaranteed by Article 8. In its opinion, the situation where a legal presumption is allowed to prevail over biological and social reality is not compatible with the state's obligations under the Convention. Accordingly, there has been a violation of Article 8. In their dissenting opinion, Judges Rozakis, Botoucharova and Hajiyev noted that they are not ready to accept that the applicant's private life encompasses a right to ask for recognition of the paternity of the stillborn child, as part of the states' positive obligations. As to them, this is the child, who could have had, if born alive, a legitimate expectation of being recognised by a biological father as part of his/her family and private life [50].

In 2007 the Court has dealt again with the question of when the life begins in the case of *Evans v. the United Kingdom* [51]. The applicant, Ms Natallie Evans and her partner, Mr J., attended a clinic for reproduction treatment, which resulted in creation of six embryos. A few weeks later she underwent an operation to remove her ovaries. The doctors ask her to wait a few years before the implantation of the embryos. In one year the relationship with a partner terminated and he withdraw the consent for the continued storage and implantation of fertilised eggs.

The applicant introduced before the Court a number of complaints. One of them related to Article 2 of the Convention, in view of the fact that according to the applicant the provisions of English law requiring the embryos to be destroyed once J. withdrew his consent to their continued storage violated the embryos' right to life. The Grand Chamber of the Court referring to the already mentioned case *Vo. v. France* [45], 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*. Therefore, there had been no breach of that provision.

The case of *A, B and C v. Ireland* [51] concerned the restrictions on obtaining an abortion in Ireland. The case is interesting for us from the point of view of the rights of mother to terminate the life of un unborn child. Here the Court stressed that although there is no European consensus on the scientific and legal definition of the beginning of life, there exist a clear consensus on the

minimum standards for abortion services necessary to preserve a woman's health and well-being. Judges Rozakis, Tulkens, Fura, Hirvelä, Malinverni and Poalelungi in their joint partly dissenting opinion noted that "…the Court was not called upon in this case to answer the difficult question of "when life begins". This was not the issue before the Court, and undoubtedly the Court is not well equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins – before birth or not – the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: *… the right to life of the mother, and, in most countries' legislation, her well-being and health, are considered more valuable than the right to life of the foetus"* [52].

The similar thoughts also were expressed in the Court's judgment of 2011 concerning Poland. The case of *R.R. v. Poland* [53] related to a lack of access to prenatal tests resulting in inability to have an abortion on grounds of foetal abnormality. Ms R.R. considered that she had been subjected to inhuman and degrading treatment as a result of the doctors' intentional failure to provide necessary medical treatment in the form of timely prenatal examinations that would have allowed her to take a decision as to whether to continue or terminate her pregnancy. After examination of all the circumstances of the case the Court held that the rights of the applicant under Article 3 and 8 of the Convention were infringed. It again stressed that although there is no European consensus in respect of the period of time when the life begins, most of the CoE states have in their legislation *resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion* (*R.R. case,* cited above, § 186).

The same year the Court has dealt also with the issue of prohibition under national law on the use of ova and sperm from donors for the purposes of *in vintro* fertilisation in the case of *S.H. and Others v. Austria* [54]. The question of whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity was one of the raised by the Court. It was observed that Austrian law does not prohibit going abroad to seek treatment of infertility and that in the event of a successful treatment it contains clear rules that respect the wishes of the parents. Therefore, the Court came to conclusion that there had been no violation of the rights of the applicants under Articles 8 and 14 of the Convention. It, however, did not decide on whether or not the prohibition of gamete donation itself is justified under the Convention. It is of interest to look at the separate opinions to this judgement as regards to the judges' attitude to a position of a human embryo.

Judge de Gaetano expressed an idea that *prohibition of the freezing and destruction of human embryos* "like the prohibitions against racism, unjust discrimination and the marginalisation of the ill and the disabled – *is not a denial of fundamental human rights but a positive acknowledgment and advancement of the same*" [55]. According to him, neither Article 8, nor Article 12 of the Convention can be construed as granting a right to conceive a child at any cost. The "desire" for a child cannot become an absolute goal which overrides the dignity of human life [55]. Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria dissented from the majority decision. They referred to Articles 12 and 15 of the International Covenant on Economic, Social and Cultural Rights [56] which recognise the right of everyone to enjoy the benefits of scientific progress and the right to enjoy the highest standard of physical and mental health [57]. In their opinion there had been a breach of Article 8 of the Convention.

With regard to the previously discussed case, it is of interest to describe the Court's approach to medically assisted procreation using a donor in respect of the same-sex couples. In the case of *Gas and Dubois v. France* [58], the Court observed that the provisions of the French law that anonymous donor insemination is only confined to infertile heterosexual couples cannot be seen as a violation of the Convention in the applicants' case as far as they could not claim to be a victim of it (*Gas and Dubois,* cited above, § 63). The case in question concerned refusal of simple adoption order in favour of homosexual partner of biological mother.

Ban on screening human embryos prior to *in vitro* fertilisation was subject to assessment in the case of *Costa and Pavan v. Italy* [59]. The applicants allege before the Court that being healthy carriers of cystic fibrosis they had no access to preimplantation genetic diagnosis for the purposes of selecting an embryo unaffected by the disease. They complained that the required technique was available to the other categories of persons and relied on Articles 8 and 14 of the Convention. It was observed that the Italian legislation lacks consistency in this area. There exists a possibility of an

abortion on medical grounds if the fœtus turns out to be affected by the disease, but no such a right in advance to prevent probable negative consequences. In view of this, the Court concluded that such a situation is contrary to the Convention.

The case of *Knecht v. Romania* [60] concerned uncooperative conduct of local authorities in returning of seized frozen embryos that the applicant deposited with a private clinic. The applicant's complaint under Article 8 of the Convention specified a breach of her right to a private and family life in so far as she was prevented from becoming a parent by means of an IVF procedure. She submitted that Romania failed to allow her to transfer her embryos into a specialised clinic of her choice. The Court observed that one year after the application was lodged with it, Romanian court expressly acknowledged that the applicant had suffered a breach of her rights under Article 8 and offered her the required redress, namely the embryos had been transferred into a specialised clinic. In view of this, the conclusion was that the Convention was not violated.

On 24 June 2014, the Court gave two judgments in cases relating to a specific aspect of the status of an embryo, *Mennesson and Others v. France* [61] and *Labassee v. France* [62]. The cases concerned recognition in France of parent-child relationships in respect of artificial insemination, which took place abroad. The applicants after a number of unsuccessful attempts to conceive a child using *in vitro* fertilisation (IVF) with their own gametes, decided to go to the United States, where they underwent IVF using own gametes and eggs from a donor. The US doctors implanted the fertilised embryos in the uterus of another woman. Given that in the USA the process in question is legal, the applicants entered into the gestational surrogacy agreements. The surrogate mothers gave birth to two twins (in the first case) and a girl (in the second case).

The couple of Mr and Mrs Mennesson entered into surrogacy agreement in California and as a result, the Supreme Court of California by its judgment recognised that they should be recorded in the birth certificate as the father and mother of the twins. The French authorities, however, refused to recognise these records in birth certificate as far as according to national legislation any reproductive or gestational surrogacy agreement was null and void.

Mr and Mrs Labassee did not challenge the refusal to register the birth of their daughter Juliette, but sought to have the legal relationship recognised on the basis of *de facto* enjoyment of status (in French - "possession d'état"). In France they were able to obtain an "acte de notoriété", a document issued by a judge attesting to the status of a child, which certifies the existence of a de facto parent-child relationship. However, the public prosecutor refused to enter this record into the register. Therefore, the couple was forced to take the matter to court.

In both cases the Court concluded that Article 8 of the Convention was not violated in respect of the parents. It in particular noted that there is no consensus in Europe both on the lawfulness of surrogacy arrangements and on the legal recognition of the relationship between intended parents and children lawfully conceived abroad as a result of such arrangements. This lack of consensus reflects the fact that recourse to surrogacy raised difficult ethical issues. Consequently, the CoE member states have a wide margin of appreciation in making surrogacy-related decisions. The Court also specified that the applicants had been able to settle in France shortly after the birth of the children and live there together. There was nothing to suggest that they were at risk of being separated by the authorities because of their situation in the eyes of French law. Given the practical implications for the applicants' family life and the respondent state's margin of appreciation, the Court held that the French authorities acted in compliance with the Convention.

As regards to the applicants' children, which were born in the US on the basis of the surrogacy agreements, the Court observed that although Article 8 of the Convention does not guarantee a right to obtain a particular nationality, the fact remains that nationality is a component of individual identity and the existing uncertainty may have negative consequences. The fact that the applicants' children were not identified under French law as their own children has implications in terms of the inheritance rights. In view of the importance to be attached to the child's best interests, the Court concluded that there had been a breach of the applicant children's right to respect for their private life under Article 8 of the Convention.

A few days later the Court issued a decision in a case with a similar background, namely *D. and Others v. Belgium* [63]. It concerned the interests of a child who had been born in Ukraine from a surrogate pregnancy, which was signed by the applicants, two Belgian nationals. The Belgian authorities went even further when refused to authorise the arrival of the child on its

national territory. The Court, however, did not find an infringement of the Convention in this case in view of the further developments in the case. When the application was already in the Court, the state authorities at the end granted of a laissez-passer for the child and the family settled in Belgium. It was observed that the Convention could not oblige the CoE member states to authorise entry to their territory of children born to a surrogate mother without the national authorities having a prior opportunity to conduct certain relevant legal checks. Given that, the applicants could reasonably have foreseen that the procedure to have the family relationship recognised and to take the child to Belgium would necessarily take a certain time. In addition, the time taken to obtain the laissez-passer had, at least in part, been attributable to the applicants themselves as they had not submitted sufficient evidence to demonstrate their biological ties to the child. Thus, in refusing to authorise the child's entry to the national territory, the Belgian state had acted within the limits of the margin of appreciation enjoyed by it.

In 2015 the chamber of the Court gave a judgment in the case of *Paradiso and Campanelli v. Italy* [64], where it held that Article 8 of the Convention was violated in view of the fact that the Italian authorities placed in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract. The applicants in the case are two Italian nationals, Ms Donatina Paradiso and Mr Giovanni Campanelli and, according to the birth certificate issued in Russia, their son, Teodoro Campanelli. The first two applicants went to a Moscow-based clinic, which specialised in assisted-reproduction techniques and entered into an agreement with a Russian company. After successful in vitro fertilisation – supposedly carried out using the second applicant's sperm – two embryos "belonging to them" were implanted in the womb of a surrogate mother. A baby was born in February 2011 and in accordance with Russian law, the applicants were registered as the baby's parents. When returned to Italy and asked to register the birth certificate, they were placed under investigation for "misrepresentation of civil status" and violation of the adoption legislation. At the court's request, a DNA test was carried out, which showed that there was no genetic link between the second applicant and the child. On the basis of this, a domestic court decided to remove the child from the applicants. The child was placed in a children's home in a locality that was unknown to the applicants and they were forbidden from having contact with the child. Moreover, the child was adopted by the other family and had received a new identity in April 2013. It meant that he had had no official existence for more than two years.

Before the Court the applicants complained of the refusal to recognise the legal parent-child relationship established abroad alleging a breach of a number of provisions of the Convention. The Court noted that the prohibition in Italy on using surrogacy arrangements could not take precedence over the best interests of the child, in spite of the absence of any biological relationship. Reiterating that the removal of a child from the family setting was an extreme measure that could be justified only in the event of immediate danger to that child, the Court concluded that, in the present case, the conditions justifying a removal had not been met.

The Court took into account also explanations given by a lawyer of the Russian company, responsible for the process of realisation of the surrogacy agreement. It was submitted that the Russian law permits to circumvent the requirement to have a genetic link with one of the future parents for the purposes of issuing a birth certificate by purchasing the embryos, which thus became "one's own" embryos. Nonetheless, given that the child has developed emotional ties with the foster family with whom he was placed at the beginning of 2013, the Court reiterated that the finding of a violation in the case cannot be understood as obliging the Italy to return the child to the applicants.

On 1 June 2015, the case of *Paradiso and Campanelli v. Italy* was referred to the Grand Chamber of the Court at the request of the Italian government. On 9 December 2015, the Court held a Grand Chamber hearing in the case. In December of 2016, the final judgment of the Court was not given yet.

The last and the newest to the moment judgment to be discussed in the current section is the one in the case of *Parrillo v. Italy* [2]. The case raised a question of possibility to use embryos for the purposes of scientific research. The applicant in this case, Ms Adelina Parrillo, complained before the Court under Article 8 of the Convention and Article 1 of protocol No. 1 to the Convention about inability to donate her embryos to scientific institution. The Court ruled that the Convention was not breached. Given the legal prohibition in Italy of conducting the embryonic cell research,

the Court agreed that Italy did not overstep its margin of appreciation. It is of interest to have a look on the Court's argumentation regarding the second complained of provision. The Court decided not to provide any explanation as to the moment when human life begins, but strongly reiterated that "*human embryos cannot be reduced to "possessions" within the meaning of that provision* [Article 1 of protocol No. 1]" (*Parrillo case,* cited above, § 215).

In the current section the author described in a chronological order, how the Court in its practice assessed the status of human embryos. In the next part of this article there will be given an analysis of this case-law with the corresponding reflections.

3. Reflections on the status of a human embryo under the Convention

The provided overview of the Court's case-law has shown that the issue of the legal status of a human embryo was the subject of the Court's examination for a period of over fifty-five years. For this period, the Court has never ruled specifically on the rights of an embryo. If the embryo was developed into a child, the Court later could give a judgment in respect of the child. When a life of an embryo was terminated at the stage from the conception and before the birth, the Court in its judgments has dealt only with the rights of parents. Even when the question of the status of embryo was raised by the parties, the Court never recognised an embryo as a victim in the proceedings before it. It is well known that a victim status is one of the key criteria for an admissibility of an application. Without having this status "persons" may not obtain any fulfilment of their rights.

For the purposes of the present study, one of the most important cases is the *Vo v. France,* when the Court clearly stated the unborn child (embryo) may not be regarded a "person" directly protected by Article 2 of the Convention. From this we can derive that the human embryo does not have a right to life under this international treaty. Of course, not all of the judges of the Court agree with such an interpretation of the Convention. Some of them already in 2004 considered that Article 2 applies to human beings even before their birth [47]. For the other judges of the Court the rights of the mother, her well-being and health are more valuable than the ones of the foetus [50]. Of course, there exist a huge variety of specific circumstances, which influence decision making practice of the Court. These are different situations, when a mother wants to give birth to a child and when she does not possess such a wish. The attitude of a society as to the right of an unborn child to see the day light is not unified. In our opinion, there is no one answer to this question. Both mother and a child deserve protection under the Convention, but what to do in the time when their interests are contravene.

In its judgment in the case of *Evans v. the United Kingdom* of 2007 the Court held that the embryos created by the applicant and her partner do not have a right to life within the meaning of Article 2 of the Convention. In 2015 the issue was again raised by the parties in the case of *Parrillo v. Italy*. Here the Court, nonetheless, concluded that it is not necessary to examine the sensitive and controversial question of when human life begins under Article 2 of the Convention, as it is not an issue in the instant case. In its concurring opinion, Judge Pinto de Albuquerque noted: "In this context, it is crucially important to note that the Grand Chamber did not cite paragraph 56 from *Evans v. the United Kingdom* (cited above) in which the Court had stated that "the embryos created by the applicant and J. [did] not have a right to life within the meaning of Article 2 of the Convention", nor the Chamber judgment of 7 March 2006 in that case, § 46, nor even the classic statement of principle in *Vo v. France* ([GC], no. 53924/00, § 82, ECHR 2004). This omission is noteworthy. Not only does it reflect the Grand Chamber's uneasiness with the Evans anti-life principle, but furthermore it consolidates the opposite principle set out in paragraph 59 of *Costa and Pavan* that the embryo is an "other", a subject with a legal status that could and should be weighed against the legal status of the progenitors…" This opinion in the most recent case of the Court, on one hand, shows, that there could be changes in the legal position of an embryo in the future case-law of the Court. On the other hand, the fact that the Court refused to rule on the subject may at the same time signify that it is not ready to recognise the embryo's right to life.

It is possible to say that the discussion as to the status of an embryo became more vivid after 2000, which can be explained by expansion of the IVF technologies and their mass utilisation. In a number of cases the Court admitted the rights of children, which were born in a result of a gestational surrogacy agreement, when the doctors implanted the fertilised embryos in the uterus of another woman. In some states of the world, such as Russia, Ukraine and the United States, persons who enter in a surrogacy contract may be recorded into the birth certificates of such children as their parents. The Court confirmed that in view of the best interests of a child, it is

important to recognise the rights of the children at issue to inherit and to obtain a residence permit in the country of origin of their "parents". Moreover, even when the child does not have a biological link with such parents, when the embryos were only purchased by them, the Court may find a breach of Article 8 of the Convention given the fact that the child was removed from "parents" and put into social-care services.

With regards to termination of existence of the embryos by means of destruction, the Court takes an opposite approach. In the case of *S.H. and Others v. Austria*, Judge de Gaetano expressed an opinion that prohibition of the freezing and destruction of human embryos, like the prohibitions against racism, serves as an acknowledgment of the human rights [55]. Similarly, in the *Parrillo case*, the Court came to conclusion that the applicant has no right to forward her embryos to the scientific institution for the purposes of research, where they would be destroyed.

Answering the question, whether the embryos could be considered a parents' property in the sense of Article 1 of Protocol No. 1 to the Convention, the Court gave a negative response. In the already mentioned judgment in the case of *Parrillo v. Italy* it noted that human embryos cannot be reduced to "possessions" within the meaning of that provision. If the human embryos are not a thing, which can be possessed by somebody, but not yet a person for the meaning of the Convention, what they are? The examination conducted above unfortunately cannot provide a reader with an answer to this question.

The other interesting aspect of a status of an unborn individual is whether the situation would be different, if we would speak not directly about an embryo, but about the other state of development of human being. The Court in its case-law clearly distinguishes, for example, between a foetus and an embryo: "…fœtus, which is clearly far further developed than an embryo…" [65] Moreover, in the *Costa and Pavan case* the Court stressed that the concept of "child" cannot be put in the same category as that of "embryo". This could mean that the principle of the best interest of a child is not applicable to the cases concerning human embryos. As to the question of whether it could be applied to the foetus the Court remains silent.

When deciding on a subject-matter, the Court often takes into account provisions of international documents, such as Oviedo Convention (see e.g. *S.H. case*, cited above, § 42; *Evans case*, cited above, § 50; *Parrillo case*, cited above, § 54). It also assesses practice of the other international human rights courts, such as the Inter-American Court of Human Rights (see, *Parrillo case*, cited above, § 68). The Court also reflects opinions of the national courts, not only within the Council of Europe, but also overseas. For instance, in the *Evans case* the Court referred to the judgment the Supreme Court of Tennessee in the case of *Davis v. Davis* (842 S.W.2d 588, 597; Tenn. 1992).

It is of importance to notice that the Court often carefully assess the existence or non-existence of common ground between the laws of the Convention contracting states in the cases concerning human embryos. On the one hand, where there is no consensus within the CoE member states, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the states will normally be restricted (see e.g. *S.H. case*, cited above, § 94). It means that the Court always have to weight, whether it will give preference to the fact that of existence of sensitive ethical issues or to the individual's identity. Both focuses are closely connected and very often it is hard to distinguish between them. Therefore, some authors criticise the Court for inconsistence in its decision making. In our opinion, all the cases relating to human embryos raise serious moral questions, but it does not mean that the margin of appreciation of the states have always to be wide. If an embryo is not a person under the Convention, then there would not be any individual existence at stake. Given the fact that in some cases the Court supported the states' legislation on prohibition of embryo destruction, the thesis does not seem to be undisputable.

3. Results

Both the case-law of the Court and the analysed norms of the international organisations and the states demonstrate that the status of a human embryo in the world is very distinct: from permission, through no regulation to prohibitive measures. Furthermore, it varies from type to type of the research on human embryos. Additionally, certain practices that are strictly prohibited

in general may be authorised through licensing and special permissions. It would, therefore, require additional study on the rules and conditions of such authorisation.

The Court in its case-law distinguishes between an embryo and a foetus, but do not specify the difference in their protection under Article 2 of the Convention. Moreover, the term "embryo" is defined differently in national law, which raises a number of other questions. Furthermore, there exist a number of synonymous titles, e. g. "embryo", "foetus", "germ", "fetus", "pre-embryo", "proembryo", which are understood similarly or differently depending on the context. In the course of translation of these terms from the various foreign languages, the meanings of the words may be interchanged as well. This again would lead to dissimilar understanding of the issue. It has to be stressed that the practice of the Court does not give an answer to the question, whether a human being on different stages of development before birth has a dissimilar level of protection.

4. Conclusion

The Court in its practice up to date refuses to answer the question, when the human life begins, but it clearly stated that the embryo is not a person in the sense of Article 2 of the Convention. It is unclear, whether it could be seen as a "person" for the purposes of the other provisions of the Convention. Up to date, there is no case-law, whether the Court has recognised an embryo as a direct victim.

What is absolutely true is that an embryo is not a possession within the meaning of Article 1 of Protocol No. 1 to the Convention. This signifies, that "parents" may not freely utilise their embryos. Therefore, in some countries, it is the state who decides on a destiny of unborn beings who are not supposed to become children. Nonetheless, in Russia, for example, a person may become an owner of embryos and even a biological parent on the basis of the purchase agreement. It shows that the legal status in the CoE member states is not unified and the Court will still have a number of issues to rule on in its future practice.

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