

Parillo v. Italy: ECHR Allows States to Interfere with Individuals' Admittedly Private Lives

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I. OVERVIEW

Adelino Parillo, an Italian national, and her partner underwent in vitro fertilization treatment (IVF) in Rome in 2002.¹ The treatment yielded five embryos that were placed in cryopreservation.² In 2003, before the embryos could be implanted, Parillo's partner was killed during the war in Iraq.³ Four months later, Italy enacted a ban on embryo donation.⁴ At an unspecified time within the following seven years, Parillo decided not to proceed with implantation, and she requested the release of her embryos to donate them to research on incurable diseases.⁵ In December 2011, the director of the embryos' storage facility refused to release them to Parillo, citing the Italian legislative prohibition that criminalized the action.⁶

Parillo brought her case before the European Court of Human Rights (ECHR) alleging section 13 of Law no. 40 February 2004 ("Law

1. Parillo v. Italy, App. No. 46470/11 Eur. Ct. H.R. paras. 11-12, HUDOC (Aug. 27, 2015), <http://hudoc.echr.coe.int/eng?i=001-157263>.

2. *Id.*

3. *Id.* para. 13.

4. *Id.* para. 16.

5. *Id.* paras. 14-17.

6. *Id.* para. 16.

40/2004”) infringed on her rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).⁷ The Italian provision explicitly bans any donation of embryos conceived through medically assisted reproduction to scientific research.⁸ Parillo alleged this restriction violated rights protected by the Convention; both her “right to respect for her private life and her right to the peaceful enjoyment of her possessions.”⁹ Parillo did not first bring her claim in Italian court; rather, she brought it directly before the ECHR.¹⁰ For this reason, and due to the elapsed time since Law 40/2004’s enactment, the Italian government objected to Parillo’s application admissibility.¹¹ The ECHR *held* that the case was properly brought before the court and that legislation banning the donation of IVF-conceived embryos does not violate the Convention. *Parillo v. Italy*, App. No. 46470/11, HUDOC, Judgment, 216 (Eur. Ct. Hum. Rts. Aug. 27, 2015).

II. BACKGROUND

A. *Italy’s Commitment to the Convention*

The Italian Constitution reiterates Italy’s commitments as a signatory to agreements such as the Convention, describing its national power as a derivative of “EU legislation and international obligations.”¹² However, in article 117 of its Constitution, Italy reserves exclusive jurisdiction over a range of topics such as public order and international relations, suggesting that ECHR judgments and other international agreements may not ultimately bind Italy where domestic law conflicts.¹³ The Italian Constitutional Court specifically maintains power to subordinate Convention obligations to its Constitution, and to review domestic laws in light of the Convention, rather than defer to ECHR for this function.¹⁴ The Constitutional Court also held that a rights violation must be raised before Italy’s lower courts.¹⁵ Only when the lower court doubts the compatibility of Italian law with the Convention shall that

7. *Id.* para. 3.

8. Legge 10 marzo 2004, n. 40, G.U. Feb. 24, 2004, n. 45 (It.).

9. *Parillo*, App. No. 46470/11, para. 3.

10. *Id.* para. 78.

11. *Id.* para. 77.

12. Art. 117 Costituzione [Cost.] (It.).

13. *See id.*

14. *See* Corte Costituzionale [Corte Cost.] [Constitutional Court], 24 ottobre 2007, n. 348, Giur. it. 2008, para. 4, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf (It.).

15. *Id.*

court bring the issue to the higher Constitutional Court, and not directly to the ECHR.¹⁶ This requirement means the Constitutional Court asserts precursory authority over questions involving Italy's own law, while utilizing the ECHR solely for interpreting the Convention without reference to domestic legislation.¹⁷ In the past, the Constitutional Court exercised this national authority, and addressed issues internally, ruling domestic law incompatible with the Convention and unconstitutional on that basis.¹⁸

B. Admissibility of Claims Before the ECHR

In article 35, the Convention requires an applicant's exhaustion of domestic remedies before bringing a case to the ECHR "within a period of six months from the date on which the final decision was taken."¹⁹ The court has considered the domestic processes' accessibility when assessing whether this requirement was met.²⁰ The ECHR stated that Italy's Constitutional Court does not always provide remedies where Italy's own law may conflict with the Convention.²¹ In *Scoppola v. Italy*, the ECHR held that an applicant's failure to apply to the Constitutional Court before lodging a complaint with the ECHR did not bar the case.²² It reasoned the Constitutional Court is not directly available to individuals because it requires cases to be referred from a lower court judge.²³ The court has viewed this procedural hurdle as creating an insufficient process for an individual to obtain a domestic remedy and has not always required this criterion's satisfaction before it hears an Italian case.²⁴

The ECHR has determined that the six-month period to submit a complaint begins the moment domestic remedies have been exhausted,

16. *Id.* paras. 4-5.

17. Corte Cost., 24 ottobre 2007, n. 349, Giur. it. 2008, para. 4, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S349_2007_Eng.pdf (It.).

18. *See* Corte Cost., 3 luglio 2013, n. 210, Giur. it. 2008, para. 6, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/210-2013.pdf (It.).

19. Convention for the Protection of Human Rights and Fundamental Freedoms art. 35, Nov. 4, 1950, E.T.S. no. 5.

20. *See* *Scoppola v. Italy* (No. 2), App. No. 10249/03 Eur. Ct. H.R. paras. 69-70, HUDOC (Sept. 17, 2009), <http://hudoc.echr.coe.int/eng?i=001-94135>.

21. Press Release, Eur. Ct. H.R., Pilot Judgment: Italy Must Pay Adjusted Supplementary Allowances in Accidental Contamination of Blood (Sept. 3, 2013), <http://hudoc.echr.coe.int/eng-press?i=003-4476922-5394188>.

22. *Scoppola*, App. No. 10249/03, paras. 77-78.

23. *Id.* para. 75.

24. *Id.* paras. 75, 77-78.

usually when proceedings have reached a final decision.²⁵ Where no effective domestic remedy exists, or the remedy is ineffective, time begins to lapse from the moment the applicant became affected by the adverse situation.²⁶ However, where the complaint stems from current legislation, the court has construed the situation as continuous and without a fixed end date.²⁷ The court reasoned that a violation of rights could be an “ongoing breach, [where] the time-limit in effect starts afresh each day and it is only once the situation ceases that the final period of six months will run to its end.”²⁸

In *Varnava v. Turkey*, applicants lodged a complaint against the Turkish government more than twenty years after their relatives had gone missing at the hands of national authorities.²⁹ The ECHR found the complaint was not barred by the six-month requirement, although there were no intervening events that might have suspended or reset the time.³⁰ They reasoned that the persons in question were still missing, and the investigation could last years.³¹ It found the applicants’ hope for a domestic remedy was still reasonable even after a lengthy passage of time.³² In cases classified as ongoing situations, the ECHR considered individual circumstances of each application and applied the six-month requirement with flexibility.³³

C. *The Convention’s Protected Rights*

The Convention, a human rights document ratified by forty-seven countries, including Italy,³⁴ obliges signatories to guarantee an individual’s “right to respect for [his] private and family life”³⁵ and to

25. *Varnava v. Turkey*, App. Nos. 16064-73/90 Eur. Ct. H.R. para. 157, HUDOC (Sept. 18, 2009), <http://hudoc.echr.coe.int/eng?i=001-94162>.

26. *Id.*

27. *Id.* para. 159; *see also* *Dungeon v. United Kingdom*, App. No. 7525/76 Eur. Ct. H.R. paras. 41, 63, HUDOC (Feb. 24, 1983), <http://hudoc.echr.coe.int/eng?i=001-57473>; *see also* *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R. para. 110, HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466>.

28. *Varnava*, App. Nos. 16064-73/90, para. 159.

29. *See id.* paras. 24-25.

30. *Id.* para. 231 (dismissing the government’s objection to the complaint’s admissibility).

31. *See id.* paras. 161-63.

32. *See id.* para. 143 (stating that a presumption of death was not automatic although many years had passed since the applicants’ relatives disappeared).

33. *Id.* para. 161 (considering “[n]ot all continuous situations are the same; the nature of the situation may be such that the passage of time affects what is at stake” when evaluating an application’s admissibility).

34. *Chart of Signatures and Ratifications of Treaty 005*, COUNCIL EUR. (Mar. 10, 2-16), http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=cv3eIF7c.

35. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, arts. 1, 8.

protect their right to a “peaceful enjoyment of his possessions.”³⁶ In the context of these protections, the ECHR has interpreted both private life and possessions broadly, and the terms lack precise definition.³⁷ Any state interference with private life must be lawful and “necessary in a democratic society,” pursuing interests such as public safety, national security, crime prevention, and “the protection of health or morals, or . . . rights and freedoms of others.”³⁸

D. Protected Possessions, the ECHR’s Precedent

The ECHR has interpreted the Convention’s commitment to protect an individual’s right to “peaceful enjoyment of his possessions” beyond the scope of material goods.³⁹ Protected possessions have included a range of nonmaterial property, from a submitted application to register a trademark to an accountant’s goodwill among clients.⁴⁰ A possession may encompass rights and interests and exists when an individual demonstrates a substantive interest in the possession.⁴¹ However, the term is not boundless, and the ECHR ruled possessions could not be solely based on either a hope of the court recognizing them as such, or on “a conditional claim which has lapsed as a result of a failure to fulfill [a] condition.”⁴² Thus, the Convention has not protected objects that could emerge from hypothetical circumstances or objects based on the mere possibility they could exist in the future.⁴³ A possession must be in

36. *Id.* protocol 1.

37. *See* *Pretty v. United Kingdom*, App. No. 2346/02 Eur. Ct. H.R. para. 61, HUDOC (Apr. 29, 2002), <http://hudoc.echr.coe.int/eng?i=001-60448>; *Beyeler v. Italy*, App. No. 33202/96 Eur. Ct. H.R. para. 100, HUDOC (Jan. 5, 2000), <http://hudoc.echr.coe.int/eng?i=001-58832>.

38. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 8; *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R. para. 111, HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466> (evaluating state legislation’s infringement on an individual’s private life by the aims stated in Article 8).

39. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, protocol 1; *Beyeler*, App. No. 33202/96, para. 100.

40. *See* *Anheuser-Busch Inc. v. Portugal*, App. No. 73049/01 Eur. Ct. H.R. para. 78, HUDOC (Jan. 11, 2007), <http://hudoc.echr.coe.int/eng?i=001-78981> (holding the applicant’s potential legal rights and interest stemming from an application to register its ownership of the “Budweiser” mark amounted to a possession); *Van Marle v. Netherlands*, App. Nos. 8543, 8674, 8675, 8685/79 Eur. Ct. H.R. para. 41, HUDOC (June 26, 1986), <http://hudoc.echr.coe.int/eng?i=001-57590> (holding that accountants’ efforts to gain clientele fell within the Convention’s concept of protected “possessions”).

41. *Beyeler*, App. No. 33202/96, para. 100.

42. *See* *Gratzinger v. Czech Republic*, App. No. 39794/98 Eur. Ct. H.R. para. 69, HUDOC (Jul. 10 2002), <http://hudoc.echr.coe.int/eng?i=001-22710>.

43. *See id.*

existence at the time of the claim, or result from a “legitimate expectation” based in concrete legal provisions or case law.⁴⁴

The limits of the term were defined in *Pressos Compania Naviera v. Belgium*, where the court found a possession could derive from an individual’s legitimate expectation.⁴⁵ In this case, the possession was compensation for a tort claim involving operator and pilot liability in ship accidents.⁴⁶ The court decided that the applicant had a reasonable expectation of financial gain, supported by case law, under general tort law principles.⁴⁷ In another case, *X v. the Federal Republic of Germany*, the court held a notary’s expectations of fees were not possessions because the fees’ percentages and regulations were recently enacted and the precise gain too uncertain.⁴⁸ The court’s reasoning stated that had the claim been based on well-established regulations and particular cases, a possession could be found.⁴⁹ These rulings illustrate that support in established law has been crucial in defining a possession when it results from an expectation.⁵⁰

E. ECHR’s Concept of Private Life, Embryos and State Deference

Article 8 of the Convention protects an individual’s right to respect and family life free from governmental interference.⁵¹ Further, the ECHR stated, “the concept of ‘private life’ is a broad term not susceptible to exhaustive definition,” but that personal autonomy is an integral component.⁵²

The court has deferred to states’ discretion regarding interference with private life and specifically, decisions about embryos, but reserved the right to subject domestic legislation to scrutiny and ensure that states’ legislative processes balance governmental interest and individuals’ interests.⁵³ While this concept of a private life has been expansive, the

44. *Kopecky v. Slovakia*, App. No. 44912/98 Eur. Ct. H.R. para. 49, HUDOC (Sept. 28, 2004), <http://hudoc.echr.coe.int/eng?i=001-66758>.

45. *Pressos Compania Naviera S.A. v. Belgium*, App. No. 17849/91 Eur. Ct. H.R. para. 31, HUDOC (Nov. 20, 1995), <http://hudoc.echr.coe.int/eng?i=001-58056>.

46. *See id.* paras. 29-32.

47. *Id.*

48. *X v. Federal Republic of Germany*, App. No. 8410/78 Eur. Ct. H.R. para. 2, HUDOC (Dec. 13, 1979), <http://hudoc.echr.coe.int/eng?i=001-74051>.

49. *Id.*

50. *See id.*; *see also Pressos Compania Naviera S.A.*, App. No. 17849/91 paras. 29-32.

51. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 8.

52. *See Pretty v. United Kingdom*, App. No. 2346/02 Eur. Ct. H.R. para. 61, HUDOC (Apr. 29, 2002), <http://hudoc.echr.coe.int/eng?i=001-60448>.

53. *See S.H. v. Austria*, App. No. 57813/00 Eur. Ct. H.R. para. 97, HUDOC (Nov. 3, 2011), <http://hudoc.echr.coe.int/eng?i=001-107325>.

ECHR has evaluated states' discretionary actions by assessing the proportionality of the infringed right's importance to an individual and the state's necessity or interest in regulating it.⁵⁴ The ECHR has not endorsed a state's interference with private life unless it is necessary and seeks democratic aims.⁵⁵ The court also clarified that a necessary aim does not automatically infer an essential purpose; rather, a proportionality test, or a balancing of interests defines necessity.⁵⁶

The ECHR has classified state regulations on the use of embryos as restrictions on individuals' autonomy in private life.⁵⁷ In *Evans v. the United Kingdom*, the applicant underwent IVF treatment after she learned she would soon become infertile due to ovarian cancer.⁵⁸ Before the embryos were implanted, the couple separated, and the applicant's partner withdrew his consent to implantation.⁵⁹ U.K. law prohibits implantation without the consent of both parties.⁶⁰ The ECHR held that the U.K. law interfered with the applicant's private life.⁶¹ Nevertheless, it also viewed the interference of the United Kingdom as a fair balance with competing interests considering the husband's rights to the embryos and public interest factors.⁶² The court also reasoned that "since the use of IVF treatment gives rise to sensitive moral and ethical issues," the United Kingdom was afforded a wide "margin of appreciation," and held that article 8 had not been violated.⁶³ The court found the law's restriction permissible although it encroached on the applicant's right to a private life.⁶⁴

Similarly, in *Knecht v. Romania*, a woman alleged her article 8 rights were violated when the national authorities refused to transfer her

54. *Soering v. United Kingdom*, App. No. 14038/88 Eur. Ct. H.R. paras. 89, 111, HUDOC (July 7, 1989), <http://hudoc.echr.coe.int/eng?i=001-57619>.

55. See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 8; *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R. para. 111, HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466> (evaluating state legislation's infringement on an individual's private life by the aims stated in Article 8).

56. See *Soering*, App. No. 14038/88, paras. 89, 111.

57. *Evans v. United Kingdom*, App. No. 6339/05 Eur. Ct. H.R. paras. 71-72, HUDOC (Apr. 10, 2007), <http://hudoc.echr.coe.int/eng?i=001-80046>.

58. *Id.* para. 14.

59. *Id.* paras. 17-19.

60. See *id.* para. 60.

61. *Id.* para. 71.

62. *Id.* paras. 76, 90.

63. *Id.* paras. 81, 92. The ECHR uses the term "margin of appreciation" to refer to the autonomous and discretionary power, usually of a national government, to decide whether to enact legislation governing any particular issue and to dictate its detailed regulations. See, e.g., *id.* paras. 81-82.

64. See *id.* paras. 71, 92.

embryos to a clinic that was not governmentally authorized.⁶⁵ Again, the court did not dispute that the restriction concerned an interference with her right to a private life, but afforded the Ukrainian government broad discretion due to the sensitive nature of the issue.⁶⁶ The judgment stated that the state authority withholding the embryos pursued “a legitimate aim, namely the prevention of crime, the protection of health or morals.”⁶⁷ The court again held that this infringement was justified and therefore did not violate the Convention.⁶⁸

F. State Discretion in Practice Among European Nations

Among European nations, national regulations of embryonic donation differ.⁶⁹ In its official stance concerning embryonic research, the Council of Europe echoes a similar sentiment to the ECHR of yielding to state discretion.⁷⁰ The Oviedo Convention, an international treaty signed by thirty-five Council of Europe member nations, embodies a commitment to apply the Convention’s human rights protections in biomedicine.⁷¹ However, this agreement grants each state the power to enact as many safeguards as it deems necessary to ensure embryos are protected under its domestic law.⁷² This discretion allows signatory states to vary in the extent of their embryonic stem cell research regulations.⁷³ Some states allow research and the creation of human embryos solely for research purposes; others allow embryonic research only in limited forms and forbid their creation for research purposes; some expressly prohibit all research; while a majority of states lack any specific regulatory framework or legislation.⁷⁴

65. *Knecht v. Romania*, App. No. 10048/10 Eur. Ct. H.R. para. 52, HUDOC (Oct. 2, 2012), <http://hudoc.echr.coe.int/eng?i=001-113291>.

66. *Id.* paras. 55, 59.

67. *Id.* para. 57.

68. *Id.* paras. 56, 64.

69. *See generally Regulation of Stem Cell Research in Europe*, EUROSTEMCELL, <http://www.eurostemcell.org/stem-cell-regulations> (last visited Apr. 19, 2016).

70. The Council of Europe is an international organization of forty-seven member states that ratified the Convention and established the ECHR. *The Court in Brief*, EUR. CT. HUM. RTS. (2014), http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Apr. 19, 2016); *see* Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine, arts. 1, 18, 37, Apr. 4, 1997, E.T.S. 164 [hereinafter *Oviedo Convention*].

71. *The Oviedo Convention: Protecting Human Rights in the Biomedical Field*, COUNCIL EUR., <http://www.coe.int/en/web/bioethics/oviedo-convention> (last visited Mar. 10, 2016).

72. *See* *Oviedo Convention*, *supra* note 70, arts. 18, 27.

73. *Regulation of Stem Cell Research in Europe*, *supra* note 69.

74. *See id.*

G. *The Italian Ban*

Law 40/2004 governs regulations of medically assisted fertilization procedures and criminalizes experimental research on human embryos.⁷⁵ It also forbids the destroying of embryos.⁷⁶ It seeks to guarantee “the rights of all persons concerned, including those of the subject thus conceived,” granting embryos rights as persons under Italian law.⁷⁷ In Judgments no. 151 and 162, the Constitutional Court responded to challenges of Law 40/2004 and ruled certain aspects unconstitutional.⁷⁸ These rulings considered provisions that imposed a universal ban on artificial insemination in cases of infertility, restricted heterologous fertilization, and thereby limited an individual’s ability to decide their embryo’s fate.⁷⁹ The Constitutional Court relied on the authority granted by the ECHR’s deference to the Italian state to justify the government’s infringement on private life.⁸⁰ This ruling stated the choice to become a parent is a “general right of self-determination . . . in that it relates to the private sphere and family life.”⁸¹ Although it found that a blanket ban on heterologous fertilization was unconstitutional, a ban that only allows exceptions on a case-by-case basis was justified because it pursued constitutional objectives and strikes a balance of interests.⁸² Italian case law has not yet addressed the ban’s compatibility with the right to private life and the protection of possessions.⁸³

IV. THE COURT’S DECISION

In the noted case, the ECHR was asked to determine whether, consistent with its admissibility requirements, Parillo’s complaint was properly before the Court, and whether Law 40/2004 violates the

75. See Legge 10 marzo 2004, n. 40, G.U. Feb. 24, 2004, n. 45 (It.); Corte Cost., 1 aprile 2009, n. 151, Giur. it. 2008, para. 1, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/CC_SS_151_2009_EN.pdf (It.).

76. Corte Cost., n. 151, para 1.6.

77. L. n. 40/2004.

78. See Corte Cost., n. 151, para. 6 (considering various restrictions of Law 40/2004, such as the imposed maximum limit of egg cells in implantation procedures); see also Corte Cost., 10 giugno 2014, n. 162, Giur. it. 2014, para 14, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/162-2014_en.pdf (It.).

79. Corte Cost., n. 151, para. 8; Corte Cost., n. 162, para 14.

80. See Corte Cost., 22 maggio 2012, n. 150, Giur. it. 2008, para. 5, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2012150_Quaranta_Tesauro_en.pdf (It.).

81. Corte Cost., n. 162, para. 6.

82. *Id.* paras. 13-14.

83. See Corte Cost., n. 150, at 36 (remitting a case to the lower court to examine the ban’s compatibility with the Convention); see also Corte Cost., n. 162, para. 14 (adjudicating the same case after remittance but failing to address the article 8 issue).

Convention.⁸⁴ The court admitted the application and ruled both that Italy did not provide Parillo with an effective domestic remedy and the case was not barred by the six-month rule.⁸⁵ It recognized the Italian policy banning IVF embryo donation to scientific research as an ongoing infringement on the right to a private life.⁸⁶ However, the ECHR adhered to its practice of deference to national governments regarding Law 40/2004's restriction and found the interference did not violate Italy's Convention obligations.⁸⁷ It then declined to extend its definition of protected possessions to human embryos.⁸⁸

The ECHR found Parillo's application met the court's admissibility criteria.⁸⁹ The Italian government objected to its admission, arguing the exhaustion of domestic remedies requirement had not been met because Parillo did not first bring her claim before the Constitutional Court to obtain relief within Italy's domestic system.⁹⁰ The state relied on the Constitutional Court's prior judgments that asserted precursory authority over complaints of incompatibility between the Italian Constitution and the Convention.⁹¹ The ECHR recognized that the Constitutional Court had indeed heard such complaints regarding the potential conflict between IVF regulation and guaranteed Convention rights, but also that these judgments only ruled on domestic constitutionality and neglected to analyze Italy's policies under the Convention.⁹² The ECHR emphasized that the Italian system's procedure does not allow individuals to bring constitutional questions directly to the Constitutional Court.⁹³ It then discussed the Constitutional Court's subjugation of the Convention to the Constitution and ruled that Italy's domestic legal system did not provide Parillo any effective remedy, so her application was not barred on these grounds.⁹⁴

84. *Parillo v. Italy*, App. No. 46470/11 Eur. Ct. H.R. paras. 87, 109-14, 117, 153, 168, 211, HUDOC (Aug. 27, 2015), <http://hudoc.echr.coe.int/eng?i=001-157263>.

85. *See id.* para. 216.

86. *Id.* para. 111.

87. *Id.* paras. 197-98.

88. *Id.* para. 215.

89. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 35; *Parillo*, App. No. 46470/11, paras. 111, 97.

90. *Parillo*, App. No. 46470/11, para. 77.

91. *Id.* paras. 79-80 (referring to Corte Cost., 24 ottobre 2007, n. 348, Giur. it. 2008, para. 4, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S348_2007_Eng.pdf (It.)).

92. *Id.* para. 95.

93. *Id.* para. 101.

94. *See id.* paras. 89, 97, 104.

It further ruled that the six-month time limit on Parillo's claim had not yet lapsed because Law 40/2004 is still in force.⁹⁵ The Italian state argued the complaint was also inadmissible because of the seven-year gap since the enactment of the legislation.⁹⁶ The ECHR rejected the position that the clock started running with the law's enactment and viewed Law 40/2004 as ongoing, so the time period to file a complaint would only begin to lapse once the situation ceased to directly affect the applicant.⁹⁷ Reasoning that Parillo's inability to donate her embryos remained constant since 2004, her complaint did not expire.⁹⁸ Therefore, Parillo's complaint was admissible.⁹⁹

The court next applied article 8's concept of private life to Parillo's decision about her embryos.¹⁰⁰ It relied on precedent from both *Evans* and *Knecht* where it deemed a woman's decision to proceed with implantation and preference for her embryos' storage facility, respectively, were aspects of private life.¹⁰¹ The court demonstrated these cases' commonality concerning the relationship of an individual to an embryo.¹⁰² It also considered that Italian law grants great significance to both embryos and family life and decided, on these grounds, the fate of Parillo's embryos undoubtedly concerns private life.¹⁰³ Further, because the ban created a continuous situation since enacted and Parillo was free to donate the embryos before it came into force, Law 40/2004 presently interferes with that right.¹⁰⁴

The court then observed that article 8 justified Italy's aim in Law 40/2004's interference and that if the law was determined necessary to pursue that aim, Italy had not breached its Convention commitment to respect for individuals' right to a private life.¹⁰⁵ The Convention's private life provision specifies that infringements may be permissible if they pursue certain crucial democratic interests such as "morals, or for the protection of the rights and freedoms of others."¹⁰⁶ The court recognized an embryo's status under Italian law as possessing human rights and

95. *Id.* para. 117.

96. *See id.* para. 106.

97. *Id.* para. 112.

98. *See id.* para. 117.

99. *Id.* para. 216.

100. *Id.* para. 149.

101. *Id.* paras. 155-56.

102. *Id.* paras. 155-56, 58.

103. *Id.* paras. 157, 59.

104. *Id.* paras. 161.

105. *Id.* paras. 197, 98.

106. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 8.

dignity.¹⁰⁷ It then ruled Law 40/2004 embodied this sentiment, and therefore the ban pursued Italy's important democratic interests.¹⁰⁸

Next, by relying on its authority to scrutinize domestic measures, the court completed its analysis of Parillo's article 8 claim by determining "the breadth of the margin of appreciation to be enjoyed by the State," and focused on whether the ban was necessary to achieve Italy's democratic interests.¹⁰⁹ The court reviewed the legislative history of Law 40/2004 and concluded that Italy's legislature had in fact "already taken account of the different interests at stake" through its effort to balance an individual's right to private life with the state's concern in protecting morals.¹¹⁰ The court relied on its precedent of state deference in sensitive, ethical decisions, a principle illustrated in documents such as the Oviedo Convention that embody variation in embryonic research regulations among European nations.¹¹¹ The court then declared the necessity of Law 40/2004's restriction was within Italy's discretionary authority and did not violate article 8 of the Convention.¹¹²

Last, the ECHR declined to address the "sensitive and controversial question of when human life begins" in determining that Parillo's embryos were not her protected possessions.¹¹³ The Italian state again asserted the embryos' human dignity.¹¹⁴ In response, Parillo argued that in the absence of implantation, the embryos lacked potential for life and should fall under her ownership as possessions.¹¹⁵ The court rejected those arguments and adhered to its own concept of possessions, where the Convention's protection only extends to possessions existing currently.¹¹⁶ It further reasoned that since the embryos were not going to be implanted, Parillo had no "legitimate expectation" of a possession in the future.¹¹⁷ The court then claimed it would refrain from assessing whether an embryo constitutes human life, beyond determining that a human embryo is not a possession and not protected by the Convention's

107. *Parillo*, App. No. 46470/11, para. 165; see Legge 10 marzo 2004, n. 40, G.U. Feb. 24, 2004, n. 45 (It.) (guaranteeing "the rights of all the persons, concerned, including those of the subject thus conceived").

108. *Parillo*, App. No. 46470/11, para. 167.

109. *See id.* paras. 168, 180.

110. *Id.* para. 188.

111. *See id.* paras. 176-79.

112. *See id.*

113. *Id.* para. 215.

114. *Id.* para. 200.

115. *Id.* para. 203.

116. *See id.* paras. 211-13.

117. *Id.* para. 213.

specific commitment to an individual's "right to peaceful enjoyment of his possessions."¹¹⁸

In his separate concurring opinion, Judge Pinto de Albuquerque disagreed with the majority's silence on an embryo's status.¹¹⁹ He thought that silence conflicted with justifying the ban's infringement by the state's aim to protect the "rights and freedoms of others."¹²⁰ He argued that by supporting this rationale, the majority implicitly classified an embryo as an "other" possessing rights.¹²¹ The judge also rejected the majority's grant of a wide margin of appreciation to states in embryonic research regulations and called for greater protection of the embryos.¹²² He implied that the majority's confidence in the balancing of interests in the Italian drafting process was an attempt to shirk the ECHR's responsibility.¹²³ Rather than deferring to the state, Judge Pinto de Albuquerque advocated that such sensitive and moral issues *should* be resolved by the Court and stated: "[T]he beginning and end of human life are not questions of policy subject to the discretion of the member States."¹²⁴ Judge Dedov's concurrence echoed a similar position, that "the right to life is absolute," and only supported a state's authority to evaluate what *form* embryos' protection takes, not whether protection should exist.¹²⁵ The joint partial dissent of Judges Casadevall, Zimele, Power-Forde, de Gaetano, and Yudkivska also disagreed with the majority's silence and argued that by regarding an embryo's fate as within article 8's realm of an individual's private life, the embryo's rights are wrongly subsumed by that individual.¹²⁶ By encompassing an embryo within an individual's private life, the majority failed to protect an embryo's own inherent, individual rights.¹²⁷

The joint opinion, concurring in part, of Judges Casadevall, Raimondi, Berro, Nicolaou, and Dedov did not focus on embryos' legal status but rather on the majority's procedural ruling of admissibility that Parillo did not have domestic remedies available.¹²⁸ The concurrence

118. *Id.* para. 215-16; Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, protocol 1.

119. *See Parillo*, App. No. 46470/11, para. 26 (Pinto de Albuquerque, J., concurring).

120. *Id.* para. 31 (Pinto de Albuquerque, J., concurring).

121. *Id.* para. 33 (Pinto de Albuquerque, J., concurring).

122. *See id.* para. 43 (Pinto de Albuquerque, J., concurring) (advocating closer scrutiny of states' protection of embryos).

123. *See id.* para. 36 (Pinto de Albuquerque, J., concurring).

124. *Id.* para. 43 (Pinto de Albuquerque, J., concurring).

125. *Id.* para. 8, 9 (Dedov, J., concurring).

126. *Id.* paras. 3, 5-6 (Casadevall, J., et al., partly dissenting).

127. *See id.* para. 7 (Casadevall, J., et al., partly dissenting).

128. *Id.* para. 1 (Casadevall J., et al., partly concurring).

called for at least the formality that an applicant brings a complaint to the Constitutional Court first, even if it is eventually lodged with the ECHR, as required by Italian law subordinating the Convention to its Constitution.¹²⁹ Additionally disputing the complaint's admission, Judge Nicolaou's partly dissenting opinion argued the six-month requirement should not have been overlooked.¹³⁰ He agreed that the time frame does not lapse in continuous situations, but he argued that Parillo's instance did not qualify.¹³¹ Nicolaou rejected the situation's continuity and pointed to the "tenuous nature of the link between the applicant and the frozen embryos."¹³² He argued that since the ban's enactment, the frozen embryos were "no more than [a] possibility" to Parillo and, at most, consisted of "a wish concerning their fate."¹³³ For Nicolaou, this limited relationship did not suffice for a continuous situation, thus, six months, and the complaint, had expired.¹³⁴

Judge Sajo's dissent agreed with the majority that article 8 encompasses an individual's right to decide their embryos' fate.¹³⁵ However, Sajo afforded this decision more significance, deeming it the applicant's freedom of choice to act as a "free and autonomous individual with regard to her genetic footprint."¹³⁶ This notion of choice became crucial as Sajo emphasized that Parillo underwent IVF treatment before the ban came into force.¹³⁷ She was then deprived of the options previously available to her when she decided to undergo IVF.¹³⁸ Sajo also cited the legal necessity of donor consent in IVF before an embryo can be implanted.¹³⁹ Independent of her desire to donate the embryos to research, implantation was not an alternative absent such consent.¹⁴⁰ With implantation precluded, the ban rendered Parillo unable to exercise any autonomy to decide her embryos' fate.¹⁴¹ As Law 40/2004 stands, she cannot donate them, they will not be implanted, and they will remain in cryopreservation indefinitely.¹⁴² Sajo stated he did not believe these

129. *Id.* paras. 6-8 (Casadevall J., et al., partly concurring).

130. *Id.* para. 1 (Nicolaou, J., partly dissenting).

131. *Id.* paras. 1-3 (Nicolaou, J., partly dissenting).

132. *Id.* para. 13 (Nicolaou, J., partly dissenting).

133. *Id.*

134. *Id.* para. 14 (Nicolaou, J., partly dissenting).

135. *Id.* para. 1 (Sajo, J., dissenting).

136. *Id.*

137. *Id.* para. 2 (Sajo, J., dissenting).

138. *Id.*

139. *Id.* para. 2.

140. *See id.* para. 2 (Sajo, J., dissenting).

141. *Id.*

142. *Id.* para. 4 (Sajo, J., dissenting).

specific embryos could possess rights as “the potential for life,” as by current law, they will never become life.¹⁴³ Claiming the majority overlooked Parillo’s individual circumstances, Sajo classified Law 40/2004 as a blanket ban and “overly restrictive of the individual’s freedom of self-determination” and contrary to the goal of advancing scientific research.¹⁴⁴ This dissenting opinion then concluded the Italian ban disproportionately interferes with an individual’s rights and was not supported by or necessary for democratic aims.¹⁴⁵

IV. ANALYSIS

The court’s ruling that the claim was admissible beyond six months from Law 40/2004’s enactment presents consequences for future complaints if interpreted widely.¹⁴⁶ While this ruling was based on previous decisions,¹⁴⁷ the court’s characterization of a restriction on a single decision (the fate of Parillo’s embryos) as a continuous infringement has the consequence of increasing access to the ECHR for rights’ violations.¹⁴⁸ Where certain sensitive issues arise, such as an embryos’ status, overlooking the six-month period may seem appropriate due to the ethical concerns at stake.¹⁴⁹ However, the court’s view that this one decision holds enough weight to allow the case provided a foundation for alleged violations with less universally acknowledged gravity.¹⁵⁰ Finding a continuous infringement from a catalyst affecting a single choice years ago could set a precedent that allows access to the ECHR for complaints the timeliness requirement was intended to filter.¹⁵¹

143. *Id.* para. 13 (Sajo, J., dissenting).

144. *Id.*

145. *Id.* para. 19 (Sajo, J., dissenting).

146. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 35; *Parillo*, App. No. 46470/11, para. 216 (holding that the instant case was admissible before the ECHR).

147. *See* *Dungeon v. United Kingdom*, App. No. 7525/76 Eur. Ct. H.R. paras. 41, 63, HUDOC (Feb. 24, 1983), <http://hudoc.echr.coe.int/eng?i=001-57473>; *see also* *S.A.S. v. France*, App. No. 43835/11 Eur. Ct. H.R. para. 110, HUDOC (July 1, 2014), <http://hudoc.echr.coe.int/eng?i=001-145466>.

148. *See Parillo*, App. No. 46470/11, para. 114 (refusing to uphold the Government’s objection that the Court should bar the complaint due to the time elapsed since Law 40/2004 affected Parillo.)

149. *See id.* para. 111 (discussing the “undeniable impact” of a restriction concerning one’s biological embryos).

150. *See id.* para. 110 (classifying Law 40/2004 as an ongoing situation due to its impact on the applicant while acknowledging it may not affect Parillo’s daily life).

151. *See id.* para. 14 (Nicolaou, J., partly dissenting) (calling for a clarification that the Convention does not give applicants an indefinite period of time to bring complaints).

The court also provided a problematic model when it overlooked the requirement of exhausting domestic remedies.¹⁵² Undermining Italy's ability to provide Parillo effective relief domestically contradicted the simultaneous holding that Italy is afforded a wide margin of appreciation in embryonic research regulation.¹⁵³ The court asserted that the Constitutional Court is unable to provide an adequate remedy where Italian domestic law conflicts with the Convention but still deferred to the state to enact provisions regarding article 8.¹⁵⁴ This position reflects an unclear perspective of the authority and capability of domestic processes regarding Convention rights: why does the ECHR trust Italy to determine the necessity of legislative infringements on individual rights if it does not have faith Italian courts can evaluate the same matters? Logically, the margin of appreciation extended to Italy to balance individual rights and state interests ought to extend to adjudicating the issues.¹⁵⁵ The court's holding lacked a coherent stance on the Italian domestic legal system's competency as to the Convention.¹⁵⁶

Judge Pinto de Albuquerque's concurrence and the joint partial dissent highlighted another inconsistency.¹⁵⁷ On one hand, the majority categorized decisions about the fate of one's embryos as within their private life and, on the other, affirmed a measure limiting this decision in order to protect the "rights and freedoms of others."¹⁵⁸ The "rights and freedoms of others" seem inaccurately classified within an individual's private realm.¹⁵⁹ One could reasonably assume that decisions that are protected within private life are not afforded simultaneous protection by virtue of concerning others.¹⁶⁰ As an "other" with its own rights, an embryo's simultaneous existence as part of its donor's private life is conflicting.¹⁶¹

152. *See id.* para. 105.

153. *Id.*

154. *Id.* para. 104 (ruling that Italy's domestic court system provided Parillo no effective remedy); *id.* para. 175 (granting Italy a wide margin of appreciation).

155. *See id.*

156. *See id.*

157. *See id.* para. 35 (Pinto de Albuquerque, J., concurring); *see id.* para. 6 (Casadevall et al., partially dissenting).

158. *See id.* para. 31 (Pinto de Albuquerque, J., concurring).

159. *See id.*; *see id.* para. 159 (stating article 8 applied to Parillo's claim).

160. *See id.* para. 159 (ruling that the right to respect for private life protects Parillo's ability to decide the fate of her embryos); *see id.* para. 167 (validating Law 40/2004's "aim of protecting morals and the rights and freedoms of others").

161. *See id.*

The court's ruling that embryos are not possessions created another incongruence.¹⁶² As a part of private life (or as "other" possessing rights), the ECHR assumes the embryos are currently in existence, and therefore they should meet ECHR case law's definition for a possession.¹⁶³ Yet, the court determined that the embryos did not meet this criterion.¹⁶⁴ It ruled embryos are not possessions capable of wholly belonging to anyone as they have their own rights and protections but also because embryos do not currently exist.¹⁶⁵ Yet, the fate of one's embryos still falls within the realm of an individual's private life.¹⁶⁶ The court ruled inconsistently by upholding Parillo's asserted violation of her "right to respect for private life," yet denying that her "right to peaceful enjoyment of her possessions" was violated.¹⁶⁷ To be within her private life but not in existence currently as possessions is an untenable position.

However, the ECHR's evaluation of whether the embryos constitute a possession under the Convention was consistent with its record of excluding conditional claims.¹⁶⁸ It accurately upheld its standards requiring an applicant's legitimate expectations.¹⁶⁹ Since the embryos will not be implanted, a plea for their recognition as possessions was based on the failure of a condition's realization because they could only come into existence *if* implanted. The court reasoned the applicant could not have a legitimate expectation of the embryos' existence if they are never implanted, so there was no possession.¹⁷⁰ Regardless of the appearance of sound reasoning, the variation among European nations' views of embryos' status, including Italy's recognition of their own inherent rights and human dignity, discouraged extending the concept of possessions to embryos.¹⁷¹ That some Council of Europe member

162. *See id.* para. 216 (stating the embryos were not protected by the concept of "possessions" as interpreted by ECHR case law).

163. *See id.* paras. 211-13 (discussing the Convention's criteria for definition as a "possession").

164. *See id.* para. 216.

165. *See id.* paras. 215-16 (ruling the embryos are not possessions according to the ECHR's understanding of the concept and that Italy had not violated the Convention).

166. *See id.* para. 159 (extending article 8's protection of a right to one's private life extended to Parillo's claim).

167. *Id.* para. 216 (holding the Italian state did not violate the Convention); *see* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 19, art. 35.

168. *See* Gratzinger v. Czech Republic, App. No. 39794/98 Eur. Ct. H.R. para. 69, HUDOC (Jul. 10 2002), <http://hudoc.echr.coe.int/eng?i=001-22710>.

169. *See id.*; *see also* Pressos Compania Naviera S.A. v. Belgium, App. No. 17849/91 Eur. Ct. H.R. para. 31, HUDOC (Nov. 20, 1995), <http://hudoc.echr.coe.int/eng?i=001-58056>.

170. *See Parillo*, App. No. 46470/11, para. 213 (holding Parillo had no legitimate expectation for the embryos to become a possession).

171. *See* Legge 10 marzo 2004, n. 40, G.U. Feb. 24, 2004, n. 45 (It.); *Regulation of Stem Cell Research in Europe*, *supra* note 69.

countries expressly prohibit embryonic research under any circumstances and give embryos special legal protection infers that if the ECHR, a multinational judiciary body, encompasses these views then these states would disagree and may enact discordant legislation.¹⁷² These divergent state views surrounding embryonic research may have influenced this ruling, irrespective of whether the ECHR's reasoning on this question was sound or consistent with precedent.¹⁷³

The ruling that an embryo was not a possession was fundamental to other aspects of the decision. This question's integral role to the outcome of the case may explain some of the above-discussed incongruences.¹⁷⁴ Had the ECHR deemed Parillo's embryos possessions, Italy's restriction on private life could no longer be justified by a democratic aim of protecting the rights and freedoms of others, because the embryos would not be others.¹⁷⁵ If they were determined possessions, this ruling would imply that embryos do not have inherent rights or human dignity.¹⁷⁶ If they are not persons with rights and human dignity, state policies that enforce their protection, such as Law 40/2004, appear unsupportable. This ruling would challenge whether the ECHR actually allows the margin of appreciation that it claims, as it would undermine the policy of state deference by rescinding states' ability to define the status itself.¹⁷⁷ Thus, if embryos are possessions, Law 40/2004 could not be justified under article 8 by the aim of protecting embryos' rights as persons, and if not justified, the ECHR would not be affording Italian courts discretion.¹⁷⁸ When we consider the degree to which other aspects of this ruling depended on embryos not constituting a possession, it seems illogical that the court did not give more attention to this question.¹⁷⁹ The overall judgment precariously hinged on the determination that embryos are not possessions.

172. See *Parillo*, App. No. 46470/11, para. 75 (discussing comparative law materials and express prohibitions on embryonic stem cell research in Andorra, Latvia, Croatia, and Malta).

173. See *id.* para. 54 (restating the Council of Europe's call for a respect of countries' decisions to abstain from international stem cell research projects if against national ethical values).

174. See *id.* paras. 159, 167, 175, 215 (deferring to the Italian state's justification of Law 40/2004's to protect embryos' rights and stating embryos are not possessions, yet ruling Parillo's ability to decide their fate involves her private life).

175. See *id.* para. 167 (determining the Italian ban serves democratic interests).

176. See *id.* paras. 188, 197 (legitimizing Law 40/2004's aim of preserving embryos' human dignity as a democratic aim that justifies its infringement on individual's right to a private life).

177. *Id.* para. 175 (granting Italy a margin of appreciation).

178. See Legge 10 marzo 2004, n. 40, G.U. Feb. 24, 2004, n. 45 (It.) (guaranteeing "the rights of all the persons, concerned, including those of the subject thus conceived.").

179. See *Parillo*, App. No. 46470/11, para. 215 (assessing embryos' status as possessions in a paragraph).

V. CONCLUSION

The ECHR sustained Italy's legislative ban and validated Italy's protection of an embryo's rights.¹⁸⁰ This decision presupposes an underlying acknowledgement of what embryos are or may one day become. By recognizing this potential for life, the ECHR does in fact define the status of an embryo.¹⁸¹ Neglecting to pinpoint a specific moment in the reproductive process does not in itself support the majority's contention that it declined to rule on embryos' status.¹⁸² By validating measures that give embryos rights and protections and asserting they are not possessions, the Court's claim of silence on "the sensitive and controversial question of when human life begins" is merely a pretense.¹⁸³ This supposed restraint from defining an embryo's status appears only to extend as far as a declination of an explicit assertion.¹⁸⁴ While Parillo's case presented a specific set of facts, for the ECHR to characterize it as a narrow holding,¹⁸⁵ and to claim to grant states the margin of appreciation in regulating embryonic research, will only result in further circumvention of a controversial issue where the Court has a discernible stance.

The ECHR's holding allowing Italy's restriction has far-reaching implications beyond ethical issues. Embryonic stem cell research is a continually growing field, bringing with it increased scientific publication output and international collaboration.¹⁸⁶ By placing constraints on this progressing area, Italy risks hampering its advancement relative to other nations.¹⁸⁷ In this regard, the ECHR's grant of a wide margin of appreciation to states ought to be accompanied by a cautionary warning that a nation may regulate at its own peril.

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180. *See id.* paras. 215-16.

181. *See id.* paras. 165-67 (justifying Law 40/2004's by Italy's aim to protect embryos' rights).

182. *See id.* para. 215 (stating the moment human life begins is not being adjudicated in this case).

183. *Id.* para. 215.

184. *See id.*

185. *See id.* para. 215 (discussing the lack of necessity to answer questions not presented).

186. EUROSTEMCELL, STEM CELL RESEARCH: TRENDS AND PERSPECTIVES ON THE EVOLVING INTERNATIONAL LANDSCAPE 5-6 (May 12, 2013), http://www.eurostemcell.org/files/Stem-Cell-Report-Trends-and-Perspectives-on-the-Evolving-International-Landscape_Dec2013.pdf.

187. *See id.* at 14-15.

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