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GENDER EQUALITY, RIGHT TO LIFE AND PRATICAL REASON: WHAT ABOUT THE FROZEN EMBRYOS?

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Abstract

The rapid evolution of Assisted Reproduction Techniques (ART) in a few years is generating a multitude of ethical and legal problems that do not give time to resolve. Also, the use of some of these techniques, such as *in vitro* fertilization (IVF), has caused the accumulation of millions of surplus embryos, which remains frozen in the Assisted Reproduction Clinics distributed throughout the world. It seems compulsory, from the point of view of practical reason, to analyze the justice of some decisions of the ECHR on assisted reproduction, in which the right to life of frozen embryos, as potential future persons, unable of defending their rights by themselves, and whose vulnerability is even greater than that of the nasciturus, comes into collision with other values, ideas or rights, and attending, both to the arguments used by the majority and dissenting votes, and to those handled by the main working groups of the EU in this matter.

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Keywords

Philosophy of Law, Assisted Reproduction, frozen embryos, right to life, European Court of Human Rights

Resumen

La rápida evolución de las Técnicas de Reproducción Asistida (TRA) en muy pocos años está generando multitud de problemas éticos y jurídicos que no da tiempo a resolver. Asimismo, el uso de algunas de estas técnicas, como la Fecundación *in vitro* (FIV), ha ocasionado la acumulación de millones de embriones sobrantes, que se encuentran, congelados, en las Clínicas de Reproducción Asistida distribuidas por todo el mundo. Parece obligatorio, desde el punto de vista de la razón práctica, analizar la justicia de algunas sentencias de la CEDH sobre reproducción asistida, en que el derecho a la vida de los embriones congelados, como potenciales personas futuras, incapaces de defender sus derechos por sí mismos, y cuya vulnerabilidad es todavía mayor que la de los *nasciturus*, entra en colisión con otros valores, ideas o derechos, y atendiendo, tanto a los argumentos utilizados por los votos mayoritarios y discrepantes, como a los manejados por los principales grupos de trabajo de la UE en esta materia.

Palabras clave

Filosofía del Derecho, Reproducción asistida, embriones congelados, derecho a la vida, Tribunal Europeo de Derechos Humanos

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Introduction

The first interest of every child (I am including everyone who in the future will end up being a child) is to be born[1]. Of course, in the case of frozen embryos in assisted reproduction processes, this interest is stuck with the legal obstacle of the requirements that civil law requires to be a person in a legal sense because only people are holders of subjective rights. But the correct use of the legal technique cannot lead to the disregard of the interests and rights of the more than one million frozen embryos scattered throughout Europe, which, in my opinion, has a lot to do with the legal and technical concept of the child's best interest, since his first interest, which is doubtful, is to be born (Novales Alquézar, 2017), particularly if we start from the assumption that Europe defends life.

Beginning from the proposition that frozen embryos are, at least, future potential persons totally incapable of defending their rights by themselves, and before the real fact of the existence of the high and growing number[2] of frozen embryos in the European assisted reproduction clinics whose interests they seem not to matter and whose vulnerability is extreme (much more, for obvious reasons than those of the *nasciturus* in general), it seems obligatory to raise issues of justice in relation to practical reason when their right to life comes into collision with other values, ideas or rights.

Different Uses of Pratical Reason

Since judicial work cannot be subtracted from practical reason, we should differentiate, first, the different uses of it, if we are going to talk about the ECHR jurisprudence on frozen embryos, starting from the formal and academic sense of practical reason in Kant.

Among the uses of practical reason, we must distinguish: a) *technical* or *instrumental* use; b) *rational* use and c) moral use of practical reason. The *instrumental* use would

1. Cfr. Corral Tallaciani's Blog, *Niños en desamparo*, Posted tagged 'caso Parrillo con Italia', 6 de septiembre de 2015. In this article of this interesting blog, Corral Talciani criticizes the protection of the conceived of the Inter-American Court of Human Rights analyzing various sentences, on the basis that "Estos diminutos seres humanos, como se comprenderá, están en situación de extrema vulnerabilidad y debieran merecer una especial tutela jurídica, sobre todo por las Cortes que tienen por misión la vigencia y aplicación de los tratados internacionales de derechos humanos", available at https://viva-chile.cl/2015/09/ninos-en-desamparo/

2. Although it is true that, with a single frozen embryo that was, the reflections that are raised in this analysis, from the *iusphilosophical* point of view, would be the same.

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consist in the determination of the ends to look for, then the means to realize them. The example would be David Hume's classic: there are no rational reasons to prefer damaging a finger to the destruction of the world, since everything depends on the goal we set.

Nevertheless, there are rational reasons to prefer damaging a finger over the destruction of the world from the second use of practical reason, which is the pragmatic or prudential, because Kant presupposes in all people the end of their own happiness (very according to Aristotle). To oppose, then, practical reason to the pursuit of one's happiness is, therefore, an absurdity.

Let us keep now in a variable of Hume's example. We already said that it is perfectly rational -from the prudential point of view- to prefer to damage a finger to the destruction of the world, because, without a finger we can certainly still achieve our happiness, something that is not possible without the existence of our planet. But what prudential reasons do we have to choose to damage a finger to the destruction of a distant country, or to the destruction of all frozen all over the world embryos if, we assume, this will not have repercussions for our lives?

The answer can only be given from the plane of a new use of practical reason, and therefore, from the highest and strictly rational: the moral use, which subjugates the end of our own happiness to that of morality, which demands of us to put us as an end in itself humanity in all people; that is, the same capacity that others have to seek their own happiness.

Thus, ends (and means) that put other values or ideas before life can be perfectly rational in an instrumental sense, but they are clearly irrational behavior from the perspective, not only moral but, in many cases[3], also prudential.

The Right to Life and to Physical and Psychological Integry of Embryos in Assisted Repreoduction

The right to life in the context of ART is usually assimilated to the right that the product of conception has to be born. However, this limits the right to life to only one of its manifestations (Gumucio Schönthaler, 1997, p. 108), being excluded, both the aspect of conservation and protection of the substantial activity of the embryo or fetus in its life before birth, as the one referred to the child once produced the birth.

3. Not in others, because I am sure that a lot of people do not care and can be perfectly happy ignoring the fate of the more than one million frozen embryos that remain in European assisted reproduction clinics.

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Specifically, the life of the fetus or embryo before birth (we do not talk about life "intrauterine" because some moments of this phase of pregnancy can occur outside the mother's womb), can be violated in several practices of ART. In general, the fact of using the technique of *in vitro* fertilization does not violate, in itself, the right to life of the fetus or embryo, because the embryos that will be implanted will be, as happens when pregnancy is given by means natural, those that survive, or some of them[4]. In any case, the status of person is attributed to the embryo but only after the first 14 days of gestation[5].

On the one hand, the technique that can affect the right to life and physical and mental integrity is the Preimplantation Genetic Diagnosis of the embryo (PGD) when the use of this technique is caused by, not medical reasons (avoid, for example, the transmission of a disease such as hemophilia linked to a certain sex) but more selfish interests such as choosing, simply, the sex of the embryo[6]. Or rather, pondering the interest that the child is born without diseases (or other situations in which the PGD is medically indicated) with the minimum but certain risks, derived from the manipulation of the embryos[7], prudence and justice require preferring to procure healthy children but, outside of this case, do not convert the DGP into a widespread practice in people who come to Assisted Fertilization.

The techniques of freezing remaining embryos can also affect their rights to life and physical and psychological integrity. The cryopreservation of embryos obtained fundamentally through *in vitro* fertilization, in embryo banks in order to preserve them for a new implantation in the same woman, when the result of the first implantation failed, or in another, when the figure of surrogate motherhood is used, or simply for research purposes, or for a post-mortem implantation, leads to a logical result: after a maximum time, which in the various legislations goes from one and up to 5 years, or up to 10 years, the embryos do not "used" must be defrosted, a process that implies a high risk of

4. In this regard, it should be remembered that the Assisted Reproduction Clinics usually offer the service of letting go, instead of 2 or 3 days from fertilization, 4 or 5 days, in order to implant or freeze the embryos that have reached state of blastocyst (that is, they are either "more alive" or "alive, with greater security" than those who have only struggled to live 2 days), similar to what happens in a natural pregnancy, since those frozen in the blastocyst stage have developed more cells (in 4 or 5 days of culture) than the previous ones. In short, we are talking about "life in evolution" or "development of human life", and the primacy of the human being as it is included in several international instruments on the subject.
5. According to this position, the embryo of less than 14 days from the moment of gestation is called "pre-embryo", concept collected in various texts, e.g., Report Warnock Commission in England, Benda Commission, Germany, in Recommendation 1046 of the Council of Europe and the Spanish law on TRA.
6. Not in vain, in most countries, England, Spain, etc. the general use of the DGP is prohibited, when there is no important reason to use it (e.g., article 12 of Spanish Law 14/2006 of May 26, which indicates when a PGD cycle is allowed).
7. There is no doubt that DGP is an aggressive genetic analysis technique that requires extracting one or two cells from the embryo to analyze them genetically, which implies the manipulation of the embryo.

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mortality, ranging from 20 to 40% (Gafo, 1986, p. 20).

In relation to the right to physical and mental integrity, and consequently to the position stated in the previous point, if it is held that there is life and, therefore, we are before a person from the moment of conception[8], then any manipulation, that is to say, any action that is carried out on the embryos or their cells (Junquera De Estéfani, 1998, p. 99), could be, potentially at least, an attempt against this right. It is not relevant at this point to distinguish whether the embryo was already implanted in the woman or is frozen, because, in any case, life is not suspended even at -196.5° C (Gafo, 1986, p. 20). And besides that this possibility of future life is not suspended, "person to be born" is someone who will exist in the future as a human being. Legally there is a person because naturally there is a man or a woman. This, from the point of view of Philosophical Anthropology, is incontestable. This is the question: Someone who has arrived, who will come to have a human life: "Was not he/she human when he/she was frozen in nitrogen?" Moreover, if was not a human being, "what is alive and frozen, so?"[9]. I conclude that it[10] was a human being and that we are talking about "life in evolution" or "development of human life" (especially in frozen embryos in the blastocyst stage) and all the Conventions applicable to the subject are based on the primacy of human being.

At the European level, the question of the nature and status of the embryo and / or the fetus is not subject to consensus, as shown in the Report of the Working Group on the protection of the human embryo and fetus: the protection of the human embryo *in vitro* of 2003[11] and the European Group of Ethics of sciences and new technologies in the European Commission[12], even if they appear to appear elements of protection of

8. In any case, this issue of whether or not we are before a person creates difficulties in the jurisprudential argumentation. For example, in the ECHR Sentence (Grand Chamber) of 8 July 2004, *Case Vo v. France*, the Court was "convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ("personne" in the French text)".

9. This is particularly clear in embryos that have been frozen in the blastocyst state. A blastocyst is an embryo of complex cellular structure, formed by approximately 200 cells, and which has remained in culture during 4 or 5 days at least before freezing. The morphological characteristics of a blastocyst are: a cavity (blastocele) and the differentiation between two cellular structures, the internal cell mass (which will give rise to the future embryo) and the trophoectoderm (which will give rise to the placental structures).

10. I'd rather should say "he/she" instead of it.

11. Although it shows a broad consensus on the need for protection of the *in vitro* embryo by insisting this Report that: "However, even in the absence of agreement on the status of the embryo, consideration could be given to reexamining certain issues in the light of the recent developments in the biomedical field and potential therapeutic advances. In this context, while recognizing and respecting the fundamental options of the different countries, it seems possible and desirable - in view of the need to protect the *in vitro* embryo recognized by all countries - to identify common approaches to guarantee adequate conditions of application of the procedures that involve the constitution and use of *in vitro* embryos. This report wants to be an aid for reflection towards this objective".

12. This group issued the following opinion on the ethical aspects of research involving the use of human embryos in the context of the 5th research framework program (November 23, 1998) in which, "even recognizing the lack of a definition in Europe consensus, neither scientific nor legal, about the beginnings of life, and confirming the existen-

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fetuses and embryos, in view of the scientific progresses and the future consequences of the investigation about genetic manipulations, medically assisted procreation or experiments in embryos. All the most can be found as a common denominator of the States the belonging of the embryos to the human species; it is the potentiality of this being and its ability to become a person protected by civil law in a large number of States[13], which must be protected in the name of human dignity without thereby making him or her a "person" who would have a "right to life" within the meaning of Article 2 of the ECHR[14]. But a principle of legal logic requires the right to life to be absolutely protected or not protected, because the intermediate positions have no consistency and neither do they make sense, from a philosophical point of view, if we speak of human dignity.

The Convention for the protection of Human Rights and the Dignity of the Human Being in relation to the applications of medicine in force since December 1, 1999, has the purpose of protecting the human being in his/her dignity and identity and guaranteeing all person, without discrimination, respect for their integrity and their other fundamental rights and freedoms in relation to the applications of biology and medicine. It protects the dignity of every person even before birth and its main concern is to avoid that any form of investigation or intervention can be undertaken in violation of the dignity and identity of the human being. It also does not define the term "person" and

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ce of two major, opposite conceptions, on whether the embryo enjoys or not the moral status of every human being and whether or not it should benefit from legal protection unlimited in a debate that is far from being closed, states are referred to resolve on this issue but remembering that Article 18 of the Convention stipulates in its first paragraph: when the law admits research on *in vitro* embryos, the Law guarantees adequate protection of the embryo (…) ». "*Diversity of points of view*: The diversity of points of view regarding the morally acceptable or not character of research on human embryos *in vitro* shows divergences between ethical principles, philosophical conceptions and national traditions. This diversity is at the very base of European culture. Two main approaches are opposed: the deontological approach that wants our duties and our principles to condition the purpose and consequences of our actions and the utilitarian or "teleological" approach that implies that human actions are evaluated according to the means and goals that are pursued (or consequences). (…). *The group issues the following opinion*: To begin with, it seems fundamental to remember that the progress of knowledge in the life sciences, which has an ethical value in itself, could not prevail over the fundamental rights of man and respect due to all the members of the human family. The human embryo, whatever the moral or legal status recognized by different cultures and the different ethical approaches underway in Europe, deserves the protection of the Law. When there is a *continuum* of human life, this protection must be reinforced in accordance with the development of the embryo and the fetus. The Treaty of the Union, which does not provide for Community legislative competence in the fields of research and medicine, implies that such protection belongs to national legislation (as is also the case of medically assisted procreation and voluntary termination of pregnancy). However, it is also true that the Community authorities must be concerned about the ethical issues raised by medical or research practices that affect the beginnings of human life".

13. As in France in terms of succession or donations, and also in the United Kingdom. Cfr. ECHR Sentence (Grand Chamber) of July 8, 2004, Case *Vo against France*.

14. In Civil law, this means specifically that before birth, the unborn child does not have the capacity to initiate a reparation action or make use of other jurisdictional remedies due to a loss or damage suffered *in utero*, and that cannot be presented in its name any complaint (Case *Paton v. British Pregnancy Advisory Service Trustees* ([1979] QB 276). Efforts have been made in these matters to convince the court invoked that according to the law of successions, the unborn child may be considered "born" or "person in being" from the moment his/her interests demand it. However, the Burton case confirms that this principle is equally subordinated to the condition that he/she is born alive ([1993] QB 204, 227).

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distinguishes between "person" and "human being", which states the primacy in Article 2 in these terms: "The interest and well-being of the human being must prevail over the interest of society or of science». Regarding the problem of the definition of the term "person", the Explanatory Report of the Legal Affairs Directorate of the Council of Europe indicates, in paragraph 18, that "in the absence of unanimity among the Member States of the Council of Europe on the definition of these terms, it has been agreed to let the internal legislations provide the pertinent clarifications for the purposes of the application of this Convention"[15].

Moreover, in this Convention there are undoubtedly provisions regarding the pre-birth phase[16]. It is interesting to note that this Tribunal can be called upon (in application of Article 29 of the Convention) to issue advisory opinions on legal issues related to its interpretation. The contracting states have not provided for any restriction on this power, so as limit the High Court's jurisdiction to matters relating only to events that occur after birth.

Thus, the Oviedo Convention does not give a definition of the human being, whose dignity, identity, primacy, interest and good consecrates. Also it does not speak of the beginning of life. The same applies to the Additional Protocol to the Convention on Human Rights and Biomedicine on the prohibition of cloning of human beings of January 12, 1998, which prohibits human cloning and the draft Protocol on biomedical research, that do not give a concept of human being[17].

Likewise, the Report of the Working Group on the protection of the human embryo and fetus of the Steering Committee for Bioethics: the protection of the human embryo *in vitro* (2003) is of interest at a European level[18].

15. Cfr. Article 1 (sections 16 to 19) of the Explanatory Report of this Oviedo Convention on Human Rights and Biomedicine.

16. Cfr. for example, Chapter IV on "Human Genome".

17. However, as Article 2 of the latter Protocol on biomedical research states that: "This Protocol shall apply to all research activities in the field of health that involve an intervention on the human being. The Protocol will not apply to research on *in vitro* embryos. It will be applied to research on fetuses and embryos in vivo". Therefore, it is not clear if the protection of frozen embryos, which are alive but not yet in the mother's womb, is included. But, in any case, Article 4 insists in the primacy of the human being: "The interest and well-being of the human being who participates in an investigation must prevail over the interest of society or science".

18. "This report aims to present an overview of the current positions in Europe on the protection of the human *in vitro* embryo and the arguments that serve as a basis. It shows a broad consensus on the need for *in vitro* embryo protection. However, the definition of the status of the embryo remains a field where fundamental differences are found that rest on strong arguments. These divergences are, to a large extent, the origin of those found on the issues that refer to the protection of the *in vitro* embryo. However, even in the absence of agreement on the status of the embryo, consideration could be given to re-examining certain issues in the light of recent developments in the biomedical field and potential therapeutic advances. In this context, while recognizing and respecting the fundamental options of the different countries, it seems possible and desirable -in view of the need to protect the *in vitro* embryo recognized by all countries- to identify common approaches to guarantee adequate conditions of application of the procedures that involve the constitution and use of *in vitro* embryos. This report wants to be an aid for reflection towards this objective".

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In the framework of Comparative Law, it is a fact that countries with strong religious traditions protect fetuses and embryos more than others. To give an example, in most of the Member States of the Council of Europe, the incrimination of involuntary manslaughter does not apply to the fetus. However, three countries have opted for specific incriminations. In Italy, Article 17 of the Law n. 194, May 22, 1978, on abortion, provides for a prison sentence of three months to two years against anyone who causes a termination of pregnancy due to imprudence[19]. In Spain, Article 157 of the Criminal Code provides for an offense relating to damage caused to a fetus and Article 146 punishes abortion caused by a "serious imprudence". In Turkey, Article 456 of the Criminal Code provides that anyone who unintentionally causes harm to anyone will be punished by a penalty of six months to one year in prison; if the victim is a pregnant woman and the damage causes a premature birth, the Penal Code provides for a penalty of two to five years in prison.

In short, it is important not to forget that life is one of the values, if not the main one, of the Convention[20] and the Jurisprudence set up by the concrete decisions of the ECHR during these first two decades of the 21st century, it contains interesting arguments about the position of Europe in relation to the protection of the life of the "unborn child", most of which is in favor of protection. Of special interest are the Opinions Dissenting from the Judgments of the Court of Strasbourg that refer to this subject:

Thus, for example, in the ECHR Sentence (Grand Chamber) of July 8, 2004 in the *Case Vo against France*[21], although the majority vote of the Court concluded that Article 2 of the Convention had not been violated for a procedural reason and, therefore, it was not necessary to say whether Article 2 was applicable, in a case in which a pregnancy of almost six months had been interrupted against the will of the mother due to a fault committed by a doctor, this sentence contained also discrepant Opinions with important reasoning's. The separate opinion of Judge Costa to which Judge Traja joined, explained how the ECHR had already shown that Article 2 is applicable to unborn life. Therefore, he added: "3. I voted in favour of finding no violation of Article 2, but would have preferred the Court to hold that Article 2 was applicable, even if such a conclusion is not self-evident"[22]. In fact, he said: "Indeed, it seems to me that the Commission and

19. This ironclad defense of life that makes the "Bel Paese" is also observed, in another issue, in the ECHR Sentence *Parrillo against Italy* of August 27, 2015, to which I will refer later.
20. Cfr. Sentence *Streletz, Kessler and Krenz v. Germany* of 22 March 2001, *Repertoire of judgments and resolutions* 2001-II, aps. 92-94 and Sentence *McCann and others v. the United Kingdom* of September 27, 1995, series to No. 324, app. 147.
21. *Vo v. France*, App. n. 53924/00, July 8, 2004.
22. "17. In sum, I see no good legal reason or decisive policy consideration for not applying Article 2 in the present case. On a general level, I believe (as do many senior judicial bodies in Europe) that there is life before birth, within the meaning

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the Court have already worked on the assumption that Article 2 is applicable to the unborn child (without, however, affirming that the unborn child is a person). […]. Had Article 2 been considered to be entirely inapplicable, there would have been no point – and this applies to the present case also – in examining the question of foetal protection and the possible violation of Article 2, or in using this reasoning to find that there had been no violation of that provision".

According to this Dissenting Opinion, "it is not the Court's role as a collegiate body to consider cases from a primarily ethical or philosophical standpoint (and, in my view, it has successfully avoided this pitfall in this judgment). The Court must endeavour to remain within its own – legal – sphere of competence, although I accept that law does not exist in a vacuum and is not a chemically pure substance detached from moral or societal considerations". In any case, Costa added: "Whether or not they choose to express their personal opinions as Article 45 of the Convention entitles (but does not oblige) them to do, individual judges are not, in my opinion, subject to the same constraints. The present case enters into the realm of deep personal convictions and for my part I thought it necessary and perhaps helpful to set out my views"[23]; and, in any case, the embryo must be recognized, no doubt, as *potential human life*[24].

Nevertheless, if Ethics is impotent to say what a person is and when life begins, does not prevent Legal Justice from defining these notions. Moreover, the work of the Human Rights Judge is precisely that. For the rest, other judges have advanced considerably in this work. For example, the German Federal Constitutional Court and the Spanish

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of Article 2, that the law must therefore protect such life, and that if a national legislature considers that such protection cannot be absolute, then it should only derogate from it, particularly as regards the voluntary termination of pregnancy, within a regulated framework that limits the scope of the derogation. The actual circumstances of Mrs Vo's case made it all the more appropriate to find that Article 2 was applicable: she was six months' pregnant (compare this – purely for illustration purposes – with the German Federal Constitutional Court's view that life begins after fourteen days' gestation), there was every prospect that the foetus would be born viable and, lastly, the pregnancy was clearly ended by an act of negligence, against the applicant's wishes".

23. Avalaible at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last access on August 2th, 2018.

24. "5. From the ethical standpoint, the most natural way to attempt to interpret Article 2 of the Convention ("[everyone's right to life shall be protected by law" – "le droit de toute personne à la vie est protégé par la loi" in the French text) is to ask what is meant by "everyone" ("toute personne") and when life begins. It is very difficult to obtain unanimity or agreement here, as ethics are too heavily dependent on individual ideology. In France, the National Advisory Committee, which has been doing a remarkable job for the past twenty years and has issued a number of opinions on the human embryo (a term it generally prefers to "foetus" at all stages of development), has not been able to come up with a definitive answer to these questions. This is only to be expected, particularly bearing in mind the Committee's composition, which President Mitterrand decided at its inception should be pluralist. To say (as the Committee has done since issuing its first opinion in 1984) that "the embryo must be recognised as a potential human person" does not solve the problem because a being that is recognised as potential is not necessarily a being and may in fact, by converse implication, not be one. As to life and, therefore, the point at which life begins, everybody has his or her own conception (see the Committee's fifth opinion, issued in 1985). All this shows is that there perhaps exists a right for a potential person to a potential life; for lawyers, however, there is a world of difference between the potential and the actual". Avalaible at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]. Last Access on August 2th, 2018.

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Constitutional Court have admitted that the right to life, as protected by Article 2 of the Convention, can be applied to the embryo and the fetus (the question of whether it is an absolute right is different) (Arnold, 2015). As Judge Traja says: "12. […] These are examples of decisions in which the highest courts of individual countries have recognised that the right to life, whether set out in Article 2 of the European Convention on Human Rights or enshrined in domestic constitutional principles of like content and scope, applies to the foetus, without being absolute. Is there any reason why the Court, which aspires to the role of a constitutional court within the European human rights order, should be less bold?"[25].

And it also happens that, as Judge Costa adds, in the field of Article 2, the Court has already done so, "at least as regards the right to life, for example, by imposing positive obligations on States to protect human life or consider that in exceptional circumstances the use of lethal force by State agents may lead to the finding of a violation of Article 2. *Through its jurisprudence, therefore, the Court has expanded the notions of the right to life and the illegitimate homicide, if not the notion of life itself*"[26]. The problem is that the Court does not dare to take more steps in the delimitation of the right to life because of the problems that this would generate. In my opinion, the importance of the interests at stake, also of the best interests of the unborn child, would require taking more steps in favour of protection and, above all, clarifying a crucial question: We, Europeans, do defend life and the right to life or we don't?

The Dissenting opinion of Judge Ress considered, in this judgment, that there had been a violation of Article 2 of the Convention upon finding that it applies to the life of the unborn child and that it is possible to answer in abstract to the question of whether the unborn embryo is a person for the purposes of Article 2 of the Convention; and he complains that, in spite of his need, a status of the embryo is lacking in Europe[27].

25. "7. Does the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life prevent the law from defining these terms? I think not. It is the task of lawyers, and in particular judges, especially human rights judges, to identify the notions – which may, if necessary, be the autonomous notions the Court has always been prepared to use – that correspond to the words or expressions in the relevant legal instruments (in the Court's case, the Convention and its Protocols). Why should the Court not deal with the terms "everyone" and the "right to life" (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms "civil rights and obligations", "criminal charges" and "tribunals", even if we are here concerned with philosophical, not technical, concepts?", avalaible at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.
26. Avalaible at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018. The highlight is mine.
27. "3. In order to reach that conclusion, it seems necessary to find out whether Article 2 applies to the unborn child. I am prepared to accept that there may be acceptable differences in the level of protection afforded to an embryo and to a child after birth. Nevertheless, that does not justify the conclusion (see paragraph 85 of the judgment) that it is not possible to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention. All the Court's case-law and the Commission's decisions (see paragraphs 75-80) are based on the "assuming that" argument

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According to this separate Opinion[28], both the Convention and the Jurisprudence of the Commission and the Court[29] and the Jurisprudence of the contracting states[30] protect the unborn. Indeed, it is clear that if there are problems of interpretation of whether Article 2 of the Convention protects the potential life or not, it is because it is not so clear. If it were, it would not be so much discussed.

Moreover, the demands of the protection of human life force to extend its protection against the rapid technical advances in assisted reproduction to respond to the real current dangers for human life[31]. It is clear that the interpretation of Article 2 is not evol-

(*in eventu*). Yet the failure to give a clear answer can no longer be justified by reasons of procedural economy. Nor can the problem of protecting the embryo through the Convention be solved solely through the protection of the mother's life. As this case illustrates, the embryo and the mother, as two separate "human beings", need separate protection. 4. The Vienna Convention on the Law of Treaties (Article 31 § 1) requires treaties to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The ordinary meaning can only be established from the text as a whole. Historically, lawyers have understood the notion of *"everyone" ("toute personne"*) as including the human being before birth and, above all, the notion of *"life"* as covering all human life commencing with conception, that is to say from the moment an independent existence develops until it ends with death, birth being but a stage in that development". Available at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.

28. "4. […]. The structure of Article 2 and, above all, the exceptions set out in paragraph 2 thereof, appear to indicate that persons are only entitled to protection thereunder once they have been born and that it is only after birth that they are regarded as having rights under the Convention. In view of the "aim" of the Convention to provide extended protection, this does not appear to be a conclusive argument. Firstly, a foetus may enjoy protection, especially within the framework of Article 8 § 2 (see *Odièvre v. France* [GC], no. 42326/98, § 45, ECHR 2003-III)". Available at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.

29. "4. […]. In addition, the decisions of the Commission and the Court contain indications that Article 2 is applicable to the unborn child. In all the cases in which that issue has been considered, the Commission and the Court have developed a concept of an implied limitation or of a fair balance between the interests of society and the interests of the individual, that is to say the mother or the unborn child. Admittedly, these concepts were developed in connection with legislation on the voluntary, but not the involuntary, termination of pregnancy. However, it is clear that they would not have been necessary if the Convention institutions had considered at the outset that Article 2 could not apply to the unborn child. Even though the Commission and the Court have left the question open formally, such a legal structure proves that both institutions were inclined to adopt the ordinary meaning of "human life" and "everyone" rather than the other meaning". Available at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.

30. "4. […]. Similarly, the practice of the Contracting States, virtually all of which had constitutional problems with their laws on abortion (voluntary termination of pregnancy), clearly shows that the protection of life also extends in principle to the foetus. Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother. Nearly all the Contracting States have had problems because, in principle, the protection of life under their constitutional law also extends to the prenatal stage". Available at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.

31. "5. It is obvious that the premise of the debate on genetic safeguards in a number of recent conventions and the prohibition on the reproductive cloning of "human beings" in the Charter of Fundamental Rights of the European Union (Article 3 § 2, final sub-paragraph) is that the protection of life extends to the initial phase of human life. The Convention, which was conceived as a living instrument to be interpreted in the light of present-day conditions in society, must take such a development into account in order to confirm the "ordinary meaning", in accordance with Article 32 of the Vienna Convention. Even if it is assumed that the ordinary meaning of "human life" in Article 2 of the Convention is not entirely clear and can be interpreted in different ways, the obligation to protect human life requires more extensive protection, particularly in view of the techniques available for genetic manipulation and the unlimited production of embryos for various purposes. The manner in which Article 2 is interpreted must evolve in accordance with these developments and constraints and confront the real dangers now facing human life. Any restriction on such a dynamic interpretation must take into account the relationship between the life of a person who has been born and the unborn life, which means that protecting the foetus to the mother's detriment would be unacceptable". Available at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.

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ving with the same speed that science evolves but the problems increase dramatically and so, for example, the European definition of an embryo status would affect the more than one million frozen embryos that exist in Europe, of which nobody speaks about[32]. The effective protection of life in the initial phase of the human being and, above all, of the so-called "pre-embryos", is totally abandoned in Europe, and this despite the fact that there are reasons to believe that, as can be seen, both the ECHR and others, as well as national legislations contain a certain protection of life to be born, which is shown, at least, in the debates and problems that arise everywhere to legislate on abortion.

The dissident Opinion of Judge Mrs. Mularoni, to which Judge Madam Straznicka stated that she joined, considered that Article 2 was applicable and had been violated. In his opinion, the fetus is a being independent of the mother[33], and if the legal personality does not appear until birth, that does not mean at all, in his opinion, that "the right of every person to life" should not be protected before birth[34]. According to the dissenting Opinion of these judges, in this case *Case Vo against France*, like the other articles of the Convention, Article 2 must be interpreted in an evolutionary manner in order to also allow responding to the great current dangers for human life, because the Convention is a living instrument, to be interpreted in the light of current conditions and the rapid advances in assisted reproduction techniques forces judges to pronounce themselves, as Mularoni and Straznicka explained[35].

32. Indeed, the freezing of embryos in the use of TRA has normalized in recent decades. However, there are parents who do not want to fertilize more ovules than necessary. This has happened in some cases of the use of the "technique of the three fathers", which combines the DNA of both parents with that of a female donor: It involves fertilizing two ovules, from the mother and the donor, with sperm from the dad. The nuclei are extracted, only that of the parents is conserved and it is introduced into the 'shell' of the donor's ovule. This is introduced into the uterus of the mother so that the pregnancy will prosper normally. More specifically, it is a mitochondrial transplant (where the energy of the cells resides) between two ovules. The novel technique allows a mother with the defective DNA of her mitochondria to give up the nucleus of her ovule, which would be introduced into the ovum donated by a healthy woman, and then fertilized *in vitro* by the father's sperm. Despite the striking of the procedure, in reality, the baby receives virtually all the genetic information of their parents, and only 0.1-0.2% corresponds to the DNA of the woman who donated the healthy ovule. However, in the case of Ibrahim, a 6-month-old boy, like his parents, because of his religious beliefs, did not want to discard any embryos, the procedure to carry out the pregnancy was different: Only the donor's egg was fertilized with the nucleus of the mother already inserted. This was how the baby was not affected by Leigh's mother's disease. The intervention was carried out in Mexico, although the medical team was headed by the American Dr. John Zhang. In Europe, only the United Kingdom has regulated this technique of fertility having been born in 2016 the first healthy child achieved with it. In Spain, for example, the use of this technique it is not permitted.

33. "Although it does not yet have any independent existence from that of its mother (though having said that, in the first years of its life, a child cannot survive alone without someone to look after it either), I believe that it is a being separate from its mother". Available at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.

34. Although legal personality is only acquired at birth, this does not to my mind mean that there must be no recognition or protection of "everyone's right to life" before birth. Indeed, this seems to me to be a principle that is shared by all the member States of the Council of Europe, as domestic legislation permitting the voluntary termination of pregnancy would not have been necessary if the foetus was not regarded as having a life that should be protected. Abortion therefore constitutes an exception to the rule that the right to life should be protected, even before birth. Available at https://hudoc.echr.coe.int/eng#{"itemid":["001-61887"]}. Last Access on August 2th, 2018.

35. "Until now, while the Convention institutions have refrained from deciding whether or not Article 2 applies to unborn

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The Destination of the Embryos Surplus in the ECHR

Notwithstanding the above, with regard to the specific case of the destination of frozen embryos from assisted reproduction procedures, the ECHR maintains contradictory views on the prevalence of the right to life of frozen embryos, in relation to other interests of the people involved in the use of ART. We will mention an example of each of the two positions: a) The *Evans* judgment *against the United Kingdom* that buries the rights of the frozen embryos and b) The *Parrillo* judgment *against Italy* that reflects an important step in Europe in the defense of the rights of the "pre-embryos". Only one thing in common have these two sentences, paradigmatic, moreover, as to the position of the ECHR regarding the legal status of the "pre-embryos" used in the use of the ART: In both cases, the reason is denied to the woman[36].

a) In Grand Chamber judgement of the ECHR April 10, 2007, in the case of *Evans v. United Kingdom*, the ECHR gave preference, in the weighing of interests, to the father's interest in not having a child against his will, against the interest of the mother who wanted to implant the frozen embryos after the conjugal separation, even though for the woman it was the last possibility of having a genetically own child, problem that affects, in my opinion, undoubtedly, Articles 2, 8 and 14 of the Convention.

The most serious of all is that the Court's argument, both in Section 4[37] and in the Grand Chamber[38], was about the weight of the respective interests of the parties but not about the preference that could have for frozen embryos the solution of being implanted (destiny –to live), in front of the non implantation solution. That is to say, it was raised as a matter of argumentative weight of the contending positions but there was

children (see paragraphs 75-80 of the judgment), they have not excluded the possibility that the foetus may enjoy a certain protection under Article 2, first sentence (see *H. v. Norway*, no. 17004/90, Commission decision of 19 May 1992, DR 73, p. 167, and *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII). Firstly, I think it necessary to bear in mind that the task of the national and international judge is not always easy, especially when a text may be construed in ways that are diametrically opposed. The travaux préparatoires on the Convention are silent on the scope of the words "everyone" and "life" and as to whether Article 2 is applicable prior to birth. Yet, since the 1950s, considerable advances have been made in science, biology and medicine, including at the prenatal stage. The political community is engaged at both national and international level in trying to identify the most suitable means of protecting, even prenatally, human rights and the dignity of the human being against certain biological and medical applications. I consider that it is not possible to ignore the major debate that has taken place within national parliaments in recent years on the subject of bioethics and the desirability of introducing or reforming legislation on medically assisted procreation and prenatal diagnosis, in order to reinforce guarantees, prohibit techniques such as the reproductive cloning of human beings and provide a strict framework for techniques with a proven medical interest".

36. I do not want to comment on the fact that in both cases the woman has been defeated in the trial, because there is the possibility that it is a coincidence, but, in the future, I will gladly dedicate myself to seek the jurisprudence of the ECHR, which gives reason to women in matters of assisted reproduction.

37. *Evans v. United Kingdom*, March 7, 2006. (Section 4).

38. *Evans v. United Kingdom,* App. n. 6339/05, April 10, 2007 (Grand Chamber).

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no reference in any part of the sentence to the argument that, for frozen embryos, it is better to be born than not to be born.

The case began with the claim of a british citizen against the United Kingdom presented before the Court on February 11, 2005, for the judicial denial of the implant of frozen embryos in *in vitro* fertilization treatment, having the husband-withdrawn consent for the implantation of his partner after separation. The Court (unanimously declared that there had been no violation of Article 2 of the Convention[39]; declared, by five votes against two, that there was no violation of Article 8; and declared, unanimously, that there was no violation of Article 14 in relation to Article 8. The Grand Chamber in the Judgment of April 10, 2007 in this Case *Evans v. United Kingdom*, unanimously held that there had been no violation of Article 2 of the Convention or 8 (by 13 votes to 4) or 14 into consideration with Article 8.

Not in vain, this sentence contains substantial Dissenting Opinions whose arguments reach more pages than the Court's own Majority Vote. They argue that the British legislation does not achieve a reasonable balance in the special circumstances of the case and, in addition, discriminates women in gender matters, as women are not in the same situation as men, that can have genetically own children in the future. Moreover, no legislation can be fair on equality if it does not recognize the diverse situation in which they find themselves, biologically, women and men, with respect to motherhood and fatherhood, respectively, because equality is to treat differently what is actually different.

b) On the other hand, in the Parrillo case against Italy, August 27, 2015[40], the Grand Chamber of the Court of Strasbourg shows signs of a strong defense of life by denying, by sixteen votes against one, the demand of condemning Italy for prohibiting that embryos conceived in *in vitro* fertilization techniques could be used for different reproductive purposes, such as research purposes[41].

In the case, Adelina Parrillo and her partner underwent IVF in 2002 without obtaining results. The following year, the man died and five embryos remained cryopreserved in a medical center in Rome. Not wanting to attempt a pregnancy with them, Ms. Parrillo asked the director of the medical center to be allowed to donate them for scientific research, but he refused to do so invoking Italian Law n. 40, February 19, 2004, about

39. And the same declared the Grand Chamber of the ECHR in this case *Evans v. U*K on April 10, 2007: "The Grand Chamber, for the reasons given by the Chamber, finds 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, and that there has not, therefore, been a violation of that provision".
40. *Parrillo v. Italy*, App. n. 46470/11, August 27, 2015.
41. And this despite the fact that the Italian Constitutional Court had indicated in April 2014, shortly before, that the prohibition of heterologous fertilization, foreseen in Law n. 40 of 2004 that regulates medically assisted procreation, was unconstitutional.

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medically assisted procreation that prohibits, under penalty criminal, all experimentation on human embryos.

The Court considered that the Italian prohibition does not violate the right to private and family life nor the right of property, guaranteed in article 1 of Protocol 1 of the ECHR, and that Ms. Parrillo claimed to have on cryopreserved embryos. The judgment states that "the embryos conceived by *in vitro* fertilization should not be considered as 'individuals' since, in the absence of implantation, they are not destined to develop into fetuses and be born", which she deduces that "from a legal point of view they are 'goods'" (nº 203). The Court expressly rejected this reasoning, and stated that, without having to enter into the question of the beginning of human life, human embryos cannot be reduced to the category of "goods", given their meaning economic and patrimonial.

In conclusion, I believe that the "pre-implantation pre-embryos" that are manipulated in the various modalities of ART, such as indisputably "tiny human beings"[42] that are, using an expression of the renowned jurist Corral Talciani, deserve, in justice, an effective legal protection because, strictly speaking, they are not ontologically different from the human life already born, as is clearly shown in the conclusions of the ECHR in the *Parrillo case against Italy*, both in the majority vote[43] and in the concordant opinion of Judge Dedov[44] and in the Common Opinion partly dissident of the judges Casadeva-

42. Even if they are not "persons" in a legal sense.

43. "43. Unborn human life is no different in essence from born life. Human embryos must be treated in all circumstances with the respect due to human dignity. Scientific research applications concerning the human genome, in particular in the field of genetics, do not prevail over respect for human dignity. Scientific progress must not be built upon disrespect for ontological human nature. The scientific goal of saving human lives does not justify means that are intrinsically destructive of that life. The beginning and end of human life are not questions of policy subject to the discretion of the member States of the Council of Europe. The "adequacy" of the protection provided to the embryo by the Contracting Parties to the Convention is subject to close scrutiny by the Court, since States have a narrow margin of appreciation with regard to fundamental issues related to the human being's existence and identity"

44. Dedov criticizes the fact that the Court accepts the wide margin of appreciation of the State regarding the protection of embryos and the right of the applicant to self-determination, affirming: "3. The Government raised the issue of the "embryo's potential for life" in support of the legitimacy of the aim of the interference. Such an important aim, which cannot be reduced to a question of margin of appreciation, presumes that the embryo's existence is a condition for a human being's development. Since the right to life is at stake, it completely changes the judicial approach in accordance with the Court's role in interpreting the Convention, including the positive obligation of the State to safeguard the beginning of life. [4…]. 5. In my view, the embryo's right to life is a key criterion for reaching the right decision. I am sure that if this criterion had been applied, many previous cases, such as *Evans*, *Vo* and *S.H.* (cited in the judgment), would have been decided in favour of the applicants, who indeed wanted to become parents and, as a result, to save the embryo's life. [6…]. 7. I ought also to mention the PACE Resolution 1352 (2003) on Human Stem Cell Research, which is even more specific: "[t]he destruction of human beings for research purposes is against the right to life of all humans…" (see paragraph 10 of the Resolution). Moreover, thanks to the European Citizens' Initiative "One of us" the embryo's right to life has been expressly acknowledged by millions of European citizens, and the initiative was supported by the EC governing bodies. Nevertheless, the Court is still silent on the subject. That ambiguity, which has continued from case to case, ultimately affected the applicant and her legal representatives, who were not sure which Article of the Convention should be applied in the present case, or which right should be protected: the right to private life or the property right. 8. I am not convinced that the margin of appreciation or the lack of consensus should prevent the Court from reaching such a conclusion. Since the right to life is absolute, and is one of the fundamental rights, neither the margin of appreciation nor sovereignty nor consensus is a relevant factor.

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ll, Ziemele, Power-forde, De gaetano and Yudkivska, and in the dissenting opinion of Judge Sajó[45] that criticizes the concept of "*margin of appreciation*"[46].I want to highlight the phrase of the Majority Vote: "Advances in science should not rest on the lack of respect for ontological human nature". On the other hand, judge Dedov recalls that the embryo determines the development of a human being. The right to life is absolute and is one of the most fundamental rights, and there is no doubt that, in the embryo, the right to life is at stake. In short, as Dedov adds, the *margin of appreciation* must only intervene to indicate the protection measures of the rights protected by the ECHR but for nothing else[47]. The judges Casadevall, Ziemele, Power-forde, De gaetano and Yudkivska remind,

A margin of appreciation is required only to determine which measures are necessary to protect a fundamental value (for example, public expenditure or a time-limit on the cryopreservation of embryos). The embryo's life cannot be sacrificed for the purpose of inter-State competition in biomedicine".

45. "3. […]. Note 46: "It will remain a mystery to me why the lack of a European consensus on the existence of a right is so often interpreted against the existence of a right, where such a right can be deduced from the autonomous concept of a Convention right, for example also in the light of international-law developments and social realities. If the exercise of a freedom has been found to be permissible in at least some countries, then this should create a presumption in favour of that Convention right if this is otherwise compatible with a reasonable interpretation of the meaning and scope of the right. This does not of course rule out the possibility that there may be good reasons in another country for restricting that right. Or are we saying that the recognition of the broader scope of a right in a number of countries is arbitrary and irrelevant? With its controversial margin of appreciation doctrine, as it is understood by the Court, the State is exempted from the duty to provide a substantive justification for the existence of an imperative need to interfere. Reference to the lack of European consensus as a decisive indicator of the absence of a certain meaning or scope of a Convention right disregards the Preamble to the Convention, which refers to the "further realisation of human rights" as one of the methods for pursuing the aim of the Convention".

46. "7. The Court finds that a right of others is present because "the potential for life" may be linked to that alleged right. I hope I am mistaken, but I fear that we face a risk here of loosening the standard applicable to the list of permissible aims for the restriction of rights. So far, the Court has consistently held that the list of exceptions to the individual's Convention rights is exhaustive and that their definition is restrictive (see, among other authorities, *Svyato-Mykhaylivska Parafiya v. Ukraine*, no. 77703/01, § 132, 14 June 2007, and *Nolan and K. v. Russia*, no. 2512/04, § 73, 12 February 2009). This is essential to any serious protection of rights. Unfortunately, in S.A.S. v. France [GC], no. 43835/11, § 113, ECHR 2014 (extracts) it was held that "to be compatible with the Convention, a limitation of this freedom must, in particular, pursue an aim that can be linked to one of those listed in [Article 9 § 2]. The same approach applies in respect of Article 8 of the Convention." From the position that there "can be a link" to those exhaustively listed exceptions, we now move to the position where a link may exist if this is not ruled out as unreasonably speculative ("there may be", rather than "there can be" a link).
Failure to undertake a serious scrutiny of a State's purported aim in imposing the restriction will undermine the rights-protective potential of any proportionality analysis. The scrutiny of the aim of a measure is part of the supervisory role of the Court (see Handyside v. the United Kingdom, 7 December 1976, § 49, Series A no. 24.) If we wish to apply the margin of appreciation doctrine, we could say that in matters of economic policy there is little scope for such an analysis, given the cognitive advantage the national legislation or national authorities enjoy or that "[b]ecause of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'" (see James and Others v. the United Kingdom, no. 9793/79, § 46, 21 February 1986). This reasoning cannot be applied without additional and convincing reasons to areas where the issue is not the general "public interest" in economic or social policies but morals, health policy or science".

47. "9. The right to life is absolute, and this fundamental tenet makes it unnecessary to explain why a murderer, a disabled person, an abandoned child or an embryo should be kept alive. We do not need to evaluate their usefulness for society, but we remain hopeful regarding their potential. The embryo's right to life cannot be called into question by the fact that, until implantation, its potential for development is something that can be maintained artificially, because any such new technology is a natural development created by human beings". "14. Since new biotechnology objectively expands our perception of the forms and conditions of human existence, I am not aware of any objective obstacles to legal recognition of this achievement, as soon as possible, as it is well known that any delay in such recognition at national and international level is potentially life-threatening and arbitrary".

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with important arguments, that the human embryo does not have the legal status of "*thing*" and that when we speak of "respecting the rights and freedoms of others", we forget often that embryos are included within that "the rest"[48]. On the lack of proportionality of the measure in the interference of the Italian State, Judge Sajó rescues the inconsistency of attributing a preponderant importance to a possibility of life[49] being the case that in Italy, both abortion and stem cell research are allowed.

North American Winds in Favor of Decisions Toward Life of Frozen Embryos

I cannot finish this article without mentioning the proposition of the new Law of the North American State of Arizona, dated in April of 2018, according to which in fights over frozen embryos, whoever wants to make a baby should win.

As well as Europe, more than a million frozen embryos are stored in fertility clinic freezers across the USA, the result of a steep rise in couples who have used *in vitro* fertilization (IVF) over the last several decades, and Arizona has become the first state in the US to pass a law mandating what happens to frozen embryos after couples get divorced[50]. When there's a dispute over whether to destroy the cells, the law says, the frozen embryos must go to the person who wants them "to develop to birth"[51].

48. "6. To find that the embryo is 'a constituent part' of the applicant's identity is a far-reaching finding indeed. Unlike the majority, we do not consider that embryos can be reduced to constituent parts of anyone else's identity—biological or otherwise. Whilst sharing the genetic make-up of its biological 'parents', an embryo is, at the same time, a separate and distinct entity albeit at the very earliest stages of human development. If a human embryo is no more than a constituent part of another person's identity then why the abundance of international reports, recommendations, conventions and protocols that relate to its protection? These instruments reflect the broad general acceptance within the human community that embryos are more than simply 'things'. They are, as the Parliamentary Assembly of the Council of Europe has put it, entities 'that must be treated in all circumstances with the respect due to human dignity' (§ 53)". "8. Regrettably, the muddled reasoning of the majority that is evident on the question of admissibility persists when it comes to the merits (at §167). In assessing the proportionality of the ban in question the Court considers that it may be linked to the aim of protecting 'the rights and freedom of others' but this, the majority quickly asserts, does not involve any assessment as to whether the word 'others' extends to human embryos!".

49. Denying the Italian State to the applicant her interest to allocate the frozen embryos to the investigation.

50. The new Arizona law was driven in part by a state court case last year. Before going through cancer treatment in 2014, Ruby Torres and her boyfriend created seven embryos through IVF. However, when her husband filed for divorce in 2016, Torres still wanted the right to use the embryos, which she said could be her last chance to have biological children. Torres' ex-husband fought against that, and the family court judge, Ronee Korbin Steiner, finally ruled in his favor. Steiner argued that the terms of the contract signed by the couple in the fertility clinic should be maintained, and that the "right not to be forced to be a parent exceeds the wife's right to procreate", even if for her it is the last chance to have biological children. Torres continues to fight her husband in the Arizona court. Appeals for the embryos they created.

51. The landmark legislation, supported by anti-abortion groups and signed into law by Gov. Doug Ducey in April, is at the vanguard of the nationwide abortion debate. While some conservatives are cheering the new law as further support for the notion of "personhood," others argue that it is a dangerous overreach of government.

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Most fertility clinics use contracts that force couples to decide ahead of time what should happen to the embryos in the event of a divorce, and most states have opted in favor of upholding the contracts, like in Europe. But a small number of cases — a couple dozen, roughly — have been fought in court, including Sofía Vergara's ongoing legal fight with her ex-fiancé Nick Loeb.

In 2016, lawmakers in Missouri wrote legislation that would have forbid the destruction of embryos in divorce proceedings. The bill got the support of anti-abortion groups but ultimately failed to become law.

The new law was sponsored by Republican Senator Nancy Barto of Phoenix[52], and supported by the conservative Center for Arizona Policy, part of the anti-abortion Family Research Council[53]. The law stipulates also that in cases where embryos are turned into babies, the parent who was not in favor of their use would have "no parental responsibilities" and would not have to pay child support.

Marchant argued that the "property versus person" debate on frozen embryos had grown largely obsolete in courtrooms, and that people on both sides generally agree that embryos are not like property. Merchant also warned that similar initiatives may be emerging soon in other states, as it is becoming a noticeable trend[54]. So the debate is served.

Conclusion

Needless to say, practice shows that it is usually women and not men who want to use frozen embryos after the emotional break to create life. Without entering into the differences of all order that exist between women and men, both biological and ontological and even spiritual, it is clear that the possibility of being a mother (genetically speaking) does not wait, unlike men, that can be parents up to after 80 years. I must insist, however, once again, that such differences should generate different legal treatment if we speak seriously of "right to equality", and this is not what the paradigmatic Evans judgment of the ECHR does.

52. Although the law itself does not use the language of personhood, Barto has a history of supporting bills restricting abortion, banning fetal tissue research, and defunding Planned Parenthood.
53. "I applaud the Governor for his bold actions in protecting parental rights," Cathi Herrod, president of CAP, said in a statement after Ducey signed the bill.
54. "I think most states recognize that this is a future human even if it's not an existing person," Marchant said. "It's not just a car or a dining table or a piece of furniture. It's something that requires more respect than that and needs to be dealt with sensitivity, regardless of your view on whether this is a person."

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From the point of view of practical reason, the fact that Europe prefers freedom over life, as seems to be the ECHR criteria in Decisions such as *Evans*, among others, is another example of the moral exhaustion of Europe and the decline of a continent once essentially defender of life, being the case that the freedom under discussion is infected by the individualism of liberalism, and this is something that should be discussed in the public forum, and not take for granted a freedom that turns out to be the freedom defended by liberalism.

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