

## ***Parrillo v Italy*: is there life in the European Court of Human Rights?**

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The European Court of Human Rights has ruled for the first time on the question of whether article 8 of the European Convention on Human Rights encompasses the right to make use of embryos obtained from *in vitro* fertilisation for the purpose of donating to scientific research. The case of *Parrillo v Italy* App no 46470/11 raises questions concerning the legal status of the embryo and the consequences of that status including the rights, duties and responsibilities of those who have a genetic connection to the embryo or who have committed themselves to potential parenthood by undertaking a course of *in vitro* fertilisation treatment resulting in the creation of embryos.

Ms Adelina Parrillo was born in 1954. In 2002 she and her partner underwent *in vitro* fertilisation treatment in Rome, Italy, from which five embryos were obtained. The applicant's partner subsequently died in a bomb attack in Iraq before the embryos could be implanted. The applicant sought, and was refused, release of the cryopreserved embryos, from the Centre of reproductive medicine at the European hospital in Rome, in order to donate the embryos for stem cell research. The Centre refused on the grounds that such research was banned pursuant to section 13 of Law no 40 of 19 February 2004 ('the 2004 Law'). This Act came into force four months after the death of the applicant's partner.

The applicant alleged to the ECtHR that the ban under section 13 of the 2004 Law was incompatible with her right to respect for her private life pursuant to article 8 of the European Convention on Human Rights and her right to peaceful enjoyment of her possessions pursuant to article 1 of Protocol 1.

Article 8 of the ECHR reads:

- '1. Everyone has the right to respect for his private and family life...
2. There shall be no interference by a public authority with the exercise of his right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or

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the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

On 27 August 2015 in *Parrillo v Italy*, the Court judged the application pursuant to article 8 admissible and the application pursuant to article 1 of Protocol 1 inadmissible.

It was accepted by the parties that if article 8 was applicable then the 2004 Law did amount to an infringement of the applicant’s right to private life pursuant to article 8. Since the interference had occurred pursuant to the 2004 Law it was in accordance with the law. The issue, therefore, before the Court was whether it pursued a legitimate aim and was necessary in a democratic society.<sup>3</sup>

The Italian government put forward, as their legitimate aim for interference with the article 8 right, the aim of protecting human dignity, which, according to Italian law, was accorded to the human embryo as a subject of law.

The Court ruled that the ‘protection of the embryo’s potential for life’<sup>4</sup> could be linked to the aim of protecting morals ‘or for the protection of the rights and freedoms of others’ pursuant to article 8.2, without deciding that the term ‘others’ applied to embryos, that is without making a decision which would imply that embryos were a human life meriting protection under that section.

It then went on to consider that these reasons were relevant and sufficient for the purposes of justifying the interference pursuant to article 8.2. This was because the margin of appreciation permitted to a member state was wider where there was no European consensus and where the case raised sensitive moral or ethical issues, as in the present case. Furthermore the Court ruled that this was not a case concerning prospective parenthood and therefore it did not concern a particularly important aspect of the applicant’s existence and identity thus enabling the Court to accord the member state a wide margin of appreciation. Furthermore the Court found that the choice to donate embryos was a decision of the applicant alone, and there was no evidence that her partner had or would have made the same choice. For these reasons the Court found there was no violation of the applicant’s article 8 right.

The Court’s approach to the Convention as a ‘living instrument’ adaptable to changes in social attitudes has recently been denounced by Professor John Finnis. This is significant in the context of the debate on the United Kingdom’s Conservative government’s manifesto pledge to ‘scrap’ the Human Rights Act 1998 and to introduce a ‘British Bill of Rights’. His lecture on Judicial Power in October 2015 was introduced and commended by the government minister now

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<sup>3</sup> The merits of the application are considered by the court at paragraphs 169-198.

<sup>4</sup> *Parrillo v Italy*, para 167

responsible for this measure, Michael Gove, the Justice Secretary and Lord Chancellor<sup>5</sup>.

Finnis is not the first to question the approach of the European Court. In recent lectures, Lords Hoffmann<sup>6</sup> and Sumption<sup>7</sup> have been critical of the perceived excesses of the 'living instrument' approach and even a strong supporter of the ECHR and the Human Rights Act 1998, Baroness Hale, Deputy President of the UK Supreme Court, has pointed out that,

'...the image of a 'living tree' may be more helpful than the image of a 'living instrument'. A violin is an instrument, but it has no life of its own, only the life it is given by the violinist who plays it. A tree has a life of its own, but it can only grow and develop within its natural limits. It is not an unstoppable beanstalk grown from a magic bean.'<sup>8</sup>

Finnis is scathing in his critique of the Court in *Hirst v United Kingdom No 2 App no 74025/01* [2005] ECHR 681 on prisoners' right to vote and of the Court's decision in *Hirsi Jamaa and others v Italy App no 27765/09* making it difficult to send migrant boats back to Libya, which he considers to be 'an important cause (among complex causes) of today's migration crisis'. He is especially sceptical of the Court's approach to article 3, where he criticises its 'creation of a huge body of rights of asylum law, in the context of a Convention quite certainly intended to contain no right to asylum'.

Professor Finnis is also, however, well known for his upholding of the intrinsic moral worth of the human embryo and his opposition to embryo experimenting and indeed his opposition to *in vitro* fertilization. See, for example, his previously unpublished essay on *C S Lewis and Test Tube Babies* in John Finnis, *Human Rights and the Common Good*,<sup>9</sup> especially at pp 278-281:

'The essential conditions of the IVF child's origin ... tend to assign this child, in its inception, the same status as other objects of acquisition. The technical skills and decisions of the child's makers will have produced, they hope, a good product, a desirable acquisition'.

Finnis proceeds to identify, 'The great evils of destructive experimentation, observation, and selection' as signs of this attitude of envisaging a child as a

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<sup>5</sup> The whole event can be seen on video and a transcript of the lecture can be read at <http://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future/>.

<sup>6</sup> Lord Hoffmann, *The Universality of Human Rights*, Judicial Studies Board Annual Lecture, 19 March 2009: <http://justice-for-families.org.uk/documents/reports/JStudiesBoardLecture0309.htm>.

<sup>7</sup> Lord Sumption, *The Limits of Law*, <https://www.supremecourt.uk/docs/speech-131120.pdf>

<sup>8</sup> <http://www.gresham.ac.uk/lectures-and-events/beanstalk-or-living-instrument-how-tall-can-the-european-convention-on-human>

<sup>9</sup> John Finnis *Human Rights and the Common Good: Collected Essays Volume III* (2011) Oxford University Press, Oxford

product. He rejects this 'radical domination' as 'not truly parental'. As for the embryo, Finnis's view is that,

'Since the culmination of the process of fertilization, each one of us has maintained not only the same genetic code or, more precisely, genetic constitution (practically unique to himself or herself) but also an organic integration which will remain until death. So it is not only the identity and singularity of genetic constitution of each stage (and indeed in each cell) which justifies this fundamental proposition: the human person's bodily life begins at conception and lasts until the death of that individual.'

According to Finnis, it follows that,

'Certain aspects of much current IVF practice are, therefore, fundamentally unacceptable and ought to be prohibited by any civilized community.'

It is therefore intriguing that his lecture on Judicial Power did not address the recent decision of the European Court in August 2015, in *Parrillo v Italy*, to prevent a woman from donating embryos to research. His *bête-noire*, the European Court of Human Rights, is in the particular context of this Italian law following something close to his defence of the human embryo in a case of fundamental significance for humanity at its most vulnerable.

This case also contains, one might say in embryonic form, some sense that there is life in the European Court of Human Rights that does not amount to a 'living tree' or 'living instrument' or 'instrumentalist' approach but which is potentially compatible with Professor Finnis's strictures. The way forward, we suggest, is to engage with the arguments proposed by the judges and to call for ambiguities to be addressed in subsequent cases. Finnis is rightly sceptical of the way the Court uses 'blanket ban' as a catch-all phrase. But it would be a mistake to have a blanket condemnation of the Court without paying heed to the arguments between the judges in *Parrillo*. A full analysis, let alone our own views, must await a later article. In this comment, however, we draw attention to some of the questioning and question-begging elements in the opinions.

The concurring opinion of Judge Pinto De Albuquerque argues robustly that, 'The majority's reasoning is both contradictory in terms of logic and scientifically inadmissible.' The judge insists on addressing the status of the human embryo because, 'Otherwise the Court would be giving up the most basic of its tasks, namely, protecting human beings from any form of instrumentalisation.'

This opinion is full of insights which could have been drafted by Finnis. Even a footnote (number 32) points out that,

'The applicant's position is in fact contradictory because she also claims that she has a property right over her embryos. It is unacceptable to invoke at the same time a right to property and a right to privacy with regard to the human embryos 'owned'. Unless the implication were that using and disposing of human beings – in the instant case human embryos – would be a form of maintaining a relationship with them.'<sup>10</sup>

The judge's main reason for objecting to the majority's approach is this:

'31. The majority's reasoning is both contradictory in terms of logic and scientifically inadmissible. It is contradictory in terms of logic because they admit, on the one hand, that the embryo is an "other" for the purposes of Article 8 § 2 of the Convention, since the protection of the embryo's potential for life may be linked to the aim of protecting the "rights and freedoms of others" (see paragraph 167). On the other hand, however, the same majority affirm that this acknowledgment does not involve any assessment by the Court as to whether the word "others" extends to human embryos. The patent logical contradiction between the two statements is so obvious that it is irremediable. The only possible reading of this contradiction is that the majority were so divided that they could not decide whether the statement of principle in paragraph 59 of *Costa and Pavan* should prevail over the opposite statement of principle in paragraph 228 of *A, B and C v. Ireland* ([GC], no. 25579/05, ECHR 2010)...'

The judge criticises the majority for their

'rhetorical "fallacy of the undistributed middle", according to which the majority assume that because they share a common property two separate categories are connected. In other words, in interpreting the Constitutional Court's judgment of 10 June 2014 the majority assume that because the right to become a parent is an aspect of a person's private life, as is the right to have IVF treatment, both of these rights are unfettered ones in so far as they are rights to "self-determination", thus forgetting that the exercise of "self-determination" of the progenitors in the latter case may impinge upon the existence of another human life: that of the non-implanted embryo.'

He then goes on to criticize the majority's reasoning that 'the embryos contain the genetic material of the person in question and accordingly represent a

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<sup>10</sup> The next footnote warns that,

'Although paragraph 65 of *Costa and Pavan* uses the word "right", this unfortunate *maladresse de plume* should not be taken literally, since the same judgment also refers, in paragraph 57, to the parents' "desire" to have a healthy child. The circumstances of the *Costa and Pavan* case are in no way similar to the present case, and can certainly not be used to ground an unfettered "negative right" to decide the fate of non-implanted embryos.'

constituent part of that person's genetic material and biological identity'<sup>11</sup> on the basis that the embryo, despite genetic links, is a different biological identity from the person who has undergone IVF. He regards the majority reasoning as unacceptable in ontological and biological terms, arguing that human dignity makes it imperative to respect 'the uniqueness and diversity' of each human being in accordance with the Universal Declaration on the Human Genome and Human Rights.

He identifies the contradiction between paragraph 158, where the majority say that the embryos represent a 'constituent part' of the genetic material of the applicant and of her biological identity and that in paragraph 174 where they conclude that the protection of a 'constituent part' of the applicant's biological identity is not one of the core rights of article 8.

His conclusion on admissibility is that since the embryo is not a thing or a 'possession', it is an 'other' within the meaning of article 8, with whom the person who has undergone *in vitro* fertilisation has a potential parental relationship and that the private nature of the relationship arises in so far as the embryo has a unique biological identity, but shares genetic material with the progenitors.

His view, consequent upon that is that unborn human life is no different in essence from born life and that human embryos must be treated in all circumstances with the respect due to human dignity. Furthermore, 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 but are 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.

Ultimately, the majority manage to come to the right answer, in this judge's opinion, because they conclude that the embryo is an 'other', rather than a thing or a possession.

A joint partly dissenting opinion of Judges Casadevall, Ziemele, Power-Forde, De Gaetano and Yudkivska has a similar critique of 'the muddled reasoning of the majority' which merits their use of a double exclamation mark in amazement that the majority are so quick to deny 'any assessment as to whether the word 'others' extends to human embryos!!'

Judge Sajo dissents from the opposite perspective on the basis that in Italy both abortion and research on foreign stem cell lines are permitted. He 'cannot see why preponderant weight is attached to the potential for life when Italian law does allow the abortion of a viable foetus, and in the particular circumstances of the present case where, in the absence of the consent of the applicant, that potential cannot materialise.'

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<sup>11</sup> *Parrillo v Italy*, para 158

Finnis might retort that one could equally say that the logic of this is to cast doubt on Italian abortion law. Or one might argue that the law takes a different stance because law-makers think that the differences between *in ventro* and *in vitro* are relevant. The Italian government made the point that in the case of abortion the rights of the foetus had to be weighed against the rights of the mother: see para 125. The point here being that a pregnancy inevitably puts the life of the mother at risk whereas the existence of an embryo outside the womb does not place any such risk on the mother, consequently the rationale for abortion does not apply to the issue of experimentation on or destruction of embryos.

Parrillo sees *in vitro* fertilisation in a completely different light to Finnis's critique and would have seen the use of the embryos for research as a positive contribution to the common good. She and her partner wanted a child. She did not share Finnis's ethical and/or religious objections to IVF. Her partner was then killed. The human embryos were then not going to be given the opportunity to grow in a womb. Whether or not she should have foreseen that this might have happened, by the time she faced the issue, the best she thought she could do to give meaning to the creation of life in these embryonic forms was to offer them for medical research. When the alternative was destruction or, as the dissenting judge put it, 'to languish indefinitely until such (unknown and unknowable) time as the embryos lost viability or could be used for a procreative purpose contrary to her clearly expressed wishes', there might be considerable sympathy for Parrillo's ethical dilemma. One of us has described such cases as 'uneasy' in the sense of not only being 'hard' but leaving many people with a sense of un-ease<sup>12</sup>, whatever the outcome. Finnis appears not to have such qualms.

In a later article, we intend to return to these underlying ethical concerns and to look at the implications of this decision for cognate areas of the law. For now, however, we conclude this note by applauding the efforts of those judges who stood apart from the crowd to give us more detailed, reasoned opinions. Finnis concludes his lecture by quoting his friend, the retired Australian High Court judge, Dyson Heydon quoting Lord Bingham: 'Judicial independence involves independence from one's colleagues.' The Parrillo case demonstrates that judges of the ECtHR are prepared to exercise their judicial independence in order to encourage future opinions to give deeper reasons for their conclusions. In more ways than one, therefore, *Parrillo v Italy* shows how there is indeed life in the European Court of Human Rights.



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<sup>12</sup> Simon Lee, *Uneasy Ethics* (2003, Pimlico, Random House, London, ebook edition, 2011)

