

Hard Cases

The Prohibition of Gametes' Donation: When the Constitutional Court 'Decides to Decide'

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Abstract

The paper addresses the prohibition on gamete donation, which was recently revoked by a landmark judgment of the Italian Constitutional Court. In the first part, it explores the social and cultural context to and political debate regarding the Italian law on medically assisted reproduction. It then sets out a framework for analysing the progressive erosion of the ban. It presents the Court's clear intention finally to adopt a position, setting aside the reluctant stance of the past and the much-criticised tendency to 'decide not to decide'. The paper then concludes with a discussion of the scenarios to which the revocation of the ban has given rise.

'One egg, one embryo, one adult – normality. But a boganovskified egg will bud, will proliferate, will divide. From eight to ninety-six buds, and every bud will grow into a perfectly formed embryo, and every embryo into a full-sized adult. Making ninety-six human beings grow where only one grew before. Progress.'

Aldous Huxley, *Brave new world* (1932)

I. The Facts

In the judgment to which this commentary relates,¹ the Italian Constitutional Court ruled unconstitutional the absolute prohibition on heterologous fertilisation.²

This technique of 'artificial reproduction'³ enables a foetus to be conceived with the use of genetic material originating either in whole or

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¹ Corte Costituzionale 10 June 2014 no 162, available at www.giurcost.it.

² Cf legge 19 February 2004 no 40, Art 4, para 3; Art 9, paras 1 and 3; Art 12, para 1.

³ The literature refers in general to 'artificial reproduction' in relation to all clinical and biological practices that enable conception other than according to the natural process: P. Vercellone, 'Procreazione artificiale' *Digesto delle discipline privatistiche* (Milano: Giuffrè, 1997), XV, 309. M. Tedesco, 'La procreazione medicalmente assistita', in M. de Tilla et al

in part from persons outside the couple.⁴ Heterologous fertilisation, as is known, is of significant scientific and therapeutic benefit as it makes reproduction possible also in situations in which the couple is sterile or infertile (ie: failure to produce gametes suitable for reproduction).⁵ Nevertheless, it has encountered a certain level of resistance on a legal level due to certain complex ethical and moral questions.⁶ The widespread prejudice against heterologous fertilisation – which was already clear in the debate prior to the enactment of legge 19 February 2004 no 40 (hereinafter 'legge 40') – was confirmed within the legislation by the absolute prohibition on the donation of gametes.

In the cases examined by the referring courts, three Italian couples who were incapable of reproducing naturally approached various healthcare facilities seeking heterologous reproduction. However, these facilities refused to perform the procedure, thereby preventing the couples from reproducing in the only manner in which they were able. The courts that heard the application,⁷ basing their position on the principles and arguments asserted by the European Court of Human Rights in Strasbourg,⁸ referred the Italian legislation in this area for constitutional review on the grounds of unreasonableness.⁹ This legislation – whilst being inspired by the aim of

eds, *Fecondazione eterologa* (Milano: UTET Giuridica, 2015), 2-3.

⁴ The production of the embryo in cases involving the donation of eggs necessarily occurs *in vitro*: the egg, which is extracted from the donor by laparoscopy, is fertilised *in vitro* with the aspiring father's semen and subsequently implanted in the woman's uterus. In the event that male semen is donated, fertilisation may occur either *in vivo* or *in vitro* (P. Spaziani, 'Questioni attuali in tema di procreazione medicalmente assistita: fecondazione eterologa e diagnosi preimpianto alla luce della giurisprudenza della Corte EDU' *Nel Diritto*, 7-8 (2013)). On this point see also: G. Baldini, *Tecnologie riproduttive e problemi giuridici* (Torino: Giappichelli, 1999), 96; G. Cassano, *Le nuove frontiere del diritto di famiglia* (Milano: Giuffrè, 2000), 54; G. Ferrando, 'La riproduzione assistita nuovamente al vaglio della Corte Costituzionale. L'illegittimità del divieto di fecondazione «eterologa»' *Corriere Giuridico*, 1068 (2014), which specifies that it would be more appropriate to refer to 'exogamic' fertilisation as the use of the adjective 'heterologous' refers in scientific terms to reproduction between subjects from different species.

⁵ In situations involving reproductive disorders of this type, it is not therefore possible to have recourse to homologous medically assisted reproduction. In fact, this practice presupposes that the generic material produced by both persons is potentially suitable for reproduction.

⁶ Cf G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' available at www.ordineavvocatifirenze.eu (last visited 24 May 2016).

⁷ Cf Tribunale di Firenze, 29 March 2013, Tribunale di Milano 8 April 2013, Tribunale di Catania 13 April 2013, available at www.gazzettaufficiale.it. See I. Rapisarda, 'Il divieto di fecondazione eterologa: la parola definitiva alla Consulta' *Nuova giurisprudenza civile commentata*, I, 929-938 (2013).

⁸ Eur. Court H.R., *S.H. and Others v Austria*, Judgment of 1 April 2010 and Eur. Court H.R. (GC), *S.H. and Others v Austria*, Judgment of 3 November 2011, available at www.hudoc.echr.coe.it.

⁹ See R. Bartoli, 'La totale irrazionalità di un divieto assoluto. Considerazioni a

offering therapeutic instruments to couples suffering from irreversible reproductive illnesses – is not capable of achieving its goals because it prevents the use of heterologous reproduction also in situations in which this represents the *only* possibility for conception.¹⁰ In addition, the referring courts asserted that the absolute prohibition on heterologous fertilisation may violate the right to the full realisation of private family life and the right to self-determination of individuals, with the risk of dangerous repercussions on the psychological wellbeing of the couples involved.

When examining the question, the Constitutional Court stressed that access to techniques of medically assisted reproduction impinges upon a range of interests of constitutional significance. In these cases, a balance must be struck¹¹ between these interests in order to guarantee a ‘minimum level of legislative protection’.¹² Generally speaking, the striking of a reasonable balance between the various ethical issues involved and the dignity of the individual falls to the legislator. However, the primary competence of the legislator does not preclude the Constitutional Court’s ability to assess the matter¹³ when the balance struck within the legislation is unreasonable.

Following these methodological indications, the Constitutional Court

marginale del divieto di procreazione medicalmente assistita eterologa’ *Rivista italiana di diritto e procedura penale*, 90 (2011); E. Dolcini, ‘Il divieto di fecondazione eterologa ... in attesa di giudizio’ *Diritto penale e processo*, 353 (2011).

¹⁰ In particular, in the cases heard by the Tribunale di Milano and the Tribunale di Firenze, the couples had requested medically assisted reproduction involving the donation of male gametes, due to the husband’s complete azoospermia (total lack of sperm cells in the seminal fluid). In the case brought before the Tribunale di Catania on the other hand, sterility – which was also absolute and irreversible – was due to the wife’s premature menopause, with the result that it was only possible to reproduce using donated eggs.

¹¹ On the need to strike a balance in the specific individual case, see P. Perlingieri, ‘Ermeneutica e valori normativi’, in Id, *L’ordinamento vigente e i suoi valori. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2006), 363-371; Id, *Interpretazione e legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2012); A. Morrone, ‘Bilanciamento (giustizia costituzionale)’ *Enciclopedia del diritto – Annali* (Milano: Giuffrè, 2008), II, 185-204; A.M. Citrigno, ‘Questioni di inizio vita nella dimensione della democrazia pluralista: la controversa disciplina sulla procreazione medicalmente assistita’ 14-15 *Revista de la Facultad de Ciencias Jurídicas*, 79 (2009).

¹² Corte Costituzionale, n 1 above.

¹³ G. Baldini, ‘La Consulta cancella il divieto di PMA eterologa’, n 6 above, 4. But see Tribunale di Milano ord 23 November 2009, *Nuova giurisprudenza civile commentata*, 774-782 (2010) which refused to refer a question concerning the constitutionality of heterologous fertilisation as the discretion of the legislator is not amenable to review. The question was also analysed by Tribunale di Catania ord 3 May 2004, *Giurisprudenza italiana*, 2088 (2004).

held – in line with the interpretative guidelines previously laid down¹⁴ – that the legislation lacked an adequate foundation in constitutional law.

II. The Prohibition on Heterologous Fertilisation. Chronicle of a Death Foretold

The declaration that the prohibition on heterologous fertilisation was unconstitutional arose as part of a process of ‘demolition’¹⁵ by politics and case law which, in little more than ten years, has uprooted the rigorous framework of the law on medically assisted reproduction.¹⁶ However, this singular ‘story of rejection’¹⁷ should not come as a surprise¹⁸ as it represents

¹⁴ Corte Costituzionale 8 May 2009 no 151, available at www.cortecostituzionale.it asserted the need to balance protection for the embryo against the requirements of procreation.

¹⁵ Cf M. Casini and C. Casini, ‘Il dibattito sulla PMA eterologa all’indomani della sentenza costituzionale n. 162 del 2014. In particolare: il diritto a conoscere le proprie origini e l’«adozione per la nascita»’ *Rivista di Biodiritto*, 136-138 (2014); L. Violini, ‘La Corte e l’eterologa: i diritti enunciati e gli argomenti adottati a sostegno della decisione’ (2014) available at www.osservatorioaic.it.

¹⁶ Corte Costituzionale 8 May 2009 no 151, n 14 above, ruled unconstitutional the prohibition on producing more than three embryos and the requirement of parallel implantation, without making any reference to the possible detriment to the health of the woman. After issuing the judgment under discussion, the Constitutional Court (Corte Costituzionale 5 June 2015 no 96, available at www.giurcost.it) struck down the prohibition on the recourse to medically assisted reproduction techniques for fertile couples who are carriers of serious genetic diseases along with the prohibition on diagnosis prior to implantation. The Constitutional Court has ruled more recently on the prohibition on experimentation with human embryos under Art 13 legge 40 in relation to the possibility for couples to select healthy embryos for implantation (Corte Costituzionale 11 November 2015 no 229, available at www.giurcost.it). In particular, it held that Art 13, para 3 (b) of legge 40 – which subjects to criminal punishment any doctor who has selected embryos, whilst also requiring the conservation the ‘excluded’ embryos indefinitely – was unreasonable (and hence unconstitutional). Recently (Corte Costituzionale 22 March 2016 no 84 available at www.cortecostituzionale.it) a question concerning the constitutionality of the prohibition on research and experimentation on embryos, even if they are in excess or affected by serious disease and not suitable for implantation, was ruled unconstitutional on the grounds that the balancing of the countervailing interests in such ‘sensitive’ matters falls to the legislator. Consequently, Italian law maintains the prohibition on the use of embryos for the purpose of experimentation, even in relation to embryos that are destined for indefinite cryopreservation. The Constitutional Court’s position may in fact be strongly criticised. The safeguarding of the life of an embryo destined for eternal cryopreservation appears to be a ‘pitiful hypocrisy’; their destination for research is in fact a much more dignified purpose: F.D. Busnelli, ‘Cosa resta della legge 40? Il paradosso della soggettività del concepito’ *Rivista di diritto civile*, I, 468 (2011).

¹⁷ M. Sesta, ‘La procreazione medicalmente assistita tra legge, Corte costituzionale, giurisprudenza di merito e prassi medica’ *Famiglia e diritto*, 839 (2010).

¹⁸ M. Abagnale, ‘La procreazione medicalmente assistita nella metamorfosi della legge 40/2004’ *Forum di Quaderni Costituzionali – Rassegna n. 1*, 1 (2015).

the natural epilogue of a ‘failure’ foretold.¹⁹

Recourse to assisted reproduction techniques has grown exponentially due to the diffusion of reproductive problems throughout Western societies. Within this context, progress in biomedical science has on the one hand offered an effective response to the growing social perception of sterility/infertility as an illness,²⁰ whilst on the other hand raising complex questions surrounding the ‘ethics of conception’, fuelling the fear that the reproductive event might depart ‘from the sphere of natural occurrences and turn into something artificial’.²¹

Confronted with this inability to establish a shared position in this area, the need for legislative intervention²² was felt in order to answer the questions raised by artificial reproduction as part of a synthesis between secular pragmatism and respect for human dignity.²³ Initially however, the recourse to techniques of medically assisted reproduction occurred within the context of a worrying legislative vacuum. During this phase, the definition of the extent and limits of protection was *de facto* delegated to ethical principles, and above all the sensitivity of the courts.²⁴ However, this situation risked undermining the principle of equality and legal certainty.²⁵ Consequently, in spite of its reluctance to adopt a position in relation to such a delicate issue, the Italian legislator was forced to address the question. And yet the result obtained was a legislative text which was

¹⁹ See along the same lines A. Musumeci, ‘“La fine è nota”. Osservazioni a prima lettura alla sentenza n. 162 del 2014 della Corte costituzionale sul divieto di fecondazione eterologa’ (2014) available at www.osservatorioaic.it; R. Bartoli, n 9 above, 92.

²⁰ M. Tedesco, n 3 above, 2.

²¹ C. Tripodina, ‘Il “diritto” a procreare artificialmente in Italia: una storia emblematica, tra legislatore, giudici e Corti’ *Rivista di Biodiritto*, 2, 67 (2014); M. Sesta, ‘Procreazione medicalmente assistita’ *Enciclopedia giuridica* (Roma: Treccani, 2004), XXVIII, 1.

²² Cf previously Tribunale di Roma 30 April 1956, *Giurisprudenza italiana*, 218 (1957).

²³ H. Jonas, *Tecnica, medicina ed etica. Prassi del principio di responsabilità* (Torino: Einaudi, 1997), 222-239. Similarly, S. Rodotà, ‘Per un nuovo statuto del corpo umano’, in A. De Meo and C. Mancina eds, *Bioetica* (Roma-Bari: Laterza, 1989), 41-68, asserts the imperative requirement for the enactment of law in relation to bioethical issues. However, it must be an ‘elastic’ and ‘flexible’ right open to ideological and value pluralism, and not conditioned by morals. Lawmakers should intervene by identifying the ‘rule of compatibility’ between countervailing values rather than the ‘rule of predominance’: P. Borsellino, ‘Vere e false alternative in tema di rapporti tra bioetica e diritto’ *Politeia*, 122-125 (2002); G. Zagrebelsky, *Il diritto mite* (Torino: Einaudi, 1992).

²⁴ M. Abagnale, n 18 above, 5; C. Tripodina, n 21 above, 83. On the importance of the role of the courts, see also C. Casini, C.M. Casini and M.L. Di Pietro, *La legge 19 febbraio 2004, n. 40 «Norme in materia di procreazione medicalmente assistita»*. *Commentario* (Torino: Giappichelli, 2004), 12.

²⁵ M. Abagnale, n 18 above, 5-6; C. Tripodina, n 21 above, 84. By contrast A.M. Citrigno, n 11 above, 79 considers that questions relating to human life can be addressed through case law as it is calibrated to the specific circumstances of the individual case.

inflexible, barely convincing, and thus incapable of fulfilling the requirements considered by its framers.

Regarding the issue of heterologous fertilisation the law appeared open to criticism from the outset as it put an end to a widespread practice,²⁶ which had been supported within the case law itself.²⁷ In fact, prior to the entry into force of legge 40, the use of gametes originating from outside the couple was considered to be lawful.²⁸ The only restrictions were a prohibition on the practise of this technique within National Health Service facilities and the prohibition on any form of remuneration for the provision of genetic material.²⁹

Secondly, the intolerance of this stance of legislative self-restraint was fuelled by the lack of a corresponding prohibition on international and Community level. The 1997 Oviedo Convention³⁰ and the Additional Protocol from 1998³¹ expressly prohibit artificial reproduction for selective and eugenic purposes along with the cloning of human beings, but do not contain any exclusion on heterologous fertilisation. In addition, compared to other European legal systems,³² the position in Italy appeared to be 'eccentric'³³

²⁶ See U. Salanitro, 'Il dialogo tra Corte di Strasburgo e Corte Costituzionale in materia di fecondazione eterologa' *Nuova giurisprudenza civile commentata*, II, 636 (2012).

²⁷ See M. Sesta, 'Dalla libertà ai divieti: quale futuro per la legge sulla procreazione assistita?' *Corriere giuridico*, 1405 (2004).

²⁸ Cf Report of 14 July 1998 given by the XIIth Standing Committee of the Chamber of Deputies concerning draft bills no 414, no 616 and no 816, presented during the XIIth legislature, available at http://leg13.camera.it/_dati/leg13/lavori/stampati/pdf/04140A.pdf (last visited 24 May 2016). For the legislative framework prior to legge 40: M. Abagnale, n 18 above, 3-9; S. Canestrari, 'Verso una disciplina penale delle tecniche di procreazione medicalmente assistita? Alla ricerca del bene giuridico tra valori ideali e opzioni ideologiche' *Indice penale*, 1091-1115 (2000); A. De Santis, 'La fecondazione eterologa nel quadro legislativo e giurisprudenziale italiano', in M. de Tilla et al eds, n 3 above, 207-214.

²⁹ Cf circolare del Ministro della sanità 1 March 1985 (Limits and conditions for establishing the legitimacy of artificial insemination services under the National Health Service); ordinanza del Ministro della sanità, 5 March 1997 (Prohibition on the marketing and advertising of gametes and human embryos). On this point see G. Ferrando, n 4 above, 1069, fn 11.

³⁰ 'Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine' signed at Oviedo on 4 April 1997 and ratified by the Italian Parliament by legge 28 March 2001 no 145. The Convention is available at <http://conventions.coe.int/>.

³¹ 'Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings' signed at Paris on 12 January 1998 and available at <http://conventions.coe.int/>.

³² For an overview of the legislation on heterologous fertilisation adopted by the other European states, see: A. Diurni, 'Il futuro di divieti e limiti della fecondazione eterologa in Europa', in G. Gabrielli et al eds, *Liber amicorum per Dieter Henrich. II. Famiglia e successioni* (Torino: Giappichelli, 2012), 108-124 including further bibliographic references.

³³ G. Ferrando, n 4 above, 1069; U. Salanitro, n 26 above, 636. For a comparative

and excessively rigid.³⁴ In fact, heterologous fertilisation is currently practised within most Member States of the Union, with the exception of Lithuania.

This argument does not in itself appear to be decisive since, in matters of an ethical nature, the European Court of Human Rights itself³⁵ tends to privilege states' 'margin of appreciation'. However, the engagement with the European context shows that the Italian legislation in the area of medically assisted reproduction is unable to ensure a satisfactory level of protection for the rights of individuals. Accordingly, the European experiences have undoubtedly favoured a rethinking of the limits contained in Italian legislation with the aim of securing genuinely universal protection for human dignity.³⁶

The most critical aspect of legge 40 relates to the fact that the solutions adopted by the Italian legislator, including in particular the prohibition on heterologous fertilisation, were excessively influenced by ethical and moral considerations³⁷ originating from Catholic circles.³⁸ This influence, which became apparent during the pre-legislative debate,³⁹ was not able to prevent the law from being approved.⁴⁰ However, it is plausible that the legislator maintained the prohibition on heterologous fertilisation in the definitive text precisely in order to counterbalance conservative positions with the need to be open towards technological progress.⁴¹ In this way, whilst not fully endorsing the recourse to assisted

perspective on assisted fertilisation, see on all points, V.C. Casonato and T.E. Frosini eds, *La fecondazione assistita nel diritto comparato* (Torino: Giappichelli, 2006).

³⁴ B. Ferraro, 'Profili della disciplina sulla fecondazione medicalmente assistita' *Diritto di famiglia e delle persone*, 252 (2005).

³⁵ See n 8 above.

³⁶ M. Dell'Utri, 'La fecondazione eterologa nel sistema dei diritti fondamentali' *Giurisprudenza di merito*, 382 (2011).

³⁷ G. Fiandaca, 'Aspetti problematici del rapporto tra diritto penale e democrazia' *Foro italiano*, 4 (2011); G. Menicucci, 'Ancora dubbi sul divieto di fecondazione assistita di tipo eterologo. Nota a margine dell'ordinanza del Tribunale di Milano del 02.02.2011' (2011) available at www.rivistaaic.it; A. Vallini, 'Procreazione medicalmente assistita', in T. Padovani ed, *Le leggi penali complementari* (Milano: Giuffrè, 2007), 570. The argument concerning the ideological basis to the legislative choice is not shared by G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' n 6 above, 1.

³⁸ John Paul II, *Evangelium Vitae. Encyclical Letter by Pope John Paul II, On the value and inviolability of human life* (Città del Vaticano: Libreria Editrice Vaticana, 1995), § 14.

³⁹ Cf draft bill sponsored by Martinat and others, no 676, tabled in the Chamber of Deputies on 11 June 2001 entitled 'Prohibition on any form of medically assisted extra-corporeal human reproduction', available at https://www.senato.it/documenti/repository/leggi_e_documenti/raccoltenormative/15%20-%20Procreazione/1%5E%20CAMERA/DDL%200676.pdf (last visited 24 May 2016).

⁴⁰ M. D'Amico, 'La fecondazione "eterologa" ritorna davanti alla Corte costituzionale' *Corriere giuridico*, 746 (2013).

⁴¹ Cf Congregation for the Doctrine of the Faith, 'Instruction *Donum vitae* on Respect

reproduction, the legislator avoided compromising the natural quality of the reproductive process, thereby dispelling the risk of 'exasperated scientism'.⁴²

From a different perspective, the prohibition on heterologous fertilisation was imposed in order to guarantee a balance⁴³ between the legitimate aspiration to become a parent and protection of the unborn child,⁴⁴ thereby preventing protection for the foetus – as asserted in Art 1 of legge 40 – from transforming into a mere assertion of a principle. Although the principal objective of the legislation continues to be that of offering couples a solution to reproductive disorders, the prohibition on the donation of gametes ensures that each child can be certain about his or her biological origins (right to genetic identity)⁴⁵ and excludes the psychological risk⁴⁶ that could result from differences between the status of his or her parents⁴⁷ and a relationship with a parent not based on a blood relationship.⁴⁸

for Human Life in Its Origin and on the Dignity of Procreation' (1987) available at www.vatican.va; E. Sgreccia, 'La Chiesa e la fecondazione artificiale' 77 *Notizie di Politeia*, 154-158 (2005); L. Scopel, 'La procreazione artificiale nei recenti documenti della Chiesa Cattolica' (2012) available at www.statoeinese.it.

⁴² Draft bill sponsored by Angela Napoli and others, no 762, tabled in the Chamber of Deputies on 12 June 2001 entitled, entitled 'Provisions on the protection of the embryo and the dignity of assisted reproduction' available at http://www.camera.it/_dati/leg14/lavori/stampati/pdf/14PDL0005380.pdf (last visited 24 May 2016).

⁴³ This aim is pursued by all of the other prohibitions contained in the law (including in particular the prohibition on pre-implantation diagnosis and the use of embryos for research). However, many authors have criticised this attempt to strike a balance as any impediment on the recourse to assisted fertilisation will be detrimental for the pre-eminent interests of the woman and for her freedom to use her body to reproduce: L. Ferrajoli, 'La questione dell'embrione tra diritto e morale' 65 *Notizie di Politeia*, 155 (2002); M. Manetti, 'Profili di illegittimità costituzionale della legge sulla procreazione medicalmente assistita' 3 *Politica del diritto*, 458 (2004); S. Rodotà, 'Prefazione', in C. Valentini ed, *La fecondazione proibita* (Milano: Feltrinelli, 2004), 12.

⁴⁴ G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' n 6 above, 1.

⁴⁵ P. Perlingieri, *Il diritto civile nella legalità costituzionale* (Napoli: Edizioni Scientifiche Italiane, 2006), 777-778 (criticising the choice of anonymity for the semen donor).

⁴⁶ R. Lombardi, 'Implicazioni psicologiche della riproduzione artificiale eterologa (AID)' 27 *Diritto di famiglia e delle persone*, II, 663-672 (1998). In general, the possibility that procreation (even if natural) could entail harm to the child was advocated in an article published a number of years ago on 'harm from reproduction': P. Rescigno, 'Il danno da procreazione' *Rivista diritto civile*, I, 614 (1956).

⁴⁷ M. D'Amico, n 40 above, 746 observes that this argument is entirely inadequate and lacks any scientific basis. During the parliamentary debate in fact, it emerged that the only accredited research carried out by the World Health Organization had excluded the risk of any detriment to the development of the subjects examined.

⁴⁸ Cf F. Di Lella, 'Osservazioni in margine alla rimessione alla Consulta del divieto di fecondazione eterologa' *Diritto e giurisprudenza*, 81 (2011); L. Violini, 'La Corte e l'eterologa' n 15 above, 4. But see R. Bartoli, n 9 above, 96 who asserts that the prohibition

In addition, the prohibition on heterologous fertilisation furthers the need to safeguard the family as an institution⁴⁹ from the consequences created by the proliferation of biological relations with unknown persons.⁵⁰ In fact, it ensures that genetic parentage will coincide perfectly with socio-legal parentage⁵¹ and excludes the creation of new models for the family.⁵²

The problem – as is evident – is filled with ideological questions. Consequently, the fear of prejudicing the principle of the secular nature of the state,⁵³ and the very freedom of conscience of individuals,⁵⁴ has over time given rise to a process of erosion of legge 40.⁵⁵

1. The Path towards the Constitutional Court

The first attempt to mitigate the rigidity of the prohibition contained in legge 40 was made within Parliament itself. As early as the first few months following the entry into force of the legislation, several significant draft bills were tabled with the aim of comprehensively modifying the framework of the law on medically assisted reproduction and repealing the prohibition on heterologous fertilisation. In particular, disegno di legge 18 novembre 2004 no 3320⁵⁶ demonstrated that a reasonable compromise between science and ethics is not a utopian objective and

on heterologous fertilisation cannot be justified by the need to protect the embryo's right to life, precisely because it prevents the very creation of the embryo.

⁴⁹ This argument is not convincing because the legal order has now abandoned a traditional conception of the family and embraces 'multiple notions of the family': P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 775, 921.

⁵⁰ In the report accompanying the Martinat proposal (n 39 above), it is even stressed that people born as a result of heterologous reproduction, who were unaware of that fact, might in turn reproduce amongst themselves and expose themselves to the risk of extremely serious hereditary diseases.

⁵¹ S. Chessi, 'La fecondazione artificiale eterologa: verità biologica e verità giuridica' 5 *Nuova giurisprudenza civile commentata*, 521-527 (2000).

⁵² G. Baldini, 'La Consulta cancella il divieto di PMA eterologa' n 6 above, 1.

⁵³ G. Di Cosimo, 'Quando il legislatore predilige un punto di vista etico/religioso: il caso del divieto di donazione dei gameti' 21 *Stato, Chiese e pluralismo confessionale*, 13-30 (2013) observes that the secular principle requires the legislator to refrain from a religious basis for the positions adopted and to remain neutral regarding and equidistant from religious confessions. Since the Italian legislator embraced the Catholic position on heterologous fertilisation it did not respect either of the two logical premises of the principle.

⁵⁴ C. Tripodina, n 21 above, 69.

⁵⁵ This paper will consider only the passages of interest for the prohibition on heterologous fertilisation. For an analysis of the process of demolition to which legge 40 in general has been subject, cf C. Tripodina, n 21 above, 67-87; M. Dell'Utri, n 36 above, 382.

⁵⁶ Bill no 3320 (XIVth legislature) sponsored by Senators Amato, Soliani and the notification of the President of 18 November 2004 available at http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Ddlpres&leg=14&id=00121877&part=doc_dc&parse=s&i&stamp=si&toc=no (last visited 24 May 2016).

does not necessarily require the most restrictive solution to be adopted.⁵⁷

In contrast to legge 40, this draft bill in fact appears to offer an *effective* therapeutic response to reproductive diseases. The use of genetic material from outside the couple is permitted not only in situations involving insuperable sterility/infertility but also when this proves to be necessary in order to protect against infective or genetically communicable diseases.

This solution appears to reconcile a secular perspective with the fundamental need to protect human dignity, including that of the foetus. In fact, although on the one hand the text proposed redefines the prerequisites for, access to and consequences of heterologous fertilisation whilst respecting its therapeutic aims,⁵⁸ on the other hand it proves to be clearly inspired by the protection of human life and dignity in outlawing surrogate maternity, the genetic manipulation of embryos and their destruction.⁵⁹

It is thus necessary to agree on the fact that the adoption of a 'more open' legislative framework will not necessarily entail the sacrifice of human dignity in the name of a 'science without conscience',⁶⁰ nor less the indiscriminate exercise of the choice to reproduce. The objective of the legal solution to questions relating to the start of life is not to emancipate procreation from sexuality.⁶¹ In fact, the prerequisite for conception is and *remains* the natural physical union between a man and a woman. Also from a secular point of view, the involvement of a physician must be a practicable – albeit exceptional – solution in all situations in which such involvement represents an 'unavoidable, or very useful, instrument for the full development of the individual'⁶² (incurable sterility, serious diseases that are communicable to the foetus). Under these conditions, there are no longer any margins for legislative discretion: the individual has the right to receive assistance from the state.⁶³

In the wake of the failure of the proposals to amend the legislation, the

⁵⁷ U. Salanitro, n 26 above, 637.

⁵⁸ Report concerning bill n 56 above, 2. This bill departs from the text in force in that it permits not only heterologous fertilisation but also diagnosis and selection prior to implantation, the cryopreservation of ootids (the stage prior to the formation of the embryo) and the use of embryos that are not implanted for the purposes of research.

⁵⁹ Cf Art 17 of bill legge n 56 above, which prevents the destruction of any embryo that is not implanted, but enables it to be used for research for therapeutic purposes. In this way, the embryo becomes 'a gift in favour of other lives (...), accompanying that destination with guarantees and precautions capable of reassuring religious sentiment, no less than secular individuals'.

⁶⁰ F. Rabelais, *La vie de Gargantua et de Pantagruel* (1542) translated by M. Bonfantini (Torino: Einaudi, 1953).

⁶¹ M. Dell'Utri, n 36 above, 397.

⁶² P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 774.

⁶³ *Ibid* 774.

prohibition on the donation of gametes was the object of a popular referendum⁶⁴ in 2005, in which the necessary quorum was not reached.⁶⁵ In any case, this vote constituted a further fundamental stage in progress towards the recent judgment of the Constitutional Court. The judgments by which the Constitutional Court ruled on the admissibility of the referendum questions in fact acted as precursors – albeit in a subliminal manner – for the future openness of the judges towards an elimination of the prohibition.⁶⁶ In ruling inadmissible the question seeking the full repeal of legge 40,⁶⁷ the Constitutional Court clarified on the one hand that the legislation on medically assisted reproduction is, considered overall,⁶⁸ mandated under constitutional law; on the other hand, it clarified that this consideration does not preclude a review of the constitutionality of the individual prohibitions contained in the law.

Following the failure of the referendum, the focus of national case law on heterologous reproduction decreased temporarily. However, it is necessary to mention several judgments which – whilst not dealing directly with the donation of gametes – favoured the ‘path’⁶⁹ towards a ruling that heterologous fertilisation is unconstitutional.⁷⁰ In particular, the Constitutional Court judgment⁷¹ which abolished the maximum limit on the number of embryos that can be produced and the obligation for parallel implantation had the merit of highlighting various grounds for reflection which without doubt conditioned the process of interpretation followed by the Constitutional Court also in relation to heterologous fertilisation. By moving beyond the dogma of the immunity from review of legislative discretion, the Court asserted first and foremost that the conflict between a variety of interests of constitutional standing must be resolved not by recourse to a judgment as to which of the values prevails, but rather a reasonable balancing operation. Secondly, it was asserted that the legal questions concerning the relationship between technical

⁶⁴ On the admissibility of the fourth question concerning the repeal of the prohibition on the donation of gametes, see Corte Costituzionale 28 January 2005 no 48, available at www.giurcost.it.

⁶⁵ M. Ainis ed, *I referendum sulla fecondazione assistita* (Milano: Giuffrè, 2005). Out of the five questions originally formulated, only those relating to the repeal of the *individual* prohibitions contained in legge 40 were ruled admissible by the Constitutional Court. By contrast, the question seeking the *total* repeal of the law was ruled inadmissible (Corte Costituzionale 28 January 2005 no 45, available at www.giurcost.it).

⁶⁶ M. Abagnale, n 18 above, 9.

⁶⁷ Corte Costituzionale 28 January 2005 no 45, available at www.giurcost.it.

⁶⁸ *Ibid* paras 3 and 6.

⁶⁹ The expression is used by M. D’Amico, n 40 above, 746.

⁷⁰ *Ibid* 748.

⁷¹ See Corte Costituzionale 8 May 2009 no 151, n 14 above.

progress and human life cannot be addressed by the legislator independently of scientific knowledge⁷² and in particular of the autonomous and responsible assessments of the doctor, as the only 'depository of technical knowledge in the specific case'.⁷³

The definitive blow to the prohibition on heterologous reproduction however arose within European case law,⁷⁴ which contributed significantly to 'bringing coherence back into the Italian legal system'⁷⁵ with the case of *S.H. and Others v Austria* before the European Court of Human Rights.⁷⁶ The case involved certain Austrian healthcare facilities which had refused access to in vitro heterologous fertilisation to two heterosexual couples who were unable to conceive naturally.⁷⁷ This procedure for conception was prohibited under the national legislation in force at the time.⁷⁸ The Austrian Constitutional Court⁷⁹ had ruled that the provisions of the national law were not incompatible with the principles laid down by Arts 8 and 14 ECHR. In fact, the prohibition resulted from the need to strike a balance between human dignity, the right to reproduce and the wellbeing of the unborn child in that it aimed to protect the unborn child from unusual parental relations, which would be detrimental for its wellbeing.

The European Court of Human Rights overturned the decision of the

⁷² Corte Costituzionale 12 January 2011 no 8, available at www.giurcost.it.

⁷³ Ibid para 5.2. This assertion includes confirmation of the supposed primacy of science over law: see R. Bin, 'La Corte e la sua scienza', in A. D'Aloia ed, *Bio-tecnologie e valori costituzionali. Il contributo della giustizia costituzionale* (Torino: Giappichelli, 2006), 2; G. Di Genio, 'Il primato della scienza sul diritto (ma non sui diritti) nella fecondazione assistita' (2009) available at www.forumcostituzionale.it.

⁷⁴ P. Spaziani, n 4 above, 6.

⁷⁵ C. Nardocci, 'La Corte di Strasburgo riporta a coerenza l'ordinamento italiano, fra procreazione artificiale e interruzione volontaria di gravidanza. Riflessioni a margine di Costa e Pavan c. Italia' (2013) available at www.rivistaaic.it.

⁷⁶ See Eur. Court H.R., *S.H. and Others v Austria*, Judgment of 1 April 2010, n 8 above. On the doubts concerning the compatibility between the prohibition on heterologous fertilisation and the principles contained in the European Convention on Human Rights, see G. Ferrando, 'La nuova legge in materia di procreazione medicalmente assistita: perplessità e critiche' *Corriere giuridico*, 813 (2004); B. Mastropietro, 'Procreazione assistita: considerazioni critiche su una legge controversa' *Diritto di famiglia e delle persone*, 1408 (2005).

⁷⁷ One of the couples required a sperm donation – due to the infertility of the husband and the dysfunctioning of the wife's fallopian tubes – followed by the fertilisation of the woman's eggs *in vitro*. The second couple by contrast requested a donation of eggs due to wife's gonadism (A. Scalera, 'La fecondazione eterologa all'esame della Corte Europea dei Diritti dell'Uomo' 10 *Studium Iuris*, 1118 (2010)).

⁷⁸ Art 3(2) and (3) of the Austrian Reproductive Medicine Act (*Fortpflanzungsmedizinengesetz* 1 July 1992) permitted on an exceptional basis the donation of male semen, provided that the semen was used in order to fertilise the woman *in vivo*, whilst prohibiting the donation of eggs.

⁷⁹ Verfassungsgerichtshof Österreich 8 November 1999.

Austrian courts. The European Court held that, even if it is exercised through recourse to artificial means, the right to reproduce falls under the broad notion of ‘private life’⁸⁰ (Art 8 ECHR). Any limitations on this freedom are not in themselves discriminatory unless there is no objective and reasonable justification (the legislative restriction is justified if it ‘pursue[s] a ‘legitimate aim’ or ... [if] there is no ‘reasonable proportionality between the means employed and the aim sought to be realised’ ’).⁸¹ The reasonableness of the legislative choice is in any case left to the discretionary assessment – which in this case is particularly wide – of the states,⁸² which must exercise their legislative discretion in such a way as to strike a reasonable balance between the interests in play in accordance with the principles enshrined in the Constitution. On the basis of these considerations, the European Court held that the prohibition on heterologous fertilisation contained in the Austrian law was unreasonable, concluding in particular that any discrimination between couples on account of the severity of the reproductive disease was not proportionate with the goal pursued by the legislator (Art 14 ECHR).⁸³

In the wake of this ruling, the Italian merits courts raised the first questions concerning the constitutionality of the prohibition on heterologous fertilisation, invoking not only principles of national constitutional law but also the violation of the Convention principles considered in the aforementioned ruling of the European Court of Human Rights. However, in a much-debated interlocutory order, the Constitutional Court⁸⁴ ‘decided not to decide’,⁸⁵ and remitted the proceedings to the referring courts for a renewed examination of the question.⁸⁶ This can be explained by the

⁸⁰ Eur. Court H.R., *S.H. and Others v Austria*, Judgment of 1 April 2010, n 8 above, para 58.

⁸¹ Ibid para 64.

⁸² Ibid para 65.

⁸³ M. D’Amico, n 40 above, 749.

⁸⁴ Corte Costituzionale ord 22 May 2012 no 150, available at www.giurcost.it. On the critical aspects relating to this order, see U. Salanitro, n 26 above, 640-644; R. Romboli, ‘Restituzione degli atti per ‘*novum superveniens*’ e riproponibilità delle questioni di costituzionalità sul divieto di inseminazione eterologa’ *Notizie di Politeia*, 88 (2013); B. Randazzo, ‘Le sentenze della Corte europea dei diritti dell’uomo come *ius superveniens*: un caso discutibile di *self-restraint* della Corte costituzionale in tema di fecondazione assistita’ *Notizie di Politeia*, 95 (2013); A. Luberti, ‘Fecondazione eterologa, norme della Convenzione europea dei diritti dell’uomo e Corte costituzionale: i nuovi diritti presi sul serio’ *Giustizia civile*, I, 2327-2339 (2013).

⁸⁵ M. D’Amico, n 40 above, 750.

⁸⁶ See B. Randazzo, n 84 above, 95; I. Rivera, ‘Quando il desiderio di avere un figlio diventa un diritto’ *Rivista di Biodiritto*, 46 (2014); P. Veronesi, ‘“Nuove” decisioni processuali, “nuovi” rapporti tra Corte costituzionale e Corte EDU, “nuove” forme di interpretazione adeguatrice: l’ordinanza costituzionale n. 150 del 2012 in materia di fecondazione eterologa’ *Studium iuris*, 139-40 (2013).

interpretation of the provisions of the European Convention on Human Rights contained in a ruling of the Grand Chamber of the Strasbourg Court, which had been adopted in the meantime.⁸⁷

In fact, whilst the proceedings before the Italian Constitutional Court were pending, the Grand Chamber issued a further ruling in the Austrian case, which significantly reined in the scope of the first judgment in the light of a renewed attention for the 'national States' margin of appreciation'.⁸⁸ This in a nutshell is the position of the Strasbourg Court: since it is not possible to identify a uniform position concerning the question on European level and since it is a 'controversial and ethically sensitive' area of law,⁸⁹ the choice by the national legislator falls within the correct exercise of the margin of appreciation and cannot be objected to. The prohibition on recourse to *specific*⁹⁰ practices of heterologous fertilisation is thus capable of striking a reasonable balance between the aspiration to become a parent and the psychological and social wellbeing of the unborn child.

This decision gave rise to widespread delusion and disappointment from various quarters as it appears to have marked a decisive step backwards compared to the interesting openness to different ideas in the first ruling by the Strasbourg Court. In reality, a correct methodological approach would require consideration to be given to the deep-seated differences between the Austrian and Italian legislation.⁹¹ In fact, Austrian law only provided for a partial prohibition on the donation of eggs and the fertilisation *in vitro* with semen from outside the couple. By contrast, the prohibition under Italian law is absolute in nature as it precludes *any* form of heterologous fertilisation. The two hypotheses are not entirely identical and thus require the indications provided by the Strasbourg Court to be read in a different light. The Austrian case in fact demonstrates how the protection of the unborn child can justify a moderate limitation on possible therapeutic solutions for infertility. By contrast, the prohibition

⁸⁷ Eur. Court H.R. (GC), *S.H. and Others v Austria*, Judgment of 3 November 2011, n 8 above.

⁸⁸ Cf E. Nicosia, 'Il divieto di fecondazione eterologa tra Corte europea dei diritti dell'uomo e Corte costituzionale' *Foro italiano*, IV, 220 (2012).

⁸⁹ P. Spaziani, n 4 above, 8.

⁹⁰ In that sense the Austrian Constitutional Court concluded that, whilst the prohibition on the donation of eggs limits the reproductive freedom of the couple, it is justified by the need to protect the unborn child. This prohibition in fact prevents the formation of unusual personal relationships that would run contrary to the certainty of the maternal relationship, along with the risk of exploitation of the female body. In addition, the prohibition on heterologous fertilisation *in vitro* avoids the risk of the commercialisation of gametes and the selection of embryos, all of which is to the benefit of the wellbeing of the future child. By contrast, none of these risks applies in relation to heterologous fertilisation *in vivo*. See U. Salanitro, n 26 above, 638.

⁹¹ P. Spaziani, n 4 above, 8.

under Italian law, framed in absolute terms, does not strike a balance between the interests of the child and those of the couple as it ‘entails a complete sacrifice of the right of the aspiring parents’.⁹²

Nevertheless, the interlocutory order issued by the Constitutional Court did not prevent questions concerning the constitutionality of the prohibition on heterologous fertilisation from being raised a second time. In fact, this prohibition appears to be unreasonable and open to criticism from the viewpoint of the principle of equality, the right to health of the couple and self-determination in relation to reproductive choices.

III. The Prohibition on Heterologous Fertilisation and the Balance Struck by the Constitutional Court

The judgment under discussion is consistent with the process of demolition described above, having struck down one of the last pilasters of the normative framework of legge 40. In reality, at least in terms of the judicial reasoning used by the Constitutional Court, it cannot be said that the ruling involved a break with the previous position.⁹³ The Court in fact ‘limited’ itself to following an interpretative trend which is now consolidated: judicial reasoning assesses the adequacy and proportionality of the prohibition on heterologous fertilisation taking account of the goals of the Italian legislation with the aim of striking a reasonable balance between the interests in play. However, one element did involve a break from the past, or at the very least a novel approach: the clear intention of the Court finally to adopt a position, casting aside the reluctant stance of the past⁹⁴ and the much-criticised tendency to ‘decide not to decide’.⁹⁵

⁹² Ibid 9.

⁹³ Similarly, see S. Agosta, ‘L’anabasi (tra alterne fortune) della fecondazione eterologa’ *Rivista di Biodiritto*, 92 (2014); C. Tripodina, n 21 above, 81.

⁹⁴ See L. Trucco, ‘Procreazione assistita: la Consulta, questa volta, decide (almeno in parte) di decidere’ (2014) available at www.giurcost.it. D. Chinni, ‘La procreazione medicalmente assistita tra “detto” e “non detto”’. *Brevi riflessioni sul processo costituzionale alla legge n. 40/2004* *Giurisprudenza italiana*, 329 (2010).

⁹⁵ An emblematic decision is that by which the Constitutional Court issued a ruling of *non liquet* in relation to a question concerning the constitutionality of the prohibition on diagnosis prior to implantation also for couples who are bearers of diseases that are communicable to the unborn child (Corte Costituzionale ord 9 November 2006 no 369, available at www.giurcost.it). Another ‘lost opportunity’ was Corte Costituzionale ord 22 May 2012 no 150, n 84 above. For a general overview of this ‘approach of not deciding’ followed by the Constitutional Court, see V. Barsotti, *L’arte di tacere. Strumenti e tecniche di non decisione della Corte Suprema degli Stati Uniti* (Torino: Giappichelli, 1999). The non-decision is in fact a technique used above all in order to carry out a ‘politic selection of disputes’.

The prohibition was ruled unconstitutional in the light of various purported systemic contradictions⁹⁶ compared to the goals asserted in Arts 1 and 4(1) of legge 40. As was noted above, the intention of the legislator in adopting this legislation was that it should provide an instrument for arriving at a therapeutic solution for reproductive problems resulting from absolute, irreversible sterility or infertility that cannot otherwise be overcome. As is clear from the definitions endorsed by the World Health Organization (WHO) and the American Fertility Society (AFS), sterility and infertility are two clearly distinct reproductive illnesses. A couple in which one or both of the partners is or are affected by a permanent physical condition which renders his or her genetic material unsuitable for reproduction is 'sterile'; by contrast, infertility relates to the inexplicable failure to conceive after twelve/twenty-four months of targeted unprotected sexual relations.⁹⁷

In cases involving infertility, the recourse to homologous assisted fertilisation can without doubt offer an effective solution to the couple's reproductive problem, as the partners are potentially capable of producing gametes that can achieve conception. By contrast, in cases involving sterility, the lack of reproductive cells renders such a procedure unworkable; thus, to prevent the use of genetic material from outside the couple would *de facto* make it impossible for them to reproduce. Accordingly, there is evidently a clear contradiction (so-called *inherent irrationality*)⁹⁸ between the prohibition on heterologous fertilisation and the therapeutic aims asserted by the legislator.⁹⁹ The prohibition results in an unjustified restriction of the potential addressees of the law¹⁰⁰ and violates the principle of equality

⁹⁶ The inconsistency was also established in another respect by the Strasbourg Court in relation to the prohibition on diagnosis prior to implantation: Eur. Court H.R., *Costa and Pavan v Italy*, Judgment of 28 August 2012, available at www.hudoc.echr.coe.it. On this occasion, the Court held that the provision was inconsistent with the possibility of recourse to therapeutic abortion in the event of a foetus malformation. Cf E. Malfatti, 'La Corte di Strasburgo tra coerenze e incoerenze della disciplina in materia di procreazione assistita e interruzione volontaria della gravidanza: quando i "giochi di parole" divengono decisivi' (2012) available at www.rivistaaic.it; C. Nardocci, n 75 above.

⁹⁷ E. Cirant, *Non si gioca con la vita. Una posizione laica sulla procreazione assistita* (Roma: Editori Riuniti, 2005), 78 (criticising the temporal criteria for certifying infertility).

⁹⁸ C. Tripodina, n 21 above, 82.

⁹⁹ M. D'Amico, n 40 above, 747.

¹⁰⁰ The contradictory nature of the law had also emerged previously in relation to the prohibition on the heterologous fertilisation of persons suffering from highly contagious sexually transmitted viruses (HIV, hepatitis B and hepatitis C). In these cases in fact, the risk of infection for the other partner and for the unborn child prevents the couple from reproducing naturally, even if they are fertile. However, these couples could not strictly speaking access artificial reproductive techniques since they cannot technically be considered as sterile or infertile. This critical issue was initially resolved by the Guidelines contained in the ministerial decree of 21 July 2004 (updated in April 2008), which

and non-discrimination (Art 3 of the Italian Constitution). In fact, both sterility and infertility – although then involve reproductive dysfunctions that are not fully equivalent – prevent the couple from reproducing through natural means. The law on medically assisted reproduction should allow all couples the same possibility to access the most suitable scientific technique in order to overcome their reproductive problems. However, this does not occur for couples who are sterile as the prohibition on the donation of gametes prevents them from reproducing in the only manner possible. This disparity between the treatment¹⁰¹ of the potential addressees of the legislation (so-called *inter-subjective irrationality* based on the severity of the illness)¹⁰² is not only unreasonable but also gives rise to a paradoxical situation:¹⁰³ precisely the most serious dysfunctions are ineligible for treatment.

A further aspect of inter-subjective discrimination results from the ‘financial’ circumstances of sterile couples.¹⁰⁴ The prohibition on heterologous fertilisation amounts to an absolute impediment only for couples who do not have sufficient financial resources to obtain treatment at foreign healthcare facilities. By contrast, the couples that dispose of the greatest resources have been able to resolve their reproductive problems easily by travelling to other European countries in which heterologous fertilisation is freely available. The diffusion of so-called reproductive tourism¹⁰⁵ cannot be taken as a parameter for assessing the reasonableness of the legislative choice.

allowed access to assisted fertilisation also in cases involving infectious diseases. However, the Guidelines only cover sexually transmitted diseases and not genetic diseases that are communicable to the foetus. It follows that couples that are carriers of genetic diseases cannot benefit from assisted reproduction because they are not considered to be sterile, and cannot establish the health of the foetus prior to implantation. Also this limit has now been set aside by Corte Costituzionale 5 June 2015 no 96, available at www.giurcost.it, which ruled unconstitutional the prohibition on diagnosis prior to implantation.

¹⁰¹ M. D’Amico, ‘La fecondazione “eterologa” ritorna davanti alla Corte costituzionale’ n 40 above, 745.

¹⁰² C. Tripodina, n 21 above, 82.

¹⁰³ Così G. Baldini, n 6 above, 2.

¹⁰⁴ See C. Tripodina, n 21 above, 83.

¹⁰⁵ See: S. Rodotà, ‘Etica, bioetica e diritto nell’età delle biotecnologie’, in P. Amodio ed, *Etica, bioetica e diritto nell’età delle biotecnologie* (Napoli: Edizioni Giannini, 2005), 28; S. Catalano, ‘Ragionevolezza del divieto di procreazione assistita eterologa, fra ordinamento italiano e CEDU’ *Rivista dell’Associazione Italiana dei Costituzionalisti*, 1 (2010); M. D’Amico, n 40 above, 746; L. D’Avack, ‘Sulla procreazione medicalmente assistita eterologa: il Tribunale di Firenze e quello di Catania rinviano la questione alla Corte costituzionale’ *Diritto di famiglia e delle persone*, I, 40 (2011); E. Dolcini, ‘Fecondazione eterologa: la parola alla Corte Costituzionale’, in M. D’Amico and B. Liberali eds, *Il divieto di donazione di gameti tra Corte Costituzionale e Corte europea dei diritti dell’uomo* (Milano: Franco Angeli, 2012), 11-18; S. Tonolo, ‘Il diritto alla genitorialità nella sentenza della Corte Costituzionale che cancella il divieto di fecondazione eterologa: profili irrisolti e possibili soluzioni’ *Rivista di diritto internazionale*, 1123 (2014).

However, this phenomenon is a symptomatic indication of the discriminatory effects of the prohibition.

The aspects of most interest in the reasons given for the judgment concern the relationship between reproductive issues and the exercise of certain fundamental human rights. In fact, the choice to reproduce and to establish a family is an expression of the fundamental and general freedom of self-determination (which may be inferred from Arts 2, 29 and 30 of the Constitution),¹⁰⁶ which cannot be sacrificed in an absolute manner solely because the couple is incapable of reproducing naturally. The very broad and pluralist notion of family and the promotion of adoption,¹⁰⁷ which permeates the Italian legal system and its principles of constitutional law, demonstrate how the legal system encourages and protects the creation of family relations, also irrespective of a genetic relationship.¹⁰⁸ Although it did not assert such a position openly,¹⁰⁹ it appears that the Court acknowledges the constitutional significance of a genuine 'right to be a parent',¹¹⁰ which is endowed with inviolable status. Inviolability does not mean that the couple's aspiration to become parents will translate into a selfish desire to be fulfilled at all costs and without reference to the child. Inviolability on the other hand must be understood as the prerequisite for the recognition of the right to use the various therapeutic options offered by science.¹¹¹

The right to become parents of couples who access assisted reproduction techniques deserves to be protected also in terms of the right to health, including both physical and psychological/emotive health.¹¹²

¹⁰⁶ Art 12 European Convention on Human Rights (ECHR), on the fundamental right to establish a family.

¹⁰⁷ However, the argument focusing on the promotion of adoption is not entirely persuasive: in contrast to assisted fertilisation, adoption does not aim to satisfy the desire to become a parent, but to offer a child the opportunity to grow up within a family context.

¹⁰⁸ Corte Costituzionale, n 1 above, para 6 of the *conclusions on points of law*.

¹⁰⁹ C. Tripodina, n 21 above, 81, observes that the recognition of the *right* to reproduce is 'totally unprecedented' within constitutional case law, which has tended to protect only the *need* to procreate. See also L. D'Avack, 'Cade il divieto all'eterologa, ma la tecnica procreativa resta un percorso tutto da regolamentare' *Il diritto di famiglia e delle persone*, 3, 1005 (2014).

¹¹⁰ V. Baldini, 'Diritto alla genitorialità e sua concretizzazione attraverso la PMA di tipo Eterologo' (2014) available at www.dirittifondamentali.it

¹¹¹ This is an assertion which must be interpreted with the utmost care as it could have repercussions with a significant social impact on further extremely delicate issues (ie: surrogate maternity, the possibility for *singles* or homosexual couples to use heterologous fertilisation): L. D'Avack, 'Cade il divieto all'eterologa' n 109 above, 1005,

¹¹² See Corte Costituzionale 25 June 2008 no 251 and Corte Costituzionale 6 April 2004 no 113, available at www.giurcost.it. See also Constitution of the World Health

In fact, since the health of the couple may be seriously harmed by the ‘failure to realise themselves through the experience of becoming parents’,¹¹³ the state has the precise task pursuant to Art 32 of the Constitution of protecting health by guaranteeing access to suitable therapeutic instruments.¹¹⁴ The reference to the right to health demonstrates how the social perception of reproductive disorders has changed.¹¹⁵ The refusal to allow heterologous reproduction arose within a social context with a reductive conception of a lack of health (a concept which originally related to one body only). If however health also includes spiritual wellbeing, the medicine of reproduction becomes a therapeutic instrument to all intents and purposes, which must be guaranteed by the legal system.

In addition, the suitability of therapeutic intervention cannot be preordained on the basis of an assessment of merely political discretion by the legislator, but must be assessed on the basis of scientific knowledge in this area. This conclusion – which has already been stressed in several constitutional precedents¹¹⁶ and highlighted by the European Court of Human Rights itself¹¹⁷ – requires pre-eminence to be afforded the role of the doctor, which legge 40 by contrast unduly banished to the sidelines. In essence, the utility and risks, including psychological risks, of a medical practice must comply with a fundamental rule: the choice must result from a synergy between the doctor’s autonomy and sense of responsibility on the one hand and the patient’s consent on the other.¹¹⁸ Thus, the legislation must be limited to framing the medical practice in a manner that is consistent with constitutional principles.

The impact of the prohibition on heterologous fertilisation on a variety of ‘constitutional interests’ relating to a couple that is unable to reproduce is not however sufficient in order to conclude that it is unconstitutional: in order to do so it would in fact be necessary to establish whether or not a formulation of the prohibition in absolute terms offers the only instrument for guaranteeing protection to the other constitutional values involved. In that regard, the Court has stressed that the only interests standing in opposition to those of the couple relate to the person born by way of artificial fertilisation. Although in these cases the mother cannot exercise

Organization adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 and available at www.who.int.

¹¹³ A. Musumeci, n 19 above, 7.

¹¹⁴ In actual fact, the status of assisted reproduction techniques as therapeutic is not unanimously supported in the literature (I. Rapisarda, n 7 above, 933; R. Bartoli, n 9 above, para 4).

¹¹⁵ G. Ferrando, ‘La riproduzione assistita nuovamente al vaglio della Corte Costituzionale’ n 4 above, 1071.

¹¹⁶ Corte costituzionale 12 January 2011 no 8, n 72 above.

¹¹⁷ Eur. Court H.R., n 8 above.

¹¹⁸ P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 775.

the right to remain anonymous,¹¹⁹ the use of genetic material originating from a person outside the couple could raise a problem concerning the genetic identity of the unborn child, or its right to establish a relationship with the biological parent, along with its psychological and social wellbeing within a non-biological relationship with a parent. In reality, the potential risks for the unborn child are not based on any scientific fact, but can above all be circumscribed following a parallel examination of the provisions on adoption.¹²⁰ Although they relate to different situations,¹²¹ it is also the case that adoption and heterologous fertilisation share the common feature of the creation of a family relationship independently of any genetic link. The legal system promotes the recourse to adoption in asserting that the genetic difference between parent and child does not preclude the establishment of an ordinary family relationship that is healthy for the child.¹²² It is thus difficult to understand the concerns surrounding the psychological wellbeing of a child born as a result of heterologous fertilisation. It must be added that the much more delicate issue of genetic identity has recently been considered by the Italian legislator precisely with reference to the provisions on adoption. Decreto legislativo 28 December 2013 no 154 scaled back the requirement of secrecy for information relating to biological parents, enabling the adoptee, under certain conditions, to access information relating to the identity of his or her biological parents,¹²³ without affecting the legal status of the adoptive parents.

Transferring these considerations to the issue of assisted fertilisation, the prohibition on heterologous fertilisation is not proportionate with the

¹¹⁹ Cf Art 9 legge 40. Corte di Cassazione 16 March 1999 no 2315, *Corriere giuridico*, 429 (1999).

¹²⁰ On the connection between MAR and adoption see A.M. Azzaro, 'La fecondazione artificiale tra atto e rapporto' *Il diritto di famiglia e delle persone*, 227-236 (2005).

¹²¹ Genetic material from outside the couple is not in fact sufficient to create life as the development of the embryo requires its implantation in the woman's body. Therefore, the donor cannot be considered as a biological parent, and his or her position cannot impinge upon the relationship between the child and a couple using the technique. This is also clear from legge no 40: Art 9 in fact provides that the donor of gametes does not acquire any legal relationship with the child. However, P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 777 does not exclude the possibility that, in the event of the death of the legal parent, the genetic donor-parent may take on some responsibilities, including in relation to education, towards the child. See also Id, 'L'inseminazione artificiale tra principi costituzionali e riforme legislative', in Id, *La persona e i suoi diritti. Problemi del diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2005), 188.

¹²² It is thus apparent that the principle of reproductive 'responsibility' prevails over the principle of biological derivation. See F. Di Lella, n 48 above, 83.

¹²³ This argument was endorsed in the recent judgment, Corte Costituzionale 22 November 2013 no 278, available at www.giurcost.it, on the reasonableness of the mother's right to anonymity as against the child's right to know his or her origins.

aim of protecting the unborn child. In fact, that aim could be achieved in a more effective manner by reviewing the principle of the anonymity of the donor¹²⁴ in all cases in which the inability to access information relating to its biological origins could be detrimental to the psychological wellbeing of the child. In this way in fact, a sterile couple will conserve its right to reproductive freedom without prejudicing the right of the child to know its own biological origins. Above all, the removal of the anonymity of the donor could offer a suitable way¹²⁵ of avoiding the risk of so-called *turbatio sanguinis*¹²⁶ along with possible risks of commodification of genetic material¹²⁷. In any case, there is no doubt that these aspects will be the object of debate in the near future.

The Court reiterates that the task of striking a reasonable balance between the interest of the couple and those of the unborn child is an assessment that falls first and foremost to the legislator. However, the history of legge 40 demonstrates that the legislator failed in this task as it chose to sacrifice the freedom of self-determination of the couple in the name of the principle of natural reproduction, proposing a family model that lacked any basis in constitutional law. The role of the courts must therefore be to correct the distortions within the law in order to ensure that it is reasonable and constitutional.

Also in this ruling – as previously occurred in relation to the obligation for the parallel implantation of the embryos produced – the Constitutional Court privileged a secular approach with the aim of ‘purifying’ legge 40 of its exclusively ‘embryo-centric’ focus, in favour of a correct balance between *all* of the interests involved. In this sense, the judgment offers a decisive contribution to safeguarding the fundamental human rights which, in this field more than in others, have been abused by a legislator

¹²⁴ This opinion has been supported since the 1980s by P. Perlingieri, *Il diritto civile nella legalità costituzionale* n 45 above, 777, who considers that certainty as to the identity of the donor is in itself capable of avoiding instances of speculation. Amongst those favourable to the removal of the anonymity of the donor, see also: R. Lanzillo, ‘Fecondazione artificiale, «locazione di utero», diritti dell’embrione’ *Corriere giuridico*, 638 (1984); G. Biscontini, ‘Considerazioni brevi sull’inseminazione artificiale’, in G. Biscontini et al eds, *Interruzione volontaria della gravidanza e procreazione assistita. Per uno statuto coerente dell’essere umano* (Camerino: EasyPark, 2001), 130.

¹²⁵ For critical arguments, see M. Comporti, ‘Ingegneria genetica e diritto. Profili costituzionalistici e civilistici’, in E. Agazzi et al eds, *Manipolazioni genetiche e diritto* (Milano: Giuffrè, 1984), 176; F. Santosuosso, *La fecondazione artificiale umana* (Milano: Giuffrè, 1984), 76; G.B. Ascone and L. Rossi Carleo, *La procreazione artificiale. Prospettive di una regolamentazione legislativa nel nostro paese* (Napoli: Edizioni Scientifiche Italiane, 1986), 38.

¹²⁶ See n 50 above.

¹²⁷ P. Perlingieri, ‘L’inseminazione artificiale tra principi costituzionali e riforme legislative’ n 121 above, 188.

that was (perhaps) overly conditioned by politics or ideological viewpoints.

The Constitutional Court acknowledges that all of the interests in play in heterologous fertilisation may be classified under human dignity. The fact that those interests are significant under constitutional law does not however mean that they cannot be limited. It is necessary in any case that any limitations be reasonably and suitably justified by the fact that it would otherwise not be possible to protect any other interests of equal significance. Thus, whilst the right to become a parent is associated with freedom of self-determination, it cannot be exercised without limitation, above all when the interests of the couple conflict with other requirements that must similarly be protected by the legal order.

Thus, according to the Court's reasoning, the absolute prohibition on heterologous fertilisation is not a limit that is compatible with the principles of reasonableness and proportionality. On the one hand, in fact, it would appear to be unreasonable to prejudice more severe reproductive disorders. On the other hand, it is evident that the objective of preserving the life and physical and psychological wellbeing of the child may be fulfilled in a different way that is less detrimental for the couple. Ultimately, the absolute prohibition on reproduction by heterologous fertilisation is not the only instrument capable of guaranteeing other interests of constitutional standing. It must be added that the legal situation of the child is already suitably guaranteed by the legislative provisions on *status filiationis*, actions for disclaiming paternity and to access information relating to one's own biological origin, as well as the prohibition on surrogate maternity. Furthermore, the risks of immoral commodification of human genetic material are excluded by the legislation on the donation of tissues and human cells,¹²⁸ as such acts must be entirely free of charge and voluntary.

Against this backdrop therefore, the excessive encroachment on the rights of the couple lacks an adequate basis in constitutional law. Since the contested provisions violate the proportionality principle, the Court concluded by ruling unconstitutional the absolute prohibition on heterologous fertilisation.

IV. What Is Left of Legge 40

With the ruling in question one of the most odious aspects of the legislative framework of legge 40 was struck down. It is a worthy result, albeit late, which nonetheless entirely removes the problems associated with heterologous fertilisation.

¹²⁸ Decreto Legislativo 6 November 2007 no 191.

The possibility of using this artificial reproductive technique is in fact still a privilege of the few.¹²⁹ At present in fact, heterologous fertilisation is not yet included as an essential form of assistance guaranteed by the National Health Service; public healthcare facilities have not been allocated the necessary funds in order to enable the effective usage of this technique. The only Italian regions that enable access to heterologous fertilisation are Emilia Romagna, Friuli-Venezia Giulia and Tuscany, although the waiting lists are very long.

In addition, the removal of the prohibition has fuelled further doubts of an ethical nature (which were only in part resolved by the recent judgment¹³⁰ upholding the prohibition on surrogate maternity).¹³¹ In fact, the abandonment by the Constitutional Court of the rigid perspective could in fact be a dangerous instrument if used in an indiscriminate manner and from a viewpoint that was balanced in favour of the claims – which are at times selfish – of the individual.

Within such a scenario, the objective of legal certainty would suggest a need for clarification by Parliament. However, this is a desire that will be difficult to realise, due to the excessively strong influence to which the Italian legislator continues to be subject.

Thus, the role of adjusting the law in line with the complexity of real life will fall to interpreting bodies. This delicate task will have to be carried out with a sense of awareness, responsibility and sensitivity, classifying the calls from the various stakeholders under the values of the legal system of origin. The aim to be pursued is to strike a reasonable balance between the interests of aspiring parents and those of future children, but also to assess the possible consequences that decisions based on an excessively

¹²⁹ Cf. L. D'Avack, 'Cade il divieto all'eterologa' n 109 above, 1007; C. Lalli, 'La fecondazione eterologa resta un diritto per pochi privilegiati' (21 April 2016) available at <http://www.internazionale.it/opinione/chiara-lalli/2016/04/21/fecondazione-eterologa-legge> (last visited 24 May 2016).

¹³⁰ Corte di Cassazione 11 November 2014 no 24001, available at www.biodiritto.org. In this last case however, the confirmation of the prohibition led to the aberrant result of removing the child born in Ukraine as a result of surrogate maternity from its family. Italy has been condemned by the Strasbourg Court for this decision (Eur. Court H.R., *Paradiso e Campanelli v Italy*, Judgment of 27 January 2015, available at www.hudoc.echr.coe.it).

¹³¹ Consider the embryo swapping scandal at the Pertini hospital in Rome. The two couples involved in this case had used homologous fertilisation *in vitro* and were awaiting the implantation of the embryos produced. During the operation, the healthcare staff mixed up the test tubes and implanted the two embryos in the wrong womb. This has accordingly been described as 'crossed' heterologous fertilisation. See F. Campodonico, 'Eterologhe "da errore" e salomonici abusi. Commenti a margine della Risposta del Comitato Nazionale di Bioetica e dell'Ordinanza del Tribunale di Roma sul caso dello scambio di embrioni all'ospedale Pertini di Roma' *Rivista di Biodiritto*, 1, 157-174 (2015).

forward-looking approach could have on the social context. This objective is not an easy one to achieve, but is a necessary one.