THE RIGHT TO PREIMPLANTATION GENETIC DIAGNOSIS: BIOLOGICAL CITIZENSHIP AND THE CHALLENGE TO THE ITALIAN LAW ON MEDICALLY ASSISTED REPRODUCTION

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In 2004, the Italian Parliament passed a restrictive law on medically assisted reproduction 40/2004 outlawing the use of preimplantation genetic diagnosis (PGD) in Italian fertility clinics. The adoption of the law triggered a massive wave of lawsuits filed by Italian citizens and medical associations against the law, leading to the invalidation by the Constitutional Court of the impugned provisions as violating constitutional rights and to the legitimization of PGD. Drawing on the concept of biological citizenship and the critical approach to legal rights, this article explores the extent to which rights litigation can ensure the recognition of biological citizens' values and interests in using new biomedical technologies. It argues that countries' dominant institutionalized ways of constitutional interpretation and reasoning play a key role in how courts resolve rights disputes. This limits the scope of rights, and the values that underpin the claimed rights, based upon which citizens can claim access to new biomedical technologies. In Italy, due to these dominant institutionalized ways of constitutional interpretation and reasoning, the Italian Constitutional Court recognized that only the right to health of the woman, and not the rights to reproductive self-determination and to respect for private and family life, legitimized access to PGD. As a result, it failed to recognize citizens' relational values of parental responsibility and care that underpinned these rights. As such, biological citizenship in the form of rights claiming therefore provides limited potential for biological citizens to have their values and interests in using new biomedical technologies recognized by the state.

Keywords: rights, Italy, preimplantation genetic diagnosis, relational values, biological citizenship, assisted reproduction

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I. INTRODUCTION

In recent years, there has been an increased interest in the ideas of 'genetic'[1] and 'biological citizenship'.[2] These terms were introduced into academic literature to conceptualize the type of relationships between authorities and citizens that build upon the recognition of citizens as biological creatures whose health, treatment, maintenance and improvement are the key value. Unlike the traditional concept of citizenship, understood as a link between individuals and the state, biological citizenship may not necessarily have a 'nationalized form' and involve state apparatus. Instead, it may encompass different forms of political participation, civic engagement as well as a

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1 Deborah Heath, Rayna Rapp and Karen-Sue Taussig, 'Genetic Citizenship' in David Nugent and Joan Vincent (eds), *A Companion to the Anthropology of Politics* (Blackwell Publishing 2007).

2 Nikolas Rose and Carlos Novas, 'Biological Citizenship' in Aihwa Ong and Stephen Collier (eds), *Global Assemblages: Technology, Politics, and* Ethics *as Anthropological Problems* (Blackwell Publishing 2004). Adriana Petryna, *Life Exposed: Biological Citizens After Chernobyl* (Princeton University Press 2002). Nikolas Rose, *The Politics of Life Itself: Biomedicine, Power, and Subjectivity in the Twenty-First Century* (Princeton University Press 2006).

pluralization of political spaces in which the activities aimed at improving citizens' health take place. On the individual level, biological citizenship encompasses the 'regime of the self', that is, citizens' relations to themselves, their intuition of who they are and who they want to be, as well 'the actions they [take] upon themselves ... in the light of those understandings'.[3] As such, it represents an outcome of various practices of subjectification and the construction of citizens' identities. The contemporary regime of the self includes the feeling of being personally entitled to, and responsible for, enhancing and maintaining their vitality.[4] Using Rose's apt expression, in the contemporary 'regime of the self', health has become 'a desire, a right and an obligation'.[5] In addition, and mainly due to the developments in genetic science, the regime of the self includes the feeling of entitlement to and responsibility for, not only their own health, but also the health of their existing and future family members. As Rose argued, when an illness has genetic roots, 'it is no longer an individual matter. It has become familial, a matter both of family histories and potential family futures'.[6] As a result, to ensure better prospects of their health, the one of their children and of other family members, individuals for example strive to manage their genetic risks and use new biomedical and genetic technologies for this purpose. On the collective level, biological citizenship may include the formation of biosocial communities such as patient and self-help groups.[7] These communities make alliances with scientists to shape the direction of scientific research and lobby their governments to assign more funds for financing research on their health condition.

Other scholars, however, emphasize that biological citizenship can and does have more traditional forms and involve state apparatus. Specifically, biological citizens actively formulate and make rights claims upon their

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3 Miller Pete and Nikolas Rose, *Governing the Present: Administering Economic, Social and Personal Life* (Polity 2008) 7. Michel Foucault, *Histoire de La Sexualité* (Gallimard 1976).

4 Paul Rabinow and Nikolas Rose, 'Biopower Today' (2006) 1 BioSocieties 195. Rose and Novas (n 2). Rose (n 2).

5 Nikolas Rose, 'Molecular Biopolitics, Somatic Ethics and the Spirit of Biocapital' (2007) 5 Social Theory & Health 3, 11.

6 Rose (2) 108.

7 Paul Rabinow, *Essays on the Anthropology of Reason* (Princeton University Press 1996).

governments in the name of their life and health and demand the state to protect their 'vital rights', for example by providing better access to biomedical benefits. Rights litigation is one of the most frequent mechanisms used by citizens against the state. For example, in her research, Petryna showed how citizens of post-Chernobyl Ukraine demanded compensation for their damaged health through litigation.[8] Further, Biehl showed how by litigating in Brazil, 'patients-citizens' achieved 'a democratization of medical sovereignty' enabling alternative health care practices to thrive.[9] Finally, Hanafin explored rights litigation in Italy against a restrictive law on medically assisted reproduction (Law 40/2004)[10] initiated by Italian couples with various genetic pathologies to gain access to preimplantation genetic diagnosis (PGD) forbidden by Law 40/2004.[11] Hanafin concluded that the use of rights litigation helped citizens to resist the 'politics from above' and have their interests, while ignored by Parliament, recognized by Italian courts.[12]

Hence, for these authors, rights litigation was employed by citizens to fulfill their hopes and have their claims 'in the name of their damaged biological bodies'[13] satisfied, whether it was a claim for financial compensation, as it was in the case of Chernobyl workers, or for access to a forbidden technology, as it was in Italy. As researchers argue, hope to find cure for one's illness is

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8 Petryna (n 2).

9 Joao Biehl, *Will To Live: AIDS Therapies and the Politics of Survival* (Princeton University Press 2007) 135.

10 Legge 19 febbraio 2004, n.40, in G.U. 24 febbraio 2004, n.45 (Law 40/2004).

11 Usually PGD is performed to search and detect genetic mutations in genes responsible for either monogenic diseases (cystic fibrosis, beta thalassemia, Huntington's disease) or for certain polygenic diseases (such as breast and ovarian cancer).

12 Patrick Hanafin, 'Rights, Bioconstitutionalism and the Politics of Reproductive Citizenship in Italy' (2013) 17 Citizenship Studies 942. Patrick Hanafin, 'The Embryonic Sovereign and the Biological Citizen: The Biopolitics of Reproductive Rights' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012).

13 Ingrid Metzler, 'Between Church and State: Stem Cells, Embryos, and Citizens in Italian Politics' in Sheila Jasanoff (ed), *Reframing Rights: Bioconstitutionalism in the Genetic Age* (MIT Press 2011).

another key aspect of biological citizenship.[14] Hope grounds political activism in all its forms, whether this be the making of alliances with scientists to shape the direction of scientific research, political participation through lobbying, or the organization of public referenda. Furthermore, and importantly, biological citizenship operates within what Rose called the 'political economy of hope'.[15] The hope of patients to find cures for their illness triggers the funding of research and treatment institutions and fuels the commercial aspirations of companies involved in procuring the relevant services and products. Thus, because of hope, 'life itself is increasingly locked into an economy for the generation of wealth',[16] or indeed bio-value.[17]

Yet, while hope might well drive biological citizens to look for cures for their illnesses, the hope that rights is an appropriate instrument to attain this goal needs further exploration. In this article, I explore the extent to which rights litigation can ensure the recognition of biological citizens' values and interests in using new biomedical technologies, as well as the costs and disadvantages of using rights to achieve these ends. To do so, I reconstruct the story of Italian litigation for citizens' access to PGD, paying particular attention to how the values and interests of citizens in using new biomedical technologies were recognized through rights litigation. I argue that countries' dominant institutionalized ways of constitutional interpretation and reasoning play a key role in how courts resolve rights disputes and thereby limit the scope of rights and underlying values, upon which citizens can claim access to new biomedical technologies. As I illustrate, adhering to its own doctrine on abortion, the Italian Constitutional Court ruled that only the right to health of the woman, and not the rights to reproductive self-determination and to respect for private and family life, legitimizes access to PGD. Thereby it reiterated its principle of a high value attributed to unborn human life and rejected to recognize citizens' relational values of parental responsibility and care for the health of their future children, important elements of their identity. To some, despite that access to PGD was formally

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[14] Rose (n 2). Rose and Novas (n 2).

[15] Ibid.

[16] Rose and Novas (n 2) 452.

[17] Catherine Waldby, 'Stem Cells, Tissue Cultures and the Production of Biovalue' (2002) 6 Health 305.

legitimized, the failure to recognize biological citizens' relational values and allow PGD to protect them might mean that only a partial success was achieved.

I will proceed as follows. In Section II, I will describe the problem of using rights to achieve the desired social and legal transformations. In Section III, I will describe how the Italian Constitutional Court interpreted the Italian Constitution regarding the issue of the status of human fetuses and state obligations with respect to them as well as how this interpretation was consolidated in its subsequent jurisprudence. In Section IV, I will show how Law 40/2004 was deliberated and adopted. In Section V, I will discuss the first legal cases launched by Italian couples with genetic pathologies seeking access to PGD and how they were decided by local judges, illustrating the importance of the principle of state protection of unborn life for their success. In Section VI, I will attend to the first judgments of the Italian Constitutional Court regarding the admissibility of PGD. In Section VII, I will show how the Court refused to recognize relational values of the plaintiffs due to the positive obligation of the state to protect unborn human life. In Conclusion, I will add some final remarks.

II. Rights Critique and the Problem of the Reconstruction of Legal Rights

The belief in rights as an instrument to remedy social ills has not always enjoyed support from lawyers and legal scholars. Starting with legal realists and following critical legal studies (CLS) scholars, this belief has been increasingly criticized.[18] One of the most famous critique on rights was launched by CLS scholar Duncan Kennedy.[19] He argued that he lost his hope, or rather faith, in rights because rights turned out to be just like any other type of rhetorical or policy argument and, therefore, were not 'trumps' in the Dworkian sense, that is, special claims which could override the interests of a political majority and lead to the closure of the debate.[20] Even if they were

[18] Gerald Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (University of Chicago 1991).

[19] Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002).

[20] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

used as trumps, rights have the ability to produce counter-claims. The need to balance them would, then again, reduce the dispute to some political or subjective argument, as 'reasoning from the right' contains no objective criteria against which the balancing could be performed.[21] Therefore, what leads to a closure of a controversy is not the claiming of rights as such, but local contingent factors such as the identity of the rights claimer, their rhetorical mastery, and the political viability of supporting arguments. As Kennedy aptly put it, his loss of faith in rights is a 'loss of faith in the judge/legislator distinction, or in the idea of the objectivity of adjudication'.[22]

Feminist critique has also been skeptical of the emancipatory potential of rights. Similar to Kennedy, Smart emphasized rights' ability to produce counter-rights and, respectively, the importance of the existing relations of power for how the balancing between the competing rights will be performed.[23] She argued that counter-rights such as men's rights, fetal rights and children's rights could be and are being used to restrict, for example, women's access to abortion and constitute a disguised support for patriarchal relationships in a society. Therefore, particularly for women, as a traditionally marginalized societal group, the use of rights might not be helpful, as the existing relations of power will even further entrench the existing subordination of women through rights.[24] Similarly, according to Lacey:

> rights may operate, in Dworkin's memorable phrase, as trumps: but trumps are of little use if there are many trumps in the pack. And this multiplicity of rights increasingly brings with it a reliance on a coercive framework of enforcement which, as Carol Smart has argued, inevitably depends on violence of legal power: rights are a creature of the state and hence a function of existing configurations of power. This means, it is argued, that they are of limited use to the politically marginalized or for the construction of claims oppositional to prevailing power relations.[25]

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[21] Kennedy (n 19).

[22] Ibid 197.

[23] Carol Smart, *Feminism and the Power of Law* (Routledge 2002).

[24] Smart (n 23).

[25] Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004) 39. Smart (n 23).

Therefore, the outcome of rights adjudication is more a consequence of local factors such as the existing relations of power in the society and the strength of the arguments used.

One such contingent local factor affecting rights adjudication is the influence of institutionally anchored ways of constitutional interpretation and reasoning, performed by national constitutional courts and contained in constitutional courts' rulings.[26] The burgeoning field of comparative constitutional law illustrated the diversity of interpretation techniques applied by constitutional courts to the interpretation of national constitutions, for example, with respect to the issue of women's reproductive rights and fetal rights.[27] Such a difference can be explained by the national political and legal culture of the country where adjudication takes place.[28] In addition, since these patterns of constitutional interpretation and reasoning are established in constitutional jurisprudence, i.e. in the jurisprudence of highly authoritative supreme courts, they affect the process of rights adjudication also through acting as judicial precedents. Both in common and civil law countries, judicial precedents play an important role because they help to assure the 'continuity scripts of the law'[29] and the certainty of jurisprudence.[30] In sum, the importance of institutionally anchored patterns of constitutional interpretation and reasoning for how rights adjudication is performed testifies that the appeal to rights does not lead to one particular outcome achievable through objective reasoning from the right. Instead, this

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[26] Jeffrey Goldsworthy, 'Constitutional Interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).

[27] Goldsworthy (n 26). Reva B Siegel, 'The Constitutionalization of Abortion' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012). Donald P Kommers, 'Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective' [1985] *Brigham Young University Law Review* 371. Myra M Ferree, 'Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany' (2003) 109 American Journal of Sociology 304.

[28] Goldsworthy (n 26).

[29] Rosenberg (n 18).

[30] Neil MacCormick and Robert S Summers (ed), *Interpreting Precedents: A Comparative Study* (Dartmouth Applied Legal Philosophy Series 1997)

outcome emerges from applying historically and contextually specific patterns of reasoning and constitutional interpretation, institutionalized in the constitutional case law of the country, to the case at hand.

Less attention has been paid to the role factors, such as institutionally anchored traditions of constitutional interpretation and reasoning, play when the attempt to reconstruct rights is performed by rights claimants. In legal theory, the need and importance of reconstructing legal rights is discussed because the ontological basis upon which traditional rights discourse and rights theory build is increasingly problematized. This ontological basis consists of the right-bearing individual seen as a separate, atomistic and self-sufficient being. Respectively, rights are seen as shields intended to protect this autonomous self and its individual values against intrusion and harm from other individuals and the state. These ontological presumptions of rights, however, have been criticized, as the emphasis on individual autonomy of the rights discourse does not allow to account for the relationality and interdependence among people.[31] Following the idea of relational autonomy, feminist scholars argued that individuals are to a large extent relational beings whose identity and bodies are shaped by the relationships and connections between them and other people.[32] Family has been used as an example of an entity whose members are particularly strongly bound by the relational ties such as responsibility, care and collective interests.[33] Similarly, pregnancy has been discussed as an example *par excellence* of relational autonomy.[34] Pregnant women's personal boundaries are intertwined with the boundaries of the fetus and the latter, in turn, at least in the first stages of pregnancy, entirely depends upon the mother. The emphasis on relationality has been particularly important to undermine the

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[31] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011). Isabel Karpin, 'Legislating the Female Body: Reproductive Technology and the Reconstructed Woman' (1992) 3 Columbia Journal of Gender and Law 325.

[32] Ibid.

[33] Hilde Lindemann Nelson and James Lindemann Nelson, *The Patient in the Family: An Ethics of Medicine and Families* (Routledge 1995). Michelle Taylor-Sands, *Saviour Siblings: A Relational Approach to the Welfare of the Child in Selective Reproduction* (Routledge 2012)

[34] Karpin (n 31).

viability of views on a disembodied embryo as a value in itself, or as a person having legal personality and rights, that should be protected against harm and violation.

In order to tackle the shortcomings of the existing rights discourse, some scholars engaged into the process of reconstructing rights. Specifically, some authors developing the idea of relational autonomy, proposed the relational approach to rights. For example, according to Herring, rights could be seen as claims protecting, not only individual but also relational values and interests.[35] While rights are still claimed to protect individual values and interests, there is no reason, according to Herring, why they cannot also be claimed with respect to 'relational values' and interests such as care, responsibility and parental duty. For example, rights such as the right to respect for private and family life, protected by Art. 8 of the ECtHR, can act as such a right, promoting relational values.

Despite the significance of this research on relational autonomy, relational rights and the need to reconstruct rights theory to accommodate relational values, it has focused mainly on the importance of using relational approach to rights as more truthfully reflecting the ontological structure of the world. As a result, the role of contextual factors has been neglected and the relations of power in whether such reconstruction of rights will ultimately succeed. As this article will further illustrate, institutionally anchored ways of reasoning and constitutional interpretation, consolidated in the country's constitutional jurisprudence, can be decisive for whether the reconstruction of rights will be successful. More specifically, in the Italian litigation for access to PGD, they were a key factor why the rights claimed by the litigants, that could protect relational values – the right to reproductive self-determination and the right to respect for private and family life – were not recognized by the Constitutional Court. As a result, existing power configurations might preclude citizens from achieving their goals through rights litigation and having their relational values of care and parental responsibility recognized by the state and thus undermine the importance of rights litigation for achieving biological citizens' goals.

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[35] Jonathan Herring, 'Forging a Relational Approach: Best Interests or Human Rights?' (2013) 13 Medical Law International 32.

III. Fetal Rights in the Italian Constitutional Jurisprudence

The Italian Constitutional Court legitimized abortion in 1975 when it repealed as unconstitutional the abortion articles of the Italian Criminal Code prohibiting abortion.[36] According to the Constitutional Court's ruling, they violated the right to health of the woman.[37]

The Constitutional Court built its ruling on the following arguments. First, it decided that the protection of the conceived (*concepito*) had a constitutional foundation. Specifically, it stated that Art. 2 of the Constitution,[38] an open-ended norm, 'recognizes and guarantees the inalienable rights of human beings, a legal status we must apply to the conceived, albeit with some particularities'. Second, it argued that whereas in itself the criminalization of abortion by the legislator was justified, the protection of the fetus was not absolute and should be balanced with other constitutional commitments of the Italian State. Specifically, because pregnancy and the health condition of the fetus could create adverse effects on pregnant woman's mental or physical health and the woman's right to health also constitutes the fundamental right guaranteed by the Constitution, the need to protect the latter warrants the limitation of the rights of the fetus. Yet, according to the Court, the legislator did not adequately balance its duty to protect the fetus's rights with the duty to protect the pregnant woman's right to health. Therefore, the respective articles of the Italian Criminal Code were unconstitutional. In addition, the Court remarked that 'the right of someone who is already a person – like the mother – not only to life, but also to good health, is not equivalent to the

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36 C.C., 18 febbraio 1975, n. 27 (Abortion Ruling 27/1975).

37 Costituzione della Repubblica Italiana, Art. 32. 'The Republic safeguards health as a fundamental right of the individual and as a collective interest and guarantees free medical care to the indigent. No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person.'

38 Art. 2 of the Italian Constitution: 'The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.'

protection of the embryo who is yet to become a person'.[39] Finally, the Court addressed to the legislator the requirement to establish through law those means that could prevent performing abortion 'without serious acknowledgments about the reality and gravity of the harm or danger that the continuation of pregnancy might inflict upon the mother'.[40] Thus, according to the Court judgment, abortion remained a crime. Yet, when it was necessary for the protection of life and health of an adult person, the judgment 'opened some space for the legitimacy' of abortion.[41]

The reasoning of the Italian Constitutional Court is thus distinctive for its strong pro-life overtones. It acknowledged that the fetus 'was to become a person' and thus enjoyed constitutional rights, although with some particularities that the state had a positive obligation to protect and ensure. However, because no right is absolute, the interference with embryos' rights could be justified to protect values and rights of greater moral and legal weight, such as the right to health of the woman.[42]

Three years later, Italian Parliament followed the Court and passed a law that decriminalized abortion if pregnancy and delivery created risks to the pregnant woman's health.[43] The Law allowed abortion within the first 90 days of pregnancy if 'pregnancy, delivery and maternity would cause a serious threat to the woman's physical and psychological health, because of her economic, social or family conditions, or because of the circumstances in which the conception took place, or because of anomalies or malformations of the conceptus'.[44] Furthermore, a woman was allowed to perform abortion after 90 days if 'pregnancy or delivery poses a serious threat to the woman's life or when pathological processes such as anomalies or malformations of the fetus' causing a serious threat to psychological or physical health of the

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39 Abortion Ruling 27/1975 (n 36).

40 Ibid.

41 Monica Cesaritti, 'Liberazione dall'aborto: l'articolato universo delle donne, il Pci e l'approvazione della legge 194' (2011) 1 Mondo contemporaneo 39.

42 It thus performed an interpretive technique called 'balancing of values', characterizing the approach of the Constitutional Court to the adjudication on fundamental rights.

43 Legge 22 maggio 1978, n.194, in G.U. 22 maggio 1978, n. 140 (Law 194/1978).

44 Ibid.

woman are acknowledged'.[45] Finally, in Art. 1 the Law stated that 'the State protects life from the outset'; whereas it did not specifically indicate when exactly human life starts, human life at the embryonic stage of development was symbolically recognized as an object of state protection.

The approach of the Constitutional Court regarding the status of human fetuses was confirmed in its next two rulings that concerned the legitimacy of the abrogative referenda on the subject matter of Law 194/1978. The first ruling concerned three campaigns launched simultaneously by the Italian Radical Party, on the one hand, and Christian Democracy and the pro-life association Movement for Life (*Movimento per la Vita*, MpV), on the other hand. The Radical Party sought to fully decriminalize and hence liberalize abortion in Italy. It campaigned for repealing a number of provisions of Law 194/1978, particularly, Art. 1 of the Law ('The State protects life from its outset'), several articles that regulated the conditions and procedures of performing abortion before and after day 90 of pregnancy, as well the penal sanctions applicable if abortion would be performed in violation of the Law. Instead, Christian Democracy and MpV campaigned for restricting the performance of abortion in Italy launching two referenda campaigns, '*massimale*' and '*minimale*'. The petition for the 'maximal' referendum proposed the electorate to vote only for those articles of Law 194/1978 that conformed to the principle of absolute embryo protection and to vote against those that foresaw any right to perform abortion, including for the sake of protecting pregnant woman's health. The second petition called on voters to vote for excluding the mental health indication for abortion, since it allowed too free an access to legal abortion.

The Constitutional Court considered the petitions for the three referenda on the matter of their consistency with the Constitution. It recognized the 'maximal' referendum launched by the MpV and Christian Democracy to be unconstitutional because the prohibition of abortion would be inconsistent with the Court's own judgment that legitimized abortion if it was needed to protect women's health.[46] However, it allowed the 'minimal' referendum initiated by the MpV and Christian Democracy as well as the referendum

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[45] Law 194/1978 (n 43).

[46] C.C., 10 febbraio 1981, n. 26.

launched by the Radical Party.[47] With respect to the latter, the Court concluded that the provisions that were the question of the referendum constituted merely a 'discretional choice of the legislator' and therefore could be the object of the popular vote.[48] As shall be seen more clearly later, what in fact underlay the decision of the Court was, not so much its view that the liberalization of abortion through a referendum was constitutional, but rather that the criminalization of abortion was not the only legal means of regulating it. In other words, the referendum, at least according to the Court, was not about the liberalization of abortion in general, but about the specific means chosen by the legislator (criminalization) to regulate it. For the time being, however, the Law remained in force: the voters voted 'no' at both referenda.[49]

The next referendum aimed at the liberalization of Law 194/1978 was initiated in 1997 also by the Radical Party and the question of the referendum was analogous to the one of 1981 referendum. However, this time the Constitutional Court ruled against the admissibility of the referendum.[50] Referring to its Abortion Ruling 27/1975, it concluded that Law 194/1978 in its current shape was indispensable to ensure the realization of values that the Court itself had defined as fundamental and in need of positive state protection, including 'the protection of human life from its outset'. Importantly, the Court also explained why it came to the opposite conclusion in its ruling concerning the referendum campaign of 1981. It remarked that, unlike the referendum of 1981, in which the topic of the 'decriminalization of abortion' and the constitutionality of criminal punishment of illegal abortions were put on the forefront, in the current referendum these issues were not raised. Instead, a complete liberalization of abortion was sought. However, according to the Court, 'the Constitution does not allow to touch by means of abrogation, even a partial one, those core dispositions of law of 23 May 1978 n. 194, which concern the protection of the life of the conceived

47 C.C., 10 febbraio 1981, n. 26.

48 Ibid.

49 Jacqueline Andall, 'Abortion, Politics and Gender in Italy' (1994) 47(2) Parliamentary Affairs 238.

50 C.C., 30 gennaio 1997, n. 35.

when the mother's health is not under threat'.[51] In other words, even if the Constitution itself did not require the legislature to regulate the provision of abortion via criminal law, this did not mean that the Constitution allowed a complete liberalization of abortion. Instead, it required the legislature to implement legal provisions that would ensure the minimum degree of protection of 'embryos' right to life. Such minimum degree of protection was the prohibition of abortion for any reason other than the protection of mothers' health.

These two rulings further reinforced and institutionalized the Court's view on the status of unborn human life and the obligation of the state towards it. Similar to Abortion Ruling 27/1975 and again following its pro-life reasoning, the Constitutional Court reconfirmed that fetal rights were in need of state protection. They could be limited only to protect the constitutional value of a greater moral and legal weight such as the women's right to health. This reasoning, reinforced through a continuous reference to its former judgments, thus gave ground to the emergence and consolidation of the *dottrina giuridica* of the Italian Constitutional Court on the issue of the status of unborn human life and state obligations towards it. The doctrine, together with the reluctance of the Constitutional Court to involve into an overt conflict with Parliament over the issue of the regulation of reproductive technologies, would significantly affect the Court's position regarding the status of IVF embryos and the results of the campaign for access to PGD.

IV. The Influence of Catholicism, The Adoption of Law 40/2004 and IVF Embryos as 'Citizen Subjects'

The Italian PGD litigation was a consequence of the adoption by Italian Parliament of a highly restrictive Law 40/2004 regulating the use of ART in Italy, much discussed and criticized elsewhere.[52] The Law was a product of a

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[51] C.C., 30 gennaio 1997, n. 35.

[52] Ingrid Metzler, ''Nationalizing Embryos': The Politics of Human Embryonic Stem Cell Research in Italy' (2007) 2 BioSocieties 413. Herbert Gottweis, Brian Salter and Cathy Waldby, *The Global Politics of Human Embryonic Stem Cell Science: Regenerative Medicine in Transition* (Palgrave Macmillan 2009). Lorenzo Beltrame, 'The Therapeutic Promise of Pluripotency and Its Political Use in the Italian Stem Cell Debate' [2014] Science as Culture 1. Volha Parfenchyk, 'Redrawing the Boundary of

20-year-long controversy spurred on and sustained by the intervention of the Catholic Church in political decision-making in Italy.[53] The Church's moral judgement and vocal appeal to implement it through secular laws found a responsive audience among Italian politicians due to the political circumstances of that time. In the beginning of the 1990s, Italian politics was undergoing profound changes as a result of *Mani pulite* (Clean Hands), a massive judicial investigation of corruption cases among Italian politicians, which led to the disintegration of Christian Democracy, the leading party, and to the emergence of new smaller parties. These latter, especially right-wing parties, such as Berlusconi's *Forza Italia* and the ultra-right *Lega Nord per l'Indipendenza della Padania*, used the Church's moral teaching to foster their political identity and gain public support. This connection between the political interests of Italian politicians and the bioethical interests of the Church constituted the main political factor pushing for restrictive regulation of ART.

The main bioethical issue in the debate on ART was the 'moral and legal status of the human embryo'. According to Catholic teaching,[54] an embryo is a person from conception and the protection of its life, like that of born persons, is of utmost importance and must be safeguarded through positive law. Hence, the Catholic hierarchy pressed Italian politicians to adopt restrictive regulations of ART to ensure the embryo was protected against technological and scientific manipulation. As Flamigni and Mori argued,[55] the Church gave up its intent to ensure the protection of other catholic values through law such as the prohibition of human procreation 'outside of the conjugal act'.[56] As they argue, the Church agreed that it would not find support for this principle in an increasingly liberal society. However, the protection of embryos remained of paramount importance. In the war

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53 Patrick Hanafin, *Conceiving Life: Reproductive Politics and the Law in Contemporary Italy* (Ashgate Publishing 2007). Carlo Flamigni and Maurizio Mori, *La Legge Sulla Procreazione Medicalmente Assistita* (Net 2005).

54 Instruction for Human Life in Its Origin and on the Dignity of Procreation '*Donum Vitae*', 1988.

55 Flamigni and Mori (n 53).

56 Ibid.

against the 'culture of death', or ethical relativism, and fighting for the reinstallation of the 'culture of life',[57] embryo protection remained the key guidepost for the Church.

However, this absolutist view of human embryos was not shared by all, as a deep secular-Catholic cleavage had been embedded in Italian society, including the political sphere, for several decades. The lack of consensus regarding the status of the embryo and how ART should be governed led to a failure to quickly produce a law regulating ART. As a result, the only document that regulated the provision of artificial reproduction services was a Circular issued by the Minister of Health in 1988. However, the Circular only applied to public fertility centers, leaving private ones beyond its regulatory reach and leading to the establishment of a rather liberal approach towards ART. Private Italian clinics offered a wide array of ART procedures, ranging from more widespread ones such as the creation of supernumerary embryos and embryo cryopreservation to surrogacy, egg donation, and the fertilization of menopausal and single women. Thus, while Italian politicians were debating about how ART ought to be accommodated in Italian healthcare arrangements, Italian biological citizens were reaping the benefits of new technologies in quite an unconstrained way. PGD, for example, was widely used in Italy, in particular because of the wide spread of diseases such as beta thalassemia in Mediterranean regions.[58]

In 2004, when the Berlusconi-led coalition won the majority of seats in Parliament, the Law was finally adopted. It was immediately labelled the 'Catholic law', because it was heavily influenced by the ethics of life of the Catholic Church and due to the Law's emphasis on the protection of embryos' rights and the disregard of interests and rights of adult citizens. In Art. 1, the Law symbolically recognized the IVF embryo as a rights-holder.[59]

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[57] The papal encyclical on the Value and Inviolability of Human Life '*Evangelium Vitae*', 1995.

[58] Sandrine Chamayou and others, 'Attitude of Potential Users in Sicily towards Preimplantation Genetic Diagnosis for Beta-Thalassaemia and Aneuploidies' (1998) 13 Human reproduction 1936.

[59] Law 40/2004, Art. 1: 'Al fine di favorire la soluzione dei problemi riproduttivi derivanti dalla sterilità o dalla infertilità umana è consentito il ricorso alla procreazione medicalmente assistita, alle condizioni e secondo le modalità previste

To implement the rights of embryos, the Law prohibited many reproductive technologies and practices. Specifically, it forbade embryo experimentation, prescribed that clinical and experimental research must be performed only for the sake of the embryo itself, forbade the creation of embryos for scientific and experimental research and outlawed eugenic embryo selection (Art. 13). Further, in Art. 14, it prohibited the discarding and cryopreservation of embryos, and prescribed that doctors must not 'create embryos in a number higher than the one strictly necessary for a single and simultaneous transfer, and in any case not more than three'. Hence, the doctor was obliged to create not more than three embryos and all the resulting embryos, including those not capable of development and the sick ones, had to be implanted into the women's uterus. The only exception to this rule was if the female patient had health issues that were unforeseen at the moment of fertilization of the eggs (Art. 14 para. 3). Even in this case, however, after the patient's health improves, the doctor was obliged to proceed with implantation.

To further restrict the possibilities of embryo manipulation, the Law directly regulated some adult citizens' rights concerning the use of, and access to, ART. First, it prescribed that only infertile married couples could have access to ART in Italy. Therefore, fertile couples wanting to avail themselves of the opportunities offered by the new technologies were excluded. Similarly, single citizens, homosexual couples and unmarried heterosexual couples did not have the right to use them. Second, in Art. 4, the Law prohibited women from withdrawing their consent after the fertilization of her eggs which meant they could formally be forced to undergo coercive treatment if they changed their mind after the IVF process had started.

Combined, all these provisions technically made PGD impossible. In addition, they created sever risks to women's health. For example, the provision obliging doctors to create a maximum of three embryos, without the right to cryopreserve them, forced them to repeat harmful hormonal stimulations, which created the risk of causing such adverse effects as ovarian hyperstimulation syndrome (OHSS) and ovarian cancer. Also, the difficulty in estimating how many embryos would be created following oocyte

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dalla presente legge, che assicura i diritti di tutti i soggetti coinvolti, compreso il concepito'.

insemination could result in a multiple pregnancy, which also put women's health at risk. Furthermore, the outlawing of PGD meant that couples faced a difficult choice between raising a baby with severe genetic pathologies or undergoing a psychologically and physically traumatic abortion procedure.

The enactment of Law 40/2004 provoked a great outflow of Italian citizens seeking treatment abroad. The *Osservatorio Turismo Procreativo* (Observatory of Procreative Tourism), a project launched in 2005 to monitor the consequences of Law 40/2004, reported that the number of couples going abroad to receive treatment in 2005 was almost four times as high as it was in 2003.[60] In 2010, the European Society of Human Reproduction and Embryology performed a survey of foreign patients treated in 46 clinics in six European countries.[61] It found out that 31.8% of the forms were filled in by Italian patients and 70.6% of them referred to legal restrictions as their reason for seeking treatment abroad. Among the most frequent procedures were IVF, gamete and embryo donation and PGD. Not all citizens decided to go abroad to receive the forbidden treatment, however. Some of them, instead, decided to pursue their rights with hope for a better outcome.

V. Local Courts, Biological Citizenship and the Appeal to Relational Values

The Law's prohibition on using the benefits of science and technology to fulfil one's personal reproductive interests prompted citizens to mobilize their efforts and to change the Law 'from below'. They used the mechanism of rights litigation to challenge the constitutionality of the Law and to have their interests recognized by the state. Specifically, the mobilization was undertaken by individual citizens who were susceptible to various serious genetic pathologies such as beta thalassemia or cystic fibrosis and wanted to use PGD to start pregnancies with healthy embryos. Litigants were supported by several patient and scientific associations acting in courts as third parties; these included the Luca Coscioni association, the association

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[60] Osservatorio sul turismo procreativo. Turismo procreativo: fotografia di una realta (225). Press Conference <http://www.tecnobiosprocreazione.it/file_download/33/Turismo+Procreativo+fotografia+di+una+realt.pdf> accessed 4 May 2018.

[61] Francoise Shenfield et al, 'Cross Border Reproductive Care in Six European Countries' (2010) 25 Human Reproduction 1361.

of aspiring parents 'Cerco un Bimbo' and the association for the study of infertility, CECOS Italia. In addition, and importantly, the fertility centers, which had formally denied the plaintiffs PGD and acted as defendants in the trials, mostly testified in favor of the plaintiffs. Hence, a strong coalition of individual citizens and their collectives emerged and acted together to restore rights taken away by Parliament.

In 2004, the first complaint was brought against a fertility center in the local court in Catania.[62] The plaintiffs, husband and wife, were healthy carriers of beta thalassemia and were infertile. During the course of their fertility treatment, Law 40/2004 came into force and the plaintiffs signed the consent form that the Law required. A month later the couple asked the center to proceed with PGD and to have only healthy embryos implanted and the rest frozen. The wife also attempted to withdraw her previous consent to having all the embryos implanted. In her written request to the director of the fertility center asking him or her to proceed with PGD and have only healthy embryos implanted, the wife described her 'hope to conceive a baby that could fulfill and complete our existence and fulfill our desire to be a family in the full and complete meaning of this word'.[63] Further, she described the painful feelings she would have if she gave birth to a baby who would endure 'atrocious suffering' for which she would feel responsible.[64] She also added that if she conceived a sick baby, she would be forced to have an abortion. The director of the center, however, rejected the request, referring to the restrictions established by Law 40/2004. The couple initiated legal proceedings, claiming that the fertility center's refusal to perform PGD violated the inalienable constitutional rights of the wife stipulated in Art. 2 (the guarantee of inviolable human rights) and Art. 32 (the right to health and the right not to be forced to submit to unwanted medical treatment) of the Italian Constitution.

The judge, however, did not sustain the complaint. First, he concluded that the prohibition of PGD did not violate the wife's right to health (Art. 32 para. 1). According to the judge, the recourse to abortion, allowed by Law

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[62] Trib. Catania, 3 maggio 2004.

[63] Ibid.

[64] Ibid.

194/1978,[65] was permitted only to prevent risks to the mother's health that a health condition of the fetus or pregnancy could create. However, in the case of PGD, her health could not be harmed because the procedure is performed before the pregnancy is established. Second, he addressed the argument of the plaintiffs that the implantation of embryos against the mother's will would violate Art. 2 and Art. 32 para. 2 of the Italian Constitution. According to the plaintiffs, together these norms meant that if a person is the title-holder of a right (in this case, the right to health), then the person's will cannot be subordinated to another interest and that the will of the individual is the only measure for deciding if, when and how treatment is to be performed. But the court responded that, in the case of PGD, the interests of two subjects were in conflict: the mother and the unborn child. In this case, it is illogical that the mother alone can decide how to balance these interests. Therefore, it was up to the state to decide how to balance these rights, and the prohibition on withdrawing consent, stipulated in Law 40/2004, represented nothing more than the state's view on how the two must be balanced. Finally, he concluded that the plaintiffs' claim was, in fact, simply their 'desire-interest to have a healthy child', which they only masked by referring to other rights. However, he continued, this right could not be sustained because the Italian Constitution did not guarantee the 'right to have a healthy child' or to a 'virtual baby that lives only in a mental representation of its parents'. This, according to the court, was a eugenic practice, which Italian law forbids. Instead, together with Law 40/2004, the Constitution protects the child 'that will in fact live as a result of the fertilization of the eggs, even [if it is] possibly sick'.

Thus, the court's reasoning and the outcome of the litigation provide us with a vivid illustration of how rights-claiming against the state can affect the recognition of biological citizens' demands to ensure the protection of their or their family's health through the use of advances in biomedicine and genetics. As the analysis above illustrates, the plaintiff's position contained claims about the interdependence between her and her future baby and it was the care for its health and well-being that urged her to seek PGD. The plaintiff referred to the suffering she would experience if she would need to give birth to a severely handicapped and suffering baby, as well as the sense of

[65] Law 194/1978 (n 43).

an unfulfilled responsibility because of failing to ensure its good health. Thus, it was not only an individual harm afflicted on her that urged her to seek PGD, but also and particularly the suffering of her future baby that she wanted to prevent via PGD. In such a view, *caring* for the future baby entitled the woman to select embryos without pathologies and discard those carrying defected genes. Her personal feelings of suffering are only a part of deep emotional ties that bound her and her future baby.

However, caring for the health of the future baby as a reason for accessing PGD first had to be translated into a right whose violation might justify the access to PGD. Yet, doing so was not unproblematic because care that the mother described in her appeal implied not only a relatively understandable desire to have a healthy baby, but also the selection of embryos with good genes and the destruction of affected embryos. PGD, in fact, while allowing women to fulfill their caring obligations, inflicted harm upon other entities – existing sick IVF embryos. In particular, the protection of their life against violation and the prevention of harm was the reason behind the prohibition of PGD. Therefore, care for the health of the future baby, a relational desire and responsibility, also implied the affliction of individual harm upon those embryos that would bear defected genes.

In the court's view, motives such as the wish to give birth to a healthy baby out of responsibility for its health or simply to have a 'family' in the full and complete meaning of this word'[66] did not qualify as good enough reason for having access to PGD. Although the couple did not explicitly claim the right to a healthy child, the court 'discerned' this right in the couple's complaint, particularly in the wife's letter to her doctor, and dismissed it. According to the judge, satisfying this request would entitle the couple to 'eugenically select only healthy children' and mean a complete negation of the embryos' right to life. This, according to the court, the state could not allow as it bears a positive obligation to protect unborn life, imposed upon it by the constitutional jurisprudence as well as by Law 194/1978 and Law 40/2004. Therefore, the selection, let alone the destruction of embryos should not be allowed, even if performed for apparently positive and well-justified reasons such as care for the health of the baby eventually to be born.

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[66] Trib. Catania (n 62).

The court acknowledged, however, by referring to existing law on abortion, that an embryos' right to life could be limited if the competing right to health of the mother was at risk. However, in the case of PGD, the court took the position that the wife's health could not be harmed in this way, so no rights conflicting with embryo rights could be violated. In other words, attempting to be consistent with the Italian law on abortion, which attributes strong protection to unborn fetuses, the court applied an individualist approach to rights, seeing the mother and the embryo as competing rivals with conflicting interests, because this approach would better promote and guarantee the protection of the embryo's life. If the plaintiff would prove how the mother's right to health is violated, then it would satisfy the plaintiff's complaint. However, because she failed to do so, the court had to dismiss the complaint.

The next case was brought by a couple from Cagliari in 2005.[67] Like the previous case, the husband and the wife were healthy carriers of beta thalassemia and could not conceive a baby naturally. The first IVF cycle was performed without PGD. Following prenatal testing, the couple learned that the fetus was affected with beta thalassemia and the woman had an abortion. After the abortion, she developed an 'anxiety depressive syndrome' that lasted for over a year and the couple decided to make use of PGD to prevent a recurrent negative impact upon her mental state caused by a similar experience. However, the doctor at the clinic refused to perform PGD, referring to Art. 13 para. 1 of Law 40/2004 prohibiting embryo experimentation. The couple asked the Cagliari court to perform a 'constitutionally oriented interpretation' of the Law and oblige the clinic to perform PGD, because not doing so would constitute 'a grave threat to the psychophysical health of the woman deriving from a well-founded fear that the embryo might be affected by a serious genetic disease' and therefore violate her right to health.[68] To substantiate the claim, the couple submitted a report from the wife's psychiatrist to the court which indicated that the woman had developed a mental health condition that could re-occur if she was prevented from using PGD. The couple also asked the court to submit the Law to the Italian Constitutional Court for adjudication on the matter of

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[67] Trib. Cagliari, 16 luglio 2005, n. 5026.

[68] Ibid.

its constitutionality if it decided that the first two requests could not be satisfied.

The judge considered the requests of the plaintiffs and decided that the clarity of the Law's intent to prohibit PGD did not allow a 'constitutionally oriented interpretation' of Art. 13 of the Law to be made and thus he could not instruct the clinic to perform the procedure. However, the court found that there was a possible contradiction between Art. 13 and the Italian Constitution, specifically, Art. 32 on the right to health. First, the judge referred to the judgment of the Constitutional Court on abortion (Abortion Ruling 27/1975) that addressed the issue of the conflict between the women's right to health and the rights of the fetus, ruling in favor of the former.[69] According to the judge, in the case of PGD, where the rights of IVF embryos similarly conflicted with women's right to health, the protection of the latter should also be prioritized over embryo's interests.

Second, according to the judge, the plaintiffs demonstrated how the legal prohibition of PGD could be harmful to the wife's mental health. Hence, in this case, the reference to health was successful because the plaintiff succeeded in proving how her health might be jeopardized by the prohibition of PGD. Third, the judge specified that legal access to PGD was warranted by the state's constitutional duty to protect the right to health of the plaintiff and not the 'interest of the parents in having a healthy child', as eugenics was forbidden by Italian law. Therefore, access to PGD should be provided on exactly the same grounds as access to abortion, that is, only if the health condition of the embryo or pregnancy would cause adverse effects to women's health. Like the Catania court, safeguarding the mothers' health was again listed as the only reason that could outweigh the conflicting rights of the embryo.

The Cagliari case is thus also illustrative of the interdependence that exists between the embryo and the pregnant woman. The harm caused upon the mental state of the woman is related not only to her individual interest, but also to the care for the future baby and its health. However, unlike the former case, rights invoked by the plaintiff were acknowledged by the judge because the plaintiff managed to translate this interdependence and care into the type

[69] C.C., 18 febbraio 1975, n. 27.

of right that would take priority over embryos' rights and that thus would enable the court to satisfy the complaint. This was done through reframing the mother's suffering into illness and hence her right to PGD as a right to health. The relational values as such were again left beyond the scope of state protection.

The analysis of the two cases is informative because it gives a preliminary illustration of how legal institutions struggle with carving out space for new biomedical technologies in their countries' constitutional order. As both CLS and feminist scholars argued in their analysis of legal rights, one of the main issues that rights claims face is that they can always give rise to counter-claims.[70] Because there are no objective criteria for deciding how the balancing of conflicting rights must be performed, the result of the balancing process depends on contextual factors, including political, moral and other variables. As I have shown above, it is important not only how local factors affect the balancing of individual rights, but also how they affect the ways in which rights, their ontological presumptions, their underlying values and interests are defined in courts in the first place. In the case at hand, one of such local factors was the tradition of treating human embryos as human beings in and of themselves, having moral and legal value due to a mere fact of their existence. This approach towards unborn human life was taken by the Italian Constitutional Court, consolidated in the Court's doctrine and later translated in the legislation on abortion. To be consistent with it and to prevent the possibility of an unconstraint disposal of embryos by future parents, both Cagliari and Catania courts denied that parents' 'interest in having a healthy child' had any constitutional basis. Instead, by recognizing that only the protection of women's right to health warrants affliction of harm on embryos, both courts followed and further reinforced the view taken by the Constitutional Court. Thus, a simultaneous production of constitutional rights, new biomedical technologies, and local legal culture characterized the debate on the constitutionality of PGD.[71] As I have already

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[70] Smart (n 23).

[71] Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004). Jasanoff, *Reframing Rights Bioconstitutionalism* (n 13).

shown and will detail further, there was little place in this debate for relational values and rights that could promote these values.

VI. The First Decisions of the Constitutional Court and the Right to Health

The judge of the Cagliari court asked the Constitutional Court whether Art. 13 of the Law 40/2004 violated Art. 32 of the Constitution on the right to health. However, the Constitutional Court declared the question of the constitutional legitimacy of Art. 13 inadmissible on procedural grounds,[72] and affirmed that the prohibition of PGD also derived from other articles of Law 40/2004 that the local judge had not submitted for consideration. He also held that prohibition of PGD reflected the 'spirit' of the Law. Put in another way, the local judge had failed to correctly formulate the appeal, which entitled the Constitutional Court to dismiss it. Importantly, the Constitutional Court did not take a stance on the legitimacy of PGD; its decision to keep the Law intact was a result of the local court's failure to fulfil the procedural requirements of the appeal procedure.

Success came later, in 2009. The local Florence court[73] and *Tribunale Amministrativo Regionale* (TAR) of Lazio[74] asked the Constitutional Court whether Law 40/2004 was in conformity with the Constitution. This time, however, they provided the Constitutional Court with arguments about other reasons why the Law might be unconstitutional. To begin with, they emphasized that it was not only mothers' mental health that could be harmed. Specifically, Art. 14 prohibiting embryo cryopreservation and obliging the doctor to implant all embryos simultaneously, created adverse effects on women's health like OHSS, ovarian cancer and multiple pregnancy. The most substantial contribution, however, was the conclusion by TAR Lazio about the degree of protection that IVF embryos were accorded by the Law itself. According to the Tribunal, the provision of the Law according to which doctors were obliged to create a maximum of three embryos and

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[72] C.C., 24 ottobre 2006, n. 369.

[73] Trib. Firenze, 17 dicembre 2007. Trib. Firenze, 23 agosto 2008, n. 382. Trib. Firenze, 11-12 luglio 2008, n. 323.

[74] Tribunale Amministrativo Regionale del Lazio, 31 ottobre 2007, n. 398.

implant all embryos simultaneously meant that embryo protection was not absolute. In particular, by allowing a doctor to create three embryos, the Law did not intend to cause a triple pregnancy but sought to increase the chances of (at least) one successful pregnancy. Parliament had thereby accepted, albeit implicitly, that only the healthiest embryo would give rise to pregnancy, while the rest would perish. Hence, the possibility of creating three embryos and not one meant that embryo protection was limited and that their 'lives' could be sacrificed to achieve certain important goals such as the protection of some procreative rights of Italian citizens. In addition, the prohibition to create more than three embryos created risks to women's health by increasing the risks of OHSS, ovarian cancer and multiple pregnancies. Therefore, the doctrine of the Constitutional Court on abortion, according to which a woman's right to health had priority over an embryo's life, should apply also to the case of ART.

In 2009, the Constitutional Court issued a judgment repealing as unconstitutional the prohibition to create no more than three embryos (Art. 14 para. 2) and the exception to the prohibition of embryo cryopreservation (Art. 14 para. 3), because these provisions violated the right to health of Italian female citizens.[75] The Constitutional Court used the reasoning put forward by TAR Lazio about the limited embryo protection accorded to embryos by Parliament itself. As a result, the Court found unconstitutional a part of Art. 14 para. 2, namely 'a single and simultaneous transfer, and in any case not more than three', and Art. 14 para. 3 prescribing that embryo cryopreservation could be performed only if the woman had serious health issues that were 'unforeseen at the moment of fertilization'.

Both judgments were subject of an intense public and scholarly debate and critique. Specifically, according to Italian constitutional law, a failure of the local court to formulate a complaint does not prevent the Constitutional Court from judging on the merits of the dispute, because of the constitutional law principle of derived constitutionality.[76] According to this principle, the Constitutional Court also had a right to repeal those provisions that were not directly questioned by the Cagliari court, if it saw a direct

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[75] C.C., 1 aprile 2009, n. 151.

[76] D'Amico Marilisa, 'Il Giudice Costituzionale E L'alibi Del Processo' [2006] Giurisprudenza Italiana 3859.

violation of constitutional rights. However, the Constitutional Court left Law 40/2004 intact by using a procedural flaw as the justification for its 'decision not to decide'.[77] Instead, it repealed the impugned provisions of the Law as unconstitutional only after it was presented with an argument about the Parliament's own intent to limit the protection of IVF embryos. What might be the reasons of this approach on the part of the Court?

First, this might have been a political move, as the Court might have wanted to avoid an explicit confrontation with Parliament, especially with respect to the problematic Law 40/2004. Second, the Court might have held that the Parliament had a right to distinguish IVF embryos from fetuses in their mothers' wombs and accord greater protection to the former, specifically by legislating that IVF embryos' rights outweigh the rights of the woman, including her right to health. Therefore, owing to the recognition that the intent of the Parliament was to accord limited protection to IVF embryos, the Court found grounds to equate embryos existing outside their mother's body with fetuses and thus to apply its jurisprudence on abortion also to the case of ART. In other words, it allowed the jurisprudence on abortion as well as its underlying philosophy to set foot in the interpretative toolkit of the Italian Constitutional Court also with respect to ART related issues. As I show in the following Section, the Court was very consistent in applying its jurisprudence on abortion also to the case of ART and to the protection of IVF embryos. In fact, exactly the reference to the principle of the protection of unborn life, reiterated and institutionalized in the Italian constitutional jurisprudence on abortion, prevented the reconceptualization of the right to PGD from the right to health of the woman into the right to reproductive self-determination and the right to respect for private and family life.

Tellingly, the judgment already contained the signs of how other cases on Law 40/2004, as well as the claim made by plaintiffs that other experiences and values justifying access to PGD should be acknowledged, would be approached by the Court. For example, the Constitutional Court declined to declare that Art. 14 para. 1, which prescribed the prohibition of cryopreservation as a general rule, was unconstitutional. Instead, it found that the limitation of the possibility to cryopreserve embryos to only 'serious'

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[77] Alfonso Celotto, 'La Corte Costituzionale 'decide Di Non Decidere' Sulla Procreazione Medicalmente Assistita' [2006] Giurisprudenza Italiana 3849.

health issues, 'unforeseen at the moment of fertilization' (Art. 14 para. 3), was unconstitutional. Rather than repealing the prohibition on cryopreservation as such, the Court only extended the range of health issues that justified embryo cryopreservation. Similarly, it only partially repealed Art. 14 para. 2: embryos still had to be created in a number 'strictly necessary' for implantation. Using the metaphor of Italian lawyers, the Court operated with a 'chisel rather than an axe' in repealing the disputed provisions, thus allowing only that degree of embryo manipulation that was essential to prevent adverse risks to women's health.[78]

VII. The Constitutional Court and the Rights to Self-Determination and to Respect for Private and Family Life

The plaintiffs in the following legal cases were fertile couples with various genetic pathologies who wanted to use PGD to start pregnancy with healthy embryos and therefore needed recourse to IVF. They complained that the Law was unreasonable in preventing fertile citizens from accessing PGD, while at the same time allowing prenatal testing and abortion to be performed – procedures significantly more potentially harmful and risky than PGD. As a result, they argued that Law 40/2004 violated several constitutional rights, including the right to self-determination which was protected by the open-ended Art. 2, the right to health (Art. 32), and the right to equality before the law (Art. 3).

These cases were considered by local courts and had different outcomes. The Cagliari court explicitly distinguished between the two rights that could legitimize the couple's access to PGD, namely, the right to health and the right to a healthy child, and recognized only the right to health as justifying access to PGD.[79] In the next three cases, however, the right to have a healthy child and the right to self-determination were acknowledged for the first

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[78] Daniele Chinni, 'La Procreazione Medicalmente Assistita Tra 'detto' E 'non Detto'. Brevi Riflessioni Sul Processo Costituzionale Alla Legge N. 40/2004' (2010) 2 Giurisprudenza Italiana 289. Lara Trucco, 'Procreazione Assistita: La Consulta, Questa Volta Decide, (Almeno in Parte) Di Decidere' (2010) 2 Giurisprudenza Italiana 281.

[79] Trib. Cagliari, 9 novembre 2012, n. 5925.

time. Local courts in Salerno[80] and Rome[81] sustained that the 'right to a healthy child', as part of the right to self-determination and guaranteed by the open-ended Art. 2 of the Constitution, also justified access to PGD. They, therefore, illustrate how judicial decision-making evolved towards the acceptance of a more liberal regulatory regime for PGD, allowing access to it, not only to prevent health risks to the female patient, but also to ensure the couple's right to self-determination on reproductive issues and the fulfillment of other, including relational, values and goals.

The position of the Constitutional Court, however, remained unchanged. The Court was asked by the Rome court whether prohibiting the use of PGD to fertile couple was in violation, among others, of Art. 2 (as it included the right to self-determination on the matters of procreation and the right to a healthy child), Art. 3 (right to equality), and Art. 32 (right to health) of the Italian Constitution. The Constitutional Court issued its judgment in May 2015[82] declaring that Art. 4 of Law 40/2004 prohibiting the use of ART by fertile couples was unconstitutional. However, unlike the Rome court, the Constitutional Court found that this prohibition violated only two articles of the Italian Constitution, namely Art. 3 and Art. 32. It concluded that it was unreasonable to prohibit access to ART and PGD to fertile couples while, at the same time, allowing access to prenatal testing and abortion. This unreasonable prohibition violated Art. 3 of the Italian Constitution. Furthermore, as abortion was much more traumatic than PGD, the prohibition of access to ART and PGD also violated Art. 32 on the right to health. As a result, the Court concluded that women should be allowed to access ART and PGD on the same grounds as they are allowed to have an abortion, namely when the health condition of the embryo or pregnancy creates 'grave risks' to mothers' health, as stipulated by Art. 6 para. 1b of Law 194/1978.

The Court's reasoning is interesting for a number of reasons. First, the Court did not discuss whether 'the right to have a healthy child' and the right to reproductive self-determination were violated. In fact, in its ruling the Court did not mention these rights at all. This 'elegant silence', as Italian scholar

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[80] Trib. Salerno, 13 gennaio 2010, n. 12474.

[81] Trib. Roma, 15 gennaio 2014, n. 69. Trib. Roma, 28 febbraio 2014, n. 86.

[82] C. C., 14 maggio 2015, n. 96.

Ianuzzi defined it, suggests that these rights found no support within the Constitutional Court.[83] Rather predictably, and in a similar manner to its previous judgments, the Court quashed another controversial provision of Law 40/2004 by finding that it violated only the right to health and thus allowed access to PGD if it was needed solely to prevent adverse health effects for the female patient.

Second, the Court ruled that access to PGD should be allowed on the same grounds as abortion was allowed, according to Art. 6 para 1b of Law 194/1978, that is to prevent grave risks to women's physical and mental health. According to Law 194/1978, abortion is legitimate within the first 90 days of pregnancy if abortion creates a risk to mothers' health (Art. 3), and after 90 days if abortion creates grave risks to women's health (Art. 6). In the first case, the woman is free to have an abortion and does not need to ask the doctor's permission, whereas in the second case the doctor's permission is required. Hence, without discussing the reasons for its decision, the Court allowed PGD not on the same conditions as abortion is allowed in general but on the strictest conditions. It limited the type of health issues which could be prevented by performing PGD and obliged female citizens to ask for a doctor's permission to perform it. In this way, the possibility of accessing PGD was obviously curtailed by these requirements.

Third, the Constitutional Court refused to build its judgment on the *Costa and Pavan v. Italy* decision that the European Court of Human Rights (ECtHR) had passed in 2013.[84] A brief description of the case is in order here. This complaint against Law 40/2004 was brought by an Italian couple claiming that Art. 8 of the ECHR (right to respect for private and family life) was being violated. The ECtHR upheld the applicant's claim. It held that since Italian law allowed prenatal testing and therapeutic abortions, the prohibition of PGD was unreasonable. Therefore, the government's interference in the applicants' private and family life was disproportionate. During the trial, the Italian government objected to the applicants' claim and

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[83] Antonio Ianuzzi, 'La Corte Costituzionale Dichiara L'illegittimità Del Divieto Di Accesso Alla Diagnosi Preimpianto E Alla Procreazione Medicalmente Assistita per Le Coppie Fertili E Sgretola L'impianto Della Legge N. 40 Del 2004' (2015) 60 Giurisprudenza Italiana 805.

[84] *Costa and Pavan v Italy* [GC] App no 54270/10 (ECtHR, 28 August 2012).

argued that their complaint was in fact a claim to the 'right to have a healthy child', which the ECHR does not guarantee. The ECtHR rejected the government's objection and stated that the right claimed by the applicants was not the right to have a healthy child. According to the ECtHR, plaintiffs did not claim this right because 'PGD cannot exclude other factors capable of compromising the future child's health',[85] such as other genetic disorders or complications during pregnancy. Instead, 'the right relied on by the applicants is confined to the possibility of using ART and subsequently PGD for the purposes of conceiving a child unaffected by cystic fibrosis, a genetic disease of which they are healthy carriers'.[86] In this way the ECtHR distinguished between a 'right' to have a child unaffected by a particular genetic disease, protected by the right to respect for private and family life, and the 'right to have a healthy child', that is an entirely healthy baby. By emphasizing this difference, the ECtHR made an important correction to the local courts' rulings that suggested the potential violation of the right to a healthy child, a part of a broader right to self-determination. In these rulings, the courts did not discuss what exact meaning they attributed to the 'right to a healthy child' and therefore it is not clear whether they indeed meant the right to have a baby unaffected by a particular disease or the right to have an entirely healthy baby. However, and despite this clarification, the Constitutional Court opted for carving out space for PGD in the same way in which it legitimized abortion, that is, only to prevent negative impacts on mothers' health and not out of respect for citizens' private and family life.

The right to respect for private and family life, appealed to by the plaintiffs in *Costa and Pavan v. Italy*, is of a particular importance here. According to proponents of the idea of relational autonomy, one of the ways through which relational values could be promoted is the endorsement by courts of the right to respect for private and family life (Art. 8 ECHR). For example, Herring praised the ruling in the case *K v. LBX*,[87] in which the British Court of Appeal urged courts to take into account the right to respect for private and family life of the ECHR when it should be decided if a person should be taken care of at home or at a relevant medical institution. Building a ruling on Art. 8 of

[85] *Costa and Pavan* (n 84), 9-10.

[86] Ibid, 9-10.

[87] *K v LBX* [2012] EWCA 79.

the ECtHR in cases involving human reproduction, courts could also promote relational values and give more discretion to women and their partners in reproductive decision-making. The Italian Constitutional Court, however, refused to build its decision on *Costa and Pavan v. Italy* and thereby refused to rule that the right to respect for private and family life was also violated.

Thus, on the one hand, through litigation Italian citizens achieved their goal of making access to PGD legitimate. The bottom-up governance made the provision of PGD and other ART in Italy less restrictive. Indeed, there is an important parallel to be drawn between these and similar cases such as litigation for access to medicine in Brazil or the right to financial compensation for health damage in Ukraine.[88] And yet, on the other hand, the use of rights yielded much more modest results in the present context. First, practically speaking, women will always need to ask permission from their doctors if they want PGD and prove they would be at risk of damaging their (mental) health, which automatically gives full decision-making power to the medical profession and runs the risk of them being denied. Second, by failing to recognize that the prohibition of PGD might violate, not only the right to health but also the right to reproductive self-determination or the right to respect for private and family life, the Court did not acknowledge other interests and values that might urge citizens to want PGD. To begin with, there could be financial reasons for having PGD as the couple would be financially incapable of raising a child with a severe genetic disease. More importantly, biological citizens might seek PGD due to ethical and relational values, duties and responsibilities unrelated to women's health proper which might be central to their self-identity or, indeed, to their 'regime of the self'. The letter of the wife from the Catania case, in which she refers to her responsibility towards the future baby as well as her and her husband's wish to create a 'family 'in the full and complete meaning of this word', illustrates that these relational values were also central to the regime of the self of (some) Italian litigants.

Indeed, much sociological research has demonstrated that relational values are key elements of self-identity of many parents to-be. For example, the

88 Hanafin 2012, (n 12).

research on couples choosing PGD has shown that these couples tend to choose PGD, not for the sake of their own health or their interests but out of 'parental obligation' towards their future children and their health.[89] Similarly, as Rapp has shown in her analysis of women having prenatal testing, the responsibility for the future baby and for other family members was often one of the reasons they sought prenatal testing.[90] These conclusions suggest that particularly in the relationships between close family members, such as between parents and children, individuals, albeit driven by parental self-determination, tend to build their decisions on relational autonomy and the feelings of mutual responsibility rather than the feeling of unlimited personal freedom, even if their decisions do not lead to a direct infliction of harm upon others.[91] They were further confirmed by other authors exploring parents' views on sex selection. For example, Scully *et al.* showed the majority of interviewed parents regarded voluntary self-limitation of their choices as constitutive of their identity as 'good parent', and felt that parental autonomy was only possible within the limits set up by relational values.[92] Similarly, in Petersen's study of the experiences of people with genetic disabilities, many participants expressed concerns about the future of their offspring, which induced them to make reproductive choices that would favor what was fair or right for the child's future, rather than their own desires.[93] In other words, in such intimate relationships as between parents and children, the feelings of mutual responsibility, care and interdependence abound. However, such personal and relational family-related interests, values and responsibilities that Italian biological citizens might have had as part of their 'regime of the

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[89] Celia Roberts and Sarah Franklin, 'Experiencing New Forms of Genetic Choice: Findings from an Ethnographic Study of Preimplantation Genetic Diagnosis' (2004) 7 Human Fertility 285. Sarah Franklin and Celia Roberts, *Born and Made: An Ethnography of Preimplantation Genetic Diagnosis* (Princeton University Press 2006).

[90] Rayna R Rapp, *Testing Women, Testing the Fetus:The Social Impact of Amniocentesis in America* (Routledge 2000).

[91] Kathryn Ehrich et al, 'Choosing Embryos: Ethical Complexity and Relational Autonomy in Staff Accounts of PGD' (2007) 29 Sociology of Health & Illness 1091.

[92] Jackie Leach Scully, Sarah Banks, and Tom W Shakespeare, 'Chance, Choice and Control: Lay Debate on Prenatal Social Sex Selection' (2006) 63 Social Science & Medicine 21.

[93] Alan Petersen, 'The Best Experts: The Narratives of Those Who Have a Genetic Condition' (2006) 63 Social Science & Medicine 32.

self' were not regarded by the Italian Constitutional Court as deserving of state recognition.

The last judgment of the Court regarding PGD, although not directly related to the issue of citizens' relational values, is nevertheless important because it reiterates and further reinforces the Court's position regarding the status of IVF embryos and the role of the state in their protection. The case was referred to the Constitutional Court by the local Naples court, which had to decide on whether the doctors of a fertility center in Naples should be accused of committing the crime of embryo selection and destruction which they performed while conducting PGD.[94] Predictably, the Constitutional Court declared the provision forbidding the selection of embryos (Art. 13 para. 3) to be unconstitutional, because the prohibition on selecting and implanting only healthy embryos would cause harm to women's health and therefore would violate Art. 32 of the Italian Constitution.[95] However, it did not find that the prohibition of destroying embryos (Art. 14 para. 1) was unconstitutional. This was so because, according to the Court, 'the embryo, in fact, irrespective of the amount of subjectivity that is attributed to the genesis of life, is definitely not a mere biological material'. As a result, according to the Court, non-implantable supernumerary embryos had to be permanently frozen in fertility labs and not destroyed. The conclusion of the Court might seem problematic at first sight as the prohibition to destroy embryos will mean that Italian clinics will be again stuffed with thousands of non-implantable 'persons-non-persons',[96] which was the main reason of the prohibition to create more than three embryos established in Law 40/2004 (Art. 14 para. 2). In light of the most recent Constitutional Court's judgment concluding that the prohibition of using IVF embryos in scientific research does not violate the Italian Constitution,[97] the prospects of this are very real. However, this decision builds on the same line of reasoning underlying all Court's former jurisprudence, testifying once again about the importance of

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94 Trib. Napoli, 3 aprile 2014, n. 149.

95 C. C., 21 ottobre 2015, n. 229.

96 Camera dei Deputati, 1998. *Resoconto stenografico*. XIII Legislatura, 395 Seduta, 20 luglio 1998, <http://leg13.camera.it/_dati/leg13/lavori/stenografici/sed395/s030r.htm> accessed 9 August 2017.

97 C. C., 22 marzo 2016, n. 84.

institutionally anchored forms of thinking and interpretation for how rights debates are resolved by courts.

All things considered, there is no doubt that Italian biological citizens managed to contest their 'exclusion from full legal citizenship' and, in this bottom-up governance, rights indeed acted as key instruments.[98] And yet, the extent to which citizens secured the 'writing of the law from below' and managed to have their interests, rights and values recognized by the state was significantly more limited, particularly compared with the scope of those rights and values that have been central to the contemporary 'regime of the self', both in Italy and abroad. This contemporary regime of the self has encompassed the feeling of entitlement to and responsibility for ensuring, not only one's own health but also the health of one's future children, which is well illustrated in the plaintiff's letter from the Catania case. However, the Constitutional Court, carefully following its own doctrine and its underlying principle of strong embryo protection, denied any legal recognition to these parental interests. As such, its decision to recognize that only 'the constitutional right to health of the mother', and not the rights to reproductive self-determination and to respect for private and family life, legitimizes access to PGD means that only partial success was achieved.

VIII. Conclusion

In this article, I sought to show the limitations of using rights and rights litigation to gain the freedom to make personal choices related to one's own health and that of one's children and family and to use new advances in biomedicine to achieve these ends. I did not mean to suggest that we should abandon our hope, or faith, in rights. The use of legal rights does play an important role in democratic governance and in making state authorities recognize and fulfill their citizens' health-related needs, rights and responsibilities. Instead, I sought to suggest that a nuanced and more reflexive approach towards rights should be adopted. In particular, I sought to show that local country's historically established and institutionally anchored patterns of constitutional interpretation and reasoning can have a key importance for how rights adjudication is performed by courts and hence

[98] Hanafin 2012, (n 12) 194.

for whether plaintiffs' rights claims will be vindicated. The constraints inherent to rights litigation should therefore be taken into account both by legal scholars exploring the interplay between new technologies and constitutional rights and citizens who chose rights litigation as a tool for changing the legal, political and technological status quo.