ORDER NO. 150 YEAR 2012

In this case the Court heard a referral order objecting to legislation imposing a ban on medially assisted procreation on the grounds of incompatibility with the ECHR. Since the referral orders based a large element of their arguments on a ruling by the First Section of the European Court, which had subsequently been significantly amended by the Grand Chamber after the referral orders were filed, the Court remitted all cases to the lower courts for consideration of the implications of the ruling by the Grand Chamber.

(omitted)

THE CONSTITUTIONAL COURT

(omitted)

gives the following

ORDER

in proceedings concerning the constitutionality of Articles 4(3), 9(1) and (3) and 12(1) of Law no. 40 of 19 February 2004 (Provisions on medically assisted procreation), initiated by the *Tribunale di Firenze* by the referral order of 6 September 2010, the *Tribunale di Catania* by the referral order of 21 October 2010 and by the *Tribunale di Milano* by the referral order of 2 February 2011, registered respectively as nos. 19, 34 and 163 in the Register of Orders 2011 and published in the Official Journal of the Republic nos. 6, 10 and 30, first special series 2011.

Considering the entries of appearance by S.B. and others, P.C. and others and the cooperative company U.M.R. – Unità Medicina della Riproduzione, and the interventions by B.S. and others and the Movimento per la vita italiano, federazione dei Movimenti per la vita e dei Centri di aiuto alla vita

d'Italia (M.P.V.) [Italian Movement for Life, federation of Movements for life and centres of assistance for life of Italy], the association WARM (World Association of Reproductive Medicine), out of time, and the President of the Council of Ministers;

having heard the judge rapporteur Giuseppe Tesauro at the public hearing of 22 May 2012;

having heard Counsel Carlo Casini for Movimento per la vita italiano, federazione dei Movimenti per la vita e dei Centri di aiuto alla vita d'Italia (M.P.V.), Counsel Gian Domenico Caiazza for S. B. and others, Counsel Marilisa D'Amico and Counsel Massimo Clara for P.C. and others, Counsel Pietro Rescigno for the cooperative company U.M.R. – Unità Medicina della Riproduzione and the *Avvocato dello Stato* [State Counsel] Gabriella Palmieri for the President of the Council of Ministers.

(omitted)

Whereas the *Tribunale di Firenze*, the *Tribunale di Catania* and the *Tribunale di Milano* raised by referral orders of 6 September and 21 October 2010 and 2 February 2011, with reference to Articles 117(1) and 3 of the Constitution – in the light of Articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: ECHR), ratified and implemented by Law no. 848 of 4 August 1955 – and Articles 2, 3, 31 and 32 of the Constitution (the second and third referral orders) and Article 29 of the Constitution (the third referral order), a question concerning the constitutionality of Article 4(3) of Law no. 40 of 19 February 2004 (Provisions on medically assisted procreation) (all referral orders) and Articles 9(1) and (3), limited to the phrase "in breach of the prohibition laid down by Article 4(3)" and 12(1) of the said Law (the second and third referral orders);

as a preliminary matter, it should be pointed out that, according to the order read out at the hearing, and annexed to this order, which ruled that the proceedings be joined (as they related in part to the same provisions, challenged in relation to constitutional principles, on grounds and on the basis of arguments that largely coincided) and ruled inadmissible the interventions: by WARM (World Association of Reproductive Medicine) in the proceedings initiated by the *Tribunale di Firenze* on the grounds that it was out of time, as the relative submission has been filed beyond the time limit laid down by Article 4(4) of the supplementary rules on proceedings before the Constitutional Court; by the Movimento per la vita italiano, federazione dei Movimenti per la vita e dei Centri di aiuto alla vita d'Italia (M.P.V.) in the proceedings initiated by the *Tribunale di Catania*, and the Associazione Luca Coscioni per la libertà di ricerca scientifica [Luca Coscioni Association for Freedom of Scientific Research], the Associazione Amica Cicogna Onlus [Stork Friend Non-Profit Association], the Associazione Cerco un bimbo [Looking for a Child Association], the Associazione Liberididecidere [Free to Decide Association] and S.B. and F.B. in the proceedings initiated by the *Tribunale di Milano*, as they are not parties to the main proceedings and are not vested with a qualified interest that is directly related to the substantive right averred in the proceedings and not simply governed, in the same manner as any other, by the contested provision or provisions, whereby it is also irrelevant – for the purposes of the admissibility of the interventions by the aforementioned associations and by S.B. and F.B. – that they are parties to proceedings different from that in which the referral order was made, though in which an analogous question of constitutionality has been raised, and it must be further acknowledged that the UDI has withdrawn its interventions in the proceedings initiated by the *Tribunale di Firenze* and the *Tribunale di Catania*;

again as a preliminary matter, it must be recalled that according to the case law of this Court, the question of constitutionality may be raised at the interim stage, where the court has not ruled on the claim (as occurred in the present case) or when it has granted the relief sought, provided that such an award does not definitively exhaust the power available to the court at that instance (see *inter alia* judgment no. 151 of 2009; order no. 307 of 2011) and hence the questions are admissible in this regard;

the objection that the question raised by the *Tribunale di Firenze* is inadmissible on the grounds that it is irrelevant, averred by the State Counsel on the basis that the referring court did not challenge Articles 9(1) and (3) and 12(1) and (8) of Law no. 40 of 2004 is groundless since the provision that the referring court must apply in the main proceedings is only Article 4(3), whilst the failure to consider the further provisions referred to by the intervener does not even impinge upon the correct description of the reference framework;

similarly, the further objections that the question is inadmissible raised by the President of the Council of Ministers, averring that the referring courts did not specify the manner of implementation of the procreative technique which the claimants in the main proceedings seek to use, whilst medically assisted procreation is claimed to require provisions that result from "a high mediation" and a "delicate balancing of constitutional values" since Law no. 40 of 2004 is claimed to fall under the class of ordinary laws "the repeal of which would result in the abolition of minimum protection in situations that require such protection under the Constitution" and "would create unbridgeable legislative gaps and significant questions regarding the protection of the individuals involved", are groundless;

in particular, with regard to these objections, it must be confirmed first and foremost that Law no. 40 of 2004 amounts to the "first comprehensive body of legislation relating to a delicate sector (…) which indubitably affects a variety of significant constitutional interests which, overall, require at the very least

that a balance be struck between them that ensures a minimum level of legislative protection" and must be deemed to be "constitutionally necessary" (judgment no. 45 of 2005), the content of which is not however mandated under constitutional law in this respect, as this Court has in fact ruled that a popular referendum seeking the repeal, *inter alia*, of Article 4(3) of the said Law was admissible on the grounds that, were the referendum to be successful, it would not be "liable to remove a minimum level of protection required under constitutional law, thus exempting it from liability to repeal by referendum" (judgment no. 49 of 2005);

having resolved the aforementioned preliminary issues, it should be pointed out that all referring courts raise first and foremost the question concerning the constitutionality of the aforementioned provisions with reference to Article 117(1) of the Constitution in the light of Articles 8 and 14 ECHR and, after summarising the case law of this Court on the relationship between internal law and the Convention, state that they must apply the Convention "as interpreted by the Strasbourg Court" in the judgment of the First Section of 1 April 2010, S.H. and others v. Austria (referral order no. 19 of 2011), and moreover that "given the scope of the ECHR ruling, a serious issue of constitutionality thus arises" with regard to the contested provisions (referral order no. 34 of 2011), and "the task of verifying whether such a contrast subsists" with "the Convention, as interpreted" by the European Court falls to this Court (referral order no. 163 of 2011);

the lower courts cite broad excerpts from the said judgment in support of the challenges, in order to assert that the contested provisions violate the aforementioned principle of constitutional law given that, according to the Strasbourg Court, despite the broad margin of appreciation left to the states over the matter under examination, where legislation has been enacted in the area of MAP the relative provisions must be consistent and take adequate account of the different interests involved, in accordance with the obligations

resulting from the Convention, with the consequence that the absolute prohibition on heterologous medically assisted procreation is unreasonable and breaches Articles 4 and 14 ECHR, since it is not the only possible means of avoiding the risk of exploitation of women and the abuse of these techniques and of preventing a-typical parenthood, given that the right of the child to know his or her biological parents is not an absolute right;

after all of the referral orders were filed, the Grand Chamber of the Strasbourg Court – to which the case decided by the First Section had been referred pursuant to Article 43 ECHR – reached a different decision by judgment of 3 November 2011 in S.H. and others v. Austria regarding the principle set forth in the judgment invoked by the referring courts in order to identify the content of the ECHR provisions considered to violate the contested provisions;

after observing *inter alia* that "it is not for the Court to consider whether the prohibition of sperm and ova donation at issue would or would not be justified today under the Convention" but to decide "whether these prohibitions were justified", the Grand Chamber asserted that "neither in respect of the prohibition of ovum donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for in vitro fertilisation ... the Austrian legislature, at the relevant time, exceeded the margin of appreciation afforded to it" and held that there had been no violation of Article 8 of the Convention as averred, finding that there was "no cause for a separate examination of the same facts from the standpoint of Article 14 read in conjunction with Article 8 of the Convention";

in view of the subsequent adoption of the judgment by the Grand Chamber, it must be recalled that it is settled case law of this Court that the question of any contrast between national legislation and the provisions of the ECHR must be resolved, insofar as is of interest here, in line with the principle that, when establishing such a contrast, the ordinary courts must

refer to the "provisions of the ECHR, as interpreted by the Strasbourg Court" (see *inter alia*, judgment no. 236 of 2011, referring to judgments no. 348 and no. 349 of 2007 and all subsequent rulings that have reiterated that position), "which [Court] was specifically established for such interpretation and application" (see most recently judgment no. 78 of 2012), since the "content of the Convention (and the obligations resulting from it) is essentially that which may be inferred from the case law developed by the Court over the years" (see on all points, judgments no. 311 of 2009 and no. 236 of 2011), whereby it is necessary to respect "the substance" of that case law "with a margin of appreciation and adaptation that enables it to take account of the special circumstances of the legal system into which the Convention provision is to be incorporated" (see *inter alia* judgments no. 236 of 2011 and no. 317 of 2009), without prejudice to the verification, which falls to this Court, of the "compatibility of the ECHR provisions, as interpreted by the Court in which that task has been expressly vested by the member states, with the relevant provisions of the Constitution" (judgment no. 349 of 2007; see analogously the more recent judgments no. 113 and no. 303 of 2011);

moreover, according to the case law of the Constitutional Court, it is necessary to order the remittal of the case file to the lower court in order to enable it to examine the terms of the question once again should, following the referral order, a change occur to the constitutional rule invoked as a parameter in the proceedings (see *inter alia* orders no. 14, no. 76, no. 96, no. 117, no. 165, no. 230 and no. 386 of 2002), or to the provision supplementing the principle of constitutional law (on all points, see orders no. 516 of 2002 and no. 216 of 2003), or should the reference framework be subject to considerable changes, notwithstanding that the contested provision remains unchanged (see *inter alia*, order no. 378 of 2008);

in the light of the principles referred to above, the fact that the Grand Chamber adopted a different ruling on the interpretation endorsed in the

judgment of the First Section, which was expressly invoked by the referring courts – and which occurred within the same proceedings in which the latter judgment was issued – impinges upon the significance of the Convention provisions considered by the lower courts and constitutes a new element with a direct impact on the question of constitutionality as raised;

the above conclusion is required: first, because it is the inevitable logical and legal corollary of this Court's understanding of the value and efficacy of the judgments of the European Court on the interpretation of the provisions of the ECHR which, as specified above, the referring courts correctly considered when formulating the challenges under examination; secondly, because were an assessment of the impact on the questions of constitutionality of the new element consisting in the judgment of the Grand Chamber (the significance of which is moreover evident also by the detailed interpretations, which differ significantly, provided by the parties in their written statements filed shortly before the public hearing) to be carried out for the first time by this Court without any opportunity for the lower courts to state their position in relation to it, this would upset the interlocutory structure of constitutional review, as it falls first and foremost to the referring courts to ascertain, in the light of the new interpretation provided by the Strasbourg Court, whether and in what terms the contrast objected to remains;

the mandatory status of that conclusion, with regard to the referral order from the *Tribunale di Firenze*, is made clear by the fact that it raised the question of constitutionality exclusively with reference to Article 117(1) of the Constitution, whilst limiting itself to observing, in relation to the further principle of constitutional law invoked, that "the conclusions reached by the European Court of Human Rights on the unreasonableness of the provision in question appear to be relevant for the significance of the question of constitutionality also in relation to Article 3 of the Constitution";

moreover, it is also necessary in relation to the remaining heads of the referral order, as the lower courts not only raised the question of constitutionality in relation to Article 117(1) of the Constitution on a preliminary basis ahead of the other grounds raised, but also repeatedly referred to the aforementioned judgment of the First Section of the Strasbourg Court in order to infer arguments in support of the challenges brought in relation to the other principles of constitutional law;

in fact, the considerations made by the *Tribunale di Catania* are unequivocally significant in this sense in that, when grounding the alleged violation of Articles 3 and 31 of the Constitution, it expressly invoked the said judgment, asserting that it provides "further solid arguments in support of the violation of Article 3 of the Constitution, with reference to the violation of the principle of non-discrimination", averring in relation to the objection based on Article 2 of the Constitution that the European Court "has clarified that it is necessary to guarantee the couple's right to choose to become parents also by way of assisted fertilisation techniques as a component of the right to respect for private and family life, which is protected under the Convention on Human Rights";

analogously, in objecting to the provisions under examination, the *Tribunale di Milano* stressed with regard to Article 2 of the Constitution that the "evolutionary process" in the interpretation of the said principle cannot "disregard the principled assertions of the ECHR as defined by the European Court of Human Rights", emphasising that in the judgment of the First Section, the Court "asserted – in summary – the couple's right to identity and self-determination with regard to their own parenthood", which was held to have been "violated by the prohibition on access to a particular type of fertilisation", and stressing "that it is necessary to guarantee, as a component of the right to respect for private and family life protected under Article 8 ECHR, the couple's right to choose to become parents also by way of assisted

fertilisation techniques "; on the other hand, with regard to the objections raised in relation to Articles 3 and 31 of the Constitution, it averred that the said ruling of the European Court of Human Rights "offers valid arguments in support of a finding that Article 3 of the Constitution has been violated, with reference to the principle of non-discrimination, since the reasons proposed by the European Court for establishing a violation of Article 14 ECHR may be formulated at the same time in the interpretation of Article 3" of the Constitution, arguing that it has "used arguments that may be transferred in full in order to establish the discriminatory status of the total prohibition on heterologous fertilisation" and considering, in conclusion, that "the interpretation of provisions of constitutional law, applied in the light of indications provided by the European Court of Human Rights" demonstrates the "discriminatory nature of the prohibition on the heterologous fertilisation of sterile and infertile couples depending upon the degree of sterility or infertility established";

therefore, in the light of the supervening judgment of the Grand Chamber of 3 November 2011 in S.H. and others v. Austria, the case file must be remitted in order to enable the referring courts to carry out a renewed examination of the terms of the questions.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

orders that the case file be remitted to the *Tribunale di Firenze*, to the *Tribunale di Catania* and to the *Tribunale di Milano*.

Decided in Rome at the seat of the Constitutional Court, Palazzo della Consulta, on 22 May 2012.

(omitted)

ANNEX:

ORDER READ OUT AT THE HEARING OF 22 MAY 2012

ORDER

Having found that the proceedings concern in part the same provisions, which are challenged with reference to principles of constitutional law, on grounds and according to arguments which largely coincide, and hence must be joined for decision in a single ruling;

that in the proceedings resulting from referral order no. 19 of 2011, initiated by the *Tribunale di Firenze*, an intervention was filed by WARM (World Association of Reproductive Medicine), which is not a party to the main proceedings, on 21 May 2012;

that in the proceedings resulting from referral order no. 34 of 2011, initiated by the *Tribunale di Catania*, an intervention was filed by the Movimento per la vita italiano, Federazione dei Movimenti per la vita e dei centri di aiuto alla vita d'Italia (M.P.V.), which is not a party to the main proceedings;

that in the proceedings resulting from referral order no. 163 of 2011, initiated by the *Tribunale di Milano*, interventions were filed: a) in a single submission, by the Associazione Luca Coscioni, per la libertà di ricerca scientifica, the Associazione Amica Cicogna Onlus, the Associazione Cerco un bimbo and the Associazione Liberididecidere, interveners in the main proceedings pending before the *Tribunale di Firenze* in which the question of constitutionality was raised (referral order no. 19 of 2011), which averred that they were vested with a qualified interest directly related to the right; b) by S.B. and F.B., parties in the constitutionality proceedings initiated by the *Tribunale di Firenze*;

that, according to the settled case law of this Court, only the parties to the main proceedings and third parties vested with a qualified interest that is directly related to the substantive right averred in the proceedings, and not

simply governed, in the same manner as any other, by the contested provision or provisions, are entitled to intervene in interlocutory proceedings before the Constitutional Court (on all points, see judgments no. 304, no. 293 and no. 199 of 2011; no. 151 of 2009), whist the fact that a person is a party to proceedings other than those within which the referral order was issued, in which an analogous question of constitutionality has been raised, also cannot render the intervention admissible (see *inter alia*, judgment no. 470 of 2002; order read out in the public hearing of 4 April 2006, in the proceedings resolved by judgment no. 172 of 2006);

that moreover, pursuant to Article 4(4) of the supplementary rules on proceedings before the Constitutional Court, an intervention "must be filed no later than twenty days after the act initiating the proceedings is published in the Official Journal", a time limit which, according to the settled case law of this Court, must be deemed to be mandatory (see *inter alia*, judgment no. 303 of 2010), which was not complied with by WARM (the referral order by the *Tribunale di Firenze* was published in the Official Journal, first special series, no. 6 of 2 February 2011, whilst the intervention was filed on 21 May 2012).

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

hereby,

rules inadmissible the interventions by WARM (World Association of Reproductive Medicine) in the proceedings initiated by referral order no. 19 of 2011; by the Movimento per la vita italiano, Federazione dei Movimenti per la vita e dei centri di aiuto alla vita d'Italia (M.P.V.) in the proceedings initiated by referral order no. 34 of 2011; by the Associazione Luca Coscioni, per la libertà di ricerca scientifica, by the Associazione Amica Cicogna Onlus, by the Associazione Cerco un bimbo, by the Associazione Liberididecidere and by S.B. and F.B. in the proceedings initiated by referral order no. 163 of 2011.

Signed: Alfonso Quaranta, President