JUDGMENT NO. 221 YEAR 2019

In this case, the Court considered two referral orders challenging provisions of Law no. 40 of 2004. The law limits access to medically assisted reproduction (PMA) procedures to married or cohabiting, different-sex couples of which both members are living and of potentially fertile age. It also imposes penalties such as fines and licensure suspensions for medical practitioners, and suspension or revocation of authority to provide PMA services for facilities found guilty of providing PMA services to couples or individuals not qualified under the law. The referring courts, both of which were hearing cases involving female same-sex couples in civil unions who were seeking access to PMA procedures, challenged the sexual diversity requirement and the related sanctions, relying on both constitutional and international provisions. The Court first held that its judgment could only apply to female same-sex couples, although one of the Courts did not make this distinction, because neither court challenged the separate law imposing a total ban on surrogate motherhood and gestational carrying, procedures necessary for reproduction by male same-sex couples, which are strictly illegal in Italy. Then, on the merits, the Court held that the questions were unfounded. Stressing the plurality of constitutional interests involved, the rapid pace of medical and scientific advancements, and the ethically sensitive nature of many of the relevant questions, the Court held that identifying a reasonable balancing fell chiefly to the evaluation of the legislator, subject only to review by the Constitutional Court to ensure that its solution was not unreasonable. Here the Court cited the European Court of Human Rights [ECtHR], which had held, in a PMA-related case, that States have a wide margin of appreciation in areas where there is no general consensus at the European level, and also that States may legitimately limit the use of PMA procedures to the therapeutic purpose of curing infertility. The Court observed that the Italian law in question had, in fact, expressly done this, limiting PMA to couples who, but for a pathology causing irreversible infertility or sterility, could reproduce naturally (different-sex couples in which both members are alive and of potentially fertile age). Distinguishing this case from two earlier cases, in which the Constitutional Court had expanded access to PMA under this same law, the Court held that, in the earlier two cases, it had worked to remedy clearly unreasonable inconsistencies within the law, without affecting its underlying purpose or overall framework. It held that the present challenges were on an entirely different plane, and would require a repudiation of the ideas underlying the law, which it held was unwarranted. After reiterating the well-established law that same-sex couples who are cohabiting or joined in civil unions are "families" under the Constitution, the Court also reiterated its reliance on the ECtHR to hold that a therapeutic purpose was legitimate as a basis for limiting access to PMA. This limitation was not discrimination on the basis of sexual orientation, it held, because the physiological inability to reproduce of all same-sex couples could not be equated to medical infertility or sterility in heterosexual couples of fertile age, and was, instead, comparable to the inability to reproduce of heterosexual couples advanced in age, who were also legitimately denied access to PMA under the law. The Court also refused to assign a constitutional value to the desire to have children with one's partner, rejecting the referring court's claims that being unable to do so was a threat to a person's mental and physical health. It distinguished from the cases allowing recognition of adoptions by homosexual

individuals of the minor biological children of their partners, and those allowing recognition of parenthood by same-sex couples achieved by PMA procedures obtained abroad. Those scenarios, the Court held, deal with existing children in need of families, and the object is to provide for that need making the best use of pre-existing bonds of affection. In the present case, where the object would be to provide a couple with a child that does not yet exist, thus fulfilling a wish to become parents, the Court held that the legislator was not unreasonable or unjustified in its concern to guarantee the conditions it considered to be not only suitable, but ideal for the child. The legislator's decision that these ideal conditions were based on the natural family (two parents, of different sexes, both living and of potentially fertile age) could also not be considered arbitrary or unreasonable, since this determination had nothing to do with the subjective fitness (of, say, a single woman, heterosexual couple advanced in age, or homosexual couple) to perform the duties of raising a child. Moreover, the Court pointed out, the Constitutional provisions on parenthood and family were clearly based on the vision of family shared by the 2004 legislator. Public opinion, the Court added, could very well shift on this matter, and was something the legislator was best positioned to grasp. The Court also rejected allegations of class discrimination, holding that the fact that wealthy citizens can avoid a prohibition by traveling abroad does not speak to the constitutionality of the prohibition.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 1(1) and 1(2), 4, 5, and 12(2), (9), and (10) of Law no. 40 of 19 February 2004 (Provisions on medically assisted reproduction), raised by the Ordinary Court of Pordenone and by the Ordinary Court of Bolzano, with referral orders of 2 July 2018 and 3 January 2019, registered, respectively, as no. 129 of the 2018 Register of Referral Orders and 60 of the 2019 Register of Referral Orders and published in the *Official Journal* of the Republic no. 38, first special series, of 2018 and no. 17, first special series, of 2019.

Considering the entries of appearance of S.B. and another, and of F.F. and another, the interventions *ad adiuvandum* of *Avvocatura per i diritti LGBTI* [Attorneys for LGBTQ rights] and the *Associazione radicale Certi Diritti* [Radical Association "Certain Rights"] and another, as well as the intervention of the President of the Council of Ministers;

Having heard from Judge Rapporteur Franco Modugno during the public hearing of 18 June 2019;

Having heard from counsel Susanna Lollini on behalf of *Avvocatura per i diritti LGBTI*, Filomena Gallo and Massimo Clara on behalf of the *Associazione radicale Certi Diritti* and another, Maria Antonia Pili on behalf of S.B. and another, Alexander Schuster on behalf of F.F. and another, and State Counsel Gabriella Palmieri on behalf of the President of the Council of Ministers.

[omitted]

Conclusions on points of law

1.– The Ordinary Court of Pordenone (r.o. no. 129 of 2018) questions the constitutionality of Articles 5 and 12, paragraphs (2), (9) and (10), of Law no. 40 of 19

February 2004 (Provisions on medically assisted reproduction), in the part in which they, respectively, limit access to medically assisted reproduction (hereinafter PMA, from the Italian *procreazione medicalmente assistita*) only to "couples […] of opposite sex" and penalize, by extension, anyone who uses PMA on "couples […] made up of subjects of the same sex."

In the referring court's opinion, the challenged provisions violate Article 2 of the Constitution by failing to guarantee the fundamental right of individuals to become parents, both as an individual, and within the social groupings in which his or her personality develops, which include civil unions and cohabitation by same-sex couples.

The referring court alleges that the same provisions also conflict with Article 3 of the Constitution, in that they effect a disparity of treatment between citizens on the basis of their sexual orientation and financial resources, by granting the right to have children only to those homosexual couples who are able to afford the cost of accessing PMA in one of the foreign countries that allow for it.

It further alleges the violation of Article 31(2) of the Constitution, which obliges the Republic to protect mothers by adopting the measures necessary for that purpose, and Article 32(1), on the grounds that being unable to establish a family with children together with one's partner is damaging to the psycho-physical health of the couple.

Finally, the referring court alleges that the challenged provisions violate Article 117(1) of the Constitution because they conflict with Articles 8 and 14 of the European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950, ratified and executed by Law no. 848 of 4 August 1955. The provisions allegedly interfere in the family life of the couple on the sole basis of the sexual orientation of its members, thus amounting to discriminatory interference.

2.– The Ordinary Court of Bolzano (r.o. no. 60 of 2019) raises questions of constitutionality concerning Articles 5, limited only to the words "of opposite sex," and 12(2), limited only to the words "of the same sex or" and "also in combination with paragraphs 9 and 10," as well as Articles 1, paragraphs (1) and (2), and 4 of Law no. 40 of 2004, "in the part in which they fail to allow couples made up of two persons of the female sex to have access to medically assisted reproductive technology."

According to the referring court, the challenged provisions violate Article 2 of the Constitution because they entail a denial of the right to become a parent that is not justified by needs relating to the protection of other interests of constitutional value, in light of the fact that social groupings based on civil unions or the cohabitation of same-sex couples are, by nature, "families," and given the full fitness of homosexual couples to welcome and raise children.

Moreover, the ban on access to PMA by same-sex couples allegedly amounts to discrimination on the basis of sexual orientation, which is damaging to human dignity, and thus conflicts with Article 3 of the Constitution.

The court also alleges that Article 31(2) of the Constitution, which obliges the Republic to protect mothers, and Article 32(1) of the Constitution, which guarantees the right to health, have been violated. This because the challenged provisions would prevent the members of female homosexual couples affected by pathologies that prevent them from reproducing in the natural way (as in the case in the pending proceedings) to overcome the problem by making complementary use of the residual reproductive capacities of each of the two individuals (the ova production of one and the gestational capabilities of the other), in spite of the fact that Article 1 of Law no. 40 of 2004 establishes that the

purpose of PMA is precisely that of resolving "reproductive problems deriving from human sterility or infertility."
Finally, the referring court alleges that the challenged provisions violate Articles 11 and 117(1) of the Constitution on the grounds that they conflict with:
a) Articles 8 and 14 ECHR, which provide, respectively, the right to respect for private and family life, and the prohibition of discrimination;
b) Articles 2(1), 17, 23 and 26 of the International Covenant on Civil and Political Rights, adopted in New York on 19 December 1996, ratified and executed by Law no. 881 of 25 October 1977, which also stipulate the prohibition of discrimination and the right to respect for private and family life;
c) Articles 5, 6, 22(1), 23(1), and 25 of the United Nations Convention on the Rights of Persons with Disabilities, done in New York on 13 December 2006, ratified and executed by Law no. 18 of 3 March 2009, which envisage the prohibition of discrimination and the promotion of the right to health with specific regard for persons with disabilities, including "reproductive disability."
3.– The two referral orders raise analogous questions, with regard, in part, to the same provisions. Thus, the corresponding judgments must be joined so they may be defined with a single decision.
4.– As a preliminary matter, it bears noting that the Court cannot consider the conclusions drawn by the parties to the case pending before the Ordinary Court of Bolzano, which seek to demonstrate that the challenged provisions also conflict with different and additional provisions than the ones brought up by the referring Court (in particular, with Articles 30(3) and 31(1) of the Constitution, as well as with other supranational sources that supplement Articles 11 and 117(1) of the Constitution).
According to the well-established case law of this Court, the object of incidental review of constitutionality is limited to the provisions and standards indicated in the referral orders. Consequently, further questions or grounds concerning constitutionality advanced by the parties cannot be considered, whether they are submitted to, but not adopted by, the referring court, or intended to later broaden or modify the contents of the referral orders themselves (see, among many, Judgments no. 141 of 2019, and 194, 161, 12 and 4 of 2018).
5.– As stated in the referral orders, both referring courts are hearing cases, under Article 700 of the Code of Civil Procedure, brought by couples of women who are partners in civil unions, and who wish obtain emergency judicial orders overturning a health facility's denial of their request to access PMA.
There are no doubts about admissibility with regard to the forums in which the questions were raised. Already in earlier rulings dealing with the regulation of PMA, this Court has reiterated its well-established case law holding that the question of constitutionality may be raised during proceedings for provisional measures, both when the lower court has not yet ruled on the complainants' request (as is the case in the present proceedings), and when it has granted the requested measure, provided that granting it does not involve the definitive exhaustion of the judge's authority over the matter (Judgments no. 162 of 2014 and 151 of 2009, Order no. 150 of 2012; see, with specific reference to questions raised in reference to emergency proceedings prior to proceedings on the merits, Judgments no. 84 of 2016 and 96 of 2015).
6.– State Counsel has objected that the questions raised by the Ordinary Court of Pordenone are inadmissible on the grounds that they lack reasoning showing that they are not manifestly lacking in foundation.

The objection is unfounded.
The referring court has laid out, in an entirely sufficient way (*primo visu*), its reasons for alleging a conflict between the challenged provisions and Articles 2, 3, and 32(1) of the Constitution. As for the remaining provisions (Articles 31(2) and 117(1) of the Constitution), the referring court's conclusions, while concise, still communicate the core of the challenges, not least of all because they are related to the challenges concerning the other standards.
7.– Both referring courts deny the feasibility of interpreting the challenged provisions in a way that complies with the Constitution, concluding that any such interpretive operation is insurmountably prevented by the unambiguous literal meaning of the legislative text.
This claim is correct.
By establishing that only couples made up of persons "of opposite sex" may have access to PMA (Article 5), and stipulating administrative penalties for anyone who applies them to couples "made up of subjects of the same sex" (Article 12(2)), Law no. 40 of 2004 denies homosexual couples the use of the relevant techniques in precise and unequivocal terms. This is, moreover, fully in compliance with the basic purpose underlying the law itself, which will be addressed below.
Thus, the principle, often affirmed by this Court, applies, that the burden of making a conforming interpretation yields to constitutional review, since the literal meaning of the provision does not allow for such an interpretation (see, among many, Judgments no. 141 of 2019, 268 and 83 of 2017, and 241 and 36 of 2016, and Order no. 207 of 2018).
8.– With the constitutional issues raised, both referring courts aim to remove the subjective requirement that the members of a requesting couple be of opposite sex in order to access PMA (together with the corresponding penalty). The effect hoped for by the referring courts is, thus, that of making PMA accessible to homosexual couples as such, that is, independent of whether their members are affected, *uti singuli*, by pathologies that place them in objective conditions of infertility or sterility (as is the case in the proceedings pending before the Ordinary Court of Bolzano).
The Ordinary Court of Bolzano also expressly limits its request to female homosexual couples. On the contrary, the Ordinary Court of Pordenone, in the operative part of its referral order, asks for the indiscriminate removal of the opposite sex requirement, thus apparently including male homosexual couples in its scrutiny (although they are not mentioned in the pending proceedings).
Nevertheless, the overall contents of its referral order show that the Ordinary Court of Pordenone's challenge, too, must actually be understood as limited to couples made up of women.
For female homosexual couples PMA is carried out through heterologous fertilization, *in vivo* or *in vitro*, using male gametes taken from a donor. This practice was originally subject to an absolute ban under Law no. 40 of 2004 (Article 4(3)), but became usable by heterosexual couples following this Court's Judgment no. 162 of 2014, in the case of pathologies that cause absolute and irreversible sterility or infertility. If the Court were to uphold the challenges raised today, heterologous fertilization would be extended to "social" or "relational infertility," which is a physiological characteristic of female homosexual couples, due to the biological non-complementarity of their parts.
For male homosexual couples, on the other hand, artificial reproduction must necessarily make use of a different practice: that is, a surrogate mother (or gestational

carrier). This refers to an agreement under which a woman is involved in achieving a pregnancy and carrying it to term on behalf of third parties, waiving in advance any claim to rights concerning the child who will be born. This practice is subject to a total ban, and punishable by criminal sanctions, under Article 12(6) of Law no. 40 of 2004, which also applies to heterosexual couples. Said provisions – considered by courts to express a public policy principle (Supreme Court of Cassation, Joint Civil Divisions, Judgment no. 12193 of 8 May 2019) – is not included among those subject to review by the Ordinary Court of Pordenone, not was it considered in any way by the referring Ordinary Court in formulating its challenges.

This leads to the conclusion that male homosexual couples will remain outside the scope of the present decision, including for purposes of the Ordinary Court of Pordenone case.

9.– Having said this, however, on the merits, the questions are unfounded.

As this Court has stated in the past, Law no. 40 of 2004 is the "first comprehensive piece of legislation concerning a delicate sector, the growth of which in recent years has been correlated with advancements in research and medical technology, and which undeniably touches on a plurality of important constitutional interests" (Judgment no. 45 of 2005).

It is an area that touches, simultaneously, upon "ethically sensitive issues" (Judgment no. 162 of 2014), in relation to which the identification of a reasonable balancing point between the conflicting needs, with respect for the dignity of the human person, belongs "primarily to the evaluation of the legislator" (Judgment no. 347 of 1998). The common thread between the various interests at stake falls, in particular, in "the area of legislation within which the legislator, acting as the interpreter of the general will, is required to strike a balance through legislation between the fundamental values that are in conflict, taking account of the views and calls for action that it considers to be most deeply rooted at any given moment in time within the social conscience" (Judgment no. 84 of 2016). The fact remains that the choices it makes are subject to review, for purposes of verifying that they have effected a not-unreasonable balancing (Judgment no. 162 of 2014).

Moreover, the European Court of Human Rights [ECtHR] has also held, on more than one occasion, that, on the topic of PMA, which raises delicate questions of ethics and morals, the States retain a broad margin of appreciation, particularly with regard to topics on which there is no general consensus (see, among others, the Judgment of 28 August 2012, *Costa and Pavan v. Italy*, and Grand Chamber, Judgment of 3 November 2011, *S.H. and others v. Austria*).

10.– The possibility – opened up by advances in science and technology – of dividing the sexual act from procreation, by means of medical intervention, effectively poses a basic question: if there is a "right to procreate" (or "to parenthood," if you will), including not only the *an* and *quando*, but also the *quomodo*, and, thus, giving rise to a right to reproduce using methods other than the natural one. More specifically, this is a matter of determining whether the desire to have a child by means of technology is one that deserves satisfaction, always and under any circumstances, or if, on the contrary, providing specific conditions for access to such services is justifiable, particularly from the perspective of protecting the rights of the fetus and future child.

The solutions adopted by Law no. 40 of 2004 are, as we know, of a restrictive character. They reflect (as far as the grounds relevant here are concerned) two fundamental ideas.

The first has to do with the function of the methods under consideration. Indeed, the law frames these, *in apicibus*, as a remedy for human sterility or infertility that are caused by a pathology and are not curable by other means. This is a clear rejection of the understanding of PMA as a way of fulfilling the "desire to become a parent," that is, as an alternative equivalent to natural conception, left to a free act of self-determination by the interested parties.

Article 1 of Law no. 40 of 2004 stipulates, in particular, that recourse to PMA "is permitted" – in keeping with the conditions and methods provided by the same law, "which assures the rights of all the subjects involved, including the conceived" – "[f]or purposes of favoring a solution to reproductive problems stemming from human sterility or infertility" (paragraph 1) and always provided that "there are no other treatment options that can effectively eliminate the cause of the sterility or infertility" (paragraph 2).

This concept is reiterated and explained in a later section, Article 4(1), which provides that access to PMA techniques "is permitted only when it is established that the causes preventing reproduction cannot be otherwise eliminated, and it is, in any case, limited to cases of unexplained sterility and infertility that are medically certified, and to cases of sterility or infertility with a known cause that is medically certified."

The second concept concerns the structure of the family unit that stems from the techniques in question. Indeed, the law stipulates a series of subjective limitations on access to PMA, rooted in the transparent intent to ensure that the family unit in question follows the family model characterized by the presence of a mother and father. These limitations are added to the objective one found in the provision at Article 4(3), which, in order to ensure the existence of a biological link between the would-be parents and their offspring, stipulates a ban (which was, originally, absolute) on accessing heterologous PMA methods (that is, techniques that use one or more gametes from an "external" donor).

Article 5 of Law no. 40 of 2004 establishes, in particular, that only "couples of persons over the age of eighteen, of opposite sex, who are married or cohabiting, of potentially fertile age, [and who are] both living" may have access to PMA.

The provisions of Article 5 are echoed, from a punitive perspective, by the provisions of Article 12. Most relevantly for present purposes, paragraph 2 of that article penalizes anyone who uses PMA techniques "on couples made up of subjects of the same sex," or couples of which at least one member has died, or is under the age of eighteen, or couples who are neither married nor cohabiting, with a severe administrative fine (of between 200,000 and 400,000 Euros).

The stipulated penalty is reinforced by that in paragraph 9, which stipulates that, for health professionals convicted of one of the offenses described in Article 12 (including, therefore, the one in paragraph 2), the law envisages "their suspension from professional activities for between one and three years." Paragraph 10 further provides for suspending the authorization to provide PMA services of any facility where the forbidden practice is carried out, with the possibility that the authorization will be revoked entirely in the case of violations of multiple prohibitions or of recurrent violations.

11.– This Court has ruled on two other occasions on the legislation at issue here, for purposes of broadening the class of persons qualified to access PMA, by means of rulings of unconstitutionality. It did so, in particular, with Judgments no. 162 of 2014 and 96 of 2015. The referring courts and parties to the disputes rely on these decisions

to argue in favor of the further extension they request today, which is framed as the ideal and consistent outgrowth of the previous rulings.
In those rulings, moreover, this Court removed what appeared, substantially, to be inconsistencies, internal or external, of the scheme laid out by the legislator, without any impact – or with merely marginal impact – on its basic coordinates.
In particular, Judgment no. 162 of 2014 admitted couples "where an illness has been diagnosed that is the cause of absolute and irreversible sterility or infertility" to access artificial reproduction, striking down, in this scenario only, the ban on access to PMA technologies of a heterologous type contained in Article 4(3) of Law no. 40 of 2004. In this way, the Court cured the "evident element of unreasonableness" inherent in the fact that, after having assigned PMA the purpose of "favour[ing] the resolution of reproductive problems resulting from sterility or human infertility," the legislator had categorically denied – with the challenged ban on heterologous fertilization – the possibility of fulfilling the desire to become parents of "couples suffering from the more serious illnesses, in contrast with the rationale of the legislation." This situation revealed that the balancing of interests carried out by the legislator was unreasonable, given that, on the other hand, the needs relating to the protection of the child were sufficiently provided for by the scheme in force, in connection both with the "psychological risk" relating to the lack of a biological link with the parents (as a result of heterologous fertilization) and with the potential "violation of the right to know his or her own genetic identity."
Later, Judgment no. 96 of 2015, in turn, opened up PMA access to fertile couples who are carriers of serious genetic conditions that may be transmitted to their offspring ("diagnosed by the appropriate public institution"). This eliminated the other "clear contradiction" that had already been condemned by the ECtHR in its 28 August 2012 judgment in *Costa and Pavan v. Italy*. Indeed, Law no. 40 of 2004 prohibited such couples from accessing PMA, which allows for pre-implantation diagnosis, while, by contrast, "our legal order, in any case, permits these couples to pursue their objective of having a child that is unaffected by the specific hereditary disease of which they are carriers through the undeniably more traumatic method of voluntary termination (sometimes more than once) of natural pregnancies – as permitted under Article 6, paragraph 1, letter b) of Law no. 194 of 22 May 1978 (Rules on the social protection of motherhood and the voluntary termination of pregnancy)."
Both these rulings followed the logic of complying with (or, more correctly, affirming the value of) the therapeutic purpose (*lato sensu*) which the legislator assigned to PMA (projecting it, in the case of Judgment no. 96 of 2015, onto the fetus as well), without contesting the other underlying legislative choice in its entirety, on the basis of its compatibility with the Constitution: the choice of applying the family model characterized by the presence of both a maternal and a paternal figure. It is true that Judgment no. 162 of 2014 reduced the need for a biological link between parents and children (in the limited scenario it considered, that is, when heterologous fertilization represents the only way to overcome absolute and irreversible infertility caused by a pathology). However, the decision took care to point out and underscore that, in any case, only those couples who meet the requirements indicated in Article 5(1) of Law no. 40 of 2004 are authorized to access heterologous fertilization, that is, couples who meet the family paradigm reflected in that provision.
12.– The questions raised today are on a different plane entirely.

Upholding them, and, in consequence, allowing homosexual couples to access PMA, would require the direct repudiation, as far as constitutionality is concerned, of both the guiding ideas that underlie the system outlined by the legislator in 2004, with potential spillover affects for the entire range of subjective legal positions that are currently excluded from access to reproductive measures (in addition to the particularly sensitive issues related to male homosexual couples, whose equality with female couples, in terms of their right to become parents, would require, as mentioned above, the elimination, at least under certain conditions, of the ban on surrogacy).

Specifically, moreover, there is no inconsistency in need of adjustment within the legislative scheme in this area. Contrary to what the referring courts maintain, the "physiological" infertility of (female) homosexual couples is in no way comparable to the (absolute and irreversible) infertility of heterosexual couples affected by reproductive pathologies, just like the "physiological" infertility of single women, or of heterosexual couples advanced in age. It is a question of clearly and ontologically distinct phenomena. The exclusion of couples made up of two women from PMA is, therefore, neither a source of contradiction nor a form of discrimination on the basis of sexual orientation.

In addition, the European Court of Human Rights has also specifically ruled along these lines. Indeed, it has held that a national law that limits artificial insemination to infertile heterosexual couples, assigning it a therapeutic purpose, cannot be considered a source of unjustified disparity of treatment with regard to homosexual couples, under Articles 8 and 14 of the ECHR. This is precisely because the situation of the latter is not comparable to that of the former (ECtHR, Judgment of 15 March 2012, Gas and Dubois v. France).

In light of this, it clearly follows that the questions raised by the referring courts on the grounds already considered, in reference to Articles 3 and 117(1) of the Constitution, the latter in relation to the provisions of the Convention just mentioned, are unfounded.

13.– This being said, and returning to the order of the challenges as laid out by the referring courts, the alleged violation of Article 2 of the Constitution is likewise unfounded.

13.1.– This Court has held that the notion of "social group" – within which Article 2 of the Constitution recognizes and guarantees inviolable human rights, and which must be understood as referring to "all forms of simple or complex communities that are capable of permitting and favouring the free development of the person through relationships, within a context that promotes a pluralist model" – includes homosexual unions, understood as the stable cohabitation of two individuals of the same sex (Judgment no. 138 of 2010; similarly, see Judgment no. 170 of 2014). This guideline was precisely echoed by Law no. 76 of 20 May 2016 (Regulation of civil unions between same-sex individuals and provisions on cohabitation), Article 1(1) of which expressly characterizes civil unions between same-sex individuals "as a specific social group under Articles 2 and 3 of the Constitution."

At the same time, this Court also pointed out that the Constitution, while favoring the formation of families, "does not endorse a concept of family which is inextricably linked to the presence of children," and that, at the same time, "[t]he free and voluntary nature of the act that enables a person to become a parent […] certainly does not imply that the freedom under examination may be exercised without any limits" (Judgment no. 162 of 2014). Indeed, this freedom must be balanced with other constitutionally protected interests, and this is particularly true when discussing the choice to resort to

PMA techniques, which, by altering the natural dynamics of the process of generating individuals, open up entirely new scenarios compared with the paradigms of parenthood and family that were historically rooted in the culture of society, and on the basis of which the provisions of Articles 29, 30, and 31 of the Constitution were clearly built, in this way inevitably raising delicate ethical questions.
In line with the principles highlighted here, the task of weighing the interests in play and finding a balancing point between the various needs – taking into consideration the most widespread leanings of society at the specific point in history – must be held to belong, as a matter of priority, to the legislator, as the interpreter of the national collectivity, subject to later review of the solutions it adopts by this Court, in order to verify that they do not fall outside the bounds of reasonableness.
In the present case, moreover, the choice expressed by the challenged provisions does not exceed the margin of discretion which the legislator enjoys *in subiecta materia*, despite the fact the area remains open to different solutions, in keeping with evolving social views concerning the phenomena under consideration.
In general terms, legislative concern for guaranteeing respect for the conditions considered best for the development of the child's personality certainly may not be considered irrational or unjustified.
In light of this, the idea underlying the provisions under review, that a family *ad instar naturae* (with two parents, of different sexes, who are both living and of potentially childbearing age) represents, as a matter of principle, the most suitable "place" to welcome and raise the newborn, cannot be considered, in turn, to be arbitrary or irrational *per se*. And this has nothing to do with the capacities of a single woman, a homosexual couple, or a heterosexual couple advanced in age to effectively perform parental functions, if need be.
By, in particular, requiring sexual diversity of the members of the couple, in order to have access to PMA – a condition that is, moreover, clearly an underlying assumption of the constitutional provisions on the family – the legislator also took stock of the level of acceptance of the phenomenon of so-called "*omogenitorialità*" [same-sex parenting] within the societal community, and concluded that, at the time the law was passed, there was no sufficient consensus on the matter.
13.2.– The validity of these conclusions is not vitiated by more recent trends in ordinary case law concerning the adoption of minors by homosexual couples, or by Italy's recognition of legal arrangements made abroad which establish parent-child relationships involving same-sex parents: two developments which are referred to extensively by the referring courts and the parties.
The prevailing case law effectively holds that so-called non-legitimizing adoption is allowable by the same-sex partner of the biological parent of a minor child, under Article 44(1)(*d*) of Law no. 184 of 4 May 1983 (Right of minors to have a family).
Under this perspective, it cannot be said that the best interests of the child requirement is not met, based solely on the sexual orientation of the person making the adoption request and of that person's partner, since the sexual orientation of the couple is irrelevant to an individual's fitness to take on parental responsibility (Supreme Court of Cassation, First Civil Division, Judgment no. 12962 of 22 June 2016).
The Supreme Court of Cassation has additionally held that foreign official documents showing that two women have produced a child, following the same assisted reproduction techniques that the two complainants in the case pending before the Ordinary Court of Bolzano would like to pursue (commonly known as Reception of

Oocytes from Partner, or ROPA, which involves the donation of an egg by one partner and gestation by the other, using third party male gametes) may be transcribed into the official registry of the Italian State. Rejecting the argument that such transcription conflicts with domestic public policy, the Court of Cassation stated, first, that there is no constitutional prohibition on homosexual couples taking in or producing children and, second, there is no scientific evidence or experiential data tending to prove that a child's participation in a family formed by a homosexual couple has negative repercussions for the education or development of the minor's personality, given that any damage connected with said participation must be concretely proven (Supreme Court of Cassation, First Civil Division, Judgment no. 19599 of 30 September 2016). The Supreme Court of Cassation had already made an analogous ruling in an earlier case concerning the custody of a child born in a previous, heterosexual relationship, after the mother stated that she was homosexual and began living with another woman (Supreme Court of Cassation, First Civil Division, Judgment no. 601 of 11 January 2013).

As stated above, none of this invalidates the earlier conclusions of this decision.

Indeed, there is a fundamental difference between adoption and PMA. Adoption presupposes that the adopted child already exists: its purpose is not to provide a child for a couple, but primarily to provide a family for a child who does not have one. Thus, in the case of adoption, the minor is already alive, and the interests of the child in maintaining bonds of affection that are already established and consolidated in concrete terms prove particularly deserving of protection (as in the narrow scenario of non-legitimizing adoption that has been held to apply to homosexual couples). The minor's interest [in maintaining these bonds of affection] must be proven on a case-by-case basis, according to the aforementioned guidelines found in case law (and the same applies to custody matters concerning children born during a previous, heterosexual relationship).

PMA, on the contrary, serves to provide a child who does not yet exist to a couple (or individual) in order to fulfill their parental aspirations. The child, therefore, has yet to be born. It is not, therefore, unreasonable, as stated above, for the legislator to take care to ensure that the child will be placed in the conditions that, in its assessment and in light of the current views of the societal community, appear, in the abstract, to be the best "starting" conditions.

14.– Concerning the alleged violation of Article 3 of the Constitution, this Court held above that there is no violation related to claims of discrimination on the basis of sexual orientation (above at point 12 of the *Conclusions on points of law*).

But the same must be held concerning the additional challenge, expressed only by the Ordinary Court of Pordenone, which alleges that the legislation under review creates an unjustifiable disparity of treatment on the basis of financial resources, with the result that only those homosexual couples who are able to meet the costs of seeking PMA procedures in a foreign country that allows them to access them may fulfill their wish to become parents.

In the absence of additional constitutional defects, the mere fact that a prohibition may be circumvented by leaving the country cannot be a valid basis for challenging its compliance with the Constitution. The fact that there is a difference between the Italian law and the many different laws throughout the world is one that the system cannot take into account. Otherwise, domestic laws would always have to conform to the most permissive of all existing foreign laws regulating the same area, in order to avoid violating the principle of equality.

15.– Furthermore, Article 31(2) of the Constitution, which concerns motherhood, rather than the wish to become a parent, has not been violated.
16.– Nor is there any violation of Article 32(1) of the Constitution, which the Ordinary Court of Pordenone alleges on the basis of the presumption that the impossibility of forming a family with children together with one's partner could have a negative impact (and even a substantial one) on the psycho-physical health of the couple.
The constitutional protection of "health" cannot be extended so far as to require the satisfaction of any and all subjective wishes or needs that a couple (or an individual) considers to be essential, rendering any legal obstacle to its fulfillment incompatible with the cited constitutional provision. The opposite conclusion, which may also be found in Judgment no. 162 of 2014, relied on by the referring court, must be understood in the context of the specific case to which that ruling refers (heterosexual couples diagnosed with a pathology causing absolute and irreversible infertility or sterility). If it were otherwise, not only the limitations under review today, but all the other limitations on access to PMA laid out in Article 5(1) of Law no. 40 of 2004 would have to automatically be eliminated, since they frustrate the desire to become parents. Judgment no. 162 of 2014, on the contrary, made specific reference to these limitations in connection with heterologous fertilization.
17.– The Ordinary Court of Bolzano alleges the violation of Article 32(1) of the Constitution on different and more specific grounds, reflecting the unique circumstances of the concrete case before it, in which – as mentioned several times previously – both complainants, who are partners in a civil union, are affected by conditions which make them unable to reproduce naturally: one because she does not produce ova, and the other because she is unable to carry a pregnancy to term without serious risks.
According to the referring court, the challenged prohibition conflicts with the constitutional protection of the right to health, to the extent that it prevents members of same-sex couples from overcoming their reproductive pathologies through the complementary use of their respective reproductive capacities (one's capacity for gestation and the other's capacity for ova production), in contradiction with the very therapeutic purpose, *lato sensu*, that Law no. 40 of 2004 attributes to PMA.
Here it bears noting that the challenge, even if well founded, would not justify the ruling requested by the referring court: that is, the *tout court* elimination of the sexual diversity requirement from the list of conditions for accessing PMA. On the contrary, the requirement would only have to be lifted in case of the ascertainable "therapeutic" need referred to by the referring court: that is, when the members of a female homosexual couple face objective conditions of infertility caused by a health condition.
The framework that would flow from this kind of intervention – although feasible in theory for this Court, through the "re-sectioning" of the request – would, nevertheless, clearly be untenable. This would allow access to PMA – and the chance to fulfill the desire to become a parent – only for those female homosexual couples who are unable to reproduce naturally.
This conclusion reveals the error in perspective that undermines the argument put forward by the referring court. The presence of reproductive pathologies is a relevant feature when it comes to heterosexual couples, in that it impedes the usual fertility of such couples. It is, however, an irrelevant variable – for the purposes at issue here – when it comes to homosexual couples, who would be infertile in any case.
18.– Article 11 of the Constitution, relied on by the Ordinary Court of Bolzano (and only in the operative part of its referral) in reference both to Articles 8 and 14 ECHR

and various provisions of the International Covenant on Civil and Political Rights of 19 December 1966, and of the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006, is an immaterial provision, given that the specified international conventions do not give rise to limitations on the sovereignty of the Italian State (concerning the ECHR in particular, see, among many, Judgments no. 22 of 2018, 210 of 2013, and 349 of 2007).

19.– Finally, the alleged violation of Article 117(1) of the Constitution must be rejected in relation to all the international provisions relied upon by the referring courts.

19.1.– Concerning the conflict, alleged by both referring courts, with Articles 8 and 14 ECHR (on respect for private and family life and the prohibition of discrimination), it is true that, beginning with the Judgment in *Schalk and Kopf v. Austria* of 24 June 2010, the case law of the European Court of Human Rights has consistently held that homosexual couples are entitled to the right to respect not only for private life, but also for family life, on equal terms with a different-sex couple in the same situation. Moreover, the couple constitutes a "family," including for purposes of the prohibition on discrimination (while the individual States are entrusted with determining the way of implementing this protection, which does not necessarily entail the extension of the institution of marriage) (see, among many, the Judgment of 14 December 2017, *Orlandi and others v. Italy*, and that of 21 July 2015, *Oliari and others v. Italy*). This principle was also specifically applied to the area of the adoption of minor children (Grand Chamber, Judgment of 19 February 2013, X and others v. Austria).

The Strasbourg Court also stated that the concept of "private life" found in Article 8 ECHR includes the right to self-determination and, thus, also the right to respect for the decision to become a parent and in what way to do so (naturally, by assisted fertilization, through adoption, etc.). The choice to utilize PMA thus falls within the scope of this protection, meaning, in consequence, that any interference in it on the part of the public authorities must respond to the purposes indicated in Article 8(2) and be proportionate to the purpose (Judgment of 16 January 2018, *Nedescu v. Romania*; Grand Chamber, 27 August 2015, *Parrillo v. Italy*; 2 October 2012, *Knecht v. Romania*; 28 August 2012, *Costa and Pavan v. Italy*; Grand Chamber, 3 November 2011, *S.H. and others v. Austria*).

However, as stated already above, the Court of Strasbourg also held that national laws reserving PMA to sterile heterosexual couples, assigning it a therapeutic purpose, does not cause disparity of treatment toward homosexual couples for purposes of Articles 8 and 14 ECHR, given the fact that the situations are not comparable (Judgment of 15 March 2012, *Gas and Dubois v. France*).

As already mentioned above, the European Court has held that the States enjoy a broad margin of appreciation in regulating medically assisted reproduction – which raises delicate ethical and moral questions – particularly with regard to matters concerning which there is no general consensus at the European level (point 9 above of the *Conclusions on points of law*). From this perspective, the Court has held that the prohibition on heterologous fertilization under Austrian law is not incompatible with the ECHR (Grand Chamber, Judgment of 3 November 2011, S.H. and others v. Austria, which overturned the ruling of the First Section of the Court in its Judgment of 1 April 2010, S.H. v Austria).

In light of this, the earlier considerations denying the alleged violation of the constitutionally protected right to procreation are also relevant when it comes to the

provisions of the Convention relied upon (point 13 above of the *Conclusions on points of law*).

19.2.– What has been observed in connection with Articles 8 and 14 ECHR may clearly be extended to the corresponding provisions – mentioned only by the Ordinary Court of Bolzano – of the International Covenant on Civil and Political Rights, relating to the prohibition of discrimination and the right to respect for private and family life (Articles 2(1), 17, 23, and 26).

19.3.– Lastly, as concerns the provisions of the New York Convention on the Rights of Persons with Disabilities (Articles 5, 6, 22(1), 23(1), and 25, on, respectively, equality and non-discrimination, women with disabilities, respect for privacy, respect for the family, and health), also mentioned only by the Ordinary Court of Bolzano, the observations made above in reference to the violations of the right to health alleged by the same court, may be reiterated (above point 17 of the *Conclusions on points of law*).

It is, indeed, plain that female homosexual couples, as such, cannot be considered "disabled."

20.– In light of the considerations herein, the questions must be declared unfounded.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

having joined the cases,

1) *declares* the questions concerning the constitutionality of Articles 5 and 12(2), (9), and (10) of Law no. 40 of 19 February 2004 (Provisions on medically assisted reproduction), raised in reference to Articles 2, 3, 31, 31(2), 32(1), and 117(1) of the Constitution, the last in relation to Articles 8 and 14 of the European Convention on Human Rights (ECHR), signed in Rome on 4 November 1950, ratified and executed by Law no. 848 of 4 August 1955, by the Ordinary Court of Pordenone, with the referral order indicated in the Headnote, to be unfounded;

2) *declares* the questions of constitutionality of Articles 5, limited to the words "of opposite sex," and 12(2), limited to the words "of the same sex or" and "also in combination with paragraphs 9 and 10," as well as Articles 1(1) and (2) and 4 of Law no. 40 of 2004, raised in reference to Articles 2, 3, 31(2), and 32(1) of the Constitution, as well as to Articles 11 and 117(1) of the Constitution, in relation to Articles 8 and 14 ECHR, to Articles 2(1), 17, 23, and 26 of the International Covenant on Civil and Political Rights, adopted in New York on 19 December 1966, ratified and executed by Law no. 881 of 25 October 1977, and to Articles 5, 6, 22(1), 23(1), and 25 of the United Nations Convention on the Rights of Persons with Disabilities, done at New York on 13 December 2006, ratified and executed with Law no. 18 of 3 March 2009, raised by the Ordinary Court of Bolzano with the referral order indicated in the Headnote, to be unfounded.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 18 June 2019.