JUDGMENT NO. 237 YEAR 2019

In this case, the Court considered a referral order concerning the constitutionality of a body of provisions that purportedly prevented a civil registry official from specifying two women, married under the law of a foreign state, as the parents of a child born as a result of medically assisted reproduction techniques on that child's birth certificate. The referring court argued that the "rule inferred" was incompatible with the rules of private international law applicable in Italy, and also violated various provisions of the Constitution. The Court noted that the law in Italy excluding same-sex couples from medically assisted reproduction fell within the legislator's margin of discretion, as a matter of both national law and the ECHR. The Court moreover ruled the question inadmissible on the grounds that there was a lack of clarity over the rule objected to. It was held not to be clear whether this rule was specifically (a) one requiring that parents be of the opposite sex, which the Court was invited here to declare non-mandatory in the face of a provision of foreign law with contrary effect, or (b) a rule preventing a civil registry official from issuing a birth certificate to a foreign national that reflected that child's status under the foreign legal system governing his or her status. The fact that the referring court had invoked a body of provisions, rather than a specific individual provision, meant that it was not possible to resolve this uncertainty.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 250 and 449 of the Civil Code, Articles 29(2) and 44(1) of Decree of the President of the Republic no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on civil status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997), and Articles 5 and 8 of Law no. 40 of 19 February 2004 (Provisions on medically assisted reproduction), initiated by the *Tribunale di Pisa*, within the proceedings pending between D.E. R. and others and the Mayor of Pisa by the referral order of 15 March 2018, registered as no. 69 in the Register of Referral Orders 2018 and published in the *Official Journal* of the Republic, no. 19, first special series 2018.

Considering the entries of appearance by D.E. R. and another, by Counsel David Cerri as the special *curator ad litem* for the minor R.G.R. R.G., and the intervention *ad adiuvandum* by the *Avvocatura per i diritti LGBTI* [Advocate for LGBTI Rights], and the interventions *ad opponendum* by the *Centro Studi "Rosario Livatino"* ["Rosario Livatino" Studies Centre] and the volunteer organisation "*Vita è*" ["Life is"];

having heard Judge Rapporteur Mario Rosario Morelli at the public hearing of 9 October 2019;

having heard Counsel Stefano Chinotti for the *Avvocatura per i diritti LGBTI*, Counsel Simone Pillon for the volunteer organisation "*Vita è*", Counsel Francesca Salvadorini for Counsel David Cerri, as the special *curator ad litem* for the minor R.G.R. R.G., and Counsel Alexander Schuster for D.E. R. and another.

[omitted]

Conclusions on points of law

1.– Having been called upon to rule on the constitutionality of the refusal by the official from the Pisa registry office of a request seeking the joint recognition of a child born in

Italy (in Pontedera) – a request made by a female couple (associated by marriage contracted in the United States), one of whom is an American citizen (from Wisconsin) and is the birth mother, and the other of whom is an Italian citizen and the "non-birth mother", as a result of consent to heterologous fertilisation (of the former) in Denmark – by means of the referral order mentioned in the headnote, the Civil Division of the *Tribunale di Pisa*, sitting as a bench of judges, as the instant court raised a "question concerning the constitutionality of the rule inferred" from Article 449 of the Civil Code, which requires that registers of civil status be kept "in accordance with the provisions laid down in the law on civil status"; from Article 29(2) of Decree of the President of the Republic no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on civil status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997) concerning the information included in the birth certificate, including the parents' particulars; from Article 44(1) (not included in the operative part but mentioned in the reasons) of Decree of the President of the Republic no. 396 on the recognition of the unborn child by the father; from Article 250 of the Civil Code which, for the purposes of the recognition of any child born out of wedlock, refers to the "mother" and the "father"; and from Articles 5 and 8 of Law no. 40 of 19 February 2004 (Provisions on medically assisted reproduction), under which access to medically assisted reproduction techniques (hereafter: MAR) is only available to adult couples "of the opposite sex".

It is suspected that the rule thereby "inferred" by the referring court may be unconstitutional, "insofar as it does not enable a birth certificate to be drawn up in Italy that recognises two persons of the same sex as the parents of a foreign national where parentage is established under the law applicable pursuant to Article 33 of Law no. 218 of 1995".

According to the referring court, this constituted a violation of: Articles 2 and 3 of the Constitution, in imposing an unlawful restriction of the right – of persons who are associated by a parent-child relationship under the applicable foreign law – to have their family union recognised in Italy; Article 3 of the Constitution due to the unreasonable discrimination compared to a similar situation involving a foreign national with parents of the opposite sex, whose status could by contrast be recognised; Articles 3 and 24 of the Constitution as the provision does not enable the child to obtain pre-constituted proof of parentage that subsists under the applicable foreign law, absent any grounds for preclusion under international *ordre public*; Articles 3 and 30 of the Constitution, due to the unlawful restriction of the child's right to receive maintenance and instruction from both parents, who have that status according to their respective national laws; Article 117(1) of the the Constitution in relation to Articles 3 and 7 of the Convention on the Rights of the Child, done in New York on 20 November 1989, ratified and implemented in Italy by Law no. 176 of 27 May 1991, due to the detriment (suffered) to the interests of the child in obtaining recognition also in Italy of both parents in accordance with his or her national law; and Article 117(1) of the Constitution, in relation to Article 7 of the above-mentioned Convention, in terms of the violation of the right to immediate recognition in Italy of his or her status as the child of both mothers, a status lawfully acquired under his or her national law.

1.1.– When providing reasons for the question raised, the *Tribunale di Pisa* starts from a fixed premise, justified with reference to various arguments, that Italian law "at present does not allow two persons of the same sex to be parents of the same child".

In its view, this does does not prevent a birth certificate issued abroad, which recognises two persons of the same sex as parents, from being registered in Italy, provided that it is established that this would not constitute a breach of *ordre public*.

The position is however different – it adds – where the birth certificate must be issued for the first time in Italy.
In such an eventuality, the registry office official is unable "to apply […] provisions of foreign law", being specifically prevented by the rule that the court "infers" from the combined effect of the various provisions objected to, which it asserts must "necessarily be applicable", as the internal rule that must be applied notwithstanding the reference to foreign law pursuant to Article 17 of Law no. 218 of 31 May 1995 (Reform of the Italian system of private international law).
On this basis, the referring court suspects that the rule thereby inferred may violate the constitutional provisions invoked under circumstances – such as those pending before it – in which the birth mother and the child are citizens of one country (the State of Wisconsin of the United States of America) according to which "the non-birth mother who […] is married to the birth mother and has provided her written consent to medically assisted reproduction is [also] the child's parent". This means that under the child's own national law – which should apply also in Italy pursuant to Article 33 of Law no. 218 of 1995 – that child should have the right to have registered as his or her parents the two women who consensually launched and successfully completed the process of heterologous fertilisation that resulted in his or her birth.
2.– As a preliminary matter, it is necessary to confirm the annexed order read out at the hearing, which ruled inadmissible the interventions by *Centro Studi "Rosario Livatino"*, the volunteer organisation "*Vita è*" and the *Avvocatura per i diritti LGBTI*.
3.– Again as a preliminary matter, it is necessary to examine the objections that the question is inadmissible – which, it is argued, should preclude an examination of the merits of the question − raised respectively by the two claimants in the main proceedings and the special *curator ad litem* nominated in those proceedings to represent the child's interests.
3.1.– The objection by which counsel for the above-mentioned claimants asserts that the referring court's basic interpretation concerning the "Italian legal context and [the] principles applicable to parentage arising as a result of the application of medically assisted reproduction techniques" is mistaken takes priority as a matter of logic.
Counsel asserts that the reference made by the *Tribunale di Pisa* to the provisions of the Code that govern parentage within marriage was not relevant, since it is only within that specific context that children must necessarily have a "father" and a "mother", whilst it is not possible, "[without] begging the question, to infer […] that every child [howsoever born] must have a father and a mother […]". Given that "marriage without doubt still has specific consequences in terms of the rules on eligibility for parenthood […]. However, it no longer has a monopoly on parenthood".
As regards the new reproductive techniques, Italian law in fact imposes "a clear principle of parental responsibility, which is dependent upon substance (responsibility for causing, by one's own voluntary actions, whether to create life, without leaving any scope for a change of heart) and not on form".
According to that principle, the referring court should have directly recognised that national law does not prevent the birth from being declared jointly by the two women, and therefore that the civil registry official erred in refusing to accept it. As a result, it is argued that the question raised is irrelevant.
3.1.1.– The objection is unfounded.
It is of course true that the child's parentage following the recourse to MAR techniques is also related to the "consent" provided, and the "responsibility" jointly taken on, by the two people who decided to access that reproductive technique.

This may in fact be inferred both from Article 8 of Law no. 40 of 2004 – which provides that children born as a result of medically assisted reproduction have the status of "children born within marriage" or "children who have been recognised" by the couple who embarked upon this process – and from Article 9 of that law which, in relation to heterologous fertilisation, provides – in a consistent manner – that the "spouse or cohabitee" (of the birth mother) cannot subsequently bring an action to deny paternity or challenge paternity on the grounds that it does not reflect the actual facts, notwithstanding the lack of any biological involvement.

However, all of the above is always subject to the prerequisite that the prospective parents constitute an "opposite sex" couple. According to the express provision laid down by Article 5 of Law no. 40 of 2004, same-sex couples cannot access MAR techniques.

Moreover, within the recent Judgment no. 221 of 2019 – rejecting the objections that Article 5 and Article 12(2), (9) and (10) and Articles 1(1) and (2) and 4 of Law no. 40 of 2004 were unconstitutional due to an alleged violation of the principles laid down by Articles 2, 3, 11, 31(2), 32(1) and 117(1) of the Constitution, the last provision in relation to Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law no. 848 of 4 August 1955, along with other supranational provisions – this Court held *inter alia* that "[t]he ineligibility for MAR of couples comprised of two women does not […] give rise to any imbalance or even any discrimination on the grounds of sexual orientation". It also recalled a similar ruling to this effect of the European Court of Human Rights, according to which a national law that reserves eligibility for artificial fertilisation to sterile heterosexual couples, vesting it with a therapeutic purpose, cannot be deemed to constitute unjustified discrimination against homosexual couples that is relevant for the purposes of Articles 8 and 14 ECHR: this is precisely because the circumstances of the latter are not comparable to those of the former (European Court of Human Rights, judgment of 15 March 2012 in *Gas and Dubois v. France*).

It therefore conclusively held that the choice made by the legislator in 2004 does "not exceed the margin of discretion available to the legislator in relation to this matter, which may nonetheless be regulated differently in line with developments in the social assessment of the phenomenon concerned".

It is not possible to arrive at any other conclusion even on the basis of the subsequently enacted Law no. 76 of 20 May 2016 (Regulation of civil unions between persons of the same sex and provisions governing cohabitation) which – whilst recognising the social and legal dignity of same-sex couples – nonetheless refrained from making provision for joint parentage, whether as a result of adoption or assisted fertilisation.

In fact, the reference made by Article 1(20) of Law no. 76 to the law on marriage (known as the safeguard clause) does not apply to the provisions governing paternity, maternity and adoption with legitimising effect, specifically because those provisions were not referred to.

Therefore, the assertion made by the *Tribunale di Pisa* that "at present" Italian law "does not allow two persons of the same sex to be parents of the same child" is therefore unobjectionable.

3.2.– Counsel for the claimants argues with reference to another aspect that – in finding that a civil registry official issuing a birth certificate is not permitted to apply the laws of another country – the *Tribunale di Pisa* embraced an "incorrect interpretation of the interaction between the rules of private international law and the substantive rules

governing the system of civil status".
"The defect within the interpretation proposed by the referring court [is claimed to lie] ... in the incorrect identification of a rule the application of which is mandatory". In fact, the rule specifying the types of act that the civil registry official may carry out is such a mandatorily applicable rule, as is that governing the applicable procedure. However, as regards the content of the certificate, this is dependent upon substantive rules, including those of foreign origin, provided that the prerequisites under the rules of private international law are met.
3.2.1.– It is not necessary to consider this second objection – which is also reiterated in essence by the *curator ad litem* for the child − because, with regard to the interplay between the internal rule and the rule of private international law, there is reason to conclude that the question is inadmissible owing to the very manner in which its object has been framed, even without any consideration of the incorrect underlying interpretative premises.
The referring court in fact takes the view that "in the light of the "living law", it must be concluded that the application of the law of Wisconsin would not constitute a breach of international *ordre public*".
It also asserts that "the assessment as to whether or not a foreign law constitutes a violation of *ordre public* does not differ depending upon whether a case involves the recognition of a foreign document or the direct application of a foreign law".
However, it then infers from the multiple provisions (some of which are contained in mere regulations) listed in the operative part that – as mentioned above – a "rule the application of which is mandatory", which supposedly prevents the application of a foreign law to the birth certificate of a child born in Italy, even though it is the national law of the child concerned.
According to the definition laid down by Article 17 of Law no. 218 of 1995, the "rules the application of which is mandatory" are comprised specifically of the "Italian rules which, having regard to their object and purpose, must be applied notwithstanding the reference to a foreign law".
However, the *Tribunale di Pisa* does not clarify whether the "rule inferred" – which it asks this Court to strike down, "insofar as it does not enable a birth certificate to be drawn up in Italy that recognises two persons of the same sex as the parents of a foreign national, where parentage is established under the law applicable pursuant to Article 33 of Law no. 218 of 1995" – is: (a) the internal rule itself requiring that parents be of the opposite sex, which it presumes is of mandatory application, and asks this Court to rule that it is not mandatorily applicable in relation to the issuance (but not also the registration) of the birth certificate of a child who is a foreign national; or (b) a rule on "administrative action" regulating the activity of the civil registry official, which purportedly prevents the official from issuing a birth certificate to a foreign child that recognises the same status as that provided for under the child's national law, but not under Italian law.
Moreover, since the referring court limits itself to objecting only to a fragment – the part considered to violate the constitutional provisions invoked – of a notional rule, which is not however referred to in its entirety, and the remaining part of which could also be brought under either of the two potential rules considered above, the uncertainty between the two alternatives as regards the object of the question cannot be resolved.
In addition, the provisions by which the legislator established the rules the application of which is mandatory within the specific area of parentage (Articles 33(4) and 36-*bis* of Law no. 218 of 1995), which are more relevant for the matter subject to incidental

constitutional review, have not been examined by the referring court.
As a result, the question is inadmissible.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

rules inadmissible the question concerning the constitutionality of the "rule inferred" from Articles 250 and 449 of the Civil Code; Articles 29(2) and 44(1) of Decree of the President of the Republic no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on civil status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997); Articles 5 and 8 of Law no. 40 of 19 February 2004 (Provisions on medically assisted reproduction), due to the violation of Articles 2, 3, 24, 30 and 117(1) of the the Constitution, the last-mentioned in relation to Articles 3 and 7 of the Convention on the Rights of the Child, done in New York on 20 November 1989, ratified and implemented in Italy by Law no. 176 of 27 May 1991, raised by the *Tribunale di Pisa* by the referral order mentioned in the headnote.
Decided in Rome at the seat of the Constitutional Court, *Palazzo della Consulta*, on 21 October 2019.

Annex:
Order read out at the hearing of 09 October 2019
ORDER

Considering the case file relating to the constitutionality proceedings initiated by the Civil Division of the *Tribunale di Pisa*, sitting as a bench of judges, by the referral order of 15 March 2018 (Register of Referral Orders no. 69 of 2018), concerning the rule resulting from the combined effect of Articles 250 and 449 of the Civil Code, Article 29(2) of Decree of the President of the Republic no. 396 of 3 November 2000 (Regulations on the review and simplification of the Law on civil status, adopted pursuant to Article 2(12) of Law no. 127 of 15 May 1997), and Articles 5 and 8 of Law no. 40 of 19 February 2004 (Provisions on medically assisted reproduction), insofar as it does not enable a birth certificate to be drawn up in Italy that recognises two persons of the same sex as the parents of a foreign national, where parentage is established under the law applicable pursuant to Article 33 of Law no. 218 of 1995 (Reform of the Italian system of private international law).
Having found that, by separate submissions *ad opponendum* filed on 28 May 2018 and 29 May 2018, the *Centro Studi "Rosario Livatino"* and the volunteer organisation "*Vita è*" and, by a submission *ad adiuvandum* filed on 29 May 2018, the *Avvocatura per i diritti LGBTI*, represented by their respective *pro tempore* legal representatives, have intervened in the proceedings before this Court.
Considering that the said entities were not parties to the proceedings before the referring court;
that according to the settled case law of this Court (see *inter alia* Judgments no. 13 of 2019, and no. 217 and no. 180 of 2018; referral orders annexed to Judgments no. 141 of 2019, no. 194 of 2018, no. 29 of 2017, no. 286, no. 243 and no. 84 of 2016), participation in proceedings before the Constitutional Court is reserved, as a rule, to the parties to the proceedings before the lower court, along with the President of the Council of Ministers and, in cases involving regional legislation, the President of the Regional Executive (Articles 3 and 4 of the Supplementary rules on proceedings before the Constitutional Court);

that exceptions may be made to these provisions – without thereby violating the incidental nature of proceedings before the Constitutional Court – only for 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;
that accordingly, the impact on the individual interests of the intervener must not result, as for all other substantive interests governed by the contested Law, from the ruling of the Court on the constitutionality of the Law itself, but rather from the immediate effect which that ruling will have on the substantive relationship at issue in the main proceedings;
that within these proceedings, the *Centro Studi "Rosario Livatino"*, the volunteer organisation "*Vita è*" and the *Avvocatura per i diritti LGBTI* are not vested with any interests that are directly related to the subject matter of the proceedings, but rather with mere indirect and more general interests related to the objects specified in their charters;
that accordingly, the interventions by the above-mentioned associations must be ruled inadmissible.

ON THESE GROUNDS
THE CONSTITUTIONAL COURT

rules inadmissible the interventions by *Centro Studi "Rosario Livatino"*, the volunteer organisation "*Vita è*" and the *Avvocatura per i diritti LGBTI*.

Signed Giorgio Lattanzi, President