JUDGMENT NO. 32 YEAR 2021

In this case, the Court heard a referral order from the Court of Padua questioning the constitutionality of legislation on medically assisted procreation on the basis that it allegedly did not allow a child born through recourse to a heterologous medically assisted procreation process, undertaken by a same-sex couple, to be granted the status of child recognised also by the intentional mother where the conditions for ''adoption in special cases'' are not fulfilled even though the courts have established that such recognition would be in the interests of the child.

The Court was of the view that there were shortcomings in the legal system as regards protecting the best interests of the child in the present case in view of the latter's need for ties with both parents and their legal recognition. However, it ruled the question inadmissible on the basis that it is primarily for the legislator to take action to provide systemic protection to children's rights thereby avoiding inconsistencies in the legal system that would arise from fragmented intervention by the Court. It renewed its previous appeal for legislation to be enacted urgently in order to guarantee all children full rights to care, upbringing, education and stable parental bonds.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Articles 8 and 9 of Law No. 40 of 19 February 2004 (Provisions on medically assisted reproduction) and Article 250 of the Civil Code, initiated by the Ordinary Court of Padua, in the proceedings pending between V. B. and C. R., with referral order of 9 December 2019, registered as No. 79 in the Register of Referral Orders 2020 and published in the Official Journal of the Republic No. 28, first special series 2020.

Having regard to the entries of appearance filed by V.B. and C. R. and the intervention filed by the President of the Council of Ministers;

after hearing Judge Rapporteur Silvana Sciarra at the public hearing of 27 January 2021;

after hearing Counsel Vittorio Angiolini, connected remotely in accordance with point 1 of the Decree of the President of the Court of 30 October 2020, Counsel Sara Valaguzza and Alexander Schuster for V. B., Counsel Massimo Rossetto for C. R. and State Counsel Chiarina Aiello for the President of the Council of Ministers, connected remotely in accordance with point 1 of the Decree of the President of the Court of 30 October 2020;

after deliberation in chambers on 28 January 2021.

[omitted]

Conclusions on points of law

1.- The Ordinary Court of Padua has raised questions as to the constitutionality of Articles 8 and 9 of Law No. 40 of 19 February 2004 (Provisions on medically assisted procreation) and Article 250 of the Civil Code in so far as, when read together, they allegedly do not allow a child born through recourse to a heterologous medically assisted procreation (MAP) process, undertaken by a same-sex couple, to be granted the status of child

recognised also by the intentional mother who has given her consent to the fertilisation procedure, where the conditions for adoption in special cases are not fulfilled and the courts have established that such recognition would be in the interests of the child.

According to the referring court, those provisions guarantee the recognition of the parent-child relationship as regards a child born through recourse to heterologous MAP techniques to both of the individuals who have given their consent and who have consequently assumed parental responsibility only where the individuals concerned are among those who were able to access such a procreative technique under Article 5 of Law No. 40 of 2004, in other words, only where they are of different sexes.

The provisions, in the referring court's view, would thus leave unprotected the interests of the child, born as a result of assisted fertilisation carried out by two women, as regards recognition of the parent-child relationship for the intentional mother, since the present case would not meet the requirements for adoption in special cases under Article 44(1)(d) of Law No. 184 of 4 May 1983 (Rules on the adoption and custody of children), owing to the lack of consent of the biological-legal parent, laid down as an indispensable condition (Article 46).

It is argued that such a lack of protection exceeds the margin of appreciation enjoyed by the legislator in this matter and leads to the infringement of a series of rights and interests that are guaranteed by the Constitution and the ECHR.

First of all, the right of the child to assert against the two persons – albeit of the same sex, who have in any event assumed responsibility for procreation – their rights to maintenance, upbringing and education but also their succession rights (especially in the event of breach and a breakdown in the couple's relationship) is allegedly infringed, contrary to Articles 2, 3, 30 and 117(1) of the Constitution, the latter in particular in relation to Article 8 ECHR. In line with the case law of the European Court of Human Rights (ECtHR), this would constitute a serious infringement of the right to privacy of the child for whom recognition of the link with their intentional mother is impeded, thus leaving them exposed to a situation of legal uncertainty in their social relations with regard to their personal identity.

This would result in an unjustified disparity of treatment both compared to children born through recourse to heterologous MAP carried out by heterosexual couples and compared to children born through recourse to MAP carried out by same-sex couples, who may have access to adoption in special cases, by virtue of the consent given by the biological mother. In the absence of such consent, children born through recourse to heterologous MAP carried out by same-sex couples would be destined to be permanently single-parent children, incapable of being recognised by the other individual who had intentionally contributed to the procreative plan. They would find themselves in a legal situation inferior to that of all other children (including those born of incestuous relationships), solely on account of the sexual orientation of the persons who were parties to the decision to procreate by resorting to the abovementioned techniques, in breach of Article 3 and Article 117(1) of the Constitution, in relation to Article 14 ECHR.

Such a gap in protection would, continues the referring court, run counter to the commitment made by the Italian State when ratifying the Convention on the Rights of the Child, signed in New York on 20 November 1989, ratified and implemented by Law No. 176 of 27 May 1991 (in particular Articles 2, 3, 4, 5, 7, 8 and 9), to consider "the best interests of the child" in all actions concerning children (Article 3) and, in any event, to

take “all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members” (Article 2).

2.- As a preliminary point, it is necessary to examine the objections as to inadmissibility raised by State Counsel.

2.1.- State Counsel considers that the questions raised by the Court of Padua are irrelevant. Specifically, it is argued that in the main proceedings, it is not the minors’ right to be recognised as the children of both mothers that is at issue, but the applicant’s claim to be recognised as the legal parent. That is allegedly demonstrated by the fact that the respondent, the biological mother of the children, was not sued as the person exercising parental responsibility over them and the remitting court did not see fit to order that they be heard. The case before the remitting court is therefore said to be unclear, so much so that it is supposedly not possible to understand which rules are challenged and hence applicable in the main proceedings.

2.1.1- The objection is unfounded.

It is clear from the referral order that the applications, brought in the main proceedings by the applicant on the basis of Articles 8 and 9 of Law No. 40 of 2004, and, secondarily, Article 250 of the Civil Code, seek to protect the children, precisely because they are designed to allow the exercise of parental responsibility over them also by the intentional mother, by virtue of the formal recognition of the status of daughters sought by her. The referring court clarifies that it is a request aimed at guaranteeing stability in the parental relationship, existing in a continuous manner since the birth of the children and such as not to cause prejudice to them. Reference is made to the intervention, albeit unsuccessful, of the Juvenile Court, following the abrupt interruption of regular contact, caused by the biological mother with the onset of conflict between the couple, and of any relations between the children and the intentional mother despite the consolidated bonds of affection between them.

According to Article 30 of the Constitution, recognition of the status of child, which is the subject of the challenged provisions, entails with it the parent’s duty of care which is, at the same time, a guarantee of the child’s right to be cared for. This is sufficient to hold that the referring court’s arguments identifying the right of the minors to be recognised as the children of both their mothers as the subject matter of the proceedings are not implausible, in keeping with this Court’s consistent line of reasoning, which, in ruling on the admissibility of the question, “carries out only an ‘external’ check on relevance, applying a parameter of non-implausibility of the associated reasoning” (Judgment No. 267 of 2020; in the same vein, Judgments No. 224 and No. 32 of 2020).

2.2.- State Counsel also claims that the questions are inadmissible on the grounds of *aberratio ictus.*

It is alleged that the legal obstacle to granting the applicant’s claim in the main proceedings, seeking recognition that the children born through recourse to heterologous MAP carried out by a female couple are her daughters, lies not in the challenged provisions but in those of Law No. 40 of 2004 itself, which set limits on access to heterologous MAP. Those limits are said to be contained in Articles 4 and 5 of Law No. 40 of 2004, which have not been challenged.

2.2.1.- This objection is also unfounded.

The referring court states that the request made by the applicant at first instance is precisely that of obtaining recognition that the children are her daughters, applying Articles 8 and 9 of Law No. 40 of 2004 broadly, on the basis of their wording. In fact, Article 8 merely states that children born as a result of the application of medically assisted techniques "shall have the status of children born in wedlock or children recognised by the couple who have expressed their willingness to use such techniques pursuant to Article 6", which means giving informed consent. Article 9, moreover, prohibits disavowal of paternity and any challenge to recognition on grounds of untruthfulness in the case of heterologous fertilisation, even when the latter was not yet allowed (before the intervention of this Court with Judgment No. 162 of 2014).

The Court of Padua, however, stated that it could not grant the applicant's request, considering that the scope of application of the aforementioned provisions – on the basis of a systemic and logical interpretation of those provisions and in the wake of this Court's Judgment No. 237 of 2019 – is implicitly limited to children born through recourse to heterologous MAP carried out by couples of different sexes, pursuant to the provisions of Article 5 of Law No. 40 of 2004.

The referring court, however, notes that, although heterologous fertilisation between same-sex couples is not permitted in Italy by a decision of the legislator that is not unconstitutional (Judgment No. 221 of 2019), it is nevertheless carried out and can take place in other countries. Those born as a result of the use of these techniques are, therefore, entitled to rights, regardless of the manner of their conception.

The referring court does not challenge the constitutionality of the limits placed on same-sex couples' access to MAP. Rather, it alleges the unconstitutionality of the impairment of the rights of the persons so born, who are made to bear responsibility for the unlawfulness of the techniques used in their procreation.

Since "questions are inadmissible on the ground of *aberratio ictus* only if the provision in respect of which the allegations of unconstitutionality are made has been wrongly identified" (Judgment No. 224 of 2020), one can only hold that this is not the case here.

The referring court correctly challenges Articles 8 and 9 of Law No. 40 of 2004, since one can infer therefrom that it is impossible to grant the status of children to those born through recourse to heterologous MAP, carried out by a female couple. It follows that there is a lack of protection when the biological mother denies her consent to enable the intentional mother to pursue adoption in special cases, with an ensuing alleged infringement of the aforementioned constitutional provisions.

2.3 The above arguments lead one to rule out a further plea of inadmissibility – although not raised – relating to the failure to attempt to interpret the challenged provisions in a way that they would conform with the Constitution, as sought by the applicant in the main proceedings.

2.3.1.- As has already been pointed out, the referring court began by exploring the option of an interpretation of the above-mentioned Articles 8 and 9 of Law No. 40 of 2004 that would make it possible to ensure the protection of children born through recourse to heterologous MAP techniques by two women, carried out abroad, by recognising their status as children of both. It considers, however, that it is impracticable on the basis of a systemic and logical interpretation because "as the law stands, the opposite sex requirement for access to medically assisted reproduction", prescribed by Article 5 of

Law No. 40 of 2004, but also "read [...] in conjunction with the rules of the Civil Code on filiation, precludes the interpretative option proposed by the applicant".

The interpretation adopted by the referring court was subsequently upheld by the Supreme Court of Cassation (First Civil Division, Judgment No. 8029 of 22 April 2020 and Judgment No. 7668 of 3 April 2020). Some decisions by lower courts, on the other hand, have disregarded that ruling precisely because of the primary and constitutionally guaranteed need "to protect the legal status of the child, granting him or her, from the outset, certainty and stability". In so doing, they have kept the question relating to the child's status separate from that relating to the lawfulness of the technique chosen to give birth to him or her (among others, Ordinary Court of Brescia, Order of 11 November 2020, Ordinary Court of Cagliari, Judgment No. 1146 of 28 April 2020; Court of Appeal of Rome, Order of 27 April 2020).

In any event, interpreting the challenged legislation in a way that it would conform with the Constitution was explored and consciously discarded by the referring court, "which is sufficient for the question to be admissible (Judgment No. 189 of 2019)" (Judgment No. 32 of 2020).

2.4.- Lastly, State Counsel objects that the questions raised by the Court of Padua are inadmissible since the amendments to the current law requested by the referring court are allegedly intended to fill a gap in protection in a matter characterised by wide discretion on the part of the legislator.

2.4.1.- The objection is well-founded in the following terms.

2.4.1.1.- Prior to the enactment of Law No. 40 of 2004, in relation to a question concerning the protection of the *status filiationis* of a child conceived by means of heterologous fertilisation, which had not yet been regulated, this Court highlighted "shortcomings in the current legal system, with constitutional implications" (Judgment No. 347 of 1998). Without entering into an assessment of the lawfulness of that technique, on that occasion the Court expressed the urgent need to identify suitable means of protecting a child born as a result of assisted fertilisation, "not only in relation to the rights and duties provided for the child's upbringing, in particular by Articles 30 and 31 of the Constitution, but even more so – on the basis of Article 2 of the Constitution – in relation to the child's rights vis-à-vis those who have freely undertaken to bring him or her into this world and assume the relevant responsibilities: rights which it is the task of the legislator to specify" (Judgment No. 347 of 1998).

Articles 8 and 9 of Law No. 40 of 2004 show that, in heeding that warning, the legislator intended to define the status of a child as regards those born through recourse to MAP, including heterologous procreation, even before the relevant prohibition was declared unconstitutional (Judgment No. 162 of 2014). In establishing a joint design for parenthood, persons of full age who, as an opposite-sex couple, whether married or cohabiting, had consensually resorted to MAP (Article 5 of Law No. 40 of 2004), became, for that very reason, responsible towards the children thereby born, who were the natural recipients of the duties of care, even in the absence of a biological link.

Moreover, the development of the legal system, starting from the traditional notion of family, has progressively recognised – as this Court has pointed out – the legal importance of social parenthood, even where it does not coincide with biological parenthood (Judgment No. 272 of 2017), bearing in mind that "the issue of genetic origin is not an essential prerequisite for the existence of a family" (Judgment No. 162 of 2014).

Article 9 of Law No. 40 of 2004, in valuing, compared to *favor veritatis*, the consent to parenthood and the assumption of the ensuing responsibility within a social group capable of accommodating the child – as this Court has remarked – "demonstrates the will to protect the interests of the child", guaranteeing "the consolidation by the child of their own affective, relational and social identity, from which derives the interest in maintaining the parental bond acquired, even if in conflict with the biological truth of procreation" (Judgment No. 127 of 2020).

That legislation was harmoniously followed by the amendments subsequently made by Legislative Decree No. 154 of 28 December 2013 (Revision of the provisions in force on filiation, pursuant to Article 2 of Law No. 219 of 10 December 2012) on filiation. The focus is on the rights of the child: "to grow up in a family and [...] to maintain meaningful relationships with relatives" (Article 315-*bis* of the Civil Code); "to maintain a balanced and continuous relationship with each parent, [...] to receive care, upbringing, education and moral assistance from both" (Article 337-*ter* of the Civil Code). At the same time, the original institution of parental authority is replaced by parental responsibility (Article 316 of the Civil Code), which incorporates the provisions of Article 30 of the Constitution, in the concise formula expressly identified by this Court some time ago, aimed at 'translating' "the obligations of maintenance and upbringing of children, arising from parenthood" (Judgment No. 308 of 2008; in the same vein, Judgment No. 394 of 2005). The evolution of the legal system thus marks an even more pronounced consonance with the rights enshrined in the Constitution.

Moreover, the Charter of Fundamental Rights of the European Union (CFREU), proclaimed in Nice on 7 December 2000 and adapted in Strasbourg on 12 December 2007, states in Article 24(2) that the best interests of the child must be a primary consideration in all actions relating to children. The Court of Justice of the European Union, with reference to that provision, has also taken this line, affirming the right of children to maintain on a regular basis relations and direct contact with both parents, if such is in their best interests (Judgment of 5 October 2010 in Case C-400/10 *PPU, J. McB*.).

2.4.1.2.- As this Court has already recalled (Judgment No. 102 of 2020), the principle of safeguarding the best interests of the child is affirmed in international human rights instruments, in particular in the United Nations Declaration on the Rights of the Child of 1959 (Principle 2), which provides that, in the enactment of laws and the adoption of all measures affecting the condition of the child, "the best interests of the child" shall be of "paramount consideration". Subsequently, that was reiterated in the Convention on the Rights of the Child, Article 3(1) of which mentions that "primary consideration" shall be given to the best interests of the child.

Even in the absence of an express provision referring to children, the ECtHR has traced back to Article 8 ECHR, often in conjunction with Article 14 ECHR, the axiom that the rights to private and family life of the child must be a decisive element of any assessment ("the child's rights must be the paramount consideration": ECtHR, Second Section, Judgment of 5 November 2002, *Yousef v. Netherlands*; First Section, Judgment of 28 June 2007, *Wagner and J.M.W.L. v. Luxembourg*, paragraph 133: "Bearing in mind that the best interests of the child are paramount in such a case"; Grand Chamber, Judgment of 26 November 2013, *X v. Latvia*, paragraph 95: "the best interests of the child must be of primary consideration").

This is the perspective chosen by the ECtHR to recognise the permanence and stability of the ties established between the child and their family and to safeguard the child's right

to benefit from ongoing relationships and contact with both parents (ECtHR, Grand Chamber, Judgment of 10 September 2019, *Strand Lobben and Others v. Norway*, paragraph 202). Unless a separation is necessary in the child's best interests, which is left to the court's discretion exercised from time to time, the child must not be separated from his or her parents against their will (ECtHR, Grand Chamber, Judgment of 10 September 2019, *Strand Lobben and Others v. Norway*, paragraph 207). Indeed, it is the duty of the States Parties to the New York Convention (Article 9(1)) to give effect to these rights and to ensure (Article 9(3)) the stability of the child's ties and relationships with all persons with whom the child has had a close personal relationship, even in the absence of a biological link ("persons with whom the child has had strong personal relationships": see paragraph 64 of *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, adopted by the Committee on the Rights of the Child on 29 May 2013, CRC/C/GC/14; there is a similar statement also in paragraph 60 of the same document) unless it is contrary to his or her best interests.

The ECtHR has repeatedly referred to Article 8 ECHR as the basis for the guarantee of stable affective ties with a person who, irrespective of the biological link, has in practice performed a parental function by caring for the child for a sufficiently long period of time (ECtHR, First Section, Judgment of 16 July 2015, *Nazarenko v. Russia*, paragraph 66). It has also equated the bond existing between the intentional mother and the child born through recourse to assisted reproduction techniques with the parent-child relationship, techniques that the then-partner had availed of (a bond which "*tient donc, de facto, du lien parent-enfant*"), consistent with the notion of "family life" in Article 8 ECHR itself (ECtHR, Fifth Chamber, Judgment of 12 November 2020, *Honner v. France*, paragraph 51).

The consideration that the protection of the child's best interests includes the guarantee of his or her right to affective, relational and social identity, based on the stability of family and care relationships and on their legal recognition, is also at the heart of the 'twin' rulings (ECtHR, Fifth Chamber, Judgments of 26 June 2014, *Mennesson v. France* and *Labassee v. France*), cited by the referring court. In those judgments, the ECtHR found a violation of the child's right to privacy in the failure to recognise the parent-child link between the child, conceived abroad by resorting to the specific technique of surrogacy, and the intentional parents, precisely in view of the impact of the parent-child relationship on the construction of personal identity (ECtHR, Fifth Chamber, Judgments of 26 June 2014, *Mennesson v. France*, paragraph 96, and *Labassee v. France*, paragraph 75).

This approach – confirmed by subsequent rulings (among others, ECtHR, Fifth Chamber, Judgment of 16 July 2020, *D. v. France*) which referred to the advisory opinion rendered, pursuant to Protocol No. 16, by the ECtHR, Grand Chamber, on 10 April 2019, concerning the recognition in domestic law of a parent-child relationship between a child born from a gestational surrogacy arrangement abroad and his intentional mother, requested by the French Supreme Court of Cassation – sees precisely in Article 8 ECHR the foundation for the obligation of States to provide for the legal recognition of the parent-child relationship between the child and the intentional parents. While leaving the States a margin of appreciation as to the means to be taken – including adoption – to achieve such recognition, it binds them to the condition that the means are appropriate to guarantee the full protection of the rights of children. If the parent-child relationship has

already become a “practical reality”, the procedure laid down for recognition must be “implemented promptly and effectively”.

The child’s identity is thus engraved as a component of his or her life, an identity which the parent-child bond significantly strengthens.

All these points add clarity to the ECtHR’s assessment of any element aimed at strengthening the protection of children within a perimeter of actually enforceable rights, which translate into obligations for States to intervene if protection is not effective.

2.4.1.3.- The rules that are the subject of the questions as to constitutionality raised by the Court of Padua concern, as aforesaid, the condition of children born through recourse to heterologous MAP carried out in another country, in accordance with the law of that country, by a woman who had intentionally shared her project for parenthood with another woman and, for a sufficiently long period of time, exercised parental functions jointly, creating with her minor daughters an environment of affection and care. The circumstance that led the biological mother to sever such a bond with the intentional mother, coinciding with the emergence of conflict within the couple, has made a gap in protection quite clear. Despite the existence of an effective parent-child relationship, consolidated in the routine of daily life with the intentional mother, no instrument can be usefully employed to enforce the rights of the children: maintenance, care, upbringing, education, inheritance and, more simply, the continuity and comfort of shared habits.

The circumvention of the limitation laid down by Article 5 of Law No. 40 of 2004, as already mentioned, does not give rise to scenarios of conflict with constitutional principles and values. This Court has already had occasion to affirm, in line with the case law of the Supreme Court of Cassation on the subject of access to MAP, that, on the one hand, there is no constitutional prohibition on homosexual couples taking in children, even though it is within the legislator’s discretion to lay down the relevant rules; on the other hand, “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” (Judgment No. 221 of 2019).

On the contrary, the concomitance of the events described above reveals a worrying shortcoming of the legal system in guaranteeing protection to children and their best interests, in view of what is strongly affirmed by the caselaw of the two European courts as well as by constitutional caselaw regarding the need for permanent affective and family ties, even if not biological, and their legal recognition, in order to give certainty in the construction of personal identity.

In ruling out the existence of a right to parenthood for same-sex couples, this Court (Judgment No. 230 of 2020) considered the other side of the coin too, directly pertaining to the protection of the best interests of the child born through recourse to MAP carried out by two women. While recalling the line adopted by the case law of the Supreme Court of Cassation, which, in order to avoid a *vulnus*, held that so-called non-legitimating adoption was applicable on the basis of an extensive interpretation of Article 44(1)(d) of Law No. 184 of 1983, in favour of the same-sex partner of the child’s biological parent, this Court announced the urgent need for “a different protection of the child’s best interests, in the direction of giving more penetrating and extensive legal content to his or her relationship with the ‘intentional mother’, which would bridge the gap between factual and legal reality”, calling for the legislator to take action.

The issues raised by the Court of Padua confirm, even more incisively, the urgency of such action. They reveal in a tangible manner the inadequacy of adoption in special cases, as currently regulated, so much so that in this specific case it is rendered impracticable precisely in the most delicate situations for the child's well-being, situations that undoubtedly include a breakdown in the couple's relationship and the denial of consent by the biological/legal parent, a requirement under Article 46 of Law No. 184 of 1983. On the other hand, the provision of such necessary consent is linked to the peculiar features of adoption in special cases, which operates in typical and circumscribed situations, producing limited effects, given that it does not confer on the minor the status of legitimate child of the adopting party, does not ensure the creation of a relationship of kinship between the adopted child and the adopting party's family (considering the uncertain impact of the amendment to Article 74 of the Civil Code made by Article 1(1) of Law No. 219 of 10 December 2012, concerning "Provisions on the recognition of natural children") and does not interrupt the relationship with the original family.

From what has been said, it is clear that those born through recourse to heterologous MAP carried out by two women are in a worse condition than all other children, solely because of the sexual orientation of the persons who carried out the procreative plan. They are destined to remain in a relationship with only one parent, precisely because they cannot be recognised as the child of the other person who has pursued the procreative plan, and the protection of their overriding interests is seriously compromised.

Their condition reveals features that are only in part comparable to another category of children who, for many years, were precluded from being recognised as children (so-called incestuous children) and were granted limited forms of protection because of their parents' conduct. That led this Court to hold that there was a "perpetual and irremediable *capitis deminutio*", detrimental to the right to formal recognition of one's *status filiationis*, which is "a constitutive element of personal identity, protected not only by Articles 7 and 8 of the Convention on the Rights of the Child, but also by Article 2 of the Constitution", and contrary to the constitutional principle of equality (Judgment No. 494 of 2002).

2.4.1.4.- This Court believes that it cannot now remedy the lack of protection of the interests of children, which is fully reflected in the aforementioned constitutional principles. It is necessary, once again, to draw the attention of the legislator to this ethically sensitive issue, in order to strike, as already hoped for in the past, a "reasonable balance between the various constitutional interests involved, whilst respecting the dignity of the human person" (Judgment No. 347 of 1998). A specific intervention by this Court would risk generating disharmony in the system as a whole.

The legislator, in the exercise of its discretion, should, as soon as possible, fill the gap in protection against the incompressible rights of children. It is hoped that the matter will be regulated in a systemic manner that identifies the most appropriate ways of recognising the stable affective ties of children born through recourse to MAP carried out by same-sex couples, including with respect to the intentional mother.

By way of example, this could be a rewriting of the provisions on recognition, or the introduction of a new type of adoption, which would give full parent-child rights through a timely and effective procedure. Only an intervention of the legislator, regulating in a comprehensive way the condition of children born to same-sex couples through recourse to MAP, would make it possible to overcome the fragmentary and unsuitable legislative tools currently used to protect the "best interests of the child". It would also avoid the

'disharmony' that could arise as a result of intervention aimed only at resolving the problem specifically brought to the attention of this Court. Such as in the case where provision is made, as regards a child born through recourse to MAP carried out by a same-sex couple, for recognition of the status of child for that individual in the event of a breakdown in the couple's relationship and refusal of consent to adoption in special cases. Whereas, instead, the – less full and guaranteed – status of adoptive child under Article 44 of Law No. 184 of 1983 would be granted in the event of the biological mother's agreement and consent to adoption. The room for intervention of the legislator is therefore very vast and the measures necessary to fill the gap in the protection of minors are differentiated and synergic.

In declaring the question under examination inadmissible out of deference to the legislator's assessment of the appropriateness of the means to achieve a constitutionally necessary end, this Court cannot but state that the continuation of legislative inertia would no longer be tolerable, so serious is the gap in the protection of the overriding interest of the child, found in this ruling.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares inadmissible the questions as to the constitutionality of Articles 8 and 9 of Law No. 40 of 19 February 2004 (Provisions on medically assisted reproduction) and Article 250 of the Civil Code, raised by the Ordinary Court of Padua with the referral order referred to in the headnote, with reference to Articles 2, 3, 30 and 117(1) of the Constitution, the latter in relation to Articles 2, 3, 4, 5, 7, 8 and 9 of the Convention on the Rights of the Child, signed in New York on 20 November 1989, ratified and implemented by Law No. 176 of 27 May 1991, and Articles 8 and 14 of the 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.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 28 January 2021.

Signed by: Giancarlo CORAGGIO, President

Silvana SCIARRA, Author of the Judgment