

JUDGMENT NO. 229 YEAR 2015

In this case the Court considered a referral order from the *Tribunale Ordinario* of Naples questioning the constitutionality of Articles 13 and 14 of Law no. 40 of 19 February 2004 (Rules on medically assisted procreation) to the extent that they forbid and attach criminal sanctions to any form of embryonic selection for eugenic purposes, without providing an exception in the definition of the offense for situations in which medical providers' actions are intended to avoid implanting embryos affected by genetic diseases in the woman's uterus. The Court noted that its prior Judgment no. 96 of 2015 had declared unconstitutional certain provisions of the same Law, thereby already rendering legal the form of embryo selection in question. Therefore, the Court held that the provisions which, in contradiction with that Judgment, purported to criminalize said selection were unconstitutional. The Court also held that the question concerning the Law's criminalization of extermination of those embryos not selected for implantation due to genetic disease to be unfounded, as there were no prevailing, conflicting, constitutionally-protected rights at stake that would carry the provisions outside the bounds of legislative discretion.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in proceedings concerning the constitutionality of Article 13, paragraphs 3, letter *b*), and 4, and Article 14, paragraphs 1 and 6, of Law no. 40 of 19 February 2004 (Rules on medically assisted procreation), initiated by the *Tribunale Ordinario* of Naples during criminal proceedings against D.B. et al. with a referral order of 3 April 2014, registered as no. 149 of the Register of Referral Orders 2014 and published in the Official Journal of the Republic no. 39, first special series of 2014.

Considering the entry of appearance of D.B. et al.;

having heard from judge rapporteur Mario Rosario Morelli during the public hearing on 6 October 2015;

having heard from Counsel, Gennaro Lepre, on behalf of D.B. et al.

[omitted]

Conclusions on points of law

1.– The *Tribunale Ordinario* of Naples alleges that Article 13 of Law no. 40 of 19 February 2004 (Rules on medically assisted procreation) violate Articles 3 and 32 of the Constitution by indiscriminately forbidding under paragraph 3, letter *b*) and attaching criminal sanctions under paragraph 4 to “any form of selection of embryos for eugenic purposes,” without providing an exception in the definition of the offense for situations in which medical providers’ actions “are intended to avoid implanting embryos affected by genetic diseases in the woman’s uterus.” It alleges that this violates the aforementioned Articles 3 and 32 of the Constitution “for violating the reasonableness principle, the corollary of the equality principle,” and for infringing upon the right to health, also protected by “Law no. 40” with regard to the parental couple. It further alleges that Article 13 violates Article 117, first paragraph, of the Constitution in reference to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and ratified and executed with Law no. 848 of 4 August 1955 [hereinafter “ECHR”] “as interpreted in the case law of the European Court of Human Rights which states that the right to respect for private and family life includes a couple’s desire to have a child unaffected by genetic disease (see ECtHR *Costa and Pavan v. Italy*, 28 August 2012, § 57).”

The same *Tribunale* also submits the subsequent Article, 14, of Law no. 40 of 2004, paragraphs 1 and 6, to constitutional review, to the extent that they at once forbid and attach criminal sanctions to the act of destroying embryos, even in the case of excess embryos which prove to be affected by genetic diseases following the selection for the purpose of avoiding their implantation in the woman’s uterus.

The referring *Tribunale* suspects that the aforementioned provision violates Article 2 of the Constitution “in light of the protection of a couple’s right to self-determination;” Article 3 of the Constitution, for unreasonableness and inconsistency with the provision of Article 6 of Law no. 194 of 22 May 1978 (Rules on the social protection of motherhood and the voluntary termination of pregnancy), which “allows health workers to practice therapeutic abortions – including more than 90 days from the beginning of the pregnancy – where there are ‘pathological processes [...] such as those

associated with serious abnormalities or malformations of the fetus;” and Article 117, first paragraph, of the Constitution, concerning the same European parameter cited above.

2. – The first issue is founded, on the all-encompassing grounds and within the limits laid out below.

2.1. – With its recent Judgment 96 of 2015, this Court has already declared the preceding Articles 1, paragraphs 1 and 2, and 4, paragraph 1 of Law no. 40 of 2004 to be unconstitutional, “to the extent to which they do not allow fertile couples who are carriers of genetic diseases that meet the criteria for seriousness under Article 6, paragraph 1, letter b) of Law no. 194 of 22 May 1978 [...], diagnosed by the appropriate public institutions, to have access to methods of medically assisted procreation.”

And this for “the sole purpose,” as explained in the reasoning, “of making a prior identification [of embryos]” in order to implant in the woman’s uterus “embryos who have not received the pathology from their parent that carries with it the danger of relevant anomalies or malformations (if not untimely death) to the offspring” as the “normative threshold of seriousness” prescribes.

2.2 – According to the principle of non-contradiction, that which has already been made legal – by means of the aforementioned additive judgment – can no longer be included in the realm of criminal activities.

And according to these very terms and limits, Article 13, paragraphs 3, letter *b*) and 4 of Law no. 40 of 2004 meet the conditions for unconstitutionality, to the extent that they forbid and attach criminal penalties to embryo selection that is used by health providers for the sole purpose of avoiding the transfer into a woman’s uterus of embryos revealed by preimplantation genetic diagnosis to be carriers of hereditary genetic diseases that meet the seriousness threshold found under Article 6, paragraph 1, letter *b*) of Law no. 194 of 1978, as certified by the appropriate public institutions.

3. – The second, related issue, concerning the constitutionality of Article 14, paragraphs 1 and 6 of Law no. 40 of 2004, is unfounded.

Indeed, as this Court has repeatedly stated in its case law, legislative discretion concerning the identification of those actions subject to criminal sanctions are only subject to censure on constitutional grounds when it is exercised in an abusive or arbitrary way, such that it manifestly contradicts the canon of reasonableness (Judgments nos. 81 of 2014, 273 of 2010, and 364 of 2004; Orders nos. 249 of 2007,

110 of 2003, and 144 of 2001, *ex plurimis*).

In the present case, in light of the above, the legislator's 2004 choice to forbid and attach criminal sanctions to the "destruction of embryos," even applied to embryos revealed by preimplantation genetic diagnosis to be affected by serious genetic diseases, as in the case before the referring *Tribunale*, cannot be subject to judicial censure.

Even with regard to such embryos, the deformity of which alone does not justify treatment inferior to that afforded healthy embryos generated in "a quantity [...] greater than that which is strictly necessary for a one-time, simultaneous implantation," under paragraph 2 of Article 14, as integrated with additive Judgment no. 151 of 2009, the need to protect the dignity of embryos is described, to which no answer may currently be given other than cryoconservation. An embryo, whatever the more or less ascertainable legal status connected with the beginning of life, certainly cannot be reduced to mere biological matter.

In the aforementioned Judgment no. 151 of 2009, this Court has already recognized the constitutionally grounded protection extended to embryos, found in the general precept enshrined in Article 2 of the Constitution. The Court has held that this protection is subject to being "diminished" (as is the protection of a fetus: Judgment no. 27 of 1975), but only in the case that it conflicts with other interests of equal constitutional significance (like a woman's right to health), which may predominate in certain circumstances, as revealed by a balancing test.

In the criminal offense under review, the breach in the protection of the dignity of the (albeit) deformed embryo, which would result from its *tamquam res* destruction, is not justified, in terms of being outweighed, by protection of other, conflicting interests.

This supports the conclusion that the challenged incriminatory provision is not manifestly unreasonable.

The provision likewise does not run afoul of the claimed "right of self-determination," or, indirectly, of the cited European parameter, on the all-encompassing grounds that prohibiting destruction of the deformed embryo does not involve, for the reasons given above, forced implantation in the woman's uterus, as the referring *Tribunal* presumes and challenges on the basis of the parameters described above.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

1) *declares* Article 13, paragraphs 3, letter *b*), and 4 of Law no. 40 of 19 February 2004 (Rules on medically assisted procreation) to be unconstitutional, to the extent to which they characterize as a criminal offense the act of selecting embryos even in cases in which this selection is solely intended to avoid implantation in the woman's uterus of embryos affected by hereditary genetic diseases that meet the criteria for seriousness 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), diagnosed by the appropriate public institutions;

2) *declares* the question of the constitutionality of Article 14, paragraphs 1 and 6, of Law no. 40 of 19 February 2004 (Rules on medically assisted procreation), referred by the *Tribunale Ordinario* of Naples in the referral order indicated in the headnote, with reference to Articles 2 and 3 of the Constitution and Article 117, first paragraph, of the Constitution as it relates to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms [“ECHR”], signed in Rome on 4 November 1950, and ratified and executed with Law no. 848 of 4 August 1955 to be unfounded.

Decided in Rome, at the seat of the Constitutional Court, Palazzo della Consulta, 21 October 2015.