Section:	**Rights, Constitution and ECHR** – Human life – *Beginning of life*
Title:	*The prohibition of heterologous fertilisation before the Strasbourg Court: A warning sign for Italian Law No. 40?*
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Judgment of reference:	Judgment of 1 April 2010, First Section, S. H. and others v. Austria (No. 57813/00)
Parameters of the Convention:	Articles 8 and 14
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With this important judgment of 1 April 2010, the First Section of the Strasbourg Court returned to some issues concerning the use of medically assisted procreation techniques (hereinafter referred to as MAP) by sterile/infertile couples.

The judgment herein analysed is of particularly interest for Italian jurists, as it deals with the issue of the prohibition of the use of heterologous MAP techniques in Austrian legislation – a prohibition also provided for in Italian legislation – and its compatibility with ECHR.

However, before entering into the merits of the matter, some introductory remarks would be useful: the Austrian Act No. 293 of 1 July 1992 – "*Bundesgesetz mit dem Regelungen über die medizinich Fortpflanzung*" ("*Fortpflanzungsmedizingesets*" – hereinafter referred to as FmedG) – regulated the use of MAP techniques for sterile/infertile couples stating, as of Article 1, section 1(1) that they consist in "*…making use of medical techniques for inducing conception of a child by means other than sexual intercourse*".

Section 2 allows the use of MAP techniques only within the boundaries of a marriage or cohabitation, when the impossibility of pregnancy, also by means of less invasive treatments, has been medically ascertained.

In principle the FmedG allows only for homologous fertilisation. However, if spouse/cohabiting sperm do not have ability to conceive, sperm from a third donor may be used through *in vivo* fertilisation, that is, introducing them into the reproductive organs of a woman. In any case the Austrian law (Article 3 (2 and 3) FmedG) prohibits ova donation, *in vitro* heterologous fertilisation and surrogation. Article 8, by contrast, allows the use of MAP techniques with embryonic cells from third donors, but only with their certified consent and the prior authorisation of the judicial authority, or with notarial deed.

The MAP may only be carried out in specially authorised hospitals (Art. 4(2) FmedG) and in any case the right to conscientious objection is recognised to doctors and nurses as long as it does not cause discrimination against those who undergo such treatments (Art. 6 (1 and 2) FmedG).

Finally, couples having recourse to MAP may ask the competent health care institution for pre-implantation genetic diagnosis of the embryo, while the woman always has the option to withdraw her consent, also informally, to the *in vivo* implantation until the introduction of the semen in her uterus.

Considering these clear and detailed rules, the two couples applied to the Strasbourg Court alleging the violation of Articles 8 and 14 of the ECHR by the FmedG.
As regards the clinical situation of the first couple, the woman suffered from fallopian-tube-related infertility and her husband was also infertile: while Austrian legislation allows for sperm donation and its use only by direct implantation techniques in the uterus, that is *in vivo*, the couple claimed that in their case only the recourse to an *in vitro* heterologous fertilisation would have induced the pregnancy.

As for the second applicant couple, on the contrary, the woman suffered from agonadism and in order to have a child she should have not only receive an ova donation, but also have recourse to an *in vitro* fertilisation, both requirements prohibited by FmedG.

Therefore, both the first and the second couple were the subject of a restriction as for the use of MAP techniques, although for different reasons, because of the prohibition of *in vitro* heterologous fertilisation set out by the Austrian legislation. The applicants argued that such a restriction would breach Articles 8 and 14 of the ECHR, also because it is not clear why *"…the legislation in force allowed for artificial insemination with donor sperm, while it categorically prohibited ova donation. In particular the distinction made between insemination with sperm from donors and in vitro fertilisation with donor sperm was incomprehensible. Thus, the impugned legislation constituted discrimination prohibited by Article 14"* (paragraph 44 of the judgment).
The Austrian Government, recalling the Court's case-law on this point, claimed that in this case the national margin of appreciation is particularly wide and, therefore, the prohibition of *in vitro* fertilisation set out by FmedG must be considered to be objectively and reasonably justified. Indeed,

it pursues the legitimate aim not only of protecting the health and well-being of women, but also that of children that will be born thanks to MAP, as well as safeguarding the "moral values" of Austrian society.
Even if the right to respect for the private life of an individual includes the right to have a child, the Austrian legislator, with the FmedG, would have struck a fair balance between the interests at stake: such a balance led to a restriction in the use of heterologous MAP techniques, in order to prevent negative consequences as a result of their potential wrong use. For instance, they could open up possible "eugenic selection" of embryos to be implanted in the uterus of a woman by medical personnel.
Apart from these ethical considerations, in the view of Austrian Government, the ban on ova donation set out by FmedG also was intended to guarantee the basic principle of law of *"mater semper certa est"*.
The Strasbourg Court, while ascertaining the violation of Articles 8 and 14 of the ECHR read in conjunction, points out that some diverse considerations must be drawn with regard to the two applicant couples.

As regards the second couple, that could not use the MAP techniques because of the prohibition of ova donation set forth in FmedG, the Court considers that the concerns based on moral considerations advanced by Austrian legislator are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique. Indeed, when a state decides to regulate a certain field, while enjoying a wide margin of appreciation under ECHR, the legislation that will be enacted must in any case be shaped in a coherent manner and therefore guarantee adequately the different interests involved.

The Court, furthermore, stresses that the complete ban on ova donation was certainly not the only solution that the legislator could adopt in order to prevent the "eugenic" selection of embryos, also because the Austrian codes of medical ethics already prohibit this kind of selective intervention by health professionals.

The Austrian Government, moreover, submitted the argument of a possible risk of abuse of these techniques and exploitation of women from an economically disadvantaged background, that would be induced, because of this law, to sell their ova to get by. As regards this argument, the Court observed that it does not specifically concern the MAP techniques, but seems to be directed against artificial procreation in general. In the Court's view, indeed, the potential abuse of such techniques is always possible and has to be combated, but is not a sufficient reason for prohibiting a specific procreation technique.

The Austrian Government returned to this point during the hearing, when it submitted another argument against the possible donation of ova, also claiming that children born with MAP

techniques have a legitimate interest to be informed about their actual descent that would prove, in these cases, difficult if not impossible to ascertain.

In this respect the Court holds that such a right of the child is not absolute and, on this point, it recalls the case of *Odiévre versus France*, concerning the impossibility for the applicant to obtain information about her biological parents. In this case the Court found no breach of Article 8 of the Convention because the French legislator had achieved a proper balance between the interests at stake.

Moving on to the situation of the first applicant couple, the Court points out that the spouses could not use MAP techniques because heterologous fertilisation, under the Austrian legislation, was allowed only *in vivo* and not *in vitro*.

In the Court's view, in this case it must be considered whether the difference in treatment between a couple that, in order to fulfill their wish to have a child, is allowed to have recourse to sperm donation for *in vitro* fertilisation while another couple that, by contrast, lawfully may make use of sperm donation for *in vivo* fertilisation, has an objective and reasonable justification; otherwise it could be deemed that the national legislator, laying down a complete ban of *in vitro* heterologous fertilisation, pursues an illegitimate and disproportionate aim in respect of the objectives guaranteed by law.

In justifying the prohibition of sperm donation in the case of *in vitro* fertilisation but not in that *in vivo*, the Austrian Government reasserted the arguments already previously submitted. However, as regards the specific case, it introduced a further argument considered by the Court as relating to efficiency. The Austrian Government, indeed, argued that *in vivo* fertilisation had already been in use for a considerable time in Austrian hospitals – even before the FmedG entered into force – and, consequently, it could be allowed also by FmedG; furthermore, this type of MAP would be easier to manage, as it does not necessarily require the assistance of a trained medical surgeon during the execution of this medical treatment.

The Court completely rejects the Government view and spells out that *"Even if one were to accept this argument submitted by the Government as a question of mere efficiency it must be balanced against the interests of private individuals involved. In this respect the Court reiterates that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted* […]. *In the Court's view the wish for a child is one such particularly important facet and, in the circumstances of the case, outweighs arguments of efficiency. Thus, the prohibition at issue lacked a reasonable relationship of proportionality between the means employed and the aim sought to be realised"* (paragraph 93 of the judgment).

In the light of these considerations, the Court finds that the difference in treatment between the two applicant couples, as compared with a couple that lawfully could make use of sperm donation for *in vivo* fertilisation under FmedG, does not have any objective and reasonable justification in the Convention and, consequently, it has to be considered disproportionate. For this reason, the Court in both cases finds a breach of Article 14 of the ECHR read in conjunction with Article 8.
The judgment in the case S.H., as already been stressed, is of particularly interest for Italian researchers, because Italian Law No. 40 of 2004, in Article 4, paragraph 3 also prohibits the recourse to any heterologous assisted fertilisation technique. At first reading, therefore, the judgment herein analysed may be considered as a risky precedent for Italian legislation. Indeed, in providing such an absolute ban, it may incur, in the light of the Court's arguments, a violation of the ECHR.
It can be said, however, that the Austrian legislation was very different from that currently in force in Italy: for this reason, while the Court's judgment is very important, it might not be particularly relevant in the Italian legal system.
In Austria, in fact, heterologous fertilisation was not absolutely prohibited. *In vitro* fertilisation was prohibited with semen from a third, as well as ova donation from women: the Strasbourg Court, in the case above examined, merely observed that when only a specific heterologous fertilisation technique, such as *in vivo* with semen from a third, is allowed, such a choice is discriminatory for those couples that may only have a child with *in vitro* fertilisation, using sperm or ova from third donors.
In conclusion, discrimination occurs when national legislation allows the use only of certain heterologous fertilisation techniques and not others, without any supporting justification: the Italian legislation, on the contrary, does not provide for any exception, because it completely prohibits the recourse to any type of heterologous fertilisation.

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