Section:	**Rights, Italian Constitution and ECHR** – Human Life – *Right to life; Beginning of life*
Title:	***Positive obligations of the State and human life protection: analysis of a recent tendency in the jurisprudence of the* Grand Chamber *of the Strasbourg Court***
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Judgments of reference:	European Court of Human Rights, *Giuliani and Gaggio v. Italy* of 24 March 2011, *Grand Chamber* (no. 23458/2002); *S.H. and others v. Austria* of 3 November 2011, *Grand Chamber* (no.57813/2000)
Parameters of the Convention:	Articles 2, 3, 8 and 14 ECHR
Keywords:	Right to Life; Inhuman and Degrading Treatment; Public Policy; Private and Family Life; Non-Discrimination; National Margin of Appreciation; Positive and Negative Obligations on the States.

In the last two years, the tendency of Strasbourg Court rulings, and specifically those of the Grand Chamber, has been to review some decisions rendered by the Chambers, with the result of reconsidering rights and legal interests held in balance before the Sections. As a consequence, on the one hand a wider margin of appreciation has been granted to states on issues closely related to the protection of human life, and on the other a greater conceptual uncertainty has been brought about between positive and negative obligations placed on the member states of the Council of Europe.

The two judgments analyzed herein were rendered by the Grand Chamber in 2011 and are paradigmatic of the ongoing tendency of the Court: they concern the case of *Giuliani and Gaggio v. Italy* of 24 March 2011 (no. 23458/2002) and *S.H. and others v. Austria* of 3 November 2011 (no. 57813/2000). In both cases, indeed, the proceeding of the Chambers, respectively the Fourth and the Fifth Section, ended with the condemnation of all the respondent states. This result, as for the two cases, was overturned by the Grand Chamber.

More specifically, in the case of *Giuliani*, the Fourth Section of the Court ascertained, by four votes to three, the violation of article 2 of the ECHR with regard to the procedure. Indeed, the Court pointed out that the Italian authorities failed to establish a parliamentary committee of inquiry to ascertain the criminal responsibility for the events that led to the death of a protester during the demonstrations at the G8 in Genoa on July 2001.

As to the case *S.H. and others*, by contrast, the First Section of the Court held that there was a breach of articles 8 and 14 of the ECHR with regard to the Austrian legislation. Only in few cases,

in fact, did it allow the use of medically assisted procreation techniques of heterologous type. In particular, the First Section ascertained an infringement of the ECHR insofar as the aforementioned national legislation: a) allowed the donation of sperm but not of ova to third party couples, b) allowed the women to undergo *in vivo* fertilisation but prohibited them to use any kind of *in vitro* fertilisation.

In both cases, the Grand Chamber had the opportunity to provide a different and new evaluation of the facts, using a series of legal arguments in order to grant a wider margin of appreciation to states on issues concerning human life protection and, at the same time, reconsidering the intensity of the positive obligations of human life protection placed upon the states.
In the case of *Giuliani*, indeed, the Grand Chamber, while reasserting – as Section IV had already done - that any type of substantive violation of article 2 of the ECHR was ascertainable, extended this legal reasoning also to the – previously ascertained – violation of the article cited above, for the procedural aspect. In the Grand Chamber's view, in the facts of the case, *"…the use of lethal force was "absolutely necessary in defence of any person from unlawful violence"* […] *and that there has been no violation of the positive obligation to protect life on account of the organisation and planning of the policing operations during the G8 summit in Genoa and the tragic events on Piazza Alimonda. In arriving at that conclusion the Court, on the basis of the information provided by the domestic investigation, had available to it sufficient evidence to satisfy it that M.P. had acted in self-defence in order to protect his life and physical integrity and those of the other occupants of the jeep against a serious and imminent threat, and that no liability in respect of Carlo Giuliani's death could be attributed under Article 2 of the Convention to the persons responsible for the organisation and planning of the G8 summit in Genoa"* (paragraphs 307 and 308 of the judgment).
In the Court's view, the proceedings conducted by the Italian authorities as regards the police permitted an evaluation of the merits of the behavior of police officers and their eventual liability for the unlawful acts committed against the protesters in July 2001. The Grand Chamber pointed out not only that a parliamentary inquiry was carried out into the facts of the case, but also that the offices of the Genoa *questura* were the subject of a ministerial administrative inspection, in order to assess irregularities in the organization of police operations.
As for the guarantee of procedural rights to Giuliani's family, by contrast, the Court observed that "*it is true that under Italian law the injured party may not apply to join the proceedings as a civil party until the preliminary hearing, and that no such hearing took place in the present case. Nevertheless, at the stage of the preliminary investigation injured parties may exercise rights and powers expressly afforded to them by law.* […] *It is not disputed in the instant case that the applicants had the option to exercise these rights. In particular, they appointed experts of their own choosing, whom they instructed to prepare expert reports which were submitted to the prosecuting authorities and the investigating judge* […]. *Furthermore, they were able to lodge an objection against the request to discontinue the proceedings and to indicate additional investigate measures which they wished to see carried out. The fact that the Genoa investigating judge, making use of her powers to assess the facts and the evidence, refused their requests* […] *does not in itself amount to a violation of Article 2 of the Convention, particularly since the investigating judge's decision on these points does not appear to the Court to have been arbitrary"* (paragraphs 312 and 313 of the judgment).

In the Court's view, the positive procedural obligations deducible from Art. 2 of the ECHR oblige that an effective investigation into the facts examined be held by the respondent State. However, from Article 2 of the Convention, as interpreted by the Court, it is not necessarily deducible that such an investigation be carried out through a public debate on the legal liability of the officials being prosecuted. Therefore, if responsible national authorities conducted their investigation having recourse to all the legal instruments allowed by the internal legal system, it must anyway be deemed that the foregoing positive obligations, that can be inferred by Article 2 of the ECHR, have been duly fulfilled by the respondent state before the Court.
Furthermore, as stressed by the Court in paragraph 324 of the judgment, the applicants have never objected that the investigations carried out by national judicial authorities have infringed the principles of impartiality and independence of the process, nor the law enforcement forces - competent to gather evidence for the prosecuting magistrate – have been involved in the facts of the case. Finally, as highlighted by the Court, the investigations have been conducted with diligence and great rapidity: neither on this point have the applicants raised any objection.
In conclusion, the Grand Chamber ascertained that, in the case considered, Italian authorities were not responsible for any violation of Article 2 of the Convention, not even in its procedural aspect. With this holding the Grand Chamber overturned what had been assessed by the Fourth Section of the Court, recognizing that Italy fulfilled the positive obligations of human life protection, that can be inferred by the Convention.
Moving on to the reasoning of the Grand Chamber in the judgment *S.H. and others v. Austria*, it must be underlined as of now that the Strasbourg Court clearly and plainly spells out the central point of the issue of the case considered, in paragraph 85 of said judgment. In the Strasbourg Court's view, indeed, "*The next step in analysing whether the impugned legislation was in accordance with Article 8 of the Convention is to identify whether it gave rise to an interference with the applicants' right to respect for their private and family lives (the State's negative obligations) or a failure by the State to fulfil a positive obligation in that respect*".
According to the Court, Article 8 of the ECHR protects individuals from arbitrary interference by public authorities. From this perspective, it does not merely require that states refrain from such interference – stating, therefore, in the negative -, but obliges them to respect the private and family life of individuals, by taking positive action towards this objective. As the distinction – often a fine one – between a negative and a positive obligation placed upon a state party to the Convention is not possible in general and abstract, in the Grand Chamber's view the interests at stake in the particular case must be taken into consideration.
The issue in the case examined concerned the use of medically assisted heterologous procreation techniques in Austria. In particular, the Court had to determine if Austria was under a positive obligation to allow such methods, or, on the contrary, if a prohibition thereof by national legislation could be considered as state interference in the private and family life of its citizens, in breach of Article 8 of the Convention.
Unlike the First Section of the Court which had held in this sense, that is, ascertaining a violation of the ECHR, the Grand Chamber has a different view, because "*Having regard to the above considerations, the Court therefore concludes that, neither in respect of the prohibition of ovum donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for in vitro fertilisation under section 3 of the Artificial Procreation Act, the Austrian*

legislature, at the relevant time, exceeded the margin of appreciation afforded to it" (paragraph 115 of the judgment).
Nevertheless, as the Strasbourg Court argues in the following paragraph 117 of the judgment, "*the Court observes that the Austrian parliament has not, until now, undertaken a thorough assessment of the rules governing artificial procreation, taking into account the dynamic developments in science and society noted above. The Court also notes that the Austrian Constitutional Court, when finding that the legislature had complied with the principle of proportionality under Article 8 § 2 of the Convention, added that the principle adopted by the legislature to permit homologous methods of artificial procreation as a rule and insemination using donor sperm as an exception reflected the then current state of medical science and the consensus in society. This, however, did not mean that these criteria would not be subject to developments which the legislature would have to take into account in the future"*.
In this way, urging the Austrian Government and Parliament to review the requirements – both legal and scientific – of the legislation at issue, the Grand Chamber, in contrast with was upheld by the First Section, concluded that the Austrian legislation on the use of medically assisted heterologous procreation techniques was in conflict with Articles 8 and 14 of the Convention.
To end this analysis of the reasoning of the Grand Chamber in such recent judgments, attention should return to the initial comments and some considerations can be drawn.

First, it should be noted that the protection of life, in these two important judgments of the Court, arises differently: on the one hand, it is inferred from a positive obligation of the states to protect their citizens – in a broad sense – from any form of public or private violence, on the basis of an interpretation of Article 2 of the Convention that proceeds, at least, from the judgment in the case of *McCann and others v. United Kingdom* of 27 September 1995.
In the case of *S. H. and others*, on the contrary, the protection of human life, while not being directly under the Court's examination, arises indirectly from the fact that judges had to consider the compatibility of the Austrian law regulating the use of certain heterologous procreation techniques with the ECHR.

It must also be stressed that the Grand Chamber could reconsider the margin of appreciation of the states in a wider sense as compared to the judgments of the Sections. However, it actually focused its legal reasoning on the positive obligations that proceed from the Convention.

In this respect, it must be noted that the Grand Chamber deduced the lack of the aforesaid positive obligations differently in its judgments. In the case of *Giuliani*, indeed, the judges had to examine the activity of the Italian public authorities, in order to determine whether they had done everything provided for in the legal system to ascertain possible criminal responsibilities of the officials.

In the case of *S. H. and others*, instead, the Court urged the Austrian authorities to reconsider the opportunities to have recourse to heterologous procreation techniques, in the light of the new technical and scientific discoveries in this regard.

In the first case, therefore, the Grand Chamber held that Italy had done everything within its power to ascertain the responsibility for the facts of the case: the lack of establishment of an official parliamentary committee of inquiry, therefore, would not fall within the positive obligations imposed upon the states under Article 2 of the ECHR. In the second case, conversely, the Court recognizes wide discretionary powers on Austria, as regards the internal rules on the use of heterologous procreation techniques; however, it merely urged the Austrian authorities to "update" the national legislative framework in the matter of medically assisted procreation.

It remains to be understood, therefore, how the Court might decide on such issues in the future: while the case of *Giuliani* may be deemed finally concluded, on the contrary, it is possible that the Grand Chamber may return to evaluate the facts, at least similar, concerning the Austrian legislation in the matter of medically assisted procreation. From this point of view, therefore, the Court would seem to grant a further period of time to the states in order to fulfill the positive obligations that can be deduced from the ECHR. In this sense, then, the Court would seem to perform a function of *moral suasion*, not merely jurisprudential in the strict sense.

Therefore, in the first instance, this attitude of the Court would seem to weaken the legal incisiveness of its precedent decisions, particularly that of the Sections. On the other hand, however, the scope of the Grand Chamber's evaluation would seem to widen for, at least as regards the positive obligations to protect human life, it declares itself competent not only to examine the compatibility of internal legislation with the Convention, but also the specific actions undertaken by states in complying with the aforesaid obligations, in the light of the Court's guidelines.

In conclusion, the legal dialogue between states and Court would seem, therefore, to expand in this way. The perspective thereof does not seem restricted to mere legislation, but also to "institutional behaviours" that states have to adopt in order to comply with the obligations of the ECHR, also taking into account the suggestions coming from Strasbourg.

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a) Caso Giuliani:

Tribunale di Genova, 9 maggio 2006

b) Caso S. H.:

Legge n. 40/2004

D. M. sanità 11 aprile 2008 (Linee – guida)

Corte costituzionale: ordinanza n. 97/2010; sentenza n. 151/2009; ordinanza n. 369/2006.

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Case-Law (Precedenti)

a) Caso Giuliani:

Conformi: *Bubbins c. Royaume-Uni*, n° 50196/99; *McCann et autres c. Royaume-Uni*, 27 settembre 1995; *Makaratzis c. Grèce* [GC], n° 50385/99; *Bakan c. Turquie*, n° 50939/99, 12 giugno 2007; *Huohvanainen c. Finlande*, n° 57389/00, 13 marzo 2007.

Difformi (See, for a dissent point of view): *Çakıcı c. Turquie* [GC], n° 23657/94; *Andronicou et Constantinou c. Chypre*, 9 ottobre 1997; *Brady c. Royaume-Uni*, n° 55151/00, 3 aprile 2001; *Ahmet Özkanet et autres c. Turquie*, n° 21689/93, 6 aprile 2004; *Giuliani e Gaggio c. Italia*, n° 23458/02, 25 agosto 2009, IV sezione.

b) Caso S. H.:

Dickson c. Regno Unito, n. 44362/04, IV sezione, sentenza del 18 aprile 2006.

Evans c. Regno Unito, n. 6339/05, IV sezione, sentenza del 7 marzo 2006.

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