

The issue of constitutional law legitimacy on “human assisted reproduction” between reasonableness of the choices and effectiveness of the protection of all involved subjects.

1. Towards constitutional issue: the “warning sign” of decision 46 of 2005 of the constitutional Court.

The relationship between the constitutional Court and the law n. 40 of 2004 in matter of human assisted reproduction are destined to resume, after the remission to the Court from part of the Court of Cagliari of a issue of constitutional legitimacy on a disposition of the same law, just from the point in which it had been interrupted with the emanation of the relative decisions to the admission of the «multi-referendum»¹. Decisions, these last ones, than had not lacked to provoke critics, as well as regarding the outcomes, the conflicting, and regarding the motivations (or not?) adduced², but at the end they have been considered as a aware (or not aware) “legal oracle”, in the part (*not petita and tautologica and apparently overabundant*) in which it was specified: «it is not therefore in argument in this centre the appraisal of eventual profiles of constitutional illegitimacy of law n. 40/2004, so that from the present decision it is not sure lawful to less draw consequences approximately the conformity or to Constitution of the normative mentioned one».

A point that, if at one side gives confirmation of the Court’s coherence regarding the own constant jurisprudence, and it helps to distinguish the various functions that the system assigns to it; at the other side the implicit will leaved (or not leaved) under investigation a space opened to the appraisal of punctual and specific relieves regarding the “illegitimacy”³ of the discipline.

In such sense, it doesn’t seems to be strange that the first regarding issue of constitutional legitimacy of law 40 remittance to the Constitutional Court from the Court of Cagliari⁴, concerns dispositions which are called “preimplantatory diagnosis”⁵, one of the

¹ Expression used by P. CARNEVALE, “Ragioni, pretese e reali, della prassi del «plurireferendum» ugualmente orientato (in margine all’attuale vicenda dei referendum in tema di procreazione medicalmente assistita)”, in www.associazionedeicostituzionalisti.it.

² An exemple is given by A. RUGGERI, “Tutela minima” di beni costituzionalmente protetti e referendum ammissibili (e... sananti) in tema di procreazione medicalmente assistita (nota “a prima lettura” di Corte cost. nn. 45-49 del 2005)”, in www.forumcostituzionale.it.

³ It seems more than merely a *lapsus calami* when the Court speaks about a «giudizio sulla illegittimità costituzionale», when the Constitution and juridical praxis refer to «llegitimacy of the laws»: a remarkable “about-turn” of judgement.

⁴ The reference is connected to the decree of Court of Cagliari (16 of July 2005), which declared important and not manifestly groundless the question of constitutional legitimacy about article 13 of law 40 of 2004 on the matter of human assisted reproduction, in relation to articles 2, 3 and 32 of italian Constitution.

norms more discussed about law 40, inside of which the tension between law, ethics and science catches up the *acme* and less simple it traces a stable line of demarcation between individual sensibility and legal regulation of the truth.

This element provokes still less surprise, if we would consider how the Constitutional Court, in decision 46 of 2005, had opened, even if indirectly, the road to such type of jurisprudence's analysis, supplying to the prohibition⁶ over recalled a connotation that, would not be to a proceeding distance based on one preliminary distinction between judgment on the admissibility of the questions of referendum and that one on the constitutional legitimacy of the laws, constitutes one substantial «identification or (...) wide superimposition from one to the other judgment»⁷.

Connotation not free of concrete hermeneutical consequences, because from the decision of the Court, as soon as recalled, two obvious legal data emerge: the impossibility of concentre in category of constitutionally “bounded” or “necessary” laws⁸ the content of the exception (inserted in codicil 2 of art. the 13) to the general prohibition of experimentation and research on every human embryo and the acknowledgment of the fact that the eventual abrogation «is not placed (...) in contrast with the principles you mail from the Convention of Oviedo of the 4 April 1997 open on the rights of the man and on the biomedicine and from the additional Protocol of 12 January 1998, n. 168, on the prohibition of cloning of human beings, that law n. 145 of 28 March 2001, has given to execution», because «object of the prohibition of which at art. 1 of the recalled Protocol they are, in fact, only the directed participations to obtain genetically human being identical to another human, a living or dead man, as we observed before such like participations – as the standard of the norm turns out – already remain prohibit»⁹.

To the aim to eliminate a dangerous *fumus* that could weaken the formulation adopted in this dissertation, we have to reveal the logical distance (nearly syllogistic) theorized, that may be summed in a question mark: the lacked qualification as “necessary” of the disposition

⁵ Even if the legislative text does not use such terminology, it limits itself to preview at article 13, codicil 1 that “it is prohibited whichever experimentation on every human embryo”.

⁶ Particularly when it says that clinical and experimental investigation can be allowed «only for therapeutical and diagnostic purposes to protect embryo's health and development, and if aren't available any other methodologies».

⁷ Again, A. RUGGERI, op. cit.

⁸ These two normative categories it seem they are used by the Court in a undifferentiated way, and the original distinction of meanings disappeared. For instance, G. MONACO, “Il referendum per l'abrogazione della legge sulla procreazione medicalmente assistita di fronte al limite delle «leggi costituzionalmente necessarie»”, in *Giurisprudenza costituzionale*, gennaio-febbraio 2005, pagg. 351 ss., and the commentaries on the decision 45 of 2005 of constitutional Court at www.forumcostituzionale.it.

⁹ According to the point 4.1 of decision 46 of 2005 of constitutional Court.

under investigation from part of the Court a reading can legitimate, coherent with the constitutional discipline in matter of health of the individuals, that it opens to the possibility to insert between the “therapeutic and exclusively diagnostic purposes” also those times to the protection of the health of the mother?

Perhaps the question introduces the nature of “predictive legal surveying”, but it persists to be open and susceptible of being connoted from multiple contained.

However the indications derived from the decision n. 46, descends inside of a short but meaningful jurisdictional distance in matter originated from a previous decree¹⁰, can assume the function of legal pointers of the (possible) outcome of pronounce relative to the constitutional legitimacy of article 13 of the law.

The fundamental problem, to the aim to comprise the question, is essentially to choose preliminary a precise legal perspectives, among multiple hypothetical ones, and the decision 46 of the Court could meaningfully have contributed to increase this perspectives, in order to effectively assure the rights of *all involved subjects*¹¹. The necessity of a such pre-condition is rendered obvious from the recent systematic analysis of jurisdictional pronounce in matter, the decree of the Court of Catania and the successive decree of the Court of Cagliari.

2. The difficult way of approach of the merit jurisprudence.

It is interesting to observe like the pronounces taken under investigation leave, also landing, as we will see, to divergent conclusions, from common, even if various declined, given a legal one: the “non-existence” as well as of a «absolute right of the parents of having a son as they wish», in order to use the “maximalist” expression of the judge of Catania, and also of a simple «interest of the parents to having a healthy son», according to «the systematically moderated» perspective of the Court of Cagliari.

The two courts move from a common conceptual substrate that appears moreover still more extended, if we proceed in the critical analysis of both argumentations. In fact, it is solved in the sense of its negation the issue of the configurability of a right to a “healthy son”. The perspective comes increased so as to include, inside the undertaken hermeneutic syllogism, the constitutional parameter of the protection of the health of the woman who approaches the techniques of human assisted reproduction.

¹⁰ The reference goes to the decree of Court of Catania (3rd of May of 2004), in E. CAMASSA – C. CASONATO (a cura di), “La procreazione medicalmente assistita: ombre e luci”, Trento, 2005, pagg. 217-250.

¹¹ The Court, in decision n. 48 of 2005, said that «article 1 of the law, when guarantees the rights of every subject involved, including the conceived, possesses a merely declaratory content, so the concrete protection of all the subjects involved have to be drawn to the whole of other norms of the law».

The constitutional theme woven, therefore, acquires greater solidity and it becomes legally binding thanks to the explicit references to a right¹² which is the protection of individuals health, it obligates the interpreter to give a formulation of rights not univocal, exclusive and excluding (and, therefore, *de facto* not balanced) but necessarily pluralistic¹³.

In fact, as have meaningfully found the judge of Catania, «right is relation».

Right has to find concrete application in order not to be reduced to a simple manifestation of *potestas* but it has to legitimate itself in many *auctoritas*, and it has to enter in relationship with the context in which it has to live, «*this does not say what right is absolutely, but only what is right in relation to*»¹⁴.

Therefore, to be effectively considered a *balanced right* it must continually place in relation, (through risen a compromise we have to refer to the Zagrebelsky's definition)¹⁵, the plurality of constitutional interests involved don't depend on the balance with the other interests that, in every various and specific circumstance, are found to concur, «it seems lawful to ask to ourselves if a normative content of the "law", whose definition can be completed "in abstract", could be configurable, without a necessary balancing of the differents concretes right»¹⁶.

If we consider this position we can not identify the Constitution as the fundamental legal compass, it is the only instrument that can orient the legislator as well as the interpreter, in order to find the corrected balance. And, in the moment in which one incurs in (eventual) impossible applications or hermeneutical uncertainties, it appears obvious that we have to address to the guardian of the Constitutional's rigidity and protection: the Constitutional Court.

Such a point can be an effective parameter to valuate if we apply it to the decrees that we are analysing, we have to abandon the common rule to explain and to analyse these subjects, in order to enter diametrically opposite roads.

¹² The only one to be qualified in the constitutional text as "fundamental".

¹³ It seems that the letter of the law in itself prescribe it, when includes in its purposes to protect the rights of *all* the subject involved.

¹⁴ Point 11 of decree of Court of Catania.

¹⁵ The Author refers to «constitutional moderation» associated with concepts of coexistence and compromise, idea that « non si tratta affatto di una rinuncia (...) si tratta invece di una maggiore pienezza di vita costituzionale che non deve essere sostenuta con l'atteggiamento rassegnato di chi si piega ad una necessità (...)», G. ZAGREBELSKY, "Il diritto mite", Torino, 1992, pag. 12.

¹⁶ R. BIN, "Diritti e argomenti", Milano, 1992, pag. 4. Furthermore, according to L. MENGONI, "L'argomentazione nel diritto costituzionale", in ID., "Ermeneutica e dogmatica giuridica", Milano, 1996, pag. 122, ««nei processi applicativi delle norme sui diritti fondamentali la tecnica del bilanciamento è, essa stessa, la *forma della decisione*, la quale consiste in un giudizio di *prevalenza* di uno o l'altro dei principi che nel caso concreto vengono a configgere, oppure di *concorrenza* dell'uno con l'altro in condizioni di reciproca limitazione».

At a first reading, it appears obvious that instead of limiting himself to an appraisal regarding to the “not manifest foundation” of the raised exceptions¹⁷, the judge of Catania, «replacing the constitutional Court, here that he wants to solve all the possible doubts, also those that the recurrent didn't pose to him»¹⁸, he goes in such a way through the competences that law 1953, n. 87, gave to him to the aim «to throw every light on possible censorship that it could be moved to the law»¹⁹.

The judge of Catania's decree, «whose length is exceptional if compared to the brevity that of usual characterizes this type of pronounce»²⁰, it appears a return to a judge as a mere mouth of the law, recognizing, in the matter under investigation, one (exclusive) importance in the legislator's intention, in fact it could constitute a serious violation of the same foundation of the democracy, «because it made sovereign the interpreter in place of the legislator»²¹.

This formulation does not exhaust the own effects of the modalities of exercise of the jurisdictional function but it can potentially modify the total constitutional order of the State, opening to a «positivist reduction of the legitimacy (that is of the justice) to the legality» and this does not find space in the constitutional that characterizes our legal system²².

It could be supported in fact like the written law, the legality understanding like legislative product, represents the only possibility of the law, a law “in power” that comes to the light through one ineluctable finalized hermeneutical activity to its concrete application: in fact to interpret and to comprise the legal text is not a merely declaratory activity but it concurs to the same formation of the law²³.

¹⁷ It should be possibile to consider this decree a case of «ordinanze di rigetto di istanze di parte così argomentate e complesse che dalla loro stessa struttura si poteva ricavare con certezza che la questione era discutibile (...) e tutt'altro che manifestamente infondata», in the opinion of G. ZAGREBELSKY, “*La giustizia costituzionale*”, Bologna, 1977, pag. 100.

¹⁸ R. BIN, “Sussidiarietà, privacy e libertà della scienza: profili costituzionali della procreazione assistita”, in E. CAMASSA – C. CASONATO, *La procreazione medicalmente assistita: ombre e luci*, pag. 42.

¹⁹ R. BIN, “Sussidiarietà, privacy e libertà della scienza: profili costituzionali della procreazione assistita”, pag. 42.

²⁰ *Ibidem*.

²¹ Point 2 of decree of Court of Catania. This could be a juridical approach which increases «l'idea di un legislatore sovrano, a cui l'investitura democratica conferisce un potere assoluto che vincola il giudice anche al di là del testo normativo: un trionfo della volontà della maggioranza su ogni altra istanza, compresa la divisione dei poteri, l'autonomia della magistratura, la funzione normativa della costituzione», R. BIN, “Sussidiarietà, privacy e libertà della scienza: profili costituzionali della procreazione assistita”, in E. CAMASSA - C. CASONATO (edits.), *op. cit.*, pag. 53 ss.

²² L. MENGONI, *op. cit.*, pag. 117.

²³ For a systematic reconstruction of the ‘living law’ theory, L. MENGONI, “Il «diritto vivente» come categoria ermeneutica”, in ID., *Ermeneutica e dogmatica giuridica*, pagg. 149 ss., in which it is enuciated the opinion of ASCARELLI, *Certezza del diritto e autonomia delle parti*, in ID., *Problemi giuridici*, I, Milano, 1959, pag. 74, who said that «l'applicazione trova la sua giustificazione nell'interpretazione e ogni interpretazione visualizza una applicazione (al caso o a una classe di casi)».

However, in the passage between the enunciation of the theoretical premise and its application to the covered concrete proceeding, it turns out obvious as the content of the decision of the Court of Catania ends with an intrinsic logical and methodological contradiction.

In fact, the judge of Catania seems to deny the presupposed one on which the own decision is founded, in how much, in order “to save” the normative dispositions object of the constitutionality relieves, ends with applying the legal instrument connected to the concept of “adequate interpretation”²⁴, of which it had preliminarily and implicitly sanctioned the substantial not application through the reference to the “greater classified relief” to the intention of the legislator.

3. Divergent hermeneutic perspectives in the light of the “adequate interpretation”.

The reference is to the adequate interpretation, not explicitly deduced from the decree of Catania but that in the issues of constitutional legitimacy constitutes a «an ulterior canon of interpretation (...) there is no doubt about the possibility to identify in such independent a category of hermeneutical canon»²⁵, that consists in reconstructing the distribution in order to attribute to it a normative meaning (among all the abstract possible meanings) this is not in contrast with constitutional parameters, so the judge is not obliged to raise the constitutional issue.

A consolidated constitutional jurisprudence²⁶ has recognized legal importance to the hermeneutical, elevating, next and beyond to the two presupposed objective ones (importance and not manifest groundlessness, former art. 23 of law 23 March 1953, n. 87), to substantial condition of admission the impossibility of such type of interpretation²⁷: so much that «the

²⁴ About this hermeneutical instrument and its connection with ‘living law’ and direct enforcement of Constitution, E. MALFATTI-R. ROMBOLI-E. ROSSI, *Il giudizio sulle leggi e la sua “diffusione”*. Atti del seminario di Pisa svoltosi il 25-26 maggio 2001 in ricordo di Giustino D’Orazio, Torino, 2002.

²⁵ According to G. AMOROSO, “L’interpretazione «adeguatrice» nella giurisprudenza costituzionale tra canone ermeneutico e tecnica di sindacato di costituzionalità”, in *Foro italiano*, 1998, part V, col. 91.

²⁶ For instance, the decision n. 121 of 1994; decision n. 242 del 1999 and n. 470 del 2002. In contra, the contribution of R. GUASTINI, “Principi di diritto e discrezionalità giudiziale”, in AA.VV., *Interpretazione e diritto giurisprudenziale. Regole, modelli, metodi*, Torino, 2002, pagg. 349 ss.: according to this Author, «quel che è certo è che un dovere giudiziale di fare interpretazione adeguatrice (...) non sussiste»: «soprattutto, è lecito sostenere che, di fronte ad una disposizione di legge che ammetta anche una sola interpretazione difforme alla costituzione, il giudice – lungi dall’aver l’obbligo di fare interpretazione adeguatrice – abbia anzi l’obbligo di sollevare questione di legittimità costituzionale di fronte alla Corte».

²⁷ According to the constitutional Court (decision n. 121 of 1994), «compito dei giudici è proprio quello di interpretare le norme di cui devono fare applicazione e che, infine, di fronte a più possibili interpretazioni di un sistema normativo, essi sono tenuti a scegliere quella che risulti conforme alla Costituzione; con la conseguenza che la dichiarazione di illegittimità costituzionale costituisce soluzione obbligata solo nell’ipotesi in cui tutte le possibili interpretazioni delle norme denunciate, inquadrate nel rimanente sistema, dovessero risultare, in sede di concreta applicazione, in contrasto con i principi costituzionali». It could be possible identify an evolutionary

radical omission of a first verification of the possibility exegesis of one adequate of the contested normative data constitutes (...) absorbent reason of inadmissibility of the raised issue»²⁸.

That demonstrates the subsistence at on one side, in head to the judge a quo, of a obligation²⁹ to search “the best one of the constitutionally among the interpretations”; from the other side, it express the paradoxical (when it is not contradictory) legal substrate of the reasons of the decree of Catania.

In fact, in the moment in which the judge asserts that it is not possible, in applying the law, going beyond the letter of the dispositions and the intention of the legislator, he seems indirectly, assuming like methodological and systematic premise a reduction of the hermeneutical activity to an automatic rifle the procedure of subsumption, to exclude the instrument of the adequate interpretation, that is the example more evident of judge’s discretion.

Here there the paradox, or better the discontinuity, are – at least in the opinion of the writer – evident, because the judge of Catania before excludes such canon *a priori*, in order then to apply it in concrete to the aim “to save” the law and to demonstrate that «the issues (...) are based on an error of right and two logical misunderstandings» (point 6 of the decree), we have necessarily to choose, in the concrete legislative disposition, between various possible interpretations (and so norms)³⁰.

journey in the constitutional jurisprudence which starts from the “type” of “rejection interpretative decisions” (in which the Court «si basa su una norma conforme alla costituzione per respingere la questione, che apparirebbe viceversa fondata sulla base di un’altra interpretazione», aiming at «a promuovere lo spontaneo adeguamento dei soggetti dell’ordinamento all’interpretazione conforme alla costituzione», secondo G. ZAGREBELSKY, *La giustizia costituzionale*, pagg. 186 ss.) and it comes to the category of the «*ordinanze di manifesta inammissibilità per insufficiente sforzo interpretativo*: decisioni nelle quali l’inammissibilità della questione viene fatta discendere dal mancato adempimento (...) del dovere di utilizzare tutti gli strumenti ermeneutici che gli sono riconosciuti al fine di trarre (...) un significato costituzionalmente corretto», secondo V. MARCENÒ, “Le ordinanze di manifesta inammissibilità per «insufficiente sforzo interpretativo». Una tecnica che può coesistere con le decisioni manipolative (di norme) e con la dottrina del diritto vivente?”, in *Giurisprudenza costituzionale*, gennaio-febbraio, 2005, pag. 786.

²⁸ Constitutional Court, decision n. 443 of 1994, mentioned by G. AMOROSO, *op. cit.*, col. 92.

²⁹ Criticizes this approach A. PACE, “I limiti dell’interpretazione «adeguatrice»”, in *Giurisprudenza costituzionale*, 1968, pagg. 1069 ss. According to A. ANZON, “Il giudice a quo e la Corte costituzionale tra dottrina dell’interpretazione conforme a Costituzione e dottrina del diritto vivente”, in *Giurisprudenza costituzionale*, 1998, pagg. 1086 ss., «in presenza di una norma di diritto vivente la “doverosità” dell’interpretazione adeguatrice si trasforma in “sussidiarietà”: l’impossibilità di una interpretazione adeguatrice non è più una delle condizioni per l’emanazione dell’ordinanza di rimessione».

³⁰ According to R. BIN, *op. cit.*, «nel pensiero del Tribunale di Catania (...) la costituzione non c’è: la sua tutela, la sua interpretazione, il suo “inveramento” non possono essere affidati ad altri che al parlamento democraticamente eletto e alla maggioranza che esercita il potere legislativo. Questa, per i giudici, deve essere una direttiva interpretativa inderogabile. La legge, dunque, non può essere criticata - e quindi impugnata davanti alla Corte costituzionale - né interpretata “secondo costituzione”, perché significherebbe “eludere” la volontà del legislatore sovrano».

On the other hand, the same constitutional Court many times has asserted that «in presence of two possible interpretations of a law, of which a single one in compliance with Constitution, is constantly asserted principle from this Court (decisions n. 149 of 1994, ord. n. 121 of 1994, sent. n. 456 of 1989) that this interpretation must be continuation».³¹

More recently, the Court has confirmed that «the judge can exercising his powers interpreting the norms according to Constitution also in presence of a juridical guideline»³²: this affirmation demonstrates that (presumed) contrast between theory of the “living law” and technique of the adequate interpretation is revealed alone appearing, being able itself to recognize a mutual relationship of instrumentality works, inside which the second one constitutes the nucleus push-button of before. A logical consequentiality that still before legal, that it sees in the hermeneutical moment the source and the limit (in how much constant instrument of control of its effectiveness) of the “living law”.

This relationship of mutual instrumentality and dependency comes effectively picked from the constitutional Court when, referring to the right interpretation function of the Court of Cassation, it characterizes which essential element of the ‘living law’ the «evolution in the time»³³ of this last one: the adequate interpretation constitutes therefore not as well as a former doctrine if how much the hermeneutical instrument through which the ‘living law’ adapted, to the light of the constitutional principles, to evolve of the truth of the normative data, rendering it “living” in the sense of the concrete legal effectiveness. The ‘living law’ is born, second this perspective, from the same ‘adequate interpretation’, which does not exhaust the own genetic force in instantaneous way, irradiating on the contrary with it constantly the life of the law applied.

The law, through the hermeneutical instrument of the application with Constitution (that reassumes the various types of interpretation), becomes straight that lives effectively in social reality, calling the ordinary judge to a greater assumption of responsibility that rather translate not as well as in a diffuse control of the constitutional legitimacy of the law how much in the acknowledgment than one axiological hierarchy that still before formal between Constitution and legislative disposition³⁴.

³¹ Constitutional Court, decision n. 255 of 1994.

³² Decree n. 2 of 2002.

³³ The Court uses this expression in the decree n. 322 of 2001.

³⁴ According to M. PERINI, *op. cit.*, pagg. 66-70, «la particolare relazione (...) tra la disposizione legislativa e quella costituzionale, potrebbe consistere in una gerarchia di tipo assiologico, che non influisce sulla validità/invalidità delle norme interessate, ma opera sul piano squisitamente ermeneutico» (pag. 70).

Therefore, carried out such conceptual premises, like not recognizing in the reading that comes proposed of the limits to revoke of consent (art. 6, codicil 3 of law 40)³⁵ in the sense to recognize of concrete, «the obvious and sure material not coercibility»³⁶, an activity of interpretation that goes beyond the letter (“until the moment of the fecundation”) and the intention of the legislator (“to assure the rights of all the been involved subjects, comprised the conceived one”), opting for meaning (between those possible ones) in compliance with the exegetic perspective of the interpreter?³⁷

So it is a distance inversely proportional to that one completed from the Court of Cagliari in the recent decree, because the first one seems to deny the former legitimacy of the canon considered in order then to reach to its effective application; the second, on the contrary, is placed in a line of adhesive continuity with the constitutional jurisprudence in this matter, but it recognizes the concrete impossibility of application, asserting that «the carried out considerations do not concur (...) one adequate interpretation of the norm»³⁸.

In this way the judge that empty of hermeneutical valence the used instrument, reconstruct one constitutionally compatible normative reading; and the judge that assert its theoretical validity, recognize the concrete inapplicability³⁹.

4. The perspective of the Court of Cagliari: paradoxical coherence with the purpose of law 40?

The Court of Cagliari reconstructs the impracticability of such an hermeneutical way on the base of rising of binding force of the restrictive interpretation commonly accepted of art. 13, codicil 2, of law 40⁴⁰. In fact this law excludes «the possibility of a preimplantary diagnosis on the embryo where the same one is not finalized exclusively to the protection of the health and the development of the same embryo».

The actors had proposed an ulterior reading, “constitutionally oriented”, than, in application of article 32 of the Constitution and «on the base of the appraisals already

³⁵ In which said that «la volontà può essere revocata da ciascuno dei soggetti indicati dal presente comma fino *al momento della fecondazione* dell'ovulo».

³⁶ Point 13 of the decree of Tribunal of Catania.

³⁷ In fact, «nello Stato costituzionale di diritto l'interpretazione della legge diviene un'operazione non meramente cognitiva ed applicativa delle fonti positive di produzione parlamentare (metodo politico di produzione del diritto) ma anche (a) operazione valutativa della conformità della fonte positiva rispetto ad altra fonte sovraordinata, (b) operazione evolutiva-adequatrice della fonte legislativa ordinaria rispetto alla fonte sovraordinata», come si può leggere nelle dispense del corso di Diritto costituzionale transnazionale ed europeo della Facoltà di Giurisprudenza di Trento.

³⁸ Decree of Court of Cagliari.

³⁹ In fact, according to the Court of Cagliari, «il giudice (...) deve *sempre*, nella interpretazione delle disposizioni di legge ritenute applicabili alla fattispecie (...), cercare di vagliarne le varie possibili interpretazioni scegliendo, *ove possibile*, quella non confliggente con principi o norme costituzionali».

⁴⁰ He refers to «primo embrione di diritto vivente giurisprudenziale» P. VERONESI, “Diagnosi preimpianto: i nodi al pettine. Dopo il referendum tocca alla Consulta”, in *Diritto e giustizia*, n. 33, 2005, pag. 17.

operated from the constitutional Court in numerous regarding decisions the interruption of the pregnancy», was suitable to guarantee the right to the preimplantary diagnosis «to the aim to proceed to the successive transfer of the embryo in case it had not turned out affection from serious genetic diseases, waves to avoid a serious prejudgment to the health of the mother».

The prosecuting attorney, taken part in judgment, joining substantially to the position of the recurrent ones, delineates an interpretation that, leaving from presupposed second which the preimplantary diagnosis would constitute the «operation to neutral content regarding any successive participation on the embryo» (therefore, “with the exception of the activities of search and experimentation could not be subordinate to limit some”), would have to lead to the not enforceability of art. 10 of the guidelines, for «obvious contrast with the dispositions at tart. 13, codicil 2, and 14, codicil 3, of the law». The diagnosis, second the interpretation supplied from the prosecuting attorney, would be therefore legitimate in the «single case in which they have made some demanded the members of the brace (...) that they mean to know the state of health of the embryo», rising, in such only case, «it obligation for the sanitary structure to practice the diagnosis».

There could be the risk of a constitutionally consistent interpretation, different from the unanimous restrictive interpretation. However, the judge thinks that there are no presupposed norms which can concur such adequate interpretation, becoming «then the examination of the issue of constitutional necessary legitimacy», founded on a presumed violation of the right to the health of the woman who demands the diagnosis.

Here two orders of issues are opened: on one side, in fact, it does not seem forced to interrogate itself on the opportunity to use the reference to rising of “binding previous interpretation” on the base of a jurisdictional distance constituted from a number much meager one of decisions, relatively to one normative whose praxis cannot sure be considered consolidated. The risk could be that one of a ‘judicial crystallization’ that, anticipating the physiological times of formation of a ‘living law’ in matter, it changes the relationship of twofold consequence between this last and adequate interpretation, eventuality perhaps works them to a greater certainty of the right but that door with himself the danger of a hermeneutical conservation that prevents to whichever exegesis other, even if constitutionally founded, of the normative data: a right that survives, instead of living⁴¹.

⁴¹ P. CALAMANDREI, *Elogio dei giudici scritto da un avvocato*, mentioned by G. SILVESTRI, *L'organizzazione giudiziaria*, (www.associazionedeicostituzionalisti.it): «la peggiore sciagura che potrebbe capitare a un magistrato sarebbe quella di ammalarsi di quel terribile morbo dei burocrati che si chiama il conformismo».

A second issue regards the possibility that the Court identifies in the renunciation to privilege the adequate interpretation an «absorbent reason of not admission of the raised issue»⁴². However, to dispel the configuration of such outcome, the same Court has recognized like requirement of the sufficient motivation, completed from the replacing judge, allows to pass to examine in the merit the constitutionality issue. The necessity to adhere to one tight application of a parameter expression of the maximum policy (creativity)⁴³ of the Court seems to exclude such probability, in consideration of the solidity and coherence of the motivations adduced from the judge of Cagliari.

The mechanism of the “deducted judicial syllogism” in decree seems in such effective sense to the aim to avoid one eventual censorship of the Court, also regarding the juridical consolidation of the parameter of the “insufficient effort of interpretation”⁴⁴: acknowledgment of the necessity to carry out one ulterior preliminary appraisal regarding the possibility to reconstruct an adequate interpretation; practical impossibility to characterize it; necessity to analyze the issue of raised constitutional legitimacy from the parts.

The adequate interpretation, therefore, seems to defer from the importance judgments and “not manifest groundlessness” from a axiological point of view and works them, much from being able to be considered one risen of a suspending procedural condition of the successes to you merit judgments: object of before is the disposition in its (possible) normative reconstruction; object of the second ones is instead the content of the concrete exception; first part from the disposition, the second ones from the norm that gives it comes draft.

Therefore, we come to a distance that the judge of Cagliari completes in estimating the estate constitutional (not manifest groundlessness) and substantial (importance) of the constitutional issue. The constitutional parameter is represented from the fundamental right to the health of the woman, based on determine if the refusal of the preimplantary diagnosis from part of the doctors (refusal that it constitutes implementation of a obligation legal that turns out needed from the letter of law) can constitute the danger of one lesion⁴⁵.

It appears obvious, also at one first reading, like, once again, we assisted, regarding the decree of Catania, to a differentiation of the legal perspective of judgment completed from

⁴² Constitutional Court, decision n. 443 of 1994.

⁴³ According to G. AMOROSO, *op. cit.*, col. 94, who mentions the decision n. 360 del 1994 of the Court in which it said that «tanto è sufficiente per poter passare ad esaminare nel merito la questione di costituzionalità».

⁴⁴ About this matter, the article of V. MARCENÒ, *op. cit.*

⁴⁵ Turning out, on the contrary, «coercibilissimo», as defined by C. CASONATO, “Legge 40 e principio di non contraddizione: una valutazione d’impatto normativo”, in E. CAMASSA – C. CASONATO (a cura di), *op. cit.*, pag. 25.

the judge of Cagliari, than, if considered to the light of the letter and the intention of the legislator, it is revealed as coherent application of the normative purposes enunciated from article 1 of law 40: the necessity to assure the rights to all the subjects involved necessarily implies a plural approach regarding the centres (or cores) of important interests in the single dispositions.

Therefore, the affirmation legally appears incontrovertible stiff to recognize «the subsistence of a being involved conflict, on one side, the protection of the health of the recurrent one and, from the other, the protection of the embryo», therefore as the conclusion is revealed constitutionally bound and logically unavoidable which the judicial organ reaches: «in this situation (...) the protection of the health of the woman appears inadequate – with consequent violation of art. 32 of the Constitution – but does not only turn out not even mainly guaranteed the health of the embryo».

The topical structure surprises for the simplicity and the rationality of proceeding, appearing like an effective adaptation of the going back but constant constitutional jurisprudence in matter of voluntary interruption of the pregnancy: recognized a conflict between interests constitutionally protect, it is constitutionally necessary to reach to a balance that achieves an elastic in the event concrete hierarchization, than does not reduce to a bellum omnium contra omnes but that, on the contrary, it catches up an unstable equilibrium, through the technique of the constitutional compromise.

5. The mother's health between continuity and effectiveness of the legal protection.

The circular course of this analysis reaches thoroughness resuming the concept of legal perspective and connoting it in pluralistic sense, recognizing that is the configurability of one plural declination of the same one: not *one* point but many points of view, multiple you show us that they go harmonizes to you, reducing the unavoidable conflict for how much possible to one situation of competition in conditions of mutual limitation⁴⁶.

Therefore, where the judge of Catania asserts that «it is illogical to say that when is a risk for the health of the unborn, it would be up to the mother to decide that balance of interests to operate», manifesting one chosen that the health of the unborn reduces the legal field to an one dimensional perspective level, the Court of Cagliari recognizes a plurality of requests and, leaving from the necessity to guarantee them both on one side «when that is possible»⁴⁷, it recognizes the inadequacy of the level of protection of the health guaranteed to

⁴⁶ According to L. MENGONI, *op. cit.*, pag. 122.

⁴⁷ According to the constitutional Court, decision n. 27 del 1975.

the woman from law 40 and, from the other, it asserts that «it not even mainly does not turn out guaranteed the health of the embryo».

The woman is not considered in the decree of the Court of Catania, in order to be considered again in that one of Cagliari in dialogical relationship with the embryo, revealing as the effective net of guarantees woven from the normative decided one is revealed inadequate regarding the legislative intention (to offer to the unborn one prevailing protection in how much subject weak person, but relational) and necessarily conflicting regarding the letter of the law (to assure the rights of all the been involved subjects).

In the event under investigation moreover I use it of the parameter of the health of the mother does not appear conceptually fragile, bearing away from a notion of health that, beginning from the definition of the OMS, it has been revealed relative and often ambiguous, in how much substantiate in a precise and documented data constituted from a produced medical certification in judgment that attests «a serious expectant state with depressed humor, closely connected to the conflict between the choice to proceed however to the system (...) and just lived of inadequacy of forehead to one possible disease of the fetus»⁴⁸.

Therefore, from the moment that a consolidated constitutional jurisprudence asserts the general principle second which «does not only exist equivalence between the right to the life but also to the health just of who is already person, like the mother, and the safeguard of the embryo that person must still become», must think «not manifestly groundless»⁴⁹ the issue of constitutional legitimacy of art. 13 n. 2 of law 40, in the part in which it does not concur to assess, by means of the preimplantary diagnosis, if the embryos (...) they are affections from genetic diseases (...) when the omission implies an assessed serious danger and puts into effect them for the psycho-physical health of the woman»⁵⁰.

6. Waiting for the Court: towards one (possible) synthesis between effectiveness and reasonableness of the levels of protection?

Found the necessity, constitutionally it sets up, to guarantee an adequate level of protection to the health of the woman also in matter of access to the techniques of medical assisted reproduction and attested scientifically⁵¹ a serious danger and puts into effect them for

⁴⁸ Decree of Court of Cagliari.

⁴⁹ Again, constitutional Court, in the decision only just mentioned, n. 27 of 1975.

⁵⁰ According to the words of the decree of Court of Cagliari.

⁵¹ The health certificate included in the proceedings of the lawsuit of Cagliari recognizes that «procedere all'impianto potrebbe essere di *grave danno* per l'equilibrio psico-fisico della *paziente*».

the psycho-physical health of the woman, could have tried the way of an adequate and systematic interpretation based on the letter of art. the 6, codicil 4, of law 40.

It does not seem in fact forced the hermeneutical operation of one be certified of serious risk for the psycho-physical equilibrium of the patient inside of the category of the «reasons of doctor-sanitary order» (art. 6, codicil 4) that legitimate the doctor in charge of the structure to decide not to proceed to human assisted reproduction: operation, that one, that would allow to exceed the produced applicatory paradox from art. the 14, codicil 3, based on which the possibility to delay the system would be excluded, «if the words have meaning»⁵², in the event in which the serious one and documented cause unexpected at the moment of the fecundation.

The hermeneutical solution seems still more legitimate if estimated on the base of the criteria of effectiveness and reasonableness of the discipline, also from the point of view of the protection of the legally protected interest of the life, to which a level of (effective) protection would be guaranteed, in how much that comes demanded from the recurrent one is not a lot to avoid every system in absolute but to avoid whichever system, through the application of the technique of the preimplantary diagnosis and the successive selection of the embryos not suffering from transmissible genetic pathologies. In such way a continuity of protection of the woman would be guaranteed who does not seem to re-enter in the legislative bill, than on the contrary it reduces to one mere contingent and transitory eventuality, being however necessary to transfer «as soon as possible» the crio-conserved embryos.

Such reading is given by a legal perspective necessary constitutionally oriented that, like it has been tried to demonstrate, it appears less ineluctable to constitutional level (than can not be put in evident and incurable contrast with art. the 32 of the Constitution) and coherent (even if that can appear paradoxical) with the purposes expressed from law 40, to the light of the interpretation of the constitutional Court (decision n. 46 of 2005).

That is rendered still more logically obvious and legally founded if it analyzes to the ulterior issue of raised, relative constitutionality to the contrast between the “preimplantary diagnosis” prohibition and the principle of former equality of article 3 of the Italian Constitution for disparity of treatment of substantially analogous subjective positions: recognized to the parents the right to the information on the health of the fetus in the course of the pregnancy, because to deny the existence of a straight correspondent in the assisted phase of procreation that it precedes the system? For the judge of Cagliari the exception is founded,

⁵² C. CASONATO, *op. cit.*, pag. 22.

in how much the right to widest and corrected information on the state of health of the fetus cannot receive an unclear protection, from the schizophrenic course, based on which the doctor has the obligation to correctly inform the brace in case of pre-born diagnosis them, answering in judgment in wrong case of or devoid information, while in the event of preimplantatory diagnosis she is penal responsible who of it authorizes the practical one⁵³.

An illegitimacy, an unconstitutionally and logically unreasonable differentiation, that could only be explained with remark to law 40, that reduces the protection of the health and the right to one aware maternity in charge of the woman to one merely eventual and residual dimension.

The delineated critical reconstruction allows – to judgment of who it writes – to answer to the question that of it has constituted the premise, if that is the lacked acknowledgment the “necessary” nature of article 13 of law 40 can allow to adopt one perspective constitutionally oriented in a position to increasing some, through the instrument of the adequate interpretation (which has been preliminarily excluded from the judge a quo) or of the participation of the constitutional Court, the application within until include between the therapeutic and exclusively diagnostic purposes also those relative ones to the protection of the health of the mother, beyond that to that one of the conceived one.

The answer seems to have to be positive, constituting the necessary outcome of a distance that develops through the resetting of successes to you dowels normative-jurisprudential, until the composition of a constitutionally coherent mosaic.

The lacked declaration, in the decision n. 46 of 2005 of the constitutional Court, of the “necessary” nature of the disposition object of the legitimacy issue allow, adopting the improper identification completed from the constitutional judge, to assert that «it goes excluded that the law dispositions (...) they can be thought to contained bound or constitutionally necessary», evidencing itself in such a way like the completed discretionary choices from the ordinary legislator, in such specific normative within, «are not forced» to only, an exogenous one, constitutionally bound normative content. On the contrary, the tension, endogenous to the legislative procedure, towards a discretionary normative creativity assumes in matter a full development, regarding which the constitutional principles do not identify with the normative content but they are a canon of address, regarding the concrete location of the same content.

⁵³ According to P. VERONESI, *op. cit.*, pag. 18.

Therefore, a legislator not constitutionally bound but constitutionally oriented (beyond that legitimated); and an individualistic but discretionarily constitutionally consistent normative content, to the light of the principles and important constitutional rights in matter, of which the law represents a development and elastic adaptation.

The fundamental right to health receive an essential nucleus, declinations connoted from one increasing progressiveness of the guaranteed level of protection; formulation, this, that it finds reply in the constant constitutional jurisprudence and represents an application in the field of the fundamental rights of the principle of formal equality. A protection that comes connoted, recognized «the subsistence of a being involved conflict, on one side, the protection of the health of the recurrent one and, from the other, the protection of the embryo», in the not absolute sense of, but prevalence first of all in comparisons with the second one, which has however to be guaranteed to the maximum compatible level of such balance.

The law under investigation, seems to turn upside down, changing in conflict, such balance oriented to the prevalence of the health of the mother, delineating a rights protection that, in asserting a superiority of the health of that before legal the ontological conceived one, is demonstrated unreasonable regarding the been involved constitutional context and incoherent towards expressed purposes, in the light of one systematic interpretation of its normative content.

In fact, regarding to the level of protection guaranteed to the subjective legal positions been involved, the normative text, in the moment of giving legal substance to the contained programmatic enunciated one in article 1, it produces rising of a 'normative paradox', when not of strabismus, based on which the position of who objective is already person receives a protection "to wide meshes", batch processing line and residual, regarding who person must still become, object of one rigid net of constitutional protection to ensure the full effectiveness.

In such sense, the vicissitude of Cagliari assumes a paradigmatic valence, from the moment that in it comes recognized as the normative option chosen before not only appears inadequate in guardian the health of the woman – with consequent violation of art. the 32 of the Constitution – but does not lead not even to a greater guarantee of the health of the embryo, abandoned from a unreasonable legislative rigidity in one be of "crio-suspension" that of it compromises the legal protection, in a relationship of consequences with the consumption of the same biological vitality. One legislative choice that, also freed from one its connotation in the sense of the constitutional necessity, is revealed therefore not only

unreasonable but also incoherent and not in a position to guaranteeing one full effectiveness of protection.

Just to the light of the lack of one (at least) equal level of protection of the health of the woman regarding that one of the conceived one, attempt of “predictive legal surveying” does not seem excessive to conclude this asserting like the constitutional Court, invested of the issue of constitutional legitimacy, turning out to preclude it from the letter of the legislative disposition the median line of the interpretation of refusal, can incline, through a legitimate political exercise, for the writing of a decision of acceptance, declaring article 13 constitutionally illegitimate, in the part in which it does not preview between the diagnostic and therapeutic purposes that allow clinical search and experiences them on every embryo, also those times to the protection of the health of the mother.

The Italian constitutional Court, few days after the conclusion of this article, declared manifestly inadmissible the issue of constitutional legitimacy, for being the petition evidently contradictory. The constitutional Court in its ordinance (decree) of inadmissibility declared that «it's clear the inconsistency of a petition which want to declare the constitutional illegitimacy of a specific disposition in the part in which it is deducible a norm (the prohibition of the genetic preimplantatory diagnosis) which, according to the same petition, could be also deducible from other articles of the same law, articles which wasn't contested by the petition, and from the systematic interpretation of the law “according to its inspiring criteria”».