



**Intertwined but Different.**  
**The Heterologous In Vitro Fertilization Case before the**  
**European Court of Human Rights and the Italian**  
**Constitutional Court**

by

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## Abstract

International and constitutional law, originally distinct realms with limited areas of intersection, are getting closer and closer, particularly in the European landscape within the human rights protection field, where these mere contacts between the two systems have become intersections and overlaps.

The present article will try to shed light on the still unsolved and problematic issues to which overlapping human rights protection systems give rise, by focusing on an analysis of the heterologous in vitro fertilization case, where both the Strasbourg Court and the Italian Constitutional Court delivered relevant judgments on very similar matters (ECtHR's *S.H.* Judgment; Judgment No. 162/2014 from the Italian CC). Such analysis revealed useful in highlighting connections and disconnections between the different levels of protection of rights, and led us to argue that the development of a multilevel protection of rights is also, at least partially, a tale of Courts, each competing to have the last word on human rights adjudication.

## Key-words

Multilevel protection of rights, European Court of Human Rights, Italian Constitutional Court, heterologous In Vitro Fertilization, margin of appreciation, consensus



## 1. The protection of fundamental rights before the European Court of Human Rights and domestic Constitutional Courts. A theoretical framework of analysis

International and constitutional law, originally distinct realms with small areas of intersection, are getting closer and closer to one another. This is particularly true within the human rights protection field, where mere contacts between the two systems have become intersections and overlaps. The European landscape of human rights protection is probably the stand-out example of such a trend, where several “Charters” (National Constitutions, the Charter of Fundamental Rights of the EU, the European Convention of Human Rights (ECHR), the European Social Charter) and “Courts” (national Constitutional Courts (CCs), the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and the European Committee of Social Rights) are committed to the protection of human rights.

The exact terms of this relationship between such different players is still an open issue among legal scholars and we witness a continuous process of definition and re-definition of the role of Courts in the European landscape. However, all the different theoretical approaches to the human rights protection system in Europe converge on what is an incontrovertible fact: the *intertwined* nature of the international, supranational and constitutional dimensions of human rights protection.

The present paper focuses on the relationship between the international (ECHR) and constitutional pillars of human rights protection – with specific regard to the Italian constitutional system – trying to shed light on the still unsolved and problematic issues to which overlapping human rights protection systems give rise.

In the first place, we need to identify the knots which create such a tangle.

From a formal point of view, the first intersection between the two legal orders is determined by the nature of the Convention: the ECHR is an international treaty to which the Contracting Parties have decided to be bound, and recognize as having a specific legal value in the domestic constitutional area. Such recognition takes place in a different way for each Contracting State, and the legal status of the ECHR within the national sphere is different too: there are States in which the Convention has been granted the status of



constitutional law, others in which it is in a sort of limbo between the Constitution and the ordinary legislation, and yet others in which it has the same status as ordinary legislation.

At the crossroads of the Charters of Rights, we find the second area of intersection which characterizes the multilevel human rights protection system in Europe: the relationship between the ECtHR and national authorities. As it has been argued,

‘while judgments of the ECtHR have no direct effect at the national level, the increasing *de facto* importance of Strasbourg case law challenges national legal orders, calling into question the role of national constitutional legislatures and judiciary, and ultimately, the sovereignty of the member State’ (Follesdal et al. 2013: 6).

Of particular interest is the relationship between the ECtHR and national supreme/constitutional courts, which is commonly referred to as “judicial dialogue”. Indeed, the European human rights protection system has developed primarily through the tension – which by the way has not been alleviated - between national courts and the ECtHR, with both claiming authority on human rights adjudication: the former on the basis of their traditional role as constitutional rights watchdogs, the latter as an international regional court with jurisdiction on human rights violations. As argued,

‘the dynamics affecting the ECHR’s constitutional relevance in domestic and European law are not one-sided, nor do they challenge the very structure of constitutional adjudication as provided in some countries; [...] Rather, a mutual influence is emerging between the Strasbourg Court and national judges, fairly corresponding to what twenty years ago was predicted as a “form of ordered pluralism”, namely a Europe/States relationship which is neither reduced to the primacy of European norm over national rules, nor broken down in a juxtaposed collection of national and European norms which do not form a unitary system’ (Delmas-Marty 1992: 321).

For Pinelli, ‘It is a kind of pluralism that is not merely compatible with, but stems from, the premises of constitutionalism, and, to that extent, contributes towards demonstrating that the latter is conceivable out of the old state setting’ (Pinelli 2013. 247). Moreover, such growing interconnection between the different levels of human rights protection has led to a twofold transformation of both national and international courts: on the one hand, since more and more national functions appear to be delegated to the international level, ‘the ECtHR is increasingly seen, not as an international or regional court, but as a constitutional



actor that participates in the formation of European public order’ (Dzehtsiarou 2015: 156); on the other hand, despite an apparent and potential marginalization of national courts, they are assigned a primary role in fundamental rights’ protection, and to accomplish this role they need to enter in dialogue with the ECtHR. At the same time, ‘in these circumstances the Court has to be open to communication from the states and be mindful of the signals that have been sent to the court from national authorities’ (Dzehtsiarou 2015: 156).

Despite the ever growing intersection between the international and constitutional dimensions of fundamental rights protection, their relationship remains problematic. This is mainly due to the *ontological* differences (structure, procedure, role in the overall system) existing between the two levels of rights’ protection. Moreover, even within each constitutional system the ECHR has a different position in the system of legal sources of law, thus having different strength and effectiveness.

The paper is structured as follows: the first part overviews the general interconnections and the main differences between international and constitutional levels of human rights protection, focusing on the ECHR’s role within the Italian legal system (Sections 2 and 3). The second part moves to the analysis of national and ECtHR case law on in vitro fertilization, where similarities and differences between the two intertwined levels of protection are particularly evident. The analysis will highlight the fundamental reasons for similarities and differences between the two systems of protection (Section 4). Section 5 builds up on the previous one, and will compare the different approaches, identifying recurrent features in the relationship between national and international systems, in order to improve understandings of the “intertwined but fragmented” character of global rights protection. Finally, in Section 6 we will try to draw some conclusion from the analysis conducted before.

## **2. An intertwined path: The place of the ECHR within domestic constitutional systems. A focus on the Italian system**

The main reason for the close interconnection between national and ECHR systems of protection of rights lies in the role played by the Convention in domestic orders. As mentioned above, the ECHR is an international treaty and, therefore, it must be respected



by the Contracting Parties, which, through ratification and/or execution, make the ECHR part of domestic legal orders. However, because of this the ECHR does not just provide individuals with a subsidiary and additional remedy against fundamental rights violations; it can also influence the interpretation and the application of domestic Bills of Rights, in ways that partially depend on the legal value accorded to the ECHR within the domestic order. On this point, as one would expect, the general approach adopted by States towards international law becomes particularly prominent. For the sake of simplicity, we can limit our analysis to the monistic and the dualistic State approach, both well known. While in monistic States international treaties become part of the domestic order as soon as they are ratified by the competent national authorities, States following a dualistic path mandatorily require an internal order (i.e. the “execution order”) for a treaty to be transposed into the domestic system.

The prototype of the first model is Austria, where the ECHR has been considered since 1964 directly applicable federal constitutional law, being formally equivalent to the original recital of fundamental rights enshrined in the Austrian Constitution. Austria is most probably the ‘State which has gone furthest in incorporating the Convention’ (Bernhardt 1993: 27), since the rights provided by the Convention complement constitutional rights and have become constitutional parameters in the judicial review of legislation (Montanari 2002: 62).

On the other hand, Italy – upon which the following analysis will prominently focus in order to provide useful elements for a better understanding of the case analyzed in Section 4 – is an example of dualistic State, although the evolutionary trend of the last decade depicts a new kind of dualism, whose features are particularly intriguing for the purpose of this paper.

In Italy, the ordinary law no. 848 of August 4, 1955 executed and therefore incorporated the ECHR into the domestic order. Consequently, it was recognized from the outset as having the same legal value as any ordinary parliamentary statute. Some scholars held a minority position (Quadri 1968: 68) proposing to interpret Article 10, para. 1 of the Italian Constitution (It. Const.) as also capable of influencing the ECHR legal position within the internal system. Since Article 10 states that ‘the Italian legal order conforms to the generally recognized rules of international law’, it automatically incorporates international customary norms into the domestic system and vests them with a



constitutional status. According to this minority doctrine, due to the automatic incorporation through Article 10 It. Const. of the customary rule *pacta sunt servanda*, international treaties too – and therefore the ECHR – would acquire such a constitutional value capable of prevailing over conflicting ordinary laws. However, the Italian Constitutional Court (CC) constantly rejected this stance, confirming that Article 10 It. Const. could not cover international treaty law, which, therefore, could only get the rank pertaining to the act used for its transposition into the domestic order.<sup>I</sup>

Despite this strong dualistic stance that dominated the initial CC approach – an approach that lasted almost fifty years – such jurisprudence intermittently revealed signals of the CC’s awareness of the deep interconnection between the Conventional system of protection of rights and the national one. Indeed, it is worth mentioning for example Judgment no. 388/1999 (Pollicino 2015: 364),<sup>II</sup> where the Court solemnly stated that ‘the Constitution and the other Charters of rights integrate one another, each completing the interpretation of the other’.<sup>III</sup> In doing so, the CC implied that, although the ECHR was endowed with the formal status of ordinary statutory law, it could nevertheless influence the domestic application of fundamental rights by promoting an interpretation of internal law consistent with the principles enshrined in the Convention.

Subsequently, growing signs of interconnection between the two systems of fundamental rights protection became evident in the CC’s jurisprudence following the Italian constitutional reform passed in 2001, which introduced a first paragraph into Article 117 It. Const. stating that ‘Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations’.

Starting from the “twin judgments” no. 348 and 349, both delivered in October 2007,<sup>IV</sup> the CC acknowledged that, pursuant to reformed Article 117, para. 1 It. Const., the ECHR should be ranked at a different level within the domestic order. However, the ECHR did not acquire a truly constitutional status; rather, it became an “interposed” rule, placed in an intermediate position between constitutional and ordinary norms, and maintained a sub-constitutional status while obtaining a supra-legislative one. Accordingly, for the first time in 2007, the CC asserted that the ECHR could prevail over conflicting domestic ordinary rule, but only as long as it did not threaten the unity and coherence of the domestic Constitution.



There are two fundamental implications within the CC reasoning. Firstly, the ECHR's incorporation into the domestic order is not without limits. The ECHR, indeed, cannot infringe constitutional norms, be they constitutional fundamental principles or merely constitutional operative norms, so that it must be prevented from entering the domestic order, whenever such conflict arises. Secondly, only the CC can hold the power to evaluate the consistency of the ECHR provisions with the domestic Constitution and, if this condition is not met, to possibly declare unconstitutional the ordinary statute law as violating Conventional provisions. This means that ordinary and administrative domestic Courts cannot directly apply the Conventional rules while dis-applying the domestic ones. Conversely, whenever the latter are potentially in conflict with the ECHR, Courts are required to refer the question to the CC.

Therefore, the CC firmly refused to equate the ECHR to European Union law, traditionally considered capable of prevailing over domestic law – the only exception being the supreme and untouchable principles of the domestic Constitution<sup>V</sup> – and of being applied directly by ordinary and administrative Courts, instead of the domestic conflicting norms.<sup>VI</sup> In other words, the CC expressly denied that ECHR could be placed under the scope of Article 11 It. Const.,<sup>VII</sup> which has been traditionally used to authorize the Italian membership of the European Union and, accordingly, to manage the relationship between EU and domestic law by ensuring the supremacy of the former.

Consequently, the ECHR is not supreme. Indeed, it is up to the CC

‘to establish a reasonable balance between the duties flowing from international law obligation, as imposed by Article 117, para. 1 of the Constitution and the safeguarding of the constitutionally protected interests contained in other articles of the Constitution’.<sup>VIII</sup>

Conversely, on the other hand, the CC acknowledges the far-reaching monopoly held by the ECtHR in interpreting the Conventional provisions. Since only the Strasbourg Court is entrusted with the power to interpret the Convention, according to the ECHR legal system, the ECHR as it “lives” in the creative interpretation of the ECtHR – and not the bare ECHR provisions by themselves – becomes relevant in the CC constitutional adjudication.



In our opinion, this jurisprudence is particularly interesting for the aim of this paper. On the one hand, it highlights the fundamental role of the courts in interpreting the Charters of Rights and, therefore, in concretely ensuring the protection of rights enshrined therein. The CC is the authoritative interpreter of the domestic Constitution, while the ECtHR is the authoritative interpreter of the Convention, and it is precisely through the dialogue between these two judicial authorities that the multilevel protection of rights takes form. On the other hand, however, such relationships between two Charters and two Courts sketches out a new kind of dualism, where the boundaries between separation and integration inevitably blur.

It is probably Judgment no. 317/2009 that reveals the clearest expression of such peculiar dualism. In the judgment the CC stated:

‘It is evident that this Court cannot permit Article 117, para. 1 of the Constitution to determine a lower level of protection compared to that already existing under internal law, but neither can it be accepted that a higher level of protection which is possible to introduce through the same mechanism should be denied to the holders of a fundamental right. The consequence of this reasoning is that the comparison between the Convention protection and constitutional protection of fundamental rights must be carried out seeking to obtain the greatest expansion of guarantees, including through the development of the potential inherent in the constitutional norms which concern the same right’.<sup>IX</sup>

In other words, the CC is asserting that, on the one hand, the ECHR is an *external* source of law (namely, the Constitution and the ECHR are still *separated*), and therefore it can only enter the domestic order as long as it is consistent with the supreme law of that order, i.e. the domestic Constitution as a whole. Accordingly, the CC is the sole and final arbiter of domestic fundamental rights adjudication. On the other hand, the ECHR and the constitutional Bill of Rights are also mutually *integrated*. Thus, since the aim of constitutional adjudication is to ‘obtain the greatest expansion of guarantees’ through a comparison between the conventional and the constitutional protection of rights, the two catalogues of rights do ultimately and definitively interplay. In conclusion, we might probably speak of a sort of “intertwined dualism”.



### 3. Looking at the differences: Structure, procedure and institutional features of fundamental rights adjudication at the ECHR and the domestic level

Despite the ever growing intersection between national and international levels of rights protection, and despite the will of the two levels to find a mutual accommodation and integration, there are several elements that make this path rough and tortuous. In this regard the different function, nature and legitimacy of national and international courts play a fundamental role. Even though in practice the differences are nuanced, and we can even see some kind of convergence between different levels of protection, nevertheless we can identify the main divergent features, which make the constitutional and international peculiar in their own function and role.

Starting from the different **roles and tasks of the international and national Courts involved in human rights adjudication**, the brilliant statement of the Italian CC in Judgements Nos. 348 and 349/2007 explains it clearly:

‘the Strasbourg Court has the task of interpreting the Convention, while the Constitutional Court must determine whether there is a conflict between a particular domestic provision and the rights guaranteed by the Convention in the light of the interpretation provided by the ECtHR’.

Therefore, even the **subjects of scrutiny differ**: the Strasbourg Court is case oriented, being the judge of a single case; on the contrary, the Constitutional Courts’ task is that of judicial review of legislation. This is why even the effects of scrutiny are dissimilar: while the ECtHR case law aims at redressing individual violations, the CCs, on the contrary - even when starting from an individual application - aim at restoring the constitutional integrity of the system, erasing the law that infringes a fundamental right, with *erga omnes* effects. Moreover, the different aims that drive the two Courts condition both the flexibility, and the outcome of the judgment. Thus, the nature of individual justice embedded in the Strasbourg system of protection of rights drives the ECtHR to condemn the respondent State when a violation of rights occurs in a particular case, regardless of whether there may exist a widespread national praxis according to which the law involved – which produced the infringement in this instance – is normally interpreted in a manner consistent with the protection of rights. On the other hand, CCs, being by their very nature



a tool intended to preserve the integrity of the whole order entrenched in the judicial review on legislation, are not inclined to declare a law unconstitutional when there is the possibility that it may be interpreted in a fundamentally rights-oriented way.

**Even when looking at procedures,** we see more differences than similarities. For example, a typical feature of the ECtHR is the possibility given to the judges to make concurring or dissenting opinions (White and Boussiakou 2009: 37-60). In contrast, in the Italian Constitutional Court, as in many other European supreme courts, such a possibility does not exist. Even the different rules of access to the Court play a considerable role: individuals who consider that their human rights have been violated can lodge, directly, a complaint before the ECtHR, after having exhausted all domestic remedies. The rules of access to national supreme courts differ widely from one country to another: for example, while in Germany and Spain applicants can lodge a direct complaint to the Constitutional Court, in Italy the access is exclusively incidental and only a judge can raise the question to the CC.

Beside these structural and ontological differences, which pertain to the nature of the two different systems, there are other lines of differentiation that affect the question of which is the authority legitimized to pronounce the last word on human rights adjudication. The core issue of the role of the judiciary in protecting fundamental rights concerns the problem of its legitimation and the “counter-majoritarian argument”. While national Constitutional Courts rely on the provisions of the national Constitution for their legitimacy and authority, the ECtHR, like other international courts, depends on an initial consent among member States for its legitimacy. However, such consent can evolve and change over time: this is the reason why the legitimacy of the Court is built on the concept of consensus, which is ‘an updated consensus because it reflects the current state of law and practice among the Contracting parties’ (Dzehtsiarou 2015: 152).

#### **4. Intertwined but different in action. A case study: The heterologous In Vitro Fertilization**

Despite the differences highlighted above, in time, both the ECtHR and national judges have become more and more aware of the necessity of dialogue and have developed several instruments (the margin of appreciation tool, the consensus theory, the



interpretation of national legislation in compliance with the Convention, the principle of subsidiarity, the dynamic interpretation of the Convention) in order to deal with each other in a ‘pluralistic, polyvalent and heterarchical’ (Dzehtsiarou 2015: 156) landscape. However, their relationship has only developed case by case; it is still critical and in certain cases even confrontational.

This is especially true in those cases concerning “ethically controversial matters” or moral matters (abortion, end of life, gender related rights, assisted reproduction, freedom of religion) in which the ECtHR and national supreme courts seem to move on different argumentative tracks.

This paper will focus on one of the most complex and sensitive ethical issues recently addressed both by the ECtHR (*S.H. v. Austria*)<sup>x</sup> and by national supreme courts (Italian Constitutional Court Judgment no.162/2014): gamete donation for in vitro fertilization.

In both cases, the applicants challenged national law provisions (in the one case the Austrian Artificial Procreation Act, in the other the Italian Law n. 40/2004) which posed restrictions on the practice of heterologous fertilization. In particular, the Austrian law declared an absolute ban on ova donation, both in vivo and in vitro, and a ban on sperm donation for in vitro fertilization, but not in vivo fertilization. The Italian law was even stricter, ordering an absolute ban on every kind of heterologous fertilization. Even though the cases are highly comparable and the rights to be protected present many common elements, different conclusions were reached as to the balance of such rights, resulting in completely opposite judgments by the ECtHR and the Italian Constitutional Court: the ECtHR upheld the ban, while the Italian CC declared the ban a violation of fundamental constitutional rights.

This case study is emblematic of overlapping areas in human rights jurisdiction and is an outstanding example of the different approaches adopted by national and international courts in dealing with human rights adjudication.

In particular, this contribution aims, through the analysis of the ECtHR and the Italian CC cases, to shed light on such different approaches (which led in the case under examination to opposite conclusions). It will seek the reasons for these divergences and will address the vital question of who is the guardian of fundamental rights in the pluralistic landscape of European space.



#### 4.1. *S.H. v. Austria* before the European Court of Human Rights

One of the ECtHR's leading cases<sup>XI</sup> on IVF is the well-known *S.H. and Others v. Austria* (Kete 2014), decided in 2011. The Grand Chamber decision is relevant for different reasons. First of all, it shows the different approaches of the ECtHR and Austrian Constitutional Court which ruled on the same case in 1999. Secondly, by reversing the previous decision of the First Section of the ECtHR, the Grand Chamber upheld Austria's restrictions on assisted reproduction. Last but not least, the decision represents a sort of "manifesto" of the ECtHR approach to ethical sensitive rights adjudication, in which the Court makes broad use of the margin of appreciation and the theory of consensus.

The case originated in 1999 when the Austrian Constitutional Court ruled on the application of two couples, whose reproductive organs were affected by certain reproductive diseases<sup>XII</sup> which could only be solved with the use of different IVF techniques (in vitro fertilization using the sperm of a donor or heterologous fertilization). None of these techniques was allowed under the Artificial Procreation Act. The applicants argued before the Austrian Constitutional Court that the law's provisions were in breach of art. 8 ECHR and of art. 7 of the Austrian Constitution (the latter protecting equal treatment). The Austrian Constitutional Court, whose function - among others - is that of ruling on the compatibility of the national legislation with the ECHR, given the "constitutional status" of the ECHR mentioned above, recognized that the impugned provisions interfered with the right to family life according to art. 8 ECHR; however, such interference was justified by the attempt performed by the legislature to properly balance the conflicting interests of human dignity, the right to procreation and the child's interest. The Court underlined the legitimate rationale under the law provision, which was to avoid the creation and development of unusual family relationships, such as a child having more than one biological mother, and to avoid the risk of exploitation of women donating ova. Moreover, the Court found that the ban on heterologous fertilization was not in breach of the principle of equality, given the substantial differences between homologous and heterologous techniques.

In 2000, the applicants applied to the ECtHR, and the First Section in 2010 stated, in *S.H. and Others v. Austria*; this First Section decision reversed the Constitutional Court's conclusions, finding a violation of art. 14 and art. 8 ECHR. Finally, in 2011, the Grand Chamber issued its decision on the case, upholding the Austrian legislation.



The Grand Chamber in *S.H. v. Austria* first of all recognized that the right for a couple to conceive a child and to make use of assisted reproduction techniques for that purpose is protected by Article 8 of the Convention, because it is an expression of private and family life. Member States, within their margin of appreciation, can adopt measures aimed at guaranteeing an effective respect for private and family life. However, such measures have to be ‘in accordance with the law’; they have to pursue one or more legitimate aims and they ‘have to be necessary in a democratic society’. In the case under examination, according to the Court, such measures were laid down in the Artificial and Procreation Act, which ‘pursued a legitimate aim, namely the protection of health or morals and the protection of the rights and freedom of others’ (para. 90).

In particular, the rationale underlying the prohibition of ovum donation for in vitro fertilization laid down by section 3.1 of the Artificial Procreation Act responds to the risk embedded in heterologous fertilization with ovum donation, namely, the threat to the basic principle of *mater semper certa*. We are referring to the split of motherhood between a genetic mother and another merely carrying the child, as well the risk of the exploitation of women, particularly those in economic or social difficulties.

More complex is the reasoning concerning the prohibition of sperm donation for IVF. Under the Austrian legislation, in fact, sperm donation is not banned in every case, but only in that of in vitro fertilization, while in vivo fertilization is allowed. Moreover, IVF with sperm donation combined two techniques which, taken individually, were allowed under the Austrian legislation: in vivo fertilization with sperm donation and in vitro fertilization. In the previous decision concerning the case under examination, the Chamber argued that the only reason underlying the prohibition of the combination of two medical techniques, which taken individually were allowed, was the fact that ‘in vivo artificial insemination has been in use for some time, was easy to handle and its prohibition would therefore have been hard to monitor’. The Chamber considered such an argument, related only to a question of efficiency, inconsistent in order to justify the prohibition of sperm donation for IVF. The Grand Chamber, on the contrary, reversed the Chamber’s decision, arguing that



‘when examining the compatibility of a prohibition of a specific artificial procreation technique with the requirements of the Convention, the legislative framework of which it forms part must be taken into consideration and the prohibition must be seen in this wider context’.

Starting from this premise, the Court stressed the fact that the prohibition of sperm donation for IVF, rather than in vivo fertilization, showed ‘the careful and cautious approach adopted by the Austrian legislature in seeking to reconcile social realities with its approach of principle in this field’ and it was therefore compatible with art. 8 of the Convention. However,

‘even if it finds no breach of Art. 8 in the present case, the Court considers that this area in which the law appears to be continuously evolving and which is subject to a particular dynamic development in science and law, needs to be kept under review by the Contracting States’ (para. 118).

The application of the theory of margin of appreciation in connection with the theory of consensus, in its different meanings (European and internal consensus), played a central role in the Court reasoning.

Firstly, the Court recognized that in cases where an important facet of an individual’s existence or identity is at stake, the State normally sees its margin being narrowed down. However, in the case of IVF, the margin accorded to the State has to be a wider one, given the lack of a long-standing consensus among Member States on the moral and ethical issues involved.

As we may all know, in fact, the margin of appreciation and consensus are intuitively in an inversely proportional relationship: the more widespread and settled the consensus, the narrower the margin; and conversely, the weaker and more unsettled the consensus, the wider the margin. This explains why in sensitive matters like the one analyzed in this paper, the margin is usually quite wide, since consensus is still ‘emerging’ and not yet ‘based on settled and long-standing principles’ (para. 96).

In particular, the Court recognized an emerging consensus among Member States in allowing gamete donation for IVF. However, this consensus is not based on long-standing principles embedded in the law of Member States; rather, it reflects only ‘a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State’ (para. 96).



If the lack of European consensus was used by the Court in order to justify the wide margin of appreciation accorded to the Austrian legislator, the lack of internal consensus within the national society was used to further sustain the legitimacy of Austrian legislation.

The Court argued, in fact, that the prohibition of gamete donation reflected a cautious approach by the Austrian legislator toward a matter which raises complex questions of an ethical nature and on which there is not yet a consensus in society. In contrast, the Court seemed to use the concept of internal consensus in order to justify the permission of sperm donation for in vivo fertilization, which was recognized as ‘a technique which had been tolerated for a considerable period beforehand and had become accepted by society’ (para. 114).

The argument in *S.H. v. Austria* is emblematic of the flexible use of the consensus theory by the Court:

‘throughout its existence the Court has used different types of consensus in its reasoning, and has not clearly distinguished among them, thus leaving some uncertainty as to both the precise meaning of consensus and the relative weighting of the different kinds of consensus deployed’ (Dzehtsiarou 2015: 39).

#### 4.2. Judgment no. 162/2014 from the Italian Constitutional Court

On a very similar issue, concerning Italian IVF legislation, Judgment No. 162/2014 from the Italian CC declared Article 4 of Law No. 40/2004 to be unconstitutional in so far as it introduced a complete ban on resorting to heterologous artificial insemination, even when one member of the couple suffers from absolute and irreversible sterility.<sup>xiii</sup> Such a ban indeed violated Articles 2 and 3 (respectively protecting, as a general clause, inviolable rights and the principle of equality), as well as Articles 29, 31 and 32 of the Italian Constitution, which are more specifically addressed to guaranteeing family life and health, the latter conceived both as individual right and as interest of society as a whole.

Law No. 40/2004, approved by the Italian legislature with the declared purpose of facilitating the solution of procreative problems arising from human sterility or infertility,<sup>xiv</sup> had been already been challenged before the Italian CC, which had questioned from the beginning its “value oriented” structure as disproportionately privileging the protection of embryos.<sup>xv</sup> In Judgment No. 162/2014, the Italian CC confirmed its general



mind-set when dealing with sensitive issues, and reaffirmed its previous approach with regard to in vitro fertilization issues. More precisely, it reiterated first of all that a judicial review of Law No. 40/2004 was to be performed, jointly considering all the constitutional parameters invoked by the referring courts. Since IVF involved ‘numerous constitutional questions’,<sup>xvi</sup> and Law No. 40/2004 consequently impinged on a variety of interests, all having a constitutional status, a balanced approach was required in order to grant each of these interests an adequate protection. The safeguarding of embryos, indeed, is not absolute; it encounters limits in the need to protect a legitimate claim to procreation. Secondly, the CC stated that the identification of a reasonable balance between all the conflicting interests at stake pertains primarily to the political evaluation of the legislature, which in matters like this is called on to adequately take into consideration the fast-moving developments of medical science<sup>xvii</sup> too. Lastly, the CC confirmed that, although important, such a political discretion cannot affect the power of the CC to review the “non-unreasonableness” of the legislative decision.

Before analyzing in more details the reasoning followed by the CC, and in order to better appreciate its relevance for the purposes of this paper, it may be interesting to briefly examine the background of this Judgment.

Initially, questions of constitutionality concerning the ban on heterologous insemination were raised by the Courts of Milan, Florence and Catania before the Constitutional Court, with the latter preferring not to rule on the issue, adopting an interlocutory order instead. This order, No. 150/2012, returned the case to the referring judges, for a reconsideration of the prerequisite of the questions in the light of the ECtHR Grand Chamber’s decision in *S.H. v. Austria*. The referring courts had challenged the constitutionality of the ban, in particular, though not exclusively, with regard to Article 117, par. 1 It. Const.,<sup>xviii</sup> which would have been indirectly breached through the violation of Articles 8 and 14 ECHR as stated by the First Section of ECtHR with reference to the similar Austrian prohibition of gamete donation for IVF. Therefore, the CC considered the Grand Chamber’s decision, reversing that of the First Section on the same issue and declaring that the Austrian Law did not violate the ECHR, as a kind of *jus superveniens*,<sup>xix</sup> able to trigger a different consideration by the referring judges of the issue at stake. In Order No. 150/2012, indeed, the CC reiterated that ‘when a modification of the constitutional parameter occurs after the issue of constitutionality is raised, or when the



normative context is subject to substantial modifications’,<sup>xx</sup> a return of the case to the referring court is necessary for a re-examination of the aspect of the issue affected by the normative modification. Moreover, the CC underlined that such a return was essential in the case under consideration, because in the referring courts’ arguments ‘the challenge related to Article 117 stands out from the others’. Accordingly, it seemed that the CC had assumed that the remaining parameters invoked (Article 2, 3, 29 and 31 It. Const.) were “absorbed” by the “main” parameter, i.e. Article 117.

Order No. 150/2012 was considered therefore not only a further step in the trend followed by the Italian CC in assigning relevance to ECHR provisions – as interpreted by the ECtHR – within the domestic review on legislation (Malfatti 2012), but also a significant departure by the CC from the usual argumentative scheme adopted in its previous case law. Thus, since the issues of constitutionality referred to the CC, though focused on the challenge related to Article 117, challenged other parameters of the Italian Constitution as well, returning the case to the referring courts following a ECtHR decision could have meant giving priority to the solution of the issues of conventionality (i.e. concerning compliance with the ECHR) over the issues of domestic constitutionality (Morrone 2012).

After Order No. 150/2012, the three referring courts – Milan, Florence and Catania – once again raised the question of constitutionality concerning the ban on heterologous insemination before the CC, which, as mentioned above, declared the ban unconstitutional.

We can summarize the Italian CC’s legal reasoning as follows. The Court firstly asserted that the complete prohibition of gamete donation for IVF does not arise from a duty to comply with international obligations which merely prohibit the use of medically assisted procreation for eugenic purposes;<sup>xxi</sup> it is not the result of settled and long-standing principles established in the system, having been introduced by Law No. 40/2004 itself. It does not possess a constitutional basis, either; although an IVF regulation can be required by the Italian Constitution to avoid a legal vacuum in procreative matters – and accordingly, for this reason, Law No. 40/2004 was qualified as a “constitutionally necessary” law by the Italian CC – its content does not derive from the implementation of constitutional principles, at least in so far as it concerns the ban on heterologous insemination.<sup>xxii</sup> Quite the opposite: since the ban infringes other constitutional values, unless it can be proved that the protection of embryos cannot be pursued in a different



way, a strict test of reasonableness and proportionality has to be performed in order to assess its consistency with constitutional principles.

On the other hand, the choice to found a family and to procreate is an expression of a fundamental freedom of self-determination, protected by Articles 2, 3 and 31 It. Const., so that its limitation – and even more its total sacrifice, as it happens in the case under examination – needs to be justified by the pursuit of other constitutional values. Of course, the freedom to procreate is not without limits. However, such limits, even if inspired by ethical beliefs, cannot be equivalent to a complete prohibition. The only interest that may oppose a couple's demand to procreate by heterologous IVF is the protection of the children born as a result of this medical technique, with respect to their right to be informed about their real ancestral descent and the risk of psychological disease arising from membership of an unusual family where the biological parenthood is unconnected to the natural one. But apart from the fact that similar problems also arise in adoption issues – as demonstrated by Judgment No. 278/2013, concerning the absolute right to anonymity of the natural mother in case of adoption, which the Italian CC declared partially unconstitutional – the totality of the relevant legislation appears to already guarantee satisfactorily the interests of the child born by heterologous IVF. Moreover, the regulation of IVF impinges on the right to health, which is also to be conceived as psychological health, and the difference between homologous and heterologous insemination cannot be considered relevant to this. In conclusion, the ban under examination is disproportionate and irrational, also considering that by *de facto* stimulating “procreative tourism”, it discriminates couples on the basis of their economic condition. And therefore, it is unconstitutional.

In doing so, the Italian CC went above and beyond what the ECtHR's Grand Chamber had suggested in the *S.H.* Judgment, when it considered the analogous ban provided for in the Austrian legislation compatible with Article 8 ECHR. It is also worth mentioning that the unconstitutionality of the ban on gamete donation for IVF was not declared in the Italian CC's Judgment as a result of the violation of specific constitutional rights considered individually, but rather of the largely unfair balance adopted at legislative level between all the conflicting interests at stake (Morrone 2014).

However, above all, it is worth stressing that Judgment No. 162/2014 ruled the case purely in the light of internal constitutional parameters: the challenges relating to Article



117 It. Const. and concerning the violation of Articles 8 and 14 ECHR remained merely “absorbed” in the reasoning pertaining to the other parameters invoked in the issue of constitutionality. This circumstance is even more surprising if we consider the content of Order No. 150/2012, in which - as already highlighted - the internal parameters invoked (Article 2, 3, 29 and 31 It. Const.) had been arguably deemed “absorbed” by the parameter of Article 117. Judgment No. 162/2014 seems, therefore, in this respect a total reversal of the perspective adopted in Order No. 150/2012; this also demonstrates that the CC could have ruled on the merit of the case in 2012, arriving at the same outcome as later reached in Judgment No. 162/2014, though at that time it preferred not to settle the case.

## 5. A comparative analysis: connections and disconnections between the ECHR and the Italian constitutional level in the heterologous IVF case

The brief analysis of the ECtHR’s and the Italian CC’s decisions on this matter – which depict one of the most emblematic examples of the intertwined, but different nature of fundamental rights adjudication at international and constitutional level - explains quite clearly why we chose the IVF case as the focus of this paper.

First of all, interconnections and differences are apparent by merely looking at the Italian CC’s decisions on heterologous IVF. On the one hand, in Order No. 150/2012 the interconnection between systems arises unequivocally. The same Italian CC seems so aware of such interconnections that it chooses not to decide the issue of constitutionality and to return the case to the referring judges for a re-evaluation of the questions in the light of the ECtHR Grand Chamber’s decision in *S.H.* On the other, however, Judgment No. 162/2014 also provides evidence of the deep differences between the ECtHR and a national CC in approaching similar issues, as even the ECtHR seems to understand perfectly. Indeed, in the later *Parrillo v. Italy* case,<sup>xxiii</sup> the Strasbourg Court noted:

‘admittedly, in Order No. 150 of 22 May 2012, in which it remitted to the lower court a case concerning the ban on heterologous fertilization, the Constitutional Court did refer, inter alia, to Articles 8 and 14 of the Convention. The Court cannot fail to observe, however, that in its judgment No. 162 of 10 June 2014 in the same case, the Constitutional Court examined the prohibition in question only in the light of the Articles of the Constitution that were in issue (namely, Articles 2, 31 and 32)’ (para. 95).



We can deduce that the ECtHR wished to underline that protection ensured in the light of Articles 8 and 14 ECHR is not the same as protection purely embedded in domestic parameters of the national Constitution, and this is probably a further confirmation from the Strasbourg side too that the two levels of protection, even though intertwined, are nevertheless still different.

Interconnections and differences, however, appear also by comparing the Judgment No. 162 and the *S.H.* decision. Here, the most visible difference lies, obviously, in the opposite results achieved by the two Courts in adjudicating the case. While the ECtHR found no violation of Article 8 ECHR, the Italian CC declared the analogous Italian ban on heterologous insemination unconstitutional.

This difference of outcome, however, probably depends on the different type of scrutiny carried out by the Courts: the ECtHR looked uniquely into the alleged breach of Article 8 ECHR, while the CC took into consideration the constitutional framework as a whole. As mentioned above, the unconstitutionality of the Italian ban on heterologous IVF was not declared as a result of the violation of specific constitutional rights considered individually, but rather of the largely unfair balance adopted at the legislative level between all the conflicting interests at stake. We do not see it as a coincidence that, in Judgment No. 162/2014, the CC started by saying that its review would take into account all the parameters invoked, and consider them jointly, in order to prevent the protection of certain fundamental rights from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution.<sup>xxiv</sup>

But a further difference between the two systems, international and constitutional, may ensue from such a different approach in adjudicating human rights issues. From the duty to take into account all of the Constitutional parameters jointly, even when an issue of compatibility with an ECHR right is at stake, the CC derives, in fact, a right to claim what it names “its own margin of appreciation” in assessing the role played by the ECHR - in the interpretation provided by the ECtHR - within the domestic system. Accordingly, both Courts expressly resort to the “margin of appreciation doctrine”. It is, however, obvious that the margin of appreciation as conceived and claimed by the CC is something different from the margin of appreciation as originally developed by the ECtHR.<sup>xxv</sup>

As clearly stated in Judgment No. 317/2009, although the CC cannot substitute its own interpretation of a provision of the ECHR for that of the Strasbourg Court,



it may assess how and to what extent the results of the interpretation of the European Court interact with the Italian constitutional order. [...] In summary, the *national* “margin of appreciation” can be determined having regard above all to the overall body of fundamental rights, the detailed and overall consideration of which is a matter for the legislature, the Constitutional Court and the ordinary courts, each within the ambit of its own jurisdiction’ (§7).

We could probably say that the clearest deployment of “its own margin of appreciation doctrine” is found in the Italian CC’s well-known “Swiss pensions case”, in which a challenge to legislation was at stake, retrospectively modifying the arrangements applicable to the calculation of pensions for workers who had spent all or part of their working life in Switzerland.<sup>xxvi</sup> The retrospectivity of this new calculation mechanism had already been challenged before the ECtHR, which had condemned Italy for violation of Article 6 ECHR, since the domestic law of “authentic interpretation” had the ‘effect of definitively modifying the outcome of the pending litigation, to which the State was a party, endorsing the State position to the applicant’s detriment’.<sup>xxvii</sup> Despite this fact, and even in view of the *Maggio* case, the CC held that the appellant had no right to expect that his pension would be calculated in line with the previous arrangements, since the contested legislation was inspired by the principle of equality and solidarity, which prevailed within the balancing of constitutional interests. More precisely, the CC affirmed that,

‘within the balancing operation against other interests protected under constitutional law which this Court is also required to consider in this case, the protection of other countervailing interests, which are of equal constitutional standing, affected by the contested legislation, prevails over the protection of interests underlying the principle of constitutional law [of the non-retrospectivity of the law]. Therefore, in relation to this balancing operation, there are compelling general interests capable of justifying the recourse to retrospective legislation’.<sup>xxviii</sup>

As a consequence, the CC declared the question of constitutionality ill founded, and in doing so, it claimed its authority not to comply with the ECtHR’s decision which had condemned Italy, on this same issue.

Probably, this Judgment may also be considered as one of the clearest displays of that ‘functional disobedience’ deployed by domestic Courts when wishing to draw the ECtHR’s



attention to national competing interests and values that were not sufficiently taken into consideration by the latter, as some Authors have exemplarily highlighted (Martinico 2015: 303). What is sure, however, is that, as can be observed in the CC jurisprudence, by deploying “its own margin of appreciation” the CC does not directly challenge the ECtHR’s judgments; it can merely deprive the latter of their effectiveness within the Italian system in the light of a systemic interpretation of the constitutional framework as a whole. Accordingly, it is a margin of appreciation claimed against the ECtHR, and after the latter has settled the case, whilst at the same time avoiding an open conflict with the European Court. The CC seems to be wishing to say: ‘I respectfully disagree’ (Martinico 2017: 417).

With regard to the Strasbourg side, and as highlighted by Sir Nicolas Bratza, a former President of the ECtHR, the margin of appreciation was instead introduced into the ECtHR’s jurisprudence as a ‘valuable tool devised by the Court itself to assist it in defining the scope of its review’. It does not provide blanket exceptions in the application of rights; rather, it ensures that human rights under the ECHR develop according to a pluralistic pattern, enabling its ‘striking an optimum equilibrium between convergence and divergence in a transnational or international setting’ (Rosenfeld 2008: 450). Even though it could seemingly jeopardize the universalistic ambition naturally implied in the international protection of human rights, the margin of appreciation doctrine was introduced as a useful tool to accommodate diversity in the field of human rights: it is believed to be a kind of ‘key to ordering pluralism’, meaning that ‘on the one hand, it expresses the centrifugal dynamic of national resistance to integration’ and ‘on the other, since the margin is not unlimited but bounded by shared principles, it sets a limit, a threshold of compatibility that leads back to the centre (centripetal dynamic)’ (Delmas-Marty 2009: 44).

Hence, the ECtHR’s margin of appreciation allows States to approach fundamental rights issues in the light of their national Constitutional identity, since they are allowed to find the most satisfactory solution to rights protection, one that is also coherent with the moral and social values embedded in their national systems. Conversely, when the majority of Contracting States shows a common trend in dealing with a specific issue, the ECtHR infers that a general consensus among States exists on the protection required for the Conventional right at stake, and that, therefore, the need to preserve the single national constitutional identity may be pushed into the background. Consequently, it is no



coincidence that the margin of appreciation and consensus among States are in an inversely proportional relationship, as already pointed out above.

Actually, the ECtHR's doctrine of the margin of appreciation allows flexibility in reviewing the State's compliance with the ECHR, by recognizing that, as far as it is possible,

'by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the "exact content of the requirements of morals" in their country, but also on the necessity of a restriction intended to meet them'.<sup>XXIX</sup>

Accordingly, we can argue that the margin of appreciation is also a legitimizing tool for the ECtHR, which - as an international court - needs to rely on States' consent to ensure that its judgments are effective.

Instead, the CC does not need to seek for legitimacy. It already possesses its own legitimacy, directly stemming from the domestic Constitution, which entrusted the CC with the task of preserving the constitutional integrity of the national system. It follows that, while the ECtHR resorts to the margin of appreciation to *get* legitimacy, by deploying its own margin of appreciation the CC *exhibits* its constitutionally embedded legitimacy, and it claims its authority on constitutional matters. In conclusion, it is only apparently that the ECtHR and the CC refer to the same doctrine, when they speak of margin of appreciation. Rather, as a matter of fact, their margin of appreciation has a different meaning and performs different functions. Judgment No. 162/2014, though at that time it preferred not to settle the case.

## 6. Taking stock: A tale of two Courts at the crossroads at the protection of rights

The analysis of the heterologous IVF case highlighted how the connections and disconnections between the international and constitutional level of protection of rights, theoretically depicted in Sections 2 and 3 of this contribution, operate concretely. Along with a deep awareness of the intertwined nature of fundamental rights adjudication nowadays, shown by both Courts in their case law, Judgments on heterologous IVF



emphasize also several differences, pertaining to the outcome of the scrutiny, the approach taken and the apparent resort to the same doctrine by the two Courts involved – i.e. the margin of appreciation –, which is conversely very differently deployed.

However, looking again at Judgment No. 162/2014 in its connection with Order No. 150/2012 and the Grand Chamber’s *S.H.* Judgment, further considerations may arise, arguably shedding light on one of the most controversial bonds in the multilevel protection of rights: the relationship between Courts.

It is worth mentioning, that in Judgment No. 162/2014, the Italian CC did actually make use, at least in part, of the legal reasoning adopted by the ECtHR in the homologous *S.H.* case, by completely embracing the idea that;

‘the couple’s choice to become parents [...] is an expression of the fundamental and general freedom of self-determination. [...] And as a consequence, limits to this freedom are to be reasonably and adequately justified by the impossibility of otherwise protecting interests having the same rank. Since the most intimate and intangible sphere of the human person is involved, the determination to have children or not is incoercible...’<sup>xxx</sup>.

However, it did so by completely neglecting to expressly mention the ECtHR’s case law in its own legal reasoning. Even the right of adopted persons to know their own origins was restated by the CC in Judgment No. 162/2014 by merely referring to its previous Judgment No. 278/2013, without any reference to the ECtHR’s *Godelli v. Italy* Judgment,<sup>xxxI</sup> which, instead, had really been the ultimate source for the recognition of that right.

The choice of the CC not to mention the ECtHR’s jurisprudence on the same matter might appear even more surprising in the light of Order No. 150/2012, in which - as previously mentioned - the Grand Chamber’s Judgment *S.H.* was considered a kind of *jus superveniens* that led the CC to choose not to provisionally settle the case. Why then, did the CC completely omit to mention the Grand Chamber’s *S.H.* in particular - and in general, any ECtHR’s decision - in Judgment No. 162/2014?

Actually, in the wake of Judgment No. 162/2014, some have argued that by completely disregarding the conventional side of the issue of constitutionality (i.e. that concerning the compatibility of Law No. 40/2004 with the ECHR), the CC had wished to show a



deferential approach to the ECtHR. Indeed, declaring the unconstitutionality of the ban on heterologous insemination for violation of Article 117 It. Const. (and therefore because it had infringed Articles 8 and 14 ECHR) would have amounted to contradicting the ECtHR, which had in its *S.H.* Judgment ruled out that the analogous Austrian ban infringed those very same ECHR provisions.

However, this explanation is not entirely convincing. Also, it is worth mentioning that the ECtHR's Grand Chamber closed its *S.H.* Judgment in the following terms:

‘The Court also notes that the Austrian Constitutional Court, when finding that the legislature had complied with the principle of proportionality under Article 8, par. 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 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. [...] The [ECHR] Court reiterates that the Convention has always been interpreted and applied in the light of current circumstances. Even it finds no breach of Article 8 in the present case, the Court considers that this area, in which the law appears to be continuously evolving and which is subject to a particularly dynamic development in science and law needs to be kept under review by the Contracting States’.<sup>XXXII</sup>

That is to say: the ECtHR had decided to anchor its judgment on the merits of the case to the time when the case originally arose, therefore at the end of the '90s. As we can see, by merely stating that an evaluation which was perfectly valid when pertaining to a situation arising in 1998 no longer needed to be followed in 2014, the Italian CC could have ruled the case in an international perspective too, without contradicting the ECtHR. The ECtHR, indeed, had underlined in *S.H.* precisely the relevance of the time factor as crucial for a proper settlement of the case. Furthermore, it had already given a generally negative evaluation (D'Amico 2014) of Law 40/2004 in the famous *Costa and Pavan v. Italy* case,<sup>XXXIII</sup> although the ECtHR had focused its analysis more particularly on the ban on preimplantation genetic diagnosis. Therefore, a declaration of unconstitutionality of Law No. 40/2004 grounded on the violation of Article 117 It. Const. could also have supported the ECtHR's conclusion in the *Costa and Pavan* case, by extending its scope to include the heterologous insemination issue.



More plausibly, therefore, it seems arguable that the CC's choice to rule the case in Judgment No. 162/2014 by focusing on purely domestic constitutional parameters depended on circumstances pertaining to the complex relationship between the ECHR and the domestic protection of fundamental rights and, ultimately, the relationship between the two "constitutional" courts, each ruling its respective system. Putting it differently; in doing so, the CC actually seemed to reveal a wish to connect constitutional human rights adjudication to the supranational dimension of fundamental rights protection, while at the same time not bowing to the ECtHR's authority.

The reasons for the CC's attitude may be found in the special position held by the Italian CC at the crossroads of the multilevel protection of fundamental rights in Europe, whose peculiar nature depends both on the CC's relationship with domestic ordinary courts and on the specific character of fundamental rights adjudication in Italy.

The inclination of the CC to promote in so far as is possible the constitutional coherence of the domestic legal order through interpretation is well-known: according to its traditional jurisprudence, it is up to domestic ordinary courts to interpret ordinary legislation consistently with the Constitution without submitting an issue of constitutionality before the CC. Only where it is not possible to settle the conflict between a law and a constitutional provision by interpretation, and therefore only where a law cannot be interpreted coherently with the Constitution, a judicial review of legislation can be brought before the CC. However, in doing so, the CC, in so far as it empowers ordinary judges to pronounce on human rights issues, ends up by depriving itself of its role as human rights adjudicator, though only partially. In contrast, the Italian system of constitutional adjudication does not provide individuals the opportunity to bring questions directly before the Constitutional Court. A judicial review by the CC can be triggered only either by a direct recourse by the State and the Regions, aimed at settling a question concerning the delimitation of their legislative competence, or by an issue incidentally raised by a judge during a concrete judicial proceeding where the constitutionality of a law to be used to settle the case is at stake. Therefore, the CC is not automatically involved when an alleged violation of human rights is at issue.

These circumstances may risk further marginalizing the role of the CC in protecting fundamental rights, with particular regard to its relationship with the ECtHR: the latter



could be called on to cover a case in which the CC was not involved, resulting in the protection of rights being significantly shifted beyond the national borders.

The most recent ECtHR jurisprudence, indeed, provides clear proof of this trend: in some cases, the ECtHR truly became the one and only judge in human rights adjudication, although the ECHR was originally shaped as a subsidiary system of protection of rights (D'Amico 2015; Sorrenti 2015).

A single example may serve to explain the Italian CC's fears: the already mentioned *Costa and Pavan v. Italy* case, concerning the Italian exclusion of preimplantation genetic diagnosis for couples that are carriers of genetically transmittable diseases, but not for infertile couples. The ECtHR's previous decisions had already shown that the exhaustion of domestic remedies was not an absolute principle, with the result that applicants were required to have exhausted internal remedies only when these were available and effective, i.e. when they were accessible, capable of offering the applicants satisfaction in redressing their grievance, and when they offered a reasonable chance of success. The *Costa and Pavan v. Italy* Judgment represents a precise and concrete application of this attitude: the recourse was declared admissible, in fact, even though domestic remedies had not been exhausted by any means.<sup>xxxiv</sup> As the ECtHR asserted, 'the applicants cannot truly be reproached for failing to apply for a measure which, as had been explicitly stated by the Italian government, was forbidden in an absolute manner by the law'.<sup>xxxv</sup> Or, in other words, since 'it was certain that the applicants could not access PGD in Italy, it was useless for them to make such an application to the Italian health authorities and to then challenge the inevitable rejection of their application before the Italian courts' (Puppink 2012: 156).

In a case like the one we are discussing, it is obvious that by admitting direct recourse to the ECHR system when internal remedies, though theoretically accessible, do not present any chance of success, the ECtHR reduced the opportunity for the domestic CC to intervene preliminarily in order to safeguard the rights at stake at a national level.<sup>xxxvi</sup>

The CC's decision to rule on the case concerning the ban on heterologous insemination, solely in the light of domestic constitutional parameters, could therefore be plausibly read as a reaction against Strasbourg's encroachments when the domestic system – and the CC in particular – had not yet had the opportunity to redress the violation autonomously. In other words, the CC may have aimed to strongly affirm that it is still primarily up to the States and national authorities to ensure fundamental rights protection.



Only when they are proven inadequate, that is to say where individuals have been denied satisfaction because all internal paths have been rejected, can an intervention by the ECtHR be admissible and welcome. It is neither admissible nor welcome, on the other hand, where domestic ordinary and constitutional courts have not yet had the opportunity to redress the violation autonomously.<sup>xxxvii</sup>

To conclude, the analysis conducted starting from the case law of the ECtHR and of the Italian CC on a similar object, rather than showing a harmonious picture, where the different levels of protection integrate to assure human rights protection, has revealed a fragmented scenario, characterized by different lines of fractures and convergences. The two levels at times seem to converge towards a common path; at other times, instead, they give the impression that under the apparent language of human rights at the surface, the deep structure of the relationship between levels and Courts is all about authority. After all, the multilevel protection of rights is also a tale of Courts, each competing to have the last word on human rights adjudication. And precisely for this reason, the relationship between the two levels is very similar to the relationship between two tectonic plates, which remain side by side, each complementing the other, until the moment they clash under the pressure of deep, convective forces, although even clashes may play a positive role, often contributing, on the Strasbourg side, to a more pluralistic – and less hegemonic – interpretation of the ECHR (Delmas-Marty 2009) and, on the constitutional side, to a more open understanding of the rights entrenched in the domestic Constitution. The result of such an interaction among national and international levels of protection is therefore not completely predictable and cannot be attributed to the simple logic of hierarchy, but at the same time it represents the fundamental feature that permits the system to evolve dynamically.

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<sup>1</sup> See, among many, Judgments Nos. 104/1969, 17/1981, 15/1982, 323/1989, etc. Only Judgment No. 10/1993 seems to contradict a reconstruction of the ECHR status within the domestic system uniquely based on the formal rank of the execution order. Here, the CC states that that the ordinary law transposing the ECHR contains ‘provisions arising from a source with atypical competence, and, as such, they are insusceptible to being repealed or modified by ordinary laws’ (Tega 2013: 30). This peculiar statement was



not, however, reiterated in following decisions. Judgments from the Italian CC are all available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it)

<sup>II</sup> As Pollicino argues ‘since this decision, the Constitutional Court has seemed less interested in looking from a formal(istic) point of view at the static position of the ECHR in the hierarchy of the sources of law, and more interested, from a substantial and axiological point of view, and by reason of its fundamental rights-based content, in its suitability to complement the recognition of inviolable fundamental rights protected by Article 2 of the Constitution’.

<sup>III</sup> Constitutional Court, Judgment No. 388/1999, available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) (last accessed on 24 October 2016).

<sup>IV</sup> Constitutional Court, Judgment No. 348/2007 and No. 349/2007, English translation available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) (last accessed on 24 October 2016).

<sup>V</sup> In Judgment No.183/1973 (the Frontini Judgment available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) – last accessed on 15 March 2016) the ICC devised the so called counter-limits doctrine, i.e. the existence of a hard core of the constitutional legal order, which cannot be impinged by the supranational order. On the counter-limit doctrine see Cartabia (1995) and Pollicino and Martinico (2012).

<sup>VI</sup> At least starting from the seminal Constitutional Court Judgment no. 170/1984 (the Granital Judgment available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) – last accessed on 7 February 2016).

<sup>VII</sup> Article 11 provides that ‘Italy agrees, on condition of its equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy shall promote and encourage international organizations furthering such ends’.

<sup>VIII</sup> Constitutional Court Judgment No. 348/2007, § 4.7 (available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) – last accessed on 7 February 2016).

<sup>IX</sup> Judgment No. 317/2009, § 7, available in English at [www.cortecostituzionale.it/.../S2009317\\_Amirante\\_Silvestri\\_en](http://www.cortecostituzionale.it/.../S2009317_Amirante_Silvestri_en) (last accessed on 23 July 2016).

<sup>X</sup> ECHR, *S.H. v. Austria*, 3 Nov. 2011.

<sup>XI</sup> The *S.H. v. Austria* case was at that time the third case on IVF ruled by the Court of Strasbourg, after the two precedents involving UK legislation: ECHR, *Evans v. United Kingdom*, 10 Apr. 2007 and ECHR, *Dickson v. United Kingdom*, 15 Dec. 2007.

<sup>XII</sup> The first applicant is married to the second applicant and the third applicant to the fourth applicant. The first applicant suffers from fallopian-tube-related infertility. She produces ova, but, due to her blocked fallopian tubes, these cannot pass to the uterus, so natural fertilization is impossible. The second applicant, her husband, is infertile.

The third applicant suffers from agonaladism, which means that she does not produce ova at all. She is completely infertile but has a fully developed uterus. The fourth applicant, her husband, in contrast to the second applicant, is not infertile.

<sup>XIII</sup> For sake of completeness, Judgment No. 162 declared also Articles 9 (concerning the prohibition to disclaim paternity when resorting to heterologous artificial procreation) and 12 (containing the pecuniary penalty for heterologous procreation ban offenders) of Law No. 40/2014 to be unconstitutional.

<sup>XIV</sup> Law 40/2014, Article 1, para. 1.

<sup>XV</sup> Judgment No. 151/2009 (available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) – last accessed on 22 June 2015).

<sup>XVI</sup> Judgment No. 162/2014, § 4 In Law.

<sup>XVII</sup> Judgment No. 162/2014, § 7 In Law. On the issue of “scientific reasonableness” see Morrone (2014) and Penasa (2014).

<sup>XVIII</sup> See *Supra* Section 2.

<sup>XIX</sup> More precisely, Order No. 150/2012 described the Grand Chamber’s Judgment as ‘a novum directly influencing the issue of constitutionality’ referred by the courts. See Ruggeri (2012); Pellizzone (2012); Romboli (2013) and Violini (2014).

<sup>XX</sup> Constitutional Court, Order No. 150/2012 (available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) – last accessed on 22 June 2015).

<sup>XXI</sup> See e.g. the Council of Europe Convention on Human Rights and Biomedicine of 1997, Article 14.

<sup>XXII</sup> In fact, a popular referendum aimed at integrally abrogating Law 40/2004 was declared not admissible by the CC, due to its character of “constitutionally necessary law” (Judgment No. 45/2005), while the referendum focused on the prohibition of heterologous insemination was plainly admitted in Judgment No. 49/2005 (even if it ultimately failed, having achieved the participation of only 25.6% of people entitled to vote).



xxiii ECHR, *Parrillo v. Italy*, 27 Aug. 2015.

xxiv This actually is a common trend in the CC case law. We can see it, for instance, in Judgment No. 85/2013, concerning the issue of constitutionality also raised with regard to Article 117, par. 1 (in connection with Article 6 ECHR) of legislation aimed at facing the very serious problem of the polluting emissions from the Ilva factory in the Taranto area. There too, the CC reiterated that ‘the rationale of the contested provision is to strike a reasonable balance between the fundamental rights protected by the Constitution, including in particular the right to health (Article 31) and the derived right to a healthy environment, and the right to work (Article 4), from which the constitutionally significant interest of maintaining employment along with the duty incumbent upon public institutions to make all efforts to that effect are derived. All fundamental rights protected by the Constitution are mutually related to one another and it is thus not possible to identify any one of them in isolation as prevailing absolutely over the others. Protection must at all times be “systematic and not fragmented into a series of rules that are uncoordinated and potentially in conflict with one another”. If this were not the case, the result would be an unlimited expansion of one of the rights, which would “tyrannizes” other legal interests recognized and protected under constitutional law, which constitute as a whole an expression of human dignity’. Therefore, the issue of constitutionality was declared groundless. (See § 9).

xxv See, among many, Brems (2003); von Staden (2012: 1024); Legg (2012); Letsas (2006), Arai-Takahashi (2013); Gerards (2011: 104); Spielmann (2012: 392-411); Mena Parras (2015); Benvenisti (1999: 843).

xxvi The issue being that, whereas under the previous interpretation of the legislation, payment of contributions in Switzerland established entitlement to a pension in Italy on the basis of Italian contributions at equivalent salary, no matter that the contribution levels in Switzerland were significantly lower, as a result of an enactment providing for an “authentic interpretation”, the Italian pension was to be calculated on the basis of the real level of the Swiss contribution, thus resulting in lower pensions.

xxvii ECHR, *Maggio v. Italy*, 31 May 2011.

xxviii Constitutional Court Judgment No. 264/2012, § 5.3 (available at [www.cortecostituzionale.it](http://www.cortecostituzionale.it) – last accessed on 10 July 2015).

xxix ECHR, *S.H. v. Austria*, para. 94.

xxx Judgment No. 162/2014, § 6 The Law, which seems to paraphrase the ECtHR’s *S.H.* decision (see, for instance, para. 86)

xxxi ECHR, *Godelli v. Italy*, 25 Sept. 2012.

xxxii ECHR, *S.H. v. Austria*, para. 118.

xxxiii ECHR, *Costa and Pavan v. Italy*, 28 Aug. 2012.

xxxiv See also, ECHR, *Parrillo v. Italy*, cit., in which the ECtHR reiterated even more clearly that its decision to declare the individual application under examination admissible despite the fact that the prerequisite of the previous exhaustion of domestic remedies had not been met, depended primarily on the Italian system of Constitutional adjudication which does not provide individuals with the opportunity to bring their cases directly before the Constitutional Court. On the relevance accorded by the ECtHR to the direct access to CCs within the domestic systems of human rights adjudication, see ECHR, *Hasan Uzun v. Turkey*, 30 May 2013.

xxxv ECHR, *Costa and Pavan v. Italy*, cit., para. 38.

xxxvi Perhaps not coincidentally, in Judgment No. 96/2015, which is the internal follow-up of the ECtHR’s decision *Costa Pavan v. Italy*, the CC declared the unconstitutionality of the prohibition for genetic disease carrier couples to have access to PGD solely on account of the violation of Articles 3 and 32 It. Const. (the former aimed at protecting the principle of equality and the latter at guaranteeing the right to health), all the other challenges remaining “absorbed”, included the one concerning Article 117, par. 1 It. Const. (and therefore Articles 8 and 14 ECHR). In the CC’s reasoning, the blanket ban on PGD, if read jointly with the possibility allowed by the Italian legal system to terminate pregnancy where a fetus is affected by a genetic pathology, while introducing an element of inconsistency into the system, was judged “insuperably” unreasonable and therefore was declared unconstitutional. Here the message of the CC to the ECtHR seemed to be even clearer: it admitted that the outcome of its reasoning was the same as the one achieved by the ECtHR by expressly quoting the Judgment of the latter in the *Costa and Pavan* case. Nevertheless, it anchored its reasoning to uniquely internal parameters. The same outcome, but reached by a different path, we might say: as if it wished to restate that the domestic constitutional system can already possess all the tools with which to redress fundamental rights violations autonomously if it was given the opportunity to do so.



xxxviii It is however worth noting that in Judgment No. 84/2016 – concerning, like the *Parrillo* Judgment, the ban on donating embryos to scientific research as provided by Law No. 40 – while quoting the latter, the Italian CC expressly adhered to the ECtHR’s approach. It declared indeed the question as inadmissible, pertaining the balance between the conflicting interests and values at stake to the political discretion of the Parliament. This reference to the Strasbourg jurisprudence was, however, considered by some Authors as a symptom of a coward attitude from the CC, seeming the latter to use the *Parrillo* Judgment as a shield in order to evade its responsibility before hard choices in extremely sensitive matters (Chierigato 2016: 12).

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