



# ITALY

## Single ECtHR Case Study Report

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1. **Basic details:** Case name, date of submission, date of ECtHR judgment, full list of applicants, core issue addressed by the case

**Case of *Costa Pavan v. Italy* (Application no 54270/10), 28 August 2012 (Final 11 February 2013)**

The European Court of Human Rights was called to decide whether the **ban on embryonic screening** mandated by Italian legislation (law 40/2004) violated article 8 of the European Convention on Human Rights<sup>1</sup>. According to the Court, the Italian law was in violation of the Convention because the Italian Government had failed to justify its assertion that the interference in that right was justified “by the need to protect the health of the mother and child and the dignity and freedom of conscience of the medical profession and to avoid the risk of eugenic abuses”. **Rosetta Costa and Walter Pavan** (applicants) found out after their first child was born with cystic fibrosis that they were healthy carriers of the disease. Rosetta Costa became pregnant again in 2010 and underwent fetal screening, it was found that the unborn had cystic fibrosis, whereupon Costa had the pregnancy terminated on medical grounds. In order to have the embryo genetically screened prior to implantation, under the procedure of pre-implantation diagnosis (PID), the couple wanted to use in vitro fertilization to have another child. The Italian law (40/2004) prohibited PID even though it allowed in vitro fertilization in certain situations (e.g. for sterile couples or for those in which the man has a sexually transmissible disease)<sup>2</sup>. **Rosetta Costa and Walter Pavan lodged their complaints, assisted by Mr. Nicolò Paoletti and Ms Ginevra Paoletti, lawyers based in Rome, on September 20, 2010** arguing that their only recourse in order to give birth to a baby free of cystic fibrosis “was to start a pregnancy by natural means and medically terminate it every time the foetus tested positive for the disease”. Therefore, relying also on article 14 of the Convention, they claimed that they were victims of discrimination compared with the sterile couples or those where the man had a sexually transmissible disease.

**The Court ruled in favour of the applicants** considering that the applicants' wish to use medically assisted procreation and PID “in order to have a baby that did not suffer from cystic fibrosis **was a form of expression of their private and family life that fell within the scope of Article 8**” and that law n.40/2004 constituted an interference with their legitimate aim. **The Court stressed the inconsistency in Italian law** “prohibiting the implantation of only those embryos which were healthy, but authorizing the abortion of fetuses which showed symptoms of the disease” leaving the applicants with only one choice: to start a pregnancy by natural means and to abort the foetus if prenatal tests indicated it had cystic fibrosis, a course of action that “brought anxiety and suffering”; the Court stressed also the difference between *Costa and Pavan v. Italy*, which concerns PID and homologous insemination, and *S.H. v. Austria*, which concerned access to donor insemination; noted that, among the legislative choices in regard to PID made in 32 Member States of the Council of Europe, only

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<sup>1</sup> According to article 8 of the Convention: “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

<sup>2</sup> Article 1, paragraph 2, of Law No. 40 of February 19, 2004, on Medically Assisted Reproduction prescribes that “[t]he use of medically assisted procreation is allowed if there is no other effective treatment methods to remove the causes of sterility or infertility.” Article 4, paragraph 1, states that the use of assisted reproduction techniques is permitted only when it is otherwise impossible to remove impediments to procreation, and nonetheless is confined to cases of sterility or unexplained infertility documented by a medical act and to cases of sterility or infertility proven and certified by a medical act”.

Italy, Austria, and Switzerland prohibited the procedure, and Switzerland was currently reviewing the matter<sup>3</sup>. **The ECtHR rejected as “manifestly unfounded” the part of the application based on article 14 of the Convention**, noting that, “where access to PID was concerned, couples in which the man was infected with a sexually transmissible disease were not treated differently to the applicants, as the prohibition applied to all categories of people”. The Italian government asked the Grand Chamber of the Court to reconsider the decision of the Second Chamber, but the request was rejected on February 2013.

## 2. **Context of the issue:** Socio-legal, political and historical background to the issue at hand and/or practices that prompted the litigation, in the given country

For several years the Italian Parliament tried to regulate medically assisted reproduction through law. Finally, **in 2004 Parliament was able to pass law 40/2004**. Many previous attempts failed “because of bitter contention, in both the Italian cultural and juridical fields, between those who consider it necessary to have rigorous and detailed legislative control and those who regard only minimal legal intervention necessary in relation to the access and use of medically assisted reproduction”<sup>4</sup>. The Italian law 40/2004 was **one of the most restrictive approved in Europe**, as its general goal was to allow the recourse to medically assisted reproduction “only in order to help solve reproductive problems arising as a result of sterility or infertility, so as to guarantee the rights of all people involved, including those of the conceived child”<sup>5</sup>. As it has been argued by Simone Penasa, **the law is characterized by a “strict approach”**, “the result of a Parliamentary debate in which the goal of protecting the embryo must prevail on all other relevant rights and interests involved”<sup>6</sup>. The law contained several bans concerning the use of medically assisted reproduction and specific requirements for the couples that wanted to have access to it<sup>7</sup>.

Secular NGOs and associations mobilized against the law and were able to collect the signatures for a referendum on the law. Most of the scientific community sided with the request for a referendum to abrogate the law; for instance Nobel laureates Rita Levi-Montalcini and Renato Dulbecco openly supported the referendum. The Catholic Church openly called Italian citizens not to vote in the referendum arguing that “life cannot be put to a vote”. This decision was intended to provoke a failure of the referendum that needed the threshold of 50% of voters to be reached. As Franco Garelli has argued: “It is difficult to establish just to what extent the appeal made by ecclesiastical leadership contributed to the outcome of the vote, but it is certain that the result of the referendum (75% abstained) ignited a heated discussion on whether it is permissible or not for the Catholic Church to intervene in such a direct and explicit way in the public discussion of a very political delicate

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<sup>3</sup> The Court pointed out that DPI is authorized in Belgium, Denmark, the Czech Republic, Finland, France, Georgia, Germany, Greece, the Netherlands, Norway, Portugal, the Russian Federation, Serbia, Slovenia, Spain, Sweden, and the United Kingdom. It is not subject to any specific regulation, moreover, in Bulgaria, Cyprus, Estonia, Ireland, Latvia, Luxembourg, Malta, Poland, Romania, Slovakia, Turkey, and Ukraine. Cyprus, Turkey, and Slovakia permit access to DPI in practice.

<sup>4</sup> I. Riezzo, M. Neri, S. Bello, C. Pomara, E. Turillazzi, *Italian law on medically assisted reproduction: do women's autonomy and health matter?*, in “BMC Women's Health”, 16, 44, 2016, p. 1.

<sup>5</sup> *Ibid.*, p. 2.

<sup>6</sup> S. Penasa, *The Italian Law on assisted reproductive technologies n. 40 of 2004 facing the European Court of Human Rights: the case of Costa and Pavan v. Italy*, *Law and Human Genome Review*, 37, 2012, p. 156.

<sup>7</sup> The law regulated very strictly also the use of embryos: “(...) a maximum of three embryos could be produced and used in one ‘sole and simultaneous implant’ forbidding, at the same time, the cryopreservation of embryos, except when implantation was temporally impossible due to the mother's transitory health problems. As a result, PGD was banned”, *ibid.*, p. 2.

issue"<sup>8</sup>. In essence, the approval of the law by Italian Parliament has been often described as a victory of "**Catholic bio-law**" against "secular bio-law"<sup>9</sup>. And this was the main frame through which this debate has been analyzed. **It is also because of the confirmation that the law received in the referendum that the Costa-Pavan case is particularly relevant, especially under the perspective of the "counter-majoritarian" dilemma.**

3. **Nature of litigation:** Strategic or not? (Elaborate). At its inception was the ECtHR an aim or was it conceived as a local/national case originally?

*Costa-Pavan v. Italy* is part of the long litigation trend against law 40/2004 that has been taking place in Italy since the law was passed by Parliament (**see attachment of all the cases in Italian**). Technically, **I would not define it as "ab initio" strategical because there was a genuine interest from the couple to have a legal remedy for their situation.** This has also been confirmed by a lawyer of the Associazione Luca Coscioni<sup>10</sup>. There are however no doubts that the case is to be understood within the framework of actions undertaken to dismantle the application of law n. 40. The same involvement of Niccolò Paoletti, a lawyer very close to the Radical Party, is a signal of that. **Paoletti clearly saw in the law a sign of the "interference of the Catholic Church within the secular affairs"**<sup>11</sup>. Paoletti conceived the case immediately as a case that could go directly to Strasbourg and, in fact, he based his own entire legal strategy on this, avoiding internal courts.

4. **Pre-ECtHR history of case:** Through which local and national courts (or other administrative bodies and procedures) did the case pass; what year did the process start locally/nationally? If strategic litigation, was it prompted by any particular event?

**Technically the case did not go through local and national courts, as the text of the law did not provide any remedy in the Italian legal order**<sup>12</sup>. However, it must be stressed that the *Costa-Pavan* case can be understood as one of the decisions in the long trend of mobilization against law n.40/2004. I mention below some of the most relevant decision by Italian Courts<sup>13</sup>:

- a) Decision by the Catania Court of May 3<sup>rd</sup> 2004: denial of PID;
- b) Decision by the Cagliari Court of 29<sup>th</sup> June 2004: access to abortion after use of assisted reproduction techniques;
- c) Ordinance of the Constitutional Court 369 9<sup>th</sup> November 2006: non-admissibility of the question of constitutionality of article 13 of law n. 40/2004;

It is worth mentioning **the decision of a local court in the Italian city of Salerno which had for the first time, in January 2010, authorized the use of PID by a non-sterile couple who were**

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<sup>8</sup> F. Garelli, *Religion Italian Style: Continuities and Change in a Catholic Country*, Routledge, 2016, p. 155.

<sup>9</sup> For a full account of mobilizations and debates see L. Ozzano, A. Giorgi, *European Culture Wars and the Italian case: Which side are you on?*, Routledge, 2016. See also D. Milani, "Veluti si Deus daretur": la legge n. 40 del 2004 sulla procreazione medicalmente assistita dal dibattito parlamentare all'articolato, *Quaderni di Diritto e Politica ecclesiastica*, 1, aprile 2015, pp. 118-142.

<sup>10</sup> Interview 18/1/2017.

<sup>11</sup> N. Paoletti, interview to Radio Radicale, 29/8/2012, available at: <http://www.radioradicale.it/scheda/359266/fecondazione-assistita-la-corte-europea-dei-diritti-umani-di-strasburgo-ha-bocciato-la>

<sup>12</sup> The declaration of admissibility by the Court was criticized by some religious activists exactly on the ground that local remedies were not exhausted.

<sup>13</sup> I was able to obtain from the lawyers of the Associazione Luca Coscioni a full list of the cases.

**healthy carriers of muscular atrophy.** However, the ECtHR describes the earlier Italian judgment as a “one-off decision.”

Nevertheless, as the ECtHR judgment points out, the Salerno court judge took note of new elements introduced in the law by the Italian Ministry of Health Decree No. 31639 of April 11, 2008. The Salerno judge further held that DPI could not but be considered one of the techniques of prenatal monitoring aimed at knowing the state of health of the embryo. The judge also “**considered it unreasonable not to guarantee the mother the right to know the state of health of the embryo by means of DPI, when her right to abort a sick foetus is recognized.**”

5. **External influences:** Was the claim supported by other local, national or transnational influences (funding, legal advice, other NGO support)? If so, please elaborate (indicate also at what stage – e.g., from its inception or only when it reached the ECtHR?)

The case did not involve many costs as the complaint was filed directly before the ECtHR. Studio Legale Paoletti, which is a small boutique law firm based in Rome, followed the case from the beginning until the end. **It is worth remembering that Paoletti is the same lawyer that followed the Lautsi case in Strasbourg.** The lawyer was constantly in contact with the coalition of NGOs that submitted amicus brief in support of the claimant. No information on funding were released. A lawyer for the Associazione Luca Coscioni, was the leading person in the coordination of the mobilization efforts to submit amicus brief in support of the claimants. As he acknowledges: “After the Italian State filed its briefs in order to defend law n. 40, the Movement for Life and 52 Italian and European Member of Parliament filed an amicus brief. The President of the ECtHR then allowed also Associazione Luca Coscioni, Associazione Cerco un Bimbo, l’Altra Cicogna and Amica Cicogna to submit our own amicus brief. With the help of MEP Nicolò Rinaldi we involved also other Members of the European Parliaments. Through the staff of the Radical Party we also reached out at Members of the Italian Parliament”<sup>14</sup>. **The major role on the other side was played by the European Centre for Law and Justice**<sup>15</sup>, which drafted the other amicus brief and coordinated the collection of signatures by MEPs.

6. **Pre-case mobilisations:** Give a full account of mobilisations around the case from its inception up to its airing at the ECtHR, including the initiating organization(s), alliances (pro and con) which may have taken shape around the issue, claims made at various point, etc.

As mentioned, **the legal strategy of the case was shaped by Studio Legale Paoletti** with the support of the NGOs that were in support of the claimants. Associazione Luca Coscioni had been mobilizing for years against law n.40 and this was just one possibility among the others to tear down parts of the law that they judged to be against basic human rights. **The other organizations that intervened in the case were mainly satellite NGOs with strong links to Associazione Luca Coscioni.** All the four organizations have provided or provide legal

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<sup>14</sup> See, F. Gallo, *Il ruolo delle Corti sovranazionali nella protezione del diritto alla salute e la libertà di ricerca scientifica*, 27/2/2014.

<sup>15</sup> On the ECLJ role in the context of ECtHR case-law see E. Fokas, *Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grasstops Mobilizations around Religion*, Oxford Journal of Law and Religion, 2016, pp. 1-33 and P. Annicchino, *Winning the Battle by Losing the War: the Lautsi case and the holy alliance between American conservative evangelicals, the Russian Orthodox Church and the Vatican to reshape European identity*, Religion and Human Rights: an International Journal, 6, 2011, pp. 213-219.

assistance to couples in cases concerning the application of Italian law on assisted reproduction. The other organizations were: Amica Cicogna ONLUS (registered office in Salerno, legally represented by its President Filomena Gallo); Cerco un Bimbo (registered office in Rome, legally represented by its President Federica Casadei); L'altra cicogna ONLUS (registered office in Quartu St. Elena, legally represented by its President Laura Pisano). All the four organizations concurred in the submission advanced by the lawyer of Costa-Pavan and offered additional data on the phenomenon of PID and assisted reproduction in Italy.

**7. Post-case mobilisations:** Trace any mobilisations taking place in the aftermath of the case (including impact of this case on other local/national/ECHR cases emerging in the national context).

The decision of the Strasbourg Court triggered further mobilization from couples that wanted to have access to the PID and, in fact, the “*Corriere della Sera*” of October 22<sup>nd</sup> 2013 reported that for the first time a local court in Rome had now forced a public hospital to deliver the service<sup>16</sup>. The decision was also used by Associazione Luca Coscioni and other NGOs that supported the claimants for the purpose of media mobilization. From the materials we have collected we can see how especially Filomena Gallo **was active in framing the decision as a success story in the use of the ECHR to counter national restrictive laws**. I am listing here the major interventions<sup>17</sup> without entering into details:

- Filomena Gallo interviewed by Radio Radicale (29/8/2012);
- Filomena Gallo interviewed by Radio 3 (29/8/2012);
- Filomena Gallo interviewed by RAI 1 (6/9/2012);
- Filomena Gallo interviewed by Sky TG24 (12/9/2012);
- Emma Bonino interviewed by SkyTG24 (12/9/2012);
- Marco Cappato interviewed by Radio Radicale (28/8/2012);
- Marco Cappato and Filomena Gallo-Filodiretto Radio Radicale (30/8/2012)<sup>18</sup>.

Other mobilizations against law 40/2004 took place in court. As leading constitutional law scholars mention: “In 2013 Statute 40/2004 was again challenged by the Courts of first instance of Milano, Firenze and Catania. More precisely, the referring Courts contested Article 4, prohibiting medically assisted procreation of the ‘aetherologus’ kind. With judgment 162/2014 in which the Constitutional Court operated an important complex balancing of the various rights involved, Article 4 was struck down”<sup>19</sup>. Associazione Luca Coscioni also wrote a formal letter to the President of the Republic asking him to take seriously into account the decision of the Strasbourg Court<sup>20</sup>.

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<sup>16</sup> [http://roma.corriere.it/roma/cronaca/13\\_ottobre\\_22/fecondazione-roma-prima-diagnosi-preimpianto-un-ospedale-pubblico-e2f15aac-3b04-11e3-95f2-9a7a296f615f.shtml](http://roma.corriere.it/roma/cronaca/13_ottobre_22/fecondazione-roma-prima-diagnosi-preimpianto-un-ospedale-pubblico-e2f15aac-3b04-11e3-95f2-9a7a296f615f.shtml).

<sup>17</sup> They were made available by the Associazione Luca Coscioni, see <http://www.associazionelucacoscioni.it/notizie/comunicati/audio-video/>.

<sup>18</sup> All the interviews are available here: <http://www.associazionelucacoscioni.it/notizie/comunicati/audio-video/>.

<sup>19</sup> V. Barsotti, P.G. Carozza, M. Cartabia, A. Simoncini, *Italian Constitutional Justice in Global Context*, Oxford University Press, 2016, p. 128.

<sup>20</sup> Available at: <http://www.associazionelucacoscioni.it/notizie/rassegna-stampa/napolitano-c-posta-te-litalia-adequi-la-legge-40-alla-convenzione-europea-dei-diritti/>.