

# Law, Biopolitics and Reproductive Citizenship

## The Case of Assisted Reproduction in Italy

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**Abstract** In 2004, the introduction of a restrictive law on assisted reproduction in Italy sees the privileging of a conservative model of family relations and a misogynist view of society by the political elite. This backlash politics excludes many individuals from full reproductive citizenship. In this regard what the Italian case allows us to see is the operation of a biopolitics which both governs and excludes. The 2004 Act excludes gay couples, single people and people who are carriers of genetically inherited conditions from access to assisted reproductive technologies. Such an exclusionary biopolitics has provoked a counter-politics of resistance against the legislation. This article examines the manner in which individuals have contested the legislation's prohibitions, and, in so doing, looks at how this might constitute an example of what Nikolas Rose has termed an *ethopolitics*. The concept of *ethopolitics* allows us to visualize the potential of an active counter-politics of resistance for restoring reproductive citizenship to those deprived of it by legislative interventions of this nature.

**Keywords:** assisted reproduction; biopolitics; reproductive citizenship; reproductive rights; bioethics.

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### I. Introduction

In this article I examine Italy's 2004 Act on Assisted Reproduction as an example of the operation of a biopolitics which both governs and excludes. The exclusionary consequence of biopolitics has been well defined by Didier Fassin as “about inequalities in life which we could call bio-inequalities” (Fassin 2009, 49). Such a notion of bio-inequality includes a “withholding [of] recognition from the other” (Fassin 2009, 57). It is precisely this withholding of recognition from individuals affected by

the prohibitions created by the Act (couples who are carriers of genetic conditions, gay couples, and single people) that has led to a counter-politics of resistance against the legislation. The legislation, Legge 19 Febbraio 2004, n. 40, '*Norme in materia di procreazione medicalmente assistita*', narrowed the scope of reproductive citizenship in that it accorded symbolic legal recognition to the embryo and prohibited embryo research, embryo freezing, and donor insemination, and prevented gay couples, single women and those couples suffering from a genetically inherited condition from gaining access to assisted reproduction services (for a full account see Hanafin 2007, 49-80). The Act while purporting to regulate the assisted reproductive sector is in effect a means of promoting a conservative notion of family formation and of excluding individuals who do not fit into this model from access to assisted reproductive services. The legislation is not an appropriate model for governing assisted reproductive technologies in a pluralist manner. As Krause and Marchesi rightly observe:

The [...] legislation suggests the “proper way to have children” is within the bounds of the heterosexual family organized around traditional gender roles and a cohesiveness borne of homogeneity (Krause and Marchesi 2007, 358).

The 2004 Act is the result of a long campaign by the Vatican and conservative Catholic politicians and pressure groups to re-impose Roman Catholic moral values in law following a period of liberalisation in the 1970s and 1980s. As Krause and De Zordo have noted in this regard:

The rigid politics of life operating in Italy supported by the Catholic Church and sympathetic politicians defends the ‘life’ and the rights of the embryo and the ideal Catholic family at all costs. As a result, women who do not have children or who postpone motherhood are stigmatized, as are infertile women and couples who confront a restrictive law on medically assisted technologies, which excluded single women and same-sex couples (Krause and De Zordo 2012, 143).

The introduction of the Act creates a paradox in that the pre-existing protections of rights in the area of human reproduction contained in the Italian Constitution and in the Abortion Act of 1978 now share legal space with a dissonant embryo protection model which values an abstract model of life as sacred and devalues individual lives and their right to choose. In this model the embryo is constructed as a subject independent of the woman in whose womb it exists. Such independent embryonic subjects are as Ingrid Meltzer (2011, 117) has put it: “framed as the embodiment of a vulnerable nature that was under attack, and as – lacking their own voice – in need of the law’s protective intervention”. For Meltzer this

leads to the construction of the embryo as “a new citizen subject” (Meltzer 2011, 118).

The 2004 Act has been the subject of continuous contestation both at the political level (in the form of an ultimately unsuccessful citizen initiative referendum in 2005) as well as the subject of numerous legal challenges (at the level of local courts, the Italian Constitutional Court and, most recently, in 2012 a successful challenge at the Court of First Instance of the European Court of Human Rights in Strasbourg). The cumulative effect of the many court challenges has led to a gradual judicial reworking of the Act. However, despite such judicial intervention, the Act itself still remains on the statute books due to a lack of willingness on the part of the main political parties of the centre right and centre left to revise it.

This article focuses on the manner in which groups and individuals affected by the Act’s prohibitions have contested the legislation’s prohibitions, and, in so doing, examines the extent to which this might constitute an example of what Nikolas Rose has termed an *ethopolitics*. Rose’s notion of *ethopolitics* can be seen as a form of affirmative biopolitics in which citizens claim for themselves rights to make decisions about and over their bodies (Rose 2001, 19). The concept of *ethopolitics* allows us to visualize the potential of an active counter-politics of resistance for restoring reproductive citizenship to those deprived of it by legislative interventions of this nature. This resistant biopolitics of living citizens calls for a continuous struggle to maintain and win rights. It allows us to move from “a rigid politics of life” to adopt Krause and De Zordo’s term to a “power of life as such” (Fassin 2009, 49). In other words it demonstrates the power of individuals acting in concert to contest draconian state action and allows us to see in Fassin’s terms that “another politics of life is possible” (Fassin 2009, 44). This is all the more important when politicians refuse to provide a facilitative and fair framework for the governance of assisted reproductive technologies.

## 2. Law, Religion and the Emergence of Embryo Protection

The 2004 Act can be described as an embryo protection law in that its overriding objective is the protection of the embryo at the expense of women’s right to exercise reproductive choice. The idea of giving an embryo legal recognition immediately sets up a conflict between this particular ‘subject’ and living citizens who may want access to reproductive services. The embryo is deployed in the legislation as a weapon to protect an imagined notion of the Italian family, one which is based on a Roman Catholic marriage between heterosexuals. All other family formations are seen as a threat to such an imagined dominant Italian family model. The Act is the apogee of a concerted campaign by the Vatican and conservative politicians to reclaim a narrow, patriarchal conservative notion of the

nation. This is a politics which lessens the freedom of living citizens in the interest of an abstract notion of Life. This curious form of biopolitics uses the apparatus of personhood to give symbolic life to the not yet living and devalues the lives of living citizens. As philosopher Roberto Esposito (2011, 185) has put it: “the concept [...] of the ‘sanctity’ of life is often used as an apparatus of exclusion or suppression of other lives, considered as not as relevant”. Indeed, as Franca Bimbi has noted, the legislation is based on a politics of fear and security. As she has observed, the law drew: “on fears, on the need for security, on the need to identify the internal from the external” (cited in Marchesi 2007, 12).

In order to see how such a restrictive law managed to achieve such widespread elite political support it is necessary to examine the history of attempts to govern assisted reproduction and the influence on elite political culture of traditionalist Roman Catholic thinking on the family. Until 2004 the only instrument which governed assisted reproductive technology in Italy was a ministerial circular, introduced in 1985 by the then Minister for Health, Costante Degan. The Degan Circular specified that assisted reproduction with donor eggs and sperm was prohibited, and also prohibited the creation and cryopreservation of embryos for deferred implantation, industrial use and scientific research. Under the Circular access to assisted reproductive services was permitted only to married couples. These prohibitions did not apply to clinics in the private sector (see further, Valentini 2004, 95-109). The Degan Circular of 1985 was a misguided attempt at partial regulation of the field. Regulation was partial in that it applied only to the provision of assisted reproductive technology in Italy's national health service. As Ramjoue and Kloti have observed, the Circular resulted:

in unequal access to ART. Wealthy patients [could] afford faster access to a wider range of ART than those who depend[ed] on the [Italian National Health Service] for treatment and financial coverage. In the absence of a comprehensive regulation on ART, many techniques [were] available to a few, and few [were] available to many (Ramjoue and Kloti 2004, 59).

As a result, a two-tier system of assisted reproductive services developed, one private and free from regulation, the other public and subject to great restrictions. The medical profession added a further layer of prohibition in 1995 with the introduction in that year of a revised version of its Code of Medical Ethics which prohibited all medical practitioners from using surrogate motherhood of any kind, insemination of gay and lesbian couples and single people, post-mortem insemination, and the insemination of women with non-precocious menopause (see Parolin and Perrotta, 2012). This partisan anti-scientific approach was to provide a foretaste of the way in which the issue of assisted reproduction would be addressed by political elites in Italy for the coming twenty years.

This is not to say that attempts had not been made to fill the legislative void in the years between 1985 and 2004. However none of these attempts were successful. In 1989 a number of Bills were introduced which would provide a legislative framework for the new reproductive technologies. These included one which would extend the provision of IVF to single women; another which would allow embryo cryopreservation and gamete donation and which would have extended provision of ART in both public and private clinics, and a third which would have given the embryo legal protection from the moment of conception. None of these Bills was successful given the lack of political will to legislate on the matter. In 1995, a Commission was established by the Ministry of Justice, under the chairmanship of Francesco Busnelli, to look into the area. This Commission recommended that donation of gametes be permitted but that single women not be allowed access to assisted reproductive services. The Report of the Busnelli Commission was not implemented by the Government (Flamigni and Mori 2005, 28). The next attempt to address the question of regulating the assisted reproduction sector came in 1997 when a centre-left coalition government was in power. In 1997 the President of the Parliamentary Social Affairs Committee, Marida Bolognesi, announced that the Committee would begin an inquiry into the feasibility of legislation in the sector. In 1998 the committee presented a draft Bill which limited access to assisted reproduction to heterosexual couples who were either married or in a stable relationship but allowed both donor insemination and embryo research for therapeutic purposes. It also provided that the number of embryos produced in each treatment cycle should be limited to that amount strictly necessary for a single implantation, and in any case not more than four.

However, during its passage through both houses of the Italian Parliament, the Bill was subject to several amendments, which would transform its structure and tone radically. The amendments were added by a cadre of Roman Catholic conservative parliamentarians whose aim was to ensure that the rights of the embryo be inserted in the Bill. The Bill was amended to include a stipulation that in the carrying out of assisted reproductive services, medical practitioners should take into account the interests of the embryo as well as the rights of the woman involved. The Bill was further amended by the introduction of a ban on the freezing of embryos, a limit of three embryos to be produced and implanted in any one treatment cycle, and an amendment was added which would allow for the adoption of embryos as if they were children. Marida Bolognesi resigned as the sponsor of the Bill, as she felt that, in its transformed state, she could no longer support it. She was replaced by Alessandro Cè of the Northern League, whose sympathies were of a far more conservative nature. The Chamber of Deputies approved the amended Bill by a majority of 266 to 153 on 26 May 1999. Once the Bill arrived in the Senate for approval, the role of sponsor was taken over by Francesco Varella of the Green Party. He attempted to undo some of the more extreme

amendments made in the lower house. The passage of the Bill through the Senate was delayed by the decision to suspend discussion until after the administrative elections scheduled in several regions for April 2000. Once the Bill resumed its passage through the Senate, certain parts of the text, which had been amended in the lower house, were further amended. This included the removal of the reference to the embryo as being possessed of rights. However, the proposed legislation was eventually abandoned due to the fall of the coalition government (see Cirant 2005, 182-184).

After the failure of the centre-left government's attempt to pass legislation on assisted reproduction, the new centre-right government led by Silvio Berlusconi reopened discussion of such a law after coming to power in 2001. With a centre-right majority the conditions for the passing of a more restrictive embryo protection law were more favourable. By 2002 the new Government had secured the approval of a revised draft of the previous Bill in the Chamber of Deputies. The revised Bill granted the embryo symbolic legal recognition, and prohibited both embryo freezing and donor insemination. After its initial approval, the Bill remained in limbo awaiting further discussion in the Senate. The Government did not appear to be in a hurry to speed the Bill through to final approval. However, the Vatican decided to expedite matters. In February 2003, on the occasion of the anniversary of the signing of the Lateran Pacts of 1929, representatives of the Government attended a meeting with Vatican officials.<sup>1</sup> On this occasion, the Pope's displeasure at Government policy in relation to its support for the war in Iraq, the implementation of discriminatory legislation on immigration, the so-called Bossi-Fini law (named after its instigators, respectively the leaders of the separatist Northern League and of the former neo-fascist National Alliance), and the Government's opposition to the introduction of a system of clemency for prisoners, was communicated to the Government. The Vatican pointed out that the swift approval of a law on assisted reproduction in line with Roman Catholic thinking would go some way to winning back its approv-

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<sup>1</sup> The Lateran Pacts were concluded between the Vatican and the fascist regime on February 11, 1929. The pacts gave official recognition to the special position of the Church in Italian politics. The Pacts recognised Roman Catholicism as the state religion as well as giving many concessions to the Vatican, including, tax exemptions for employees of the Holy See, exemption from jury service for the clergy, and providing for the teaching of Christian doctrine in primary schools. The Pacts were given continued recognition in the post-fascist republic by virtue of Article 7 of the Constitution of 1948 which provides as follows: "The State and the Catholic Church are, each within its own ambit, independent and sovereign. Their relations are regulated by the Lateran Pacts. Such amendments to these Pacts as are accepted by both parties do not require any procedure of Constitutional Revision."

al and, more importantly, its political backing (see Valentini 2005, 39-42). After this meeting the Government's position on assisted reproduction legislation changed. By December 2003, the Government had obtained approval of the draft legislation in the Senate, without any significant amendments. The Bill became law on 10 February 2004 after final approval by the Chamber of Deputies.

Significantly, the centre-left opposition did not act to oppose the legislation in spite of its blatantly unconstitutional and anti-pluralist nature. In fact, there seemed to be no major difference between the opposition and the Government on the issue when it came to the final vote. They seemed to have a common interest in pushing the law forward based on shared patriarchal values (Cirant 2005, 190-204). Francesco Rutelli, then leader of the centre-left *Margherita* party, declared that his party members should be allowed to vote according to their conscience on the law. Rutelli's conscience and those of many of his party colleagues led them to vote for the Act, leading to the absence of any effective parliamentary opposition (see Lalli 2004, 163-165; Valentini 2005, 123-136). The centre-left argued that any legislation, however flawed, was better than none. However, in this case, it was obvious that they had their eyes on the Roman Catholic vote which is still a substantial one for political parties seeking an electoral majority.

### 3. The Biopolitics of Reproductive Citizenship

The legislation gives implicit legal recognition to what is termed the *concepito*, literally 'that which is conceived'. This broad term encompasses all stages of pre-natal development including both the embryo and the foetus. However, the term *concepito* is employed only in Article 1 of the Act. In the rest of the Act the object of legal protection is named as the *embrione*, the embryo. In this case using the term *concepito* could imply that all unborn life once conceived is deserving of protection. This notion of embryo protection goes beyond the existing balance drawn in Italian law between the mother and foetus in the case of abortion. Under a ruling of the Constitutional Court of 1975 it was held that the welfare of the foetus does not override a woman's right to health. This was later confirmed by the introduction of the Abortion Act of 1978, which allows for pregnancy termination up to the twelfth week of gestation. There is therefore a stark contradiction in Italian law in relation to the question of reproductive rights. On the one hand the Constitution and abortion legislation provides a liberal framework in which reproductive choice is legally valued. On the other hand, the 2004 Act introduced into law a limitation on individual choice in relation to reproduction in favour of a symbolic recognition of the embryo as legal subject.

The 2004 Act limited access to in-vitro fertilisation to those categorised as infertile or sterile couples. Significantly, couples who are carriers

of a hereditary genetic condition could not as a consequence gain access to assisted reproductive services in Italy. This aspect of the Act has been the subject of numerous court challenges, culminating in a successful appeal to the Court of First Instance of the European Court of Human Rights in August 2012. The Act in Article 13 provides a general prohibition on any form of embryo experimentation. It does however allow clinical research on embryos only when exclusively therapeutic and is used to advance the well-being of the embryo. However the 2004 Act does not explicitly prohibit pre-implantation genetic diagnosis. This ambiguity was further compounded when the Government introduced the Code of Practice pursuant to the Act in 2004, which explicitly prohibited pre-implantation genetic diagnosis. This was beyond the statutory powers of the Minister for Health who introduced the Code of Practice as it created a prohibition which did not exist in the Act itself.

The Act allows only assisted reproduction using the egg and sperm of the couple involved and prohibits the use of donor gametes. This reflects a particular ideological narrative, which sees *homologous* reproduction, (that is, reproduction using genetic material from the couple), as natural, and *heterologous* reproduction, that which uses donated genetic materials, as offending against nature (see further Marchesi 2012). In addition the Act limited access to assisted reproductive services to adult heterosexual couples who are either married or in a stable relationship, are of a potentially fertile age and are both living. Moreover, the Act only permitted consent to the procedure to be withdrawn up to the point at which the egg is fertilised. This could have the consequence of women being forced to go through with the procedure once the egg is fertilised. This forced consent measure breaches Article 32 (2) of the Italian Constitution which states that no person shall be subjected to medical treatment without legal sanction and that the law can in no manner violate the limits imposed by the need to respect human dignity.

The conservative model of family relations inherent in the legislation has been subjected to judicial challenge in a series of cases in the lower courts and the Constitutional Court in Italy as well as a successful appeal to the European Court of Human Rights in Strasbourg. These cases have been taken by a coalition of medical and scientific associations, reproductive rights interest groups and individuals affected by the law's provisions. Many of the individuals who have challenged the legislation's provisions have been supported in doing so by reproductive rights interest groups such as *Amica Cicogna*, *Luca Coscioni*, and *Cerco un Bimbo* as well as medical and scientific interest groups such as WARM (World Association for Reproductive Medicine) (see Gallo and Lalli 2012, 85). Such a practice of what Nikolas Rose and Carlos Novas call "rights bio-citizenship" (Rose and Novas 2005, 442) has led to courts redefining the terms of the 2004 Act and dismantling some of its prohibitions. Rose and Novas (2005, 442) define "rights bio-citizenship" as: "forms of activism such as campaigning for better treatment, ending stigma, gaining access to ser-



vices". This practice of rights bio-citizenship also has an ethical dimension which Nikolas Rose, writing elsewhere, terms *ethopolitics*. This term brings together an active campaigning politics with an ethical dimension which allows individuals to improve their position in society through an active working on the self in relation with others. This thinking of Rose's is indebted to Michel Foucault's later work on ethics as care of the self (see Foucault 1978, 1985, 1986). This is an active thinking of citizenship which makes of the citizen more than a mere object of state governance but, rather, an active participant in political affairs.

In Rose's interpretation of Foucault's thought one can see the emergence of a politics of resistance which works to counter the construction and governance of individuals as objects of political power. It could be called an affirmative biopolitics which allows individuals to engage power and act in a collective manner to resist their exclusion from full citizenship. As such, *ethopolitics* for Rose, refers to:

ways in which the ethos of human existence – the sentiments, moral nature or guiding beliefs of persons, groups, or institutions – have come to provide the 'medium' within which self-government of the autonomous individual can be connected up with the imperatives of good government. In ethopolitics, life itself, as it is lived in its everyday manifestations, is the object of adjudication [...] ethopolitics concerns itself with the self-techniques by which human beings should judge themselves and act upon themselves to make themselves better than they are. While ethopolitical concerns range from those of lifestyle to those of community, they coalesce around a kind of vitalism: disputes over the value to be accorded to life itself, "quality of life", "the right to life" or "the right to choose", euthanasia, gene therapy, human cloning and the like" (Rose 2001, 18).

Thus, for Rose (2001, 19), *ethopolitics* enables individuals to: "use their individual and collective lives, the evidence of their own existence [to] demand civil and human rights [...] They call for recognition, respect, resources [...] control over medical and technical expertise".. Rose's notion of *ethopolitics* allows us to visualize the potential of deliberative participative politics within the context of reproductive rights and citizenship.

In the current battle for reproductive citizenship in Italy one can see the play between the *ethopolitics* of movements of individuals who are attempting to self-style their reproductive choices, and what I have called elsewhere the *vitapolitics* of politicians and the Roman Catholic Church who attempt to prevent the creation of this right (Hanafin 2007, 5). This *vitapolitics* is based on rigid moral beliefs and refuses to recognize contra-

ry views<sup>2</sup>. In reaction to the 2004 Act there has been an instantiation of an *ethopolitics* by groups and individuals affected by genetic illness who see the Act as a major obstacle to gaining access to assisted reproductive technologies and to the development of medical research to identify treatments for genetically inherited conditions. As Ingrid Meltzer (2011, 111) has observed: “Speaking in the name of their physical vulnerability and mobilizing their damaged bodies, they acted as “biological citizens””. Such biological citizens use their bodies as a strategic means of achieving full reproductive citizenship. The notion of the biological citizen is an interesting one in that it brings together both the reality of contemporary political regimes in which we are all the subjects of governance, with the co-existing ability to resist such governance in the mode of an affirmative biopolitics. It creates a space of resistance in which citizens take on an active role in contesting the manner in which their citizenship is constructed. In challenging the law, such ethopolitical resistance has taken two forms, one fought on the political plane in the form of a citizen initiative referendum, and the second, fought in the courts by individuals contesting the act on the grounds that it interferes with and is incompatible with pre-existing constitutional rights to privacy, health, and freedom from discrimination.

### 3.1. The Citizen Initiative Referendum: A Failed Ethopolitical Intervention

The citizen initiative referendum failed in large part due to successful negative campaigning on behalf of the Roman Catholic Church. The repeal referendum (*referendum abrogativo*) is a form of citizen initiative referendum which requires that the petitioners for a referendum obtain at least 500,000 signatures of citizens with the right to vote and allows the petitioners to outline their proposals for either partial or total repeal of the legislation in question. In opposition to the 2004 Act, a referendum committee was formed, which was made up of an alliance of the Radical Party, representatives of parties of the centre-left, the Green Party, and other interested parties, including scientists, doctors, and patients’ groups. Once the requisite number of signatures is obtained the referendum proposals are then scrutinized for admissibility by the Constitutional Court (see further Barbera and Morrone 2003, 11-27). The referendum

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<sup>2</sup> The notion of *vitapolitics* refers to the manner in which conservative Roman Catholic interests in Italy (and in other jurisdictions) struggle to insert in public policy a definition of life as sacred from the moment of conception. Such an ideology valorizes the abstract notion of life over the actual rights of living citizens, particularly women. Such a model would criminalize abortion and limit severely access to in-vitro fertilization. (see further Hanafin, 2007, pp. 4-10).

committee called for the total abrogation of the legislation. In addition, and in the event that the Constitutional Court would reject this proposal, four proposals, which would partially repeal the legislation, were also proffered. On obtaining the requisite number of signatures, the Constitutional Court decided to allow four out of the five proposed referendum proposals. The proposal that was rejected was that which called for the total repeal of the Act. The main opposition to the referendum came from the Roman Catholic Church. The Church set up an anti-referendum committee called 'Science and Life' (*Scienza e Vita*) to campaign on its behalf. The anti-referendum campaign instead of calling for a 'no' vote called for voters to abstain, so that the required quorum of 50% plus 1 of voters would not be reached and the ballot would be declared invalid. This tactic was seen as a far more effective way of allowing the law under question to remain untouched but was also a subversion of the so-called deliberative democratic process.

The anti-referendum campaign proved to be successful. The quorum was not reached with only 25.9% of voters turning out (Luzi 2005). The reason for the large abstention cannot be attributed simply to the Church's call for a boycott of the polls. The issue of assisted reproduction was not one which excited the enthusiasm of many voters. They saw it as an issue which affected a minority of the population. Moreover, the recent history of referendum in Italy had been marked by a large rate of abstention. In the years immediately preceding the referendum on the assisted reproduction law (i.e. between 1997 and 2003) eighteen referendums were held and not one of these achieved a quorum (Barbera and Morrone 2003, 209-251). In addition there may have been a further explanation for the lack of a quorum in the particular case of the assisted reproduction referendum. The feminist writer Silvia Ballestra has astutely observed that there was an unwillingness on the part of a large section of the Italian electorate to engage with the vital issues raised by the referendum campaign. Instead, drained of curiosity or civic responsibility, in a polity which had become a mediocracy, many Italians simply could not be bothered to inform themselves of what exactly was at stake in this referendum (Ballestra 2006, 30-31).

#### **4. Rights, Resistance and the Bio-Constitutional Reframing of Assisted Reproduction**

On the legal plane cases challenging the Act have been fought at courts of first instance, the Italian Constitutional Court and the European Court of Human Rights in Strasbourg. This legal *ethopolitics* demonstrates the ability of citizens affected by the Act in coalition with reproductive rights interest groups and scientific and medical groups to win back rights within the context of assisted reproductive technologies by harnessing pre-existing constitutional rights which support a liberal mod-

el of reproductive citizenship. In this sense, what such legal contestations demonstrate is a form of, what Sheila Jasanoff has called, 'bioconstitutionalism'. For Jasanoff (2011, 290), 'bioconstitutionalism': "displays the power of human subjects to articulate new claims vis-à-vis governing institutions, thereby demonstrating the productivity of constitutional ideas as resources for bottom-up self-fashioning". Thus the ethopolitical encounter with the law involves precisely an enactment of 'bioconstitutionalism'. It undoes the imposition of a biopolitical ordering on individuals and allows them, through their own continuous action, to perform an active and contestatory form of citizenship. As such, as Jasanoff (2011, 290) reminds us, 'bioconstitutionalism' is: "a dispersed and active process of reordering – indeed reconstituting – knowledge and society". These cases allow for another more pluralist voice in relation to reproductive citizenship to be listened to and heard in the public domain.

The initial cases to challenge the Act were heard almost immediately upon its introduction with the first heard in Catania in May 2004 (*Tribunale di Catania, 1 sezione civile*, 3 May 2004), followed by another in Cagliari in 2005. In the Catania case, a couple, who were both healthy carriers of the genetic condition *beta thalassaemia* (a blood disorder that reduces the production of haemoglobin leading to a lack of oxygen in many parts of the body), requested approval of pre-implantation embryo selection to ensure that the child born as a result would not suffer from this condition. The judge ruled that this was not permissible under the Act, and noted that the fertilised eggs be implanted whether or not there is a risk that they may carry this disease. This ruling was based on an interpretation of Article 14 of the Act which prohibited the creation of a number of embryos greater than that strictly required for one contemporaneous transfer. The number created should be no greater than three. The couple argued that the 2004 Act was incompatible with the rights guaranteed in Article 2 (the guarantee of inviolable human rights) and Article 32 (2) (the right not to be forced to submit to unwanted medical treatment) of the Italian Constitution. The judge dismissed these claims, noting that the obligation to transfer three embryos into the womb simultaneously did not constitute unconsented to medical treatment contrary to Article 32 (2) of the Constitution. The judge also rejected the claim that the couple's inviolable human rights were being interfered with, noting that there was no fundamental right to have a child of one's desires. The judge argued that the child in this case is a potential child rather than an actually existing one. If the couple were to continue with the embryo transfer and subsequently discover that the future child would suffer from such a condition, the only option left open to them would be a therapeutic abortion. The process would then have to start over again with no guarantee that a similar outcome would not occur.

In the Cagliari case in July 2005 the *Tribunale Civile* of Cagliari referred the question of the constitutionality of Article 13 of the Act to the Constitutional Court (*Corte Costituzionale*) for review. The Act in Article

13 provides a general prohibition on any form of embryo experimentation. Here, a couple who had been refused access to pre-implantation genetic diagnosis by their consultant claimed that this refusal was contrary to Articles 2, 3 (equality and non-discrimination) and 32 (1) of the Italian Constitution. The female partner had, on a previous occasion, undergone IVF treatment and had discovered in the eleventh week of her pregnancy that the foetus was affected by *beta thalassaemia*. As a result she decided to undergo a pregnancy termination. On this occasion the couple wanted to make sure that the embryo was not affected by the condition before implantation. They refused to go ahead with the embryo transfer before undergoing a pre-implantation genetic diagnosis. The doctor involved refused this service on the grounds that Article 13 of the 2004 Act prohibited it.

The judge in this case noted that the question of the constitutional legitimacy of the law was not manifestly without foundation. In referring to decisions of the Constitutional Court in relation to abortion, the judge noted that the Constitutional Court had always declared in favour of the right to health of the woman when it came into conflict with the protection accorded to the foetus. In addition, the judge spoke of the right of a woman in such a case to receive the fullest information on the state of health of the embryo. In this case the general right to receive information in relation to medical procedures would apply to information obtained via pre-implantation genetic diagnosis in relation to the state of health of the embryo. The judge noted that this was the case in relation to determining the health of a foetus *in utero*. Therefore, if couples in the position of the applicants were to be refused access to pre-implantation genetic diagnosis then this would place them in a different position to couples who had a right to obtain access to tests to determine the state of the health of the foetus *in utero*. This raised the question of whether this ban was in accord with the equality provisions in Article 3 of the Constitution, as well as the human rights provisions of Article 2 and the specific provisions in relation to the right to health in Article 32 (1). The judge referred the matter to the Constitutional Court for a consideration of the constitutionality of this aspect of the law.

The matter was heard by the Constitutional Court on 24 October 2006 (Corte Costituzionale, Ordinanza 369/2006). The Court declared inadmissible the question of the constitutional legitimacy of Article 13. The written decision was produced on 9 November 2006 wherein the Court stated that the Cagliari court's assumption was contradictory in that the constitutionality of the impugned article could be deduced from other articles in the 2004 Act and in the light of the interpretation of the entire Act against the background of its stated intent. In other words, for the Court, the 2004 Act had as its objective the protection of the embryo and, as such, any procedure which would harm the embryo is not legitimate. However, the Constitutional Court refused to measure the constitutional validity of Article 13 against the principles of equality and the right

to health in the Constitution. It merely stated that the law itself was justified by its legitimating principles. Clearly unwilling to judge the constitutionality of the issue, the Court (in a decision which was not unanimous) stated that the law is legitimate because of its ideological premise.

Since this dispiriting and irrational decision of the Constitutional Court in 2006, there have been several successful challenges to the Act in both the lower courts and the Constitutional Court, culminating in a declaration of incompatibility of the Act with the *European Convention of Human Rights and Fundamental Freedoms* by the European Court of Human Rights in 2012. In this phase of judicial interpretation of the Act a more robust and interventionist style emerged in which courts declared several parts of the Act incompatible with rights protected by the Italian Constitution. One of the most important of such cases was the decision of the Regional Administrative Tribunal of the region of Lazio in January 2008 (Sentenza n. 398, reg. ord. n. 159 del 2008, 21 January 2008). This Case was initiated by the World Association for Reproductive Medicine (WARM), a not-for-profit organisation which represents the interests of professionals working in the area of medically assisted reproduction. The action challenged the legitimacy of the Code of Practice introduced by Ministerial Decree in 2004, as being beyond the powers of the Minister of Health, as well as the constitutionality of Article 13 (the ban on embryo experimentation) and Article 14 (the transfer of no more than three embryos to the womb simultaneously) of the 2004 Act. WARM also contested the conflation of the terms sterility and infertility in the Act and the legal status accorded to the embryo in the Act. This challenge, which also had the support of a number of other reproductive rights organisations (namely *Amica Cicogna*, *Luca Coscioni*, and *Cerco un Bimbo*), was opposed by the Italian government together with a number of conservative civil society organisations, such as the Movement for Life.

The Court in its decision overruled parts of the Code of Practice introduced pursuant to the 2004 Act (Ministerial regulations – Explanatory notes on assisted reproductive technology – introduced by Ministerial Decree n. 15165 of 21 July 2004). The impugned provisions related to Article 13 (5) of the Act, which prohibits experimentation on human embryos. The decision also raised doubts over the constitutionality of Article 14 (2) of the Act. In effect, what the decision did was to overrule the limitation on pre-implantation genetic diagnosis of embryos for observational purposes only, on the basis that such a provision could not be enacted by secondary legislation. The Minister of Health had therefore exceeded his powers in introducing this measure by ministerial regulations. As a result of this decision, the guidelines on assisted reproduction were revised on 11 April 2008 to remove the limitation on pre-implantation genetic diagnosis for observational purposes only.

The Regional Administrative Tribunal of Lazio in its decision of 21 January 2008 also referred the question of the constitutionality of Article 14 of the Act to the Constitutional Court. The Constitutional Court, in its

decision of 1 April 2009 (Corte Costituzionale, sentenza n. 151/2009, 1 April 2009) reversed the prohibition contained in Article 14 of the 2004 Act on the transfer in any one cycle of a maximum of no more than three embryos. In addition to the referral from Lazio, the Constitutional Court, in the same decision, also considered two referrals from the *Tribunale Ordinario* of Florence from its decisions of 12 July 2008 and 26 August 2008 (see Tribunale Ordinario di Firenze, ordinanza del 12 luglio 2008, reg.ord. n. 323 del 2008 and Tribunale Ordinario di Firenze, ordinanza del 26 agosto 2008, reg.ord. n. 382 del 2008). In both of these decisions the Florence court questioned the constitutionality of Article 14 of the Act insofar as it prohibited the freezing of any excess embryos which were not used in any one cycle of IVF, and imposed a maximum limit of three embryos which could be created in any IVF treatment cycle and the need for their simultaneous transfer to the patient's womb. In addition, the Florence Court questioned the constitutionality of Article 6 (3) of the Act which decreed that once a woman had consented to the simultaneous transfer of these three embryos she could not withdraw that consent. The Constitutional Court in its decision held that Article 14 (2) of the Act was unconstitutional in that it breached Article 3 of the Constitution in relation to equality and Article 32 of the Constitution which upholds the right to health. The Court observed that the prohibitions contained in Article 14 of the Act ignored the individual personal and medical circumstances of women who underwent IVF and as such treated widely diverse medical situations in a similar manner. The idea that one size fits all in reproductive medicine ignores the highly particular and individual treatment required in different cases. As such this article fell foul of the equality provisions of the Constitution in that it proposed that the same medical solution should be applied to different cases. Moreover, such a blunt prescription also interfered with a woman's right to health in the Constitution. As a result of this decision, Article 14 (2) of the 2004 Act is no longer to be interpreted as placing a limit on the number of embryos to be transferred. The Court held that the number of embryos transferred in any treatment cycle should be based on individual expert medical opinion based on the facts of each individual's case. The decision also overruled the ban in Article 14 (1) on the freezing of embryos. As a result of the decision, embryos which might not be used in a treatment cycle may now be frozen for use in a later treatment cycle. The Court, in referring to Article 1 of the Act, noted that the interests of all parties (not just the embryo) should be considered, citing the Constitutional Court's previous jurisprudence on abortion in which the rights of the woman to self-determination and health should be given priority. The Court thus affirmed the autonomy of individual women as well as the professional autonomy of medical practitioners who should be allowed to decide independently on the treatment to be followed depending on the individual's medical history and needs. The Court observed that the principle of medical autonomy and responsibility as well as the principle of patient auton-

omy should prevail in such cases and not the interests of the embryo.

In October 2010, the *Tribunale Civile* of Florence (Tribunale civile di Firenze, 6 October 2010) overturned the ban on IVF with donor eggs or donor sperm contained in Article 4 of the Act and referred this aspect of the Act to the Constitutional Court for review. On 21 October 2010 the *Tribunale Civile* of Catania made a similar ruling, questioning the constitutionality of the ban on IVF using donor gametes (Tribunale civile di Catania, 21 October 2010). In the decision of the *Tribunale Civile* of Salerno of 13 October 2010 the limitation in Article 1 of the 2004 Act on access to in-vitro fertilisation to only those people categorised as infertile or sterile was successfully challenged (Tribunale civile di Salerno, 13 October 2010). The Court ruled in favour of access to pre-implantation genetic diagnosis in the case of a couple who were neither sterile nor infertile. The couple suffered from amyotrophy, a genetically inherited condition, which causes the progressive wasting of muscle tissues.

The 2004 Act was the object of a third Constitutional Court decision in May 2012. This case concerned the question of the prohibition of IVF using donor gametes under Article 4 of the Act. The decision however turned out to be more of a non-decision in that it held that the cases should be referred back to the regional courts from which they issued for re-hearing. The case involved references from three lower courts, in Florence (Tribunale Ordinario di Firenze, 6 September 2010), Catania (Tribunale Ordinario di Catania, 21 October 2010), and Milan (Tribunale Ordinario di Milano, 2 February 2011) in relation to Article 4 (3) of the Act (which bans IVF using donor gametes), on the grounds of potential constitutional incompatibility. The Florence case involved a couple of whom the male partner was infertile and, as a result, the couple required access to donor sperm. The clinic they attended could not carry this out as the Act prevented it from doing so. The Court was of the opinion that Article 4 of the Act was unconstitutional but noted that it needed to refer the matter to the Constitutional Court as lower court judges do not have the power to declare a part or whole of a statute unconstitutional. The reference from the court in Catania concerned a couple where the female partner suffered from premature menopause and who attended a clinic in order to request an egg donation. However, she was prevented from doing this by the prohibition contained in Article 4 (3) of the 2004 Act. The Court noted a possible breach of the Constitution and observed in addition that this procedure was medically necessary. Again, due to the inability of lower court judges to declare statutes unconstitutional, the case was referred to the Constitutional Court. In the Milan case a couple required sperm donation as the male partner suffered from azoospermia. In this case the prohibition contained in Article 4 (3) of the 2004 Act prevented the couple from gaining access to such a procedure. All three courts noted that there was a potential constitutional violation.

The justification given by lawyers on behalf of the Government in the argument before the Constitutional Court for such a prohibition was the



right of the child to know the biological identity of their parents. This justification had more to do with a conservative mentality in relation to family relations rather than any rights of the child involved. Indeed this was clearly manifested in the parliamentary debates on the legislation where those who supported the law likened donor insemination to adultery, resulting in the birth of a child which was not that of the husband (see Lalli 2005, 129-171). On hearing the references before it the Constitutional Court decided to refer the matter back to the three lower courts, using as a justification for this, the then recent decision of the Grand Chamber of the European Court of Human Rights in the case of *S.H. and others v Austria* (Application n. 57813/00, Grand Chamber decision 3 November 2011), which had occurred after the lower courts had made their decisions. The decision of the Grand Chamber overruled a decision of the Court of First Instance of the European Court of Human Rights in *S.H. and others v Austria* of April 2010, on which the three lower courts had based their decisions. In its decision the Grand Chamber held that there was no violation of Article 8 of the *European Convention of Human Rights and Fundamental Freedoms* in a case involving a challenge to the provision of the Austrian *Assisted Procreation Act* of 1992 which prohibits the use of sperm from a donor for IVF and ova donation in general. The Austrian *Assisted Procreation Act* only allows IVF with gametes from the couples involved. Even though the Grand Chamber noted that there was a clear trend across Europe in favour of allowing gamete donation for IVF, it added that an emerging consensus was still under development and so was not, as yet, based on settled legal principles. The Grand Chamber held, by a majority of thirteen votes to four, that there had been no violation of the Convention. The Grand Chamber further noted that the Austrian legislation was not disproportionate as it had not banned individuals from going overseas for infertility treatment unavailable in Austria. This assumes, without thinking, that couples are in a position to engage in such reproductive tourism.

The decision of the Grand Chamber was entirely at odds with the First Instance ruling in the same case (*S.H. and Others v Austria*, Chamber judgment 1 April 2010). The Court of First Instance had held that the impugned section of the Austrian legislation breached Article 8 of the *European Convention of Human Rights and Fundamental Freedoms* as this prohibition interfered with the couple's right to access treatment which would allow them to found a family. The lower courts had noted, based on the Court of First Instance decision, that the prohibition in the 2004 Act of IVF using donor gametes constituted a breach of Articles 8 and 14 of the *European Convention of Human Rights and Fundamental Freedoms*. The Constitutional Court observed that as the Grand Chamber had overruled this decision the referring courts should re-hear these cases based on this new development (Corte Costituzionale, Ordinanza n. 150, 2012, pp. 11-12).

In August 2012, the Court of First Instance of the European Court of

Human Rights handed down a decision against Italy in relation to the prohibition of pre-implantation genetic diagnosis in the case of a couple, who are carriers of a genetically inherited condition. In the case of *Costa and Pavan v Italy* (Application n. 54270/10), a couple, Mr. Pavan and Ms. Costa, both carriers of a hereditary illness, cystic fibrosis, wished to prevent this condition being inherited by any second or subsequent child they might have together. In September 2006 they gave birth to a child with cystic fibrosis, only then becoming aware that they were both carriers of the disease. The couple have a one in four chance of having a child born with the condition and a one in two chance that any future child of theirs will be a carrier of the condition. They want to ensure that any further child they might have would neither have, nor be a carrier of, cystic fibrosis. The 2004 Act prevents access to pre-implantation genetic diagnosis to couples suffering inherited genetic conditions. It only allows access to screening for infertile couples or where the male partner has a viral disease which can be transmitted through sexual intercourse, such as HIV, or Hepatitis B and C. Since these exceptions did not apply to this couple, the only option open to them as the law stood was to have an abortion on discovery via foetal testing that the future child was either a sufferer or carrier of the condition. In fact, Ms. Costa had conceived a child with cystic fibrosis so decided to undergo an abortion in February 2010.

In their application to the European Court of Human Rights in Strasbourg, the couple relied on Article 8 in conjunction with Article 14 of the *European Convention on Human Rights and Fundamental Freedoms*. Their complaint was that their right to privacy and family life protected by Article 8 had been infringed in that they were not allowed access to pre-implantation genetic diagnosis to allow them to prevent the birth of a child with cystic fibrosis. They also claimed that they suffered discrimination, contrary to Article 14, compared to infertile couples or those couples in which the male partner has a sexually transmitted disease. In its decision of 28 August 2012, the Court of First Instance of the European Court of Human Rights held unanimously that the ban on access to pre-implantation genetic diagnosis for couples with genetically inherited diseases infringed Article 8 of the Convention. The Court found that there was no breach of Article 14. The Court held that the desire of the couple to have a child who was not affected by a genetically inherited disease of which they were healthy carriers and to undergo pre-implantation genetic diagnosis and IVF in order to do so was protected by Article 8 as it formed part of their right to private and family life (*Costa and Pavan v Italy*, (Application N. 54270/10) at paragraph 57). The Court unanimously declared that the 2004 legislation was incoherent in that on the one hand it prohibited the transfer of only embryos which were not affected by cystic fibrosis and on the other hand it allowed the couple to abort a foetus affected by this condition. There was a clear impact on the couple's Article 8 rights in this case as a result.

In its judgment, the Court of First Instance in *Costa and Pavan v Italy* held that this case should be distinguished from that of *S.H. v Austria* in that it did not concern donor IVF, as the gametes of both partners would be used in the procedure. As a result, the Court in *Costa and Pavan v Italy* was obliged to measure the proportionality of the prohibition of pre-implantation genetic diagnosis in light of the fact that therapeutic abortion is a possibility in such a case. For the Court this was a specific and unique situation and it noted that only two other member states of the Council of Europe prohibited such a procedure, namely Austria and Switzerland. The Court also noted that the Swiss government was currently considering the lifting of such a ban in its legislation. The Court concluded that the interference with the applicants' right to privacy constituted by the ban in the 2004 Act on pre-implantation genetic diagnosis to such couples was not proportional (*Costa and Pavan v Italy*, (Application N. 54270/10) paragraphs 67-71). In particular, the Court focused on the contradictory position which the prohibition on pre-implantation genetic diagnosis for couples such as *Costa and Pavan* created. The court observed:

The consequences of such a system for the right to respect for private and family life of the applicants is evident. The only means by which they can exercise their right to give birth to a child who is not affected by the illness of which they are healthy carriers is to undergo a pregnancy by natural means and to then undergo a therapeutic abortion once a prenatal screening reveals that the foetus is affected by the condition [...] the Court [...] recognizes the anguish caused to the female applicant who unable to gain access to pre-implantation genetic diagnosis has as her only means of becoming a mother having a child affected by the condition of which she is a carrier, and also recognizes the suffering provoked by having to choose to proceed with a therapeutic abortion to prevent such a pregnancy (*Costa and Pavan v Italy*, (Application N. 54270/10) paragraphs 67-71)

The Italian Government had contested the applicants' arguments and argued that the prohibitions in the 2004 Act of which they complained were necessary to protect the health of the "child", and of the woman as well as the dignity and freedom of conscience of the medical professions and the need to prevent eugenic practices. The Court was not convinced of these arguments and noted that one could not claim that an embryo was a "child", and pointed out the contradiction of the Act's protection of the embryo which was the basis for the prohibition on access to pre-implantation diagnosis and in-vitro fertilization for such couples while at the same time allowing such couples to have access to therapeutic abortion (*Costa and Pavan v Italy*, (Application N. 54270/10) paragraphs 61-62). The Court also wondered why the Government did not think that the perfectly legal practice of therapeutic abortion could not also lead to

eugenic practices or interfere with the dignity and freedom of conscience of the medical professions. In other words, there was a clear contradiction between the arguments in favour of the 2004 Act and its prohibitions and the freedoms contained in the Italian Abortion Act of 1978.

Despite the clear exposure of the incoherence of the Act by the Court, the Italian Government nonetheless entered an appeal against this decision. In February 2013, the Grand Chamber of the European Court of Human Rights did not allow this appeal, noting that the Italian Law on Assisted Reproduction was clearly incoherent and in breach of Article 8 of the *European Convention on Human Rights and Fundamental Freedoms*. The decision of the Court of First Instance of August 2012 is now the final word on the matter as far as the compatibility of the 2004 Act with the *European Convention on Human Rights and Fundamental Freedoms* is concerned. The Act has now been declared incoherent and incompatible with the *European Convention of Human Rights and Fundamental Freedoms* and the Italian Government is under an obligation to address this. This decision strengthens the hand of those groups in Italy campaigning for the legislation to be reviewed. The decision requires the Italian Government to revise the 2004 Act to make it compatible with the *European Convention on Human Rights and Fundamental Freedoms*. However given the lack of willingness of successive Italian governments to move in this direction it is unlikely that such a review process will begin immediately. Nonetheless what one can guarantee that will continue to happen will be individual court challenges to the Act, which will gradually have the cumulative effect of nullifying the Act's prohibitions. It will then be imperative even for unwilling politicians to act to introduce a law which is both coherent and compatible with the *European Convention of Human Rights and Fundamental Freedoms*.

#### **4. Conclusion: Reclaiming Reproductive Citizenship Through Ethopolitics**

This episode in Italian legal and political history displays a deliberate attempt by political elites to resist a pluralist model of legal governance of reproductive technologies in favour of a conservative model which favours embryo protection over the rights of women. This legislation was passed despite the existing constitutional protections for women's reproductive rights as well as the right to reproductive freedom contained in the Abortion Act of 1978. The political élite deliberately ignored these freedoms in order to return to a traditionalist conception of Italian national identity based on a heteropatriarchal model of family formation. In such a case we are faced with what Roberta Dameno (2004) has termed a 'manifesto law' which has for its real objective the upholding of a traditional idea of the family rather than attempting in any way to facilitate access to assisted reproduction. The introduction of such a restrictive law

was facilitated by the existence of a relatively stable right-wing coalition, which was willing to adopt the Roman Catholic Church's position on this issue in a wholesale manner for pragmatic political gain. The fact that opposition parties of the centre-left aligned with the Church's position allowed for the easy passage of the legislation through both chambers of the Italian legislature. This displays an unwillingness on the part of political elites to engage in open deliberative consensus politics on issues of bioethical controversy, particularly where Roman Catholic ethical values are at stake.

The series of court challenges to the 2004 Act and the continuing civil society political organisation against it demonstrate the need for continued political action on the part of citizens to win back what were once thought to be established rights such as a right to decide in relation to reproduction. This active citizen politics allows us to see how the abstract control over Life exercised by the State in the name of religious ideology can be contested successfully. As I have identified earlier in this article, this form of citizen resistance falls into the model defined by Nikolas Rose as *ethopolitics*. Such ethopolitical resistance has utilised the resources already present in the Italian Constitution and the *European Convention on Human Rights and Fundamental Freedoms* to enact a 'bioconstitutionalism', a means of undoing the paradigm in which citizens are defined as objects of power but instead take active control of their lives and win back a space of autonomous decision-making in relation to reproductive matters. Such a mode of ethopolitical intervention allows us to imagine another politics of life which has been aptly defined by Didier Fassin (2009, 49) as: "the power of life as such".

This model of *ethopolitics* is intimately related to an ethos of collective action. Such a model stresses the need for continuous political engagement to make real the merely declaratory nature of rights. It is an active engagement with the promise contained in constitutional bills of rights to enable citizens to access rights in reality. This is a continuous process. As such, this recent episode in Italian political life has universal resonance in that it demonstrates clearly the need on the part of citizens to resist in contemporary regimes of biopower when their material lives are devalued and their full citizenship is threatened in the name of a totalizing narrative of Life. As Krause and De Zordo (2012, 148) have put it: "the struggles around reproductive policies are articulated in juridical terms [...] and produce rights-bearing citizens pitted against each other [...] These new moral regimes generate social and political spaces for ongoing negotiation".

In such a series of ongoing negotiations one comes to see that "another politics of life is possible" (Fassin 2009, 44). In this campaign of ethopolitical resistance to the 2004 Act an alternative more pluralist model of community has emerged which is not based on defending the nation from imagined enemies. This undoes the symbolic conservative notion of the self-sufficient nation under attack from others seen as enemies. This

points to the possibility of an “affirmative biopolitics” which is not a “politics over life” but a “politics of life” (Esposito 2012, 185). It is a politics which does not valorise an abstract ideologically rigid notion of Life which restricts individual lives but which is driven by actions of individual living beings acting in relation with one another.

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