

# (Not) Making “Heterologous” Fertilization

The Italian ART Law and its paradoxes

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**Abstract** The Italian law regulating ART approved in 2004 is at the centre of this conversation, which departs from the book ‘Fecondazione eterologa’ (2012) written by two prominent Italian professionals in the field. The three contributors of this conversation analyse different profiles of the law: the contradictions between Catholic moral order and a scientific rationality which is not fully aware of its heteronormativity (Parolin); the macropolitics of information along Italian history and the moral economy surrounding fertilization techniques (Metzler); Law 40 in the context of the EU landscape of reproductive rights (Schuster). All the three voices of the conversation emphasize the paradoxes of ART in Italy and the perverse effects of the prohibition of heterologous fertilization, namely the medical exodus of Italian couples outside of the Italian territory.

**Keywords:** heterologous fertilization, Law 40, moral order, scientific rationality, reproductive rights.

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## I. Parenthood: Between Catholic Hegemony and Heteroscientific Rationality

*Laura Lucia Parolin*

The book by Carlo Flamigni and Andrea Borini *Fecondazione eterologa* aims to be a useful instrument for Italian citizens who need accurate information on assisted reproductive technologies (hereafter ART). According to the authors, both well known professionals in the biomedical field, Italy suffers from an informative deficit on these issues, mainly because of the strong influence of the Vatican hierarchies on the

social and juridical environment. The authors claim that: “The ordinary Italian is not particularly religious, even attentive to the rules of Catholic morality. However, especially when they have to take position on ethical issues, [ordinary Italians] still tend to be inspired by bishops and priests, who seem to maintain a particular prestige even in a historical moment in which the religion they represent is troubled by a serious crisis of credibility” (Flamigni and Borini 2012, 9).

The approval of Law 40 in 2004, which regulates the access to ART, has to be located in this social and political context. The Authors argue that the law regulates ART according to the ethical logic of the Catholic Church rather than to the biomedical rationality and the scientific debate. In the book they show how, focusing on avoiding embryo surplus, the law ends up being harmful from the point of view of the biomedical rationality – which is understood as the efficacy of treatment for the birth of a healthy baby and the prevention of risks related to pregnancy.

Given such a regulatory framework, the authors are not surprised that many Italian couples choose to go abroad to undergo ART. Presenting data from the Observatory on Reproductive Tourism – a private organization led by Borini, created in 2005 to monitor Italians’ access to assisted reproductive centres abroad – the authors describe the flow to countries with more permissive regulations on ART. In particular, they reveal an exodus of Italian citizens to countries where it is possible to use donor gametes and embryos. After the introduction of Law 40 this amount of couples is tripled. The authors argue that, surprisingly, this flow does not decrease despite recent rulings revoked some of the law major limitations (see also Hanafin and Schuster in this issue). According to the authors, this depends on the strong interest in maintaining a strategic ambiguity on ART-related issues, defined as “ethically sensitive” to uphold the hegemony of the Catholic Church’s voice. At the same time, they point out that providing specific and customized advice to Italian citizens who intend to use ART abroad might be considered an illegal activity, according to a literal interpretation of Law 40. In order to address this lack of information and ambiguity, the volume aims to provide a broad range of information on ART and related debates. In this respect, the core argument of the book is summarized in its title: the neologism ‘e(s)terologa’, meaning the connection between (the prohibition of) gamete donation and the need to go abroad.

The central part of the book deals with the analysis of ethical and juridical issues related to gamete and embryo donation. Although the authors seem to associate the desire for kinship with the will (taken for granted and socially prescribed) to transfer genes, they introduce the notion of social kinship (i.e. kinship based on desire and responsibility rather than blood ties) to challenge (in some extreme cases) the overlap of genetic bounds and kinship. As they underline: “What happens to most of these couples, which allows them to make choices precluded to many other people, is discovering that there is a parenthood that has nothing to

do with genetics and the transfer of their own chromosomes to another individual; a parenthood based on responsibility, on the promise to care about and to love a child who is not born yet. A parenthood of great moral value, which is still unacceptable and even perverse for many people” (Flamigni and Borini 2012, 29-30). This kind of kinship is not yet socially legitimate and still needs full social acceptance. The discussion on the secrecy of donation is still ongoing among people involved and many couples who went for gamete donation choose to not reveal it to the child and their relatives and friends. However, the debate on children’s right to know their genetic identity, which varies from country to country on the basis of different national laws on donors’ anonymity, could be widely re-configured adopting a perspective that privileges social kinship.

The book, therefore, stresses two main interrelated features about ART in Italy. On the one hand, the restrictive national legislation is bound by the ethical issues imposed by the Catholic Church. Law 40 is driven by an ethical logic that limits ART, reducing its effectiveness (in terms of children born) and security (for the mother), on the basis of a traditional notion of family, which reduces parenthood to genetic ties. On the other hand, the moral and ethical values embedded in Italian politics, institutions and health care professionals inhibit the access to technoscientific information, which citizens would need in order to perceive themselves as subjects deprived of their reproductive rights. The Authors claim that this phenomenon is particularly evident with reference to the lack of accurate information on recent repeals of the law, which balance the restrictions and allow Italian centres to use ART more effectively. In fact, They argue that the “proven Catholic faith” of people in charge of the Ministry of health has deterred centres for assisted reproduction from making communication campaigns on the opportunities that have opened up thanks to the intervention of the Constitutional Court. This ambiguity in the public debate marks the bounds of biomedical expertise and the (alleged) rationality of the scientific discourse.

Law 40 has been sharply criticized as technically inappropriate and inconsistent with the Italian legal framework (for example, the ban of pre-implantation diagnosis contrasts with the regulation on abortion). Surprisingly, however, the authors root their criticism on arguments related to social and human dimensions. Their experience with prospective parents leads them to challenge the alleged natural basis of parenthood as desire to transmit genes. Moreover, using the term “citizens” to refer to patients the authors emphasize the right to access ART. However, it seems that the rhetorical device that builds ART patients as multiple and collective bodies – the “hermaphrodite couple” (Van der Ploeg 1995)<sup>1</sup> – limits the range of those who have the right to access. Authors have in

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<sup>1</sup> “Hermaphrodite couple” is a concept proposed by Irma Van der Ploeg (1995) to refer to a figure of discourse that presents the heterosexual couple as a body-subject of assisted procreation.

mind exclusively heterosexual couples – which are probably their ideal readers. Therefore, even though this might be expected from the critique of parenthood based on genetic ties, their arguments do not challenge the question of heteronormativity in ART. This narrows the authors' point of view and weakens the powerful effects of interpreting parenthood on the basis of desire, rather than genetic ties. The latter, for instance, normalizes the compulsory medicalization of women who have sterile partners, considering this a more “ethical” choice than using donor gametes. Similarly, the stigmatization and social exclusion of ‘other’ bodies (Parolin and Perrotta 2012), not having reproductive citizenship according to Law 40, are just taken for granted along the volume as part of the medical and organizational practices of the health care system.

The authors deal with the scientific debate on homosexual parenthood, emphasizing the social and situated character of the scientific discourse. Quoting Macdougall and colleagues (2007) they seem to recognize the complex nature of parenthood when donor gametes are used, which is constructed through technical as well as narrative elements for accountability. Moreover, they acknowledge the ‘scientific’ arguments illustrating that there are no substantive differences in the psycho-affective development of children raised by homosexual parents. However, they root their biomedical scepticism about the inclusion of homosexual couples in ART referring to the fear of “social reactions to these events and the inevitable repercussions on the child of people hostility and critique” (Flamigni and Borini 2012, 65). Authors are not unaware of some of the links among biomedicine, rhetorical devices and social phenomena in ART. However, the heterogeneous elements that shape the range of individuals’ and couples’ reproductive choices (whether assisted or not) are only partially addressed. Although the authors recognize the social elements embedded in reproductive choices, they use naive categories to explain the heterogeneous aspects of these choices. For instance, discussing the tendency to postpone parenthood they introduce bizarre analytical categories, such as “the age shown in the mirror”, which is supposed to affect the delay in parental choice.

To sum up, the first part of the book is focused on the consequences of the ethical hegemony of Catholic values on issues related with ART. Particularly, the limitations introduced by the law are discussed, highlighting their impact on medical practices and access to techniques. Throughout the book the authors aim at illustrating the contrast between the law and the biomedical and scientific rationality. However, it emerges from the book that the call for biomedical and scientific rationality is deeply entangled with political and social aspects, perhaps even more than the authors seem to be aware of.

## 2. The Politics of Information in a Nation State Wrestling with its Moral Order

Ingrid Metzler

Carlo Flamigni and Andrea Borini's book begins with a well-chosen and deceptively succinct title. *Fecondazione eterologa* combines the term *eterologa* (heterologous) with the term *estero* (abroad), labelling something that does not quite belong because it is not "homologous". Fusing two different yet related types of alienations into a single neologism, the wonderfully suggestive title indicates that a steady number of ART are not only linguistically marked as far-fetched in Italy (e.g., drawing on the reproductive powers of other bodies is not referred to as a solitary act of "gamete donation" but as the disruptive act of bringing something into a space where it should not be), but a portion of them are also exiled from Italian territory. Each year, a number of Italians travel abroad for fertility help, to neighboring Switzerland or Austria, to geographically more distant and scientifically more prestigious spaces, such as Spain or Belgium, or to an unspecified "East" that the authors leave strangely black-boxed in their book.

Flamigni and Borini do not seem to be surprised that this phenomenon has taken shape. An "exile" of patients – or, using the term that appears throughout the book, of "citizens" – seemed to be an appropriate and rational choice for patients, once the Italian Parliament passed the (in)famous Law 40 in February 2004, 'expatriating' a number of techniques and practices, and imposing tight restrictions on all practices still legally available. Yet, the authors seem to be puzzled, intrigued, and at times also worried that the flow of patients has not slowed, once Italian courts in general and the Constitutional Court in particular began to "free the hands" of Italian bio-medical professionals, relaxing the tight norms that were also never "as severe as they seemed" (Flamigni and Borini 2012, 145). The authors note that some parts of the law were formulated sufficiently ambiguously to allow scientists to work around them.

Flamigni and Borini make no attempt in this book to fathom why so many Italians continue to travel abroad for fertility services. Instead, they seek to endow Italian citizens with the kind of information that will help them to make an informed choice, somehow assuming that they would make different choices if they only knew better. In roughly 160 pages, Flamigni and Borini take their readers, whom they envision as patients and certainly not as social scientists, through the kind of information they deem necessary for Italian citizens to make informed decisions. In doing so, they clearly show that providing information is not an easy job. For instance, they note that the higher IVF (*In Vitro* Fertilization) success rates that U.S. fertility centres pride themselves on come with the hidden cost

of “excessive hormone stimulations” and “embryo reductions,” both of which are “considered very critically in Europe” (Flamigni and Borini 2012, 30, author’s translation) and which are nonetheless silenced in these figures. At other times, though, they reveal those difficulties in a less voluntary or deliberate way, leaving informed readers amazed by the sheer number of things that the authors take for granted, and what they deem “evident” and not in need of explanation or justification.

The authors are two Italian bio-medical professionals. In light of this, it might not be surprising that they privilege their bio-medical perspective, taking for granted that readers will accept the supremacy of their knowledge over, say, the knowledge of other patients who share their experience in an internet forum. So, instead of discussing the “micro-politics of information,” and unpacking what they leave out, I prefer to discuss some of the macro-politics of information, embedding this book in the moral economy of a debate that it both describes and engages in.

Let me begin by going back a bit in time. The book itself invites such a step. It is the fourth issue in a series sponsored by the AIED, the Italian Association for Demographic Education, whose honorary president is the coauthor Carlo Flamigni. Today, the association’s name sounds anachronistic. Yet, back in 1953, AIED began to assemble a range of moral pioneers who provided information on sexuality, reproduction, and contraceptive devices. At that time, disseminating such information was criminalized by one of the pro-natalist provisions enacted during Fascism to ensure that the Italian population would multiply. With the end of the fascist regime, the demographic dream of a rapidly growing Italian “stock” quickly devolved into a nightmare in the face of a postwar reality, in which food was scarce for those already born. Nonetheless, many of the provisions enshrined in law during the fascist period still remained in force.

One of the reasons for this was something of a “tacit contract to silence” between the Roman Catholic Church and the then-emerging new elites. In this tacit contract, contraception, abortion, and indeed all matters that involved human sexuality and reproduction were excluded from the realm of issues that the then-young republic would address. In this context, disseminating information on these forbidden matters was tantamount to an act of civic disobedience that empowered individual citizens and the entire nation at once, disrupting the tacit contract to silence and shoving ignored issues onto the political agenda from below. Throughout the 1960s and 1970s, matters of reproduction not only became matters that started to be spoken about, but they also became subjects of a series of legal innovations, the last of which was the abortion law of 1978.

Today, sixty years after the establishment of the AIED, the moral economy that Flamigni and Borini seek to enlighten is slightly different. At issue is no longer the dissemination of suppressed knowledge on how to limit reproduction; today, the more immediate issue is providing in-

formation that could give ailing reproductive bodies a helping hand. Nor is it a matter of providing information where none is available. Today, it is not a lack of information, but – perhaps – an excess of information, which presents patients and consumers with the difficulty of not knowing whom to trust, in a situation in which political authorities actively “muddy the waters” (Flamigni and Borini 2012, 30). It is not ignorance through silence that the authors seek to challenge but “confusion” through an excess of public claims (Flamigni and Borini 2012, 12).

Shifting back in time once more might help us understand this contemporary confusion better. The story that moral pioneers such as the AIED kicked off in the 1950s culminated in a series of legal innovations, the last of which were “norms for the social protection of motherhood and on the voluntary interruption of pregnancy,” namely, the Italian Abortion Act of 1978. This law had been many years in the making. The process involved nasty controversies between those who drew on the Italian Republic’s commitment to protect the “inviolable human rights of man,” as enshrined in Article 2 of the Italian Constitution, to argue that embryos and foetuses belong to the moral community of human subjects, that the right to life is the most fundamental of all human rights, and that there could be no choice other than to continue to outlaw abortions. These arguments were challenged by those who argued that unborn human life could not be meaningfully endowed with personhood. These were parts of women’s bodies, and any civilized nation must realize that decisions about what to do with their bodies belong to the range of civil rights that an enlightened nation bestows on its (female) citizens.

With the first position articulated in particular by members of the *Democrazia Cristiana* (the catholic party which governed Italy for almost half a century) and the second one tied to members of the Radical Party, the moral economy of the abortion debates in the 1970s was very similar to the structure of contemporary disputes on the techniques of assisted reproduction. Today, there are those who lend their voice to defend the rights of those “who have no voice” – that is, embryos – with the difference that, in the meantime, the list of the rights of embryos has grown and now also includes a “right to identity”. On the other side of the debate are those who assert that the rights of embryos are not equal to the civil rights of full-fledged adult human beings, and who are now fighting not just for women’s rights to refuse an unwanted pregnancy but also for women’s rights to access to technology to have a (healthy) child.

And yet, historically, there is a striking difference. At the time of the abortion debate, a third collective of actors and arguments bridged these two positions. These actors – many of them members of the Communist and the Socialist Party – framed the abortion debate not as an ethical debate, nor as a debate on civil rights, but as a social issue. They argued that the question was not whether abortions were good or bad, nor whether women should be allowed to abort or not (they would abort, anyway); instead, the question that politics – that is, parliament – had to address was

*how* and *where* Italian women should interrupt pregnancies: in clinics abroad; or in clandestine spaces in Italy where the economically well-off risked their health and at times their lives; or in openly regulated spaces in Italy where state authorities would ensure that if women, any women, chose to abort, they would not have to pay with their health, their bodies, or their lives. I do not see such actors today who attempt to bridge the two positions on assisted reproduction.

Back in the middle of the 1990s, when these debates begun in earnest, those blessed with Catholic certainties were opposed by women such as Marida Bolognesi who admitted that these matters were difficult, that no answers were readily available, and that a different kind of politics, a politics that is ready to listen to the reasons of others, was needed. Yet, over the past two decades, such humble positions have disappeared. Today, Catholic truths, camouflaged as scientific ones, are challenged by technoutopians (if I dare to simplify it that much). They presume that to undo political and religious interferences into bio-medicine is the major problem. Today, both sides pretend to speak from nowhere. A ‘dialogue between deaf’ has emerged, that might well be the reason for all the “confusion” that the two authors seek to address.

In this context, providing the kind of information that the two authors assemble in their book might be empowering and enlightening. But it would be even more enlightening for individual patients and the entire nation, if Flamigni and Borini did not take for granted that others – patients traveling abroad or politicians making irrational choices – behave in irrational ways because they ignore the facts. Those others might well behave differently because they are motivated by other facts, concerns and wishes or phenomena that we – and not they – ignore. Making such an effort to understand the others better, or retreating from the assumption that science (or religion) contains all the answers, might be an act of moral pioneering of different kind, one that revitalizes the spirit of the AIED of the second half of the 20th century yet making it fit the needs of a nation wrestling with its moral and technological order as it confronts the 21st century.

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### **3. The Challenges of Pluralism in Reproductive Rights**

*Alexander Schuster*

Hardly do any other fellow Europeans suffer legal constraints in seeking medical assistance to fulfil their desire of parenthood as Italians do. The law that for the very first time regulated assisted reproductive techniques in Italy was passed by a parliament that held strong ideological



views (Law 19 February 2004, no. 40, *Norms related to medically assisted procreation*). It certainly filled a legislative *vacuum*, yet the matter was not at all previously unregulated. There were and still are professional rules of conduct. Their legal classification in the Italian context is debated, but they are undisputedly considered at least effective parameters for assessing medical negligence and conduct overall. The Ministry of Health had issued some administrative circulars as well as orders on specific points, such as importation and exportation of gametes (see also Hanafin in this issue).

The outcome of this law is still shaping the reproductive landscape of Italy. Cross-border medical assistance has since boomed. As the book underlines, the Italian Constitutional Court set aside most of the controversial provisions of the parliamentary act in its 2009 judgment. A key aspect that was found unconstitutional was the limitation on the maximum number of three for embryos that could be produced. It encompassed the obligation to transfer all embryos, notwithstanding the will of the woman, who, however, clearly never became victim of coercive measures. The law did indeed leave no margin of medical appreciation as to how many oocytes it was fit to fertilize given the age, the health history and the conditions of the couple, nor would it grant the possibility to freeze supernumerary embryos. Although some limitations have been neutralized by the judiciary, couples are not aware of the current situation and seek abroad what in some cases is or has become available again.

There are limitations that still obtain today. Section 4, paragraph 3 of the law prohibits heterologous insemination. The book went to print before the Grand Chamber of the European Court of Human Rights reached a different conclusion than the first section on 1st April 2010. The 17 judges overturned “S.H. et al. v. Austria” (application no. 57813/00) and found against the applicant couples that Austria acted within its margin of appreciation in permitting sperm donation *in vivo*, yet not *in vitro*. Following this, the Italian Constitutional Court remanded on 22 May 2012 the issue on the constitutionality of the legal prohibition entrenched in the law of 2004 to the referring courts. They were asked for a new evaluation of their doubts on the legitimacy. In March and April 2013 three new preliminary rulings from the courts of Milan, Catania and Florence were lodged and will be decided in 2014 (see Hanafin in this issue). Along with the prohibition on heterologous insemination two major obstacles still remain in force. The first one is surrogacy, the second is the subjective limitation. Only opposite-gender couples, either married or cohabitating, who are considered either infertile or sterile may revert to ART. As the book points out, the two terms used by the law bear a different meaning in the medical jargon. Infertility allows virtually any couple to access these techniques, for it is broadly construed as including those situations where, despite sexual intercourse, no pregnancy is reached within 18-24 months. It should also include *de facto* infertility, i.e. when

couples do not engage in sexual intercourse due to diseases such as HIV or genetic diseases that may be passed on to the child.

There are of course other prohibitions, such as embryo donation or the exclusion of scientific research on embryos. For a long time preimplantation genetic diagnosis (PGD) was excluded from the guidelines that are issued approximately every three years. While the first edition allowed for examinations solely for the purpose of observation, the 2008 guidelines removed that part and allowed PGD for avoiding sexually transmissible diseases on the side of the man. Nevertheless, embryo screening remained a contentious issue for other diseases, especially hereditary ones. Some judges ruled in favour of couples affected by this situation (see Hanafin in this issue). The book could not cover the decision by which the Strasbourg court declared the prohibition of PGD in violation of article 8 of the European Convention on Human Rights, which protects the right to respect for family and private life (judgment *Costa and Pavan v. Italy*, application no 54270/10, 28 August 2012). The provision has been considered inconsistent with Italian law in “prohibiting the implantation of only those embryos which were healthy, but authorising the abortion of foetuses which showed symptoms of the disease”.

This update on the Italian legal situation shows that significant parts of the law have been demolished by either Italian or European judges. Yet severe obstacles remain and the book retains all its usefulness. It will not be easy for many fertility clinics to quickly regain excellence in PGD and the significant high number of clinics on the national territory – as pointed out by the authors – impacts negatively on the average success rate of treatments. But certainly what forces thousands of Italians every year to expatriate is the limit to heterologous insemination and to the persons that may access ART. There was somehow a way-out. The regulation on importation of gametes was not renewed in 2004. The couple is not subject to any fine if insemination is carried out by them directly. *In vivo* fertilization becomes *de facto* possible. The possibility to purchase online from sperm banks self-insemination kits and have them shipped to Italy relied on a loophole and could be a more convenient in a cost-benefit analysis option if compared with travelling abroad. Only lately a new government order issued in relation to Directive 2004/23/EC (ministerial decree of 10 October 2012) toughened the rules for importation and exportation of embryos and gametes, placing them within the tight boundaries of Law no 40/2004 and its prohibition of heterologous insemination.

Whereas the focus of the book is on the medical data and the possibilities available abroad, there are other aspects that could be mentioned in relation to “cross-border reproductive tourism”. The authors could have focused on how a couple may take advantage of screenings and medical counselling in Italy so to reduce the services needed abroad. It would have been interesting to learn more on how a couple can bring with them reproductive cells to a foreign clinic. Cryopreservation of gametes is not forbidden in Italy and actually even foreseen as a medical protocol if

therapies may endanger the reproductive health of the patient. Besides well-known cases such as tumours, one may now think even of preservation of ovarian tissue or egg-cells of a transsexual person wishing to have her gonads removed for gender-reassignment surgery. The person should be entitled to withdraw the gametes and carry them abroad. The recent change in the Italian law on importation and exportation does not affect the intra-EU dimension and overall does not apply when the person is the owner of the gametes and these are intended for personal use. Yet the question arises: could Italy ban the importation of reproductive cells, which could be used for *in vivo* fertilization without any medical assistance? Do economic freedoms play a role?

The authors highlight the legal constraints that explain expatriation and the opportunities abroad. The law has, however, more to say than that. Among the matters that deserve further academic exploration we should mention the principle of extraterritoriality of legal prohibition, which can be found for instance in relation to surrogacy in some Australian legislation; the whole array of problems deriving from the non-recognition by the country of origin of children born abroad (for instance because surrogacy is against national public policy or because what is at stake is same-gender parenthood), which should ideally be part of the information Italian citizens are given when travelling abroad for reproductive purposes. Both legal and psychological counselling, along with medical counselling, should not be underestimated either. Stress increases dramatically when a desire for children faces obstacles, especially if they are not just legal, but biological as well. It is unfortunately not unusual that psychological tension has a disruptive impact on the couple's life and often even existence. Couples should also become aware that there has been at least a case in Italy where the child allegedly adopted or commissioned with surrogacy in Russia by an Italian couple has been taken away and given up to adoption. The case is currently pending in Strasbourg.

The title of the book by Carlo Flamigni and Andrea Borini is a play on words and could somehow transferred into English with *Hexternologous fertilization*, a mix of "heterologous" in relation to gametes and "external" in relation to the territory or jurisdiction. On a closing note, we can say that "*he(x)ter(n)ologous*" fertilization will lead to increasing case law at the European level. Europe is called upon to strike a fair balance between national pluralism in matters of reproductive rights and a common market and space of liberty and freedom.

Are services related to medically assisted reproduction economic services? In *Society for the Protection of Unborn Children Ireland Ltd. v. Grogan*, Case C-159/90, [1991] ECR I-4685, the Court of Justice of the EU dealt with domestic proceedings against Irish students associations which distributed information about the identity and location of clinics abroad where voluntary termination of pregnancy was lawfully carried out, and held that medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a

service within the meaning of Article 60 of the Treaty (now Article 57 Treaty on the Functioning of the European Union).

How far can rules on goods extend to reproductive cells and tissues? What will be the impact of directive 2011/24/EU on the application of patients' rights in cross-border healthcare when its transposition by Member States is completed by 25 October 2013? Is information on what is available abroad protected by freedom of expression? This was the position of the Strasbourg Court in relation to abortion in *Open Door v. Ireland* (application no. 14234/88; 14235/88, 29 October 1992). Whereas counselling pregnant women in Ireland to travel abroad to obtain an abortion or to obtain further advice on abortion within a foreign jurisdiction was found unlawful by Irish courts, the European Court of Human Rights held that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued and was in breach of the Article 10 of the European Convention, which protects freedom of expression.

Can foreign economic actors such as EU clinics or US agencies advertise in Italy heterologous insemination and promote surrogacy in California by meeting interested parties on the Italian territory? Can an Italian lawyer assist a lesbian or gay couple willing to become parents according to the UK legislation? The clash between the State's willingness to protect public morals and everyone's right to build a family will soon write new chapters in both the Luxembourg and Strasbourg case-law, for it will remain a legal and political minefield for a very long time.

## References

- Flamigni, C. and Borini, A. (2012) *Fecondazione e(s)terologa*, Roma, L'Asino d'oro.
- Macdougall, K., Becker, G., Scheib, J. and Nachtigall, R. (2007) *Strategies for Disclosure: How Parents Approach Telling Their Children that They Were Conceived with Donor Gamete*, in "Fertility and Sterility", 87 (3), pp. 524-533.
- Parolin, L.L. and Perrotta, M., (2012) *On the Fringes of Parenthood: Othering and Otherness in Italian Assisted Kinship*, in "AG About Gender", 1 (2), pp. 100-131.
- Van der Ploeg, I. (1995) *Hermaphrodite Patients: In Vitro Fertilization and the Transformation of Male Infertility*, in "Science, Technology & Human Values", 20 (4), pp. 460-481.