SURROGACY IN ITALY

Submission in response to the call for input to the thematic report of the Special Rapporteur on violence against women and girls to the General Assembly 80th session on surrogacy and violence against women and girls

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About the Authors

The *Associazione Luca Coscioni per la libertà di ricerca scientifica APS (ALC)* was founded in 2002 by Dr. Luca Coscioni, an Italian Professor of Economics affected by amyotrophic lateral sclerosis, who spent his life advocating for greater freedom of scientific research in Italy, with particular emphasis on embryonic stem cells. Since then, the ALC has led pioneering advocacy initiatives aimed at protecting human rights and freedoms in areas shaped by scientific and technological progressIt collaborates with legal experts, researchers, and scientists to develop policy proposals grounded in evidence-based debates and supported by the meaningful participation of civil society in decision-making processes. With the goal of strengthening alignment between Italian legislation and international human rights standards, the ALC contributes to the monitoring of human rights in Italy and abroad by actively engaging with national and international institutions

Science for Democracy (SfD), founded in 2018, is an international network advocating for the protection of the universally recognized "right to science".. SfD engages with international organizations and bodies, such as the United Nations, the European Union and the African Union, to promote the implementation of this right and its integration into national and regional policy frameworks.

The legal framework governing surrogacy in Italy

Art. 12.6 of Law 40/2004 prohibits maternal surrogacy, imposing penalties of imprisonment from three months to two years, and fines ranging from six hundred thousand to a million euros on those who engage in the practice.. Art. 12.7 further sanctions medical professionals who assist in the surrogacy procedures by suspending their medical licenses for one to three years.

The crime of surrogacy, as introduced by Law No. 40/2004, penalyzes not only the intended parents but also all individuals involved in carrying out, organizing or publicizing the commercialization of embryos, gametes or surrogacy arrangements. The legal definition of this offence raises significant concerns regarding the principle of legality, particularly due to the vagueness and imprecise wording of the provision. Indeed, the mentioned provisions fail to clearly define the prohibited conduct; furthermore, the absence of any legal definition of "maternal surrogacy" within the Italian legal framework leaves the interpretation of the term to public perceptions and general assumptions about the nature of this assisted reproduction technique.

Due to the ban, Italians seeking to become parents through surrogacy have turned to international options since the enactment of Law 40/2004, often facing significant legal obstacles. Between 2004 and 2012, Italian heterosexual couples could obtain a birth certificate in the country of the child's birth and have it transcribed into the Italian civil registry. However, starting in 2012, Italy began prosecuting parents resorting to surrogacy abroad, charging them with the felony of falsifying civil records, an offence punishable by up to 15 years of imprisonment. While prosecution of heterosexual couples largely ceased around 2015-2016, a new legal challenge emerged: prosecutors began seeking the annulment of the birth certificates transcription for children born through surrogacy to two fathers. In December 2022, the Italian Court of Cassation ruled against the automatic transcription of such birth certificates, deeming it contrary to public order.

As stated by the European Court of Human Rights ed in *Mennesson and Labassee v. France*, the complete absence of legal recognition of the *status filiationis* of children born through surrogacy constitutes an excessive and disproportionate interference with the enjoyment of the rights protected under the European Convention on Human Rights. Indeed, in the words of the Court, "respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship".

However, Italy has recently tightened its legal framework on surrogacy, going so far as to penalize anyone resorting to surrogacy abroad, even in countries where the practice is permitted under national law (Law No. 169/2024).

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This news should be read in accordance with the amendment to Directive 2011/36/EU adopted on 24 April 2024 by the European Parliament, which broadens the scope of existing measures to prevent and combat human trafficking, and to enhance support for victims.

In addition to labor and sexual exploitation, the revised legislation includes the exploitation of surrogacy as a criminal offence at the European level. Specifically, with regard to trafficking for the purpose of surrogacy, the EU Directive targets individuals "who coerce or deceive women into acting as surrogate mothers". This means that, within the European Union, what must be prosecuted is the exploitative conduct associated with surrogacy, not surrogacy itself in all its forms.

In light of the above, we argue that current Italian legislation should be replaced with more balanced provisions to prevent the exploitation of vulnerable women while ensuring that children born through surrogacy abroad are afforded adequate legal protection upon their return to Italy. In order to give concrete form to our proposals, we have submitted a citizens' legislative initiative to Parliament. The full text is available here: https://www.associazionelucacoscioni.it/wp-content/uploads/2023/05/29-MAGGIO-2023-Gravidanza-per-altri-solidale-Ass.-Luca-Coscioni-Altri.docx.pdf.

Surrogacy as a "universal crime"

On October 16th, 2024, the Senate of the Italian Republic passed a law, at the initiative of senator Carolina Varchi, that extends the criminal liability of Italian citizens who resort to surrogacy abroad, even in countries where the practice is legal. The Law modifies Article 12 paragraph 6 of Law 40/2004, which regulates medically assisted reproduction (assisted reproductive techniques). The revised version of the article reads as follows:

> "*Anyone who, in any form, carries out, organizes or publicizes the commercialization of gametes or embryos or surrogacy of motherhood shall be punished by imprisonment from three months to two years and a fine from 600,000 to 1 million euros. The punishments established by this paragraph also apply if the act is committed abroad".*

The change does not introduce new cases, behaviour or circumstances of the crime constituting the offence, but rather extends the applicability of the existing prohibition beyond national borders.

The derogation from the general rules governing the applicability of domestic jurisdiction raises several problems of both a substantive and procedural nature.

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As a rule, States, including Italy, exercise jurisdiction primarily within their own national territory. An exception to this mechanism is the so-called extraterritorial jurisdiction, which allows for the exercise of jurisdiction outside national borders under certain conditions.

Within the Italian legal framework, Articles 7 to 10 of the Penal Code provide for the exercise of criminal jurisdiction over offences committed abroad, provided that specific requirements are met.

As emerges from the parliamentary proceedings, the choice of extending Italian jurisdiction to those who seek to form a family through surrogacy abroad is justified by framing the practice as seriously harmful to individual dignity, particularly that of women. Through this legislative stance, Italy intends to position itself at the forefront of efforts to promote universal criminalization of surrogacy. Indeed, once the revised legislation was adopted, surrogacy was labelled with an expression that raises legal concerns: "universal crime". This designation appears to respond more to political advocacy than to a solid legal foundation, as it lacks sufficient grounding in international criminal law.

Still, more than 70 countries all over the world regulate surrogacy instead of placing an absolute ban on this practice[1].

As observed by Special Rapporteur Maud de Boer-Buquicchio in 2016, even *"commercial surrogacy may not constitute sale of children if it is closely regulated in compliance with international human rights norms and standards"*[2]. Notably, the Special Rapporteur identified several key elements of potential regulation, including a *ban on unjustified fees for pregnant women and strict regulation and monitoring of any intermediary entities*.

It is particularly relevant, in light of arguments invoking the protection of women, that the work of the Special Rapporteur condemned practices that are detrimental to individual dignity, without advocating for restrictions on women's autonomy in decision-making or their rights to sexual and reproductive health. Such an approach avoids reinforcing stereotypical or patriarchal conceptions of the very individuals the law seeks to protect.

In sum, beyond reaffirming the obligations to prohibit and prevent the abduction, sale, and trafficking of children born through surrogacy practices, and acknowledging the diverse sensitivities among States on the issue, the aforementioned recommendations move in a direction contrary to an absolute prohibition of surrogacy.

These few, yet significant, developments at the UN level underscore the absence of a universal consensus regarding the inherent seriousness of the practice. At the same time, they highlight the need for regulation aimed at preventing violations of rights protected by specific international conventions, such as the prohibition of the sale of children and the obligations to prevent the exploitation and abuse of women.

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[1] C. DANISI, *Maternità surrogata come reato "universale": considerazioni di diritto internazionale e dell'Unione europea, GENIUS, Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere; 2/2024; see the map of States regulating surrogacy at: www.associazionelucacoscioni.it/mappa-leggi-gpa.*

[2] Special Rapporteur on the sale and sexual exploitation of children, *Thematic Study on Safeguards for the Protection of the Children, UN doc. A/HRC/37/60, il 15 January 2018.*

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Crucially, however, they do not suggest that surrogacy per se is incompatible with international human rights law.

The best interest of the child

The proposal for a regulation drafted by the European Commission to regulate the mutual recognition of filiation within the Union seems indicative. This does not foresee any exclusion clause for the use of surrogacy precisely because, if it takes place in a member state or in third states that allow it, there is no substantial conflict with the fundamental rights applicable within the Union framework.

Despite the tendency to condemn the practice when it comprises the commodification of children and the exploitation of women that, in various forms, emerges there, recent developments call into question the alleged absolute incompatibility of surrogacy with human rights and, on the other hand, do not support the extension of criminalization to all forms through which the practice is conducted.

All this also points to the unreasonableness of the comparison with international crimes and the potential use of universal jurisdiction in surrogacy matters, as neither that widespread consensus within the international community on the need to prosecute it more or less broadly, nor the different values underlying the establishment of the cooperation mechanisms available today to condemn and prosecute those crimes can be traced.

The rights of children born through surrogacy to know and be cared for by their parents (Article 7.1 of the UN Convention on the Rights of the Child)

In Italy, Article 17, paragraph 2 of Presidential Decree 396/2000 (Regulations on civil status) establishes that:

"Documents issued abroad by foreign authorities may be transcribed into Italian civil status registers, provided they are not contrary to public order." (unofficial translation)

This means that the Italian civil registrar has a duty to register a foreign birth certificate as long as it meets formal requirements and does not violate Italian public order. The concept of "public order" is highly debated, particularly in relation to children born through surrogacy.

In this context, the Italian Court of Cassation, in several decisions (e.g., Cass. Civ., Sec. I, no. 12193/2019), has restricted the full transcription of birth certificates indicating two fathers (intended parents), arguing that the recognition of double paternity is contrary to public order. However, it has also emphasized the need to safeguard the fundamental rights of the child, recommending alternative legal mechanisms (such as stepchild adoption under Article 44(d) of Law 184/1983).

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This tension between international and domestic law is particularly evident in the role of the civil registrar: while Italian law provides for the transcription of foreign documents, this may be denied based on an interpretation of"public order", that does not always afford preeminent weight to the respect of the best interest of the child. Nevertheless as enshrined in Article 3 of the UN Convention, the best interests of the child should guide the interpretation of public order, supporting transcription whenever it is necessary to guarantee the child's right to be recognized and cared for by their parents.

In some cases, Italian courts have ruled that birth certificates of children born abroad through surrogacy cannot be fully transcribed into Italian civil registers, as they are deemed to have been issued in violation of Article 12, paragraph 6 of Law No. 40 of 2004. According to these interpretations, the latter is a provision aligned with the notion of public order. As a result, transcription is often limited to the biological parent only, excluding the intended mother or non-biological parent from the Italian birth certificate.

From a legal standpoint, such an approach is highly contradictory.. If the reason for refusing full transcription is the alleged violation of a public order norm – namely Article 12, paragraph 6 of Law 40—then **even the biological parent** should, in theory, be denied recognition, as they too participated in the surrogacy arrangement, and arguably played an even more active role by contributing their genetic material.

Despite this, many courts continue to uphold such denials, resulting in numerous cases where children are recognized as having only one parent (typically the father), while the mother is excluded. This affects the latter, especially when women face medical challenges that prevent them from carrying a pregnancy to term and contributing genetically to the procreative project. As a result, they are compelled to adopt her own child to gain legal recognition.

Furthermore, this case law is beginning to be applied to heterosexual couples as well.

Chapter III of Law No. 40/2004 establishes that individuals who, under Italian law, are eligible for artificial reproductive techniques and who sign informed consent for accessing them techniques, even in violation of the Italian ban (originally referring to heterologous fertilization but also applicable to surrogacy), are considered legal parents of the child, who cannot be disavowed.

This represents a second instance of non-application of domestic law, the first being Presidential Decree No. 396/2000.

Although the European Court of Human Rights has confirmed that there is a minimum level of protection for the child through special-case adoption, we believe that Constitutional Court rulings No. 32 and 33 of 2021 clarify that the Court itself acknowledges that this form of adoption, when applied to same-sex couples, perpetuates discrimination among children at birth.

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