Towards Universal Criminalisation

Italy to Unconditionally Prosecute Its Citizens for Surrogacy Carried Out Abroad

Maria Chiara Ubiali

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"Italy Criminalises Surrogacy from Abroad, a Blow to Gay and Infertile Couples." This was the headline on the New York Times website following the approval of a law in Italy criminalising reproductive tourism. Giorgia Meloni had already introduced the bill, Act no. 824, in the last Parliament, and the current right-wing majority has now passed it. The news has gone around the world. Let us try to understand why.

Surrogacy and its regulation

Gestation for others, commonly known as "surrogacy", is a method of assisted reproduction in which a woman carries a pregnancy on behalf of others, who then become the parents of the child. The ovum from which the child is conceived comes from a donor or from the intended mother, ensuring that the pregnant woman has no blood ties to the unborn child. The male gametes can be those of the future father (or of one of the future fathers in the case of same-sex couples), or of a donor. For a so-called "altruistic surrogacy", the pregnant woman receives no payment (except for her expenses). "Commercial surrogacy", on the other hand, involves payment to the woman who carries the pregnancy. In some countries, both European and non-European, surrogacy is allowed only in the altruistic form (e.g. United Kingdom, Netherlands, Portugal, Canada), in others – the minority – in both altruistic and commercial forms (United States, Greece, Georgia, Ukraine).

In Italy, however, surrogacy has been a criminal offence since 2004. Law no. 40/2004 art. 12, para. 6 punishes with imprisonment from three months to two years or a fine from 600,000 to 1 million euros "anyone who, in any form, carries out, organises or advertises the commercialisation of gametes or embryos or surrogacy".

The reform

Crucially, the new Italian law does not create a new offence, nor does it increase the penalties. Instead, it extends the law's reach by allowing prosecution of Italian citizens engaging in surrogacy abroad. Previously, prosecution of such conduct abroad was only possible at the request of the Italian Minister of Justice, as per art. 9 of the Italian Criminal Code. Moreover, even in the absence of an expressed legislative provision, Italian law required, according to some courts and scholars, "double incrimination" for ordinary offences committed abroad, meaning that the act had to be considered a criminal offence both in Italy and in the foreign State where it was committed.

The application of double incrimination has rarely been addressed by Italian courts, and the few decisions on this topic send mixed messages. However, one significant decision of the *Corte di Cassazione* (the highest Italian civil and criminal court) took a stance on this issue in the context of surrogacy. In 2016, the Court heard the case of an Italian heterosexual couple who had resorted to this assisted procreation technique in Ukraine, where such a practice is legal (see Cass. pen., sez. V, 10 marzo 2016, n. 13525). The Court acquitted the two defendants, stating that the aforementioned uncertainty in the interpretation of art. 9 Criminal Code – and thus of the double incrimination requirement – had led to an unavoidable error on the part of the accused: the couple was not in a position to know whether or not the conduct they had committed in Ukraine was punishable under Italian law, and thus acquitted.

The new bill was finally approved by the Senate on 16 October. It remedies this legal uncertainty by inserting the following sentence at the end of para-

graph 6 of article 12 of Law no. 40/2004: "If the facts referred to in the preceding sentence, with reference to surrogacy, are committed abroad, the Italian citizen shall be punished according to Italian law." This way, surrogacy carried out by Italian citizens abroad can now be prosecuted, even without the request of the Minister of Justice and without double incrimination. In the public debate, this innovation has been called a "universal offence". However, this is a misnomer: The legislation does not make surrogacy a "universal offense" in the true sense, that is a conduct universally criminalized – such as war crimes, torture, or genocide. Instead, it is more accurately a form of extended jurisdiction that Italy claims over Italian citizens who engage in surrogacy abroad, even where it is legally permissible.

Some reflections on state power

The new law provides an opportunity to reflect on the limits of state power in criminalisation, especially in modern liberal democracies. Some argue that the criminalisation of surrogacy abroad is concerning as it reflects "an idea of a State guardian of the morality of its citizens, wherever they go", which is contrary to "the principles of political liberalism" (see D. Pulitanò, *Surrogazione di maternità all'estero. Problemi penalistici, in Cassazione penale*, 2017, p. 1372). The reform has broad implications for other legal areas as well, especially international judicial cooperation and private law.

A particularly pressing issue arises with the legal status of children born through surrogacy abroad. In civil cases, the Court of Cassation has constantly held (lately with the confirmation by the *Sezioni Unite*, the Court of Cassation sitting in full court) that Italy does not automatically recognize foreign court orders, and consequently also related original birth certificates, designating intended parents as legal parents, even if one is the biological parent. This reflects a negative view of surrogacy in Italian civil jurisprudence, which, according to the *Cassazione*, "regardless of the manner in which it is practiced and the aims it pursues, is intolerably offensive to the dignity of women and deeply undermines human relationships."

What remains to be done

Subsequently, the Constitutional Court in 2021 (Decision No. 33/2021) examined whether the view expressed in the civil decisions of the Cassation was compatible with the rights of the child enshrined in constitutional and supranational law. While recognizing a child's right to legal acknowledgment of their parental relationships, the Court also affirmed the state's interest in discouraging surrogacy which can be weighed against the right of the child, within the limits of proportionality. Referring to European Court of Human Rights case law, particularly *C. v. France and E. v. France*, the Court noted that while states may choose not to register foreign documents acknowledging intended parenthood, they must ensure alternative means for recognizing the child-parent relationship if it has effectively materialized. It is then left to the discretion of each State to choose such measures. Those measures may include adoption of the child, provided that a genuine 'filiation' bond between the adopter and the adoptee can be established, and "provided that the detailed rules laid down by domestic law ensure the effectiveness and rapidity of its implementation, in accordance with the best interests of the child." However, Italy's current provisions under Law No. 184/1983, which allow for "adoption in special cases", have been deemed insufficient by the Constitutional Court to fully protect children's rights. The Constitutional Court had no choice but to call upon the legislator, but the recent Act no. 824 only extends criminal penalties, failing to address the issues related to the civil status of the child born through surrogacy, as pointed out by the Constitutional Court, and which have become widespread in practice.

This gap leaves many families in a precarious situation upon returning to Italy, risking self-incrimination by seeking legal recognition for the child's status – a problem that engages the principle *nemo tenetur se detegere* (the right against self-incrimination), whose constitutional relevance was reaffirmed by the Constitutional Court in Decision No. 111 of 2023.

There are many more complexities to the regulation of surrogacy that other critical elements in this

matter which, leaving aside the various ethical opinions on surrogacy, call for a deeper reflection on the path that the Italian Parliament is following – or intentionally not following – in such a delicate area. But the law demands that any regulation protects the fundamental rights of the person, in particular those of the children.

ABOUT THE AUTHOR

Maria Chiara Ubiali

Maria Chiara Ubiali is a Researcher in Criminal Law at Department of Law "Cesare Beccaria", University of Milan.

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