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ON THE SO-CALLED "UNIVERSAL CRIME" OF SURROGACY (IN ITALY)

On October 16th, 2024, the Senate of the Italian Republic adopted a law, at the initiative of Carolina Varchi (Brothers of Italy), which extends the prosecutability of Italian citizens that acceded to surrogacy abroad, also in a country where the practice is legal.
The Law modifies Article 12 paragraph 6 of Law 40 of 2004, which regulates medically assisted reproduction (assisted reproductive techniques), which now 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 consist in the provision of other cases, conduct or circumstances of the crime, but in the extension beyond national borders of the prosecution of (what in Italy was already prohibited) t even when it is committed in territory that legally regulates the practice.

The introduction of such a derogation from the general principles governing the applicability of domestic jurisdiction poses several problems of both a substantive and procedural nature.

1. The crime of surrogacy: introductory issues

The crime of surrogacy introduced by Law No. 40 in 2004, punishes anyone who, including the intended parents and all persons involved in the practice, carries out, organizes or publicizes the commercialization of embryos or gametes and surrogacy. The wording of the crime under Law 40 poses many problems of "legality" especially in relation to the regulatory technique adopted. In fact, the legislation does not provide a description of the punished conduct, nor can a definition of the expression "surrogacy of motherhood" be traced in our legal system, which is therefore left to the collective imagination one has of such an assisted fertilization technique.

This creates numerous problems of **legal certainty** so much so that the doctrine has often pointed out that in the absence of a clear definition it is difficult to identify **the segment of surrogacy that the law incriminates.**

The identification of the criminally relevant moment has also often been debated in doctrine, so much so that for some (Losappio) the stipulation of the contract, that is, the agreement between the prospective parent(s) with the pregnant woman, would already be suitable to integrate the crime.
Majority doctrine holds that criminal intervention cannot precede the concrete execution of the practice (Spena, Vallini) except then disagreeing on the moment at which the crime is perfected whether already with the *in utero* transfer of the embryo or with the subsequent conduct of entrusting the child to the intentional parent(s) (Rocchi).

The provision also proves to be controversial where among the subjects liable to punishment it seems to contemplate, in addition to medical personnel and intentional parents, the pregnant woman herself who would become the perpetrator of the crime from being a victim of it, this provided that the dignity of the woman is not identified as the only legal good protected. In this case, it would be contradictory to hold her as the author of the crime, despite the fact that the letter of the law does not expressly exclude the punishability of the pregnant woman. Within this uncertain framework, it should come as no surprise that it is doubtful whether or not the case of joint and several surrogacy falls within the rationale of the rule, since the wording of the prohibition lends itself to opposing interpretations, and the extreme strictness of the penal discipline would lead to a provision referring only to the onerous form.

So we are in the presence of a crime that lends itself to very different interpretations of each other (?), failing which the certainty for the consociates, the recipients of the prohibition, to know exactly what is allowed and what is a crime.

2. Surrogacy as a “universal crime”.

It should be premised that in general, States, including Italy, have the power to exercise jurisdiction within their national territory. An exception to this mechanism is the so-called **universal jurisdiction**, which is based on the recognition of the transnational, indeed universal, relevance of certain serious crimes. Some international norms are so relevant that they apply everywhere: all States must work to ensure that these norms are respected, and that any violations of them are prosecuted; emblematic cases involve extremely serious crimes such as genocide, torture and war crimes. Indeed, several codictic provisions are devoted to cases in which Italian jurisdiction can be extended to crimes committed abroad (arts. 7- 10 Criminal Code), in response to various State requirements.

The Law adopted in October 2024, was introduced on the basis of Article 7, No. 5 of the Italian Criminal Code. In fact, Article 7 provides for a derogation from the principle of territoriality in relation to certain crimes unconditionally punishable under Italian law, even if committed abroad by a citizen or non citizen, specifically states in No. 5 (of the Criminal Code?) that crimes for which special legal provisions or international conventions establish their applicability are punishable under Italian criminal law.

The new Law is thus a special provision that derogates not only from the principle of territoriality to which by reason of the structure of the crime it should have been subjected, but also from Articles 9 and 10, which introduce a derogation from the principle of territoriality by providing precisely for universal jurisdiction on the basis of certain conditions. We are therefore in the presence of a derogation of a derogation.

This possibility is in fact provided for in Italy's Criminal Code, but because of this "specialty" to date, the majority doctrine, starting even from the preparatory works to the Criminal Code of 1930 (Ministerial Report of the Draft Criminal Code, p. 37), inextricably links it to the presence of the so-called double criminality. In this way, the legislation could provide for the prosecution abroad of an act of crime committed by an Italian citizen when that act is also provided for as a crime in the foreign country. This is first and foremost to protect the principle of legality, both in its national (Art. 25 Const) and international (Art. 7 ECHR) declination.

3. Surrogacy and international law

As emerges from the parliamentary proceedings, the choice of subjecting to Italian jurisdiction those who intend to establish a family through surrogacy abroad is justified by the qualification of this practice **as seriously damaging to individual dignity, particularly that of women.** With the introduction of such a ban, Italy intends to place itself as one of the countries at the forefront of reaching an international agreement that would result in its criminalization at a universal level.

In this regard, an examination of the positions expressed in organizations of a universal or European nature, as well as international legislation on the subject, show an **evolution toward legal regulation aimed at preventing human rights violations rather than a tout court condemnation of surrogacy as a practice contrary to the respect of human rights**[1]**.**

This is demonstrated, in particular, by the developments that have emerged at the United Nation, the most representative forum for ascertaining the existence of any kind of international consensus on the matter: the work of the Special Rapporteur on the sale and sexual exploitation of children, i.e., the only body to date that has devoted specific attention to the issue, is significant. While in 2016, Special Rapporteur Maud de Boer-Buquicchio expressed strong concern about the use of surrogacy and urged State Parties to regulate surrogacy since, if properly regulated, even *"commercial surrogacy may not constitute sale of children if it is closely regulated in compliance with international human rights norms and standards"*[2]*.*

The Special Rapporteur also identified key aspects of this possible regulation, such as a *ban on unjustified fees for pregnant women* and *strict regulation and monitoring of any intermediary entities*. It is worth pointing out, in the face of the demands for the protection of women, that the work of the Special Rapporteur referred to so far, condemns practices that are **detrimental to individual dignity, but without entailing "a restriction of women's**

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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.*

[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.*

autonomy in decision-making or of their rights to sexual and reproductive health,"[3] with the evident intention of avoiding the reproposition of stereotypical or patriarchally inspired visions of the very person they are meant to protect.

In sum, beyond reiterating the obligations to prohibit and prevent the "abduction," "sale," and "trafficking" of children born through surrogacy practices, and to take into account the various sensitivities on the matter among States, the aforementioned recommendations go in the opposite direction with respect to the absolute prohibition of surrogacy.
These few - albeit significant - elements that have emerged at the UN, signal the non-existence of a universal consensus on the seriousness of this practice. At the same time, they highlight the need to regulate its use in order to avoid situations that could result in the violation of rights protected by specific international conventions, such as the ban on the sale of minors or the various obligations aimed at preventing the exploitation and abuse of women, but not the incompatibility of surrogacy per se with international human rights law.

At the universal level, it should be pointed out that surrogacy has never been taken into account in the framework of universal instruments aimed at identifying so-called international crimes, nor by the mechanisms established for their repression. If we refer, for example, to the Statute of the International Criminal Court, which has codified such crimes with regard to genocide (Art. 6), crimes against humanity (Art. 7) and war crimes (Art. 8), **their qualification depends on the injury that these cases entail to values considered fundamental by the international community as such** and not to "specific" interests of one or more states or linked to the protection of identity values of a majority of them. In fact, while the international crimes recalled can never be compatible with human rights, **surrogacy could instead comply with international and European human rights standards if properly regulated as the work of the Special Rapporteur so far mentioned suggests.** Similar considerations also apply to the profile of repression. This is also the direction in which Europe has gone. In examining the Commission's proposal to amend the existing Anti-Trafficking Directive 2011/36/EU, the European Council did not accept, at the first reading, the opinion of the European Economic and Social Committee to identify "gestational surrogacy" per se as a "new" form of trafficking but instead called for criminal action by member states only in relation to forms of coercion and exploitation.

[3] Study on Surrogacy and Sale of Children, cit., par. 11,

The proposal for a regulation drafted by the European Commission to regulate the mutual recognition of filiation within the Union also 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.

4. Surrogacy and Constitutional law

The principle of dual punishability is not provided for in express form in Italy's Criminal Code with respect to the application of Italian jurisdiction for acts committed abroad, but majority doctrine has always considered it an implicit principle, in the absence of which serious problems of respect for the Constitution would arise.

In fact, the thesis of double criminality is based on the principle of legality whereby a crime cannot be charged if it is not provided for by law as such, exactly in accordance with the principle expressed in Article 25 of the Constitution.

Articles 8-10 of Italy's Criminal Code thus represent a derogation from this principle, which is instead expressly provided for in Article 13 of the Code with respect to the institution of extradition. This is done for practical reasons of necessary cooperation between judicial authorities.

The decision to extend the punishability of acts committed by Italian citizens abroad, where such acts do not constitute crimes, is in clear conflict with the principle of legality, non discrimination and harm principles.

5. Considerations on the applicability of the crime committed abroad (in the European Union) - EUROPEAN INVESTIGATION ORDER

Criminal law represents the bulwark defending the sovereignty of states. Indeed, in the process of European unification, criminal law has remained one of the last areas to be explored in order to increasingly create a common area of justice. An essential element for such an operation, on the procedural front, is the free movement of criminal evidence within the Union. One of the biggest problems in international investigations is the diversity of legal systems among the various states, and the acquisition of criminal evidence in the territory of a state has always remained, and still is, the utmost manifestation of that state's sovereignty, thus tending to be closed to access by other external partners, including those of the Union.

In this scenario, an important step towards greater integration among states was certainly represented by the 2002 Framework Decision on the European Arrest Warrant, for the surrender of suspects, accused or convicted persons. The same had the merit of overcoming the classic extradition system between EU states, of making the procedure essentially judicial rather than political in nature (a tendency already manifested since the Schengen Agreement and then in the 2000 Cooperation Convention, which, however, Italy never ratified, except this year - 2024 - when it was becoming an almost outdated instrument), based on the principle of mutual recognition rather than that of mere assistance, and of overcoming the principle of double criminality for certain crimes.

With regard to evidentiary aspects, i.e. the acquisition of evidence, which is necessary in order to be able to prosecute facts of crimes committed abroad, Directive 2014/41/EU of 3.4.2014, published in the OJEU on 1.5.2014, intervened, and subsequently with its transposition into the Italian system by Legislative Decree No. 108 of 21.6.2017, published in the Official Gazette on 13.7.2017, which came into force on 28.7.2017.

Thus, the acquisition of evidence is also based today on the principle of mutual recognition and does not require, for a list of thirty-two crimes, the principle of double criminality. For all offenses not on this list, the executing country may refuse to cooperate.