## Call for Inputs - Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse materialScience for Democracy

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**SURROGACY IN ITALY**

1. **Identity rights, parentage and protection of the family environment**

While in 2002 the Court of Rome authorised a physician to carry out altruistic surrogacy in Italy (Trib. di Roma, sex. XI, 14/02/2000), surrogacy is currently regulated under article 12, paragraph 6, law 40/2004 on medically assisted procreation (MPA) which punishes whoever, in any form, produces, arranges or advertises the sale of gametes, embryos, or surrogacy, with imprisonment from three months to two years and a fine ranging from 600,000 to one million euros.

Although commercial surrogacy is forbidden in all European countries, the provision is still controversial as it does not make a distinction between the different circumstances in which surrogacy might occur. In fact, surrogacy can be carried out with the use of embryos produced from (1) gametes provided by both the intended parents, (2) gametes provided by one of the intended parents and a third party or (3) gametes donated by third parties only. The second option involves access to techniques of MPA of heterologous type. Given that in Italy heterosexual couples are allowed to access techniques of MPA of heterologous type (Corte Costituzionale, 162/2014), children born from surrogacy with the use of gametes provided by at least one of the intended, heterosexual, parents should have their *status filiationis* legally recognised on ground of Law 40/2004.

Same-sex couples or single individuals are not allowed to access any of the Assisted Reproductive Technologies (ART) regulated by Law 40/2004, instead.

As a consequence, many couples or individuals decide to embark on a surrogacy journey abroad, in compliance with foreign law, despite the uncertainties about the legal effects arising out of this choice, once back in Italy. A legal grey area surrounds the status of couples or singles who have children through surrogacy abroad, in fact, while several principles about parentage by natural reproduction or by ART are established in the Italian Civil Code and Law 40/2004, no Italian legislation establishes any parentage principle applicable to Italian citizens doing surrogacy abroad and the legal recognition of their children is often fraught with legal challenges.

This legislative vacuum often leads Italian intended parents to fight prolonged battles before Italian Courts to obtain recognition of their rights as parents, which they legitimately acquired abroad. Some of them have, sometimes, also faced criminal charges for the crimes of alteration of status by means of misrepresentations (art. 567, § 2, Italian Criminal Code) or misrepresentations of personal qualities to a public official (art. 495, § 2, no. 1, Italian Criminal Code) and some others have seen their non-genetic, but legal children, declared adoptable.

Different recognition of children’s parental rights on Italian territory and violation of children’s fundamental rights (i.e. inheritance rights, freedom of movement), including their identity rights (CRC art. 7 and 8) such as the right to personal and family identity, are some of the consequences of such a legislative gap. Also, this affects and jeopardizes the family environment due to the uncertainty of obtaining, in Italy, the same legal parentage relationship’s recognition, acquired under the birth Country’s law.

In fact, while principles under articles 7 and 8 of the Convention on the Rights of the Child are generally protected in Italy, Presidential Decree 396/2000 – which allows the registration of newborns with the indication of both parents, provided their consent to being recognised – there are still cases where the lack of regulation hinders the effective protection of identity rights. To mention some examples:

* Minors’ right to use their mother’s last name;
* The intersex infants and minors’ right to be identified, within Civil Registries, as intersexual people instead of being identified with the male or female gender;
* Rights of children born from ART to have their legal parentage relationship recognised with their single or same-sex parents;
* Rights of children born from surrogacy abroad to enjoy, in their residence country, the same legal parentage status that they enjoy in their birth country, regardless of the sexual orientation of their parents.

Italy’s highest Court has recently ruled that the execution of a foreign judicial order that recognises a legal parentage status between two children and their non-biological father cannot be allowed in Italy for public policy reasons (Corte di Cassazione, 12193/2019).

The case involved an Italian same-sex couple who had a child via surrogacy in Canada. After the registration of the biological father only, they successfully obtained an order from the Canadian judge, legally recognising the second non-biological parent as the child’s father and ordering Canada Vital Record to amend the first birth certificate to reflect the double paternity.

Later in 2017, they asked and obtained the execution of the foreign order from the Court of Appeal of Trento; therefore, they were both named as fathers to the children. However, this decision was successfully challenged by the mayor of Trento and the Ministry of the Interior and the contrast with public policy was among the main reasons evocated in this case.

If, until today, based on domestic well-established case law, the notion of "public policy" has been analyzed from an international perspective as a mix of international principles and regulations and not just from a domestic one, something different occurred in this case.

Although the Supreme Court confirmed that an international perspective is essential when dealing with international situations, the judge also stated that the concept of public policy cannot be limited to the fundamental principles of our Constitution and those set out in international treaties and conventions but it should also include how such principles are reflected in ordinary laws and interpreted by our courts as founding values of the jurisdiction in a specific historic time. In particular, the Supreme Court upheld that the prohibition of surrogacy is a rule of public policy on the basis of the criminal sanctions that apply in case of violation of the surrogacy prohibition. Hence, the authorisation of the execution of a foreign parentage order in which the non-biological intended father is legally recognised as a parent of a child born via surrogacy would be against our public policy. The Court justified its decision on the ground of protection for the pregnant woman and the institution of adoption.

It follows that the non-biological parent of any child born through surrogacy abroad cannot be named as legal parent to the child and that stepchild adoption (the so-called “adoption in particular cases”) remains the only accessible way in these instances. However, stepchild adoption does not produce the effects of a full adoption and it does not create any parental links between the adopted child and the family of the adoptive parent. Also, while same-sex civil relationships are now permitted under Italian law, the legal status of same-sex adoption is still unclear; nevertheless, several court decisions have permitted same-sex adoption in Italy to protect the best interest of the child but some others still reject this kind of requests. It is also worth noting that the stepchild adoption procedure can be costly and time-consuming, leaving children in uncertain conditions with regard to their status filiationis for years.

The mentioned case is likely to have a significant impact on similar cases; however, it is not binding; every situation will be still managed on a case-by-case basis. Also, because the wording of the decision applies to the non-genetic parent of any child born through surrogacy regardless of their sexual orientation, the ruling has broader implications for all Italian couples involved in surrogacy carried out with the use of gametes provided by third parties.

Italy was sanctioned by the European Court of Human Rights with two judgments (D’Alconzo v. Italy (application no. 64297/12) and Improta v. Italy (application no. 66396/14)) for violation of article 8 of the European Convention on Human Rights on account of the length of the judicial proceedings which may have irreparable effects on the relationship between parents and children.

The concerns highlighted by the Court are even more troubling for same-sex parents when the non-biological parent is not legally recognised in Italy. Under the existing legislation, the parent who is not legally recognised has no title to file a petition with the Italian courts to protect his/her relationship with the child.

The Juvenile Court of Milan, with decisions dated 2 November 2007 and 20 October 2009, confirmed that the intended parent has no legal title to request protection to the court in case of interruption by the biological parent of the relationship between the intended parent and the child. The Juvenile Court upheld that the title to act is subject to the existence of a biological or legal (including as a consequence of an adoption) parent relationship with the child and, accordingly, given that the non-biological mother was not a legal parent and had no "parent responsibility" to guarantee the material and moral well-being of the child, she was not entitled to request a measure which could be expression of the exercise of parental powers.

The Juvenile Court also notified the case to the public prosecutor so that the latter could evaluate the opening of a proceeding to limit the parental rights of the biological mother who refused the continuation of the relationship between the non-biological mother and the children, but the proceeding was terminated because it was deemed that: (i) the behaviour of the biological mother was not sufficient to justify a limitation of her parental rights and (ii) there was not an impassable need to order the continuation of the relationship with the non-biological mother given that it did not arise that the absence of relationship would cause a severe prejudice.

The absence of a direct action by the non-biological parent to protect the right of the child to "maintain significant relationships" with him/her is prejudicial to the interest of the child who cannot even be assessed by a court if the public prosecutor (who is the only one entitled to start the proceeding) decides not to act.

Interestingly, the European Court of Human Rights (ECtHR) does not exclude the recognition of a family life pursuant to art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) even in the absence of a biological link (or a clear legal basis such as adoption), provided that there are «*genuine personal ties*» (Paradiso and Campanelli, GC, par. 148). In its first advisory opinion requested by France under art. 1 of Protocol 16 of the Convention, the ECtHR has recognised that the child’s best interests also entail “*the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment*”. The Court “*considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement entered into abroad and the intended mother is incompatible with the child’s best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case*”. (Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, No. P16-2018-001, 10 April 2019, § 42).

1. **Access to origins**

Concerning the access to origins, although this matter is not regulated under a specific law, separate regulations, depending on different situations, do apply. In particular, several principles about parentage by natural reproduction are established in the Italian Civil Code and while in relation to maternity identification, the “mother of birth” principle is applicable, with regard to the fatherhood determination, a paternity presumption applies, if the child is conceived during the marriage.

Anonymous births represent a circumstance worth paying particular attention, when it comes to the analysis of access to origins. They are fully lawful under Italian law and occur when the mother gives birth to a child without disclosing her identity, or where her identity remains unregistered. In such situations, the woman’s right to freedom and self-determination and the minor’s right to access to origins can happen to be in contrast.

With judgment 278/2013, the Italian Constitutional Court has considered a challenge to legislation which provided that the choice to remain anonymous made by a biological mother whose child had been adopted retained irrevocable status for 100 years. The lower court argued that, should the child subsequently wish to contact his or her biological mother, the latter should be contacted to establish whether she still wanted to remain anonymous.

The Court ruled the provision unconstitutional on the grounds that it was excessively rigid, as requirements of secrecy differing from case to case must be treated in a more nuanced manner. Also, the child's right to health must also be taken into account. Therefore, all of these elements fail to be regulated by the legislation which Parliament is called upon to enact, in the manner and according to the arrangements deemed most appropriate avoiding a contrast with those regulations applicable to the mother’s right to anonymity.

In particular, Judges held that “…*the basis in constitutional law of the mother’s right to anonymity is rooted in the need to safeguard the mother and the newly born child from any turmoil associated with a broad range of personal, environmental, cultural and social situations that would be liable to create risks for the mental and physical health or the very safety of both, whilst at the same time ensuring a framework for the birth to occur in the best possible conditions…Therefore, safeguarding life and health are the interests of primary standing present within the backdrop of a systemic choice which, considered in itself, seeks to favor natural parentage.*

*However, within this perspective, the child’s right to know his or her own origins – and to access information relating to his or her parents – represents a significant element within the constitutional system ensuring protection for the person, as has also been recognized in various judgments of the European Court of Human Rights. Moreover, the related need to know constitutes one of the aspects of the personality that can condition the intimacy and the very social life of a person as such...”*

In fact, the ECtHR seems to implicitly promote the recognition of the right to the origins in the case of surrogacy. (see Advisory opinion, § 41)

**iii) Access to origins and its balance with the right to privacy of parents and gamete donors**

When it comes to ARTs, access to origins is connected with the search for a balance between the right to privacy of parents and gamete donors.

Article 8 of Law 40/2004 establishes that children born through ART have the status of legitimate children or children recognised by the couple who has voluntarily consented to the medical procedure. Article 9 of the same law also clarifies that the spouse whose consent is obtained from “conclusive acts” cannot perform the action of disavowal of paternity and the woman cannot decide not to be appointed as a mother.

With regard to the relationship between the child and the external donor, this is still regulated by Article 9. According to the article the external donor is not entitled to claim paternity or maternity to the child born from ART procedures.

1. **Data**

Since surrogacy is illegal in Italy, it is very complicated to establish a percentage of Italians entering into a surrogacy agreement abroad every year, due to the sensitive nature of this matter and their strong willingness to keep their situation confidential.