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Surrogacy: Issues of cross-boarder medically assisted reproduction between Greece and Italy

a. General remarks.

Despite being neighbors, Greece and Italy have great differences with regard to legislation on medically assisted reproduction. Thus, while Greek legislation (Law 3089/2002\(^1\) and Law 3305/2005\(^2\)) is one of the most liberal at the EU level, in Italy, Law 40/2004\(^3\) has been characterized as an obsolete law, incompatible with scientific progress on human reproduction\(^4\), as well as with the applicable legislation on medically assisted reproduction adopted by other EU member states\(^5\).

The Italian Law 40/2004 has been significantly amended since its adoption, by virtue of domestic court rulings, according to which some of its provisions were declared unconstitutional\(^6\). Indeed, recently, the Constitutional Court of Italy (\textit{Corte Costituzionale}), by means of its ruling No 162/2014\(^7\), held that the prohibition of heterologous assisted reproduction is unconstitutional. However, the restrictions imposed by Law 40/2004 with regard to the prohibition of surrogacy, research on embryos, using assisted reproduction (and, consequently, preimplantation diagnosis) when couples are not facing infertility problems\(^8\) etc., remain in place.

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\(^3\) Gazzetta Ufficiale n. 45/24.2.2004.
\(^6\) See, in particular, ruling No 151/2009 of the Constitutional Court in Gazzetta Ufficiale n. 19/13.5.2009.
\(^7\) Gazzetta Ufficiale 1a Serie Speciale, n. 26/ 18.6.2014.
\(^8\) Despite the fact that Italy was sentenced by the ECHR in case \textit{Costa/Pavan v. Italy}, for prohibiting fertile couples-carriers of hereditary diseases from accessing preimplantation genetic diagnosis, the country has made no legislative changes in order to comply with the ruling of the ECHR. Therefore, it was left upon domestic courts to decide and, in particular, upon the Court of Rome which, by means of its ruling No 86/28.2.2014, referred to the Constitutional Court (where it is still pending) the issue of the unconstitutionality of the provisions in question.
In its almost eleven years of existence, the restrictive provisions of the Italian law have forced a large number of couples to travel abroad in order to resolve their reproduction problems, to countries where the relevant methods were permitted. Different views have been expressed in relation to the extent of these movements by Italian couples. According to one approach, the so-called “reproductive tourism” has not affected a large number of people and is actually a “false problem”, the risk of which is used as an argument in order to legalize prohibited methods and reduce the protection afforded by law to the human embryo. Others argue that there is a large number of couples traveling abroad every year and find this phenomenon to be an important problem, especially for reasons related to the quality of the medical services provided abroad and to the ability to follow-up patients, as well as to the legal issues often arising when the assisted couple returns to Italy.

However, according to the most recent published research, carried out in 2012 by the Observatory of Reproductive Tourism (“Osservatorio del Turismo Procreativo”), an organization established in 2005 in order to monitor the “exit” of couples from Italy to other countries for reproductive purposes, the number of couples seeking heterologous reproduction services abroad amounted to 4,000, having Spain as their “favorite” destination, whereas, in 2011, a total of 60 couples traveled to Greece for the same purpose. Thirty-three fertility centers from seven countries, including Greece, were surveyed on surrogacy issues. These centers were quite “reluctant” in terms of providing the requested information, probably due to the legal consequences that the couples would probably face when returning to Italy. No cases were recorded in relation to the use of surrogacy methods by these couples in Greece. However, it was noted that although, in theory, access to foreign nationals was prohibited on the basis of the (then) applicable Greek legislation, in practice, the cases presented in the press suggested that there was a possibility to circumvent this restriction.

b. Emerging problems.

Regardless of the existing difficulties as to the exact calculation of people traveling outside Italy to visit fertility centers and, therefore, probably Greek fertility

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10 Data from 39 fertility centers in 21 EU and non-EU countries.
centers, in order to have children through surrogacy, it is clear that the relevant discussions should not be limited to this question alone. It is indisputable that, to a greater or lesser extent, there is actually some movement\textsuperscript{11}. Account should be also taken of the fact that, after the changes arising from lifting the ban on heterologous fertilization in Italy and establishing that persons residing abroad may obtain a court order in order to receive surrogacy services in Greece\textsuperscript{12}, it is reasonably expected that there will be a reduction in the number of Italian couples traveling to Greece for assisted reproduction care using third-party genetic material\textsuperscript{13}, and an increase of couples seeking surrogacy services in Greece\textsuperscript{14}.

In this context, the relevant efforts should be focused on finding solutions to the problem of kinship establishment between the child born outside Italy via surrogacy and the intended parents prior to and, mainly, after their return to their country of origin. If the procedure is carried out in Greece, these problems may emerge when, for instance, the Embassy of Italy or the competent consular authorities, to which the assisted couple submits the birth certificate issued by a Greek registry office, become aware of the fact that the child was born through surrogacy and notify the Italian authorities on the matter, leading to a denial of the latter to transfer the certificate to the relevant national records, due to the fact that it is contrary to national public policy\textsuperscript{15}.

c. Resolution “margins”.

It has been observed that, although legal issues in the field of kinship establishment between the Italian couple of intended parents and the child born via

\textsuperscript{11} It has been actually observed that the website of many assisted reproduction units in Greece is also translated into Italian.

\textsuperscript{12} According to Article 8 of Law 3089/2002, in its initial wording, both the intended mother and the surrogate mother had to have their permanent residence in Greece. This condition was repealed by Article 17 of Law 4272/2014 (Government Gazette, Series A, No 145/11.7.2014), according to which either the intended mother or the surrogate mother must have her permanent or temporary residence in Greece.

\textsuperscript{13} For the moment, the use of heterologous assisted reproduction in Italy is not particularly widespread. Note that, in 2014, following ruling No 162/2014 of the Constitutional Court (April 2014), only 30 cases of couples using this method were recorded. See Eterologa: un anno di promesse disattese, at http://www.voxdiritti.it/?p=3582, accessed on: 29.1.2015, according to which the main cause of this situation is the lack of ova and genetic material donors.

\textsuperscript{14} Couples travel from Italy to other countries for various reasons, e.g. homosexual couples wishing to have a child through medically assisted reproduction methods. This case is not touched upon in this paper as it is prohibited both in Italy and in Greece.

\textsuperscript{15} According to Article 12(6) of Law 40/2004, surrogacy arrangements are also punishable by imprisonment between three months and two years and by a financial penalty ranging between EUR 600,000 and EUR 1,000,000.
heterologous reproduction were addressed even before lifting the ban on this method, via the provisions of Law 40/2004\textsuperscript{16}, this is not the case for surrogacy. The Italian legislator does not specify the legal consequences in relation to kinship establishment when surrogacy is carried out in breach of the law, either in Italy or abroad.

Firstly, in the light of civil law and according to the prevailing view, violations of this prohibition taking place inside and, mostly, outside Italy\textsuperscript{17} are covered by Article 9(2) of Law 40/2004, according to which a child’s mother cannot request not to be cited as the mother in the child’s birth certificate and, therefore, the surrogate mother (who is the legal mother of the child under Article 269(3) of the Italian Civil Code), cannot renounce her motherhood after the child’s birth\textsuperscript{18}. Accordingly, when the genetic material belongs entirely to the assisted couple, it is argued that Article 9(3) of Law 40/2004, stipulating that the gamete donor (in this case the couple) does not have any legal connection to the child, should apply, \textit{mutatis mutandis}, to surrogacy. According to another view, which has been criticized as arbitrary\textsuperscript{19}, these provisions would cease to apply only if the surrogate mother was to choose to renounce her right to motherhood or to abandon the child after its birth, therefore leading to the recognition of the child by the intended parents.

With regard to the Italian jurisprudence, in recent years, the legal sphere has been focusing on a series of court rulings, which have not addressed the issue in a uniform manner\textsuperscript{20}. In particular, the largest number of published cases relate to criminal court rulings on the criminal liability of couples receiving assisted reproduction services abroad with regard to the offense of “\textit{alterazione dello stato positivo}”.

\textsuperscript{16} According to Article 9 of Law 40/2004, which was applicable at the time, “when heterologous reproduction methods are used in breach of the prohibition laid down in Article 4(3), the spouse or partner giving his consent through acts of will, may not challenge the child’s paternity in the cases set out in Article 235(1)(1) and (2) of the Civil Code, nor may he lodge the appeal provided for in Article 263 of the same Code”, whereas par. 3 of the same Article stipulated that when heterologous reproduction methods were used in breach of the law, no legal relationship can be established between the gamete donor and the child, nor may the latter claim paternity or have responsibilities towards the child.

\textsuperscript{17} Given that, according to Italian law (Article 33 and 35 of Law 218/1995), kinship establishment between the child and the parents is not determined by the child’s place of birth, but by the law of the child’s nationality which, in all cases where the genetic material comes from one or both members of the assisted couple - Italian citizens, is Italian law.

\textsuperscript{18} Reference to this view is made in A. Lorenzetti, “Bilanciamento di interessi e garanzie per i minori nella filiazione da fecondazione eterologa e maternità surrogata”, in La famiglia si trasforma. Status familiari costituiti all’estero e loro riconoscimento in Italia, tra ordine pubblico ed interesse del minore. Ed. Cesaro G.O./Lovati P./Mastrangelo G., p. 86 \textit{et seq.}

\textsuperscript{19} M. Faccioli, “Procreazione medicalmente assistita” in Dig. civ. Agg. III, 2, p. 1071.

\textsuperscript{20} Note that, for the moment, there are no published court rulings with regard to surrogacy arrangements carried out in Greece.
“alteration of civil status”), under Article 567(2) of the Criminal Code, pursuant to which any person who uses false evidence, declarations and data in order to alter the civil status of a newborn when drawing up the child’s birth certificate shall be punished by imprisonment between five and fifteen years. In this context, the courts have issued a criminal conviction\(^{21}\), a ruling sentencing the couple for false declaration before the authorities\(^{22}\) and other rulings that acquitted couples by considering that the birth certificate had been drawn up legally in the country where the procedure had taken place\(^{23}\) or adopting the principles of the EU case-law (ECHR)\(^{24}\).

Recently, the ECHR ruling dated 27.1.2015 on case Paradiso and Campanelli v. Italy\(^{25}\), sentenced Italy for breaching Article 8 of the Convention, due to the fact that it removed a child born through a surrogacy arrangement in Russia from its intended Italian parents, giving the child to another family. The main argument adopted by the Court’s ruling was that the child’s best interest was not taken into account when removing the child from the couple, which was an extreme measure that could be justified only in the event of immediate danger to that child.

Despite the fact that the ruling in question does not oblige Italy to change its legislation, the question arises as to how the Italian authorities will react in similar cases in the future. Even if in theory it will be accepted that the child’s interest may be

\(^{21}\) See Tribunale di Brescia, Sez. II pen., ruling of 26.11.2013, http://www.penalecontemporaneo.it/area/3/-/24/-/2906-ancora_in_tema_diAlterazione_di_stato_e_procreazione_medicalmente_assistita_all_estero_una_sentenza_di_condanna_delltribunale_di_Brescia/ Accessed on: 2.2.2015, with comments by T. Trinchera, in which case it was held that the process was illegal also in Ukraine, where it had taken place, due to the fact that the couple had used, at the same time, third-donor genetic material and surrogacy.


\(^{23}\) See Tribunale di Milano, Sez. V pen., ruling of 15.10.2013 http://www.penalecontemporaneo.it/area/3/-/24/-/2856-alterazione_di_stato_e_maternita_surrogata_all_estero_una_pronuncia_assolutoria_delltribunale_di_milano/, Accessed on: 2.2.2015, which upheld that the Italian law itself obliged Italian citizens to draw up the relevant birth statements in accordance with the place where the birth takes place.


\(^{25}\) See http://hudoc.echr.coe.int/sites/eng/Pages/search.aspx#(%22itemid%22:%5B%22001-150770%22%5D), Accessed on:7.2.2015.
interpreted under the assumption that the child must be legally connected to the persons who “initiated the process” for its creation, even without a biological link therewith, in practice, it would be very difficult to ensure such interest under the applicable Italian legal framework. For as long as the legislator chooses not to interfere with this issue, there will be cases of children whose “interest” will be regarded as inferior by the rules of the Italian public order; leading to the former being set aside in favor of the latter. If, in the future, there is actual commitment to resolve these problems, the perspective of an international convention would be highly desirable but difficult to achieve, given that this kind of effort would be rejected by many States and especially those that have a strict legislation on the matter, as they would have to suffer a major blow due to the immediate legal recognition of these practices, which are regarded as illegal under domestic law. For this reason, and for as long as there are still differences between domestic legal systems, it would be more realistic, in my view, the adoption of a legislative or a jurisprudential approach in Italy, with the aim to establish a legal relationship between these “parentless” children and, at least, at a subsequent stage (e.g. by applying the rules on adoption), the person whose genetic material was used and who started this process, in line with the child’s best interest as adopted by the ECHR.