SURROGACY: A CLASH OF COMPETING RIGHTS

With Particular Reference to the European Court of Human Rights
Case of Paradiso and Campanelli v. Italy

Team Portugal II
Filipa Redondo | Filipa Valente | Maria João Esteves

Accompanying Teacher
Maria Perquilhas
Índice

I. Introduction .......................................................................................................................................... 1

II. The Paradiso and Campanelli Case .................................................................................................... 3
   a. Case Resume ........................................................................................................................................ 3
   b. Court’s decision ................................................................................................................................. 4

III. Surrogacy – concept in European Court of the Human Rights ....................................................... 5

IV. Surrogacy: a comparative law summary in Europe ........................................................................ 7

V. The clash of competing rights ........................................................................................................... 11
   a. The Intending Parents ......................................................................................................................... 11
   b. The Surrogate mother ....................................................................................................................... 13
   c. The child ........................................................................................................................................... 14

VI. Conclusion ....................................................................................................................................... 17

VII. Bibliography ..................................................................................................................................... 19

I. Introduction

“Thirty years after the first surrogate baby was born, courts across the world still struggle to work out the morality of childbirth transactions.”

Surrogacy is a present-day issue, which divides people and leaves no one impassive, because of the moral and ethical questions it raises – far beyond the medical point of view.

We chose this subject because of its topicality and increasing importance. In fact, globalization, the medical achievements and declining fertility rates have put this subject on the agenda.

4 E.g., in a worldwide perspective, the number of children born per woman was 2.8 in 2000; and in 2016 it decreased to 2.4. This is a problem which affects mostly industrialized countries. – Source: https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html.
What is surrogacy, then? It is a way of having children in which a woman – the surrogate – gets pregnant having already decided to give the child away to someone else, with whom she made an arrangement – the intending (or intended) parent(s). It is necessary to distinguish traditional surrogacy from gestational surrogacy. In traditional surrogacy, the surrogate provides her own genetic material (egg), and therefore the child born is genetically related to the surrogate. In gestational surrogacy, the surrogate does not provide her own genetic material, so the child born is not genetically related to the surrogate. Gestational surrogacy usually occurs following IVF treatment and the gametes may come from both intending parents, one, or neither.

Also, it may be a commercial (for-profit) surrogacy arrangement or an altruistic (non-profit) surrogacy arrangement. In for-profit ones, the intending parent(s) pay the surrogate financial compensation which exceeds her “reasonable expenses”. In altruistic ones, the intending parent(s) pay the surrogate nothing or, more frequently, only her “reasonable expenses” related to the surrogacy. For understandable reasons, these kinds of altruistic arrangements most of the times (but not always) take place between intending parent(s) and a relative or a friend.

Our starting point was the Paradiso and Campanelli case. In fact, it is the ECtHR’s most recent case law on this matter. It is a very interesting case to analyze, since there was no biological link at all between the intending parents and the child, brought from a Russian clinic, which means this case dangerously approximates human trafficking. Furthermore, the Grand Chamber ruling was not only a reversal of the Chamber’s decision, but also was held by eleven votes to six, which means it is a controversial case.

Surrogacy gives rise to many issues, namely concerning the human rights of those involved in the process, in particular when we talk about for-profit cross-border surrogacy arrangements. Indeed, we may question if we are not sliding into a sort of “children on demand” scenario: in fact, the intending parent(s) can choose the surrogate, the egg donor and the sperm donor, through the selection of many of their traits. In addition, as long as there are many children waiting for an adoptive family, can we really argue that it is the right to found a family that is at stake?

Regarding all this, we will approach the subject of surrogacy from both ethical and legal perspectives, taking into account the implications caused by the fact that the approaches around the world – and even across Europe - are multiple and sometimes hardly compatible.

---

5 The following definitions are based on the glossary prepared by the Permanent Bureau of The Hague Conference on Private International Law (HCCH) (“The desirability and feasibility of further work on the parentage / surrogacy project”, Annex A of Preliminary Document No. 3B, April 2014).
6 In this paper, we are mostly primarily looking at gestational surrogacy, which is currently the most common one, by far.
7 For “pain and suffering” or only the fee charged by the surrogate mother for carrying the child.
8 The Grand Chamber decision is from 24th January 2017.
9 In fact, in the other surrogacy cases ruled by the Court summarized on chapter III the decisions were all unanimously held.
10 See “circumventive reproductive tourism” in chapter IV.
11 Some surrogacy clinics provide real women catalogues, displaying each surrogate or egg donor photos and features, such as hair and eyes colors and personality traits, and even their hobbies.
II. The Paradiso and Campanelli Case

a. Case Summary

Mrs. Donatina Paradiso e Mr. Giovanni Campanelli filed an application in the ECtHR concerning an alleged violation of Article 8 of the European Convention on Human Rights (referred as Convention from now on) by the Italian Republic. The applicants claimed that their right to private and family life was disrespected when the Italian authorities took a series of measures concerning the child T.C..

The applicants, a married couple, tried to be parents through medically assisted reproduction and, after the repeated failure of that method, they were authorized by the Campobasso Minors Court to adopt a foreign child. However, the couple never had news about a child eligible for adoption.

As result, they tried something different. Mrs. Paradiso went to a Moscow-based clinic and made a gestational surrogacy agreement with it. Allegedly, Mrs. Paradiso travelled to Moscow with Mr. Campanelli’s seminal fluid, which was duly conserved, and handed over to the clinic. Therefore, the applicants stated that the two embryos implanted in the surrogate mother’s womb on 19 June 2010 had genetic material from Mr. Campanelli. This was certified by the Russian Clinic on 16 February 2011.

The child was born in Moscow on 27 February 2011. The surrogate mother gave away any rights concerning the child to be born.

On 10 March 2011 the child was registered by the Registry Office in Moscow as the son of Giovanni Campanelli and Donatina Paradiso and on 29 April 2011 the Italian Consulate issued the documents enabling the child to travel to Italy with Mrs. Paradiso, which happened on 30 April 2011.

However, on 2 May 2011, the Italian Consulate in Moscow informed the Campobasso Minors Court, the Ministry of Foreign Affairs and the Colletorto Prefecture and Municipality that the paperwork concerning the child T.C. contained false information. Consequently, on 5 May 2011, the Public Prosecutor’s Office opened criminal proceedings against Mrs. Paradiso and Mr. Campanelli and requested at the Campobasso Minors Court the opening of proceedings to make the child available for adoption. This request had a positive answer on the same day and a guardian ad litem (curatore speciale) was appointed to the child. On 16 May 2011, the child was placed under guardianship.

From this point forward, a judicial dispute started between the applicants and the Italian Public Prosecutor’s Office, from which an extremely relevant fact has emerged: the court ordered DNA tests in order to establish if the second applicant was the child’s biological father and the result was negative. After being confronted with the DNA tests results, the Russian clinic expressed its surprised and stated that it was not possible to identify how the error was made. Therefore, the child had no biological link to Mr. Campanelli and, has we already knew, to Mrs. Paradiso.

This was a crucial point for the Minors Court, as we can understand from its decision of 20 October 2011. The Court applied an immediately enforceable decision stating that the child should be removed from the applicants, taken into the care of social services and placed in a children’s home. From the Court point
of view, this was not gestational surrogacy, because “in order to be able to talk of gestational or traditional surrogacy (in the latter, the surrogate mother makes her own ovules available) there must be a biological link between the child and at least one of the two intended parents (in this specific case, Mr. Campanelli and Mrs. Paradiso), a biological link which, as has been seen, is non-existent”.

Consequently, the applicants put themselves in an unlawful situation that could not be accepted by the Italian Authorities. To the court, the child was in a state of abandonment and it was essential to find him an adoptive family. The child has now been adopted.

b. Court’s decision

The Chamber considered that the private life and family life of the applicants, protected by Article 8 of the Convention, had been violated. In this sense, the court decided that there was a de facto family life between the applicants and the child and, with the measure describe above, the Italian Authorities interfered without right to it in their family.\textsuperscript{12}

The Italian government appealed. The Grand Chamber of the ECtHR had two main questions to solve: whether Article 8 of the Convention is applicable; and, in case of a positive answer to the first question, whether the urgent measures ordered by the Minors Court, which resulted in the child’s removal, amount to an interference in the applicants’ right to respect for their family life and/or their private life within the meaning of Article 8 § 1 of the Convention and, if so, whether the impugned measures were taken in accordance with Article 8 § 2 of the Convention.

Concerning the question of the application of Article 8, the Court noted that the applicants and the child lived together for a short period of time (“six months in Italy, preceded by a period of about two months shared life between the first applicant and the child in Russia”) which would be inappropriate to define a minimal duration of shared life necessary to constitute de facto family life.

The court noted as well that the quality of the bond and the existence of a parental project are relevant to define the existence of family life. However, in the present case, the absence of any biological tie, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective were determining factors that led the Court to state that there was not a de facto family life.

But, as the case concerns the bonds created and developed between the applicants and the child, which pertains to individual’s life and social identity, the Court concluded that the impugned measures pertained to the applicants’ private life, making Article 8 applicable to the case.

As the measures interfered with the applicants’ private life, they must be justified under Article 8 § 2 of the Convention. The Court considered that the interference was “in accordance with the law”, as the

\textsuperscript{12} The Chamber stated that when the Italian authorities decided to take the child from the applicants and place him under the care of the social services, they didn’t reach a fair balance between the interests as stake, especially because they didn’t preserve the best interest of the child. Actually, the child spent two years without an official identity. Therefore, the Court wasn’t convinced that the Italian authorities respected the necessary conditions in order to justify the measures they take in this case.
application of the Italian law by the domestic courts was foreseeable. It was as also considered that the intention of reaffirming the State’s exclusive competence to recognize a legal parent-child relationship, with a view to protecting children is a legitimate aim pursued by the measures.

Regarding the necessity of the measures in a democratic society, the Court stated that the public interests of child protection (as there was a careful analysis of the case) and law reaffirming (against the illegality of the applicants’ conduct) were decisive and justified these measures.

In conclusion, the Court held, by eleven votes to six, that there had been no violation of Article 8 of the Convention.

III. Surrogacy – concept in European Court of the Human Rights

Only a few cases involving surrogacy have been taken to the ECtHR and have been found admissible. Below, we can see the summarized facts of each one of these cases.

**S.H. and Others v. Austria** (Application No. 57813/00)

The applicants were two Austrian married couples whose wives were infertile. They wished to use medically-assisted procreation techniques, which were not allowed in Austria. The applicants complained that because of the Austrian Artificial Procreation Act there was a violation of their rights under Article 14 (prohibition of discrimination) read in conjunction with Article 8 (right to respect for private and family life) of the Convention. In November 2011, the ECtHR upheld the constitutionality of the Austrian Artificial Procreation Act. The Court decision was based on the wide margin of appreciation doctrine, because these cases concerned issues where there is no consensus in the European Union. The Court thereby applied Article 8 (and stated that there was no cause for a separate examination of the same facts from the standpoint of Article 14 read in conjunction with Article 8) and found that the procedural deference owed to the member state (Austria) outweighed the protections granted by these Articles. Despite the fact that it held that there had been no violation of Article 8 in the present case, the Court underlined in its decision that the subject of artificial procreation, because of its particular dynamic development in science and law, had to be kept under review by the Contracting States.

**Mennesson v. France** (Application No. 65192/11) and **Labassee v. France** (Application No. 65941/11)

In these two similar cases, France refused the legal recognition to parent-child relationships that had been legally established in the United States, where surrogacy is legal. In both couples, the Mennessons and the Labassees, the wives were infertile, so they went to California and Minnesota respectively. Both embryos were formed with the sperm of the intending fathers and donated eggs.

---

13 All these cases the Court has ruled concerned to gestational surrogacy, fruit of cross-border agreements.

14 Concerning to this case, it is interesting to remember that the Chamber, in its judgment of 1st April 2010, originally found, regarding Austrian law, a violation of Article 14 of the Convention in conjunction with Article 8 both in respect of the female applicants and the male applicants. So the Grand Chamber decision meant a reversal of the Court’s prior position.
The applicants, in both cases, complained specifically of the fact that France’s refusal meant the detriment of the children’s best interests. The ECtHR stated that in these cases Article 8 of the Convention was applicable in both its family life aspect and its private life aspect. Then, in both cases, the Court held that there had been no violation of Article 8 of the Convention concerning the applicants’ right to respect for their family life. Yet, the Court held that there had been a violation of Article 8 concerning the children’s right to respect for their private life, because of the aspect of the identity of individuals, which demands that, far as surrogacy is concerned, the margin of appreciation left to States needs to be reduced.

**Foulon v. France** (Application No. 9063/14) **and Bouvet v. France** (Application No. 10410/14)

The applicants were, in the first case, a French national and his daughter, born in Bombay, India, in 2009, and, in the second case, a French national and his twin sons, also born in Bombay, India, in 2010. These children were born through surrogate pregnancies and in both cases the applicants are the biological fathers of the children concerned.

Both these French nationals were facing the refusal to get the recognition in France of the parent-child relationship between them and the children in India. This occurred because the French authorities suspected that they had resorted to gestational surrogacy agreements, prohibited in France. Before the ECtHR, based on Article 8, the applicants alleged a violation of their right to respect for their private and family life as a result of the French authorities’ refusal.

The Court held that there was no violation of Article 8 concerning the applicants’ right to respect for their family life, but on the other hand held that there was a violation of Article 8 concerning the right to respect for children’s private life.

It is interesting to note that the Court have always considered that these surrogacy cases fall within the scope of Article 8 of the Convention - right to respect for private and family life - but has never considered that there has been a violation of this Article as regard its family life perspective. On the other hand, when there were surrogate children involved, the Court considered that the refusal of legal recognition to parent-child relationships is a violation to the child’s right to private life, which has motivated lots of reactions speaking out against a supposed “liberalization of surrogacy” by the ECtHR. Since then, the Paradiso and Campanelli Grand Chamber’s decision was rendered and the Court decided that there was not a violation of Article 8 of the Convention. Actually it does not mean necessarily a change of the Court’s position, since

---

15 It is impressive that in Foulon case the intended father paid a particularly low amount for the surrogacy agreement: € 1.300.

16 In fact, “Article 8 is one of the most open-ended of the Convention rights, covering a growing number of issues and extending to protect a range of interests that do not fit into other Convention categories.” – “Article 8 | Right to private and family life”, UK Human Rights Blog: https://ukhumanrightsblog.com/incorporated-rights/articles-index/article-8-of-the-echr/.

17 “The European Court of Human Rights (ECHR) is progressively legitimizing surrogacy by a rapid succession of decisions each carrying further the liberalization of this practice and the logic of the right to a child.” – PUPPINCK, Grégor, “The Liberalization of Surrogacy by the ECHR”, European Centre for Law & Justice, https://eclj.org/surrogacy/the-liberalisation-of-surrogacy-by-the-echr.
in the case of Paradiso and Campanelli there isn’t a biological link between the intending parents and the child, contrary to prior cases brought in front of the ECtHR.

We consider that the Court could have already taken these opportunities to adopt a clear position on this matter – regarding the whole issue of commercial surrogacy. In fact, “the Court failed to grasp the problem of surrogacy as a whole, or did not want to”18, although a definitive position is required by all moral and ethical ties.

IV. Surrogacy: a comparative law summary for Europe

Regarding legal approaches to surrogacy in internal laws and policies, it is possible to identify three different categories: strict, permissive and unregulated. We will focus on the approach of some Contracting States of the Council Europe19.

According to the ECtHR20, seven21 of the thirty-seven States have permissive legislation regarding surrogacy. Some of them permit commercial surrogacy and others only permit altruistic surrogacy. States may define eligibility criteria for intending parents and surrogate mothers, regulate the legal parentage of the child born as result of the surrogacy arrangements, define if the surrogacy arrangement is or is not enforceable and regulate who appears in the birth certificate.

In these States we can distinguish two different kinds of regulatory approaches: one where there is a pre-approval or post-approval system to engage in surrogacy; and other where the intended parents apply for the transfer of legal parentage after the child has been born. In the first type, the intending parents and the future surrogate mother have to present their arrangement to a designated body that verifies that the conditions of the legislation have been met and approves it prior to or after any medical treatment22. Thus, in some States, parental status can be transferred pre or postnatally to the intended parents without bureaucracy. In the second type, we find a variation in whether or not the birth certificate mentions the surrogate at all or is there a mandatory waiting period for the gestational mother in order for her to waive her parental rights over the child23.

Table 1 – Comparison of permissive surrogacy laws in some Contracting States24

<table>
<thead>
<tr>
<th>Country</th>
<th>Ukraine2</th>
<th>Russia2</th>
<th>United Kingdom2</th>
</tr>
</thead>
</table>

18 PUPPINCK, Grégor, “ECHR: Towards the Liberalization of Surrogacy Regarding the Mennesson v France and Labassee v France cases (n°65192/11 & n°65941/11)”.  
19 Cross-border reproductive tourism is a worldwide reality (Europe, Australia, North and South America, Asia and Africa). India, which has been one of the most sought after countries, has recently taken measures to impose restrictions to foreigners and to guarantee surrogates’ and child’s rights. To know more, visit: http://www.prsindia.org/uploads/media/Surrogacy/Surrogacy%20(Regulation)%20Bill,%202016.pdf.  
20 The ECtHR proceeded to do comparative law research into different legal approaches related to surrogacy in thirty-five of the thirty-seven Contracting States, when assessing their judgment in Labasse v. France.  
21 Albania, Greece, the Netherlands, the United Kingdom, Georgia, Russia and Ukraine.  
<table>
<thead>
<tr>
<th>Type of surrogacy allowed</th>
<th>Commercial and altruistic.</th>
<th>Commercial and altruistic.</th>
<th>Altruistic.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment to the surrogate</td>
<td>No restriction.</td>
<td>No restriction.</td>
<td>Reasonable expenses excluding payment for the benefit of the surrogate.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Surrogate mother (the transferring of guardianship must occur through a court order, the application for which has to be submitted within six months of the child’s birth, if at least one of the intending parents is genetically related to the child and one of those is domiciled in UK, moreover they must be at least 18 years old and be married, civil partners or living together in an enduring family relationship; after that deadline or if there is no biological link between the intending parent(s) and the child, only through adoption).</td>
</tr>
<tr>
<td>Legal guardian of the surrogate child</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>The intending parents, from the moment of conception. Donor or a surrogate mother has no parental rights over the child.</td>
<td>The surrogate mother, if she has provided the egg. The intending parent(s), if the surrogate mother has not provided the egg.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>The surrogate mother’s name appears on the birth certificate. Once the parental order is issued or the adoption is decreed, the birth certificate is replaced by one with the intending parents as the child’s legal parents.</td>
</tr>
<tr>
<td>Registration of the child</td>
<td>The birth certificate is issued with the intended parents’ names regardless of their genetic link to the child.</td>
<td>The intending parents can make a contract with the surrogate stating that, after the child is born, its birth certificate will have no mention of the surrogate mother. Otherwise, after the birth, the surrogate mother must give her consent to the registration of the intending parents as the child’s legal parents.</td>
<td></td>
</tr>
<tr>
<td>Imprisonment for engaging in commercial surrogacy</td>
<td>No provision.</td>
<td>No provision.</td>
<td>Maximum three months.</td>
</tr>
</tbody>
</table>

### Eligibility criteria for intending parents

<table>
<thead>
<tr>
<th>Requirement of being married</th>
<th>Yes (only heterosexual couples).</th>
<th>No (single women and heterosexual couples, regardless of their marital status, allowed).</th>
<th>No (includes intending parents living in a civil partnership or living simply as partners).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citizenship and/or residency</td>
<td>No requirement.</td>
<td>No requirement.</td>
<td>At least one of the intending parents must be a permanent resident in UK.</td>
</tr>
<tr>
<td>Existence of a medical reason</td>
<td>Yes.</td>
<td>Yes.</td>
<td>No requirement.</td>
</tr>
</tbody>
</table>

### Eligibility criteria for surrogate mother

<table>
<thead>
<tr>
<th>Age</th>
<th>18-35 years.</th>
<th>20-35 years</th>
<th>Not specified.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of own children</td>
<td>At least one.</td>
<td>At least one.</td>
<td>No requirement.</td>
</tr>
<tr>
<td>Number of times one can be a surrogate</td>
<td>No restriction.</td>
<td>No restriction.</td>
<td>No restriction.</td>
</tr>
<tr>
<td>Consent of the partner</td>
<td>No provision.</td>
<td>Required.</td>
<td>Not required. But the husband will be considered the legal father, irrespective of the biological relationships, unless it can be shown that her husband did not consent to the surrogacy arrangement.</td>
</tr>
</tbody>
</table>

1. Ukraine has signed but not yet ratified the Convention on Human Rights and Biomedicine.
2. Russia has not signed the Convention on Human Rights and Biomedicine.
3. United Kingdom has not signed the Convention on Human Rights and Biomedicine.

In some States\(^{25}\)\(^{26}\), surrogacy arrangements are expressly prohibited by law, usually on the basis that such agreements violate the surrogate mothers and child’s human dignity, reducing both to mere objects of contracts\(^{27}\)\(^{28}\). In several of these countries the parties will incur in criminal sanctions and, as far as the child

---

\(^{25}\) Germany, Austria, Spain, Estonia, Finland, Iceland, Italy, Moldova, Montenegro, Serbia, Slovenia, Sweden, Switzerland and Turkey.

\(^{26}\) Actually, in Portugal, surrogacy is prohibited. However, a new law was published in 22.08.2016, permitting altruistic surrogacy under certain and restricted conditions but it has not entered into force because its implementation has not yet been published.

\(^{27}\) See Article 21 of the Convention on Human Rights and Biomedicine, 1997. This Convention has not been signed and ratified by all Contracting States.

\(^{28}\) Eg. Germany and Switzerland.
is concerned, the surrogate mother will be considered its legal parent and often this is not contestable. Other countries have opted for a total ban on surrogacy arrangements, whether commercial or altruistic. However, these circumstances do not mean that it cannot be recognize if obtained abroad.

The consequence of this kind of regulation is that surrogacy arrangements in contravention of the law are void and unenforceable. Therefore, the general rules related to legal parentage will apply to any child born as a result of such an arrangement.

### Table 2 – Comparison of restrictive surrogacy laws in some Contracting States

<table>
<thead>
<tr>
<th>Country</th>
<th>Germany¹</th>
<th>Italy²</th>
<th>Finland³</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of surrogacy allowed</td>
<td>None (commercial, altruistic, traditional and gestational).</td>
<td>None (commercial, altruistic, traditional and gestational).</td>
<td>Neither commercial nor altruistic. But traditional surrogacy is not expressly banned.</td>
</tr>
<tr>
<td>Legal guardian of the surrogate child</td>
<td>Despite being forbidden, the intending parents can adopt a child born through surrogacy under the following conditions: the consent of the surrogate, since the consent of the biological parents in general is mandatory, which cannot be given before the child is 8 weeks old. But they are only able to adopt the child if it is necessary for its welfare: the court will decide on a case by case basis.</td>
<td>No legislative provision determines adoption as an instrument to allow the intending parents (in cases of international gestational surrogacy) to become legal parents.</td>
<td>No regulation for cases of international gestational surrogacy. It has been suggested that some analogous support and guidance could be drawn from provisions governing the choice of law in the Paternity Act. In theory, adoption should be refused as surrogacy is forbidden in Finland, but the child’s best interests suggest otherwise.</td>
</tr>
<tr>
<td>Imprisonment for engaging in commercial surrogacy</td>
<td>Three years’ imprisonment.</td>
<td>Three months to two years’ imprisonment and a fine.</td>
<td>No provision.</td>
</tr>
</tbody>
</table>

1. Germany has not signed the Convention on Human Rights and Biomedicine.
2. Italy has signed but not yet ratified the Convention on Human Rights and Biomedicine.
3. Finland has signed and ratified the Convention on Human Rights and Biomedicine, which entered into force in 01.03.2010.

Finally, in ten other Contracting States there are no regulations on gestational surrogacy, and it is either prohibited under general provisions or not tolerated, or the question of its legality is uncertain. In addition to these countries, Belgium, Czech Republic, Luxemburg and Poland lack specific legislation, but have a tolerant approach to surrogacy.

The characteristics of this group of States are: surrogacy arrangements are not expressly prohibited and their terms are either expressly or under general law principles, void and unenforceable; in some States, commercial surrogacy is prohibited by criminal law, either by express provisions or because that these kinds of agreements contravene other related provisions (e.g. child trafficking); in others States, medical institutions facilitate altruistic surrogacy, within strict conditions. Once more, legal parentage will be determined by general laws, with the inherent difficulties for the intending parents.

---

³⁰ RINTAMO, Sara, idem, page 31.
³² BRUNET, Laurence, and others, idem, pages 267-276 and 294-301.
³³ RINTAMO, Sara, idem, page 33-36.
³⁴ Andorra, Bosnia-Herzegovina, Hungary, Ireland, Lithuania, Latvia, Malta, Monaco, Romania and San Marino.
³⁵ RINTAMO, Sara, idem, page 38.
To sum up, the differences between States is one of the reasons for cross-border surrogacy. Indeed, in order to avoid the prohibitive or restrictive legal approaches to this matter in their own country, intending parents have to travel to others countries where surrogacy arrangements are allowed with fewer restrictions, which increase cross-border cases and this can be known as “circumventive reproductive tourism”\(^{37}\). However, there are others reasons as well: the lower costs or fewer perceived risks abroad (for example, risk of the surrogate reneging on the agreement). On the other hand, the increase of international surrogacy arrangements’ numbers in some States is also related to the ready availability of poor surrogates\(^{38}\).

It is also evident that the lack of regulation encouraged a vast lucrative business opportunities as well as potentially dangerous activities of intermediary agencies and specialized clinics\(^{39}\).

---

\(^{36}\) BRUNET, Laurence, and others, idem, pages 206-233 and 324-332.


---

Table 3 – Comparison of some Contracting States which not regulate surrogacy\(^{36}\)

<table>
<thead>
<tr>
<th>Country</th>
<th>Belgium(^1)</th>
<th>Romania(^2)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Type of surrogacy allowed</strong></td>
<td>Due to the lack of a legal framework, altruistic and gestational surrogacy are authorized by some hospitals, which handle the surrogacy requests, under certain and restricted conditions.</td>
<td>Surrogacy is not expressly regulated. Nevertheless, the issue of surrogacy can be addressed indirectly via medically assisted reproduction.</td>
</tr>
<tr>
<td><strong>Contract</strong></td>
<td>Not enforceable.</td>
<td>Not enforceable.</td>
</tr>
<tr>
<td><strong>Legal guardian of the surrogate child</strong></td>
<td>Surrogate mother and, if she is married, her husband. The intended mother has to engage an adoption procedure. The intended father has to acknowledge the child if the surrogate mother is not married and gives her consent. If the surrogate mother does not give her consent, a court tries to conciliate the parties and can reject the claim by the intended father in case conciliation is not attained and with the condition that it is proven that the intended father is not the biological father of the child. Moreover, the court can reject this acknowledgment if the child is a year or older and this acknowledgement is obviously against the child’s best interests. If the surrogate is married, the intended father has to contest the parental paternity of her husband or engage an adoption procedure to establish his own paternity.</td>
<td>Surrogate mother and, if she is married, his husband. Maternal filiation is not disputable, except when a birth certificate has not been drawn up for the child. In this situation, filiation can be proven by possession of status. On the other hand, if the surrogate is married, the intended parent has to contest the paternal paternity of her husband or, alternatively, initiate an adoption procedure. For instance, if the surrogate mother refuses to give up the child for adoption to the genetic parents, the latter can require a genetic test for establishing the genetic filiation with the child, which can be used as an objective proof in court.</td>
</tr>
<tr>
<td><strong>Citizenship of the child</strong></td>
<td>A child can acquire Belgian citizenship either on the basis of the nationality of his/her parents, or his/her birth on Belgian territory, or by the collective effect of an acquisition act.</td>
<td>A child can acquire Romanian citizenship either on the basis of the nationality of his/her parents, or his/her birth on Romanian territory.</td>
</tr>
</tbody>
</table>

---

**Eligibility criteria for intending parents**

<table>
<thead>
<tr>
<th>Requirement of being married</th>
<th>Usually, only heterosexual couples are accepted.</th>
<th>Not regulated.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Existence of a medical reason</td>
<td>Usually, sterility of the intended mother or her incapacity to complete a successful pregnancy.</td>
<td>If the medically assisted reproduction law could be considered as applicable, its granted to any woman or man suffering from sterility, that cannot be treated with a classic method of treatment or surgical intervention.</td>
</tr>
</tbody>
</table>

---

1. Belgium has not signed the Convention on Human Rights and Biomedicine.
2. Romania has signed and ratified the Convention on Human Rights and Biomedicine, which entered into force in 01.08.2001.
In the midst of these heterogeneous legal approaches, surrogates and the newborn child are often “forgotten”: many issues arise from the lack of regulation of their rights, welfare and security. We will discuss these questions further.

V. The clash of competing rights
   a. The Intending Parents

Everything starts with the right to found a family, under Article 16 of the Universal Declaration of Human Rights (UDHR). This right also falls within the scope of Article 8 of the Convention (Right to respect for private and family life), as it is confirmed by the ECtHR decisions, and of Article 9 of the Charter of Fundamental Rights of the European Union (CFREU), which states the right to marry and the right to found a family.

Actually, surrogacy allows people who cannot conceive children – such as infertile and homosexual couples – and even a single person to access that fundamental right. This is of increasing importance if we bear in mind the declining fertility rate and the fact that medical knowledge is so advanced that the odds of success in achieving a pregnancy are high. In fact, surrogacy may be justified by the recognized suffering caused by not reaching the fulfillment of the dream of becoming a parent. On the other hand it can be argued that “longing for a child is agony, but so too is needing an organ transplant, yet we do not allow the indigent to earn money selling organs”, that is, the end does not justify the means.

It is also argued by the intended parents that the decision to procreate is an extremely private matter, so no interference of the state shall occur. However, “the assumption will prove to be false in almost all cases but one; if procreation follows from so-called natural processes. In case of any complications in procreation, there will be legislation involved in defining the framework within which individuals can obtain services to fulfil their innate desire to become a parent.” So, the privacy argument seems to be fallacious especially since “legislation in reproductive matters tends to be even more value-bound than most legislation”.

As regards the intending parents’ rights, there is a key issue that we need to address. Since the unborn surrogate baby is their child, they are required to look after its health. So, are the intending parents allowed to restrict and impose conducts on the surrogate mother? There is a clash of competing rights: the intending parents’ right to protect their unborn baby’s health (or even life, if we consider the possibility of

---

40 “1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (…) § 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” Our emphasis
41 ECtHR have been deciding that this right to found a family does not fall within the scope of the Article 14 (Prohibition of discrimination), even when it deals to a homosexual couple.
42 “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”
43 See endnote no. 4.
45 RINTAMO, Sara, idem, page 7.
46 See Chapter V., b).
abortion) versus the surrogate’s freedom and self-determination. We consider that the answer is: a surrogate mother’s fundamental rights should not be limited. Contrary to other types of contracts, in surrogacy there are fundamental human rights involved, so the contractual freedom must be reduced. We do not forget the intending parents’ right to protect their unborn child, but we believe that the surrogate’s freedom and self-determination must never called into question, not least because we must remember that it was the intending parents who chose to use surrogacy (and chose that specific woman to carry their baby), with the constraints involved.

Now this leads us to another question – does the right to found a family really mean that there is a reproductive right? The answer is: probably, not. Because the truth is that someone, even when struggling with infertility, or a homosexual couple, can find a family through adoption. Furthermore, even the right to found a family seems not to be absolute: the ECtHR reiterates that “Article 8 protects an existing family rather than a hypothetical or desired family”⁴⁷. In other words, “despite compassion for the unmet longing to be a parent, there is no right to a child for anyone — heterosexual, homosexual, or singles by choice”⁴⁸.

Another question arises from the intended parents’ point of view. What if, after the birth, the surrogate mother decides not to give them the child? If the child has a biological link with one or both of the intended parents and none with the surrogate⁴⁹, it would probably not be difficult for them to get the child – also according to Article 9 § 1, of the United Nations Convention on the Rights of the Child (UNCRC)⁵⁰. However, if that link does not exist⁵¹, it can be highly problematic for the intending parents. The question then must be decided according to two different values: the child’s best interest and the public interest in fighting human trafficking and not according to intended parents’ interests. In fact, we cannot agree with this statement: “What would the intended parents do in a situation where both the egg and sperm are donated by a donor? Should that child not return to his intended parents who spent tens of thousands of dollars to have a child of their own? Clearly, the answer is no.”⁵² Actually, we feel that this would not be the right way forward when the issue of the amount spent by the intending parents is a decisive argument.

Some of those who endorse surrogacy state that the intended parents are “reproductive refugees’, boxed out of reproductive rights in their own countries, [which chase] them through others”⁵³, adding that "it's a constant chase” because they have to run from the countries that used to allow commercial surrogacy and progressively are now tending to ban it. The obvious counter argument is: why is that global movement in which national legislations tend to ban for-profit surrogacy or strongly limit its requirements⁵⁴? That is

⁴⁸ RIBEN, Mirah, idem.
⁴⁹ Assuming we are not talking about traditional surrogacy, which today is rare.
⁵⁰ “States Parties shall ensure that a child shall not be separated from his or her parents against their will (…)”.
⁵¹ As in the Paradiso and Campanelli Case.
⁵² Journal of International Business and Law, Volume 14 | Issue 1, Article 4, 1st January 2015.
⁵³ PREISS, Danielle, SHAHI, Pragati, idem.
⁵⁴ Take the very recent example of India, which used to have one of the world’s biggest surrogacy industries. See endnote no. 20.
because the profound ethical and human rights questions involved, and the questionable morality of the commercial surrogacy agreements, are becoming clearer.

**b. The Surrogate mother**

To fulfill the dream of the intending parents of having a child, the surrogate is the one who plays the principal role. One cannot forget that, as a human being, she has fundamental rights that cannot be violated or even put at risk. Then, can we say that surrogacy arrangements respect surrogate fundamental rights?

The UDHR sets outs in Article 1 that “all human beings are born free and equal in dignity and rights”. The CFREU also sets out in Article 1 that “Human dignity is inviolable. It must be respected and protected”. In its turn, Article 3 establishes that “1. Everyone has the right to respect for his or her physical and mental integrity. 2. In the fields of medicine and biology, the following must be respected in particular: (...) the free and informed consent of the person concerned, according to the procedures laid down by law, (...) the prohibition on making the human body and its parts as such a source of financial gain”.

Regarding the application of Biology and Medicine, the Convention on Human Rights and Biomedicine sets in its Article 21 that “The human body and its parts shall not, as such, give rise to financial gain.”

When a woman enters into a surrogacy arrangement as a surrogate, her human dignity may be at risk. Firstly, the surrogate is seen as a way to reach the intending parents’ goal. In gestational surrogacy, her role is to provide a service to the intending parents: her body and, more precisely, her womb is used as a true instrument/object. Secondly, as we mentioned above, frequently the intending parents impose conducts on the surrogate (for example, imposing restrictive diets or a different lifestyle, prohibiting the surrogate from consuming alcohol, having sexual relations, playing sports, etc.), that violate the surrogate’s freedom and self-determination. Furthermore, the pregnancy can have repercussions on surrogate’s private life (for example: as she cannot hide a pregnancy easily, she will be obliged to explain her situation; if she has other children, her pregnancy will have impact on them, as they witness their mother carrying a baby who she will give away to someone else; etc.). Also, during the proceedings of fertilization and the pregnancy, the physical integrity of surrogate can be compromised, for instance as they run sampling tests, amniocentesis

---

55 “It is now possible for a woman to become pregnant as a result of nine different combinations of possible use of eggs and sperm: (a) the egg and sperm of a commissioning heterosexual couple; (b) the egg of a commissioning woman and donor sperm; (c) the egg of a donor and the sperm of a commissioning male (be he part of a couple or a single person); (d) both donor egg and sperm (unrelated to the commissioning person(s)); (e) the egg of a donor and sperm from the surrogate’s partner; (f) her own egg and the sperm of a commissioning male; (g) her own egg and the sperm of a donor; or (h) her own egg and the sperm of her partner. (a)–(e) entail some form of ‘gestational’ surrogacy, in which the woman is not genetically related to the child; (f)–(h) entail what is often referred to as ‘traditional’ surrogacy, as the woman is genetically related to the child.” (ALLAN, Sonia, “The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations”, in “Surrogacy, Law and Human Rights”, edited by GERBER, Paula, O’BYRNE, Katie and contributors, Routledge Taylor & Francis Group, 2015, Chapter 7, endnote 21).

56 In Germany, it has been concluded that surrogacy is an illegal adoption that “violates the child’s and mother’s human dignity and reduces both to objects of commercial contracts” (ALLAN, Sonia, idem, endnote 13).

57 Positions more extremely about surrogacy compares it to prostitution, as they consider that is a way of explore the human body for financial gains.

58 ALLAN, Sonia, idem, subtitle A. “Is the Surrogate Involved in the Sale or Commodification of Children?”. 
or vaginal intra-sound. In case of complications, there is a high probability that her life is relegated to second place, because the child’s life is the main concern. In addition to this, it is known that there is a risk of maternal mortality for women who are implanted with other women’s eggs.

As Sonia Allan refers, “regardless of genetic connection, the gestational mother provides many biological resources during the pregnancy”. Indeed, during the pregnancy a physical connection between the woman and the fetus is established and, as far as the woman is concerned, there is also a psychological connection with the baby.

Often, surrogates are poor women with deficient education, so social and financial pressures frequently lead women to enter into a surrogacy arrangement. This gives rise to another issue: the surrogate is an autonomous and willing part of the arrangement but she is often left without any kind of legal assistance. For this reason, the surrogate may not give a conscious, free, voluntary and informed consent, which is required. In other words, the surrogate is frequently more susceptible to manipulation. For example, a woman can be dazzled by a large sum of money, without realizing the physical and/or psychological effects of being a surrogate.

In for-profit surrogacy it is evident that the surrogate is using her body for financial gain, which is prohibited by international legal instruments (as we saw above), resulting in the commodification of the child. In non-profit surrogacy cases, it could be argued that there is no violation of human dignity nor is there the commodification of the child, but as long as the intending parents pay the reasonable expenses of the surrogate, there is always the risk that the payment is being used to hide a real commercial surrogacy.

Furthermore, we must note that surrogate mothers are also at risk of human trafficking and exploitation. Indeed, the absence of uniform world-wide legislation increases “fertility tourism”, as a global market, and frequently leads to exploitation, human trafficking and violence against the surrogates who are economically, socially or legally disadvantaged, as they are used for the profit of agents or brokers.

c. The child

Surrogacy is entirely devised for one goal: to give someone, or a couple, the opportunity of having a child. Consequently, most of the discussion over the subject was centered on harmonizing all the concerning rights and interests, as well as the complex problems brought by this triangular relationship. However, because of the very objective of surrogacy, we cannot stop questioning ourselves: what about the child?

As we know, children are especially protected by the law, due to the fact that they are human beings in development and, therefore, in need of special care and attention by States and the Society in general.

---

59 For instance, the surrogate has the right to terminate her pregnancy in such cases? And if the fetus suffers some deformation? These and others questions can emerge from infinitive possibilities which can emerge from problems arise during the surrogate’s pregnancy.

60 ALLAN, Sonia, idem, subtitle A. “Is the Surrogate Involved in the Sale or Commodification of Children?”.

61 ALLAN, Sonia, idem, subtitle D. “Commercial Surrogacy Agreements: Reduced Bargaining Power and Lack of Informed Consent”.

62 Article 25 § 2 UDHR “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”
In order to fulfil this concern, the UNCRC guarantees all children the right to life (Article 6 § 1 UNCRC), to be registered immediately after birth, to have a name, to acquire a nationality and the right to know and be cared for by their parents (Article 6 § 1 UNCRC). Furthermore, the Convention recognizes children’s right to preserve their identity (nationality, name and family relations) and to their private and family life (Articles 8 and 16 UNCRC). Finally, it is important to highlight children’s right to not be separated from their parents against their will, except in some circumstances specified in the Convention (Article 9 UNCRC).

Furthermore, and as a general and primordial principle, the Convention States that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration” (Article 3 UNCRC), which implies that the main focus in the surrogacy arrangements must be the best interest of the child.

Arriving at this stage, we must ask ourselves: what is the best interest of the child in surrogacy cases? In fact, there is not merely one answer to this question. It all depends on the circumstances of the case. For example: is there a biological link between the child and the surrogate mother?; is the biological material used in the process provided by the intended parents or from external donors?63; does the child have any health issues?; is the child’s birth the result of an international surrogacy agreement?.

All these singularities must be accounted, for, as mentioned above, they carry many risks of children’s rights violations which are not directly covered by the national laws.

The following list has some examples of situations that can put the child in a legal limbo:

- When the intended parents change their mind and they do not want the child, an abortion is not anymore possible or the surrogate mother does not want to do it…
- When the surrogate mother does not take care of her health and she is risking the child’s health…
- The intended parents do not want the child anymore, because of some medical problem or because the surrogate mother gave birth to twins and the intended parents just want one child…
- The surrogate mother does not want to give the child away to the intended parents…

What can be done?

In these types of situations children are exposed to the risk of being victims of abandonment or of abuse, becoming stateless64 or not having a legal parentage established65. Even more, children face the astounding

---

63 The more genetic links the participants have with the child, the more complicated is to find a fair point of balance between their expectations concerning the legal parentage.
64 This is expressly prohibited by Article 7 UNCRC.
danger of being victims of human trafficking\textsuperscript{66}, and that happens because children can be seen, in these agreements, as objects, to be produced and handed over to the intended parents for a sum of money\textsuperscript{67}.

Unfortunately, these risks are not just hypothetical scenarios. These regretful situations happen all over and some cases became widely known. The “Baby Gammy Case”\textsuperscript{68} shocked the public, especially because a child with a deficiency was involved, as did the “Manji Case”\textsuperscript{69} and the “Balaz Twins Case”\textsuperscript{70}. Also, in Thailand, it was discovered that a Japanese man had fathered at least sixteen children through surrogacy arrangements, which raised suspicions of child trafficking.\textsuperscript{71}

In the Paradiso and Campanelli case, the intending parents tried to build their family through an illegal act against public order. Due to the particularities of the case, especially the lack of a biological link with the intending parents, the Italian Courts were very suspicious about what really happened in Russia. The child lived in an institution for a while before he was entrusted to a foster family and then adopted. Therefore, this is another example of how surrogacy arrangements can leave the child in a very ungrateful situation.

What if everything went smoothly? That is, the child is with the intended parents, legal filiation was successfully established, the surrogate mother didn’t want to be part of the child’s life and this new family is like any other? Are the child’s rights still at stake?

The lack of a genetic and gestational link doesn’t seem to lead to a lower level of affection or to a parent/child relationship that is less positive than those created through “natural” parenthood.\textsuperscript{72} Actually, “findings from the preschool phases of the study predicted more positive motherchild relationships in surrogacy than in natural conception families.”\textsuperscript{73}

The child does not face a greater risk of having its human rights violated because of the lack of genetic or gestational link between him and his parents. Indeed, the potential exposure of the child to human rights violations is more likely to happen during the gestation period and immediately after his birth, as explained before. If the surrogacy arrangement is respected by everyone and the State recognizes the parenthood without any legal problems, then the child is completely integrated in his or her family.

\textsuperscript{66} This is expressly prohibited by Article 35: “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.”

\textsuperscript{67} “Because the ultimate purpose is the production of a child through the commodified services of a surrogate’s reproductive ability and because there is an exchange of payment for the child, the argument is that commercial surrogacy is, in fact, the sale of children.” – CHOU DHURY, Cyra Akila, “The Political Economy and Legal Regulation of Transnational Commercial Surrogate Labor”, Vanderbilt Journal of Transnational Law, January 2015, Vol. 48, no. 1, page 13.

\textsuperscript{68} ACHMAD, Clair, “How the Rise of Commercial Surrogacy is Turning Babies into Commodities”, The Conversation, 25\textsuperscript{th} December 2014.


\textsuperscript{70} CHOU DHURY, Cyra Akila, idem, page 8 and 9.


\textsuperscript{72} “The growing body of research on other nontraditional family forms indicating that family structure in itself does not have an adverse effect on family functioning similarly led to the expectation that the surrogacy families would not differ from the egg donation or natural conception comparison groups.” – GOLOMBOK, Susan and others, “Families created through surrogacy: mother-child relationships and children’s psychological adjustment at age 7”, September 2011, page 3.

\textsuperscript{73} Idem.
However, there is a right that remains in jeopardy: children’s right to know their origins. Indeed, all human beings have the right to know their biological history and this may be very important to guarantee not only health issues but also psychological and sociological balance.\textsuperscript{74,75}

In fact, in surrogacy arrangements, even more in international ones, there is a serious possibility that the child cannot access information related to the donors, for instance, or the surrogate mother. Even if the donors are the intended parents, one cannot say that the right to know the origins is fulfilled if the child doesn’t know that a surrogacy arrangement preceded its birth. However, we cannot minimize the surrogate right to privacy, which should be fairly balanced with the child’s rights.

VI. Conclusion

We can conclude that we are openly against for-profit surrogacy. Indeed, as long as it increases the risks of surrogate mothers to exploitation, human trafficking and the commodification of women and children, the for-profit surrogacy runs counter to the most fundamental human rights, which are universally acknowledged in positive law.

We are also clearly against traditional surrogacy. In fact, we cannot even see how the possibility of a woman giving away her own child, on the basis of a contract, could be defended.

We feel that this is the right way to go when even countries that used to be the “surrogacy havens”, like India, Thailand, Nepal and Cambodia, are restricting, or even banning, access to surrogacy arrangements, due to all the ethical and moral questions arising from commercial surrogacy and the inherent risk of human rights violations.

Furthermore, we reiterate what we have already stated above: there is no right to a child for anyone. Therefore, there is not a fundamental right that can be opposed to this understanding.

As regards non-profit surrogacy, we acknowledge that some risks still exist in this kind of surrogacy. Namely, the risk of the following situations: the intending parents imposing conducts on the surrogate mother; possible health problems arising from the surrogate pregnancy; the rejection and the abandonment of the child leading to cases of stateless children; the disrespect of child’s right to know his or her origins.

However, we consider that the total prohibition of any kind of surrogacy is not the best solution nor is it the most efficient answer to the current reality. Why? Firstly, the surrogacy ban could lead to the existence of underground services, with all the emerging and increasing risks to all parties involved. Secondly, we are aware that every country is free to adopt its own laws and policies and, therefore, the “circumventive reproductive tourism” would still be an issue.

\textsuperscript{74} “Having their right to know their origins violated, with the attendant possible negative psychological (and even physical) repercussions.” - SUTTER, Petra de, idem.

\textsuperscript{75} “Several members of the Group noted the importance of children knowing their origins, which some characterized as a right, and the preservation of records.” See paragraph 25 of the “Report of the experts’ group on the parentage / surrogacy project”, meeting of 31st January to 3rd February 2017.
Allowing the non-profit surrogacy and trying to avoid the mentioned risks mean that States must have a very careful legislation. The existence of such legislation would be essential to Courts, providing them with the necessary instruments to resolve the legal and ethical questions that surrogacy raises.

Therefore, it is our belief that the following points should be provided for in any legislation:

1. Surrogacy should be permitted only in certain cases, such as where there is a lack of uterus or an injury or illness related to it that absolutely and definitively rules out the chance of pregnancy;
2. The child must have a genetic link with, at least, one of the intending parents and must not have any genetic material from the surrogate mother;
3. Prior and subsequent to consent, medical, psychological and legal support to all the parties (intending parents and surrogate mother) must be provided. In sum, both parties should have all the relevant information about the surrogacy arrangement;
4. The consent from both parties has to be voluntary, free and informed, which will be facilitated by the support described above;
5. The surrogacy arrangements must be approved and followed by an independent body, such as an ethics committee;
6. The contract must be as comprehensive as possible. Namely, what should be done in cases of fetal malformation and cases of danger to the surrogate mother’s health, as well as the possibility or not of abortion, have to be in the contract;
7. The intending parents cannot impose conduct on the surrogate mother;
8. Payment must be restricted to medical expenses, duly inspected by the State and proved by documents;
9. If the procedure succeeds, the intending parents must legally be considered the child’s parents;
10. The child should have the right to know his or her origins;
11. The surrogate mother should have the right to refuse to be a part of the child’s upcoming life;
12. There must be criminal penalties for those who do not respect the previous restrictions.

Beyond national regulations, an international Convention must be celebrated to help the States deal with the cases of international surrogacy agreements. Such a project has been studied and progressively put into place by the Hague Conference on Private International Law (HCCH)\(^76\).

In conclusion, the international community’s awareness must be raised as regards all these ethical questions and the subsequent need for regulation. As stated by the HCCH on March 2012 “The number of international surrogacy arrangements appears to be growing at a rapid pace and while some States are attempting to resolve the problems arising as a result, this global phenomenon may ultimately demand a

---

\(^{76}\) To access all the HCCH’s work, see [https://www.hcch.net/pt/projects/legislative-projects/parentage-surrogacy](https://www.hcch.net/pt/projects/legislative-projects/parentage-surrogacy). Especially, pages 16 and 17 of the HCCH background note for the meeting of the experts’ group on the parentage / surrogacy project, February 2016.
global solution. There is no doubt that the current situation is far from satisfactory for the States and parties involved and, most importantly, for the children born as a result of these arrangements. There is a real concern that the current situation often fails to adequately ensure respect for children’s fundamental rights and interests.  

VII. Bibliography

- ALLAN, Sonia, “The Surrogate in Commercial Surrogacy: Legal and Ethical Considerations”, in “Surrogacy, Law and Human Rights”, edited by GERBER, Paula, O’BYRNE, Katie and contributors, Routlegde Taylor & Francis Group, 2015;
- BERTRAND, Brad, “Shifting Surrogacy Laws Give Birth to Uncertainty”, Nikkei Asian Review [Singapore], 26th December 2015;
- European Centre for Law and Justice, “Surrogate Motherhood: a Violation of Human Rights” - report presented at the Council of Europe, Strasbourg, 26th April 2012;
- Journal of International Business and Law, Volume 14 | Issue 1, Article 4, 1 January 2015;
- GOLOMBOK, Susan and others, “Families created through surrogacy: mother-child relationships and children’s psychological adjustment at age 7”, September 2011;

- “Report of the experts’ group on the parentage / surrogacy project”, meeting of 31th January to 3th February 2017;

**Websites:**