GESTATIONAL SURROGACY: A EUROPEAN OVERVIEW AND THE SPANISH CASE. A FEASIBLE PROPOSAL?

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The purpose of this paper is to present gestational surrogacy as a complex phenomenon, including a discussion of the associated problems and ethical dilemmas.

We will approach the study the matter by analysing the international context and the law in non-EU and EU states. Furthermore we will carry out an analysis of the ECHR case-law on the subject, based on the observation of different rulings. Moreover we will look at the current state of the matter in Spain. Finally, we will give voice to different proposals for the future.

Gestational surrogacy can be defined as the process that involves a woman carrying a child on behalf of another person, to whom she gives the child when it is born and who assumes the responsibility of motherhood or fatherhood. There are different ways to carry out this process, but a common aspect of all of them is that the woman who goes through the pregnancy and delivery does so at the request of another person who wants offspring and to be recognized as the father or mother of the newborn.

Gestational surrogacy includes questions related to morality, parentage, the natural mother–infant bond, and the complexities of inequalities in a globalized world. It is also a matter of human rights since the right to life, physical and moral integrity, dignity, respect for private and family life, and the rights of children are involved.

Currently, there are no international regulations or guidelines; therefore, the debate over surrogacy has two main positions. One side argues that we should allow the practice with regulations. The other side argues that it should be prohibited.

The truth is that an international solution is needed; a common response should be developed with input from all parties involved in order to avoid exploitation, protect women and look out for the best interests of children.

LEGISLATIVE DEVELOPMENT IN EUROPE

In this section we will provide a brief overview of the situation in each country in terms of surrogacy legislation, focusing on our immediate neighbours in Europe and highlighting the most relevant cases abroad.

In 2018, the Report of the UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material noted a lack of cohesive international regulation, and that legislation relating to surrogacy varied widely, from non-existent to
“extensive” texts, which presented a vastly different array of solutions (forbidding surrogacy contracts in general, allowing it only on an altruistic basis, or permitting commercial modalities).

**The situation in Europe**

The European situation serves as a perfect example of the legislative variety between relatively close countries, in spite of some efforts directed to impulse a common endeavour. The European Union, in its 2018 Annual report on Human Rights and Democracy in the World, condemned the practice of surrogacy, stating that it "undermines the human dignity of the woman (...), involves reproductive exploitation and use of the human body" and therefore "shall be prohibited", yet no texts were approved. The disparity of the position of each country was also shown in 2018, when the Council of Europe also failed to agree on a common resolution, even if there was a clear majority of Members willing to prohibit surrogacy in all its forms, or at least commercially.

Facing all this diversity, we are going to study the different regulating tendencies on the continent and the most representative States therein. In any case, it must be taken into account that many of these countries are undergoing a revision process regarding their legislation, depending on the shifting pressure of their political parties and opinion groups.

**1. Forbidding States**

The majority of European countries do not accept surrogacy, and consequently we will mention the most peculiar and major examples.

In **France**, since 1994 all surrogacy contracts, be they commercial or altruistic, have been deemed illegal and strictly prohibited. In fact, the Court of Cassation ruled in 1991 that any surrogacy arrangements were binding and could not lead to the adoption of the resulting child. This doctrine was transposed into its Civil Code and, later on, the role of the intermediary was considered a criminal offence, punished with penalties of fines and imprisonment, aggravated for commercial modalities. Nevertheless, issues concerning inscription and adoption have arisen in recent years thanks to the jurisprudence of the European Court of Human Rights.

Going one step further, in **Germany** surrogacy is considered to be in breach of the right to human dignity protected by the first article of its Constitution, leading to Act 745/90, on the Protection of Embryos, which criminalizes the use of surrogacy techniques and any role or individual involved unless they are willing to take care of the child. The legal parents will always be the surrogate mother and her legal partner or the man who, with her consent, recognizes fatherhood according to its Civil Rights Code (*Bürgerliches Gesetzbuch*), and consequently the Adoption Placement Act rules every surrogacy case out of its procedures. Foreign birth certificates are not recognized either, unless in the case of a judicial decision.
Similarly, other states forbid surrogacy in a similar manner, banning every form of it, either altruistic or commercial. For instance, Italy which establishes in its Constitution the irreplaceable duty and responsibilities of genetic progenitors towards their children, and the correlative right of the latter to be raised by the former, and its Civil Code forbids any action on one’s own body if violating the law. This led to its restrictive law 40/2004, which imposes the penalty of imprisonment on any individual involved in the process of commercial surrogacy. It must be noted that in April 2014 the Italian Constitutional Court ruled the prohibition that impeded gamete donation in assisted reproduction treatments as unconstitutional, on the grounds of the fundamental rights to have children, to self-determination and to health.

The same path is followed by Lithuania, whose Law on Medically Assisted Procreation from 2016 bans every form of surrogacy (though there is no criminal prosecution to the intended parents and the carrier, who would be considered the mother of the child) and Norway, where the Biotechnology Act bars the fertilization of an embryo alien to the gestational woman, and the Children Act declares such contracts as non-binding and non-enforceable before the courts, establishing a legal penalty for medical professionals involved in the whole process. Finland's Act 1237/2006 on Assisted Fertility Treatments reaches a similar conclusion (sanctions on medical personnel involved) while forbidding surrogacy treatments and parental implications (adoption and modification of filiation), though firm laws to these ends have yet to be created. Sweden also bans commercial and altruistic surrogacy alike, especially after the Wendel Report in 2016, which argued that altruism in this kind of relationship could not be fully guaranteed, so recommendations to the Ministry of Justice were made in order to strengthen measures for impeding the access of Swedish citizens to surrogacy in foreign countries; consequently, commercial surrogacy is sanctioned.

One particular case in this group of countries is Denmark, where the Act on Assisted Reproduction (N.93, of 19th January 2015) bans every form of surrogacy and its publicity, and labels the surrogate as the legal mother of the child; however, the intended father who has provided his gametes will also be considered the legal parent, and his partner could technically apply for adoption if they have cohabitated for at least two and a half years. A similar process occurs in Switzerland, where surrogacy is explicitly banned by its 1998 Federal Law of Human Procreation, and embryo donation is even prohibited by its Federal Constitution; consequently, surrogacy is considered illegal, but the gestational carrier is not punished and is regarded by its civil laws as the mother of the resulting child. A discordant precedent can be found in the Administrative Court of Cantar's decision from the 24th of August, 2014, which recognized a couple's partnership as a result of a child born through surrogacy in the USA. The case of Austria is very similar, as its Law on Medical Assisted Reproduction (1992) only allows for oocytes and embryos to be used by the woman who produces them, rendering surrogacy techniques impossible.
2. Non-regulating States

As of 2020, some European countries still lack a detailed permissive or restrictive surrogacy regulation, and deal with its legal consequences (nationality, filiation, situation of the gestational mother and the intended parents) in various ways.

Some countries deal with these legal voids with an implicit prohibition on surrogacy. In Poland, though there are no rules dealing with these techniques, its Civil Rights Code qualifies that the mother is always the woman who gives birth to the child, and such agreements are generally considered to be against the spirit of the law. Hungary’s Health Act implicitly bans surrogacy by excluding it from the list of procedures of reproduction that can be legally performed, and prohibiting commerce with the human body in its Criminal Code; but it is possible for children born abroad through altruistic surrogacy to be adopted with express consent of the gestational mother by the intended parents. The same solution results from the legislation of the Czech Republic, where parents are also considered regarding biological criteria, that is, the gestational mother and the male donor; but in this case the biological mother (ovum provider) may technically adopt the child in the event that the carrier legally renounced motherhood, and foreign birth certificates resulting from surrogacy can be registered based on the best interest of the child, according to the Medical Assisted Reproduction laws of the country.

In contrast, Andorra has no specific norms that even provide for a legal definition either (probably because its courts have yet to face a specific case involving surrogacy and its consequences), but its Law of Civil Registry from 1996 states that maternity has to be proved in order to inscribe the child’s filiation, and it would be possible for the intended parents to adopt the resulting child according to its laws. The absence of regulation also leads to an implicit permission in Romania, where there are at present no laws, and they will not exist until the current discussion at its parliament leads to a uniform text; in practice, the intended parents (a heterosexual couple) could reach a notarial agreement with the surrogate mother and, after birth, complete the process through adoption, with the only condition that the gestational carrier and/or the material provider cannot be informed, or receive compensation or payment. In the Netherlands the subject of surrogacy is also being studied by a national commission, and in the absence of specific texts its civil code would apply, allowing for the intended parents to make private agreements with the surrogate mother with two specific limits: the penal code prohibits every form of publicity or promotion of commercial surrogacy (for every potential party involved, including the surrogate mother), so the only possibility would be to stipulate private contracts between the participants, and reimburse the expenses caused to the carrier; secondly, the agreements cannot be enforced at the courts if they contradict the civil rules regarding child protection or parentage. This is why foreign birth certificates require a court order for a travel document to be issued.
In Albania there is no explicit regulation either, although surrogacy would be possible by its Law 8876 on Reproductive Health and the new article 261 of the Family Code would be also applicable in terms of establishing filiation, but this matter is still being discussed. In the absence of definitive laws, the general opinion is that compensation could also be involved.

Belgium is also in a grey area. In the absence of laws and, as an exception, altruistic surrogacy is permitted under highly strict conditions and only a few specific medical centres undertake this treatment. As for commercial surrogacy, there is a lack of written norms in spite of its implicit prohibition in the Civil Code, which defines the human body as extra-patrimonial and therefore non-tradeable. In practice, this leads to its authorities not recognizing the legal consequences of foreign surrogacy agreements carried out abroad.

Some states are trying to provide for a normative frame, such as Luxembourg, whose Draft Law 6568 aims to categorize every surrogacy arrangement as void, though it is still under discussion. Also, work on Ireland’s AHR draft legislation has been in progress since 2015, and will soon come into force; it will predictably allow for gestational surrogacy only for medical reasons, and with the contribution of at least one of the intended parents. It would also prohibit commercial surrogacy only, allowing for the reimbursement of reasonable expenses. Meanwhile, its citizens can consult the guidelines published in 2012 by the Department of Justice and Equality on the procedures required to obtain travel documents for the resulting child. In Estonia the subject of surrogacy is being discussed in its Parliament, being formerly criminalized in its Penal Code and by the now repealed Law with the support of the Estonian Association of Gynaecologists.

Finally, other states remain without regulation and have no current ongoing initiatives, such as Bosnia and Herzegovina, which lacks any laws or supplementary norms beyond a brief development of assisted reproduction techniques, such as in vitro fertilization. In addition, in Montenegro the total prohibition of surrogacy is not followed by supplementary rules concerning its consequences (parentage of the resulting child) or its procedures (material donation).

3. Permitting countries

As we commented, allowing surrogacy is currently an exception in the general European regulation. The normative framework also varies greatly in this sector, as some countries have wider and rather more imprecise regulation, while others regulate those cases allowed with precision. In this section we will give a more detailed overview of each of the systems implemented and the main weaknesses that the experts have outlined in each case.

Portugal’s Law N. 32/2006, on Medically Assisted Procreation (updated by Law 25/2016) establishes a precise regulation of altruistic surrogacy. Commercial surrogacy is prohibited, as it is considered a criminal offence for any payment to be involved (except for documented medical expenses) and the contracts cannot
be formalized if there is economical subordinacy between the parties. There are also subjective criteria, as the intentional parent or parents must be a woman or a heterosexual couple who fulfil the specific medical conditions comprised in the law which impede procreation, demanding that at least one of them provides the material for the process, in which it is not possible for the carrier gametes to participate. For the purpose of ensuring that every case meets all the legal requirements, the Medically Assisted Procreation National Council was created. This body reviews every non-binding contract from the Medical College, and only those supervised and approved can be effectively continued with. The Council also acts as a data and information base for surrogacy procedures.

**Greece has** also regulated altruistic surrogacy since its Law 3089/2002, which modified articles 1455 to 1464 of its Civil Code, later complemented by Law 3305/2005, on the Enforcement of Medically Assisted Reproduction. Not every type of surrogacy is permitted, as the surrogate mother cannot contribute with her own material (banning of traditional surrogacy), nor receive any compensation that exceeds the necessary medical expenses or the loss of profit (banning of commercial surrogacy). In fact, these procedures are only allowed for medical reasons, such as infertility or preventing the transmission of serious illnesses. Subjectively speaking, it is required that all the parties are Greek citizens or permanent residents in the country; the carrier must be under 50 years old, and the intentional parents (a single woman or a heterosexual couple) have to provide their own gametes or accept an anonymous donation; both parties must also undergo a medical examination to ensure their health is good. As a protection measure, every agreement must be written and approved by a court, verifying that the written text fulfils the legal requirements, that there is no economic benefit involved and that the parties involved are healthy. In terms of parenthood, the law establishes a presumption of legal kinship in favour of the intended parents, but only if the carrier does not reclaim maternity in the six months after giving birth, proving that her material was used in the process. The aforementioned Law of enforcement prohibits any agreement that fails to meet the legal conditions, publicly announces or promotes surrogacy, or acts as a middleman or service provider for commercial surrogacy.

The Greek legal system is not without its critics, as some voices have pointed out that the judicial control of altruism in these cases is somewhat vague, given the number of contracts and the limited cases where a previous relationship exists between the parties. Also, it has been ascertained that many clinics advertise surrogacy procedures through the internet despite the legal prohibition.

The legislation in **Cyprus** follows a very similar pattern with its Law 69(I)/2015, on Medically Assisted Reproduction, but also incorporates elements of the Portuguese system. Specifically, the approval of surrogacy agreements depends on authorization from both the Board of Medically Assisted Reproduction and the Courts, and the latter can impose certain conditions in its order. The contract is signed afterwards, and must include the commitment to transfer the child’s kinship (at most, as commercial surrogacy is
prohibited), the assurance of medical expenses during and after birth by a letter of credit, and state that the surrogate will remain in the country from the 28th week of pregnancy to the date of birth. As a matter of fact, the carrier must be a woman under 50 and permanent resident in the country, or have permission to do so by the Board. The material must be provided by the intended parent or parents (either a heterosexual couple or a single person with a medical condition that impedes procreation) or can come from any donor but the carrier. Parentage transference and the activity of the clinics also resemble the Greek legislation.

In the United Kingdom only altruistic surrogacy is permitted, as any commercial arrangement or any contract that implies compensating the gestational mother for any more than the reasonable expenses is considered illegal by article 2 of the Surrogacy Arrangements Act 1985. Publicity and advertisements of these procedures are not permitted by the Act either. In terms of recognizing parentage and adoption there is a special provision: as surrogacy contracts are not enforceable even if expenses have been paid, the carrier after birth keeps the right of determination for the child (even if they are not genetically related, in the event her oocytes have not been used), so she and her partner would be considered the parents of the child by the Human Fertilization and Embryology Act 2008. This means that the intended parents will have to apply for a parental or adoption order with their consent, and meet the legal requirements (genetic link with the minor, and reside with him or her in United Kingdom territory), or the ownership of parental rights will be decided in courts, always based on the best interests of the child.

The Russian Federation established a broad system through the Federal Law on Protection of Citizen’s Health from 2011, which reformed the Family Code in terms of kinship and the Law on the Acts of Civil Status from 1997, completed by Ministry of Health Order 107, of 13 August 2012. The legal conditions are quite ample, as the intentional parents can be citizens or foreigners, being heterosexual couples or single women who demonstrate they are infertile or unable to give birth, and the surrogate must be a woman between the age of 20 and 35 who has already given birth, in a good state of health who in any case cannot use her own ovule. The child’s filiation to the intended parent or parents is established by simply presenting the birth certificate and the renouncement of the surrogate mother in the Registry, but she will remain as the woman who gave birth to the resulting child. As noted, her consent is always necessary to register parentage correctly, and the provision of the Family that permits her to keep the child has been deemed constitutional by the Constitutional Court (ruling of 15 May 2012). This system nonetheless presents some inconsistencies, as it lacks precision in many points that end up being implicitly allowed. First, it is not specified whether the material used must come from the intended parents or whether third parties can be involved. Also, there are no provisions for financial compensation to the carrier or payments towards agency services, so in practice there is no proper control over the provisions exchanged or the development of commercial surrogacy. Publicity of surrogacy services also remains largely unregulated. Finally, the state lacks a registration system of foreign birth certificates.
The Republic of Belarus’s Law on Assisted Reproductive Technologies from 2012 created a system that resembles its Russian counterpart, reforming its Marriage and Family Code. Only traditional surrogacy, where surrogate gametes are used, is prohibited, and it can only be carried out due to medical reasons. The surrogate must be a married woman, already a mother, in a good state of health and not involved in criminal proceedings. The material could come from the intended parent or parents (heterosexual couple or single women) or be external, and the regulation of the consequences largely depends on the agreement between the parties, including compensation of expenses and possible remuneration (as commercial modalities are allowed) and parentage registry. In fact, the contract implies that the commissioning parties and not the carrier will be considered the legal parents. Like Russia, the regulations on activity of surrogacy agencies and clinics are vague, along with those on publicity and advertising, and there is no registry system for foreign certificates, requiring a court decision.

Some States that opt for wider regulations have faced numerous criticisms. Ukraine has a permissive regulation towards every form of surrogacy, permitted by article 123 of its Family Code. As for the subjects, there are extensive requisites for both the intended parent or parents (a single adult or a heterosexual couple who provide medical justification relating to fertility treatments) and the carrier (an adult woman who already has given birth to children of her own). The arrangement must be made before a notary, who verifies the established consents and requirements, and monetary compensation can be agreed upon by the parties with no limit. The gestational mother can withdraw her consent before the transfer of the embryo, losing said compensation. In terms of filiation, these contracts mean that the intended parents will be legally considered as such from the moment of birth, formalizing the relationship before the public Registry, providing all the documents mentioned above. Detractors brand the appointed regulation as lax, citing that it is neither adequate nor sufficient: the country has around 50 clinics that perform surrogacy procedures, and an average of 2000 to 2500 contracts are signed each year. Nevertheless, the procedure itself is regulated not by law but administrative norms, which are said not to properly specify the rights and duties of the parties involved, and many experts have voiced the lack of monitoring in these centres.

This has led countries such as Spain to advise their citizens against undergoing these techniques in Ukraine, not only because they violate its legal system (Law 14/2006 and the Directorate General for Registers and Notaries’ Instruction from the 18th February 2019), but also due to doubts concerning the proper and dignified treatment of gestational mothers, which led the Consulate to speak out on the irregularities that surround many of these clinics in terms of procedure, medical praxis, lack of information and transparency.

EUROPEAN COURT OF HUMAN RIGHTS

Cases concerning gestational surrogacy arrangements raise issues mainly under Article 8 of the European Convention on Human Rights, which enshrines the Right to respect for private and family life and states:
“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

In order to determine whether the interference by the authorities in the private and family life of applicants was necessary in a democratic society, and whether a fair balance was struck between the different interests involved, the European Court of Human Rights examines whether the interference was in accordance with the law, pursued a legitimate aim or aims and was proportionate to the aim(s) pursued:

**Evans v. the United Kingdom (10 April 2007)**

This decision of the ECHR must be taken into account, although it is not directly related to gestational surrogacy, because it is the first time that ECHR rules on the question referred to the right to become a parent in the genetic sense. The issues raised by the case were undoubtedly of a morally and ethically delicate nature. In addition, there was no uniform European approach in the field.

This case concerned a UK citizen, Ms Evans, who claimed that UK legislation which allowed her partner J., to withdraw consent for the utilization and storage of embryos that she and her partner created together, violated her Convention rights. Ms Evans had had cancer, and frozen embryos were the only hope remaining of her having a genetic child. The dilemma central to the case was that it involved a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, the interests of both were entirely irreconcilable, since if the applicant was permitted to use the embryos, J. would be forced to become a father, whereas if J.’s refusal or withdrawal of consent was upheld, the applicant would be denied the opportunity of becoming a genetic parent. The principal issue was whether the legislative provisions as applied in the case struck a fair balance between the competing public and private interests involved. In that regard, the findings of the domestic courts that J. had never consented to the applicant using the jointly created embryos alone were accepted.

The Court ruled that respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the decision of the legislature to enact provisions permitting no exception, to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to
avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what had been described by the domestic courts as “entirely incommensurable” interests. The general interests in question were legitimate and consistent with Article 8. Given these considerations, including the lack of any European consensus on the point, the Court did not consider that the applicant’s right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.’s right to respect for his decision not to have a genetically-related child with her.

**Mennesson v. France and Labassee v. France (26 June 2014)**

These cases concerned the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy treatment, and the couples who had received the treatment. 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 and a violation of Article 8 of the Convention concerning the children’s right to respect for their private life.

The European Court of Human Rights firstly noted that on the one hand, there was indeed no doubt that the applicants had cared for the children as parents since birth and they lived together in a way that was indistinguishable from “family life” in the accepted sense of the term. On the other hand, the right to identity was an integral part of the concept of private life, and there was a direct link between the private life of children born following surrogacy treatment and the legal determination of their parentage.

The Court then noted that the interference with the applicants’ right to respect for their private and family life resulting from the refusal of the French authorities to recognize the legal parent-child relationship had been “in accordance with the law” within the meaning of Article 8 of the Convention. The Court also accepted that the interference in question had pursued two of the legitimate aims listed in Article 8, namely the “protection of health” and the “protection of the rights and freedoms of others”. It observed in this regard that the refusal of the French authorities to recognize the legal relationship between children born as a result of surrogacy treatment abroad and the couples who had the treatment stemmed from a wish to discourage French nationals from having recourse outside France to a reproductive technique that was prohibited in that country with the aim, as the authorities saw it, of protecting the children and the surrogate mother. Lastly, examining whether the interference had been “necessary in a democratic society”, the Court stressed that a wide margin of appreciation had to be left to States in making decisions relating to surrogacy, in view of the difficult ethical issues involved and the lack of consensus on these matters in Europe. Nevertheless, the margin of appreciation was narrow when it came to parentage, which involved a key aspect of individual identity. The Court also had to ascertain whether a fair balance had been struck between the interests of the State and those of the individuals directly concerned, with particular reference to the fundamental principle according to which, whenever children were involved, their best interests must prevail. The Court observed in particular that the French authorities, despite being aware that the children had been identified in the
United States as the children of Mr and Mrs Mennesson and Mr and Mrs Labassee, had nevertheless denied them such status under French law. It considered that this contradiction undermined the identity of the children within French society. The Court further noted that the case-law completely precluded the establishment of a legal relationship between children born as a result of (lawful) surrogacy treatment abroad and their biological father. This overstepped the wide margin of appreciation left to States in the sphere of decisions relating to surrogacy.

**D. and Others v. Belgium (8 July 2014)**

This case concerned the initial refusal of the Belgian authorities to authorize the arrival in national territory of a child who had been born in Ukraine from a surrogate pregnancy, as resorted to by the applicants, two Belgian nationals. The applicants alleged in particular that their effective separation from the child, on account of the refusal of the Belgian authorities to issue a travel document, had severed the relationship between a baby (aged only a few weeks) and its parents, which was contrary to the best interests of the child and in breach of their right to respect for family life. They also considered that this separation had subjected all three of them, parents and child, to treatment contrary to Article 3 (prohibition of inhuman or degrading treatment) of the Convention.

The Court declared inadmissible, as being manifestly ill-founded, the complaints of the applicants concerning their temporary separation from the child, finding that the Belgian authorities had not breached the Convention in carrying out checks before allowing the child to enter Belgium. The Court observed that the Convention could not, effectively, oblige States to authorize entry to their territory of children born to a surrogate mother without the national authorities having a prior opportunity to conduct certain legal checks. In addition, the Court took the view that the applicants could have had reasonable foresight of the procedure to be followed in order to have the family relationship recognized and to take the child to Belgium, especially as they had been advised by a Belgian and a Ukrainian lawyer. Lastly, the time taken to obtain the laissez-passer had, at least in part, been attributable to the applicants themselves, in that they had not submitted sufficient evidence at first instance to demonstrate their biological ties to the child.

**Paradiso and Campanelli v. Italy (24 January 2017)**

This case concerned the placement in social-service care of a nine-month-old child who had been born in Russia following a gestational surrogacy contract entered into with a Russian woman by an Italian couple (the applicants); it subsequently transpired that they had no biological relationship with the child. The applicants complained, in particular, about the removal of the child from them, and about the refusal to acknowledge the parent-child relationship established abroad by registering the child’s birth certificate in Italy.
Having regard to the absence of any biological tie between the child and the applicants, the short duration of their relationship with the child and the uncertainty of the ties between them from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Grand Chamber held that a family life did not exist between the applicants and the child. They accepted that the Italian courts, having concluded in particular that the child would not suffer grave or irreparable harm as a result of the separation, had struck a fair balance between the different interests at stake, while remaining within the room for manoeuvre (“margin of appreciation”) available to them.

The Grand Chamber found that there had been no violation of Article 8; they considered that the contested measures had pursued the legitimate aims of preventing disorder and protecting the rights and freedoms of others.

**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, requested by the French Court of Cassation (10 April 2019)**

This case concerned the possibility of recognition in domestic law of a legal parent-child relationship between a child born abroad through a gestational surrogacy arrangement and the intended mother, designated in the birth certificate legally established abroad as the “legal mother”, in a situation where the child was conceived using the eggs of a third-party donor and where the legal parent-child relationship with the intended father has been recognized in domestic law.

The Court decided that the child’s right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the “legal mother”; on the other hand they found that States were not required to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the legal parent-child relationship with the intended mother, as adoption may also serve as a means of recognizing that relationship.

**C and E v. France (19 November 2019)**

This case concerned the refusal of the French authorities to inscribe, in the French register of births, marriages and deaths, the full details of the birth certificates of children born abroad through a gestational surrogacy arrangement and conceived using the gametes of the intended father and a third-party donor, in so far as the birth certificates designated the intended mother as the legal mother.

The Court considered in particular that the refusal of the French authorities was not disproportionate, as domestic law afforded a possibility of recognizing the parent-child relationship between the applicant
children and their intended mother by means of adoption of the child of the other spouse. The Court declared
the two applications inadmissible as being manifestly ill-founded.

GESTATIONAL SURROGACY IN SPAIN. REGULATION, CASE LAW AND CURRENT
SITUATION

Regulation

Gestational surrogacy has already been regulated in Spain for more than thirty years. Specifically, Article 10
is entrusted, with or without monetary consideration, to a woman who waives maternal parentage in favour
of the other contracting party or a third party shall be null and void. 2. The parentage of children born by
gestational surrogacy shall be determined by birth. 3. In spite of this, the action to claim paternity regarding
the biological father according to the general rules shall remain unaffected.” In 2006 a new Assisted
Human Reproduction Technology Act was enacted and revoked the 1988 Act, but its Article 10 reproduces
word for word the same content as the former Act.

Thus gestational surrogacy arrangements are prohibited in Spain. Further still, there are some actions related
to surrogacy that could be punished according to the Spanish Criminal Code (SCrimC). Indeed, Article 220
SCrimC provides: “1. An intended birth shall be punished with imprisonment of six months to two years. 2.
The same punishment shall be imposed on whoever conceals or delivers a child to third parties to alter or
change the parentage thereof”, and Article 221 SСrimC: “1. Those who, for a financial consideration,
deliver a child, descendent or any minor to another person, even though there is no bond of affiliation or
consanguinity, eluding the legal procedures for safekeeping, fostering or adoption, in order to establish a
similar relationship to that of filiation, shall be punished with imprisonment from one to five years and to
special barring from exercise of parental rights, guardianship, care or safekeeping for a term from four to
ten years. 2. The same punishment shall apply to the person receiving the child and the intermediary, even
though the delivery may have taken place in a foreign country.”

However, besides criminal aspects, Spanish law does not provide any effective solution when it comes to
babies who were already born abroad because of a surrogacy arrangement, recognised as children of the
intended parents in the origin state, and then taken to Spain. There is clearly conflict between different
rights. On the one hand, the procedure which was followed until the child was born – signing a contract with
a woman who gestates an embryo and then waives maternal parentage – is unlawful in Spain. Apart from
ethical implications, surrogacy could lead to serious human rights violations and affect the dignity of
surrogate mothers, which has to necessarily – or at least, should – be a limit to the principle of contract
freedom. It can be easily concluded making a comparison between surrogacy contracts and employment
contracts. In our legal system, a work contract in which the agreed wage is under the minimum professional
wage is null and void. Such a clause is not only contrary to imperative laws, but also concerns the dignity of workers. These kind of practices are usually supported both by the state of need of workers and by profit-seeking employers. The State is, under the Spanish Constitution and international human rights treaty bodies, bound as guarantor of law and order and, consequently, also of the dignity of workers.

Should it be considered that the personal, economic and social situation of the surrogate mother fulfils the requirement of equality between the two contracting parties? Advocates of the so called asymmetry thesis hold that surrogate arrangements reveal a strong inequality. Surrogate motherhood does not produce goods or commodities as a result, but a baby. It entails a spread of the market into the private sphere of the sexuality and reproduction of women, which is a threat to their constitutional right to bodily integrity and to the inherent dignity of the human person.

On the other hand, the right of children to an identity, to a private life, including having a family, and to a nationality should be taken into account. Furthermore, they must not be discriminated on the basis of their conception or origin. The best interests of the child is a principle which derives from the United Nations Convention of the Rights of the Child and also from Article 39 of the Spanish Constitution. It must be recognised that the rights of children shall be a primary consideration protected by law.

**Case law**

This problem has already been approached by the Spanish Supreme Court, first of all with regard to the birth registration of children born through surrogacy at Spanish Consular Register, and secondly, with respect to welfare benefits during motherhood, where it concerns intended mothers who are not biological mothers.

Two Spanish males wed in 2005, and in 2008 decided to arrange a surrogacy agreement in the United States of America, specifically in the State of California, which turned out to be a twin pregnancy. Once the babies were born on 24 October 2008, the intended parents applied for the birth registration at the Spanish Consular Civil Registry in Los Angeles. They enclosed the birth certificate documents issued by the Californian Registrar in the application form, which said that the babies were theirs. The Spanish Registrar refused the application, considering the surrogacy ban in Spain pursuant to Article 10 of the 2006 Assisted Human Reproduction Technology Act.

The applicants filed an appeal before the Directorate General for Registries and Notaries, in which they sought the annulment of the Spanish Consular Civil Registry in Los Angeles and the birth registration according to the paternal filiation stated on the Californian birth certificate. The Directorate General for Registries and Notaries issued a ruling on 18 February 2009 in which the appeal was upheld, and in which it was ordered that the birth of the babies be registered at the Spanish Consular Civil Registry in Los Angeles, because both applicants appeared as the parents in the foreign birth documents. The ruling considered that
this solution would not break Spanish international public order, that it did not mean discriminatory treatment on the basis of sex, and that it widely protected the best interests of the children.

The Department of Public Prosecutions filed a lawsuit against the ruling of the Directorate General for Registries and Notaries before the Court of First Instance of Valencia, because the place of residence of the parents was in the city. It was argued that the solution reached constituted a direct violation of Article 10 of the 2006 Assisted Human Reproduction Technology Act, which states that gestational surrogacy agreements are null and void, and that the parentage of children born via this practice shall be determined by birth. Therefore, the ruling of the Directorate General for Registries and Notaries went against Spanish public policy, and the birth registration which the ruling ordered was not appropriate.

Court of First Instance no. 15 of Valencia, which had the competence to deal with the claim, passed judgment on 15 September 2010. It upheld the challenge of the Department of Public Prosecutions against the ruling of the Directorate General for Registries and Notaries, revoked it and annulled the registration of the birth at the Consular Civil Registry in Los Angeles.

The parents filed an appeal against the judgment of the Court of First Instance no. 15 of Valencia. On 23 November 2011, the Provincial High Court of Valencia issued decision no. 826/11, in which the appeal was dismissed. The parents would appeal against this judgment before the Spanish Supreme Court.

The Supreme Court Decision was issued on 6 February 2014 and it is the only one thus far relating to a case of international surrogacy and its registration. The Civil Chamber of the Supreme Court, sitting in Plenary Session, dismissed the appeal against the Valencia Provincial High Court judgment. The decision was taken by a majority of 5 votes to 4, and the minority pronounced a dissenting opinion in favour of the request of the parents to maintain the registration of the birth of the babies at the Spanish Consular Civil Registry in Los Angeles.

Concerning the recognition and enforcement of foreign decisions, the Supreme Court states that it is necessary for the decision to avoid breaking Spanish international public policy, which consists of the system of rights and freedoms guaranteed by the Spanish Constitution, and by the international human rights conventions ratified by Spain, values and principles those rights embody.

Regarding the birth registration of the children who were born through a gestational surrogacy agreement, the Supreme Court declares that it implies a breach of the rules that aim to protect the dignity of the surrogate mother and of the child. Surrogacy arrangements commercialize gestation and filiation, and take the surrogate mother and the child for commodities. This practice allows private intermediaries to do business with people, and facilitates the exploitation of the state of necessity of young women who are at risk of poverty. Furthermore, surrogacy practices create a kind of “wealth-based citizenship”, in which only
those with considerable economic resources can afford it and thus establish parent-child relationships, which is in fact unreachable to the majority of the population.

With reference to the alleged breach of Article 14 of the Spanish Constitution, which recognizes the principle of equality, the Supreme Court Decision dismisses the allegation. The Valencia Provincial High Court judgment does not violate it because the reason for the denial of the birth registration is not the fact of the applicants being two men married to each other, but that the filiation derives from an illegal, null and void contract.

To conclude, Supreme Court Decision no. 835/2013 of 6 February 2014 states that surrogacy agreements are illegal contracts because they go against the Spanish Constitution, specifically Article 10.1, which provides: “The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and for the rights of others are the foundation of political order and social peace.”

On the other hand, and with respect to welfare benefits during motherhood, Supreme Court Decision no. 953/2016 of 19 October 2016 must be highlighted. This judgment was issued by the Social Chamber and unifies the former jurisprudential doctrine. The National Social Security Institute had denied welfare benefits during motherhood to an intended mother who was not the biological mother of a child born through gestational surrogacy. The Institute considered that it was not a situation protected by law, since a surrogacy agreement is null and void. The First Instance Court dismissed the appeal filed by the woman, and she challenged this judgment before the Supreme Court. The Social Chamber upheld the appeal based on different arguments given below.

First of all, the fact that the surrogacy agreement is null and void does not imply that the child born as a result can be denied access to a number of rights. Secondly, Article 8 of the European Convention on Human Rights, which states the right to respect for private and family life, imposes the protection of motherhood. Finally, it is apparent from Article 14 of the Spanish Constitution, read together with Article 39.2 ("The public authorities likewise shall ensure full protection of children, who are equal before the law, irrespective of their parentage and the marital status of the mothers [...]"), that the appeal must be upheld, because of the right of the child to equality before the law, regardless of his or her filiation.

Situation

According to the figures given by the Spanish Government in 2017, between 2010 and 2016 there were 979 birth registrations in Consular Office Civil Registers from different countries, which belonged to children who were born because of a surrogacy arrangement. Most of these agreements – 553 out of 979, more than a half of them – have been signed in the United States, mainly in the state of California, where it is widely allowed not only for heterosexual couples, but also for same sex couples.
Within Europe, 231 out of 979 surrogacy arrangements – almost a quarter– have been signed in Ukraine. The main reason why this country has become a very popular destination to find a surrogate mother is its regulation: since 2002, surrogacy and surrogacy in combination with eggs or sperm donation has been completely legal in Ukraine, and surrogate mothers have no parental rights over the child born, who is legally, and from conception, the child of the prospective parents. Furthermore, the country underwent a substantial increase in surrogacy demand in 2015, because several countries in Asia had outlawed the practice or, at least, those contracts with foreign citizens.

However, as stated in journalistic resources, in Spain in the year 2014 alone between 800 and 1000 people had children as a result of a surrogacy arrangement signed in a foreign country. Gestational surrogacy regulation in our country is detailed below, following this initial overview.

Looking through the figures initially stated in this section, it seems that Spanish regulation is not effective enough to avoid gestation surrogacy arrangements signed by Spanish intended parents. This practice is actually forbidden by Article 10 of the 2006 Assisted Human Reproduction Technology Act (AHRTA), but after all these years there are still babies being born abroad because of a surrogacy contract and then registered in Spanish Consular Offices as biological or adoptive children of the prospective parents. Obviously it is an evasion, a fraudem legis.

CONCLUSIONS: FINAL CONSIDERATIONS AND POSSIBLE COURSES OF ACTION

Through this brief overview we have seen the legal and jurisdictional diversity that still exists in Europe surrounding surrogacy. In order to avoid legal vacuums and legal obscurity, which could result in insecurity, legal evasion and ultimately the failure of the mutual trust principle, common initiatives must be taken at a European level. Facing the difficulty of coordinating several legislative systems, a “bare minimum” agreement could be reached to provide reciprocal legal stability between states.

As neither doctrine nor legislators seem to peacefully agree on the basis of such “minimum” regulation, a common endeavour should be made in order to assess the situation and establish a common denominator from where to start from. We understand that two main approaches could be taken:

1) Abolitionist position: it would imply forbidding surrogacy in all its forms and throughout the European continent generally

In favour of this theory, it can be stated that a person’s dignity deserves European protection as a fundamental right, and as a constitutional principle that impedes the human body from being considered as a commodity and therefore an object of commercial traffic. The dignity would act as a limit relating to other legally protected rights. It could be elaborated that Public powers must assure a minimal protection to all
individuals who, due to their special situation regarding age, social condition or state of need are not in a position to freely give consent and are consequently at risk of finding themselves in a situation of indignity.

Against this pathway is the fact that most countries, as we have developed, regulate different forms of surrogacy, and as a consequence many civil relationships have developed in the few years that these legislations exist. Moreover, this would hardly solve the future cases of legal evasion, where a citizen tries to inscribe and establish kinship with a minor born from surrogacy techniques abroad, and the situation of such child.

2) Regulationist position: acknowledging the reality of surrogacy, and aiming to harmonize the different legal systems, European states could establish guidelines that meet an acceptable level of protection for the fundamental rights involved. Different solutions could be followed, mirroring different national legislations:

a) Allowing the inscription of every surrogacy case so as not to harm the interest of the children. This initiative would nonetheless foment legal evasion cases, as national regulations could be easily avoided.

b) Legalizing surrogacy with the strict condition of altruism. It could be argued that these laws would allow for the surrogacy services sector to develop, with the danger of clinics evading the regulation by charging management and other costs; as we have explained, many legislations do not offer proper guarantees for clinic regulations, and their control systems have been strongly criticized. Problems relating to the proper protection of the health and dignity of surrogate mothers will also arise and, therefore, strict regulations relating to these issues should then complement international agreements.

c) An intermediate solution could be reached in the form of a minimum agreement between the European states mirroring some of the aforementioned legislations, permitting only altruistic surrogacy, and establishing a double filter where agreements would be reviewed by the Health Administration and Courts (the case of Cyprus) or National Committees (the Portuguese case), in a similar manner to the case of transplants; the withdrawal right of the gestational mother should also be profoundly regulated, foreseeing the possibility of revoking her consent to the process itself or the renouncement of maternity in the months following the birth; proper protection of carrier health should also be ensured. This posture would however meet its own set of problems: in the jurisprudence of the Court of Justice of the European Union there is no recognized right to maternity or paternity, so the legal justification for these regulations would be, at the least, controversial.

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