The European Master's Programme in Human Rights and Democratisation (E.MA)

Years 2018-2019

Towards the Recognition of a Right to a Child Under the European Human Rights Framework? A study of Surrogacy: Emphasis on France

---

Thesis written and presented by Ms. Lauryane LENEVEU

Under the supervision of Dr. Julie FRASER

And Prof Dr. Antoine BUYSE, Second Reader

Utrecht University

Global Campus Europe

Universiteit Utrecht

Abstract:

Human beings' dependency on technology has fallen upon us in a blink of an eye. This dependency slowly allows technological progress to act in the most personal aspects of individuals' lives. Reproductive technology while appearing as godsends for some and abominations for others gradually changes family structures and the traditional vision of parenthood. Among this technology, surrogacy is the one preoccupying all minds. On the one hand, by its very nature, surrogacy is the assisted reproductive technology that complies with the broader panel of family compositions by including gay couples and single men. However, on the other hand, it is also the one producing the most heated debates by pushing both the boundaries of, notably, (bio)ethics and law. Still, because surrogacy has become increasingly accessible and easier to perform, States are increasingly facing individuals' demands pushing this reproductive technology to its peak. These circumstances brought France, one of the most prohibitionist States in the matter, to a situation in which it found itself stuck into a whirlwind of contradictions: being torn between its own beliefs, the cry of despair from some of its citizens as well as the protection of the rights of others. Such context becoming even more complicate as a consequence of the intervention of European institutions, most notably the European Court of Human Rights. While both national and European institutions tend to diverge when dealing with surrogacy and its correlated phenomena, they have both been required to adjudicate on the hypothetical emergence of a right to a child. Thus, should surrogacy be considered as a rights' abuser or a rights' driver?

Acknowledgments

I would like to express through these lines my gratitude, first, to Dr. Julie FRASER, my supervisor, for the significant advice and instructions she gave me throughout this academic journey. Her pedagogy pushed me beyond what I thought was my limits. I can only be grateful to her. Many thanks now to Prof. Dr. Antoine BUYSE who has been assigned Second Reader.

I thank also all the staff of the European Inter-University Centre for Human Rights and Democratisation (EIUC), notably, Prof. George ULRICH, Prof. Dr. Wiebke LAMER, Prof. Dr. Chiara ALTAFIN and Mrs. Daniela LA MATTINA. They gave me the opportunity to carry out the E.MA programme in excellent conditions. I would like to extend my thanks to both the internal and visiting professors of the EIUC and Utrecht University. I commend, in particular, Prof. Dr. Marjolein VAN DEN BRINK for her supervision, reactivity and kindness, she has made my stay in Utrecht an enriching human and academic experience.

I would like also to express my gratitude towards the staff of the library of the European Court of Human Rights, in particular, Mrs. Genevieve WOODS who allowed me to conduct my research at the Court and who welcomed me so warmly.

A special mention goes to Mr. Raoul FREY, my fiancé, who has never ceased to encourage me and who has been an invaluable emotional and psychological support.

Finally, I thank all of you that I cannot mention here (word limit).

I feel grown up from this E.MA experience.

Table of abbreviations

Art(s).	Article(s)
ART(s)	Assisted Reproductive Technology(ies)
AO	Advisory Opinion
BIC	Best Interests of the Child
CC	Civil Code
CCass	Cour de Cassation
CCNE	Comité Consultatif National d'Éthique
CE	Conseil d'État
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
CRC	Convention on the Rights of the Child
e.g.	*exempli gratia*
ECHR	European Convention on Human Rights
ECLJ	European Centre for Law and Justice
ECtHR	European Court of Human Rights
EU	European Union
i.e.	*id est*
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSI	Intra cytoplasmic sperm injection
ISA(s)	International Surrogacy Arrangement(s)
IVF	*in vitro* fertilisation
No(s)	Number(s)
PACE	Parliamentary Assembly of the Council of Europe
PC	Penal Code
PGD	Pre-implantation genetic diagnosis
UN	United Nations
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
WHO	World Health Organisation

Table of contents

General introduction

0.1.Foreword to the thesis

Reproduction is among the most basic features of the human experience occupying a privileged place in human beings' desires.[1] Human beings seem indeed to have an intrinsic and natural aspiration to reproduce. However, an individual's reproductive abilities might be impaired. Gradually, as a response to humans' inability to procreate, scientific progress permitted assisted reproductive technologies (ART(s)) to emerge to counterbalance the suffering of infertile or seriously ill couples and individuals precluded from reproducing.[2] ARTs encompass "*all treatments or procedures that include the handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy*" or furthering research techniques on embryos.[3] This includes, but not limited to, intrauterine insemination, intra cytoplasmic sperm injection (ICSI), pre-implantation genetic diagnosis (PGD) and *in vitro* fertilisation (IVF).[4] These ARTs can be divided into two categories: homologous (*i.e.* gametes providing from the intended parent(s)) and heterologous (*i.e.* with gametes providing from donation(s)). Nowadays millions of babies are conceived through these techniques.[5]

While they are perceived as effective responses towards infertility and reproduction issues, ARTs also challenge "*the traditional model of family [by]enabling the creation of families that otherwise would not exist [and by] allow[ing] a pluralism of family structures, including single parents and same-sex couples*".[6] Accordingly, the emergence of new technologies towards reproduction does not only entail beneficial effects. Certain reproductive techniques raise a number of issues, and surrogacy appears to be the most controversial.[7] At this point it should

---

[1] Corrine Packer, 1996, "The Right to Reproductive Choice: A Study in International Law", Abo Akademi University, Institute for Human Rights, p.1

[2] Albert Jean, 2016, « La procréation médicalement assistée: vers une humanité diminuée», Le mariage & la loi: protéger l'enfant, Institut Famille et République, pp.73-82, p.74

[3] Fernando Zegers-Hochschild, David G. Adamson, Jacqueline de Mouzon, *et al*, 2009, "International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organisation (WHO) revised glossary of ART terminology", for ICMART and WHO, *Fertility and Sterility*, Vol.92, Vol.5, pp.1520-1524, p.1520

[4] A glossary is available in Appendix 1

[5] Susan Golombok, Clare Murray, Vasanti Jadva, *et al*, 2006, "Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3", *Human Reproduction*, Vol.21, No.7, p.1918-1924, p.1918

[6] Ludovica Poli, 2017, "Bioethics, human rights and their interplay in the legal reasoning of ECtHR's case law on artificial reproductive technologies", *federalism.it*, pp.1-18, p.6

[7] UNFPA, 2016, Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions, HR/PUB/164/6, p.115

be specified that there is no consensus on whether surrogacy belongs as part of ARTs. Indeed, surrogacy also occurs in situations that do not involve intended parent(s)' gametes at all. Thus, it would not be an "assisting" technology but a "creating" one. For the purpose of the present study, and in accordance with the World Health Organisation (WHO), surrogacy is considered as part of the set of ARTs.[8]

The term surrogacy is derived from the Latin "*surrogatus*" meaning "substitute" or "in place of another".[9] It is believed that surrogacy is a practice which first occurred about 2000 years B.C. when Sarah, Abraham's wife tasked their maid Hagar to give birth to the child she could not carry.[10] However, it is with the advent of IVF in the 1980s that the practice expended beyond what was expected, leading to the first surrogacy arrangements (also called agreements).[11] Through such arrangements, parties (*i.e.* intended parent(s), the surrogate (and intermediaries)) agree that the surrogate carries a child until birth, point from which she relinquishes both the child and her parental rights to the intended parent(s). Surrogacy agreements can also contain the parties' rights and obligations *e.g.* "*contingencies in case of medical complications, compensation, parental rights and responsibilities... etc*".[12]

Whilst surrogacy has become more common in certain countries, so have cross-border surrogacies. Indeed, due to the majority of States prohibiting the practice, individuals are often performing surrogacy agreements abroad where the practice is authorised.[13] In such situations, arrangements are referred as international surrogacy arrangements (ISA(s)). ISAs are vectors of what is called "procreative tourism" characterised by the movement of individuals from one State to another to obtain specific types of ART prohibited or inaccessible (*i.e.* because individuals do not fulfil national criteria *e.g.* being a married heterosexual couple[14]) in their own country.[15] Hence, some destinations such as Ukraine, Russia, Georgia, India and Thailand

---

[8] Fernando Zegers-Hochschild, David G. Adamson, Jacqueline de Mouzon, *et al*, 2009, p.1521
[9] Viveca Söderström-Anttila, Ulla-Britt Wennerholm, Anne Loft., *et al*, 2016, "Surrogacy: outcomes for surrogate mothers, children and the resulting families- a systematic review", *Human reproduction update*, Vol.22, No.2, pp.260-276, p.261
[10] *Ibid.*
[11] Rajendra Gunputh and Kartina Choong, 2015, "Surrogacy tourism: the ethical and legal challenges", *International Journal of Tourism Sciences*, Vol.15, No.1-2, pp.16-21, p.16
[12] Michael Wells-Greco, 2016, "The status of children arising from inter-country surrogacy arrangements: the past, the present, the future", The Hague: Eleven International Publishing, p.48
[13] UNFPA, 2016, p.115
[14] As required in France according to Art.L.2141-2 Public Health Code *(Code de santé publique)*
[15] Michael Wells-Greco, 2016, p.14

have become hubs for ISAs.[16] These countries are not only favoured because they allow intended parents to avoid prosecution (in case surrogacy is criminally punishable in their own country) , but also because they offer attractive prices.[17] For instance, a surrogacy procedure in Thailand and India costs around $72,000 while being up to $225,000 in the United States.[18]

Procreative tourism is a *mutatis mutandis* vector of cross-border legal issues with national authorities frequently being asked to discard their own regulations to "recognise" part or full ISAs, often for "the sake" of the child involved.[19] This situation became recurrent in France, a country known for being one of the most prohibitionist in the matter. Surrogacy inflamed French public debate as early as 1989 when the first anti-surrogacy initiatives occurred.[20] Pursuant to national authorities, strict regulation is necessary when the practice at stake raises numerous complexities related to, *inter alia*, the determination of legal parent-child relationships, the civil status of surrogate-born children, human trafficking, human dignity, or the commodification and instrumentalisation of human bodies.[21] The French approach concerning surrogacy has also attracted the attention of the European Court of Human Rights (ECtHR) the monitoring body of the European Convention on Human Rights[22] (ECHR), which, since 2014, repeatedly condemns France for its highly restrictive system creating a situation in which both European and French judges appear to be divided on the path to follow. [23]

---

[16] Rajendra Gunputh and Kartina Choong, 2015, p.17

[17] Caroline Kleiner, 2017, "Surrogate motherhood in France: the need for a change Considerations of French Private International Law", *Kansai University Review of Law and Politics*, No.38, pp.49-62, p.55

[18] Joseph Chamie and Barry Mirkin, 2014, "Surrogacy: Human Right of Reproductive Exploitation?", available at https://yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation, accessed on 2 July 2019

[19] UNGA, 2018, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60, §17

[20] See *e.g.* Cass. Civ. 1ère, 13 décembre 1989, n°88-15.655

[21] See *e.g.* CE, 2018, Révision de la loi de bioéthique: quelles options pour demain?, Étude à la demande du Premier Ministre, Étude adoptée en Assemblée Générale le 28 juin 2018, available at https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000450.pdf, accessed on 6 June 2019; See also CCNE, 2018, « Rapport de Synthèse du Comité Consultatif National d'Éthique », Opinions du Comité Citoyen, Bioéthique, États Généraux, available at https://www.ccne-ethique.fr/sites/default/files/rapport_de_synthese_ccne_bat.pdf, accessed on 10 May 2019; and European Parliament, 2016, "Regulating international surrogacy arrangements- state of play", Amalia Rigon and Céline Chateau, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf, accessed on 19 May 2019, p.1

[22] *European Convention for the Protection of Human Rights and Fundamental Freedoms* [1950], CoE, adopted in 4 November 1950, entered into force on 3 September 1953, ETS 5

[23] See *Mennesson v. France* [2014], judgment of 26 June 2014, n°65192/11; *Labassee v. France* [2014], judgment of 26 June 2014, n°65941/11; *Foulon and Bouvet v. France* [2016], judgment of 21 July 2016, nos.9063/14 and 10410/14; *Laborie v. France* [2017], judgment of 19 January 2017, n°44024/13

This situation might be worsened with today's contexts in which the rising availability and proliferation of ARTs correlated to the evolution of family structures and mentalities as well as the increasing demand for individuals' procreative autonomy has given rise to new claims. Indeed while "*infertility and childlessness are [often] considered unnatural and lead to a perceived sense of a "an unfulfilled" life for the woman [and] "emasculation" for the man*"[24], ARTs, in particular surrogacy, are more and more represented as ways to respond to individuals' desire and need to have a child. Procreative technologies being increasingly rooted in western societies are gradually becoming alternative to fulfil that need. A need which tends slowly to be perceived as a right by infertile individuals. Indeed, presently, individuals faced with infertility whilst being prevented from accessing specific ARTs are increasingly initiating domestic and international legal proceedings based on their human rights - in particular, their right to a private and family life, right to found a family, right not to be discriminated against as well as their reproductive rights - giving substance to a common claim related to a right to a child. Nonetheless when such a debate involves also arguments based on (bio)ethical and legal issues as well as concerns towards the protection of the rights and liberties of others, should surrogacy be considered as a rights' abuser or a rights' driver?

0.1.1. Research questions

The issues identified above have prompted the following main research question:

> **Is a right to a child, resulting from infertile individuals' social claims related to ARTs and surrogacy, emerging under the European human rights framework and should that right be effectively recognised and protected by both European and national, specifically French, institutions ?**

In light of the above-research question, the present thesis relies on both evaluative and normative elements. Moreover, this research question begs a number of sub questions: How did ARTs, notably surrogacy, revolutionise both "traditional" family structures and parenthood?

---

[24] Karen Blain, 2018, "The dangerous Effects of Surrogacy: A review of "A transnational Feminist View of Surrogacy Biomarkets in India"" available at http://www.cbc-network.org/2018/11/surrogacy-biomarkets-india/, accessed on 6 July 2019

How French and European human rights regulations have adapted and dealt with such changes? How is the correlation of scientific progress towards ARTs, the transformations of family structures, and human rights obligations, slowly pushing French and European institutions to deal with new claims of a right to a child? Could the ECHR provide a sufficient basis to respond to these claims of a right to a child that should be recognised under both national and regional frameworks? Alternatively, could reproductive health arguments provide for a sufficient basis to respond to these claims of a right to a child that should be recognised under both national and regional frameworks? Finally, is there any way to reconcile all factors, interests and rights involved by surrogacy arrangements in the recognition of a new model of human right while limiting the hypothetical adverse impacts that such a recognition would have on all the stakeholders involved?

0.1.2. Research delimitations

First of all, it should be specified that surrogacy has been selected as a case-study amongst other ARTs as it is by far the most controversial one, particularly in France. Moreover, surrogacy is an interesting topic as both sides of the debate related to the practice and correlated phenomena have strong arguments. Therefore, it is all the more challenging to untangle the complexities raised by the practice. Surrogacy is also the only ART which can provide gay couples and, in particular, single men with a biological child. Consequently, surrogacy - compared to other ARTs - could provide a stronger basis for the recognition of a right to a child for all.

Nevertheless, the purpose of this thesis is not based on the rights and wrongs of surrogacy *per se*. Rather, it aims to address whether the practice, with its derivative challenges, can lead to the emergence of a new human right in both national and European contexts. An umbrella of factors that can draw and support a hypothetical answer are addressed. This is on that basis only that the "advantages" and "disadvantages" of surrogacy are analysed. For the same reasons, although taking into account the following, the thesis focuses less on the notions of motherhood, fatherhood, parenthood, parental responsibilities and parental rights, than on the consequences surrogacy brings to such notions.

In addition, this contribution is above all Eurocentric with an emphasis on France. France has been picked as a case-study for several reasons. On the one hand, its framework and ways of broaching surrogacy are legally interesting. France is among the countries that have a longstanding legal framework in the field, supported by strong and innovative arguments sometimes of a legal nature, sometimes moral, and sometimes ethical. The role it plays at the European level towards surrogacy developments, notably in light of ECtHR case-law, contributed to its "selection" as the subject. On the other hand, the research has also been reduced to France only because of time constraints. Moreover, regarding language and accessibility of national documents being a citizen of the chosen country was beneficial.

Similar arguments justify a study undertaken within the European framework which is in itself an interesting research area. Indeed, the ECtHR in particular, is an active international Court exercising authority in the 47 member States of the Council of Europe (CoE) and which regularly recognise new rights. Moreover, given the case-law already handed down by the Court as well as pending cases on surrogacy and ARTs, the ECtHR offers a rich basis to be studied. Still, European Union (EU) law arguments are also analysed. These arguments include regulations as well as case-law of the Court of Justice of the EU (CJEU). They are notably used to support several arguments related to reproductive health. The notion of "European human rights framework" must accordingly be understood in its broadest sense.

Although a global study comparing the different national (and international) human rights frameworks, in light of the globalisation of surrogacy, would have been attractive, time constraints required a narrower topic. Thus, while alongside France other European countries might be cited and used as examples, other countries' laws are not analysed. This is not a comparative study. However, it does not mean that international law standards are not taken into consideration when relevant. In fact, both national and European standards are interpreted in "*harmony with the general principles of international law*" [25] when Courts deem it necessary. Thus, any relevant rule of international law that is relevant to the debate of a right to a child is taken into account. The thesis considers in particular the Convention on the Rights of the

[25] ECtHR, FRA and CoE, 2015, Handbook on European Law relating to the Rights of the Child, available https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.pdf, accessed on 8 July 2019, p.26

Child[26] (CRC), the International Covenant on Economic, Social and Cultural Rights[27] (ICESCR) as well as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[28]

Finally, it is also important to clarify at the outset that this thesis is not providing an exhaustive study of gender, sex or sexual orientation issues. Still, such factors will be taken into account when relevant. Nevertheless, nothing in this thesis should be understood as neglecting these concerns; the focus being merely on the hypothetical recognition of a right to a child for intended parents in an overall.

0.2.Aims, methodology and structure of the thesis

0.2.1. Research aim

This thesis aims to:

1. Provide a clear analysis of surrogacy and the transformations it has made to family structures and parenthood while comparing this specific reproductive technique to other ARTs as well as adoption;
2. Address surrogacy in the context of both national and regional human rights frameworks and draw a parallel between French and European regulations with regards to surrogacy to highlight how they interact and influence each other;
3. Discuss how the changes raised by surrogacy led both French and European institutions to increasingly face and deal with individuals' claim of a right to a child;
4. Analyse through the prism of European human rights law, while taking into account national parameters as well as principles of international law (when relevant), the veracity of a right to a child;
5. Study reproductive health arguments to define whether they could support the emergence of a right to a child;

---

[26] *Convention on the Rights of the Child* [1989], UNGA, adopted on 20 November 1989, entered into force on 2 September 1990, UN Treaty Series, Vol.1577, p.3
[27] *International Covenant on Economic, Social and Cultural Rights* [1966], UNGA, adopted on 16 December 1966, entered into force on 1 January 1976, UN Treaty Series, Vol.993, p.3
[28] *Convention on the Elimination of All Forms of Discriminations Against Women* [1979], UNGA, adopted on 18 December 1979, entered into force on 3 September 1981, UN Treaty Series, Vol.1249, p.13

6. Respond to the realities of surrogacy while exploring arguments supporting and infirming an effective recognition of a right to a child in light of the rights of others;
7. Add a valuable contribution to the ongoing national and European debates regarding the issue of surrogacy as well as to the (future) legal developments surrounding the practice and more broadly ARTs;
8. Give all the readers a pleasant time.

0.2.2. Research methodology

The approach adopted in this thesis is interdisciplinary in the sense that the sources used combine legal, (bio)ethical, medical, social and anthropological arguments. This approach is taken, first for the quality of the thesis and the arguments based thereupon; but also, to allow a complete understanding of all the issues raised by surrogacy. Still, one approach is given primacy, the legal one, in particular human rights law, not only as a crucial aspect to take into consideration in the context of surrogacy and (bio)ethics overall, but also as a cornerstone of several arguments and counter-arguments related to the emergence of a right to a child.

Furthermore, the method chosen concerning the "lens" taken is primarily intended parent(s) centric *i.e.* although both surrogates' and children's point of views are assessed; the hypothetical recognition of a right to a child relates mainly to the intended parent(s). Consequently, this is the path this thesis takes.

As regard to the source, a plurality of sources is used including both primary and secondary sources. Primary sources encompass both national and European (*i.e.* both CoE and EU) standards, *i.e.* regulations, instruments and case-law; with a special focus on the work of the *Cour de Cassation* (CCass)[29] and of the ECtHR. Specifically, this thesis provides a review of national and European standards regarding surrogacy (and ARTs) as well as reproductive health which apply human rights law arguments in the context of a hypothetical emergence of a right to a child. These standards are similarly analysed to assess the Courts balancing of conflicting rights when faced with issues pertaining to surrogacy (and ARTs) towards the recognition of a right to a child. As aforementioned, international standards are also used, however, only when

[29] Definitions of French institutions and terms are available in Appendix 2

combined with national or European arguments and interpretations (in the field of surrogacy (and ARTs)) related to the recognition of a right to a child.

Secondary sources encompass reports and studies of national, international and intergovernmental institutions, books, journal articles, blogs, reports from non-governmental institutions, newspapers and (institutions') web sites. All the aforementioned sources aim to contribute to an empirical study, and aim to confirm, infirm, counterbalance, support, and reject findings related to the recognition of a right to a child.

Moreover, two interviews have been conducted with surrogacy specialists.[30] I decided to interview two individuals representing dissenting positions as to the practice of surrogacy. This allowed me to analyse the convergence and divergence of their arguments towards the practice of surrogate motherhood and to draw some conclusions based on their arguments combined with my own. The interviews were semi-constructed through a "scheme" that simply included topics and ideas deemed crucial. This provided me with a flexibility during the interviews towards the (open) questions asked as well as themes reviewed while adapting myself to the discourse of the interviewees. The interviews lasted approximately 45 minutes during which various issues and matters were discussed. Overall, similar issues have been broached during the two interviews. This includes, among others, their thoughts about the approach taken by France regarding surrogacy; the approach taken by the ECtHR regarding surrogacy; the recognition of a right to a child; the issues and benefits raised by surrogacy; and how they perceived this experience. I made the choice to include empirical data to give not only a theorical but also a practical approach to the thesis as both interviewees have been directly involved in or faced with surrogacy arrangements and are similarly concerned with this claim of a right to a child. The main difficulty has been to find participants as surrogacy is a highly controversial topic and few agreed to express themselves in this debate. Then, the second difficulty faced has been to implement interviewees' speeches within my own argumentation without appearing biased or influenced. I have faced similar difficulties during the interviews, *i.e.* asking questions without influencing their answers. Also, translating (as both interviews have been conducted in French) the interviews without altering their discourses was

[30] Short descriptions of the interviewees are available in Appendix 5

challenging. Answers gathered are directly implemented within the thesis sometimes quoting directly the interviewee, sometimes referring to the interviews.

Finally, a word should be said about language. The present study is written in English. However, as France is the case-study chosen, a lot of research materials used were only available in French. It means that translation was necessary. This translation was personally undertaken. Wherever feasible the original "spirit" and wording have been preserved. Still, it should be underlined that some terms cannot be (properly) translated. Similarly, it happens that national and international institutions use disparate terminologies.

0.2.3. Research structure

Chapter I provides descriptions and comments about the different forms of surrogacy and analyses this phenomenon alongside other ways of parenting available to infertile individuals to assess how surrogacy specifically revolutionised conventional family structures and parenthood, what it means regarding a possible emerging right to a child, and how these elements interact with each other.

Chapter II addresses surrogacy in the context of both national and regional human rights frameworks and draws a parallel between French and European regulations with regards to surrogacy to highlight how they influence each other. Chapter II similarly considers how both national and European institutions face and deal with issues raised by surrogacy and the emerging claims of a right to a child.

Chapter III scrutinises and interprets whether, responding to a correlation of pressing social demands and increasing medical progress towards human reproduction, a right to a child is emerging under the European human rights framework through the ECHR.

Chapter IV studies and considers whether, responding to a correlation of pressing social demands and increasing medical progress towards human reproduction, a right to a child is effectively emerging under the European human rights framework through reproductive health assertions.

Chapter V assesses the hypothetical right to a child alongside the rights of others notably the rights of the child and the rights of surrogates, to define whether those rights can coexist and whether on that basis a right to a child, emerging or not, should ever be effectively recognised.

I. SURROGACY ONE WORD, ONE DESIRE, A MULTITUDE OF FACTORS

This first Chapter further introduces the concept of surrogacy. It begins with a presentation of the grounds leading infertile individuals and surrogates to enter surrogacy arrangements. This analysis puts an emphasis on the motives infertile individuals consider legitimate to both use this practice and claim a right to a child. On the other hand, surrogates' motives are analysed to determine how surrogate motherhood and the recognition of a right to a child could impact them differently depending of their motivations. Then, an explanation of the different form of surrogacy is undertaken. This explanation is divided into two phases: (1) the different forms that surrogacy can medically take, and (2) the different forms that surrogacy can take in practice *i.e.* the practical application of the medical process. These different forms of surrogacy are displayed to acknowledge the various factors that a right to a child should encompass if recognised as a human right. Secondly, surrogacy is compared to other ARTs and adoption to draw lines on how deep surrogacy transformed "traditional" family structures compared to other means of parenting. It also demonstrates the articulations and dissimilarities between these different forms of parenting to show the reasons upholding that surrogacy could provide the strongest basis for the recognition of a right to a child.

1.1. Setting the stage

1.1.1. Intended parents and surrogates: motives behind the practice

One of main reasons individuals rely on surrogacy as ART lies on pathological issues of one or both partners precluding them from procreating. It could be, for instance, the absence of a uterus; contraindications to pregnancy *e.g.* heart failure[31]; repeated IVF failures; miscarriages; or sperm-related issues *e.g.* poor quality.[32] Ancillary motives may be linked to adoption failures or unavailability and/or inaccessibility of ARTs procedures. Another indication is the biological inability to conceive or bear a child which applies to gay couples and single individuals.[33] In this sense one may consider that surrogacy is "*the only way for*

[31] Françoise Shenfield, Guido Pennings, Jeremy Cohen, *et al*, 2005, "ESHRE task force on ethics and law 10: surrogacy", *Human Reproduction*, Vol.20, No.10, pp.2705-2707, p.2705
[32] Fiona MacCallum, Emma Lycett, Clare Murray, *et al*, 2003, "Surrogacy: the experience of commissioning couples", *Human reproduction*, Vol.18, No.6, pp.1334-1342, p.1336
[33] Viveca Söderström-Anttila, Ulla-Britt Wennerholm, Anne Loft., *et al*, 2016, p.262

[such individuals] to have a child".[34] A child who would have, in addition, full or partial genetic ties with his or her intended parent(s). However, other more controversial grounds should not be excluded, such as the use of surrogacy for "convenience" *e.g.* the will not to be subjected to the "vicissitudes" of pregnancy or to favour one's professional career as pregnancies might be perceived as threats to professional advancements.[35]

A right to a child as such would encompass all of these motives. Nevertheless, some appear more "legitimate" than others. The use of surrogacy for convenience demonstrates one of the numerous excesses a right to a child could be subjected to. This would perhaps open the floodgates to claims linked to other rights that will only serve human beings' indolence, but also devoid more "legitimate" (*e.g.* infertility-related) claims regarding a right to a child. Indeed, because one would attempt to avoid such abuses, a right to a child could never merely be recognised even with regards to individuals who have no other means to become (biological) parents. Therefore, it appears that a right to a child, if effectively emerging, should take these aspects into considerations and be highly scrutinised and framed.

Concerning surrogates, it was found that there were many different motives behind a woman's decision to become a surrogate such as the desire to help a childless couple (or individual), financial gain, enjoyment of pregnancy and/or childbirth, obtaining a sense of self-worth, or self-confidence and value.[36] These motives may differ depending on whether or not the surrogate is related to the intended parent(s). A surrogate may indeed be a relative such as a sister or a friend but also a woman totally unrelated to the intended parent(s), contacted *e.g.*, through surrogacy agencies or the internet. For instance, it might be advanced that a "related" surrogate commits herself in a surrogacy arrangement rather to help a childless brother or friends' couple than gaining money. Still, whether being unrelated or related, women's motives may have significant weight in balancing the recognition of a right to a child. Indeed, if it is asserted - through prior screenings- that women enter surrogacy arrangements for motives such as sense of self-worth or to help infertile individuals, then precluding would-be surrogates,

---

[34] Olga van den Akker, 2006, "Psychosocial aspects of surrogate motherhood", *Human reproduction update*, Vol.13, No.1, pp.53-62, p.57

[35] *Idem*., p.54; CCNE, 2017, « Avis du CCNE sur les demandes sociétales de recours à l'assistance médicale à la procréation (AMP) », Avis, 15 June 2017, No.126, available at https://www.ccne-ethique.fr/fr/publications/avis-du-ccne-du-15-juin-2017-sur-les-demandes-societales-de-recours-lassistance, accessed on 13 May 2019, p.30

[36] Vasanti Jadva, Clare Murray, Emma Lycett, *et al*, 2003, "Surrogacy: the experiences of surrogate mothers", *Human reproduction*, Vol.18, No.10, pp.2196-2204, pp.2197 and 2199; Viveca Söderström-Anttila, Ulla-Britt Wennerholm, Anne Loft., *et al*, 2016, p.262

allegedly in the name of women's rights, to enter surrogacy arrangements may preclude women to freely used their reproductive abilities and rights. Such findings would give less weight to all arguments based on similar contentions *e.g.* women's autonomy that could be raised against the recognition of a right to a child. To sum up, in the case it would be assessed that all parties would enter surrogacy agreements for the "good motives" *i.e.* being naturally prevented to have a child and to provide help to such individuals, a right to a child would have greater potential of being recognised. Then one should question whether such a right should encompass all kind of surrogacies.

1.1.2. The polysemy of surrogacy: traditional, gestational, commercial, altruistic and ethical surrogacy

In what it called "traditional" surrogacy, the surrogate's own eggs are used alongside the semen of the intended father or possibly a sperm donation. It means that in such a situation the surrogate "*is biologically, genetically and gestationally related to the child*".[37] Traditional surrogacies are generally performed through IVF. However, it happens that some traditional surrogacies occur through "artificial" inseminations, also called "at home surrogacies" *i.e.* the process of self-insemination by the surrogate with the (intended) male's semen.[38] This artificial technique relies on possible sexual relations between the surrogate and the intended father or on a direct insemination performed with a syringe containing the male semen. In that situation, one could no longer talk about assisted reproductive technology as the process is performed without assistance.

Then, unlike traditional surrogacy where the surrogate shares biological and gestational ties with the child, gestational surrogacy is characterised by the absence of biological link between the surrogate and the future child. Here, the role of the surrogate is purely gestational.[39] ARTs such as IVF enable intended parents' or donors' gametes to be used and fertilised - in a laboratory - to conceive a foetus which will be transferred later on into the surrogate's womb for gestation. Thus, the future child could be genetically linked to one, both or none of the

[37] Kim Armour, 2012, "An overview of surrogacy around the world: trends, questions and ethical issues", *Nursing for women's health*, Vol.16, No.3, pp. 231-236, p.233
[38] CCNE, 2017, pp.30 and 54
[39] Fiona MacCallum, Emma Lycett, Clare Murray, *et al*, 2003, pp.1334-1342

intended parent(s).[40] In such processes, up to five individuals might be involved in the child "conception" through the following combinations: (i) the gametes are provided by both intending parents; (ii) there is a double gametes donation *i.e.* coming from oocyte and sperm donors or from an embryo donation; or (iii) there is a single gamete donation *i.e.* one intending parent provides one gamete while the other will be provided through donation.[41]

A right to a child, if actually emerging, should not distinguish between situations involving traditional or gestational surrogacy arrangements. In fact, it will indirectly equate to differentiate intended parents who could provide at least one gamete to the child's conception, to those who would be absolutely prevented to do so. A right to a child would be recognised as a human right, thus it should be equally applicable to all human beings prevented from having a child. Here the term "prevented" is crucial. As mentioned above, a right to a child should be recognised for individuals prevented from having a child, not those who made the deliberate choice not to have a child *e.g.*, for convenience. Thus, a right to a child if recognised should encompass both traditional and gestational surrogacy. However, a right to a child could be dependent on the practical framework from which it evolves.

The first framework in which surrogacy can take place is within a commercial arrangement. Commercial surrogacy, also known as "for-profit" surrogacy, occurs when the payment going to the surrogate goes beyond reasonable pregnancy-related expenses *i.e.* beyond "*itemised expenses incurred as a direct result of the surrogacy arrangement*".[42] The commercial nature of this type of surrogacy has attracted some players called "intermediaries", often responsible for creating and participating in prosperous "baby-markets", generating considerable profits.[43] Intermediaries are generally understood as "*parties that bring together intending parents and surrogate mothers, and/or mediate the ongoing surrogacy arrangement including medical clinics, medical professionals, attorneys, surrogacy agencies or "brokers"*".[44] In the majority of cases, intermediaries such as agencies or brokers are unregulated. This results in situations in which the commercial aspect of the practice is all the more present with sometimes both the

[40] Kim Armour, 2012, p.233
[41] Françoise Shenfield, Guido Pennings, Jeremy Cohen, *et al*, 2005, p.2705
[42] UNGA, 2018, §39
[43] Marcy Darnovsky and Diane Beeson, 2014, "Global Surrogacy Practices", Working paper No.601, International Institute of Social Studies, available at https://repub.eur.nl/pub/77402, accessed on 12 May 2019, p.18; UNGA, 2018, §62
[44] UNGA, 2018, §40

intended parents and the surrogate being abused by these third-parties. The abuses include, but are not limited to "*not paying the surrogate, failing to cover medical needs, [and]overcharging intended parents*".[45] In addition, it should be specified that in the average in commercial surrogacy arrangements, only about one-third of the payment goes to the surrogate with the biggest part being split amongst intermediaries.[46] For all these reasons, the commercial form of surrogacy is recurrently at the core of social debates as, it often involves a vicious profit-making from human despair whether coming from adults longing for parental aspirations or (vulnerable) women whose bodies are used to carry another's child.

On the other side, altruistic surrogacy is perceived as a "philanthropic" act based on voluntariness often occurring between relatives or individuals with pre-existing relationships (*e.g.* friends or family members), entailing on a general basis an exclusion of surrogacy agencies and "payments".[47] However, altruistic surrogacy should not be mistaken with "free" or "gratuitous" surrogacy. Altruism and remuneration are not mutually exclusive. Indeed, the surrogate may receive "compensation" or "reimbursements" covering the "*medical costs directly related to the pregnancy and/or for loss of income due to the pregnancy*".[48] Nevertheless, when raising the altruistic motive, high scrutiny should be put on these "reimbursements" which must be reasonable and itemised, as otherwise they may actually be disguised payments for the transfer of a child, means of subsistence or incentives to "volunteer" for such procedures.[49] Still, the altruistic "label" of surrogacy does not expunge all criticism. It occurs that "compensation" received might be so high that it exceeds two or ten times the remuneration perceived by a "commercial" surrogate in another country, blurring the lines between commercial and altruistic surrogacy.[50] Moreover, the altruistic form of surrogacy does not address all the adverse effects of the practice such as the negative psychological or medical consequences that surrogacy can raise. Then, even though the surrogate is not compensated, all

---

[45] Joseph Chamie and Barry Mirkin, 2014

[46] PACE, 2016, "Children's rights related to surrogacy", Report, Committee on Social Affairs, Health and Sustainable Development, Prof. Dr. Petra De Sutter, doc.14140, p.6

[47] UNGA, 2018, §69

[48] Viveca Söderström-Anttila, Ulla-Britt Wennerholm, Anne Loft., *et al*, 2016, p.261

[49] UNGA, 2018, §69 ; Julia de Koenigswarter, 2014, "Breaking fertile ground in the European Union: A trial for the regulation of womb and child trade in surrogacy", Utrecht University, European Inter-University Centre in Human Rights and Democratisation, available at https://www.icl-journal.com/media/ICL_Thesis_Vol_9_6_15.pdf, accessed in 9 May 2019, p.4

[50] Claire De La Hougue, 2016, « Le Conseil de l'Europe rejette le rapport sur la GPA », Gènéthique, available at http://www.genethique.org/fr/le-conseil-de-leurope-rejette-le-rapport-sur-la-gpa-66185.html#.XL7n6S_pNQJ, accessed on 23 April 2019; UNGA, 2018, §69

the medical and/or legal professionals involved such as lawyers and doctors will not operate free of charge.[51] This results in a situation in which almost all actors involve into the arrangement are being remunerated except for the surrogate thereupon interrogating the fairness and equality of the process.

Finally, there is what is called ethical surrogacy. This "newly" emerging type of surrogacy raises interest on several points. First of all because there is no commonly agreed definition of ethical surrogacy. Each actor has his or her own definition as demonstrated by the interviews conducted with Marie Josèphe Devillers and Dominique Mennesson both representing diverging positions within the "surrogacy spectrum".[52] Hence, while for the latter ethical surrogacy must rely on a free, prior and informed consent of the surrogate, the availability of (prior) independent evidence-based information, and a continuing relationship between the surrogate and the intended parents; for the former ethical surrogacy merely does not and cannot exist as discussed below.

Supporters of ethical surrogacy contend, as aforementioned, that independent information *i.e.* from an independent actor not attracting any lucrative profit from the process, about the medical, legal, social, financial, and psychological dimensions of surrogacy should be made available to the surrogate (and the intended parent(s)).[53] This has to be correlated to the second argument holding to the free, prior and informed consent of the surrogate (and the intended parent(s)) who should be informed of all the potential risks involved and who should act for altruistic motivations, not as means of subsistence.[54] This underlies that a surrogate must not give her consent because of financial or psychological distress and/or vulnerability. The last aspect of ethical surrogacy relies on the human relationship that should subsist between the surrogate and the intended parent(s).[55] A "bond" emerging before the (medical) process and continuing after the birth and relinquishing of the child. This aspect is all the more important as it relies on the acknowledgement of the surrogate's "endowment" on behalf of the intended parent(s).[56]

---

[51] ECLJ, 2018, « La violation des droits des enfants issus d'AMP », available at http://media.aclj.org/pdf/La-violation-des-droits-des-enfants-issus-d%27AMP,-ECLJ,-mars-2018.pdf, accessed on 19 May 2019, p.25
[52] For more information about the interviewees, please refer to Appendix 5
[53] Based on the interview conducted with Mr. Dominique Mennesson
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid.*

On the other hand, opponents affirm that "ethical" surrogacy is a misuse of the notion "ethical" in a biased and oriented way.[57] Indeed, surrogacy although being "ethical" would not solve any concerns raised by the practice. It would only limit the damage caused. Opponents often face "ethical" surrogacy with other "ethical oxymora" such as an "ethical" death penalty *e.g.*, lethal injection, which at the end remains the death penalty.[58]

First of all, attaching the notion "ethical" to a practice does not, indeed, demonstrate that such practice is ethical. Ethical surrogacy seems to be an umbrella term used to undermine the adverse aspects of surrogacy. Rather all surrogacy arrangements, whether altruistic or commercial, should fulfil the criteria allegedly characterising an "ethical" surrogacy. In that case, it will not turn such arrangements into ethical ones, but it will preclude one from asserting that these arrangements are unethical. A right to a child should be established *mutatis mutandis* on the same criteria *i.e.* related to free, prior and informed consent…etc. Although for the above arguments, it would be preferable that a right to a child relies on an "altruistic" framework. A right to a child and commercial surrogacy would not fundamentally exclude each other for three main arguments: (1) intended parents may feel more comfortable and accompanied if intermediaries (they choose) are involved in the process; (2) the exchange of money might be justified by the high cost of IVF and necessary medical interventions, or required legal fees related to the compliance of the arrangement with the law; (3) it appears legitimate that a surrogate receives compensation palliating the loss of income she could face during the pregnancy. Thus, if regulated, commercial surrogacy would not *per se* contravene the recognition of a right to a child.

This first part demonstrated the complexities of surrogacy and its multiple forms. While traditional and gestational surrogacy should be included within a right to a child so as to avoid any infertile individual from being excluded, high scrutiny should be taken when coming to the practical forms of the practice. Not only should both intended parents and surrogates' motives be reviewed, but both the commercial and altruistic forms of surrogacy should also be subjected to strict regulations to prevent abuses. Then, if these criteria are fulfilled, a right to a child if emerging could embrace all of the different practical forms of surrogacy. In the following part, surrogacy is assessed alongside other forms of parenting - also comprising situations involving

[57] Based on the interview conducted with Mrs. Marie Josèphe Devillers
[58] *Ibid.*

infertile individuals - to distinguish between the specific changes it brings towards both "traditional" family structures and parenthood.

1.2.Comparing surrogacy to other forms of parenting: A focus on "traditional" ARTs and adoption

1.2.1. Surrogacy and "traditional" ARTs

"Traditional" ARTs, whether heterologous or homologous aim to remedy and treat medically diagnosed infertility or to prevent the transmission of a particularly serious disease or health issue to a future child.[59] Therefore, ARTs initially aim to respond to medically diagnosed infertilities or pathologies. Nevertheless, with the advent of surrogacy, ARTs have expanded way beyond their original purposes by being now widely used in a variety of family planning situations such as "old-age" and homosexual couples, or single-composed families.[60] In such situations, the shift occurred from being a response to medically diagnosed infertility to encompassing also "social" infertility as *e.g.*, members of a homosexual couple taken individually as person have often the biological and physiological abilities to procreate.[61]

Social ARTs are inaccessible in France as *e.g.*, "*the mere fact that a man is naturally deprived of a uterus does not make him "infertile" under French law*".[62] Specifically, access to ARTs is only available to "*compensate the medically diagnosed pathological infertility of a heterosexual couple […] of childbearing age*".[63] It means that homosexual couples, single individuals and persons of a non-childbearing age are prevented to access ARTs in France. This is notably supported by the fact that, whilst traditional ARTs support intended parents with their difficulties in conceiving a child, surrogacy, in particular heterologous gestational surrogacy creates a child for the intended parent(s). Thus, there is another distinction to be drawn. Whereas traditional ARTs "replicate" natural procreation; surrogacy goes way beyond by *e.g.*,

---

[59] CCNE, 2017, p.3
[60] Katarina Lee, 2017, "With the Advent of Artificial Reproductive Technologies Is There a Fundamental Right to a Child", *Ave Maria Int'l LJ*, Vol.6, pp.20-29, p.21 ; Elisabeth Steiner and Andreea Maria Rosu, 2016, "Medically Assisted Human Reproductive Technologies (Art) and Human Rights-The European Perspective", *Frontiers L. China*, No.11, pp.339-369, p.342
[61] CCNE, 2017, pp.3-4 ; CCNE, 2018, p.112
[62] Marion Abecassis, 2016, "Artificial Wombs: The Third Era of Human Reproduction and the Likely Impact on French and U.S. Law", *Hastings Women's L.J.3*, Vol.27, No.1, pp.3-27, p.26
[63] Art.L.2141-2 Public Health Code *(Code de santé publique)*

implementing a couple's embryos into the womb of a third person.[64] Moreover, surrogacy is the only ART that separates the child from the woman who carried him or her, and it is also the only one that can also completely dissociate biological and social parenthood.[65]

Nevertheless, "traditional" ARTs and surrogacy also share similarities. In fact, it should not be omitted that so far the majority of individuals resorting to surrogacy also face infertility or procreative issues. In such scenarios, both "traditional" ARTs and surrogacy provide the opportunity for infertile intended parents to have a child with whom they could be genetically related. Still "traditional" ARTs by excluding gays couples and single men provide for a narrower scope than surrogacy in that sense. Then, all ARTs separate sexuality from procreation. "Traditional" ARTs may also dissociate procreation and filiation when, for instance, it an involves an artificial insemination with a sperm donation. In that case the non-genetically related parent will nevertheless be considered as being the legal parent of the ART-born child.[66]

Consequently, surrogacy and "traditional" ARTs are not fundamentally different. It remains that surrogacy by embodying a broader panel of individuals, further revolutionises family's compositions. While the few effects surrogacy has on family's structures and parenthood could be assessed by the above-mentioned findings (*i.e.* by allowing individuals who should normally be prevented to do so to become biological parents), such effects are all the more perceptible when surrogacy is analysed alongside adoption.

1.2.2. Surrogacy and adoption

One might easily acknowledge that the parental desire of infertile individuals could also be achieved through adoption. Nonetheless, the practical and legal distinctions between surrogacy and adoption often justify intended parents' penchant for the former. In practical terms, the time frame between the birth of the child and his or her relinquishment is significantly shorter in surrogacy procedures than it is in adoption procedures. Furthermore, children available for adoption tend to be older with few infants or young children available for adoption

[64] Elisabeth Steiner and Andreea Maria Rosu, 2016, p.343
[65] CCNE, 2017, p.29
[66] *Idem*., p.5

placements.[67] This aspect might make those intended parents who may not wish a child who received a (foreign) prior education or who experienced traumas (*e.g.* death of both biological parents) reluctant to adopt. Also, adoption might not be available to all intended parents who might fail adoption screening procedures *e.g.* because of an inability to fulfil the prerequisites for adoption such as the age limit or the need to be married. Surrogacy provides the biggest benefit by enabling, in the great majority of cases, the child to be genetically related to at least one intended parent. However, one must also underline that the purpose of adoption is to provide a family to a child, which fundamentally differs from obtaining a child for a family. Still surrogacy and adoption share similarities in substance. Indeed, both separate biological and social parenthood.[68] Similarly, both may necessitate intended parents be recognised as legal parents while not necessarily sharing any biological link with the child. Finally, surrogacy, like adoption involves a situation in which a woman bore a child before relinquishing him or her.[69]

In France two types of adoption exist the full and the partial adoption. Full adoption which is the most attractive implies that the rights and the legal parent-child relationship established between the child and his or her biological parents will be relinquished to the adopter(s), *"unless she or he is the spouse of the father or of the mother of the adoptee; in that event, the adopter has parental authority concurrently with his or her spouse"*.[70] Nevertheless, full adoption has inherent limitations. It requires parents to be married[71] excluding thereupon a majority of family compositions and infringing upon individual freedoms by imposing a marital status upon would-be parents. In a partial adoption "*an adoptee remains in his family of origin and preserves all his rights therein, in particular his rights of succession*".[72] It might be a solution after a divorce when a new partner wishes to establish a legal parent-child relationship with his or her partner's child. However, the fact that the child will remain in his or her family of origin represents a great barrier to individual seeking to have their "own" child. Thus, overall, intended "*parents who follow the legal path of adoption are less likely to have their wishes fulfilled than those who break French law*".[73]

---

[67] Olga van den Akker, 2006, p.55
[68] Susan Golombok, Clare Murray, Vasanti Jadva, *et al*, 2006, p.1919
[69] Olga van den Akker, 2000, "The importance of a genetic link in mothers commissioning a surrogate baby in the UK", *Human reproduction*, Vol.15, No.8, pp.1849-1855, p.1853
[70] Art.356 CC
[71] *Ibid*.
[72] Art.364 CC
[73] CCNE, 2017, p.40

This is the deepest change raised by surrogacy. In fact, not only surrogacy – compared to adoption and "traditional" ARTs – occurs in cases absolutely dissociating biological, social and legal parenthood, but it also provides infertile individuals with shorter and easier means to achieve parenting. Similarly, surrogacy by "*separate[ing] sex from reproduction; […] motherhood from pregnancy; and […] the unity of one couple into the involvement of a third person within the potential family relationship*"[74] gradually contributes to individuals' claims of a right to a child. New contexts of parenthood correlated to modern means of achieving parental desires appear to progressively support assessing the interaction of reproductive technology and law in accordance with family's and parenthood's transformations. Both these changes and claims have been felt nationally and regionally by institutions being increasingly compelled to take into consideration such transformations within their regulatory framework.

II. SURROGACY A LEGALLY INTRICATE CONCERN: MAPPING NATIONAL AND EUROPEAN FRAMEWORKS

Chapter II aims to demonstrate how both French and European frameworks have been confronted with revolutions raised by surrogacy as well as how they have responded and are responding to these transformations. This second Chapter underlines notably the interactions and correlations between these two frameworks as well as towards the hypothetical emergence of a right to a child. The emphasis is put, firstly, on the French legal framework both before and after 2014, the date on which the ECtHR gave rulings that pushed France to revise its approach to surrogacy. The European framework *i.e.* both the CoE and the EU, is analysed as a second step to assess whether a common or dissenting position regarding surrogacy might be found between the two institutions and towards the intended direction of a right to a child.

[74] Olga van den Akker, 2000, p.1849

2.1.French legal framework[75]

2.1.1. French legal framework before 2014

France, when it comes to surrogate motherhood is known for its strict prohibitionist legislation. The French State has opted for a firm ban of the practice within its territory in 1994 throughout the adoption of the laws on bioethics.[76] These laws introduced new Articles within the French Civil (CC)[77] and Penal Codes (PC)[78] prohibiting and criminally condemning surrogacy.[79] Laws on bioethics, although having been revised several times before (in 2004, 2011 and 2013), did not override the prohibition of surrogacy, demonstrating the willingness of France to oppose the practice. The last revision was supposedly to have occurred in 2018, has been postponed, notably due to the latest movements related to surrogacy and "social" ARTs claims.

In France, the general prohibition on surrogacy is coupled with both civil and criminal sanctions. The civil sanction is expressed through the nullity of surrogacy arrangements[80],whilst criminal sanctions take the form of prison sentences and fines for all individual involved in any surrogacy arrangement occurring within the French territory *i.e.* intended parent(s), surrogates and intermediaries.[81] This absolute prohibition is justified by national authorities through arguments relying on notions of human dignity[82], as well as the unavailability, inviolability, non-commodification and non-instrumentalisation of the human body.[83] French authorities consider that *"only things may be the subject matter of legal transactions between private individuals[and] the object of agreements".*[84] Still, in light of the growing "procreative tourism" in Europe correlated to a flow of surrogate-born children arriving in France, the former Minister of Justice Christiane Taubira issued, in 2013, a *"Circulaire"*[85] granting Certificates of French Nationality as well as travel documents to

[75] All national provisions used in this thesis are available in Appendix 4
[76] Loi n°94-548 du 1er juillet 1994 ; Loi n°94-653 du 29 juillet 1994 ; and Loi n°94-654 du 29 juillet 1994
[77] French Civil Code (2019 English version)
[78] French Penal Code (2019 English version)
[79] See Arts.16-5,16-7 and 16-9 CC
[80] Arts. 16-5 and 16-7 CC
[81] Arts.227-12 and 227-13 PC
[82] Art.16 CC
[83] See Art.16-1 CC
[84] Art.1128 CC
[85] Circulaire du 25 janvier 2013 relative à la délivrance des certificats de nationalité française – convention de mère porteuse – État civil étranger, NOR : JUSC1301528C ; A definition is available in Appendix 2

surrogate-born children.[86] This *Circulaire*, validated by the *Conseil d'État* (CE) in 2014,[87] allows for the issuance of the aforementioned Certificates provided that the surrogacy arrangement is regularly performed abroad on the basis that should be considered *"French a child one parent of whom at least is French"*.[88] However, in order to fully perceive the legal spectrum related to surrogacy in France, it is necessary to analyse the case-law of the *Cour de Cassation*, the highest civil Court.

One of the first cases of the CCass founding French jurisprudence on surrogacy occurred in 1989, in which the CCass ruled that associations aiming at bringing together (future) surrogates with intended parents were/are prohibited as contrary to public order.[89] Then two years later, in 1991, the Court further stated that an agreement through which a woman committed herself, albeit for altruistic motives, to conceive and bear a child in order to relinquish him or her at birth contravened both the unavailability of the human body and of the state of persons (*état des personnes*).[90] Thus, surrogacy agreements were declared null and void as contrary to public order. The CCass also deduced accordingly that adoptions of surrogate-born children by intended parents could not be legally valid.[91] This decision of 1991 laid down the basis of the forthcoming 1994 laws on bioethics.

Going a step further in its strict anti-surrogacy regime, in a case of 2011,[92] the CCass stated that the details of a birth certificate of a child born abroad through a surrogacy arrangement could not be registered within the French register of births, marriages and deaths. The CCass asserted notably that such refusal would not deprive a child of his or her legal parent-child relationship recognised as valid abroad. Likewise, it could not be considered that the non-transcription infringed the child's right to respect for private and family life[93] nor his or her best interests.[94]

---

[86] CE, 2018, p.85
[87] CE, *Association Juristes pour l'enfance et autres,* 12 décembre 2014, nos. 367324, 366989, 366710, 365779, 367317, 368861
[88] Art.18 CC ; See also Art.47 CC
[89] Cass. Civ. 1ère, 13 décembre 1989, n°88-15.655
[90] Cass. Ass. Plen., 31 mai 1991, n°90-20105 ; See also Frédérique Dreifuss-Netter, 2017, « Prohibition de la GPA et intérêt de l'enfant dans la jurisprudence de la Cour de Cassation », *Cahiers Droit, Sciences & Technologies*, No.7, pp.77-84 p.79
[91] Cass. Ass. Plen., 31 mai 1991, n°90-20105 ; Caroline Kleiner, 2017, p.52 ; CCNE, 2010, « Problèmes éthiques soulevés par la gestation pour autrui », Avis, 1 April 2010, No.110, available at https://www.ccne-ethique.fr/fr/publications/problemes-ethiques-souleves-par-la-gestation-pour-autrui-gpa, accessed on 7 May 2019, p.3
[92] Cass. Civ. 1ère, 6 avril 2011, n°10-19.053
[93] Here the Court was referring to Art.8 ECHR
[94] Here the Court was referring to Art.3(1) CRC

Here, it should be underlined that the CCass was aware that its ruling could infringe principles of international human rights law. That is the reason why, it prepared its defence by "demonstrating" that its position (*i.e.* not denying a legal status legally valid abroad) was not infringing international standards enshrined within the CRC (best interests of the child) nor *e.g.* the ECHR (right to private and family life).

Finally, echoing the *Circulaire Taubira* of 2013, the CCass, in a series of cases[95] tightened its legal regime regarding surrogate motherhood by declaring that alongside a violation of public order, surrogacy arrangements were also a fraud on French law. Consequently, although birth certificates were legally valid abroad, they could not be held legally valid in France as it would constitute a fraud to the regulations established in France. Accordingly, when such fraud was declared neither the BIC nor respect for a child's private and family life could be usefully raised. In doing so, the CCass provided the *Circulaire Taubira* with a very narrow scope, even though a Certificate of Nationality could be established because the surrogacy arrangement was legally valid abroad, that arrangement would be subsequently considered to be fraud under French law.

This above-explained regime was governing any issue related to surrogacy in France until the *Mennesson*[96] and *Labassée*[97] cases held by the ECtHR in 2014. These cases concerned the refusal of France to register on the register of births, marriages and deaths, foreign birth certificates of surrogate-born children denying them any legal parent-child relationship with their intended parents. Applicants (children and intended parents) in these cases alleged that such a situation contravened to the BIC and their right to respect for private and family life protected by Article 8 ECHR. In both cases the Court concluded that there had been no violation of Article 8 concerning the Applicants' rights to respect for their family life as they had not been denied the possibility to live as families in France.[98] Nonetheless, it further held that there had been, in both cases, a violation of Article 8 concerning the children's rights to respect for their private life.[99] The Court observed in particular that French authorities, despite being aware of the valid recognition of the legal parent-child relationships established abroad, denied these relationships under French law. This analysis took on particular importance when it was

[95] Cass. Civ. 1ère, 13 septembre 2013, nos.12-18.315 and 12-18.138
[96] *Mennesson v. France* [2014], judgment of 26 June 2014, n°65192/11
[97] *Labassee v. France* [2014], judgment of 26 June 2014, n°65941/11
[98] *Mennesson v. France,* §§94-95 ; *Labassee v. France*, §§72-73
[99] *Idem.,* §§100-101 ; *Idem.,* §§79-80

provided that one of the intended parents, the fathers, were in addition the children's biological fathers. Accordingly, the Court held that a legal parent-child relationship should have been established, at least, between the intended fathers and the children and that France, by having refused to do so, violated the ECHR.[100] These cases provoked a tidal wave within French regulations towards the practice of surrogacy and necessitated national authorities to do a complete U-turn.

2.1.2. French legal framework after 2014

As mentioned, the twin cases of 2014, in which France was condemned, generated great changes at the national scale. Firstly, France did not appeal the decisions demonstrating its willingness to comply with the ECtHR's rulings. Secondly, as a direct result of the *Mennesson* and *Labassee* cases, the French State removed most of the legal and administrative obstacles faced by surrogate-born children, in particular, *vis-à-vis* the establishment of a legal parent child-relationship between them and their intended (biological) father, in order to preserve children's private lives as required by the Court.[101] Likewise, the last case-law of the CCass is undeniably a step forward in terms of the protection of surrogate-born children, as illustrated by two decisions of July 2015[102], in which the Court affirmed that whilst surrogacy is still prohibited in France (Articles 16-6 and 16-9 CC) and criminally punishable (Articles 227-12 and 227-13 PC), principles protected by Article 8 ECHR and Article 3(1) CRC must prevail. In other terms the CCass did not decriminalise or authorise surrogacy, it discarded its former reasoning based on the notions of public order and fraud.[103] Instead, France presently relies on the provisions of Article 47 CC to assess the validity of surrogacy arrangements and foreign birth certificates of surrogate-born children.

Article 47 states as followed:

> *"Faith must be given to records of civil status of French persons and aliens made in a foreign country and drawn up in the forms in use in that country, unless […][it is]*

[100] *Ibid*.
[101] CCNE, 2017, p.40
[102] Cass, Ass. Plen., 3 juillet 2015, n°14-21.323; Cass, Ass. Plen., 3 juillet 2015, n° 15-50.002
[103] Thierry Renoux, 2018, « *Mater Semper Certa Est*: Brèves Réflexions sur la Gestation pour Autrui et le Principe d'Égalité», Les droits de l'homme à la croisée des droits: mélanges en l'honneur de Frédéric Sudre, LexisNexis, pp.633-643, p.639

establish[ed] that the record is irregular, forged or that the facts declared therein do not square with truth".

Thus, today, foreign birth certificates of surrogate-born children are transcribed if they correspond to reality within the meaning of Article 47 CC.[104] Specifically, based on a cross reading of Article 47 CC and of the principle of "*mater semper certa est*" *i.e.* "the mother is always certain"; French authorities consider that a birth certificate indicating the intended mother as being the child's mother cannot be fully transcribed as the facts declared therein do not correspond to reality. French authorities support this argument by affirming that under French law, the mother is the woman who gives birth.[105] Precisely, because it is considered that being a mother is being the woman who has been directly "*involved in the child's conception and birth*" irrespective of any use of ART and whether or not the intended mother provided her own eggs.[106] Consequently, to comply with the "reality" requirement of Article 47 CC, French authorities consider that a birth certificate, to be fully transcribed, must indicate as parents, on the one hand the individual who provided the male gametes for the conception of the child (*i.e.* in general the intended father), and on the other hand the woman who was directly involved in the child's conception (*i.e.* the surrogate).[107] The "*Comité Consultatif National d'Éthique*" (CCNE) *i.e.* the National Consultative Committee of Ethics, indicates that additionally such a reasoning "*corresponds to a requirement of transparency and truth regarding the child's origins*".[108]

Nevertheless, such a distinction between maternal and paternal filiation in France introduces an unequal treatment between men and women. The adage "*mater semper certa est*" was initially used to ascertain a presumption regarding paternal filiation *i.e.* the father of a child is deemed to be the husband of the biological mother. However, today's interpretation of Article 47 CC seems to indicate that filiation is now purely biological on the father's side and mainly social

[104] See also Cass. Civ. 1ère., 5 juillet 2017, nos.15-28.597, 16-16.901, 16-50.025, 16-16.455 and 16-16.495
[105] Priscille Kulczyk, 2019, "Surrogacy French law & European Thrust", European Centre for Law and Justice, available at https://eclj.org/surrogacy/eu/le-droit-franais-sur-la-gpa-rsistera-t-il-aux-coups-de-boutoir-de-leurope--?lng=en, accessed on 25 April 2019; See also Cass. Ass. Plen., 5 octobre 2018, n°10-19053; and Art.322 CC
[106] Pinhas Shifman, 1987, "The Right to Parenthood and the Best Interests of the Child: A Perspective on Surrogate Motherhood in Jewish and Israeli Law", *NYL Sch. Hum. Rts. Ann.*, 1986, Vol.4, pp.555-568, pp.565-66
[107] Assemblée Nationale, 2018, Proposition de Résolution appelant à une interdiction universelle de la gestation pour autrui, No.972, p.3
[108] CCNE, 2017, p. 39

on the mother's side.[109] Indeed, pursuant to a series of decisions in July 2017[110], the CCass stated that the use of surrogacy does not in itself prevent the (intended) father's wife (or husband) from adopting the child born from this practice, if the legal conditions for adoption are met and if it is in the BIC.[111] Thus, although the CCass admits that a legal parent-child relationship can be established between the surrogate-born child and the second intended parent, it lead to a situation in which filiation is "easily" established with regard to the (biological) intended father while the intended mother (or second father) is compelled to adopt the child although hypothetically sharing biological links with the latter. It means that the second intended parent will never be a parent other than an adoptive parent while being legally recognised as the "real" parent abroad.[112] Moreover, it is "*absurd [that an individual], who provided [his/her] genetic material and initiated the conception of the child, [is required] to adopt him/her upon birth*".[113] Ultimately, the female (or second) intended parent is discriminated against by the misuse of a Latin adage.[114]

In light of the above-findings, it is quite clear that France does not intend to show direct recalcitrance to the ECtHR when it comes to surrogacy. France, on the contrary, demonstrates its willingness to soften its approach for the sake of surrogate-born children as required by the Court. However, it remains that behind the curtain France is determined to maintain its now quasi-strict legislation regarding the prohibition of surrogacy by finding any and all means to avoid directly and fully transcribing surrogate-born children' birth certificates and otherwise discourages future intended parents to use that practice. It is also clear that France and the ECtHR are in the middle of a long and arduous duel, in which each institution is passing the buck, but also in which each institution is gradually relaxing its restrictive approach towards surrogacy as shown in the following part.

---

[109] Muriel Fabre-Magnan, 2015, « Les trois niveaux d'appréciation de l'intérêt de l'enfant: à propos de la gestation pour autrui »; Recueil Dalloz, 191e année, No.4, pp.224-229, p.225
[110] Cass. Civ. 1ère., 5 juillet 2017, nos.15-28.597, 16-16.901, 16-50.025, 16-16.455 and 16-16.495
[111] *Idem*.; See also Assemblée Nationale, 2018, p.4
[112] Thierry Renoux, 2018, p.643
[113] Marion Abecassis, 2016, p.21
[114] Thierry Renoux, 2018, p.641

2.2.European legal framework

2.2.1. The Council of Europe

There is at the CoE scale no instrument regulating surrogacy, notably observing that member States' positions greatly diverge. Indeed, domestic laws related to surrogacy amongst CoE member States vary across a spectrum from prohibitionist to permissive and from extensive to non-existent. On the one hand, as it is in France, most European countries expressly prohibit surrogacy.[115] This is the case in Austria, Bulgaria, Croatia, Estonia, Denmark, Finland, Germany, Hungary, Italy, Malta, and Spain.[116] On the other hand, a bench of States allows (or at least does not prohibit) surrogacy within their domestic regulations. Amongst these States, one should distinguish those only allowing altruistic surrogacy (*e.g.* Greece, UK, Portugal, and the Netherlands[117]), to those authorising also commercial surrogacy (*e.g.* Ukraine, Georgia and Russia).[118] Finally, few States do not have any law regulating surrogacy such as Cyprus, Czech Republic, Ireland, Latvia, Lithuania, Monaco, Poland, and Romania.[119] This rainbow of domestic laws might be damaging to the recognition of a right to a child, as such a right, if emerging, would hardly find legitimacy. In fact, overall, only a minority of States clearly demonstrate to be in favour of surrogacy while the two-thirds are against. Therefore, a right to a child entailing a liberalisation of surrogacy (*i.e.* as covering gay couples and single men' right to a biological child), if emerging or even recognised, will face high difficulties either to be implemented or merely to be viable.

Still, despite this fragmentation of national legislations and while no "*instrument explicitly addresses surrogacy, many address rights crucial in this context*".[120] Hence, a first instrument worth mentioning is the so-called Oviedo Convention on Human Rights and Biomedicine (ratified by 29 member States including France).[121] Among the most important principles and standards consecrated by the Oviedo Convention are the protection of human dignity together

[115] CCNE, 2017, pp.75-76; See also CCNE, 2010, p.4
[116] CCNE, 2017, p.75
[117] *Idem*., p.76
[118] *Ibid.*
[119] *Ibid.*
[120] Michael Wells-Greco, 2016, p.419
[121] *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine : Convention on Human Rights and Biomedicine* [1997], CoE, adopted on 4 April 1997, entered into force on 1 December 1999, CETS No.164

with the principle of protection of the integrity of human beings[122], and the prohibition of financial gain and disposal of the human body.[123] All these principles would go against surrogacy as being a practice challenging simultaneously the integrity of the human body, human dignity, as well as financial gain and disposal of the human body. Then, it should be emphasised that while the ECtHR can only rule on rights protected by the ECHR, it does not have similar powers with regards to rights safeguarded by the Oviedo Convention. Thus, the Committee on Bioethics of the CoE (which is not a Court) has assumed responsibility for monitoring the Convention. Nevertheless, the ECtHR does mention and refer to the Oviedo Convention as well as the work of the Committee as relevant sources of CoE law when adjudicating cases pending before it in the field of human rights and biomedicine such as ARTs and surrogacy.[124]

Still, this is through the ECHR and its interpretation and application by the ECtHR that surrogacy issues are dealt with at the CoE scale. The aforementioned *Mennesson* and *Labassee* cases are the two first admissible cases in which the ECtHR clearly provides an answer related to how surrogate-born children should be treated according to ECHR's rights. The *Mennesson* and *Labassee* jurisprudence, *i.e.* the non-recognition of surrogate-born children's legal relationships with their intended (biological) fathers contravenes their right to private life, has been upheld by the ECtHR in subsequent surrogacy-related cases. Hence, in *Foulon and Bouvet*[125] and *Laborie*[126], respectively of 2016 and 2017, the ECtHR again condemned France for its approach to surrogacy. These two cases are all the more interesting when one knows that in the meantime, the CCass changed its jurisprudence to comply with the 2014 ECtHR's rulings in the *Mennesson* and *Labassee* cases.[127] Still, the ECtHR considering the lapse of time between the children's births and the adaptation of the French legal system, and affirmed that France, at that time (*i.e.* in 2016 and 2017) still did not sufficiently take into consideration findings of the *Mennesson* and *Labassee* cases.[128]

---

[122] Art.1 Oviedo Convention
[123] Art.21 Oviedo Convention; See also Elisabeth Steiner and Andreea Maria Rosu, 2016, p.346
[124] See as instance *Evans v. UK* [GC][2007], judgment of 10 April 2007, n°6339/05, §40; *Costa and Pavan v. Italy* [2012], judgment of 28 August 2012, n°54270/10, §§21 and 25; *S.H. and Others v. Austria* [GC][2011], judgment of 3 November 2011, n°57813/00, §35; and *Paradiso and Campanelli v. Italy* [2015], judgment of 27 January 2015, n°25358/12, §44
[125] *Foulon and Bouvet v. France* [2016], judgment of 21 July 2016, nos.9063/14 and 10410/14, §§56-57
[126] *Laborie v. France* [2017], judgment of 19 January 2017, n°44024/13, §§31-32
[127] Thierry Renoux, 2018, p.638
[128] *Laborie v. France*, §31

What can be drawn from the case-law of the ECtHR is that the Court did not analyse the issue of surrogacy *per se*.[129] The Court instead appreciated its consequences.[130] In the *Mennesson, Labassee, Foulon and Bouvet* and *Laborie* cases, the ECtHR dealt with legal parent-child relationship issues and deduced the consequences of the non-recognition of such relationships in light of ECHR's rights. Besides, while the ECtHR has been ruling so far on filiation between surrogate-born children and their biological intended fathers; the Court has been recently asked, through the *Braun*[131], *Saenz and Saenz Cortes*[132] and *Maillard*[133] cases to adjudicate on the legal relationships between non-biological intended mothers and surrogate-born children. However, before the Court had the opportunity to rule on these cases, the CCass used Protocol No.16 to the ECHR[134] to request the first Advisory Opinion[135] (AO) before the ECtHR on the issue. In fact, in the context of the national re-examination the *Mennesson*[136] judgment, the CCass pursuant to Article 1 Protocol No.16 ECHR, stating that highest national Courts may request an AO from the ECtHR concerning "*the interpretation or application of the rights and freedoms defined by the Convention [arising] in the context of case pending before [them]*", asked the following questions:

> "*1. By refusing to enter in the register of births, marriages and deaths the details of the birth certificate of a child born abroad as the result of a gestational surrogacy arrangement, in so far as the certificate designates the "intended mother" as the "legal mother", while accepting registration in so far as the certificate designates the "intended father", who is the child's biological father, is a State Party overstepping its margin of appreciation under Article 8 ECHR? In this connection should a distinction be drawn according to whether or not the child was conceived using the eggs of the "intended mother"?*

---

[129] Julia de Koenigswarter, 2014, p.40
[130] Grégoire Puppinck and Claire de la Hougue, 2014, "ECHR: Towards the Liberalisation of Surrogacy: Regarding the Mennesson v. France and Labassee v. France cases", In French in the *Revue Lamy de Droit Civil*, No.118, September 2014, pp.78-91, p.80
[131] *Braun v. France* [2018], introduced on 4 January 2018, n°1462/18
[132] *Saenz and Saenz Cortes v. France* [2018], introduced on 2 March 2018, n°11288/18
[133] *Maillard and others v. France* [2018], introduced on 10 April 2018, n°17348/18
[134] *Protocol No.16 to the Convention on the Protection of Human Rights and Fundamental Freedoms* [2013], CoE, adopted on 2 October 2013, entered into force on 1 August 2018, CETS No.214, Art.1(1)
[135] *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* [2019], ECtHR, Grand Chamber, n°P16-2018-001
[136] Cass. Civ. 1ère, 6 avril 2011, n°10-19.053

2. In the event of an answer in the affirmative to either of the two questions above, would the possibility for the intended mother to adopt the child of her spouse, the biological father, this being a means of establishing the legal mother-child relationship, ensure compliance with the requirements of Article 8 of the Convention?"[137]

The ECtHR in its AO, also referring to the CRC, states that the lack of recognition of a legal relationship between a surrogate-born child and his or her intended mother produces negative impacts on several aspects of that child's right to respect for private life.[138] The Court relying on the *Mennesson* and *Labassee* cases, cited above, holds that such a situation places the child in a position of legal uncertainty regarding his or her identity within the French society. This notably affects his or her inheritance rights, right to nationality, and the peacefulness of his or her continued relationship with his or her intended mother should their intended parents separate or the intended father die.[139] In addition, the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a surrogate-born child and his or her intended mother is incompatible with the BIC.[140] The Court further emphasises that "*the need to provide a possibility of recognition of the legal relationship between the child and the [biological] intended mother applies with even greater force*".[141] One could underline that here the Court implicitly acknowledged that French application of the Latin adage *"mater semper certa est"* and its interpretation of the "direct" involvement of a woman within a child conception is obsolete, by recognising among the line, the indirect involvement of a women within a child's conception to establish motherhood. Then, the Court continues by upholding that, however, the means establishing such a relationship fall under the margin of appreciation of States should they "*be implemented promptly and effectively, in accordance with the [BIC]*".[142] Thus the current French practice relying on adoption appears to be valid in the Court's view. In so deciding, the ECtHR seems *in fine* to condone a situation in which France establishes a distinction between paternal and maternal filiation with regard to intended parents. Moreover, the Court, once again, does not assert its position regarding the practice of surrogacy itself.

---

[137] *Advisory Opinion on the legal parent-child relationship between an intended mother and a surrogate-born child*, §9
[138] *Idem*., §40
[139] *Ibid.*
[140] *Idem*., §42
[141] *Idem*., §47
[142] *Idem*., §§51 and 55

Overall, although there is no instrument related to surrogacy at the CoE level and although the ECtHR does not adjudicate directly on the practice, the Court tends nevertheless to be more and more protective in this field. Not only did the Court afford protection of surrogate-born children *vis-à-vis* their legal relationship with their intended biological fathers, but it now provides for the same protection regarding biological and non-biological intended mothers. Even though this protection has notably been established with regard to children's right to private life, it is undeniable that in a sense it is favourable regarding intended parents' claim to a right to a child. By requiring States, in particular France, to increasingly relax their legislation related to surrogacy and the correlated legal consequences, one could legitimately advance that the Court might slowly be leading towards a recognition of a right to a child. Still, it seems that on this question, both regional Courts diverge on the path to follow.

2.2.2. The European Union

While it is correct to emphasise that there is, under EU law no instrument regulating surrogacy and that the EU being born as an economic organisation does not focus on human rights issues, some CJEU findings are relevant to the current the debate.[143] In *C.D. v. S.T.*[144] and *Z. v. A Government Department and the Board of Management of a Community School*[145], also from 2014, concerning respectively a British and an Irish national both of whom had used surrogacy, the CJEU had to rule on the entitlement to maternity leaves through Directive 92/85/EEC (the Pregnant Workers Directive)[146] for intended mothers.[147] The CJEU, in these cases, asserts that maternity leave is granted to allow a woman who gave birth to recover after a period of pregnancy and childbirth, considering, therefore that pregnancy and childbirth were fundamental criteria to allocate maternity leave. [148] Thus, it seems that through these cases the

[143] Michael Wells-Greco, 2016, p.10
[144] *C.D. v. S.T.* [2014], judgment of 18 March 2014, n°C-167/12
[145] *Z. v. A Government Department and the Board of Management of a Community School* [2014], judgment of 18 March 2014, n°C-363/12
[146] *Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)* [1992], EEC, adopted on 19 October 1992, entered into force on 28 November 1992, No.L.348/1
[147] Michael Wells-Greco, 2016, p.407; Jehanne Sosson, 2015, « La jurisprudence européenne et la gestation pour autrui», *Journal de droit européen*, 23e année, No.216, pp.52-55, p.53
[148] *C.D. v. S.T.*, §§40-43; *Z. v. A Government Department and the Board of management of a community school*, §§57-61

CJEU follows rather the path of French laws according to which the mother is the woman who gives birth. Such an approach undermines any hypothetical recognition of a right to a child as such a right would encompass situations related to women precluded from carrying a child or giving birth as well as situations not involving "any" women at all in the case of gay couples and single men.

Pursuant to both the national and the European (human rights) frameworks there is no standard related to surrogacy *per se*, there is, however, several instruments that have been used by institutions to rule on the issue. While France struggles with the practice, no European Courts have adjudicated on the practice so far. They rather assess situations that occur following surrogacy arrangements. Still, it is undeniable that there is among national and European Courts a dynamic in which they go back and forth towards each other. While France gradually relaxes its legislation regarding surrogacy, the ECtHR progressively pushes the boundaries France is settling, whereas the CJEU tends to indirectly and implicitly support the French position. It appears, consequently, that the transformations surrogacy has imposed on traditional family structures, resulted in both national and European institutions addressing their regulations on the matter, without achieving a consensus. This absence of consensus does not demonstrate that a right to a child is unlikely to occur, as all these institutions are required to deal with these new claims to a right to a child. Thus, the absence of consensus rather demonstrates that a right to a child is a pressing situation that need to be taken into consideration. Consequently, it is now about whether a right to a child is effectively emerging within the European (human rights) framework, starting by an analysis of the ECHR.

III. TOWARDS A PROGRESSIVE RECOGNITION OF A RIGHT TO A CHILD UNDER THE ECHR?

Chapter III aims to analyse whether a right to a child is emerging under the ECHR. Article 8 relating to the right to respect for private and family life has been so far the most cited and used Article when dealing with surrogacy-related cases. Accordingly, Chapter III begins with a deep analysis of the two paragraphs of Article 8 as a possible stepping-stone to the recognition of a right to a child. Then, the hypothetical emergence of a right to a child is assessed in light of Article 12, which relates to the right to marry and to found a family, as already affording protection in the family sphere. Finally, Article 14 on the prohibition of discrimination is analysed to establish if the current distinctions operated by France with regard to certain infertilities and intended parents could support the necessity and the recognition of a right to a child.

3.1.The ECtHR and Article 8 ECHR: entwining and estranging

3.1.1. Art.8(1) ECHR- The right to respect for private and family life: A stepping-stone to a right to a child?

A right to a child could, indeed, find its basis under the ECHR with an ECtHR more willing to take into account changes in societies with regards to ARTs - and more specifically surrogacy - through a slow expansion of the scope of protection afforded by Article 8 (1) ECHR.

Article 8 (1) states as followed:

> *"Everyone has the right to respect for his private and family life, his home and his correspondence".*

Here, the main question is whether the Court, when addressing the scope of private and family life through Article 8(1), is recognising an evolving right to a child. The ECtHR has already in the past recognised the emergence of new rights on the basis of the doctrine of "evolutive" or "dynamic" interpretation. This doctrine ensures that the ECtHR is interpreting the ECHR in

light of present-day conditions as a "living instrument".[149] On that basis the ECtHR already instigated societal shifts around sensitive issues through Article 8 [150] *e.g.* by requiring gender-identity changes[151]; or by ensuring equal status for children born out of wedlock.[152] Therefore, Article 8 has already been afforded a dynamic and progressive interpretation from which new rights have emerged.[153] Moreover, recent years have already seen the ECtHR taking an expansive approach regarding Article 8 in the field of human reproduction. Still, one should assess whether such interpretation is leading or should lead towards the recognition of a right to a child. To begin with, the ECtHR in most instances states that Article 8 provides for the right to become a parent. The development of this right can be traced through several leading cases *vis-à-vis* ARTs and their access.

One of the first cases is *Evans v. UK*[154] concerning a woman who "*underwent IVF with her then partner before having her ovaries removed. When the couple's relationship ended, her ex-partner withdrew his consent for the embryos to be used. National law consequently required that the fertilised eggs be destroyed*".[155] The Applicant was complaining under Article 8 that such an act prevented her from ever having a child to whom she would be genetically related. The Court recognised that such a situation was indeed interfering with the right to private life of the Applicant which encompassed the right to respect for the decision to become a parent in the genetic sense.[156] However, the Court considered that this rationale applied *mutatis mutandis* to her former partner who consequently had the right not to become a parent in the genetic sense. Therefore, the Court considering that national authorities had struck a fair balance between the competing interests concluded that there was no violation of Article 8. Similar findings are found in *Dickson v. UK*[157] in which the Applicant, "*a prisoner serving a 15-year sentence for murder, was refused access to ARTs facilities to enable him to have a child with his wife, who, because of her age would have little chance of conceiving after his release*".[158]

---

[149] Pavel Bures, 2016, "Objectification of children through the European Court of Human Rights Jurisprudence?", *Polski rocznik praw czlowieka i prawa humanitarnego*, Vol.7, pp.35-46, p.37
[150] Clare Ryan, 2018, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights", *Colum. J. Transnat'l L*, No.56, pp.467-528, p.485
[151] See *e.g. Goodwin v. UK* [GC][2002], judgment of 11 July 2002, n°28957/95
[152] See *e.g. Marckx v. Belgium* [1979], judgment of 13 June 1979, n°6833/74
[153] Michael Wells-Greco, 2016, p.358
[154] *Evans v. UK* [GC][2007], judgment of 10 April 2007, n°6339/05
[155]ECtHR, 2019, Factsheet- Reproductive Rights, available at https://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf, acceded on 14 June 2019, p.4
[156] *Evans v. UK*, §§71-72
[157] *Dickson v. UK* [2007], judgment of 4 December 2007, n°44362/04
[158] ECtHR, 2019, p.5

In this case the Court reaffirmed that Article 8 protects the right to respect for the decision to become a genetic parent which was, in the present facts, impeded by the restrictions towards Applicants' access to IVF.[159]

Article 8 consequently provides individuals with a right to become parents in the genetic sense. It could *mutatis mutandis* equate to individuals having a right to have a biological child as becoming a genetic parent implies having a biological child. It would entail that, high scrutiny should be undertaken when preventing would-be parents from accessing specific ARTs including surrogacy, as it would infringe their right to have a biological child. Nevertheless, the right to become a genetic parent presents several issues that could inhibit the emergence of a right to a child. Firstly, as established in the *Evans* case, the right to become parents has to be put alongside the rights of others (*i.e.* in that case the right not to become a genetic parent of Applicant's then partner). Thus, this right is not absolute. Secondly, a right to become a genetic parent, affords protection in limited situations as it excludes individuals who may not be genetically related to their child (*e.g.* heterologous surrogacy). However, the ruling of the ECtHR in *S.H. and others v. Austria*[160] may provide an answer to this second concern. This case relates to two couples who wished to conceive a child through heterologous IVF but were prevented to do so by Austrian law prohibiting the use of sperm donation for IVF and ova donation in general.[161] Although the Court adjudicated a non-violation of Article 8, notably because of the large margin of appreciation given to the State in this area, it considered that "*the right of a couple to conceive a child and to* ***make use of medically assisted procreation for that purpose*** *is also protected by Article 8, as such a choice is an expression of private and family life.*"[162] In the same vein in *Costa and Pavan v Italy*,[163] concerning an Italian couple healthy carriers of cystic fibrosis who could not use PGD to avoid the transmission of that disease to their future child[164], the Court held that Article 8 "*applies to heterologous insemination techniques*".[165] It seems, consequently, that the ECtHR acknowledges that the

[159] *Dickson v. UK*, §66 ; Andrea Mulligan, 2015, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", *Medical Law Review*, Vol.26, No.3, pp.449-475, p.452
[160] *S.H. and Others v. Austria* [GC][2011], judgment of 3 November 2011, n°57813/00
[161] ECtHR, 2019, p.5
[162] *S.H. and others v. Austria*, §82; emphasis added
[163] *Costa and Pavan v. Italy* [2012], judgment of 28 August 2012, n°54270/10
[164] ECtHR, 2019, p.5
[165] *Costa and Pavan v. Italy*, §49; Andrea Mulligan, 2018, p.453

right of individuals to use ARTs, including heterologous ARTs, to conceive a child is protected by Article 8.

However, so far the Court's assessment associated with ARTs is strictly related to the facts of the case. Accordingly, a new self-standing right could not emerge as such. While the right to become a genetic parent as well as the right to use ARTs fall under the protection of Article 8, their concrete applications is assessed by the Court on a case-by-case basis. Thus, although Article 8(1) does afford a protection to those individuals seeking to conceive a child, such protection is not absolute and therefore does not support the emergence of a right to a child, which would require more than protection assessed on a case-by-case basis.

Then, turning to surrogacy-related cases, a first decision which is worth analysing is *Paradiso and Campanelli v. Italy*.[166] First of all, it should be specified that this case has been analysed twice –by the Chamber in 2015 and by the Grand Chamber (on appeal) in 2017. Both cases are studied consecutively. The *Paradiso* case concerns specifically the placement in social-service care of a nine-month-old child born through ISA between a Russian surrogate and an Italian couple.[167] In the First Chamber decision, the Court found a violation of Article 8 considering, that despite the lack of biological links, the brevity and fragility characterising the "family life" of the Applicants, a de facto family life was existing between the Applicants and the surrogate-born child.[168] In fact, the Chamber held that although the cohabitation period "*was in itself relatively short […]the Applicants had acted as parents towards the child [therefore] a* ***de facto family*** *life [existed] between the Applicants and the child*".[169] Consequently, the placement in social-service care of the child breached the right to respect for family life of the Applicants. This decision is all the way interesting taking into account that as it is in France, surrogacy is prohibited in Italy. Still, it seems that, in this case, the Court made the choice of giving pre-eminence to the parental desire of the intended parents and protecting that desire through Article 8. It could, therefore, be alleged that in doing so, the Court indirectly confirmed the emerging phenomenon of a right to a child.

[166] *Paradiso and Campanelli v. Italy* [2015], judgment of 27 January 2015, n°25358/12
[167] ECtHR, 2019, p.11
[168] *Paradiso and Campanelli*, §§67-69
[169] *Ibid*., emphasis added

Nevertheless, the Grand Chamber reversed this ruling in 2017.[170] Indeed, in its Grand Chamber decision, the Court shifted its focus and gave huge weigh to the unlawful acts of the Applicants, the absence of biological ties and the short duration of their relationship. All these elements pursuant to the Court demonstrated that it was inappropriate to conclude that there had been a violation of their (*de facto*) family life.[171] The Grand Chamber rather affirmed that while it "*does not underestimate the impact which the immediate and irreversible separation from the child must have had on the Applicants' private life*"[172], and it upheld that "*the provisions of Article 8* ***do not guarantee […] the right to found a family****. [As] [t]he right to respect for "family life" does not safeguard the* ***mere desire to found a family****[173]; it presupposes* ***the existence of a family***"[174] or at least a potential relationship that could have been developed.[175] Consequently, the Grand Chamber found, by eleven votes to six, that there had been no violation of Article 8.

The *Paradiso* findings would, therefore, undermine the recognition of a right to a child as such a right would begin exactly by the "mere desire" to found a family. It is worth emphasising that the Court in this case rather seems to protect children against the risks of abuse that surrogacy arrangements and a right to a child would entail.[176] In fact, if the Court had authorised the intended parents to become the child's parents it would have been tantamount to authorising an illegal situation created by them in breach of laws on adoption. In fact, the absence of genetic ties between the Applicants and the child was crucial in this case as it led the Court to assess that laws on adoption were applicable. This being established, it should be recalled that when it comes to international adoption, laws[177] governing such situations absolutely prohibit payments.[178] Therefore, condoning a situation in which individuals illegally brought a child from one State to another to become his or her parents, in breach of laws on adoption, would have implicitly led the Court to endorse child trafficking.

---

[170] *Paradiso and Campanelli v. Italy* [GC][2017], judgment of 24 January 2017, n°25358/12; France did not intervene in this case
[171] *Paradiso and Campanelli* [GC], §153
[172] *Idem*., §215
[173] See also *E.B. v. France* [GC][2008], judgment of 22 January 2008, n°43546/02, §41
[174] *Paradiso and Campanelli* [GC], §141; emphasis added; See also *Marckx v. Belgium*, §31
[175] *Ibid.*; See also *Nazarenko v. Russia* [2015], judgment of 16 July 2015, n°39438/13, §58
[176] *Paradiso and Campanelli* [GC], §202
[177] See as instance the *European Convention on Adoption of Children (revised)* [2008], CoE, adopted on 27 November 2008, entered into force on 1 September 2011, CETS No.202; *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* [1993], Hague Conference on Private International Law, adopted on 29 May 1993, entered into force on 1 May 1995, No.33
[178] Art.17 European Convention on adoption of Children; Art.8 Hague Convention on Adoption

Moreover, even when a *de facto* family life is assessed, the Court seems to be unwilling to recognise any violation towards that family's rights. In the aforementioned *Mennesson*, *Labass*ee, *Foulon and Bouvet* and *Laborie* cases, the Court considered instead that because the Applicants had been permitted to live together as a family similarly to other French families, and had not suffered any tangible hardships as a result of their status, France while denying any recognition of legal parent-child relationship did not breach their right to respect for their family life.[179] Thus, although the Court recognised that the right to family life of the Applicants was at stake, it refused to adjudicate on a violation of France towards such right, ruling instead on a violation of the right to private life of the children.[180] Therefore, these cases provide little support for an emerging right to a child as none of these judgments establish a violation of parents' rights to respect for private and family life.

Thus, both surrogacy-related and ARTs-related cases under Article 8 currently afford a limited recognition of a right to a child. Reproductive issues appear to fall within the scope of Article 8 as an expression of private and family life[181] with the Court gradually integrating the right to become a genetic parent and to have access to ARTs within the scope of Article 8.[182] Nevertheless, it has also been established that such rights are not absolute and provide a restricted scope. Moreover, the existence of protected *de facto* family life by Article 8 while being encouraging has never been so far recognised by the ECtHR in the field of surrogacy, nor has been the right to private life of intended parents in that field. Thus, in light of the aforementioned elements, it will be ill-founded to assert that Article 8(1) affords a sufficient basis to establish recognition of a right to a child. One should accordingly analyse the basis provided by the second paragraph of Article 8.

---

[179] *Mennesson v. France*, §§92-94, *Labassee v. France*, §§71-74; *Foulon and Bouvet v. France*, §55; *Laborie v. France*, §29

[180] *Idem*., §96; *Idem*., §75; *Idem.*, §§56-57, *Idem.*, §§31-32

[181] Elisabeth Steiner and Andreea Maria Rosu, 2016, p.359

[182] Guillem Cano Palomares, 2015, « La procréation médicalement assistée devant la Cour européenne des droits de l'homme: évolutions et impact», Mélanges en l'honneur de Dean Spielmann/ Essays in honour of Dean Spielmann: liber amicorum Dean Spielmann, Wolf legal Publisher, pp.73-84, p.74

3.1.2. Art.8(2) ECHR- Legitimate limitations: The national margin of appreciation and the European consensus as keystone players

Article 8(2) provides that:

> *"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".*

States can therefore legitimately interfere with the right to respect for private and family life if such interference is "provided by law", pursued one of the above-mentioned "legitimate aims" and is "necessary in a democratic society". The ECtHR examines the three conditions in the order provided above. Once the Court assesses a State failure to comply with one of the three requirements, it will not examine the case further and declare the interference unjustified *i.e.* the Convention has been infringed. On the contrary, if all three requirements are fulfilled, the interference by the State will be considered as a legitimate restriction to the ECHR's rights.

When it comes to surrogacy-related (and ARTs) cases the Court has little difficulty in concluding that an interference fulfils the two first elements. For instance, in France surrogacy is prohibited under national law and the legitimate aims pursued by French authorities are generally the protection of children and surrogates or the protection of public order which fall under the "protection of health or moral", "public safety" and/or the "protection of the rights and freedoms of others". [183] Thus, these two first stages do not, on a general basis, give rise to discussion.[184] The decisive element is the third stage stating that any restriction must be "necessary in a democratic society". This criterion measures whether the grounds advanced by national authorities to justify an interference with ECHR's rights are "proportionate to the legitimate aim pursued" in a democratic society.[185] This "proportionality test" consists of an

[183] Andrea Mulligan, 2018, p.458; See also *e.g. Mennesson v. France*, §§52 and 62
[184] François Chénedé, 2017, « Petite leçon de « réalisme juridique»: À propos de l'affaire Paradiso et Campanelli contre Italie», Recueil Dalloz, 193e année, No.12, pp.663-666, pp.663-664
[185] See *e.g. Lindon and others v. France* [GC][2007], judgment of 22 October 2007, nos.21279/02 and 36448/02, §45

analysis of the alleged pressing social need supporting the "necessity" of an interference. As part of this inquiry, "*the Court employs the margin of appreciation doctrine, allowing member States a discretion when they act in the area*" of ECHR's rights.[186] The doctrine of the margin of appreciation finds its basis in the principle of subsidiarity of the Court and is articulated as follows: "*[t]he Convention leaves to each Contracting State, **in the first place**, the task of securing the rights and liberties it enshrines*".[187] Indeed, States are considered to be in the best place to assess "*the feeling of their community*".[188] The margin of appreciation, thus, allows the ECtHR to graduate the scope of deference it grants to States in a given area. It entails that "*in deciding the breadth of the margin of appreciation, the ECtHR classifies some factors as meaning that a broad margin of appreciation is appropriate, and other factors as requiring a narrow margin of appreciation*".[189] The margin of appreciation, however, does not suggest an exclusion of the Court's supervision. On the contrary, "*it is for the latter to examine carefully the arguments taken into consideration when reaching the impugned decision and to determine whether a fair balance has been struck between the competing interests*".[190] In its assessment of the margin of appreciation, the Court often takes into account the "European consensus".

The ECtHR uses the existence or non-existence of a consensus amongst member States towards specific areas to subsequently define the scope of the States' margin of appreciation in these fields. It means that the margin of appreciation varies according to "*the strength of the European consensus*".[191] Specifically, a European consensus (or potentially an emerging one) on a particular issue will afford States a narrow margin of appreciation and *vice-versa*. To assess the existence or non-existence of a consensus, the Court generally conducts surveys related either to the amount of converging regulations *e.g.* the number of States that prohibits surrogacy, or on values *e.g.* the trend of States condoning surrogacy.[192]

The importance of the margin of appreciation and of the European consensus towards a recognition of a right to a child is that these two principles usually provide a basis for new rights to be incorporated into the Convention (or how a right is specifically protected). Specifically,

---

[186] Andrea Mulligan, 2018, p.454
[187] *Handyside v. UK* [1976], judgment of 7 December 1976, n°5493/72, §48; emphasis added
[188] *Oliari and others v. Italy* [2015], judgment of 21 July 2015, nos.18766/11 and 36030/11, §176
[189] Andrea Mulligan, 2018, p.454
[190] See *e.g. Paradiso and Campanelli* [GC], §195; See also *S.H. and Others v. Austria*, § 97
[191] Clare Ryan, 2018, p.493
[192] *Idem*., pp.493-94

the European consensus is a powerful factor in "*the ECtHR decision-making on whether to advance its jurisprudence*" in a specific area.[193] Meaning that any inclination to depart from the existence of this consensus to declare the emergence of a new right will undermine both the legitimacy of this right and the Court's jurisprudence in this area.[194] Moreover, a lack of consensus amongst member States will preclude the Court from recognising a new right, as the Court will rather declare that "*the matter falls within the national institutions' margin of appreciation*".[195] It is now about analysing the cases related to ARTs and surrogacy to assess the path taken by the Court in these areas.

The Court's findings in the *Evans* case, set the tone for its subsequent decisions and states that where "*there is no consensus within the member States of the Council of Europe […] particularly where the case* ***raises sensitive moral or ethical issues, the margin will be wider***".[196] Surrogacy and more broadly ARTs undeniably pose ethical and moral issues related *e.g.* to the commodification and instrumentalisation of the human body. This being said, this gives a clue to the general conclusion of the ECtHR regarding both ARTs and surrogacy cases. In fact, besides the *Dickson* and the *Costa and Pavan* cases in which the Court held a violation of Article 8 regarding their specific facts, it tends to afford a wide margin of appreciation to almost all cases related to ARTs. For instance, in *S.H. and others* the ECtHR held the same *ratio decidendi* as in *Evans* and considered that IVF treatments lack consensus among member States and raise sensitive moral and ethical issues entailing a wide margin of appreciation.[197] Similar rulings have been held in cases involving other type of ARTs related to embryo donation and the use of such embryos in the *Parrillo*[198] and *Knecht*[199] cases. Here, the Court reaffirmed that in such areas involving sensitive and ethical issues, the margin of appreciation given to States must be wide.[200]

---

[193] Lady Justice Arden, 2015, "Surrogacy cases throw light on the role of the Court", Mélanges en l'honneur de Dean Spielmann/ Essays in honour of Dean Spielmann: liber amicorum Dean Spielmann, Wolf legal Publisher, pp.3-9, p.7
[194] *Idem*., p.8
[195] *Idem*., p.7
[196] *Evans v. UK*, §§77-78; emphasis added
[197] *S.H. and others v. Austria*, §97
[198] *Parrillo v. Italy* [GC][2015], judgment of 27 August 2015, n°46470/11
[199] *Knecht v. Romania* [2012], judgment of 2 October 2012, n°10048/10
[200] *Parrillo v. Italy*, §169*; Knecht v. Romania*, §59

However, there is an inconsistency, while the Court considers that a wide margin of appreciation should be given in cases raising ethical and moral concerns in an absence of European consensus as it is for ARTs, it also considers that such areas are subject to fast-moving medical and scientific developments.[201] Thus, in reasoning this way, the Court is adopting an extremely high threshold, as it is difficult to conceive that a European consensus will ever evolve in areas that are constantly moving and developing.

Concerning surrogacy-related cases, the Grand Chamber in *Paradiso*, held that the facts of the case were touching upon ethically sensitive issues (*i.e.* ARTs and surrogacy) on which a consensus cannot be established, again affirming that a wide margin of appreciation must be afforded in such fields.[202] Similar findings have been held in the *Mennesson*[203] and *Labassee*[204] cases, with the Court adding that a wide margin of appreciation, concerning not only the decision on whether or not to authorise this method of procreation but also on whether or not to recognise the legal parent-child relationships at stake, should be afforded to States when striking a balance amongst the interests concerned.[205] Finally, in its AO of April 2019 related to the legal parent-child relationship between a surrogate-born child and his or her intended mother, the ECtHR restates that "*where the case raises sensitive moral or ethical issues, the margin of appreciation will be wide*".[206]

Pursuant to these above-mentioned factors, the application of the margin of appreciation and of the European consensus doctrines applied by the ECtHR towards ARTs and surrogacy cases would entail a wide leeway given to national authorities when broaching these areas. Thus, if fairly assessed the approach taken by France should be condoned by the Court. The fact that the Court concluded a violation of the ECHR in the *Mennesson, Labassee, Foulon and Bouvet* and *Laborie* cases was consistent with the view that the French approach affected disproportionality and unreasonably children('s rights). Now that France redressed and addressed this issue, the Court would most probably rely on the margin of appreciation in future cases. This is the path the Court took in its AO of April 2019. In fact, although it affirmed that

[201] See *e.g. Evans and UK*, §81; and *S.H and others v. Austria*, § 97
[202] *Paradiso and Campanelli v. Italy* [GC], §§182-184 and 194
[203] *Mennesson v. France*, §77
[204] *Labassee v. France*, §56
[205] *Mennesson v. France*, §79; *Labassee v. France*, §58
[206] *Advisory Opinion on the legal parent-child relationship between an intended mother and a surrogate-born child*, §43

in light of the current state of law in France, a legal parent-child relationship should be established between a surrogate-born child and his or her intended mother, it leaves the means establishing such relationship at the discretion of France *i.e.* adoption. The Court did so in the name of the margin of appreciation, while acknowledging that this could be problematic as available "*only to intended parents who are married*"[207], as the establishment of such relationship "*is a matter for the domestic courts to decide*".[208] Thus, the doctrines of margin of appreciation and of the European consensus regarding surrogacy would entail in their current state that a right to a child would be far from being recognised or even emerging.

Still, there is another aspect to take into consideration. In fact, the ECtHR ruled in *Mennesson*[209] and *Labassee,*[210] as it previously ruled in the *Evans*[211] and *S.H and others*[212] cases, that when an issue although raising ethical and moral concerns is touching upon an individual's identity or an individual's existence, States margin of appreciation must be narrower and limited. This might be coupled with its ruling in the *Dickson* case, in which the Court sustains that "*the choice to become a genetic parent* ***is one facet of an individual's existence and identity***".[213] Thus, if the margin of appreciation of a State should be narrower when it comes to aspects of an individual's existence and identity and that the right to become a genetic parent falls within an individual's existence and identity; therefore, a State margin of appreciation should be narrower when it comes to an individual's will to become a parent in the genetic sense. It implies that high scrutiny should therefore be required on behalf of States when balancing the interests at stake. This reasoning is nevertheless limited as in all the aforementioned cases, the Court did not *in fine* give primacy to Applicants' will to become genetic parents as counterbalanced by the rights of others *i.e.* specifically, the children, the former partner and the State. Moreover, such reasoning would only concern genetic parents, which would not be in a spirit of a right to a child for all. In addition, a narrower margin of appreciation does not necessary entail the emergence of a new right. It rather means that States will be asked to particular scrutinise in that case. It provides consequently little space for the recognition of a right to a child.

---

[207] *Idem*., §57
[208] *Idem*., §58
[209] *Mennesson v. France*, §77
[210] *Labassee v. France*, §56
[211] *Evans v. UK*, §77
[212] *S.H. and others v. Austria*, §97
[213] *Dickson v. UK*, §78; emphasis added

Analysis of the above cases demonstrate that both the margin of appreciation and the European consensus are vital to the outcomes concerning surrogacy and ARTs-related cases.[214] Nevertheless, these two areas offer little consensus amongst member States providing them with a broad margin of appreciation. Similarly, the sensitive ethical and moral issues raised by ARTs and surrogacy strengthen the idea according to which an extensive interpretation of Article 8 rights cannot be given at this point in time. Moreover, surrogacy being probably the most controversial form of ARTs, it is unlikely that a consensus will emerge in the near future or that surrogacy, in particular, will fall outside the category of "ethical and moral" concerns.[215] Even though the margin of appreciation must be narrower when a particularly important aspect of an individual's existence or identity is at stake including the right to respect for the decision to become a parent in the genetic sense, such a finding while being encouraging towards the issue of surrogacy itself (*i.e.* the liberalisation of surrogacy), provides little support for the recognition of a right to a child. Therefore, in an overall, the doctrines of the margin of appreciation and of the European consensus provide little space for a hypothetical recognition of a right to a child.

Chapter three, part I demonstrated that despite factors going in favour of an emerging right to a child, Article 8 ECHR does not provide that a recognition of such right is likely to occur, as least, in the near future. While Article 8(1) encompasses factors that could potentially advocate for a recognition of a right to a child *i.e.* the right to become a genetic parent and the right to access ARTs to achieve one's parental project, such rights are too limited in both *rationae materiae* and *personae*. Similarly, the application of the doctrines of the margin of appreciation and of the European consensus of Article 8(2) tend to provide States with the possibility to legitimately limit, at their "convenience" ARTs and surrogacy access according to their own beliefs as long as these limitations are not excessively disproportionate or unreasonable. This wide leeway afforded to States towards the restriction of access to, as well as rights arising from, ARTs and surrogacy confirms that a right to a child is not emerging under Article 8.[216] Nevertheless, Article 8 is not the only basis on which a right to a child could emerge under the ECHR as Article 12 likewise affords protection to family's rights. This right should thus be analysed.

---

[214] Andrea Mulligan, 2018, p.456
[215] *Idem*., p.475
[216] ECLJ, 2018, p.37

3.2.The ECtHR and Articles 12 and 14 ECHR: Alternatives to a recognition of a right to a child?

3.2.1. Art.12 ECHR- The right to marry and to found a family

Article 12 ECHR states as followed:

> *"Men and women of marriageable age have the right to marry and* ***to found a family****, according to the national laws governing the exercise of this right".*[217]

Article 12, like Article 8, mentions "family". Nevertheless, when it comes to ARTs and surrogacy, the ECtHR rarely refers to the former. Specifically, concerning surrogacy-related cases, Article 12 has never been raised by the Applicants in their claims to the Court. Still some would-be parents complained under Article 12 with regards to the inaccessibility to specific ARTs in their country. In fact, the Applicants in *Dickson* alleged that their right to marry and to found a family had been breached by Austria when the latter denied them access to IVF.[218] After having examined Article 8, the Court held that "*no separate issue arise[d] under Article 12 of the Convention and that it [was]not therefore necessary also to examine the Applicants' complaint under this provision*".[219] In others word, the Court having adjudicated on Article 8 (violation), considered that there was no longer any reason to rule separately on Article 12 as both Articles related to the same issue *i.e.* family. Thus, findings of the Court concerning Article 8 would apply *mutatis mutandis* to Article 12. This finding has been upheld in the concurring opinion of the *Paradiso* case in which judges de Gaetano, Pinto de Albuquerqe, Wojtyczel and Dedov established that "*Article 8 must be read in the context of Article 12*".[220]

Such an approach may seem odd as Article 8 and Article 12 are two different Articles. Despites sharing similarities, the mere fact that they are two distinct Articles demonstrates that they do not afford the same protection. Nevertheless, the Court considered that the similarities shared by Articles 12 and 8 could justify a correlated analysis. Such a ruling could imply that a couple when married is even more "legitimate" to raise a right to found a family.[221] Indeed, making

---

[217] Emphasis added
[218] *Dickson v. UK*, §37
[219] *Idem*., §87
[220] *Paradiso and Campanelli v. Italy* [GC][2017], judgment of 24 January 2017, n°25358/12, Concurring Opinion of Judges de Gaetano, Pinto de Albuquerqe, Wojtyczel and Dedov, §3
[221] Sanni Nieminen, 2018, "Assisted Reproductive Technologies and Medically Assisted Reproduction in the Context of the European Convention on Human Rights: Legal and Social Perspective", Umea University, p.38

these Articles working alongside each other could suggest that married couples have the right to found a family and to respect for their family and private life. By combining the previous findings related to Article 8, it would mean that married couples would have the right to become genetic parents, to achieve parenthood through the use of ARTs and to found a family. On that basis, one could assert that such an approach could indeed provide married couples with a right to a child or at a minimum would entail a liberalisation of ARTs and surrogacy. In fact, the correlation of the aforementioned rights would assert that individuals should not be prevented from accessing ARTs that could allow them to become a genetic parent and to found a family. However, Judge de Gaetano in his separate opinion of the case *S.H. and others* highlights that "*neither Article 8 nor Article 12 can be construed as granting a right to conceive a child at any cost*".[222] Thus, a right to (conceive) a child is still subject to limitations. The wording "*at all cost*" entails that such right must be balanced with other elements in order not to provoke disproportionate impact within its application. The *Evans* case provides a good example in this sense. Indeed, the right to conceive a child of the Applicant could not have been recognised at the expense of her former partner's right not to become a genetic parent. Secondly, it might be arduous "*to argue that international human rights law interprets the right to found a family to be as broad as to include the right to access ART*".[223] As advanced at the preliminary stages of this thesis, founding and creating a family are not synonyms. Similarly, the right to found a family does not necessarily require that individuals should be provided help in cases where they are prevented to procreate naturally. Moreover, Article 12 connects the right to found a family with marriage. Indeed, the wording "*this right*" suggests that "*the right to marry and to found a family*" is a single right.[224] Therefore, by seeing the foundation of a family only as part of a marriage, Article 12 "*offers a very limited scope of protection*" to would-be parents.[225] Thus, if Article 12 would be used as a basis to the recognition of a right to a child, it would entail that such right would only apply to married couples. This would bring a discriminatory treatment *vis-à-vis* unmarried couples as the marital status must not determine whether or not individuals should found a family.[226] Also, taking into account that the notion "family" has been interpreted

[222] *S.H. and Others v. Austria* [GC][2011], judgment of 3 November 2011, n°57813/00, Separate Opinion Judge de Gaetano, §2
[223] Elisabeth Steiner and Andreea Maria Rosu, 2016, p.353
[224] Athena Liu, 1991, "Artificial Reproduction and Reproductive Rights", University of Hong Kong, Dartmouth, p.29
[225] *Idem*., p.30
[226] CCNE, 2018, p.112

by the ECtHR as also encompassing *de facto* families, the foundation of families cannot only be restricted to marriage-composed ones.[227]

Thus, when comparing Article 12 to Article 8, it seems that Article 8 by connecting "family" not to marriage but to "private life" provides the notion of "family" with "*a much wider meaning that in Article 12*".[228] On that basis, and in light of what has been argued, while the right to found a family under Article 12 might be relevant when it comes to (access to) ARTs and surrogacy, when family's rights are at stake Article 8 seems to provide stronger incentives.

Thus, as it has been established that Article 8, in its current state, could not provide a basis to a right to a child, it is even less likely that Article 12 would do so. However, lastly, the emergence of a right to a child should be assessed in light of Article 14 ECHR providing for the prohibition of discrimination. As a right to a child is currently unlikely to emerge under family-related rights, it may be that the current disparities that the French framework instigates between intended parents require an invention from human rights institutions through the recognition of a right to a child.

3.2.2. Art.14 ECHR-Prohibition of discrimination

Article 14 ECHR stands as followed:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status".*

Article 14 ECHR provides, consequently, for the prohibition of discrimination. However, it might be advanced that France in its current approach of ARTs, including surrogacy tend to discriminate against intended parents. Indeed, the French framework by restricting ARTs only to cases of clinically diagnosed pathological infertility can be considered as infringing

[227] Andrea Mulligan, 2018, p.452
[228] Athena Liu, 1991, p.30

individuals' equal access to reproductive technologies.[229] Having a particular type of infertility (*i.e.* social) disregarded while other types (*i.e.* medically diagnosed) are provided with a response from society, might be considered discriminatory, notably when whatever the type of infertility, it leads to a situation where individuals are precluded from having children in a natural manner.[230] Similarly, legalising same-sex marriage while maintaining the inaccessibility of same-sex couples to ARTs creates a biased system. In fact, by legalising same-sex marriage, France has rejected " a "*natural" sexual division of labour requiring marriage to be restricted to a union between a man and a woman*"[231]; why could the same rationale not being applied when it comes to procreation? Moreover, it could be linked to Article 12 ECHR, which affords married couple with a right to found a family. France by allowing same-sex marriage while preventing same-sex couples from founding a family might also violate the right protected by Article 12. The French conception of social ARTs could therefore be considered as being the maintenance of an outdated vision based on intolerance and exclusion while today's societies rather require equalities for all. Thus, at minimum France should "*broaden the definition of "infertility" so as to encompass the physiological infertility of same-sex couples [and single individuals] and enable them access to [ARTs] for the purpose of their parental projects*".[232] Consequently, the current situation of ARTs and more specifically surrogacy in France reflects social inequalities and discrimination between intended parents making procreative disparities more salient.[233] Thus, should a discriminatory treatment be found within the French approach, it would lead to a liberalisation of ARTs including surrogacy, which could itself support thereof the emergence of a right to a child.

However, a finding of discrimination would be rarely indisputable. In fact, the difference of treatment might be justified by the difference of situation between social and pathological infertility as well as between homosexual and heterosexual (infertile) couple.[234] The rulings of the ECtHR when analysing Article 14 read in conjunction with Article 8 - as Article 14 is not self-standing *i.e.* it must be read in conjunction with one of the other rights protected by the

---

[229] Véronique Fournier, Denis Berthiau, Julie d'Haussy *et al*, 2013, "Access to assisted reproductive technologies in France: The emergence of the patients' voice", *Medicine, Health Care and Philosophy*, Vol.16, No.1, pp.55-68, p.60
[230] CCNE, 2010, p.16
[231] Barbara Stark, 2011, "Transnational surrogacy and international human rights law", *ILSA J. Int'l & Comp. L.*, Vol.18, pp.369-386, p.381
[232] Marion Abecassis, 2016, p.27
[233] Ludovica Poli, 2017, p.8
[234] CCNE, 2017, p.7

Convention[235] - could support such findings. Indeed, in the case *Gas and Dubois v. France*[236] the Court establishes that French regulations concerning access to ARTs characterised by the deprivation of homosexual couples to such access could not be considered as entailing a difference in treatment, the situations being different.[237] This argument is also support by the CCNE which considers that a reasoning relying on an inequality of access cannot be admissible in a legal sense because, with regard to procreation, a clinically diagnosed infertile couple is not in an equivalent situation to that of single individuals or homosexual couples.[238]

Nonetheless, on the other hand, it would seem that, on a general basis, the ECtHR avoids ruling on discrimination and ARTs as far as possible. In fact, when intended parents are claiming a violation of their right not to be discriminated against, the Court almost systematically refrains to rule on Article 14. As instance, in *Evans*, the Grand Chamber concludes that "*it is not required to decide […] whether the Applicant could properly complain of a difference of treatment […], because the reasons given for finding that there was no violation of Article 8 also afford a reasonable and objective justification under Article 14*".[239] Then, in *Costa and Pavan,* while the Applicants raised Article 14[240], the Court remained silent on that issue. It might be contended that here the opposite reasoning has been applied. In fact, because the Court in *Costa and Pavan* affirms a violation of Article 8, it does not "need" to assess the violation of Article 14 which was correlated to Article 8. This is the rationale advanced by the ECtHR in the *Mennesson* case in which it considers that "*in view of its finding of a violation of Article 8 […], the Court [does] not consider it necessary to examine the Applicant's complaint under Article 14*".[241] Thus, when it comes to Article 14, the ECtHR seems to operate a "sleight of hand" in which to avoid being compelled to rule on allegedly discriminatory situations when it comes to "sensitive ethical and moral" concerns raised by ARTs and surrogacy, will refer to its "main" conclusions concerning Article 8. Consequently, even though Article 14 would represent a sustainable first step, it has not yet been considered by the Court.[242] Nevertheless, in light of the growing and pressing social claims in this regard, the Court will most probably be compelled to address this issue in the coming years.

---

[235] Michael Wells-Greco, 2016, p.353
[236] *Gas and Dubois v. France* [2012], judgment of 15 March 2012, n°25951/07
[237] *Idem.*, §63
[238] CCNE, 2018, p.120
[239] *Evans v. UK*, §95
[240] *Costa et Pavan v. Italy*, §3
[241] *Mennesson v. France*, §108
[242] Julia de Koenigswarter, 2014, p.40

Therefore, while both Articles 12 and 14 ECHR represent promising factors towards the emergence of a right to a child, they both fail to provide a sustainable basis to that right. Article 12 by its wording is inherently a restricted and limited right as applying notably to married couples. Then, the ECtHR does not seem to be willing to take a position on the current situation in light of Article 14 and hypothetical ongoing discrimination, condoning nevertheless *a fortiori* France's approach. It means that, although the ECHR and its interpretation made by the ECtHR undeniably give small indications implying that a right to a child may be developing, in its current state the Convention does not provide for an emerging right to a child. However, it should be emphasised that the ECHR provides mainly for civil and political rights, while the second generation of human rights *i.e.* economic, social and cultural also increasingly leads to the recognition of new rights. Specifically, in the case at stake, the right to health might constitute a sustainable basis to the recognition of a right to a child. This is therefore a situation that must be taken into consideration.

IV. TOWARDS A PROGRESSIVE RECOGNITION OF A RIGHT TO A CHILD THROUGH REPRODUCTIVE HEALTH ARGUMENTS?

The hypothetical emergence of a right to a child within the European human rights framework should not only be restricted to the ECHR as other instruments could support the recognition of such a right. Thus, it is now about analysing a right to a child not in light of the ECHR, but in light of reproductive health arguments. Hence, in the first part, Chapter IV is analysing reproductive rights arguments in consideration of a possible recognition of a right to a child. Then, in the second part, reproductive health arguments are assessed in correlation with the notion of procreative liberty as vector of a right to a child. In the final part, Chapter IV assesses the recognition of a right to a child through the argument of the right to cross-border healthcare services.

4.1.Reproductive health arguments: a half-worded right to a child?

4.1.1. Reproductive rights

Reproductive rights are a relatively new field of international law.[243] This international character rather than European does not preclude such argument from being relevant to the present analysis. In fact, as established both national and European institutions recurrently refer to international law when analysing and developing their own standards, notably when the standards used have been developed under the auspices of the United Nations (UN) to which both France and all European countries are member States. Thus, reproductive rights should not be disregarded as not being only restricted to the European human rights framework.

Reproductive rights emerged for the first time through the Proclamation of Tehran which provides that "*parents have a basic human right to determine freely and responsibly the number and the spacing of their children*."[244] Since then, the United Nations Population Fund (UNFA) *i.e.* the UN sexual and reproductive health agency, broaden that definition by considering reproductive rights as "*the basic rights of **all couples** and **individuals** to **decide freely** and **responsibly** the number, spacing and timing of their children and to have the information and **means to do so**, and the right to attain **the highest standard of sexual and reproductive health***".[245] Reproductive rights would therefore refer to individuals' rights not to be prevented from freely deciding when and how they want to procreate, notably if this decision is taken in a responsible manner. The wording "responsibly" of both definitions suggests that reproductive rights are limited rights in the sense that they cannot be claimed *e.g.* at the expense of others' rights and freedoms. It similarly entails that individuals cannot unreasonably raise their reproductive rights *e.g.* by requiring States to completely disregard individuals' choices when it comes to procreation. Then the notion "all couples and individuals" from the UNFA affords a broader protection than the notion "parents" of the Proclamation of Tehran by encompassing all form of family structures *i.e.* single, homosexual, heterosexual parent(s) etc.

[243] Barbara Stark, 2011, p.377
[244] *Proclamation of Teheran* [1968], UN, 22 April to 13 May 1968, Final Act of the International Conference on Human Rights, UN. Doc. A/COBF/32/41 at 3, §16
[245] UNFPA, 2016, p.19; emphasis added

Moreover, reproductive rights have to be placed in relation to "reproductive and sexual health".[246] Reproductive health is defined as "*the right of men and women to have access […] to methods of their choice for regulation of fertility*".[247] It includes "*the constellation of methods, techniques and services that contribute to reproductive health and well-being through preventing and solving reproductive health problems*".[248] All the same, "*surrogacy might be deemed to be consonant with the reproductive rights and reproductive health of intended parents*".[249] Indeed, through the protection afforded by their reproductive rights and in the name of their reproductive health infertile intended parents (as well as surrogates) should "*have a possibility to decide for themselves about their reproduction and their ability to have children*".[250] Thus, reproductive rights and reproductive health provide individuals with a right to (have) a child by choice.[251] However, reproductive rights should not be understood as implying that States must provide a child to individuals, they rather affirm that State must assist intended parents in their "quests" for children *i.e.* providing them access to the method of their choice. In other words, a right to a child recognised under the auspices of reproductive rights and health would be a negative right *i.e.* States should not interfere with the reproductive will of individuals. Therefore, reproductive rights and health while not providing *strico sensus* for a right to a child would rather provide for a right not to be prevented from having responsibly children at the time and through the mean(s) individuals desire.

Nevertheless, as far as it comes to reproductive rights, States have been reluctant to incorporate them in self-standing binding international instruments. All the aforementioned instruments providing for reproductive rights and health are not binding *i.e.* do not entail any obligation as such. Core human rights instruments, though, encompass and protect to some extent elements

---

[246] Ludovica Poli, 2017, p.9

[247] *Programme of Action of the International Conference on Population Development*, 1994, UN, adopted at the International Conference on Population and Development Cairo, 5-13 September 1994, 20th Anniversary Edition, available at https://www.unfpa.org/publications/international-conference-population-and-development-programme-action, accessed on 26 May 2019, §7(2); *Beijing Declaration and Platform of Action*, 1995, UN, Fourth Conference on Women, available at https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf, accessed on 26 May 2019, §97

[248] *Ibid*.; *Idem*., §94

[249] Mario Gervasi, 2018, "The European Court of Human Rights and Technological Development: The Issue of the Continuity of the Family Status Established Abroad Through Recourse to Surrogate Motherhood", Diritti umani e diritto internazionale (DUDI), Vol.12, No.2, pp.213-242, p.214

[250] Birgitta Essen and Sara Johnsdotter, 2015, "Transnational surrogacy- reproductive rights for whom?", Nordic Federation of Societies of Obstetrics and Gynecology, *Acta Obstetricia et Gynecologica Scandinavica*, Vol.94, pp.449-450, p.449

[251] *Programme of Action of the International Conference on Population Development*, 1994, §7(16)

of reproductive rights.[252] For instance, the right to the highest attainable standard of health, which includes the right to sexual and reproductive health is protected by Article 12(1) ICESCR. Similarly, Article 15(1)(b) ICESCR provides for the right of all persons to benefit from scientific progress and its application. It underpins that all individuals have the right to access scientific progress towards human reproduction as well as to use such progress if facing infertility issues.[253] While reproductive rights and health are neither enshrined within any binding European instrument, the ECtHR several times acknowledged their veracity either through the ECHR itself or when referring to the ICESCR as part of its analysis of ECHR's rights. For instance, the ECtHR, by stating in the *Evans* case that Article 8 encompasses the right to respect for the decision to become or not to become parents in the genetic sense recognised that reproductive rights of individuals are protected by the ECHR.[254] Moreover, the Court admitted that Article 8 was encompassing reproductive rights and health, in a case related to birth at home in which it affirmed that reproduction "*encompasses issues of physical and moral integrity, medical care, reproductive health and the protection of health-related information. These issues […] are therefore fundamentally linked to [an individual]'s private life and fall within the scope of that concept for the purposes of Article 8 of the Convention*".[255] Going a step further and relying directly on the ICESCR, Judges Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria in their Dissenting Opinion attached to the *S.H and others* case, assessed that nowadays "*society has to cope with new challenges brought to the forefront by [a] technological revolution [in the field of assisted reproduction] and its social implications. In this respect, it seems […] important to recall Articles 12 § 1 and 15 § 1 (b) [ICESCR] which recognise the right of everyone to enjoy the benefits of scientific progress and its applications, and the right of everyone to enjoy the highest standard of physical and mental health*".[256] Therefore, reproductive rights are not devoid of a legal basis at the regional level and although they fail to be enshrined directly in any instrument, the ECtHR tends to recognise their existence within European human rights law and affords them protection under the ECHR. It means, in light of the above-development, that reproductive rights and health would indeed advocate for

[252] UNFPA, 2016, p.21
[253] *Idem*., p.114
[254] *Evans v. UK*, §71
[255] *Dubská and Krejzová v. the Czech Republic* [GC][2016], judgment of 15 November 2016, nos.28859/11 and 28473, §163
[256] *S.H and Others v. Austria* [GC][2011], judgment of 3 November 2011, n°57813/00, Joint Dissenting Opinion of Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria, §9

an emerging right to (responsibly have) a child through the mean of one's choice within the European human rights framework.

Still, reproductive rights and health are limited in the sense that the treatment, service or method that individuals choose to treat their infertility should not be against the law.[257] Similarly, reproductive rights should be, as already established, reasonably claimed. It means that in countries, such as France, in which surrogacy or a specific type of ARTs are prohibited as unreasonably impacting the rights of others, reproductive rights and health would constitute a limited basis for infertile couples to claim a right to a child. This condition greatly undermines the recognition of a right to child under reproductive rights arguments. Nonetheless, on the other side, France's interference within individuals' reproductive choices could be deemed illegitimate as infringing their procreative liberty as established below.

4.1.2. Procreative liberty

The argument of procreative liberty relies on the idea that certain areas are at such a high degree of privacy and intimacy that they should not be scrutinised by States.[258] This is the case with procreation. Similarly, the notion of "family", often put alongside "procreation", has traditionally been seen as falling within the private sphere; as demonstrated by the wording of Article 8 ECHR combining the right to private life with the right to family life.[259] Thus, individuals' decision to have a child is a private one to which only special circumstances should justify an obstruction.[260]

Procreative liberty is also an expression of personal autonomy.[261] Concerned individuals should be the only ones deciding whether or not and when to procreate. While it may appear controversial with regards to surrogacy, it is rather "obvious" concerning other reproductive-related areas *e.g.* abortion. Indeed, it might be quite understandable to assess that women only

[257] *Programme of Action of the International Conference on Population Development*, 1994, UN, §7(2); *Beijing Declaration and Platform of Action*, 1995, UN, §94
[258] Ludovica Poli, 2017, p.6
[259] Sanni Nieminen, 2018, p.48
[260] Françoise Dekeuwer-Défossez, 2010, « Réflexions à verser au dossier du « droit à l'enfant»», Revue Lamy Droit Civil, No.76, 7pp, p.1
[261]Défenseur des droits, 2019, Décision du Défenseur des droits n°2019-016, available at https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=18789, accessed on 19 May 2019, p.3

should be able to decide whether or not they wish to abort, and it seems outrageous that third-parties prevent them from making a specific choice regarding their own bodies. Thus, why it cannot be the same when it comes to surrogacy, in particular, when all the parties gave their free and informed consent. All in all, following the procreative liberty argument, the right to a child should, as it concerns reproductive rights, at least be a "negative" right.[262]

However, an argument upholding that the liberty of one prevents the exercise of the liberty of others, cannot stand in human rights discourse. On this basis, Mrs. Marie-Josèphe Devillers asserts that "*the argument of procreative liberty is an argument never raised by surrogate mothers themselves, but always by third parties interested in this type of activity (i.e. intermediaries) or by intended parents*".[263] Moreover, a decision may no longer be seen as falling within the private sphere when the feasibility of that decision involves a number of third-parties *e.g.* doctors, clinics, surrogacy agencies, gametes donors, and lawyers.[264] Similarly, although the decision to use surrogacy or ARTs is private decision, access to ARTs "*is decided very much on the State-level*"[265] and their realisation are dependent of public expenses. In such situation it cannot be considered that a State illegitimately interfere with intended parents' decision as they need State intervention to fulfil their desire.

In light of the above-mentioned findings while reproductive-related arguments offer a consequent basis for the recognition of a right to a child, it seems that here again, they provide for a limited feasibility of recognition of such a right. On the one hand, reproductive rights are mainly dependent of others' rights and liberties as demonstrated by their requirement of being claimed "reasonably". Thus, reproductive rights cannot be claimed absolutely and are subjected to high limitations depending of their context and impact on others' rights. On the other hand, while the argument of procreative liberty would refer to a private choice that individuals could make without being prevented by States, the feasibility of their choice remains highly dependent on State intervention. Therefore, reproductive health arguments by being reliant on a multiple of other factors seem too precarious to conduct a genuine emergence of a right to a child. Nonetheless, individuals could be indirectly afforded with a right to a child through the

[262] Véronique Fournier, Denis Berthiau, Julie d'Haussy *et al*, 2013, p.65
[263] Based on the interview conducted with Mrs. Marie Josèphe Devillers
[264] Ludovica Poli, 2017, p.6
[265] Sanni Nieminen, 2018, p.48

right to cross-border healthcare which would allow them to enjoy such right in countries allowing specific type of ARTs including surrogacy.

4.2.The right to cross-border healthcare services: A boon for a recognition of a right to a child?

4.2.1. The right to cross-border healthcare services and the ECtHR

The main aim of the ECtHR is not to ensure the free movement of goods, services, capitals and persons, as it is for the EU. Its purpose is rather to guarantee human rights within Europe. In spite of this, the Court in its case-law already acknowledged, along the line, that individuals are not prohibited under European human rights law to have access to cross-border healthcare services.[266] In the *S.H and others v. Austria* decision, the Court points out that while Austrian legislation was prohibiting heterologous ARTs, there was "*no prohibition […] on going abroad to seek treatment of infertility*".[267] It even highlights that in addition of this, in the event of a successful treatment abroad "*Austrian law provided for the recognition of paternity and maternity*".[268] This reasoning can be fully transposed to the French case. France is prohibiting surrogacy within its territory. However, it does not "punish" individuals who went abroad to perform ISAs. Secondly, the CCass affirms that Article 47 CC provides for the recognition of foreign birth certificates at the domestic level. A recognition of parenthood in such situations is consequently provided by law. Thirdly, the fact that individuals can go abroad to use ARTs prohibited within the national territory is condoned by French authorities themselves as supported by both the *Assemblée Nationale*[269] and the CCNE.[270]

Thus, both European and national authorities are tacitly arguing that intended parents can travel abroad for the purpose of receiving medically assisted treatments prohibited within national jurisdiction. However, asserting such an assumption may also equate to affirming that European and national authorities are implicitly encouraging procreative tourism. It is instead

---

[266] Patrick Kinsch, 2015, « L'article 8 de la Convention et l'obligation de reconnaître les situations familiales constituées à l'étranger: à la recherche du fondement d'une solution jurisprudentielle», Mélanges en l'honneur de Dean Spielmann/ Essays in honour of Dean Spielmann: liber amicorum Dean Spielmann, Wolf legal Publisher, pp.273-282, p.280
[267] *S.H. and others v. Austria*, §114
[268] *Ibid*.
[269] Assemblée Nationale, 2018, p.5
[270] CCNE, 2017, p.45

correct that Courts hold that they will not interfere with individuals' choice to go abroad to avail themselves of those services. Still, the right to cross-border healthcare could further be explained through the lens of EU law.

4.2.2. The right to cross-border healthcare service: Support on behalf of the CJEU and EU law

The EU and the CoE are the two main European institutions. Although they do not regulate the same areas, they both refer to and complete each other in certain fields. EU law that concerns the right to cross-border healthcare services may, therefore, strongly support the above-mentioned conclusions, notably through regulations governing the Single market *i.e.* the freedom of movement of goods, persons, capitals and services.[271] Indeed, Article 56 of the Treaty on the Functioning of the EU[272] and Directive 2011/24/EU,[273] which respectively rule on the prohibition of any restriction on the freedom to provide services within the EU and on the application of patients' rights in cross-border healthcare could be understood as implying an enforceable "right to cross-border healthcare services" suggesting that individuals could circulate freely among member States to access specific healthcare services including surrogacy.[274]

Specifically, Directive No. 2011/24/EU "*facilitates access to safe, high-quality cross-border healthcare and [promotes] healthcare-related cooperation between EU States*"[275] except regarding long-term care services, organ transplants and public vaccination programmes.[276] Provisions of the Directive encompass all healthcare services provided or prescribed by any "*private or public healthcare providers practicing legally [in any EU member State]*".[277] It could therefore include any country which legally provides surrogacy services *e.g.* the

[271] Elisabeth Steiner and Andreea Maria Rosu, 2016, p.347
[272] *Consolidated version of the Treaty on the Functioning of the European Union* [2007], EU, adopted on 13 December 2008, entered into force on 1 December 2009, 2008/C115/01
[273] *Directive 2011/24/EU of the European Parliament and of the Council on the Application of Patients' Rights in Cross-border Healthcare* [2011], EU, adopted on 9 March 2011, entered into force on 4 April 2011, JO L.88/45
[274] Jehanne Sosson, 2015, p.52
[275]CLEISS, 2019, "FAQ: Directive on cross-border healthcare", available at https://www.cleiss.fr/faq/directive_sur_les_soins_transfrontaliers_en.html, accessed on 2 July 2019 ; Art.1 Directive No. 2011/24/EU
[276] *Ibid*.
[277] CLEISS, 2019; Art.4(1)(a) Directive No.2011/24/EU

Netherlands or Greece. The Directive guarantees, additionally, a regulated framework as well as a complaint mechanism in case of harm which could provide a safeguard regarding abuses.[278]

The right to healthcare services is also supported by the CJEU. In the *Grogan*[279] case, concerning abortion in Ireland, the CJEU considers that healthcare services, even though being considered as illegal or immoral at the domestic level, constitute services in the sense of EU law. It recalls that EU law relying, notably, on the freedom to provide services and on the freedom of movement of citizens, prevents member States from prohibiting their citizens to seek "*treatment elsewhere in the EU [where such treatment is legal], however unethical the treatment is in [their] State of origin*".[280] It seems, therefore, that the two European Courts, while recognising that some healthcare services may be "unethical" or "immoral" within specific national legislations, endorse the idea that citizens can merely cross national borders and seek such services in other (EU/European) countries in which they are legally performed.[281]

However, a first concern would be the risk of abuses of such a liberty which will reduce to almost nothing a State's freedom to prohibit or limit surrogacy in its territory. Still in its current state, the Courts' reasoning respects States' sovereignty while recognising the right to access to all ARTs made available by medical progress.[282] That implicit recognition is by itself a big step forward regarding surrogacy but also towards the recognition of a right to a child at the European level. Secondly, this reasoning stands only if ARTs, and specifically surrogacy, are indeed considered to be healthcare services. According to the WHO, healthcare services are "*service delivery systems [encompassing] the whole spectrum of care from promotion and prevention to diagnostic, rehabilitation and palliative care*".[283] ARTs being techniques palliating human infertility could legitimately be considered as healthcare services. Nevertheless, according to the definition of the Directive, healthcare services means "*health services provided by health professionals to patients to assess, maintain or restore their state of health, including the prescription, dispensation and provision of medicinal products and*

[278] Art.4(2)(c) Directive No.2011/24/EU
[279] *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan* [1991], judgment of 4 October 1991, n°C-159/90
[280] Elisabeth Steiner and Andreea Maria Rosu, 2016, pp.356-357
[281] Véronique Fournier, Denis Berthiau, Julie d'Haussy *et al*, 2013, p.66
[282] *Idem*., p.67
[283] WHO, 2019, "Health Services", available at https://www.who.int/topics/health_services/en/, accessed on 2 July 2019

medical devices".[284] It means that *strico sensus*, surrogacy and ARTs do not fall under the definition provide by the Directive. Therefore, a right to cross-border healthcare services is a boon to the recognition of a right to a child but is not absolute, particularly when it is dependent of the inclusion of ARTs as falling under the notion of "healthcare services". Nevertheless, on the whole, the right to cross-border healthcare tends to support a right to a child by allowing individual physiologically and biologically unable to have children to seek treatments against their infertility abroad.

Reproductive health arguments undoubtedly support the recognition of a right to a child. Nonetheless, it is still too soon to affirm with certainty that reproductive health arguments would indeed lead to the recognition of a right to a child. Indeed, reproductive health arguments are still too narrow in their scope and inherently limited. These elements could prematurely deprive the right to a child of any (sustainable) existence. Another question that needs to be asked is should this right ever be recognised? Throughout the previous Chapters an argument was recurrently raised, the protection of the rights and freedoms of others. Thus, although some arguments tend to support the emergence of a right to a child, they should be counterweighted with the impact that such a right would have on others' rights and liberties.[285]

V. INTERMINGLING OF CONFLICTING RIGHTS: SHOULD A RIGHT TO A CHILD EVER BE RECOGNISED?

In this final Chapter the (hypothetical) right to a child is analysed alongside the rights of other stakeholders. Indeed, should this right ever be recognised, or even emerging, one must beforehand consider and anticipate the outcome that such a recognition would have on others' rights and freedoms. Hence, firstly a right to a child is considered in light of the rights of the child, in particular his or her best interests, to evaluate the compatibility or the incompatibility of a right to a child within the framework of children's rights. Secondly, the (hypothetical) right to a child is "interpreted" in consideration of surrogates' and third-party stakeholders' (*e.g.* intermediaries) rights. In fact, it is deemed that the emergence of a right to a child is also highly

[284] Art.3(a) Directive No.2011/24/EU
[285] Barbara Stark, 2011, p.379

dependent on the balance that might be struck amongst all the rights, issues and interests at stake.

5.1.Right to a child v. rights of the child

5.1.1. A right to a child would be incompatible with the rights of the child

As aforementioned a right to a child should be established in respect of the limits set by other fundamental rights, in particular those of the child.[286] First of all, respect of children's rights entail that the BIC is taken "*as a primary consideration when different interests are being considered*".[287] The notion of BIC aims at "*ensuring both the full development and effective enjoyment of all the rights recognised in the [CRC] and the holistic development of the child*".[288] Hence, such principle "*shall be applied to all matters concerning the child […] and taken into account to resolve any possible conflicts among [different] rights*".[289] The ECtHR is mindful of such principle and assesses accordingly cases involving children with high scrutiny. Specifically, it states that "*the obligations that the ECHR lays on its States Parties in the field of children's rights […] must be interpreted in light of the CRC*".[290] To this end, when relevant the ECtHR explicitly refers to the CRC in its decisions.[291] Further, when doing so, the Court constantly reaffirms that "*whenever the situation of a child is at stake, the best interests of the child must be a primary consideration*".[292] A right to a child must therefore be assessed and determined in light of a child's rights, in particular, his or her best interests. To begin with, a series of arguments start by arguing that a right to a child would infringe children's rights, while the following part will demonstrate that both rights might coexist. It should be specified that arguments analysed below are not classified in any hierarchical order, they are instead merely considered as together contributing to the ongoing debate. Thus, a right to a child would go against children rights for, *inter alia*, the reasons debated below:

---

[286] Françoise Dekeuwer-Défossez, 2010, p.7
[287] Committee on the Rights of the Child, 2013, General Comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1), CRC/C/GC/14, §6(a)
[288] *Idem*., §4
[289] *Idem*., §33
[290] *Harroudj v. France* [2012], judgment of 4 October 2012, n° 43631/09, §42
[291] ECtHR, FRA and CoE, 2015, p.26
[292] See *e.g. Mennesson v. France*, §§81 and 99 ; *Labassee v. France*, §§60 and 78 ; *Paradiso and Campanelli v. Italy* [GC], §208; *Wagner and J.M.W.L v. Luxembourg* [2007], judgment of 28 September 2007, n°76240/01, §§133-34; *E.B. v. France*, §§76 and 95; and *Harroudj v. France*, §42

(1) The recognition of a right to a child would be against both the BIC and children's rights as it could lead to the "objectification" of children, making children mere objects of desires. Considering that an individual has a right to, not over, another human being leads to the objectification of the latter.[293] Thus, the recognition of a right to a child would disregard *"the rights and human dignity of the child by effectively turning [him or her] into a product"* and object of an arrangement. [294] However, a right to a child would be established as being a human right, if such a right tended to undermine another human beings' (*i.e.* here the child) rights and dignity, therefore it should not be recognised. A right cannot be "labelled" a human right, if it inherently undermines the objects and purposes of human rights.

(2) A right to a child could not comply with children's rights as it might possibly enable child trafficking and/or the sale of children. Part of the doctrine already considers surrogacy as to be inherently a sale of children[295] defined as *"any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration"*.[296] A right to a child would tend to worsen such a situation by allowing future intended parents to have quasi-unlimited access to ARTs. Thus, it would be increasingly difficult to monitor the exchange of payments between surrogates, intended parents and intermediaries. Even in the case of an alleged altruistic surrogacy, if a right to a child is ever recognised, it would be highly difficult for States to oversee payments exchanged to ensure that they are only for pregnancy-related expenses. Similarly, regarding child trafficking, a right to a child could most probably be subjected to abuses in which "intermediaries" but also black-market actors will increasingly extend into a baby market.

(3) A right to a child would be contrary to the BIC, as it would be contrary to a child's right to "know his or her parents and to be raised by them as far as possible".[297] On the one hand, this right may be understood as referring mainly to "biological parents". Etymologically the word "parent" comes from the Latin "Parens" or "Parentem" *i.e.* "who gave birth".[298] Thus,

---

[293] Françoise Dekeuwer-Défossez, 2010, p.1
[294] PACE, 2014, "Human Rights and ethical issues related to surrogacy", Motion for a resolution, tabled by Mr Valeriu Ghiletchi and other members of the Assembly, doc.13562, p.1; ECLJ, 2012, "Surrogate Motherhood: A Violation of Human Rights", available at https://www.ieb-eib.org/en/pdf/surrogacy-motherhood-iclj.pdf, accessed on 12 May 2019, p.5
[295] PACE, 2014, p.1
[296] Art.2(a) Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography
[297] Art.7(1) CRC
[298] ECLJ, 2018, p.30

the term "parents" in the CRC is likely to refer to biological and not intended parents.[299] On the other hand, this right to know one's parents has been assessed by the ECtHR in the case *Jäggi v. Switzerland*[300] related to the Applicant's demand to carry out a DNA test on his alleged deceased father to determine his "true" identity. The Court through this case stated that Article 8 protects "the right to know one's lineage".[301] At this point two conclusions might be drawn. First, children have the right to know their biological parents and such rights would be highly undermined should a right to a child ever be recognised. Second, it seems that the ECtHR links the right to know one's parents with the right to identity guaranteed by Article 8 ECHR.

(4) Hence, a right to a child may neither be compliant with the "child's right to identity".[302] The ECtHR affirmed such principle in *Mikulić v. Croatia*[303] in which it stated that respect for private life requires that an individual be able to obtain information necessary to determine the "truth" concerning important aspects of his or her personal identity, such as the identity of one's parents.[304] It has to be correlated with findings of the *Mennesson* case in which the Court further underlined "*the importance of a biological relationship as part of an element of each person's identity*".[305] It suggests that a child has a right to know his or her biological parent as part of his or her personal identity. However, the recognition of a right to a child would greatly impair such rights as diminishing biological parenthood to almost nothing *i.e.* by giving instead primacy to social parenthood.

(5) Moreover, the fact that a child may not know his or her biological parents could negatively impact his or her health as "*the gaps in personal history, generate serious traumas, which are often at the root of neuroses, even psychoses*".[306] Similarly, it is also contended that because a bond is prenatally formed between the surrogate and the child she carries, withdrawing a child from the woman who carried him or her could adversely impact his or her (psychological) health at a preliminary stage of his or her life.[307] Such argument is based on

---

[299] *Idem*.; See also Committee on the Rights of the Child, 2002, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C15/Add.188, §§31-32
[300] *Jäggi v. Switzerland* [2006], judgment of 13 July 2006, n°58757/00
[301] *Ibid*., §37
[302] Art.8 CRC
[303] *Mikulić v. Croatia* [2002], judgment of 7 February 2002, n°53176/99
[304] *Ibid*., §§54 and 64
[305] *Mennesson v. France*, §100
[306] ECLJ, 2018, p.12
[307] CCNE, 2018, p.117

the fact that a child perceives, *in utero*, the surrogate's "*movements, emotions, heart, breathing rhythms, or the type of food she eats or smells*".[308] On another level, not knowing one's biological parents' medical history could prevent adequate responses to medical issues that may affect a child, which would go against his or her best interests. Furthermore, this would erode children's right to health, as a right to a child would require legislation to favour the right to (procreative) health of intended parents over the right to health of children.

(6) Surrogacy, as other ARTs, could not coexist with the BIC, as they are deemed to be "adult centric". ARTs are practical ways to fulfil adults' desires, they do not contribute to a child's well-being as such, contrary to adoption. ARTs provide children to adults and not parents to children. What right could allegedly advocate for the BIC when children are initially disregarded?[309] A right to a child would deepen this centrism towards adults by failing to strike a fair balance between the rights of the child and the rights of parents.

(7) Finally, some individuals are truly unsuited to parenthood and recognising a right to a child would open the floodgates to a myriad of situations that would go against the BIC. For instance, a diagnosed disability may call into question intended parents' willingness to accept a surrogate child. In fact, several stories already report the abandonment of disabled surrogate-born children by the intended parents.[310] Such situations demonstrate that such individuals were not seeking parenthood but rather a child with specific characteristics. It similarly brings under the spotlight the question of who could claim rights over a specific child. Indeed, in the case of surrogacy up to four individuals could legitimately claim (parental) rights over a child (*i.e.* intended parents was well as the surrogate and her husband) in case of dispute. A right to a child could, thus, lead to situating in which several individuals would be disputing a child or on the contrary none of them would be required to take care of that child. Therefore, a right to a child would tend to give primacy to intended parents' well-being instead of children's welfare.

---

[308] CCNE, 2017, p.34

[309] Francis Kernaleguen, 2017, « Vos enfants ne sont pas vos enfants »: être institués parent ?», La Semaine Juridique: édition Générale (JCP), 91e année, Nos.7-8, pp.319-326, p.325

[310] See as instance, https://www.bbc.com/news/world-asia-28621639; and https://www.telegraph.co.uk/news/health/children/11055643/British-mother-rejected-disabled-twin-because-she-was-a-dribbling-cabbage-says-surrogate.html

However, as specified in the CRC the best interests of the child should rather be taken as the primary consideration.[311]

Several elements would consequently demonstrate that a right to a child whether or not emerging, should not be recognised as being contrary to children's rights and best interests. On the other hand, numerous arguments are also sustaining that a right to a child and children's rights are not fundamentally incompatible as demonstrated below.

5.1.2. Right to a child and rights of the child could coexist

It is asserted here that the recognition of a right to a child should not be categorically excluded as allegedly infringing children's rights. In fact, a right to a child should and could rather be established in a grey area in which rights of intended parents and rights of the child could coexist, as showed by the arguments below:

(1) As for the objectification of children, it would entail that intended parents using surrogacy or other ARTs consider indeed children as objects. Nevertheless, in a 2013 study conducted in France with intended parents of surrogate-born children, the authors affirm that intended parents "*do not believe they have [a] right to a child for [their] own sake as an object of personal desire*".[312] Intended parents do not objectify their children, they rather consider that having children is "*a blessing*" notably when they know that they were prevented from having children naturally.[313] Intended parents believe instead that a child born through ARTs *"is a long awaited and precious gift […] and a miracle of modern medicine*".[314] Similarly, asserting that in the case of a right to a child, children are used as "means" to achieve individuals' parental projects[315], would equate to denying that it is not the case in all parental projects. However, on the whole, children are almost always born following individuals' parental projects.

---

[311] Bill Muehlenberg, 2017, "On the "Right" to have Children", available at https://billmuehlenberg.com/2016/09/06/on-the-right-to-have-children/, accessed on 2 July 2019; See also Art.3(1)CRC
[312] Véronique Fournier, Denis Berthiau, Julie d'Haussy *et al*, 2013, p.67
[313] Joseph Chamie and Barry Mirkin, 2014
[314] Marion Abecassis, 2016, p.17
[315] Pavel Bures, 2016, p.46

(2) As for the right to know one's parents, the CRC does not provide any definition of the term "parents". Therefore, the notion "parents" might equally cover genetic, social or legal parents.[316] Moreover, with regards to today's reproductive technology, a child could literally have more than two biological parents. Thus, it makes little sense to appreciate the term "parents" as only referring to biological ones. Similarly, transformations in family structures as well as parenthood tend to support that nowadays families and parenthood are more regarded as social rather than biological.[317] It is also supported by the ECtHR's recognition of *de facto* families but also by adoption procedures. Furthermore, France also legalises several situations in which biological parents are disregarded as being a child's parents. For instance, women are authorised to give birth anonymously.[318] All these elements lead to the conclusion that a right to a child would not fundamentally violate a child's right to know his or her parents.

(3) Then, a child's right to establish his or her identity is not absolute. The ECtHR in *Odièvre v. France*[319], concerning anonymous births, stated notably that while individuals have a primary interest in receiving information necessary to establish their origin and identity, it considered it legitimate to conserve secrecy after an anonymous birth.[320] The French system governing anonymous births states that unless the woman who gave birth changes her mind, her identity cannot be revealed, only elements (with her consent) which cannot lead to her identification might be disclosed *e.g.* blood type.[321] Accordingly, the Court assessed that "*French law balanced complex public as well as private interests, noting that disclosure of the mother's identity could entail risks for the mother herself, as well as for the Applicant's adoptive family, her siblings, and her natural father*".[322] This reasoning was already brought into the spotlight by the Court in the aforementioned *Jäggi* and *Mikulić* cases in which it established that third persons' rights may preclude an individual from accessing information related to his or her origin or identity.[323] Accordingly, an unconditional right to identifying information to establish one's identity does not exist.[324] This means that while a right to a child

[316] Michael Wells-Greco, 2016, pp.430-431
[317] Maria Taruts, 2016, "Surrogate motherhood: In Search of Comprehensive Regulatory Solution", Deusto University, European Inter-University Centre in Human Rights and Democratisation, available at https://doi.org/20.500.11825/220, accessed on 1 June 2019, p.40
[318] Art. 326 CC
[319] *Odièvre v. France* [2003], judgment of 13 February 2003, n°42326/98
[320] *Idem.*, §49
[321] Art. L.147-6 Family and Social Action Code (*Code de l'action sociale et des familles*) ; CCNE, 2018, p.123
[322] Andrea Mulligan, 2018, p.463; *Odièvre v. France*, §49
[323] *Jäggi v. Switzerland*, §38; *Mikulić v. Croatia*, §64
[324] Michael Wells-Greco, 2016, p.425

should be balanced with other's rights and liberties, such as are children' rights (still with the highest scrutiny).

(4) As for the damaging consequences that a right to a child would have on the right to health of children, "*studies have shown that children conceived through third-party reproduction are doing well psychologically and developmentally and do not appear to be adversely affected by the lack of a genetic or gestational link to [their] intended parents*".[325] Similarly, during the interview conducted with Mr. Dominique Mennesson, it has been found that surrogacy is rather "*a human experience of high intensity*" with few adverse consequences on both intended parents and surrogate-born children.[326]. Then, as demonstrated by the French framework related to anonymous births, in very few cases adopted or ARTs-born children are left without vital information at all (*i.e.* that could be central to their well-being such as donors' allergies). Thus, a right to a child recognised within a regulated and monitored framework, could be established alongside children's rights to health.

(5) Justifications against a right to a child only relying on the BIC include inherent deficiencies as it is extremely difficult to predict *"[with certainty] and in advance the happiness or misfortune of an unborn child*".[327] Indeed, how could legislators decided beforehand with more or less certainty that a right to a child would inherently violate the BIC. A balance of the rights and interests at stake is indeed required, but in light of what has been argued so far, it might be possible that both a right to a child and rights of the child coexist. Moreover, if judges only consider the BIC as their only guide to completely disregard the hypothetical emergence of a right to a child, it could equally completely disregard intended parents' rights (*e.g.* reproductive rights or right to become a genetic parent).

(6) The concept of BIC is often manipulated by institutions for their own benefits.[328] In fact, for instance, France is, on the whole, a State committed to its traditions *i.e.* often opposing strong resistance to societal changes. Thus, national authorities could use the concept of BIC to maintain a prohibition regarding surrogacy and resist "any" change regarding its regulation in

[325] Dorothy Greenfield, 2015, "Effect and outcomes of third-party reproduction: parents", American society for Reproductive Medicine, *Fertility and Sterility*, Vol.104, No.3, pp.520-524, p.521
[326] Based on the interview conducted with Mr. Dominique Mennesson
[327] Françoise Dekeuwer-Défossez, 2010, p.3
[328] Committee on the Rights of the Child, 2013, §34

this area. In that sense it is rather institutions that decide that a concept is against the BIC, than the concept itself.

(7) Finally, although some individuals are indeed unsuited to parenthood, recognising a right to a child would not inherently open the floodgates to a myriad of situations that would go against the BIC. There are already several situations in which children are under the guardianship of individuals that might be deemed unsuited to parenthood *e.g.* alcoholics, drug addicts… Similarly, there are already situations in which individuals are disputing children *e.g.* custody disputes after divorces, but also in which children are abandoned by their parents (otherwise orphanages would not exist). Therefore, even though the recognition of a right to a child would most probably produce changes over these already existing phenomena, it would not fundamentally worsen such phenomena.

It seems, consequently, that while at first sight a right to a child should not be recognised because it appears to be against children's rights, a more-detailed study would not conclude such a definitive outcome. A right to a child would, in any case, impact children's rights. Nonetheless, a balance could be established in several situations. Still, some concerns remain, particularly regarding child trafficking, sale of children, children' rights to health or to identity. Nevertheless, before concluding it is necessary to assess the right to a child in view of the surrogates and other stakeholders' rights and liberties.

5.2. Right to a child v. the protection of others

5.2.1. Right to a child v. rights of the surrogates

Recognising a right to a child could produce impacts way beyond the intended parent(s) and the child, with in first line the surrogates as demonstrated below:

(1) The recognition of a right to a child could lead to a situation in which a restriction on surrogates' personal freedom and autonomy during their pregnancies would be allowed.[329] Indeed, a surrogate when entering a surrogacy agreement might be subjected to certain

[329] CE, 2018, p.79

restrictions. Such restriction might encompass the cessation of certain activities such as sport, but it can also touch private aspects of her life *e.g.* the cessation of sexual activities during the pregnancy. Conversely, a surrogate may be committed to perform some activities *e.g.* being subject to a specific diet plan. A right to a child could, likewise, equate to intended parents having an influence on women's (reproductive) rights and health. For instance, they may require the surrogate to perform an abortion if it is discovered that the child has a disability or a malformation. Such a situation goes against the surrogate's autonomy and might worsen when, for instance, she has a moral objection to abortion.[330] It would additionally contravene Article 16 (1)(e) CEDAW which protects women's reproductive health, and therefore supports that women should be free from using their reproductive abilities. Thus, even when entering a surrogacy arrangement, a surrogate should remain the only decisional actor during her pregnancy. Nevertheless, it is a double-edged argument, as it might be argued that if a woman desires to use her reproductive abilities to enter a surrogacy arrangement she should be able to do so without third-parties arguing that it would be against her rights.[331] In fact, while surrogacy is often viewed as being a form of exploitation of a women's body and autonomy, it should not be neglected that surrogates may also freely decide to enter such arrangements and to use their reproductive abilities to help a childless couple.

(2) Then there are contentions based on the commodification and instrumentalisation of human bodies, pillars on which the French prohibitionist legal regime relies. Here surrogacy as well as a right to a child would be seen as processes involving the commodification and instrumentalisation of surrogates' bodies by assigning them monetary value, as well as disposing and using women's reproductive abilities.[332] It could further be considered that *"assigning a monetary value to an experience as intimate as pregnancy and childbirth may lead to a degradation of [human experiences] that have been previously considered to be sacred and priceless"*.[333] In that sense a right to a child would be a mere vulgarisation of a business relying on childbirths, which would go against CEDAW's definition of maternity as a social function.[334] However, when it comes to the commodification and instrumentalisation of surrogates' bodies, some highlight an "hypocrisy" within the French system. In fact, "exceptions" under the French regime tolerate and authorise "trading" of human bodies or their

[330] ECLJ, 2012, p.12
[331] UNFPA, 2016, p.115
[332] Ludovica Poli, 2017, p.7
[333] *Ibid*.
[334] Art.5(b) CEDAW; Marcy Darnovsky and Diane Beeson, 2014, p.8

parts.[335] Specifically, human bodies can be donated and used for medical research. Similarly, in France, both female and male gametes as well as organ donations are allowed. Therefore, why should a woman be prevented from "donating" her reproductive abilities if she freely agrees to do so? To this, it could be argued that if elements of the human body can, under certain conditions, be donated, a human person as such cannot be the subject of an arrangement. Moreover, arguments of commodification and instrumentalisation of human bodies derive from the principle of human dignity which has constitutional value under French law.[336] Pursuant to this rationale, a right to a child including a liberalisation of surrogacy, would undermine *"the human dignity of the [surrogate] as her body and [her] reproductive [abilities] are used as a commodity"*.[337] Using another woman's reproductive abilities to fulfil one's parental project seems, thus, to be radically infringing respect for the dignity of that woman.[338] Then, one could tempt to overturn this argument by asserting that a surrogate's dignity could not be disrespected when she has freely and non-coercively chosen to turn herself into a surrogate.[339] Nevertheless, a human being cannot freely agree to a degrading treatment which would infringe his or her dignity as demonstrated by a famous case of the *Conseil d'État*[340] confirmed by the Human Rights Committee[341] related to dwarf tossing. Thus, a right to a child would be incompatible with the notion of human dignity as constituting a degrading treatment for surrogates.

(3) The recognition of a right to a child, as it is for surrogacy, would also question the issue of free and informed consent from surrogates especially when there are great disparities amongst the parties involved. The socioeconomic status of intended parents are on a general basis significantly different from that of surrogates as the former typically come from high-income countries, while the latter usually comes from low or middle-income countries.[342] There is therefore "*a marked economic inequality between the two parties*".[343] It could be argued in such a scenario that women turn themselves into surrogate motherhood not on altruistic motives but to fulfil their basic needs *e.g.* food and housing.[344] They would therefore be economically

---

[335] CCNE, 2010, p.12; C.L.A.R.A, 2011, « Pour la reconnaissance de la gestation pour autrui éthique : Résumé des constats et propositions, par l'Association C.L.A.R.A », Document support de l'audition du 22 mars 2011 par la Commission des lois du Sénat, available at http://claradoc.gpa.free.fr/doc/377.pdf, accessed on 7 May 2019, p.5
[336] Elisabeth Steiner and Andreea Maria Rosu, 2016, p.361
[337] PACE, 2014, p.1
[338] CCNE, 2010, p.7
[339] Maria Taruts, 2016, p.48
[340] CE, *Morsang-sur-Orge*, 27 octobre 1995, n°136727
[341] HRC, *Wackenhein v. France* [2002], decision of 15 July 2002, n°854/1999
[342] Rajendra Gunputh and Kartina Choong, 2015, p.18 ; Olga van den Akker, 2006, p.57
[343] *Ibid*.
[344] CCNE, 2017, p.35

coerced with the poverty factor limiting their capability to give free consent. The educational gap which may also exist between the parties may result in a similar situation, language or literacy concerns challenging also the validity of the consent given by women who may enter ISAs without being fully aware of the potential risks involved.[345] On the other hand, a right to a child could increase situations in which intermediaries, led by greediness, would exercise pressure on (vulnerable and "poor") women by pushing them towards surrogate motherhood. Thus, alongside the economic one, the psychological coercion should not be neglected. Nevertheless, one could argue that these risks may be alleviated in cases in which women decide to engage themselves altruistically in surrogate motherhood, in particular, for relatives. In such a scenario there will be little evidence of the surrogate being coerced by the couple, or an intermediary.[346] Furthermore, in specific situations *e.g.* in low income countries, surrogacy might be an opportunity for women with modest revenues to have their own incomes leading to their empowerment and increasing independence from their family members.[347] The consent issue toward the recognition of a right to a child is therefore complex and delicate.

(4) The recognition of a right to a child could intensify risks of human trafficking. Indeed, the absence of global standards towards surrogacy or ARTs correlated to their liberation through the recognition of a right to a child would increase a procreative market. Surrogates becoming a "resource" to trade from one State to another. Cases of women and girls being trafficked from one State to another, to be turned into surrogates, are not uncommon notably from low-income countries such as India or Thailand.[348] Such situations would here again infringe the CEDAW which calls for special protection of women against trafficking.[349]

(5) A right to a child, coupled with a liberalisation of surrogacy, could additionally infringe women's right to health specifically protected by Article 12 CEDAW. Indeed, although pregnancies are never without risks, such risks might be exacerbated with surrogacy. Surrogacy often entails the implantation of several foetus to increase the chance of pregnancy and its success. Multiple pregnancies often result in complications during pregnancies and childbirths,

[345] Vasanti Jadva, Clare Murray, Emma Lycett, *et al,* 2003, p.2196
[346] Fiona MacCallum, Emma Lycett, Clare Murray, *et al*, 2003, p.1341
[347] Birgitta Essen and Sara Johnsdotter, 2015, p.449
[348] Karen Blain, 2018
[349] Art.6 CEDAW

as well as non-medical caesareans requested by intended parents.[350] Recent research conducted in California found, in addition, that *"such pregnancies had a four-to-five fold increase in stillbirths compared with naturally achieved pregnancies"*.[351] Then, gestational surrogacy, in particular, carries its own risks. Multiple studies report that pregnancies using foreign gametes are associated with a higher incidence of pregnancy-induced hypertension, rejection or placental pathology; as immune responses to foreign tissues.[352] However, some commentators argue that debates on surrogacy and its alleged health outcomes are interpreted differently by western and eastern medical practitioners as the former would tend to support anti-surrogacy regimes with biased medical arguments related to the practice.[353] Western practitioners would have, indeed, a tendency to exaggerate when claiming that surrogacy drastically increases pregnancy-related risks, as eastern-based studies find that "*surrogate pregnancy is not more risky than ordinary pregnancy in the West*".[354]

(6) In the same vein, hypothetical adverse impacts on surrogates' psychological health could be raised. Here, it is suggested that relinquishing a child may be extremely distressing, resulting in post-natal depression, and create feelings of anger or guilt, which could add further strain to the surrogate's psychological health, notably when she shares biological links with the child.[355] Thus, to avoid adverse psychological consequences, a surrogate may force herself to be detached from the child at the beginning of the pregnancy, a process whose effects are not fully known.[356] Nevertheless, a study in 2003 demonstrates that *"surrogacy has generally been a positive experience for those surrogate mothers interviewed and fail[s] to lend support to claims regarding the potentially negative outcomes of surrogacy for surrogate[s]"*.[357] This study further underlines that while some surrogates "*did experience some problems immediately after the handover, these were not severe, tended to be short-lived, and to dissipate with time*".[358] Similar conclusions have been held by a study dated 2016.[359] Still, when it comes to any research analysing a controversial topic, socially desirable answers should not be excluded

---

[350] CCNE, 1994, « Avis sur l'évolution des pratiques d'assistance médicale à la procréation », Rapport, 30 March 1994, No.42, available at https://www.ccne-ethique.fr/sites/default/files/publications/avis042.pdf, accessed on 07 May 2019, p.4
[351] Marcy Darnovsky and Diane Beeson, 2014, p.21
[352] *Idem*., p.27
[353] Birgitta Essen and Sara Johnsdotter, 2015, pp.440-450
[354] *Ibid*.
[355] Vasanti Jadva, Clare Murray, Emma Lycett, *et al*, 2003, p.2196
[356] CCNE, 2010, p.6
[357] Vasanti Jadva, Clare Murray, Emma Lycett, *et al*, 2003, p.2203
[358] *Ibid*.
[359] Viveca Söderström-Anttila, Ulla-Britt Wennerholm, Anne Loft., *et al*, 2016, pp.268-273

i.e. an attempt to present the situation in the best possible light.[360] To sum up, a right to a child if recognised could, by condoning the use of surrogacy, implicitly acknowledge the - even though debatable - negative impacts that such practice would have on surrogates or worse disregard these impacts. In doing so, a right to a child would give primacy to the right of intended parents at the expense of women's right to health, and a hierarchy amongst human rights should not be permitted.

(7) Finally, a right to a child could worsen the social and discriminatory disparities impacting upon women committed to surrogate motherhood. A surrogate may, indeed, encounter several social strains notably related to cultural aspects.[361] "Traditional" family structures are still strongly protected in certain regions of the world. A protection which may be explained by religious objections according to which foreign tissues and gametes transfer or IVF are prohibited *e.g.* Jehovah Witnesses, Catholicism, Islam... Alternatively, the preservation of "traditional" family structures "*may be a reflection of the prevailing cultural belief in the traditional structural functionalist view of the family*".[362]All these elements combined may lead to the surrogate being socially stigmatised by her community because of the activity she performs.[363] On the other hand, discriminatory factors are often assessed when it comes to the "choice" of the surrogate. In fact, a surrogate may be chosen on social and cultural elements linked to her religion, skin colour, or other physical characteristics and overall attractiveness, as well as educational background and IQ.[364] Such factors might lead to disparities related to surrogates' remuneration or treatment with intended parents willing to pay higher prices for specific physical or intellectual attributes reinforcing discriminatory prejudices.[365]

Thus, the adverse impacts that a right to a child could have on surrogates and women's rights, while possibly mitigated and counterbalanced in certain areas *e.g.* women's reproductive rights and consent, would be undeniable. Moreover, such outcomes would be notably inconsistent with the CEDAW focusing on women's rights. Lastly, an overview of the impact of a right to a child would produce on other actors such as intermediaries and the State should be broached to allow general conclusions to be drawn.

---

[360] *Idem*., p.274
[361] Raywat Deonandan, Samantha Green, and Amanda Van Beinum, 2012, "Ethical concerns for maternal surrogacy and reproductive tourism", *Journal of Medical Ethics*, Vol.38, No.12, pp.742-745, p.743
[362] Olga van den Akker, 2000, p.1854
[363] CCNE, 2017, p.36
[364] ECLJ, 2012, p.15
[365] *Idem*., p.7

5.2.2. Right to a child v. rights of other stakeholders

A liberalisation of surrogacy through the emergence of a right to a child would increase the demand providing from intended parents. It raises the question of how could a State- France- manage such situation? On the one hand, all ARTs could not be supported financially by the government as ARTs for medically diagnosed grounds are in France, while ARTs procedures *e.g.* IVF are extremely costly. Moreover, they require qualified medical practitioners whose current number may be well below the hypothetical demand emanating from intended parents. On the other hand, where would the genetic material come from? French "Gametes banks" barely manage to meet the needs of individuals suffering from pathological infertility.[366] Also, with regards to societies, a right to a child could create a "pressure" towards reproduction concerning those individuals who might not wish to become parents. It could also push individuals to claim the emergence of correlated (absurd) rights *e.g.* right to a partner. Finally, a right to a child would disregard some States' willingness to maintain their prohibition towards certain ARTs and their access. This would therefore question the weight of States' sovereignty as well as the legitimacy of such a right in particular when the prohibition is based not only on legal but also moral, social and ethical factors. Finally, a right to a child could also affect and infringe "*the ability for individuals to practice medicine*"[367] as it would open the floodgates to situations transforming medicine into the fulfilment of individuals' desire instead of a process healing individuals affected by a pathology.

[366] CCNE, 2018, p.109
[367] Katarina Lee, 2017, p.28

Conclusion

Human beings' dependency on technology has fallen upon us in a blink of an eye. This dependency slowly allows technological progress to act in the most personal aspects of individuals' lives. Reproductive technology while appearing as godsends for some and abominations for others gradually changes family structures and the traditional vision of parenthood. Among this technology, surrogacy is the one preoccupying all minds. On the one hand, by its very nature, surrogacy is the ART that complies with the broader panel of family compositions by including gay couples and single men. However, on the other hand, it is also the one producing the most heated debates by pushing, notably, both the boundaries of (bio)ethics and law. Still, because surrogacy has become increasingly accessible and easier to perform, States are increasingly facing individuals' demands pushing this reproductive technology to its peak. These circumstances brought France, one of the most prohibitionist States in the matter, to a situation in which it found itself stuck into a whirlwind of contradictions: being torn between its own beliefs, the cry of despair from some of its citizens as well as the protection of the rights of others. Such context becoming even more complicate as a consequence of the intervention of European institutions, most notably the ECtHR. While, both national and European institutions tend to diverge when dealing with surrogacy and its correlated phenomena, they have both been required to adjudicate on the hypothetical emergence of a right to a child.

While it is not wrong to observe some evidences of the existence of a right to a child, notably through arguments relying on reproductive rights and health, the right to cross-border healthcare services, the right to become a parent in the genetic sense as well as the right not to be discriminated against, such a right is not guaranteed nor is otherwise emerging through the ECHR or in its interpretation by the ECtHR. Indeed, despite the Court's adoption of "evolutive" interpretation to ensure the effectiveness of the ECHR in today's society, the ECtHR remain reluctant to imply rights that threaten national conceptions of morality, and, in particular, to the recognition of new rights that cut too deeply into issues that are deemed central to national identity.[368]

[368] Clare Ryan, 2018, p.522

Additionally, a right language associated with a desire to have a child would negate the status of children as rights-holders. No individual should have the legal right to another person. A right to a child should in no way be achieved at the expense of children's rights.[369] There is no fundamental right to a child, however, children have fundamental rights.[370] Similarly, parenthood should remain a choice, not a right, notably when the recognition of such a right would infringe the rights of others. Apart from the consequences to children, the emergence of a right to a child would lead to a waterfall of adverse consequences affecting the rights of surrogates, as well as those of all the other stakeholders involved in such processes. A situation in which the right of some will be given primacy towards the rights and liberties of others cannot be permitted.

Nonetheless, intended parents claims and rights should not be absolutely and undeniably disregarded. All humans' desires are not rights. Still, whereas the desire or need for a child should not lead to the recognition of a right to a child, it should at least lead to a right to be provided with assistance in procreation. If individuals cannot have a right to a child, they must have a right to procreate and to be (medically) supported when they are naturally prevented to do so. In that sense French legislation is undeniably obsolete.

The actual – and expected future – non-emergence of a right to a child is not an end in itself. Given the continuing growth and constant movement of surrogacy and ARTs correlated to the wide range of challenges they raise, as well as the still unaddressed issues faced by numerous (socially) infertile individuals, national and European Courts cannot remain indefinitely on the side-lines regarding human (right to?) reproduction.

It means that the real work starts, rather than finishes.

[369] Olga van den Akker, 2006, p.1854
[370] PACE, 2016, p.10

Bibliography

1. Legal instruments

1.1. International instruments

Consolidated version of the Treaty on the Functioning of the European Union [2007], EU, adopted on 13 December 2008, entered into force on 1 December 2009, 2008/C115/01

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine : Convention on Human Rights and Biomedicine [1997], CoE, adopted on 4 April 1997, entered into force on 1 December 1999, CETS No.164

Convention on the Elimination of All Forms of Discriminations Against Women [1979], UNGA, adopted on 18 December 1979, entered into force on 3 September 1981, UN Treaty Series, Vol.1249, p.13

Convention on the Rights of the Child [1989], UNGA, adopted on 20 November 1989, entered into force on 2 September 1990, UN Treaty Series, Vol.1577, p.3

Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) [1992], EEC, adopted on 19 October 1992, entered into force on 28 November 1992, No.L.348/1

Directive 2011/24/EU of the European Parliament and of the Council on the application of patients' rights in cross-border healthcare [2011], EU, adopted on 9 March 2011, entered into force on 4 April 2011, JO L.88/45

European Convention for the Protection of Human Rights and Fundamental Freedoms [1950], CoE, adopted in 4 November 1950, entered into force on 3 September 1953

European Convention on Adoption of Children (revised) [2008], CoE, adopted on 27 November 2008, entered into force on 1 September 2011, CETS No.202

Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption [1993], Hague Conference on Private International Law, adopted on 29 May 1993, entered into force on 1 May 1995, No.33

International Covenant on Economic, Social and Cultural Rights [1966], UNGA, adopted on 16 December 1966, entered into force on 1 January 1976, UN Treaty Series, Vol.993, p.3

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography [2000], UNGA, adopted on 25 May 2000, entered into force on 18 January 2002, UN Treaty Series, Vol.2171, p.227

Proclamation of Teheran [1968], UN, 22 April to 13 May 1968, Final Act of the International Conference on Human Rights, UN. Doc. A/COBF/32/41 at 3

Protocol No.16 to the Convention on the Protection of Human Rights and Fundamental Freedoms [2013], CoE, adopted on 2 October 2013, entered into force on 1 August 2018, CETS No.214

1.2. National instruments

Circulaire du 25 janvier 2013 relative à la délivrance des certificats de nationalité française – convention de mère porteuse – État civil étranger, NOR : JUSC1301528C, available at http://www.textes.justice.gouv.fr/art_pix/JUSC1301528C.pdf, accessed on 17 May 2019

French Civil Code (2019 English version), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwi6upip3PLiAhX0DGMBHccCAGgQFjABegQIAhAC&url=https%3A%2F%2Fwww.legifrance.gouv.fr%2Fcontent%2Fdownload%2F1950%2F13681%2Fversion%2F3%2Ffile%2FCode_22.pdf&usg=AOvVaw0QZoE4vEx8YiypWcjgNbYY, accessed on 3 May 2019

French Penal Code (2019 English version), available at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwi6upip3PLiAhX0DGMBHccCAGgQFjAAegQIARAC&url=https%3A%2F%2Fwww.legifrance.gouv.fr%2Fcontent%2Flocation%2F1740&usg=AOvVaw3jcyV4oaCp1UJSRlrN8AwQ, accessed on 3 May 2019

Loi n°94-548 du 1er juillet 1994 relative au traitement des données nominatives ayant pour fin la recherche dans le domaine de la santé et modifiant la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000547135&dateText, accessed on 17 May 2019

Loi n°94-653 du 29 juillet 1994 relative au respect du corps humain, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000549619&dateText, accessed on 17 May 2019

Loi n°94-654 du 29 juillet 1994 relative au don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal, available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000549618&dateText, accessed on 17 May 2018

2. Awards by Courts

2.1. International Courts

2.1.1. European Court of Human Rights

2.1.1.1. Case-Law

- *Braun v. France* [2018], introduced on 4 January 2018, n°1462/18
- *Costa and Pavan v. Italy* [2012], judgment of 28 August 2012, n°54270/10
- *Dickson v. UK* [2007], judgment of 4 December 2007, n°44362/04
- *Dubská and Krejzová v. the Czech Republic* [GC][2016], judgment of 15 November 2016, nos.28859/11 and 28473
- *E.B. v. France* [GC][2008], judgment of 22 January 2008, n°43546/02
- *Evans v. UK* [GC][2007], judgment of 10 April 2007, n°6339/05
- *Foulon and Bouvet v. France* [2016], judgment of 21 July 2016, nos.9063/14 and 10410/14
- *Gas and Dubois v. France* [2012], judgment of 15 March 2012, n°25951/07
- *Goodwin v. UK* [GC] [2002], judgment of 11 July 2002, n°28957/95
- *Handyside v. UK* [1976], judgment of 7 December 1976, n°5493/72
- *Harroudj v. France* [2012], judgment of 4 October 2012, n°43631/09
- *Knecht v. Romania* [2012], judgment of 2 October 2012, n°10048/10
- *Jäggi v. Switzerland* [2006], judgment of 13 July 2006, n°58757/00
- *Laborie v. France* [2017], judgment of 19 January 2017, n°44024/13
- *Labassee v. France* [2014], judgment of 26 June 2014, n°65941/11
- *Lindon and others v. France* [GC][2007], judgment of 22 October 2007, nos.21279/02 and 36448/02
- *Maillard and others v. France* [2018], introduced on 10 April 2018, n°17348/18
- *Marckx v. Belgium* [1979], judgment of 13 June 1979, n°6833/74
- *Mennesson v. France* [2014], judgment of 26 June 2014, n°65192/11
- *Mikulić v. Croatia* [2002], judgment of 7 February 2002, n°53176/99

- *Nazarenko v. Russia* [2015], judgment of 16 July 2015, n° 39438/13
- *Oliari and others v. Italy* [2015], judgment of 21 July 2015, nos.18766/11 and 36030/11
- *Odièvre v. France* [2003], judgment of 13 February 2003, n°42326/98
- *Paradiso and Campanelli v. Italy* [2015], judgment of 27 January 2015, n°25358/12
- *Paradiso and Campanelli v. Italy* [GC][2017], judgment of 24 January 2017, n°25358/12
- *Paradiso and Campanelli v. Italy* [GC][2017], judgment of 24 January 2017, n°25358/12, Concurring Opinion of Judges de Gaetano, Pinto de Albuquerqe, Wojtyczel and Dedov
- *Parrillo v. Italy* [GC][2015], judgment of 27 August 2015, n°46470/11
- *S.H. and Others v. Austria* [GC][2011], judgment of 3 November 2011, n°57813/00
- *S.H. and Others v. Austria* [GC][2011], judgment of 3 November 2011, n°57813/00, Separate Opinion of Judge de Gaetano
- *S.H. and Others v. Austria* [GC][2011], judgment of 3 November 2011, n°57813/00, Joint Dissenting Opinion of Tulkens, Hirvelä, Lazarova Trajkovska and Tsotsoria
- *Saenz and Saenz Cortes v. France* [2018], introduced on 2 March 2018, n°11288/18
- *Wagner and J.M.W.L. v. Luxembourg* [2007], judgment of 28 September 2007, n°76240/01

2.1.1.2. Advisory Opinion

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 [2019], ECtHR, Grand Chamber, n°P16-2018-001

2.1.2. Court of Justice of the European Union

- *C.D. v. S.T.* [2014], judgment of 18 March 2014, n°C-167/12
- *The Society for the Protection of Unborn Children Ireland Ltd. v. Stephen Grogan* [1991], judgment of 4 October 1991, n°C-159/90
- *Z. v. A Government Department and the Board of Management of a Community School* [2014], judgment of 18 March 2014, C-363/12

2.1.3. Human Rights Committee

- HRC, *Wackenhein v. France* [2002], decision of 15 July 2002, n°854/1999

2.2.National Courts

2.2.1. Cour de Cassation

2.2.1.1. Première Chambre Civile

- Cass. Civ. 1ère, 13 décembre 1989, n°88-15.655
- Cass. Civ. 1ère, 6 avril 2011, n°10-19.053
- Cass. Civ. 1ère, 13 septembre 2013, n°12-18.315
- Cass. Civ. 1ère, 13 septembre 2013, n°12-18.138
- Cass. Civ. 1ère., 5 juillet 2017, n°15-28.597
- Cass. Civ. 1ère., 5 juillet 2017, n°16-16.901
- Cass. Civ. 1ère., 5 juillet 2017, n°16-50.025
- Cass. Civ. 1ère., 5 juillet 2017, n°16-16.455
- Cass. Civ. 1ère., 5 juillet 2017, n°16-16.495

2.2.1.2. Assemblée Plénière

- Cass. Ass. Plen., 31 mai 1991, n°90-20105
- Cass, Ass. Plen., 3 juillet 2015, n°14-21.323
- Cass, Ass. Plen., 3 juillet 2015, n°15-50.002
- Cass. Ass. Plen., 5 octobre 2018, n°10-19053

2.2.2. Conseil d'État

- CE, *Morsang-sur-Orge*, 27 octobre 1995, n°136727
- CE, *Association Juristes pour l'enfance et autres,* 12 décembre 2014, nos. 367324, 366989, 366710, 365779, 367317, 368861

3. United Nations documents

3.1. General Assembly

UNGA, 2018, Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material, A/HRC/37/60

3.2.Committee on the Rights of the Child

Committee on the Rights of the Child, 2002, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C15/Add.188

Committee on the Rights of the Child, 2013, General Comment No.14 (2013) on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (art.3, para.1), CRC/C/GC/14

3.3.United Nations Population Fund

UNFPA, 2016, Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions, HR/PUB/164/6

3.4. Miscellaneous

Beijing Declaration and Platform of Action, 1995, UN, Fourth Conference on Women, available at https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf, accessed on 26 May 2019

Programme of Action of the International Conference on Population Development, 1994, UN, adopted at the International Conference on Population and Development Cairo, 5-13 September 1994, 20th Anniversary Edition, available at https://www.unfpa.org/publications/international-conference-population-and-development-programme-action, accessed on 26 May 2019

4. European Court of Human Rights documents

ECtHR, FRA and CoE, 2015, Handbook on European Law relating to the Rights of the Child, available https://www.echr.coe.int/Documents/Handbook_rights_child_ENG.pdf, accessed on 8 July 2019

ECtHR, 2019, Factsheet-Reproductive Rights, available at https://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf, acceded on 14 June 2019

5. Parliamentary Assembly of the Council of Europe documents

PACE, 2014, "Human Rights and ethical issues related to surrogacy", Motion for a resolution, tabled by Mr Valeriu Ghiletchi and other members of the Assembly, doc.13562

PACE, 2016, "Children's rights related to surrogacy", Report, Committee on Social Affairs, Health and Sustainable Development, Prof. Dr. Petra De Sutter, doc.14140

6. European Union document

European Parliament, 2016, "Regulating international surrogacy arrangements- state of play", Amalia Rigon and Céline Chateau, available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/571368/IPOL_BRI(2016)571368_EN.pdf, accessed on 19 May 2019

7. Assemblée Nationale document

Assemblée Nationale, 2018, Proposition de Résolution appelant à une interdiction universelle de la gestation pour autrui, No.972

8. Conseil d'État document

CE, 2018, Révision de la loi de bioéthique: quelles options pour demain?, Étude à la demande du Premier Ministre, Étude adoptée en Assemblée Générale le 28 juin 2018, available at https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000450.pdf, accessed on 6 June 2019

9. Comité Consultatif National d'Éthique documents

CCNE, 1994, « Avis sur l'évolution des pratiques d'assistance médicale à la procréation », Rapport, 30 March 1994, No.42, available at https://www.ccne-ethique.fr/sites/default/files/publications/avis042.pdf, accessed on 07 May 2019

CCNE, 2010, « Problèmes éthiques soulevés par la gestation pour autrui », Avis, 01 April 2010, No.110, available at https://www.ccne-ethique.fr/fr/publications/problemes-ethiques-souleves-par-la-gestation-pour-autrui-gpa, accessed on 07 May 2019

CCNE, 2017, « Avis du CCNE sur les demandes sociétales de recours à l'assistance médicale à la procréation (AMP) », Avis, 15 June 2017, No.126, available at https://www.ccne-ethique.fr/fr/publications/avis-du-ccne-du-15-juin-2017-sur-les-demandes-societales-de-recours-lassistance, accessed on 13 May 2019

CCNE, 2018, « Rapport de Synthèse du Comité Consultatif National d'Éthique », Opinions du Comité Citoyen, Bioéthique, États Généraux, available at https://www.ccne-ethique.fr/sites/default/files/rapport_de_synthese_ccne_bat.pdf, accessed on 10 May 2019

10. European Centre for Law and Justice documents

ECLJ, 2012, "Surrogate Motherhood: A Violation of Human Rights", available at https://www.ieb-eib.org/en/pdf/surrogacy-motherhood-icjl.pdf, accessed on 12 May 2019

ECLJ, 2018, « La violation des droits des enfants issus d'AMP », available at http://media.aclj.org/pdf/La-violation-des-droits-des-enfants-issus-d%27AMP,-ECLJ,-mars-2018.pdf, accessed on 19 May 2019

11. Défenseur des droits document

Défenseur des droits, 2019, Décision du Défenseur des droits n°2019-016, available at https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=18789, accessed on 19 May 2019

12. Doctrine

ABECASSIS M., 2016, "Artificial Wombs: The Third Era of Human Reproduction and the Likely Impact on French and U.S. Law", *Hastings Women's L.J.3*, Vol.27, No.1, pp.3-27

ARDEN L. J., 2015, "Surrogacy cases throw light on the role of the Court", Mélanges en l'honneur de Dean Spielmann/ Essays in honour of Dean Spielmann: liber amicorum Dean Spielmann, Wolf legal Publisher, pp.3-9

ARMOUR, K. L., 2012, "An overview of surrogacy around the world: trends, questions and ethical issues", *Nursing for women's health*, Vol. 16, No.3, pp.231-236

BLAIN K., 2018, "The dangerous Effects of Surrogacy: A review of "A transnational Feminist View of Surrogacy Biomarkets in India"" available at http://www.cbc-network.org/2018/11/surrogacy-biomarkets-india/, accessed on 6 July 2019

BURES P., 2016, "Objectification of children through the European Court of Human Rights Jurisprudence?", *Polski rocznik praw czlowieka i prawa humanitarnego*, Vol.7, pp.35-46

C.L.A.R.A, 2011, « Pour la reconnaissance de la gestation pour autrui éthique : Résumé des constats et propositions, par l'Association C.L.A.R.A », Document support de l'audition du 22 mars 2011 par la Commission des lois du Sénat, available at http://claradoc.gpa.free.fr/doc/377.pdf, accessed on 7 May 2019

CANO PALOMARES G., 2015, « La procréation médicalement assistée devant la Cour européenne des droits de l'homme: évolutions et impact», Mélanges en l'honneur de Dean Spielmann/ Essays in honour of Dean Spielmann: liber amicorum Dean Spielmann, Wolf legal Publisher, pp.73-84

CHAMIE J. and MIRKIN B., 2014, "Surrogacy: Human Right of Reproductive Exploitation?", available at https://yaleglobal.yale.edu/content/surrogacy-human-right-or-reproductive-exploitation, accessed on 2 July 2019

CHÉNEDÉ F., 2017, « Petite leçon de « réalisme juridique»: À propos de l'affaire Paradiso et Campanelli contre Italie», Recueil Dalloz, 193e année, No.12 (27 avril 2017), pp.663-666

DARNOVSKY M. and BEESON D., 2014, "Global Surrogacy Practices", Working paper No.601, International Institute of Social Studies, available at https://repub.eur.nl/pub/77402, accessed on 12 May 2019

DE LA HOUGUE C., 2016, « Le Conseil de l'Europe rejette le rapport sur la GPA », Gènéthique, available at http://www.genethique.org/fr/le-conseil-de-leurope-rejette-le-rapport-sur-la-gpa-66185.html - .XL7n6S_pNQJ, accessed on 23 April 2019

DEKEUWER-DÉFOSSEZ F., 2010, « Réflexions à verser au dossier du « droit à l'enfant»», Revue Lamy Droit Civil, No.76, 7pp

DEONANDAN R., GREEN S., and VAN BEINUM A., 2012, "Ethical concerns for maternal surrogacy and reproductive tourism", *Journal of Medical Ethics*, Vol.38, No.12, pp.742-745

DREIFUSS-NETTER F., 2017, « Prohibition de la GPA et intérêt de l'enfant dans la jurisprudence de la Cour de Cassation », *Cahiers Droit, Sciences & Technologies*, No.7, pp.77-84

ESSEN B. and JOHNSDOTTER S., 2015, "Transnational surrogacy- reproductive rights for whom?", Nordic Federation of Societies of Obstetrics and Gynecology, *Acta Obstetricia et Gynecologica Scandinavica*, Vol. 94, pp.449-450

FABRE-MAGNAN M., 2015, « Les trois niveaux d'appréciation de l'intérêt de l'enfant: à propos de la gestation pour autrui »; Recueil Dalloz, 191e année, No.4, pp.224-229

FOURNIER V., BERTHIAU D., D'HAUSSY J., *et al.* 2013, "Access to assisted reproductive technologies in France: The emergence of the patients' voice", *Medicine, Health Care and Philosophy*, Vol.16, No.1, pp.55-68

GERVASI M., 2018, "The European Court of Human Rights and technological development: the issue of the continuity of the family status established abroad through recourse to surrogate motherhood", Diritti umani e diritto internazionale (DUDI), Vol.12, No.2, pp.213-242

GOLOMBOK S., MURRAY C., JADVA V., *et al*, 2006, "Non-genetic and non-gestational parenthood: consequences for parent-child relationships and the psychological well-being of mothers, fathers and children at age 3", *Human Reproduction*, Vol. 21, No.7, pp.1918-1924

GREENFIELD D., 2015, "Effect and outcomes of third-party reproduction: parents", American society for Reproductive Medicine, *Fertility and Sterility*, Vol.104, No.3, pp.520-524

GUNPUTH R. P. and CHOONG K. A., 2015, "Surrogacy tourism: the ethical and legal challenges", *International Journal of Tourism Sciences*, Vol.15, Nos.1-2, pp.16-21

HCCH, 2012, A preliminary report on the issues arising from international surrogacy arrangements, Prel. Doc. No.10

JADVA V., MURRAY C., LYCETT E., *et al*, 2003, "Surrogacy: the experiences of surrogate mothers", *Human reproduction*, Vol. 18, No.10, pp.2196-2204

JEAN A., 2016, « La procréation médicalement assistée: vers une humanité diminuée», Le mariage & la loi: protéger l'enfant, Institut Famille et République, pp.73-82

KERNALEGUEN F., 2017, «Vos enfants ne sont pas vos enfants »: être institués parent ?», La Semaine Juridique: édition Générale (JCP), 91e année, Nos.7-8, pp.319-326

KINSCH P., 2015, « L'article 8 de la Convention et l'obligation de reconnaître les situations familiales constituées à l'étranger: à la recherche du fondement d'une solution jurisprudentielle», Mélanges en l'honneur de Dean Spielmann/ Essays in honour of Dean Spielmann: liber amicorum Dean Spielmann, Wolf legal Publisher, pp.273-282

KLEINER C., 2017, "Surrogate motherhood in France: the need for a change Considerations of French Private International Law", *Kansai University Review of Law and Politics*, No.38, pp.49-62

KULCZYK P., 2019, "Surrogacy French law & European Thrust", European Centre for Law and Justice, available at https://eclj.org/surrogacy/eu/le-droit-franais-sur-la-gpa-rsistera-t-il-aux-coups-de-boutoir-de-leurope--?lng=en, accessed on 25 April 2019

LEE K., 2017, "With the Advent of Artificial Reproductive Technologies Is There a Fundamental Right to a Child", *Ave Maria Int'l LJ*, Vol.6, pp.20-29

LIU A., 1991, "Artificial Reproduction and Reproductive Rights", University of Hong Kong, Dartmouth

MACCALLUM F., LYCETT E., MURRAY C., *et al*, 2003, "Surrogacy: the experience of commissioning couples", *Human reproduction*, Vol.18, No.6, pp. 1334-1342

MUEHLENBERG B., 2017, "On the "Right" to have Children, available at https://billmuehlenberg.com/2016/09/06/on-the-right-to-have-children/, accessed on 02 July 2019

MULLIGAN A., 2018, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements", *Medical Law Review*, Vol.26, No.3, pp.449-475

PACKER C., 2016, "The Right to Reproductive Choice: A Study in International Law", Abo Akademi University, Institute for Human Rights

POLI L., 2017, "Bioethics, human rights and their interplay in the legal reasoning of ECtHR's case law on artificial reproductive technologies", *federalism.it*, pp.1-18

PUPPINCK G. and DE LA HOUGUE C., 2014, "ECHR: Towards the Liberalisation of Surrogacy: Regarding the Mennesson v. France and Labassee v. France cases", In French in the *Revue Lamy de Droit Civil*, No.118, September 2014, pp.78-91

RENOUX T. S., 2018, « *Mater Semper Certa Est*: Brèves Réflexions sur la Gestation pour Autrui et le Principe d'Égalité», Les droits de l'homme à la croisée des droits: mélanges en l'honneur de Frédéric Sudre, LexisNexis, pp.633-643

RYAN C., 2017, "Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights", *Colum. J. Transnat'l L*, No.56, pp.467-528

SHENFIELD F., PENNINGS G., COHEN J., *et al*, 2005, "ESHRE task force on ethics and law 10: surrogacy", *Human Reproduction*, Vol.20, No.10, pp.2705-2707

SHIFMAN P., 1987, "The Right to Parenthood and the Best Interests of the Child: A Perspective on Surrogate Motherhood in Jewish and Israeli Law", *NYL Sch. Hum. Rts. Ann.*, Vol.4, pp.555-568

SOSSON J., 2015, « La jurisprudence européenne et la gestation pour autrui», *Journal de droit européen*, 23e année, No.216, pp.52-55

SÖDERSTRÖM-ANTTILA V., WENNERHOLM U-B., LOFT A., *et al*, 2016, "Surrogacy: outcomes for surrogate mothers, children and the resulting families- a systematic review", *Human reproduction update*, Vol.22, No.2, pp.260-276

STARK B., 2011, "Transnational surrogacy and international human rights law", *ILSA J. Int'l & Comp. L.*, Vol.18, pp.369-386

STEINER E. and ROSU A. M., 2016, "Medically Assisted Human Reproductive Technologies (Art) and Human Rights-The European Perspective", *Frontiers L. China*, No.11, pp.339-369

VAN DEN AKKER O., 2000, "The importance of a genetic link in mothers commissioning a surrogate baby in the UK", *Human reproduction*, Vol.15, No.8, pp.1849-1855

VAN DEN AKKER O., 2006, "Psychosocial aspects of surrogate motherhood", *Human reproduction update*, Vol.13, No.1, pp.53-62

WELLS-GRECO M., 2016, "The status of children arising from inter-country surrogacy arrangements: the past, the present, the future", The Hague: Eleven International Publishing

ZEGERS-HOCHSCHILD F., ADAMSON G.D., DE MOUZON J, *et al*, 2009, "International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology", for ICMART and WHO, *Fertility and Sterility*, Vol.92, No.5, pp.1520-1524

13. Thesis

DE KOENIGSWARTER J., 2014, "Breaking fertile ground in the European Union: A trial for the regulation of womb and child trade in surrogacy", Utrecht University, European Inter-University Centre in Human Rights and Democratisation, available at https://www.icl-journal.com/media/ICL_Thesis_Vol_9_6_15.pdf, accessed on 9 May 2019

NIEMINEN S., 2018, "Assisted Reproductive Technologies and Medically Assisted Reproduction in the Context of the European Convention on Human Rights: Legal and Social Perspective", Umea University

TARUTS M., 2016, "Surrogate motherhood: In Search of Comprehensive Regulatory Solution", Deusto University, European Inter-University Centre in Human Rights and Democratisation, available at https://doi.org/20.500.11825/220, accessed on 1 June 2019

14. Web sites

CLEISS, 2019, "FAQ: Directive on cross-border healthcare", available at https://www.cleiss.fr/faq/directive_sur_les_soins_transfrontaliers_en.html, accessed on 2 July 2019

WHO, 2019, "Health Services", available at https://www.who.int/topics/health_services/en/, accessed on 2 July 2019

15. Hyperlinks

- https://www.telegraph.co.uk/news/health/children/11055643/British-mother-rejected-disabled-twin-because-she-was-a-dribbling-cabbage-says-surrogate.html
- https://www.bbc.com/news/world-asia-28621639

Appendices

Appendix 1 : Glossary of surrogacy related terms- arranged by alphabetical order[371]

Altruistic surrogacy arrangement	Altruistic surrogacy is perceived as a "philanthropic" act based on voluntariness often occurring between relatives or individuals with pre-existing relationships (*e.g.* friends or family members), entailing an exclusion of "payments" going beyond the "reasonable expenses" associated with the pregnancy. This may encompass a gestational or a traditional surrogacy arrangement.
Assisted reproductive technologies (ARTs)	All treatments or procedures that include the *in vitro* handling of both human oocytes and sperm or of embryos for the purpose of establishing a pregnancy. This includes, but is not limited to, *in vitro* fertilisation, embryo transfer, gamete intrafallopian transfer, intracytoplasmic sperm injection, gamete and embryo cryopreservation, oocyte and embryo donation, and surrogacy.
Commercial surrogacy arrangement	Commercial surrogacy, also known as "for-profit" surrogacy, occurs when the payment going to the surrogate goes beyond reasonable pregnancy-related expenses. This may be termed "compensation" for "pain and suffering" or may be simply the fee which the surrogate "charges" for carrying the child. This may be a gestational or a traditional surrogacy arrangement.
Embryo donation	The transfer of an embryo resulting from gametes (spermatozoa and oocytes) that did not originate from the intended parent(s).
Embryo/foetus reduction	A procedure to reduce the number of viable embryos or foetuses in a multiple pregnancy.
Gamete (egg) donor	The woman who provides her eggs to be used by other person(s) to conceive a child. In France donors do not receive compensation and the donation is anonymous.

[371] Based on Fernando Zegers-Hochschild, David G. Adamson, Jacqueline de Mouzon, *et al*, 2009, "International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology", for ICMART and WHO, *Fertility and Sterility*, Vol.92, No.5, pp.1521-1524; and HCCH, 2012, A preliminary report on the issues arising from international surrogacy arrangements, Prel. Doc. No.10; Changes have also been made by the author

Gamete (sperm) donor	The man who provides his sperm to be used by other person(s) to conceive a child. In France donors do not receive compensation and the donation is anonymous.
"Genetic parentage" or the Genetic parent(s)	The person(s) who have provided their genetic material for the conception of the child. In some languages, this is referred to as "biological parentage". In surrogacy situations, such person(s) may not be (and often will not be), the legal parent(s) of the child.
Gestational surrogacy arrangement	A surrogacy arrangement in which the surrogate does not provide her own genetic material and thus the child born is not genetically related to the surrogate. Such an arrangement will usually occur following IVF treatment. The gametes may come from both intended parents, one, or neither. This may be an altruistic or commercial arrangement.
***In vitro* fertilisation (IVF)**	An ART procedure that involves extracorporeal fertilisation.
Infertility (clinical definition)	A disease of the reproductive system defined by the failure to achieve a pregnancy after 12 months or more of regular unprotected sexual intercourse.
Infertility (social definition)	Social infertility is a term to describe a situation in which the person(s) have difficulty or cannot achieve a pregnancy related to other factors than medically diagnosed infertilities such as sexuality or age.
Intended or Commissioning parent(s)	The person(s) who request another to carry a child for them, with the intention that they will take custody of the child following the birth and parent the child as their own. Such person(s) may, or may not be, genetically related to the child born as a result of the arrangement.
International surrogacy arrangement	A surrogacy arrangement entered into by intending parent(s) resident in one State and a surrogate resident (or sometimes merely present) in a different State. Such an arrangement may well involve gamete donor(s) in the State where the surrogate resides (or is present), or even in a third State. Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or commercial in nature.
Intracytoplasmic sperm injection (ICSI):	A procedure in which a single spermatozoon is injected into the oocyte cytoplasm.
"Legal parentage" or the Legal parent(s)	The person(s) considered to have acquired the legal status of being the "parents" of the child under the relevant law, and who will acquire all the

	rights and obligations which flow from this status under that law. In surrogacy situations, this may not (indeed, often will not) coincide with the genetic parentage of the child (*i.e.*, those who have provided their genetic material).
Preimplantation genetic diagnosis (PGD)	Analysis of polar bodies, blastomeres, or trophectoderm from oocytes, zygotes, or embryos for the detection of specific genetic, structural, and/or chromosomal alterations.
Surrogate (mother) or Gestational carrier	The woman (related or unrelated to the intended parent(s)) who agrees to carry a child (or children) for the intending parent(s) and relinquishes her parental rights following the birth. This term is used to include a woman who has provided her genetic material for the child. In these circumstances, surrogates are also called "gestational carriers" or "gestational hosts". Gametes can otherwise originate from the intended parent(s) and/or a third party (or parties).
Surrogacy arrangement	An arrangement entered into by intended parent(s) and a surrogate in which the parties agree that the surrogate carries a child until birth, point from which she relinquishes both the child and her parental rights to the intended parent(s). Such an arrangement may be a traditional or gestational surrogacy arrangement and may be altruistic or commercial in nature.
Traditional surrogacy arrangement	A surrogacy arrangement where the surrogate provides her own genetic material and thus the child born is genetically related to the surrogate. Such an arrangement may involve natural conception or artificial insemination procedures. This may be an altruistic or commercial arrangement.

Appendix 2: Glossary of French terms and institutions- arranged by alphabetical order

Assemblée Nationale	The legislative institution which with the *Sénat* compose the French Parliament.
Circulaire	A Circulaire provides recommendations to civil service employees *e.g.* attorneys general and Public Prosecutors.
Comité Consultatif National d'Éthique	A French governmental advisory council on bioethics issues. The CCNE was created by a Presidential decree of the then French President François Mitterrand in 1983.
Conseil d'État	French governmental body acting both as legal advisor of the executive branch as well as then highest administrative Court in France.
Cour de Cassation	The highest civil Court in France.
Par ricochet	Indirectly.

Appendix 3: Compilation of international provisions- arranged by alphabetical order

Name	***Article***	***Provision(s)***
CEDAW	*Art.5(b)*	To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.
	Art.6	States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.
	Art.12	1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.
	Art.16(1)(e)	States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.
CRC	*Art.3(1)*	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.
	Art.7(1)	The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

	Art.8	1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference. 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.
Directive No. 2011/24/EU	*Art.1*	1. This Directive provides rules for facilitating the access to safe and high-quality cross-border healthcare and promotes cooperation on healthcare between Member States, in full respect of national competencies in organising and delivering healthcare. This Directive also aims at clarifying its relationship with the existing framework on the coordination of social security systems, Regulation (EC) No 883/2004, with a view to application of patients' rights. 2. This Directive shall apply to the provision of healthcare to patients, regardless of how it is organised, delivered and financed. 3. This Directive shall not apply to: (a)services in the field of long-term care the purpose of which is to support people in need of assistance in carrying out routine, everyday tasks; (b)allocation of and access to organs for the purpose of organ transplants; (c)public vaccination programmes against infectious diseases which are exclusively aimed at protecting the health of the population on the territory of a Member State and which are subject to specific planning and implementation measures. 4. This Directive shall not affect laws and regulations in Member States relating to the organisation and financing of healthcare in situations not related to cross-border healthcare. In particular, nothing in this Directive obliges a Member State to reimburse costs of healthcare provided by healthcare providers established on its own territory if those providers are not part of the social security system or public health system of that Member State.
	Art.3(a)	For the purposes of this Directive, the following definitions shall apply "healthcare" means health services provided by health professionals to patients to assess, maintain or restore their state of health, including the

		prescription, dispensation and provision of medicinal products and medical devices.
	Art.4(1)(a)	Taking into account the principles of universality, access to good quality care, equity and solidarity, cross-border healthcare shall be provided in accordance with the legislation of the Member State of treatment.
	Art.4(2)(c)	The Member State of treatment shall ensure that there are transparent complaints procedures and mechanisms in place for patients, in order for them to seek remedies in accordance with the legislation of the Member State of treatment if they suffer harm arising from the healthcare they receive.
ECHR	*Art.8*	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.
	Art.12	Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.
	Art.14	The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
European Convention on Adoption of Children	*Art.17*	No one shall derive any improper financial or other gain from an activity relating to the adoption of a child.
Hague Convention on the Protection of Children and Co-Operation in Respect of	*Art.8*	Central Authorities shall take, directly or through public authorities, all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.

Intercountry Adoption		
ICESCR	*Art.12(1)*	The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
	Art.15(1)(b)	The States Parties to the present Covenant recognise the right of everyone to enjoy the benefits of scientific progress and its applications.
Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography	*Art.2(a)*	Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.
Oviedo Convention	*Art.1*	Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine. Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention.
	Art.21	The human body and its parts shall not, as such, give rise to financial gain.
Protocol No.16 to the ECHR	*Art.1*	1. Highest courts and tribunals of a High Contracting Party, as specified in accordance with Article 10, may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. 2.The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. 3.The requesting court or tribunal shall give reasons for its request and shall provide the relevant legal and factual background of the pending case.
Treaty on the Functioning of the EU	*Art.56*	Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended […].

Appendix 4: Compilation of national provisions- arranged by alphabetical order

Name	***Article***	***Provision(s)***
Civil Code	*Art.16*	Legislation ensures the primacy of the person, prohibits any infringement of the latter's dignity and safeguards the respect of the human being from the outset of life.
	Art.16-1	Everyone has the right to respect for his body. The human body is inviolable. The human body, its elements and its products may not form the subject of a patrimonial right.
	Art.16-5	Agreements that have the effect of bestowing a patrimonial value to the human body, its elements or products are void.
	Art.16-7	All agreements relating to procreation or gestation on account of a third party are void.
	Art.16-9	The ban on surrogacy is of public order.
	Art.18	Is French a child one parent of whom at least is French.
	Art.47	Faith must be given to records of civil status of French persons and aliens made in a foreign country and drawn up in the forms in use in that country, unless other records or documents possessed, external data or elements drawn from the record itself establish that the record is irregular, forged or that the facts declared therein do not square with truth […].
	Art.356	Adoption confers on the child a parentage which substitutes for his original parentage: the adoptee ceases to belong to his blood family, […].However, an adoption of the spouse's child still leaves extant his original parentage with regard to that spouse and his or her family. It produces, furthermore, the effects of an adoption by two spouses.
	Art.364	An adoptee remains in his family of origin and preserves all his rights therein, in particular his rights of succession. The prohibitions to marriage provided for in Articles 161 to 164 of this Code apply between the adoptee and his family of origin.
	Art.1128	Only things which may be the subject matter of legal transactions between private individuals may be the object of agreements.

Family and Social Action Code *(Code de l'action sociale et des familles)*	*Art.L.147-6*	The Council shall communicate to the persons mentioned in 1° of Article L. 147-2, after having ensured that they maintain their request, the identity of the mother of birth: -if it already has an express declaration of lifting the secrecy of her identity; -if there has not been an express manifestation of her will to preserve the secret of her identity, after having verified her will; -if one of its members or a person mandated by it has been able to obtain her express consent in the respect of her private life; -if the mother has died, provided that she has not expressed a contrary intention when requesting access to knowledge of the child's origins. In this case, one of the members of the Council or a person mandated by it shall notify the family of the birth mother and offer its support. If the mother of birth has expressly consented to the lifting of the secrecy of her identity or, in the event of her death, if she has not objected to her identity being communicated after her death, the Council shall inform the child who has made a request for access to her personal origins of the identity of the persons referred to in Article L. 147-2, paragraph 3. […] The Council shall communicate to the persons mentioned in 1° of Article L. 147-2 information that does not affect the identity of the […] mother of birth, transmitted by the health establishments, departmental services and bodies referred to in the fifth paragraph of Article L. 147-5 or collected from the father and mother of birth, with due respect for their privacy, by a member of the Council or a person mandated by it.
Penal Code	*Art.227-12*	The incitement of the parents or one of them to abandon a born or unborn child, made either for pecuniary gain, or by gifts, promises, threats or abuse of authority, is punished by six months' imprisonment and a fine of €7,500 €.

		Acting for pecuniary gain as an intermediary between a person desiring to adopt a child and a parent desiring to abandon his/her born or unborn child is punished by one year's imprisonment and a fine of €15,000. The penalties provided by the second paragraph apply to acting as an intermediary between a person or a couple desiring to receive a child and a woman agreeing to bear this child with the intent to give it up to them. Where the offence is habitually committed for pecuniary gain, the penalties incurred are doubled. Attempt to commit the offences referred to under the second and third paragraphs of the present article is subject to the same penalties.
	Art.227-13	Wilful substitution, false representation or concealment which infringes the civil status of a child is punished by three years' imprisonment and a fine of €45,000. Attempt to commit this offence is subject to the same penalties.
Public Health Code (*Code de santé publique*)	*Art.L.2141-2*	ARTs are authorised for therapeutic purposes, to compensate for the infertility of a heterosexual couple living and of childbearing age, or to avoid the transmission to the child or a member of the couple of a particularly serious disease.

Appendix 5: Interview participants and consent forms

Mrs. Marie-Josèphe Devillers is a member and the Co-President of the "*Coalition Internationale pour l'Abolition de la Maternité de Subsitution*" *i.e.* International Coalition for the Abolition of Surrogate Motherhood which is a French association aiming to promote women's rights.

Mr. Dominique Mennesson is the Co-President of the "*Comité de Soutien pour la Légalisation de la GPA et l'Aide à la Reproduction Assistée*" (C.L.A.R.A) *i.e.* the Support Committee for the legalisation of surrogacy and ARTs which is a French association aiming to support infertile couples and defend the rights of surrogate-born children and intended couples.

Interview Consent Form

Research project title (not final) : *« Stuck in a whirlwind of headwinds: France v. the ECtHR towards the recognition of the right to have a child/ the « surrogacy » case ».*

Research investigator : Mrs. Lauryane LENEVEU

Research Participant name :

The interview will take approximately thirty (30) minutes. We don't anticipate that there are any risks associated with your participation, but you have the right to stop the interview or withdraw yourself from the research at any time.

Thank you for agreeing to be interviewed as part of the above research project. Ethical procedures for academic research require that interviewees explicitly agree to being interviewed and how the information contained in their interview will be used. This consent form is necessary for us to ensure that you understand the purpose of your involvement and that you agree to the conditions of your participation. Would you therefore read the accompanying information sheet and then sign this form to certify that you approve the following:

- The interview will be recorded and a transcript will be produced ;
- The transcript of the interview will be analysed by Mrs. Lauryane LENEVEU as research investigator ;
- Access to the interview transcript will be limited to Mrs. Lauryane LENEVEU or academic colleagues and researchers with whom she might collaborate as part of the research process ;
- Any summary of the interview's content or direct quotations from the interview that might be made available through academic publication or other academic outlets might be anonymised so that you cannot be identified, and care could also be taken to ensure that other information in the interview that could identify yourself is not revealed if you wish so ;
- The actual recording will be kept unless you disagree;
- Any variation of the above conditions will only occur with your further explicit approval.

Global Campus Europe Funded by: Universiteit Utrecht

Quotation Agreement :

I also understand that my words may be quoted directly. With regards to being quoted, please initial next to any of the statements that you agree with :

MJVD	I agree to be quoted directly.
	I agree to be quoted directly if my name is not published and a made-up name (pseudonym) is used.
	I agree that the researchers may publish documents that contain quotations from me.

All or part of the content of your interview may be used :

- In (printed or online) academic papers, (printed or online) policy papers or (printed or online) news articles OK MJVD
- In presentations OK MJVD
- In an archive of the project as noted above OK MJVD

By signing this form, I agree that :

1. I am voluntarily taking part in this project. I understand that I don't have to take part, and I can stop the interview at any time;
2. The transcribed interview or extracts from it may be used as described above;
3. I have read the information sheet;
4. I don't expect to receive any benefit or payment for my participation;
5. I am/have been able to ask any questions I might have and I understand that I am free to contact the researcher with any questions I may have in the future.

Marie Josèphe Devillers

Participant Signature : Date : 02 06 2019

Researcher Signature : Date :

Global Campus Europe Funded by: Universiteit Utrecht

Formulaire de consentement à un entretien

Titre du projet de recherche (non définitif) : *« Stuck in a whirlwind of headwinds: France v. the ECtHR towards the recognition of the right to have a child/ the « surrogacy » case ».*

Chercheur investigateur : Mme. Lauryane LENEVEU

Nom du/de la participant(e) à la recherche :

L'entrevue prendra environ trente (30) minutes. Nous ne prévoyons pas que votre participation comporte des risques, mais vous avez le droit d'interrompre l'entrevue ou de vous retirer de la recherche en tout temps.

Merci d'avoir accepté d'être interviewé(e) dans le cadre du projet de recherche susmentionné. Les procédures pour les recherches universitaires exigent que les personnes interrogées acceptent explicitement d'être interviewées ainsi que la manière dont les informations contenues dans leur entretien seront utilisées. Ce formulaire de consentement nous est nécessaire pour nous assurer que vous comprenez le but de votre participation et que vous acceptez les conditions de votre participation. Veuillez donc lire la fiche d'information ci-jointe et signer ce formulaire pour certifier que vous approuvez ce qui suit :

- L'entrevue sera enregistrée et une transcription sera produite ;
- La transcription de l'entrevue sera analysée par Mme. Lauryane LENEVEU en tant que chercheur ;
- L'accès à la transcription de l'entrevue sera limité à Mme. Lauryane LENEVEU ou collègues universitaires et chercheurs avec lesquels elle pourrait collaborer dans son processus de recherche ;
- Le contenu de l'entrevue et/ou les citations directes tirées de cette dernière pourront être rendus public par le biais de publications universitaires ou autres publications. Si vous le souhaitez ces informations pourront être rendues anonymes de sorte que vous ne puissiez pas être identifié(e). En outre, l'on veillera à ce que toute autre information pouvant permettre une identification de votre personne ne soit pas révélée ;
- L'enregistrement proprement dit sera conservé sauf désaccord de votre part ;
- Toute modification des conditions ci-dessus n'interviendra qu'avec votre accord explicite et préalable.

Global Campus Europe Financé par: Universiteit Utrecht

Consentement de citation :

Je conçois également que mes paroles peuvent être citées directement. En ce qui concerne les citations, veuillez apposer vos initiales à côté de toute déclaration avec laquelle vous êtes d'accord :

X	J'accepte d'être cité(e) directement.
	J'accepte d'être cité(e) directement si mon nom n'est pas publié et/ou qu'un nom inventé (pseudonyme) est utilisé.
X	J'accepte que les chercheurs publient des documents contenant des citations de ma part.

Tout ou partie du contenu de votre entretien peut être utilisée :

- Dans des documents (papier ou en ligne) universitaires, des documents (papier ou en ligne) d'orientation ou des articles (papier ou en ligne) d'actualité
- Dans des présentations
- Dans une archive du projet comme indiqué ci-dessus

En signant ce formulaire, j'accepte que :

1. Je participe volontairement à ce projet. Je comprends que je n'ai pas à participer à l'entretien et que je peux y mettre fin à tout moment ;
2. L'interview transcrite ou des extraits de celle-ci peuvent être utilisés de la manière décrite ci-dessus ;
3. J'ai lu la fiche d'information ;
4. Je ne m'attends pas à recevoir de prestations ou de paiements pour ma participation ;
5. Je suis/ ai été en mesure de poser toutes les questions que j'ai pu avoir, et je comprends que je suis libre de communiquer avec le chercheur si j'ai des questions à lui poser à l'avenir.

Signature du/de la participant(e) : Date :

Signature du chercheur : Date :

Coordonnées: D. Meijl 21/05/2019

Que dois-je faire si j'ai des préoccupations au sujet de cette recherche ?
Si cette recherche vous préoccupe ou si vous vous inquiétez de la façon dont elle est menée, vous pouvez communiquer avec les personnes suivantes :