



# OPINION OF THE REFLECTION GROUP ON BIOETHICS ON GESTATIONAL SURROGACY

The question of European  
and international rules



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(Translated from French)



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# TABLE OF CONTENTS

1	INTRODUCTION A RAPIDLY EXPANDING PRACTICE	2
2	MULTIPLE MODALITIES	5
3	GESTATIONAL SURROGACY, A FORM OF ALIENATION OF THE 'SURROGATE MOTHER'	7
3.1	The appropriation of the body of the 'surrogate mother'	7
3.2	The intrusion into personal life	8
3.3	A pregnancy without attachment to the unborn child?	10
3.4	Freedom of consent	11
4	GESTATIONAL SURROGACY AND THE COMMODIFICATION OF THE CHILD	12
4.1	Separation from the 'surrogate mother'	12
4.2	The child treated as a product	13
5	FRAGMENTED MATERNITY	14
6	THE LEGAL TANGLE	16
7	HOW CAN COMMON RULES AT INTERNATIONAL OR EUROPEAN LEVEL BE ACHIEVED?	18
	LIST OF MEMBERS	21





# 1. INTRODUCTION.

## A RAPIDLY EXPANDING PRACTICE

‘Gestational surrogacy’ has become a “booming, global business”<sup>1</sup>. In the 1970s and 1980s, some sterile couples, in order to become legal parents, called on the services of ‘surrogate mothers’, who agreed to be inseminated by the spouse’s sperm, to carry the baby to the term of the pregnancy and to hand over the child at birth. These ‘surrogate mothers’ conceived and carried the baby that they undertook to hand over to the commissioning couple with whom they had made an agreement. Their status is both biological and gestational mother.

The progress of assisted reproductive technologies, in particular the perfection of *in vitro* fertilisation, has profoundly changed situations like these. It offers sterile couples the possibility of having children, except for those where the woman has impaired uterine function. For a number of the latter, this situation is not only endured with a great deal of suffering, but seems particularly intolerable and unjust in today’s climate. A growing number of such couples wish to carry out *in vitro* fertilisation with their own gametes (or with gametes from donors), then transfer the embryo to the uterus of another woman who will thus merely be a ‘surrogate mother’ or ‘gestational surrogate’ for their own child. In this case there is no genetic link between the gestational surrogate and the child, which would lead to the belief that the unborn child is in no way the child of the ‘surrogate mother’. From now on, this practice is therefore designated by the expression ‘gestational surrogacy’, which places the emphasis on the fact that a woman agrees to carry a child for the benefit (usually) of a commissioning couple<sup>2</sup> seeking to become parents, who are therefore escribed as ‘intended parents’.

‘Surrogate motherhood’, as described above, now more frequently designated by the more valuing term ‘reproductive surrogacy’ [‘procréation pour autrui’]<sup>3</sup>, is therefore hardly ever practised any more. By contrast, gestational surrogacy is booming in countries that officially tolerate commercial activities in this field,

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1 Hague Conference on Private International Law, Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements. Document drawn up by the Permanent Bureau, March 2011, Section 11.

2 It is now not only infertile heterosexual couples who have recourse to gestational surrogacy due to the inability of the woman to carry a child, but also male couples.

3 National Consultative Ethics Committee for Health and Life Sciences (France), Opinion no. 110, Ethical issues raised by gestational surrogacy, 1 April 2010, Introduction.



## 4 | GESTATIONAL SURROGACY

such as the United States (California), India, Thailand, Ukraine and Russia<sup>4 5 6</sup>. In these countries, specialist agencies and legal practices have multiplied, using the Internet to attract clients from all over the world and putting them in contact with young women who are destitute to varying degrees and ready, for some kind of recompense, to carry a child on behalf of the commissioning couple. A contract is drawn up, which provides that the child will be handed over at birth to the 'intended parents', most often in exchange for 'recompense', the amount of which is often very high in comparison with salaries normally earned in the gestational surrogate's country.

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4 Cf. Hague Conference on Private International Law, A study of legal parentage and the issues arising from international surrogacy arrangements, March 2014, Section 130.

5 Preparatory Document of the Synod of Bishops on the Family 2014 warns against '*an increase in the practice of surrogate motherhood (wombs for hire)*'.

6 The practice of gestational surrogacy is growing strongly, due to a general trend towards the legalisation of homosexual relations by means of legal forms such as 'same-sex marriage': cf., for example, Council for Responsible Genetics, *Surrogacy in America*, 2010, p. 13; BioEdge, *Will gay marriage boost third-world surrogacy?* [http://www.bioedge.org/index.php/bioethics/bioethics\\_article/10135](http://www.bioedge.org/index.php/bioethics/bioethics_article/10135); and The Sydney Morning Herald, *Marriage leads to children - gay marriage leads to surrogacy* <http://www.smh.com.au/federal-politics/political-opinion/marriage-leads-to-children--gay-marriage-leads-to-surrogacy-20120718-22aco.html#ixzz3F4d7DHfj>

## 2. MULTIPLE MODALITIES

Gestational surrogacy is sometimes practised totally selflessly. A fertile woman concludes an agreement with a woman from her circle of acquaintances (or even with someone previously unknown to her), who is infertile in terms of uterine function, to carry to the term of pregnancy the latter's biological child conceived by *in vitro* fertilisation, without asking for any 'remuneration' or 'recompense', at most a 'reimbursement' of expenses actually incurred. In this case the term used is 'altruistic gestational surrogacy'<sup>7</sup>. Although rarely implemented, it is still often evoked to enhance the status of the practice of gestational surrogacy in general.

Only two Member States of the European Union explicitly allow gestational surrogacy by law, and only subject to the condition of being 'altruistic'. In general, the Member States of the European Union, whatever their legislation, condemn all 'commercial' forms of gestational surrogacy, but this principle is applied differently from country to country. The United Kingdom allows payment to the gestational surrogate of 'recompense' of a 'reasonable' amount<sup>8</sup>, a concept open to numerous interpretations. An amount of €4,000 to €5,000 that appears 'reasonable' in Europe represents a considerable sum, ten years' wages for a manual worker<sup>9</sup>, for the poor populations of India. This does not necessarily prevent 'intended parents', who have paid 'recompense' of this kind, on returning to the United Kingdom with their child once it is born having been 'carried' by an Indian gestational surrogate, from being able to benefit from a legal decision (Parental Order) giving them the status of parents of the child!

Among the twenty-five other Member States<sup>10</sup>, seven completely prohibit gestational surrogacy, six partially prohibit it and twelve have no legal provisions on the subject. Some States demonstrate a very firm attitude, but the fact remains that, within the European Union, many judges have come up with legal arrangements that grant a child born from a commercial gestational surrogacy legal parentage with its 'intended parents'. *"In a number of States ad hoc, 'ex post facto' remedies have been found with a view to reducing the harmful impact of this legal limbo for*

7 Cf. European Parliament, Directorate General for Internal Policies, *A Comparative Study on the Regime of Surrogacy in EU Member States*, May 2013. Introduction, Table 1, Summary of definitions.

8 Cf. European Parliament, Directorate General for Internal Policies, *Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of surrogacy agreements: What is the current situation in the MS? Need for EU action?*, Oct. 2010, Section 3.4.

9 Cf. Hague Conference on Private International Law, March 2011, *op. cit.*, Section 3.4.

10 Croatia only acceded to the European Union in July 2013, two months after the publication of *A Comparative Study...*, the document quoted above which is the source of the following information.



## 6 | GESTATIONAL SURROGACY

*children. These remedies are ways of trying to cope with situations which are, in effect, a fait accompli: the child is already born and usually the surrogate mother does not wish to care for the child and the intending parents do*<sup>11 12</sup>.

The fact that many judges yield before the *fait accompli* can only encourage infertile couples who strongly wish to have a child to defy the law of their own country, all the more because they are often unfamiliar with it and many agencies unscrupulously promise to settle all legal problems. In all cases, even if there are no reliable statistics, there appear to be a substantial number of European couples who have recourse to ‘international’ (also known as ‘cross-border’) gestational surrogacy, travelling abroad to a country where commercial gestational surrogacy has been developed, in order to be put into contact, by agencies who charge high fees, with potential gestational surrogates. The conditions under which the long period from *in vitro* fertilisation, to the transfer of the embryo, to the pregnancy, takes place, depends to a great extent on the contract concluded, but also on the country in which the transaction is implemented.

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11 Hague Conference on Private International Law, March 2011, *op. cit.*, Section 14.

12 By ‘legal limbo’ it may be understood here that the general legal regime relating to legal parentage applies when there is no explicit legal provision on gestational surrogacy, or when the law that prohibits it has no explicit provision for the consequences, in terms of legal parentage, of breaking that law.

### 3. GESTATIONAL SURROGACY, A FORM OF ALIENATION OF THE 'SURROGATE MOTHER'

#### 3.1. The appropriation of the body of the 'surrogate mother'

The first question raised by gestational surrogacy is that of the relationship it implies with the body of the gestational surrogate. The expression used in popular speech to qualify this is 'womb for hire'. This is expressive, but does not go far enough, as it is not only an organ, but the gestational surrogate's whole person that she places at the service of the others, usually for remuneration.

A worker provides an employer, in exchange for a wage, with his labour, involving his body and his person, for a period defined by the employment contract and social legislation, and for tasks in which his privacy is protected. The body of the 'surrogate mother' is incomparably more involved in a gestational surrogacy contract. She provides the commissioning couple with a function that, regardless of the social relevance, a woman usually exercises in her private sphere, in close conjunction with her family, more specifically with her spouse. The exercise of this function will involve her whole body for a period of nine months, and it will be subject to major changes, with the inherent risks associated with pregnancy and giving birth. In order to guarantee the successful birth of the child and to comply with the date on which it is to be handed over to the couple who are waiting for the said child, such pregnancies often end in caesarean sections<sup>13</sup>, a source of risk to the gestational surrogate in subsequent pregnancies.

The act of acquiring such a hold on the body of another, often due to the power of money, raises a significant issue. Gestational surrogacy "gives rise to the use and instrumentalisation of women that is without precedent"<sup>14</sup>. "[The gestational surrogate] has to transform her body into a biological instrument to serve the desires of others; in brief, she has to live in the service of others, cutting off her own existence from all meaning to herself"<sup>15</sup>.

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13 LA HOUGUE C. de, PUPPINCK G., *La gestation pour autrui. Une violation des droits de l'homme et de la dignité* [Gestational surrogacy. A violation of human rights and dignity], European Centre for Law and Justice, 20 March 2013, Exploitation des femmes [Exploitation of women].

14 FABRE-MAGNAN M., *La gestation pour autrui. Fictions et réalité* [Gestational surrogacy. Fiction and reality], Paris, Fayard, 2013, p. 77.

15 AGACINSKI S., *Corps en miettes* [Body in pieces], Paris, Flammarion, 2009, p. 95.



## 8 GESTATIONAL SURROGACY

This is a serious offence against human dignity<sup>16</sup>, all the more unacceptable for the fact that it often takes the form of exploitation of vulnerable women from poverty-stricken communities who are attracted by the promise of payment of sums that exceed anything they could have previously imagined. It even happens that women have been subjected to pressure, compulsion, abuse and sometimes violence in order to ensure that they resign to putting their bodies at the service of others in this way<sup>17</sup>.

### 3.2. The intrusion into personal life

*“The intrusion into the personal lives of surrogate mothers and the encroachment of their individual liberty are also without precedent”*<sup>18</sup>. In the United States, contracts drawn up with the assistance of agencies very often include extremely precise restrictive clauses covering the whole sphere of the gestational surrogate’s personal life, her diet, her sporting activities (or lack of), her sex life, regular in-depth medical check-ups deemed compulsory, with the commitment, which goes far beyond the boundaries of common law, to hand over all medical records to the ‘intended parents’, who even have the right to be present at the birth. The ‘surrogate mother’ usually submits to all these demands, because the contact she has accepted generally provides for penalties in the case of failure to execute the various clauses. *“Such an alienation of a human being and such a renouncement of fundamental rights and liberties are actually unprecedented in law”*<sup>19</sup>. Even the issue of abortion in the case of a foetal anomaly is covered by these contracts, the decision often being given over to the ‘intended parents’.

*“In many countries the agency exercises regular control, sometimes with daily visits, and the psychological monitoring may also become a means of surveillance. [The ‘intended parents’] themselves may be in constant contact with the surrogate mother, by telephone or through visits, to the point of infringing the privacy of the surrogate mother and maintaining an unhealthy confusion”*<sup>20</sup>. In other countries, gestational surrogates are kept shut away for the full period from the preparation of the transfer of the embryo to the term of the pregnancy, separated from their family, their husband and their children, subjected to constant surveillance, and forced to keep to a strict diet and to

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16 In this context, we should reflect on the principle of the non-commercialisation of the human body and its parts or the principle of prohibition of financial gain using the human body and its parts as set out in Article 21 of the Convention on Human Rights and Biomedicine, 1997.

17 Cf. Hague Conference on Private International Law, March 2011, *op. cit.*, Section 34.

18 FABRE-MAGNAN M., *op. cit.*, p. 82.

19 *Idem*, p. 84-85.

20 LA HOUGUE C. de, PUPPINCK G., *op. cit.*, Surveillance des femmes [Surveillance of women].

spend their time in a way determined by the gestational surrogacy agency or clinic<sup>21</sup>.

It is very difficult to recognise any valid consent in the situations of vulnerability described above and, primarily, in situations of extreme poverty<sup>22</sup>. Forced gestational surrogacy is compared to a form of human trafficking<sup>23</sup> and the case law of the European Court of Human Rights recognises that public ‘interference’ in gestational surrogacy is justified “*by the objectives... of combating trafficking in human beings*”<sup>24</sup>. This is a new form of trafficking for the purpose of reproduction, whose victims are not only the ‘surrogate mothers’<sup>25</sup> but also children born as a result of gestational surrogacy<sup>26</sup>.

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21 The Iona Institute, The Ethical Case against Surrogate Motherhood: What we can learn from the Law of Other European Countries, 1.B.1. and 1.B.2. <http://www.ionainstitute.ie/assets/files/Surrogacy%20final%20PDE.pdf>

22 The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993, stipulates that “*An adoption within the scope of the Convention shall take place only if the competent authorities of the State of origin (...) have ensured that (...) the consents have not been induced by payment or compensation of any kind and have not been withdrawn*” (Article 4 (c) (3)).

23 Cf. Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children, Human trafficking for the purpose of the removal of organs and forced commercial surrogacy, 2012, p. 17 and seq. The Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005, in Article 4 (a), defines trafficking in human beings as “*the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*” Moreover, paragraph (b) of this Article clearly states that “*The consent of a victim of ‘trafficking in human beings’ to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used*”. Cf. also the Palermo Protocol (Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime, 2000), Article 3; and Directive 2011/36/EC of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims (2011), Article 2.

24 D. and others v. Belgium, decision of 8 July 2014, Section 52.

25 “*Women’s bodies are sold internally and on the global market for sex trafficking, and it seems inevitable that organized crime will shift into the surrogacy market and sales of women’s reproductive capacity*” (The Iona Institute..., *op. cit.*, p. 13). cf. the Convention on the Elimination of All Forms of Discrimination Against Women, which came into force on 3 September 1981, and which establishes that the “*States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women*” (Article 6).

26 It is in fact difficult to distinguish certain situations of commercial gestational surrogacy from the sale of children, defined in the Optional Protocol to the Convention on the Rights of the Child, concerning the Sale of Children, Child Prostitution and Child Pornography, 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*” (Article 2 (a)). Cf. also Forbes, Surrogate Parenthood For Money Is a Form of Human Trafficking <http://www.forbes.com/sites/realspin/2014/04/04/surrogate-parenthood-for-money-is-a-form-of-human-trafficking/>.



### 3.3. A pregnancy without attachment to the unborn child?

All gestational surrogates undertake to hand over the child at birth to the commissioning couple. For her, the fact of considering the gestation contract as a simple business transaction may appear to be a necessary protection, an aid to preventing any attachment to the child during the pregnancy. *“Not only do surrogates need to tell themselves from the beginning that the pregnancy is merely a business relationship in order to ease the pains of relinquishment, they need the aid of a support group to constantly psychologically condition and affirm the mindset throughout and after the pregnancy”*<sup>27</sup>. The major gestational surrogacy agencies make substantial charges for such support, and are thus convinced that gestational surrogacy could have serious physical and mental consequences without this kind of psychological conditioning. However, this support is not always provided. And is it actually desirable, if it takes the form of psychological conditioning, a denial of reality?

The lack of research on the long-term psychological effects of gestational surrogacy means it is not possible to draw conclusions about the consequences for the ‘surrogate mother’ of the absence of attachment to the child and of the handing over at birth to the ‘intended parents’. But authors believe that they are comparable to the difficulties encountered by women who have had to give their child up for adoption<sup>28</sup>. Others deem that *“the moment of separation of the gestational surrogate and the child she has carried for nine months may be much more painful than anticipated. The feelings of the gestational surrogate toward the child may have developed during the pregnancy, to an extent that it is difficult to foresee. It may result in grief, depression and, in extreme cases, a refusal to hand over the child”*<sup>29</sup>.

Other authors are concerned about the effects on the children of gestational surrogates, of the abandonment by their mother of a child she has carried throughout her pregnancy. They deplore the lack of research on this subject<sup>30</sup>.

<sup>27</sup> The Iona Institute, *op. cit.*, 1.A.2.

<sup>28</sup> *Idem.*

<sup>29</sup> Académie nationale de Médecine (France), La gestation pour autrui: Rapport 09-05 [Gestational surrogacy: Report 09-05], 10 March 2009, Les arguments contre la gestation pour autrui [The arguments against gestational surrogacy].

<sup>30</sup> *Idem*, Les connaissances actuelles concernant les aspects médicaux [The current state of knowledge about the medical aspects].

### 3.4. Freedom of consent

If, in the case of gestational surrogacy, it is all about will and ‘intent’, how can freedom be ensured? And if it cannot, all arguments legitimising gestational surrogacy collapse immediately.

Those in favour of legalising gestational surrogacy assert that some women truly desire to carry a child for the benefit of another, because they want to provide a service to an infertile couple or to make up for a painful episode in their own lives, or even because they like being pregnant without then having to raise a child. These cases do exist<sup>31</sup>, but they emphasise the fact that the most common motivational factors are different, much more prosaic ones: the desire to earn a substantial sum of money over a fairly limited time period while remaining available for other occupations, or great poverty and the unexpected opportunity to earn in a single year a sum that could not be obtained from a lifetime of saving. “*Economic pressures in commercial surrogacy or emotional pressures in altruistic surrogacy should not be underestimated*”<sup>32</sup>.

Under such conditions, how can it be verified that consent is freely given before the start of the pregnancy, and that it continues until the birth? If, at that moment, the ‘surrogate mother’ is loath to hand over the child, is she still really free to keep it? Are the financial constraints not too great for her? In any case, in the famous case of Baby M, where a ‘surrogate mother’ refused in 1986 to hand over her child to its genetic father, the Supreme Court of New Jersey recognised all the constraints that cast doubt on the fully voluntary and informed nature of the consent to hand over the child to the ‘intended parents’<sup>33</sup>.

The logical conclusion from the foregoing is:

***By the instrumentalisation of the body of the ‘surrogate mother’ that it causes, the intrusion into the personal life of the surrogate mother, the denial of the intra-uterine bond between the pregnant woman and the child she is carrying, the exploitation of vulnerable women from poverty-stricken populations for the benefit of couples – or persons – who have substantial financial resources, without prejudice to any other sources of harm, gestational surrogacy proves to be a practice that is severely detrimental to human dignity***<sup>34</sup>.

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31 Cf. SZEJER M., WINTER J.-P., Les maternités de substitution [Surrogate motherhood], *Études*, vol. 410, no. 5, May 2009, p. 605-616.

32 European Parliament, Directorate General for Internal Policies, May 2013, *op.cit.*, 1.2.2.

33 Cf. FABRE-MAGNAN M., *op. cit.*, p. 90.

34 The same assessment may be applied, *a fortiori*, to ‘surrogacy’.



## 4. GESTATIONAL SURROGACY AND THE COMMODIFICATION OF THE CHILD

### 4.1. Separation from the ‘surrogate mother’

*“The advances in research on the subject of prenatal skills and the development of the infant psyche never cease to show us how detrimental it is to separate a very small infant from its mother, thus removing its first points of reference, causing it to live in real chaos. This breaking off can be devastating”<sup>35</sup>.*

Many paediatricians are convinced that a child in its mother’s womb perceives her voice, the sounds of her body, the voice of the father if he speaks close to her belly, the family atmosphere. Removing the child from the woman who carried it thus cuts it off from this familiar universe, depriving it of the reference points it could have referred to in the first moments of post-natal life. This separation is sometimes necessary, for example where a newborn needs to be looked after in an intensive care unit, but in such cases doctors seek as much as possible to encourage the close presence of the woman who nurtured the child in her womb.

Yet gestational surrogacy almost always leads to a very rapid, even brutal, separation of the child from the ‘surrogate mother’. And the suffering registered in the subconscious is revived later in life, especially in adolescence, and may be expressed in various ways, *“in the form of depression, anxiety, various physical symptoms of psychological distress, feelings of insecurity or suicidal tendencies”<sup>36</sup>.*

Of course one can presume that the ‘intended parents’ are motivated by a desire to love this child and make it happy. However, in the joy of at last being able to take this long-awaited newborn in their arms, they no longer pay attention to the circumstances in which it came into the world, or to the woman who made this possible. They therefore do not understand that their child may later perceive this entry into the world in terms of abandonment by the one who carried and gave birth to it.

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<sup>35</sup> SZEJER M., WINTER J.-P., *op. cit.*, p. 608.

<sup>36</sup> *Idem.*

## 4.2. The child treated as a product

Gestational surrogacy almost always involves the handing over of the child for a payment of money, whatever the term used to qualify this amount – compensation, recompense, etc. The child is therefore treated as a product and the agreement is similar to a contract of sale<sup>37 38</sup> : in addition, there are also provisions in a good number of contracts signed in the United States that the ‘surrogate mother’ is obliged to reimburse all the money received if she does not hand over the child. *“The child is therefore owed in return for the price paid by the ‘intended parents’. Conversely, the sum of money is owed by the parents in return for [the handing over of] the child, which is the definition in law of a price”*<sup>39</sup>.

And the ‘intended parents’ expect to receive a child in good health. This indicates the legal insecurity that affects these gestational surrogacy agreements and also the newborn. What would happen if, for reasons of congenital abnormality, the commissioning couple refused to accept the child?

***Such a commodification of the child is in direct contradiction of the affirmation of human dignity, the keystone of the Charter of Fundamental Rights of the European Union and violates “the prohibition on making the human body and its parts as such a source of financial gain”***<sup>40</sup>.

37 Cf. note 26 above.

38 It is clear with regard to commercial gestational surrogacy, but also in the case of so-called ‘altruistic’ gestational surrogacy, that the child is treated as an object.

39 FABRE-MAGNAN M., *op. cit.*, p. 43.

40 Charter of Fundamental Rights of the European Union, Articles 1 and 3.



## 5. FRAGMENTED MATERNITY

When a child comes into the world by means of gestational surrogacy, who is truly the mother? It appears increasingly detestable to tear the newborn away from the woman who carried it if she refuses to be separated from the baby. Legal propositions are heading in this direction, providing for the gestational surrogate a right to retract. And yet it is not possible to simultaneously recognise her right to keep the child simply because she has carried it and to justify gestational surrogacy by considering that carrying the child is a secondary aspect of maternity<sup>41</sup>.

Many countries recognise the mother of the child by means of the act of giving birth – according to the principle *mater semper certa est* – and therefore by the pregnancy that leads up to it. Driven by their suffering due to their inability to have a child themselves, encouraged by biotechnological innovations and by a certain vagueness of the application of the law, couples demand that an exception be made to this general principle, to their own benefit and also to the presumed benefit of the children born as a result of gestational surrogacy. The fervent demands of these couples are understandable, but satisfying them calls into question a fundamental principle of law, thereby completely upsetting family law, and leading to the outcome that maternity is no longer founded on physical realities, but solely on the desire or intention to become a parent. “*This is a case of totally destroying the foundations of legal parentage*”<sup>42</sup>, and it opens wide the door to diversity and fragility of intention, and therefore to uncertainty for unborn children. It also opens the door to a whole range of demands.

In fact, if it is only the desire or intention to become a parent that is the basis for maternity and paternity, why reserve gestational surrogacy for couples where the woman has no uterine function, instead of opening it up to other couples, whoever they are, even ‘same-sex couples’, or to single persons who long for a child, in the name of the principle of equality between people and rejection of all discrimination? This would be to recognise a ‘right to a child’, independent of marital situation, and therefore to make the child an object, ‘an object to which one has a right’<sup>43</sup>, and no

41 Cf. FABRE-MAGNAN M., *op. cit.*, p. 33-34.

42 ORNELLAS (Mgr P. d’) and the Bishops of the working group on bioethics, Bioéthique. Propos pour un dialogue [Bioethics. Proposals for dialogue], Paris, Lethielleux-DDB, 2009, p. 101.

43 Congregation for the Doctrine of the Faith, *Donum Vitae* [The Gift of Life], February 1987, II. B. 8. Cf. also Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, Section 235.

longer 'a gift'<sup>44</sup> and a subject of law. Where else, moreover, could all the 'surrogate mothers' needed to satisfy such a 'right' be found, other than in the poorest regions of the planet, at the price of substantial financial incentives?

Experience shows the affection that children born following gestational surrogacy can have for the couple who bring them up and care for their education. But this should not mask the dissociation of the elements that form the basis of a society and which encourage the establishment of a parental bonds and legal parentage. In the case of gestational surrogacy, the function of maternity is divided between two or three women, the one who has carried the child and given birth, the one who brings up the child, and often also an oocyte donor. This dissociation between the educational, genetic and physical dimensions (relating to the pregnancy and intra-uterine relations) could upset the formation of the child's personal identity and do him/her a very painful injury, especially if the conditions surrounding their birth are revealed belatedly.

The Magisterium of the Catholic Church warns in particular against this dissociation. The child should be the fruit and the sign of conjugal relations "*of the mutual self-giving of the spouses, of their love and of their fidelity*"<sup>45</sup>, to the exclusion of any other parent. This is not the case in 'surrogate motherhood' which "*offends the dignity and the right of the child to be conceived, carried in the womb, brought into the world and brought up by his own parents; it sets up, to the detriment of families, a division between the physical, psychological and moral elements which constitute those families*"<sup>46</sup>. In addition, "*it is contrary to the unity of marriage and to the dignity of the procreation of the human person*"<sup>47</sup>.

***Contrary to this unified vision of the human being and human procreation, gestational surrogacy brings about a dualist vision of the human person and of maternity. The priority is on the initial undertaking of the gestational surrogate and the intention of the commissioning couple. The body is erased, or at least reduced to a simple function. No case is made for that which usually takes place between the child and its mother, within her body.***

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44 Congregation for the Doctrine of the Faith, *idem*. Thus, "*legislation must also prohibit, by virtue of the support which is due to the family, (...) surrogate motherhood*" (*ibid.*, III).

45 *Ibid.*, II.A.1.

46 *Ibid.*, II.A.3. Cf. also II.B.8. et Catechism of the Catholic Church, Section 2376.

47 *Ibid.*.



## 6. THE LEGAL TANGLE

“A serious and significant problem in many (if not most) International Surrogacy Arrangement cases is the legal status of the children born as a result of International Surrogacy Arrangements”<sup>48</sup>. The focus is on the establishment and/or recognition of the child’s legal parentage and the legal consequences which flow from such a determination (e.g., the child’s nationality, immigration status, who has parental responsibility for the child, etc.).<sup>50</sup> Often, the ‘intended parents’, on return to their State of residence, especially and predictably if their State prohibits all forms of gestational surrogacy, are not recognised as the legal parents of the child. In certain cases, albeit a minority, such children, are trapped without nationality or passport in their State of birth, unable to leave and sometimes with no permission to stay<sup>51</sup>.

The complexity of these legal difficulties arises from the great number of ethical and public order issues raised by ‘traditional surrogacy’ and gestational surrogacy, from the disapproval these issues arouse in many countries, and from the conflicts between the rules for establishing legal parentage and filiation in the States in question, the State of the child’s birth and the State of residence of the ‘intended parents’<sup>52</sup>. Moreover, these rules may differ widely from one State to another, so that the studies carried out to date that tackle the legal problems raised by ‘surrogate motherhood’ in various countries around the world fill many thick volumes<sup>53</sup>.

*“As the rapidly burgeoning case law from multiple jurisdictions indicates, the legal problems in this area are acute (and misinformation on legal matters for hopeful infertile couples, rife). [...] Problems may arise: (a) when intending parents wish to take the child ‘home’ to their State of residence, (b) once the child is in the State of the intending parents’ residence and either registration of the foreign birth certificate is sought or a judicial / administrative action is brought to recognise a foreign judgment relating to the child’s legal parentage; and (c) even later in time when the issue of parentage might be raised as an incidental question to a custody or maintenance dispute”<sup>54</sup>.*

48 The general term ‘Surrogacy’ encompasses both ‘traditional surrogacy’ and ‘gestational surrogacy’. In this and the following paragraph, the term ‘Surrogacy’ is used in the same way as ‘surrogate motherhood’.

49 Hague Conference on Private International Law, March 2014, *op. cit.*, Section 147.

50 Hague Conference on Private International Law, March 2011, *op. cit.*, Section 3.

51 Hague Conference on Private International Law, March 2014, *op. cit.*, Section 147.

52 Cf. European Parliament, Directorate General for Internal Policies, May 2013, *op.cit.*, Chap. 5.

53 Cf. European Parliament, Directorate General for Internal Policies, May 2013, *op.cit.*

54 Hague Conference on Private International Law, March 2011, *op. cit.*, Section 13.

A transcription of the birth certificate, or the recognition of judgments made in the country of birth granting legal parentage to the 'intended parents', present even more difficulties if the country of residence has strict rules with regard to 'surrogate motherhood' or even formally prohibits it. As has been indicated above, no form of commercial 'surrogate motherhood'<sup>55</sup> is allowed in the Member States of the European Union. Many Member States of the European Union invoke 'public order' or 'fraud to the law' to justify their refusal to recognise administrative documents or legal decisions from the country of birth<sup>56</sup>. Nevertheless, many judges have managed to come to various legal arrangements: sometimes, legal parentage is established through the procedure for recognition of paternity or through the adoption procedure; in other cases, only the custody of the child is granted to the 'intended parents', but they are not recognised as legal parents<sup>57</sup>. All this will add to the difficulties encountered by children born as a result of a 'traditional surrogacy' or a 'gestational surrogacy' agreement and by the 'intended parents' themselves. The latter are also subject to a kind of social repudiation of the process in which they have invested so much energy and a significant amount of their assets.

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55 As specified above, 'surrogate motherhood' includes traditional surrogacy and gestational surrogacy.

56 *Idem*, Section 29.

57 Recently, the European Court of Human Rights, in two cases against France where one of the 'intending parents' (the fathers) were also the biological parents of the child (the oocyte coming from anonymous donors), considered that, by rejecting all the possible routes – including the route of recognition of paternity or adoption – “*both regarding the recognition and the establishment in internal law of the bond of legal parentage with their biological father(s)*” in particular, France had violated the identity of the children and thus their right to respect of their private life (cf. the decisions of 26 June 2014 in the cases of *Mennesson v. France* and *Labassee v. France*).



## 7. HOW CAN COMMON RULES AT INTERNATIONAL OR EUROPEAN LEVEL BE ACHIEVED?

Such a legal tangle gives rise to a good deal of uncertainty for couples who go abroad in the hope of returning with a child obtained by ‘surrogate motherhood’ and great insecurity for the children born in this way. And yet the practice is growing. Under these conditions, the conviction is spreading that it is becoming untenable “*to fail to respond to the legal and regulatory challenges presented by the increasing prevalence of surrogacy*”<sup>58</sup>, and that it is necessary to act at both national and supra-national level. The International Convention on the Rights of the Child, moreover, recognises the right of every child “*to acquire a nationality*”<sup>59</sup> and stipulates that “*the best interests of the child shall be a primary consideration*”<sup>60</sup> in all decisions of courts and administrative authorities concerning children.

In the same vein, various reports commissioned by the European Parliament demand the establishment of “*common private international law standards*”<sup>61</sup>, to establish within the EU a “*mutual recognition of judgments and public documents concerning the recognition of legal parenthood*”<sup>62</sup>, to harmonise the national laws governing ‘surrogate motherhood’<sup>63</sup> and, from a much wider perspective, to cooperate in the drafting of an international convention<sup>64</sup>.

The Hague Conference on Private International Law is working on an in-depth investigation into, and reflection on, these issues. But, while seeking to better unify the rules of international private law<sup>65</sup>, its stated objective is to examine how to provide better protection of the rights and well-being not only of children but also of the other parties involved in international ‘surrogate motherhood’. The same preoccupation is present in the reports drafted at the request of the European

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58 European Parliament, Directorate General for Internal Policies, May 2013, *op. cit.* Chapter 5.

59 UNO, International Convention on the Rights of the Child, Article 7.

60 *Idem*, Article 3.

61 European Parliament, Directorate General for Internal Policies, Oct. 2010, *op.cit.*, 4.1.

62 *Idem*, Section 4.2

63 *Ibid.*, Section 4.2

64 *Ibid.*, 4.3

65 Cf. Hague Conference on Private International Law, The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project, April 2014, V.

Parliament<sup>66</sup>, and in numerous court decisions.

In judgments relating to the attribution of legal parenthood, some common law countries currently take account of the quality of the consent of the ‘surrogate mother’ and, conversely, the degree to which she is exploited, the financial aspects of the gestational surrogacy agreement, etc. In civil law countries, the decisions made by the courts are founded either on the interest of the child in the particular case in question or taking account of much wider factors such as the commodification of women and children and the exploitation of gestational surrogates<sup>67</sup>. Where these countries invoke the concepts of ‘public order’ or ‘fraud to the law’, this is specifically in order to oppose such practices that are adjudged to seriously harm the fundamental rights and dignity of the human person.

From such a perspective, the reflection cannot end with the *fait accompli* of the ‘surrogate motherhood’ market and the associated development of ‘procreative tourism’ with the resultant issues concerning the status of children born in this way. Justice and compassion demand that the intensity of the suffering of infertile couples is recognised, without absolving legislators of the responsibility of questioning the acceptability and consequences of the means used to remedy it. The relief of one party’s suffering cannot be sought by means that contradict the major values recognised by a society, especially the respect of the dignity and fundamental rights of others, which may in the long term cause an escalation of situations that produce equal suffering.

The Member States of the EU have always deemed unacceptable the commodification of the body of the ‘surrogate mother’ and of the child and, consequently, the commercial ‘traditional surrogacy’ and gestational surrogacy. It therefore seems possible that agreement can be reached on this subject. The search for common rules<sup>68</sup> and comparable legal practices could begin with the strict application of the principle set out above and thus with the evaluation of the feasibility of refusing a transcription of birth certificates or a recognition of the legal decisions of the birth country in cases where ‘recompense’ is paid that goes beyond the mere reimbursement of expenses actually incurred by the ‘surrogate mother. Any other attitude of the judicial or administrative authorities would only allow the commercial system of gestational surrogacy to flourish and encourage

66 Cf. European Parliament, Directorate General for Internal Policies, May 2013, *op.cit.*, 1.2.2.

67 Cf. Hague Conference on Private International Law, March 2014, *op. cit.*, Sections 173-174.

68 It would be preferable to achieve common rules at a global level. The document A Comparative Study... (p. 199) affirms that “the EU could consider adhering to an international instrument regulating these issues on the grounds of its external competences to join treaties”.



couples and single persons, who want a child, to get involved in it<sup>69</sup>. But to truly undertake to follow this route requires real determination on the part of each of the Member States.

Clearly, such a change in attitude would necessitate clear announcements and explanations to the citizens of the EU, and those third-party countries where commercial gestational surrogacy is currently practised, so that each and every one may assume their own responsibility and not contribute to the birth of children in situations that would put them in difficulty.

Such legal orientation would not mean forgetting the best interests of the child, to whom each State that is a signatory to the International Convention on the Rights of the Child should give 'primary consideration'. This entails not encouraging reproduction methods where the child and the woman who carries it are treated as a product and as an instrument of production respectively.

***“The crucial question in law is whether we want to establish a society in which children are produced and sold like products, and whether we are aware of the consequences for the way in which we think of them, as well as for the resultant human and social relations”<sup>70</sup>.***

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<sup>69</sup> It is not certain that the document *A Comparative Study...* clearly draws this conclusion (cf. p. 193).

<sup>70</sup> FABRE-MAGNAN M., *op. cit.*, p. 76.

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