



Contribution of the *European Centre for Law and Justice*
(ECLJ)

to the Report of the Special Rapporteur on the sale and sexual
exploitation of children, including child prostitution, child
pornography and other child sexual abuse material relating to
***Safeguards for the protection of the rights of children born
from surrogacy arrangements***

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Introduction

Addressing the issue of the rights of children born through surrogacy should not obscure the fact that this practice **is in itself contrary to the rights of women and children**. No surrogacy is carried out for the sake of the child's interest: it is only a question of **satisfying the desire of the adults**. The child, as well as the surrogate mother and the oocyte donor, are the **means by which to satisfy this desire**. To treat a person as a means and not an end is a violation of human dignity.

Surrogacy implies a **manipulation of the child's civil status**, that is to say, a modification of his identity. His maternal affiliation is split between the surrogate and sponsor (or buyer) mothers, and possibly an oocyte donor. The sponsor may or may not be the parent, and the surrogate's husband may claim paternity. The child thus conceived is inevitably deprived of a clear ancestry. The surrogate mother, that is to say, the biological mother who gives birth, is eliminated from the life and filiation of the child. His identity documents, recognizing the sponsors as the legal parents, are therefore based on an **institutionalized lie**.

Finally, in surrogacy, the child is transferred, both physically and in the civil registry, from the mother who gave birth to the sponsor/buyer(s), with or without the intervention of an agency, for a fee or other benefits. This is the definition of the **sale of children**. Human life is therefore considered a good that can be disposed of, either gratuitously or for a fee. An attribute of the right of property is thus exerted over such children: this is the definition of slavery.

Surrogacy is not a new practice: it comes under the definition of the "fraudulent attribution of a child to a woman who has not given birth", a crime punishable under Article 345 of the former French Penal Code (. The novelty is that it can be accepted as one way among others to have a child ("new opportunities for family formation") and that it has become a real international trade.

France has expressly prohibited surrogacy since the first law of bioethics in 1994. This prohibition is a measure of public order (Civil Code, articles 16-7). Incitement to child abandonment and mediation between a potential surrogate mother and a sponsor are penalized (Criminal Code, art 227-12), as well as the violation of civil status (civil code 376 and Penal Code 227-13). Nevertheless, the recognition, under pressure from the European Court of Human Rights (ECHR), of situations created abroad to circumvent French law, undermines this prohibition.

1- The interest of the child as primary consideration (CDE, Art. 3)

As noted in the final report of the Mission Droit et Justice, *"the best interests of the child appear to be the foundation for both the advocates of the recognition of a 'right to a child' and its detractors. . . . In the analysis, it appears that a general and abstract assessment of the best interests of the child grounds a protection of the child and his rights, whereas the concrete appreciation of this interest in the light of the created situation favors the emergence of a 'right to a child'."*¹

¹ Clotilde Brunetti-Pons (Dir.), *Le « droit à l'enfant » et la filiation en France et dans le monde*, Final Report of the Mission de recherche Droit et Justice, CEJESCO of the University of Reims, 2017, p. 52-53.

Surrogacy and right to a child

There can be no right *to* the child, a right *to* a person or *on* them. As the Special Rapporteur has already pointed out, **international law does not recognize any “right to a child”**.²

It also follows from the established case-law of the ECHR that no such right is guaranteed by any article of the European Convention on Human Rights. The right to marry and to found a family imposes on States only the negative obligation not to hinder the decision of the married couple composed of a man and a woman to try to procreate.

However, surrogacy is by nature an application of the claim of the right to the child. It operates a shift from the *desire* to have a child to the *right* to obtain one by any means.

Surrogacy and manipulation of the best interests of the child

The proponents of surrogacy invoke the best interests of children to have it ratified. They claim it must be legalized to better control it. Yet, it is the will of the adults who use surrogacy which causes these violations of children’s rights, not the refusal to recognize this practice. In order to allow this practice, which is detrimental to human dignity, to be accepted, its supporters thus **exploit the interest of the children whom they themselves have put in this situation**, which is contrary to the principle *nemo auditur propriam turpitudinem allegans*.

Several cases have been submitted to the ECHR by couples or persons who have used surrogacy, and who always invoke the best interests of the child. There is thus a “**real manipulation of the child by the buying couples**. . . . *If, in these cases, the child is indeed a victim, it is important not to mistake the guilty: it is not the French authorities as the applicants argue, but the buying couples who deliberately decided to give birth to children in the disadvantageous and inhumane conditions of surrogacy; all this with the complicity of States that are quick to issue deceptive birth certificates with potential serious psychological consequences that the child will carry for life.*”³ *The concern for the interest of the child seems to have been very secondary in the eyes of couples and invoking it a posteriori to validate such acts is paradoxical. There is an abuse of rights, that is to say the use of human rights against themselves, which is expressly prohibited by the European Convention (Article 17), itself manipulated by the applicants.*”⁴

For an appreciation of the best interests of the child upstream and in abstracto

Regarding procreation, the difficulty is that the children concerned do not yet exist: they are therefore not legal subjects, so it is not possible to balance the rights of future children with those of other people involved. It is therefore necessary to question the meaning of the best interests of the child upstream. It must first be recognized that **the purpose of surrogacy is to satisfy the desire of adults** which, however legitimate it may be, does not allow for infringement upon the dignity of others.

² Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material relating to safeguards for the protection of the rights of children born from surrogacy arrangements, 15.01.2018, A/HRC/37/60, §64.

³ The Hague Conference on private international law, *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, March 2014, Dov. pré. No 3C (the study), § 188.

⁴ « Le droit français sur la GPA résistera-t-il aux coups de boutoir de l’Europe ? », 11.01.2019, *Génétique*.

This goal is the exact opposite of that of adoption, which is carried out in the best interests of the child. Adoption gives a family to a child who has been deprived of one by the misfortunes of life. Surrogacy, on the other hand, produces a child to dispossess him of his parents.

Every child who comes into the world needs his true parents: he should know his biological parents, be raised by them and have a true biological affiliation. Any other situation should only exist by accident. To voluntarily deprive a child of his true parents and of the knowledge of his filiation is always a serious injustice and a cause of suffering.

Surrogacy has **various negative impacts** on the children who are born through it. In addition to the known disadvantages of medically assisted procreation, a child born through surrogacy must live knowing that he came into the world under a contract, and that his mother abandoned him for money. At birth, or soon after, he was torn from his mother, with whom deep links were established throughout the pregnancy. Science reveals more and more the depth and impact of these links on the life and the physical and mental health of the child.

It should be noted that “purely altruistic” surrogacy is not necessarily better for the child. In addition to the fact that the total absence of counterpart is extremely rare, the agreement between the parties risks being ephemeral, giving rise to violent hatred and endless procedures, of which the child is both the object and the victim.

2- Rights to identity, access to one’s origins and family environment

Surrogacy runs straight up against the Convention on the Rights of the Child, including articles 7.1, 8.1, and 9.3. Moreover, according to **article 16**, “*No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family*” (1) and “*The child has the right to the protection of the law against such interference or attacks*” (2). These provisions are to be understood in relation to each other and show that States have a positive obligation to foster relations between the child and his parents, and more generally with his biological family.

The importance of the biological basis of filiation

The ECHR encompasses the right to identity within the right to privacy protected by Article 8 of the European Convention. It expressly includes the right to have access to one’s biological origins and even states that it “*includes obtaining information necessary to discover the truth concerning important aspects of one’s personal identity, such as the identity of one’s parents*”⁵ There is therefore a positive obligation to facilitate people’s access to the identity of their biological parents, taking into account in particular the best interests of the child.⁶ The case law on surrogacy confirms the importance given by the ECHR to the biological basis of filiation.⁷

In France, **gametes donations are anonymous**. No parentage can be established between the author of the donation and the child born (civil code, art 311-19) and any action to establish or contest filiation is prohibited (civil code, art 311-20). It is therefore impossible for a person conceived with such a donation to have access to his origins. In other words, there is no balance between the rights of the child conceived with gamete donation and those of other stakeholders. It is precisely on this point that cases pending at the ECHR implead France.⁸

⁵ *Phinikaridou v. Cyprus*, No. 23890/02, 20.12.2007, § 45.

⁶ *Mikulic v. Croatia*, No. 53176/99, 4.09.2002, § 56 à 59.

⁷ Compare *Mennesson v. France*, No. 65192/11, 26.06.2014 (violation) and *Paradiso and Campanelli v. Italy* [GC] No. 25358/12, 24.01.2017 (non-violation).

⁸ *Gauvin-Fournis v. France*, No 21424/16 ; *Silliau v. France*, No 45728/17.

The practice of surrogacy being prohibited in France, people who long for a child turn to countries where it is allowed or tolerated. Upon their return to France, the sponsors request the transcription of the child's foreign birth certificate in the French civil status registers in order to obtain a French birth certificate, to make the affiliation established abroad enforceable, and finally, to hide the use of surrogacy.

The safeguards preventing the recognition of surrogacy agreements made abroad, mainly the refusal to transcribe them, have been rendered ineffective by the ECHR: instead of clearly condemning surrogacy, it gives hope to fraudsters to not be condemned and even to be recognized in their right.

Indeed, having initially not allowed any transcription in case of surrogacy,⁹ France was condemned by the ECHR¹⁰ and then gave in¹¹ by allowing the transcription of the act mentioning the biological father and the surrogate mother. In 2017, it admitted that the paternal filiation be recognized through a partial transcription of the birth certificate mentioning both members of the buying or sponsor couple; transcription with respect to the biological father and establishment of the filiation with respect to his wife (or husband) through adoption.¹² This solution, accepted by the ECHR,¹³ is based on Article 47 of the Civil Code according to which the foreign act is authentic unless it is "*irregular, falsified or that the facts declared there do not correspond to reality*". Indeed, birth is realized by childbirth and in French law, **the mother is the woman who gives birth** according to the ancestral fundamental principle stated by the adage *mater semper certa est*, applied by the courts when they deal with the transcription of the foreign birth certificate. Thus, the mother being the surrogate woman, a birth certificate drawn up following a surrogacy indicating the sponsor woman as the child's mother cannot be legally transcribed, as the facts declared do not correspond to reality.

If such an act were transcribed, it would imply the creation of "*a filiation of pure convenience established at the individual will . . . contrary to the principle of unavailability of the human body*".¹⁴ The civil status would then no longer pursue an objective of general interest but instead would be used to satisfy individual desires.

This solution, however, concerns the hypothesis where the egg comes from the surrogate mother or from a donor: **what would the solution be if it were that of the female sponsor?** A judgment of the Nantes regional court has just recognized as the "intended mother" a female sponsor who provided her eggs to the surrogate mother.¹⁵ If this judgment were confirmed, it would be tantamount to renouncing the principle *mater semper certa est* and to recognizing surrogacy, giving it full effect in violation of the law. This would also contravene the prohibition of the establishment of filiation with regard to the oocyte donor.

⁹ Cass. 1re civ., 6.04.2011 (10-19.053) ; Cass. 1re civ., 13.09.2013 (12-18.315).

¹⁰ *Mennesson v. France*, No 65192/11, and *Labassee v. France*, No 65941/11, 26.06.2014.

¹¹ Cass. Ass. Plén., 3.07.2015 (14-21.323 and 15-50.002).

¹² Cass. 1re civ., 5.07.2017 (15-28.597, 16-16.901, 16-50.025, 16-16.455 et 16-16.495 et 16-20.052), confirmed by Cass. 1re civ., 29.11.2017 (16-50.061) and Cass. 1re civ., 14.03.2018 (17-50.021).

¹³ 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, P16-2018-001, 10.04.2019.

¹⁴ « Le droit français sur la GPA résistera-t-il aux coups de boutoir de l'Europe ? », *op. cit.*

¹⁵ « Enfants nés par GPA : l'évolution de la justice », *Le Monde*, 24.05.2019.

The disadvantages of adoption by the spouse of the biological father

This solution raises many problems. If the filiation thus established is more in conformity with reality and more respectful of the interest of the child than a deceptive transcription, it amounts to confirming *a posteriori* the process of surrogacy, in violation of an essential prohibition by the law and at the cost of misappropriation of adoption, as recognized by the Special Rapporteur in 2016.¹⁶ It encourages, in the end, the use abroad of a practice prohibited in France:¹⁷ the creation of a child (who is deliberately deprived of one of his biological ancestries) as a commodity to satisfy the sponsor parents' desire for one.

Let's recall that in its Recommendation 1443(2000), the Parliamentary Assembly of the Council of Europe strongly opposed the mercantile abuses surrounding adoption, which also apply to surrogacy. In addition, the Hague Convention on Intercountry Adoption, which aims to prevent child trafficking, excludes both the payment of money in exchange for adoption and the contact between biological parents and adopters before birth (art. 4).

The problems are aggravated when a full adoption is pronounced because it erases any trace of surrogacy by erasing the initial civil status, i.e. the real filiation of the child (Civil Code, Article 354). If the complete transcription of the birth certificate is refused in order to respect the right of the child to the knowledge of his origins and his right to identity, **pronouncing a full adoption following surrogacy is logically contrary to the best interests of the child.** Yet this has in fact been done.¹⁸

3- Sale of children

Surrogacy falls perfectly within the definition of the sale of children as prohibited by international law.¹⁹ As the Special Rapporteur has acknowledged, commercial as well as altruistic surrogacy “*constitute the sale of children*”.²⁰ **The Special Rapporteur must draw all the appropriate consequences from this by condemning the principle of surrogacy.**

Between commodification and slavery

The child born through surrogacy is conceived, carried, brought to the world and delivered pursuant to a contract. He is therefore reified, treated as a merchandise,²¹ used to satisfy the desire of adults. Even when the surrogate mother is not paid, it is not uncommon for her to receive certain benefits and a compensation. The intermediate companies and medical teams involved never work for free. In the end, **“ethical” and “non-commercial” surrogacy in Britain is twice as expensive as commercial surrogacy in Eastern Europe and four times more than in Asia.** The same is true with oocyte “donations”: even in countries where

¹⁶ Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography “A study on illegal adoptions” 22.12.2016, A/HRC/34/55, § 52

¹⁷ At least 200 children are alleged to be ordered abroad every year by French people as part of illegal surrogacy agreements: Laurence Brunet (dir.), A Comparative Study on the Regime of Surrogacy in EU Member States, 15.05.2013, p. 19.

¹⁸ « GPA à l'étranger : pourquoi la cour d'appel de Paris dénie l'intérêt supérieur de l'enfant », *Valeurs actuelles*, 21.09.2018.

¹⁹ OPSC, 25 May 2000, art. 2a; CDE art. 35. See also the ILO's Worst Forms of Child Labour Convention, No 182, 1999, art. 3.

²⁰ A/HRC/37/60, § 75.

²¹ Clotilde Brunetti-Pons (Dir.), op. cit., p. 344-346.

donations are free, women often receive a large “compensation”.²² Having ordered a child and selected some of his characteristics, the sponsors require a certain level of quality. Some do not hesitate to refuse the “delivery” and sue the surrogate mother or the intermediaries if the “product” does not match their expectations as to sex, physical characteristics, or state of health.²³

A child that is provided to surrogacy sponsors free of charge (very rarely) or for a fee is being commoditized, meaning that an attribute of the right of ownership, the *abusus*, is exercised on him. The Convention against Slavery of 1926 defines slavery as “*the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.*” Objectively, therefore, independent of the intentions of the sponsors, (which are most often good), the child conceived through surrogacy is in a situation of slavery.

French law does not criminalize the sale of children

Even if the Rennes Court of Appeal²⁴ found in a surrogacy case that it was actually “*a purchase of children, obviously contrary to public order*”, **French law does not incriminate the sale of children.** This serious deficiency was noted by the Committee on the Rights of the Child. The government acknowledged this in its October 2012 report to this Committee, while stating that the facts included in this definition were “*criminal offences in French law in the context of the sale of children, inciting the abandonment of children and procuring the abandonment or adoption of children, including in the case of [surrogate] mothers.*”²⁵ It recognized incidentally that surrogacy is a form of sale of children. There is, however, **no specific criminal sanction for the sale of children**, to the point that a woman who had sold two of her children over the internet only received a 1 year suspended jail sentence, and that for defrauding the buyers!²⁶ In the absence of incrimination of the sale of children, it would be possible to recognize that surrogacy constitutes the crimes of enslavement (Penal Code, art 224-1-A) and child trafficking (Criminal Code, 225-4-1).²⁷ These provisions,²⁸ however, have never been used in a case involving surrogacy.

²² “Reimbursed or remunerated? Belgian oocyte donors receive up to €2,000 per donation” *Génétique*, 13.05.2019. See also IGAS, « État des lieux et perspectives du don d’ovocyte en France », 02.2011, p. 25.

²³ Clotilde Brunetti-Pons (Dir.), op. cit., p. 367. Emilie Lopes and Paul de Coustin, « Gammy, le bébé qui sème le malaise sur la GPA », *Le Figaro*, 6.08.2014.

²⁴ Judgment No11/01846, 10.01.2012.

²⁵ CRC/C/FRA/5, § 588. The French reads “*incriminés en droit français, dans le cadre de la vente d’enfants, la provocation à l’abandon d’enfants et l’entremise pour l’abandon ou l’adoption d’enfants, notamment dans le cas des mères porteuses*” which should translate as “criminal offences in French law in the context of the sale of children, inciting the abandonment of children and procuring the abandonment or adoption of children, including in the case of surrogate mothers” but was translated in the UN document by “in the case of pregnant mothers” (I underlined)

²⁶ Criminal Court of Blois, 22.03.2016: after receiving the payment, she claimed the children were dead and sold them again to other buyers.

²⁷ Claire de La Hougue, « La qualification juridique de la gestation pour le compte d’autrui au regard du droit international et du droit pénal français », *Droit de la famille* No 11, November 2015, study 15.

²⁸ See Muriel Fabre-Magnan, « Les nouvelles formes d’esclavage et de traite, ou le syndrome de la ligne Maginot », *Dalloz* 2014, p. 491.

Conclusion

To address only the question of the rights of children born through surrogacy has the major disadvantage of considering this practice as a fact not only accomplished, but also acceptable.

Respect for the best interests of the child means that decisions concerning him are made in a way that serves him and his rights and interests. Before addressing the issue of the interest of children born through surrogacy, **this practice must be recognized as intrinsically detrimental to the interests of children and to human dignity. We must first of all prevent the creation of structures which allow the creation of situations contrary to the rights of the children: this implies the prohibition of surrogacy in that it harms the interest of the children and the punishment of those who have recourse to it**, especially agencies, doctors, lawyers and other intermediaries. Only this solution will reduce the use of this practice and allow the cases of children born through it to be treated according to their own best interests.

It would be too easy, if not profoundly hypocritical, to simply defend the rights of children born through surrogacy while turning a blind eye to the root cause of their situation. Practices contrary to human dignity and to the rights of individuals must be prohibited in all circumstances and those who participate in them must be punished. For if the existence of a practice prevented its prohibition, slavery would never have been abolished.