

# Surrogacy in Spain. Medical, legal and ethical perspective

## Abstract

Surrogacy presents itself as a major ethical and legal problem in Spain. On the one hand, this practice is forbidden in Spain, however, Spanish couples go to other countries to carry it out and subsequently want to register their children as their own. Spanish society is constantly demanding this practice so the law will have to be modified: regulated permission or prohibition with criminal liability. A legal solution must be found in the best interests of the children.

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## Introduction

Society is experiencing changes. In this sense, new regulations regarding homosexual marriage have opened a scenario where same sex couples of men or women, may have children not only by means of adoption—not permitted for homosexual couples in many countries—but also through in vitro fertilization. For this reason, surrogate pregnancy is becoming the option for heterosexual couples with specific problems for male couples and males without a female partner.

In this regard, the current definition of “sexual and reproductive health” developed by the World Health Organization and provided for in our Spanish Legislation addresses this matter positively.<sup>1</sup> If the right to a good health implies the right to wellbeing in a broad sense also the aspects of mental health must be cared for by the legal framework when it comes to the frustration that married same-sex couples experience as they can’t fulfill by themselves their wishes of maternity and paternity.<sup>2</sup> Therefore, there is a new subjective right: the right to found a family a demand that must be fulfilled by the public authorities and which is expressed in some cases, in the surrogate pregnancy.

Surrogate pregnancy commonly known as surrogate maternity or wombs for hire takes place when a female lends herself with or without financial compensation to gestate a creature from conception to birth on behalf of a couple or individual to whom it will be handed over after he/she is born.

In principle, this technique was conceived as a means of assisted reproduction to help infertile persons or who were unable to gestate a baby think for example the case of women where the uterus is absent or their uterus cannot hold an implanted embryo. However and given the fact that in certain countries as in Spain homosexual marriages are allowed, this technique is well fit in order for them to have children. The problem that we are going to examine is that in Spain the agreement of surrogate pregnancy is legally invalid or null. However, there are couples who resort to finding solutions to this issue abroad and then they want that the Civil Registry recognizes them as parents and in that moment arise several juridical problems.

## Classification of surrogacy

**From the biotechnological and social advancements, surrogate pregnancy can be classified depending on different factors:**

### a) Origin of gametes

In surrogate pregnancies there are many options when it comes to the origin of the gametes:

- Fertilization takes place using the gametes (eggs and spermatozoids) from the couple who requests the surrogate pregnancy. An In-vitro fertilization takes place and then the pre-embryo is transferred to the surrogate mother. This way the mother is only lending her uterus to host an embryo in whose formation she has not taken part.
- The egg belongs to the female who request the surrogate maternity but the sperm belongs to her partner or to a donor.
- The surrogate mother provides in addition to the pregnancy, her own egg in such a way that it becomes fertilized by insemination of spermatozoids from the requesting male.
- The embryo originates from donors or from the surrogate mother where by the couple would not have any biological link with the future child. This would be equivalent to an adoption except for the need to meet the legal requirements which would be waived.
- A female requests the egg to another female and a third one receives, hosts, gestates and gives birth to the baby- using the sperm of her partner or from a donor.

### b) Onerous or altruistic character<sup>3</sup>

- The surrogate mother receives monetary compensation from those who request her services in order to cover the medical examinations to which she will be subjected during pregnancy. The days of work she may absent due to pregnancy the endurance and pain that this process may imply and even the period after birth.
- The woman engages herself in this practice on altruistic grounds with regards to those who order the child. It is assumed that in

most of the cases there exists a family relationship or at least a friendship with the surrogate mother, who agrees without financial compensation to gestate the child and hand it over once he/she is born.

### Pros and cons of surrogacy<sup>4</sup>

- A) Starting with the arguments against surrogacy because they are minors, we can refer to the following arguments:
- i. It could constitute a cover-up for a child business trade, it could even be a way to bypass the required legal paperwork for adoptions. Particularly in those countries where adoptions by same sex couples are subjected to several restrictions or are even forbidden. Therefore, in order to avoid this situation and to accept surrogate pregnancy it should be required that at least one of the requesting partners provide the gamete (egg or sperm) or the embryo instead.
  - ii. This practice could result against the human dignity: A) it could demean the dignity of the woman as she is turned into an instrument for reproduction. Besides, it is necessary to point out that this practice breach basic Spanish regulations as The Convention on Biomedicine stipulated. "The human body and its parts shall not, as such, give rise to financial gain". However, to this respect there are people who consider that procreation is a faculty and not a part or an organ of the body.<sup>5</sup> Furthermore, not even the gametes are considered as a part of the body. Therefore, its donation is admitted and in some countries even the purchase and sale of those.
  - iii. It is against the dignity of the child born because this would mean for him/her to have a minimum of two mothers: the gestating and the biological one or even three the requesting one, the gestating one and the donor of the eggs. To sum up, we shall finish with the basic principle in the Spanish Civil law "mater semper certa est" (it is always certain who the mother is). Besides, it would be necessary to think about the child's right to know his/her biological origin as in the case of adoption but not in the case of an anonymous donation of gamete.
  - iv. Possible commodification or commercialization of the human body not limited to the gestating mother. As mentioned above but extended to specialized agencies in charge of managing all stages of the process putting in contact all parties, arrange the agreements, monitor their fulfillment among others.
- B) Relating to arguments in favour of subrogacy, we can refer to the following:
- a) It is possible to think that surrogate pregnancy is an assisted reproduction technique and therefore it would be accepted on the basis of the following arguments:<sup>6,7</sup>
  - b) The reproductive freedom of the persons. In the first place, it is necessary to point out that a reference is made to reproductive freedom because in the Spanish Constitution it does not appear in an explicit way the "right to reproduction" as a fundamental right. I consider that its existence could be defended as derived from other fundamental rights that are expressly provided for in the Constitution: protection on human dignity (art 10), the right to equality (art 14), the right to physical and moral integrity (art 15), the right to freedom (art 17.1) and other rights that constitute guidelines of the economic and social life, such as the right to found a family (art 32).
  - c) Once the possible existence of this right to reproduction has been established, it is necessary to consider who is entitled to this

right. In this sense we need to recognize the right of the woman to be inseminated by the gamete of a donor and therefore, this thought could be extended to the right of the man to request a woman to provide her gamete and the pregnancy so that he can become father. Indeed, if a couple of women can legally request assisted reproduction, then a couple of men based on their right of non-discrimination by gender.

- d) Furthermore, the passing of the Law 13/2005, by which the Civil Code is amended in terms of the right of individuals of the same sex to engage in marriage, gives rise to the expansion of the concept of family and therefore, it must be brought under reflection if these couples may have their right of access to all the assisted reproduction techniques recognized, including, the surrogate pregnancy which is the only possibility to have descendants with a biological link.
- e) The law must guarantee the fulfillment of the agreements reached by the parties.<sup>8</sup>
- f) The dignity of the surrogate woman, as there are situations in which women living on low financial resources and to carry out this practice implies an extra income. At the same time they receive a healthcare coverage.
- g) The right to health, as it has been defined by the World Health Organization and by the Spanish Law includes the right to sexual, reproductive and mental health, which would require that the legal frameworks provide the means for individuals to have children.<sup>9</sup> Therefore, this right would be related to the subjective right to reproduction.
- h) The right to development your own personality, which is the basis that sustains all the other rights. Spanish law allows women to have access to the techniques of assisted reproduction even though they may not have a male partner. As a result of this we could also think about male couples that can use these techniques.

### Contractual relations relating to Surrogacy

With respect to the agreement of surrogate pregnancy, the Spanish Law 14/2006 regarding the techniques of assisted reproduction,<sup>10</sup> is clear and definitive about it when in article 10.1 declares null any surrogate pregnancy agreement with or without financial compensation by which a woman renounces her maternity in favor of the other signing party or a third party. According to that article the gestating mother-whether she provided the gamete or not-would be the mother of the child.

Furthermore, the convention on biomedicine,<sup>11</sup> stipulates in article 21 that "The human body and its parts shall not as such give rise to financial gain", whereby it could be understood that the womb of a woman cannot be taken for rent.

The character of null conferred to this kind of agreements is based on the Spanish civil code. In the first place we can speak of a null or invalid agreement as this is lacking in one of its essential parts the object itself. Therefore, it is correct from the juridical point of view to speak of an invalid agreement as there is no object. As a matter of fact, it would breach article 1.261 of the Spanish Civil Code where it is stated that there is no agreement except when there is a specific object which constitutes the matter of the agreement. This principle is linked to that established in article 1.271 which reads that, things can be object of a contract as long as they are not out of the reach of men.

Therefore, the future newborn cannot be object of a contract because the persons cannot be an object for trade themselves.

In the second place, such contract could be described as “a groundless contract or based on unlawful grounds” since such agreement is contrary to the laws and morality (1.275 Spanish Civil Code). Therefore, these contracts have no effect.

In the third place, and following this preceding argumentation the article 1.305 of the Spanish Civil Code, states that when nullity derives from the cause or the object being illicit. Further, the following article 1306, states that, if the matter that represents the wrongful cause does not constitute a minor breach of the law. The following rules will be observed:

- 1) When the blame is on both agreeing parties, none of them will be able to claim back whatever he had given under the terms of the agreement, and will not be able to demand the fulfilling of what the other party may have offered.
- 2) When the blame is only on one side of the agreeing parties, this will not be able to claim back whatever he has given, nor will he be entitled to the fulfillment of what the other party had offered. The other party not related to the wrongful object will be entitled to the fulfillment of what was offered to him without the obligation of fulfilling what he may have offered himself.

In short if we consider the nullity of such agreement, the surrogate mother finds herself unable to claim to the other party what may have been promised in exchange of the pregnancy, nor will the other party be able to demand back from the surrogate woman what was paid as retribution even in the case of backing off. Therefore, since the juridical agreement is not valid no obligations are derived thereof for any party as that agreement is lacking in any effect regarding trading. Consequently, applying the general principles regarding obligations the persons have no obligation to do what was agreed, namely, hand over the child because if this is not fulfilled the other party would have no way to enforce such fulfilling of duty (art 1098, Spanish Civil Code).

### **Civil registration of surrogate children in Spain**

In Spain,<sup>12</sup> even though the surrogate pregnancy agreement has not any effect there are more Spanish people who decide to travel abroad to make use of this technique<sup>13</sup> (USA, India, Ukraine, and Russia among others).<sup>14</sup> We are facing therefore a juridical problem of great relevance when Spanish nationals request surrogate pregnancy elsewhere and later on they want to register the filiation in Spain in their name.

Given this issue, there are several legal precepts that must be studied, but let's start with the most basic in order to define our argumentations.

In the first place, we have the Spanish Law on Assisted Human Reproduction Techniques which recognizes different assisted reproduction techniques as a form of therapy to address the problem of infertility (art 2.1). Moreover, it prohibits the use of certain techniques and it lists them (art. 20) and finally it is unambiguously explicit and direct as it declares invalid the agreement by which a surrogate pregnancy is agreed with or without financial compensation. Where a woman would then formally renounce her right to maternal filiation in favor of the party who ordered the child or another third party (Art 10.1). However, it considers the possibility that such event may take place, and therefore it regulates the situation of maternal filiation with regards to the children born this way stating that this filiation will

be determined by the birth itself. The same law establishes that the possibility of claiming the paternity regarding the biological father—if he actually provided the gamete—remains available according to the general rules (art. 10.3). It would be different if whoever ordered the child had not provided his gamete; in such a case, there would not be any possible claim of paternity.

In the second place, let us remember the amendment to the Spanish Civil Code introduced by the Law 13/2005, by which the Civil Code is modified with regards to the right of same sex marriage which conveys that other rights are recognized, such as the subjective right to procreate.

Based on these precepts, we shall see in a chronological fashion how the directorate general of registries and notaries and tribunals resolves the cases of surrogate pregnancy.

### **Statement of the directorate general of registries and notaries (2009)**

In order to provide an answer to the cases of surrogate pregnancy, the Directorate General of Registries and Notaries admitted the registration of two children born in California by means of surrogate pregnancy,<sup>15</sup> where the party requesting the registration provided the masculine gamete.<sup>16</sup> This statement examines the proceeding of the foreign document by which the filiation of the children was acknowledged in favor of a hiring Spanish couple, and states that the access to the Consular Civil Registry must be permitted and can proceed to authorize its registration.<sup>17</sup> In order to be able to do that, the person in charge of the Registry must control the legality of the foreign registration certificate, and he will check that this certificate originates from an authority that is not contrary to the Spanish international public order.<sup>18</sup>

In this statement it is argued that not allowing the notarial registration of those born at the request of two males would be discriminatory by reasons of gender and therefore, contrary to the Spanish Constitution (art.14) since the Law on assisted reproduction techniques allows the registration of filiation in favor of women as a result of assisted reproduction techniques (art 7.3). In short, the best interest of the child advises that the filiation existing in the Consular Registry be registered.

However, this decision was challenged by the Prosecutor resulting in a Judgment of the Court of First Instance of Valencia number 15, dated September the 15th, 2010, which cancels the Registration remarking that a wrongful way have been resorted to in order to register the child, since the reality should have been verified regarding the registration and how this was illegal with regards to the current Law regulating assisted reproduction techniques (art.10), therefore, it determines that registration had to be canceled. This sentence was confirmed by the Provincial Court of Valencia on November the 23rd, 2011.

### **Statement of the directorate general of registries and notaries 2010**

The statement of 2009, would have tried to provide an answer to a specific case, but would have not solved the core of the issue regarding surrogate maternity initiated by two Spanish persons who travelled abroad to have this practice carried out, engage in an agreement and later on, once the baby was born, they pretend the registration in the Spanish Civil Registry by resorting to the procedure of mutual recognition of international court rulings. Therefore, with the purpose of regulating the registration proceedings of those born by means of

a surrogate maternity agreement and in view of establishing criteria to be applied in the consular registries to this regard, the Directorate General of Registries and Notaries.<sup>19</sup>

This statement allows the registration of the birth of the child foreign national in the Spanish Civil Registry as long as there is a foreign court ruling that endorses the legality of the birth under the current laws in that country.<sup>20</sup> Furthermore, this statement will demand, not only a consular registration certificate accompanied by a medical certificate relating to the birth of the child in which the identity of the surrogate mother is not mentioned but a court ruling from abroad will be required where the mother renounces her rights of filiation. In addition to this, it will be necessary to verify that there has not been a breach of the best interests of the child and of the surrogate mother. That is, she must have renounced to her maternity in her free will and capacity of judgment without having incurred in any error, fraud or violence.

In view of the fulfillment of the requirements, if there is a foreign court ruling referring to a judicial proceeding similar to that of voluntary jurisdiction, the registration in the Spanish Civil Registry may take place through the ordinary way (art.81 Civil Registry Act), without being necessary to resort to a court procedure of mutual recognition of the decisions of foreign tribunals (*exequatur*).

However, this practice ignores the article 10 of the Law on assisted reproduction—which considers this agreement null—and also ignores the Law 54/2007 on International Adoption.<sup>21</sup>

In short, this Statement is based on the principle of the best interest of the child and provides an answer to a specific case, even to the detriment of legal certainty, but does not regulate the surrogate maternity which is what was expected from this Statement.

### Provincial court of Valencia (2011)

The decision of the provincial Court of Valencia dated November the 23rd, 2011, cancels the Statement of the Directorate General of Registries and Notaries dated October the 5th, 2010, and rejects the registration for breaching article 23 of the Spanish Law of Civil Registry of 1957, which stipulates that filiation can only be registered by means of a certificate issued in the foreign Registry, “as long as there is no doubt about the reality of the registered and its compliance with the Spanish Law”, which, obviously is not the case as it breaches article 10 of the law on assisted reproduction techniques.

Furthermore, the Court considers that the application for registration does not satisfy the requirements of compliance with the law stipulated in article 23 of the Law of Civil Registry, and warns that the best interest of the child “cannot be achieved by breaching the law, especially when the law itself does offer ways for registration of the filiation of the child in favor of the defendants—claim to determine the filiation in favor of the male donor of the gamete (art.10.3) for further adoption by the other partner (art. 175 of the Spanish Civil Code).

### Spanish supreme court (2014)

Finally, the conflictive surrogate pregnancy reaches the Supreme Court as a result of an appeal filed to the Provincial Court of Valencia 2011, mentioned above, by the couple whose registration was refused.

The Supreme Court resolved this issue in its ruling dated February 6th, 2014,<sup>22</sup> with regards to the appeal filed, not without certain critics for considering that said ruling did not harmonize the existing jurisprudential and administrative criteria on this issue to favor Legal Certainty.<sup>23</sup>

This sentence considered that in order to recognize the foreign certificate where the filiation is stated, it is necessary to conduct a thorough check of that certificate of the Registry that wants to be accepted, verifying that certificate be authentic, in such a way that the registration that this document certifies offers similar guarantees to those required for the registration in Spain, complying with the Spanish Law. However, the Law of the Civil Registry in its article 23 requires that not only it is necessary to conduct a check of all formal aspects of the certificate, which is what was being done to date, but also other underlying issues, that is, its compliance with the Spanish laws. Besides, the compliance with the law should be understood in a broad sense, respecting the requirements of the Spanish law but also the rules, principles and values concerning to public order.<sup>24</sup>

With regards to the “International public order”, the Supreme Court ruled that the decision of the Directorate General of Registries and Notaries assigning the condition of parents to the couple who hired the surrogate pregnancy from a woman who gave birth in a country where such agreements are allowed is contrary to the international Spanish public order, because it is incompatible with the rules that regulate these fundamental aspects of family relationships, namely article 10.1 of the law on assisted reproduction techniques, which is part of the public order, since this article tries to prevent that the advancements of the science degrade the dignity of the surrogate mother turning pregnancy and filiation into a business trade, turning the woman and the child into an object, allowing even middlemen to make a business out of it, allowing the exploitation of a situation of financial need in which some young women find themselves”.

For all these reasons, the supreme court rules:

- a. The cancellation and removal of the filiation from the Consular Registry. It refuses the transcription of the foreign birth certificates into the Civil Registry that established the filiation of the children in favor of the hiring individuals in this type of agreements for being contrary to the Spanish international public order.
  - b. The possibility of finding, for the protection of the child, some family link between the child and the hiring individuals. For this reason, Spanish Law allows the claim of paternity in regard of the biological father, in compliance with the general rules, whereby, if any of the individuals filing the appeal were the biological father, - for providing his gamete or embryo to the surrogate mother – the paternal or maternal filiation could be established and therefore, the integration of the child within the family could be achieved either by adoption which allow the legal formalization of the real integration of the child within the family nucleus. In the case where the appellants had not provided their gamete, they would have to resort to the Law 54/2007, of December the 28th, regarding International Adoption.
- In this case, the Supreme Court considers that the issues that may appear in the process of establishing the biological filiation and adoption are temporary and can be overcome, and they do not reach a degree of gravity that could be considered as causing an imbalance in the interests of the community, established by the legislation regarding filiation and the interest of the child.
- c. The possibility of the child to obtain the nationality once the filiation, with regards to the biological father, has been established, and the filiation by non-biological criteria with regards to other member of the couple.

- d. The possibility that the child would have to inherit from the hiring individuals if any of them died, once the filiation has been determined as it has mentioned case above.
- e. The protection of the identity of the child in the country where they are going to live. That is, in the best interest of the child, the Supreme Court urges the Prosecution to take the necessary actions in order for the children to integrate themselves in the family nucleus which existed and in which it is likely that one of the appellants is the biological father.

In my view, the court ruling was very appropriate and precise since it ensures the best interest of the child in the same way stipulated the European Court of Human Rights. It is about solving an issue that takes place in Spain trying to apply the Spanish law—that is why the Registration is not allowed—but providing a solution in order for the children to be integrated de facto in the family. Indeed, the breach of article 10 of the Law on Assisted Reproduction Techniques cannot be accepted, but the children cannot find themselves unprotected. However, even though a satisfactory solution has been given to the parties, it should be a matter of priority to undertake a change in the legislation which regulates the practice of surrogate pregnancy in order to provide for legal certainty for all subjects involved.

International public order must guarantee the best interest of the child, which requires the recognition of the filiation. It finally concludes saying that the best interest of the child is affected gravely as he is placed in an uncertain juridical situation without protection, deprived from his identity and family nucleus.

However, the works of the Supreme Court don't finish here, because derived from this ruling, the appellants filed a motion for dismissal of proceedings of the tribunal dated Feb the 6th, 2014, arguing that ruling breached the fundamental rules of the appellants: the right to legal protection, the right to equality and the privacy of the family. The appeal has been dealt with by the Chamber of Civil Cases of the Supreme Court it is ruling dated Feb 2nd 2015, which follows in this section in chronological order.

### Spanish civil registry act of 2011 which came into force in 2014

In the year 2011, the Spanish lawmaker passes the Spanish Civil Registry Act 20/2011, 21st of July, coming into force in 2014. In articles 97 and 98 it is established the procedure that needs to be followed in order to validate the foreign registrations, requiring the following checks both of which will apply in the case we are dealing with:

- a) When it is a public foreign document of non-judicial nature:
  1. That the document has been granted by a competent foreign authority according to the laws of its State;
  2. Foreign authority has taken part in the production of the document, making use of competences equivalent to those employed by the Spanish authorities in whatever the relevant matter may be;
  3. Situation contained in the document be valid and complies with the Spanish legal framework relating to international private law, and
  4. Registration of the foreign document will not incompatible with the Spanish public order.
- b) When it is about a certificate of Registrations issued in foreign Registries, these will represent the object to be registered in the Spanish Civil Registry, as long as the following requirements have been met:
  - 1) Certificate has been issued by a competent foreign authority according to the laws of its State.
  - 2) Foreign Registry from where the certificate originates has, with regards

to the facts attested, analogous guarantees to those required for the registration by the Spanish law. 3) The situation contained in the foreign registry certificate be valid with regards to the Spanish legal framework concerning private international Law. 4)

Registration of the foreign document is not incompatible with the Spanish public order. Finally, the court ruling will have to be recognized according to one of the proceedings established in article 96, where two proceedings are considered: Resort to judicial review procedures urging the recognition of the foreign ruling, or through a proceeding before the Civil Registry. Finally, it is required that data or circumstances that cannot be obtained directly from the foreign certificate, be completed by any pertinent legal means, either because the certificate itself did not have that data, or because there are formal defects that affect the authenticity or reality of the facts that are being registered.

Therefore, this law not only enforces a check of compliance with the law, but also with the Spanish public order: in order for the court ruling regarding the filiation of the child born of surrogate pregnancy, (required by the Directorate General of Registries and Notaries in its statement of October the 5th, 2010), to be registered, it is necessary to check, among other requirements that the “registration of the resolution does not result being incompatible with the Spanish public order”, which could be breached if the stipulations of article 10.1 of the Law on Assisted Reproduction Techniques were ignored.

In short, in light of this legal precept, we are still having a division because there are authors who consider that the court ruling should be the same: to reject the surrogate maternity upholding this way the stipulations of article 10 of the Law on Assisted Reproductive Techniques, since that precept belongs to the Spanish public order, and against of what the Directorate General of the Registries and Notaries stated in 2009 – which supported the registration because not allowing that the filiation of a child “born” from two males would be discriminatory by reason of gender, which is strictly prohibited by article 14 of the Spanish Constitution. Therefore, in the opinion of these authors, neither can the institution itself be accepted nor can the effects derived thereof be accepted.

However, the best interest of the child must be taken into account as quoted by the Supreme Court, as well as the principle of continuity in family relationships, quoted by the European Court of Human Rights.

### European court of human rights (2014 and 2015)

As it was expected, these cases of surrogate pregnancy, reached the European Court of Human Rights, whereby we will analyze the most recent court rulings to this respect: two of them from 2014 against the French state and one in 2015 against the Italian state.

We have two rulings, both from June 26th, 2014, from the same plaintiff: the French State, (cases *Mennesson* and *Labasee*, from France). In these cases, two French married couple hire in the USA one surrogate pregnancy – something that is not allowed by the French law. In both cases, the French Court of Cassation expressed that “in the presence of this fraud, neither the best interest of the child guaranteed by article 3 of the Convention on the Rights of the Child, nor the respect to the private and family life in the sense of art.8 from the Human Rights Convention of 1950 could be claimed in a useful way. In short, the French Court of Cassation manifested: a) Refusal to transcribe into the Civil Registry the foreign birth certificates that establish the filiation of the girls in respect of the intended parents who

arranged the contracts of surrogate maternity; b) The impossibility to determine in France any relationship of filiation between the girls and the intended parents, it even cancels the possible recognition of paternity of the biological father due the fraudulent character of the contract of surrogate pregnancy; c) The impossibility that the girls obtain the French nationality; d) The impossibility of the girls to inherit from the intended parents; e) The impossibility that neither the best interest of the child could be invoked nor the right to his private life due to the fraud existing in this case; f) The impossibility that in a subsidiary way, the filiation be determined on the basis of highlighting the civil status of the intended parents and the family history as it stated that both appellants have educated the girls from their birth.

In both cases, the European Court on Human Rights manifests its argumentation in consideration of the Human Rights Convention of 1950 and considers that the French State, by refusing the filiation has breached the right of the child to private life. It has not taken into account the principle of the best interest of the child, which breaches article 8 of the Convention, therefore condemning the French State. It would therefore be about applying a criteria of "principle of continuity" in the family relationships, which previously the same tribunal had recognized in former rulings.

Secondly, the same Court issued another ruling dated January the 27th, 2015, (Case *Pardiso et Campanelli c Italie* Application no. 25358/12).<sup>25</sup> Mrs. Donatina Paradiso and Mr. Giovanni Campanelli filed an application in the European Court concerning an alleged violation of Article 8 of the European Convention on Human Rights by the Italian Republic. The applicants claimed that their right to private and family life was disrespected. The married applicants, tried to be parents through medically assisted reproduction but this method failed so they went to a Moscow-based clinic and made a gestational surrogacy agreement with it. The two embryos implanted in the surrogate mother's womb had genetic material from Mr. Campanelli and this situation was certified by the clinic. The child was born in Moscow. The surrogate mother gave away any rights concerning the child to be born. On 10 March 2011 the child was registered by the Registry Office in Moscow as the son of Campanelli and Paradiso and on 29 April 2011 the Italian Consulate issued the documents enabling the child to travel to Italy with Mrs. Paradiso. However, on 2 May 2011, the Italian Consulate in Moscow informed the Campobasso Minors Court, the Ministry of Foreign Affairs and the Colletorto Prefecture and Municipality that the paperwork concerning the child contained false information. Consequently, was opened a criminal proceeding against the couple and requested at the Campobasso Minors Court the opening of proceedings to make the child available for adoption. On 16 May 2011, the child was placed under guardianship. In that moment a judicial dispute started between the applicants and the Italian Public Prosecutor's Office, from which an extremely relevant fact has emerged: the court ordered DNA tests in order to establish if the second applicant was the child's biological father and the result was negative. After being confronted with the DNA tests results, the Russian clinic expressed its surprised and stated that it was not possible to identify how the error was made. Therefore, the child had no biological link to Mr. Campanelli and, as we already known, to Mrs. Paradiso. This was a crucial point for the Minors Court, as we can understand from its decision of 20 October 2011. The Court applied an immediately enforceable decision stating that the child should be removed from the applicants, taken into the care of social services and placed in a children's home. From the Court point 4 of view, this was not gestational surrogacy, because "in order to be able to talk of gestational or traditional surrogacy (in the latter, the surrogate mother makes her own eggs available) there must be a biological link between the child and at least one of the two intended

parents, a biological link which, as has been seen, is non-existent". Consequently, the applicants put themselves in an unlawful situation that could not be accepted by the Italian Authorities. To the court, the child was in a state of abandonment and it was essential to find him an adoptive family. The child has now been adopted.

Relating to the Court's decision, The Chamber considered that the private life and family life of the applicants, protected by Article 8 of the Convention, had been violated. In this sense, the court decided that there was a *de facto* family life between the applicants and the child and, with the measure describe above, the Italian Authorities interfered without right to it in their family. The Italian government appealed. The Grand Chamber of the European Court had two main questions to solve: whether Article 8 of the Convention is applicable; and whether the urgent measures ordered by the Minors Court, which resulted in the child's removal, amount to an interference in the applicants' right to respect for their family life and/or their private life within the meaning of Article 8.1 of the Convention and, if so, whether the impugned measures were taken in accordance with Article 8.2 of the Convention. Concerning the question of the application of Article 8, the Court noted that the applicants and the child lived together for a short period of time ("six months in Italy, preceded by a period of about two months shared life between the first applicant and the child in Russia") which would be inappropriate to define a minimal duration of shared life necessary to constitute *de facto* family life. The court noted that the existence of a parental project is relevant to define the existence of family life. However, the absence of any biological tie, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective were determining factors that led the Court to state that there was not a *de facto* family life. But, as the case concerns the bonds developed between the applicants and the child, which pertains to individual's life and social identity, the Court concluded that the impugned measures pertained to the applicants' private life, making Article 8 applicable to the case. As the measures interfered with the applicants' private life, they must be justified under Article 8.2 of the Convention. The Court considered that the interference was "in accordance with the law", as the 12 The Chamber stated that when the Italian authorities decided to take the child from the applicants and place him under the care of the social services, they didn't reach a fair balance and they didn't preserve the best interest of the child. Furthermore, the child spent two years without an official identity. Therefore, the Court wasn't convinced that the Italian authorities respected the necessary conditions in order to justify the measures they take in this case. In conclusion, the Court held, by eleven votes to six, that there had been no violation of Article 8 of the Convention.

From my point of view, neither the French State nor the Italian State are looking after the best interest of the child, which is the most important in these cases. In France and Italy, the government pretended to punish the behavior of the intended parents breaching many of the rights of the child: nationality, inheritance, custody. It is necessary to look for a solution where the best interest of the child will be protected, and alongside, a more precise legislation on this matter should be developed.

### Spanish supreme court (2015)

In Spain the appellants in Cassation filed a motion for dismissal of proceedings against the ruling pronounced on Feb the 6th, 2014, considering that this ruling breached the following fundamental rights: a) the right to an effective justice, since the Chamber would have breached the rules on the proof based on the existence of facts whose existence was not proven and would have deviated the debate from a matter of civil registry to a different one, on the consequences of the

unlawfulness in Spain of surrogate pregnancy: b) the right to equality without discrimination, for the child, as not being discriminated based on the way to be birth, and for the intended parents to not being discriminated based on their sexual orientation c) the right to privacy in the family as to the right of the couple to choose medically assisted reproduction techniques.<sup>26,27</sup>

## Concluding remarks

I consider that it may be positive to accept “surrogate motherhood”, as long as it is used as an assisted reproduction technique for infertile persons, for women unable to gestate a child either for absence of uterus, or with it but without the ability to host an embryo implant, and finally to help men due to their inability to gestate an embryo.

However, in order to allow this, a comprehensive regulation should be conducted. To this respect, I propose that the following matters should be provided for in any legislation:

- 1) Surrogacy should be permitted with specific requirements for pregnant woman –age, psychological and physical health, etc. – whether single or married.
- 2) The child must have a genetic link with, at least, one of the intended parents (embryo / sperm / egg) and must not have any genetic material from the surrogate mother.
- 3) Prior and subsequent to consent, medical, psychological and legal support to all the parties (intended parents and surrogate mother) must be provided. In sum, both parties should have all the relevant information about the surrogacy arrangement. The consent from both parties has to be voluntary, free and informed.
- 4) Establishing the maximum number of times, a woman is allowed to lend herself to provide this service to carry out this practice.
- 5) Altruistic Surrogate: The government have to determined fees so that the service is paid as a financial compensation.
- 6) Refusal from the surrogate woman to comply with the agreement. I consider that this situation could be compared to resorting to the assisted reproduction techniques, since, once an informed consent has been signed by both parties, revocation would have no effect since the reproductive material belongs to the intended couple, who would be able to claim paternity/maternity- this is the reason to require that the gamete belongs expressly to the couple.
- 7) Decease of the intended parents. In this case, I consider that the surrogate mother could not be obliged to keep the child or give it in adoption, but the intended couple have to assume responsibility for it, and in the case of decease, the same proceedings would have to be followed than for those born in a natural and traditional way. The same regulation would be followed in the case of divorce.
- 8) Interruption of pregnancy due to embryopatic eugenesic reasons. Through prenatal genetic diagnostics an illness or fetal anomaly was detected and the intended couple wished to interrupt pregnancy, but not the pregnant woman. Personally, I consider that in this case, the pregnant woman would be the one to decide since the interruption of pregnancy affects her physical health and even her life. In fact, let us remember that in Spain, when there are medical indications for abortion only the consent of the pregnant woman is needed, and not that of the husband, therefore, this specific case would resemble it. However, the law would have to determine the filiation of the child born with anomalies if the woman had decided to give birth to it.
- 9) The possibility of multiple pregnancy. In these cases, the pregnant woman could be forced to proceed to terminate the pregnancy of one of the embryos, to the extent that the agreement only provided for the gestation of one embryo. Therefore, this issue should be covered by the contract.
- 10) The possibility that after the surrogate maternity, the couple could benefit from maternity or paternity government subsidies. Likewise, the possibility of enjoying financial support for maternity, which is recognized in the Spanish legislation.
- 11) The child should have the right to know his or her origins, as it is happening in the case of adoption, but it does not, instead, in the case of an anonymous donation of gamete, since in Spain this option is not allowed. Therefore, the possibility of exercising this right should be available both to adopted children as well as those born by any of the assisted human reproduction techniques.
- 12) The surrogacy arrangements must be approved and followed by an independent body, such as an ethics committee.
- 13) If the procedure succeeds, the intended parents must legally be considered the child’s parents.

In short, I have proposed some possible situations as well as controversies that could arise during the process of surrogate motherhood. If the law regulated all these issues, the negative effects that can result out of this practice could be avoided. Therefore, I think that surrogacy should not be banned, especially if it serves as an alternative to natural procreation.

It is necessary for all of us to protect the most vulnerable parties in the agreements of surrogate motherhood: on the one side the pregnant women, that has to receive the agreed money, the expenses derived from the pregnancy and compensation in case they suffer any harm or damage thereof. On the other side, the intended couple they must be aware of the economic costs in which they are engaging and should have the guarantee that once the proceeding has been initiated or after the birth they will not be subject to extortion as well as that they should have the guarantee to register the birth in the Spanish Civil Registry.

In short, the laws must change not only to permit practices of assisted reproduction, but also to carry out adoptions, laws on the right to same sex marriages, laws on equality and so on.

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## Conflicts of interest

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