Regulation of Cross-Border Surrogacy In Light of the European Convention on Human Rights

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Domestic and the European Court of Human Rights Case Law

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Toukokuu 2016
Surrogacy is a debated way of having children. It divides people, and jurisdictions in those who endorse it and those who do not accept it. Just within Europe there are multiple approaches adopted on its regulation, alternating between permissive take on it to total bans and criminal sanctions. Globalisation, advancement of medicine and digitalisation have contributed to enabling the providers of surrogacy services in countries where it is legal with the people in the countries where it is not permitted at all or where they are not eligible to take part in such an agreement, who want to have a child through a surrogacy arrangement. This has created a completely unregulated global market of service providers and cross-border reproductive patients circumventing domestic legislation.

The diversity of regulatory approaches in national legislation in Europe combined with the total absence of international regulation create a robust foundation to exploitation and human rights infringements in surrogacy cases. Most European states have ratified the European Convention on Human Rights, and have to accommodate its requirements in their legislation and practices concerning surrogacy. Consequently, this thesis aspires to map out the different legislative ways that European countries have adopted in regulating surrogacy, and evaluate their compatibility with the European Convention on Human Rights as well as their felicity in ensuring the realisation of the human rights of the surrogate mothers. In addition to that, the thesis discusses the historical development of medically assisted reproduction and surrogacy.

Cross-border surrogacy has led to litigation on both domestic courts and in the European Court of Human Rights. The case law from both of this are shaping the developing understanding of the scope of national legislation regarding surrogacy. Cross-border reproductive tourism has put the scope of national law in test, invoking questions about whether national regulation on the subject will prove to be redundant when the circumvention of national is increasingly affordable and accessible. Judging these cases, the courts have to take into account not only domestic legislation, but also international conventions the states have contracted and the principles, such as the priority of the best interest of the child, stemming from them. This thesis has a detailed review of the cross-border surrogacy cases of the European Court of Human Rights, and analyses case law’s impact on the current and the future development of national and international regulation, their effect on the predictability and legal stability of domestic law.

Lastly, the thesis maps out the current endeavours on international level to draft international regulation on surrogacy. There are some similarities between the development of the international adoption regulation to ongoing developments of surrogacy in practice and in regulation. The thesis provides a brief review of present situation of international regulation, and aspires on its part to contribute data to analysing the best regulatory options for both national and international regulation on surrogacy.
### TABLE OF CONTENTS

Table of Contents .................................................................................................................. III

Bibliography .......................................................................................................................... Error! Bookmark not defined.

1 Introduction ........................................................................................................................... 1
   1.1 Research Question and Methodology ................................................................... 1

2 What Is Reproductive Tourism? .................................................................................. 2

1.3 What Is Surrogacy? ..................................................................................................... 4

2 Reconciling Surrogacy as a Reproductive Right with Human Rights ..................... 7
   2.1 Reproductive Rights .............................................................................................. 7

2.2 The Applicable Articles of European Convention on Human Rights ............... 8
   2.2.1 European Convention on Human Rights and Their Application of Articles 8 and 12 of the Convention in Relation to Assisted Reproductive Rights .......... 9

2.3 Other Relevant European Regulation ....................................................................... 11
   2.3.1 Ad Hoc Committee of Experts on Bioethics .................................................. 11

2.3.2 Convention on Human Rights and Biomedicine ............................................. 11

2.3.3 Draft Recommendation The Rights and Legal Status Of Children And Parental Responsibilities ................................................................. 13

2.4 Human Rights Issues Arising from Surrogacy ...................................................... 14
   2.4.1 Surrogacy's relation to somewhat parallel Arrangements ............................ 15
<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4.2</td>
<td>Condemning Views on Surrogacy</td>
<td>16</td>
</tr>
<tr>
<td>3</td>
<td>National Legislations of Contracting States of the Council of Europe Regarding Surrogacy</td>
<td>18</td>
</tr>
<tr>
<td>3.1</td>
<td>General</td>
<td>18</td>
</tr>
<tr>
<td>3.2</td>
<td>Mater Semper Certa Est</td>
<td>19</td>
</tr>
<tr>
<td>3.3</td>
<td>Permissive Legislation</td>
<td>21</td>
</tr>
<tr>
<td>3.3.1</td>
<td>Ukraine</td>
<td>21</td>
</tr>
<tr>
<td>3.3.2</td>
<td>Russia</td>
<td>24</td>
</tr>
<tr>
<td>3.3.3</td>
<td>Greece</td>
<td>26</td>
</tr>
<tr>
<td>3.3.4</td>
<td>United Kingdom</td>
<td>28</td>
</tr>
<tr>
<td>3.4</td>
<td>Strict Legislation</td>
<td>31</td>
</tr>
<tr>
<td>3.4.1</td>
<td>General</td>
<td>31</td>
</tr>
<tr>
<td>3.4.2</td>
<td>Finland</td>
<td>33</td>
</tr>
<tr>
<td>3.4.3</td>
<td>Other Nordic Countries</td>
<td>36</td>
</tr>
<tr>
<td>3.5</td>
<td>Unregulated</td>
<td>38</td>
</tr>
<tr>
<td>3.5.1</td>
<td>General</td>
<td>38</td>
</tr>
<tr>
<td>3.5.2</td>
<td>Belgium</td>
<td>39</td>
</tr>
<tr>
<td>3.6</td>
<td>Conclusions on National Regulation on Surrogacy</td>
<td>42</td>
</tr>
<tr>
<td>4</td>
<td>European Court of Human Rights and Cross-Border Surrogacy</td>
<td>43</td>
</tr>
<tr>
<td>4.1</td>
<td>Cross-border Tourism Judgements and Decisions</td>
<td>43</td>
</tr>
</tbody>
</table>

IV
4.1.1 Mennesson v. France .................................................................44
4.1.2 Labassee v. France .................................................................47
4.1.3 D and Others v. Belgium ..........................................................48
4.1.4 Paradiso and Campanelli v. Italy ..............................................49

4.2 ECHR 8 ART in Light of the Case Law Regarding Cross-Border Surrogacy.....54
4.3 Margin of Appreciation on Family and Private Life Matters......................58
4.4 Equality Questions in Surrogacy ....................................................61

5 International Regulation on Surrogacy – Possibilities ................................63
5.1 Similarities and disparities between international adoption and international surrogacy..............................................................................................................63
5.2 The 1993 Hague Intercountry Adoption Convention ...............................64
5.3 Hague Conference on Private International Law – The Parentage / Surrogacy Project........................................................................................................66

6 Concluding Remarks ............................................................................68
Bibliography

Books and Book Chapters


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1 INTRODUCTION

1.1 RESEARCH QUESTION AND METHODOLOGY

The subject of surrogacy is a contemporary, under-regulated and very sensitive subject that has aspects of many disciplines of the law as well as connections to private international legislation. The concept is by no means new\(^1\), but has recently had a big popularity boost following medical advancements and increased accessibility and affordability of cross-border health care, including cross-border surrogacy.

In this text, I aim to analyse the legal problems that European countries have confronted and the regulation they have produced to solve the issues that have arisen when medical tourism and surrogacy have met. The national legislation cannot be observed without including the role that the European Court of Human Rights case law has in shaping how national courts interpret domestic legislation. In order to do that it is imperative to first disentangle what the primary object of legal protection is on a national level. Only then is it possible to look for wider pan-European trends, and start determining if legislation could be even quasi-harmonized. This paper does not include discussion on the distribution of liability in cross-border medical tourism, but focuses on the solutions adopted in legislation and the reasoning behind them.

One of the research questions that this paper contemplates is whether it truly is even possible for a Contracting State of the European Convention on Human Rights to effectively ban reproductive tourism in treatment forms that are nationally forbidden by legislation; or will

\(^1\) See D'Alton-Harrison, 2014, p. 357 for the historical mentions of surrogacy dating back to the Hammurabi Code and before.
it ultimately always be in the child’s best interests to be allowed to stay with the family they have been with through the presumably lengthy legal process?²

METHODOLOGY

1.2 WHAT IS REPRODUCTIVE TOURISM?

The saying that the world gets smaller increasingly applies to the world of health care. The trend of globalisation and mobilisation extends to not only medical staff and doctors but to patients as well. Limits imposed by national legislative regulation or customs are being dodged by travelling to another country. In the Internet era demand will find supply, neither of which know state nor legislative boundaries, thus leading to a situation where it would seem to be unavoidable that national legal bans crumble.

Medical tourism refers to the activity, where people travel from their domestic countries (‘countries of origin’) to another country (‘destination country’) in the purpose of acquiring medical care while staying there. There are a number of reasons to go abroad for medical treatment alternating from financial motivators to seeking to obtain treatment that is not sanctioned or legalized in one’s home country. The term ‘medical tourism’ is a misnomer because it suggests that there is a recreational purpose to the trip. To better describe the situation the people are in, the use of a more neutral term, such as ‘cross border patients’, is appropriate. The people who seek medical treatment outside of their country of residence are referred to as medical tourists or cross-border patients.³

Reproduction is a very private aspect of an individual’s life. In all European countries as well as in most of the countries in the world, the government does not interfere with an individual’s decision-making in reproductive matters. Reproductive decision-making is very

² As was the case in both Mennesson v. France - 65192/11, 2014 and Labassee v. France - 65941/11, 2014, and as Hedley J reiterated in the case of Re L (A Minor) [2010] EWHC 3146 (Fam).
deep in the realm of right to private and family life. However, one significant exception exists – when reproductive decisions cannot be executed without medical expertise and becomes a matter of assisted reproduction. Medical interference brings regulatory aspects into the question. Assisted reproductive regulation is closely tied to morals and ethics of each nation thus making the regulation often national and hard to harmonize. The intensity of the emotions evoked, both for and against assisted reproduction and its regulation make it next to impossible to have an impassive dialogue about it.

The kind of cross-border reproductive care that is the focal point of this paper is ‘circumventive reproductive tourism’, which means that the patients have the purpose of going around the restrictions and bans their national legislation has set down in the country of origin and obtaining care not available to them domestically. This is often a direct consequence of restrictive legislation in domestic countries, and as such needs to be dealt with by their domestic legislation.

The European Court of Human Rights has briefly acknowledged this issue in a Grand Chamber rulings A, B and C v. Ireland and S.H. and Others v. Austria in their judgement. Main concerns regarding some ART’s are that the human body and its parts will be commoditised thus inevitably opening the gate to exploitation of underprivileged people, and especially women. Implementing strict policies that are in practice easily and regularly circumvented is not an effective remedy to the unwelcomed side effects of ART. Another contributor in the decision to turn to transnational reproductive health care is that in some countries the legislation has led to a situation, where the waiting times for gametes are so long that people seek to go elsewhere.

1.3 WHAT IS SURROGACY?

In order to talk about surrogacy, and to discuss the legal challenges included in the process both nationally and internationally, it is important to specify what is meant by the term ‘surrogacy’. Surrogacy is an arrangement where a woman is impregnated with the purpose that she gives the child away when the child is born. The term itself includes different types of procedures, that differ medically and especially legally so much from each other, that for a comprehensive legal paper to cover all of them would have to be substantially longer than this work is intended to be. The woman who is carrying the child, the surrogate, is not the child’s intended parent. The intended parents can be referred to as ‘commissioning parents’. However, it does not tell anything about the genetic relations of the child, surrogate or intended parents.

There are multiple variations to the surrogacy scenario. In straight surrogacy, also known as traditional surrogacy, the surrogate is artificially inseminated with the intended father’s sperm and the child is genetically related to the surrogate. Artificial insemination means injecting sperm directly into the uterus through the cervix with an instrument. Naturally, involving from little to no medical expert’s involvement, this is more affordable than gestational surrogacy. Straight surrogacy has more legal risks, because in the eyes of the law would be seen as the irrevocable mother of the child, having both birthed the child and being genetically related to the child. As an example, the Finnish legislation has mater est doctrine, an irrefutable presumption about motherhood that is so strong that it is not even written into the legislation. In Finland, the only way for the intended mother to have legal rights over a child born via a surrogacy arrangement is to adopt the child. As traditional surrogacy requires no medical expertise and can be done completely under the radar it is very hard to distinguish it from a situation where the mother chooses to give her child up for

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8 Nieminen, 2013, p. 265.
10 For more information on different types of artificial insemination: MediLexicon International Ltd, 2011.
adoption with certain parents in mind. Traditional surrogacy has lesser risk of organised crime involved, is often not regulated in national legislation, and is explicitly excluded from the legislation concerning surrogacy in the countries where surrogacy is permitted.\textsuperscript{12}

In gestational surrogacy, the child is unrelated to the surrogate.\textsuperscript{13} There are sublevels to gestational surrogacy depending on the genetic relations between the parties involved. Options vary from ‘cyber procreation’ where the intended parent just goes online and picks a sperm donor and an egg donor, has the donor eggs fertilized with the donor sperm and the embryo implanted to a surrogate\textsuperscript{14} to less complex arrangements. The described case is very extreme, and probably as far away from traditional procreation as probably possible. In the described case, the form of surrogacy is gestational surrogacy with a donor embryo. Some of the less drastic options are the forms of gestational surrogacy where one or two intended parent(s) are genetically related to the child. These scenarios involve arrangements where the intended fathers’ sperm is used to fertilize a donor egg, or where the intended mother’s eggs are fertilized in vitro with donor sperm, or the intended parent’s gametes are used to create an embryo, which is then implanted in the surrogate’s womb. In this text, unless otherwise specified the term ‘surrogacy’ entails gestational surrogacy where one or two intended parent(s) have used their gametes to create the embryo.

To have a better understanding of surrogacy, it is useful to have the basic knowledge of related medical terms as defined by the World Health Organization (hereinafter WHO).\textsuperscript{15} The clinical definition of infertility is ‘a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse’. This definition has some flaws to it. It has been criticised for making it a disease for couples that can only affect heterosexual couples.\textsuperscript{16} I find the criticism partly untrue, since a woman can in fact have regular unprotected sex with more than one male partner,\textsuperscript{17}

\textsuperscript{12} More about this further in the chapter 3.3.
\textsuperscript{13} Brindsen, 2003, p. Abstract.
\textsuperscript{14} Swink & Reich, 2011, p. 241.
\textsuperscript{15} Zegers-Hochschild, et al., 2009, pp. 1521-1522.
\textsuperscript{16} Aarnipuu, 2006, p. 450.
and if after that she is not pregnant in a year, she fits the diagnose of infertility without being in a couple. However, as has been pointed out, the fact remains that to meet the criteria for infertility, which occasionally has been suggested to be a qualification for access to surrogacy, a woman would have to prove her right for health care with heterosexual sex.  

WHO defines assisted reproductive technology as a variety of treatments that involve handling gametes or embryos to establish a pregnancy. That includes in vitro fertilisation, where an ovum is fertilised with sperm in a petri dish. The created embryo is subsequently either implanted into a womb or frozen for later use. The WHO definition includes gestational surrogacy as a form of assisted reproductive technology but excludes artificial insemination.

The legal questions of surrogacy cannot be separated from the legal forms of artificial reproduction. Medically, gestational surrogacy cannot be performed without artificial reproductive technologies, which means that they are also legally bound. Legislature’s approach towards the use of artificial reproductive technologies and their availability is an indicator of how the legislation views surrogacy. Also, the ban on surrogacy can be incorporated in the legislation regulating human fertilisation and embryos.

In this paper I will focus on gestational surrogacy, and in this paper the term ‘surrogacy’ is interchangeable with ‘gestational surrogacy’. Traditional surrogacy will be always be referred to fully.

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2 RECONCILING SURROGACY AS A REPRODUCTIVE RIGHT WITH HUMAN RIGHTS

2.1 REPRODUCTIVE RIGHTS

The decision to procreate seems at first glance like an exceedingly private matter. If it is put under scrutiny, the assumption will prove to be false in almost all cases but one; if procreation follows from so-called natural process. In case of any complications in procreation, there will be legislation involved in defining the framework within which individuals can obtain services to fulfil their innate desire to become a parent. Even more regulation is involved when a person chooses to exercise their reproductive freedom by not wanting to procreate, whether it is terminating a pregnancy or having sterilization. The regulation varies widely depending on the state in question, the regulation would seem to be less permissive when it comes to exercising the negative reproductive services, regardless of whether fertilization has taken place or if it is a pre-emptive measure. The more parties, e.g. doctors, donors or fertility experts, involved the less certain it is that it will be viewed as a ‘private matter’.

All national legislation reflects the culture and values of the state in question. Legislation in reproductive matters tends to be even more value-bound than most legislation. The legislation in this area is often based on a fragile consensus reached between parties with different ethical, religious and moral viewpoints and agendas, thus making it an especially culturally sensitive subject. The level of restriction on what reproductive choices, and to what extent, are available to subjects varies greatly within the member states of the European Union. The free movement and services within the Union risk restrictive national reproductive legislation turning into dead letter. At a time when travelling is easier and more affordable by year and where access to information about services and possibilities in neighbouring countries is quite literally at everyone’s fingertips, lawmaker face a new challenge in trying to maintain some flesh to national legal orders’ bones. Because of the cultural sensitivity of the subject and the size of the Union, pan-European regulation is
unimaginable. Yet, when going around national legislation is easy and treated as a noteworthy option by the European Court of Human Rights it begs the question; are national legislative walls in Europe bound to crumble down as a result of increased movement of the citizens?

2.2 THE APPLICABLE ARTICLES OF EUROPEAN CONVENTION ON HUMAN RIGHTS

In today’s world where family units are not a homogenous group the right to found a family is not as tightly linked to having children as it was when the European Convention on Human Rights was drafted. In the light of contemporary case law of the European Court for Human Rights the trend is, and has been for quite a while, that the Article under which reproductive matters have been submitted to the European Court of Human Rights has been predominantly Article 8 where Article 12 has been left with little or no mention. There are several plausible reasons for this, which will be further speculated in the following paragraphs.

The European Convention on Human Rights Article 12 states as follows; Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. This could seemingly be used as a legal basis for the right to procreate, since it secures the right to found a family. In the late 1970’s the Court said in its statement in the case of X and Y v United Kingdom that Article 8 only applies when there is existing family life, thus rendering it useless in procreation issues. The statement continues to say that: “Article 12 does not guarantee a right to adopt or otherwise integrate into a family a child that is not the natural child of the couple”. As said earlier, these are statements given in a time when even the terminology used to speak about reproductive matters was different, and thus it cannot be applied as such to this day.

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19 In more detail in chapter 4.1.
However, the Court stating that Article 12 is not applicable to situations where the child is not biologically the parents’ explains in part the shift from Article 12 to Article 8 at least when it comes to artificial reproductive technologies. Article 8 has, too, been drafted at a time when the object of protection has been individual’s choice to procreate or not to procreate, without the regime having the power to take that chance away by sterilizing a person against their will.\(^\text{22}\) The Court has held a conservative interpretation of wording on both Articles. The wording of the Articles in question is quite different. Article 12 leaves a wide margin of appreciation to the country applying it, since, according to the Convention; it is to be applied “according to the national laws governing the exercise of this right”. Article 8 on the other hand has been written in a universal form. Furthermore, unlike Article 12 the phrasing of Article 8 does not limit the applicability only to heterosexual couples, but includes everyone.

It has been argued, that in the past, before the traditional nuclear family unit gave way to different types of families and before technology enabled artificial reproductive measures the right to found a family had a different emphasis than now - a more straightforward one. This might serve as a part reason to the European Court of Human Rights grounding reproductive rights to Article 8, which does not address procreation \textit{per se} at all.\(^\text{23}\)

2.2.1 \textbf{EUROPEAN CONVENTION ON HUMAN RIGHTS AND THEIR APPLICATION OF ARTICLES 8 AND 12 OF THE CONVENTION IN RELATION TO ASSISTED REPRODUCTIVE RIGHTS}

In their assessment in the case of \textit{S.H. and Others v. Austria} the Court, first referring to the case of \textit{Dickson v. the United Kingdom}\(^\text{24}\), established Article 8 being applicable to cases involving assisted reproductive measures stating that “The right of a couple to conceive a child and to make use of medically assisted procreation for that end comes within the ambit

\(^{22\text{\ Janis, et al., 2008, p. 373 and Council of Europe Staff, 1985, p. 95.}}\)
\(^{23\text{\ Eijkholt, 2010, p. 128.}}\)
\(^{24\text{\ Dickson v. the United Kingdom [GC] - 44362/04, 2007.}}\)
of Article 8, as such a choice is clearly an expression of private and family life”. 25 Earlier, in their assessment in the Dickson –case the Court emphasized that when concerning such essential features of a person’s existence as the choice to have biological child States’ margin of appreciation is generally limited. 26 The Court further solidified Article 8 as viable basis for claims concerning the right to procreation by declaring S.H. and Others where the applicants alleged that there had been a violation of Article 8 alone, and in conjunction with Article 14, admissible.

Exactly to what extent Article 8 covers reproductive rights is yet to be confirmed. In E.B. v. France the Court asserted that Article 8 does not guarantee a right to adopt nor does it shield the wish to found a family. 27 Earlier, in the case of X, Y and Z v. United Kingdom the Grand Chamber the Court stated that family life is not confined to people living in marriage, but is inclusive of other sorts of de facto relationships too. Furthermore, the Court elaborated that in the process of estimating whether a family life exists, there are many factors to take into account, and as an example of those the Court listed cohabitation, length of the relationship and ‘whether they had demonstrated their commitment to each other by having children or by any other means’. 28 The term ‘private life’ in its narrow and traditional interpretation is understood to protect one’s privacy and private life from impeachments by the government. In the broad sense of the term it encompasses that non-interference, and personal identity and relationships. 29 The scope of Article 8 is put to test when it is measured against paragraph 2 of the article, which states that ‘[…] except such as is in accordance with the law and is necessary in a democratic society […] for the protection of health or morals, or for the protection of the rights and freedoms of others’. In S.H. and Others v. Austria the object of legal protection is, according to the Austrian government, in addition to the omnipresent

25 S.H. and Others v. Austria [GC], 2010.
26 Dickson v. the United Kingdom [GC], 2007, para 78.
28 X, Y and Z v. the United Kingdom [GC], 1997, para 36.
29 Pretty v The United Kingdom - 2346/02, 2002, para 61. and again in Gilland and Quinton v The United Kingdom - 4158/05, 2010, para 61.
moral and ethical complexities ‘the unease existing among large sections of society as to the role and possibilities of modern reproductive medicine’.  

2.3 OTHER RELEVANT EUROPEAN REGULATION

2.3.1 AD HOC COMMITTEE OF EXPERTS ON BIOETHICS

The Ad Hoc Committee, also known as CAHBI, has members from many disciplines, and in 1989 the committee drafted a report on the principles they thought should researchers should abide by in this new territory of science, namely artificial procreation. In its report CAHBI expressed its opinions on how the regulation should be that methods of artificial procreation should be accessible only for heterosexual couples when it is in accordance with the future child’s wellbeing, and when other infertility treatments have failed or there are serious risks to the health of the child or the mother. The report has principles about consent and prohibition of profiting from donation of gametes of embryos.

The CAHBI report has a section on surrogate motherhood, where it states that artificial procreation techniques are not to be used for the purpose of surrogacy, and that all surrogacy agreements and contracts are to be unenforceable and advertising surrogacy should not be allowed. In ‘exceptional cases fixed by national law’ surrogate motherhood would be allowed providing it is altruistic and the mother is presented with the possibility of keeping the child after birth.

2.3.2 CONVENTION ON HUMAN RIGHTS AND BIOMEDICINE

The Convention on Human Rights and Biomedicine stays silent on the issue of surrogacy, and does not say much about reproductive rights in general. However, some of its provisions

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30 S.H. and Others v. Austria [GC], 2010, para 99.
are relevant either as such or with a little analogous interpretation be applicable to surrogacy. It sets limits to the use of reproductive technologies and the progress of science in the general provisions by upholding the human dignity and underlining the primary nature of the human interest and welfare over those of the society. Some of the views adopted in the Biomedicine Convention have led to a comparatively low ratification numbers, including the lack of ratification of some major Council of the Europe Contracting States such as the UK, the Netherlands, Italy, Russia and Germany. The fact that so many important countries opted out from the Biomedicine Convention goes to show that harmonising the laws on bioethical question was and remains an insurmountable effort.

Most significant provision in light of national and international surrogacy is Article 21. It is about the prohibition of financial gain from the human body and its parts, applying to surrogacy as such in the States where it is permitted, as well as weighing in on legislation and judgements made in recognition of cross-border surrogacy in the ratifying States. The same prohibition is pronounced in Article 3(2)(c) of the Charter of Fundamental Rights of the European Union31 and with some national discretion as to the amount of compensation in Article 12(2) of the Directive 2004/23/EC,32 which applies to the donation on gametes.

The articles indirectly relevant to surrogacy, and by extension artificial reproductive technologies, are Article 5 concerning consent and Article 14 about the non-selection of the sex of a child. Article 5(3) stating that a person has the rights to freely withdraw their consent at any time is more controversial in its applicability to surrogacy, since it in essence makes enforceable surrogacy agreements made prior to the birth of the child incompatible with the convention. Greece has ratified the convention on human rights and biomedicine but they also have enforceable surrogacy agreements.

Additional Protocol\textsuperscript{33} precludes applying Article 19 governing organ and tissue donation to reproductive, embryotic or foetal organs or tissue. However, if the proper parts of the Article were to be analogously applied to surrogacy, it would lead essentially the same safeguards that are required in e.g. Ukraine and Greece, where access to surrogacy requires medical reasons and surrogacy is a subsidiary method to treat infertility.

2.3.3 **DRAFT RECOMMENDATION THE RIGHTS AND LEGAL STATUS OF CHILDREN AND PARENTAL RESPONSIBILITIES**

Committee of Expert on Family Law received a mandate from the European Committee on Legal Co-operation to outline a legal instrument concerning children’s legal status and parental responsibilities in European framework.\textsuperscript{34} In the final draft recommendation out of the three drafts recommendations made, Article 7 of the draft recommendation covers the establishment of maternal affiliation and its 3\textsuperscript{rd} paragraphs has The phrasing ‘are free to’, which differs from the phrasing of the first paragraph of the article, which states that the birthing woman ‘should be’ considered the legal mother. The explanatory memorandum elaborates the reasoning behind the word choices in this Article accentuating that there is no requirement nor notion for the Contracting States to have domestic legislation on the subject.

‘3. States having legislation governing surrogacy arrangements are free to provide for special rules for such cases.’\textsuperscript{35}

‘Without suggesting that there should be national legislation governing such [surrogacy] arrangements nor in any way prescribing what form such legislation, if any, should take […]’\textsuperscript{36} [Emphasis added.]

\textsuperscript{33} Article 2(3) of Council of Europe CETS 186 (Additional Protocol to the Convention on Biomedicine), 2002.

\textsuperscript{34} See Explanatory Memorandum (Appendix IV) of Committee of Experts on Family Law, 2011, para 5.

\textsuperscript{35} Committee of Experts on Family Law, 2011 Appendix III.

\textsuperscript{36} Committee of Experts on Family Law, 2011, para 36 Appendix VI.
In the Explanatory Memorandum, the non-interference is reiterated thrice in one sentence making it very clear that there is no stance taken or an implication hidden to any direction. The pronounced non-intervention policy adopted in the explanatory memorandum is interesting considering that there was no reason to assure explicitly that the States need not to regulate the issue; the phrasing only addresses the States that have existent legislation on the subject.

2.4 HUMAN RIGHTS ISSUES ARISING FROM SURROGACY

The opponents of surrogacy often argue that surrogacy as a concept turns the human body into a commodity thus derogating the human dignity of both the surrogate women and the babies born through the arrangement. The reality of the situation is that neither neglecting to address the issue in legislation nor prohibiting surrogacy it will prevent it from occurring. The lack of regulation, both in national and international level, plays a role in forming a ‘black market’ around surrogacy, making it next to impossible to detect or intervene in the exploitation of women.

There is no denying of the complex human rights issues linked with surrogacy. There is always risk of exploitation or at least coercion involved. The obvious risks of surrogacy include situations where the surrogate refuses to give the child to the intended parents that maybe be the genetic parents as well. In addition to that, situations can arise where the intended parents no longer wish to have the child after implantation of the embryo(s), but the surrogate either refuses to have an abortion or is too far along to have one. There are also the issues with the legal, moral and ethical problems concerning situations when the surrogacy does not go according to the plan and there is insufficient regulation as to how the situation needs to be handled. Current lack of collective regulation regarding cross-border surrogacy and its legal effects lends to a very disruptive situation with little predictability of outcomes of either the agreements or the national legislation’s certainty if a decision gets appealed to the European Court of Human Rights.

In general, the issues transpiring from surrogacy have to do with the aforementioned commodification of the human body and gaining financial or other profit from it. In addition
to these general concerns there are specific issues connected to the parties involved. The believed human rights violations regarding the surrogates revolve around exploitation, human trafficking and modern slavery due to the dubious consent given by possibly illiterate women in a foreign language.\textsuperscript{37} The resulting children get caught in the middle of a possibly long legal battle where the intended parents are trying to get the child recognised as theirs in their country of origin that is likely to have very different legislation on the subject than the country where the surrogacy agreement took place. This leaves the children in a legal limbo or a vacuum where they may be stateless, without anyone having parental rights over them and not fully or at all recognised by the country where the intended parents took them.

2.4.1 Surrogacy’s relation to somewhat parallel arrangements

Riitta Burrell, a Finnish lawyer and an avid opponent of all forms of surrogacy, states that organ donation and surrogacy are not parallel. In her article about surrogacy she poses a question about: ‘Why is organ donation not objectifying the donor if surrogacy objectifies the surrogate?’, and her answer is that ‘A child is not an organ. The difference between donating an organ and donating a child is more than gradation’.\textsuperscript{38} In cases where an organ donor, e.g. a kidney donor, is alive, the donor makes a decision to give up something that is theirs, a part of their body by biology. They donate the organ knowing that not only may the surgery to remove the organ be fatal but also if they are left with one kidney and it starts to malfunction, that could be fatal to them, too. Organ donation may thus be a lethal decision in the long run. Surrogacy, as all birthing/parturient involves a risk to the birthing/parturient woman. That risk is parallel to the risk that an organ donor accepts when agreeing to donate.

In gestational surrogacy the child is not genetically related to the surrogate, and to achieve the point where the surrogate is implanted with the embryo, they will have had time to think through if they want to proceed with this. Unlike in some cases of organ donations where the need is acute, the surrogacy arrangement takes time and planning, because of the medical

\textsuperscript{37} Gunputh & Choong, 2015, p. 18.

\textsuperscript{38} Burrell, 2011, p. 1007.
requirements of creating an embryo from the gametes of the intended parents. One can argue that the social pressure to agree to donate an organ to a relative is greater than the pressure to agree to be a gestational surrogate. Finally, giving a child up for adoption is giving up a child that is genetically related to the mother. Usually, that child was not intentional, and thus the biological mother has not had time to think through whether she is ready to emotionally go through giving the baby away unlike a person, who has willingly entered a surrogacy agreement to become a gestational surrogate. If a person is allowed to give their child up for adoption after a consideration period, why not apply the same logic to surrogacy?

The risk is equal to the risk a man takes if they have unprotected sex with a married woman; their fatherhood will not be acknowledged without the permission of the husband. The legal framework would be explicit; there would be a risk that the gestational mother chooses to keep the child. There is no need to ban the whole arrangement, just make the necessary framework to facilitate it. By arguing that all forms of surrogacy are degrading to the surrogate’s human dignity, one argues that giving their child up for adoption is degrading to human dignity as well, since there are no real obstacles to creating an adoption-like legislation to extend to surrogacy as well.

2.4.2 CONDEMNING VIEWS ON SURROGACY

In their resolution in December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 the European Parliament expressed its stance on surrogacy matters stating the following:

‘[The European Parliament] -- Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable
women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments’.\textsuperscript{39}

The unambiguous condemnation of all forms of surrogacy is a very strong message concerning the lack of uniform regulation on the subject on a European level, as can be seen from the previous chapter on the national legislations of the Contracting States. The statement suggests that accepting surrogacy arrangements is in breach of the Convention on Human Rights and Biomedicine.\textsuperscript{40}

European Center for Law and Justice (hereinafter ‘ECLJ’) stated in their submission\textsuperscript{41} to the decision \textit{D. and Others v. Belgium} that surrogacy is against the surrogate’s and the child’s human dignity. In ECLJ’s view surrogacy should be prohibited throughout the member States. In the \textit{D. and Others} case they requested the Court to dismiss the application as being in breach of Article 17, since the applicants had circumvented Belgian law and in doing so created the situation they now complained about. ECLJ has been adamant in opposing all forms of surrogacy. ECLJ has presented the Council of Europe with a report concerning surrogacy titled ‘Surrogacy Motherhood: A Violation of Human Rights’\textsuperscript{42}, a response to the case law the European Court of Human Rights set.

\textsuperscript{39} European Parliament, 2015, para 115.
\textsuperscript{41} D. and Others v. Belgium - 29176/13, 2014, paras 46-47.
\textsuperscript{42} European Center for Law and Justice, 2012.
3 NATIONAL LEGISLATIONS OF CONTRACTING STATES OF THE COUNCIL OF EUROPE REGARDING SURROGACY

3.1 GENERAL

In order to address the controversies and problems of cross-border reproductive tourism and cross-border surrogacy it is necessary at times to elaborate on other assisted reproduction–related legislation. As previously explained, preceding gestational surrogacy the intended parent or the ova donor must go through the same steps as someone receiving fertility treatments would have to go through.\textsuperscript{43} Therefore scrutinizing legal framework around surrogacy requires an occasional dip into the realm of assisted reproductive regulation and its controversies. In this section I will shed some light into the different approaches adopted by EU member states in both national surrogacy and to circumventive reproductive tourism. Scrutinizing national legislation helps evaluating and comparing which conventions seem to lead to sustainable and balanced outcomes in terms of viable regulatory approach options for possible future international regulation. Some clarifying case law is briefly discussed when necessary.

The European Court of Human Rights proceeded to do a comparative law research\textsuperscript{44} into different legal approaches towards surrogacy adopted in thirty-five of the forty-seven Contracting States when assessing their judgement in \textit{Labassee v. France}, one of the French surrogacy cases. The final judgement was declared in June 2014, so this is still a rather current review of the state of legislation and regulation in Europe. As can be seen from the study described in more detail in the following chapters, there in fact seems to be more of a European consensus on not, at least explicitly, permitting surrogacy. Regardless of the seemingly unfavourable regulation of surrogacy in national legislation, in twenty-four of the thirty-five States of the study, the intended parents can get legal recognition of a parent-child relationship through exequatur. Some of the countries that do offer legal recognition are the

\textsuperscript{43} Brindsen, 2003, p. 483.

\textsuperscript{44} Labassee v. France, 2014, paras 31-33.
same countries that have in their national regulation selected to ban, and in some cases even
penalise, surrogacy.

National approaches towards surrogacy can be divided roughly to three categories; permissive, strict and unregulated. This chapter will focus on different national approaches adopted by the Contracting States of the Council of Europe. They have been grouped to three categories, and in each category, a few of the most representative States’ legislation will be covered in more detail in each group. Most European countries have adopted either the strict or the partly permissive approach, allowing only gratuitous surrogacy. Some of the countries that have opted for the permissive legislation have booming supply of fertility clinics with internet pages written in many languages explaining the legal procedures and requirements for a foreigner to come to their clinic to make a surrogacy agreement.\footnote{Just by conducting a Google search with the words 'Russia surrogacy' returns with 241,000 hits. Searching for 'Ukraine surrogacy prices' comes back with 79,000 hits.} The pages have information in impeccable English and often also French and German stating how to acquire surrogacy services in a way that is recognised in their home countries.

3.2 MATER SEMPER CERTA EST

Defining motherhood is different from defining fatherhood. There is a Roman phrase in Latin that summarizes the difference: ‘Mater semper certa est, pater semper incertus est’. Literal translation would be ‘the mother is always certain, the father is never certain’. It is a generalized assumption traditionally based in biology, meaning that the mother is the woman who carries the child. Most, if not all, European countries have legislation that makes it possible to gain motherhood of a child post-natally through adoption or giving up parental responsibility via adoption. Fatherhood is not tied to biology. Fatherhood is commonly legally assumed based on marriage with the person regarded as mother with a possibility to correct it to reflect biological facts. Due to advancements in technology, the increasing permitting of ova donation and surrogacy, and the prevalence of the mater est –doctrine,
motherhood has now, too, separated from being based on a biological truth to being more clearly a legal presumption.

Surrogacy as a legal construction can be conceived in one of two ways. It makes a tremendous difference in all related legal issues, which one is chosen by the lawmaker. One way to perceive surrogacy is the most common conception that predates the medical advancements that have made assisted reproduction possible, the traditional in which a woman is always seen as the mother of the child she has birthed. In jurisdictions that adhere to that doctrine, surrogacy is inevitably just a contract to adopt the child born from the implanted embryo. Thus, the intended parents have no parental status in relation to the unborn child. The whole act must be viewed through the concept of adoption; it usually has an inherent option for the surrogate to change their mind similar to the reconsideration period incorporated in many adoption laws. In addition to the uncertainty of possibly not having the child they wanted, this regulation can also lead to a situation where the genetic parents of a child are left with no legal path to get legal parental rights over the child should the surrogate choose to keep the child.

Statistically, totally discarding mater est -assumption would be unwise, as it holds true in the vast majority of the cases. Many argue that it is helpful in upholding the principle that the human body is not to be subjected to commodification. The fear of commodification of the human body is valid. This problem can be solved similarly to the UK, who solved essentially this same question in regards of organ donation; by making commercial form illegal while allowing non-commercial option. Some argue that a ban on commercial surrogacy is not enough, and that in fact surrogacy is inherently objectifying and degrading to human dignity.\footnote{Burrell, 2011, p. 1006.} However, granting it the status of praesumptio iuris et de iure written in stone at a time where it is possible that the birthing woman has no genetic relation to the birthed child whatsoever.
3.3 PERMISSIVE LEGISLATION

According to the study conducted by the Court, only seven of the thirty-five States, namely Albania, Greece, the Netherlands, the United Kingdom, Georgia, Russia and Ukraine, permit surrogacy. In the last three States commercial surrogacy is allowed, others have allowed just altruistic surrogacy. It would seem that permissive legislation stems actually from the lack of any or sufficient regulation rather than carefully constructed legal provisions enabling reasonable and well thought out framework.

The states with permissive legislation on surrogacy have two different kind of regulatory approaches. Firstly, there is the pre-approval system, where a prior approval is required from an organ to engage in surrogacy. In this arrangement, the parental status transfers pre- or post-natally to the intended parents without bureaucracy. This might enable transfer of parental rights at the moment of birth, increasing reliability of the arrangement. The second option is a system where the intended parents apply for the transfer of legal parentage after the child has been born. This option has variation in whether or not the birth certificate mentions the surrogate at all or is there a mandatory waiting period for the gestational mother in order to waive her parental rights over the child.

This chapter will provide an overview of the legislative solutions some of the Contracting States that allow surrogacy have drafted to regulate surrogacy. The selection of the states was done to find a comprehensive review of the legislation, including to show the legislation in traditionally attractive destination countries for international surrogacy as well as to show the ways in which some permissive countries have tried to subdue its appeal in regards of cross-border surrogacy. In addition to describing the legislative environment I will briefly assess their relationship to international surrogacy.

3.3.1 Ukraine

Ukraine has one of the most indulgent legislation in regards of assisted reproduction. It also happens to be one of the very few medically advanced countries with legislation condoning
surrogacy and low costs of medical care.\textsuperscript{47} Hence, Ukraine is one of Europe’s most popular destination countries for people looking into cross-border surrogacy, with an estimated 10 percent of surrogacy patients being foreigners.\textsuperscript{48} Other than Ukraine, only a few U.S. states and Russia have assumed very surrogacy friendly approach. For the purposes of best contrast, Ukrainian legislation will be used to illustrate permissive legislative approach to surrogacy. The relevant provisions of Ukrainian law in regards of surrogacy are the Civil Code, the Family Code and the Instruction on the Application of Assisted Reproductive Technologies.\textsuperscript{49} The legislation regarding assisted reproduction in Ukraine is embedded in the article concerning the right to life, thus applying to everyone, not only Ukrainian citizens.\textsuperscript{50}

Ukrainian government has opted for a ‘laissez-faire’ type of regulation, which has very little restriction on freedom of contract. There are only a few noteworthy restrictions on said freedom. Firstly, on the parties involved in surrogacy in the Ukrainian legislation is that the intended parents have to be married in a way that the Ukrainian law\textsuperscript{51} recognises marriage, e.g. a marriage of a man and a woman, thus preventing single people, civil unions and same-sex couples engaging in a surrogacy contract legally in Ukraine. Secondly, the previously mentioned Ukrainian Order of the Health Ministry limits the availability of assisted reproductive services, including surrogacy, to those who are unable to procreate due to medical reasons; either infertility of one of the spouses or the risk that pregnancy would impose on to the child or the woman. The Family Code requires that the embryo must be conceived by the spouses, which does not explicitly require at least one of the intended parent be genetically related to the child thus making surrogacy through all donated gametes illegal.\textsuperscript{52} Thirdly, there are some criteria concerning the surrogate, as well. One criterion set

\textsuperscript{47} BBC, 2014.
\textsuperscript{48} Druzenko, 2013, p. 357.
\textsuperscript{49} Міністерство охорони здоров’я України (Ukrainian Ministry of Health), 2008.
\textsuperscript{50} Druzenko, 2013, p. 357.
\textsuperscript{51} Сімейного кодексу України статті 123 (The Ukrainian Family Code, Article 123).
\textsuperscript{52} A case involving circumventing this sort of regulation in Russia, see Paradiso and Campanelli v. Italy, 2015, para 76.
in the Ministry Order is that the surrogate woman must be an adult, of full capacity, she must be medically deemed fit to carry a child, and she has to have minimum one healthy child of her own. The criteria that most clinics set forth are stricter than the government imposed limits, as can be seen from service providers’ webpages. The other criterion set forth in the Ministry Order is the limitation of embryos that can be implanted in the surrogate; one or two embryos are the standard, three requires the surrogate’s consent and more than that is prohibited.

The lack of almost all contractual prohibitions is what sets Ukraine apart from the rest of Europe so clearly; most other countries have deemed birth mother’s right to change her mind worthier of legal protection than the intended parents’ legitimate expectations. According to Article 123(2) of Family Code ‘If an ovum conceived by the spouses (a man and a woman) is transferred to another woman via assisted reproductive technology, the spouses shall be the parents of the child’, and the surrogate is precluded from contesting the maternal affiliation in 139(2) of the Family Code. Once entering the surrogacy agreement, the birth mother has no right to the child; legally it is the child of the intended parents from the moment of the agreement or the conception, whichever comes first, regardless of the surrogate. This brings a lot of certainty to a situation where one of the most prominent fears is that the surrogate can change their mind and that the intended parents will not have any legitimate claim over the child born. The wording of the article rules out traditional surrogacy, as it only applies to situations where the embryo is transferred to another woman, suggesting that in cases of traditional surrogacy the maternal affiliation cannot be confirmed to any other woman than the one birthing the child. To register the child, Ukrainian law provides a notarised consent from the surrogate allowing the intended parents to be registered as parents.

Ukraine is one of the very few European countries that do not prohibit commercial surrogacy. In fact, it does not say anything about commercial surrogacy, but when interpreted with other Ukrainian Civil Code articles that emphasize the principle of freedom

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53 For instance Surrogacy - Ukraine & New Life Ukraine.
54 Druzenko, 2013, p. 358.
of contract it is clear that it since not explicitly prohibited, it is allowed.\textsuperscript{55} Ukraine has signed, but not yet ratified, the Convention on Human Rights and Biomedicine. Once Ukraine ratifies it and puts it to force it will bring commercial surrogacy to a stop.\textsuperscript{56}

It is undeniable, that Ukrainian regulation on surrogacy is under-regulated albeit there have been relatively few cases stemming from it.\textsuperscript{57} There has been at least one Draft Law that aimed to limit access to surrogacy agreements only to intended parents that are Ukrainian citizens but the draft was altered in the Parliament to exclude only intended parents that come from countries that do not accept surrogacy.\textsuperscript{58}

3.3.2 Russia

Russia has very similar regulation to Ukraine; lack of legislation on commercial surrogacy, allowing only gestational surrogacy and having some major shortcomings when it comes to cohesion of the legislative framework within which surrogacy happens in Russia. Surrogacy is regulated in the Family Code and the Federal Act on Fundamentals of Protection of Public Health in the Russian Federation.\textsuperscript{59}

There are a few crucial differences between Ukrainian and Russian surrogacy regulation that need to be taken into account when assessing their attractiveness as destination countries for cross-border reproductive tourism. Firstly, Russian law grants access to assisted reproductive technology, including surrogacy, to larger group of people than its Ukrainian counterpart, namely heterosexual couples, regardless of their marital status and single women.\textsuperscript{60} Interestingly the law does not mention single men, although the reason for that seems to be unknown to academics, since intentionally excluding single men but not women

\textsuperscript{55} Druzenko, 2013, p. 359.
\textsuperscript{57} Druzenko, 2013, pp. 361-363.
\textsuperscript{58} Draft Law no 8282 referred to in Druzenko, 2013, pp. 363-364.
\textsuperscript{59} Khazova, 2013, p. 312 & 318.
\textsuperscript{60} Russian Law on Citizens’ Health 2011 Section 55(3), translation from Khazova, 2013, p. 315.
would be discriminatory both between the sexes and between married and unmarried men suffering from infertility under both the Russian Constitution as well as the Convention.  

Allowing single women, and maybe men, access to surrogacy services makes it possible for single homosexuals to travel to Russian and obtain surrogacy services.

The other significant distinction between the Russian and Ukrainian approach towards surrogacy is legally very important. The commissioning parents can make a contract with the surrogate mother stating her consent to bear the child, and following this agreement when the child is born, the birth certificate will have no mention of the surrogate. After the registration of the baby the commissioning parents gain full parental rights over the child without further bureaucracy. The surrogacy agreement is limitedly enforceable; only the financial terms of the agreement can be enforced, leaving the possibility that the surrogate can keep the child or decide to terminate the pregnancy.  

As explained above in the previous chapter, Ukrainian law recognises the intended parents as the child’s legal parents from the point of conception whereas the Russian law operates under the _mater est_ –doctrine making it possible for the surrogate mother to change her mind and keep the child. If that were to happen under Ukrainian jurisdiction, the intended parents could obtain a court order to register them as the parents; under Russian jurisdiction a post-natal consent is required making it a lot less attractive country of destination due to uncertainty stemming from that.

Russia shares the same problems relating to surrogacy as Ukraine does; the lack of regulation has led to rampant surrogacy providing services that on their part create new legal problems. The legal uncertainty combined with the sums of money involved in commercial surrogacy have led to a situation where a lot of surrogacy happens under the radar making it virtually impossible to monitor for human trafficking or other illegal activity.

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61 Khazova, 2013, p. 316.
63 Druzenko, 2013, p. 358.
64 Khazova, 2013, p. 318.
Unlike in Russia and Ukraine, in Greece the permissive framework does not originate from deficient legislation and holes in the existing regulation but rather from a place of careful consideration and thought-through limitations. What hinders Greece from becoming a sought after destination country for cross-border surrogacy as has happened to both Russia and Ukraine? In order to control the legal problems arising from international surrogacy, Greece has regulated what was proposed as a draft law in Ukraine and limits access to surrogacy only to people whose domicile is Greece. Although this has lessened the appeal, according to a study out of the 17 cases the researcher got access to in 11 the surrogate was a foreigner domiciled in Greece, which goes to show that the provision is not airtight. This raises some question about the veracity of the altruistic nature of surrogacy in these cases. Regardless of the circumvention of the domicile requirement, the Greek legislator has other regulation that deserves a closer look, as it is somewhat unique in the framework of European legislation concerning surrogacy.

Before any surrogacy-related actions take place, the applicant(s) need to apply for a court’s authorisation. This is where it most differs from both Ukraine and Russia, because in those countries the authorities do not contribute to the process but for the registration of the child’s parents. In Greece, the surrogacy agreement covers only the area that law does not, leaving terms that e.g. contradict the surrogate’s right to her body unenforceable.

According to Greek Civil Code Article 1458, assisted reproduction is available for single women and heterosexual couples regardless of their marital status. Single men are excluded from obtaining assisted reproductive services, although this seems to not be peremptory according to case law due to the same discriminatory reasons that were previously explained.

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to be the issue with identical prohibition in Russia.\textsuperscript{68} Both the surrogate and the intended parents need to go through a medical check to confirm the former’s suitability for carrying a child and psychological stability.

The Greek law requires a medical reason for acquiring surrogacy, since it is viewed as a ‘complimentary’ to other forms reproductive technologies for inability to procreate naturally, and without a document stating either infertility, inability to carry a child to term or a serious hereditary disease a woman cannot apply for a judicial authorisation to access assisted reproductive technologies.\textsuperscript{69} Strict application of medical necessity shuts down most moral and ethical questions raised by surrogacy.

The other great difference in the Greek system is that the surrogacy agreement is enforceable, and a judge is included in the process. A surrogacy agreement need not to follow any formal form, but the Greek Civil Code demands that it is written, signed by the women involved and their husbands if they have one. However, if either of the women have a male partner that they are not married to, they need a notarised consent from the male(s).\textsuperscript{70} The agreement ensures that the applicant(s) will be registered as the parent(s), and it also prohibits the parties from deviating from what is agreed, regarding both parental relations and other agreed upon terms, and has been substantiated by the authorisation.\textsuperscript{71} A court revises the agreement and substantiates the parties’ consent for the arrangement. When the court gives its authorisation the agreement becomes enforceable, namely the surrogate mother loses her right to keep the child nor can the intended parents change their minds.\textsuperscript{72} Rebuttal of maternity is possible only if the surrogate can provide proof to suspect that the child is biologically related to her, and even then the timeframe for the rebuttal is six months.\textsuperscript{73} Surrogacy agreements are null

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\textsuperscript{68} Rokas, 2013, p. 146 and Brunet, et al., 2013, p. 285.
\textsuperscript{69} Rokas, 2013, p. 145.
\textsuperscript{70} Brunet, et al., 2013, p. 290.
\textsuperscript{71} Rokas, 2013, p. 148.
\textsuperscript{72} Brunet, et al., 2013, p. 290 and Rokas, 2013, p. 148.
\textsuperscript{73} Greek Civil Code Article 1464(2), more on Brunet, et al., 2013, p. 291 and Rokas, 2013, p. 148.
and void under the Greek law if they concern a child to whom the surrogate is genetically related because it is deemed ‘contrary to the general principle of fairness and social ethos.’

3.3.4 United Kingdom

The United Kingdom confronted the issues arising from unregulated surrogacy early on, and formulated legislation governing surrogacy agreements, acquiring parental order following surrogacy arrangement and made information about international surrogacy readily available for those who were considering it. The Surrogacy Arrangements Act 1985 was drafted to create outlaw some of the most unwanted practices involved in surrogacy as well as to regulate the field as a whole. The Surrogacy Arrangements Act 1985 defines the relevant terms, bans commercial surrogacy arrangements and the advertisement of surrogacy and states that surrogacy agreements are not enforceable.

The Human Fertilisation and Embryology Act 2008 is the law regulating parentage when people have undergone assisted reproductive care including parental order, which is the equivalent of adoption order but applicable and designed for surrogacy. UK law bases its view of maternity on mater est – doctrine, specifying it in the HFEA 2008 section 33(1) to mean ‘the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs’, hence explicitly addressing surrogacy arrangements, too.

The UK law states that a child must be registered within forty-two days (six weeks) of their birth. The mater est - assumption is irrefutable for the six weeks following the child’s birth. As a result of the time limits set in the legislation, unlike in Russia and Ukraine, the child gets issued a birth certificate with the name of the woman who gave birth to the child. Once

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74 Brunet, et al., 2013, p. 288.
77 Wells-Greco, 2013, p. 371.
78 Births and Deaths Registration Act 1953 / 1953 Chapter 20 1 and 2 Eliz 2.
a parental order is attained, the birth certificate is replaced by one that discloses the intended parents as legal parents and states the name they have given the child.\textsuperscript{79} At the age of 18 in the UK save for Scotland, where the age limit is 16, a person whose parentage is determined with a parental order is entitled to access their original birth certificate resulting in a situation, whereby it is impossible to hide the identity of the surrogate effectively from the child.

To obtain a parental order at least one of the applicants must be genetically related to the child\textsuperscript{80} otherwise the only way to become the parent of the child is via adoption. The previous Human Fertilisation and Embryology Act 1990\textsuperscript{81} extended parental order only to married couples. Acquiring a parental order still requires two people who have to be in a relationship but the HFEA 2008 includes also civil partners and to ‘two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other’\textsuperscript{82} thus allowing homosexual couples to become parents via surrogacy. Application for the parental order must be made between sixth week and sixth month of the child’s life\textsuperscript{83} and it can only be made when the child resides with the applicants and if at least one of the applicants is domiciled in the UK.\textsuperscript{84} Since surrogacy agreements are not enforceable\textsuperscript{85} according to the UK legislation, there is some inevitable uncertainty involved in entering a surrogacy agreement in the UK. That, together with the possible difficulties of finding a surrogate due to the ban on advertising and regulatory choice of having the birth certificate show the gestational mother as well, are surely part reasons to why, regardless of the UK allowing surrogacy domestically, Brits still go abroad to engage in surrogacy.

\textsuperscript{79} Wells-Greco, 2013 p. 376
\textsuperscript{80} HFEA 2008 section 54(1)(b).
\textsuperscript{82} HFEA 2008 s 54(2)(c) .
\textsuperscript{83} HFEA 1990 s 30(2).
\textsuperscript{84} HFEA 2008 s 54(6).
\textsuperscript{85} Surrogacy Arrangements Act 1985 s 1A.
As stated above, only altruistic surrogacy arrangements are sanctioned under the UK law, which means that only the reasonable expenses of surrogacy can be covered.\textsuperscript{86} However, the in their case law the UK courts have repeatedly ruled that the welfare of a child exceeds the prohibition of payment. For instance, Mr. Justice Hedley in the case of \textit{Re L (A Minor)}\textsuperscript{87} reasoned that it was clear that the payments made in that case exceeded reasonable expenses. Hedley J criticized the concept of ‘reasonable expenses’ for being too vague, and proceeded to state that under HFEA 2008 and other regulation\textsuperscript{88} only an extremely evident breach of public policy could ever sway the scale in favour of public policy over the welfare of the child, which is paramount. Subsequently, in a case concerning retrospective authorisation of payment in an international surrogacy Sir Nicholas Wall P ruled that an amount as high as £27,000 did not stand in the way of the intended parent’s parental order.\textsuperscript{89} The judge in case declared that he wanted to make the judgement public for the significance of the subject and to affirm the interpretation and the stance earlier described to be taken by Hedley J, amongst others, in the \textit{Re L (A Minor)}.\textsuperscript{90}

This interpretation, albeit the only one there is to be made in light of the existent norms, turns the interdiction of commercial surrogacy into a dead letter, which surely is not the desired effect and does not serve the purpose set out in the UK law. Yet again, it raises the question whether it is futile to make restrictions and prohibitions on commercial surrogacy when the best interests of the child predominantly overpower the public interest involved. However, to battle commercial surrogacy this kind of regulation is definitely a step in the right direction albeit it needs some work to bring the desired effect.

\textsuperscript{86} HFEA 2008 s 54(8).
\textsuperscript{87} (Re L (A Minor) [2010] EWHC 3146 (Fam), 2010, para 10).
\textsuperscript{88} 2010 Regulations (SI 2010/986).
\textsuperscript{89} Re X and Y (Children), 2011.
\textsuperscript{90} Re X and Y (Children), 2011, para 2.
3.4 STRICT LEGISLATION

3.4.1 GENERAL

According to the aforementioned comparative study conducted by the Court surrogacy is explicitly forbidden in Germany, Austria, Spain, Estonia, Finland, Iceland, Italy, Moldova, Montenegro, Serbia, Slovenia, Sweden, Switzerland and Turkey. The countries that explicitly prohibit surrogacy base the ban on their view that it is against the ethics and morals of the society compromising the rights of the children and women involved. Some of these countries, Finland for example, have however refrained from banning traditional surrogacy, and the prohibition only extends to surrogacy arrangements facilitated by an intermediate party. States with a restrictive approach to the subject have either accepted the phenomenon of circumventive cross-border reproductive care as inevitability and some have stayed silent on the matter.

Some countries have opted for a total ban on surrogacy matters, commercial and altruistic. The countries with the most restrictive approach towards surrogacy have it not only banned but also penalised under criminal law. A strict and negative response to surrogacy does not, however, necessarily mean that it cannot be recognised if obtained abroad. For example, both Austria and France have prohibited surrogacy in their civil codes, which will be further elaborated later in this chapter. Regardless of their similar approach to the issue, France has opted to also try and prevent its citizens from circumventing national legislation by systematically refusing to recognise the parental relationship born thereof. Verfassungsgerichtshof, the Austrian Constitutional Court on the other hand, concluded that acknowledging filial relationships even based on commercial surrogacy is required to

92 S.H. and Others v. Austria [GC], 2010, para 46.
achieve a result that is in the best interest of the child, an approach outlined by the European Court of Human Rights in their *S.H. and Others v. Austria* decision.

As an example of this, Austria’s legislation is a prime example of very strict regulation on artificial procreation. The Austrian Artificial Procreation Act ova or viable cells cannot be used for anyone other than the woman of whom they were extracted from, thus banning ova donation as whole. The ban on ova donation naturally excludes the possibility of gestational surrogacy. The reasoning behind this was that the Austrian lawmakers wanted to ensure that motherhood of a child could not be disputed, thus allowing artificial procreation only when the relations replicate the natural process. They made such a commitment to the natural process that they allowed sperm donation in cases where the male in the relationship is infertile, when done *in vivo*. The use of donor gametes is prohibited *in vitro* fertilisation. Austrian reproductive legislation has been under scrutiny in the European Court of Human Rights in the *S.H. and Others v. Austria* case.

In addition to Austria, Germany has legislation prohibiting surrogacy. The legislation in Bürgerliches Gesetzbuch, the German Civil Code, states that the mother of the child is the one who gives birth to the child. Germany has gone as far as to not only ban but make surrogacy criminally punishable by Embryo Protection Act with three years’ imprisonment. Unlike Austria, Germany has not explicitly stated that it will sanction its citizen’s circumventive reproductive travel ex post. Bundesgerichtshof, the German Court of Justice, gave a judgement in late 2014 where it ruled that recognising Californian judgement granting parental rights to the intended fathers’ one of whom is the biological father of the child, was not against German public policy. The judgement is in compliance

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94 Verfassungsgerichtshof B 13/11-10, 2011, para 4.2.
95 S.H. and Others v. Austria [GC], 2010, para 114.
97 See S.H. and Others v. Austria [GC], 2010 on Austrian legislation.
98 Bürgerliches Gesetzbuch, § 1591.
99 Embryonenschutzgesetz, § 1(17).
with the European Court of Human Rights’ case law. In actuality, this means that, at least in gestational surrogacy cases where at least one of the intended parents is genetically related to the child, Germany accepts cross-border surrogacy.

3.4.2 FINLAND

Finland is an interesting example, because before the Human Fertilisation Act, which came into force in September 2007, Finland had no surrogacy-related legislation but had a permissive attitude towards it. The Human Fertilisation Act outlawed all surrogacy, by prohibiting and penalising the doctor administrating fertilisation treatment from proceed if there is reason to suspect that the resulting child will be given up for adoption. Finland has had active conversation about reproduction related regulation, including mapping the situation on surrogacy, and researching the option of a Parenthood Act with provisions on both paternity and maternity, as well as a draft for a Maternity Act.

In the absence of regulation, surrogacy agreements were processed applying adoption legislation and paternity legislation. According to the Adoption Act substantiating adoption if money has been paid or offered to be paid in connection to the adoption is prohibited, which when applied to surrogacy arrangements resulted in only allowing altruistic surrogacy. The intended parents had to find the surrogate themselves, and there could not be a fee paid to the surrogate, which is why the surrogate was oftentimes someone close to the intended parents.

13 children were born as a result of a surrogacy in that time, all of which were a genetically related to the intended parents. No legal problems arose in those surrogacy arrangements, but two out of ten surrogate’s suffered from postpartum depression according to the expert

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101 Hedelmöityshoitolaki (1237/2006) 8.6 § and 34 §.
102 Nieminen, 2013, p. 182.
opinion given by ETENE, The National Advisory Board on Social Welfare and health Care Ethics for the Survey Memorandum conducted by Ministry of Justice.\textsuperscript{105} In Finnish legislation amending parental relations is only possible via adoption, and since there was no regulation on surrogacy, the process had to be done applying the then Adoption Act’s provisions. That means that the intended parents have had to fulfil the requirements set out in the Adoption Act for adoptive parents, and go through the mandatory Adoption counselling. This means, that while not specifically regulated, there was an effective and comprehensive vetting of the intended parents’ suitability in place prior to the ban ensuring that the best interests of the child would be ensured in the only way known.

As explained above, surrogacy in Finland was used mainly to enable couples to have a genetic child that the woman has not been able to carry herself, as a complimentary fertility treatment of sort. As the Human Fertilisation Act is very progressive, and does not list two parents nor infertility as a prerequisite for access to fertility treatments, it has been argued that a total ban on surrogacy arrangements does not sit well with that.\textsuperscript{106}

In the preliminary works of the Act a total ban was suggested, because allowing surrogacy might put the women asked to be a surrogate in a difficult situation if the person asking is close to the woman. On the other hand, it states that if the surrogate is not someone close to the intended parents there is a risk of commercial and financial exploitation were the arrangement legitimised. There were also worries about the health risks of pregnancy and giving birth, such as postpartum depression that might pose a higher risk for surrogate mothers than other women. In the preliminary work the term surrogacy is defined by taking an embryo to woman in the purpose that the parturient woman gives the child to another woman or a couple after birth.\textsuperscript{107} That definition excludes traditional surrogacy from the agenda totally, and as a result, with the current regulation, traditional surrogacy is not banned in Finland. In addition to the risks surrogacy may pose to the surrogate, the risks in the legal status of parenting and obligations following from a surrogacy agreement were pondered in

\textsuperscript{105} Salminen, 2007, p. 18.
\textsuperscript{106} Salminen, 2007, p. 20.
\textsuperscript{107} HE 3/2006 vp s. 17.
the preliminary works; the inability to ensure the legal protection of all parties involved is stated as one of the reasons that the arrangements should not be allowed. The Human Fertilisation Act ended up taking away the access to fertility treatments from the only group of people who had utilised the possibility of surrogacy agreements – heterosexual couples were the woman could not, for whatever reason, carry a child.

Finland has no regulation regarding which law to apply for recognition of maternity in cases of international surrogacy, but it has been suggested that some analogous support and guidance could be drawn from the provisions governing the choice of law in the Paternity Act.\textsuperscript{108} This was later on the content of the relevant provision in the Ministry of Justice commissioned working committee preliminary version of a draft law on maternity.\textsuperscript{109} Finnish courts have had cases involving cross-border surrogacy before them several times. For example, a case where a Finnish man sought to have an Indian birth certificate substantiated in Finland as a judgement determining paternity.\textsuperscript{110} The applicant had entered a surrogacy agreement with his spouse whereby an Indian woman had given birth to a child created from an embryo made of the applicant and his spouse’s gametes. The child had been handed over to the applicant and his spouse. The surrogate and her spouse had given a notarised statement of forfeiting all parental rights of the child for the applicant and his spouse, and the birth certificate stated that the applicant had been registered as the child’s father. According to the then Paternity Act a paternity order given abroad is recognised as such unless e.g. the order is against Finnish public order.\textsuperscript{111} Helsingin hovioikeus, the Helsinki Court of Appeal, admitted that its case law on the issue was varied. The court referred to a previous case of somewhat similar issue concerning Russian birth certificates as a decision creating legally recognisable paternal affiliations, but it refused to acknowledge the motherhood on the basis of the same certificate.\textsuperscript{112} The court did ultimately reach the

\begin{itemize}
\item\textsuperscript{108} Helin, 2013, pp. 310-311.
\item\textsuperscript{109} Nieminen, 2015, p. 304.
\item\textsuperscript{110} Helsingin hovioikeus (Helsinki Court of Appeal) 2013:4, 5.7.2013.
\item\textsuperscript{111} Isyyslaki (700/1975) 52 §.
\item\textsuperscript{112} Helsingin hovioikeus (Helsinki Court of Appeal) n:o 2029, 12.7.2012 and Nieminen, 2015, pp. 303-304.
\end{itemize}
conclusion that it was indeed an order defining legal filial relationships in India, and moved to contemplate whether it was forbidden on the basis of public order.

The court stated that public order –clauses are to be subjected to restrictive interpretation. The court brought up UNCRC\(^{113}\) according to which all court decision-making concerning children has to put the best interest of the child ahead of everything else. The court holds that the lack of legislation on surrogacy in India increases the risks to the child and the surrogate. The court also points out that since the surrogacy agreement was commercial, which is allowed in India, it is against the Adoption Act provision prohibiting adoption –related payments - the backdrop against which surrogacy whence not banned, was measured in Finland. However, the court further reasons that payment for adoption is not parallel to a payment to a gestational mother, albeit it may be dubious on the human dignity of the surrogate it does not commodify the child the same way commercial adoption does. Recognising that dismissal of the application was likely to have a discouraging impact on future attempts to circumvent the law as well as the fact that the reason for this situation was deliberate circumvention of the law the court substantiated the Indian decision. In my opinion surrogacy itself could not be plausibly deemed to be against the public order of Finland, since it was allowed and facilitated for so long, leaving only the question of the financial side of surrogacy to be weighed against the child’s best interest.

3.4.3 OTHER NORDIC COUNTRIES

There is a chapter on the regulatory situation of other Nordic countries in the aforementioned Finnish Survey Memorandum, according to which other Nordic countries have very similar approach to the subject as Finland, and currently surrogacy is not permitted in any of the Nordic countries. All of the Nordic countries adhere to *mater est* –doctrine. Norway has prohibited surrogacy the same way Austria has, by prohibiting implantation of a fertilised egg into a different woman than the one the egg is from. The latest discussion about the national stance on surrogacy within the Norway was in 2011, when the majority of the

committee set for the charting the situation voted against allowing surrogacy, and concluded that there were still too many controversies surrounding the subject.

The Swedish law on fertilisation states that a donated egg can be implanted into a woman if it is fertilised with her partner’s sperm, and if the woman is single, she can only use her own eggs. Sweden has had rather lively public debate over the legalisation of surrogacy in the past years. Just three years ago Sweden’s National Council on Medical Ethics recommended altruistic surrogacy to be permitted in Sweden, but in the early 2016 the report on surrogacy commissioned by the government was handed to the Minister of Justice, stating that Sweden should not allow surrogacy because there is a risk of coercion involved.

Denmark, on the other hand, appears to have similar legislation to Finland, forbidding giving fertility treatments to a woman who intends to act as a surrogate, stating that all surrogacy related agreements are void, and outlawing advertising surrogates. According to the Memorandum, the last time Denmark has reviewed its surrogacy regulation was in 2008, when the committee set to review it found the status quo was satisfactory.

Iceland, where surrogacy is outlawed by similar regulation as Finland and Denmark, has a draft legislation on the subject that has been handed to the Parliament in October 2015. The law change stems from a case where an Icelandic couple had a baby delivered by a surrogate in India and were subsequently denied return with the child since according to the Icelandic law neither of the intended parents were his legal parents. The purposed law would permit altruistic surrogacy for men and women regardless of their marital status making it possible for male couples to have a genetically related child. Iceland has a ban on anonymous donation of gametes, meaning that if donated gametes are used in surrogacy the intended parents and the resulting child will have the right to know their identity. The Icelandic surrogacy legislation would require written agreement, age restrictions on both the

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114 Lag (2006:351) om genetisk integritet 7:3 §.
surrogate and the intended parents, explicitly listing reimbursable costs in the legislation, and preapproval of applicants by a Committee consisting of a lawyer, a doctor and a social worker or a psychologist. The prospect of becoming an attractive destination country for cross-border surrogacy and trying to prevent exploitation of women from third world countries is taken into account by setting a requirement of five years of continuous residence in Iceland for the surrogate and the intended parent(s). Preapproving the intended parents is a good way of helping them prepare for the arrangement; much like the case was in Finland prior to the current ban. Pending legislation would make Iceland the first Nordic country to explicitly permit surrogacy, and possibly pave the way for the rest to follow.

3.5 UNREGULATED

3.5.1 GENERAL

The Court’s study states that there are ten Contracting States, namely Andorra, Bosnia-Herzegovina, Hungary, Ireland, Lithuania, Latvia, Malta, Monaco, Romania and San Marino, that do not have explicit regulation regarding surrogacy specifically, but which have indirectly or via general provisions indicate disapproval, or that have an ambiguous legal stance on the issue.\textsuperscript{117} In addition to these, there are four more States that lack specific regulation, but have a tolerant approach to surrogacy, and these are Belgium, the Czech Republic, Luxembourg and Poland.

Some countries have undertaken legislative changes since the Court’s study has been conducted, which is a step in the right direction. Regardless of the position any given state will take on the subject, not addressing it in their legislation is not a good solution in the long run and it would be beneficial for clarity that there would be either explicit or implicit mention on surrogacy in national law. Ireland, for instance has looked into including regulation on surrogacy into their assisted reproduction -legislation following a ruling in

\textsuperscript{117} Labassee v. France, 2014 para 32.
granting maternity to the ova donor and intended mother in a gestational surrogacy case regardless of mater semper certa est maxim Ireland.

3.5.2 Belgium

Belgium does not, at the moment, have surrogacy legislation regardless of numerous bills having been drafted to fill that gap. Belgium has somewhat similar legal situation regulating surrogacy as Finland had before the prohibitive regulation come into force. Belgium has a law on medically assisted reproduction, which does not stipulate surrogacy matters, but is to be applied when one involves a technique regulated in the Act.

Surrogacy agreements take place in Belgium, both nationally and internationally, and the authorities acknowledge this and warn people against the risks of cross-border surrogacy agreements in regards of the uncertain recognition of familial ties upon return. The Ministry of Foreign Affairs states that 'An increasing number of Ukrainian hospitals offer surrogacy services. Those services are completely legal in Ukraine, but strictly advised against by us due to the legal vacuum on the subject in Belgian law. Consultation of a Belgian lawyer in advance is imperative.'

Since there is no legislation - federal, communal, or regional - the criteria set for prospective parents and the surrogate are left to the ethical committees of the conducting hospitals. They

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118 M.R. and D.R (suing by their father and next friend O.R.) [2014] IESC 60, in 7.11.2014 by Denham C.J.
120 Verhellen & Verschelden, 2013 p. 53.
121 According to La Libre.be, 2015 in the past 20 years there have been estimated 150 – 200 cases of altruistic surrogacy in Belgium.
122 Royaume de Belgique: ‘De plus en plus de cliniques offrent les services de mères porteuses. Ces services sont tout à fait légaux en Ukraine, mais absolument déconseillés vu le vide juridique qui existe en Belgique dans ce domaine. La consultation préalable d’un avocat belge est impérative.’ (author’s translation).
have the power to decide who is afforded access to surrogacy. The proposed bills on surrogacy all have aimed to fix this situation and unify the requirements by having norms about the criteria on which the people involved would be chosen.\textsuperscript{123} The drafts have all had requirements of minimum age or the surrogate, being at least of age and a suggested maximum age, her having the capacity to contract, and most of the bills have some requirements of having a Belgian nationality or being subject to its domestic personal law. They also include provisions on the surrogate providing information about her health to maximise the safety of the pregnancy to both her and the child. The intended parents face some requirements in the bills too. For example an age limit around 45 years, differing requirements for civil status and sexual orientation, most require a genetic link to exist between at least one of the intended parent’s and the child, and the intended parents have to have the capacity to contract, some ties to Belgium varying between nationality and permanent residence. Notably, all the bills require the intended parents to have a gynaecologist diagnosed medical reason for having to resort to surrogacy save for male gay couples.

Belgian law operates under mater est –principle, meaning that the surrogate mother has the parental rights at birth, because there is no law on surrogacy to regulate otherwise; and since the motherhood starts at birth, the surrogate cannot effectually give up her rights before birth.\textsuperscript{124} According to Article 1128 of the Belgian Civil Code, nothing but things that are at trade can be the objects of agreements, ruling out agreements on humans. Like I have previously explained to have been the practice in Finland prior to regulation on subject, the current situation on domestic surrogacy in Belgium demands adoption in order to transition the parenthood from the surrogate to the intended parents, but paternity can also be contested based on biology.\textsuperscript{125} Same-sex couples can get married under the Belgian law, and they can

\textsuperscript{123} See Verhellen & Verschelden, 2013 p.54-58 For an overview of all of the bills’ contents.

\textsuperscript{124} Verhellen & Verschelden, 2013 p.59.

\textsuperscript{125} Brunet, et al., 2013 p. 206. Overview on the subject in Verhellen & Verschelden, 2013, pp. 73-75.
jointly apply for adoption,\textsuperscript{126} so both parties in same-sex couples can have their parental rights established in Belgian law over a child born through surrogacy.

Due to the ambiguous legal situation on surrogacy in the country, Belgium is both a country whose citizens go abroad in search of surrogacy services, and a destination country for foreigners. In both cases, Belgian Code of Private International Law is the only regulation that is applicable. In cases where Belgian citizens have gone abroad to engage in a surrogacy agreements, the only way to have the child issued with a Belgian travel document or to have the child entered into the Belgian civil registry is to have the Belgian authorities recognise the parentage of at least one of the intended parents.\textsuperscript{127} The Belgian cases involving cross-border surrogacy agreements, which according to Court of Appeal in Liège\textsuperscript{128} are against the Belgian public policy, have ended up in recognition of the biological filial relationship between the intended father and the child in the name of child’s best interest prevailing over the breach of public policy.\textsuperscript{129} This practice partial recognition was initiated in the case of H&E\textsuperscript{130} where the judge concluded that recognition of he intended father would not be against public policy, since the core issue with public policy is the recognition of someone other than the woman who gave birth as the mother.\textsuperscript{131} The possible other parent will have to apply for adoption to have his/her legal parental rights established. Belgian Civil Code stipulates a waiting period of two months from the birth of the child before the legal mother, namely the woman who gave birth to the child, and her possible husband can consent to adoption. That is inconvenient in surrogacy situations and goes to show that regardless of its permissive position on surrogacy \textit{de facto} the situation \textit{de jure} is not always as adaptive.

\textsuperscript{126} Code Civil Belgique (Belgian Civil Code) Article 343.
\textsuperscript{127} Verhellen & Verschelden, 2013, pp. 68-69.
\textsuperscript{128} M&M, Cour d'appel Liège (Court of Appeal Liège), 2010, p. Section C.
\textsuperscript{130} H&E, Tribunal de première instance d’Anvers (Court of First Instance Antwerp), 2008.
3.6 CONCLUSIONS ON NATIONAL REGULATION ON SURROGACY

Countries with permissive surrogacy regulation categorize into those where the regulation is more inclusive of all surrogacy arrangements, and to those where the arrangements are highly and strictly regulated. The countries in the formed category are very attractive destination countries for cross-border surrogacy, but they seems have lower protection of human rights, especially the surrogate’s. Leaving commercial surrogacy unregulated allows exploitation, maybe even more so than allowing supervised commercial surrogacy. I believe that the states in the latter category have found a more sustainable balance, allowing surrogacy in certain situation, and having it supervised either in advance or **ex post facto**. Restricting access from foreigners seeking only to circumvent their domestic legal restrictions is responsible and sustainable way to hinder their own citizens from going abroad where the human rights of the parties might not be as well protected as domestically would be and assuming responsibility in the global scale in this issue.

The countries that do not condemn surrogacy are in a difficult situation when the legislation has to be applied in real life situations. They have a democratically chosen legislature that has outlawed surrogacy, deeming it to be against public policy and maybe even morals and ethics of the people. However, when its citizens circumvent the domestic ban by relying on cross-border surrogacy and seek to have their parental status recognised upon return, the courts’ are faced with a difficult task finding a balance between the reality and the legal obligations of domestic law and international conventions. Regardless of the outcome that would arise from national law, International conventions, such as the United Nations Convention on the Right of the Child obligating the courts of law and the administrative authorities to make the best interest of the child a primary consideration\textsuperscript{132}, have to be honoured as well. The courts are repeatedly concluding that in the light of the current national and international regulation they have to acknowledge these filial relationships, at least between the intended parent with a genetic link to the child.

In light of reviewing the situation in both written law and case law, it would seem futile to create total bans on surrogacy in national level. The people who wish to engage in a surrogacy agreement to have a child very few in numbers, and are likely to turn to cross-border surrogacy if there is no domestic choice. In light of the case law, it would seem that the intended parents’ country of origin is unable to keep the consequences of surrogacy arrangement, namely the children and the unconventional family affiliations, out of its jurisdiction.

4 EUROPEAN COURT OF HUMAN RIGHTS AND CROSS-BORDER SURROGACY

4.1 CROSS-BORDER TOURISM JUDGEMENTS AND DECISIONS

There are two landmark cases in the European Court of Human Rights’ case law regarding reproductive tourism. The status of reproductive tourism was first established as a valid and legitimate alternative to home country services in the case of A, B and C v. Ireland in 2010, which was reinforced in the following year this in S.H. and Others v. Austria. According to the Austrian government, the Austrian legislation does not need to adapt to the medical advancements, because the services that are illegal in Austria can, in fact, be obtained from abroad and furthermore subsequently fully legitimized by Austrian law be when returned to the country. By accepting that reasoning, the Court solidified reproductive tourism as a justifying matter for bans on assisted reproductive technologies. In these cases, the European Court of Human Rights has unequivocally established medical and specifically reproductive tourism as a basis to maintain a broad margin of appreciation when it comes to restrictive legislation in member state. At the least, it is a safety valve for the Court to refrain from

133 See chapters 3.4.2 and 3.5.2.
134 S.H. and Others v. Austria [GC], 2010, para 114.
having to take a stance against some controversial policies established by the Contracting States.

Only a handful of cases involving cross-border surrogacy have been brought in front of the European Court of Human Rights and have been found admissible. There are more cases coming along as this is being written, including three cases against France concerning no-recognition of paternity\textsuperscript{135} and foreign birth certificate\textsuperscript{136}. They all are relatively recent cases, although the surrogacy itself has, in some cases, taken place over a decade ago. To analyse the Court’s approach to cross-border surrogacy some light needs to be shed on the circumstances of the cases, and for that purpose the chain of events will be repeated at some length. That will allow scrutiny of the Court’s view on cross-border surrogacy’s compatibility with the Convention in light of its case law. An important thing to note is that the cases the Court has ruled have only been about seeking recognition of the intended parents’ relationship to the children in cases of gestational surrogacy. The following chapters will offer a recap of the cases’ factual circumstances paraphrased and summarised from the Court’s judgements respectively.

4.1.1 Mennesson v. France

\textit{Mennesson v. France}\textsuperscript{137} was one of the two very similar surrogacy cases brought before the European Court of Human Rights almost simultaneously. The Court decided to handle the Mennesson case and the \textit{Labassee} case\textsuperscript{138} proceedings simultaneously.\textsuperscript{139} Following the European Court of the Human Rights judgements in these cases, the Court of Cassation

\begin{footnotesize}
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\item \textsuperscript{135} Foulon v. France - 9063/14, 2014 and Bouvet v. France - 10410/14, 2014.
\item \textsuperscript{136} Laborie and others v. France - 44024/13, 2013.
\item \textsuperscript{137} Mennesson v. France 2014.
\item \textsuperscript{138} Labassee v. France, 2014.
\item \textsuperscript{139} Mennesson v. France, 2014, para 3.
\end{itemize}
\end{footnotesize}
released a press release stating that henceforth ‘[s]urrogate motherhood alone cannot justify the refusal to transcribe into French birth registers the foreign birth certificate of a child who has one French parent’.\textsuperscript{140}

The Mennesson’s, a married French couple, had gone to California to enter a gestational surrogacy agreement after trying and failing to conceive a child using their own gametes. Due to Ms. Mennesson’s infertility, the IVF treatment they had undergone did not work, and thus they decided upon fertilising a donor egg with Mr. Mennesson’s sperm and implanting the created embryo into the uterus of a surrogate. Surrogacy was not commercial, and the surrogate reimbursed for her expenses. The Supreme Court of California ruled that any children of the surrogate born within four months of the ruling will legally be the Mennesson’s children. Subsequently, the Mennesson twins were born in October 2000, and had birth certificated stating the Mennesson as their parents in compliance with the Californian court’s ruling.

The applicants tried to enter the children into the French register of births, marriages and deaths to add the children onto Mr. Mennesson’s passport so in order to return to France in November 2000. The consulate rejected the application suspecting that a surrogacy arrangement had taken place, and reported the case to Nantes public prosecutor’s office. Despite this, the children were able to travel to France because they had been issued with US passports where the Mennessons were named as their parents. In 2002 the public prosecutor instructed the Mennesson children to be entered into the register by the consulate in US only to lodge proceedings against the Mennessons seven months later in a court in France to have those entries annulled. The Créteil tribunal de grande instance where the public prosecutor had instituted the proceedings ruled against the prosecutor, who claimed that the Californian court’s judgement was based on surrogacy agreement, which under the French law was null and void, and as such against French public policy. The court ruled against the prosecutor on the basis that the prosecutor himself had infringed said public policy by instructing the consulate to enter the children to the register, and could not bring proceedings against his own instructions. The case was appealed until Court of Cassation,\textsuperscript{140}

\textsuperscript{140} Cour de Cassation, 2015.
which returned it to the lower Court of Appeal, which then overturned its previous ruling reiterating that ‘civil-status documents were indissociable from the decision underlying them and the effectiveness of that decision remains conditional on its international lawfulness’\textsuperscript{141}. As the Californian court’s judgement is against the French Civil Code, and a matter of public policy under the same Code, it interferes with the French public policy. Due to the indissociability, finding the judgement unlawful requires the entry to the register to be annulled.

The Mennessons complained to the European Court of Human Rights that their right for private and family life had been infringed when the State would not recognise the filial relationship legally established by abroad by a relevant court, and that the refusal to legally recognise the relationship was not in the best interest of the children. The applicants and the Court both stated that where the Contracting States have a wide margin of appreciation concerning surrogacy legislation but that this case was not about that, but rather about the denial of legal documents stating the filiality of children born via surrogacy and as such, narrowed down the margin of appreciation\textsuperscript{142}. However, the Court held that while there is no consensus on either surrogacy or the recognition of the legal relationships born thereof, the question is essential to the identity of individual and it is for the Court to decide whether a fair balance has been stuck between the public interest and the individuals concerned. In the case at hand, the Court remarks that it has to balance those interests against the best interests of the children. The Court concludes, that the issue at hand needs to be dealt in two parts; whether France has infringed the parents’ right for their family life and whether the children’s right to respect for their private life had been infringed.

The Court discussed issues on the parent’s family life in paragraphs 87-95 of their judgement. They reiterated that the Court of Cassation had struck a fair balance between the applicants’ interests and public interests regardless of acknowledging that the State’s refusal to recognise the filial relationship does affect the Mennessons family life, and that because of the Mennesson children not having French nationality and the complications arising from

\textsuperscript{141} Mennesson v. France, 2014, para 24.

\textsuperscript{142} Mennesson v. France, 2014, paras 75-76.
that. In assessing whether the children’s right to respect of privacy was violated, the court established that being able to have a legal parent-child relationship is an essential aspect of identity and as such falls within the scope of respect for private life. Acknowledging that with the annulment of recognition France was trying to discourage its citizens from attempting to circumvent national legislation, the Court considered that the non-recognition and the uncertainty of ever gaining nationality affected the children’s identities negatively, both internally and within the French society. The Court deemed that the Court de Cassation judgement had failed to find a fair balance between competing interests when it came to the children’s right to privacy. It stated that it was not in the best interests of the children not to have a fully recognised relationship with their biological father and Ms. Mennesson, since it affected the children’s position in regards to inheriting to the applicants. The Court then ruled that France had crossed beyond the margin of appreciation afforded to them in this matter and that the children’s right under Article 8 had been infringed.

4.1.2 LABASSEE V. FRANCE

The Labassee couple had a very similar situation to the Mennessons. Ms. Labassee was infertile, which lead the applicants to gestational surrogacy in the United States using Mr. Labassee’s sperm and donor eggs. As a result, a child was born to the Labassees. Similar to the chain of events described above in the Mennesson case, the French authorities refused to enter the child’s birth certificate into the French register of births, marriages and death’s due to suspicion of a surrogacy arrangement taking place. The Labassee’s did not challenge the refusal, but proceeded to try to have their legal relationship recognised by a ‘acte de notoriété’ establishing filiation between Mr. and Ms. Labassee and the child. The public prosecutor refused to enter the birth certificate even with the ‘acte de notoriété’ stating with the Tribunal de grande instance de Lille that the basis for the ‘acte de notoriété’ was in conflict with the French law and as such could not serve as the grounds for the entry of filial

relationship. The European Court of Human Rights gave identical ruling in this case as it had in the Mennesson case, holding that there had been no violation of the right to family life under the Article 8 in regards to Mr. and Ms. Labassee but that the child’s Article 8 covered right to respect for privacy had been infringed upon.

4.1.3  **D AND OTHERS V. BELGIUM**

In *D and Other v. Belgium* a married Belgian couple had gone to Ukraine to undertake a surrogacy agreement. Subsequently, when the child was born and the Ukrainian birth certificate was drawn up in accordance with Ukrainian law stating that the applicants were the parents without any mention of using a surrogate. The applicant sought to issue a Belgian passport to the child from the Belgian embassy in Kyiv, which was refused on the basis of insufficient documents proving that there was a family relationship between the applicants and the child. The applicants then sought urgent applications judge to order Belgian authorities to issue the child a travel document. The judge deemed application as unfounded. Belgian law bases maternity on mater semper certa est – doctrine thus making it impossible for the female applicant to substantiate biological family relationship with the child. The paternity was not proven uncontestably with the DNA test, since it could not be proven whose sample had been sent. The applicants’ residents permit expired, and they had to return to Belgium without their son, whom they had to leave to Ukraine. Three months later after providing the relevant Belgian court with sufficient evidence the Belgian court recognised the paternal relationship and the applicant received the travel documents required to fly the child from Ukraine to Belgium.

According to Belgian law the Ukrainian birth certificate was not to be recognised *ipso jure* as sufficient basis for establishing a family relationship. Hence, issuing the child with a

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147 Belgian Code of Private International Law, article 27, para 1 and idem article 62, para 1.
passport, save for situations where “there is a doubt as to the applicant’s identity or nationality, the issue of the passport or other document in lieu thereof may be suspended until the person or the department has established his or her identity or Belgian nationality by means of documents or conclusive testimonies.”\(^{148}\). The Court considered that this fell within the scope of Article 8 as the Belgian government and the applicants had agreed upon. They stated that there was legal basis for the refusal to issue a passport in the Belgian embassy in Ukraine and that the objective of the interference, namely trying to prevent human trafficking and preventing criminal offences, was legitimate. The failure to provide sufficient evidence to Belgian authorities when applying for the laissez-passer was attributable to the applicants themselves at least to some extent. Because of that and the foreseeability of the procedure, regardless of admitting that separation from family is detrimental to the child’s psychological development – although noting that the applicants were absent for three months interrupted by two weeklong visits to see the child – the Court concluded that the Belgian State had acted within the afforded margin of error and the measures it had taken were in proportion with the objective of protecting the rights of others. The Court declared the application inadmissible.

4.1.4 PARADISO AND CAMPANELLI V. ITALY

A rather recent case of *Paradiso and Campanelli v. Italy*\(^{149}\) offers a deeper look into the problematics of cross-border surrogacy than the French cases, albeit the case is not about surrogacy itself, *per se*. The Chamber judgement was given in January 2015 and it has been referred to the Grand Chamber in June 2015 but their judgement has yet to be given.

An Italian married couple, after unsuccessfully trying to get pregnant via *in vitro* – fertilisation sought out gestational surrogacy services from an infertility clinic in Moscow. Subsequently, they entered a surrogacy agreement with the clinic, and proceeded to implant an embryo that had resulted from a successful IVF round into the surrogate mother. Resulting

\(^{148}\) Belgian law of 14 August 1974 on the issue of passports, section 7.

\(^{149}\) Paradiso and Campanelli v. Italy, 2015.
from this the applicants’ son was born. In accordance with the Russian law, the applicants had a written consent from the surrogate mother to register the child as the intended parents’, following which the applicants were registered as the baby’s parents with no mention of surrogate in the birth certificate. The certificate was certified following the provisions of the Hague Convention\(^{150}\). The child was issued with travel documents per the applicant’s request by the Italian Consulate in Moscow without any problems.

As with the French cases cited above, the applicant’s then requested to have the foreign birth certificate entered into the Italian register of births, marriages and deaths. However, the Moscow Consulate of Italy had alerted several authorities in Italy that the child’s paperwork had false information, which led to a formal investigation to the applicants under Criminal Code for altering civil status and breaching the law by circumventing the conditions of their acquired adoption authorisation. Italian authorities sought and were granted the procedures to free the child for adoption. The applicants objected to these proceedings and requested to be granted permission to adopt the child themselves. In her statement given at early stages of national proceedings Ms. Paradiso said that she had gone to Russia with her husband’s seminal fluid to go have an embryo created from her and her husband’s gametes and subsequently implanted to a surrogate’s uterus. A child born from this arrangement would, according to Russian law, be granted a birth certificate with the commissioning parents’ names on it. Further into national proceedings, it was found through a DNA test that the male applicant was in fact not genetically related to the child, and Ms. Paradiso changed her statement about her ovum being used in creation of the embryo to saying that donor ova had been used in the creation of the embryo. There was no biological link between the applicants and the child whatsoever. In bringing the child to Italy under the premises that the child was their son the applicants had committed criminal offences and breached international adoption provisions. Meanwhile, the Youth Court had appointed the child with an adviser who proceeded to ask the court to relieve the parents of their parental responsibility. Italian authorities sought to have the court issue the child a new birth certificate and the court ruled

the child was to immediately be removed from the applicants. The facts of the case were obscure at best, and they were summarised by the Campobasso Court as follows:

‘The decision indicates that there existed serious suspicions that the offences in question had been committed. In particular, the first applicant had put about a rumour that she was pregnant; she had gone to the Consulate and implied that she was the natural mother; she had then admitted that the child had been born to a surrogate mother; she had stated to the carabinieri on 25 May 2011 that the second applicant was the biological father, although the DNA tests had disproved this, and had therefore made false statements; she had been very vague as to the identity of the genetic mother; the documents concerning the surrogate motherhood stated that the two applicants had been seen by the Russian doctors, which did not accord with the fact that the second applicant had not been in Russia; the documents about the birth did not have a precise date. All that was known was that the child had been born and that he had been handed over to the first applicant against payment of almost EUR 50,000.’

Since the child was not related to either of the applicant and the woman who had given birth to him had given him up the relevant Italian court rendered that the child was an alien abandoned alien minor and thus the Italian adoption legislation to be applicable. The applicants were forbidden to be in contact with the child who was placed into a children’s home from where he got to a foster family a little over a year later at which point the child was still without a registered Italian identity. The foster parent requested the court to assign the child an identity that Italian authorities recognise in order to grant him access to public services. The court ruled that the Russian birth certificate that Ms. Paradiso and Mr. Campanelli had sought to have entered into the register was fraudulent and as such, entering it to the registry would be against public order. Hence, the court ordered the child to be issued with a new birth certificate, where place of birth was Moscow and parents were marked as unknown. In addition, the court stripped the intended parents of their locus standi

151 Paradiso and Campanelli v. Italy, 2015, para 29.
in the adoption matter since they were neither the child’s parents nor his members of his family.

In the European Court of Human Rights, the applicants, Ms. Paradiso and Mr. Campanelli, claimed on behalf of the child that his rights under the Articles 6, 8 and 14 were violated in the proceedings explained above, following his arrival to Italy. The Italian government contested by saying that the applicants no longer had the right to represent the child in court, as he had been appointed a guardian who represented him both in national proceedings and thusly the complaint is to be dismissed as it does not meet the *ratione personae* requirement. The Court sided with the Government’s view, basing their assessment on the applicants not having a biological link nor a recognised legal filial relationship, the child having been removed from the applicants’ care to foster family, and an adoption process being on its way with a different family than that of applicants in the fact that the child had a guardian representing him in national proceedings.

The Court accepted that a de facto family life had existed between the applicants and the child, since they had, albeit for a short period of time, prior to losing parental responsibility and custody of him, acted as his parents. In the Court’s assessment, the refusal to recognise the filial relationship established by foreign authorities amounted to a breach of the Article 8 protected rights of the applicants. However, the Court deemed it to have been in accordance with the law, since the Hague Convention\textsuperscript{152} states that the apostille is not indicative of the contents’ veracity rather than its technical adequacy and the national legislation allowed for the application of Italian law in a case where the child’s nationality was not established. As was the case with *Mennesson v. France* and *Labassee v. France* the child’s best interests are of paramount importance, narrowing the margin of appreciation otherwise afforded to the State.

The applicants’ lawyer, employee of Rosjurconsulting, explained that by buying donor gametes the requirement to use ‘one’s own’ gametes could be bypassed.\textsuperscript{153} This statement

\textsuperscript{152} Hague Conference on Private International Law, 1961, article 5.

\textsuperscript{153} Paradiso and Campanelli v. Italy, 2015, para 76.
together with the applicants’ statements that they believed that the male applicants gametes had been used in creating the embryo lead the Court to determine that it had not been showed that the applicant did not act under *bona fide*.

In the end the Court held that the applicants’ rights under Article 8 of the Convention had been infringed in a manner that was in accordance with the law but did not strike a fair balance between the interests of the applicants’ and those of the State. The Court, referring to its earlier case law, reiterated that ‘The removal of a child from the family setting is an extreme measure which should only be resorted to as a very last resort. Such a measure can only be justified if it corresponds to the aim of protecting a child who is faced with immediate danger’154, and recited *Pontes v. Portugal* in which the Court had defined necessity in the meaning of Article 8 paragraph 2, to mean ‘a pressing social need’ that needs to be in proportion to the legitimate aim that is pursued.155 Regardless of breaching national and international legislation, residing with the applicants’ would not have constituted a situation where aforementioned qualifications for ‘necessity’ would have fulfilled.156 The Court found that removing the child from the applicants’ care who had been assessed and approved for adoption without so much as a consult from an expert was not proportionate considering the interests at stake.

In their partly dissenting opinions157 judges Raimondi and Spano questioned the Court’s interpretation that Article 8 would safeguard family life, formed in an illegal act, between a child and people with no genetic link to a child. They argued that the nature of the illegal act, namely being against public order, needs to affect the requirement of proportionality. The did not see an infringement of Article 8 rights in this case, and were sceptical of its applicability to this case in the first place.

154 Paradiso and Campanelli v. Italy, 2015, para 80.
156 Paradiso and Campanelli v. Italy, 2015, para 85.
In both the French and the Italian cases cited above, the Government had submitted that their actions, refusal to recognise the parent-child relationships, which in itself was deemed an infringement of Article 8, and the actions following that had been to protect the health and the rights and freedoms of others.\textsuperscript{158} In the cases cited above the Court clarified that Article 8 does enshrine recognition of filial relationship as a part of Article 8 protected manifestation of individual identity.\textsuperscript{159}

Article 8 has a bipartite structure safeguarding both the right for family life and respect for private life, and the Court found both these rights to have been breached in \textit{Mennesson} and \textit{Labassee} cases when the State had refused to recognise the family bond. While the Court found the infringements upon the right for family life to have taken place it also concluded that since the State was to be afforded a rather generous margin of appreciation, albeit narrowed by the involvement of essential existential identity questions around parentage, the objective, namely protection of children and surrogates\textsuperscript{160}, was in proportion to the infringement. Deducting from the Court’s judgement, refusal to recognise filial relationship legally acquired elsewhere breaches the right to family life but can be justified.

The Court has in its previous case law stated that the State is obligated to act in a manner that enables the child’s integration in his family.\textsuperscript{161} However, that interpretation is incompatible with the position taken in the Court’s earlier judgements, where the Court has previously held that Article 8 has both negative and positive obligations to the State. The conclusion in the French cases leads to believe, that as long as the Contracting State does not actively interfere with the right to family life or the citizens are not faced insurmountable obstacles preventing them from enjoying their family life the State has stayed within their

\textsuperscript{159} Mennesson v. France, 2014, para 96.
\textsuperscript{161} Kroon and Others v. The Netherlands, 1991, para 32.
margin of appreciation. Admittedly, the Court is not tied to its previous judgements nor is the interpretation of the Convention static.

Ruling in the Mennesson and Labassee cases that only the children’s rights for privacy had been infringed in an illegitimate way the Court established, that prohibiting all forms of surrogacy and refusing to recognise filial relationships created thereof, is not incompatible with the European Convention on Human Rights, per se. The human rights issue in light of the Convention in the French cases was the legally uncertain situation in the eyes of the French law where the refusal left the children. Extrapolating from that, had there been certainty of their legal status in front of the French law, the outcome could have been different, and the Court may have sided with the French government. One must be careful not to draw too far gone generalisations regarding surrogacy from the French cases as the Court emphasized multiple times the meaning of the biological link between the child(ren) and one of the intended parents, namely the fathers.

The Contracting States have continuously invoked either surrogacy, commercial surrogacy or circumventive reproductive tourism to be against their public policy. In international context ordre public, or public policy, means when the choice of law points to a foreign law to be applied, but doing so would lead to consequences that are unacceptable or would permit conduct deemed offending to the fundamental principles of the forum’s jurisdiction. The ordre public –principle is present in most jurisdictions. For international private law to be relevant, deviation between jurisdictions need to be tolerated, and ordre public should not be invoked unless there are fundamental differences in the jurisdictions in a specific question. In the presented surrogacy cases brought before the ECtHR, the question was about a concept totally forbidden in the other jurisdiction resulting in a few differences between the jurisdictions of the destination country and the country of origin, namely the acceptability of surrogacy on its own, the acceptance of commercial surrogacy and recognition of filial relationships. These, per se might be fundamental enough on their own to justify invoking ordre public, however in surrogacy there is always the human rights and the best interest of the child to be taken into account. Thus, the true interest weighing is between which would

end up being more against the country of origin’s public order; leaving children in a legal vacuum as a repercussion of their parents’ choices or the surrogacy arrangement itself.\textsuperscript{163}

European countries have been opposing surrogacy on the basis of non-profit surrogacy giving leeway to for-profit surrogacy and an uncontrollable situation, where women rent their wombs to make a living. European Convention on Human Rights and Biomedicine Chapter VII Article 21 states, “The human body and its parts shall not, as such, give rise to financial gain”.\textsuperscript{164} All the countries that are committed to the Convention have some sort of compensation for gamete donation and surrogacy. The level of compensation sets the level of available ova for patients who need ART’s. The higher the compensation the more ova there would seem to be and the shorter the waiting times for the people who need donations. It is debatable whether ova and sperm donation should legally be treated the same, but in terms of compensation, there ought to be a substantial difference. Sperm donation is a five-minute act that is non-invasive and painless. The complete opposite of that is ova donation, which is invasive and painful, and requires several days of hormone injections, egg harvesting and check-ups for 3-5 weeks.\textsuperscript{165} Due to the rather laborious nature of ova donation there tends to be a shortage of ova.\textsuperscript{166}

Whether a prohibition is \textit{de facto} possible remains to be seen, because the State’s margin of appreciation in this matter will continuously be weighed against the rights of the individual, and the Court has yet have deemed the State to have stayed within the afforded margin in declining to give legal acknowledgement to filial relationships stemming from surrogacy. This was speculated to have been due to the fact that before \textit{Paradiso and Campanelli}, at least one of the applicants’ had been biologically related to the child, but the latest judgement proved that assumption to have been inaccurate.\textsuperscript{167} It is hard to imagine that almost any

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\bibitem{164} Convention on Human Rights and Biomedicine, 1997.
\bibitem{165} Väestöliitto (The Family Federation of Finland), 2016.
\bibitem{166} Hudson & Culley, 2015, p. 447.
\bibitem{167} Koffeman, 2015, p. 67.
\end{multicols}
public policy breach concerning recognition of familial ties, combined with a principle as vaguely defined as the margin of appreciation, that it would surpass the need to avoid leaving children in a legal vacuum\textsuperscript{168} for the duration of legal proceedings. Much less, that it would be deemed as a proportionate measure to prevent breaches of public policy.\textsuperscript{169}

Albeit according to the Court the question at hand in Paradiso and Campanelli was not surrogacy per se, but the replacement of the child, in light of the French cases above, the conclusion of Judges Raimondi and Spano in their dissenting opinion on the Paradiso and Campanelli –case was fair assessment of the stance the Court seems to have taken in the surrogacy cases:

‘[…] the majority’s position amounts, in substance, to denying the legitimacy of the State’s choice not to recognise gestational surrogacy. If it suffices to create, illegally, a link with the child abroad in order for the national authorities to be obliged to recognise the existence of “family life”, then it is clear that the States’ freedom not to give legal effect to gestational surrogacy, a freedom that has nonetheless been acknowledged by the Court’s case-law (see Mennesson v. France, no. 65192/11, 26 June 2014, §79, and Labassee v. France, (no.65941/11), 2 June 2014, §58), is reduced to nought.’\textsuperscript{170}

The position taken by the Court is effectually the same as to reiterate what the Court stated in both \textit{S.H. and Others v Austria} and \textit{A, B and C v Ireland}, namely the encouraging of people to go abroad to evade domestic restrictions set by the legislate.

Thus far the Court has only had rather unilateral cases before it, and they have yet to establish for instance the compatibility of the Article 8 rights and the Greek system of enforceable

\textsuperscript{168} The term is used in Wagner and J.M.W.L. v. Luxembourg, 2007, para 155 to describe the state where the child had yet to be afforded Luxembourg nationality and was therefore faced with quoditian obstacles.


\textsuperscript{170} Judges of dissenting opinion in Paradiso and Campanelli v. Italy, 2015, para 15.
surrogacy agreements in a situation where the gestational surrogate would not want to give up the child but is by law required to.

4.3 MARGIN OF APPRECIATION ON FAMILY AND PRIVATE LIFE MATTERS

Margin of appreciation is a doctrine about the breadth of leeway afforded to the Contracting States in matters concerning the rights guaranteed in the European Convention of Human Right. The Court has been criticised to have been using it to defer from having to address the real issues at hand properly.\(^{171}\) Margin of appreciation goes hand in hand with the Court coined term of ‘European Consensus’, the scope of which is a bit unclear and it is somewhat vague and unpredictable.\(^{172}\) The definition of ‘European consensus’ has been drawn and redrawn multiple times in the case law of the Court to the extent that the judges of dissenting opinions have questioned its validity.\(^{173}\) Using ‘European consensus’ as grounds to adopt a new interpretation is interesting, since the aim of the Council of Europe is not to harmonise the legislation.\(^{174}\) In fact, the more importance ‘European consensus’ has in assessing whether something is in violation of human rights, the less protection is offered in the questions with the most diverse practices throughout the Contracting States. Arguably, those are the cases where the protection is needed the most. Then again, legal security and predictability demand that once the Court assumes a position on an issue, deviating from it requires a valid reason, such as consensus in the Contracting States.

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\(^{172}\) See Dzehtsiarou, 2009 for more on European consensus in general and Nieminen, 2015, pp. 294-298 for its appliance specifically on reproductive cases.


\(^{174}\) Nieminen, 2015, p. 294.
The Court has elaborated on the scope of margin of appreciation in the Mennesson case characterizing it as follows:

‘[…] where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. […] where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will normally be restricted […]’.\textsuperscript{175}

The margin of appreciation is, for the reasons stated above, particularly unpredictable in virtually all of the cases involving assisted and artificial procreation, because there are two conflicting interests that would demand opposite approaches to the margin of appreciation.

In \textit{A, B and C v. Ireland} the Court held that since the Irish have the possibility to legally leave the country to go have the abortion performed in another country, and having access to information regarding these services abroad, Ireland has not exceeded the margin of appreciation afforded to them.\textsuperscript{176} Moral views of the Irish were a factor in the Court’s assessment of whether or not Ireland had been in violation of article 8 of the European Convention of Human Rights. The Court stated that Ireland had found a ‘fair balance’ between the rights of the applicants and the rights that the moral views of the Irish people regarding the rights of an unborn child.

In \textit{X, Y and Z v. United Kingdom} the Court admitted that it had held in previous cases that from the moment of a child’s birth or as soon as practicable the State must act to enable the child’s integration in their family, and that limits the breadth of the State’s margin of appreciation. However, following that notion the Court considers that since there is no European consensus on neither affording transsexuals with parental rights nor filiation in

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\bibitem{176} A, B and C v. Ireland [GC], 2010, para 241.

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cases where artificial insemination by donor has been used, the State must be granted a wide margin of appreciation.\textsuperscript{177}

The Court has referred to the possibility to seek treatment abroad both in cases concerning life generating and life ending treatments. The Court’s refusal in both leads to the conclusion that the Court is refraining from having to make any decisive rulings on reproductive matters, and as a safety valve it has refused to narrow down the Contracting States’ margin of appreciation in these cases. In its conclusions in cases \textit{A, B and C v. Ireland} and \textit{S.H. and Others v. Austria} the Court showed no disparity in their line of reasoning. In both cases the Court went so far in order to allow a wide margin of appreciation that its reasoning ended up illogical.\textsuperscript{178}

For example, in a hypothetical scenario spouses, a man and a woman, from France wish to have a child. The woman has undergone a partial hysterectomy leaving her with ovaries but no uterus. She is therefore unable to have a biological child, although she has ova. She and her husband would have the genetic material to have a biological child, but due to her lack of uterus, she is unable to carry the child herself. Under the French law, there is no legal way for them to have a biological child. Another hypothetical couple, identical in their situation to the first couple otherwise but the woman has a functioning uterus but has no ovaries. The latter couple can, under the French law, have fertility treatments, obtain donated ova, and thus have a child biologically related to one of them and recognised by the French law as their child. Is it proportionate to put the hypothetical couple in a different situation to achieve the legitimate aim of protecting the human body and children from becoming commodities? Is it proportionate still, if France were to regulate surrogacy by law, establishing a system of pre-approval, vetting of all the parties involved? In my opinion, it seems the less proportional the more regulated the access is would be, since were it to be allowed domestically in regulated circumstances the attraction of going abroad to countries where the human rights issues are more likely to be involved would lessen.

\textsuperscript{177} X, Y and Z v. the United Kingdom [GC], 1997, paras 43-44.
\textsuperscript{178} See footnote n. 173.
Surrogacy is the only way for a male same-sex couples, as well as single men, to have a genetically related child of their own without involving a woman who has rights over the child. Wider acceptance of women having access to surrogacy treatments than single men seems to suggest that the society sees women’s parenting superior to that of men. If surrogacy was allowed, would the only way to limit it be to grant access only when donated gametes are not used? That would limit access only to fertile heterosexual couples. I see legislative approaches such as Russian and Greek, where a single woman, but not lesbian couples, can enter into a surrogacy agreement, problematic in light of Article 14 rights. In *E.B. v. France* the Court had held that refusing to grant approval for adoption to a woman who was living with another woman in a homosexual relationship was in violation of her Article 14 rights in conjunction with her Article 8 rights, since the national law allowed single women to adopt, effectively meaning that single homosexual women could adopt. That brings to question the conformity of Russian legislation with the Human Rights Convention. Provocatively extrapolating from that, excluding single men from accessing surrogacy agreements would effectually be the same as excluding women without wombs since both are medically equally incapable of carrying a child; Both could be genetically related to the child, thus making the only difference their sex, which cannot be a basis for discrimination. As single-father families are not prohibited, it’s hard to see how there could be a legitimate reason to exclude single men.

Would it be an infringement of Article 14 enshrined rights of the men if a foreign judgement establishing their parental relationship with the child was not recognised in their country of origin? That might be soon answered, because in Switzerland there has been a case where two men in a registered partnership travelled to California to enter a surrogacy agreement. The child was conceived with a donor egg and the other intended father’s sperm. Subsequently they obtained a judgement establishing the men as the parents. Surrogacy is

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179 See chapters 3.3.2 and 3.3.3 on Russian and Greek regulation, respectively.
prohibited in Switzerland and same-sex couples are excluded from adoption and second-parent adoption.

The Swiss Supreme Court (Bundesgericht) has in their judgement\(^{181}\) refused to recognise the Californian judgement. The paternity was initially recognised by a lower court but the case ended up in the Supreme Court because the Federal Justice Department appealed the decision. The court considered to what extent was it acceptable to oppose circumvention of law by refusing to recognise paternity in light of the European Convention on Human Rights, the Convention on the Rights of the Child and the recent European Court of Human Rights case law.\(^{182}\) The Swiss court interpreted that the legal status of the child was sufficiently protected because there was no obstacle to the recognition of the intended father who was also the genetic parent; therefore, the court reasoned that the refusal of the other intended father’s paternity was neither against any conventions nor the European Court of Human Rights’ case law.\(^{183}\)

The judgement is very similar to the previously discussed \textit{M&M} case in Belgium. In the Belgian case refusal to recognise of the parental status of the non-genetically linked intended father could be established by him applying to adopt the child, which in Switzerland is not possible. This puts the men in the Swiss case in a different position straight couples in Switzerland, who can do a simple adoption. It remains to be seen whether the case ends up to European Court of Human Rights and how it will be viewed not only in light of Article 8 but also under Article 14 of the Convention. No direct conclusions could be drawn from this potential judgement on the subject of recognising non-genetic fathers of children born from a surrogate, since in this case there is already one genetic and recognised parent.

\textit{X, Y and Z v United Kingdom} was the first time a case where the issue was establishing a legal parental relationship with a child conceived with donor sperm. The applicant in the case was a post-operative transsexual man, who sought to get legally recognised as the parent

\(^{181}\) Bundesgericht (The Supreme Court of Switzerland) Urteil vom 21 Mai 2015, 2015.
\(^{182}\) Bundesgericht (The Supreme Court of Switzerland) Urteil vom 21 Mai 2015, 2015, para 6.
\(^{183}\) Bundesgericht (The Supreme Court of Switzerland) Urteil vom 21 Mai 2015, 2015, paras 6.2 - 6.4.
to a child born to his female partner with artificially inseminated donor sperm. According to UK law, a transgender person could not marry a person of opposite sex, because their recognition of gender was only the biological gender assigned to a person at birth, and it could not be changed later on. According to Human Fertility and Embryology Act 1990 if an unmarried woman gives birth to a child conceived via artificial insemination by donor the male partner will, for legal purposes, be treated as the father of the child. The Court concluded that this was a question on family life, not private life. The Court observed that the law in regards to parental rights to transsexuals was in transition with no common European standard the State must be left with a wide margin of appreciation. The Court concluded that given the complexity of issues deriving from transsexuality Article 8 cannot be interpreted to obligate the State to formally recognise a person nor biologically related to the child as the father of said child.

5 INTERNATIONAL REGULATION ON SURROGACY – POSSIBILITIES

5.1 SIMILARITIES AND DISPARITIES BETWEEN INTERNATIONAL ADOPTION AND INTERNATIONAL SURROGACY

The biggest difference might be that adoption is an arrangement much more widely acknowledged an arrangement than surrogacy is. Arguably, surrogacy and adoption have opposite premises to starting a family; adoption is about finding a family for a child that is already in existence whereas surrogacy is about fulfilling a parent(s) need for getting a child. The most obvious fault in that would be to assume that all adoption is altruistic from the parents’ point of view – people can choose to adopt for social reasons that are not widely

185 X, Y and Z v. the United Kingdom [GC], 1997, paras 42 & 52.
accepted reasons for using surrogate. A relatively safe assumption to make is that there is no universal and all-encompassing right to become a parent at any price. Yet, it seems rather presumptuous to rule out some people’s right to have a genetic offspring based on no justifiable or rational reasoning.

To rule out surrogacy in all of its forms and in all situations is out of proportion a reaction to whatever threat of exploitation or commodification of the human body seeing that identical challenges were overcome in regards of international adoption. The moral and ethical questions pertaining surrogacy are more complex but non-regulation is not a lasting solution.

One could argue that this is a faulty line of reasoning considering that most people who have a child without requiring medical assistance do decide to have a child, and they are not criticized for ‘fulfilling their wish to have a child’. Furthermore, the line between allowing access to some forms of assisted medical reproductive technologies and surrogacy with at least one of the intended parents’ gametes is blurry at best.

5.2 THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION

International adoption and international surrogacy have many similarities thematically and problem-wise. International adoption is rather new a phenomenon, having become commonplace only in the last third of the 20th century, hence all associated regulation is relatively novel. Although being a recognised concept, de facto if not de jure in most if not all countries, and is not quite as controversial of its moral and ethical nature as surrogacy is, when put to international framework adoption has faced a lot of obstacles. A lot of the challenges derive from the international nature of the arrangements, having to reconcile

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186 Ukrainian, Russian and Greek legislation all treat surrogacy as an 'extension' of assisted reproductive technologies considering they all require a medical reason for surrogacy.

different legal systems and structures together while ensuring that it causes no additional grievance to the child included in the proceedings. Simultaneously, prior to international regulation the level of uncertainty surrounding the adoption and the risks of exploitation, criminal activities and extortionists were high due to the variety of intermediaries used. The 1993 Hague Intercountry Adoption Convention\(^{188}\) was created to bring certainty and order into a situation that was insufficiently regulated, disorganized, unpredictable and disadvantageous to both the children and the prospective parents.

The Hague Convention is an international private law convention with 96 Contracting States to date\(^{189}\) and it is the successor of the Hague Convention was the 1965 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions. There exists a clear dichotomy in international adoption between the countries where the children come from (countries of origin), and the countries where the prospective parents reside (receiving countries) which the Hague Convention aims to equalize by sharing the burdens and profits between the two.\(^{190}\) The Hague Convention differs from its predecessor in having included the countries of origin in the process, emphasizing the importance or cooperation in order to achieve as efficient and comprehensive a result as was possible.\(^{191}\) Inclusion of all the parties involved, namely the countries, non-governmental organisations and intergovernmental organisations, from the drafting on has been the key to its success to the date.\(^{192}\)

The Hague Convention combines many elements, simultaneously regulating the administrative, judicial and private international law aspects making the one convention compact regulatory instrument covering all aspects of international adoption thus lessening the bureaucratic unpredictability born from trying to anticipate the outcome of combining the legislations of the country of origin and the receiving country. The principle features and

\(^{188}\) Henceforth referred to as 'The Hague Convention' or 'The 1993 Hague Convention'.


\(^{191}\) van Loon, 1990, p. 19.

\(^{192}\) Baker, 2013, p. 420.
its multi-level purpose is clear in the text of the Convention; according to Article 1 of The Hague Convention its objects are:

‘a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;

b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;

c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention’ [Emphasis added]

The 1993 Hague Convention was a comprehensive reaction to various issues surrounding the phenomenon of intercountry adoption and is meant to carry out Article 21 of the United Nation Convention on the Rights of the Child. It accentuates that the child must be paramount and that in order to realise it is insufficient to have regulation not encompassing all the aspects. The extensive and inclusive design of the Convention has ensured its longevity and prosperity.

5.3 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW – THE PARENTAGE / SURROGACY PROJECT

The Permanent Bureau of The Hague Conference on Private International Law has launched a Parentage / Surrogacy Project to map out the current situation regarding surrogacy and the private law issues arising from it with a mandate from its Member States. A number of relevant documents, including studies, notes and reports have been created to see if the current regulatory situation is satisfactory or whether some international regulation is needed. The biggest challenges that are mentioned in the fragmented regulation globally

concerning everything from assisted reproduction to parentage and surrogacy agreements. Additionally, there are obstacles to having birth certificates and other legal documents accepted due to the varying policies of how they are written up in surrogacy cases. The regulation may be national but the medical development combined with the accessibility of everything in modern age make it a globally shared concern.

In a very recently drafted Background Note to sum up the current status and private international law circumstances of surrogacy in the light of the children’s rights. In the Background Note a system of common safeguards is suggested to create stability and reliability to the current situation by establishing some policies via various instruments both binding and non-binding. Suggested areas where a common standard would be useful included but were not limited to some screening for both the surrogate and the intended parents, regulation on the surrogacy agencies and concentrating on ensuring that the monetary transactions do not amount to selling children and that the surrogates are in it of their own free will.

The Background Note suggests that considering the gravity and extent of subject a convention is the best way to take on the challenges arising from international surrogacy; it is also suggested to ‘draw some inspiration from other Hague Conventions’. As a secondary option soft law approaches consisting of guides, principles and model laws were brought up.

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197 ibid, 2016, p. 4 para 2.
198 ibid, 2016 p. 16, para 59.
199 ibid, 2016 p. 18, para 64.
200 ibid, 2016 p. 18, para 66.
CONCLUDING REMARKS

The most common response to why surrogacy is banned would seem to be the legislator’s fear that it would lead to commodification of human body, namely the surrogates and the babies, and further to human trafficking. The Court’s study reveals that almost seven out of ten of the Contracting States of the European Convention on Human Rights do facilitate surrogacy by acknowledging the filial relationship. Arguably that would imply that rather than being inherently impossible to regulate and absolutely leading to exploitation on women, the reason for the ban is simply that a ban is much easier solution than to try to regulate it nationally and internationally the way adoption has been regulated both within Europe and globally. Any validity of reasoning based on moral or ethical issues suffers from illogicality of the assumption that something that is domestically prohibited to ‘protect the health, rights and freedoms of others’, namely the surrogate mothers and the resulting children can be, when done abroad to circumvent the protective regulation, legitimised upon return.

At the moment cross-border surrogacy is running rampant, and that will not change until both national and international regulation will be put to place. Without that, it is virtually futile to try to prevent human trafficking and commodification of the human body in the arrangements made thus rendering all the parties involved vulnerable to exploitation. The main difference between adoption and surrogacy is that in adoption there is a child, not made per request of the adoptive parents, that is in need of parents and parents who want a child. In surrogacy, there are parents who want a child and then proceed to make one. Some argue, that adoption stems from the child’s needs and surrogacy from the parents’ which justifies treating them differently. However, I find that argument limping, since people who do not need assistance to reproduce also have babies at their convenience, so claiming surrogacy to be more reprehensible has no logical basis.

As Michael Wells-Greco states, surrogacy always has risks, and because of that it is paramount to try, and eliminate as many of the risks as possible by regulation.\textsuperscript{201} The

\textsuperscript{201} Wells-Greco, 2013, p. 285.
delicacy of the issues relating to surrogacy, namely the surrogate keeping the child or the intended parent(s) refuse to ‘take’ the child, further accentuates the need to regulate the issue both nationally and internationally. The varying and inconsistent regulation on surrogacy within the Member States of Council of Europe combined with the nature of wanting to have a child inevitably create legal insecurity that serves no other purpose, than to facilitate exploitation of the surrogate women and the people wanting to have a child via surrogate, and leaving the resulting children in a state of legal vacuum during the sorting out of filial relations in the face of national law.

Harmonisation of even the most essential parts, such as parental recognition, is not a realistic goal in the near future and instead of that time would be better spent to approach the issue from the perspective of already established common ground, found in the 1993 Hague Convention, for example. A market for surrogacy is already created, both within Europe and globally. In surrogacy, all parties involved are in a very vulnerable position making it paramount that the surrogacy practice is domestically regulated. That would be a step in the right direction, and as I see it, refusing to regulate is essentially refusing to take responsibility in trying to prevent a black baby market from formulating, or strengthening, around cross-border surrogacy. The varying level of regulation and the lack of international regulation on the subject the current state of incoherent, fragmented and colliding regulation the prevalent situation is optimal ground for all the human rights infringements and exploitation to happen. This is why intercountry cooperation is sorely missed and why achieving multinational regulation is in the best interest of both the opposing and the supporting states.

Regardless of the debated reproductive rights of the intended parents, the primary goal of ensuring that the children have continuous security and legal status, and that someone has parental responsibility over them throughout the process needs to be set. Making children collateral damage to set an example to the citizens infringes the child’s human rights and cannot be sanctioned. As is evident from the national and European Court of Human Rights case law, courts sanction surrogacies that are against their public policy because the best interest of the child demand recognition of parental affiliations, even when the question is about commercial surrogacy agreements that are primarily illegal or deemed reprehensible in all but a few European states. On the other hand, that interpretation cannot lead to a
situation where on the cover of the child’s best interest surrogacy is always eventually sanctioned.

The current situation, where regardless of how firm and consistent a line has been drawn against domestic and cross-border surrogacy by the legislator of the Contracting State the European Court of Human Rights interprets it to be in violation of the children’s right for private life, is not sustainable. Though legal assessment should not and cannot be bypassed with notions of ‘European consensus’ or suggestions of going abroad. The Court’s case law virtually encourages people to circumvent the legislation and try their luck. This is disruptive to the consistency and foreseeable of the domestic legislation that has persistently upheld the prohibition, and seems to contradict the allegedly wide margin of appreciation afforded to the state in matters concerning important ethical questions. In my opinion, the Court has failed to produce well-rounded, well-argued and comprehensive judgements on cross-border reproductive care matters, and that lowers the justifiability of the Court.

In light of the domestic and European Court of Human Rights case law described and analysed above in this paper, I would see that the United Kingdom and Greece have the best policies, thus far created in Europe. Pre-approving the contents of the surrogacy agreement and the applicants, the vetting both the intended parents and the surrogate for their medical and psychological suitability would create a controlled environment, where by with individual assessment surrogacy would be available. Most countries already have the necessary system and practices in place, since people applying for adoption often have to go through a careful process before they are approved as adoptive parents, and they and their families are offered counselling on legal, medical and psychological matters during the process and after it, if needed. With a little modification, the same practices could be used to evaluate the suitability of both intended parents and the surrogate and to provide support for them and their families throughout the process. In future international regulation it would be wise to make good use of the well-tried practices of the 1993 Hague Adoption Convention, as is planned to do in the Parentage / Surrogacy Project.