

## Surrogate motherhood in France: the need for a change Considerations of French Private International Law

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### **I. Introduction. What is a surrogacy?**

Surrogacy is a highly controversial issue and a widespread phenomenon in the world. One could think that a definition – at least – is one of a consensus. After all, surrogacy implies at least three persons: a putative parent or parents, who have recourse to a female to carry a child whom will be considered (whatever the means used) being the child of the putative parent(s). The facts are simple but the law is more complicated, and the three relationships that evolve from such a scheme (the relationship between the putative parent(s) and the surrogate mother; between the surrogate mother and the new born and between the putative parent and the new born) are apprehended in different ways, according to their genetic link, but above all, according to the cultural, social, and legal background of each country. No universal consensus exists. More specifically, the notion

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1) I would like to thank the Kansai University School of Law for having given me the great honor to be a guest professor for two months, and more particularly professor Yayohi Sato of the Faculty of Law, for her kind and devoted attention, for having proposed me to deal with that subject during a conference which has held in the premises of the School of Law on 21 April 2016, and finally for having handed to me the Report of the Assisted Reproductive Technologies Review Committee of the Science Council of Japan (see footnote 2) of which she is a member.

of surrogacy is not at all apprehended in the same way in France and in Japan, the countries that will be scrutinized in this contribution. Mainly two discrepancies in the Japanese context and in the French one might be noted.

The first one concerns the definition of the “commissioning person” (Japanese term) or “intended parent” (French term). The Science Council of Japan in 2008<sup>2)</sup> defines surrogacy as such: “Surrogate pregnancy refers to a *woman*<sup>3)</sup> who wants a child (the commissioning female) requesting another female to conceive using reproductive treatment technology and to continue that pregnancy and give birth to a child, and for the commissioning female to then receive that child”.<sup>4)</sup>

Speaking of a *woman*, and later on, of a *wife*, we can presume that the situation envisaged in the Japanese Report concerns only a *married* couple who wishes, for certain reasons (medical or “for comfort”) to use a surrogacy mother. Single woman and unmarried couples are then excluded from the Report, hence from the scheme of surrogacy described. Not to speak of single man, who seems to be a thousand miles away from the reflection of the Council.

The Japanese Report excludes also another concrete aspect of this sociological issue, which concerns the fact that homosexual male couples who cannot conceive a child, also use surrogacy mothers. But quite strangely, this aspect of the problem has not been addressed. This exclusion might probably be explained because Japanese law already deals with that problem by prohibiting homosexual couples to use assisted reproductive techniques (ART) and also barring adoption to them. Anyhow, the situation exists, and I am not sure that the already existing regulation (i.e. prohibition) relating to that kind of couples is sufficient to solve the situation.

In France, as it is the case so far in Japan, where only proposals exist but where no rule of law has been adopted relating to that issue, no legal definition exists. Two recent reports have been written on this issue in France. One is 350 pages long, and is the common work of jurists, medical doctors, sociologists and anthropologists. This report titled “*Filiation – origins – parenthood*”<sup>5)</sup>, achieved in 2014, has been done under the mandate of the Minister for Family. This group had to think on the various needs of reforms in Family law concerning legal parenthood, adoption, and procreation. An annex to the seventh chapter, dedicated to procreation with ART focuses on surrogate

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2) See Report of the Assisted Reproductive Technologies Review Committee of the Science Council of Japan of 8 April 2008 on « Issues Related to the Assisted Reproductive Technologies Centered on Surrogate Pregnancy –Toward a Social Consensus– » (hereafter: Japanese Report).

3) Emphasis added.

4) Japanese Report, p.4.

5) Report of the Working Group “Filiation, origines, parentalité” presided by Irène Théry, general reporter: Anne-Marie Leroyer: “*Filiation, origines, parentalité. Le droit face aux nouvelles valeurs de responsabilité générationnelle*”, 2014 (hereafter: Théry Report).

motherhood. It must be valued for the efforts made to appease the debate over this very controversial issue. The other report, the work of two members of the Senate (Higher Chamber of the French Parliament) in 2016<sup>6)</sup>, is shorter (100 pages) and is very clear on its legislative intention, which is to continue to prohibit surrogate motherhood, to worsen criminal sanctions in case of abandonment of children and collusion for abandonment of children, to refuse that a child born abroad through surrogacy can establish its filiation towards its “intended mother”.<sup>7)</sup>

Neither in the former, nor in the latter, a definition of surrogacy motherhood is suggested. Yet, the Report of the Senate deplors the lack of precision of the vocabulary and remarks that different words have been alternatively used. First, the word full of imagery “gestational mother” (a bad translation of *mère porteuse*, which should literally be translated by “carrying mother”) has been used to describe the phenomenon. Then the word *surrogate mother* (a true translation of *mère de substitution*) has been mainly used. However both reports address surrogacy motherhood whoever is/are the intended parent(s): a married or unmarried heterosexual couple, a married or unmarried homosexual couple, a single woman, or a single man.

Another precision needs to be made to clarify our issue.

The Japanese Report distinguishes between the *surrogate mother* and the *host mother*. The surrogate mother system in “where a husband’s sperm is injected into the uterus of a third person using the technique of artificial insemination to cause fertilization...”<sup>8)</sup> The *host mother* is the third person who receives the embryo created from the wife’s egg and the husband’s sperms and who carries and gives birth to a child on behalf of the wife. The embryo received might also be created from donated eggs and the husband’s or a donor’s sperms. The distinction is stipulated so that the Japanese Report focuses only on surrogate mothers.<sup>9)</sup>

In France, the distinction is also made. Article 16-7 of the Civil Code distinguishes

6) *Rapport d’information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d’administration générale sur l’assistance médicale à la procréation (AMP) et la gestation pour autrui (GPA)* par M. Yves Détraigne et Mme Catherine Tasca, n°409, session 2015–2016 (hereafter : Report of the Senate), available at <http://www.senat.fr/notice-rapport/2015/r15-409-notice.html>. This Report of the Senate concerns both assisted reproductive technologies (ART) and surrogate motherhood. An earlier Report rendered by two other members of the Senate had already tackled this issue in 2008 (*Rapport d’information n°421 (2007–2008) de Mme Michèle André, MM. Alain Milon et Henri de Richemont, fait au nom de la commission des lois et de la commission des affaires sociales, 25 juin 2008, « Contribution à la réflexion sur la maternité d’autrui »*). This report is already too old to give a complete report of the current situation in France, since many decisions of the Higher Judicial Court in France (*Cour de cassation*) and the European Court of Human Rights have been rendered after 2008.

7) See *infra*.

8) Japanese Report, p.4

9) Japanese Report, p.4 and 25.

between “procreation” and “gestation” for the benefit of another. The former corresponds to the situation where the gestational mother is also the genetic mother; the latter concerns the case where the gestational mother carries an embryo, which has been created with the intended mother’s egg or a donor’s egg.<sup>10)</sup> However, this distinction has no real impact, since both are prohibited. Similarly, a child born abroad through surrogacy motherhood will not be permitted to have his filiation established towards the intended mother, even though she is the “genetic mother”.<sup>11)</sup>

## **II. The prohibition to use a surrogate mother and to be a surrogate mother in France**

The state of the law in France is quite simple: it prohibits surrogacy motherhood in France, whoever are the intended parents. No special statute is made towards “commissioning” or “intended” parents who have no other recourse than to use a surrogate mother to have a child with their genes.

This prohibition is reflected in civil law, but also in criminal law, as well as in ethical norms.

### ***1. Prohibition from a civil law point of view***

In 1994, French Parliament voted the first bioethics Acts, which forbid very clearly surrogacy. The Act has thus introduced a new provision in the Civil code – article 16-7 – which states that

*“All agreements relating to procreation or gestation for the benefit of another are null”.*

These acts were enacted after a famous decision of the Court of cassation decided in 1991<sup>12)</sup> that the agreement by which a woman commits herself, even without being paid, to conceive a child in order to abandon him after his birth, is contrary to public policy and to the principle of unavailability of personal status. Therefore, not only is the surrogacy agreement null and void, but also no adoption by the intended mother or father of the new born is possible. In the same vein, this prohibition makes it impossible for the intended mother to have recourse to the usual means provided for by French law<sup>13)</sup> in order to

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10) See the Report of the Senate, p.53.

11) See *infra*.

12) A decision rendered by the highest chamber of the *Cour de cassation* (*l’Assemblée plénière*), which gives that decision a particular weight: Ass. Ple. 31 May 1991, pourvoi No c. All decisions cited in this contribution are available on this website: <https://www.legifrance.gouv.fr/initRechJuriJudi.do>.

13) See article 310-1 and following of the French Civil Code. A translation into English or Chinese of the French Civil Code is available at: <https://www.legifrance.gouv.fr/>.

establish its parent-child relation (when the birth occurred abroad), such as possession of apparent status (*possession d'état*)<sup>14)</sup> or voluntary acknowledgment by the intended mother<sup>15)</sup> or even by the genetic father.<sup>16)</sup>

The scope of application of this provision is general enough to concern any situation, whoever is the “intended parent”: a single woman, a married heterosexual or homosexual couple, a single man. No exception is foreseen; the prohibition is total. More specifically, the situation of a woman incapable of carrying and giving birth to a child, for medical reasons, is absolutely not envisaged, contrary to the proposition of the Japanese Report.<sup>17)</sup> However, this *de lege lata* situation does not mean that no current reflection is on going. This was precisely the mandate of the Group who authored the Théry Report. But their members disagreed on the necessity to continue with the prohibition or to regulate surrogacy motherhood. Hence, no proposition is made in that regards.<sup>18)</sup> The Report of the Senate is much more decisive on this issue. Regulation of surrogacy motherhood is not contemplated; rather its continuing prohibition is desired.

The civil sanctions are not the only one provided for by French Law.

## **2. Prohibition from a criminal law point of view**

Different types of criminal offenses exist in French law that may be applied to the various protagonists implied in a surrogacy process: the intended parents, the intermediaries between commissioning parents and surrogate mother, the doctors and the surrogate mother herself.

The first provision has been introduced in French Law in 1804 and is, of course, not specific to surrogacy motherhood. It concerns more generally the abandonment of child, which may cover different situations. Article 227-13 of the Penal Code provides that

*“Wilful substitution, false representation or concealment which infringes the civil status of a child is punished by three years’ imprisonment and a fine of €45,000.*

*Attempt to commit this offence is subject to the same penalties”.*

Very few decisions condemning persons who committed that offence have been rendered in the last years.<sup>19)</sup> Anyhow, this rule is so broadly described that any person, i.e.,

14) See Court of cassation, 1st Civil Chamber, 6 April 2011, pourvoi No 09-17130.

15) See Rennes Court of Appeal, 4 July 2002, No 01/02471.

16) See Court of cassation, 1st Civil Chamber, 13 September 2013, pourvoi No 12-18.315 and No 12-30.138.

17) See Japanese Report, p.26.

18) See Théry Report, p.186. However, members of the group agreed on the fact that it is important and urgent to recognize in French law the filiation of children born abroad through a surrogate mother.

19) According to the Ministry of Justice, 4 convictions were granted in 2013, 2 in 2012 and 4 in 2011. Those data are mentioned in the Report of the Senate, p.56.

the intended parents, the intermediary between the intended parents and the surrogate mother, and the surrogate mother are possible offenders. This severe measure is not understandable as far the surrogate mother is concerned. The Japanese report shows much more consideration for the particular position of this woman by proposing that surrogate mothers should be excluded of any punishment.<sup>20)</sup> Not without reason, the Japanese report states that “the surrogate mother is the victim who has taken on the burden of pregnancy and childbirth, and as such, would be excluded from punishment”. It should be noted that the punishment mentioned in this report are non-criminal punishment. This kind of legal sanctions are considered too harsh and inefficient in the Japanese Report to prevent illegal surrogate motherhood.

The second possible offense according to which surrogacy motherhood might be criminally sanctioned is enshrined in Article 227-12 of the Penal code. It provides that

*“The incitement of the parents or one of them to abandon a born or unborn child, made either for pecuniary gain, or by gifts, promises, threats or abuse of authority, is punished by six months’ imprisonment and a fine of €7,500 €.*

*Acting for pecuniary gain as an intermediary between a person desiring to adopt a child and a parent desiring to abandon its born or unborn child is punished by one year’s imprisonment and a fine of €15,000.*

*The penalties provided by the second paragraph apply to acting as an intermediary between a person or a couple desiring to receive a child and a woman agreeing to bear this child with the intent to give it up to them. Where the offence is habitually committed for pecuniary gain, the penalties incurred are doubled.*

*Attempt to commit the offences referred to under the second and third paragraphs of the present article is subject to the same penalties”.*

Whereas article 227-13 concerns primarily the parents (intended parents or the surrogate mother), this offence addresses primarily to third persons, intermediaries who propose their services for the arrangement of surrogacy motherhood and doctors who monitor the process.

Whatever the reasons are, both French reports remark that very few surrogacy motherhood take place in France. Is it because the participation to a surrogacy procedure is a criminal offense and that intended parents, doctors and surrogate mother fear a possible punishment? Or is it because the general sociological condemnation of this

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20) See Japanese Report, p.25 and 29.

phenomenon in France makes it unconfessable to have recourse to surrogacy motherhood or to be used as a gestational mother? Nobody can tell. What is certain, on the contrary, is that French couples or French single persons prefer to go abroad. Since those offences, when committed abroad by French Nationals may not be prosecuted in France, unless an element of the offense took place in France, as long as the foreign country where the surrogacy motherhood took place does not consider it as an offence. In those circumstances, the intended parents – who travel to countries where surrogacy motherhood is legal – are assured not to be prosecuted if they go abroad to contract a foreign gestational mother domiciled abroad.

### 3. *Situation from an ethical point of view*

Debate is hysterical and French society is very divided on the subject. The fact that the Thery group could not find a compromise on this subject, shows how divided is the issue in France. For instance, a short philosophical essay written by S. Agacinski, *Corps en miettes*<sup>21)</sup>, (literally: *Body in pieces*) shows how difficult it is to have an elaborated and educated debate on that matter. Opinions are usually very sharp, even when elaborated by jurists.<sup>22)</sup> Unfortunately, the discussion of this issue has been increasingly spoiled by the debate, which surrounded the adoption in May 2013 (and even after) of the Act of “marriage for all”.<sup>23)</sup>

The French National Consultative Ethics Committee for Health and Life Sciences has rendered an opinion in 2010<sup>24)</sup>, which addresses the issue of whether it is ethically sound to add gestational surrogacy to the list of authorized ART procedures. Its conclusion, after having analyzed a set of reasons, is that the arguments in favor of keeping existing legislation as it currently is have prevailed over those in favor of legalizing this ART procedure, even if it were strictly limited and controlled.

Surrogacy motherhood is then also condemned from an ethical point of view. This prohibition, must be criticized not only for its intransigence and the absence of consideration for severe problems of infertility, but also for its quasi inefficiency. Indeed, as it has already been mentioned, intended parents may go abroad to benefit from foreign legislation which authorize gestational surrogacy. This situation cannot be solved by a pure prohibition, nor by diplomatic discussions with countries authorizing surrogacy in order to bar access of French nationals to surrogacy as the Report of the Senate suggests, since it denies real births occurred abroad and is prejudicial to the children, who cannot be

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21) Paris, Flammarion, 2009

22) See M. Fabre-Magnan, *La gestation pour autrui*, Paris, Fayard, 2013.

23) Act No 2013-404 of 17 May 2013 granting access to marriage to same sex couples.

24) The opinion is available in English on this website: <http://www.ccne-ethique.fr/en/publications/ethical-issues-raised-gestational-surrogacy-gs#.WBCKRFtyFb0>.

punished for the acts of their parents.<sup>25)</sup>

### III. Effects in France of surrogate motherhood made abroad

French case law has very recently evolved on that issue. Although French courts, for a very long time, disregarded children born abroad by surrogacy, those children still exist and have a legitimate right of construing their identity.<sup>26)</sup> The child-parent relationship belongs obviously to that identity. Now, when a genetic link exists between the child and the father, the father is recognized as the *legal* father. The European Court of Human Rights has made this progress possible only after the condemnation of France. However, the situation of the intended mother, is still in a legal vacuum.

Before entering into more details in that evolution of French case law, it should first be explained what kind of requests introduced by intended parents are made before French authorities. Second, the different rules usually applied to recognition of foreign public documents and foreign judgments should be briefly explained. Third, the decisions of French courts regarding this question will be scrutinized.

#### 1. What it is to be recognized?

A child who has been given birth by a surrogate mother, as any other children, is registered in the registries of the State where he is born. However, the laws of countries which recognize and regulate surrogate motherhood are very different as to how the child should be signed up.<sup>27)</sup> Sometimes the gestational mother is mentioned in the birth certificate; sometimes only the intended parents are mentioned, as the legal parents. Such is the case in Ukraine, a very friendly surrogacy State, where commissioning parents are considered the child's legal parents from the moment of conception. Sometimes the process of registration of the new born takes place only within administrative bodies, sometimes the approval of a judge is necessary. This is the case for instance in California, where a judgment is given, a few days after the birth (or even before), authorizing the registration of the child with the intended father as the father and the intended mother as "the legal mother". This is also the case in England, where intended parents may introduce a request within 6 months after the birth for a *parental order* which transfers legal rights from the birth mother to the intended parents. The parental order may be

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25) See H. Fulchiron and Christine Bidaud-Garon, "Ne punissez pas les enfants des fautes de leurs pères. Regard prospectif sur les arrêts Labassée et Mennesson de la CEDH du 26 juin 2014", *Recueil Dalloz* 2014, p.1773.

26) See also A. Chaigneau, "Pour un droit du lien : le débat sur la gestation pour autrui comme catalyseur d'un droit de la filiation renouvelé", *Revue Trimestrielle de Droit Civil* 2016, p.263, who argues for a renewal of French law of parenthood relationship, which should stop aping natural procreation, since new biological techniques create new ways of becoming « parent ».

27) See D. Sindres, "Le tourisme procréatif et le dip", *Journal du Droit International* 2015, doct. 4, n°9



issued only if at least one of the intended parents is genetically related to the child. In those cases, Family Courts control the surrogacy process and the interests of all parties.

Those precisions are of importance since the rules of recognition of an act made abroad differ, whether it is considered a “judgment” or a “civil status record” or a “public document”.

## **2. Potential applicable Rules of recognition and transcription**

Rules to recognize a foreign decision are twofold in France. First, it might depend on the country where the judgment has been issued. Indeed, if the decision has been rendered by a jurisdiction of a member State of the European Union (EU), which concerns a matter covered by a Regulation of the EU, then the rules of recognition of that Regulation will apply. However, neither *Brussels I* Regulation<sup>28)</sup> nor *Brussels II* Regulation<sup>29)</sup> foresee in their material scope of application questions of filiation. Indeed, article 1 §3 a) of *Brussels II* Regulation excludes “the establishment or contesting of a parent-child relationship” and article 1 §2 a) of *Brussels I* Regulation excludes “*status or legal capacity of natural persons*” from their scopes of application. Second, where no EU Regulation is applicable, the rules of recognition of foreign judgment are those provided for by the international conventions to which France is a party, or by French law. In that respect, no provisions are set forth either in the Civil Code or in the Civil Procedural Code. Rules applied by French courts have been construed by case law.<sup>30)</sup> Today, the conditions of recognition and execution of foreign judgments are:

- Foreign court had jurisdiction to give the judgment; its jurisdiction is assessed on the basis of a “sufficient link” with the dispute, upon the condition that French court had no exclusive jurisdiction on the subject matter of the dispute
- Foreign judgment shall not be contrary to the international conception of French public policy
- Foreign judgment shall not be given by fraud.

By contrast, rules of recognition of public documents are different and simpler. Article

28) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

29) Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

30) See P. Mayer and V. Heuzé, *Droit international privé*, Paris, Monchrestien, 2015, n°460 ; B. Audit and L. d’Avout, *Droit international privé*, Paris, Economica, 2014, n°333 ; P. Bourel, Y. Loussouarn and P. de Vareilles-Sommières, *Droit international privé*, Paris Dalloz, 2015, n°210 ; D. Bureau and H. Muir Watt, *Droit international privé* vol.1, Paris PUF, 2015, n°135.

47 of the French Civil Code sets forth that

*“Full faith must be given to acts of civil status of French persons and of aliens made in a foreign country and drawn up in the forms in use in that country, unless other records or documents retained, external evidence, or elements drawn from the act itself establish, after all useful verifications if necessary, that the act is irregular, forged, or that the facts declared therein do not square with the truth”.*

Truth is, this provision does not concern the issue of *recognition* but consists in a rule of evidence. What article 47 simply states is that a foreign public document should be given full faith and credit. But this implies also that, if what is stated in the foreign public document shall be considered the truth, a request based on this document shall be awarded. This provision has been used for instance for the issuance of certificates of French nationality of children born abroad from a surrogate mother. A *circulaire*<sup>31)</sup> (a sort of practice statement issued by the Government, addressed to public officers for the application of a certain provision) made in 2013 by the then Minister of Justice, Christine Taubira, explained that public officers had to grant a certificate of French nationality requested by French parents of children born abroad, on the basis of this article, even though it could be presumed that the child had been procreated by a gestational mother. This *circulaire* clarified the situation of parents who could not return to France, with their child born in a foreign country, because the child was refused the issuance of a French passport on the basis that the new born had been given birth by a surrogate mother.<sup>32)</sup>

This provision could also be used to consider the foreign public document establishing the parent-child relationship between the child and the intended parent(s), and then registering the child in the French public registries as the child of the intended parents. However, this provision has not served that purpose, until very recently. Indeed, the fact that the child has been procreated by a surrogacy mother has been considered to be contrary to French public policy, which paralyzed any effect such foreign public document could have on the basis of article 47 of the Civil Code. Although a public policy exception is not specified in this article, French courts have always considered it to supersede any other provisions.

### ***3. From a strict refusal to recognize the parent-child relationship established in a foreign country towards the recognition of the legal parenthood of the genetic father***

When parents begun to introduce before French courts requests contesting the refusal

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31) Circ. NOR JUSC1301528C, 25 January 2013

32) See for instance the decision of the *Conseil d'Etat* (Highest Cour of the administrative courts system) : CE, 4 May 2011.

of French authorities to recognize the legal parenthood established by Foreign authorities, the answers have been the same: the refusal of recognition was justified for public policy reason. Hence, whatever type of document those parents produced (a judgment or a public document), the attitude of French courts was the same. Surrogacy agreement being contrary to public policy; no legal relationship may be inferred from a surrogacy.<sup>33)</sup> In two decisions rendered in 2011<sup>34)</sup>, where French couples brought to French registries the *foreign birth certificate* made in California, as a proof of their legal parenthood (as provided for by article 47 of the French Civil code), the Court did not look at the birth certificate, but at the judgment upon which such certificate was issued (the judge authorized the intended parents to be registered as genetic father and legal mother). Indeed, there is no “public policy” ground to refuse to give effect to a foreign public document. However, such ground exists to refuse the recognition of a foreign judgment. French authorities exercise a double control of what is stated in the foreign public document. If the parenthood has been established on the basis of a surrogacy agreement (“*une convention portant sur la gestation pour le compte d’autrui*”), no legal relationship may be established because it would be contrary to the principle of “unavailability of civil status”, given the fact that such agreement is contrary to article 16-7 of the Civil code.

Then, in subsequent decisions given in 2013<sup>35)</sup>, the Court of cassation maintained its position but changed its reasoning. Instead of invoking a violation of French public policy, the Court insisted on the fact that those surrogacy agreements, though entered into in conformity with local law, were concluded in circumvention of the law, by fraud. As a consequence, it was contrary to public policy to give effects (establishing the parent-child relationships) to an agreement concluded by fraud. Even when only the father, who is genetically related to the child, requests recognition of his legal parenthood established in India (where the Indian birth certificate mentions the name of the surrogate mother as the legal mother), French authorities were said to be right, when they refuse to register the child as the son of this father.<sup>36)</sup> In this decision, even when the birth certificate reflects the genetic reality, no legal parenthood has been recognized.

The situation of those children is disastrous. They suffer from what is called in French

33) See Court of cassation, 1st Civil chamber, 17 December 2008, No 07-20468.

34) Court of cassation, 1<sup>st</sup> Civil chamber, 6 April 2011, *Epoux Mennesson c. Ministère public* No 10-19053 and *M. F. Labassée et autres c. Ministère public* No 09-17130. Those decisions have been brought before the European Court on Human Rights, which rendered two decisions on 26 June 2016 (see *infra*).

35) Court of cassation, 1<sup>st</sup> Civil Chamber, 13 September 2013, No 12-30.138 and No 12-18.315. See also H. Fulchiron et C. Bidaud-Garon, «L’enfant de la fraude ... Réflexions sur le statut des enfants nés avec l’assistance d’une mère porteuse», *D.* 2014, p.905. Those decisions have also been brought before the European on Human Rights, which rendered a decision 21 July 2016 (see *infra*).

36) Court of Cassation, 1st Civil Chamber, 19 March 2014 N°13-50.005.

private international law a “statut boiteux” (unstable status). They are recognized to be the children of the intended parents in the country of their birth, but are the children of no one in France. As a consequence, children do not have any specific inheritance right; non-recognized parents need to ask to French courts the authorization to exercise some rights a parent usually has (*autorité parentale*) and the family has trouble to travel since their passports do not show that they belong to the same family. Even in such situations, allegations made by parents of a violation of article 3 §1 of the 1989 New York Convention on the rights of the child, which states that

*“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.*

were disregarded by French courts.

French families suffering from that situation have then brought the issue before the European Court of Human Rights. In two cases decided on June 26, 2014,<sup>37)</sup> applicants (parents *and* children) claimed that their right to respect for family and private life (fundamental rights guaranteed by article 8 of the European Convention on Human Rights) had been infringed. Concerning the right to respect for family life, the European Court decided that no violation has been committed by France. For the European Court, the decision of the Court of Cassation<sup>38)</sup> “strikes a fair balance between the interests of the applicants and those of the State”. It decided that France has a legitimate interest to prohibit surrogacy agreements and the family has been able to enjoy in France their right to respect for their family life, since they were able to settle in France shortly after the birth and are in a position to live there together in conditions broadly comparable to those of other families. However, the right to respect for private life of the children has been infringed. Indeed, the Court says that respect for private life requires that everyone should be able to establish details of their identity as individual human being. The legal parent-child relationship belongs to that identity. Furthermore, nationality is an element of a person’s identity. And the children in those cases were not French, because they could not established before French authorities their link to their father. The Court remarks that the fact that the legal parenthood with the father, who is genetically related to them, was all the more problematic. Another ruling given by the European Court in July 2016 against France adopts the same reasoning.<sup>39)</sup>

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37) *Labassée v. France*, Case No 65941/11 and *Menesson v. France*, Case No 65192/11 (decision available in English: [http://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-145389%22\]}](http://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-145389%22]})).

38) The decisions of 6 April 2011 previously described.

39) *Foulon and Bouvet v. France*, Case No 9063/14 and 10410/14 (21 July 2016).

Consequently, when the French *Court of Cassation* has been seized again of this question, the *Assemblée plénière* (plenary session which comprises judges from the six chambers of the Court of cassation) rendered two decisions in July 2015, which reverse its prior position.<sup>40)</sup> Both cases concerned children born in Moscow. The birth certificates established by Russian authorities designated the applicant, a French national, as the father and the Russian surrogate mother, as the legal mother. In both cases, the fathers requested the entry of the Russian birth certificate in the French entries, which was denied by French courts, since a surrogacy agreement was suspected. The Court of cassation annulled those decisions and decided that to the extent that the particulars stated in the foreign birth certificate were true, French authorities had misapplied article 47 of the French Civil code by refusing to give full faith to the foreign documents. Hence, the current position of the Highest Court in France is that surrogate motherhood alone cannot justify the refusal to transcribe into French birth registers the foreign birth certificate of a child who has one French parent, a reasoning finally based on article 47 of the Civil code. The Court of cassation does not say that surrogacy is not *not contrary to public policy* anymore. What it says is that the public policy requirement is not a requirement anymore (and, in fact, never was). In this regard, the French Court of cassation complies *a minima* with the decision of the European Court.<sup>41)</sup> Consequently, the only grounds for refusal of transcription of foreign birth certificate are the one stated in article 47. If the document is either unlawful, or forged or where facts declared therein do not correspond to the reality, the foreign public document cannot produce any effect. So when the foreign certificate mentions the intended mother as the legal mother, the act is refused to produce effects, since the particulars declared do not correspond to the biological reality.<sup>42)</sup>

There is an undisputable progress. The situation of the intended father, as long as he is genetically related with the child, is settled. However, the position of the French highest Court is still awkward towards the intended mother. Indeed, the mother is, under French law, the woman who gives birth, whatever are her genetic link with the child. Hence, the woman who gives birth to a child procreated with a donor's egg is automatically considered to be the woman's embryo as soon as it is inseminated in her uterus.

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40) Court of Cassation, Plenary session, 3 July 2015, No 14-21.323, No 15-50.002.

41) In this regard, the new position of the German Federal Court is much more progressive. In its ruling of 10 December 2014 (Case XII ZB 463/13), the German Federal Court of Justice (Bundesgerichtshof – BGH), held that recognition of the Californian judgment could not be refused on the grounds of violation of public policy and ordered the civil registry office to register the child's birth and state the appellants as the joint legal parents. The Court found that German public policy was not violated by the mere fact that legal parenthood in a case of surrogacy treatment was assigned to the intended parents, if one intended parent was also the child's biological father while the surrogate mother had no genetic relation to the child.

42) See for instance: Rennes Court of appeal, 28 September 2015 (No 14/05537, No 14/07321) which concern two birth certificates in India and in the United States. Judges in the first instance had acknowledged the parent-child relation of the intended mother, but the Court of appeal reversed the judgments.

Accordingly, when a surrogate mother carries and gives birth to a child who was procreated by the intended mother's egg and intended father's gamete, she is considered to be the mother. French law continues to stick to a very old vision of maternity: the mother has to give birth. If in most births, it corresponds to the genetic reality, it is not necessary the case. The intended mother is left in a legal vacuum. Even if she considered as the legal mother in the country of birth, her status will not be recognized as such. The only possibility for her to establish her parent relationship with the child would then be the traditional means to acknowledge the status of a mother: possession of apparent status (*possession d'état*) or the adoption of the child. So far, those various means have been denied. But those decisions<sup>43)</sup> were given prior the overruling decisions of the *Assemblée plénière* in July 2015. One could however find an analogical reasoning based on a recent decision given by the Court of appeal in Dijon which refused the adoption by a man of the son of his husband, who was given birth by a surrogate mother in the United States.<sup>44)</sup> In the absence of a surrogacy agreement, this adoption should have been possible, according to the new Act of 2013<sup>45)</sup>, which, along with the marriage of same sex couple, permit same sex couples to adopt a child. So this decision shows the reluctance of some French courts to abandon their traditional position.

## V. Conclusion

French law needs to be changed. Those changes should not be left in the hands of courts. It is up to the legislator to take some action. First, as soon as parenthood is recognized abroad, the relationship should also be recognized in France. This should also be the case if the foreign document stipulates that the intended mother is the *legal* mother; French traditional vision of motherhood should be overturned and more coherent with newest technologies and sociological reforms. Moreover, we are living in a paradox. Why the genetic truth should be of such importance when the procreation takes place abroad, and then disregarded when a woman receives a donor's egg in France? Second, French civil law should also be modernized in order to take into account a crucial factor so far denied in the establishment of parent-child relationship: the commitment of being parent.<sup>46)</sup>

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43) Cited *supra* footnote 14, 15 and 16.

44) Dijon Court of appeal, 24 March 2016, No 15/00057.

45) See footnote 23.

46) A. Chaigneau, cited footnote 26.