

[論 說]

# CROSS-BORDER SURROGACY UNDER TURKISH LAW AND THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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## INTRODUCTION

Surrogacy is a very controversial and complex topic. From a lawyer's perspective, it involves sociological, ethical, religious, legal and medical aspects. One can even expand these aspects. Needless to say, the approach to surrogacy varies from one country to another due to different religious beliefs, as well as cultural, sociological and moral norms. Some countries ban all kind of surrogacy, whether altruistic or commercial, some allow only altruistic surrogacy, and some are silent about surrogacy as they have very limited legislation or none at all. Basically, the approach to surrogacy in national laws is diverse.

In Europe, jurisdiction regarding surrogacy is not uniform. According to research done by the European Court of Human Rights in 2014, among the states party to the European Convention on Human Rights, Germany, Austria, Spain, Estonia, France, Finland, Iceland, Italy, Moldavia, Montenegro, Serbia, Slovenia, Sweden, Switzerland, and Turkey have banned surrogacy. The other states party to the Convention namely Andorra, Bosnia-Herzegovina, Hungary, Ireland, Latvia, Malta, Monaco, Romania and San Marino are silent on this issue. In other words, there is no legislation in these states. In Belgium, Luxemburg, Poland and the Czech Republic it is partly tolerated. Albania, Georgia, Netherlands, Russia, the United Kingdom, Greece and Ukraine allow surrogacy under certain conditions<sup>2</sup>.

Those who are against surrogacy stress that i) the child born through surrogacy becomes a commercial product; ii) surrogate mothers become disposable products (once the baby is born and handed over, the surrogate mother is no longer useful and is abandoned); iii) there might be a high risk of unknown

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2 This information is cited in paragraph 31 and continuing paragraphs in *Labassee v. France* (Application no: 65941/11) Judgment dated September 26, 2014 and in paragraph 40 and continuing paragraphs in *Mennesson v. France* (Application no: 65192/11) Judgment dated June 26, 2014 of the European Court of Human Rights.

complications due to the procedure; iv) there is a risk of abuse and human trafficking; v) a child born through surrogacy is prevented from knowing his or her origin and identity; vi) surrogacy may have negative health and social consequences for the surrogate mother and even to the baby. Of course, religious beliefs, cultural and moral norms are also reasons for opposing surrogacy. Those who are in favour of surrogacy point out that it is a fundamental human right which is consistent with the freedom of personal choice and the right to bear children and founding a family.

The prohibition of surrogacy in some countries has led the prospective parents to search and use surrogacy services abroad. Especially with the current developments in assisted reproductive technology, the extensive internet use and the lack of an international convention regulating cross-border surrogacy have led to the growth in cross-border surrogacy arrangements. These rapid growing cross-border surrogacy arrangements without any regulation on an international level have constituted a new sector causing many problems, including stateless children, abandoned children, human trafficking and abuse of human body and dignity. As mentioned before, at present there is not an existing international consensus on surrogacy and thus there is neither an international body nor a binding agreement at an international level that might be helpful to settle cross-border (international) surrogacy disputes<sup>3</sup>. In this regard, 10 March, 2012, the Hague Conference on Private International Law (HCCH), an intergovernmental organization composed of 80 member States, including the European Union and all of EU Member States, called on its members to adopt an international instrument regulating cross-border surrogacy, particularly for the sake of children, some of whom have been left “marooned, stateless and parentless” due to the diverse legal approaches to surrogacy in different national laws<sup>4</sup>. Following this call, at the Council on General Affairs and Policy meeting held by HCCH in March 2015, it was decided that an Experts Group be set up and the “Parentage / Surrogacy Project” was adopted in order to explore the feasibility of drawing up an international instrument regulating cross-border surrogacy<sup>5</sup>. The last meeting of the Experts Group was held from 6-9 February, 2018, and the Group is currently still working on the issue.

While the Experts Group is working on an international instrument which may regulate cross-border surrogacy, the European Union took an unexpected position on surrogacy. It is very puzzling to note that

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3 Seema Mohapatra, “*Adopting an International Convention on Surrogacy – a Lesson from Intercountry Adoption*”, *Loyola University Chicago International Law Review*, Volume 13, Issue 1, p.47.

4 The Hague Conference on Private International Law, “A Preliminary Report on Issues Arising from International Surrogacy Arrangements” Prel. Doc. No.10, March 10, 2012 please see; <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf> (last visited March 25, 2018).

5 The Hague Conference on Private International Law, “The Parentage / Surrogacy Project: An Updating Note” Prel. Doc. No.3A, February 2015 please see; <https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf> (last visited March 25, 2018).

the European Parliament, in its report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)) dated 30 November, 2015, condemned the practice of surrogacy<sup>6</sup>. Moreover, not only did the European Union take this position but also the Parliamentary Assembly of the Council of Europe rejected a proposal to introduce European guidelines on surrogacy<sup>7</sup>. In fact, that proposal was suggested in order to draw up European guidelines to safeguard children's rights in relation to surrogacy arrangements and to collaborate with The Hague Conference on Private International Law (HCCH) on private international law issues related to the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements.

In order to have a sound understanding of the topic, it is essential to give some basic information on the term of surrogacy. Although there is not an existing a single definition agreed upon, surrogacy can be defined as an alternative assisted reproductive method to infertile couples. In surrogate motherhood, one woman acts as a replacement mother for another woman, who does not have healthy eggs or cannot carry a pregnancy. According to the definition of the European Council; "*surrogate mother means a woman who carries a child for another person and has agreed before pregnancy that the child should be handed over after birth to that person*"<sup>8</sup>.

There are mainly **two types of surrogacy** arrangements: traditional surrogacy and gestational surrogacy. In the case where partner's or husband's sperm is implanted in the surrogate by a procedure called Artificial Insemination, then the surrogate mother is both the genetic mother and the birth mother. In this method the surrogate is the egg donor and at the same time the actual surrogate for the embryo. Such method of surrogacy is called **traditional surrogacy**. In the second type, the intended mother has healthy eggs but cannot carry a child to birth so, the intended mother's eggs are fertilized with the husband's or

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6 The European Parliament report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)) dated November 30, 2015, please see; <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0344+0+DOC+PDF+V0//EN> (last visited March 25, 2018). Paragraph 114: "*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;*".

7 "Children's rights related to surrogacy (Doc. 14140)" Please see; <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnVudG1sL1hSZWYvWDJILURXLWV4dHIuYXNwP2ZpbGVpZD0yMzAxNSZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdc9QZGYvWFJZi1XRClBVC1YTUwyUERGLnhzbA=&xslparams=ZmlsZWlkPTIzMDDE1> (last visited May 01, 2018).

8 Principles set out in the report of the ad hoc committee of experts on progress in the biomedical sciences (CAHBI, 1989) please see: <https://rm.coe.int/16803113e4> (last visited March 25, 2018).

another man's sperm in a process called in vitro fertilization and the embryo is implanted in the surrogate mother. This method is called **gestational surrogacy**. Different from the traditional surrogacy, in gestational surrogacy, the surrogate does not have any genetic ties with the child. In such method the genetic mother is the intended mother whose eggs are fertilized in the laboratory by in vitro fertilization<sup>9</sup>.

There is one more classification of surrogacy **altruistic surrogacy** and **commercial surrogacy**. According to a preliminary report adopted by the Hague Conference on Private International Law, **altruistic surrogacy** is defined as “a surrogacy arrangement where the intending parent(s) pay the surrogate nothing or, more usually, only for her “reasonable expenses” associated with the surrogacy. No financial remuneration beyond this is paid to the surrogate. ... Such arrangements often (but not always) take place between intending parent(s) and someone they may already know (e.g., a relative or a friend)”<sup>10</sup>. Whereas **commercial surrogacy** is defined as; “a surrogacy arrangement where the intending parent(s) pay the surrogate financial remuneration which goes beyond her “reasonable expenses”. This may be termed “compensation” for “pain and suffering” or may be simply the fee which the surrogate mother charges for carrying the child”<sup>11</sup>.

It is the commercial surrogacy which mostly raises concerns about the commodification of childbirth, as the surrogate is paid for services<sup>12</sup>. Here, even if we only focus on India we will realise how big the cross-border commercial surrogacy is. Commercial surrogacy was very commonly practiced until recently in India and India became a very attractive destination for fertility tourism due to high quality health care, western trained doctors, low medical costs and liberal policies<sup>13</sup>. It was only recently in 2016 that India prohibited commercial surrogacy by enacting a law. The Minister of State for Health of India in 2016 stated that commercial surrogacy became a 2 billion USD illegal industry and that 80 per cent of

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9 Sevtap Metin, “*Fooling Nature: Ethical, Social, Psychological and Legal Aspects of Surrogate Motherhood*”, Law & Justice Review, Volume: 1, Issue: 3, December 2011, p. 117.

10 See the definition of “altruistic surrogacy” given by The Hague Conference on Private International Law, in the annexed Glossary in “A Preliminary Report on Issues Arising from International Surrogacy Arrangements” Prel. Doc. No.10, March 10, 2012 please see; <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf> (last visited March 25, 2018).

11 See the definition of “commercial surrogacy” given by The Hague Conference on Private International Law, in the annexed Glossary in “A Preliminary Report on Issues Arising from International Surrogacy Arrangements” Prel. Doc. No.10, March 10, 2012 please see; <https://assets.hcch.net/docs/d4ff8ecd-f747-46da-86c3-61074e9b17fe.pdf> (last visited March 25, 2018).

12 Lydia Bracken, “*Assessing the best interest of the child in case of cross-border surrogacy: inconsistency in the Strasbourg approach?*”, Journal of Social Welfare and Family Law, 2017, Vol. 39, No. 3, p. 369.

13 Jennifer Rimm, “*Booming Baby Business: Regulating Commercial Surrogacy in India*”, U. PA. J. INT’L L., Vol. 30, Iss. 4, 2014, p. 1430.

the total child births through surrogacy in India were for foreign nationals<sup>14</sup>.

So far, I have tried to give some very basic information on surrogacy. In this paper, I will not be in favour of or against surrogacy and thus will not try to justify one to the other. In the first part of this paper, we will observe the current legal environment in Turkey by explaining the relevant articles regulated under the “*Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres*”, the “*Turkish Criminal Code*”, the “*Turkish Civil Code*” and the “*Turkish Code of Obligations*”. In the second part, the recent judgments of the European Court of Human Rights (ECHR) will be evaluated.

## **PART I. SURROGACY UNDER TURKISH LAW**

### ***1. Evaluation of the “Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres”***

In Turkey, surrogacy has not been set up through a law enacted by the Parliament. To be more precise, this controversial topic has not been debated either by the law maker in the Parliament nor by the public<sup>15</sup>. Instead, efforts have been made to resolve the matter by issuing regulations (bylaws) by the administration, the Ministry of Health, since the very beginning, dating back to 1987<sup>16</sup>. Since then, the Ministry of Health issued in 1987<sup>17</sup>, 1996<sup>18</sup>, 1998<sup>19, 20</sup>, 2001<sup>21</sup>, 2005<sup>22</sup> and 2010<sup>23</sup> regulations (bylaws) to

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14 The new Indian Express of 01 September, 2016. Please see; <http://www.newindianexpress.com/nation/2016/sep/01/Commercial-surrogacy-has-become-2-billion-illegal-industry-Government-1515261.html> (last visited April 30, 2018).

15 Zeynep B. Gurtin, “*Banning reproductive travel: Turkey’s ART legislation and third-party assisted reproduction*” *Reproductive BioMedicine Online* (2011) 23, p.562.

16 Ebru Sensoz Malkoc, “*Uluslararası tasiyici annelik sozlesmesinden dogan ihtilaflarda uygulanacak hukuk*” [*Applicable law to the disputes arising from international surrogacy agreements*], *Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bulteni* [Public and Private International Law Bulletin], Volume 35, Issue 2, 2015, p.15.

17 Official Gazette no.19551, August 21, 1987, “*Regulation on in vitro fertilization and embryo transfer centres*”.

18 Official Gazette no.22822, November 19, 1996, “*Regulation Amending the Regulation on In vitro Fertilization and Embryo Transfer Centres*”.

19 Official Gazette no.23227, January 11, 1998, “*Regulation Amending the Regulation on In vitro Fertilization and Embryo Transfer Centres*”.

20 Official Gazette no.23244, January 28, 1998, “*Regulation Amending the Regulation on In vitro Fertilization and Embryo Transfer Centres*”.

21 Official Gazette no.24359, March 31, 2001, “*Regulation Amending the Regulation on Assisted Reproductive Treatment Centres*”.

22 Official Gazette no.25869, July 8, 2005, “*Regulation Amending the Regulation on Assisted Reproductive Treatment Centres*”.

23 Official Gazette no.27513, March 6, 2010, “*Regulation on Assisted Reproductive Treatment Techniques and Assisted*

regulate the matter. The latest instrument that sets out the rules with regard to assisted reproductive techniques, which repealed the previous regulations and is in force today, is the “Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres” (Regulation) published in the Official Gazette in 2014<sup>24</sup>. It is worth emphasizing once again that this regulation is the sole instrument which regulates the matter in Turkey.

When we examine the Regulation, we find out that it only puts the concept of the **married couple** in the centre as it was in the previous regulations<sup>25</sup>. In article 1 of the Regulation, it is clearly indicated that the aim of the Regulation is to set out the procedures and methods that will be used to help **married couples without children** in order for them to have a child. This is also emphasized in Article 4 of the Regulation where assisted reproductive treatment is defined as technics, accepted as treatment methods under modern medicine, that involve the fertilization of the intended **mother’s egg** with **her husband’s sperm** in various ways, including the fertilization outside the body, and transferring the gametes or the embryo to the intended mother. From both articles 1 and 4 of the Regulation we understand that in Turkey only married couples may benefit from assisted reproductive treatments with their own gametes. Any treatment involving third party assistance such as donor eggs, donor sperm or surrogacy are not allowed under Turkish law. This prohibition is clearly specified in annex 17 sanction form number 4 of the Regulation. According to annex 17 sanction form number 4, married couples are only allowed to use their own gametes in assisted reproductive treatments. The use of donor, transfer and application of embryos obtained from the married couple or donors to others is prohibited. So, basically surrogacy is prohibited under Turkish law.

In the case of the treatment involving third party assistance such as donor eggs, donor sperm or **surrogacy** which might be discovered at any stage of pregnancy, the license of the assisted reproductive treatment centre or clinic and the certificates of the involved persons will be cancelled, and also such involved persons will be barred from working and will never be allowed to work at such centres or clinics again and those involved personnel will be reported to the public prosecutor<sup>26</sup>.

Furthermore, according to annex 17 sanction form number 6 of the Regulation, any person acting

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Reproductive Treatment Centres”.

24 Official Gazette no.29135, September 30, 2014, “Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres”.

25 Zeynep B. Gurtin, “*Banning reproductive travel: Turkey’s ART legislation and third-party assisted reproduction*” Reproductive BioMedicine Online (2011) 23, p.557.

26 See Annex 17 sanction form number 4 of the Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres.

contrary to this rule, including the woman who becomes pregnant as a result of such illegal practice, her husband and the donor will be reported to the public prosecutor.

As for the Regulation, it is also not allowed to refer or send patients to international assisted reproductive treatment centres where the infertile couples may receive third party assistance such as surrogacy. According to annex 17 sanction form number 5 of the Regulation, none is allowed to refer or send patients to domestic or even to international assisted reproductive treatment centres where they apply the prohibited technics. In such cases, if it is discovered that any centre or its personnel have referred or sent the patients to such domestic or international assisted reproductive centres where they apply the prohibited technics contrary to this Regulation, such referral centres will be closed for 3 month period. If the centre repeats such an act, then the centre will be closed for an indefinite period and all relevant persons will be reported to the public prosecutor.

As it can be clearly seen from the relevant articles of the Regulation, surrogacy is a prohibited assisted reproductive treatment method under Turkish Law. The Regulation simply does not allow married couples to use surrogacy in any form. The Regulation also prohibits cross-border third party reproductive assistance including international surrogacy. Although surrogacy including cross-border surrogacy is banned, it is a fact that a huge number of Turkish couples travel to other countries for cross-border surrogacy. Since the desire of the childless infertile couples to have a child will not vanish and the rapid developments in treatment methods have made it easier for infertile couples to travel abroad, the number of such couples is bound to increase.

## ***2. Evaluation of the “Turkish Criminal Code” and “Turkish Civil Code”***

As mentioned above, although the Regulation has prohibited surrogacy and stipulates that those who get involved in surrogacy will be reported to the public prosecutor, there is a handicap with regard to penalizing those people, as surrogacy itself is not determined as a crime in the Turkish Criminal Code yet. More precisely, there is no specific article in the Turkish Criminal Code that is imposing a punishment to those who are involved in surrogacy, namely the surrogate mother, intended couple, doctors etc. So, what does it all mean? **How will those involved people, acting contrary to the Regulation be punished?** How will the public prosecutor take action and initiate an investigation about those involved in surrogacy? To which penalty clause will the public prosecutor refer while filing an indictment?

At present, if anyone acts contrary to the Regulation and gets involved in surrogacy, the only instrument for the public prosecutor is article 231 of the Turkish Criminal Code which regulates the crime altering

the lineage or in other words, altering paternity of a child<sup>27</sup>. This might sound absurd but currently this is the only instrument for the public prosecutor to use and rely on. I almost hear the question *how is it possible that the public prosecutor can accuse those people involved in surrogacy with the crime of altering the lineage of a child?*

In order to answer this question, one must first answer how parental relation is established under Turkish law. Article 282 of the Turkish Civil Code is the sole legislation which establishes maternity (parenthood) between the child and the mother. According to Article 282 paragraph 1, “*The woman who gives birth to a child is the mother*”. The Turkish lawmaker has adopted the Roman law principle: The mother is always known (*mater semper certa est*). Thus, maternity of the woman giving birth is the irrebuttable presumption under Turkish law. In other words, due to Article 282/1 of the Turkish Civil Code, the birth mother, meaning the surrogate mother, cannot legally reject the child’s filiation<sup>28</sup>. As it can be clearly seen, even in gestational surrogacy, Turkish law does not create any legal relationship with the genetic mother namely the intended mother. Consequently, the genetic mother (intended mother) who has provided her eggs will not have any legal connection with the child such as i) a line of descent with the child, ii) maternal right, iii) the right to initiate affiliation proceeding and iv) the right to become the heir of the child<sup>29</sup>.

As mentioned above, in surrogacy the main aim is to find a healthy woman who can give birth to a child for another woman. In the event that a healthy woman is found, the intended mother who is not able to give birth makes a contract with the surrogate mother. Very briefly, the scope of the contract is that the healthy woman (surrogate mother) will carry and give birth to the child and, after birth, the child should be handed over to the intended mother. **The crime of altering the lineage, or in other words, altering paternity of a child, comes into the picture when** the intended parents receiving the new born child from the surrogate mother, go to the Civil Registry to register the new born child under their own family registration. Due to the crime defined in the Turkish Criminal Code, the intended parents risk criminal liability if they participate in domestic or cross-border (international) surrogacy.

Since it is forbidden and penalized in Turkey to be involved in a surrogacy procedure, is there any legally risk-free alternative solution for infertile couples? The answer is yes, if you fall in line with the

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27 Article 231 of the Turkish Criminal Code; “*Anyone who alters or conceals the lineage of a child shall be sentenced to a penalty of imprisonment for a term of one to three years*”.

28 Sevtap Metin, “*Fooling Nature: Ethical, Social, Psychological and Legal Aspects of Surrogate Motherhood*”, Law & Justice Review, Volume: 1, Issue: 3, December 2011, p. 148, 149.

29 Hakan Hakeri, “*Tasiyici annelik*” [*Surrogacy motherhood*], Uluslararası Sağlık Hukuku Sempozyumu [International Health Law Symposium], Türkiye Barolar Birliği Yayınları No: 306, 2015, p.88, 89.



rules. Article 282 paragraph 3 of the Turkish Civil Code states that filiation may also be established through adoption. So, the only way left to infertile couples to establish legal filiation with a child is by proceeding and finalizing child adoption procedures<sup>30</sup>. However, one must keep in mind that child adoption procedures under Turkish Law is a very frustrating and along process. Although the subject of this paper is not child adoption, it is essential to briefly highlight Turkish Adoption Law to understand the complexities a couple would face should they opt to establish filiation through legal adoption. The person who wishes to adopt a child must meet the conditions set forth by the law. According to law, prospective adoptive parents must care for and educate the child for at least one year before the adoption claim is submitted to the court<sup>31</sup>. The consent of the biological parents must also be obtained<sup>32</sup>. In the case that the child is going to be adopted from the surrogate mother, the consent of the surrogate mother and biological father must also be obtained. In some surrogacy procedures, sometimes it is not only the intended mother who is not capable to conceive, but the intended father is also incapable and, in such cases, a donor sperm is used and it would be difficult to obtain the consent of the sperm donor, as mostly the identity of such sperm donors is kept secret. It should also be noted that, since surrogacy and the use of donor sperm are prohibited and illegal in Turkey, it would also not be legally possible to obtain the consent of the surrogate mother and the sperm donor even if the sperm donor's identity is known. Another criterion that must be met is that the intended couple wishing to adopt a child must have been married for at least five (5) years or both of them should be over thirty (30) years old<sup>33</sup>. And, of course, the intended couple must be physically and mentally fit for adoption.

### ***3. Evaluation of the Turkish Code of Obligations***

Surrogacy entails a contractual relationship with the surrogate mother and the intended parents. In a surrogacy contract, there are many issues covered. The contract will not only specify that the surrogate mother will carry and give birth to a child and handover the child at birth to the intended mother, but it will also cover issues such as payment of the medical and travel expenses for delivering the child, providing medical and psychological services for the surrogate mother, maternity clothing allowances, the acceptance of the surrogate mother to avoid ingesting alcohol, drugs, or other substances except as prescribed by her physicians, the acceptance by the surrogate mother to see her doctors regularly, and, if it is a commercial surrogacy, the compensation to be paid to the surrogate mother, etc.

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30 Arzu Genç Aridemir, “*The Problems of Paternity Between the Child and the Mother in Turkish Civil Law*”, The Journal of Social Sciences Institute- Afro-Eurasia Special Issue / ISSN: 1302-6879, p.19.

31 Article 305 of the Turkish Civil Code.

32 Article 309 of the Turkish Civil Code.

33 Article 309 of the Turkish Civil Code.

In principle, Turkish law recognizes freedom of contract and the parties may choose the subject and terms of a contract at their discretion. However, such freedom of contract is not unlimited. According to Article 27 of the Turkish Code of Obligations, contracts that are in breach of the imperative provisions of the law, contrary to good morals, against personal rights, and with impossible subject are strictly null and void.

Since all legal transactions must be completely consistent with the legal order, it is not possible to say that surrogacy contracts are valid under Turkish law, as surrogacy has been strictly prohibited under the “Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres”. Moreover, any surrogacy contract will also be against the provisions of the Turkish Civil Code related to paternity of the child and mother. As the core of a surrogacy contract will be the change of paternity, by handing over the new born child to the intended mother such will definitely be against the imperative provision stated in Article 282 paragraph 1 of the Turkish Civil Code, “*The woman who gives birth to a child is the mother*”.

When we examine the context from the perspective of good morals and ethics, it is not easy to come to a conclusion that altruistic surrogacy is against good morals and ethics. In altruistic surrogacy, mostly the infertile couple seeks help from a healthy relative or a close friend where the only intention is to have a child and nothing else. According to some scholars, in altruistic surrogacy it is not possible to determine if the intention of the parties is against good morals or ethics. Immoral and unethical conduct comes up when surrogacy is agreed for material benefit, as it is in commercial surrogacy<sup>34</sup>. However, contrary to this opinion, some scholars say that although the surrogate does not receive material benefit in altruistic surrogacy, it is still against good morals as the obligation of the surrogate to hand over the baby to the intended parents arises from the surrogacy agreement, which also means renouncing of personal rights. According to such scholar’s agreements renouncing personal rights are both illegal and immoral<sup>35</sup>. However, the discussion of whether altruistic surrogacy is moral or not does not change anything, since all kinds of surrogacy are prohibited under Turkish law.

When we look at the issue from the view of personal rights, there is a lot to debate on whether a person can freely decide on his/her body. The concept of personal rights involves not only rights and obligations and capacity, but also, among other things, bodily integrity, health, name, reputation etc. Protection of

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34 Haluk Nomer, “*Suni Dollenme Dolayisiyla Ortaya Cikabilecek Nesep Problemleri*” [Paternity problems that may arise due to artificial insemination], Prof. Dr. Kemal Oguzman’in Anisina Armagan, Beta Yayinlari, Istanbul, 2000, p.569, 570.

35 Burcu Kalkan Ozturk, “*Turk Medeni Hukuku’nda Biyoetik Sorunlar*” [Bioethical Problems under Turkish Civil Law], Vedat Kitapcilik, Istanbul, 2011, p.396, 397. Also see, Mehmet Beşir Acabey, “*Soybagi*” [Paternity], Guncel Hukuk Yayinlari, Izmir, 2002, p.177.

personal rights is not only ensured against third persons; it is also ensured against the person himself as persons themselves sometimes agree to restrictions on their own personal rights under outside pressure<sup>36</sup>. In order to protect personal rights Article 23 of the Turkish Civil Code has stated that; “no person may renounce his/her capacity to have rights or capacity to act, even partially. No person may renounce his/her freedom or restrict them against the law or morals”. When we speak about surrogacy agreements, we notice that the surrogate mother accepts and undertakes, in advance, to renounce her parental rights and also her right to obtain and maintain regular contact with the child. Such an undertaking of the surrogate mother is widely acclaimed to be contrary to Article 23 of the Turkish Civil Code and thus surrogacy contracts are strictly null and void according to Article 27 of the Turkish Code of Obligations<sup>37</sup>.

#### ***4. The validity problem of the relevant articles of the “Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres” imposing sanctions on individuals who get involved in surrogacy in Turkey.***

So far, I have tried to point out and explain the current legislation regulating surrogacy in Turkey. As I said before, unfortunately the rules with regard to assisted reproductive treatment methods and surrogacy, which is a very controversial topic, have not been debated by the law maker in Parliament and by the public in Turkey. Instead, there has been an administrative effort to resolve the matter by issuing regulations.

However, as a lawyer, I have doubts and concerns like many other writers, academicians and lawyers, whether such a controversial topic should be regulated and even penalized through regulations (bylaws). Since assisted reproductive treatment methods and surrogacy contain many important, sensitive and controversial issues such as physical integrity, private life, the right of the child etc., setting out the procedures and methods that will be used or just restricting some of the methods or even imposing penalties through regulations (bylaws) do not seem to be in conformity with the general principles of law, with the Constitution and with the European Convention on Human Rights.

According to Article 13 of the Turkish Constitution, fundamental rights and freedoms may be restricted only by enacting a law and in conformity with the relevant articles of the Constitution. These restrictions shall not be contrary to the Constitution or its spirit, and the requirements of the democratic order of the

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36 Tugrul Ansay, “Introduction to Turkish Law”, Sixth Edition, Wolters Kluwer, 2011, p.99 et seq.

37 Ebru Sensoz Malkoc, “Uluslararası tasiyici annelik sozlesmesinden dogan ihtilaflarda uygulanacak hukuk” [Applicable law to the disputes arising from international surrogacy agreements], Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bulteni [Public and Private International Law Bulletin], Volume 35, Issue 2, 2015, p.39-40. Also see; Nagehan Kirkbesoglu, “Soybagi Alaninda Biyoetik ve Hukuk Sorunlari” [Bioethics and legal problems in paternity], Vedat Kitapcilik, Istanbul, 2006, p.70 et seq.

society and the principle of proportionality. It is not possible to restrict someone's rights and freedom with regulations (bylaws). Therefore, the Regulation setting up the procedures and methods that will be used in assisted reproductive treatment or just restricting some of the methods such as surrogacy or imposing penalties does not seem to be in conformity with the Constitution.

The Regulation also requires that the clinics and its personnel will be reported to the public prosecutor. However, it is not clear with which crime such persons will be charged as there is no specific provision in the Criminal Code. According to Article 2 of the Turkish Criminal Code, a person may not be punished for an act which does not explicitly constitute an offence within the definition of the Law. Furthermore, it is also not possible to impose criminal punishment based on a regulation (bylaw) issued by the administration<sup>38</sup>.

Another unclear situation is, how the Turkish prosecutors will exercise jurisdiction over those centres, clinics, and/or personnel established and operating abroad<sup>39</sup>.

Additionally, such regulation (bylaw) prohibiting surrogacy, imposing penalties and not allowing the registration of the children born through surrogacy in the Civil Registry are also against the jurisprudence of the European Court of Human Rights which now Turkey has to consider and bring its legislation into conformity with the jurisprudence of the European Court of Human Rights. This is so because According to Article 90 paragraph 5 of the Turkish Constitution, international treaties duly put into effect have the force of law. In the case of a conflict between international treaties concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international treaties shall prevail. As you can appreciate, according to the Turkish Constitution, international treaties concerning fundamental rights and freedoms have superiority over domestic legislation and such rules must be strictly applied. Since Turkey is a party to the European Convention on Human Rights and accepts the jurisdiction of the European Court of Human Rights, it seems that the Regulation on Assisted Reproductive Treatment Techniques and Assisted Reproductive Treatment Centres is in contradiction with the convention, especially when we take into consideration that the European Court of Human Rights has recently judged that the refusal to recognise a parent-child relationship between children born following surrogacy abroad and the intended couples would affect the children's interest and right to respect for their private life, implying that everyone should be able to establish the essence of his or her identity, including his or her parentage.

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38 Article 2/2 of the Turkish Criminal Code; "No criminal punishment may be imposed based on regulatory transactions of the Administration".

39 Zeynep B. Gurtin, "*Banning reproductive travel: Turkey's ART legislation and third-party assisted reproduction*" Reproductive BioMedicine Online (2011) 23, p.563.

So, bearing in mind all the above explained legal problems of banning and penalizing surrogacy through a regulation issued by the administration, it is strongly recommended that the third party assisted reproductive treatment methods including surrogacy, be debated in the parliament and a law be enacted to set the rules, which will clearly specify applicable treatment methods, forbidden treatment methods, and penalties. Whether surrogacy should be allowed or not is another issue. But even if surrogacy is going to be banned and even penalized this should be done by enacting a law in the Parliament and not through regulations (bylaws). In this regard, it is essential to mention how other countries deal with the matter. For instance, France has explicitly prohibited surrogacy by enacting Article 16-7 of the French Civil Code. According to Article 16-7 of the French Civil Code; “*All agreements relating to procreation or gestation for the benefit of another are null*”<sup>40</sup>. It is also argued that not only is the surrogacy agreement accepted as null, but also no adoption by the intended mother of the new born is possible. Furthermore, according to Article 227-12 of the French Penal Code, getting involved in a surrogacy procedure is also accepted as a criminal offence and is penalized<sup>41</sup>. The European Union member states Austria, Bulgaria, Finland, Germany, Italy, Portugal, Spain and Sweden have also banned surrogacy explicitly by enacting a law.

## **PART II – THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS**

In this part of my paper, I examine the recent judgments of the European Court of Human Rights with regard to surrogacy. Before explaining the judgments of the Court, it would be essential to give some basic information about the ECHR.

### ***1. Basic information on the European Court of Human Rights***

The European Court of Human Rights is an international court established by the Convention for the Protection of Human Rights and Fundamental Freedoms which is more commonly known as the European Convention on Human Rights<sup>42</sup>. The main task of the Court is to ensure that the rights and guarantees set out in the Convention are protected and respected by the states party to the Convention. Unfortunately, the Court has no right to examine an instance *ex officio* or, in other words, on its own

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40 Cemile Turgut, “*Yapay dölleme tasiyici annelik ve soybagina ilişkin hukuki sorunlar*” [Artificial insemination, surrogate motherhood and legal disputes arising from paternity] On iki levha Yayıncılık, Istanbul, First edition 2016, p.136.

41 Caroline Kleiner, “*Surrogate motherhood in France: the need for a change consideration of French Private International Law*”, Kansai University Review of Law and Politics, No: 38, March 2017, p.54.

42 Article 19 of the European Convention on Human Rights.

motion, whether there is a breach or not. In order for the Court to examine a violation, there must be a complain which has to be brought to the Court by an individual claiming that the contracting State has violated one or more of his/her rights which are protected by the Convention. At the moment, 47 states are party to the Convention in Europe. The judgments of the Court are binding and the states concerned are under obligation to comply with the judgments.

In order to have the right to apply to the Court, the applicant must first exhaust domestic remedies, that is, individuals complaining of violations of their rights must first have taken their case to the national/ domestic courts of the state concerned<sup>43</sup>. It is very important to mention that there is a time limit to make an application to the European Court of Human Rights. According to the Convention, an applicant must bring his/her case before the Court within six months following the final judicial decision in the state concerned<sup>44</sup>. It should also be noted that the claimed violation should be one of the rights that is being protected by the Convention<sup>45</sup>.

## **2. Surrogacy and the ECHR**

Over the past decade legal order could not catch the technological developments in science and medicine. Law is always coming from behind with old notions to find solutions for the conflicts caused by technological developments. And one of the controversial areas that law is struggling with is surrogacy and, especially, legal consequences of cross-border surrogacy. As mentioned before, when it comes to surrogacy, some countries have banned surrogacy, some are silent and some allow. Being a parent or wanting to be one is maybe the most important existential issues in the world for humankind. However sometimes God just simply says no to some people. Then technology and money come to the fore. If you have enough money, nowadays you have a chance to have a baby. When we search the internet, we easily find thousands of advertisements of such nature. Thus, those infertile couples with the desire to have children attempt to have children through surrogacy, even if it is banned in their home country. They simply go abroad and become mother and father without thinking about the legal consequences they might face. When they come back to their home country where surrogacy is banned, sometimes the legal consequence they face is only the refusal of the authorities to recognize the-parent-child relationship, but sometimes it tragically ends up with the separation of the child and parents.

The European Court of Human Rights also had to deal with conflicts linked with surrogacy. Those people who are the citizens of the member states of the European Convention on Human Rights have the right

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43 Article 35 paragraph 1 of the European Convention on Human Rights.

44 Article 35 paragraph 1 of the European Convention on Human Rights.

45 Article 35 paragraph 3 (a) of the European Convention on Human Rights.

to bring their cases before the European Court of Human Rights in the event that their home country violates their basic human rights, i.e. the right to respect for private and family life which is protected under Article 8 of the Convention<sup>46</sup>. Cases concerning surrogacy brought before the European Court of Human Rights are *Mennesson v. France*<sup>47</sup>, *Labassee v. France*<sup>48</sup>, *D. and Others v. Belgium*<sup>49</sup>, *Foulon and Bouvet v. France*<sup>50</sup>, *Laborie v. France*<sup>51</sup> and the case *Paradiso and Campanelli v. Italy*<sup>52</sup>.

Here I will attempt to examine two cases the case of *Mennesson v. France* and the case of *Paradiso and Campanelli v. Italy*. The European Court of Human Rights adopted two different approaches in these cases. The cases of *Labassee v. France*, *Foulon and Bouvet v. France*, *Laborie v. France* were similar to the *Mennesson v. France* case and the Court delivered similar judgments.

### 3. *The Case of Mennesson v. France*

**The conflict:** In this case, French authorities did not recognize the parent-child relationship which was established in the United States between the twins born as a result of surrogacy and the intended parents by refusing to register the twins in the Civil Registry as the children of the couple. French authorities also did not issue French nationality to the twins.

**The facts of the case:** In this case, there were four applicants Mr. Dominique Mennesson, the father, Mrs. Sylvie Mennesson, the mother and Ms. Valentina Mennesson and Ms. Fiorella Mennesson, the twins born through surrogacy. The first two applicants Mr. Dominique Mennesson and Mrs. Sylvie Mennesson, who had a number of unsuccessful attempts to have a child using in vitro fertilisation with their own gametes, decided to go to California and enter a gestational surrogacy agreement. The twins were born through surrogacy and on the American birth certificate Mr and Mrs Mennesson were indicated as the father and mother. Following the birth of the twins, Mr. Dominique Mennesson went to the French consulate in Los Angeles with the American birth certificate in order to register the birth of the twins to the Civil Registry

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46 Article 8 of the Convention; “1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

47 Application Number 65192/11; judgment dated June 26, 2014.

48 Application Number 65941/11; judgment dated June 26, 2014.

49 Application Number 29176/13; judgment dated July 08, 2014.

50 Application Number 9063/14 and 10410/14; judgment dated October 21, 2016.

51 Application Number 44024/14; judgment dated January 19, 2017.

52 Application Number 25358/12; judgment dated January 24, 2017.

records. The Consulate rejected the request and due to surrogacy arrangement, and the Consulate sent the file to the Nantes public prosecutor's office in France. Since the twins were born in the US, they received US citizenship and thus the US Federal Administration had issued US passports for the twins on which Mr. and Mrs. Mennesson were named as their parents. So, all four could return to France. However, as soon as they returned home an investigation was launched against unknown persons for acting as intermediaries in a surrogacy arrangement, and the Mennesson couple for false representation infringing the civil status of children. Since the acts were committed on US territory where it was totally legal, the judge gave a ruling of no case and thus the acts of the couple could not be punished in France<sup>53</sup>. Thus, the risk of being convicted for the couple was over. But still, child-parent relationship was not recognized by the French authorities and the twins could not receive French citizenship. Although the Mennesson's exhausted all domestic remedies, they were not able to establish a legal parent-child relationship in France.

The applicants applied to the ECHR and complained that France did not recognize the legal parent-child relationship that had been legally established in the US between the Mennesson couple and the twins who were born through cross-border surrogacy. They complained of a violation of the right to respect for their private and family life guaranteed by Article 8 of the Convention<sup>54</sup>.

***The Court's findings:*** First of all, it is very important to mention that the Court did not examine whether the prohibition of surrogacy was against the Convention or not. The Court focused on the consequences. The Court examined whether the interference (not recognizing legal parent-child relationship) had been "necessary in a democratic society". The Court stated in its judgment that there is no consensus within the member states of the Council of Europe on the legitimacy of surrogacy, which raises sensitive ethical questions<sup>55</sup>.

The Court emphasized that due to the difficult ethical issues involved and the lack of consensus on surrogacy arrangements in Europe, a wide margin of appreciation had to be left to States<sup>56</sup>. According to the Court, it is possible for the states to ban surrogacy. However, stating that the states have a wide margin of appreciation in sensitive ethical issues, the Court also stated that such a wide margin of appreciation should be reduced when it comes to parentage, which involves a key aspect of individual identity<sup>57</sup>. Basically, the Court stated that it was up to France to prohibit surrogacy and it had no

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53 Paragraphs 8 – 16 of *Mennesson v. France* (65192/11, June 26, 2014).

54 Paragraph 43 of *Mennesson v. France* (65192/11, June 26, 2014).

55 Paragraph 78 of *Mennesson v. France* (65192/11, June 26, 2014).

56 Paragraph 79 of *Mennesson v. France* (65192/11, June 26, 2014).

57 Paragraph 80 of *Mennesson v. France* (65192/11, June 26, 2014).



intention to question the ban. However, the Court also stated that the consequences of refusing the recognition of the parent-child relationship should be examined to determine if it was a violation of the Convention or not. The Court therefore focused its judgment on the consequences of refusal to recognize the parent-child relationship and refusal to issue French citizenship, on the family life and private life of all the applicants guaranteed in Article 8 of the Convention. The Court also emphasized that whenever the situation of a child is the issue, the best interests of that child are paramount<sup>58</sup>.

According to the Court, a distinction had to be drawn in this case between Mennesson couple's right to respect for their family life on the one hand, and the right of the twins (the third and fourth applicants) to respect for their private life on the other hand<sup>59</sup>.

*With regard to the right to respect for family life:*

The Court considered in its judgment that the lack of recognition under French law of the legal parent-child relationship between the couple and the twins necessarily affects their family life<sup>60</sup>. The difficulties which the family was facing with regard to the social security application, school and any outdoor centre enrolment and financial assistance application from the Family Allowances Office due to the absence of French civil status documents or family records book were also noted by the Court<sup>61</sup>. But, the Court also stated in its judgment that the applicants did not claim that it had been impossible to overcome the difficulties they referred to and had not shown that the inability to obtain recognition of the legal parent-child relationship under French law had prevented them from enjoying their right to respect for their family life in France. According to the Court, all four of them were able to settle in France and to live together in conditions broadly comparable to those of other families and they were not at risk of being separated by the authorities on account of their situation under French law<sup>62</sup>. Thus, although the family was facing some difficulties due to non-recognition of the parent-child relationship by the French authorities, such did not constitute a violation of Article 8 of the Convention with regard to the applicants' right to respect for their family life<sup>63</sup>.

*With regard to the twins' right to respect for their private life:*

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58 Paragraph 81 of *Mennesson v. France* (65192/11, June 26, 2014).

59 Paragraph 86 of *Mennesson v. France* (65192/11, June 26, 2014).

60 Paragraph 87 of *Mennesson v. France* (65192/11, June 26, 2014).

61 Paragraph 88 of *Mennesson v. France* (65192/11, June 26, 2014).

62 Paragraph 92 of *Mennesson v. France* (65192/11, June 26, 2014).

63 Paragraph 94 of *Mennesson v. France* (65192/11, June 26, 2014).

With regard to the twins' right to respect for their private life, the Court noted that the French authorities, despite being aware that the twins had been identified in America as the children of Mr. and Mrs. Mennesson, had denied them that status under French Law and that denial undermined the twins' identity within French society<sup>64</sup>. The Court also stressed that the twins face a worrying uncertainty as to the possibility of obtaining French nationality and as such, the refusal of recognizing the twins as the children of Mr. and Mrs. Mennesson, although the father is the biological father, had negative impacts on their inheritance rights<sup>65</sup>.

The Court came to the conclusion that it could accept France's wish to deter its nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited in France. But, the non-recognition of the legal parent-child relationship affected the children themselves and their right to respect for their private life-which implies that everyone must be able to establish the substance of his or her identity, including the legal parent-child relationship. This right was substantially affected. The Court also stressed that the best interest of the child should have been taken into consideration<sup>66</sup>.

More importantly, the Court also stated that at least one of the parents actually the father of the twins' is a biological parent. According to the Court, by preventing the recognition and establishment of the twins' legal relationship with their biological father, the French overstepped the permissible margin of appreciation<sup>67</sup>. Thus, the Court held that the twins' right to respect for their private life had been violated.

It should be noted that the Court basically said that the existence of a biological link was very crucial.

#### ***4. The case of Paradiso and Campanelli v. Italy***

***The conflict:*** In this case, Italian authorities refused to grant legal recognition to parent-child relationship that had been established in Russia between the child born via surrogacy and the intended parents. Moreover, the Italian authorities separated the child and the intended parents on a permanent basis.

***The facts of the case:*** The applicants, Mrs. Donatina Paradiso and Mr. Giovanni Campanelli, a couple who had had a number of unsuccessful attempts to conceive via medically assisted reproduction techniques, decided to adopt a foreign child and they obtained the necessary official authorisation.

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64 Paragraph 96 of *Mennesson v. France* (65192/11, June 26, 2014).

65 Paragraph 98 of *Mennesson v. France* (65192/11, June 26, 2014).

66 Paragraph 99 of *Mennesson v. France* (65192/11, June 26, 2014).

67 Paragraph 100 of *Mennesson v. France* (65192/11, June 26, 2014).

However, they were tired of waiting for the eligible child and decided to try a surrogate mother in Russia<sup>68</sup>. Mrs. Donatina Paradiso travelled to Moscow, transporting from Italy Mr. Giovanni Campanelli's sperm, which she handed in to the clinic and paid almost 50,000 Euros for surrogacy. The surrogate mother gave birth to the child in Moscow on 27 February 2011<sup>69</sup>. The couple were registered as the newborn baby's parents by the Registry Office in Moscow<sup>70</sup>. Mrs. Paradiso went to the Italian Consulate in Moscow with the birth certificate to obtain the necessary documents. Although the Italian Consulate issued the documents, they informed the Campobasso Minors Court, the Ministry of Foreign Affairs and Municipality that the paperwork for the child's birth contained false information<sup>71</sup>. A criminal proceeding against the intended couple was opened and the couple was accused of "misrepresentation of civil status", and "use of falsified documents". The authorities accused the couple of bringing the child to Italy in breach of the procedure indicated in the provisions on international adoption. The Public Prosecutor's Office requested the opening of proceedings to make the child available for adoption, since he was legally to be considered abandoned. The child was then placed under guardianship<sup>72</sup>. However, the couple challenged this decision. The couple were visited by the social workers and according to the report prepared the couple were viewed positively and had a comfortable income and were living in a nice house. The report also stated that the child was in excellent health and was cared in the highest standards<sup>73</sup>. Basically, the child was loved and nurtured by the intended couple.

During the proceedings, the Italian Minors Court ordered that DNA testing be carried out in order to clarify whether the intended father was the child's biological father. The result was tragic. It showed that there was no genetic link between the child and the intended father<sup>74</sup>. The Russian company just cheated to get the money. Following the DNA test result, the Civil Registry Office refused to register the Russian birth certificate. The applicants lodged an appeal with the Larino Court against this refusal<sup>75</sup>. The Minors Court ordered that it was necessary to remove the child from the couple and the child was taken into the care of the social services and placed in a children's home<sup>76</sup>. The couple lodged an appeal before the Campobasso Court of Appeal. The Court of Appeal dismissed it. No appeal was lodged before the Court of Cassation against the decision of the Campobasso Court of Appeal.

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68 Paragraph 10 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

69 Paragraph 14 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

70 Paragraph 16 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

71 Paragraphs 17, 18 and 19 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

72 Paragraphs 21, 22 and 23 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

73 Paragraphs 24 and 25 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

74 Paragraphs 28 and 30 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

75 Paragraph 32 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

76 Paragraph 36 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

The applicants then alleged that on behalf of the child and themselves, the measures taken by the Italian authorities in respect of the child which resulted in the child's permanent removal, had violated their right to respect for private and family life, guaranteed by Article 8 of the Convention<sup>77</sup>.

### ***The Judgment of the Chamber of the Second Section of the European Court of Human Rights***

The Chamber dismissed the couple's application done on behalf of the child due to the absence of any proof of biological ties with the child and stated that the applicants did not have legal authority to represent the child. The Court also declared inadmissible the complaint with regard to the refusal to recognize the birth certificate issued in Russia<sup>78</sup>. The Court ruled that the applicants did not exhaust available domestic remedies as they did not appeal before the Court of Cassation against the decision of the Campobasso Court of Appeal. However, the Court decided to examine the measures which had led to the child's permanent removal.

The Chamber ruled that the actions of the Italian authorities were not necessary in a democratic society. It stressed that the removal of the child from the couple was an radical move which should only be resorted to when there is no other option. According to the Chamber, such a measure could only be justified if it aims to protect the child who is in immediate danger. The Chamber ruled that the Italian authorities had failed to strike the correct balance between the interests of the State and intended parents. The Chamber also stressed on the basis of the evidence in the file that the national courts had taken decisions without any specific assessments of the child's living conditions with the applicants and that they had failed to take account the child's best interest principle. The Chamber concluded that there had been violation of Article 8 of the Convention<sup>79</sup>.

The intended couple was relieved. However, this judgment was not final. As per Article 43 of the European Convention on Human Rights, the Italian government requested the case to be referred to the Grand Chamber<sup>80</sup>.

### ***The Judgment of the Grand Chamber***

The Court stressed that in this case the egg and sperm donors were unknown and there was no biological

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77 Paragraph 95 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

78 Paragraph 98 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

79 Paragraph 101 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

80 Article 43 paragraph 1 of the Convention; "Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber."

tie between the intended parents and the child. It also stressed that the applicant paid 50,000 Euros to receive a child who was born through surrogacy<sup>81</sup>. The Court noted that in the cases of *Menesson v. France* and *Labasse v. France* the intended parents resorted to gestational surrogacy and the existence of the biological tie between the father and children was proven. So, the French authorities did not attempt to remove the children from the intended parents. According to the Court, the issue at the heart of those cases was the refusal to register the relationship of the children and intended parents. But, at the core of this case was the extreme measure taken by the Italian authorities that ended up with the child's permanent removal and whether such measures were an interference in the applicants' right to respect for their family life and/or private life within the meaning of Article 8 of the Convention<sup>82</sup>.

In this regard, the Court in its judgment should have ascertained first whether there existed a family life with the intended parents and the child. The Court noted that the intended parents had developed a parental project and had assumed their roles as parents, and that they had close emotional ties with the child in the first stages of his life. This was also borne out from the report of the social workers<sup>83</sup>. The Court noted that the intended mother had spent 2 months together with the child after his birth in Russia before moving to Italy and that the intended couple spent 6 months in Italy together with the child. The court was not willing to define a minimum period of shared life which would be necessary to constitute *de facto* family life. According to the Court, the duration of the relationship with the child is a key factor in recognizing the existence of a family life<sup>84</sup>. The Court referred to the case *D and Others v. Belgium* in which a Belgian couple and the child born in the Ukraine to a surrogate mother spent only two months before temporary separation. However, in that case, there was a biological tie with the child and father<sup>85</sup> whereas in this case there was no biological tie. The Court concluded that no *de facto* family life existed in this case as there was no biological tie between the child and the intended parents and the duration of the relationship with the child was short<sup>86</sup>.

The Court noted that the intended parents had been affected by the judicial decisions which resulted in the child's removal and his being placed in the care of the social services and guardianship and with the ban not allowing the intended parents to have contact with the child<sup>87</sup>.

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81 Paragraph 130 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

82 Paragraphs 131, 132, 133 and 134 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

83 Paragraph 151 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

84 Paragraph 153 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

85 Paragraph 154 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

86 Paragraph 157 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

87 Paragraph 166 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

The Court considered that the measures taken in respect to the child had thus amounted to an interference with the intended parents' private life, but stated that the interference was "in accordance with the law" and was "necessary in a democratic society". "*According to the Court's established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests. In determining whether an interference was necessary in a democratic society the Court will take into account that a margin of appreciation is left to the national authorities...*"<sup>88</sup>. The Court stated that in case there is no consensus within the member States of the Council of Europe with regard to sensitive moral and ethical issues, a wide margin of appreciation should be given to member States<sup>89</sup>. With regard to the present case, the Court stated that the member States enjoyed a wide margin of appreciation on sensitive issues such as adoption, the taking of a child into care, and surrogacy<sup>90</sup>.

The Court strongly emphasized that, in contrast to the situation in the *Mennesson* judgment, the questions of the child's identity and recognition of parent-child relationship did not arise in the present case since there were no biological links between the child and the intended parents. In addition, this case did not concern the choice to become genetic parents, an area in which the State's margin of appreciation is restricted<sup>91</sup>.

In general, the Court ruled that, "*... the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to the intended parents' interest in their personal development by continuing their relationship with the child. Agreeing to let the child stay with the intended parents, possibly with a view to becoming his adoptive parents, would have been tantamount to legalising the situation created by them in breach of important rules of Italian law. The Court accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in the present case*"<sup>92</sup>. Thus, the Court ruled by eleven votes to six, that there was no violation of Article 8 of the Convention.

In the present case, the Court's consideration the best interest of the child was insufficient. In other words, the Court did not examine in detail the child's conditions during his stay at the intended parents

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88 Paragraph 181 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

89 Paragraphs 182, 183 and 184 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

90 Paragraph 194 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

91 Paragraph 195 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

92 Paragraph 215 of *Paradiso and Campanelli v. Italy* (25358/12, January 24, 2017).

and whether it was for the best interest of the child to remain in the care of the intended parents. The lack of such consideration might have happened because the child was not a party to the proceedings. According to the Court, the intended parents did not have the standing to act before the Court on behalf of the child and the complaints raised on behalf the child were dismissed by the Court due to incompatible *ratione personae*<sup>93</sup>. If the child had been a party to the proceedings before the Court, then in such case the Court would be in a position to examine and analyse in depth the best interest of the child and maybe a different judgment might have been rendered<sup>94</sup>. Whether the child is a party to the proceeding or not, the Court should have considered the best interest of the child as it is stated in Article 3 of the United Nations Convention on the Rights of the Child<sup>95</sup>.

In this context, it is worth reading the joint dissenting opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev. The relevant part of the dissenting opinion reads as follows; “... *with respect to the interest of the child, we have already noted that we are surprised by the characterisation given to the child’s situation as one of being in a state of abandonment. At no point did the courts ask themselves whether it would have been in the child’s interest to remain with the persons who had assumed the role of his parents. The removal was based on purely legal grounds. Facts came into play only to assess whether the consequences of the removal, once decided, would not be too harsh for the child. We consider that in these circumstances it cannot be said that the domestic courts sufficiently addressed the impact that the removal would have on the child’s well-being. This is a serious omission, given that any such measure should take the best interest of the child into account...*”<sup>96</sup>

It should be noted that the Paradiso and Campanelli judgment is the most recent judgment of the European Court of Human Rights related to surrogacy, and, as you can appreciate from the judgment, the Court puts a premium on the concept of biological tie. If there had been a biological tie with the child and intended parents, most probably the Court would have given a decision as the one in Mennesson judgment. So, from these two different judgments, we see that in the future the Court will examine whether at least one of the intended parents have biological ties with the child before rendering its judgments. And if there is biological tie with the child, then the surrogacy bans in European countries will not mean much to those families and such will open a new gate to intended parents.

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93 Paragraph 86 of Paradiso and Campanelli v. Italy (25358/12, January 24, 2017).

94 Lydia Bracken, “Assessing the best interest of the child in case of cross-border surrogacy: inconsistency in the Strasbourg approach?”, Journal of Social Welfare and Family Law, 2017, Vol.39, No.3, p.375.

95 Article 3 of the United Nations Convention on the Rights of the Child 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”.

96 Paragraph 12 of the joint dissenting opinion of Judges Lazarova Trajkovska, Bianku, Laffranque, Lemmens and Grozev of Paradiso and Campanelli v. Italy (25358/12, January 24, 2017).

## CONCLUSION

In conclusion, as mentioned before, surrogacy is a very controversial topic. It is my opinion that there will never be a worldwide consensus on surrogacy due to religious beliefs, ethical, moral and cultural differences. Some countries will oppose and try to ban it and even impose penalties, while some will be in favour, and will accept it as a legal assisted reproductive treatment method.

Since the desire of infertile couples to have children will not vanish, I do not believe banning surrogacy and even penalizing those involved will be a solution. On the contrary, with the rapid technological developments, such prohibition and even penalizing will only most probably force people to seek treatment either abroad or underground, and children will continue to be born through surrogacy, which will result in more complex cases where all parties involved end up getting hurt. For instance, let's assume that the infertile couple simply travelled to a country where surrogacy is allowed with great expectations. If everything goes right, the desire of the infertile couple to have children will be met through the surrogacy method. But then other problems may arise as in the *Menesson v. France* case. The authorities of the home country may refuse to register the filiation of the child born through surrogacy with the intended couple, or as in the *Paradiso and Campanelli v. Italy* case, the authorities may even impose extreme measures that might end up with the child's permanent removal. Or, if the baby is born with conditions such as Down's Syndrome, the intended couple may just leave the new born baby behind alone with the surrogate mother, as it happened in Thailand a couple of years ago<sup>97</sup>. The surrogate mother in Thailand gave birth to twins, but, one of them was born with Down's Syndrome and the intended couple took the healthy child but left the other one behind. So as said, simply banning and penalizing those involved in surrogacy will not be a solution.

In essence, the rights of the children born through surrogacy must be respected and when enforcing any decision with regard to such children the best interest of the child must be the primary consideration. I believe that we, the people of the world, will find some answers as we look closer, as we explore the facts. But, we should not be driven by emotion and or by beliefs. We should be driven by what's real. Banning and penalizing or condemning a matter is easy but finding a solution for cross-border surrogacy and especially to its legal consequences is not easy. It is time for all nations and international organizations to deal with the matter and especially with the legal problems of the children born through surrogacy. The question is how to deal with the consequences of surrogacy without losing our dignity and humanity. Hopefully, fingers crossed, the Huge Conference might be a hope and solution to this very

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97 *Baby with Down's Syndrome left in Thailand by Australian parents*, The Guardian (August 1, 2014), <https://www.theguardian.com/society/2014/aug/01/baby-downs-syndrome-abandoned-thailand-australian-donations> (last visited March 25, 2018).



controversial matter.

