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Family Law Symposium

THE FRENCH POSITION ON SURROGACY

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II. **IN 2014, FRANCE WAS CONDEMNED BY THE ECHR: THE MENNESSON AND LABASSÉE CASES**

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I. FRANCE PROHIBITS SURROGACY AGREEMENTS

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FRANCE DOES NOT ALLOW SURROGACY AGREEMENTS (1/2)

- According to **Article 16-7 of the French civil code** : « *All agreements relating to procreation or gestation on behalf of a third party are void* ».
- Such prohibition is grounded in two paramount principles of bioethics laid down in **Articles 16 and 16-1** of the French civil code : dignity of the human body and the fact that it is inviolable and may not form the object of any patrimonial right.
- Such civil prohibition is coupled with **criminal penalties**: they only concern potential intermediaries (agencies, doctors, lawyers…), not the intended parents, nor the surrogate mother.

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FRANCE DOES NOT ALLOW SURROGACY AGREEMENTS (2/2)

- In this legal context, the main issue about surrogacy in France is the matter of recognition of a parent-child relationship as a result of a surrogacy abroad.
- A number of French citizens quickly appealed to surrogate mothers outside of France, in countries where it is not punishable, and came back with children who were deemed to be theirs according to foreign birth certificates.

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FRANCE DOES NOT RECOGNIZE PARENT-CHILD RELATIONSHIP AS A RESULT OF A VALID SURROGACY ABROAD (1/3)

- The French example: a general prohibition with an **extraterritorial scope**
  - ✓ **Public policy**: *Cour de Cassation*, April 6th 2011 (n°09-66.486, n °10-19.053, n°09-17.130).
  - ✓ **Fraud on French law which prohibits surrogacy agreement:** *Cour de Cassation*, September 13th 2013 (n°12-30138; n°12-18315)

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FRANCE DOES NOT RECOGNIZE PARENT-CHILD RELATIONSHIP AS A RESULT OF A VALID SURROGACY ABROAD (2/3)

- The Menesson case and the Labassée case were among 3 decisions dated April 6, 2011, by which the French supreme court (Cour de cassation), approved the court of appeal for having refused the transcription of the foreign birth certificate's particulars into the French registrar of civil status, based on its incompatibility with French international public order.
- In both cases the facts were similar : two married opposite-sex couples had concluded a gestational surrogacy agreement with an american mother (in California for the Menessons and in Minnesota for the Labassées). In each case the gametes were those of the husband and of a female donor, distinct from the surrogate mother. Birth certificate were issued, mentioning Mr Mennesson as the biological father and Mrs Menesson as the legal mother.

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FRANCE DOES NOT RECOGNIZE PARENT-CHILD RELATIONSHIP AS A RESULT OF A VALID SURROGACY ABROAD (3/3)

- In two later decisions rendered about surrogacies in India dated September 13, 2013 (pourvoi n°12-30138 and pourvoi n°12-18315) the French Cour de cassation ruled in the same direction but on a different ground : that of fraud on French law.
- Again the Cour de cassation addressed the issue of private and family life, but only to quickly mention that neither **the best interest of the child nor the right to respect of one's private and family life in the sense of Article 8 of the ECHR could be usefully invoked in the context of this fraud.**

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II. THE FRENCH CONDEMNATION BY THE ECHR : THE MENNESSON AND LABASSÉE CASES OF JUNE 2014

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ECtHR, June 26, 2014 (Mennesson n°65192/11; Labassé n°65941/11)

Does the refusal from the French authorities to register the particulars of the foreign birth certificates of the children born from surrogacy abroad constitute a breach of article 8 of the ECHR?

- Refusal to recognize the family tie = **interference** in right to respect for the family life.
- Interference **in compliance with the law** and pursuing a **legitimate goal**.
- Absence of consensus + sensitive moral and ethical issues = **wide discretion** for the Member state.
- **Fair balance** between the interest of France and the interest of the applicants.
- Intended parents **could not ignore the serious risk of non-recognition**.

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Children born from a surrogacy abroad suffer an infringement in their right to respect of their private life

- However: Children, in **no way responsible** for the circumstances of their conception, were **prevented from establishing one important element of their identity:**

  *« It cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature **where the biological reality of that relationship has been established** and the child and parent concerned demanded full recognition thereof (…)*

  *by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, **the respondent State overstepped the permissible limits of its margin of appreciation.** » (para. 100)*

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- This first step towards recognition leaves **some major questions unanswered**:
  - ✓ Would the ECHR ruling have been the same in a case where none of the intended parents was the biological parents ?
  - ✓ Does the obligation of recognition exists regarding the biological father only or also to the intended mother?

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III. The French adaptation after the ECHR rulings

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Transcription of foreign birth certificates in home country

French supreme court adopted a narrow interpretation in two decisions dated July 3, 2015 (Cases n°14-21.323 and n°15-50.002).

- In both cases, the *Cour de Cassation* found that the fraud committed by the parents was no longer sufficient base to refuse the recognition.
- As long as the foreign birth certificate is regular and its mentions accurate, fraud does no longer prevent its registration into the French register of public status.
- Here concerns biological father and surrogate mother.

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Immigration and nationality issues: *the Taubira circulaire*

- Another significant evolution in France before the ECHR rulings was the circulaire Taubira dated January 25, 2013, Christiane Taubira being the French minister of Justice.
- According to this circulaire, requests for a certificate of nationality shall be granted where the legal parent-child relationship with a French person results from a foreign civil certificate of probative value under article 47 of the civil code and "*the mere suspicion of having resorted to a [surrogacy] agreement concluded abroad cannot suffice to deny issuance of certificates of French nationality (…)*".
- Circulaires are supposed to interpret and explain the current state of the legislation to the administrative authorities. They cannot modify the law.

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- When the circulaire was issued, there was no doubt that, according to the Cour de cassation, there could be no recognition in the French legal system of a parent-child relationship between a child born from a surrogacy agreement and his the intended parents.
- Yet, granting French nationality to such a child because one or both of the intended parents are French nationals is acknowledging a legal effect, under French law, to the relationship between the child and the intended parents.
- The circulaire was thus, at the time, logically challenged before the Conseil d'Etat for excess of power (requests n°367324, 366989, 366710, 365779, 367317, 368861)
- However, at the time of the ruling of the Conseil d'Etat, the ECtHR had already rendered the Mennesson and Labassee decisions, and they originate from a higher authority than the French *Cour de Cassation*. The circulaire was therefore logically deemed valid on December 12th 2014 on the basis of findings directly inspired by the reasoning of the ECtHR.

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ESTABLISHMENT OF PARENTAGE AVAILABLE ONLY FOR THE BIOLOGICAL FATHER

The 2015 *Cour de Cassation* decisions rendered mandatory the transcription of the particulars of the foreign birth certificate into the French registered of civil status which is quite different from establishing parentage, the first one being a matter of civil status only.

- Acknowledgement of parentage ("reconnaissance"): commonly used by fathers, notably outside of marriage.
- **Article 311-17 Civil Code** : valid if done in conformity with either the **national law of the acknowledger or the national law of the child**.
- The biological father mentioned on the foreign birth certificate should be able to establish his parentage by acknowledgment of paternity.

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ECtHR, JULY 21ST, 2016 (FOULON VS. FRANCE (N°9063/14) / BOUVET VS. FRANCE (N°10410/14)

- In two decisions rendered about surrogacies in India dated September 13, 2013, the French *Cour de Cassation* had ruled that it was impossible for a French man (the biological father) to obtain in France recognition of his parental link towards a child born in India from a valid surrogacy.
  Cass, 1ère Civ, 13/09/2013 *pourvoi* n°12-30138 and Cass, 1ère Civ 13/09/2013 *pourvoi* n°12-18315.
- In a very recent decision, the **European court condemned France** and now, the biological father mentioned in the foreign birth certificate can also obtain the recognition of his paternity towards the child born from a valid foreign surrogacy.

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IV. THE REMAINING UNANSWERED QUESTIONS

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WHAT STATUS FOR THE INTENDED PARENT ?

- If the recognition is limited to the biological parent, how to proceed to establish a legal relationship with the other, so that the child is protected in his relation to the other parent ?
- If the European Court of Human rights has carefully opened a door to the recognition of the parentage of children born as a result of surrogacy agreements, the status of the "non biological" commissioning parent – the intended mother in most cases – remains unanswered.
- What would be the *Cour de Cassation*'s answer if the foreign birth certificate mentioned the "genetic" mother. It would not be inaccurate. Yet how could this notion be translated into French law when, under French law, the mother is still only the woman who gives birth?

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- The same problem would arise with a foreign birth certificate mentioning the mother as the legal mother or, indeed, a legal father along with the biological father.

  Will the *Cour de Cassation* go back to the solution of a partial recognition(towards one of the parents only), as it had done in the past, before the notion of fraud emerged and prevented any kind of recognition (see for instance Cass 1ere civ. April 6, 2011 n° 09-66.486)?
- The answer seems to be yes: very recent example of such partial recognition with a decision of the *Court of Appeal* of Rennes, which ordered the partial transcription of an Ukrainian birth certificate, in order to establish the child's parentage towards his biological father but not towards his intended (non biological) mother, although both mother and father were mentioned on the foreign birth certificate (Rennes Court of Appeal, Case n°15/03855, dated March 7, 2016.)

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WILL FRANCE EVENTUALLY CAVE IN ?

If the obligation of recognition applies not only to the biological father but also to the intended mother, a new concept will have to emerge in French national law: **that of intended parent**.

Indeed, the concept of intended parenthood is, as yet, unknown in French law. The legislator would then need to create a way of establishing a legal parent-child relationship on the ground of the intended parenthood…

… still a vey controversial subject in France !

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THANK YOU !