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Surrogacy in Spain. Is it really forbidden?

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Abstract: Surrogacy contracts are declared to be null and void in Spain by Law 14/2006, but this rule does not prevent the access to this practice in countries having accepted it from a substantive point of view. Spaniards are travelling abroad to satisfy their desire to become parents through surrogacy and this reality has generated problems that the authorities have had to deal with in the absence of a legal regime covering cross-border cases. The existing administrative doctrine and the case law of Spanish courts, including the Supreme Court and the Constitutional Court, have not provided for uniform criteria for addressing situations that are being granted efficacy in Spain while at the same time are raising serious human rights concerns. The purpose of this paper is to examine the current situation in this matter, with the main objective of answering this question: Is surrogacy really forbidden in Spain?

Keywords: surrogacy parentage cross-border surrogacy agreements human rights best interest of the child gestational women gender perspective intended parents.

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(A) SURROGACY IN SPAIN: AN INCONSISTENT LEGAL FRAMEWORK THAT LEADS TO INCONSISTENT RESULTS

The legal treatment of surrogacy in Spain has been a controversial matter for years and continues to raise questions and concerns due to an unsatisfactory existing legal framework. Domestic cases seem to be legally clear, but the Spanish legislator has not yet focused seriously on cross-border cases, this leading to an undesirable legal uncertainty for all the persons involved as well as to unwanted results, especially from the perspective of the rights of children and gestational women.

The purpose of this article is to highlight the main developments of the legal treatment of surrogacy in Spain through the critical analysis of the existing substantive legislation and the main results that this legislation and the case law interpreting it have produced in our country. Considering all these elements, our efforts will be devoted to answer the following question: Is surrogacy really forbidden in Spain?

(1) Surrogacy in Spanish Law: Article 10 Law 14/2006 and its Interpretation by the Supreme Court

Surrogacy is explicitly regulated in the Spanish legal system in Article 10 Law 14/2006, 26 May 2006, on Assisted Human Reproductive Techniques (Law 14/2006).[1] The

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most widespread interpretation of this article supports that surrogacy is prohibited in Spain, this primarily based on its two first paragraphs. The first one states that surrogacy contracts, either altruistic or commercial, shall not have efficacy in Spain: "*The contract under which surrogacy is agreed, with or without a price, by a woman who renounces to maternal parentage in favour of the other contracting party or a third party, shall be null and void*." The second paragraph, consistently with the first one, states that "*The parentage of children born by surrogacy shall be determined by birth*."[2]

The rules on surrogacy in Law 14/2006 therefore appear to be clear and easy to apply in practice. The arrangements according to which a woman (the gestational mother) agrees to bear a child for another person or persons (the intended parents), who intend to become the child's legal parent(s) after birth, shall be null and void and consequently cannot entail a parentage relationship. In these situations, parentage can only be established in relation to the woman who gives birth in accordance with the principle "*mater semper certa est*". Hence, these rules should prevent citizens to make use of surrogacy because carrying out this practice should not produce the meant civil effects, i.e. the establishment of the filiation of the child in favour of the intentional parents. However, reality shows that this prohibition is not working in practice, at least in the international arena, where surrogacy contracts are now commonplace in cross-border private relationships.

From the Spanish point of view, the above situation is mainly due to serious inconsistencies in the existing regulatory framework despite the prohibition that emerges from these first two paragraphs of Article 10 Law 14/2006 and the case law of the Supreme Court, which has strongly condemned this practice to the detriment of the rights of the children concerned, as will be explained later but not in a sufficiently dissuasive manner, given the facts. The Spanish Supreme Court has dealt with this issue on several occasions but only two judgments of the Civil Chamber have specifically addressed the recognition of parentage through surrogacy, a claim that should be distinguished from the establishment of parentage through alternative solutions accepted in Spanish law or from the possible recognition of partial or indirect effects, as will also be explained later. This section will be devoted to the analysis of these two Judgments, which were rendered in February 2014 and March 2022, regarding respectively to children born in the United States of America (USA) and Mexico.

The Civil Chamber of the Supreme Court rendered its first judgment dealing with the possible recognition of parentage in international surrogacy agreements on 6 February 2014 (STS 835/2013).[3] The case concerned a same-sex couple who requested the registration of a pair of twins born in California (USA) before the Spanish Consulate in Los Angeles. Their request was rejected, and the decision was appealed before the (then called) General Directorate of the Registries and the Notaries (DGRN, currently named General Directorate of Legal Certainty and Public Faith), where the case was resolved in the positive. The Public Prosecutor challenged this decision and the Court of First Instance n. 15 of Valencia ruled in the negative again, thus preventing the registration

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1 Law 14/2006, 26 May 2006, on Assisted Human Reproduction Techniques (BOE no. 126, 27 May 2006).

2 Translation of the author.

3 STS 835/2013, 6 February 2014.

of these children in Spain. The intended parents challenged the decision before the Provincial High Court of Valencia, which confirmed the challenged rejection. This judgment was subsequently challenged before the Supreme Court, where, again, the request for registration was refused, although not unanimously.

While five of the magistrates ruled against the registration, four of them issued a dissenting opinion supporting the opposite solution. This latter fact has caused great concern in the debate, as the outcome for the lives of those children (and their prospective parents) would have been completely different if the five/four positions had been reversed. The arguments provided for in this Judgment, this including those supported by the dissenting magistrates, evidence the controversial nature of this topic and the difficulties in reaching a definitive solution as to its treatment under the current regulation.

The cassation appeal that gave rise to this Judgment was based on a single ground: infringement of Article 14 of the Spanish Constitution (CE) for violation of the principle of equality, in relation to the minors' right to a unique identity and their best interests, as enshrined in the 1989 Convention on the Rights of the Child. The Supreme Court's reasoning was based on a correct premise: the legal technique to be applied to address this problem was not the conflict of laws, but the recognition of foreign decisions. In other words, the Spanish authority did not have to consider which law was applicable to the case, but rather that a decision adopted by a foreign authority already existed and the key question was whether such a decision could be recognised and deploy effects in the Spanish legal system.

The Supreme Court acknowledges that it is a reality that people move from one country to another and, as a consequence of that, they come into contact with different legal systems, with the possibility of choosing different legal responses; however, it points out that this choice is limited by "the respect for public policy, basically understood as the system of individual rights and freedoms guaranteed by the Constitution and in the international human rights conventions ratified by Spain and the values and principles that they embody".[4] Hence, as the Court explains, although the control of legality cannot be understood as absolute, since this would make recognition impossible, it must imply respect for these rules, principles and values.

On this basis, the Court argues that Article 10 Law 14/2006 is included in Spain's international public policy and furthermore, that the reality that surrogacy implies is not accepted in our legal system nor in the majority of those systems based on similar principles and values, because it involves the violation of the dignity of the pregnant woman and the child, who are objectified, it commercialises gestation and parentage, it allows certain intermediaries to do business with them, and it allows the exploitation of the state of need of poor young women. Furthermore, the Court upheld that it is not possible to register the minors as a "peripheral" consequence of the null contract, since this claim refers precisely to the direct and principal consequence of the contract, and therefore the dissociation between the contract and the parentage could not be admitted.[5]

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4 Translation of the author.

5 Agrees with this position J.R. De Verda Beamonte, 'Inscripción de hijos nacidos mediante gestación por sustitución (a propósito de la sentencia del Juzgado de Primera Instancia número 15 de Valencia, de 15 de septiembre de 2010)', 7501 *Diario La Ley* (2010), at 6.

Consequently, the Court dismissed the appeal against the Judgment of the Provincial High Court of Valencia and urged the Public Prosecutor's Office to take the relevant actions to determine, as far as possible, the correct parentage of the minors and to protect them taking into consideration, where appropriate, their effective integration into a "*de facto*" family.

As noted above, four out of nine magistrates issued a dissenting opinion (*Voto particular*) supporting the opposite solution. Several interesting and thought-provoking aspects are worth highlighting. Firstly, the judges agree with the ruling that the technique to be applied is the recognition of foreign decisions, but precisely for this reason, the application of Article 10 Law 14/2006 should not be considered, since the paternity had already been determined by a foreign authority. Therefore, the contract cannot be the cause for refusing recognition but, where appropriate, the consideration that the foreign decision violates the Spanish public policy, this understood from the perspective of the best interests of the child. Therefore, in this matter public policy should not be assessed from the perspective of the contradiction with the internal rule, but from the point of view of the necessary protection of the interests of the child.

On the other hand, the dissenting opinion also refers to the profiles of the persons involved in this type of transactions. In first place, pregnant women and intended parents, who should not be subject of generalisations. Regarding women, the magistrates consider that their capacity to consent should not be underestimated without further consideration, since it is given before a judicial authority in charge of ensuring their free will and in full knowledge of the consequences. They deem the agreement between the parties to be voluntary and free, so that the woman is hardly being exploited or objectified against her will. As regards the intended parents, surrogacy is a particularly important manifestation of the right to procreate for some people who are genetically unable to have their own child, as is the case for same-sex couples, such as the family referred to in this judgment. And finally, regarding the child, from their point of view, surrogacy does not violate his best interest since he is born into a loving family.

Furthermore, this opinion points out that the current trend in Comparative Law favours regularisation and flexibility, and it also recalls on an important interpretative criterion for the application of public policy which is ignored in this judgment: the importance of assessing its possible violation on a case-by-case basis. The ruling does not consider the circumstances of the case; it protects the Spanish public policy in a preventive manner, beyond the facts heard by the Chamber. By doing so, the magistrates denounce that the needs of the children concerned by this decision have been neglected. They have been placed in an "uncertain legal limbo" while they grow up creating "irreversible emotional and family ties". The protection that the ruling claims to offer these minors by urging the Public Prosecutor's Office to act is considered insufficient by these magistrates, who defend that public policy covers the right to non-discrimination based on parentage and therefore "the illegal nature of parentage does not justify any differential treatment". In fact, it is rather contradictory to read how the Judgment recognises that the rejection of the registration of the parentage established in the California registry may be detrimental to the legal position of the children while at the same time it has no objection to sacrifice their expectations considering that they are not left unprotected because there are other means to do so.

In 2015, the Supreme Court had a new opportunity to take position on this same case through the incident of nullity of the proceedings brought by the appellants, which was resolved by a writ issued on 2 February 2015 (ATS 335/2015).[6] They considered, as did the dissenting opinion of the previous decision, that the debate had been diverted from a civil registry issue to the consequences of the unlawfulness of surrogacy in Spain, as if the occasion had been taken as an opportunity to issue an exemplary judgment. The Supreme Court refused to declare the nullity of the Judgment, stating, moreover, that in the context of the right to family privacy, it is not appropriate to extrapolate the case law of the European Court of Human Rights (ECHR)[7] established in the *Labassee and Mennesson v. France* cases[8] (both Judgments of 26 June 2014, i.e. after the STS 835/2013) because the Spanish and French legislations were not comparable. While French Law did not allow for the recognition of this parentage by any means, Spanish Law does provide for other ways of establishing it in these cases.

One last interesting issue about this case: the question remains as to whether the outcome would have been different if the appellants had provided the judgment issued under the California Family Code the Supreme Court Judgment refers to, which was not brought into the proceedings[9] as required by the DGRN Instruction on the Registration Regime of Parentage of Children Born Through Surrogacy of 5 October 2010, that will be explained later.

The second Judgment by the Civil Chamber of the Supreme Court on this matter, dated 31 March 2022 (STS 1153/2022),[10] was adopted unanimously; with no dissenting opinion. This second case concerned a single parent (a woman) who concluded a surrogacy contract in the State of Tabasco (Mexico) without any genetic link. The child was born in Mexico in 2015 and after some time living together in Spain, the grandparent of the child filled a claim before a court of first instance of Madrid in January 2018 claiming the parentage of her daughter towards the child through possession of status

6 ATS 335/2015, 2 February 2015.

7 See for further information about these Judgments, *inter alia* J. Carrascosa González and A.L. Calvo Caravaca, 'Gestación por sustitución y Derecho internacional privado. Más allá del Tribunal Supremo y del Tribunal Europeo de Derechos Humanos', 7-2 *Cuadernos de Derecho Transnacional* (2015) 45-113; F. Río Santos, 'La jurisprudencia del TEDH en materia de gestación por sustitución y su influencia en la jurisprudencia española', 6 *Actualidad Civil* (2017), 84-94; M.O. Godoy Vázquez, 'La gestación subrogada en la jurisprudencia del TEDH, TJUE y Tribunal Supremo', 34 *Anuario de la Facultad de Derecho* (2018) 111-131; S. Quicios Molina, 'Regulación por el ordenamiento español de la gestación por sustitución: dónde estamos y hasta dónde podemos llegar', 1 *Revista de Derecho Privado* (2019) 3-46, at 16-18 [DOI: https://doi.org/10.30462/RDP-2019-01-01-676]; G. Lazcoz Moratinos and A. Gutiérrez-Solana Journoud, 'La invisible situación jurídica de las mujeres para el TEDH ante la maternidad subrogada en la primera Opinión Consultiva del Protocolo nº 16, 11-2 *Cuadernos de Derecho Transnacional* (2019) 673-692 [DOI: https://doi.org/10.20318/cdt.2019.5012]; J.M. Díaz Fraile, 'La gestación por sustitución ante el Registro Civil español. Evolución de la doctrina de la DGRN y de la jurisprudencia española y europea', VI-1 *Revista de Derecho Civil* (2019) 53-131, at 118 ff.

8 *Labasse v. France*, ECHR (2014); *Mennesson v. France*, ECHR (2014).

9 In fact, the California Family Code requires a judicial decision for extinguishing the bond with the gestational woman and her partner, where appropriate and establishing it with the intentional parents. A. Quiñones Escámez, 'El contrato de gestación por sustitución no determina la filiación sino la intervención de una autoridad pública conforme a la ley', 2 *InDret. El orden público interno, europeo e internacional civil. Homenaje a la Dra. Nuria Bouza* (2017) 201-251, at 205.

10 STS 1153/2022, 31 March 2022.

(*posesión de estado*). The Court rejected the parentage claim but encouraged the intended mother to apply for guardianship or foster care as a preliminary step to adoption.

This Judgment was challenged by the father of the intended mother before the Provincial High Court of Madrid, which ruled in December 2020 in favour of the registration of the child and the confirmation of the parentage. The Public Prosecutor challenged this decision before the Supreme Court, which ruled against the establishment of the parentage by possession of status with similar arguments to those used in 2014 in the STS 835/2013 analysed above. The facts of the two cases are therefore different, but the outcome remains the same: the Supreme Court rules against the parentage claim, because surrogacy is considered to violate Spanish public policy and the rights of pregnant women and children, who are said to be commodified.

The legal reasoning of the Supreme Court can be disputed from two different perspectives considering precisely the consequences for the two most vulnerable groups of persons in commercial surrogacy contracts: surrogate women and children.

Starting with the children, from our point of view the general solution rejecting the registration or the establishment of the parentage of the particular children concerned neglects their best interest in both judgments.[11] By rejecting these claims the Court seeks to dissuade other prospective parents to resort to surrogacy abroad and makes this message prevail over the best possible solution for those children, which should have consisted in confirming legally the *de facto* families in which they were being raised. Conversely thereof, the STS 1153/2022 explicitly states that rejecting the parentage claim through possession of status while encouraging the adoption of the child by the intended mother is a balanced solution. It satisfies his best interests and at the same time it seeks to safeguard fundamental rights the ECHR has also encouraged to protect, such as the rights of gestational women and children in general. The Spanish Supreme Court considers that their rights would be seriously harmed if the practice of commercial surrogacy is enhanced by making it easier for surrogacy agencies to operate, and this would happen in case they can ensure to their potential clients the almost automatic recognition in Spain of the parentage resulting from the surrogacy contract. Therefore, the Court decided to give precedence to the deterrent message to the detriment of the interests of that child because the legal confirmation of his *de facto* family would have been more respectful with his needs.

As a result, the Court's reasoning in the two Judgments seeks to protect the children's rights in general terms but does not fulfil adequately the protection of the children involved in these two cases. In the same vein, the protection of gestational mothers in this field is far from being at the centre of legal operators' concerns, who have primarily focused so far on the children's rights and the cross-border recognition of parentage. And such recognition as we have seen it is happening in Spain , even if it is reasonable once the child is born and a *de facto* family has been created, fosters the exploitation of women who accept this practice due to economic needs, because this outcome encourages the future parents to travel abroad knowing that the

[11] C. Azcárraga Monzonís, 'La gestación por sustitución en el Derecho Internacional Privado español. Un ejemplo más de la controvertida aplicación de conceptos jurídicos indeterminados', 17 *Anuario Español de Derecho Internacional Privado* (2017) 673-710, at 680.

parentage will be recognized at some point, sooner or later, in the foreign country or once back in Spain, despite the prohibition of Law 14/2006 and the Judgments of the Supreme Court.

The above situation is deeply unsatisfactory from a gender perspective but as the growing existence of reproductive tourism threatens women's rights,[12] at least the discussion about the consequences of commercial surrogacy for surrogate women and the need to address this issue from a gender perspective to avoid or prevent abuse and exploitation is beginning to emerge in the doctrine.[13] In fact, the STS 1153/2022 has boosted this discussion because it provides for interesting (and worrying) information that enables to deepen into the functioning of commercial surrogacy in some countries. It reproduces some clauses of the contract signed in Mexico that force these women to accept decisions based on non-medical grounds thus neglecting their health (or the child's health) and severely restricting their sexual and reproductive rights. Some examples: Clause 14: "In the event that the surrogate woman suffers any life-threatening illness or injury (such as brain death), the intended mother has the right to keep her alive with medical life support, with the aim of saving the foetus until the doctor determines that he is ready for birth." […] Clause 16: "The surrogate woman agrees to undergo a caesarean section for the birth of the child, unless the doctor recommends a vaginal birth." […] Clause 18: "The surrogate woman agrees that she will only undergo an abortion when a doctor determines with a written certificate that her life or health is in danger."[14] These examples show in which terms surrogate women accept those conditions. The children born through surrogacy shall be protected but the gender perspective also urges to be addressed in this field.

In conclusion, the two judgments of the Civil Chamber of the Supreme Court rendered in 2014 and 2022 have not been dissuasive enough to prevent the use of this practice abroad despite the general position against surrogacy they both upheld. But this is not the only element in the equation that is allowing international surrogacy to become a usual phenomenon in Spain. Some other elements are shaping the present state of affairs facilitating its recognition in cross-border cases. On the one hand, our domestic model includes some solutions that are leading to the establishment of parentage (2) or at least to granting some sort of effects under the doctrine of the mitigated public policy (3). On the other hand, the treatment of surrogacy contracts is not being uniform before Spanish courts (4), resulting in erratic case law that favours legal uncertainty in an already unclear legal framework.

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12 R. Espinosa Calabuig, 'Sorority, equality and European Private International Law', 1 *Freedom, Security & Justice: European Legal Studies* (2023) 113-131, at 127 [doi:10.26321/R.ESPINOSA.CALABUIG.01.2023.05].

13 G. Lazcoz Moratinos and A. Gutiérrez-Solana Journoud, 'La invisible situación jurídica de las mujeres para el TEDH ante la maternidad subrogada en la primera Opinión Consultiva del Protocolo nº 16', 11-2 *Cuadernos de Derecho Transnacional* (2019) 673-692; R. Espinosa Calabuig, 'La (olvidada) perspectiva de género en el derecho internacional privado', 3 *Freedom, Security & Justice: European Legal Studies. Rivista quadrimestrale on line sullo Spazio europeo di libertà, sicurezza e giustizia* (2019) 36-57, at 50-54; C. Azcárraga Monzonís, 'La gestación por sustitución en España. Aspectos sustantivos e internacionales', in M.J. Antunes and D. Lopes (coord.), *Gestação de substituição: perspetivas internacionais* (Faculdade de Direito da Universidade de Coimbra, Coimbra, 2021) 43-71.

14 Translation of the author.

(2) Solutions Leading to the Establishment of Parentage

The group of solutions that have led to the establishment of parentage in cross-border surrogacy cases despite the general prohibition of this practice in Law 14/2006 include: (a) Paternity claims, (b) Recognition of foreign judgments and (c) Adoption of the child.

(a) Paternity Claims

The third paragraph of Article 10 Law 14/2006 states that "*Paternity claim remains available for the biological father under the general rules* [of the Spanish Legislation]." Consequently, the legislator leaves the door open to the recognition of parentage in those cases where there is a biological link between the intended father and the child, a solution which favours genetic fathers and raises the question about the different treatment granted to these cases depending on the existence of a biological link or not.

This solution collides with the nullity of surrogacy contracts and the intention of the legislator to prevent their legal efficacy and raises uncertainty in the general prohibition system set up in Spain. However, at the same time it is coherent with the general rules on parentage allowed in our country due to the existence of a biologic factor, as well as with the rule on the acquisition of Spanish nationality based on the *ius sanguinis* criterion.

Regarding the regulation on parentage, Articles 112 ff of the Spanish Civil Code (Cc)[15] and Articles 764 ff Civil Procedural Law 1/2000 (LECiv)[16] governing parentage procedures are to be applied regardless of the previous existence of a surrogacy contract. This is deemed null and void but the biological link with the child, if properly evidenced, is an uncontested fact that is granted legal effects in Spain. Under Article 764 LECiv, the legal determination or the challenge of parentage may be claimed before the courts in the cases provided for in the civil legislation. Article 113 Cc states that parentage can be accredited by different means: by registration in the Civil Registry, by the document or judgment that legally determines it, by the presumption of matrimonial paternity and, in the absence of the previous means, by possession of status. Furthermore, in accordance with Article 115 Cc, maternal and paternal matrimonial parentage shall be legally determined by the registration of the birth together with the marriage of the parents or by final judgment. Therefore, Spanish law offers other solutions besides the direct registration of parentage in the Civil Registry, allowing access to the courts through different civil actions.

On the other hand, the establishment of parentage by means of a paternity claim is also consistent with the rules on the acquisition of Spanish nationality. Spanish nationality can be obtained through different means. A first distinction must be done regarding nationality of origin *versus* derivative nationality. While the first option refers to situations where Spanish nationality is granted by the law, the second one refers to

[15] Royal Decree publishing the Civil Code, 24 July 1889 (Gaceta de Madrid no. 206, 25 July 1889).
[16] Civil Procedural Law 1/2000, 7 January 2000 (BOE no. 7, 8 January 2000).

the acquisition of Spanish citizenship by foreigners, who are granted the possibility to apply for it if they meet the specific requirements stated for four different means: acquisition of Spanish nationality by option, by discretionary conferral, by residence or by possession of status. All of them are regulated in Articles 17 ff Cc, where the blood relate is conferred importance in the acquisition of the nationality of origin. Article 17.1 a) Cc embraces the *ius sanguinis* criterion when stating that those "*born of a Spanish father or mother*" are granted the Spanish nationality. Therefore, the establishment of parentage should not be denied to children having genetic linkage with intended parents because of two main reasons: firstly, the rule does not require parentage to be established for obtaining the Spanish nationality by law (it does not say "*hijos de padre/madre español*" but "*nacidos de padre/madre español*"), and, secondly, this decision would discriminate people holding the Spanish nationality on birth grounds. And this is prohibited *inter alia* by Article 14 CE, as is well known.[17]

And what about children not having a biological link with the intended parents? The parentage determination is obviously more difficult to establish in cases where there is not a biological relation. This fact hampers the direct bridge between surrogacy and a possible judicial claim aiming at confirming the parentage between a child and his prospective non-biological parents, thus possibly leading to an unsatisfactory solution from the premise under which the swift establishment of parentage is more respectful with the best interest of the child. Furthermore, in these cases, more doubts may be raised when it comes to confirming parentage, as was the case in the ECHR Judgment *Paradiso Campanelli v. Italy* ruled in 2017[18] as well as in the above studied STS 1153/2022. The children did not share the biological link with the intended parents in any of these cases and this led to a judicial journey marked by multiple rejections. By contrast, other recent decisions like the Judgment of the Supreme Court of 16 May 2023 (STS 754/2023), or the Judgment of the Constitutional Court of 27 February 2024 (STC 28/2024), evidence that the existence of the genetic link unquestionably opens the door to the recognition of surrogacy in international cases, thus confirming the rule embodied in Article 10.3 Law 14/2006. Both Judgments will be addressed later.

(b) Recognition of Foreign Judgments

Along with Article 10.3 Law 14/2006, a second approach that has led to the recognition of parentage derived from surrogacy in the Spanish system derives from the DGRN Instruction on the Registration Regime of Parentage of Children Born Through Surrogacy of 5 October 2010.[19] This Instruction contains administrative guidelines addressed to Spanish consular authorities, establishing the requirements to allow the registration of parentage of the children born abroad as a result of surrogacy where at least one of

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17 Art. 14 CE: "*Spaniards are equal before the law, without any discrimination based on birth, race, sex, religion, opinion or any other personal or social condition or circumstance.*"

18 *Paradiso Campanelli v. Italy*, ECHR (2017). A.M. Ruiz Martín, 'El caso Campanelli y Paradiso ante el Tribunal Europeo de Derechos Humanos: el concepto de familia de facto y su aportación al debate de la gestación por sustitución', 11-2 *Cuadernos de Derecho Transnacional* (2019) 778-791.

19 DGRN Instruction on the Registration Regime of Parentage of Children Born Through Surrogacy of 5 October 2010 (BOE no. 243, 7 October 2010).

the intended parents holds the Spanish nationality. For the registration to be accepted before the Civil Registry, the Instruction requires a foreign judicial decision (*resolución judicial*) establishing the parentage, issued by the competent court, a condition which has been based on two different grounds.

On the one hand, the Instruction states that the intervention of a foreign judge guarantees the fulfilment of the foreign law and the respect for the rights of the parties involved, above all the ones the gestational woman is granted in the country of origin. According to this administrative Instruction, this requirement makes it possible to verify her full legal capacity and her valid consent, as well as any other requirements provided for in the regulation of the country of origin. It also allows attesting that there is no simulation in the surrogacy contract concealing international trafficking of minors. On the other hand, the said Instruction grounds this additional requirement on the third paragraph of Article 10 of Law 14/2006, which refers to the general rules on the determination of filiation by requiring the exercise of procedural actions and the consequent judicial resolution for the establishment of the parentage of minors born through surrogacy. The Instruction ensures that this protects the interests of the minor, facilitating the cross-border continuity of the parentage relationship declared by a foreign court, provided that such a decision is recognized in Spain.

The existence of this administrative doctrine has provided legal certainty and predictability to some cases but at the same time it suffers from negative aspects. Firstly, because an administrative body has taken on the role of legislator in a field where fundamental rights are at stake so that the adoption of a superior rule of law adopted by the true legislator would be desirable.[20] Secondly, since providing a different treatment to the children depending on whether it is possible or not to obtain such a judgment under the relevant foreign law contravenes the prohibition to discriminate on birth grounds under the mentioned Article 14 CE as well as under Article 2 of the Convention on the Rights of the Child of 1989.[21] Thirdly, this additional requirement contravenes the referred rule on the *ius sanguinis* acquisition of Spanish nationality as well because the Spanish nationality should not be refused to children having a genetic link with Spanish parents if such judicial resolution cannot be obtained. This fact depends on the legislation of the country of origin and children should not be discriminated on this ground.

Once the foreign decision has been issued and its recognition has been sought before the Spanish authorities, two possible procedures are provided for depending on the nature of the procedure that took place in the country of origin: if it derives from a contentious procedure *exequatur* will be required; if the decision has been issued following a procedure comparable to a Spanish procedure of voluntary jurisdiction, it will be subject to incidental recognition by the Civil Registrar as a prior requirement to

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[20] A. Durán Ayago, 'Una encrucijada judicial y una reforma legal por hacer: problemas jurídicos de la gestación por sustitución en España. A propósito del auto del Tribunal Supremo de 2 de febrero de 2015', 2 *Bitacora Millenium DIPr* (2015) 1-16, at 62 [DOI: https:/doi.org/10.36151/MDIPR.2015.010].

[21] BOE no. 313, 31 December 1990. Art. 2.1 Convention on the Rights of the Child: "*States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status*".

its registration. The Instruction requires such incidental control to verify the following aspects: the regularity and formal authenticity of the foreign judicial decision and of any other documents that may have been presented; that the court of origin has based its international jurisdiction on criteria equivalent to those contemplated in Spanish law; that the procedural rights of the parties have been guaranteed, in particular, those entitled to the gestational woman; that there has been no violation of the best interests of the child and of this woman (in particular, it must verify that the latter's consent has been obtained freely and voluntarily, without error, fraud or violence and that she has sufficient natural capacity); that the judicial decision is final and that the consents given are irrevocable, or, if they are subject to a period of revocability according to the applicable foreign legislation, that this period has elapsed without the person with recognised power of revocation having exercised it.

This Instruction was intended to be replaced by another one adopted in 2019 (DGRN Instruction of 14 February 2019),[22] even more favourable to the recognition of effects, which was annulled a few days later without even being published in the Spanish Official Journal by a second Instruction (DGRN Instruction of 18 February 2019) that reinstated the validity of the one adopted in 2010.[23] The DGRN Instruction of 14 February 2019 probably derived from the media pressure related to the situation that some Spanish families were living in Ukraine when the Spanish authorities decided at that time to stop the recognition of children born in this country by surrogacy.[24] The guidelines for consular registration contained some interesting novelties that favoured these applications taking into account the diversity of possible situations at origin.[25] Some of them have even been considered as the possible basis for a future regulation.[26]

On the one hand, some novelties referred to the solution already foreseen in the 2010 Instruction, that is the possible recognition of a court decision establishing the parentage relationship issued in the country of origin (through *exequatur* or incidental recognition), which was given greater safeguards in the Instruction of 14 February 2019. For instance, the public policy control aimed more intensively at protecting the women and children rights. Firstly, because the consent of the gestational woman, besides making sure that it had been obtained freely and voluntarily, without error, fraud or violence, with sufficient information and awareness of the scope of her declaration of will, and with sufficient natural capacity, as a novelty had to be confirmed after the birth of the child. Secondly, it embodied for the first time the child's right to know his or her biological origins. And thirdly, and equally novel, in line with adoption procedures, the authorities were compelled to confirm that there were no serious reasons for the

[22] DGRN Instruction of 14 February 2019, accessed 5 December 2024.

[23] DGRN Instruction of 18 February 2019. BOE no. 45, 21 February 2019.

[24] For further information see A. Ortega Giménez, M.E. Cobas Cobiella and L.S. Heredia Sánchez, 'Los contratos de gestación subrogada en España. A propósito del debate surgido por la paralización de las inscripciones de nacimiento por el Consulado español en Kiev', 9281 *Diario La Ley* (2018).

[25] P. Jiménez Blanco, 'La "crisis" de la gestación por sustitución en Ucrania y el caos en el Ministerio de Justicia (comentario a las Instrucciones de la DGRN de 14 y 18 de febrero de 2019)', 37 *Revista Electrónica de Estudios Internacionales* (2019), 24-31, at 25.

[26] A. Durán Ayago, 'Gestación por sustitución en España: a hard case needs law. De por qué la jurisprudencia no puede resolver este problema', 11-2 *Cuadernos de Derecho Transnacional* (2019) 575-582, at 579 [DOI: https://doi.org/10.20318/cdt.2019.4977].

parents' lack of suitability to assume the guardianship and protective functions of parental authority, due to their age, state of health or other reasons.

On the other hand, the Instruction dated 14 February 2019 included more solutions besides the recognition of a foreign judgment establishing the parentage. In the event that the identity of the pregnant mother (being a foreigner and the birth having occurred abroad) was stated in the foreign registration certificate or in the declaration and medical certificate of the birth, the Spanish Civil Registry was declared to be competent to register the birth if the parentage of the child with a Spanish parent was confirmed. This accreditation could be carried out by judgment rendered in a parentage procedure or through the paternity recognition by any means provided for by the Spanish Civil Code, supplemented by other sufficient evidence to prove beyond doubt the reality of this paternal filiation, such as a DNA test as a preferential (not exclusive) means of proof. Once the paternal parentage confirmed, if the maternal parentage also wanted to be established the intended mother could start the adoption procedure in Spain.

Finally, this overturned Instruction also contained another interesting solution regarding the establishment of maternity in favour of the intended mother, alone or as a member of a same-sex couple. A groundbreaking solution that challenged the "untouchable principle" by which maternity is determined by childbirth[27] based on the need to protect the child if the surrogate mother confirmed that she did not want to take care of him, a will that had to be clarified by her declaration or from the terms of the surrogacy contract. If all these circumstances were met and the intended mother had a genetic link with the child because she had provided her egg, the DGRN proposed the analogous application of Article 10.3 Law 14/2006 in the same way as for paternity, in order to be able to recognise and register in the Spanish Civil Registry the maternal filiation in favour of the woman whose genetic material had been used.

However, as already announced, these additional solutions never entered into force because on 18 February 2019 another Instruction was published rendering ineffective the previous one and confirming the application of the one issued in 2010. Therefore, the solution under which a judicial resolution must be provided to the Consular authorities for the registration to be accepted became effective again as the only way to guarantee the recognition from the country of origin. As an alternative option in the absence of a foreign judgment, the Instruction of 18 February 2019 declares that the applicant may obtain from the local authorities, if appropriate, the child's passport and permits to travel to Spain. This solution has been said to transform the problem of determination of parentage into an immigration issue[28] which may even give rise to statelessness cases because meeting these requirements will depend on the legislation of the birth country.[29]

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27 Mª B. Andreu Martínez, 'Una nueva vuelta de tuerca en la inscripción de menores nacidos mediante gestación subrogada en el extranjero: la Instrucción de la DGRN de 18 de febrero de 2019', 10 bis *Actualidad Jurídica Iberoamericana* (2019), 64-85, at 76.

28 P. Jiménez Blanco, *supra*, n. 25, at 28.

29 A.L. Calvo Caravaca and J. Carrascosa González, 'Notas críticas en torno a la Instrucción de la Dirección General de Registros y del Notariado de 5 de octubre de 2010 sobre régimen registral de la filiación de los nacidos mediante gestación por sustitución', 3-1 *Cuadernos de Derecho Transnacional* (2011) 247-262, at 248. Furthermore, in page 257 of this contribution the authors recall that under Article 17.1 CC the existence of "rational indications of the physical generation by a Spanish progenitor" should be enough to obtain the Spanish nationality since the wording of the rule does not require the previous establishment of

If the family manages to return to Spain with the child, the corresponding proceedings for the registration of parentage must be initiated, with the intervention of the Public Prosecutor's Office, or legal action shall be brought to claim parentage.

The brief Instruction of 18 February 2019 based its restrictive decision on the fact that this phenomenon entails a serious violation of the rights of children and gestational women. It upholds that it is necessary to provide a treatment permitting to assess all the circumstances that arise in each case, especially in view of the clear abuses against women that have occurred and the unlawfulness of the lucrative activity of the mediating agencies that operate in this field.[30] In fact, surrogacy companies are operating with impunity in the reproductive industry despite the information currently available on the existence of these abuses and the additional legal measures existing in Spain against surrogacy besides the nullity of contracts stated in Law 14/2006, this including rules on criminal liability and administrative prosecution of advertising.

Article 221 of the Spanish Criminal Code[31] makes it a criminal offence that shall be punished with imprisonment of one to five years and special disqualification from exercising the right of parental authority, guardianship, curatorship or custody for a period of four to 10 years, to hand over a child to another person even if there is no relationship of parentage or kinship, by means of financial compensation, evading the legal procedures of guardianship, foster care or adoption, with the aim of establishing a relationship similar to parentage. The same penalty is foreseen for the person who receives the child and for the intermediary, even if the delivery of the child has taken place in a foreign country. Nevertheless, the figures show that this rule has not yet been a major obstacle for people who decide to go abroad for surrogacy.[32]

Some other measures were adopted in 2023 to raise public awareness of the illegality of surrogacy, but these have also proved to be clearly insufficient. Article 32.2 of Organic Law 2/2010 on sexual and reproductive health and the voluntary interruption of pregnancy,[33] as drafted by Organic Law 1/2023,[34] states that information on the illegality of surrogacy shall be promoted through institutional campaigns. And Article 33 of the same Law of 2010, which was also added in 2023, proclaims the prohibition of the commercial promotion of gestational surrogacy, so that the Administration shall bring legal action aimed at declaring the unlawfulness of advertising that promotes commercial practices for gestational surrogacy and its cessation. The same Law dated

parentage ("*nacidos de españoles*" and not "*hijos de españoles*"). In the same vein, others support that any means of proof accepted in our legal system should be accepted in this regard (for instance, a DNA test as allowed in the Instruction of 14 February 2019). A.J. Vela Sánchez, 'Análisis estupefacto de la Instrucción de la DGRN de 18 de febrero de 2019, sobre actualización del régimen registral de la filiación de los nacidos mediante gestación por sustitución', 9453 *Diario La Ley* (2019), at 13.

30 Against this view, *Ibid.*, at 5. Vela Sánchez considers the criticism levelled against mediating agencies to be unfair and disproportionate.

31 Organic Law 10/1995, 23 November 1995, of the Criminal Code (BOE no. 281, 24 November 1995).

32 Newtral Figures period 2010-2022, accessed 5 December 2024.

33 Organic Law 2/2010, 3 March 2010, on sexual and reproductive health and the voluntary interruption of pregnancy (BOE no. 55, 4 March 2010).

34 Organic Law 1/2023, 28 February 2023, amending the Organic Law 2/2010, 3 March 2010, on sexual and reproductive health and the voluntary interruption of pregnancy (BOE no. 51, 1 March 2023).

2023 added a new paragraph in Article 3 a) of Law 34/1988 on Advertising[35] stating that, besides other actions, advertising that promotes commercial practices for gestational surrogacy is unlawful in Spain.

In brief, if our model is really based on the prohibition of surrogacy, it will be necessary to adopt a stronger restrictive regulation for addressing cross-border cases. In the meantime, the administrative doctrine explained in this section will continue to be an avenue of recognition, in addition to the claim of paternity and the possible adoption of the child, as we will see below.

(c) Adoption of the Child

International surrogacy has also been granted efficacy in Spain through the possibility of adopting the child. This solution has not always been embraced by Spanish courts,[36] but adoption has said to be a suitable solution by the Spanish Supreme Court in the same judgments where it has fiercely opposed to surrogacy denouncing the commodification of women and children. Despite this forceful position, it ends up accepting and even fostering the establishment of parentage through other legal institutions such as adoption. This solution has been particularly welcome in this field regarding the adoption of the couple's biological child, as regulated in Articles 175 and 176.2.2 Cc. It has also been supported by the ECHR and the Spanish Constitutional Court.

The ECHR issued an Advisory Opinion in 2019 requested by the French *Cour de Cassation* urging the contracting states to regulate the determination of parentage with the intended mother as the legal mother in the birth certificate legally issued abroad when the parentage with the biological father has already been established. The ECHR has declared that states are not obliged to register the details of the birth certificate to establish this legal bond in favour of the intended mother; adoption may serve as an appropriate means of recognizing that relationship provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests.[37]

This doctrine has been subsequently applied in several Judgments regarding different contracting states[38] and it has also been followed by the Spanish Supreme Court when encouraging the adoption as an appropriate means of establishing parentage in cross-border surrogacy cases following the refusal to recognize or establish parentage. However,

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35 Law 34/1988, 11 November 1988, General Advertising (BOE no. 274, 15 November 1988).

36 In AAP Barcelona 565/2018 the Court dealt with the adoption of two children born in Thailand through surrogacy. The adoption claim was filed by the same-sex couple of the biological father, who appeared as the legal father in the birth certificate issued by the Spanish Consulate in Bangkok. The Provincial High Court of Barcelona referred to the nullity of the surrogacy contract and the violation of Spanish public policy and ended up focusing on the terms of the contract for rejecting the adoption: under the Catalan Civil Code the biological mother is granted a period of six weeks for confirming the adoption of the child while the contract only granted her three days after birth.

37 ECHR Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, 10 April 2019, accessed 5 December 2024.

38 ECHR case-law on surrogacy, given before and after the referred Advisory Opinion, accessed 5 December 2024.

it is important to stress that this solution fulfils the ECHR doctrine provided that the domestic procedure ensures that it can be implemented "promptly and effectively", but undefined legal concepts are very difficult to assess. The STS 1153/2022 upheld that this was the case when the establishment of parentage through possession of status was rejected and the Court encouraged the plaintiff to adopt a child born in 2015, thus seven years later at the time this Judgment was rendered. Seven years "legal limbo" and counting… However swift this adoption procedure was going to be, was this decision respectful with the child's best interests? Probably not. Faster solutions for the establishment of parentage would be desirable in these cases not to affect the best interest of these children.

The Spanish Constitutional Court has also recently confirmed the adequacy of adoption for the establishment of parentage in cross-border surrogacy cases. The Court ruled on this matter for the first time some months ago, by STC 28/2024 of 27 February 2024.[39] The plaintiff sought the constitution of the adoption of the biological son of her spouse, a child born in Kiev (Ukraine) through surrogacy in 2016. The documents issued in Ukraine showed the Spanish couple as the legal parents while the documents issued by the Spanish authorities showed the Spanish husband as the legal father and the Ukrainian woman as the legal mother, following the registration of the birth of the child in those same terms at the Consular Civil Registry of the Spanish Embassy in Kiev. The child obtained the Spanish passport issued by the Spanish consular authority in Ukraine. Once in Spain, the Spanish mother sought the adoption of her husband's child before Spanish courts. The voluntary jurisdiction procedure (n. 451-2017) was heard by the Court of First Instance n. 28 of Madrid, which confirmed the establishment of the adoptive parentage in January 2018.[40] The Court rejected the application of Article 10 Law 14/2006 to this case and based its decision on the previously explained case law of the Spanish Supreme Court that has supported other means of establishing the parentage, such as paternity claim or adoption, precisely.

In May 2019 the first instance decision was overturned on appeal by the Madrid Provincial High Court,[41] after the Public Prosecutor had lodged the corresponding appeal primarily grounded on the violation of several international legal instruments of different scope and the existence of international legal fraud regarding the paternal parentage.[42] According to this court, the fraud in the attribution of parentage arising from a contract that should be considered null and void as contrary to Spanish public policy, cannot lead to the establishment of parentage in favour of the father. He should go through the appropriate channels to determine the biological link in accordance with Spanish law and, once parentage with the husband had been determined before a court, adoption in favour of his wife could be requested.

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39 STC 28/2024, 27 February 2024.

40 AJPI 28 Madrid 15/2018, 15 January 2018.

41 AAP Madrid no. 279/2019, 30 May 2019.

42 Legal fraud is regulated in Spanish Private International Law in Art. 12.4 CC: "*The use of a conflict rule in order to circumvent a mandatory Spanish rule shall be considered as fraud of law*". This provision has been interpreted in an extensive manner including the circumvention in bad faith of any rule of the Spanish legal system. See C. Esplugues Mota and G. Palao Moreno, *Derecho internacional privado* (17th edition, Tirant Lo Blanch, Valencia, 2023), at 261. In the absence of an explicit solution for international cases, Article 6.4 CC is to be applied: "*Acts carried out under a rule which pursue a result prohibited by, or contrary to, the legal system shall be deemed to be carried out on legal fraud and shall not prevent the due application of the rule which it was sought to circumvent.*" Translations of the author.

The decision of the Madrid Provincial High Court was challenged before the Constitutional Court alleging the infringement of the right to effective judicial protection, in terms of the right to a reasoned and well-founded judicial decision and the right to a due process (Article 24 CE). The appellants also claimed that their sons were being treated differently since the adoptive parentage of the youngest one, also born in Kiev, had already been confirmed by the same Court of First Instance n. 28 of Madrid.[43] Strangely enough, the Public Prosecutor did not challenge this decision unlike decided in the brother's case.

From our point of view, the starting point of the reasoning of the Constitutional Court is correct: the case did not involve the possible refusal to register the birth and parentage of a minor in the Spanish Civil Registry based on certificates from a foreign registry nor the refusal to recognize parentage relations declared by a foreign court, but the adoption by the wife of the husband's son as registered in the Spanish Civil Registry, where the registered data are presumed to be correct.[44] The Court upholds the fulfilment of the requirements for the adoption to be constituted[45] and in order not to prolong the situation of legal uncertainty the child had been suffering, it simply declares the nullity of the decision of the Provincial High Court and confirms the adoptive parentage originally established by the Court of First Instance.

The fact that the Court explicitly adopted the fastest solution to avoid undue delay affecting the child deserves special attention. The legal uncertainty surrounding this matter together with the controversial application of undefined legal concepts, such as public policy or best interest of the child,[46] have hampered in many cases the adoption of prompt measures thus leaving many children in an undesirable legal limbo for too long. The time factor is important in this context, as derived from the ECHR case law. This idea is thoroughly clarified in the recent case *C. v. Italy* of 31 August 2023,[47] where the Court noted that the domestic courts had been unable to take a swift decision to protect the applicant's interest in having her legal relationship with her biological father established. The child, aged four, had been kept since birth in a state of protracted uncertainty as to her personal identity and, as she had no legally established parentage, was considered a stateless person in Italy. The Court therefore held that, despite the margin of appreciation afforded to the State, the Italian authorities had failed to fulfil their positive obligation to ensure the applicant's right to respect for her private life under the Convention. Hence, the States are sovereign for regulating the possible recognition of legal parentage derived from surrogacy agreements but the best interests of the child demand effectiveness and celerity in this determination.[48]

43 AJPI Madrid no. 265/2018, 21 June 2018.

44 See Art. 113 Cc and Art. 16 and 19 Law 20/2011, 21 July 2011, of the Civil Registry (BOE no. 175, 22 July 2011).

45 Art. 175 and 176.2.2 Cc.

46 C. Azcárraga Monzonís, 'La gestación por sustitución en el Derecho Internacional Privado español. …', *supra* n. 11, 673-710.

47 C. v. Italy (n. 47196/21) ECHR (2023), accessed 5 December 2024.

48 A.J. Vela Sánchez, 'El Tribunal Constitucional ampara a una madre de intención a quien se denegó la adopción del hijo de su marido nacido de convenio de gestación por sustitución. A propósito de la Nota informativa del Tribunal Constitucional nº 19/2024, de 27 de febrero', 10487 *Diario La Ley* (2024), at 7.

Along with the need for swift action, the importance of implementing the gender perspective in this field has also been highlighted by the magistrate who issued a dissenting opinion to the STC 28/2024. Mrs María Luisa Balaguer asserts that the Court's reasoning lacks gender perspective. Its approach makes invisible the structural problem that exists in the Spanish legal system regarding foreign women who are not protected by the basic guarantees of our constitutional system. The Court considers the rights of the child as well as the rights of the adoptive mother, but forgets about the rights of gestational women, whose voices are not heard by Spanish courts whereas they should at least be protected by the Constitutional Court. She considers that the accurate interpretation of public policy in this matter should be articulated on two fundamental ideas: on the one hand, an adequate understanding of the best interests of the minor, not implying the automatic recognition of the effects of a contract that is null and void in Spain; and, on the other hand, a correct evaluation of the conditions under which the contract has been signed in the country of origin assessing the gender approach and the rights of the pregnant woman.

The magistrate confirms that the existing legal framework in this field is defective and leads to considerable legal uncertainty. This situation should prompt the legislator to act effectively and immediately bearing in mind the constitutional limits that she points out in this opinion, but until the legislator provides for a regulation, she assumes that the role of judicial authorities becomes crucial. And in this sense, she argues that the judicial interpretation of the existing framework should be based on four essential elements: 1) the best interests of the child, individually considered; 2) the best interests of children to be protected from actions that violate their dignity as a group; 3) the guarantee of the principle of human dignity of both the child and his biological mother; and 4) the guarantee of the rights of the biological mother, so that it can be concluded that they were not violated in the course of the entire gestational process.

Taking the above into account, we agree with the magistrate that the Constitutional Court has probably lost a very good opportunity for shaping the public policy concept in cross-border surrogacy cases based on constitutional arguments, seeking the proper balance of the constitutional values at stake. However, even though this approach would have been desirable, we also believe that the Court has rightly focused on the specific situation it was requested to, unlike the Supreme Court Judgments rendered in 2014 and 2022, which were clearly general and exemplary and did not focus on the needs of the children involved in those cases. Because once the child is born and the *de facto* family has been created abroad, is there really any room for any solution other than the recognition or establishment of parentage in Spain?

Regarding this case, the Constitutional Court's approach has led to the confirmation of the adoptive parentage in favour of the wife of the biological father under the general rules governing the adoption and consequently, surrogacy has become effective again in the Spanish system by circumventing the prohibition of Law 14/2006. This doctrine has been said to confirm the validity of surrogacy agreements entered by Spanish citizens abroad, as well as the feasibility and admissibility of the determination of legal parentage in these cases.[49] In brief, it is a fact that paternity claims, the recognition of

[49] A.J. Vela Sánchez, 'Tribunal Constitucional español y convenio de gestación por sustitución. A propósito de la Sentencia del Tribunal Constitucional 28/2024, de 27 de febrero', 10507 *Diario La Ley* (2024), at 4 and 10.

foreign judgments and the possible adoption of the child ensure the recognition or the establishment of parentage in Spain of children born abroad through surrogacy. Along with this, other scenarios in which the Spanish authorities have also accepted other peripheral or indirect effects under the doctrine of the mitigated public policy will be addressed in the next section.

(3) Mitigated Public Policy

Surrogacy has deployed some peripheral effects in Spain in cross-border cases despite its general prohibition in our legislation. The *ordre public atténué* doctrine has been primarily applied in the field of (a) social security and maternity/paternity benefits, and recently, the Supreme Court has upheld another positive outcome in relation to (b) the change of the child's place of birth.

(a) Social Security Benefits

Surrogacy has been granted efficacy in Spain in the field of social security benefits. The Social Chamber of the Supreme Court has unified doctrine in a positive sense granting the maternity/paternity benefit in cross-border surrogacy cases and in doing so it has provided for a unified criterion that clarifies the situation in Spain in this field on the basis of the necessary protection of all children under the principle of the best interest of the child, despite the opposite positions ruled in lower instances and the absence of an explicit reference to surrogacy in the relevant legislation.[50]

The *ordre public atténué* doctrine was applied by the Social Chamber of the Supreme Court for the first time in two cases ruled in 2016 regarding children born in the United States of America (California, USA) and India. The first Judgment of 25 October 2016 referred to a Spaniard who contracted assisted reproduction in India using his genetic material (STS 881/2016);[51] the second Judgment of 16 November 2016 involved a Spanish female worker with a child registered at the Spanish Consulate in Los Angeles (STS 953/2016).[52] Although the Spanish Social Security initially refused the requested benefits, the Supreme Court upheld the applicants, holding that the rules shall be interpreted in an integrated manner, in the light of the case law of the ECHR, the European Court of Justice (ECJ)[53] and various international, constitutional and regulatory provisions.

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50 N. Sirvent Hernández, 'Gestación por sustitución y derecho a prestaciones de seguridad social: razones para una regulación urgente', 205 *Revista Española de Derecho del Trabajo* (2018) 69-104, at 4, 19, 21-22.

51 STS 881/2016, 25 October 2016. It contains three dissenting opinions; one of them in favour of dismissing the appeal due to legal fraud.

52 STS 953/2016, 16 November 2016. It contains two dissenting opinions in favour of dismissing the appeal.

53 ECJ Judgments in Cases C-167/12 (ECLI:EU:C:2014:169) and C-363/2012 (ECLI:EU:C:2014:159), both dated 18 March 2014. Further analysis in J. Gorelli Hernández, 'La prestación por maternidad en los casos de gestación por sustitución o maternidad subrogada (vientres de alquiler)', 1 *Revista Aranzadi Doctrinal* (2017); M.J. Moreno Pueyo, 'Maternidad subrogada y prestación de maternidad', 116 *Revista del Ministerio de Empleo y Seguridad Social* (2015) 21-56, at 35 ff; A. Hernández Rodríguez, 'Determinación de la filiación de los nacidos en el extranjero mediante gestación por sustitución: ¿Hacia una nueva regulación legal en España?', 6-2 *Cuadernos de Derecho Transnacional* (2014) 147-174, at 165 ff.

This Chamber has considered that the existence of a family unit in which the children have *de facto* family relations with the appellants should lead to a solution allowing the development and protection of those family bonds. Hence, granting the maternity/paternity benefit is deemed to be a suitable means of doing so. If this protection is not granted to a child born after a surrogacy contract, this would result in discrimination on birth grounds, in contravention of Articles 14 and 39.2 CE, the latter of which provides that public authorities shall ensure the full protection of children, equal before the law regardless of their parentage.[54]

In brief, the Supreme Court has ruled in this order that there is no evidence of fraudulent or criminal behaviour, beyond the unlawfulness involved in surrogacy itself,[55] and that caring for the children should be the predominant point of view when it comes to social security benefits. It is considered that in this area the focus should not be put on the prohibitions of registration or on the surrogacy contract itself and that two perfectly distinct levels should be distinguished: on the one hand, the one concerning the surrogacy contract and its nullity, and, on the other hand, the situation of the child. The nullity of the contract cannot undermine the child, among other reasons, because our Labour Law already recognizes certain effects in cases of legal transactions affected by nullity,[56] furthermore it is also open to foreign institutions declared by foreign judicial or administrative resolutions whose purpose and legal effects are those foreseen for adoption and pre-adoptive fostering[57] and, above all, because the best interests of children must guide any decision affecting them.

However, the aforementioned Judgments, far from being unanimous, are accompanied by dissenting opinions that symmetrically question the reasoning underlying the result reached by the majority of the Chamber.[58] This shows, once again, the controversial nature of this matter and the need for the legislator to take the lead in setting clear criteria in this area. Especially considering that, in addition, this positive doctrine of the Social Chamber of the Supreme Court experienced in 2019 a period of uncertainty because of the novelties brought by the Royal Law-Decree 6/2019.[59] This regulation merged the former maternity and paternity benefits into a single "childbirth and childcare benefit" (*prestación por nacimiento y cuidado de menor*) and extended the periods of entitlement to the parent other than the biological mother as well as the requirements for accessing the benefit.

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54 STS 953/2016 (FJ 9).

55 STS 881/2016 (FJ 9): In this case, there is no evidence of fraudulent conduct, abuse of rights or illegal obtaining of benefits that could alter the result, as would have occurred if a duplication of benefits was sought or in cases where there was a conflict between biological and intended parents.

56 STS 953/2016 (FJ 9): by recognising the right to remuneration for time already worked under a contract that turns out to be void, by establishing a widow's pension in certain cases of marriage annulment or by limiting the effects of the absence of a work permit.

57 Art. 2.2 Royal Decree 295/2009, 6 March 2009, on the economic benefits of the Social Security system for maternity, paternity, risk during pregnancy and risk during breastfeeding (BOE no. 69, 21 March 2009).

58 J.R. Mercader Uguina, 'La creación por el Tribunal Supremo de la prestación por maternidad subrogada: a propósito de las ssts de 25 de octubre de 2016 y de 16 de noviembre de 2016', 9-1 *Cuadernos de Derecho Transnacional* (2017) 454-467, at 460.

59 Royal Law-Decree 6/2019, 1 March 2019, on urgent measures to guarantee equal treatment and opportunities between women and men in employment and occupation (BOE no. 57, 7 March 2019).

In principle, it follows that all births are covered by this benefit, but the key question seems to be what is meant by the term "biological mother", whether it is a mother who has given birth by biological birth or, in a broader sense, a mother who has a genetic link with the child, regardless of the method used.[60] Some authors have wondered about the correct interpretation of this new rule and have expressed doubts as to whether an integrative solution to situations arising from surrogacy could continue to be supported until future jurisprudence clarifies the situation.[61] To date, however, it appears that despite the absence of an explicit regulation covering these cases and the amendment that took place in 2019, the interpretation remains the one defended by the Supreme Court since 2016.[62] In our view, this is the right position because every child should be entitled the right to benefit from the proper care regardless of his origin.

(b) Changing the Place of Birth of the Adopted Child

On 17 September 2024, the Civil Chamber of the Supreme Court (STS 1141/2024)[63] upheld the position of a Spanish married couple who entered a surrogacy contract in Ukraine. This Judgment exemplifies the situation where surrogacy is not the object of the controversy as such nor directly accepted (nor rejected) but it is indeed granted a positive treatment based on the mitigated public policy despite the prohibition of surrogacy contracts in our legal system. In this case, the ruling takes place in the framework of the Civil Registry after the legal parentage had already been confirmed by both parents (paternal biological parentage and maternal adoptive parentage following the adoption of the husband's child the biological father's child). These parents of a child born in Ukraine applied for the transfer of the birth registration of the minor from the Central Civil Registry to the Civil Registry of their domicile requesting the modification of his place of birth (Kiev) to the place of the parents' domicile (Barcelona). They also requested that neither the surrogacy nor the adoption were included in the birth registration.

The Civil Registry refused to change the place of birth, and this refusal was subsequently confirmed by the General Directorate of Legal Certainty and Public Faith on 21 February 2022, so the parents challenged the decision before the competent courts. This claim was dismissed first in November 2022 by the Court of First Instance n. 51 of Barcelona and then by the Provincial High Court of Barcelona in June 2023, so that they appealed in cassation before the Supreme Court. The Supreme Court has upheld the parents' position, which was based on two main arguments. On the one hand, the appellants plead the infringement of substantive rules of the Civil Code (Article 4 Cc on

60 D. Tomás Mataix, 'La problemática derivada del reconocimiento de los efectos del contrato de gestación subrogada desde la perspectiva del Derecho del trabajo y de la Seguridad Social', 11-2 *Cuadernos de Derecho Transnacional* (2019) 348-359, at 357.

61 *Ibid.*, pp. 357-358; L. Sales Pallarés, 'La pérdida del interés (superior del menor) cuando se nace por gestación subrogada', 11-2 *Cuadernos de Derecho Transnacional* (2019) 326-347, at 340.

62 E. García Testal, 'Prestaciones por nacimiento y conciliación de la vida laboral y familiar', in R. Roqueta Buj and J. García Ortega (dir), *Derecho de la Seguridad Social I* (Tirant Lo Blanch, Valencia, 2024), 323, at 326-327.

63 STS 1141/2024, 17 September 2024.

the analogical application of rules) and the (former) Civil Registry Law,[64] claiming that the requirements of *de facto* and *de jure* identity with international adoptions where the transfer of the place of birth was explicitly contemplated were met; on the other hand, they plead the infringement of the child's right to personal and family privacy and the free development of his personality.

The Supreme Court endorsed that the fact that the child was born through surrogacy was not relevant in the case under appeal since the parentage of the child had not been established on the surrogacy contract but on the biological link between the child and his father and the maternal parentage on the adoption of the spouse's child. These two ways of determining parentage are allowed in the Spanish legal system and the Court stressed that they respect the dignity of the child. Taking the above into account, it asserted that the possible violation of public policy was not a problem in this case despite the existence of a surrogacy contract at the origin because the biological link of the paternity and the subsequent maternal adoption led to a different situation than the one prohibited in Article 10 Law 14/2006.

On these premises, the Supreme Court considered applicable by analogy the provisions of the Civil Registry Law that allowed this change of the place of birth in intercountry adoptions. Analogously, although the referred adoption has no cross-border nature, the place of birth of the child in a remote country with which the parents have no other relationship, would also denote the adoptive nature of the filiation and the circumstances of the origin of the minor. The registration of a specific place of birth abroad, which would appear on the national identity document or passport, would violate the right to privacy of the minor, as it would reveal the existence of the adoption and the circumstances relating to his particularly sensitive origin (in this case, having been conceived by surrogacy) and would constitute discrimination with respect to other parentages (namely, intercountry adoption).

Even though this rationale is refutable on the basis of the children's right to know their origins,[65] this interpretation goes in line with several provisions of the Spanish Constitution like Article 18.1 CE, insofar as it allows the effectiveness of the right to personal and family privacy of the minor. Also, the above-mentioned Article 14 CE, that prohibits discrimination based on birth, and Article 39.2 CE, which refers to the protection by public authorities of all children, who shall be treated equally before the law regardless of their parentage.

The new Civil Registry Law 20/2011,[66] does not foresee this same provision explicitly but this kind of requests seeking the change of the place of birth of a child born abroad who is adopted in Spain could still be pled under Articles 77 and 307 of the Regulation

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64 Art. 20.1 of the former Civil Registry Law of 1957 (BOE no. 151, 10 June 1957): "*In case of international adoption, the adopter or adopters may request by mutual agreement that the new registration includes their domicile in Spain as the place of birth of the adopted child.*" Translation of the author.

65 Art. 180 Civil Code, paragraphs 5 and 6. See C. Azcárraga Monzonís, 'La adopción nacional e internacional desde la perspectiva autonómica. El caso de la Comunidad Valenciana', 17 *Actualidad Jurídica Iberoamericana* (2022) 1034-1069, at 1061 ff. It has also been asserted that surrogacy is incompatible with the children's right to know their origins in G. Iruegas Prada, 'El derecho a conocer sus orígenes: una manifestación del interés superior del menor', 37 *Revista Boliviana de Derecho* (2024) 476-499, at 494.

66 Civil Registry Law 20/2011, 21 July 2011 (BOE no. 175, 22 July 2011).

of the Civil Registry Law of 1958.[67] Therefore, the recognition of some sort of effects based on the analogous treatment of surrogacy to intercountry adoptions is still possible in our legal system when it comes to this particular issue the change of place of birth . Concerning other aspects, we believe that making these two legal institutions equivalent is far from being possible and that it is very dangerous to go on exploring possible parallels.

International adoptions are now subject to very strict procedures involving the authorities of the two countries concerned (the country of residence of the adoptive family and the country of residence of the child), who are responsible for ensuring that all the conditions for the adoption are met, that the consents are strictly checked, that the biological mother has given her consent after the birth of the child and the adoptive parents are eligible and suitable to adopt.[68] By contrast, as seen in this research, surrogacy cases raise serious concerns about the violation of fundamental rights. Therefore, whereas intercountry adoption and cross-border surrogacy may have some minor parallels, they cannot be made equivalent in the present state of affairs. For now, this new ruling of the Supreme Court evidences another positive inclination towards the indirect recognition of surrogacy in our system based on the mitigated public policy doctrine and moreover, this is due to an interpretation which considers the parallels with intercountry adoption, an institution that is now fully established in our system which also underwent a normative evolution until its full recognition in Spain. Is this happening again?

(4) The Inconsistent Treatment of Surrogacy Contracts in Case Law

"Surrogacy contracts" refer in general to a wide category of agreements that include different legal relationships among the various persons involved in commercial surrogacy cases. These may refer to, first, the contract signed between the intended parents and the gestational woman, second, the one between the gestational woman and the agency, and third, between the agency and the intended parents. Which ones are covered by Article 10.1 Law 14/2006 and therefore are deemed to be null and void?

To answer this question, it is relevant to start reminding the content of Article 10.1 Law 14/2006: "*The contract under which surrogacy is agreed, with or without a price, by a woman who renounces to maternal parentage in favour of the other contracting party or a third party, shall be null and void.*" The wording of the rule, and therefore the nullity it enshrines, seems to cover two types of contracts. On the one hand, the one concluded between the intended parents and the gestational woman; and on the other hand, the one agreed between this woman and the agency, since the provision refers to contracts under which a woman renounces to maternal parentage "*in favour of the other contracting party* (woman/intended parent/s) *or a third party* (woman/intermediary agency)." Hence,

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67 Decree of 14 November 1958 on the Regulation of the Civil Registry Law (BOE no. 296, 11 December 1958). J.J. Pretel Serrano, 'Comentario a la sentencia del Tribunal Supremo 1141/2024, de 17 de septiembre', 5 October 2024, accessed 5 December 2024.

68 See The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (BOE no. 182, 1 August 1995), which establishes a network of Central Authorities appointed by the contracting parties.

the material scope of application of Article 10 Law 14/2006 raises doubts about the third kind of contract referred to above, thus extending those doubts also to their possible nullity in Spanish law: does the nullity also cover the contract signed between the intended parents and the intermediary agency?

In principle, this agreement could be qualified as a contract for the provision of services. However, several recent decisions like the Judgment of the Provincial High Court of Barcelona of 15 January 2019 (SAP Barcelona 74/2019)[69] show a very different scenario. This Judgment relates how the company SUBROGALIA, S.L. commits to a result (the birth of a baby) even including a clause in its contracts guaranteeing the success of the transaction. This decision concerns two contracts concluded in Spain between two couples and the company in question with the aim of assisting them during the procedure, which was expected to finish with a baby born in Mexico. In this case, as also happened in the previous procedure that took place before the Court of First Instance n. 55 of Barcelona, the Provincial High Court did not deal with the validity or nullity of the contracts. Surprisingly enough, it assessed the possible contractual breaches in their enforcement without even questioning whether they should deploy efficacity or not.[70]

The two families filed a lawsuit against the company because the purpose of the contract was not fulfilled. They did not achieve to get a baby, so they claimed the existence of a breach of contract and its termination for this reason, claiming the refund of the amounts they had already paid and compensation for damages. Furthermore, among other circumstances that occurred during the procedure that prevented the fulfilment of the contracts, the Mexican State of Tabasco forbid surrogacy at the time, so the company proposed them to continue in the USA changing the economic terms previously agreed. So, are these contracts valid in our country considering the treatment they are given in this judgment? Do they fall within the scope of application of Article 10 Law 14/2006? If so, they should have been declared null and void and therefore not granted any legal consequence nor being object of a contractual breach procedure. At least, this seemed clear enough regarding the contracts signed in Mexico between the parents and the gestational women, which were also provided by the parties in the procedure heard before the Provincial High Court. However, again, the court did not consider their possible nullity either.

These same doubts also arise regarding the Judgment of the Supreme Court of 16 May 2023 (STS 754/2023),[71] where the reasoning of the Court does not include any assessment or criticism regarding the possible nullity of the contracts. The plaintiff brought a double action for the establishment of parentage of the plaintiff's paternity in respect of the two biological children of his former partner and the paternity of his former partner in respect of the plaintiff's two biological children, all of whom were born through surrogacy. The claim was rejected by the Court of First Instance n. 4 of Pozuelo de Alarcón (Madrid) and by the Provincial High Court of Madrid. The latter court

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69 SAP Barcelona 74/2019, 15 January 2019. See also SAP Barcelona 14112/2019, 28 November 2019.

70 M.E. Sánchez Jordán, 'La necesaria doble aproximación a la gestación subrogada. En particular, de los olvidados contratos de gestación por sustitución', 4 *Indret: Revista para el Análisis del Derecho* (2020) 116-146, at 126.

71 STS 754/2023, 16 May 2023.

asserted that the parentage was not denied due to the nullity of the surrogacy contract according to Article 10 Law 14/2006 but because neither of the fathers had participated in the contract signed by the other or manifested the acceptance to undertake the surrogacy procedure of the other member of the couple. Again, the possible nullity of the contract was not considered to be a relevant element, because in this case the children's parentage was already recognized in the Spanish legal system and was not questioned before the Court.

The Supreme Court recalls that there was no legal uncertainty concerning parentage of all the children involved, the two pair of brothers, because it had already been established in relation to each biological father separately before the case was even brought before the Court of First Instance. Possession of status is declared not to be applicable because the parties were perfectly aware of the separate parentage they had established with their respective children and furthermore they would have been able to legalise the cross parentage for years through other means, such as the adoption of the couple's children. Moreover, the claim was filed after the couple had split and the socio-affective bond of the children with each other and with the partner of their respective fathers was not deemed in itself the basis for the establishment of legal parentage, and even less so when this legal situation, and the rights and obligations it entails, did not exist before the break-up of the cohabitation.

In brief, the claim pursued to extend the parentage based on legal solutions accepted by the Spanish legislation and it was rejected in every instance without even questioning the nullity of the original surrogacy contracts. It can therefore be concluded that the Supreme Court has already heard cases in which the implementation of effects of surrogacy contracts performed abroad has been standardized as a basis on which elucidate subsequent issues, either parentage itself as happens in this case or other minor issues like the change of the place of birth as explained in a previous epigraph. The validity of these contracts is not questioned neither on the basis of Article 10.1 Law 14/2006 nor regarding the possible breach of essential contractual elements.[72]

Hence, the inconsistent treatment of surrogacy contracts before Spanish courts leads to question the real scope of their nullity. While some declare them null and void, others hear cases on breaches of contract. It is obvious that under the current regulation not enough is being done to prevent the development of this practice in our country if no more measures are adopted to limit this kind of commercial transactions. The next question that arises in this respect is whether it is really in the Spanish legislator's intention to prohibit this practice. In the meantime, it seems that the judicial power is not being clear enough in establishing the desirable boundaries. By doing so, the message sent, both to society in general, and to future litigants in similar cases, is that surrogacy and the economic and legal-contractual activity that takes place around it, are perfectly valid in our country.[73]

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[72] M.E. Sánchez Jordán, *supra* n. 70, at 135. The author claims that, according to Spanish law, the nullity of these contracts is also due to the breach of some essential contractual elements relating to consent and its object.

[73] A. Gálvez Criado, '¿Sigue siendo nulo en España el contrato de gestación subrogada? Una duda razonable', 9444 *Diario La Ley* (2019), at 9. The author differentiates the cases in which the child is born from those in which there is not a child to protect. In the latter case, the one tackled by the Barcelona Provincial High

(B) IS SURROGACY FORBIDDEN IN SPAIN?

In a nutshell, a contract that is expressly prohibited in the Spanish legislation is becoming effective in our country in cross-border cases, so that the initial question can only be answered in the negative: surrogacy is not prohibited in Spain. This breach of the general rule occurs in cross-border cases, sometimes in the context of the recognition of judgments, sometimes because of paternity claims, sometimes with the aim of establishing parentage, sometimes to obtain other types of effects such as social security benefits or damages for breach of contract, but in the end all these possibilities are accepted despite the general prohibition established by Article 10 Law 14/2006. This confirms the existence of serious inconsistencies in the Spanish current legal framework and evidences a complex panorama that generates legal uncertainty for which the legislator is responsible, and which is solely within its competence to resolve. As Mrs Balaguer accurately asserted in the STC 28/2024, "it is contrary to the legal certainty of Article 9.3 of the Spanish Constitution that the same legislator that prohibits a practice in Spain does not provide sufficient restrictions for equivalent practices carried out outside our country, because this legalizes de facto, through inaction and by way of the necessary protection of minors, what is considered illegal in our system".[74]

Legislative action is therefore imperative, as is ensuring that the relevant legislative measures are taken from a human rights perspective. Any legislation adopted in this area should seek to limit what is seen by many as a serious problem of human rights abuse. Indeed, it is clear that the human rights of children and women are threatened by this practice and any measure adopted in this area should seek to address this worrying situation.

As far as children are concerned, we share the ECHR's position in favour of the confirmation of parentage, as swift as possible so as not to prejudice the rights of children. In this vein, the various solutions offered by the Spanish system seem to protect them from a legal point of view, since the parental link with the intentional parents is guaranteed by the various means described above, at least in cases where a biological relation with the child can be proven. This approach is necessary because establishing parentage by birth, as provided for by Article 10.2 Law 14/2006 if this provision is applicable at all to cross-border cases , makes no sense within a legal system that also includes different ways to establish parentage beyond this traditional approach. The "*mater semper certa est*" principle allows for exceptions in the Spanish model, as should be the case here, at least in cross-border cases, for the sake of the best interests of the child.

Article 10.3 Law 14/2006 on paternity claims by biological fathers provides a more coherent solution within the Spanish system. The State's wide discretion in the matter of legal parentage is limited where there is a biological link between the parents and the child. However, it is more complicated to bet on a solution when there is no genetic

Court, he considers that it seems that purely contractual legal conflicts can be raised regardless of the nullity of the contract "thus normalising without the slightest qualm an economic activity that consists of agreeing a specific (and large) remuneration for services that are contrary to our laws".

74 Translation of the author.

link with the prospective parents. Should the creation of a *de facto* family be sufficient to establish parentage? Should the temporal criterion i.e. the length of time the child has lived with the intended parents be relevant in establishing parentage, for instance through possession of status? These criteria, if applicable, should be confirmed or disregarded by the legislator.

As for women who accept these transactions, it is well known that, apart from the few altruistic cases that have occurred in some countries, the vast majority of them accept abusive conditions to satisfy the parental desires of citizens living abroad, so that in our opinion it is safe to say that this reality is a breeding ground for new forms of modern slavery. And, just as serious, the Spanish legislator is allowing it to happen. The STS 835/2013 already referred to the undesirable commodification of women and the STS 1153/2022 boosted the gender perspective by reproducing literally some of the clauses included in the surrogacy contract performed in Mexico. The woman's sexual and reproductive rights were completely nullified and her right to health was eroded, severely undermining her dignity and free development, thus calling into question a real and valid free consent.

However, this accurate reasoning was the basis for an inappropriate final decision as was also the case in the 2014 Judgment which prevented the best interests of the children involved from being adequately protected. These two Judgments rejected the claims because they ruled against surrogacy in general, forgetting the rights of the children whose lives depended on such decisions. Consequently, the possible future regulation governing cross-border surrogacy cases should ponder two elements for achieving a proper balance in the treatment of the cases where children already exist. On the one hand, the human rights perspective and in particular, the gender perspective; but also, on the other hand, which is the best solution for the child the case refers to. This requires a case-by-case assessment by legal operators and leads to another interesting point for discussion: should the solutions be different depending on the presence or absence of a child? Probably. As mentioned above, once the child has been born and the *de facto* family has been created abroad, and in many cases has been living in Spain for a long time, we believe that there is no room for any other solution than the recognition of parentage. The *fait accompli* doctrine is the only respectful solution for children's rights, but unfortunately, not for impoverished women because it does not allow to assess the situation that led to the conception of the child, often associated with a woman in need, forced by her life circumstances to enter this kind of transactions.[75]

As we have seen, many aspects remain to be resolved in a desirable future regulation. However, despite the urgency of adopting regulatory standards for international cases, there are currently no national legislative or policy initiatives dealing with cross-border surrogacy cases. Do they exist at international level? If so, have they addressed this issue from the gender perspective? Promoting cooperation within international bodies with the objective of harmonising rules for cross-border cases is particularly useful for citizens involved in private international relationships. However, discussing and reaching common views on sensitive issues such as this one is extremely difficult and may lead to a consensus that could be far from the ideal solution from a human rights perspective.

[75] C. Azcárraga Monzonís, 'La gestación por sustitución en España…', *supra* n. 13, at 66.

The work done so far by the EU or the Hague Conference on Private International Law (HCCH) is extremely important because the current legal uncertainty needs to be addressed from a legal perspective. If the national legislator does not promote this legislative action, we are forced to examine what is happening at the international level. Let us take a brief look at the work developed so far by these two organisations in this field; this will help us to conclude this study with some final remarks.

(C) WORK IN PROGRESS AT INTERNATIONAL LEVEL AND CONCLUDING REMARKS

The EU has shown a strong position against commercial surrogacy since time ago. The European Parliament Resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter[76] condemned the practice of surrogacy because it "undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity" and considered "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".

More recently, in its Resolution of 5 May 2022 on the impact of the war against Ukraine on women,[77] it recalled "the serious impact of surrogacy on women, their rights and their health, the negative consequences for gender equality and the challenges stemming from the cross-border implications of this practice, as has been the case for the women and children affected by the war against Ukraine" and asked "the EU and its Member States to investigate the dimensions of this industry, the socio-economic context and the situation of pregnant women, as well as the consequences for their physical and mental health and for the well-being of babies" and "the introduction of binding measures to address surrogacy, protecting women's and newborns' rights".

Therefore, the position of the EU against commercial surrogacy is crystal clear. Indeed, it has been confirmed at legislative level with Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, [78] that has included surrogacy in the concept of "exploitation" stated in Article 2 Directive 2011/36/EU.[79] The current wording of this provision, paragraph 3, reads as follows: "*Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs*, or the exploitation of surrogacy, *of forced marriage, or of illegal adoption*". The

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76 EP Resolution of 17 December 2015 (2015/2229(INI)).

77 EP Resolution of 5 May 2022 (2022/2633(RSP)).

78 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (OJ L 2024/1712, 24 June 2024).

79 Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (OJ L 101, 15 April 2011).

question remains as to whether this regulation will have an impact on the substantive law of the EU Member States that currently accept this practice, albeit in the altruistic modality, and/or the possible consequences that this regulation may have on the possible recognition of cases that have taken place abroad.

To date, however, the gender perspective takes a back seat in European PIL. The fact that the child may already have been born by the time the case is considered determines the outcome. Once born, the focus is on the protection of these children and the possible recognition or establishment of parentage in cross-border relationships regardless of the way they were born or conceived or the type of family they are part of. In this vein, the ECJ has supported the recognition of social security benefits[80] and the new Proposal for a Regulation on parentage does not exclude surrogacy from its scope of application. The inclusion within its scope of protection of surrogate-born children and the requirement of the cross-border recognition of rainbow families have proved to be the two main points of contention but the Proposal had to include all children and, above all, the children of "alternative families" given that the latter are disproportionately affected by the problem of non-recognition of parenthood in the EU.[81]

The Proposal for a Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood of 2022[82] covers all PIL questions whilst leaves untouched the substantive family laws of the EU Member States. For its purposes, parentage may be biological, genetic, by adoption or by operation of law. It covers the recognition of a child's parentage irrespective of the way he was conceived or born and his type of family. Nonetheless, it is imperative to recall that according to Article 3.3 "*This Regulation shall not apply to the recognition of court decisions establishing parenthood given in a third State, or to the recognition or, as the case may be, acceptance of authentic instruments establishing or proving parenthood drawn up or registered in a third State.*"

Recognition of cases arising in third countries would certainly have provided a quicker outcome for these families, but EU law is not yet ready to accept common standards for the recognition of decisions from outside the EU. However, the doors have not been closed to establishing parentage before European national courts in cases taken place abroad by starting the parentage procedure on EU territory, because under this Proposal "the parenthood may feature elements of connection also with third States"[83] beyond the PIL field of recognition. This happens, for instance, when establishing the parentage derived from a cross-border surrogacy arrangement where the child's residence is located in the EU (Article 6 general jurisdiction) and the case is governed by the Law of a third state that accepts this practice in the commercial modality as the law of the state of birth or the law of the state of the habitual residence

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80 See *supra* n. 53.

81 A. Tryfonidou, 'The cross-border legal recognition of parenthood under European law: current law and future prospects', 46-2, Journal of Social Welfare and Family Law (2024) 267-285, at 279-280 [https://doi.org/10.1080/09649069.2024.2344936].

82 COM(2022) 695 final, accessed 5 December 2024.

83 D. Danielli, 'Third-State connections" in the proposal for an EU regulation on parenthood: more than a regime of circulation of the status between Member States?", 15-2 *Cuadernos de Derecho Transnacional* (2023) 1387-1399, at 1393.

of the person giving birth (Articles 16 universal application and 17 applicable law).

Indeed, it has been argued that the applicable law rules of Article 17 clearly aim at preserving the validity of parentage in the context of assisted reproductive technology or international surrogacy arrangements[84] and to this end it is very interesting to read how the two paragraphs of this Article ensure a positive outcome in cross-border cases for the two parents of biparental families. It embodies several options for establishing parentage once the *de facto* family is in the EU and this outcome guarantees the continuity of parentage throughout the EU. All this in light of Recital 18, which incorporates the ECHR doctrine, and with the possible recourse to public policy but limited by the right to non-discrimination and the best interests of the child (Articles 22.2 applicable law and 31.1 recognition).

Once this positive result has been obtained in one Member State, that "recognised parentage" will become a "circulating parentage" in the EU.[85] To this end, the rules on recognition and the creation of a European Certificate of Parentage ensure circulation within the EU. This outcome respects the rights of children as it preserves the continuity of their parentage in cross-border cases, a position that is in line with the international trend in this area but, at the same time lacks from gender perspective because it does not address the exploitation of women that is taking place. We agree that it is necessary to respect the transnational identity of children and to stop ignoring the existence of all types of families that exist today. Among other negative consequences, the opposite solution prevents the child from acquiring the nationality of the non-recognised parent or inheriting that parent's property, while the non-recognised parent does not benefit from any administrative privileges in relation to the child, such as travelling alone with him, consenting to medical care, or opening a bank account for the child.[86] In doing so, however, the legislator leaves the gender perspective out of the fight, a serious concern that would also need to be addressed legally.

Truth is that one of the grounds for refusal of recognition stated in Article 31 of the Proposal could be interpreted as taking the position of the pregnant woman into account, albeit weakly. The recognition of a court decision given in another EU Member State shall be refused (…) "c) *upon application by any person claiming that the court decision infringes his fatherhood or her motherhood over the child if it was given without such person having been given an opportunity to be heard.*" Yet, although it can be seen as a step forward, this is not enough from the human rights perspective. These women may have had the legal capacity to sign these contracts and may have been given the opportunity to be heard, but the struggle is for their consent to be considered truly valid.

Consequently, in the EU, as happens in the Spanish model, the inconsistency of opposing surrogacy as contrary to human rights and then facilitating the recognition of these situations in international private relations cannot be overlooked. Again,

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84 European Group for Private International Law, "Observations on the Proposal for a Council Regulation in matters of Parenthood", 2023, at 2. Accessed 5 December 2024.

85 S. Álvarez González, 'La propuesta de Reglamento europeo sobre filiación. Una presentación crítica', 10-3 *Revista de Derecho Civil* (2023) 171-200, at 196.

86 A. Tryfonidou, *supra*, n. 81, at 269.

substantive law does not go in line with PIL. Substantive law prohibits and PIL accepts. If the prohibition does not reach cross-border relationships, it might be advisable to envisage an *ex-ante* system to be applied prior to the birth of the children in parallel with the system facilitating the cross-border recognition of parentage after their birth assuming that this practice is unstoppable nowadays at the international level. The *ex-ante* or "a priori" system has been considered at the HCCH, where the cross-border recognition of parentage has been under discussion for more than a decade. [87] Let us examine the progress that has been made regarding possible future instruments on parentage and surrogacy agreements.

The first "Preliminary note" on this topic drawn up by the HCCH Permanent Bureau was published in March 2011.[88] During seven years the Experts' Group (EG) discussed just about the convenience and feasibility of adopting an international legal instrument about parentage and international surrogacy agreements. They agreed upon the possible adoption of a Convention on parentage and a separate Protocol on international surrogacy agreements. As regarding the latter, one of the main points of discussion was whether to go for an a priori or an a posteriori system.[89] The experts ensured that a number of states might be attracted to an a priori model (along the lines of the 1993 Intercountry Adoption Convention) because it would better protect human rights, but they also concluded that an a posteriori model would be more feasible.

The a priori approach, based on a cooperation system, favours reducing risk of placing receiving States in the difficult situation of having either to (i) recognise the child's legal parentage and encourage those abusive practices or (ii) not recognise the child's legal parentage thus penalising that child for the adults' failure to adhere to the uniform safeguards. But at the same time, the higher degree of public authority involvement required in cross-border cooperation mechanisms (both for states that regulate and that prohibit),[90] as well as the fact that it would imply the acceptance of these practices before they have occurred, made difficult to envisage a model focused on future situations that will encourage citizens residing in countries where this practice is prohibited to use surrogacy abroad. With all these arguments in mind, the further discussion focused on the a posteriori approach, which remains the main option in the work now being undertaken by the Working Group on Parentage/Surrogacy (WG) made up of representatives appointed by the states .

Following the mandate of the Council on General Affairs and Policy of the HCCH, the first meeting of the WG took place in November 2023. The WG started its consideration of draft provisions for one new instrument as mandated by the Council, if possible by focusing on possible rules on the recognition of judicial decisions, and in particular to what extent they could be applied to different scenarios of establishment,

87 Click for all the information about this legislative work, accessed 5 December 2024.

88 Permanent Bureau HCCH, Private international law issues surrounding the status of children, including issues arising from international surrogacy arrangements, March 2011, accessed 5 December 2024.

89 HCCH, Parentage/Surrogacy Experts' Group, 'Final Report, The feasibility of one or more private international law instruments on legal parentage', 1 November 2022, at 29 and 54, accessed 5 December 2024.

90 Major changes in (most States') domestic law; agreeing on uniform minimum safeguards and standards; and a more elaborate system of cross-border cooperation, which would require substantial government resources and involvement in individual cases. *Ibid.*, at 29.

contestation and/or termination of legal parentage. It also identified some scenarios that may require specific rules, like precisely legal parentage established as a result of a surrogacy arrangement.[91] In the second meeting held in April 2024, the WG dealt with many relevant issues, including a preliminary discussion on safeguards and standards on the basis of the 2022 EG Final Report. This discussion focused on the desirability and feasibility of including safeguards for different case scenarios in a possible instrument on the recognition of judgments on legal parentage. The Group discussed various safeguards or standards, and how these could be included in an instrument (e.g., as part of a definition, as conditions for recognition, as grounds for refusal, as general obligations).[92]

This issue is of particular interest in this context, according to the Final Report of the EC, where the aforementioned safeguards and standards are listed.[93] The system would take better account of the gender perspective by including some of them as grounds for refusal or conditions for recognition.[94] For instance, the consent to the surrogacy agreement of the surrogate mother (and her partner), to be given before/after birth, freely, in writing, informed and not having been withdrawn; eligibility and suitability of the intended parents according to the law of the state of origin, which includes, at a minimum, the intended parents to be adults with full capacity and that they have no previous criminal convictions for offences against children; or genetic connection to at least one of the intended parents and/or the gamete of the surrogate mother not having been used to conceive the child. Furthermore, the importance of preventing surrogacy from constituting or leading to the sale or trafficking of human beings and the need to uphold the right of children to know their origins have also been highlighted.[95]

From 4 to 8 November 2024, the WG met for the third time. Pursuant to its mandate, the WG continued its consideration of draft provisions for one new instrument on legal parentage generally, including legal parentage resulting from international surrogacy agreements. The Report about this meeting is not available yet. In brief, although the work undertaken at the HCCH has been considered more cautious than the European Proposal[96] and the internal forecasts are not overly optimistic,[97] if these global rules are adopted in the future, they will probably complement the EU regulation, as they will

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91 Working Group on Parentage/Surrogacy, Report of the first meeting (13-17 November 2023), at 5, accessed 5 December 2024

92 Working Group on Parentage/Surrogacy, Report of the second meeting (8-12 April 2024), at 3, accessed 5 December 2024.

93 Final Report of Parentage / Surrogacy Experts' Group, *supra* n. 89, at 32 ff.

94 *Ibid.*, at 34-35. Conditions for recognition: for each individual case, the child's legal parentage would be recognised by operation of law but only if those safeguards/standards were met. Grounds for refusal: for each individual case, the child's validly established legal parentage would be recognised by operation of law but the requested State could refuse this recognition if these safeguards/standards were not met.

95 L. Martínez-Mora Charlebois, 'La protección internacional de las personas, en particular los niños, niñas y adolescentes, a través de los Convenios de La Haya', in S. Adroher Biosca, B. Campuzano Díaz and G. Palao Moreno (coord.), *Un Derecho Internacional Privado centrado en los derechos de las personas* (Tirant Lo Blanch, Valencia, 2024), 49-80, at 77.

96 E. Rodríguez Pineau, 'La propuesta de reglamento europeo sobre filiación en situaciones transfronterizas', 6 *Cuadernos de Derecho Privado* (2023) 148-180, at 156.

97 L. Martínez-Mora Charlebois, *supra* n. 95, at 78. Mrs Martínez Mora, HCCH First Secretary, believes that "perhaps the most feasible would seem to adopt a PIL instrument with some basic guarantees that constitute red lines for countries. If further and more comprehensive protection is required, this will be

cover the cross-border recognition of parentage established in non-EU countries. But the final outcomes must ensure a proper balance between the continuity of parentage in cross-border relationships and the human rights of the children and women involved. This a very difficult task to undertake in the current international arena but inaction is not an option. Given that the legal solutions to improve the existing legal framework do not seem to come from the Spanish legislator, we will have to wait and see what these international initiatives will bring.

left to states and other bodies." She recognises that "this will clearly be unsatisfactory for both sides, but it may be the only way to reach consensus."