UNIVERSITY OF MISKOLC
FACULTY OF LAW AND POLITICAL SCIENCES
DEÁK FERENC DOCTORAL SCHOOL IN LAW AND POLITICAL SCIENCES

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Surrogacy and its legal circumstances in the legislation and case law of selected states and ECHR

(PhD Thesis)

Ferenc Deák Doctoral School of Law and Political Sciences

Head of the Doctoral School: Prof. Dr. Erika Róth

Title of the Doctoral Program: Further development of the Hungarian state and legal system and legal scholarship, with special regard to European legal trends

Academic Supervisor: doc. JUDr. Andrea Erdősová, PhD.

MISKOLC 2025

SUPERVISOR'S RECOMMENDATION

Name of the student: **Mgr. Zsófia Nagy** (4rd year of the doctoral study)

Supervisor and the author of this valuation: **Doc. JUDr. Andrea Erdősová, PhD.**

Date and Place: Bratislava, 23 May 2025

Zsófia Nagy was my student in the past at the Faculty of Law at PEVŠ, and when she approached me with a request to become her supervisor within the CEA and in Miskolc, I did not hesitate, because working with her has always been excellent. This is due to several factors. One of them is her choice of topic. Zsófia tends not to look for easier paths to achieve results but instead chooses demanding, discursive topics that pose an academic challenge. This is something I find very admirable in her as a student and a promising researcher.

For this reason, I naturally agreed to supervise her. The second reason is her personality. Zsófia is a young and ambitious person who is not afraid of challenges. She is diligent and open to development. She accepts constructive criticism and is also demanding of herself, with a sincere desire to grow, both personally and academically. She is meticulous when finalizing her texts and always genuinely strives to view complex bioethical dilemmas and legal issues within a broad spectrum of contexts.

All of these qualities are prerequisites for her continued work as a researcher, ensuring that her contribution to science is neither repetitive nor trivial, but instead brings new perspectives and approaches to solving complex legal questions.

We chose the topic of surrogacy together, although it was her proposal. Since I also focus on this issue in my own academic work, there was alignment from the very beginning, in both initiative and proposal. The topic is highly demanding because it carries a multidisciplinary aspect. It requires not only excellent knowledge of legislation, both national and international, but also the ability to compare and critically analyze legal frameworks.

Moreover, surrogacy has a medical foundation, as it belongs to the field of assisted reproduction. This area is incredibly dynamic; few fields in medicine have seen such

remarkable progress in methods, approaches, and healthcare provision. What was once impossible now pushes the boundaries of what is considered achievable. However, the concept of human reproduction is undergoing profound transformation in our era, and the discourse is no longer limited to the work of renowned science fiction authors. Indeed, the concept of reproduction without sexual intercourse dates back to biblical times.

And finally, it is a matter of valuesa so-called cultural-ethical issue. A researcher who addresses this topic from a bioethical perspective must possess a highly sensitive perception in order to balance the interests of all involved parties and to see beyond the legal question into many other layers: the vulnerability of the subjects, the protection of their fundamental rights, mechanisms of responsibility, the best interests of the child, the psychological dimension of infertility and the desire for a biological child, as well as emotional attachment and expectations. At the same time, it is crucial to prevent abuse and exploitation, and to protect the sovereignty of states and individuals involved in these processes. All of this makes surrogacy a truly complex and demanding field of research.

The dissertation begins with the overview terminology related to medically assisted reproduction and surrogacy, and introduces various definitions and types of surrogacy arrangements, distinguishing between traditional and gestational surrogacy, as well as commercial and altruistic arrangements.

Subsequently, a brief historical and ethical analysis about surrogacy arrangements will be discussed, tracing its development from ancient cultural practices to modern medical procedures.

This section establishes the social and technological context within which current surrogacy practices have evolved. Through the glimpse into most notable, mainly American, case-law, we touch upon the inherent complexity and sensitivity surrogacy arrangements necessarily embrace.

The American approach will not be analyzed in-depth, but a minimally shall be mentioned as the USA has been the most liberal towards utilizing the new ART techniques, and performed adequate value balancing and ethical debate.

The second part of the dissertation thoroughly analyses the current European human rights approach with special regard to the international children’s rights protection framework. The chapters focus on deeply venturing into the area of international child

protection and the recent developments within. The purpose of surrogacy arrangements are motivated by the desire and longing for a child, thus in our legal analysis the children's rights and potential risks stemming from the circumstances of their conception and birth will be examined. The specific human rights implications of surrogacy arrangements are addressed, with a particular focus on children's rights to identity, nationality, and family relationships, and how can they be compromised in surrogacy arrangements. Throughout the research, particular attention is devoted to analyzing how surrogacy arrangements impact children's rights, examining potential risks such as statelessness, disruption of identity rights, and commodification.

Furthermore, the third part of the dissertation then investigates the international legal framework surrounding surrogacy, analyzing relevant human rights instruments and jurisprudence, with particular attention to the European Court of Human Rights case law that has shaped the regional approach to cross-border surrogacy arrangements. The phenomenon of reproductive tourism and cross-border surrogacy arrangements. Lastly, a comparative analysis follows, examining national legal approaches to surrogacy within the Central European region, focusing on Hungary, Slovakia, and Czechia as the primary cases, while also exploring the contrasting regulatory approaches of Ukraine that explicitly permit commercial surrogacy. The chapter will also analyse the role of the European Union in the surrogacy debate, and the current developments. The final substantive chapter presents recommendations for a more coherent regulatory approach to surrogacy at both national and European levels, proposing legal reforms that prioritize the best interests of children while addressing legitimate concerns about commercialization and exploitation. The conclusion synthesizes the findings and presents a balanced assessment of how legal systems might adapt to address the challenges posed by surrogacy arrangements while protecting all parties involved, especially the children.

As the supervisor of this thesis, and given that the concept and research approach were consulted jointly, with Zsofia being highly active and an excellent collaborator, **I fully support the structure of her work, as well as the methodology and the manner and form of its execution.**

An adequate amount of professional literature has been processed in the dissertation, which are uniformly integrated into the work, thereby **the literary processing of the**

subject area can be considered complete. Overall, it can be established that this dissertation **fully meets the requirements for PhD dissertations in both formal and substantive aspects, the work is the author's own work, contains new scientific results, in view of which I recommend submitting it for workshop discussion.**

Doc. JUDr. Andrea Erdősová, PhD.

LIST OF ABBREVIATIONS

AI - Artificial insemination

ART – assisted reproductive techniques

CAHBI – Expert Committee on Bioethics

CHIP – Child Identity Protection

CoE – Council of Europe

CRC – Committee on the Rights of a Child

DH-BIO – Committee on Bioethics

ECHR – European Convention on Human Rights and Freedoms

ECtHR – European Court on Human Rights

ET – embryo transfer

EU – European Union

GIFT – gamete intrafallopian transfer

HCCH – Hague Conference on Private International Law

ICSI – intracytoplasmic sperm injection

IVF – in vitro fertilization

MAR – medically assisted reproduction

OPSC – Optional Protocol to the Convention on the Rights of a Child on the sale of children, child prostitution and child pornography

PGD – preimplantation genetic diagnosis

UK – United Kingdom

UN CRC – United Nations Convention on the Rights of a Child

UNICEF - United Nations Children's Fund

USA – United States of America

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Introduction – Objectives, Structure and Methodology

„They just don't want to change the method that has worked flawlessly for two million years? I have to think about this, because in yesterday's New York Times – which is a shadow of its former self – I read the following shocking statement in an article; by Deborah Grimm: "It is high time, that society uses other methods instead of sexual intercourse in order to ensure the reproduction of the population."[1]

Robert Merle in his magnificent novel from 1974 entitled *The Virility Factor* explored the utopistic idea, of how society would be reframed if natural reproduction was replaced by medically assisted reproduction out of necessity, and how it would reconceptualize family, children and the social role of man and woman.

However, the concept of human reproduction is undergoing profound transformation in our era, and the discourse is no longer limited to the work of renowned science fiction authors. Indeed, the concept of reproduction without sexual intercourse dates back to biblical times. The ancient tale of Abraham, Sarah, and Hagar from the Book of Genesis presents perhaps the earliest documented case of what we would now term surrogacy arrangement, complete with its emotional and social complexities.

With the rapid advancement of medical technology since the 1970s, assisted reproduction has moved from theoretical possibility to medical reality. The birth of Louise Brown in 1978, the first „test–tube baby" achieved through in vitro fertilization by Patrick Steptoe and Robert Edwards, marked a watershed moment in reproductive medicine. In the decades since, these procedures have become increasingly routine, serving as a foundation for further innovations in reproductive technology. However, this progress brings with it ancient moral dilemmas in new forms: where shall we draw the line between technological feasibility and ethical permissibility?

In order to highlight the topicality of the issue, as well as its relevance to the general public, we shall stick to more contemporary works of literature, which have explored the modern reality of accessible ART and surrogacy practices, and the inner force, that unshakable desire for a child, which drives individuals to go to extraordinary lengths and endure significant hardships in pursuit of parenthood.

[1] Robert Merle, Védett férfiak, trans. Ádám Réz, ed. Vera Somló, 5 világrész könyvei (Budapest: Európa Könyvkiadó, 1983).

As Katarina Durica reflects in her new book „Mennyit adtál érte?"[2]: *„I have three children, so I spend a lot of time at playgrounds and playhouses. While standing by the sandbox, mothers often confide in one another — I, too, have heard many stories and heartfelt confessions about adoption, IVF, and even egg or sperm donation. These conversations contributed to my growing curiosity: how far is someone willing to go to have a child of their own? I myself had a deep longing for a child, and I was fortunate — it happened naturally, and at no cost. But of course, I also asked myself: would I have gone to the very edge to become a mother"*[3]

Among all forms of medically assisted reproduction, surrogacy remains the most controversial, challenging fundamental legal and social norms regarding parenthood, human dignity, and the rights of children. Surrogacy arrangements dismantle conventional understanding of motherhood by allowing private parties to determine maternal status through contractual agreements. At the centre of these arrangements are the children born through surrogacy, who may face complex legal, emotional, and identity challenges resulting from the circumstances of their birth and upbringing, who yet cannot advocate personally for their rights.

This dissertation aims to examine the legal framework surrounding surrogacy in selected states with a particular focus on cross–border surrogacy arrangements and their implications under the European human rights system, and the children's rights perspective within. The primary objective is to prioritize the children's rights perspective within surrogacy arrangements, critically assessing whether current human rights approaches provide adequate protection for these most vulnerable stakeholders. It is essential to acknowledge that this topic necessitates further discussion not only from legal perspectives but also through bioethical, philosophical, and social lenses, although this research primarily concentrates on legal implications. The purpose of the work is to elevate the human rights implications with special regard to children, as well as to take a closer look at the legislation of Hungary, Slovakia, and the Czech Republic.

In this dissertation, several core hypotheses have been established. Firstly, children conceived and born through surrogacy face unique risks of having their fundamental rights

[2] In free translation of the Author: „How much did it take?"
[3] Katarina Durica, *Mennyit adtál érte?* (Piros Hó Kiadó, 2024), 4.

compromised. Secondly, the European human rights system's approach to surrogacy focuses primarily on protecting children's interests, potentially undermining national legislation based on public order considerations. Thirdly, the legal frameworks of Slovakia, Hungary, and the Czech Republic either oppose or refrain from legalizing surrogacy. Through investigating these aspects, this dissertation seeks to analyse the nature of international surrogacy arrangements, explore their characteristics in selected European states, identify human rights implications while focusing on children and propose *de lege ferenda* suggestions for more coherent regulation, and the key values it shall tackle.

The dissertation opens by establishing foundational terminology for medically assisted reproduction and surrogacy, presenting various definitions and categorizations of surrogacy arrangements. It differentiates between traditional and gestational surrogacy, as well as commercial and altruistic models. The terminology is focusing on the medical definitions, but at the same time some definition established by legal scholars are introduced.

Following this foundation, the work examines the historical evolution and ethical dimensions of surrogacy arrangements, tackling their progression from ancient cultural traditions to contemporary medical practices. This section contextualizes the social and technological environment that has shaped modern surrogacy practices. A selective review of significant case law, primarily from the United States, illustrates the inherent complexities and sensitivities these arrangements encompass. While not providing an exhaustive analysis of the American framework, the dissertation acknowledges the US is a pioneer of liberal ART implementation, with substantial ethical discourse and value–based considerations.

Surrogacy represents a delicate topic raising numerous human rights concerns, including potential exploitation of women, commodification of the human body, violations of human dignity, and practices resembling slavery. While these risks merit examination, this dissertation focuses specifically on repercussions surrounding children, establishing whether their rights are compromised in surrogacy arrangements.

The second section conducts an in–depth examination of the current European human rights framework, emphasizing international children's rights protections. These chapters

explore international child protection mechanisms and recent developments. Given that surrogacy arrangements are driven by the desire for parenthood, the legal analysis prioritizes children's rights and potential vulnerabilities arising from their conception and birth circumstances. The research addresses human rights implications of surrogacy, concentrating on children's rights to identity, nationality, and family relationships, examining risks such as statelessness, identity disruption, and commodification concerns.

The third section investigates the international legal architecture governing surrogacy, analysing pertinent human rights instruments and judicial precedents, with focused attention on European Court of Human Rights jurisprudence. This section explores reproductive tourism and international surrogacy arrangements, examining how inconsistent national regulations create legal gaps that may place children in vulnerable positions.

A comparative analysis examines national surrogacy legislation within Central Europe, focusing on Hungary, Slovakia, and the Czech Republic, while contrasting these legal frameworks with Ukraine's permissive regulation on commercial surrogacy and the United Kingdom’s permissive regulatory framework for altruistic surrogacy. This chapter evaluates the European Union's role in surrogacy discourse and current developments. The question is tricky, as surrogacy arrangements tend to cross national border it is stepping into international territory, which shall be governed by the principles of private international law. Although, it additionally raises the question whether the international legal alliance between European states within the European Union could adequately address the issue, or whether this would intrude too much into member states’ sovereign power to create their substantive family law. Nonetheless, international surrogacy arrangements are the ones which include the most potential for breach of human rights. The more closely examined countries exhibit similarities in legislation, due to the shared history and long–established alliance in the Visegrad 4 and the EU, although handling surrogacy and issues related to children and protection of family shows some national specificities.

The concluding part of the dissertation proposes recommendations for enhanced regulatory coherence at both national and European levels, suggesting legal reforms prioritizing children's best interests while addressing concerns regarding

commercialization and exploitation. The conclusion lists the findings and presents a balanced evaluation of how legal systems might evolve to address surrogacy related challenges while safeguarding all stakeholders, particularly children. To achieve these objectives, this dissertation employs multiple research methodologies within an interdisciplinary framework. The historical method provides context through tracing the development of surrogacy from ancient cultural practices to modern medical procedures. This historical perspective illuminates how societal attitudes toward alternative family formation have evolved, offering insights into the purpose and functions of current surrogacy regulations. While the primary focus remains on the continental European legal tradition, reference is made to Anglo–Saxon legal developments where relevant to understanding broader trends.

The comparative method forms a key pillar of this research, examining how different jurisdictions have approached surrogacy regulation. This comparative analysis focuses primarily on Hungary, Slovakia, and the Czech Republic, exploring how these countries with shared legal histories have diverged in their regulatory approaches to surrogacy, while contrasting it with the permissive Ukrainian legislation. This comparative perspective reveals the varying legal, ethical, and cultural factors influencing national approaches to surrogacy.

Additionally, doctrinal and normative methods are utilized, which includes detailed examination of relevant international instruments such as the European Convention on Human Rights, the Convention on the Rights of the Child, the Convention on Human Rights and Biomedicine, and other applicable human rights treaties. At the national level, constitutional provisions, family law frameworks, and specific legislation addressing assisted reproduction are systematically analysed. These methods will be complimented by a thorough case law analysis, which constitutes a crucial component of this research, focusing particularly on the jurisprudence of the European Court of Human Rights in landmark cases such as Mennesson v. France, Paradiso and Campanelli v. Italy, D. v. France, and other, more recent decisions, that have shaped the European approach to legal parentage in cross–border surrogacy cases. National court decisions are also examined where they provide insight into how domestic legal systems navigate the complex issues raised by surrogacy arrangements. The research base comprises a wide range of primary

and secondary sources including legal instruments at international, European, and national levels, jurisprudence from the European Court of Human Rights and national courts; reports and recommendations from international bodies such as the UN Committee on the Rights of the Child, and the Council of Europe; academic literature from legal, ethical, and medical perspectives; data from the World Health Organization and other public health authorities; and expert declarations and principles including the Verona Principles and the Casablanca Declaration.

Through this multifaceted methodological approach, the dissertation aims to provide a comprehensive analysis of the complex legal challenges posed by surrogacy arrangements, with particular attention to the protection of children's rights in cross–border scenarios, accompanied by the analyses of legal circumstances of the selected Central European states. The ultimate goal is to contribute to the development of a more coherent regulatory framework that balances reproductive autonomy with the imperative to protect the rights and interests of all parties involved, especially the children born through these arrangements.

I. INTRODUCTION TO ART AND SURROGACY

1. Terminology related to ART and surrogacy

As both a social and biological being, human procreation is driven by instinct, fulfilling not only a biological imperative but also a deep-seated social aspiration. The fundamental need to protect and preserve the family unit underlies this drive. However, when natural conception is not possible due to circumstances that prevent safe or successful procreation individuals often seek alternative paths to achieve the goal of building a family and experiencing a complete family life. Such obstacles commonly arise from infertility, affecting one or both partners within the couple. The treatment for infertility is enhanced by the new bioethical developments, offered in reproductive medicine. In modern circumstances, although the motivations behind turning to assisted reproductive techniques changed, as founding a family with a child became closely related to the embodiment of personal autonomy, freedom to found a family, and reproductive freedom. In the following chapter we will introduce the basic terminology on ART and surrogacy as a form of ART. We will refer to the current and widely accepted medical terminology provided by the European Society of Human Reproduction and Embryology and its academic contributions, as well as of the World Health Organization.

Infertility is a medical condition, more precisely a disease according to the WHO, which can affect both male and female reproductive systems. This medical problem is not new-fangled, it has affected many people thorough time, thus the man of today has come up with a solution, and treatment according to the scientific knowledge available.

Medically assisted reproduction is a broader umbrella term, which encompasses several techniques to medically help infertile patients to reproduce. In MAR reproduction achieved through a range of medical interventions, procedures, surgeries, and technologies designed to address various forms of fertility impairment and infertility. These methods encompass ovulation induction, ovarian stimulation, ovulation triggering, ART, uterine transplantation, as well as intrauterine, intracervical, and intravaginal insemination using either the partner's or a donor's sperm.[4] These techniques are intended

[4] Fernando Zegers-Hochschild et al., "The International Glossary on Infertility and Fertility Care, 2017," *Human Reproduction* 32, no. 9 (2017): 1786–1801, https://doi.org/10.1093/humrep/dex234.

to address infertility or other medical conditions that make pregnancy and childbirth risky for women, such as heart disease, ocular disorders, or cases involving previous sterilization. In addition, surrogacy offers a potential solution to so-called „social infertility" referring to situations where legal or societal barriers make it difficult or impossible for certain individuals ,such as same-sex male couples or single men, to adopt a child or pursue parenthood through conventional means.[5]

ART indicates a form of MAR, thus is a form or method of reproductive medicine. ART where both human oocytes, sperm and embryos are handled, typically outside the body, for the purpose of reproduction. These are the techniques which ART encompasses, although are not strictly limited to these medical techniques, IVF and embryo transfer embryo transfer, intracytoplasmic sperm injection, embryo biopsy, preimplantation genetic diagnosis, assisted hatching, gamete intrafallopian transfer, zygote intrafallopian transfer, gamete and embryo cryopreservation, semen, oocyte and embryo donation, and gestational carrier cycles. Thus, ART does not, and ART-only registries do not, include assisted insemination using sperm from either a woman's partner or a sperm donor.[6]

Artificial insemination was one of the first ART methods to be implemented to medical practice, which can be performed diversely depending on which part of the female reproductive organ, the sperm is placed into[7].

IVF is a key technique which highly contributed to the evolution of surrogacy arrangements, too. Here, the fertilization occurs outside the body, with the resulting

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[5] Marta Soniewicka, "Ethical and Philosophical Issues Arising from Surrogate Motherhood," in *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, ed. Piotr Mostowik (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 969–980.

[6] Fernando Zegers-Hochschild et al., "The International Glossary on Infertility and Fertility Care, 2017: 1786–1801.

[7] We may distinguish: „*Intra-cervical insemination (A procedure in which laboratory processed sperm are placed in the cervix to attempt a pregnancy.), Intra-uterine insemination (A procedure in which laboratory processed sperm are placed in the uterus to attempt a pregnancy.), Donor insemination (The process of placing laboratory processed sperm or semen from a man into the reproductive tract of a woman who is not his intimate sexual partner, for the purpose of initiating a pregnancy.), Vaginal insemination (A procedure whereby semen, collected from a non-lubricated condom or similar method, is deposited into the vaginal cavity of a female. An intervention that can be self-administered by a woman attempting pregnancy.), Conventional in vitro insemination (The co-incubation of oocytes with sperm in vitro with the goal of resulting in extracorporeal fertilization.)"*
See: Fernando Zegers-Hochschild et al., "The International Glossary on Infertility and Fertility Care, 2017: 1786–1801.

embryo transferred to a woman's uterus.[8] In common terms, the technique involves the „test-tube baby", which usually is transferred to the uterus of the spouse, the de facto partner, single woman, or the surrogate mother's depending on the legal circumstances of the given country, which covers the eligibility criteria of the use of IVF.

Gamete donation involves the donation of oocytes, sperm for the purposes of reproduction. Additionally, already conceived embryos can be donated in some instances. Embryo donation encompasses the *„ART cycle, which consists of the transfer of an embryo to the uterus or Fallopian tube of a female recipient, resulting from gametes that did not originate from the female recipient or from her male partner, if present."*[9] For the donation of embryos, additionally, the practice of PGD could be requested, and is essential to examine the healthy development of the embryo, as a comprehensive genetic testing of the embryo's DNA is performed.[10]

The above-mentioned terminology was approached essentially from a medical point of view, to see how these practices are performed and what purpose they serve. These additionally are important to apply to surrogacy arrangements, where there can be discrepancies, and uncertain overlaps between the medical, social or legal terminology. The interdisciplinary nature of assisted reproduction and surrogacy means that terminology is often used differently across medical, legal, and ethical contexts. Medical terminology tends to focus on the biological and technical aspects of reproductive procedures, while legal terminology emphasizes the relational and rights-based dimensions.

Additionally, we shall examine the terminology and variations on surrogacy, to establish clear boundaries in the term thoroughly used in the analyses. The topic is very sensitive, important exactly specify different solutions, including medical terms, too. The modern understanding of surrogacy has evolved significantly, particularly with the advancement of reproductive technologies, and dependent on the type of surrogacy is utilized, distinctive legal and ethical issues emerge from the. In general, we will use the

[8] The medical definition of the IVF is provided as *„A sequence of procedures that involves extracorporeal fertilization of gametes. It includes conventional in vitro insemination and ICSI."*
See: Ibid.
[9] Ibid.
[10] Ibid.

term *surrogacy* as a practice of a woman getting pregnant and giving birth to a child on behalf of another, who is due to medical or other reasons is unable to do so. Furthermore, the term *surrogacy arrangements* will be referring to the written or oral „contracts" in which the involved parties, namely the surrogate mother and the intended parents express their will and terms on the performing of surrogacy.

Based on the genetic relationship between the surrogate, the child, and the intended parents, surrogacy can be categorized into several types, as follows:

1. *Sensu Stricto Surrogacy / Gestational Surrogacy*: A scenario in which the intended parents contribute both the oocyte and the sperm, resulting in an embryo that is implanted into a surrogate mother, who carries the pregnancy to term and, upon birth, transfers the child to the intended parents, who are at the same time the child's genetic parents, too.
2. *Sensu Largo Surrogacy*: A situation in which one of the gametes, either the egg or the sperm, is provided by a third-party donor, while the other is contributed by one of the intended parents. The resulting embryo is carried by the surrogate mother, who, after birth, relinquishes the child to the intended parents.
3. *Quasi Surrogacy*: When none of the intended parent is genetically related to the child. The embryo is created from donor gametes and is implanted to the surrogate mother.
4. *Pseudo-surrogacy*: Cases where the intended parents are individuals who could not naturally produce a child together, and thus are subjected to social infertility, e.g. single individuals and homosexual partners, regardless of the genetic connection.[11]
5. *Traditional Surrogacy*: In cases when the genetic material is provided by the surrogate mother, and the intended father, thus the child has a genetic connection with the surrogate mother, but not with the intended mother.[12]

Another typology of surrogacy can be determined from the financial perspective, where *commercial surrogacy arrangements* refer to a practice which involves financial compensation to the surrogate mother beyond the reasonable expenses directly related to the pregnancy. In commercial surrogacy arrangements the surrogate mother is granted

[11] Agnieszka Wedeł-Domaradzka, "Surrogacy – a solution that brings new problems. International organizations and surrogate motherhood," in *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, ed. Piotr Mostowik (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 607-639.

[12] Practice Committee of the American Society for Reproductive Medicine. "Definitions of infertility and recurrent pregnancy loss: a committee opinion." Fertility and Sterility, Vol. 99, No. 1, 2013.

compensation for her reproductive „service", on the other hand, *altruistic surrogacy arrangements* the surrogate mother receives no extra payment beyond the reimbursement of the expenses related to the applied ART, pregnancy and childbirth. This distinction is justified, as commercial surrogacy arrangements give rise to more complex ethical and legal challenges, particularly concerning human rights implications for all parties involved. These include, among others, issues related to human dignity, personal and reproductive autonomy, and the right to respect for private and family life.

These classifications illustrate the complex interplay of genetic, gestational, and social parenthood that surrogacy arrangements can entail, raising profound questions about how we define family relationships and parental rights.[13]

Thorough the study we will reflect in majority of cases to commercial surrogacy arrangements where at least one of the intended parents, mostly the intended father is genetically related to the child. If the term *surrogacy arrangements* is used in the study, it will encompass both altruistic and commercial forms, referring to the phenomenon as a whole, specifically, a situation in which a woman carries a pregnancy on behalf of another person who is unable to do so due to medical or other reasons. Additionally, the certain usage of term will be justified and further explained in the footnotes.

2. History and the ethical dilemmas of surrogacy

Modern surrogacy is deeply intertwined with the evolution of reproductive medicine, although contemporary ART were only introduced in the 1970s. However, the conceptual foundation for reproduction without sexual intercourse extends far back into human history. Perhaps, one of the earliest and most fundamental techniques of ART is artificial insemination, which can be traced back to the fifteenth century. A historical anecdote about the infertility of Henry IV of Castilla, nicknamed as „the Impotent" was believed to impregnate his wife Juana of Portugal through artificial means, as he was unable to ensure naturally ensure conception. Even though his efforts were futile, it signifies the struggles

[13] József Kovács, *A modern orvosi etika alapjai. Bevezetés a bioetikába. 3. átdolgozott, bővített kiadás* (Medicina Könyvkiadó, 2025) 536.

with infertility and the motivation to ensure an offspring through other than natural means.[14]

Furthermore, the struggles with infertility precedes even the Middle Ages and has its original foundation in biblical times. A notable example appears in the Old Testament, specifically in the Book of Genesis, which recounts the story of Abraham and Sarah. Confronted with infertility, Sarah urged her husband Abraham to conceive a child with their servant, Hagar. Hagar subsequently bore a son, and Sarah, though not biologically related to the child, nevertheless took the role of his mother.[15] This story embodies one of the earliest examples of surrogate motherhood. Not only that, but the hardships arising from infertility in marriage, the complex ethical situation stemming from the conflict of the two woman, who both claimed their maternal role, intertwines in the story, which persists to the current ethical and legal debates about surrogacy.[16]

The highlighted historical examples about surrogacy and AI underscore the persistent human motivation to overcome the reproductive barriers in order to have a genetic child and establish a family, which goes hand in hand with the inevitable rise of ethical dilemmas about family values as well as human dignity and autonomy. These stories demonstrate, how modern surrogacy exposes the deep connection among cultural norms, medical advancement and ethics.

The story is ancient but the method is new. Nowadays, surrogacy is the most discussed technique, as other ART does not in such depth differentiate the individual who intends to raise the child and the one who has a genetic relation to him or her. The fact of child delivery, and the fact of biological and genetic connection is in conflict.[17]

Modern surrogacy emerged alongside with the evolution of reproductive medicine. The biggest revolutionary advancement which later on enabled gestational surrogacy was

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[14] The story whether Henry IV of Castilla truly exprerimented and performed AI was not confirmed by historians, only his presumed infetility.
See: Willem Ombelet and Johan Robays, "Artificial insemination history: hurdles and milestones," *Facts Views Vis Obgyn* 7, No. 2 (2015): 137-143, https://pmc.ncbi.nlm.nih.gov/articles/PMC4498171/.

[15] Old Testament (Genesis 16:1-15)

[16] See more in: Mark E. Lones, „A Christian Ethical Perspective on Surrogacy" in *Bioethics in Faith and Practice* 2, No. 1 (2016): 23-30, https://digitalcommons.cedarville.edu/cgi/viewcontent.cgi?article=1014&context=bioethics_in_faith_and_practice.

[17] Zoltán Navratyil, *A varázsló eltöri a pálcáját? A jogi szabályozás vonulata az asszisztált humán reprodukciótól a reproduktív klónozásig* (Gondolat Kiadó, 2012) 88.

the development of IVF, especially by to exceptional gynecologist of the 1970s Patrick Steptoe and Robert Edwards. During their scientific venture about treating female infertility, they conducted the first successful IVF, from which a heathy baby, Louse Brown was born in on 25 July 1978 in the United Kingdom.[18] In terms of Central Europe, it is worth mentioning that, in Czechoslovakia, the first child conceived through IVF was born in 1982 at the First Gynecological and Obstetrical Clinic in Brno.[19] Slovakia followed a decade later, with the first Slovak child born through assisted reproduction in 1992 at the First Gynecological and Obstetrical Clinic in Bratislava. [20]

The opportunities brought in by these new techniques opened up a vast horizon of possibilities for treating infertility and supporting individuals affected by it. However, the backlash against these methods also triggered the reassessment of values and interpretations surrounding motherhood, fatherhood, human dignity, and the motivations behind the desire to have a genetically related child and form a family.[21]

One of the notable ethical surrounding surrogacy is whether human dignity and autonomy can truly coexist within this arrangement. On one hand we have autonomy to make decision about our bodily and personal integrity. On the other hand, we respect the inherent value of human dignity which requires that no human being can be treated merely as a tool or means to an end.[22]

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[18] Tian Zhu, "In Vitro Fertilization," *Arizona State University: Embryo Project Encyclopedia*, July 22, 2009, https://embryo.asu.edu/pages/vitro-fertilization.

[19] „Před 40 lety se ve FN Brno narodilo první „dítě ze zkumavky," Fakultný Nemocnice Brno, November 11, 2022, https://www.fnbrno.cz/pred-40-lety-se-ve-fn-brno-narodilo-prvni-dite-ze-zkumavky/t7607.

[20] Martin Petrenko and Zuzana Zoláková, „REPRODUKČNÁ MEDICÍNA V SLOVENSKOM PRÁVNOM PROSTREDÍ," *Unilabs*, August 15, 2017, https://www.unilabs.sk/clanky-invitro/reprodukcna-medicina-v-slovenskom-pravnom-prostredi.

[21] *„Perhaps a sterile couple prefers to bring up a child related to the husband than have an adopted child, in no way related biologically either to her husband or wife. But does this marginal benefit, in the category of joy that new parents can experience, outweigh the potential losses that they will suffer, whether themselves, or the child conceived as a result of a surrogate pregnancy contract, or other people?"*
See: H.T. Krimmel, "Argument przeciwko rodzicielstwu zastępczemu" in *Początki ludzkiego życia*, ed. W. Galewicz, (Universitas Krakow, 2010) 337–349.

[22] On the philosophical and ethical aspects of surrogacy and ART see: Marta Soniewicka, "Ethical and Philosophical Issues Arising from Surrogate Motherhood," in *Fundamental and Legal Problems of Surrogate Motherhood,* ed. Piotr Mostowik (Wydawnictwo Instytutu Wymiaru Sprawiedliwośc, 2019), 969–980; Zoltán Navratyil, "Az asszisztált reprodukciós eljárások a jogi szabályozás tükrében - különös tekintettel az in vitro embrió helyzetére," *Debreceni Jogi Műhely*, special issue (2005); Andrea Erdősová, "Surrogacy in the Light of Accountability Mechanisms, Uncertainties, and Possible Solutions," *Justičná revue* 77, No. 2 (2025):137 – 150; Judit Sándor, "Transnational Surrogacy: An Overview of Legal and Ethical Issues," in *Cross-Cultural Comparisons on Surrogacy and Egg Donation*, eds. Sayani Mitra, Silke Schicktanz and Tulsi Patel (Central European Academy, 2018), 35-55; Aleksandra Korać Graovac, "Legal

Furthermore, ethical concerns emerge to all subjects of the surrogacy arrangements, and perhaps the surrogate mother and the intended child are most at risk having their rights jeopardized.

The risk of commercialization is a well-debated and a never-ending dispute, which is always present in surrogacy arrangements. Surrogacy inherently involves the offering of the surrogate's body, where reproductive labor becomes a commercialized service. The debate over whether such commercialization is justifiable is often compared to the discourse surrounding prostitution. While both involve women providing access to their bodies in exchange for compensation, a key distinction lies in the duration of that access and the nature of the "service" provided. Surrogacy involves a long-term, deeply personal and biologically involved commitment, as opposed to a typically shorter-term physical interaction in prostitution.[23]

The potential harm to women is present in surrogacy arrangements, as by becoming a surrogate mother, she is bound by „contractual obligations" which is extended to the decision-making about her private life, e.g. changing to a lifestyle or a diet which prioritizes the fetus healthy development, refraining from sexual activity in order to avoid unintended pregnancy, undergoing specific medical examinations requested by the intended parents. In extreme cases, the intended parents may control decisions related to abortion, end-of-life choices concerning the surrogate mother in order to ensure the delivery of the baby, and the execution of a pregnancy and birth plan approved by them. This plan may include specifics such as whether the surrogate gives birth in a hospital or elsewhere, and whether the delivery is performed via cesarean section or not.[24] Sometimes, exploitative practices could go so far as addressing surrogacy as a means of „modern slavery".[25] Understandably, some feminist scholars argue, that surrogacy reinforce the reproductive role of woman and all the associated prejudice and harmful

regulation of medically assisted reproduction and the impact on the family," *Glasnik Hrvatskog katoličkog liječničkog društva* 34, No. 2 (2024):133-138, https://hrcak.srce.hr/clanak/461359.

[23] Marta Soniewicka, "Ethical and Philosophical Issues Arising from Surrogate Motherhood," 969.

[24] Carlos Martínez de Aguirre, "International surrogacy arrangements: a global "Handmaid's Tale"?," in *Fundamental legal problems of surrogate motherhood: Global perspective*, ed. Piotr Mostowik, (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 458-460.

[25] Thanh-Dam Truong, "Human Trafficking, Globalization, and Transnational Feminist Responses", in *The Oxford Handbook of Transnational Feminist Movements*, eds. R. Baksh-Soodeen and W. Harcourt (Oxford University Press, 2015) 295.

practices within. A strong advocacy for abolition for especially commercial surrogacy practices, as it entails reproductive prostitution and trafficking in woman.[26] Although the feminist literature is not unified, as some movements see it as an embodiment of their self-expression and empowerment.[27]

The potential most severe ethical concerns in regards to the child involve commodification, commercialization, trafficking, and the presence of modern eugenics and baby design. In commercial surrogacy arrangements, human reproduction besides being placed on a market driven framework, it can also foster a controlled environment, which allows the „creation" of the most desirable child. This is made possible through access to genetic engineering and practices such as fetal reduction, although not only in cases of genetic abnormalities or disabilities, but also when the fetus does not match the intended parents' gender preference for the child.[28]

Needless to say, the motivations of intended parents, especially those struggling with infertility, are entirely understandable, as the longing for a child is a deep human desire. With the emergence and increased accessibility of surrogacy, many see it as a final opportunity to fulfill their dream of parenthood, so it is only natural that they would wish to take this opportunity. However, at first glance, and particularly when considering the previously discussed concerns regarding the rights and welfare of surrogate mothers and children, it may be difficult to fully sympathize with the intended parents. Nevertheless, it is important to emphasize that many have already endured numerous hardships and failed attempts to conceive, making surrogacy a last resort. The process can be emotionally and psychologically demanding.[29] One of the most evident risks is the legal uncertainty surrounding parental recognition, particularly in international surrogacy arrangements. In extreme cases, intended parents may face accusations of human

[26] Andrea Dworkin, *Right-Wing Women: The Politics of Domesticated Females* (Women's Press, 1983) 181.
[27] Laura M. Purdy, *Reproducing Persons: Issues in Feminist Bioethics* (Cornell University Press, 1996) 38.
[28] See more in: Ronald M. Green, *Babies by Design: The Ethics of Genetic Choice* (Yale University Press, 2008) 126.
[29] In addition to the primary stressors of infertility or biological inability to have children, intended parents often face secondary stressors associated with the surrogacy process itself. These may include the initial search for a suitable surrogate, the nature of their relationship with the surrogate throughout the process, and societal or familial attitudes toward gestational surrogacy.
See: S. Golombok et. al., "Families Created Through Surrogacy Arrangements: Parent-Child Relationships in the 1st Year of Life," *Developmental Psychology* 40 No. 3 (2004): 400–411, https://doi.org/10.1037/0012-1649.40.3.400.

trafficking or may even lose custody of their genetically related child due to conflicting national policies or public interest arguments. Additionally, emotional risks are also largely present, especially in situations where the surrogate changes her mind and refuses to hand over the baby to the intended parents. We shall not neglect the financial risks, particularly in the form of unforeseen costs or exploitative practices by intermediaries and surrogacy brokers.[30]

It has been highlighted that both the potential gains and losses in surrogacy arrangements are significant, the stakes are extremely high, and achieving a desirable outcome for all parties involved is a delicate endeavor.

The way society responds to the challenges posed by new reproductive technologies and surrogacy ultimately depends on a value-based assessment that is inherently tied to the specific value system of each nation-state. These assessments are not homogeneous[31]; however, it is the legislator who plays the decisive role in shaping a legal framework that best reflects the prevailing values of the national population.[32]

In order to briefly illustrate the complex ethical and legal dilemmas surrounding surrogacy it is worth discussing some exemplary cases from the USA[33], where the

[30] See more in: F. Sheinfeld et. al., "Writing Group on behalf of the ESHRE Ethics Committee," *Human Reproduction* 40, No. 3 (2025): 405-409, https://academic.oup.com/humrep/article/40/3/420/7979098.

[31] The diverse legal landscape will be deeply analysed in part IV. of the dissertation.

[32] There are several determinants which could define the value based legislation of surrogacy and ART of a given country, perhaps the role of religion is an influential factor. Religious doctrines often play a pivotal role in defining the ethical boundaries and societal acceptance of these practices, on which national legislative approaches are based. Primarily the Roman Catholic Church in Declaration of the Dicastery for the Doctrine of the Faith "Dignitas Infinita" on Human Dignity, from 08 April 2024, expressed its opposition towards surrogacy, as it endangers the dignity of both woman and children. Pope Francis has denounced the practice as deplorable, calling it a form of human trafficking that commercializes life and exploits women's vulnerable economic situations. He emphasizes that a *child is a gift*, not a commodity to be acquired through contractual arrangements.
Notably, the Jewish perspective is greatly supportive of surrogacy arrangements, and is allowing several types of ART, too. Consequently, the legal framework on surrogacy and ART are very developed, and is primarily governed by the principle of reproductive freedom and autonomy.
See: Dena S. David, *The Oxford Handbook of Religious Perspectives on Reproductive Ethics* (Oxford Handbooks, 2024); Sándor Fazekas, *Mielőtt megformáltalak* (DRHE, 2025); Máté Julesz, *Az egészséghez fűződő jog – A pótanyaságtól a Covid–19-ig* (Medicina, 2021)

[33] Sital Kalantry, "Chapter 22: Surrogacy in the United States of America: from prohibition to permission," in *Research Handbook on Surrogacy and the Law,* eds. Katarina Trimmings, Sharon Shakargy , and Claire Achmad (Edward Elgar Publishing, 2024); Zoltán Navratyil, "Az anyaság útvesztői. A dajkaanyaság és béranyaság rejtelmei a jogi szabályozásban, különös tekintettel az Egyesült Államokra," *IUSTUM AEQUUM SALUTARE* 6, No. 3 (2010): 189-226.

legislator decided upon navigating the issue on a commercial basis in some states, enabling surrogacy to be oriented on a market-profit-oriented axis.

Notably, the always referenced Baby M case exemplifies the complex often ambiguous controversies that might arise in surrogacy arrangements. It highlights the inherent tension between reproductive autonomy and contractual obligations, suggesting that the mixing of deeply personal choices and contractual legal agreements may lead to significant ethical and legal repercussions to all parties involved. Mary Beth Whitehead entered into a traditional surrogacy agreement with William and Elizabeth Stern. After giving birth, Whitehead initially surrendered the child but later changed her mind, leading to a widely publicized custody battle, involving fleeing with the intended child to a state where the commercial surrogacy arrangement could not be enforced. The New Jersey Supreme Court ultimately invalidated the surrogacy contract as contrary to public policy, declaring it potentially *„illegal, perhaps criminal, and potentially degrading to women."* The court restored Whitehead's parental rights as the biological mother while granting full custody to William Stern, the biological father, with Whitehead receiving visitation rights.[34]

The magazine covers showing the fleeing Mary Whitehead holding her biological daughter, Baby M, vividly illustrate that surrogacy involves not only legal but also profound emotional challenges. Finding a solution is not solely a matter of legal science, but also of social convention of how we, as a society, decide where to draw the line between scientific advancement and ethical values.

3. Role of Bioethics

Bioethical debates are invariably triggered by new biotechnological discoveries that challenge fundamental natural laws. In contemporary times, advancements in science and technology have reached a stage where they enable transformative outcomes that shift *„fundamental aspects of human existence from the nature-controlled 'realm of chance' to a part of human design and the 'realm of human freedom m'."*[35] Bioethics has developed

[34] New Jersey Supreme Court in the Matter of Baby M. -- In re Baby M. 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988).

[35] Jürgen Habermas, *Die Zukunft der menschlichen Natur. Auf dem Weg zu einer liberalen Eugenik?,"* (Suhrkamp Verlag, 2010) 53.

separately or alongside classical medical ethics, which mostly draws on traditions and codes of medical ethics established by the practice.[36] Bioethics can be viewed as a paradigm shift, introducing new moral values that promote a more comprehensive approach to treating illness. This approach moves beyond the treatment of purely physical diseases or dysfunctions to also address psychological disturbances and the social changes affecting a patient's life. Moreover, it incorporates spiritual dimensions into medicine, marking a significant development from the more limited perspective established by the Hippocratic Oath.[37]

The postmodern perspective on biotechnological advancements has led to a redefinition of long-established concepts such as personal autonomy, reproduction, freedom, and integrity. These developments give rise to constant tensions between two competing interests: on one hand, the promotion of scientific and technological progress that has the potential to enhance human well-being in the long term; on the other, the protection of universally recognized values such as human dignity, the sanctity of life, and the prohibition of exploitation or slavery. However, the safeguarding of these values in postmodern democratic societies reveals a high degree of ethical pluralism, reflecting the absence of a universally accepted ethical framework that could unambiguously determine how scientific freedom should be "humanized." Since only humanity itself can meaningfully define the limits and responsibilities of scientific progress, bioethics is inherently characterized by the coexistence of divergent perspectives. Rather than offering definitive solutions to ethical dilemmas, the central purpose of bioethics lies in clarifying the core of such dilemmas, to identify the conflicting interests involved, to explore alternative ways of addressing them, and to exclude solutions that are generally considered morally or socially unacceptable. In this way, bioethics functions as a critical and

[36] With the gradual development and transformation of medical science, medicine has evolved into a form of teamwork, involving not only classical medical professionals but also experts from various therapeutic disciplines. This shift has significantly influenced medical ethical codes, which were previously shaped primarily by medical associations and councils. Since the 1960s, with the rise of comprehensive and interdisciplinary medicine, other therapeutic fields have also sought to integrate their own ethical standards and principles into the broader medical ethical framework.
See: R. S. Downie and Kenneth C. Calman, *Healthy respects: Ethics in healthcare,* (Faber and Faber, 1987) 243-244.
[37] József Kovács, *A modern orvosi etika alapjai. Bevezetés a bioetikába,* 41.

reflective tool, facilitating informed and balanced discourse in ethically complex areas of science and medicine.[38]

In contemporary medical practice, there is a clear shift away from the traditional paternalistic model of the patient-physician relationship toward a framework that emphasizes collaboration and the elevation of patient autonomy.[39] This transformation prioritizes the patient's conscience, active involvement, and participation in medical decision-making. Central to this model is the recognition of the patient not as a passive recipient of care, but as an autonomous individual with the right to make informed choices about their treatment. However, this approach assumes the presence of an „educated" and empowered patient, one who is emancipated, self-aware, and capable of engaging in moral and practical evaluation of their health condition and the medical options available. Such a patient is presumed to be familiar with their rights and responsibilities within the healthcare system and able to exercise them meaningfully. The growing emphasis on patient autonomy also reflects broader social and cultural changes, which increasingly position the patient as the primary decision-maker in value judgments related to their own health and treatment. Nonetheless, this trend remains inherently pluralistic. The principle of autonomy is expressed differently across diverse patient populations, as individual value systems, educational levels, and socioeconomic or cultural backgrounds shape how patients perceive and exercise their role in healthcare decisions.[40]

Several key fundamental tensions emerge from surrogacy from a bioethical perspective, where the two competing interests are hardly resolvable with each other. The first and central tension is emerging between the principles of autonomy and the protection from exploitation. Engaging into a surrogacy arrangement may represent autonomous choices by adults, power imbalances based on gender, class, and global inequalities raise concerns about whether such choices are truly free from coercion. The focal point revolves

[38] Adorján Lívia Hidvéginé and Simkó Ágnes Sáriné, *Etikai normák és dilemmák az egészségügyben - Orvos-beteg jogviszonyok az egészségügyben VI.* (Medicina publishing, 2018) 60.
[39] Bioethics has reshaped the traditional Hippocratic foundations of medical ethics, while still upholding its core principles, *beneficence, non-maleficence, justice, and respect for patient autonomy*, as essential guiding values. At the same time, bioethics introduces complementary ethical norms that respond to the profound transformations in medical science and its expanding social, legal, and ethical implications. These additional norms are necessary to address the complex challenges brought about by modern biomedical advancements.
[40] Hans-Martin Sass, "Bioethics: Its Philosophical Basis and Application," *in Pan American Journal of Public Health* 108, No. 5/6 (1990): 12, https://iris.paho.org/handle/10665.2/27131.

around the surrogate mothers' perspective, and the interpretation of the autonomous decision- making to undergo surrogacy arrangement while still being protected from exploitation.[41] This tension is particularly evident in international commercial surrogacy, where significant economic disparities between intended parents from wealthy countries and surrogate mothers from developing countries create potential for exploitation. However, prohibiting such arrangements may itself restrict women's autonomy by limiting their reproductive and economic choices. [42]

Further clash of morals is the conflict between commercialization and human dignity. Another fundamental tension exists between permitting commercial transactions in reproductive services and protecting human dignity by preventing commodification of human reproduction. Commercial surrogacy raises concerns that women's reproductive capacity and children themselves become commodities to be bought and sold.

Critics argue that commercialization of reproduction fails to respect human dignity, treating the human body and its functions as mere objects of commerce. Defenders of commercial surrogacy counter that properly regulated compensation does not necessarily objectify surrogates, but rather fairly compensates them for their labor, time, and physical burden.[43]

Additionally, surrogacy opens elaboration on the importance and aspects of origins, and how one conceptualizes it. The tension arises between the relative importance of genetic connection versus gestational relationship. Surrogacy arrangements disrupts the role of origins and expands it above the relevance of genetic connections as the concept of genetic and gestational motherhood is challenged. Contemporary legal discourse tends to extend the interpretation of identity and origins of the child beyond the genetic relations. The intimacy, emotional factor of pregnancy, childbirth and childrearing is especially a sensitive issue, as surrogacy arrangements involve the handing over the child to the intended parents.

[41] Autonomy emphasizes the importance of informed consent, meaning that surrogate mothers should fully understand the medical, legal, and emotional implications of the surrogacy arrangement before proceeding.
[42] See more in: John A. Robertson, "Children of Choice: Freedom and the New Reproductive Technologies," *High technology Law Journal* 10, No. 1 (1995): 201-211;
[43] C. Fabre, "Surrogacy: In Whose Interest?," *Journal of Medical Ethics* 23, No. 4, (1997): 269-271.

Perhaps the most profound tension in surrogacy ethics involves balancing the rights and interests of the resulting child against the reproductive rights of adults. While adults have recognized rights to reproductive autonomy, children also have rights to identity, family connections, and protection from potential harms. Since children resulting from surrogacy cannot consent to the circumstances of their creation, ethical analysis must consider their best interests. This raises difficult questions about whether certain forms of surrogacy might compromise children's welfare or rights to identity. The limited empirical evidence on outcomes for children born through surrogacy neither conclusively supports nor refutes concerns about potential psychological or identity issues.[44]

[44] : S. Golombok, S et. al., "Children Born Through Reproductive Donation: A Longitudinal Study of Psychological Adjustment," *Journal of Child Psychology and Psychiatry* 54, No. 6 (2013): 653-660, https://acamh.onlinelibrary.wiley.com/doi/10.1111/jcpp.12015.

II. HUMAN RIGHTS APPROACH TO SURROGACY: A CHILD-CENTERED PERSPECTIVE

1. Introduction

The ideal concept of family can be described generally as the basic union of individuals, who share goods among themselves, contribute to provide for each other and ensure protection of the members. However, precisely define family is avoided by lawmakers, as it is fairly impossible in modern society, where concept of family ties are changing fast. Avoiding specification is understandable, as by this, it can be more inclusive.[45]

Assisted reproductive technologies have reshaped traditional family structures. In today's context, the reasons for turning to ART have evolved, with family formation increasingly tied to concepts of personal autonomy, the right to found a family, and reproductive freedom. However, the involvement of fertility clinics, surrogate mothers, and sometimes gamete donors introduce additional layers to what was once considered an intimate family unit.

Among the various ART methods, IVF and surrogacy arrangements pose the most significant ethical challenges. Surrogacy, in particular, involves multiple parties, complicating legal relationships and making it difficult to equitably balance everyone's rights. The position of the child is especially delicate, while legal parents are typically the child's primary caregivers, the determination of legal parenthood in surrogacy cases is often unclear, leading to divided parental responsibilities. Given the complexity and controversy surrounding surrogacy, states generally adopt one of three legal approaches to address it: outright prohibition, permissive regulation, or legislative silence.

Due to the controversy of surrogacy arrangements and practice, and the diverse legal approaches states take to address the issue, nationals from prohibiting states tend to access these medical services abroad, where it is legal and accessible, thus the phenomenon is reaching cross-border dimensions and is venturing in the domain of reproductive tourism.

[45] Zdeňka Králíčková, "On the Family and Family Law in the Czech Republic," in *Family Protection From a Legal Perspective*, ed. Tímea Barzó and Barnabás Lenkovics (Central European Academic Publishing, 2021), 77–110.

The cross-border element in surrogacy is essentially the one, which causes the most complexities in resolving conflicts of family- human rights and children's rights law.

Furthermore, cross-border surrogacy arrangements add another layer of complexity to family structures. Intended parents often travel abroad to circumvent the legal barriers imposed by their home countries, seeking out jurisdictions where surrogacy is legal and available to foreigners. While this may offer a solution in the short term, significant challenges frequently arise when they return home, particularly when attempting to register the child with the domestic civil registry based on a foreign birth certificate. This process often leads to serious legal and practical uncertainties regarding the establishment of legal parenthood, the child's nationality, and, in some cases, even results in the child being placed in alternative care.

From the perspectives of children's rights, key issues involve, *the child's rights to identity,* to get to know his or her genetic origins, *their best interests*, *the right to respect for private and family life*, additionally the right to grow up in family environment, the child's right to health, education and social security.

These values take on particularly broad and complex dimensions in the context of children born through surrogacy. Countries that are signatories to international children's rights treaties are obligated, both positively and negatively, to establish a legal framework that enables the full realization of these rights.[46]

Ultimately, the clash between competing rights and legal principles is undeniable, and determining which takes precedence often falls to the courts, most notably the European Court of Human Rights. The ECtHR employs a range of interpretative methods to navigate the legal intricacies of international surrogacy arrangements, aiming to prevent human rights violations. It is now widely recognized that children's rights are human rights, and the international community must take meaningful action to ensure that all children, including those born via surrogacy, can fully enjoy the protections guaranteed by various international conventions.

[46] In many cases, children's rights may conflict with those of the parents, and in surrogacy arrangements, the rights of the surrogate mother must also be taken into account. Most notably, the right to self-determination, both of the surrogate mother and the intended parents, can be compromised. While the intended parents are typically the ones seeking to assume full parental status, with all associated rights and responsibilities, the legal reality in most European

The most noteworthy international legal tool specific to children's rights protection is the UN CRC[47], is the most widely ratified UN treaty, plays a crucial role in establishing legal safeguards and guiding principles for the protection, promotion, and participation of children's rights. By ratifying the UN CRC, states commit to taking all necessary legal, administrative, social, and cultural measures to ensure an environment where children can flourish and their rights are upheld. While enforcement mechanisms may differ across jurisdictions, both the UN CRC and the Committee on the Rights of the Child (Committee) have issued important observations regarding specific phenomena and emerging challenges. Particular attention has been given to how the best interests of the child and the child's right to identity are upheld in the context of ART, especially surrogacy. These concerns are particularly pronounced in the fragile structure of surrogacy arrangements, where complex legal implications, most notably those arising from international surrogacy, pose significant challenges to fully protecting the child's rights.

In the following chapter, we will examine extensively how children's rights prevail in cross-border surrogacy arrangements, in an attempt to engage into examining the hypothesis whether *children are especially at risk of having their rights compromised due to being conceived and born through international surrogacy.* By analyzing what the children's rights centered approach in cross-border surrogacy arrangements entail, with special regard to how the best interests of the child, the child's right to identity and nationality, and tangentially examining other related rights (right to grow up in family environment, right not to be trafficked) we suggest that they shall play a pivotal role in the resolution of the competing interests. Surrogacy is a new technology of reproductive medicine, which is available for infertile intended couples, thus if we resort to proactively tackle the issue, instead of complete abolition, prioritizing the children's interest is the noblest way forward.

2. The Evolution of International Legal Protection of Children

The international legal framework concerning children's rights protection in the context of surrogacy arrangements is characterized by a complex interplay of ethical,

[47] UN General Assembly, *Convention on the Rights of the Child : resolution / adopted by the General Assembly*, A/RES/44/25, 5 December 1989, https://www.refworld.org/legal/resolution/unga/1989/en/27134.

legal, and social considerations. While the UN CRC establishes fundamental rights for children, such as the right to identity and knowledge of their origins, it does not specifically address surrogacy, leading to a lack of cohesive international standards. As it has been highlighted before, the absence has resulted in significant variability in national laws, with some countries outright prohibiting surrogacy, while others permit and regulate it, creating potential conflicts for children born through these arrangements and their intended parents. The diversity in regulation ultimately causes potential legal gaps in child protection processes, even if international legal frameworks established a common legal foundation for the protection and fulfillment of children's right, they are grasping the generally expectable assertion of principles. This „generality" although, was a pivotal feature of the UN CRC, as it became the most widely ratified UN convention, by withholding value-specific, and value-decisive passages in the UN CRC regarding the most controversial ethical and legal issues surrounding children, thus respecting the discretion and sovereign legislation and decision-making of the member states.[48]

[48] The UN CRC was a major step forward for the international community to enhance legal cooperation in child protection, although during the drafting period, key controversial issues has been negotiated, one of which was the utmost intriguing discussion about how to phrase and whether to include when childhood begins, whether pre-birth protection of the rights' of a child should be included in the final wording of the UN CRC.
Understandably, there have been diverse views about when life begins. Some countries e.g. the Holy See, Malta, Ireland, Senegal vouched for the beginning point of the child's life to be the moment of conception and demanded a strong protection for the unborn child. At the same time, countries, where the national legilsation allowed abortion, opposed to include any phrasing that could imply the unborn child's right to life is protected, as it would necessarily restrict the reproductive rights, as the protection of prenatal life in the UN CRC could be interpreted as member states have to ban abortion laws. As the debate progressed, the proposal to explicitey grant the right to life „from conception, was reejected, due to the upon mentioned worries.
Eventually, the UN CRC's text reflects neutrality and a reached compromise in a form, that the working group included a vague reference in the Preamble as follows: *„Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth".* This formulation, refers to the origins of the notion of child protection, established by the 1959 Declaration on the Rights of the Child, at the same time allowing interpretation of this phrasing to be non-bidning, and free for interpretation according to the member states' natinal laws. This was also confirmed by the Legal Counsel, as during the *Travaux Préparatoires* the delegation of the UK sought clarification on the interpretation of the Preamble in conjunction with Article 1. stipulating the definition of the child or Article 6 stipulating the right to life. The Legal Counsel noted that while it was unusual, an interpretative statement could be included in preparatory documents to clarify that the Preamble does not legally obligate states to recognize fetal rights, and confirming that the text of the Preamble does not turn over the national abortion laws, thus making it a diplomatic compromise rather than a legal mandate.
Although the protection of children's rights often raises morally and politically diverse concerns, the widespread ratification of the UN CRC can be attributed to its commitment to open dialogue and its balanced, neutral approach. This framework allows States Parties to adhere to the Convention without the

It is important to emphasize that surrogacy is not an isolated legal or ethical phenomenon; rather, it encompasses a complex web of rights and responsibilities involving multiple parties. Although surrogacy arrangements initially emerged as a means to address infertility and to fulfill adults' aspirations for parenthood and family life, they inherently extend beyond individual interests, raising broader legal, social, and human rights considerations. Subsequently, the children's rights considerations in surrogacy arrangements have not made a focal point until the adoption of the UN CRC, which solidified the affirmation of the principle of a child-centric approach in all private and public aspects. Many issues such as, financial exploitation, best interests, transparency of identity, nationality and citizenship, have prompted calls for clear guidelines and ethical practices to safeguard the interests of vulnerable individuals and uphold the child's welfare in surrogacy arrangements. This evolving perspective has also expanded the concept of the protected values beyond their legal dimensions, moving into a more philosophical realm. In this context, the rights of children born or conceived through ART are approached with greater depth and nuance, incorporating substantive protections that go beyond procedural safeguards.

To fully grasp the significance of a child rights-based approach to these contemporary challenges, it is worth turning our attention to the historical development of child protection and the evolution of key principles underpinning children's rights. By examining the shift from an adult-centric to a child-centric perspective in both private and public domains and tracing the evolution of legal and social recognition regarding the holders of rights and responsibilities, as well as the manner[49] in which these rights are exercised, it becomes possible to identify the underlying trends and normative aspirations of child protection. This analytical lens also offers insight into the potential future development of legal responses to challenges arising from surrogacy arrangements, which will also help us to determine, whether children's rights are more or less likely to be

perception that it overrides national legal systems, which are deeply rooted in the unique historical, ethical, and cultural evolution of each nation.
See: UN. Office of the High Commissioner for Human Rights, *Legislative History of the Convention on the rights of the child, Volume I,* (United Nations, 2007)

[49] The most contemporary attitude towards the exercise of the rights of children, places increasing emphasis on the child's *welfare* and *participation*, recognizing the child as a competent individual capable of expressing views and having a say in matters that affect them.

compromised. The historical trajectory of children's rights protection has facilitated the development of values, as well as both the legal and social perception of the child.

2.1 The path leading to the UN Convention on the Rights of a Child

The formal recognition of children's legal protections began to take shape alongside the anti-child labour movements of the 19th century. The Industrial Revolution dramatically increased labor demands, and children alongside woman, were frequently subjected to exploitative working conditions. Regarding the betterment of the conditions of workers in general, the individualist state, already influenced to some extent by socialist ideals, implemented protections for women's and child labour. However, these measures, much like broader labour protections, were not rooted in ethical principles, but rather driven by the practical need to preserve the productivity of workers viewed primarily as instruments of economic gain. Furthermore, in many countries, such labour protections are frequently circumvented or disregarded by employers.[50]

Despite the emergence of formal equality during this period, Parental authority remained in focus and stayed decisive in the family power dynamics, thus the formal equality introduced with the Bourgeois and the Industrial Revolution remained non-inclusive to children.[51] However, as society gradually began to recognize the intrinsic value of children, the right to education came to the forefront, which was contradictory to the execution of child labour. This shift led to a decline in child workforce participation and greater social awareness of children's well-being in order to preserve the duty of school attendance, by which the normative focus also began to turn.[52]

The examination of international instruments addressing child labour, although have a separate development from the general children's right protection, reveals that concerns

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[50] Sigmund Engel, *Elements of Child-Protection,* trans. Paul Eden (George Allen & Company, 1912).
[51] Dubravka Hrabar, *Uvod u prava djece in Prava djece* (Pravni fakultet Sveučilišta u Zagrebu , 2016), 21.
[52] Although child labour itself was still not considered as exploitative and harmful, but gradually with time some legal safeguards regulating the minimum and maximum age to work, improving working conditions and shortening the working hours were introduced s in the second half of the 19th century in some countries such as Prussia, Denmark, Germany, Italy, the Netherlands and Belgium.
A great breakthrough was imposed by the International Labour Organization in 1919, namely Convention no. 5 on minimum age of children for employment in industry and Convention no. 6 on night work of young persons in industry, which started a wave in recognition of the exclusive link between compulsory education and the minimum age of employment. See more in: Ivana Grgurev, "Rad i socijalna sigurnost djece," in *Prava djece - multidisciplinarni pristup*, ed. Dubravka Hrabar (Pravni fakultet Sveučilišta u Zagrebu, 2016)

for the welfare of working children served as early, albeit less impactful, catalysts for the gradual expansion of societal awareness regarding child well-being.

The true emergence of children's rights in a normative sense began in the 20th century. This period saw a wave of national legislation aimed at child protection, laying the groundwork for a broader recognition of the need for an international legal instrument dedicated specifically to children's rights. The catastrophic impact of the First World War underscored the vulnerability of children and prompted a shift in public consciousness toward their recovery and protection.

The emergence and strengthening of the social solidarity towards children was embodied by the establishment of NGOs designed to aid vulnerable, orphaned, starving children. Several notable initiatives emerged during this time, including the establishment of the Save the Children Fund by Eglantyne Jebb in 1919, and the creation of the International Save the Children Union in 1920 by Rädda Barnen in collaboration with the International Committee of the Red Cross. These pioneering efforts culminated in the adoption of the Declaration of the Rights of the Child by the League of Nations in Geneva in 1924m which was the earliest predecessors of the UN CRC. Though composed of only five articles, the Declaration marked a historic turning point. It called on member states to prioritize the international legal protection of children, recognizing that their inherent vulnerability made them especially susceptible to abuse and exploitation. These articles in today's legal terms encompassed the right to development, the right to survival, health, resocialization and rehabilitation and substitute care, the right to protection from economic exploitation and restricted work conditions and the right to upbringing and all-round development and to nurture and educate the child in a way that later he/she can be beneficial for society.[53]

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[53] The Geneva Declaration original wording reads as follows:
,,Preamble
By the present Declaration of the Rights of the Child, commonly known as 'Declaration of Geneva,' men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed
Article 1 - The child must be given the means requisite for its normal development, both materially and spiritually.
Article 2 - The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored.
Article 3 - The child must be the first to receive relief in times of distress.

The Geneva Declaration was driven by the conviction that children constitute a distinct group of legal subjects whose interests and needs must be acknowledged, and whose visibility must be ensured in a world governed by adults. It emphasized the moral and social responsibility of adults toward children's well-being and development.

The further cornerstone of the children's rights legal framework development in within the UN, was embodied by the adoption of the Declaration of the Rights of the Child by UN General Assembly Resolution 1386 (XIV) on 20 November 1959.[54] This Declaration revised, expanded, and modernized the original Geneva Declaration, reinforcing its principles while delivering a clearer and more assertive message to the international community. It explicitly outlined the fundamental rights and freedoms of children, emphasizing the importance of securing both their individual well-being and, through that, the broader well-being of society.[55]

2.2 The UN Convention on the Rights of a Child

These foundational developments culminated in the adoption of UN CRC, a seminal international instrument that establishes legally binding obligations for member states to uphold, promote, and protect the rights of the child. The Convention embodies the global shift towards the universalization of child rights protection, situating children as autonomous rights-holders within the international human rights framework. It mandates member states to harmonize their domestic legal systems with a rights-based approach to child protection and development, thus ensuring the comprehensive recognition and implementation of children's rights in both law and practice.

Article 4 - The child must be put in a position to earn a livelihood, and must be protected against very form of exploitation.
Article 5 - The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men."
See: League of Nations, *Geneva Declaration of the Rights of the Child* (League of Nations, 1924), http://www.un-documents.net/gdrc1924.htm

[54] The revision of the Geneva Declaration was motivated to introduce new principles to expand the concept of the child's welfare, while it was still strongly emphasized that, despite the updated wording, the declaration *„should bind the peoples of the world today as firmly as it did in 1924*" (See: United Nations, *Economic and Social Council Official Records, 1st year, 2nd session: 4th meeting*, (United Nations, May 28 1946), 283.
See: UN. OHCHR., *Legislative History of the Convention on the rights of the child,* 4.

[55] Philip E. Veerman, *The Rights of the Child and the Changing Image of Childhood*, (Martinus Nijhoff Publishers, 1992), 159.

It is important to highlight, that the overview of the accountability of member states towards the UN CRC is facilitated by the Committee on the Rights of the Child, which monitors implementation. This Committee reviews reports submitted periodically by member states detailing their progress in applying the Convention's provisions.[56] In turn, the Committee issues expert recommendations and observations, guiding states on how to enhance their child protection frameworks.

Basically, the UN CRC Committee's review and overview work promotes the enforceability of the UN CRC, although the Committee does not function as a regular executive body, the member states are expected under international law to comply and uphold the content of the UN CRC. As the enforceability is linked to the reporting mechanism, which is a soft pressure relying on transparency and international scrutiny, it eventually lies on the discretion of the member states on how and to what extent comply with the UN CRC. Regardless, the UN CRC represents a critical step toward embedding a universal, legally grounded commitment to the rights and dignity of every child.

The adoption of the UN CRC was preceded by the cumulative efforts of the international community, which gradually recognized children as bearer of rights, who possess specific needs linked to their age, maturity, development, and it lies in the hands of the adults to create a safe environment, where these needs can be satisfied. The historical development of the perception of the child gradually changed from the children being an asset to the community, through an object/value to protect, to an active bearer and contributor of their rights as far as their development stage ensures. The involvement of children born through surrogacy in matters that concern them becomes particularly vivid through the exercise of their right to identity, which right encompasses not only the legal recognition of the child's name, nationality, and parentage but also access to information regarding their origins, including the identity of the surrogate mother and, where applicable, gamete donors. Thus, the right to participation of the child to initiate proceeding towards learning about their identity including circumstances of birth becomes relevant, too.

[56] UN CRC Articles 43 – 45.

Although, the „passive" child protection in the context of surrogacy arises also before birth as well as during infancy, in particular the right not to be trafficked and sold, right to life, right to health.

Anyhow, children's right in the ART has not been eagerly considered during the drafting period[57] of the UN CRC, as the technology „peaked" just after the adoption. Regardless, this pivotal document established essential rights for children, including the right to identity, which encompasses birth registration and the right to know one's parents as far as possible (Art. 7. and Art. 8), which are fundamental in the context of surrogacy. However, while the CRC provides a framework for the rights of children, it does not explicitly address surrogacy, although the Committee's work on the interpretation of the Convention, as well as the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, tangentially address issues stemming from ART and also surrogacy.

2.3 The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography[58]

The OPSC, extends and specifies child protection, focusing on measures to guarantee the protection of child victims from the sale of children, child prostitution and child pornography, through strict prohibition and criminalization of practices and conduct falling under its Articles. Adopted in 2000 and entering into force in 2002, the Protocol followed years of advocacy and debate within the international community, led by the UN General Assembly and the Special Rapporteur on the Sale of Children, aimed at expanding

[57] Upon the first Polish Drafts, general comments were handed in by the member states, which was annexed to Commission on Human Rights resolution 20 (XXXIV) of 8 March 1978, included the general Comment from Columbia, which highlighted a suggestion to the drafters to bear in mind the further challenges of ART and the evolution of reproductive medicine and its potential effect to children's rights, by stating, that: *„The item concerning the convention should include as a topic of discussion the development of new scientific methods for the fertilization and preservation of human reproductive cells and experiments concerning their genetic structure."*
See: UN. OHCHR., *Legislative History of the Convention on the rights of the child,* 56.

[58] United Nations General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, CRC/C/156 (UN General Assemby, May 25 2000).

national jurisdiction to more effectively address crimes involving children and strengthen international cooperation in combating these offenses.[59]

It has been recognized in the UN CRC as well that children are particularly vulnerable to certain kinds of certain kinds of exploitation, including sexual exploitation and sale, trafficking, and abduction.[60] Here too, the Committee plays a key role in overseeing implementation by issuing concluding observations as a reaction to the periodic reviews, as well as enabling additional supervision by the work of the Special Rapporteur on the Sale and Sexual Exploitation of Children and the Special Representative of the Secretary-General on Violence Against Children.[61]

The OPSC also holds particular relevance in the ongoing discussion surrounding international commercial surrogacy. Although not explicitly referenced within the OPSC, there is an active and complex legal and ethical debate about whether commercial surrogacy falls under its scope. Proponents of inclusion argue that commercial surrogacy, where surrogate mothers receive financial compensation beyond reimbursement for medical, travel, or related costs, may amount to the commodification and exploitation of children. In this view, such practices could violate the child's right *not to be sold,* stipulated in the OPSC Art. 2 as „*Any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration.*" Furthermore, these arrangements might pose potential risks to the dignity and autonomy of surrogate mothers, particularly in cases involving economic vulnerability or coercion.[62] On the other hand, in countries where surrogacy is allowed, the surrogacy arrangements never display the child as the object of the contract or arrangement, rather the reproductive

[59] UN. OHCHR., *Legislative History of the Convention on the rights of the child,* 56.

[60] Article 35 of the UN CRC states: *„State Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."*

[61] David Smolin and Maud de Boer-Buquicchio, "Surrogacy, intermediaries, and the sale of Children," in *Research Handbook on Surrogacy and the Law,* ed. Katarina Trimmings, Sharon Shakargy, and Claire Achmad (Edward Elgar Publishing Limited, 2024), 55.

[62] The international human rights perspective, some scholars argue that the only appropriate approach to surrogacy would be to completely ban the practice, because its incompatibility of human rights standards. See more in: John Tobin, "To Prohibit or Permit: What Is the (Human) Rights Response to the Practice of International Commercial Surrogacy?" International and Comparative Law Quarterly 63, no. 2 (2014); David Smolin, "Surrogacy as the Sale of Children: Applying Lessons Learned from Adoption to the Regulation of the Surrogacy Industry's Global Marketing of Children", (2015-2016) 43 Pepperdine Law Review.

labor of the surrogate mother or the transfer of parental responsibilities, which is transferred after the birth of the child, thus fulfilling the arrangement. According to this perspective, the transaction does not directly equate to the sale of a child but instead centers around facilitating parenthood through a legal agreement, reflecting the standpoint of certain feminist legal theories.[63]

There has been two Reports[64] delivered by the UN Special Rapporteur on the Sale and Sexual Exploitation of Children which made intersection between the sale of children and surrogacy, which expressed clear reservations, warning the Human Rights Council that commercial surrogacy may, in certain forms, embody the sale of children. In the Special Rapporteur's earlier work, she called for stringent legal frameworks around surrogacy to prevent human rights violations, especially concerning human dignity and protection against commodification as well as rights to nationality and identity, access to origins and the family environment, statelessness, best interest assessments, genetic filiation and establishment of legal parenthood of the surrogate-born child.[65] Although, surrogacy is an overreaching problem extending purely the right not to be sold and trafficked, the Special Rapporteur highlighted the transcending problem which goes beyond the questionable ethics of surrogacy arrangements, which pose actual legal obstacles by *„the international regulatory vacuum that persists in relation to international commercial surrogacy arrangements leaves children born through this method vulnerable to breaches of their rights, and the practice often amounts to the sale of children."*[66] There are voices, that zero tolerance approach to surrogacy, so complete prohibition, would enhance the frequency of illicit practices, which provided that maybe not all commercial surrogacy

[63] Lily Johnson, "Commercial Surrogacy Is the Sale of Children?: An Argument That Commercial Surrogacy Does Not Violate International Treaties," *Washington International Law Journal* 28, no. 3 (2019): 701-706, https://digitalcommons.law.uw.edu/wilj/vol28/iss3/9/.
[64] UN Human Rights Council. *Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material,* A/HRC/37/60 (February 26, 2019) (hereafter: UN SR, 2018, Thematic Report), and UN General Assembly. *Sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material*, A/74/162, (July 15, 2019) (hereafter: UN SR, 2019, Thematic Report)
[65] See more in: UN SR, 2019, Thematic Report
[66] UN SR, 2018, Thematic Report para. 8.

practices may equate the sale of children, if certain conditions are met, which the Special Rapporteur highlights, too.[67]

In light of these concerns, the Committee urges member states where surrogacy is practiced to implement regulations to ensure that surrogacy arrangements do not result in the sale of children. Furthermore, both the CRC and the UN Special Rapporteur have emphasized the need for careful assessment of related human rights concerns, especially in the context of cross-border surrogacy. These include the child's right to a legal identity and nationality, access to information about their origins, prevention of statelessness, and the clear establishment of legal parenthood, all while ensuring that the child's best interests remain the primary consideration. The existing diversity in European surrogacy laws further underscores the importance of harmonizing legal protections to address the complex realities of surrogacy arrangements in a rights-respecting manner.[68]

2.4 The role of the ECtHR

International protection of children's rights is also strongly reflected in the work of the Council of Europe, particularly through the jurisprudence of the ECtHR. Since the drafting of the Convention, member states have integrated its human rights protections into their national legal systems. Although the Convention does not specifically address children's rights as a separate category, several of its provisions are directly applicable to children. Moreover, the case law of the ECtHR provides valuable guidance on the interpretation and application of human rights in cross-border surrogacy cases, and usually is confronted by issues surrounding legal parenthood, discrimination, adoption, genetics,

[67] To ensure this distinction is substantive rather than merely a legal fiction, several safeguards must be in place, such as, the legal recognition at birth, guaranteed payment conditions and voluntary transfer of the child.
The surrogate mother must be recognized as the legal mother at the time of birth and must not be contractually or legally required to hand over the child, leaving her a certain leverage revaluate her obligations undertaken in the arrangements. Her obligations under the arrangement should be considered fulfilled upon completing the pregnancy and childbirth, regardless of whether she retains parental status. Furthermore, all compensation to the surrogate must be completed before any legal or physical transfer of the child occurs. Necessarily, payments must be non-refundable, even if the surrogate decides to keep parental rights, and these terms must be clearly stated in the contract. If the surrogate mother later chooses to transfer the child to the intended parents, this act must be entirely voluntary, based solely on her post-birth decision and not mandated by any pre-existing agreement
See: UN SR, 2019, Thematic Report.
[68] See more in: UN SR, 2019, Thematic Report.

distinction of commercial and altruistic surrogacy procedures, including the protection of the child's rights, born from a surrogacy agreement, where the ECtHR presents evolving jurisdiction.

Overall, considerations related to children's rights play a pivotal and often determinative role in surrogacy-related cases. The ECtHR consistently underscores the necessity of safeguarding the rights of children born through such arrangements. In evaluating whether a state's legislation or actions amount to a violation of the European Convention on Human Rights, the Court applies its established criteria, assessing whether the interference was proportionate, pursued a legitimate aim, and was necessary in a democratic society to protect fundamental values. In light of the absence of a uniform European consensus on the legal recognition of cross-border surrogacy arrangements, member states are afforded a broad margin of appreciation. This grants national authorities a degree of discretion in balancing competing rights and interests, though the scope of this margin varies depending on the nature and importance of the rights involved. Notably, the ECtHR frequently draws upon the UN CRC as a complementary interpretive tool, so reinforcing the integration of international child rights standards into its jurisprudence. The turning point in surrogacy related cases culminates in the best interest of the child assessment in light of the child's right to identity, which is encompassed under the Article 8. of the Convention, more precisely under the right of respect for private life. The in-depth examination of the ECtHR will be provided in part III.

2.5 The role of the European Union

Within the European Union, the Treaty of Lisbon[69] marked a significant advancement in supranational protection of children's rights. It elevated the protection of children's rights to a general objective of the EU, applicable across all policy areas, both internal and external.[70] Consequently, EU member states are obliged to actively promote and safeguard children's rights in line with this objective. Although, since the European Union has no

[69] Conference of the Representatives of the Governments of the Member States, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community,* 2007/C 306/01 (13 December 2007), https://www.refworld.org/legal/agreements/eu/2007/en/7108.
[70] Conference of the Representatives of the Governments of the Member States, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* 2007/C 306/01, (13 December 2007), Art. 2. and 3., https://www.refworld.org/legal/agreements/eu/2007/en/7108.

competences over family law, normatively, there are far more essential international legal documents, which comprehensively navigates and lists children's rights related issues. The European Union in its mission to enhance harmonization of legislation of member states, cross-border family law issues has been subjected to thorough scrutiny, including issues surrounding child poverty, quality education, fighting violence against children (sexual, physical, mental and all kinds of violence, domestic violence etc.), exploitation of children (including sexual exploitation, child prostitution, pornography and trafficking), protection of children from substance abuse, as well as cross-border recognition of parenthood which is the most tackling issue arising from surrogacy arrangements within the EU. These are the pressing issues, where the European Union might take legal and political initiative (not necessary in binding, perhaps the soft law solutions might be more suitable on the EU level), although, these problems also imply region specific considerations.[71]

Turning to the binding regulations of the EU, which covers segments of children's rights, could be tracked in the context of parental responsibility and cross-border family law matters, the revision of the Brussels IIa Regulation (now Brussels IIb)[72] brought procedural improvements. These include the acceleration of judicial proceedings involving children, more efficient cooperation between states, and stronger enforcement of children's rights in cross-border cases.

The most notable EU document, which first and foremost is designated to human rights protection, extends its application to children, is the Charter of Fundamental Rights of the European Union[73]. It became legally binding with the Lisbon Treaty, serves as a primary legal source within the EU. The Charter contains specific and enforceable provisions on children's rights, obligating both EU institutions and member states to uphold them. Article 24 of the Charter is specifically designated to the rights of the child, prioritizing their protection, care and well-being, the best interests principle, as well as

[71] Dubravka Hrabar, "Children's Rights and the European Union – Framework," in *Children's Rights in Regional Human Rights Systems* ed. Anikó Raisz (Central European Academic Publishing, 2024), 65-66.
[72] Council Regulation No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.
[73] European Union, Charter of Fundamental Rights of the European Union, 2000/C 364/01 (26 October 2012).

incorporating the child's right to participation and expression of their views, based on age and maturity, which shall be considered. Furthermore, the unity of the family through maintenance of regular contact with both parents is encouraged.[74] It is noteworthy that, in alignment with the European Convention on Human Rights, the level of protection provided by the Charter must not fall below that established by the Convention, ensuring a consistent and high standard of child rights protection across Europe.

Basically, the EU does not have competence in shaping substantive family law through children's rights, although some references are indicating children's rights protection both in primary (although here just tangentially) and secondary legislation. The body of secondary legislation within the EU, encompassing regulations, directives, decisions, recommendations, and opinions, is steadily expanding, while primary legislation, consisting of the Founding Treaties, includes relatively fewer provisions. Although substantive family law remains outside the regulatory scope of the European Union, matters of judicial cooperation in cross-border civil cases fall under shared competence. This relates to the development of the so-called area of freedom, security, and justice, aimed at ensuring legal certainty, security, and freedom within the EU.[75] The relevance of the EU law in cross-border family matters in the context of recognition of surrogate parenthood will be discussed in later chapter.

The secondary law of the EU, encompassing soft law instruments such as strategies, resolutions, recommendations, and guidelines, is considerably more extensive in the field of children's rights, primarily serving the purposes of their promotion and protection. While these instruments are non-binding, they clearly reflect the European Union's commitment to the safeguarding of children's rights and are intended to provide guidance for member states in the development and implementation of relevant policies.[76]

The legal risks to children arising from cross-border surrogacy are not explicitly addressed in any of the aforementioned EU documents. However, this absence does not imply that the EU has remained outside the legal and societal discourse surrounding the

[74] Ibid, Article 24.
[75] Hrabar, "Children's Rights and the European Union,", 70
[76] Noteworthy directed policies are e.g. EU Strategy on the Rights of the Child 2021 (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – The EU Strategy on the Rights of the Child 2021-2024); European Child Guarantee 2021.

issue. It is evident that the overarching message of the EU's framework for the protection of children's rights builds upon the principles enshrined in the UN CRC, particularly the primacy of the best interests of the child, the significance of a family environment, the promotion of healthy development, and the respect for children's participation, while recognizing them as active holders of rights.

The European Commission has made a timely commitment at the strategic level to the protection of children's rights. However, it must be acknowledged that the competences related to the most impactful and tangible measures remain largely within the hands of the Member States. As such, the Strategy carries the inherent risk of limited effectiveness in the absence of genuine commitment at the national level. Within the current legal framework, the key to meaningful change lies primarily with the proactive engagement of the member states.[77] Despite the obligation to respect the „common values"[78] of the EU, there is no obvious unity within the member states, how the issue of cross border surrogacy shall be navigated, thus remaining in the area of the member states discretion.[79]

3. The key rights of children at stake

After exploration various ethical and legal perspectives on cross-border surrogacy arrangements imply in the following part we shift our focus to the broader framework of international human rights law concerning children's rights. The primary framework in this context is the UN CRC and the jurisprudence of the ECtHR. Key provisions of the UN CRC particularly relevant to scenarios to cross-border surrogacy arrangements are examined, more precisely the *child's right to identity and nationality* the *child's best interest principle* and the *right to grow up in a family environment*. Additionally, the ECtHR's jurisprudence in this analysis is influential, as the Convention contextualizes the above-mentioned children's rights under the umbrella of many of its provisions, for our interest jurisprudence on Art. 8, the right to respect for private and family life, which

[77] Márta Benyusz, "A gyermekek jövője az Európai Unióban - Mit ígér a Bizottság 2021-2024-es stratégiája?," *Jog, államp, politika* 3, (2021): 149-162, https://szakcikkadatbazis.hu/doc/2342760.
[78] Preamble of the Charter of Fundamental Rights of the European Union
[79] There has been some significant development of the interpretation of surrogacy related legal issues (human trafficking), as well as recognition of civil documents, cross-border parental rights, and the best interests of the child. The development of the EU legislation is discussed in depth in part IV. of the dissertation.

serves as a benchmark in the field. Anyhow, the aspects these rights involve are the most vital to uphold a in cross-border surrogacy arrangements, especially commercial ones.

We have to highlight, that children's rights protection, in cross-border surrogacy arrangements are double in nature. This twofold nature is what causes legally and ethically problematic discussions, and depending where the focus lies could reach different outcomes in potential solution-making legal response. Firstly, the ethical and legal considerations for children have to be distinguished based on the individual and general human rights concerns, more concretely, whether the issues revolve around children *already born* through surrogacy arrangements, those who are *already conceived* and those who are *yet to be conceived, the intended child*.[80]

In the latter case, the yet to be conceived child has general human rights concerns, basically potential concerns for a potential child.[81] These are invoked, usually when a state determines its national legislation on surrogacy arrangements, and are based on the elusive interpretation of human dignity.

[80] If we go further in our analysis, we might include the considerations of the child in-between these determined points of development, the child conceived but not yet born. The IVF conceived embryo and its status has many repercussions both ethical and legal. There is even a legal distinction between the embryo conceived IVF of those who were conceived inside womb. The discussion surrounding the status of the embryo often centres on the ethical boundaries of conducting scientific research involving embryos, generally, the legal status and normative assessment of the human embryo. ART used for reproductive purposes raise ethical and legal dilemmas across multiple dimensions, including the right to life, the right to health, and the potential commodification of embryos. The discussion is already highly complex at the philosophical level. However, if we bring in the additional grounds surrogacy arrangements might imply, the health risk to the embryo caused by IVF environment, the possibility of genetic screening, pre implantation genetic diagnoses, which if utilised, might open the path for selective reduction based on sex, genetic disease or disability initiated by the intended parents, because of the „undesirable characteristics of the future child, as well as the potential manipulation with the „redundant" embryos, which were not implanted. These circumstances challenges the objective duty of the state to safeguard the right to life, and whether, under what circumstances, within what margin of appreciation the embryo is given moral status.
See more in: Judit Sándor, "Az élethez való jog," in Internetes Jogtudományi Enciklopédia, eds. András Jakab, Miklós Könczöl, Attila Menyhárd, and Gábor Sulyok (Alkotmányjog rovat, 2021), http://ijoten.hu/szocikk/az-elethez-valo-jog.

[81] The Committee in General Comment No. 13 that the care women receive before, during, and after pregnancy has profound implications for the health and development of their children. This indicates that the Committee does, in fact, consider the importance of protecting children before birth, as well as the significance of prenatal and perinatal healthcare during pregnancy. We can without a doubt deduct there is an intent to extend protection to the unborn child, despite the exact beginning point of the life of the child is deliberately omitted, from the UN CRC, probably causing its internationally wide acceptance.
See: UN Committee on the Rights of the Child, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence*, CRC/C/GC/13 (April 18, 2011), https://www.refworld.org/legal/general/crc/2011/en/82269.

The case of the children already born through surrogacy arrangement, the rights become immediately individualized, and can be understood from a more practical perspective, particularly in relation to the legal complications arising from their ambiguous status. The assessment of the child's right to identity and nationality, right to grow up in a family environment, right to respect for private and family life, and the best interests principle underpinning and navigating all these rights from behind to safeguard the child's well-being are contrasted by the states' prohibiting regulation towards surrogacy. Interestingly often argumentatively lying on the rationale to protect the children's right to human dignity – the children's who are not yet conceived in an erga omnes sense, the protection of children in a general sense introduced above. The following chapters will primarily focus on the children *already born* through surrogacy arrangements, while sometimes contrasting it with the interests of children *already conceived*, and those of *yet to be conceived, the intended child* in surrogacy context.

The child's right to identity is not a stand-alone right, as it is also deeply interconnected with the realization of other rights outlined in the UN CRC. For example, Article 6 upholds the child's right to life and development, Article 9 aims to keep families united, Article 10 addresses maintaining contact between family members across borders, and Article 20 stresses the importance of preserving a child's ethnic, religious, cultural, and linguistic identity in alternative care situations.[82] This interconnectivity is basically characteristic to the whole nature of child protection, as expressed in connection with the right to identity of the child, the United Nations Children's Fund emphasized the critical nature of identity rights in 2019, stating: *"Society first acknowledges a child's existence and identity through birth registration. The right to be recognized as a person before the law is a critical step in ensuring lifelong protection and is a prerequisite for exercising all other rights."*[83] This underscores the importance of recognizing identity as a multifaceted and essential right, one that plays a foundational role in the broader framework of child protection. Given its inherent complexity and interconnectivity with various aspects of a child's well-being, the right to identity must be carefully considered

[82] Mia Dambach and Nigel Cantwell, "Child's right to identity in surrogacy," in *Research Handbook on Surrogacy,* ed. Katarina Trimmings, Sharon Shakargy and Claire Achmad (Edward Elgar Publishing Ltd, 2023), 2.
[83] UNICEF, *Birth Registration for Every Child by 2030: Are we on track?* (New York, UNICEF 2019).

when addressing the legal and social implications of surrogacy arrangements, both in the planning stages and in the long-term outcomes. This holistic approach reflects the very nature of child protection, where rights such as identity are deeply interconnected with the child's development, sense of self, and overall dignity. The longevity of the effects has to be considered of the right to identity of the child is crucial, as its effects often extend well into adulthood. Moreover, the toolbox available to the child to for uncovering or inquiring about the circumstances of birth etc., are many times practically not feasible.

Additionally, this is often due to emotional barriers, such as a perceived conflict of loyalty toward their parents. The ultimate decision to disclose this information typically rests with the parents, as access to certain identity-related details may require parental consent or oversight. The sensitivity and the weight of revealing the circumstances of birth to the child, has twofold consequences, impacting both to the child and the parents. The decision about disclosure invokes concerns about maintaining family unity, emotional trust, thus it is requiring careful consideration to safeguard the well-being of all parties involved.

3.1 The right to identity and nationality

3.1.1 Theoretical and legal dimensions of identity

The right to identity encompasses numerous facets related to an individual's origins, making it a foundational element in shaping personal development. While the concept of identity involves various dimensions, philosophical, sociological, and psychological, the ability to understand one's cultural, biological, national, and ethnic roots is widely recognized as crucial for the healthy development of a child. This awareness not only impacts the individual but can influence generations to come.[84] If certain aspects of a person's identity remain undisclosed or untraceable, it can significantly hinder the child's healthy development, potentially undermining their sense of self and self-esteem. Given that identity is a fundamental element of personal development, its absence can lead to lasting consequences that are often difficult, if not impossible, to fully repair, even in

[84] Elaine O'Callaghan, "Surrogate Born Children's Access to Information About Their Origins," *International Journal of Law, Policy and the Family* 35, no. 1 (2021): 1-19, https://doi.org/10.1093/lawfam/ebab009.

adulthood. Cross-border surrogacy arrangements may with high probability cause gaps in accessing aspects of identity, in respect for genetic or gestational origins.

Traditionally, identity has been understood through a substantive and essentialist lens, emphasizing the stable and inherent aspects of one's authentic self.[85] However, more recent perspectives advocate for a reinterpretation of this concept, highlighting the role of relationships with significant others in the formation of identity. From this view, a child's path toward authentic selfhood is shaped by interactions and social bonds, rather than fixed internal traits alone.[86]

Legally, identity is often approached from a practical and administrative standpoint, merely reflecting its deeper meaning on a superficial level, as expressed particularly in the UN CRC in Art. 7. This article affirms every child's right to birth registration, to acquire a nationality, to have a name, and to know and, as far as possible, be cared for by their parents. It also imposes a positive obligation on states to take measures to prevent statelessness among children. Article 8 further strengthens this protection by obligating member states to respect and preserve the child's identity, including aspects such as nationality, name, and familial relationships, without unlawful interference.

Furthermore, there are additionally several other critical components are associated with the child's right to identity, concerning the right to get to know one's origins, more precisely the *„preservation of identity, nationality, name, family relations"* as laid out in Article 8 of the CRC. Identity is not confined to biological or genetic facts. Rather, as it has been already highlighted above, it is shaped by a broad constellation of relationships involving gestational, social, legal, and genetic factors.

This broader interpretation of „*family relations*" allows Article 8 to move beyond the traditional legal parenthood framework, accommodating the complex familial structures often present in surrogacy cases.[87] Importantly, the UN CRC's language, while not

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[85] Charles Taylor, *The Ethics of Authenticity* (Harvard University Press, 1992) 35.

[86] Ya'ir Ronen, "Redefining the Child's Right to Identity," *International Journal of Law, Policy and the Family* 18, no. 2 (2004): 147–177, https://doi.org/10.1093/lawfam/18.2.147.

[87] The original initiation to formulate Art. 8, was based on Argentina's proposal, which highlighted to enhance and extend the child's identity protection as well as preservation. The proposal was submitted by Argentina to the working group as follows: *„The child has the inalienable right to retain his true and genuine personal, legal and family identity. In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood relations to be brought up."*

explicitly mentioning biological or gestational parentage, creates space for addressing the delicate realities of children born through ART. In doing so, the drafters implicitly recognized that these modern reproductive arrangements may present distinct risks to a child's identity, thus calling for a nuanced and inclusive application of the UN CRC's protections.

The child's right to identity is not a stand-alone right, as it is also deeply interconnected with the realization of other rights outlined in the UN CRC. For example, Article 6 upholds the child's right to life and development, Article 9 aims to keep families united, Article 10 addresses maintaining contact between family members across borders, and Article 20 stresses the importance of preserving a child's ethnic, religious, cultural, and linguistic identity in alternative care situations.[88] This interconnectivity is basically characteristic to the whole nature of child protection, as expressed in connection with the right to identity of the child, the United Nations Children's Fund emphasized the critical nature of identity rights in 2019, stating: *"Society first acknowledges a child's existence and identity through birth registration. The right to be recognized as a person before the law is a critical step in ensuring lifelong protection and is a prerequisite for exercising all other rights."*[89] This underscores the importance of recognizing identity as a multifaceted and essential right, one that plays a foundational role in the broader framework of child protection. Given its inherent complexity and interconnectivity with various aspects of a child's well-being, the right to identity must be carefully considered

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The proposal was made in reflection of the highly topical repercussions after the fall of the dictatorship, which has revealed, that during the regime children of political dissidents were forcefully taken from their families, stripped of their identities and freed for illegal adoption to the government supporters. The proposal was later refined, as the original phrasing of *„family identity"* was not part of the legal terminology in many other states, thus to avoid gaps in legislation, a more inclusive and comprehensive wording was proposed. The final phrasing of Art. 8 was thus changed to *„family relations"*, which made it interpretatively extensive to be applied beyond solely the parents of the child, reflecting the other family models and structures across cultures. This compromise ensured the CRC's applicability worldwide while preserving the core intent: protecting a child's historical, cultural, and biological connections as fundamental to their identity.
See: UN Economic and Social Council, Commission of Human Rights, Forty-second session, Agenda item 13, Report of the Working Group on a draft convention on the rights of the child, E/CN.4/1986/39, 13 March 1986, para. 86; Christina Baglietto and Laurence Bordier, "Preserving Family Relations as an essential feature of the child's right to identity," *Adoption & Culture* 12, no. 2 (2024): 222-243, https://muse.jhu.edu/article/947402; UN. OHCHR., *Legislative History of the Convention on the rights of the child,* 383.

[88] Dambach and Cantwell, "Child's right to identity in surrogacy" 2.

[89] United Nations Children's Fund, Birth Registration for Every Child by 2030: Are we on track? (New York: UNICEF, 2019) 25-26.

when addressing the legal and social implications of surrogacy arrangements, both in the planning stages and in the long-term outcomes. This holistic approach reflects the very nature of child protection, where rights such as identity are deeply interconnected with the child's development, sense of self, and overall dignity. The longevity of the effects has to be considered of the right to identity of the child is crucial, as its effects often extend well into adulthood. Moreover, the toolbox available to the child to for uncovering or inquiring about the circumstances of birth etc., are many times practically not feasible. Additionally, this is often due to emotional barriers, such as a perceived conflict of loyalty toward their parents. The ultimate decision to disclose information typically rests with the parents, as access to certain identity-related details may require parental consent or oversight. The sensitivity and the weight of revealing the circumstances of birth to the child, has twofold consequences, impacting both to the child and the parents. The decision about disclosure invokes concerns about maintaining family unity, emotional trust, thus it is requiring careful consideration to safeguard the well-being of all parties involved.[90]

3.1.2. Surrogacy and the „identity vacuum"

Nevertheless, when surrogacy is involved, safeguarding the child's identity faces significant limitations, which arise primarily from three core aspects of the practice.

One of the most complex and problematic aspects of surrogacy, particularly in legal terms, concerns the establishment of parenthood, especially the legal status of the mother. In many countries adhering to Continental legal traditions, the longstanding Roman law principle *mater semper certa est*[91] continues to prevail. According to this doctrine, legal motherhood is inherently linked to childbirth, meaning that the woman who gives birth to the child is recognized as the legal mother. However, in jurisdictions where surrogacy is permitted and regulated, this biological and gestational connection can be overridden by contractual intent. In such cases, maternity is assigned to the intended mother based on the terms of a surrogacy agreement.

This divergence in legal interpretations creates significant challenges when the intended mother, who did not give birth, returns to a country that upholds the Roman law

[90] Tímea Barzó, *A magyar család jogi rendje* (Patrocinium, 2017), 318.
[91] the mother is always certain.

principle. Her status as the legal mother may be easily contested or outright denied, particularly if the surrogacy contract is considered invalid, illegal, or unenforceable under domestic law.

More broadly, surrogacy arrangements introduce a multilayered complexity to parenthood establishment, which may be established through gestational, genetic, and social connections. Legal recognition of these different forms of parenthood varies widely between jurisdictions. In some instances, a child born through surrogacy could, in theory, have up to five individuals with potential parental claims: the surrogate mother who carried and delivered the child, the intended mother and father who may or may not have contributed genetic material, and possibly separate male and female gamete donors.[92]

Out of a practical point of view is the treatment of the birth certificate, which often reflects only the intended parents, frequently excluding the surrogate mother and any gamete donors. This legal documentation, therefore, can misrepresent the biological and gestational realities of the child's origins. In many jurisdictions, there is no indication whatsoever that the child was conceived through surrogacy, leaving the child without a factual or legal reference point to begin tracing their origins. As a result, the broader family network, both genetic and gestational, can become effectively untraceable.

This lack of transparency creates what has been described as an *"identity vacuum or void,"* a profound gap in the child's self-understanding that may persist well into adulthood. During childhood, the tools and legal means to fill this void are often inaccessible, leaving the individual to grapple with unanswered questions about their genetic, biological, social, and cultural roots. While Article 8 offers a promising framework for a more comprehensive understanding of identity, the realities of surrogacy demonstrate how legal documents and procedures, such as falsified or incomplete birth certificates, can undermine that right and challenge the child's ability to construct a coherent and authentic personal narrative. This identity vacuum can profoundly affect the child's sense of self, emotional development, and long-term psychological well-being,

[92] Zoltán Navratyil, *A varázsló eltöri a pálcáját? A jogi szabályozás vonulata az asszisztált humán reprodukciótól a reproduktív klónozásig* (Gondolat Kiadó, 2012) 140-141.

especially as the legal system may offer little recourse to uncover these foundational aspects of their identity.[93]

The second issue concerns the international dimension of many surrogacy arrangements. an often-overlooked but essential aspect of surrogacy arrangements is the long-term impact on the child's right to health, identity, and connection to their cultural and biological roots. In many cases, children born through surrogacy are raised in a country geographically and culturally distant from their place of birth and the domicile of the surrogate mother. This physical and social separation may lead to a disconnection from the child's ethnic and cultural origins. Ensuring that the child has access to transparent information about their background is not merely a matter of curiosity but a key component of their overall well-being. As emphasized in Article 6 of the UN CRC, aligning the child's upbringing with their cultural and ethnic heritage contributes meaningfully to their physical, psychological, cultural, and spiritual development.[94]

Lastly, preserving the child's right to access medical and genetic information is equally critical, especially in the event of health risks or hereditary diseases. Access to such data plays a vital role in ensuring the child's right to health and appropriate medical care. However, this necessity often clashes with legal protections surrounding data privacy and the anonymity of the surrogate mother or gamete donors. Health data, which often encompassing sensitive genetic information, disease predispositions, and personal health histories, is generally subject to strict confidentiality protections, and its legal status is complex. Typically, the individual to whom the data pertains holds the right of access, though some jurisdictions allow for these rights to be extended to genetic descendants under certain conditions.[95]

This raises pressing questions about whether access to such data should be unrestricted in the name of the child's best interests or limited to critical medical information necessary for health-related decision-making. The legal landscape remains fragmented: national laws vary widely concerning the anonymity of sperm, oocyte, and embryo donation, and

[93] Claire Achmad, "Children's Rights in International Commercial Surrogacy. Exploring the challenges from a child rights, public international human rights law perspective," (PhD thesis, Leiden University, 2018) 60.
[94] Ibid.
[95] Fereniki Panagopoulou-Koutnatzi, "The right of the child to access its genetic identity," *Culture and Research* 5 (2016): 45-54, https://doi.org/10.26262/culres.v5i0.4950.

many jurisdictions have yet to clearly regulate surrogacy. As a result, even when intended parents wish to trace the donor's medical or personal identity, doing so in an international context may be exceptionally difficult or even impossible due to conflicting national laws and protections.

Ultimately, the intersection of identity, cultural heritage, and medical history reflects the broader need for a rights-based approach in surrogacy. One that prioritizes the child's long-term interests and development, especially in an increasingly globalized and legally fragmented environment.

We can see, how complex the identity issue surrounding surrogacy arrangement is, while the legal encapsulation of it, although broad in interpretation, rather recourse around the practical effects of the administration of birth certificate, which shall contain all the necessary information about identity and nationality. The potential involved risks beyond the existential, health and development consequences, the administrative legal risk of being left stateless arise in connection to the problems establishing the child's nationality.[96]

3.1.3 Legal identity and nationality - UN CRC

Both these issues are covered under the UN CRC, particularly in Articles 7[97] and 8[98]. These provision, ultimately, require member states to prevent situations where a child is left stateless, and wishes to ensure due diligence during the issuance of the birth certificate, and registration of the birth of the child. Although, Article 7 explicitly establishes this duty, it does not specify the nationality to which a child may be entitled, nor does it

[96] Elena Cristiana Ilioi and Susan Golombok, "Psychological Adjustment in Adolescents Conceived by Assisted Reproduction Techniques: A Systematic Review," *Human Reproduction Update* 21, no. 1 (2015): 84–96, https://doi.org/10.1093/humupd/dmu051.

[97] *„1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.*
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."
UN CRC, Art. 7.

[98] *„1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."
UNC CRC, Art. 8.

guarantee the right to a nationality from birth.[99] Art. 7 outspokenly focuses on the preliminary requirements to be fulfilled, thus right to be registered after birth, name, nationality and right to know and be cared for *as far as possible* be cared upon by his or her parents, in order to be able to enjoy their right to establish and preserve their identity articulated in Art. 8, necessarily broadening the interpretation of the scope of identity by including the right to preserve the „family relations".[100] That is why the these two articles are intertwined, offering a comprehensive notion of identity protection including both practical and theoretical level.

Upon closer examination of these Articles, the right to a nationality is deeply rooted in the broader principle of human dignity, a principle that faces serious threats in the context of international surrogacy. Children born through cross-border surrogacy arrangements are at an increased risk of becoming stateless, particularly when the intended parents' home country refuses to recognize the legal effects of the surrogacy agreement or to accept foreign-issued birth certificates.[101]

Conclusively, prompt birth registration is essential, as it serves as a gateway to the realization of other rights linked to the child's overall well-being. Childhood statelessness,

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[99] This lack of clarity poses serious challenges in cases involving international surrogacy arrangements. Such arrangements are often made between intended parents from countries where surrogacy is banned and surrogate mothers residing in countries where it is permitted. This situation raises concerns about whether member states are truly fulfilling their obligations under the aforementioned articles. One possible interpretation is that countries which legally allow surrogacy should impose restrictions on access for foreign nationals seeking such arrangements.
See: Sanoj Rajan, "International surrogacy arrangements and statelessness" in The World's Stateless Children, eds. Laura van Waas and Amal de Chickera (Oisterwijk: Wolf Legal Publishers, 2017), 374-385.

[100] Achmad, "Children's Rights in International Commercial Surrogacy," 215.

[101] A well-known case reflecting to the risk of statelessness of the surrogate born child is the baby Manji case. In 2007, the Yamadas, a Japanese couple, entered into a gestational surrogacy arrangement in India, using the intended father's sperm and an anonymous Indian egg donor. However, by the time the child, baby Manji, was born, the couple had divorced due to serious marital difficulties. While the intended father expressed his willingness to raise the child, the ex-wife declined any responsibility, as she had neither a biological nor legal connection to the baby. This situation gave rise to legal uncertainty regarding the maternal status of the child. Three potential maternal figures emerged: the surrogate mother who carried and delivered the baby, the anonymous egg donor, and the former intended mother, despite her lack of biological or legal ties. Neither the surrogacy agreement nor existing legislation at the time provided clear guidance on determining baby Manji's nationality or legal parentage. As a result, the child was effectively rendered stateless. The matter was brought before the Supreme Court of India, which acted swiftly, directing the relevant state authorities to resolve the case. Eventually, travel documents were issued, allowing baby Manji and his grandmother to return to Japan. Japanese authorities later indicated that the child could be eligible for Japanese citizenship, pending the legal establishment of a parent-child relationship.
See: Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji;* (Kenan Institute for Ethics, 2018), https://kenan.ethics.duke.edu/wp-content/uploads/2018/01/BabyManji_Case2015.pdf

in contrast, poses a serious threat to accessing education, adequate living standards, healthcare, social support, and other forms of protection to which every child is entitled.[102]

The UN Committee on the Rights of the Child elaborated on the identity issues surrounding ART, which also encompasses the rights children born from surrogacy arrangements. The Committee emphasized, that children born of third-party reproduction have a right to know their origins, although not explicitly listing, what is that information which shall be disclosed to the child, neither the time when and how. The normative determination of these circumstances has been left to the discretion of the member states, reflecting the diversity in legislation relating to medically assisted reproductive techniques.[103] Through the individual Concluding Observation on the fifth periodic report of France from 2016, contains concretely identified interpretative pathway the Committee prefers, about navigating the child's identity, including those born out of surrogacy. The Committee reaffirms that children have a right to know and be cared for by their parents, which includes knowledge of their biological origins and encourages the member state of the importance of legal and institutional measures to ensure that children born trough surrogacy or other non-traditional means can fully access their identity and origin information, in line with the best interests of the child and CRC Articles 3, 7, and 8. Ultimately, the Committee, through its soft-law instruments, urges states to ensure that member states shall *"...take all necessary measures to allow all children, irrespective of the circumstances of their birth, (...) to obtain information on the identity of their parents, to the extent possible."*[104] The Committee's observation advocates for complete transparency in matters of identity, including the establishment of legal parentage and the child's right to access information about their origins.

Other important organs of the UN such as the UN Special Rapporteur on sale and sexual exploitation of children have also contributed to the discourse in forms of recommendations connected to safeguards and guarantees to child identity preservation in

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[102] Rene de Groot, "Children, Their Right to a Nationality and Child Statelessness", in *Nationality and Statelessness under International Law*, ed. Alice Edwards and Laura van Waas (Cambridge University Press, 2014) 144.

[103] Child Right International Network, *A Children's Rights Approach to Assisted Reproduction*, CRC/C/IRL/ Co/3-4, 1/03/2016 (CRIN, 2016) paras. 33-34, https://archive.crin.org/sites/default/files/a_childrens_rights_approach_to_assisted_reproduction_0.pdf.

[104] Concluding Observations to France, CRC/C/FRA/CO/5, 2016, para. 33. Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/FRA/CO/5.

cases of assisted reproductions. The report 2019 UN General Assembly, incorporated into the identity preservation debate the situation of children born from surrogacy arrangements, in order to strengthen their identity rights under the UN CRC.[105]

What is more, by contemplating on the extended interpretation of the identity of the child, expressed in Art. 8, probably encompasses the possibility of the child to get access to the identity of broader family members, based on genetics This may encompass the identities of the child's wider genetic relatives, such as half-siblings and other biological kin.

Conclusively, within the framework of the UN CRC, the protection of a child's identity is closely linked to tangible rights, such as the right to a name and nationality. However, the right to identity must be understood as a broader and more encompassing concept, one that integrates biological, cultural, ethnic, and other deeply personal elements. At its core, this right is intrinsically tied to self-determination and the dignity of the individual, which is minimally addressed in the UN CRC.

For children, identity is not an autonomous construct but one shaped through interdependent relationships and external circumstances, developing through the influence of others. The UN CRC addresses these components across multiple articles, offering legal instruments to protect and nurture a child's evolving sense of self. This framework implies that identity is "constructed" by surrounding systems and actors rather than being purely self-generated.

The above-mentioned UN CRC framework for the elements of identity and the means of its preservation, within this context, especially in the domain of surrogacy, which remains largely unregulated both nationally and internationally, the child may be denied the opportunity to form a coherent and complete identity, as it relies on external factors and influences. This is due not only to the frequent reluctance of intended parents to

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[105] *,,(d) Preserve, in all cases, all pertinent information, and establish and maintain registers and national records containing information about the genetic and gestational origins of surrogate-born children, through which children can seek to access (…) there should be comprehensive safeguards to ensure that records of the surrogate arrangement are kept in order to enable the surrogate-born children to have access to information about their origins;*
(e) Ensure the right of surrogate-born children to access information about their identity and origin, including their cultural, ethnic, religious and linguistic background, in line with their evolving capacity and in accordance with the legal regulations of the given country."
See more: See more: UN SR, 2018, Thematic Report.

disclose the circumstances of the child's birth but also to the absence of specific, enforceable identity-related safeguards within the CRC framework.

Specifically, preserving broader family unity becomes particularly challenging in cross-border surrogacy arrangements. Such practices may disrupt not only the cohesion of the intended family, where the emphasis is often on exclusivity, but also the family life of the surrogate mother.[106] These dynamics further complicate the child's ability to access or construct a full, multifaceted identity, raising serious ethical and legal concerns under the principles of the UN CRC. Despite the commendable efforts made by child rights–oriented bodies within the UN, encouraging a widespread shift in the stance of member states remains difficult.

3.1.4 Legal identity and nationality – ECtHR

The ECtHR also have contributed to the identity rights of children born in the framework of ART. It has previously been elaborated on, that Art. 8, the right to respect for private and family life encompasses identity related rights, both in surrogacy related cases, as well as the general identity rights issues of adults, although stemming from childhood. Undoubtedly, the jurisprudence of the ECtHR plays a significant role in shaping the human rights dimension of ART, with direct implications for the legislation of member states. In its decision-making, the ECtHR often refers to children's rights instruments such as the UN CRC to support its interpretation of complex matters. Moreover, the case law of the ECtHR often uses the UN CRC as a reference to identity rights of a child by mentioning its Art. 7 and 8.

Over time, the Court has developed particular trends in addressing international surrogacy arrangements and the preservation of identity. However, it is important to note that identity-related legal issues are not limited to surrogacy alone. Similar challenges arise in the context of intercountry adoption, donor conception, and other circumstances in which a child is separated from their biological origins. The core issue in cross-border surrogacy cases before the ECtHR especially focuses on the denial of the transcription of

[106] Her own children may witness the physical progression of a pregnancy without ever encountering its outcome in the form of a sibling, potentially leading to emotional confusion or distress. Additionally, when the child is immediately removed from the country of birth, preserving their cultural or ethnic heritage, rooted in the surrogate mother's background, becomes practically impossible.

the foreign birth certificate, which is the predeterminant for the intended parents to perform their parental responsibilities. The ECtHR oftentimes refers to the identity rights and best interests principle of the child in these cases, although not under the focus of identity rights of the child towards the surrogate mother, the donor's genetic material or the availability of the data about the circumstances of birth.[107]

Although these cases vary in their factual circumstances, they share common implications concerning the right to identity. As such, the reasoning established by the ECtHR in its general identity-related jurisprudence may be applied by analogy to surrogacy cases, which frequently raise similar ethical and legal questions, such as how and whether the truth about one's origins should be disclosed, the significance of such knowledge, and the potential practices that may emerge in this context.[108]

Nonetheless, it is essential to approach ECtHR case law on general identity rights with caution. Many of these decisions reflect the perspective of adults seeking retrospective recognition or information, rather than addressing the immediate and evolving identity needs of children. Thus, while instructive, such jurisprudence should not be viewed as a direct reflection of the child's right to identity, but rather as a complementary framework to be adapted carefully when considering cases involving children born through surrogacy.

The jurisprudence of the ECtHR significantly contributes to clarifying the concept of individual identity and its various components. It also sheds light on how the right to identity should be weighed when balancing individual rights against broader societal interests. While the right to identity is not explicitly articulated within the Convention, its protection has been established through the interpretation of Art. 8. This connection has been underscored in several landmark rulings of the Court. The ECtHR has established

[107] Agnieszka Wedel-Domaradzka, "Family Life- and Identity-Related Rights of the Child" in *Childrens Rights in Regional Human Rights Systems,* ed. Raisz Anikó (Central European Academy Publishing, 2024), 157.

[108] Typically, surrogacy-related cases focus on whether the child is recognized as an applicant in proceedings based on a genetic link to the commissioning parents. In contrast, many of the ECtHR's earlier identity cases concern adult applicants who were adopted through secret adoption or donor conception and are now seeking access to information about their biological origins. These cases demonstrate that the effects of an *identity void* can persist well into adulthood, affecting the individual's sense of self and psychological well-being.

vast jurisprudence on the interpretation of private and family life, and also how this relative right shall be evaluated by the balancing of interests test.[109]

A vivid example of the significance of the assessment of the child's right to identity, encompassed under the right to private life of Art. 8 is the outcome of the case of Mennesson v. France. The risk of statelessness and the overreaching ambiguity of the legal status of the child, when the home country refuses the recognition of the birth certificate, has been highlighted indirectly before the ECtHR in the Mennesson v. France[110] case. The ECtHR examined the nationality rights of children born via cross-border surrogacy. French authorities refused to register the parentage stated on the U.S. birth certificate, where the intended French parents were listed, and the surrogate mother omitted, citing domestic surrogacy restrictions. Although the twins acquired U.S. citizenship by jus soli[111] and were not stateless, the Court found a violation of their right to private and family life due to France's refusal to legally recognize their parent-child relationship, which created significant legal uncertainty. The ECtHR's judgement highlighted how the child's identity encompasses the right to nationality, thus establishing both the practical and theoretical or conceptual nature of identity protection. One of the most crucial assessment the ECtHR made was the extension of the right to respect for private and family life to encompass the child's identity includes the right to nationality and highlighted the importance of recognizing at least one intended parent, typically the genetic parent, as a legal parent. However, this safeguard is insufficient when the child has no genetic link to the intended parents and surrogacy is prohibited in their home country.[112]

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[109] The European Court of Human Rights has consistently adopted a broad interpretation of the concept of identity under Article 8 of the Convention, recognising that access to information about one's origins forms an integral part of private life. In situations where an individual's identity or origins are uncertain or unknown, such as in cases of adoption, anonymous birth, or paternity disputes, the Court has emphasized the importance of enabling access to such information. However, it also acknowledges that this right is not absolute, and must be carefully balanced against the rights and interests of others, particularly those who may wish to keep their identity confidential, such as biological parents.
For example, in adoption cases, adopted individuals have the right to seek information about their biological origins, but biological parents may have a legally protected interest in remaining anonymous. Even in such cases, the ECtHR has made it clear that this right to anonymity does not amount to an unconditional veto.

[110] *Mennesson v. France,* App. No. 65192/11 (ECtHR, 26 June 2014).

[111] Meaning, birth-right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship.

[112] Ultimately, the child if not registered thoroughly at birth, above the legal issues, there are serious practical consequences, too. The challenges lie, particularly in relation to the issuance of valid travel documents or visas for the child. The discrepancy between the legal parent-child relationship and nationality laws across jurisdictions can make it exceptionally difficult to secure even temporary documentation. Several high-

To extend the interpretation of the ECtHR on the right to identity, the case of Mikulić v. Croatia[113] expressed again, the importance of having accessible legal mechanisms and legal tools to uncover one's identity, in this case it was issued upon a request to establish paternity.[114] Moreover, although the Croatian law provided for legal mechanism to uncover the legal paternity of the Applicant, there were lacking procedural effectiveness, leaving the Applicant with several unsuccessful attempts to recover a dimension of her identity for seven years, causing her prolonged uncertainty regarding her origins. As the Croatian legal framework at the time did not provide mechanisms to compel compliance of the presumed father with such orders, nor did it offer sufficient alternatives to determine paternity in a timely manner. Although the ECtHR acknowledged that third parties, such as presumed fathers, may have legitimate interests in declining certain measures, such as DNA testing, it also noted that the absence of any legal consequences for the alleged father's repeated refusal to cooperate effectively allowed him to evade the examination of the paternity claim, undermining the integrity of the proceedings.[115] According to the *Mikulić* standard the legal system has to offer swift and prompt procedural mechanisms to resolve ambiguity stemming from parental filiation.

In general, the ECtHR tends to associate the protection of identity under the scope of 'private life' of Article 8, though in certain cases, it is also linked to 'family life'; especially when issues of genetic origins and relationships with prospective or biological parents are at stake.[116] One notable illustration of this approach is the *Odièvre v. France*[117]

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profile and tragic cases have illustrated the severe consequences of these legal gaps, where children born through cross-border surrogacy have been left stateless, trapped in a legal limbo without citizenship or the rights that come with it.

[113] *Mikulić v. Croatia,* App. No. 53176/99 (ECtHR, 07 February 2002).

[114] Ibid, para. 64: *„A person has a vital interest, protected by the Convention, in receiving information necessary to uncover the truth about an important aspect of his or her personal identity and eliminate any uncertainty in this respect"*

[115] Ibid, paras. 64-65.

[116] Questions of identity can have a significant impact on an individual's self-perception in adulthood, particularly when there is a lack of clear information about early childhood circumstances. This concern was addressed by the ECtHR in one of its key decisions. The Gaskin case involved an individual who spent most of his childhood in state care. During this period, the local authority compiled confidential records containing reports from various professionals, including doctors, teachers, police officers, social workers, and foster carers. When the applicant later sought access to these records in order to pursue a personal injury claim against the local authority, his request was denied. The Court expressed, that:
„(...) persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development."
See: *Gaskin v. the United Kingdom*, App. No. 10454/83 (EctHR, 7 July 1989), para. 49.

[117] *Odièvre v. France*, App. No. 42326/98 (ECtHR, 13 February 2003).

case. Here, the applicant challenged national legislation that protected birth-related confidentiality, which in turn prevented her from accessing information about her genetic background and biological relatives. The applicant, who was adopted, sought to uncover the circumstances surrounding her birth and the identity of her biological siblings. However, her mother had chosen to give birth anonymously, requesting that her identity remain confidential, which restricted the applicant from receiving any identifying information. In its judgment, the ECtHR recognized a direct link between identity protection and the notion of 'private life' under Article 8.[118] This established a firm precedent connecting the right to know one's origins with the broader protection of personal identity under the Convention.

3.2 The Best Interests of the Child

The principle of the best interests of the child is a foundational element of both international and domestic legal systems, particularly within the domain of family law and child welfare. Since its codification in the UN CRC in 1989, this principle has been enshrined in Article 3(1), which provides that *"in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*.[119] This clause reflects a universal commitment to prioritizing children's welfare, safety, development in all legal and social decision-making processes.[120]

Despite its broad endorsement, the best interests principle is notoriously difficult to universally apply due to its inherently indeterminate and context-sensitive nature, meaning the application of this principle has to be weighted with other individual rights, as well as with individual interest if a concrete child. Its interpretation is shaped by socio-cultural, legal, and historical contexts, which differ significantly across jurisdictions and

[118] The Court found, that: „*Matters of relevance to personal development include details of a person's identity as a human being and the vital interest protected by the Convention in obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents. Birth, and in particular the circumstances in which a child is born, forms part of a child's, and subsequently the adult's, private life"*
See: *Odièvre v. France*, para. 29
[119] UN CRC, Art. 3.
[120] Thoko Kaime, *The Convention on the Rights of the Child: A Cultural Legitimacy Critique*, (Europa Law Publishing, 2011), 106.

even within communities. Additionally, the best interests of the child are not universally fixed, rather, they vary based on the individual characteristics, needs, and lived experiences of each child. What may serve one child's best interests may not be suitable, for another, necessitating a case-by-case assessment informed by sensitivity and specificity.[121]

This complexity is even more pronounced in assisted reproduction and surrogacy arrangements, where questions arise regarding the best interests of children who are not yet conceived, and also of those who are already born through these arrangements. The best interests of the child are primarily of a *welfare* nature as well as of a threefold nature encompassing a substantive right and a rule of procedure, as well as a fundamental interpretative legal principle a to the child's rights.[122] Although, as highlighted above, this principle is although of *shall be a primary consideration*, it is not an automatic principle which can definitely overturn the decision making, but this principle must be flexible due to the wide variety of situations it covers, which necessitates the case by case basis application. The Committee urges the states, when full alignment is not possible, decision-makers must carefully balance competing rights and interests, ensuring that the child's best interests retain a position of priority and are not treated as equal to other considerations.[123]

The General comment No. 14 presents a significant guideline, which is particularly relevant in the context of surrogacy arrangements, where the best interests principle serves to elevate and reinforce other provisions of the UN CRC. The process of balancing the interests of the child with those of the adults involved, such as intended parents and surrogate mothers, is especially critical. Given the inherent vulnerability of the child, their position must receive heightened consideration in all decision-making processes.

The best interests of the child principle have to be applied to all categories of children, which is especially sensitive in ethically controversial topics such as surrogacy arrangements. If the best interests principle is applied as a fundamental interpretative legal

[121] UN Committee on the Rights of the Child, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC /C/GC/14 (May 29, 2013), https://www.refworld.org/legal/general/crc/2013/en/95780.
[122] Ibid, p. 6.
[123] Ibid pp. 36-40.

principle it goes hand in hand with other provisions of the UN CRC, such as human dignity, right to life, the right to health, the right to non-discrimination, the right of a child to know and be cared for by his or her parents as far as possible, the right to an identity, protection from all forms of abuse, neglect, violence and exploitation, including trafficking among others. We shall note, some of these rights are elevated during the prenatal, even the pre-conception period, and have crucial implications to safeguard their future rights, once they are born.[124] Although, once they are born, the best interests principle extends to the other two of its concepts, and encompasses the substantive and procedural rights dimensions and faces repercussions purely because of the decisions of their intended parents. Then, the issues revolve around the individualized rights of a concrete child born through cross-border surrogacy arrangement, who because of its controversial circumstances of birth might find themselves in a legal limbo.[125] This legal limbo is evident, and the states are faced with difficult situation, as by assessing and protecting the best interests of the child in a specific case, it would serve the child to allow the legal recognition of the intended parents, to gain custody, to activate their parental responsibility, even if doing so it implicitly acknowledges the illegal activity, public policy regarding prohibition of surrogacy. Regardless, the best interests if the already born child reconceptualizes the overturn of the public policy concerns. Even if the national prohibition of surrogacy is extended to extraterritorial circumstances, it is always the

[124] The legal and ethical frameworks to navigate is not so obvious, as it is based on abstract and speculative assessment of welfare, as there is no concrete child, who's individual welfare circumstances could be referenced. The challenge lies in ensuring that the potential child's rights and well-being are safeguarded, despite the absence of an existing individual to whom those rights can be directly ascribed. However, once the child is born, the pre-conception a prenatal safeguards, and interest might not be applicable. Once the child is born, regardless of the circumstances surrounding their birth, they must be granted full legal protection based on their best interests, even if this stands in tension with public policies aimed at protecting children in general, such as those prohibiting sale or trafficking, which are often invoked in the context of cross-border surrogacy arrangements.

[125] The General Comment No. 7 (2005) Implementing child rights in early childhood, emphasizes that children are right holders, as well as the non-discrimination principle, where surrogate born children fit, as they may face discrimination based on birth. The Comment specifically acknowledges that children born out of wedlock are often subject to additional social and legal challenges, highlighting how children whose birth deviates from traditional norms may encounter barriers to the full realization of their rights. In the past, such children often existed in a legal limbo, without clear recognition or adequate protections, now these are the children born through ART as well as surrogacy. The core of the General Comment is to extend the protection to children who are excluded or disadvantaged due to other legal and social frameworks, which do not acknowledge them.

child's welfare that is eventually compromised, by the illegal actions of the intended parents, which is not in line with the best interests principle.

Notable mentions of the best interests assessment contrasting the public policy, could be presented from the jurisprudence of British courts. With the emergence of new ART, the United Kingdom adopted a progressive approach by embracing these innovations as part of infertility treatment options, including altruistic surrogacy. This stance laid the foundation for a comprehensive and evolving interpretation of the child's welfare within surrogacy arrangements by national courts, placing the best interests of the child at the center of legal and ethical considerations.[126] A landmark decision of Re: L A Minor (Commercial Surrogacy)[127] which resolved around a commercial cross border surrogacy arrangements presenting the usual legal problem of the refusal of the recognition of the foreign birth certificate. The intended parents, who were British nationals, entered into commercial surrogacy arrangement in the USA, and upon returning to their home country requested the recognition of their legal parenthood. Although the UK allows surrogacy, but commercial surrogacy obviously includes overcrossing the scope of „reasonable expenses" defined as the allowed altruistic surrogacy, deeming it illegal under UK laws.[128] Justice Hedley emphasized, that the paramount consideration of the child's welfare under

[126] As an example, the United Kingdom offers a unique legislative model regarding surrogacy. The first legal framework specifically addressing surrogacy was introduced through the Surrogacy Arrangements Act of 1985, which laid the groundwork for how such arrangements would be treated under UK law. Currently, surrogacy is governed by both the Human Fertilisation and Embryology Act 1990 and its updated version, the Human Fertilisation and Embryology Act 2008. These two acts operate in tandem, forming the core legal architecture that regulates surrogacy and broader ART in the UK. Importantly, under UK law, surrogacy arrangements are not legally enforceable, meaning that the parties involved cannot compel one another to follow through with the terms of the agreement in court. Furthermore, these arrangements must be altruistic in nature: any form of payment beyond „reasonable expenses" is prohibited. The Surrogacy Arrangements Act 1985 expressly discourages commercial surrogacy practices. It criminalizes actions such as advertising for a surrogate, offering oneself as a surrogate for compensation, or facilitating surrogacy arrangements as a commercial intermediary. These prohibitions reflect a broader ethical stance aimed at preventing the commodification of reproductive services and protecting all parties involved, especially the surrogate and the child, from potential exploitation. The UK legal approach to surrogacy reflects a cautious, measured stance. Legislators have chosen to recognize the realities of reproductive technological advancement while deliberately avoiding excessive legal barriers that might hinder access to such innovations. Instead, the focus is placed on ensuring informed consent, safeguarding the autonomy of the surrogate, and maintaining ethical boundaries within which ART, including surrogacy, may be pursued. Through this carefully structured legal framework, the UK aims to balance the interests of intended parents, surrogates, and children, while upholding fundamental ethical principles and human dignity.

[127] Re: L (A Minor) [2010] EWHC 3146 (Fam)

[128] UK Human Fertilisation and Embryology Act 2008 (EC) S. 59(4) amending S42(2) of the Surrogacy Arrangements Act 1985.

the best interests of the child in all administrative and legal decisions. There was no automatic recognition of the foreign surrogacy arrangement, despite under UK law it was illegal, rather thorough best interest assessment was carried out by the court encompassing, the emotional attachments formed after birth, the stability of the proposed home environments, the capacity of the individuals to meet the child's long-term needs, and the potential psychological impact of relocation.[129] The best interests assessment post-birth will always dictate the case accordingly, even if public policy grounds exist for refusal, regardless of prior arrangements or genetic link.[130]

To further emphasize the paramountcy of the principle we shall reflect to it through the lens of the child's right to identity. UN CRC affirms the importance of protecting a child's identity, particularly in context, where that identity may be altered. In cases where legal parentage is transferred from a surrogate to the intended parents, the child's genetic and biological origins, as well as their broader family relations, must be safeguarded.[131]

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[129] Claire Fenton-Glynn, "The Difficulty of Enforcing Surrogacy Regulations," *The Cambridge Law Journal* 74, no. 1 (2015): 34-37, https://www.jstor.org/stable/24693756.

[130] An important consideration of Justice Hedley in connection to the best interests principle assessment post-birth contrasting the public policy concerns on surrogacy has been expressed upon a judgement on the case of Re X and Y (Foreign Surrogacy). *„I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e the child concerned) that rigour must be mitigated by the application of a consideration of that child's welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order."*
See: X v. Y (Foreign Surrogacy), Re (9 December 2009)

[131] The UN Committee on the Rights of the Child (CRC) has expressed concern regarding the use of so-called "baby boxes" in the Republic of Korea, a practice primarily run by religious organizations that allows mothers in crisis to anonymously abandon their newborns in designated safe spaces. While these initiatives are intended to prevent harm to infants, the Committee urged the state to prohibit their use and instead "consider introducing, as a last resort, the possibility of confidential hospital births"; a model that preserves both the safety of the child and essential aspects of identity.
Similar practices continue to exist in other countries, particularly in Central Europe, with the Czech Republic serving as a notable example. The Committee's position highlights the importance of balancing child protection with the child's right to preserve their identity and access information about their origins.
This reasoning is highly relevant by analogy to surrogacy arrangements, particularly in jurisdictions where surrogacy is unregulated or prohibited. In both cases; anonymous birth and surrogacy, the child's legal parentage and identity may be obscured or altered. Thus, the CRC's emphasis on confidentiality rather than anonymity, and on ensuring postnatal legal safeguards and identity protection, can be extended to support minimum standards in surrogacy, including best interest determinations, the right to know one's origins, and clear legal parentage grounded in the child's welfare.

Whenever a child's identity is subject to modification, a formal Best Interests Assessment or Determination must be conducted by competent and qualified professionals. Such an assessment ensures that the child's best interests remain the paramount consideration in all decisions affecting their legal and personal identity.[132]

These assessments pose unique challenges for states that prohibit or do not regulate surrogacy, as they are often required to recognize parental relationships based solely on foreign-issued birth certificates, without access to comprehensive documentation regarding the pregnancy or birth. Both UNICEF and CHIP have acknowledged these difficulties in their policy guidance, stating that while it is in the child's best interests to have legal parentage established as early as possible, the integrity of that legal parentage must be protected through a set of minimum standards. These include pre-surrogacy safeguards, consent from all parties involved, best interests determinations, and the preservation of the child's right to access information about their origins.[133]

In this context, the best interests of the child have emerged as a *paramount principle* in cross-border surrogacy cases among UN CRC member states. This principle serves as a critical benchmark when states are confronted with the legal and ethical dilemmas arising from surrogacy practices initiated abroad. The Committee, along with regional human rights bodies such as the Council of Europe and the European Union, increasingly calls on states to strike a delicate balance between preserving their public order and moral frameworks, and upholding the child's rights to legal identity, parental care, and access to origins.

Particular pressure is placed on jurisdictions where both commercial and altruistic surrogacy are prohibited or unregulated, as they are compelled to navigate a controversial legal and ethical landscape. Despite the absence of a unified European legal instrument directly addressing cross-border parenthood through surrogacy, states are nonetheless expected to interpret and apply international human rights obligations in a way that

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See: 12. UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of the Republic of Korea*, CRC/C/ KOR/CO/5-6 (October 24, 2019), https://digitallibrary.un.org/record/3862000?v=pdf.

[132] Dambach and Cantwell, "Child's right to identity in surrogacy," 10.

[133] UNICEF and CHIP, "Key Considerations: Children's Rights & Surrogacy Briefing Note," February 2022.

prioritizes the child's welfare.[134] This evolving legal reality demands that even the most reluctant states engage with the consequences of surrogacy arrangements, especially when the recognition of parenthood is necessary to protect the fundamental rights of the child under both the UN CRC and broader regional human rights frameworks.[135]

3.3 Right not to be sold, trafficked and exploited

Cross-border surrogacy arrangements, especially the clearly commercial ones likely contain exploitative practices applicable to both woman and children. The human trafficking risks, the sale of children is elevated due to the vulnerability of these social groups.[136] Surrogacy fundamentally reshaped the notion of family and childbearing, extracting it from the intimate sphere of the family, to the private sector, pushed by the constant demand for children, where on a market-based principle intended parents can

[134] The recognition of foreign birth certificates issued in the context of surrogacy arrangements has become increasingly inevitable, particularly in light of case law from the ECtHR, which have established to give an upper, decisive hand to the child's identity rights and the best interests principle. However, this legal trend has generated significant tension among member states, especially those that prohibit or do not regulate surrogacy. These states are often reluctant to extend recognition to family formations that, in their view, conflict with domestic constitutional principles and societal values regarding parenthood, reproduction, and the creation of family life. Many prefer to prioritize adoption or natural conception, which, despite their own ethical considerations, have already been the subject of extensive public discourse and legal development, allowing for more culturally and ethically aligned responses.

[135] Lilla Garayová, "Surrogate Motherhood – the European Legal Landscape," *Law, Identity and Values* 2, no. 1 (2022): 65-83, https://doi.org/10.55073/2022.1.65-83.74.

[136] Since the emergence of surrogacy arrangements, there have been some extreme cases gaining international attention, where it seemed like, such ART opened pandora's box.
Since the emergence of surrogacy arrangements, several extreme cases have drawn international attention, highlighting concerns that some ART may have unleashed a figurative „Pandora's box" of ethical, legal, and human rights dilemmas, and that ART has serious practical and ethical dowsides.
A particularly recent and notable example involved a long-term trafficking of Thai woman, who were ruled to Georgia for becoming surrogates, for a financial compensation between $12,000 and $17,000. Although, upon arrival, they were coerced to „work" as egg donors for the Chinese-run fertility clinic. , it has sparked a broader and urgent debate concerning the ethical and legal implications of Georgia's surrogacy tourism industry, particularly with regard to its potential facilitation of serious human rights violations
Moreover, in 2023 a scandal surfaced on the Greek island of Crete, where a surrogacy clinic was shut down following the arrest of its founder and several employees. The clinic is alleged to have engaged in exploitative practices, including collaboration with illicit brokers to recruit women from Eastern European and Balkan countries to serve as surrogates and egg donors. Many of these women were reportedly accommodated in substandard living conditions in properties rented by the clinic, raising serious concerns about coercion, trafficking, and the violation of their fundamental rights.
See: Helena Bedwell, „Scandals Resurface in Georgia's Surrogacy and IVF Industry, Threating Reproductive Tourism," *Georgia Today*, March 6, 2025, https://georgiatoday.ge/scandals-resurface-in-georgias-surrogacy-and-ivf-industry-threating-reproductive-tourism/ and Stephen Page, „Greece Rocked by a Surrogacy Scandal," *Page Proven*, August 25, 2023, https://pageprovan.com.au/greece-rocked-by-a-surrogacy-scandal/.

reach the same outcome. This persistent demand for children previously had enabled intended parents to achieve parenthood through market-based mechanisms. Historically, such demand gave rise to ethically problematic and, at times, demeaning practices, particularly through illicit cross-border adoptions.[137] Eventually, international legal efforts cumulated in the adoption of the 1993 Hague Adoption Convention[138], as a notable way of prevention and regulation to prevent abusive patterns in intercountry adoption. As global challenges necessitate global solutions, the Hague Adoption Convention serves as a model of international cooperation. Surrogacy appears to be following a comparable evolutionary trajectory in terms of its associated risks and potential for abuse. However, the ethical and legal concerns it raises extend beyond traditional adoption paradigms, encompassing the rights and welfare of the not yet conceived child, the already conceived child, and the inherent vulnerability of the surrogate mothers.

However, if surrogacy unequivocally amounted to sale of children, the issue would not continue to generate such extensive legal debate. It is evident that, under certain circumstances, surrogacy may constitute an exploitative practice involving children. At the same time, the opposite may also be true, depending on the context, and the incorporated legal safeguards. The boundary between legitimate reproductive arrangements and exploitative practices remains deeply contested and often blurred.[139]

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[137] A particular example of systemic abuse within intercountry adoption practices is found in Cambodia during the late 1990s and early 2000s. Cambodia became a significant sending country because of the minimal regulatory oversight and a growing global demand for children free for adoption. However, the adoption system there became compromised with corruption and exploitation. Investigations revealed widespread practices of child laundering, wherein children were illicitly obtained through force, fraud, or financial inducement including cases of deception of birth parents, forged documents, and the operation of so-called „baby farms" designed to supply children for international adoption. These abuses motivated several receiving countries, including the United States, to suspend adoptions from Cambodia. The Cambodian experience became emblematic of how demand-driven adoption systems, lacking comprehensive safeguards, can facilitate child trafficking under the guise of humanitarianism. It also highlighted the urgent necessity of international instruments like the Hague Adoption Convention as a framework for ethical regulation and abuse prevention in intercountry adoption.
See more in: David M. Smolin, "The Case for Moratoria on Intercountry Adoption," *Southern California Interdisciplinary Law Journal* 30, no. 3 (2021): 501–516, https://gould.usc.edu/why/students/orgs/ilj/assets/docs/30-2-Smolin.pdf.

[138] Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 33, Hague Conference on Private International Law, 29 May 1993, https://www.refworld.org/legal/agreements/hagueprivate/1993/en/32114.

[139] It is important to highlight that surrogacy is often driven by the exercise of the fundamental freedom to procreate. However, when accessing this freedom requires crossing national borders to obtain reproductive medical services that are otherwise prohibited in one's home country, intended parents are seizing an opportunity that aligns with their personal needs and desires. Since this option is available abroad, many

The most applicable international documents to dive into are the UN CRC, the OPSC and the Palermo protocol[140] and how these define by legal norms the sale, trafficking and exploitation of children.

The UN CRC's dedicates Article 35 as a general rule, stipulating *that „States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form."* [141] The UN CRC expresses a general interest in prohibiting practices involving the sale and trafficking of children, and for that, the implementation of the more specific OPSC and the Palermo Protocol serves as a great tool. Although Art. 35 mentions the sale and trafficking in the same provision, as child trafficking and the sale of children may intersect, and differences in definition does not refer to the differences in the impact these practices have to the reality of the experience of the child. Although, clear distinction is critically helpful in combating these practices, as specifically tailored prosecution and guidelines how the decisions concerning the best interests of the child shall be navigated.[142] What is important to keep in mind is, that Art. 35 urges member states to take action in preventing *both* sale and trafficking of children, although because of the overlap of these practices, states might not specifically cover the prohibition of the sale of children in their legislation.[143] Since there are grey areas where both literal and intuitive forms of child sale practices occur, a member state's regulation of the issue does not necessarily imply that it prohibits both forms. This broader context of commodification is especially relevant in surrogacy cases, as it influences whether the specific scope of the OPSC should apply to such cases.[144]

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choose to pursue surrogacy, regardless of the financial, legal, or ethical costs, in order to realize their reproductive goals. This growing demand reflects the deeply personal and, at times, desperate nature of the pursuit of parenthood. There is a correspondent service to this demand, the borders are open, thus the system shopping attitude governs the process, although grey and black markets flourish without adequate international regulation, and might be supported by the prohibitive stance on commercial surrogacy. See: Sanchit Sharma, "Commercial Surrogacy & Black Market: The Unlikely Duo," *International Journal of Advanced Legal Research*, https://ijalr.in/commercial-surrogacy-black-market-the-unlikely-duo/.

[140] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted November 15, 2000, entered into force December 25, 2003, 2237 U.N.T.S. 319.

[141] United Nations Convention on the Rights of the Child (1989) 1577 UNTS 3, Art. 35

[142] UNICEF Innocenti Research Centre, *Handbook on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography* (Florence: UNICEF Innocenti Research Centre, 2009), p. 10.

[143] Ibid. p. 9.

[144] David Smolin and Maud de Boer-Buquicchio, "Surrogacy, Intermediaries, and the Sale of Children," in *Research Handbook on Surrogacy and the Law,* edited by Katarina Trimmings, Sharon Shakargy, and Claire Achmad. (Edward Elgar Publishing Limited, 2024), 78.

The elements of the Art. 2 of the OPSC's definition on the sale of children involves, transfer of the child[145], for renumeration so for payment, as a result for the exchange. This Article shall be interpreted in conjunction with Art. 3, stipulating, that ,,*Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis"*[146] and specifies these practices, which must be criminalized, namely the sexual exploitation of the child; transfer of organs of the child; forced labour of the child; and improperly induced consent, as an intermediary, for adoption of the child[147]. Meaning, that practices which are listed in Art. 3 1. (a) must be criminalized, although certain forms of practice which contains the elements defined as the sale of children shall be prohibited, but not necessarily criminalized. Given the absence of explicit reference to the criminalization of the potential sale of children within the context of surrogacy arrangements, some commentators maintain that the OPSC does not extend to surrogacy-related practices, while others oppose this argumentation.[148] Although, the general prohibition stemming from Art. 2 of the OPSC and Art. 35 of the UN CRC implies that all kinds of practice intending to sell a child, is initiated for exploitative purposes, while the purpose of surrogacy is of a non-exploitative nature, where all parties can benefit from the arrangements[149], and is governed by the emotional longing to have a child. Exactly this has been recognized by the UN Special Rapporteur's Thematic Report from 2018, and concluded, that regardless of the

[145] Both physical and legal.
See: UN SR, 2019, Thematic Report
[146] OPSC, Art. 3.
[147] Ibid, Art. 3 (1) (a) (i) and (ii).
[148] Tobin argues, that commercial surrogacy may still be seen as inherently exploitative due to concerns about the child's dignity, the OPSC's language and drafting history suggest a broad, inclusive definition of child sale that does not hinge on exploitative intent. Article 35 of the CRC reinforces this by requiring the prevention of child sale "for any purpose or in any form." The absence of references to commercial surrogacy during drafting is not evidence of approval, as the practice was largely undeveloped at the time. Moreover, most states currently prohibit international commercial surrogacy, and the silence of human rights bodies likely reflects prioritization of more severe forms of exploitation, not endorsement.
See: Tobin, "To Prohibit or Permit," 24–27.
[149] Surrogacy can be viewed as mutually beneficial for all involved: the child gains existence, the intended parents gain a child they longed for, and the surrogate receives financial compensation and possibly emotional fulfillment.
See: John A. Robertson, "Surrogate Mothers: Not So Novel after All," *The Hastings Center Report* 13, no. 5 (1983): 28–34, https://doi.org/10.2307/3560576.
[149] UN SR, 2018, Thematic Report, 22.

broader debates around surrogacy, all States have a clear legal obligation to prohibit and prevent the sale of children. While this obligation does not settle every policy issue related to surrogacy, it does set boundaries on what kinds of practices or regulations are legally and ethically acceptable under international law.[150]

If we insert the notion of exploitation into the surrogacy debate, international legal norms on child trafficking become more applicable, e.g., the Palermo Protocol. Article 3 defines the trafficking in persons as *„the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"*[151] Clearly, the Palermo Protocol is more extensive in listing the conduct and the purpose, what encompasses child trafficking, while the purpose of exploitation is non-exhaustive to those listed in the Art. The Palermo Protocol includes two defining elements, what is done, how and why. Although the coercive, forceful or fraudulent means are not required in order for the conduct to fall under the definition of trafficking in persons.[152]

As highlighted above, although the sale of children and their exploitation often occur simultaneously, one does not necessarily require the other. A key distinction lies in the elements of movement and intent to exploit. While children may be sold in the course of being trafficked, while trafficking cannot occur without exploitation, whereas a child may be sold without the intent to exploit.[153]

This latter scenario is particularly relevant to surrogacy arrangements and helps explain the ongoing debate regarding the applicability of the OPSC. Nevertheless, it

[150] UN SR, 2018, Thematic Report, 22.
[151] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted November 15, 2000, entered into force December 25, 2003, 2237 U.N.T.S. 319, Art. 3.
[152] *„The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used"* Ibid, Art. 2 (c).
[153] UNICEF, *Handbook on the Optional Protocol,* 10.

remains essential to return to the broader prohibition articulated in the UN CRC. The international legal framework is increasingly oriented towards identifying and condemning the inherent immorality of treating children as objects of sale. In this context, international child protection efforts aim to shift the perception of the child from a potential commodity to a distinct individual, entitled to rights and dignity. Where a child is not yet capable of exercising those rights independently, it becomes the responsibility of adults to ensure appropriate safeguards are in place to uphold and protect them.[154]

4. How the ECtHR Navigates Children's Rights in Surrogacy

Tangentially, references have been made to the case law of the ECtHR concerning both the application of the best interests of the child principle and the child's right to identity. The ECtHR places particular emphasis on how identity is assessed, especially in relation to children, recognizing that their inherent vulnerability and inability to establish their identity independently argues a heightened protection. This vulnerability justifies the elevated importance of identity-related rights in such cases, reinforced through the consistent application of the best interests principle as a guiding framework. Ambiguity of establishing and preserving the identity of the child is not only stemming from cross-border surrogacy arrangements, but could be stemming from secret adoption, anonymous births and donor-conception as well all of which can obscure the child's origins and complicate the legal recognition of familial relationships. It is due to give the general identity protection a context, to get a comprehensive understanding of how this element of the right to private life is crucially decisive in cross-border surrogacy cases before the ECtHR.

The core principle of identity protection is explicitly articulated in earlier cases such as Gaskin v. the United Kingdom[155] and Mikulić v. Croatia[156]. In these decisions, the ECtHR underscored the adopted child's right to obtain information about their origins. At

[154] *„The notion of the child as a full subject of rights is recent and has broken new ground. The child is no longer considered as a 'becoming adult', but as a person with his or her own rights. There is no ambiguity in this, and it represents a considerable step forward in history. Releasing children from their traditionally perceived status as 'minors' and 'dependents' is a decisive change in the perception of childhood."*
See: Ibid, Foreword, x.
[155] Gaskin v. the United Kingdom, App. No. 10454/83 (EctHR, 07 July 1989).
[156] Mikulić v. Croatia, App. No 53176/99 (ECtHR, 07 February 2002)

the same time, the ECtHR acknowledged that biological parents may have a right to keep their identity confidential. However, this right does not amount to an absolute entitlement to block the child's access to information concerning their identity.[157]

In the Gaskin case, the applicant had spent the majority of his childhood in foster care, during which local authorities compiled confidential records, reports created by medical personnel, educators, social workers, police officers, and other professionals involved in his upbringing. The applicant sought access to these records, not in pursuit of any legal claim relating to his biological origins, but because he believed he had been mistreated while in care and wanted to understand the conditions he experienced. This case highlighted the critical importance of the early stages of life in the formation of personal identity and affirmed that individuals have a vital interest protected under the Convention in accessing the information necessary to know and understand their origins, childhood, and early development.[158]

The search for fragments of the Applicant's identity was personally motivated, and the investigation of the ill-treatment would have made possible through gaining insight into his own life story. Access to these records was denied, with the state justifying the restriction on the grounds of maintaining confidentiality in the public interest, arguing that preserving secrecy ensured continued cooperation from professionals involved in childcare.

Nonetheless, the ECtHR recognized the applicant's intention and clearly stated that individuals in such circumstances have a protected interest under the Convention in obtaining information essential for understanding their childhood and development. The ECtHR emphasized that this right is not contingent upon asserting a legal claim or pursuing a specific remedy, but rather stems from a fundamental personal need for self-understanding. While the judgment did not explicitly label this as a matter of identity protection, it marked an important step in recognizing the significance of a person's right to access personal history as part of the broader framework of identity and self-development.

[157] This point was thoroughly argumented also emphasized by the dissenting judges in Odièvre case.
[158] Gaskin v. the United Kingdom, para. 49.

The concept of this entitlement to get to know about one's origins was further refined in the case of *Mikulić v. Croatia*, which addressed the issue of paternity recognition for a child born outside of marriage. In its reasoning, the ECtHR advanced the concept of identity protection by stating: *„Respect for private life requires that everyone should be able to establish details of their identity as individual human beings, and that an individual's entitlement to such information is of importance because of its formative implications for his or her personality."* This statement is particularly significant as it attaches "formative implications" to the right to identity. In other words, the Court emphasized that identity protection is fundamentally tied to self-development and self-knowledge. It includes both the discovery of biological truths (the tracing element) and the formal legal acknowledgment of parenthood through genetic linkage (the recognition element).[159]

The Odièvre v. France case represents a pivotal moment in the ECtHR jurisprudence on the right to identity, particularly in the context of early childhood abandonment and the long-term impact of missing personal history on one's adult identity. At the heart of the case lies a tension between two private interests: the biological mother's right to remain anonymous and the adopted individual's right to know her origins, both elements falling under the protection of private life as enshrined in Article 8 of the Convention.

The Court, while acknowledging the importance of identity, ultimately upheld the French system of anonymous birth, emphasizing the state's margin of appreciation in balancing competing rights. However, this diversity in national legislation, some prioritizing the right to know, others the right to anonymity, demonstrates the complexity of these cases and the flexibility afforded to states in navigating sensitive personal data and identity matters.

Notably, the dissenting judges in Odièvre expressed concern that the applicant's right to identity had been gravely undermined, as she was effectively barred from discovering or forming relationships with her biological relatives. They emphasized the profound

[159] See: Godelli v. Italy case (App. no. 33783/09, ECtHR 25 September 2012), para. 52. *„The extent of the State's margin of appreciation depends not only on the right or rights concerned but also, as regards each right, on the very nature of the interest concerned. The Court considers that the right to an identity, which includes the right to know one's parentage, is an integral part of the notion of private life. In such cases, particularly rigorous scrutiny is called for when weighing up the competing interests."*

psychological and emotional need often experienced by adoptees to understand their origins, arguing that the majority's decision failed to adequately reflect the deep-rooted connection between identity and origin.

Although Odièvre remains cornerstone case, although unusual, as it redirects from the initial phase of identity protection expressed in in the ECtHR's reasoning in the Gaskin v. United Kingdom and the Mikulić v. Croatia, thus marking a development in the evolving perspective on identity issues.

There has been a gradual move toward limiting the scope of parental anonymity in favour of the individual's right to know their origins. This evolution is evident in cases such as *Phinikaridou v. Cyprus*, where the the applicant, a woman who had been abandoned by her mother and raised by a foster family, discovered the identity of her biological father only at the age of 52. She subsequently initiated legal proceedings to have her paternity officially recognized. However, the Cyprus courts dismissed her claim on the basis that it had been filed outside the statutory time limits imposed by domestic law.

Before the ECtHR, the applicant argued that this refusal to permit her to pursue paternity proceedings constituted a violation of her right to respect for private life, particularly her ability to establish her biological identity. The ECtHR found a violation of Article 8 after national courts applied rigid procedural time limits that prevented an individual from establishing paternity. In this case, the Court affirmed that the interest in discovering one's biological identity may outweigh formal legal or procedural barriers, particularly when access to such information is delayed through no fault of the individual.[160] The case once again narrowed down the possibility of preserving anonymity of the third parties, when its waiving is in the interest of preserving or establishing identity.

The ECtHR most recently has ventured into the territory of bioethically challenging issue of the preserving of identity of donor-conceived persons. The case of Gauvin-Fournis and Silliau v. France[161], where the two Applicants argued that France violated their right to identity under Art. 8, by especially denying access to any information relating to their origins, whether concerning their donor or their biological siblings or their medical

[160] *Phinikaridou v. Cyprus*, App. No. 23890/02 (EctHR, 20 December 2007).
[161] *Gauvin-Fournis and Silliau v. France,* App. No. 21424/16 and 45728/17 (EctHR, 19 February 2024).

history. Both Applicants has been conceived by sperm donation via assisted reproduction, and upon learning the circumstances of their conception, they sought to access both identifiable and non-identifiable medical data about their biological fathers. Their request was rejected by both the donation centers and the administrative courts, which cited the Bioethics Act from 1994. This legislation enshrined the principle of donor anonymity, allowing only two exceptions, when doctors needed access to non-identifying medical information from the donor's file for therapeutic reasons, or if the donor was found to have a serious genetic condition. Although, this French legislation changed, due to international and societal pressure, and the new Bioethics Act from 2022 introduced the condition of recording both identifiable and non-identifiable information for all gamete donors, and the anonymity waiver is possible for persons conceived through medically assisted reproduction with the application to the Commission on Access to Third-Party Donor Data for Persons Born through Medically Assisted Reproduction. Although, this new system does not apply retrospectively, thus persons born from donors before the 1st of September 2022, must have acquire the consent of the donor for the disclosure. Eventually, the ECtHR found no violation of Art. 8. and by the retrospective application of the principle of absolute anonymity of donors, the conditional consent of the donor requirement for the anonymity waiver, the denial to access medical history and information about biological siblings, was in the margin of appreciation of the state. The ECtHR examined the application from the perspective of positive obligation under Art. 8, and it welcomed the legislative changes gradually introduced by France for reshaping the principle of absolute anonymity.[162] The ECtHR carried out a procedural review of the domestic legislation, which examined, whether the French legislators sufficiently weighted the competing interests. Given there is no clear consensus among the member states on the issue of access to origins but only a recent trend in favour of lifting donor anonymity, and the thorough legal and ethical debate in France, the ECtHR found that the legislator acted within its margin of appreciation, which was admittedly reduced by the challenge to an essential aspect of the applicant's and his private lives.[163] Additionally, the ECtHR reiterated, that the right to health as such, in this case the potential adverse

[162] Ibid, paras. 112 and 118.
[163] Ibid, para. 123.

health effects of the persons conceived through anonymous gamete donation, is not guaranteed under the Convention, the member states nevertheless have a positive obligation to take the necessary steps to protect lift and heath of their nationals.[164] The slight majority racio is telling in the decision, as well as the joint dissenting opinion of Judges Ravarani, Mourou-Vikström and Gnatovskyy, rendering this Judgement a step back from the extensive identity protection in cases involving ART.[165]

Among all, the Odièvre case may not be entirely transferable to contexts like surrogacy, where public and ethical interests often intersect with private ones, it provides essential insight into how the ECtHR has gradually broadened its interpretation of identity protection. The case underscores that identity is not static, and that its protection must evolve in light of changing societal norms and individual needs, especially where the search for origins is a central component of personal development and human dignity.[166]

However, based on the introduced case law, we can clearly see, that the ECtHR's case law strongly supports the comprehensive protection of the right to identity under the Convention. While the nature of identity-related cases may vary, including instances of anonymous birth, secret adoptions, parentage determinations, and, notably, assisted reproductive technologies the ECtHR consistently maintains a high standard of protection. This is achieved by narrowing the margin of appreciation available to States, recognizing that the nature of identity as a core personal interest requires access to information regarding one's birth circumstances, biological parents, and relatives as essential for safeguarding personal development.

It is also crucial to highlight that the aforementioned cases primarily concern adults seeking to understand their identity retrospectively. When these issues arise in the context of children, the level of protection is heightened, as the best interests of the child are recognized as a paramount consideration under international human rights law. The

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[164] Ibid, para. 125.

[165] The dissenting opinion expresses, that the majority failed to keep in mind that, when identity issues arise in the case, the margin of appreciation of the state is reduced, as the right to know one's origins forms an essential element in the personal development of the individual. Additionally, the late considerations about the best interests of the child were withheld by the national authorities, as well as these perspectives were absent the initial legislative framework.
See: Ibid, Joint dissenting opinion of Judges Ravarani, Mourou-Vikström and Gnatovskyy.

[166] Andrea Mulligan, "Anonymous gamete donation and Article 8 of the European Convention on Human Rights: The case for incompatibility," *Medical Law International* 22, no. 2 (2022): 119-146, https://doi.org/10.1177/09685332221096210.

complexity of identity in such cases extends to all individuals involved in the child's conception, gestation, and upbringing.

This elevated standard will become increasingly evident as we examine how the ECtHR has applied these principles in the context of surrogacy-related cases. Furthermore, the evolving discussion within the Council of Europe regarding donor conception and identity has reached a certain level of consensus, particularly supporting a preference for non-anonymous gamete donation[167], which aligns with the broader trajectory of the ECtHR's jurisprudence on identity protection.

From the ECtHR's case law on identity protection, certain key criteria emerge that guide the balancing of competing interests. These principles serve as foundational reference points from which the jurisprudence on identity protection in cross-border surrogacy cases can further develop.

Firstly, the ECtHR treats identity as a fundamental component of private life, which includes both access to information about biological parentage and formal legal recognition of family relationships. Where children are involved, their best interests take precedence, warranting a heightened level of protection due to their vulnerability and limited capacity to access this information independently. The nature of the right to identity is recognized by the ECtHR to be foundational to self-development, recognizing the long-lasting consequences if an element of identity is vacant, even in cases where no immediate or tangible legal effects arise due to this vacancy. Thus, not only practical legal implications but the theoretical ones are highlighted.

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[167] Significan standpoints and perspectives were presented by the Parliamentary Assembly debate on on 12 April 2019 (18th Sitting) then encapsulated in the Recommendation 2156 on Anonymous donation of sperm and oocytes: balancing the rights of parents, donors and children was delivered. Most importantly it envisages para. 7.1 that: *"anonymity should be waived for all future gamete donations in Council of Europe member States, and the use of anonymously donated sperm and oocytes should be prohibited. This would mean that (except in exceptional cases, when the donation is from a close relative or friend) the donor's identity would not be revealed at the time of the donation to the family, but would be revealed to the donor-conceived child upon his or her 16th or 18th birthday. The donor-conceived child would be informed at that time (ideally by the State) that there was supplementary information available on the circumstances of his/her birth. The donor-conceived person could then decide whether and when to access this information containing the identity of the donor, and whether to initiate contact (ideally after having had access to appropriate guidance, counselling and support services before making a decision)."*
Although the Recommendation is a soft-law instrument, its incorporation by the member states is various, differentiating between full anonymous, semi anonymous or open/non-anonymous donation of gametes. There are also distinctive legislations n the kind of information the donor conceived person can access (identifiable or non-identifiable information) and for what purposes.
See online : https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=27680

Secondly, the national authorities' procedural safeguards are examined from the standpoint of availability and effectiveness of these domestic remedies, stressing that while states are not obliged to compel specific testing or disclosure tools, it is in the margin of appreciation of the state, but they must ensure that individuals have access to alternative legal avenues for establishing their origins. What is also an intriguing aspect is the timing and individual circumstances of the claim made by the applicant, and in what ratio had the Applicant or the external circumstances cause the failure of the domestic remedy.[168]

Following up, the proportionality test towards the third-party interests and public policy against the individual interest of identity protection, the ECtHR gradually narrows the state's margin of appreciation, especially in light of broader European trends favoring transparency in adoption, donor conception, and surrogacy arrangements. Seems to be that the evolving ART motivates the evolution of the legal and social norms. If the narrowing margin is mostly applied in cases about adult identity protection, how it can correlate with the granted wide margin when ethically and morally controversial issues make it to the table of the ECtHR, such as surrogacy arrangements. It is important to highlight that surrogacy-related cases before the ECtHR primarily concern the refusal to recognize foreign birth certificates, effectively individualizing the matter by focusing on whether such refusal, aimed at upholding a state's prohibitive public policy on surrogacy, was consistent with the best interests of the child in denying the legal recognition of parenthood. Can we make parallel to the identity protection decision making tendencies of the ECtHR for the right of adults to the right to children born through surrogacy arrangements to identity preservation?

Basically, the issue of tracing one's origins is a pressing legal and ethical concern not only in adoption, donor conception, and secret births, but also, in cross-border surrogacy arrangements. Surrogacy presents a heightened level of complexity due to the difficulty, and in many cases the practical impossibility, of identifying or contacting the surrogate mother, especially for the child born through such an arrangement or for the adult later seeking to understand their origins.

Unlike in traditional adoption scenarios, identity protection in surrogacy cases often focuses on the establishment of identity, rather than its preservation, as mentioned before.

[168] *Mikulić v. Croatia; Gaskin v. the United Kingdom*.

In such cases, the absence of legal recognition of identity can have serious practical consequences, including difficulties in establishing nationality, inheritance rights, and access to legal status, all of which are integral to the broader framework of personal identity. This dilemma was at the heart of the Mennesson v. France case, in which the ECtHR found that the refusal to recognize the legal relationship between a child and the intended biological father in a surrogacy arrangement carried significant legal and personal repercussions. Recognizing at least one intended parent, especially the biological one, became a legal necessity not just for formal reasons, but to protect the child's identity and future. Recognition of the intended mother, who had no genetic link, was acknowledged as important too, but not as urgently necessary in legal terms. In contrast, the establishment of parentage with the intended mother, who may not have a genetic connection to the child, while important, was viewed as a secondary consideration in terms of immediate legal urgency. [169]

The cross-border nature of surrogacy arrangements further complicates the ability of surrogate-born individuals to access origin-related information. Jurisdictional fragmentation, diverging national policies, and the lack of a unified legal framework at the international or European level obstruct retrospective access to identity data. Yet, the ECtHR's case law regarding general identity protection suggests a gradual move toward openness, rejecting the notion of complete confidentiality in cases where emotional and psychological well-being is at stake.[170] Although, it cannot be wholeheartedly said to the cases involving donor-conceived persons, as the ruling in the case of Gauvin-Fournis and Silliau v. France ahs not found a violation of Art. 8. This could be interpreted as a step back from the emerging trend of non-anonymity, although even in this case the ECtHR acknowledged the narrow margin of appreciation of the member state, as we as that the principle of strict anonymity in light of the new technological advancements and the so-

[169] Nonetheless, the preservation of the child's identity may ultimately require the recognition of both intended parents, and additionally may involve access to information about the circumstances of the child's birth, including the identity of the surrogate mother, any potential half-siblings, and broader familial relationships on the surrogate's side. However, this broader conception of identity preservation often clashes with the intentions of both the surrogate mother and the intended parents. Typically, surrogate mothers do not seek to assume a parental role; their motivations, whether altruistic or financial, do not align with long-term relational ties to the child. Likewise, intended parents generally pursue surrogacy with the clear aim of exclusive parenthood, not shared parental identity.

[170] *Phinikaridou v. Cyprus.*

called recreational genetic tests[171], is assumably no longer sufficient to strike a fair balance between competing interests.

In this light, it appears that the best interests of the child are often emphasized in the specific context of identity protection in surrogacy cases. While the child's welfare is cited as a guiding principle, the practical application of best interest assessments in identity-related matters for surrogate-born children remains the key aspect, particularly when set against strong competing interests, such as parental anonymity and national public policy concerns. However, as the child matures, the emotional and psychological dimensions[172] of identity become more pronounced, yet the ECtHR did not conceptualize what are the concrete elements, that shall be accessible to the child, which would enable identity preservation, in the child's broader identity framework.[173]

5. Concluding remarks

The preceding sub-chapters has demonstrated with clarity that children born through international surrogacy arrangements find themselves in a uniquely unpredictable legal and ethical territory. Although, surrogacy has evolved as a response to infertility and the realization of reproductive autonomy for adults, the resulting legal frameworks and debates remain primarily structured around adult interests, those of the intended parents, the surrogate mother, or the legislative frameworks of nation states. Children, who are the most affected by these arrangements, often find themselves on the margins of these deliberations, their rights subject to adult-centric decision-making, diverse value-based ethical complications, and eventually deeply fragmented legal systems.

Throughout this chapter, the hypothesis posed in the introduction, *children are especially at risk of having their rights compromised due to being conceived and born through international surrogacy,* has been consistently supported. The emergence of reproductive technology, legal pluralism, and global inequality has produced a surrogacy

[171] *Gauvin-Fournis and Silliau v. France*, para. 122.
[172] That said, as children born through surrogacy grow up, their needs and rights start to mirror those the ECtHR already recognizes for adults, basically the emotional and psychological weight of not knowing where they come from, or who gave birth to them. It presupposes clearly that the legal and emotional aspects of identity should not be separated. Although, identity protection before the ECtHR in relation to cross-border surrogacy revolves around the legal documents and more practical consequences, and les about the dignity aspects.
[173] Achmad, "Children's Rights in International Commercial Surrogacy," 249.

landscape in which the rights of children are insufficiently safeguarded, despite the already existing international legal documents on human rights.[174]

One of the most significant yet persistently overlooked aspects in this context is the child's right to identity. While the UN CRC enshrines this right through concrete attributes, such as the right to a name, nationality, and knowledge of one's parents, it does not present a cohesive or specific safeguard tailored to the complexities of surrogacy. From a more holistic and child-centered perspective, identity must be understood as a far-reaching and integrative concept encompassing biological, cultural, ethnic, and social dimensions. At its core, this right is intrinsically tied to self-determination and human dignity. Yet, for children, identity is not autonomously constructed, it is inherently interdependent, shaped by familial, legal, and institutional influences. Their capacity for self-realization hinges not only on the choices of the adults around them, but also on the systems that either facilitate or obstruct their access to foundational truths about their origin.[175]

A central and ongoing challenge lies in balancing the adults' desire for anonymity and confidentiality with the child's fundamental need to access and preserve knowledge of their origins. It is increasingly evident that a truly child-centered approach to surrogacy must involve the development and maintenance of a comprehensive and accurate system for documenting the circumstances of the child's birth. This would include not only legal recognition of parentage and nationality, but also access at an appropriate time and manner, to non-identifiable information about the surrogate mother involved. Upholding

[174] A notable illustration of the neglect of the child's involvement in surrogacy arrangements is reflected in the drafting of surrogacy agreements, which are typically clear and comprehensive in outlining the rights and responsibilities of the adults involved, while excluding the child as an active party to the arrangement, even on the account of pre- or post-birth best interests assessment. The child, though central to the outcome, remains legally passive. In most cases, it is left to the courts to conduct a best interests assessment, which tends to focus narrowly on the immediate question of assigning parental responsibility, often resulting in the recognition of the intended parents, even in jurisdictions where surrogacy is prohibited. While such decisions aim to resolve legal uncertainty for the child, they often fail to incorporate a broader and more holistic understanding of the child's best interests, one that is aligned with the indivisible, interdependent, and interrelated nature of children's rights as recognized in international law. Consequently, long-term considerations, such as the child's right to identity, access to origin information, and emotional and psychological development, are frequently overlooked in favour of resolving the most pressing legal concern: establishing legal parenthood and enabling the exercise of parental responsibility.
See: Carlos Martínez de Aguirre, "International surrogacy arrangements: a global Handmaid's Tale?," in *Fundamental legal problems of surrogate motherhood: Global perspective*, ed. Piotr Mostowik, (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 458-460.
[175] Baglietto and Bordier, "Preserving family relations," 71.

this right rests primarily with the legal parents, but it is also significantly shaped by the external legal and institutional environment. Children cannot be expected to maintain or reconstruct their own identity without assistance, particularly when the truth of their origin is buried under layers of secrecy, incomplete records, or legal ambiguities.[176]

Therefore, from a rights-based perspective, the active preservation of the child's identity demands a dual commitment: first, from parents who must embrace transparency and recognize the long-term importance of truth in the child's development; and second, from states, which must legislate and operationalize systems capable of storing, safeguarding, and, when appropriate, disclosing critical information about birth circumstances. A children's rights, focused surrogacy framework may even call for the establishment of centralized, confidential databases that securely document surrogacy and donor arrangements, not necessarily with personally identifiable details, but with enough information to allow the child, when mature, to form an authentic understanding of their origins.[177]

Moreover, the cross-border dimension of these arrangements intensifies the risks. A child born in a country where surrogacy is permitted may find themselves stateless or unrecognized upon entry to the intended parents' home country. Such children face uncertainty not only in terms of citizenship and parentage, but also in access to fundamental rights such as healthcare, education, and family life. These legal uncertainties are not merely bureaucratic inconveniences, they can cause psychological consequences, obstruct the development of personal identity.[178] The gaps in identity construction cause repercussions in adulthood.

While judicial bodies like the ECtHR have begun to fill some of these gaps, acknowledging the importance of the construction of identity as well as its preservation, these challenges persist into the cross-border surrogacy cases, where the child's right to identity and best interests were crucially decisive. However, the broad divergence in national family laws significantly impedes the development of harmonized international framework**.** Although, the sovereignty of states in governing their family law systems

[176] Dambach and Cantwell, "Child's right to identity in surrogacy," 2.
[177] Ibid.
[178] Neil Leighton, "The Family: Whose Construct is it Anyway?," in *The Family in the Age of Biotechnology*, ed. Carole Ulanowsky (Avebury press, 1995), 91-104.

must be respected, it is also true, that this very sovereignty can become a barrier to uniform protections. Therefore, international cooperation aimed at aligning legal standards on the basis of shared commitments to child welfare rather than imposing uniformity, offers a more pragmatic and politically viable path forward.

Furthermore, the dissonance between adult-centered legality and child-centered rights raises a fundamental ethical question: should adult intentions or reproductive freedoms outweigh the child's right to a secure legal and personal identity? Even when surrogacy is pursued with the noblest of intentions, the absence of clear legal guarantees for the child results in a system that too often fails to live up to international human rights standards. Anyhow, the decision of having a child is an inherently „selfish" decision, although accompanied by the desire to care for the child with love and compassion. This compassion, thus should be reframed in a way to put the child's interests first, in any decisions concerning his or her well-being, practically once the child is born. The reality is, although, that the structural power imbalance between adults and children is only further magnified when the child's entry into the world is mediated by contracts, clinics, and international borders.[179] The international community is ought to put effort in further shaping the image of the child to view them as individual persons with inherent dignity and rights, who is a subject and an active holder and contributor to their rights.

Furthermore, the commodification critique, whether surrogacy arrangements constitute the sale of children, remains unresolved. While not all surrogacy amounts to trafficking or exploitation, the absence of clear boundaries leaves space for abuse. International frameworks such as the OPSC and the Palermo Protocol must be better integrated into domestic laws to ensure that any practice approaching commodification is identified, regulated, or prohibited.

The underlying issue here is not whether surrogacy should exist or not, as it already does, this reproductive option is already available in reality. Therefore, it would be unrealistic to revert the concept of childbearing to a time before such technology existed.

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[179] *„The bitter reality is that, despite the CRC's pledge of protection for the child as a subject and a rights holder, children are still too often seen as objects and commodities. They are treated as merchandise rather than as persons whose rights must be respected and protected."*
See: UNICEF, *Handbook on the Optional Protocol,* ix.

These techniques and arrangements likely will continue, driven by the global demand for reproductive assistance. The idea of future legal, social and ethical discourse should revolve around to provide a meaningful response to these challenges. There shall be a common ground to ensure that children born through such arrangements are not left in a legal or moral vacuum. What is required is the development of coherent, internationally agreed-upon standards that place the child, not the adults, at the center of the framework. The focus should extend beyond simply addressing how to create life if it is medically difficult or compromised and how these techniques can serve adult interests. Instead, it must ensure that children born from these arrangements receive proper care, dignity, and attention throughout their lives. These standards must ensure legal certainty, protection from commodification, and guaranteed access to identity and origins information.

This necessitates a reconceptualization of surrogacy law from a child-rights perspective. It demands that states move beyond reactive case-by-case litigation toward proactive legislative design, embedding principles such as the best interests of the child, the right to identity, and freedom from exploitation into the regulatory frameworks governing reproductive technologies. It also requires broader cooperation between states to avoid jurisdictional gaps that leave children in statelessness or legal limbo.

In conclusion, the hypothesis set forth at the beginning of this chapter holds: children born through cross-border surrogacy arrangements are especially vulnerable to rights violations, not only because of the legal ambiguity surrounding their status, but also because the surrogacy debate continues to prioritize adult interests. Until a genuinely child-centered legal and ethical framework is adopted, one that affirms the child as a subject of rights rather than an object of adult desires, these vulnerabilities will persist. The path forward requires the collective will of the international community to protect children’s rights in all their complexity, and to ensure that every child, regardless of the circumstances of their conception or birth, can grow up with dignity, legal security, and a fully recognized identity.

III. THE CoE and ECtHR AND THE SURROGACY DEBATE

Assisted reproductive techniques have introduced solutions for intended parents to establish a family without any difficulties in one sense. Although, it is now medically possible for infertile persons and also same-sex couples to have a child, surrogacy initiated various ethical, political, commercial and legal debates. The issue of surrogacy in Europe is dealt with utmost sensitivity, also in international and European legal frameworks, due to the conflicts of rights, which are at stake around surrogacy as a procedure. These important aspects are the following, the best interest of the child principle, the potential objectification of the human body or its parts, protection of the embryo's life, of matrimonial bonds, of planned parenthood and reproductive health and freedom. These values are taken into consideration when a country defies its permissive or prohibitive legislation. The three subject's expectations, who take part in the surrogacy procedure, so the child, the intended parents and the surrogate mother are at conflict from various perspectives. From the child's perspective questions arise from the family life, the child-parent relationship, the legal status of the family, genetic and cultural identity, and obviously its best interest. Next, the intended parents wish to become parents even if that is not possible naturally due to medical conditions, they can found a family by resorting to assisted reproductive procedures, such as surrogacy. By this they can preserve their reproductive freedom, right to healthy life, rights to freely found a family. The third subject is the surrogate mother's right to private and family life is the key feature. Ethical questions arise from the fact, whether the surrogate mother should make her uterus available for „rent" by objectifying her body in her vulnerable position.[180]

The issue of surrogacy especially in a cross-border context has reached the attention of the Council of Europe as well as the ECtHR, which has been continuously expanding its case law on the matter, thus facilitating a human-rights based approach for the member states to incline to. Surrogacy triggers many ethical, social and legal dilemmas, thus its legislation in the member states of the CoE varies, because it is determined by the historical, cultural and social values of the country, which eventually deems the practice admissible or inadmissible in their legal system. The European legal landscape on

[180] Navratyil, *A varázsló eltöri a pálcáját*, 140-141.

surrogacy is tremendously fragmented, but the free movement of persons and medical services being guaranteed between the states of the European Union, those nationals whose legislation in their home country is prohibitive or does not regulate the issue but may be interpreted as a criminal or administrative offence, naturally turn to other states where the legal climate if friendlier towards surrogacy practices. In this regard, we are ought to mention the phenomenon of „surrogacy tourism", meaning a couple from a state where surrogacy is prohibited or not regulated, travels to another state where surrogacy is permitted, or have an advantageous legal framework, i.e. easy access to these services for foreigners.[181] The intended parents' motivation to circumvent domestic law gave a rise in cross-border surrogacy cases, in which intended parents enter into a surrogacy arrangement abroad, which has inevitably enlarged the „surrogacy market"[182]. However, intended parents are faced with repercussions stemming from the difficulty of the recognition of the foreign birth certificate or court ruling of the child, where the intended parents are listed as the legal parents. Although, in states where surrogacy as a whole is prohibited according to domestic jurisdiction, would also like to discourage their nationals to access these medical services abroad, thus refusing the recognition of the foreign birth certificate or court ruling, as the suspicion about the engagement of surrogacy arrangements arose.[183] The state's argument for the refusal of the foreign birth certificate is laying on the exceptional grounds of public policy. Such proceeding from the state can have serious not only legal but psychological consequences for the intended parents and the child, who may be taken away from them and placed into alternative care and eventually eligible for adoption, causing the child to become parentless, in the gravest instances statelessness, which multiplies the child's vulnerability. The intended parents are also majorly affected, as not only their (partially or not at all) genetically related child is taken away from them but may face criminal investigation for child trafficking. The aftermath of the international surrogacy arrangement puts the children in a legal limbo,

[181] Ukraine, Greece, Czechia, Portugal Georgia are popular destinations for the intended parents, as commercial surrogacy is allowed and accessible to foreigners

[182] Katarina Trimmings and Paul Beaumont, highlighted in their article that: „[i]t is no exaggeration to say that the modern world has already witnessed a development of an extensive international surrogacy market" See: Katarina Trimmings and Paul Beaumont, "International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level," *Journal of Private International Law* 7, no. 3 (2011): 627-647, https://doi.org/10.5235/jpil.v7n3.627.

[183] Smolin and Boer-Buquicchio, "Surrogacy, intermediaries, and the sale of Children," 152.

which causes danger to several of their rights including right to be cared for by their parents, right to decisions made for them in their best interest, as well as their healthy development just to mention a few.[184] Given the intended parents' resort to cross-border surrogacy arrangements for family formation, the most relevant regional judicial authority to assess human rights related issues falls into the jurisdiction of the ECtHR. However, it is important to highlight, that the ECtHR addresses these issues on a case-by-case basis, meaning that it evaluates the state authorities' procedural and substantive law, as well as the legislative attitudes to the human rights enshrined in the Convention by evaluating whether the interference to the individual rights was necessary in a democratic society, was in accordance with the law, and proportionate in relation to the competing public and private interests.

The Court does not infiltrate with the legislative approach the member state took in such clearly national topics such as family law, medical law, civil law and other inherently private law disciplines (what is backed up by the diverse European legal landscape on the matter, while most European countries presented a more conservative approach). Nevertheless, it is worth turning our attention to the development of the case law of the ECtHR, and derive whether there is a European legal standard on human rights protection in cross-border surrogacy cases, or not.

1. The „right" to become a parent

The freedom to make decisions about one's most intimate aspects of life, including autonomy in personal and familial choices and the ability to determine one's own path, plays a central role in decisions related to childrearing and parenthood. One could argue

[184] On the issue of potential risks involving surrogate born children the Hague Conference on Private International Law in its Permanent Bureau of the Hague Conference on Private International Law, A Preliminary Report from 2012 precisely captured the overreaching problem as follows:
„Children may be "marooned, stateless and parentless" in the State of their birth, with their families resorting to desperate, sometimes criminal, measures to attempt to take them "home".6 Further, if they are able to travel "home", children may be left with "limping" legal parentage, with the consequent child protection concerns that this involves. These and other child protection issues arising as a result of such arrangements, implicate the fundamental rights and interests of children, including the right not to suffer adverse discrimination on the basis of birth or parental status, the right of the child to have his or her best interests regarded as a primary consideration in all actions concerning him or her, as well as the child's right to acquire a nationality and to preserve his or her identity."
Permanent Bureau of the Hague Conference on Private International Law, *A Preliminary Report on the Issues from International Surrogacy Arrangements*, Preliminary Document No. 10 (March 2012), para 1.

that becoming a parent is primarily an individual choice, and no one should be forced or discouraged from pursuing it. However, this freedom is not absolute; it must be balanced against the rights and freedoms of others, public morality, and societal values. This is why reproductive rights, particularly in the context of modern assisted reproductive technologies (ART), remain a topic of significant bioethical and moral debate. Even beyond ART, the right to become a parent is generally considered within the broader framework of reproductive rights. Before examining this issue further in relation to the Convention, it is worth exploring some philosophical perspectives on this so-called „right."

For some individuals, true fulfilment comes from raising children and experiencing parenthood, a sense of satisfaction that is deeply tied to the quality of the parent-child relationship. However, what constitutes genuine fulfilment in this dynamic is not purely objective; rather, it emerges from the interaction between the interests of both the parent and the child. Political theorists and ethicists have long debated the moral foundation of family structures, exploring how the balance of interests between parents and children, along with each party's capacity for self-expression, shapes the nature of their relationship.

One of the most prominent theories in this discourse is the dual-interest theory, which is rooted in a liberal egalitarian framework.[185] This perspective underscores the unique value of parenting and argues that adults possess an inherent moral right to become parents. It maintains that the deep intimacy and authority inherent in the parent-child relationship play a crucial role in an adult's self-actualization. The experience of raising a child provides a distinctive and irreplaceable form of personal fulfilment, one that cannot be directly equated with other meaningful relationships, no matter how valuable they may be for both individuals involved.[186] The decision to pursue parenthood is therefore a reflection of fundamental values associated with family and childrearing. Once made, it is primarily motivated by an individual's desire to align with these values, irrespective of

[185] Colin McLeod, "Parental Responsibilities in an Unjust World," in *Procreation and Parenthood: The Ethics of Bearing and Rearing Children*, ed. David Archard and David Benatar (Oxford University Press, 2010); Harry Brighouse and Adam Swift, *Family Values: The Ethics of Parent-Child Relationships*, (Princeton University Press, 2014).
[186] Brighouse and Swift, *Family Values,* 88.

their parenting abilities. However, if this issue were examined purely through a child-centred perspective, the parent's pursuit of personal fulfilment through parenthood and childrearing might not be given the same level of ethical consideration.[187]

A critical approach to this theory argues, that the parents' personal fulfilment to justify power over children, rather than focusing exclusively on the child's well-being, feeds the historical bias concentrated around the authoritative side of the relationship, and that children lack moral agent and are pawn of their own parents.[188] Arguably, if we focus solely on the competence of the most capable parents to raise a child, which would be in their interest, that could even mean redistributing them from adequate biological parents to more competent caregivers. However, children have a fundamental biological and gestational connection to their parents, which cannot be overseen.[189] The mere desire to have a child for self-fulfillment in the parental role cannot justify any means of becoming a parent, as it risks overlooking the child's best interests.

The deep-seated desire to have a child has increasingly been perceived as a fundamental need, fueling the expansion of the international surrogacy market and reinforcing an adult-centered approach to parenthood. However, the right to become a parent can scarcely be classified as a fundamental right, given that not all individuals are capable of childrearing due to health limitations, psychological readiness, or socio-economic constraints. While adult-centrism is evident throughout various stages of surrogacy arrangements, it is most pronounced during the initial phase, where the primary focus is on the intended parents' aspirations and rights. However, as these arrangements progress, the normative framework gradually shifts, emphasizing biological ties and custody rights. If a surrogacy case is brought before the Court, the legal focus ultimately aligns with the best interests of the child. Thus, while surrogacy begins with an adult-centred perspective, once a child is conceived, child-centric considerations progressively take precedence.

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[187] Ibid, p. 5 and 86

[188] Anca Gheaus, "Is There a Right to Parent?," *Law, Ethics and Philosophy* 3, (2015): 193-204, https://philarchive.org/rec/GHEITA-2.

[189] Anca Gheaus, „The Right to Parent One's Biological Baby," *Journal of Political Philosophy* 20, no. 4, (2012): 432-455, https://doi.org/10.1111/j.1467-9760.2011.00402.x

The right to parenthood in the context of surrogacy arrangements is primarily framed through the principles of reproductive autonomy, self-determination, and human dignity. However, in practice, legal disputes surrounding surrogacy often shift the focus toward parental filiation, specifically, the recognition of intended parents and the legal status of children born through cross-border surrogacy. This shift occurs because member states of the CoE are unlikely to accept a definitive, value-based ruling from the Court on such morally and ethically complex matters. Instead, national sovereignty and domestic legislation take precedence in regulating these sensitive issues.

2. Reproductive Rights in the ECHR

The ECHR is a foundational document that solidifies human rights and freedoms within European legal culture. It encompasses and enumerates multiple generations of human rights. As the distinction becomes increasingly blurred between the fundamental rights and freedoms outlined in the Convention, and the socio-economic rights, the ECtHR is often inevitably called upon to address health-related matters, including reproductive rights.

Does the Convention enshrine reproductive rights? To answer this, we must first clarify how the right to health and reproductive rights are described and defined. The ECHR does not explicitly guarantee a right to healthcare or a right to be healthy. These rights are typically considered part of the fourth generation of human rights, which are closely tied to social rights. Such rights are primarily outlined in the European Social Charter, the European Code of Social Security, and the International Covenant on Economic, Social and Cultural Rights. However, health related rights are fitting under the umbrella of the rights protected by the ECHR and are invoked before the ECtHR. The ECtHR has played a significant role in interpreting "the right to health"[190] within its case law. The Court has expanded the notion of private life to include the right to protect one's

[190] A significant number of cases had been brought before the ECtHR, which pertains to health-related issues. For example, Article 1 of the ECHR, (the right to life) has been invoked in cases involving the legal status of the foetus and abortion, resource allocation, and the right to die. Article 5 (the right to liberty and security) has been widely applied in mental health cases. Article 8 (the right to privacy in home and family life) has been utilized in matters of health privacy and patient confidentiality, treatment autonomy, and reproductive rights. Lastly, Article 12 (the right to marry and found a family) has featured in claims concerning reproductive rights, specifically.

physical, moral, and psychological integrity, as well as the right to personal autonomy and choice, which are predominantly relevant perspectives in health-related, as well as reproductive issues.

Secondly, reproductive rights are among the most personal and fundamental human experiences, deeply connected to our bodily autonomy and integrity. These rights encompass the values surrounding an individual's or couple's decision to reproduce or not, whether immediately or in the future, and the circumstances under which they choose to do so. Specifically, the right not to procreate includes issues related to contraception and abortion, while the right to procreate may involve matters such as assisted reproduction, surrogacy, uterus transplantation, and sterilization. Additionally, the conditions surrounding procreation and childbirth cover aspects like prenatal diagnosis and the authorization of home births.[191]

Basically, the European instruments do not explicitly mention reproductive rights, and the Convention does not directly address them. However, the ECtHR has been invoked in numerous cases concerning reproductive matters. The ECtHR typically addresses these cases within the framework of Article 8[192], interpreting them as substantive or procedural interferences with private and family life, which must be justified under Article 8(2). This justification is subject to a margin of appreciation, reflecting the principle of subsidiarity. It is important to note that this margin of appreciation tends to be broader when dealing with sensitive ethical and moral issues where there is no clear European consensus on the matter.

Furthermore, the margin of appreciation doctrine plays a significant role in relation to cases, which invoke Article 8. This article is designed to protect individuals from arbitrary interference by public authorities. Thus, any such interference must serve a „legitimate aim" be „in accordance with the law" and be „necessary in a democratic society". A restriction on a Convention right cannot be considered „necessary in a democratic society"

[191] Tamara K. Hervey and Jean V. McHale, "Rights: health rights as human rights," in *European Union Health Law: Themes and Implications*. (Cambridge University Press, 2015) 156-183.

[192] Article 8(1): *„Everyone has the right to respect for his private and family life, his home, and his correspondence."*
Article 8(2): *„There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

unless it is, among other things, *proportionate* to the legitimate aim being pursued. Additionally, effective respect for private life may require the implementation of measures to ensure this respect, even in relations between individuals. This includes establishing a regulatory framework and enforcement mechanisms to protect individual rights and, where appropriate, implementing specific measures.[193]

Consequently, the ECtHR has played a significant role in shaping case law related to „the right to health." The ECtHR has interpreted the concept of private life to include the right to protect one's physical, moral, and psychological integrity, as well as the right to make personal choices and exercise individual autonomy. In this sense, the member state has negative obligations (to secure the right to effective respect for physical and psychological integrity etc.) and positive obligations (provide effective and accessible protection of the right to respect for private life, which includes, among other things, the establishment of appropriate legal and administrative frameworks, as well as practical measures and adequate information) to comply with in this regard.[194]

In the context of reproductive rights, the ECtHR categorizes applicants' interests as „private life," „family life," or „private and family life." However, there appears to be an inconsistent methodology in the application of these categories, with the choice of concept sometimes determined pragmatically through agreement between the parties involved. Additionally, the ECtHR addresses various aspects of privacy in reproductive matters, distinguishing between personal autonomy and self-determination on one hand, and the right to moral and physical integrity on the other.

From the related case law of the ECtHR on reproductive issues, we could assume that a specific kind of proceduralizing approach of Art. 8 is prevailing. Article 8(1) is not an absolute right, as with Article 8(2), delineating possible limitations by stipulating that any interference must be „in accordance with the law" and „necessary in a democratic society." Thus, in jurisprudence concerning reproductive rights, the scrutiny typically revolves around the requirement for legal clarity regarding the interference and, more

[193] Thematic factsheet, 2023, p. 23 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://rm.coe.int/thematic-factsheet-reproductive-rights-eng/1680adebc3

[194] https://www.cambridge.org/core/books/european-union-health-law/rights-health-rights-as-human-rights/8BEEDFFF1797476E48F9324E9D4FC5F7

frequently, the effectiveness of legal protections. The ECtHR predominantly safeguards these rights through the criterion of the effectiveness of legal protections, rather than adopting a substantive approach that conceptualizes reproductive rights. The case law demonstrates a propensity to adopt a narrow and neutral perspective on reproductive rights, anchored in the autonomy paradigm. This approach often fails to recognize the specific circumstances associated with reproductive rights, such as the egalitarian aspects concerning women and the inseparability from reproductive health, resulting in a lack of contextualization of these rights.

Moving forward, by the analysis of surrogacy cases as an option to exercise reproductive autonomy, we will see, that the ECtHR tends to take a minimalist approach in its conceptualization of these rights. In other words, when faced with disputes involving irreconcilable moral views, the ECtHR often adopts a minimalist strategy, focusing on resolving cases through specific angles rather than addressing broader theoretical issues. In the realm of reproductive rights, this minimalism is evident in the ECtHR's approach, such as prioritizing procedural rights over substantive rights or selecting the least contentious option for substantive analysis. Furthermore, reproductive cases also illustrate the interaction between the ECtHR and national legislation in recognizing non-enumerated rights. Although the ECtHR applies the ECHR to reproductive issues, it refrains from conceptualizing these rights as a distinct category. Instead, its jurisprudence adopts a minimalist stance, emphasizing procedural protections and state obligations in line with social and legal developments, rather than pursuing a dynamic interpretation.

Surrogacy being the most controversial form of assisted reproductive techniques, it is evident, that ECtHR focuses on resolving cases each with its individual circumstances, rather than establishing a clear human rights imperative. The Court has not (and should has not) taken up the role to justify or diminish the new forms of family formation, and other new forms of parenthood, nevertheless it inevitably has to act as a „living instrument" and reflect to the novelties in the field of technologies and methods of reproductive medicine, which affect the social perception of family and private life, and enhances the development of new socio-economic relationships.[195]

[195]Andrea Erdősová, "Náhradné materstvo ako bioetický problém z pohľadu ochrany základných práv a slobôd," *Justičná revue* 72, no. 4 (2020): 471-480.

2.1 Reproductive rights in the work of the CoE and its standpoints

The Council of Europe, as anticipated, has been continuously reacting to new unprecedented challenges which appeared alongside biomedical developments. As an initial response, the special Expert Committee on Bioethics has been set up in 1985, which worked on delivering expert advisory opinions and technical support in the field of ethics in biomedicine. The CAHBI slowly transformed into the Committee on Bioethics (DH-BIO), which is in function nowadays. Besides the numerous ,,sub-committies"[196] of the CoE, the decision-making of the European Court on Human Rights (ECtHR) shall not be neglected in this regard. Undoubtedly, the case law of the ECtHR contributes to navigating the human rights aspect of ART, which generally affects the legislation of the member states.

However, as of today, there is no generally binding legal document on the most controversial aspect of ART, namely surrogacy. Although we are ought to mention the Convention for the Protection of Human Rights and Dignity of the Human Being with regards to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, which oblige the parties to grant legal instruments on a national level to fulfil the aims and measures in human rights protection in the field of biomedicine. The Oviedo Convention intends to safeguard human dignity against the misuse of biomedical scientific advances. The ethical argument presented in the convention seemingly condemns commercial surrogacy, pursuant to Article 21 stating that *,,The human body and its parts shall not, as such, give rise to financial gain."*.[197] Moreover, in connection to ART, it rejects MAP[198] techniques to be carried out on the human genome, as well as

[196] E.g. Steering Committee for Human Rights (CDDH), Committee of Experts on Family Law (CJ-FA), Committee on Legal Co-operation (CDCJ), Committee on Social Affairs, Health and Sustainable Development

[197] It is worth noting, that surrogacy practice involves offering a bodily function, namely the whole body of the surrogate mother, her reproductive functions, not just a body part, which can be detached from the host, e.g. in oocyte or sperm donation, which is often times financially supported. The biological and physiological reality of a pregnancy cannot be reduced by identifying only the womb, which is being ,,rented" or ,,sold".

[198] The co-called technique of mapping and sequencing of the human genome, involves scientific research exploring the human genome at an early stage, which provides key landmarks in the genome (the DNA and chromosome structure). Genome sequencing is the process of determining the order of bases in a length of DNA. Basically, from this practice, serious ethical concerns can arise, i.e. misuse of human genetic information, disproportionate usage of DNA data of donors in sequencing, manipulation

in assisted procreation unless the sex-selection of the foetus contributes to avoiding hereditary sex-related disease.[199]

The general stance of the CoE seems to be, that in issues stemming from international surrogacy arrangements, the most evident problem being the parental filiation of the child born through such arrangements, it is the ECtHR which can provide resolutions, thus the problem solving shall be faced by the competent judiciary in human rights related questions.

As mentioned above, the case law of the ECtHR broadly dealt with the problem of ART, mainly concerning Article 8 of the Convention (right to respect for private and family life) sometimes in conjunction with Article 14 (prohibition of discrimination).

A noteworthy example to illustrate the ECtHR's minimalist approach, argumentation and perspective to the new means of reproductive medicine, and on how member states can approach bioethically challenging assisted reproductive techniques in the scope of their margin of appreciation regarding the positive and negative obligation related to Art. 8 of the ECHR (right to respect for private and family life) is presented in the case of S.H. and others v. Austria (Application no. 57813/00, Judgement by Grand Chamber on 3 November 2011). The argumentation of the case outlined several ethical considerations in connection to IVF and assisted reproduction in general. The factual background of the case involved two Austrian couples, who wanted to start a family and wished to conceive a child through IVF, for which one couple required the use of a sperm donor and the other pair an ova donor, however under Austrian law at the time ova donation, and sperm donation for IVF was prohibited. The applicants stated that there has been a breach of Article 8, as well as Article 14, because only some ART are legal in Austria, and it is discriminatory that ova donation is not, while sperm donation is allowed. The court ruled that there had been *no violation* of Art. 8, as it found the approach of the member state to regulate ART sufficient and circumspect on such a controversial issue, which raises complex ethical questions. As there was no clear consensus in Europe states about gamete donation for in vitro fertilisation, it was in the margin of appreciation of the member state, to draw the line of limits, which it did while backing it up with fair arguments (risk of

[199] Oviedo Convention on Human Rights and Biomedicine, *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine,* Oviedo Convention on Human Rights and Biomedicine, 4 April 1997, Art. 12, 13, 14 and 18.

„splitting“ motherhood, exploitation of ova donors etc.).[200] Moreover, the state did not take the opportunity away from couples, who wish to participate in certain types of ART which is not allowed in Austria, to travel to other member states and access such services.[201]

Fundamentally, the Court presented an interesting evaluation of the notion and interpretation of ART. Austria by the ban on gamete donation for IVF, intended to maintain the „natural characteristics" of childbirth and childrearing even in medically assisted procreation. Both *in vitro* and *in vivo*[202] fertilisation are methods of ART, however referring to Austria's legislation, ova donation is only permissible in cases of *in vivo* fertilisation. The Court observed, that Austria only allowing gamete donation only in specific cases of ART, is pertinent, as it tried to navigate assisted reproduction in a manner that would not upset long-established societal views on family, parenthood etc. In other words, by banning ova donation for IVF, the principle of mater semper certa est would be maintained, there would be no distinction between the genetic mother and the mother who gave birth to the child. The Court recognized that the intention of Austria was not to disturb society with the ethically questionable possible outcomes of medically assisted reproduction techniques[203]. Overall, a cautious approach in regulating sensitive issues as such is within the margin of appreciation of member states.

Currently, the CoE presents a similar resolution on the most controversial type of ART (surrogacy), as the European Union, which will be later discussed in other subchapters. Pursuant to the 2016 Report on „Children's rights related to surrogacy" by Committee on Social Affairs, Health and Sustainable Development, condemned commercial surrogacy. The Report was prepared by Petra De Sutter, a member of the Belgian delegation to the Parliamentary Assembly of the Council of Europe at the time, who advocated for raising awareness and sensitivity about the risks, which arise from commercial surrogacy arrangements and to draft unified guidelines on altruistic surrogacy, on how to protect children's rights. She recommended the following:

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[200] *S.H. and others v. Austria*, App. No. 57813/00 (EctHR, 3 November 2011) paras. 114-115.
[201] Ibid.
[202] A method of fertilisation, where the fusion of male and female gametes happens within the body of a female. The sperm is placed into the female genital tract and the development of the embryo happens inside her body.
[203] Ibid, p. 104.

„The Parliamentary Assembly recommends that the Committee of Ministers: 1.1. consider the desirability and feasibility of drawing up European guidelines to safeguard children's rights in relation to surrogacy arrangements;

1.2. collaborate with the Hague Conference on Private International Law (HCCH) on private international law issues surrounding the status of children, including problems arising in relation to legal parentage resulting from international surrogacy agreements, with a view to ensuring that the views of the Council of Europe (including those of the Parliamentary Assembly and the European Court of Human Rights) are heard and taken into account in any multilateral instrument that may result from the work of the HCCH."[204]

The report heavily focused on recommending the Committee of Ministers of the Council of Europe to explore the desirability and feasibility of establishing European guidelines to safeguard children's rights in surrogacy arrangements, and notably to collaborate with the Hague Conference on Private International Law (HCCH) on issues concerning the status of children, particularly the most evident issue stemming from the practice, the legal parentage arising from international surrogacy agreements. This partnership would ensure that the perspectives of the Council of Europe, including those of the Parliamentary Assembly and the European Court of Human Rights, are taken into account in any multilateral agreement developed by the HCCH. While the PACE Committee on Social Affairs, Health, and Sustainable Development approved the draft recommendation in September 2016, PACE itself rejected it in October of the same year. The Report was not accepted by the Committee, by the ratio of drafts 83 against to 77 for votes.

The hesitancy of the CoE is prevailing on the issue of surrogacy of the CoE still, however a promising Advisory opinion concerning legal parenthood in cross-border surrogacy was issued under Article 1 of Protocol No. 16 to the ECtHR on 10.04.2019, which offered a follow-up interpretation of the Menesson v. France case (no. 65192/11, 26 June 2014), on the topic of protection of children in cross-border surrogacy cases. The gist of the document provides balanced, child-protection-centred guidelines on this issue.

[204] Committee on Social Affairs, Health and Sustainable Development, *Children's rights related to surrogacy* (Council of Europe, 2016), 1.

Although, the Advisory opinion has no legally binding force, it seems to be a positive well-grounded development in the interpretation and application of law of in surrogacy cases.

3. Case law of the ECtHR on Surrogacy

Fundamentally, reproductive cases are brought before the ECtHR under Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination). If we focus on assisted reproduction, we concretely mean the right to conceive a child with the use of medically assisted procreation, especially concerning surrogacy arrangements, and the question of legal parenthood of the surrogate born child. Although, the surrogacy related issues had arisen in a fair number of cases, which have predominantly focused on the legal parenthood and filiation between the intended parents and the child born from surrogacy, the ECtHR have not yet addressed the fundamental question, whether a national legislation banning surrogacy is in line with the ECHR or not. Nevertheless, the tendency of minimalist approach of the ECtHR in matters of reproductive rights, and the characteristics of family law being explicitly under the control of state authorities, the diverse perspectives in this ethically and morally sensitive area, along with the rapid pace of scientific advancements, the Court has deferred many decisions on reproductive matters to national authorities, and is unlikely to derive an European legal standard on the matter of surrogacy arrangements.[205] By broadening the margin of appreciation in sensitive matters, which often require a complex balancing of individual rights and public interests, it is difficult to assert that the Court is providing or intending to provide a comprehensive interpretative framework for cross-border surrogacy cases. The Court prioritizes delivering a ruling focusing on the specific circumstances of the case, and performing the proportionality and subsidiarity test, then delivering argumentation on whether there was a violation or not, they do not create a generally applicable rule for cases arising in the future.[206] However, even from the minimalist and procedural approach, we can derive certain decision-making tendencies from

[205] Nelleke Koffeman, *Morally Sensitive Issues and Cross-Border Movement in the EU* (Intersentia, 2015), 56.

[206] Alina Tryfonidou, "Chapter 8: Surrogacy in the EctHR and the European institutions" in *Reseach Handbook on Surrogacy and the Law*, ed. Katarina Trimmings, Sharon Shakargy and Claire Achmad (Edward Elgar Publishing, 2024), 154.

jurisprudence by analyzing in depth the landmark judgment on cross-border surrogacy and how the Court references it in current cases.

Fundamentally, the majority of the Council of Europe member states prohibit and condemn surrogacy, especially the commercial version, the matter of conflicts brought before the Court are connected to the non-recognition and refusal of the foreign birth certificate establishing legal parenthood on the basis of surrogacy arrangements contracted abroad by the national public authorities, upon comeback of the intended parents with a child to their home country. As it has been highlighted above, given the lack of European consensus regarding surrogacy arrangements, member states enjoy a wide margin of appreciation in this area. However, the ECtHR has many times incorporated both the best interest of the child principle as an essential value to be prevailing in surrogacy cases, which has become an important decisive momentum for the outcome of the ruling, alongside with the existence or non-existence of the biological link between the child and the intended parents.

Nonetheless, there have been landmark cases on cross border surrogacy which has established some important aspects the Court investigates and bases their decision-making on, and we could observe some values, interests and objective specific circumstances in the facts of the case, which can gravely define the outcomes of the judgement. In this regard, a children's rights focused approach, more precisely the prevalence of the best interest of the child principle, could be predominantly observed. However, this approach has also fuelled some criticism from the contracting states, especially of those who ban surrogacy arrangements on their territory.[207]

To be more specific, the approach of the Court to the recognition of the parent-child relationship in cross-border surrogacy cases, has been markedly established on many occasions, especially in the following key cases: *Mennesson v. France*[208], *D v. Belgium*[209], *Paradiso and Campanelli v. Italy*[210], *and the Advisory opinion on recornition of the intended mother*, which is not a bingind decision, but have established noteworthy

[207] The children's rights approach of the ECHR in surrogacy arrangements will be in depth analysed in other chapters of the thesis. The best interest principle and its relevance in the case law will be the core idea of the general analysis of the cases in this chapter.
[208] *Mennesson v. France*
[209] *D. and Others v. Belgium* , App. No. 29176/13 (EctHR, 11 September 2014).
[210] *Paradiso and Campanelli v. Italy*, App. No. 25358/12 (ECtHR Grand Chamber, 24 January 2017).

principles, the Court takes into account in surrogacy cases. In the following, we will highlight the most groundbreaking judgements, which have established the applicable reasoning for further decisions on similar cases, as well as showcasing some more recent judgements on such matters.

The Court has been confronted with the human rights issues stemming from surrogacy arrangements in several cases, however the early case law has established key factors the Court looks at during its assessment. In the following, the most fundamental cases will be discussed then a commentary will be provided on the incoherency in the Courts' decision-making regarding the margin of appreciation assessment, as well as highlighting the shallow children's right perspective application and evaluation the Court provides in recent cases.

In regards to the case-selection, the chapter was meant to systematically cover all relevant ECtHR judgments concerning surrogacy, based on the Court's official case list on the issue of surrogacy. The intention was to provide a comprehensive overview, ensuring that no surrogacy-related decision, both landmark and more peripheral decisions were included. Each case is discussed at least briefly to highlight its relevance to the development of the Court's jurisprudence, while greater detail is given to those judgments that significantly shaped the interpretive framework, such as Mennesson v. France, Paradiso and Campanelli v. Italy, and D.B. and Others v. Switzerland. The intention of the case selection is led by the idea of completeness, and to be exhaustive.

3.1 Foulon v. France and Bouvet v. France

The interpretation presented in the Mennesson case was further advanced in Foulon v. France and Bouvet v. France[211] cases, which confronted the Court with the recognition of parenthood of a single parent, living in de facto homosexual relationship. By these cases, the ECtHR's jurisprudence on surrogacy to same-sex families.

The cases concerned intended fathers of children born via surrogacy in India, challenging the refusal by French authorities to list them as parents on the French birth certificates. The Mr. Foulon and Mr. Bovet, the intended fathers separately were trying to establish their paternity and the maternity of the surrogate mother, subsequently the

[211] *Foulon and Bouvet v. France*, nos. 9063/14 and 10410/14 (Strasbourg, 21 July 2016).

parental recognition concerned only single parents (not the partner of the intended father). Another important distinction to the previous Mennesson case, that here the intended parents recourse to traditional surrogacy arrangements, meaning that no ova donation was involved, thus the child had biological link to the surrogate mother.

These circumstances could have been assumed to open an opportunity for the Court to elaborate on the legal and moral concerns traditional surrogacy arrangements entail, as well as the establishment of the status of a single parent and the family formation of same sex couples, the Courts approach remained minimal and brief. The Court determined that the applicants' situation closely resembled that of the applicants in the Mennesson case and saw no justification to diverge from its previous conclusions. Again, the core principle guiding the ruling was the child's best interest being of paramount consideration, which overrides the public policy concerns of states having a national ban on surrogacy. The Court concluded that there was a violation of the children's right to respect for private life but did not find a violation of the right to respect for family life based on the specific circumstances of the case. Regardless of the specificities of these cases, the Court was not proactive to the new issues it brought into the surrogacy discourse, as it still remains uncertain whether the Convention would consider it a violation if a birth certificate identified two individuals of the same sex as legal parents, rather than biological ones, and those relationships are not recognized.[212]

3.2 D v. France

The following case[213] centered on the recognition of a legal relationship between a child born abroad through gestational surrogacy and the intended mother listed as the legal mother on a birth certificate issued legally abroad. It is important to highlight, that the intended mother was also the genetic mother of the child. The circumstances of the case involved situation of the use of donor gametes, and the legal relationship between the child and the intended father was recognized under national law. The Applicants argued that the child's right to respect for private and family life had been violated and that there was

[212] Máire Ní Shúilleabháin, "Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights," *Law, Policy and the Family* 33, no. 1 (2019): 104-122, https://doi.org/10.1093/lawfam/eby021.
[213] *D. v. France*, App. No. 11288/18 (ECtHR, 16 July 2020).)

discrimination based on birth circumstances, due to the non-recognition of the foreign birth certificate (where the intended mother was listed as the legal mother, naturally).[214] The Court flawlessly demonstrated its precedent findings in Mennesson, as well as reflecting the overall conclusions from the above-mentioned Advisory Opinion. The Court found no violation of Article 8 of the Convention, ruling that the refusal to enter the child's birth certificate information into the French registry was not an abuse of discretion, neither in the alleged violation of Article 14 (prohibition of discrimination) in conjunction with Article 8, as the differing treatment regarding the legal recognition of the child and the genetic mother was deemed reasonable, in regards to ensuring the best interest of the child.

The Court's assessment concluded that, based on its precedent, genetic kinship does not automatically mean that a child's right to respect for private life requires the establishment of a legal relationship with the parents through birth certificate registration.[215] In the Advisory Opinion requested by the French Court of Cassation, the ECtHR noted that adoption has similar effects to registering birth data abroad when recognizing the legal relationship between the child and the intended mother. Therefore, the state was not required to register the birth certificate information for a child born through gestational surrogacy abroad to recognize the legal connection with the intended mother, as adoption could perfectly serve this purpose, as long as procedure laid down by domestic law ensures that they can be implemented promptly and effectively, in accordance with the child's best interests.[216]

In conclusion, if a child is born abroad through gestational surrogacy, conceived using the gametes of the intended father and , and if the legal relationship with the father is recognized by national law, the child's right to respect for private life under Article 8 of the Convention mandates that domestic law *must* allow for the possibility of recognizing the legal parent-child relationship with the intended mother. However, this recognition does not necessarily require entering the information into the birth certificate registry, as the relationship can be legally established through other means, such as adoption.

[214] Ibid, para. 27.
[215] A similar stance was taken in the C. and E. v. France case.
[216] Advisory Opinion of the Grand Chamber to the Cour de Cassation, P16-2018-001, 10 April 2019, para. 96.

Therefore, the Court acknowledged, that recognition of legal parentage is not strictly limited to the birth certificate.

Some critics emerged in relation to this case, namely the possibility to interpret the decision as amounting to gender discrimination in recognition of parenthood, in order to ensure and serve the child's best interest. The discrimination occurred towards the intended mother, who was genetically related to the child. While the father was automatically recognized as the legal father of the child, because the genetic connection they shared, the intended mother had to take extra procedural steps to obtain legal recognition of her motherhood. Seems to be, that the recognition of motherhood is not relying on the genetic link, what is although the case of the intended father, but rather on the fact of gestation and giving birth.

3.3 Valdís Fjölnisdóttir and Others v. Iceland

By now it is clear that the genetic link between the intended parents and the child born through surrogacy arrangements is a decisive factor to the Court's ruling. The following case[217] from Iceland underscored the role of genetics in creation of alternative families. This guidance of the Court was further affirmed in this instance, where the steps taken by the public authorities of states where surrogacy is against the law, of formal non-recognition of the family relations between the child and the non-genetic intended parents, constituted a lawful and necessary interference with the applicants right to respect for private and family life.

The circumstances of the case involved a same-sex married couple from Iceland entered into a gestational surrogacy arrangement in the United States and returned to Iceland with the surrogate-born child, who had no biological connection to either parent. Since Iceland prohibits surrogacy and recognizes the birth mother as the legal mother, the authorities refused to acknowledge the parent-child relationship established in the U.S. between the child and the intended parents (two mothers). As a result, the child was placed in foster care with the intended parents, while being treated as an unaccompanied minor in Iceland. Although they could care for the child as foster parents, they were not given parental responsibility or legal parentage by the authorities. During their joint application

[217] *Valdís Fjölnisdóttir and Others v. Iceland*, App. No. 71552/17 (ECtHR, 18 May 2021).

to adoption procedures, the couple separated, this caused their disqualification to jointly adopt the child, according to the Supreme Court of Iceland. Thus, the Applicants brought their case to the Court, claiming a violations of Article 8, right to respect for family life, and Article 14, prohibition of discrimination. The Court ruled that, while there was an interference with their family life due to the refusal to recognize the legal parentage, nevertheless, it was justified. Icelandic law, which bans surrogacy and considers the birth mother as the legal mother, provided a legitimate basis for the interference, because this law aims to protect women from potential exploitation in surrogacy arrangements and safeguards children's right to know their biological parents.[218] The Court came to the conclusion, that the steps taken by Icelandic authorities, and the legislation did not amount to a violation of Art. 8. Because it offered a sufficient mechanism to establish legal parenthood to the Applicants. Another relevant factor the Court considered in evaluating the proportionality was that the child could obtain Icelandic nationality, and the intended parents were given fostering rights with equal access. This was deemed to be a fair compensation to the Applicants for the ineligibility to jointly adopt a child after their divorce. It is worth noticing, that in the latter case the Court welcomed the comprehensive and cautious steps taken by the public authority to ensure the child's best interests while also maintaining their public policy concerns about commercial surrogacy arrangements. A fair balance had been stroke between the competing interests, namely the child's right to family life has been preserved by the state by measures of concluding a permanent foster care arrangement with Ms. Fjölnisdóttir and equally to Ms. Agnarsdóttir, and granting of the Icelandic nationality to the child. Furthermore, the ECtHR highlighted that the in the future the child has the possibility to have his legal parental relationship established at least one of the intended parents through adoption. Although, the Court made clear focus on the genetic/biological link a decisive importance in establishing parenthood, it also acknowledged, that adoption order[219] is valid option for the genetically

[218] Ibid, para. 65.

[219] Nevertheless, it's important to highlight that the Hague Conference of Private International Law has explicitly emphasized that the structure outlined in the 1993 Hague Adoption Convention is not applicable to surrogacy agreements. Consequently, the conference established a working group on parentage/surrogacy to assess the viability of a private international law instrument in this regard.

non-related intending parent.[220] Nevertheless, the Court still left some truly relevant and pressing questions[221] open in this regard.[222]

The concurring opinion of Judge Lemmens, highlights that the assessment of the Court about the child's private life was missing from the ruling, which should have questioned the possibility of parenthood recognition of both intended parents. The Court seemed to miss the opportunity to further develop the case law on surrogacy, and rather maintained its wide margin of appreciation doctrine towards the state in human rights-related surrogacy cases. Underscoring, that adoption might not always be a feasible path, highlighting those children, who are lacking a genetic relation to their intended parents, might find themselves in legal uncertainty, a legal limbo in regard to their private life and identity.[223] Nevertheless, one of the most important risks cross-border surrogacy arrangements face the child with is parentlessness, what in the light of the Valdís Fjölnisdóttir and Others v. Iceland case was evaded by the authorities, because offering a legal option, the essence of which was to make available for at least one of the genetically-

[220] *C. and E. v. France*, App. No. 1462/18 and 17348/18 (ECtHR, 11 November 2019) and *D. v. France*.

[221] The ECtHR follows a clear pathway in the decision-making about transnational surrogacy cases, namely finding a solution for the already existing surrogate-born child, rather than encouraging or discouraging signatory states to regulate surrogacy in a certain way. The most pressing concerns are the problems of how to solve the potential risk of statelessness and parentlessness of the surrogate-born children, that is why the ECtHR is advocating for the possibility of granting nationality of at least one of the intended parents to the child, and parentlessness is solved by the recognition of legal parenthood by the genetic parent. However, solely focusing on genetics when granting legal parenthood, fails to protect those surrogate-born children who share no genetic connection to either of the parents.
See more in: Julian W März, "What makes a parent in surrogacy cases? Reflections on the Fjölnisdóttir et al. v. Iceland decision of the European Court of Human Rights," *Medical Law International* 21, No. 3 (2021): https://journals.sagepub.com/doi/full/10.1177/09685332211043499.

[222] Further issues arise from other situations when the surrogate mother is genetically related to the child, whether this approach of the Court applies also to genetic motherhood, not only fatherhood, whether this reasoning in the Mennesson case could be applied to same sex couples is further discussed here: Katarina Trimmings, "Surrogacy Arrangements and the Best Interests of the Child: The Case Law of the European Court of Human Rights," in *Fundamental Rights and Best Interests of the Child in Transnational Families*, ed. Elisabetta Bergamini and Chiara Ragni (Intersentia, 2019) 187-208.

[223] The exact wording reads as follows: *„It seems to me that future development should not at all be excluded. The negative impact which the lack of recognition of a legal relationship between the child and the intended parents has "on several aspects of that child's right to respect for its private life" (ibid., § 40, with an enumeration of a number of disadvantages for the child) applies to all children born through a surrogacy arrangement carried out abroad. Indeed, for the children the impact is the same, whether or not one or both of their intended parents has a biological link with them. In both situations, I wonder whether the legal limbo in which a child finds itself can be justified on the basis of the conduct of its intended parents or with reference to the moral views prevailing in society." Valdís Fjölnisdóttir and Others v. Iceland*, Concurring opinion of Judge Lemmens, para. 4.

non related intended parent the establishment of legal parenthood keeping in mind to avoid surrogate-born children to become parentless.

3.4 D.B. and Others v. Switzerland

Upon the issue of recognition of the genetically non-related intended parent of the child, the Court have dealt with in D.B. and Others v. Switzerland[224]. Still remaining in the outskirts of same-sex intended parents and their recognition of parenthood, the following case demonstrates what recognition mechanisms are insufficient in relation to the child's rights and best interest.

The D.B. and Others v. Switzerland case, involved a same-sex couple from Switzerland who engaged in a surrogacy arrangement in the United States. The child born from this arrangement was biologically related to one of the partners. However, upon their return to Switzerland, the authorities refused to recognize the legal parent-child relationship for the non-genetic father, citing the country's prohibition on surrogacy.

The applicants claimed, that the refusal violated their rights under Article 8 (right to respect for family life) and Article 14 (prohibition of discrimination) of the ECHR. Although Swiss law acknowledged the genetic father as the child's legal parent, the relationship with the non-genetic father remained unrecognized. It is necessary to mention, that Swiss law only allowed same-sex couples to adopt since of 2018, leaving the couple in legal uncertainty for several years (the child was born in 2011).

The ECtHR ruled that the prolonged non-recognition of the parent-child relationship for the non-genetic father, without any alternative legal route for recognition before adoption was possible, violated the child's right to private life under Article 8. The Court emphasized that this legal uncertainty harmed the child's best interests by delaying the establishment of a stable family environment. However, it found no violation of the intended fathers' rights, as Swiss authorities had offered a legal solution through adoption after 2018, to which they immediately applied, and the adoption request was successful.

This case illustrates the challenges associated with surrogacy and same-sex parentage and reflects the Court's stance that states must provide timely legal frameworks to ensure the child's well-being is prioritized. As the Advisory Opinion on the legal recognition of

[224] *D.B. and Others v. Switzerland*, App. No. 58252/15 and 58817/15 (ECtHR, 22 November 2022).

the intended mother, raises similar concerns that to a non-genetically related intended father in the D.B. case, thus is applicable.[225] From the perspective of the children, it does not matter, what the sexual orientation of the intended parents are, they find themselves in a comparable position to that of children of hetero couples. However, the decision had not addressed the question of what kind of legal complications the same-sex filiation itself brings to the table. Regardless the protection of the public order argument was placed on the prohibition of surrogacy and the discouragement of Swiss nationals to engage into reproductive tourism by the non-recognition. In such sense, the Court's findings could be understood as the child's best interest overwriting their national ban on cross-border surrogacy as well as the heteronormative adoption procedures. This ruling definitely limits the member state's discretion to enforce their national ban on surrogacy practices, and the impossibility of adoption procedures for alternative couples.[226]

3.5 KK and others v. Denmark

One of the most recent decisions concerning cross-border surrogacy, the ECtHR represents the conventionality with the previously established best interest of the child approach applied in such cases. However, the ECtHR's assessment about the national authorities' procedural steps taken in transnational surrogacy arrangement, in the KK and others v. Denmark case[227], invoked criticism from legal professionals.

The factual background of the case involves the individuals, KK, C1, and C2, all citizens of Denmark residing in Copenhagen, are connected as mother and children. C1 and C2 were born in 2013 through surrogacy arrangement in Ukraine under an agreement involving KK and her husband. Although, they were automatically legally recognized as parents on birth certificates in Ukraine, KK faced challenges in formalizing her maternal status under Danish law upon returning to the country of residence. Despite being granted joint custody, her application for adoption was denied. The Supreme Court upheld this decision in 2020, citing concerns regarding paid consent in surrogacy and emphasizing

[225] Ibid, para. 84-85.
[226] Nikos Koumoutzis, "D.B. and others v. Switzerland: Tracing the Origins of the Right to Recognition of Same-Sex Parentage in International Surrogacy," *Strasbourg Observers*, December 23, 2022, www.strasbourgobservers.com/2022/12/23/d-b-and-others-v-switzerland-tracing-the-origins-of-the-right-to-recognition-of-same-sex-parentage-in-international-surrogacy/
[227] *K.K. and Others v. Denmark*, App. No. 25212/21 (ECtHR, 6 December 2022).

the children's best interests over legal formalities, . The Applicant couple claimed that their rights to a family life under article 8 of the ECHR had been violated. The Court found (by very slight majority), that Danish authorities with the refusal of the adoption by the genetically non-related intended mother *„failed to strike a fair balance between, on the one hand, the specific children's interest in obtaining a legal parent-child relationship with the intended mother, and, on the other, the rights of others, namely those who, in general and the abstract, risked being negatively affected by commercial surrogacy arrangement."*[228]

The argumentation and the decision of the ECtHR is not without shortcomings, which are listed and highlighted in the joint dissenting opinion of Judges Kjølbro, Koskelo and Yüksel. Essentially, the misinterpretation of the best interest of the child principle[229], and the unnecessarily narrowed margin of appreciation[230] of the state was underscored in the dissent. The criticism towards the majority decision encapsulates, most interestingly, how the *„paramount consideration"* of the best interest of the child, might, however, not essentially be in its best interest in cross-border commercial surrogacy cases. The clearly stricter application of the child's best interest, is not in line with the standard level of protection stemming from other international documents like the UN CRC and the Charter of Fundamental Rights of the European Union.[231] The incoherent and not well founded application of the child's best interest principle potentially paves the way of the ECtHR overwriting or enabling practices where children's rights are not respected, which otherwise are protected in the UN CRC, and in respect to the present case, in the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, too.[232] It is evident, from the

[228] Ibid, para. 76
[229] *K.K. and Others v. Denmark*, paras. 96-97.
[230] Ibid. para. 88
[231] Ibid. 94
[232] The misunderstanding of the best interest of the child principle eventuates in the violation of Art. 8 in the respect of private life of the child, however the objects of protection in the context of cross-border surrogacy arrangement, namely the child's right not to be sold and the right to preserve his or her identity, is thus jeopardized by the ECtHR's decision. In other words, the best interest of the child to establish legal parenthood with the intended mother overrides the child's right not to be sold. Although, in the above-mentioned international documents enshrining children's right, surrogacy is not mentioned explicitly, but the notion of getting a child by any means, let it be adoption or surrogacy, shall not involve renumeration nor shall be executed on an exploitative and non-consensual basis. The ECtHR fails to holistically approach

Judgement, that regardless of the findings of the Advisory opinion on the Mennesson case about the the Danish authorities not accepting the adoption application of the intended mother, but on the other hand securing the children legal stability in connection with nationality, parental responsibility, custody and potentially inheritance too, it did not exhausted the requirement of ,,*another means*"[233] .

As the case law presented above points out, that the attitude of the ECtHR towards cross-border surrogacy arrangements is fueled by a child-protection-centered approach, focusing on the best interest of the child principle and the child's right to identity. Although, all the international hard and soft law instruments protecting children's rights represent important and valid guidelines for the member states, it also raises concerns, that potentially such a child-focused approach suggests an existence of a loophole in the law of the prohibiting states. Putting it more simply, the measures incorporated in the member states' law to prevent and discourage cross-border surrogacy practice (prohibitive regulation), usually hinder the safeguards of the best interest of the child. This means, that ECtHR, in its endeavors to prioritize the child's best interests, effectively legitimizes surrogacy by granting legal parentage to commissioning parents.[234]

3.6 C v. Italy

One of the most recent cases[235] revolved around the Italian authorities' refusal to acknowledge the legal parent-child relationship that was documented on a Ukrainian birth certificate. The certificate recognized a child born through gestational surrogacy, as being connected to her biological father and intended mother.

The factual background of the case is the usual one, involving an Italian couple engaging into gestational surrogacy arrangements, using a donor gamete and the sperm of the intended father to conceive a child. After the birth of the child, the couple upon

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the best interest of the child principle, thus enabling the intended parents with a legal tool to circumvent the national law on the ban of surrogacy, by turning to the ECtHR after exhausting all domestic remedies. This tendency in the decision-making of the ECtHR creates encouragement to the couples to engage into commercial surrogacy arrangements, which in the member state raises public policy concerns.
See more in: Katarina Trimmings, "ECtHR and cross-border surrogacy arrangements: K.K. and others v. Denmark Legal memorandum," *Child Identity Protection,* April 1, 2023, https://www.child-identity.org/wp-content/uploads/2023/04/CHIP-2023-Surrogacy-LegalMemorandum.pdf.

[233] Advisory Opinion No. P16-2018-001.

[234] Čulo and others, "Presumptions of Motherhood on Crossroad of Surrogacy Arrangements in EU," 797.

[235] *C v. Italy*, App. No. 47196/21 (ECtHR, 13 August 2023).

returning to Italy turned to the civil status registry, to register the child according t the foreign Ukrainian birth certificate. Consequently, the authorities denied their application on the basis of contrariness to public order of Italy. Later, they modified their application and wanted to register only the biological father on the birth certificate alone, however the Court of Appeal was reluctant to satisfy their request, stating, that the best interest of the child principle should not override and disregard the national ban on surrogacy, aiming to protect public order.

The ECtHR found that Italy had violated Article 8 of the European Convention on Human Rights, which protects the right to respect for private and family life. This violation concerned the legal relationship between the child and her biological father. The Court noted that the Italian courts had failed to take swift action to protect the child's right to have her relationship with her biological father legally recognized. The child, just four years old, had been left in a legal limbo, without a legally established parentage, which rendered her stateless in Italy. Despite the leeway given to states, Italy did not meet its obligation to ensure the child's rights under Article 8.

However, regarding the relationship between the child and her intended mother, the Court ruled that there was no violation of Article 8. While Italian law did not allow for the intended mother to be registered as the child's mother based on the Ukrainian birth certificate, the law still provided a pathway for her to legally recognize the child through adoption. The refusal to register the intended mother's details on the birth certificate was therefore within Italy's margin of discretion.

This ruling highlights the importance of balancing a child's right to a legally recognized family with a state's ability to manage its own laws on surrogacy and parenthood.

3.7 S.-H. v. Poland

A notable mention is the case of S.-H. v. Poland[236], what demonstrates the differences between the often-occurring problem with surrogacy cases, regarding children, parentlessness and statelessness. The latter, more precisely the denial of the opportunity to acquire a certain citizenship through filiation, is framed in the case, it also presents the

[236] *S.-H. v. Poland*, App. No. 56846/15 and 56849/15 (ECtHR, 16 November 2021).

clash of alternative family creation through surrogacy with the national public order protection of morals. The case differs from the previous ones as the Applicants questioned, that the Polish authorities' denial on recognition of Polish citizenship of the child born through surrogacy, on the grounds of the intended parent's sexual orientation, as well as the national ban on surrogacy, violated the child's rights under Art. 8 in conjunction with Art. 14. It is important to emphasize that the Applicants' country of residence was not Poland, but Israel. In other words, they sought recognition of parental filiation (which would grant citizenship rights) in a third country, where the intended parents held nationality.

The principal facts of the case involve intended parents, a married homosexual couple, who engaged into a gestational surrogacy arrangement with one of the intended father's sperm and a donor egg. Twins were born in the U.S., consequently the Superior Court of California declared the intended parents as joint and equal parents of the twins, additionally including the record of one of the applicants as the biological father of the children. As the biological father was a legal national of Poland, the intended parents applied for recognition of filiation, and the acquisition of Polish citizenship to the children, based on the established paternity abroad. However, the Polish authorities denied the application, citing the reason that they did not recognize the intended father as the legal father because the children were born via surrogacy, which is not allowed in Poland, and according to their U.S. birth certificate, their legal parents were a same-sex couple, which is not admissible, and ran counter to the basic principles of the Polish legal system.[237]

The Court find the Application unanimously inadmissible, based on lack of jurisdiction *ratione materiae*. Although the case concerned the private life aspects of the Applicants, and was affected by the denial of recognition by the Polish authorities, in a practical sense, they did not suffer from any negative repercussions. The Court highlighted, the significant difference between the circumstances of the cases like Mennesson, where that Poland (where they requested recognition of filiation) was not their home country.[238] On the grounds that, the couple have never lived and intend to move in Poland in the near future; the children were unlikely to become stateless (because they

[237] Ibid, para. 24.
[238] Ibid, para. 71.

already had the dual US/Israeli);[239] the family would not encounter any issues in Israel (their country of residence) due to the refusal of Polish citizenship;[240] and as family members of an EU citizen, the applicants would still benefit from the freedom of movement.[241]

The Court dismissed the applicability of protection of the children's identity, which is a part of their private life, thus the Polish authorities' denial of the children's social identity through the citizenship recognition could be seen flawed. These aspects were highlighted in Mennesson, while in this case this aspect was not regarded, because the Applicants did not live in Poland.[242] Although, the non-recognition of their familial ties in a third country, might leave them in an uneasy situation when leaving their country of residence, bouncing from recognition to non-recognition.[243]

Nevertheless, the Court maintained a cautious approach, by focusing more on the „practical obstacles", by deeming the Application inadmissible, due to the not imminent legal consequences the family faced, meaning that in cross-border surrogacy parental filiation recognition issues could be assessed by the Court if the non-recognition occurs in the country of residence.

4. Critical remarks on the ECtHR's case law

As we have seen above, the Courts' jurisprudence is becoming more and more extensive, hopefully reaching a more comprehensive, nuanced and holistic direction in the future, while still staying true to the „living instrument"[244] function to effectively and proactively reflect to the human right challenges of the present.

Nevertheless, we shall address the decision-making tendencies and the key factors the Court credits, when assessing the admissibility and the occurrence of violation in a certain case. Cross-border surrogacy cases although shall be addressed on a case-by-case basis,

[239] Ibid, para. 69.
[240] Ibid, para. 70.
[241] Ibid, para. 72.
[242] Sarah Ganty, "Surrogacy as citizenship deprivation in S.-H. v. Poland," *Strasbourg Observers,* March 14, 2022, https://strasbourgobservers.com/2022/03/14/surrogacy-deprives-from-citizenship-in-s-h-v-poland
[243] Tryfonidou, "Surrogacy in the EctHR and the European institutions," 161
[244] *Tyrer v. the United Kingdom*, App. No. 5856/72 (ECtHR, 25 April 1978).

some key elements could be derived from the Court's up to date case law, but a general standard could hardly be observed.[245]

Surrogacy basically triggers complex ethical and legal dilemmas from both public and private law interests[246], thus the Court could be faced with multifaceted applications, although the main issue tends to be centered around the legal status of surrogate-born children, under Art. 8 the right to respect for private and family life. The Court has established case law on the right to become a parent by assisted reproductive procedures, but surrogacy cases build on the minimalist approach of reproductive autonomy, while not ever delivering a ruling on whether surrogacy itself is acceptable from a human-rights perspective.[247]

4.1 The specificities of cross-border surrogacy cases – distinctive factors from the case law on ART

Court reflects a seemingly firm stance on cross-border surrogacy, as demonstrated in the *Mennesson* case and the Advisory Opinion. These precedents suggest a willingness by the Court to treat cross-border surrogacy cases differently from typical cases involving ART. Unlike other ART-related cases, where the Court typically grants states a wide margin of appreciation due to the ethically and value-driven nature of these issues, cross-border surrogacy is approached with distinct considerations. For cases primarily focused on access to specific types of ART, the Court generally maintains a minimalist approach. It emphasizes the principles of subsidiarity and proportionality, asserting that member states are best positioned to decide which forms of ART to permit or prohibit. This deference to national authority is rooted in the recognition that ART policies are deeply

[245] Sharon Shakargy, "Choice of Law for Surrogacy Agreements: In the In-between of Status and Contract," *Journal of Private International Law* 16, no. 1 (2020): 138-162, https://doi.org/10.1080/17441048.2020.1741121.
[246] Amonng the public law issues we can mention the informed consent guaranties, the access to assisted reproductive procedures, the protection of certain types of family types, protection of children and woman from exploitation, nationality and citizenship etc. As well as the private law implications such as presumptions of motherhood aand fatherhood, so parental rights and responsibilities, parental filiation, the right to become a parent, the child's right to identity, issues of the legal status of the child, enforceability of the surrogacy contratcst and so on.
[247] Tryfonidou, "Surrogacy in the EctHR and the European institutions," 161.

intertwined with the values, ethical frameworks, and traditional legal principles that form part of a state's national identity in mostly family law matters.

The issue of cross-border surrogacy entails elaboration on reproductive autonomy, the right to health and if it could be considered a right at all– right to become a parent. The question of reproductive autonomy in surrogacy cases is *not* necessarily assessed, but only in cases where the genetic link between the child and at least one of the intended parents is *missing*. An example of this is the Paradiso and Campanelli case, where the initial question surrounded the removal of the child and his placement for adoption, which allegedly violated their right to respect for private and family life under Article 8 of the Convention. However, as soon as it has been confirmed, that the child and the intended parents are genetically not related, although the Chamber decision accepted that ,,de facto family life" existed between the child and the intended parents[248], the Grand Chamber overruled this assessment, as based on the quality of the relationship, it was concluded that family life did not exist in the present case.[249] Causing, that the child did not became an Applicant in the case, because the intended parents lacked legal standing on representing his or her private and family life.

This was a crucial point in the Court's decision-making, as the circumstances present in the Mennesson case (such as the genetic connection) were not met, leading to the withholding of the child's private rights concerns, by performing the evaluation of whether the non-recognition of the parental filiation were not in line with the child's best interests and child's right to identity.

The child's private life concerns were lacking in Paradiso and Campanelli, thus reshaping the case purely about ART, the indented parent's private life concerns about their reproductive autonomy, which constitutes a wide margin of appreciation,[250] unlike

[248] *Paradiso and Campanelli v. Italy*, para. 69.
[249] *Paradiso and Campanelli v. Italy*, para. 157.
[250] *,,As regards the Court's recognition that the States must in principle be afforded a wide margin of appreciation regarding matters which raise delicate moral and ethical questions on which there is no consensus at European level, the Court refers, in particular, to the nuanced approach adopted on the issue of heterologous assisted fertilisation in S.H. and Others v. Austria (cited, above, §§ 95-118) and to the analysis of the margin of appreciation in the context of surrogacy arrangements and the legal recognition of the parent-child relationship between intended parents and the children thus legally conceived abroad in Mennesson (cited above, §§ 78-79)."*
See: Ibid. para. 184.

cross-border surrogacy cases, where the private life implications of the child, the best interests, and identity rights narrows the discretion of the states.

We can conclude, that the focal issue in cross-border surrogacy cases address the children's right (especially, the right of the *biological child* of the intended parents), the child's right to identity as an aspect of private life, which is a broad concept under the ECHR, and whether it is balanced with the domestic regulation on surrogacy, in prohibitive member states. This is usually the decisive circumstance, which takes the cross-border surrogacy case out of the scope of cases related to ART.

On one hand, we have the member states' public interest to refrain from any surrogacy arrangements taking place on their territory, as well as discouraging their nationals to engage into these medical services abroad, in the name of protecting national values on traditional family structures, protection of woman and children from exploitation. Meanwhile, the infertile couples seek solutions for family creation elsewhere amounting to reproductive tourism, what is, in any case, supported by the ECtHR.[251] Upon a successful surrogacy arrangement, the return to their country of domicile with a child, they face legal repercussions. In the midst of all this, the child, who has no saying to any of the circumstances, experiences the most vulnerability and legal uncertainty, and who is ultimately left to the discretion of the state authorities, and hopefully not be exposed to risks of being left parentless or stateless.

Nevertheless, it is in the member states' authority to freely regulate on such deeply national branches of law as family law, what also reflects their national identity, heritage,

[251] The confirmation to this is available in the decision of of S.H. and others v. Austria (Application no. 57813/00, judgement on 15 November 2017) para. 114, where the Court stipulated that „*In this connection, the Court also observes that there is no prohibition under Austrian law on going abroad to seek treatment of infertility that uses artificial procreation techniques not allowed in Austria and that in the event of a successful treatment the Civil Code contains clear rules on paternity and maternity that respect the wishes of the parent"*
Moreover, before the Austrian case, the Court did not condemn, but positively welcomed the opportunity open to the Applicants to travel abroad and take up medical services, otherwise prohibited in their home country. The Irish case involved yet another ethically controversial topic for reproductive rights, namely abortion, where the Court ruled that the possible ,,circumvention" of the strict abortion laws as appropriate in *A, B and C v. Ireland*, App. No. 23379/05 (Grand Chamber, 16 December 2010) para. 241,, *Accordingly, having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life (see paragraphs 222-27 above) and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State."*

values and customs. It has been acknowledged by the ECtHR, that arguments on public order and public morals, which are definitely challenged by the development of new technologies in assisted reproduction - serve to protect the majority interest, and if performed in line with the proportionality judicial tool, could scrutinize the minority interests at stake. Moreover, the margin of appreciation doctrine accommodate the subsidiary principle between the Court and the member states, which is usually left wide in ethically challenging issues, where no European consensus has been established yet. Surrogacy and the arising cross-border recognition of parenthood fits into this category well, where the balancing between the public and private interests at stake, shall be left exclusively to the Member States. However, such minimalist and cautious approach could not be overall observed from the case law of the ECtHR, especially regarding the landmark decisions of *Mennesson* and *Paradiso*, where the established certain principles and factors could bend the domestic bioethical standards in relation to assisted reproduction, and on the same tone could contribute to opposing outcomes.

4.2 Determination of the margin of appreciation and the genetic link

The turning point of surrogacy related cases comes around, when the Court determines the margin of appreciation of the state, which could be narrowed or widened based on certain specificities of the case. Basically, its strength lies precisely in its adaptability, allowing it to be tailored to the unique circumstances of each case, the prevailing stance of states on the issue at the time of adjudication, and the ethical and moral sensitivity surrounding the matter.[252] For the surrogacy cases, this factor seems to be non-other that the children's rights implications of Art. 8. , more precisely the children's right to identity, as playing a pivotal role in the children's private life guaranties. However, as to how it is in the children's best interest to preserve its elements of identity through the recognition of filiation, is ultimately about whether there is a *biological link* between the child and either of the intended parents.

The utmost relevance of the genetic link, is further elaborated on in the Advisory opinion, as ,,*the Court considers that the general and absolute impossibility of obtaining recognition of the relationship between a child born through a surrogacy arrangement*

[252] Tryfonidou, "Surrogacy in the EctHR and the European institutions," 162.

entered into abroad and the intended mother is incompatible with the child's best interests, which require at a minimum that each situation be examined in the light of the particular circumstances of the case."[253]

The Advisory opinion together with the Mennesson principles suggest, that the Court's role in surrogacy cases shall be a ,,processed-based review". This involves examining how the national authorities assessed the best interests of the child, whether they demonstrated a willingness to consider the specific circumstances of the case, and whether they provided a thorough justification for the refusal or acceptance of the foreign birth certificate.[254]

In the Mennesson case, the Court first examined the margin of appreciation in the fields of regulation of assisted reproduction and the authorization of surrogacy, and the parent-child relationship stemming from surrogacy arrangements. Regarding the first point of interest, the Court swiftly concluded, that the domestic provisions were in accordance with the law, pursuant to the legitimate aim of ,,protection of health and rights and freedoms of others"[255]. The turning point came down to the assessment of necessity in a democratic society, where the Court maintained its minimalist approach in cases involving reproductive rights, thus the member states are free to regulate on what kinds of assisted reproductive techniques they cover with their legislation. The decisive margin of appreciation analysis was made on the second issue stemming from the case, the parent-child relationship. The Court invoked the child's rights to identity aspect of private life protection to be concerned with the denial of parenthood, what resulted in the reduction of the margin.[256] The violation was not confirmed on the side of the Applicants, that they could not establish parent-child relationship according to the French rules, but were,

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[253] Advisory Opinion No. P16-2018-001, para. 42

[254] „*Process-based review is not limited to procedural issues in the traditional sense, as distinguished from issues of legal substance. In other words, it does not in any way limit the Strasbourg Court from continuing to fulfil its fundamental role of analysing substantive outcomes at the domestic level. However, the significance of process-based review lies in its shift of the Court's primary methodological focus from its own independent assessment of the 'Conventionality' of the domestic measure towards an examination of whether the issue has been properly analysed by the domestic decision-maker in conformity with already embedded*" See: Robert Spano, "Universality or Diversity of Human Rights: Strasbourg in the Age of Subsidiarity?," *Human Rights Law Review* 14, No. 3 (2014): 480, Online: https://doi.org/10.1093/hrlr/ngu021.

[255] *Mennesson v. France,* para. 60.

[256] *,,However, regard should also be had to the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned. The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced"*
Ibid. para. 80.

nevertheless, recognised as parents on the basis of the U.S. certificate, thus the non-recognition would hardly cause them any practical hardships in their family life.[257]

However, the denial on the recognition on child's right to identity, although not amounting to practical aspects and obstacles they would face, but how their *personal identity* could be jeopardized, by presumably hardly acquiring French nationality in the future. Although, the children were not at the risk of being lest stateless by the decision of the French authorities, the acquisition of French nationality, established based on biological truth (the genetic connection to the intended father), would amount to the firm acknowledgement of certain element of the child's identity, namely the genetic and social, all integral of their personal identity.

Interestingly, the Court focused on the child's right to the development of their personal identity on an abstract but a profound way, in terms of the repercussions children born through surrogacy arrangements may face. Additionally, the aspects of the recognition of social parenthood, not only genetic one, was confirmed to be in the interest of the child in the Advisory Opinion No. P16-2018-001, highlighting the importance of an existence of some measures, such as adoption to promptly and effectively in the child's best interest recognize the filiation with the other intended parent.[258]

These pivotal aspects established by Mennesson, reached a completely different conclusion, and were not regarded much attention in the Paradiso and Campanelli v. Italy case. Seemingly, the Court did not find the aspects of the child's identity being at stake, solely on the non-existence of a genetic ties between the intended parents and the child, thus the child as an applicant was not given a standing, moreover concluding, that in regards to the short period of time even de facto family life did not exist between them.

The Court, thus was left on balancing between interest, not including the child's identity aspects, occurred around the regulation of assisted reproduction and the authorization of surrogacy, and ventured into the territory of the reproductive rights with sensitive moral and ethical aspects, this indicating the minimalist approach of the court and understandably a widening of the margin of appreciation.

[257] Ibid. para. 94.
[258] Advisory Opinion No. P16-2018-001. P. 2.

In this light, the Court's assessment it is not illogical or unnecessary, that they extended their analysis on the risk involved in cross-border surrogacy arrangements, such as illicit practices, human trafficking effecting the children and woman.[259] Surely, the practices could invoke additional risks to the subjects of surrogacy arrangements, but regardless of the non-existence of the genetic link between the child and the intended parent, the notions *of personal identity* of the child were clearly affected by the action of the authorities, which did not make recognition and further elaboration from the Court. The lack of personal standing based on the absence of genetic link turned this cross-border surrogacy case into a case, where a Court was necessarily „obliged" not to overstep the boundaries of state sovereignty, as well as the member states' supremacy in navigating the legislation in ethically sensitive areas of family law, which reflects their national legal identity, heritage and traditions.[260]

Nevertheless, it could be argued, that the Court should extend their application of a narrow margin to surrogate born children regardless of what their genetic link indicates. There is a child put in the middle of the competition of the states' interest to withhold surrogacy arrangements on their territory, as they are opposing their public order, and the intended parents' private interest to found a family with, probably, the only means that is available and corresponding to their infertile condition. With the Court „greenlighting" reproductive tourism, these cases will continue to emerge in the future, regardless of the states' well justified prohibitive legislation. Thus, the Court shall provide a cautious approach, and a complete human rights analysis, to take a proactive imperative in pressing bioethical issues such as surrogacy, to which a child's rights-based approach would perhaps be the most honourable way.

4.3 Refusal of public policy grounds – from procedural to value-defining approach

By these precedents the national authorities shall expect, that shallow refusal based on public policy, without the best interests assessment, is insufficient, as the margin of appreciation is constantly narrowed when the child's best interests and identity rights are

[259] *Paradiso and Campanelli v. Italy*, paras. 202-204..
[260] Andrea Mulligan, "Identity Rights and Sensitive Ethical Questions: The European Convention on Human Rights and the Regulation of Surrogacy Arrangements," *Medical Law Review*, 26, no. 3, (2018): 449-475, https://doi.org/10.1093/medlaw/fwx066.

affected.[261] Moreover, if a state offers some kind of measures, such as adoption to promptly and effectively in the child's best interest recognize the filiation with the other intended parent, the violation of the Convention could be avoided.[262] A noteworthy example of that is the Valdís Fjölnisdóttir and Others v. Iceland case, where the Court welcomed the state authorities steps towards on one hand supporting the de facto family life between the intended parents and the child, on the other hand continuing to be cautious on the national ban on surrogacy. The foster care agreement, the custody rights as well as the likely acceptance of the joint adoption offered by the authorities in the Courts' eyes satisfied the criterium of the member state to facilitate *„another means"* of the Advisory opinion, to recognize parenthood in the child's best interest.[263] Moreover, as Icelandic citizenship given to the child, the risk of statelessness, just like other practical hindrances were further minimized, thus with the interference the Applicants could de facto still enjoy their family life.[264] Although, the concurring opinion of Judge Lemmens pointed out, that the reluctancy to address the private life dimensions and the identity rights of the child, which is usually inevitable, where at least one intended parent is biologically related to the child, this did not arise in this case, because the arguments of this case focused more on the arguments on the interference of the family life. Regardless, one shall not forget that the consequences to private life of the child is the same, whether there is s biological link or not, and affects all children born from a cross-border surrogacy arrangement. That is why a broader assessment shall be issued around the child's right to a legal relationship with the intended parents in the future.[265]

Perhaps, the overall emphasis on the genetic link, and the questions risen when non-traditional families enter into a cross-border surrogacy arrangement, creates a different approach in the Court's assessment.[266] Although, focusing more on the approach of the Court presented in the selected judgement above, the KK and others v. Denmark is

[261] *Mennesson v. France,* para. 77
[262] Advisory Opinion No. P16-2018-001, p. 2.
[263] *Valdís Fjölnisdóttir and Others v. Iceland*, para. 71.
[264] Ibid, paras. 72 and 75
[265] Ibid, Concurring Opinion of Judge Lemmens, pp. 4-5
[266] See the criticism about the selective approach of the Court in relation to non traditional families in: Lydia Bracken, "Accommodations of private and family life and non-traditional families: the limits of deference in cases of cross-border surrogacy before the European Court of Human Rights," *Medical Law Review* 32, no. 2 (2024): 141–157, https://doi.org/10.1093/medlaw/fwad038.

conspicuous, in a sense that the ,,process-based approach" was somehow rather overturned, although the national authorities carried out a best interest assessment, and did not provide an automatic and superficial refusal to the parental recognition. Here, the relationship with the genetic intended father was established, and the factual enjoyment of the right to family life was not interrupted, as both intended parents were given joint custody of the children. Now the infamous private right concerns arose, where the Court established the narrowing margin if identity rights, are at stake in the context of recognition of parenthood.[267] However, the Danish authorities provided seemingly enough legal tools to the intended mother to establish family life with the children, the children were given Danish nationality, those did not satisfy the Court. The Court established a *higher standard* for the best interests of the children and their private life, which is not compatible with the Danish legislation and public policy, which necessitated the refusal of the adoption order of the intended mother.[268] Here, the circumstances are similar to the Mennesson case, but the Danish authorities did not overall refuse to facilitate somehow the legal parenthood, it would have been in the best interest of the children to acknowledge legal parenthood on the same level with both of the intended parents, although in the Valdís case the custody rights and the foster agreement was satisfactory.

This rather nit-picky approach of the Court on the evaluation of the ,,another means" for parenthood recognition, as well as stepping out of the ,,process-base review" opens up an inconvenient pathway to those member states who would like to uphold their public policy surrounding cross-border surrogacy, to expect that their sovereign legislation on banning or not supporting surrogacy arrangements, would be scrutinized by the Court.[269]

5. Evaluating ECtHR case law on Surrogacy

The analysis of surrogacy within the framework of the ECHR reveals significant tensions between adult-centered reproductive claims and the best interests of the child. The notion of a "right to become a parent" remains a problematic focal point in the surrogacy debate, as it risks prioritizing the desires of intended parents over the well-being

[267] *K.K. and Others v. Denmark*, para. 80.
[268] Ibid, para. 57 and 75
[269] Anica Čulo Margaletić, Barbara Preložnjak and Ivan Šimović, "Presumptions of Motherhood on Crossroad of Surrogacy Arrangements in EU," *EU and Comparative Law Issues and Challenges Series (ECLIC)* 3, (2019): 778–802, https://doi.org/10.25234/eclic/9031.

and rights of children. This perspective may inadvertently reduce children to objects of adult fulfilment, rather than recognizing their inherent rights and individual needs.

A key challenge in surrogacy-related litigation before the ECtHR is the value-based assessment conducted by the Court. While the Court has consistently emphasized the best interests of the child, its evolving jurisprudence has raised concerns about potential intrusions into national sovereignty, particularly in states where surrogacy is strictly prohibited. The majority of CoE member states ban surrogacy, especially commercial surrogacy, due to ethical concerns regarding the commodification of women and children. These prohibitions are generally designed to protect children from exploitative practices and uphold national public order. However, the Court's intervention in surrogacy cases has introduced legal uncertainty, creating friction between domestic laws and international human rights obligations.

The concerns about public policy and the limits of judicial intervention is a particularly contentious issue in surrogacy cases, as the reliance on public policy grounds to justify the non-recognition of foreign surrogacy arrangements serves to maintain state sovereignty and ensuring state determined values in the means of founding a family. While states seek to uphold their legislative choices and ethical convictions by denying legal parenthood to intended parents in cross-border surrogacy cases, such denials can adversely impact surrogate-born children, potentially leaving them in a state of legal limbo. The ECtHR has ruled that a child's right to identity and legal recognition of family ties must be protected, yet this does not mean that states should be compelled to fully recognize parenthood established through surrogacy. Instead, the Court should acknowledge alternative legal mechanisms that ensure the child's welfare without eroding national prohibitions on surrogacy.

This issue was evident in cases such as Mennesson v. France, where the Court recognized the importance of the child's right to identity but did not impose a blanket obligation on states to legalize surrogacy or recognize all parental ties established abroad. Conversely, in Paradiso and Campanelli v. Italy, the Court's decision not to grant standing to the child, based solely on the absence of a biological link, demonstrated a more state-deferential approach, leaving the regulation of surrogacy to national authorities. These

cases illustrate the Court's inconsistent jurisprudence, which fluctuates between child-centered reasoning and respect for state sovereignty.

The ECtHR's role in surrogacy disputes should be to safeguard the best interests of the child without dictating national family law policies. The means by which states establish parenthood should not be imposed by the Court, as long as domestic legal frameworks provide alternative solutions that secure the child's well-being. If a state conducts a thorough best interests assessment and opts for mechanisms such as adoption or legal guardianship to maintain de facto family life between the child and the non-biological intended parent, such measures should be considered satisfactory and compliant with human rights standards.

A fundamental risk in surrogacy jurisprudence is that excessive judicial intervention may unintentionally incentivize reproductive tourism, indirectly encouraging individuals to engage in surrogacy abroad despite domestic prohibitions. By consistently recognizing parental ties in cross-border surrogacy cases, the Court may undermine national efforts to deter surrogacy, ultimately weakening state sovereignty in morally sensitive areas such as family law and bioethics. A more cautious and principled approach would require the Court to respect national public order concerns while ensuring that surrogate-born children are not left without legal protections.

Given the transnational nature of surrogacy, a purely national approach is insufficient. The legal challenges surrounding international surrogacy demand an international solution, one that harmonizes the protection of children's rights with respect for national sovereignty. The absence of a uniform legal framework across CoE member states exacerbates the risk of legal uncertainty and inconsistent rulings. Moving forward, a balanced and coherent judicial approach is needed, one that: prioritizes the best interests of the child; ensuring their right to legal identity and family life; respects state sovereignty, allowing member states to regulate parenthood within their ethical and legal traditions; recognizes alternative legal solutions, such as adoption to secure the child's welfare without compelling full recognition of surrogacy arrangements; avoids reinforcing reproductive tourism, preventing the Court from inadvertently encouraging surrogacy practices in states that prohibit them.

Ultimately, the Court must navigate these complex issues without imposing value-based judgments on member states or compelling them to reduce their sovereignty in morally and ethically sensitive matters. Instead, it should focus on establishing a human rights-based approach that safeguards surrogate-born children without legitimizing surrogacy itself. This careful balance is essential for fostering both legal certainty and ethical integrity in addressing the evolving challenges of international surrogacy.

IV. COMPARATIVE APPROACH TO SURROGACY

Surrogacy represents one of the most ethically and legally complex reproductive phenomena, which challenges the traditional notions of parenthood, family formation, and the legal status of children. This complexity is reflected in the remarkably diverse legal landscape across Europe, where national approaches to surrogacy regulation range from explicit permission to strict prohibition, with many jurisdictions occupying an ambiguous middle ground of legislative silence.

European jurisdictions have essentially adopted one of three legislative pathways regarding surrogacy arrangements. The permissive approach is exemplified by countries such as Greece, Cyprus, and Portugal, which have established legal frameworks for altruistic surrogacy under specific conditions. The prohibitive approach is represented by countries such as Germany, France, Italy, and Spain, which have explicitly banned surrogacy through various legal mechanisms, arguing that surrogacy as incompatible with certain constitutional and ethical principles, particularly concerning human dignity, the protection of the child, and non-commercialization of reproduction. The third approach encompasses those countries that remain legislatively silent on the issue, creating a legal gray zone where surrogacy is neither explicitly permitted nor prohibited. This regulatory diversity reflects deeper societal tensions between reproductive autonomy, the protection of vulnerable parties, children's rights, and traditional conceptions of family. Understanding this complex legal mosaic is essential for analyzing how different legal systems balance these competing interests and how cross-border reproductive care challenges traditional notions of sovereignty in family law matters.

This chapter will focus specifically on an in-depth analysis of surrogacy regulations in Hungary, Slovakia, and the Czech Republic. The selection of these Central European nations is motivated by several factors. Primarily the author's personal connections to these countries and linguistic competencies, the shared legal history among these countries, geographical proximity, and their political alliance within the Visegrád Group. This comparative analysis offers a unique opportunity to examine how countries with similar historical-legal traditions and regional ties have nevertheless developed distinct approaches to surrogacy. This chapter is dedicated to test the hypothesis, whether *the legal*

frameworks of Slovakia, Hungary, and the Czech Republic either oppose or refrain from legalizing surrogacy.

Our analysis will proceed along several dimensions. First, we will provide a comprehensive overview of ART and surrogacy regulations in each country, tracing the historical development of relevant legislation and examining whether surrogacy arrangements are legal and under what circumstances. Second, we will explore private law considerations, particularly the presumptions of maternity and paternity, and analyze how each legal system approaches a child's right to identity in cases of adoption, which may offer insights into how a child's identity rights might be protected in surrogacy arrangements. Third, we will examine public law considerations, analyzing constitutional protections of family and children, and criminal law provisions that might explicitly criminalize surrogacy or other related conduct.

Additionally, this chapter will briefly introduce Ukraine's legislative framework on surrogacy, as it represents one of the most popular and accessible destinations for „reproductive tourism" in Europe. Ukraine's closeness to Hungary, Slovakia, and the Czech Republic makes it a likely destination for citizens of these countries seeking surrogacy services, especially given its relatively lower costs compared to other European or oversees options. While the United States have extensive case law and jurisprudence on surrogacy, this analysis deliberately excludes these jurisdictions to maintain a narrower comparative scope to the dissertation. Moreover, American approaches to surrogacy are often grounded in different bioethical frameworks and values regarding human rights and children's rights than those predominant in Europe, making them less likely to serve as models for Central European legislation. Additionally, a sub-chapter is dedicated to the legal framework of the United Kingdom, as it is a member of the ECHR and the UN CRC. The UK system from the early emergence of IVF were not shy to face the new bioethical challenges, and since then they have developed a broad regulatory framework governing ART and surrogacy. The sub-chapter on the UK serves as a valuable insight on a specific legislative path chosen.

Finally, this chapter will examine the European Union's evolving stance on surrogacy through a dedicated subchapter. Although substantive family law remains within the exclusive competence of member states, the cross–border implications of surrogacy

arrangements inevitably engage EU law. This section will explore whether unification forces are emerging at the EU level, recent developments in EU institutions' approaches to surrogacy, and whether harmonization in this field is feasible or desirable given the profound ethical divisions among member states. Through this comparative analysis, we hope to not only illuminate the current legal status of surrogacy in these selected jurisdictions but also identify emerging patterns and potential future directions for surrogacy regulation in Central Europe and beyond.

1. Surrogacy in Hungary[270]

1.1 Overview of legal framework on ART and surrogacy

The Hungarian law on ART has been shaped in order to keep up with the biotechnological advancements, to keep up with the new forms of assisted reproductive techniques since the 1990s. The Hungarian Scientific and Research Ethics Committee of the Scientific Council for Health, has been engaging into ethical debates, stating that the emergence of ART since the birth of Louis Brown, a new era has begun in reproduction and its ethical considerations. The new discoveries in ART had opened up countless questions about family creation, which are ought to be answered clearly and unambiguously, or at least accompanied by an ethical guideline to avoid risks and dangers.[271] The Hungarian Scientific and Research Ethics Committee of the Scientific Council for Health position statement on the Report of the 1990s initiated an allowing

[270] For clarity and consistency in the context of Hungarian legislation, we will use the term "surrogacy" to refer specifically to "altruistic surrogacy", excluding commercial surrogacy. While the most literal translation from Hungarian would be "nanny pregnancy", we will not use this term.
In Hungarian, the term "dajkaterhesség" refers to "nanny pregnancy" or altruistic surrogacy, as the word "dajka" translates to "nanny" in English, emphasizing a caregiving role rather than a commercial one. On the other hand, commercial surrogacy is called "béranyaság", which suggests that the surrogate mother receives payment or "rents out" her womb for the pregnancy. The word "bér" in Hungarian means both "wage" and "rent", highlighting the financial aspect associated with "anyaság" (motherhood). This linguistic distinction reflects the contrast between unpaid and compensated surrogacy arrangements.
Another expression used for altruistic surrogacy is "pótanyaság", where the prefix "pót" equals "replacement" or "substitute" in English.
The altruistic form of surrogacy in Hungary is thus called nanny pregnancy (dajkaanyaság or pótanyaság). Usually these are the terms used in Hungarian scientific articles on the matter.

[271] Alfréda Temesi, József Mandl, *Tudományos és Kutatásetikai Bizottság Állásfoglalásai (1990-1999)* (Egészségügyi Tudományos Tanács, 1999) 17, https://ett.aeek.hu/wp-content/uploads/2016/09/tukebkonyv.pdf

approach[272] toward the altruistic form of surrogacy thus there has been a legal preparatory follow-up on the matter, more specifically in the Draft on the Act CLIV of 1997 on Healthcare. Originally, the draft presented an allowing approach to the altruistic form of surrogacy, more precisely nanny pregnancy, which was set to take effect on January 1. 2000.[273] The Draft specified that „*An embryo created outside the body from the gametes of both individuals in a marital or cohabiting relationship may be implanted into another woman's (the surrogate mother's) uterus for the purpose of carrying the pregnancy on behalf of the couple who created it (surrogacy) if the woman providing the egg is unable to carry the pregnancy due to physical conditions, or if carrying the child would endanger her life or physical well-being, or if implantation into her body would likely not result in the birth of a healthy child."*[274] In surrogacy arrangements, the use of third-party donor gametes would be deemed inadmissible, as only the gametes of the married or cohabiting couple would be eligible IVF. This formulation reflects the legislators' intent to prevent potential manipulation and misuse of gametes while emphasizing the importance of establishing a genetic link between the child and the intended parents. Such an approach seeks to reinforce familial bonds, reduce ambiguity regarding biological parentage, and

[272] The Committee expressed conditional support of both gestational and partial surrogacy, only when it is strictly medically necessitated, and deemed unethical for convenience purposes. The procedure should first of all be limited to a few well-prepared centres, with legal and professional bodies overviewing the procedure. The group work program in the centres should include key considerations on the psychological, medical, and ethical factors, as well as legal uncertainties (the surrogate mother's rights, the dynamics of family and kinship relationships, the relationship between the intended parents and the surrogate mother during pregnancy and after childbirth, the fate and well-being of the child in case of defects, financial responsibilities, the emergence of medical interventions during childbirth, appropriate screening and genetic tests, issues on termination of pregnancy).
It expressed strict opposition to conduct commercial surrogacy as it is unethical. The committee emphasizes the need for clear legal regulations before proceeding further with ethical evaluations.
See: Temesi, Alfréda, and József Mandl, Tudományos és Kutatásetikai Bizottság Állásfoglalásai (1990-1999) (Egészségügyi Tudományos Tanács, 1999), https://ett.aeek.hu/wp-content/uploads/2016/09/tukebkonyv.pdf.

[273] Altruistic surrogacy has been consistently promised by healthcare ministers across successive administrations, yet it was omitted entirely the Draft. Before the 1997 Health Act came into effect, surrogacy was a recognized and functional practice in Hungary. It was even included in the original version of the Health Act passed by Parliament as a legally available reproductive procedure, understandably under strict conditions. Before the enforcement, the Ministry of Justice was given adequate time to revise family law regulations appropriately, reforming mostly the presumptions on parenthood. However, despite the Ministry drafting the necessary regulatory framework, the amendment was never implemented.
See: Társaság a Szabadságjogokért, "Álláspont Az egyes egészségügyi törvények módisításáról," *TASZ*, February 5, 2024, https://tasz.hu/wp-content/uploads/2024/02/TASZ26_1.pdf.

[274] Decision of the Constitutional Court of Hungary no. 08/B/2000. Part II. about the 183. § (1) Act on Health 1997 Amendment Draft

uphold (semi)traditional family structures, trying to reinforce the child's identity rights, even in a complex legal relationship. On the other hand, woman with a type of infertility, who cannot produce their own healthy ovas, would have been excluded in accessing surrogacy.

Moreover, the Draft listed conditions, which have to be met on the side of the surrogate mother as well, based on 183. § (2) Act on Healthcare 1997 Draft, *a surrogate mother can be a person who is in a close familial relationship with either of the individuals who provided the gametes to create the embryo, is legally competent, capable of carrying a healthy pregnancy, has reached the age of 25 but has not yet turned 40 at the time of embryo implantation, and has given birth to at least one live-born child.* The close familial relationship between the surrogate mother and the intended parents served guarantee the altruistic form of the arrangements, as well as the condition that the surrogate mother has already been pregnant before with her own child reflects to minimize emotional bonding between the child and the surrogate mother, which usually poses challenges connected to giving away the child to the intended parents.[275] The Constitutional Court justified the age limit by stating that childbirth over the age of 40 involves increased risks.

Additional safeguarding requirements were included in the Draft focusing on stabilizing the legal relationships to the child and the surrogacy arrangements. The legal requirement on the side of the intended parents would have included a joint request of spouses or cohabiting partners to enter the arrangement, simultaneously, on the side of the surrogate mother a general declaration of consent, as well as of her spouse or cohabitating partner's declaration of consent, in order to avoid the activation of the presumption of paternity to the spouse of the surrogate mother, rather to the presumption to apply for the intended father.

In the justification of the Draft, the listed types of ART were aimed at giving solution to infertility problems, highlighting that the legislator recognized the approach to „treat"

[275] According to Hungarian Civil Code §4:96-97, close relatives are defined as a direct ascendant or descendant (in this case, specifically a mother or child), an adopted, step-, or foster child, an adoptive, step-, or foster parent, as well as a sibling.
The familial or close relationship between the intended parents and the surrogate mother to serve a guarantee for altruism has been communicated by several anthropologists and philosophists scholars. See: Françoise Héritier-Augé, "La Cuisse de Jupiter," *L'Homme* 94, no. 25 (1985): 5-22, https://www.persee.fr/doc/hom_04394216_1985_num_25_94_368560#:~:text=Héritier%20Françoise.,tome%2025%20n°94.

infertility as a medical condition, by providing means to help childless parents.[276] More precise regulation on the circumstances of surrogacy would have been provided in a form of a Decree of the Minister of Welfare.[277] Originally, the provisions on surrogacy were subject to a delayed entry into force to allow sufficient time for the necessary amendments in related branches of law, such as family law and inheritance law, ensuring the establishment of an appropriate legal framework for surrogacy, including the determination of motherhood and parental rights.

However, in the end, the legislator chose to entirely omit the provisions on surrogacy from the Draft, preventing these sections from coming into effect. The repeal was justified by several key concerns, with members of parliament emphasizing the prematurity of the legislation. They argued that other branches of law were not yet prepared to accommodate the extension of assisted reproductive technology (ART) procedures to include surrogacy, and that such an expansion would inevitably lead to legal uncertainty and confusion within existing legal frameworks. Moreover, the medical, ethical, and legal challenges associated with surrogacy were deemed insufficiently explored to warrant legislative regulation.

Furthermore, in alignment with European legal trends, most jurisdictions have adopted a prohibitive stance on surrogacy, citing concerns over human dignity and the potential exploitation of women and children. Additionally, there is a lack of clear, well-established precedent on the matter from key human rights institutions, such as the Council of Europe's Ad Hoc Committee of Experts on Bioethics, which has not supported the practice. Ultimately, surrogacy raises significant concerns regarding children's rights,

[276] The Justification furthermore highlights, that the purpose of these procedures is to assist couples who, due to infertility, are otherwise unable to conceive a child, primarily by enabling them to have a biological child. Although, the requirements for accessing these medical services have not been extended to single parents (nor homosexual couples, this social category has not been discussed in the justification) as they still have the option of adoption to „treat" childlessness. The main message of the legislator is to solve the social consequences of infertility (childlessness) in a cohabitation or marital relationship, that is why it remained exclusively accessible to heterosexual couple in a marital or cohabiting relationship, in order to reserve family formation to couples.
Consequently, the eligibility criteria for the joint decision to engage into ART, serves the child's interest, therefore, a unilateral declaration from one spouse or partner is not sufficient to initiate a reproductive procedure.
See: Justification of Act CLIV of 1997 on Healthcare – Bill No. T/4459, (online: https://jogkodex.hu/doc/6901764) (Accessed: 12.12.2024)

[277] About the § 183-184; Justification of Act CLIV of 1997 on Healthcare – Bill No. T/4459, (online: https://jogkodex.hu/doc/6901764) (Accessed: 12.12.2024).

particularly in relation to identity issues and the best interests of the child, both of which require thorough scrutiny in legislative considerations.[278]

Furthermore, there has been a follow-up, about the constitutionality of the annulment of the provisions on surrogacy, and the Constitutional Court delivered its opinion on the petition in Decision No. 108/B/2000 AB.

The petitioners, alleged that the last-minute (the Amendments to the Act on Healthcare were published in the Hungarian Gazette on the 23 December 1999, and the removal of the paragraphs on surrogacy was adopted by the National Assembly just three day before, on the 21. December 1999) Amendment to the Act on Healthcare is formally unconstitutional, because of the fact that the amendment modifies multiple unrelated laws, which they claim violates legal certainty and disrupts the constitutionally protected order of lawmaking. Another justification of the unconstitutionality is based on the proponents, which failed to involve relevant prof essional and social organizations in its drafting, as required by Section 20 of the 1987 Act XI on Legislation. Moreover, they did not seek the opinion of the Human Reproduction Committee, as mandated by Section 186 (3)(c) of the Act on Healthcare. This failure was due to the fact that the committee had not yet been established at the time of the amendment's adoption.[279]

The Constitutional Court dismissed the claim on formal unconstitutionality based on procedural deficiencies, arguing, that the removal of the provisions on surrogacy, did not modify the effective text of the Health Act, merely annulled a provision that was planned to come into force later. Moreover, the Court held that, even if the legislative process of the Amendment on the Health Act raised concerns from the perspective of the rule of law, this alone does not justify annulling the contested provisions on procedural grounds.[280]

Most importantly, the Constitutional Court delivered some pivotal considerations on the value- based issues surrounding surrogacy. The ruling stated that *„the right to freedom of self-determination does not extend to an obligation for the state to provide the possibility for any arbitrary medical intervention."* Surrogacy arrangements involve the

[278] About §16, Justification for Section 16 of Bill No. T/1517 on the amendment of certain laws related to state organization, as well as the laws on real estate registration, healthcare, and fisheries and angling. (online) https://jogkodex.hu/doc/5494597 (Accessed: 2024.12.06).
[279] Part III., Decision No. 108/B/2000 AB. (online) https://jogkodex.hu/doc/1586695 (Accessed: 03 March 2025)
[280] Ibid.

right to self-determination, however, this right cannot be understood purely as an individual one, as the practice also affects the rights of other parties.[281] Overall, the Constitutional Court did not distance itself from surrogate motherhood, rather merely pointed out, that it shall be left to the discretion of the state to allow it or not, as it is not obliged to fundamentally introduce it as an option to ART on the grounds of constitutional law.

The Constitutional Court elaborated that access to assisted reproductive technology (ART) is not recognized as a fundamental right for any individual, and surrogacy is no exception. The Court also acknowledged that surrogacy raises complex medical, ethical, and legal issues, particularly concerning the legal status of the mother and the potential for multiple claims to parental rights over the child. For this reason, before any legislative action is taken, the domestic professional community must first establish a well-founded position on the matter, one that was not yet available at the time of the Draft. This position should be informed by the evolution of international practices and public opinion, which had not yet been sufficiently developed at the time of the amendment**.**

The ruling of the Constitutional Court represents a yet to be refined state around the legal issue of surrogacy, pointing out the ethical and moral complexities of the practice, not only the legal one. The Constitutional Court as well as the Hungarian Parliament's reaction to remove the paragraphs about surrogacy before the enactment accurate reflects the ambiguity and underdevelopment not only in legal circumstances, but the bioethical professional considerations on a national and international level.

However, the dissenting opinion of Constitutional Judge Kukorelli provides valuable insight into whether the amendment to the Act on Healthcare prior to its enactment was constitutional or not. It also highlights significant concerns regarding the negligence of the involvement (as well as creation) of a national professional ethics committee on the issue (which were about to be created by the introduced amendments on the Act on Healthcare), which played a crucial role in the preparatory work for the practical implementation of surrogacy arrangements in accordance with professional guidelines and oversight.

[281] Ibid.

The dissenting opinion highlight several steps which have been missed in the legislative process upon the creation of the Draft amendments, including the paragraphs on surrogacy. As §20 (a) Act XI of 1987 on Legislation stipulates, that the legislator is obligated to involve law enforcement authorities, social organizations, and representative bodies in the legislative process, which concern the interests they represent and protect, as well as the social relations they affect. In the current case, the Commissioner for Fundamental Rights as well as professional bioethics or healthcare representative committees should have been involved during the legislative process, although the legislator failed to fulfil this obligation.[282] Moreover, the Health Science Council Human Reproduction Committee was supposed to be established before the enactment of the Amendments, thus should have been part of the legislative drafting process, and during the parliamentary debate by expressing their professional opinion, and advice on the matter of surrogacy.

Another key highlight of the opinion was the reference to the Constitutional Court's Decision 30/2000. (X. 11.)[283] which stipulates, that *„organizations explicitly and specifically designated by law with powers of consent or consultation, due to their role in the democratic decision-making process, are considered public authorities in relation to the obligation of consultation and, as such, cannot be bypassed by the legislator."*[284]

Conclusively, the omission of the involvement of the Health Science Council Human Reproduction Committee, additionally its non-establishment constitutes as unlawful. This Council should have been established in 1998, in order to be ready for facing the professional issues surrounding controversial ARTs, and to deliver expert opinion to the legislator, in order to fulfil its particular duty in orienting the *„legislation and professional regulations concerning reproductive procedures, making proposals for their creation and modification."*[285]

[282] Act no. XI of 1987 on Legislation
[283] Decision of the Constitutional Court no. 30/2000 on the petition for a posterior constitutional review of Government Decree 99/1997. (VI. 11.) amending Government Decree 111/1995. (IX. 21.) on the restriction of heavy goods vehicle traffic.
[284] Ibid, Justification III. 2.1.
[285] Act on Healthcare, §186.

These arguments outline a basis for establishing formal unconstitutionality in accordance with Constitutional Court Decision 30/2000. (X. 11.)[286]. Notwithstanding the examination of the requirements ensuring the transparency and reasonableness of legislation, the issue at hand directly affects fundamental rights, necessitating a broad professional and public debate.[287]

The intense legislative debate and considerations by the Constitutional Court reinforced, that the taxative list on the types of ARTs in the Act on Healthcare, rules out any form of surrogacy as an option while other techniques are accessible to infertility treatment.[288] There has been no significant legislative or public debate on the issue recently.

1.2 Private law considerations

The main legal source on private law relations considering the family, can be found in the Family Law Book of the Hungarian Civil Code[289]. This serves as the foundation for interpreting key considerations on family and kinship, from which we can derive how the Hungarian private law addresses fundamental issues in the particular context of surrogacy arrangements.

1.2.1 Parentage and legal recognition of children born via surrogacy arrangements

The importance of the family status of a child can be expressed in the interest of a normal family life. The orderliness of the family status of a child provides a basis for the child to live in a legally recognized family relationship, which can be regarded as legally complete if both paternal and maternal status are occupied in the child-parent relationship. From a social standpoint, however, it is only considered complete if the people who gave

[286] Decision of the Constitutional Court 30/2000, Justification III. 2.1.
[287] Ibid, Part IV. Dissenting opinion of Constitutional Judge Dr. István Kukorelli.
[288] §166 of the Act on Healthcare stipulates the following accessible reproductive procedures:
„a) in vitro fertilization and embryo implantation,
b) artificial insemination performed with the gametes of a spouse or partner, or with donated gametes,
c) in vitro fertilization and embryo implantation using donated gametes,
d) embryo implantation performed with donated embryos,
e) [missing provision, this was the place of surrogacy until its removal]
f) other methods facilitating the fertilization or fertilizability of female gametes, as well as the implantation and development of fertilized gametes"
[289] Act no. V of 2013 on the Civil Code

birth to the child are established as the father and mother of the child and are registered in the birth register.[290]

The Hungarian legal framework sticks to the traditional Roman law principle regarding the maternal status, moreover the Civil Code defines it not as a presumption, but a fact. The *mater semper certa est* (the mother is always certain) principle in the 4:115§ (1) stipulates, that the mother of the child is the woman who gave birth. By this the Hungarian legislator gives recognition to the birthmother, in accordance with the international practice, expressing crucially decisive approach to surrogate motherhood.[291] The non/reliance on the genetic connection expresses the choice of the legislator, that despite the emergence of the new ART and the splitting of motherhood between genetic and gestational or birth mother, the birth mother's contribution to childbearing takes priority over genetics. This is further strenghtened by 4:115§ (4) that, the the woman who donated a gamete or embryo for the procedure is *not entitled* to initiate legal proceedings on maternity lawsuit.[292]

Altough, the intended mother (either genetic or not) could technically choose the option of open adoption procedure, where the biological mother consents to the adoption concerning a specific adoptive parent whom they know.[293] The open adoption procedure, understandably has other perspectives including child protection and adoption eligibility criteria[294].

Usually, through the recognition of paternity, the intended mother could initiate a less „tricky" process to become the legal mother of the child, through spousal adoption, presuming that the intended parents are married. The recognition of the genetic father is

[290] Ottó Csiky, *A gyermek családi jogállása* (Közgazdasági és Jogi Kiadó, 1973), 13.
[291] Barzó, *A magyar család jogi rendje*, 318.
[292] The family law book contains a prohibition to initiate maternity lawsuit in case the child was conceived through reproductive procedure, meaning that not only the ova or embryo donor woman, but noone can initiate the lawsuit.
See: Barzó, *A magyar család jogi rendje*, 320.
[293] Civil Code 4:125§ (1)
[294] A person intending to adopt a child may do so only if they are legally competent, at least twenty-five years old, at least sixteen but no more than forty-five years older than the child, and deemed suitable for adoption based on their personality and circumstances.
See: Civil Code, 4:121. § (1)

relatively easier, as either through a fully effective paternal acknowledgment or a court ruling, the intended father could become the legal father the of the child.[295]

Although, the option of adoption, especially the open one, has its traps as well, firstly, the option of the biological mother can withdraw her consent to the open adoption within six weeks from the birth of the child in order to ensure that the child is raised by the parent or another relative of the child. The parent must be informed of the possibility of withdrawal.[296] Moreover, an additional legal risk arises if the genetic father is involved, as the surrogate mother may seek to establish the intended father's paternity by initiating a paternity lawsuit. Should the court confirm paternity through such proceedings, the intended father would acquire full legal parentage, assuming all associated rights and obligations toward the child, irrespective of the fact that the child was not born to his wife. These obligations include financial support, maintenance responsibilities, maintaining a relationship with the child, and ensuring that, as a direct descendant, the child inherits at least the statutorily prescribed minimum share of the father's estate.[297]

If cross-border surrogacy arrangement has taken place, there can be grey areas regarding the recognition of parenthood. Firstly, from the perspective of private international law, Act XXVIII of 2017 on Private International Law may render the application of foreign law concerning the recognition of maternity or paternity inadmissible. This is due to the absence of a legal framework for surrogacy procedures in Hungary and their incompatibility with public policy. Pursuant to § 12 (1) of the Act, the application of foreign law must be disregarded if its outcome in a specific case would clearly and seriously contravene the fundamental values and constitutional principles of the Hungarian legal system, as it is considered contrary to Hungarian public order.[298]

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[295] 4:98. § of the Civil Code stipulates that, paternity can be established by marriage bond, or biomedical procedure in the case of de facto partners, or recognition (acknowledgment if the parties are not married), or judgment of the court.
Subsequently, the order established in this legal institution indicates that if a presumption on paternity is established earlier in the order, the next presumption in line cannot be applied, except the presumption established on the fact of the de facto partner of the mother, if the child was conceived through assisted reproduction, even if the presumed conception period has not elapsed between the termination of the mother's previous marriage and the birth of the child.
See: Civil Code, 4:100.

[296] Civil Code, 4:125. § (2).

[297] Zsuzsa Boros, „A XXI. század családjogi kihívásai figyelemmel a nemzetközi trendekre," in *Határokon átnyúló családi ügyek*, ed. Katalin Raffai (Pázmány Press, 2018), 55.

[298] Act XXVIII of 2017 on Private International Law

Secondly we shall observe the deliberate „rigidness" on the maternity recognition in cases of cross-border surrogacy according to the Act on Private Law. The the flexibility clause in cases of cross-border recognition of paternity, the law of the another state that has a *close connection* to the case shall apply if it is more favorable for the child in this regard.[299] This passage recognizes the priority of the child's fundamental right to be recognized immediately after birth, following the UN CRC Art. 7.[300] This interest of the child is fulfilled, if under a certain law, although different from its the personal national law, but still closely connected to the case, the child has a legal father, this shall be recognized as much as possible in the Hungarian legal circumstances as well. This is a specific flexibility clause, diverse from the general one, as the former requires purely a „close connection" to the case, instead of a qualified „significantly closer connection" prerequisite of the relationship between the two laws. The application of this flexibility clause is subject to two key limitations. First, it applies solely to cases where paternal status remains unestablished and cannot be invoked to determine maternity or circumvent regulations related to surrogacy. Moreover, in accordance with the previously mentioned public order clause, the relevant foreign law must be disregarded if its application would result in a violation of the fundamental values and constitutional principles of the Hungarian legal system. The regulation of applicable law in parenthood recognition is structured to prevent the legal recognition of intended parents, particularly the intended mother, when such recognition would otherwise not be permissible or could be achieved through circumvention.[301]

1.2.2 Child's right to identity

The legal frameworks that ensure a child's right to know their origins are fundamental to the healthy development of their personality. This right encompasses access to information regarding the circumstances of their birth, which is particularly sensitive in surrogacy arrangements. Intended parents often prefer to withhold such information from

[299] Ibid, § 32.
[300] *„The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."*
[301] János Bóka, „Családjog és öröklési jog az új nemzetközi magánjogi törvényben," *Jogtudományi Közlöny* 3, (2018): 93-103, https://szakcikkadatbazis.hu/doc/4403913.

the child, fearing that disclosure could undermine their parental status, complicate family relationships, and disrupt the family environment.

In cases where a child is born to Hungarian intended parents, the absence of legal regulation on surrogacy, despite its implicit prohibition, creates a significant legal gap. There are no applicable or accessible legal instruments enabling the child to trace their origins in these cases. If the official birth certificate lists the intended parents as the legal parents, no record remains indicating that a surrogacy arrangement ever took place.

Notwithstanding this, we shall examine the Hungarian legal provisions that enshrine a child's right to identity, particularly in cases where their origins are ambiguous, as well as the relevant legal framework for adoption, to provide clarity on how identity-related issues are governed in Hungary. Based on the provisions of substantive law, it can be established that the detailed regulations governing the right to know one's biological origins are set out in private law provisions. However, these cannot be viewed in isolation, as the legal institution also has multiple public law implications. This is the point where private law and public law intersect and overlap. In this context, both branches of law serve the same fundamental purpose: the protection of the child.[302]

The Civil Code, as the most essential source of private law, places particular emphasis on the protection of children within its Family Law Book, recognizing it as a fundamental legal principle. Specifically, it affirms the child's right to be raised within their own family and, in the absence of such care, the right to grow up in a family-like environment whenever possible, while also preserving existing familial relationships.[303] This provision underscores the paramount importance of the child's best interests, prioritizing family-based care even when biological parental care is unavailable, as such an environment is deemed most conducive to the child's healthy development and well-being.

The child's right to know their origins is supported, on one hand, by the previously analysed presumptions of paternity and maternity. However, a more nuanced and arguably stronger interpretation of this right, particularly as a personality right, emerges in the context of adopted children. It is important to emphasize that the primary goal of adoption is to provide the child with a stable and structured family environment. This stability must

[302] Balázs Somfai, "Családjogi és/vagy gyermekvédelmi jogviszony," *Családi Jog* 4, no. 32 (2013): 29-33, https://szakcikkadatbazis.hu/doc/8704029.
[303] Civil Code, § 4:2.

be safeguarded from disruption, which could potentially arise when the child exercises their right to know their origins. To balance these conflicting interests, legal limitations have been established, specifying when, where, and how the child may access information about their biological background.[304]

The adopted child's right to know about his or her biological origins is encapsulated in 4:135 § of

the Civil Code, defines the circumstances of how and when is the child is entitled to request information from the Guardianship authority about certain facts surrounding its biological origins. The requested information is limited to questions about the fact of adoption, whether their biological parent is alive, whether they have siblings, which the child can request without any age restriction,

The child can access personal data about their biological parents and siblings, under stricter circumstances, in order to balance out the child's rights to know his or her origins with the biological parents' and siblings' right to privacy. The due protection of the biological parent and sibling is strengthened by the requirement of explicit consent from their side, to the release of their personal identification data to the child. Additionally, the regulation extends to the possibility of familiarizing with the biological parents' health related personal data, which is stipulated in a separate paragraph.[305]

The initiation of the process for accessing personal identification data of the biological parent and sibling is subject to a minimum age requirement of fourteen years. Upon reaching this age, the child may independently initiate the proceeding without requiring the consent of their legal representative. The child's right to know his or her origins could

[304] The primary objective of adoption, is to establish a stable familial relationship between the adoptive parent, their relatives, and the adopted child. Adoption serves to provide a nurturing family environment for children who lack biological parents or whose parents are unable or unwilling to care for them adequately. A key aspect of this process is facilitating the child's seamless integration into the adoptive family**,** in line with international practices, often encouraging detachment from their biological family**.** This duality is seemingly unresolvable, as one of these aims could be fulfilled at the expense of the other. However, there is an increasing recognition of child's right to maintain connections with their biological relatives, particularly in cases of spousal or kinship adoption. Within defined legal boundaries, this includes the right to access information about their biological origins**,** balancing the interests of integration and identity preservation**.**
See: György Wellmann, ed., Polgári Jog I-IV. - új Ptk. - Kommentár a gyakorlat számára, 6th ed. (Budapest: ORAC Kiadó Kft., 2024), updated January 1, 2024, https://jogkodex.hu/doc/6512777#js1.
[305] Civil Code, §4:136 §

be extended to the right to maintain contact with them, even after the termination of parental custody, all of which is bound by the consent of the biological parents.[306]

The Civil Code intends to create a balance between the two competing interests – the biological parent's and sibling's right to remain anonymous and protect their personal data, with the adopted child's right to get to know his or her origins. The legislator choose an approached, which enables both subjects to decide between staying indifferent to the biological truth but also offers the option to maintain relationship between each other. Ultimately, the authority over the disclosure of identity rests with the biological parent, who is not a passive party in the proceedings initiated by the adopted child. It is important to emphasize that such disclosure may deviate significantly from an idealized notion, as adoption often arises from a crisis situation on the part of the biological parent. In many cases, the parent was unable to provide adequate care for the child, making adoption the most appropriate solution to meet the child's needs, or the child was a result of an unwanted pregnancy or a child was born out of wedlock and without the knowledge of the new spouse. Regardless, the current peaceful family life might be disrupted on the side of the biological parent, taken into account the previous scenario.[307]

The delicacy of the balancing act is of utmost importance, while identifying the appropriate response and setting clear boundaries remains a complex challenge. Any direct contact between an adopted child and their biological parents is resting on the willingness of the biological parents to engage. Once tracked down, the biological parents cannot be compelled to reestablish contact with a child they placed for adoption decades earlier, nor can they be forced to disclose information regarding the circumstances of the adoption.

Besides the adopted child and the biological parent, the interests of the adoptive parents might arise, although are not given much concern, as the search for information about biological parents generally does not interfere. Additionally, while obtaining information about one's biological origins may reveal previously unknown truths, this process, unlike legal challenges to paternity presumptions, does not affect the legal status

[306]Act no. XXXI of 1999 on the Protection of Children and Guardianship Administration, § 7 (4).
[307] Barzó, *A magyar család jogi rendje*, 366.

acquired through adoption, nor does it jeopardize the continuity of the adoptive relationship.[308]

1.3 Public law considerations

The Fundamental law of Hungary in several of its provisions included the protection of family and children, as well adequately supporting its nationals to bear children.[309] The initial version of the Fundamental Law upheld the family as essential to the nation's continued existence. This wording implies, that the constitutional safeguarding of families is motivated by concerns about demographic challenges and population sustainability.[310] The Fundamental Law encompasses the protection of families, which first of all are based on heterosexual marriage, subsequently includes the protection of the parent-child relationship.[311] The phrasing of the Fundamental Law, thus focuses on families with children, recognizing its reproductive roles and functions, while not referring to it as an inherent value.[312] Besides, the Fundamental Law expresses strong commitment for supporting childbearing, which is recognized to have social and economic aspects. In order to achieve this goal, the state enhances the welfare of families through a complex system of tools, specifically outlined in Act CCXI of 2011 on the Protection of Families.[313]

The protection of the child, is recognized in the Fundamental Law, especially mentioning the right to the protection and care necessary for his or her proper physical, mental and moral development. The most recent, the 15th Amendment to the Fundamental Law emphasized the importance of this right to development, by additionally stipulating,

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[308] Emília Weiss, "A származás megismeréséhez való jog és e jog korlátai," *Jogtudományi Közlöny* 1, (2002): 1-12, https://szakcikkadatbazis.hu/doc/4404038.

[309] *„Hungary shall support the commitment to have children."*
See: Fundamental Law of Hungary, Art. L. (2)

[310] Lóránt Csink, "Házasság és család," in *Internetes Jogtudományi Enciklopédia (Alkotmányjog rovat),* ed. Eszter Bodnár and András Jakab (Orac kiadó, 2018). 195.

[311] *„Hungary shall protect the institution of marriage as the union of one man and one woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. Human beings shall be male or female. The mother shall be a woman; the father shall be a man."*
See: Fundamental Law of Hungary, Art. L. (1).

[312] Balázs Schanda, „Élet és értékek az új Alaptörvényben," in *(L)ex Cathedra et Praxis, Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából*, ed. Zoltán Csehi, Balázs Schanda and Pál Sonnevend, (Xenia, 2014), 511.

[313] Barnabás Kiss, *'Útmutató az Alaptörvényhez'* ed. Zoltán Józsa, Judit Tóth, and Mária Ugróczky (Budapest: ORAC Kiadó Kft., 2023).

that *„This right shall prevail over any other fundamental right other than the right to life."* [314]

Undeniably, the constitutional guarantees in Hungary address the challenges posed by demographic decline, at the same time deliberately focuses on traditional family forms and values. While prioritizing natural conception and the nurturing role of the family, the framework aims not only to promote childbearing but also to establish legal and financial guarantees to ensure that no family suffers hardships or repercussions because of their decision to have children. Accordingly, a comprehensive support system is being implemented.[315] The primary focus on the child's right to healthy development also reflects the commitment to preserving child protection within the traditional value system, which is tied to Hungary's constitutional identity and public morals. Thus, the public policy upholds the values of the traditional family, and deliberately connected the institute of marriage and family protection, additionally choosing to keep the childbearing preferably to heterosexual married couples, while not being exclusive to the protection of non-traditional family forms.[316] The explicit selection of constitutional values regarding

[314] The Fundamental Law of Hungary provides the moral foundation for guiding the state's approach to child protection, asserting that gender ideology poses a threat to children's development. It therefore supports preserving a self-identity aligned with one's sex at birth and ensures an upbringing rooted in the values of the country's constitutional identity and Christian culture.
The 15th Amendment was introduced in response to global social, economic, and political trends, with the aim of preserving the country's sovereignty and traditional values, and expressed support for limiting the space for redefining the cultural norms on such fundamental institutions as family and the child protection within. Hungary emphasizes maintaining a stable, predictable, and community-oriented society, avoiding the mistakes of other countries affected by polarization, migration tensions, and value erosion, and safeguarding it for the future generations.
See: Bill No. T/11152 with justification – Fifteenth Amendment to the Fundamental Law of Hungary, paras. 1–5.

[315] Hungary supports childbearing and the Fundamental Law specifically states in Art. L (3) that *families are entitled to protection and support, which are regulated by a cardinal Act.* The phrasing of the Fundamental Law expresses that the child and the family comprise the resource that, although private, is the most important public matter.
Subsequently, Hungary in several initiatives introduced „Family-friendly measures" to create a supportive legal framework to those who decide to establish a family with children.
See: Edit Sápi, "Hungary: Hungaricums of the Family Law Policy," in *Demographic Challenges in Central Europe. Legal and Family Policy Response*, ed. Tímea Barzó (Central European Academy Publishing, 2024), 429–475.

[316] By establishing family protection as a fundamental principle, the Family Law Book of the Civil Code emphasizes that family law primarily safeguards the family as a social unit, focusing on the relationships among its members. This protection extends to legally recognized family ties, such as marriage, parentage, adoption, and guardianship, as well as other forms of cohabitation regulated by law, in accordance with the jurisprudence of the ECtHR.
See: Barzó, *A magyar család jogi rendje*, 34-38.

family and child protection reflects a public policy and moral orientation toward traditional family values and the child's right to healthy development. Recently, this right has been elevated to take precedence over all other fundamental rights, except for the right to life. As a result, it may override the intended parents' right to private and family life, particularly the decision to utilize certain forms of ART, involving surrogacy, which eventuates the creation of non-traditional family structures.

Additionally criminal law provisions allude to potential criminalization of surrogacy arrangements, especially Act C of 2012 on the Criminal Code Art. 213, which criminalizes the violation of family status, stipulating that *„Anyone who alters or terminates another person's family status shall be punished with imprisonment of up to three years for a felony"*[317] The provision was intended do cover illegal acts which are associated with introducing illegitimate changes to family status, which falsely changes or terminates one's family status, even if the act appears to be legally valid. This offense appears in different forms, including changing parentage records, switching children, abandoning a child in a way that breaks their legal family ties, smuggling a child into another family through deception about the child's origin.

As the mater cemper certa est principle is the applicable presumption on the establishment of maternity, if the status of the birthmother is not reflected on the parental certificate, what is usually the case in cross-border surrogacy arrangements, where the intended parents are listed as legal parents on the birth certificate, in the Hungarian criminal law environment, the altering the parentage to the intended mother might constitute an offence under Art. 213. Although, the application of criminal is fairly unlikely if the surrogacy arrangements are carried out abroad. Rather, the intended parents might face complications of administrative law nature, when applying for the recognition of foreign birth certificate.[318]

[317] Act C of 2012 on the Criminal Code Art. 213

[318] The Immigration and Nationality Office of Hungary, has been faced by an application for civil registry entry and issuance of a certificate from Ukraine. The Immigration office rejected the request arguing, that the Ukrainian birth certificates do not prove biological descent under Hungarian law, and due to the suspicion of surrogacy arose, as the plaintiff based the children's claim to Hungarian citizenship on his own citizenship and did not seek to prove the 'mother's' pregnancy which is contrary to the Hungarian public policy. The Immigration office argued, that *„foreign birth certificates cannot serve as a basis for domestic registration or the examination of citizenship if the underlying act is not recognized under Hungarian law. The Hungarian family law system bases descent on the fact of motherhood, which, unlike paternity, is not*

2. Surrogacy in Slovakia[319]

2.1 Overview of legal framework on AR T and surrogacy

In general, Slovak legislation adopts a notably conservative stance[320] on reproductive rights. Slovakia remains among the countries that have not introduced specific legal regulation concerning surrogacy as a reproductive option, and the broader framework governing ART is characterized by notable incoherence, internal contradictions, and substantive inadequacies. The fragmented regulatory environment has rendered the

merely presumed if the identity of the mother is known. The Convention on the Rights of the Child likewise does not allow a child to request registration of birth by any contracting state. Given that surrogacy is not recognized under Hungarian law, and neither descent nor the identity of the mother has been clarified, neither the father's nor the mother's data can be entered into the domestic civil registry."
The first instance court overturned the Immigration Office's decision on the rationale, that the best interests of the child international principle indicated that, *„It is in the undisputed best interest of the plaintiff's children to have their citizenship status settled, so that, as children of a proven Hungarian citizen father, they may enjoy the protection and support of their father's homeland, Hungary, as Hungarian citizens."*
The second instance court upheld the first instance judgement by reaffirming the prevailance of the best interests of the child principle, and added, that the burden of proof lies in the hands of the Immigration Office, which has not initiated additional investigation in order to clarify the facts, as the mare suspicion of surrogacy is insufficient to deny the registration of the child.
See: Budapest Court of Appeal Case No. 2.Kf.27.291/2012/8.

[319] In this subchapter *surrogacy* refers to *altruistic surrogacy*, while *commercial surrogacy* will be addressed as *commercial surrogacy*.
The Slovak expression to surrogate motherhood, depicting the altruistic and commercial one, is dual. In Slovak scientific literature two terms are used: *„náhradné materstvo"* and *„surogačné materstvo"*.
In Slovak, the term *„náhradné materstvo"* directly translates to *„substitute motherhood"* or *„replacement motherhood"*, with *„náhradné"* meaning *„replacement"* or *„substitute"*, and *„materstvo"* meaning *„motherhood"*. This wording emphasizes the non-biological, and supportive or substitute nature of the role without necessarily implying a commercial transaction. It suggests that the surrogate mother carries the child on behalf of the intended parents as a substitute, in a primarily altruistic context.
On the other hand, the term *„surogačné materstvo"* is derived from the term *„surrogacy"* commonly used in English literature. *„Surogačné"* derives from *„surrogation"* meaning substitution, which emphasizes the idea of someone stepping in for someone. This expression is more modern and is often used in legal, medical, and international contexts, aligning Slovakia's terminology with broader European and global standards. It does not inherently distinguish between altruistic and commercial surrogacy but remains neutral in tone.
The linguistic choice between *„náhradné materstvo"* and *„surogačné materstvo"* reflects a slight nuance: *„náhradné materstvo"* is deeply rooted more in Slovak vocabulary and emphasizes replacement, whereas *„surogačné materstvo"* puts the concept within a more globalized and technical discourse.

[320] The legal framework surrounding home births in Slovakia remains undefined, as current legislation does not explicitly address this practice. This lack of regulation creates significant risks for midwives, who may face criminal prosecution for assisting in home deliveries. Consequently, some women seeking home births are compelled to travel to neighbouring countries, such as Hungary, where the practice is legally recognized. Additionally, abortion remains a contentious political issue in Slovakia. Recent legislative proposals have sought to impose stricter regulations, including extending the mandatory waiting period before an abortion and banning advertisements related to abortion services. However, none of these measures have been enacted into law by the Slovak National Council to date.

system capable to exploitation by assisted reproduction clinics, which are able to navigate and interpret the law in ways that may not align with its intended purpose.[321]

Furthermore, Slovakia lacks a substantial legal tradition concerning the debate or regulation of surrogacy. The legalization of surrogacy remains absent from the domestic legislative discourse, further highlighting the fragmented and incomplete nature of the state's regulatory framework in the field of assisted reproduction.

Slovakia lacks a comprehensive and coherent legislative framework governing the use and availability of assisted reproductive methods. The foundational principles of medically assisted procreation are set forth in Measure No. 24 of 1983 of the Ministry of Health of the Slovak Socialist Republic on the conditions of artificial insemination, issued on 10 October 1983, which was intended to regulate the medical and legal framework for the practice of artificial insemination[322] within the former Czechoslovak legal system.[323] Although this regulation remains formally in force[324], it is widely regarded as outdated and is frequently disregarded in practice.[325] Regardless of the ambiguous legal continuity

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[321] Lilla Garayová, "*Slovakia: Safeguarding the Future – Legal and Policy Solutions to Demographic Trends,"* in *Demographic Challenges in Central Europe. Studies of the Central European Professors' Network* (Central European Academic Publishing, 2024).

[322] AI is legally defined in this measure as a *„medical procedure involving the introduction of semen into a woman using the sperm of either her husband or another man."*

[323] Measure of the Ministry of Health of the Slovak Socialist Republic No 24/1983 of the Bulletin on the modification of conditions for artificial insemination (No Z-8600/1983-D/2).

[324] This Measure No. 24 of 1983 is surrounded by ambiguity regarding the legal continuity of regulation on ART. This measure was originally drafted to accompany as an implementing decree to the Act No. 20 of 1966 Coll. on the Care of the People's Health. The latter Act was replaced in 1994, by the adoption of the Act No. 277 of 1994 Coll. on Healthcare. Currently, however, neither this act is not in force, as by the adoption of the current legislation regulating healthcare, Act No. 576 of 2004 Coll. on Healthcare came into force in 2005. What causes legal continuity issues, is that while the main Act on Healthcare has been revised thorough the years, the original Measure No. 24 of 1983 implementing measure was not officially annulled, thus it technically is in force.
If the implementing regulation continues to exist independently of the primary legal acts it was originally intended to implement, a regulatory discontinuity is created. The continued validity and effectiveness of this measure is therefore legally questionable, although it remains one of the few instruments explicitly referencing artificial insemination in Slovak law. This underscores the fragmented and inconsistent character of the domestic regulatory framework on ART.

[325] There are diverse arguments by legal scholars on the continued applicability of Measure No. 24 of 1983. The argument for continued applicability is based on the the interpretation of § 79(1)(a) of the Act No. 578 of 2004 on Healthcare Providers, which stipulates the obligation of healthcare providers to comply with „special legal regulations" when delivering medical care. However, under the term „special legal regulations" the disputed measure is not listed nor attached, some scholars suggests to apply broad interpretation to this paragraph, which was intended to encompass all legal norms governing the provisions on healthcare without explicit citation.
Regardless of outdatedness of the Measure No. 24 of 1983 it shall be referred as a valid legal measure, due to formally remaining in force. Another question arises, whether such a norm, given its restrictive provisions can be considered constitutional, especially in light of the absence of a clear statutory basis for such

issues in connection to this measure, it is worth describing its content, as it reflects the regulatory and ethical assumptions of the early 1980s and remains relevant for understanding the historical legal approach to assisted reproduction. An important point is the established personal scope of the measure, which restricts access to artificial insemination to married heterosexual couples. Only spouses acting jointly may submit an application, excluding single women and unmarried couples from eligibility. This reflects a normative assumption of family structure based on marriage as a prerequisite for reproductive assistance. The personal scope was intended to address infertility[326], specifically, its consequence of childlessness, within the institution of marriage. This is reflecting the original target group for these novel reproductive techniques, and to initially help natural conception. Additionally, the measure contained age restriction posed on woman as the procedure is allowed only for women of full legal age, and in practice, this means under 35 years of age, a boundary that reflects both the medical knowledge and socio-political assumptions of the time. Interestingly, the measure opts for the possibility to use donor sperm, if the husband's sperm is damaged or unusable. The medical professional is allowed to determine the appropriate donor, what is subjected to the mandatory consent of the spouses, as well as to the strict anonymity of the donor, who cannot be biologically related to the woman undergoing the artificial insemination.

Above artificial insemination, no other ART techniques are regulated by the measure, although these technologies have already existed during the drafting period. By not addressing the modern practices such as IVF, embryo transfer, cryopreservation, and other advanced methods of reproductive medicine, the legislator sticked to strictly utilize ART in vivo procedures.

From the initial regulative framework from 1983, we can imagine the stance of the legislator, both by the fact it discarded certain forms of ART, and that it did not foresee,

limitations. Overall, the ambiguity of its effectiveness and applicability, the measure shall be taken into account, having legal significance for healthcare providers, until explicitly annulled.
See: Ivan Humeník, *Ochrana osobnosti a medicínske právo*, (Eurokódex, 2011) 45-48; Ivan Humeník and Zuzana Zoláková, "Tvoríme človeka: rozhodujúce právne aspekty asistovanej reprodukcie a dispozícií s embryom," in *Reprodukčné zdravie ženy v centre záujmu*, ed. Ivan Humeník, Inocent-Mária V. Szaniszló and Zuzana Zoláková (Wolters Kluwer, 2014), 47.

[326] The measure lists the specific medical and biological indications, among which mentions: infertility or reproductive disorders in the husband, anatomical or functional disorders of the female reproductive system, risk of transmission of hereditary diseases or congenital defects, and other medical conditions making it impossible or significantly risky for the couple to conceive and bear healthy offspring naturally.

and could not had foreseen the sweeping societal transformations that began in November 1989, including the dissolution of Czechoslovakia, the divergent social, legal, and cultural development of the successor states, and their eventual accession to the EU, which further strengthened and realized the principles of free movement of persons, goods, services, and capital. Nor could the legislator have anticipated the remarkable scientific advancements in the field of ART, nevertheless the controversies brought into the legal and ethical discourse by surrogacy arrangements. The legislator approached these techniques with a high degree of caution and a hint of skepticism, which is reflected by the limited access of persons to artificial insemination as well as excluding the more advanced forms of ART. The regulation focused solely on addressing infertility as a medical condition affecting heterosexual, married couples, without any recognition of social infertility, that is, infertility arising not from biological limitations but from non-traditional family structures. Although it may not have been the legislator's express intent to restrict infertility treatment exclusively to married couples in order to reinforce traditional family norms, the legal framework was implicitly grounded in such assumptions. It considered infertility strictly as a condition affecting couples within marriage and did not envision the evolving concepts of family, parenthood, and family formation that would emerge in the decades to follow. Neither could it foresee the significant arise of reproductive tourism, for the sake of undergoing ART, nor the subsequent challenges regarding the recognition of parenthood established abroad of the thus born child.

The original intent behind the legal framework was to afford special protection to paternity arising from assisted reproduction, particularly in cases involving anonymous sperm donation, where the absence of a biological link between the child and the legal father could easily lead to disputes in paternity denial proceedings. For this reason, the measure limited such protected paternity exclusively to the mother's husband, as assisted reproduction was legally permitted only for married couples at the time.[327]

Although this restrictive approach has not been formally revised in the Slovak legal order, it has become increasingly untenable in light of changing societal realities. The

[327] Supreme Court, Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic, Decisions in Civil Law Matters 2/2022. 63.

possibility for unmarried couples to access ART abroad and the broader expansion of family forms beyond the marital unit, has rendered the original assumptions of the historical legislator outdated.[328] Today, those assumptions no longer align with either social practice or the principles underpinning modern family law and reproductive rights.

While Measure No. 24/1983 once served as the foundational legal instrument for artificial insemination in the Slovak part of Czechoslovakia, its provisions today are largely **obsolete**. Moreover, its continued formal validity is legally ambiguous, as it lacks a current enabling statute. Nonetheless, the measure provides important historical context for understanding how reproductive medicine was regulated un der a socialist legal system and the moral framework in which such regulation was embedded.

Turning to the more current legislative framework, the Transplantation Act No. 317 of 2016[329] offers legal navigation on fragmented issues in relation to reproductive and sexual health. The Act is does not specifically relates to ART, rather was initiated to create the basis of a general legal framework to govern diverse aspects of human tissues and cell transplantation in order to ensure the transposition of binding European Union, which are specifically listed in the Act itself. Although, the Transplantation Act is not ,,designed" to navigate legal issues arising from ART, some important deductions could be made on the potential implications of the human rights, human dignity and bioethical issues surrounding ART and surrogacy.

Firstly, Art. 2(5) of the Transplantation Act defines *reproductive human cells* as *,,human tissue or human cells intended for the purpose of assisted reproduction."* This paragraph, although appears to be insufficient in providing clear legal definition to *assisted reproduction*, particularly regarding whether an embryo, especially in the context of IVF and its transfer to a surrogate mother's womb is included. Due to these omissions, it can be inferred that the Transplantation Act in was primarily designed to regulate reproductive medical treatments involving the donation, procurement, and transfer of

[328] Even if it was the legislator's intention in 1982 to limit the use of assisted reproductive therapy exclusively to married couples, and such intent were to be regarded as an expression of legislative will, the principle of changed circumstances applies. In the view of the appellate court, the conditions have evolved to such an extent since then that the original intentions of the historical legislator can no longer be taken into account. See: Filip Melzer, *Metodologie nalézání práva* (C. H. BECK, 2010) 234.

[329] Act No. 317 of 2016 Coll. on the Requirements and procedures for the collection and transplantation of human organs, human tissues, and human cells and on amendments to certain acts.

reproductive cells strictly within the framework of in vivo procedures, rather than in vitro techniques. The Act does not account for or directly address processes such as fertilization outside the human body, embryo culture, cryopreservation, or embryo transfer, which are core elements of IVF. This suggests that the legislator's focus was limited to reproductive interventions occurring entirely within the body, which aligns with the Act's broader transplantation logic but falls short of accommodating the complexities of modern assisted reproductive technologies.

The Transplantation Act serves as a general legal framework, regulating the procurement and transfer of human organs, tissues, and cells, including reproductive gametes, from donors to recipients. To highlight the tangential connection to surrogacy arrangements, it is optimal to keep in mind the permission criteria[330] for the donation human cells, which includes reproductive cells. Under these, the donation and use can be permitted only if a *„direct therapeutic benefit for the recipient of the organ, tissue, or cells is anticipated"*[331] bears a significant meaning in connection withs surrogacy arrangements, because in this case we shall address whether the surrogate mother receives *therapeutic benefit* from the donated reproductive cells. The surrogate mother is unlikely to benefit from the donation of reproductive cells, as her own reproductive organs and cells are not compromised. She is typically a healthy woman capable of carrying a child on behalf of the intended parents. The therapeutic benefit from the donation of reproductive cells would apply to the intended mother if her own reproductive cells were unfit or damaged, yet she remained capable of carrying the pregnancy herself, which is generally not the case in typical surrogacy arrangements.[332]

Furthermore, the main source of law stipulating the conditions for providing healthcare is the Act No. 576 of 2004 on Healthcare, which establishes important legal

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[330] *„The removal of a human organ, human tissue, or human cells from the body of a living donor for human use is permitted only if:*
a) it is expected that the removal will not seriously endanger the health of the donor of the organ, tissue, or cells,
b) a direct therapeutic benefit for the recipient of the organ, tissue, or cells is anticipated,
c) the benefit to the recipient outweighs the harm to the donor of the organ, tissue, or cells,
d) it is not possible to obtain a suitable organ, tissue, or cells from a deceased donor, and
e) no other known medical procedure offers a better or comparable outcome."
Ibid, §4 (1)
[331] Ibid, §4 b)
[332] Lenka Dufalová, *Surogačné materstvo. 1. Vydanie* (Wolters Kluwer, 2020) 73-74.

principles for healthcare providers and patients alike. The Government regulation No. 76 of 2004 on the Catalogue of Health Performances, outlines the list of healthcare procedures which can be provided under the law. This regulation recognizes certain types of ART[333], although the regulation does not provide detailed and exhaustive definition of the individual ART methods, rather the Catalogue is vague and general and offers distinctive interpretations in the clinical application practice, and does not list any form of surrogacy arrangements. Circling back to the legal principles for both the healthcare providers and the patients, where the core elements are linked to informed consent requirement and the contractual basis for medical services, which are key determinants for surrogacy arrangements.[334] The Act on Healthcare refers to *assisted reproduction* in §12 about the Legal relationships in the provision of healthcare, stipulating the conditions for the healthcare provider to refuse a proposal to conclude an agreement providing healthcare. The §12 (9) c) stipulates, that the refusal condition of *„personal beliefs of the healthcare worker who is to provide the care"*, which is only applicable for cases of induced termination of pregnancy, sterilization, and assisted reproduction. In the context of IVF, if the procedure is to be performed only for specific medical indications, which is basically missing at the surrogate mother, and if the provider invokes personal beliefs under § 12 (9) (c) as a basis for refusal, this may suggest that the legislator did not envisage surrogacy arrangements as a recognized or legitimate form of ART.

Conclusively, the current legal framework ART in Slovakia is fragmented, outdated, and marked by considerable ambiguity, creating substantial challenges for consistent application in clinical practice. While certain procedures e.g. basic IVF cycles, are

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[333] These are: cycle prior to oocyte retrieval, cycle involving oocyte retrieval for IVF without embryo transfer, and comprehensive cycle involving embryo transfer.

[334] Informed consent is *not* required in taxatively listed cases, stipulated in Act No. 576 of 2004 on Healthcare §6 (9) as follows:
„a) In emergency care, if it is not possible to obtain informed consent in time, but it can be reasonably presumed;
b) In protective treatment ordered by a court, court-ordered detention, or the provision of healthcare based on a court decision pursuant to a special regulation;
c) In institutional care, if the person is spreading a communicable disease that seriously endangers others;
d) In outpatient or institutional care, if the person, due to a mental illness or symptoms of a mental disorder, poses a threat to themselves or others, or if there is a risk of serious deterioration of their health condition; or
e) In institutional care pending a decision on the issuance of a preliminary order for the placement of the person in a healthcare institution providing inpatient care, if the placement is being decided by a judge in accordance with the Code of Criminal Procedure."

formally recognized within existing health regulations, the lack of a comprehensive and explicitly defined catalogue of ART techniques represents a major legislative shortcoming. The law fails to clearly specify or regulate many of the methods routinely employed by ART centers, leaving significant gaps in legal guidance and undermining both legal certainty and patient protection.

Within this unclear regulatory environment, surrogacy occupies a particularly ambiguous position. It is neither expressly permitted nor explicitly prohibited under Slovak law, resulting in a legal vacuum. This absence of clear legal recognition or prohibition makes the practice legally uncertain and operationally complex for healthcare providers and intended parents alike. The regulatory silence surrounding surrogacy, combined with the overall incoherence of ART legislation, may encourage Slovak nationals to engage in reproductive tourism to neighboring countries that offer a more favorable legal framework for addressing their health and reproductive needs and goals.

2.2 Private law considerations

In the following, the pivotal Slovak private law sources considering family law will be discussed, which includes the Act No. 36 of 2005 on the Family which contains basic principles on the recognition of parenthood, from which key pillars on the interpretation of family in Slovakia could be derived.

2.2.1 Parentage and legal recognition of children born via surrogacy arrangements

Slovakia focuses on maintaining the traditional form of family, what is expressed in the basic principles listed in the Act on Family. Art. 1 stipulates that *„Marriage is a union between a man and a woman. Society comprehensively protects this unique union and promotes its welfare. Husband and wife are equal in rights and obligations. The main purpose of marriage is to establish a family and properly raise children.*". Furthermore, the Act on Family in Art. 2 stipulates *„family founded by marriage is the basic cell of society. Society comprehensively protects all forms of the family"*. The basic principles, as well as other provisions in the Act on Family puts emphasis on the traditional forms of family, what is primarily formed in the institute of marriage between one mand and a woman. Keeping in mind the first two basic principles on family law, the family is defined

as a relationship involving at least one parent and at least one child. However, childless marriages cannot be discriminated against, as Article 1 of the Family Act also guarantees protection to marriage as such. It can therefore be inferred that the protection afforded under Article 2 constitutes a specific form of protection, directed particularly toward families with children. The fundamental tenets emphasize that marriage primarily serves to create a family unit and ensure children's appropriate development, reflecting Slovakia's conventional perspective on familial structures and relationships.

Additionally, Art. 3 expresses the legislator's stance on what is the most suitable form of family, which serves both the reproductive function of marriage as well as the best interests of the child and healthy development in a family environment, as follows: *„Parenthood is an exceptionally recognized mission of women and men in society. Society acknowledges that for the comprehensive and harmonious development of a child, the most suitable environment is a stable family formed by the child's father and mother. Society provides not only its protection to parenthood but also necessary care, especially through material support for parents and assistance in exercising parental rights and duties."*

The Slovak Family law maintains the *mater semper certa est* Roman law principle when the identity of a child's mother was essentially indisputable, as fragmentation between a child's genetic origin and gestational origin could not occur. The primary principle is that paternity is derived from maternity. Paternity cannot be determined if maternity has not been established. The primary presumption on maternity is expressed in §82 (1) as *„the mother of a child is unequivocally defined as the woman who gave birth to the child"*. From this paragraph, we can derive, that childbirth is the simple determining fact, which is objectively verifiable[335]. What is additionally interesting in the Slovak legal presumptions on motherhood is §82 (2) which explicitly stipulates, that *„Agreements and contracts that contradict paragraph 1 are invalid."* This paragraph could be directly applied to surrogacy arrangements, as such agreements typically attempt to transfer legal

[335] Motherhood is currently established solely by the act of childbirth, which constitutes the only legal fact necessary for its recognition. No additional legal steps are required on the part of the woman for her status as mother to be affirmed. Childbirth is legally defined as the moment the fetus is separated from the woman's body. Until that point, the unborn child is regarded as *pars viscerum matris*, a part of the mother's body. See: Imrich Fekete, *Občiansky zákonník - Veľký komentár (1. Zväzok)* (Eurokódex, s. r. o., 2014), 93.

parenthood from the surrogate mother to the intended mother. Although, in the Slovak legal circumstances, any agreement that attempts to separate the status of gestational mother from that of legal mother is rendered void. By this legal passage, the Slovak legislator intends to deliberately establishes childbirth as the exclusive determinant of motherhood, effectively dismissing alternative concepts such as social motherhood or intended motherhood that might otherwise be recognized through contractual or other legal mechanisms.[336] The Family Act explicitly refers to the necessity of establishing facts about childbirth.[337] Additionally, maternity could be disputed before court if doubts arise.[338]

The determination of paternity in Slovakia follows a presumption-based system commonly found in continental European jurisdictions. Paragraph 85 of the Act on Family establishes three legal presumptions of paternity in a hierarchical order, with each subsequent presumption applicable only if the preceding one cannot be applied.[339] Additionally, the court determines paternity based on scientifically sound methods, primarily DNA testing, which has largely replaced older methods of paternity determination.[340] More recently, the Supreme Court has furthered the interpretation on how the presumptions of paternity can be applied to assisted reproductive cases. The Supreme Court established that a man's consent to assisted reproduction procedures constitutes a legal fact that determines his paternity to a resulting child, effectively replacing the biological relationship as the basis for legal parenthood. This represents a crucial recognition that legal paternity need not always align with biological reality,

[336] The Slovak Act on Family since 2005 explicitly prohibits surrogacy arrangements, although, even before this, surrogacy contracts could be considered invalid, particularly in cases where the surrogate mother received compensation. In such circumstances, §3 and §39 of the Civil Code would apply, as such arrangements could undoubtedly be deemed contrary to good morals.

[337] In disputes concerning the determination of motherhood, the court is obligated to objectively ascertain which woman actually gave birth to the child. the subject of the court's examination in motherhood determination proceedings is solely the circumstance of childbirth, as only the woman who gave birth can be legally determined as the child's mother.
See: Lila Bronislava Pavelková, *Zákon o rodine: komentár, 3. vydanie* (C. H. Beck, 2019) 524.

[338] Slovak procedural law provides a method for determining motherhood, through non-contentious civil proceedings. The selection between these approaches depends on whether a dispute exists between the parties. The court's examination remains strictly focused on establishing the fact of childbirth rather than genetic connection.
See: Act No. 161 of 2015 on the Civil Non-Contentious Procedure Code §104 - §110

[339] Paternity can be determined by by marriage bond, or recognition as an acknowledgment in the form of a joint statement, or judgment of the court.

[340] Pavelková, *Zákon o rodine*, 559.

particularly in cases involving medical intervention in reproduction.[341] The Supreme Court's ruling draws a clear distinction between social and legal parenthood and biological parenthood, recognizing that in the context of assisted reproduction, the intent to become a parent can take precedence over genetic ties. By preventing a man who consented to assisted reproduction from later denying paternity solely on the basis of lacking a biological connection, the Court affirms the importance of family stability and the child's right to have legally recognized parents. This reasoning supports equal protection for children conceived through assisted reproduction, regardless of the marital status of their parents.[342]

Although the decision does not explicitly address surrogacy, the underlying principles have potential implications for how paternity may be determined in future surrogacy cases. The Supreme Court's acknowledgment that legal parenthood can arise from informed consent to an assisted reproduction procedure even in the absence of a biological link, establishes a conceptual basis that could support the legal recognition of intended fathers in surrogacy arrangements.

However, this progressive interpretation of paternity stands in contrast with the rigid determination of maternity under Slovak law, which on the other hand, continues to rely exclusively on the act of childbirth. While the law has evolved to accommodate advances in reproductive technologies in relation to paternity and maternity remains inextricably tied to gestation and birth, creating significant legal obstacles for intended mothers in surrogacy arrangements.

The Supreme Court's willingness to engage in analogical reasoning and extend legal protections across different forms of family relationships indicates a judicial openness to accommodating non-traditional family structures through interpretative means. Nonetheless, in the absence of specific legislative provisions on surrogacy, judicial

[341] In its reasoning, the Court applied an analogical interpretation of §87 (2) of the Family Act, which limits the denial of paternity in cases where conception occurred through artificial insemination with the husband's consent. The Supreme Court extended this protection to cases where paternity was established through consensual declaration after assisted reproduction with the consent of a man who is not the mother's husband. This analogical application demonstrates the Supreme Court's willingness to adapt existing legal frameworks to new reproductive technologies while preserving the integrity of family relationships.
See: Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic 2/2022, para. 19.1

[342] Ibid.

flexibility remains limited, especially in cases involving intended mothers, where the long-standing principle of *mater semper certa est* continues to dominate Slovak legal doctrine without exception.

Generally, the cases of cross-border recognition of parenthood arising from foreign surrogacy arrangements, is similar as those of Hungary. For the favorable legal environment, Slovak nationals engage inti surrogacy arrangements abroad, and the return with the foreign birth certificate, with lists them as legal parents to the child. The Act No. 97 of 1963 on Private International and Procedural Law, will govern the choice of law and admissibility of the recognition of the foreign birth certificate. The Act on Private International and Procedural Law stipulates §65 , *that „(...) matters of determination (establishment or denial) of parenthood, where at least one of the parties to the proceedings is a Slovak citizen, as well as foreign decisions in matters of child adoption, where the child or at least one of the adoptive parents is a Slovak citizen, and foreign decisions on the restriction or deprivation of legal capacity of a Slovak citizen, shall be recognized in the Slovak Republic."* Additionally, the birth certificate cannot be allowed if it is not final or enforceable in the state in which it was issued or is contrary to public policy.[343] The practice although suggests, that authorities generally do not examine whether a surrogacy agreement underlies a foreign birth certificate**,** nor do they assess the circumstances or legal basis on which the data in the certificate was entered.[344] In conclusion, the Slovak legal framework remains silent on the issue of surrogacy arrangements, while simultaneously discouraging the practice by treating such arrangements as legally invalid. The fragmented regulation of assisted ART, combined with the explicit legal emphasis on traditional family structures and the legislature's clear intent to preserve them, further suggests a systemic reluctance to accommodate surrogacy within the current legal order. Other fundamental shortcomings include a lack of common objective between the parties, a lack of public interest in enforcing such agreements, and

[343] Act No. 97 of 1963 on Private International and Procedural Law §64 b) f)

[344] The competent authority tasked with enforcing the record is limited to verifying the authenticity of the birth certificate as a public document, without scrutinising the accuracy of its content or the legality of the underlying parental arrangements, such as surrogacy.
See: Katarína Burdová, "Náhradné materstvo a slovenské medzinárodné právo súkromné," in *Míľniky práva v stredoeurópskom priestore 2013: zborník z medzinárodnej vedeckej konferencie doktorandov a mladých vedeckých pracovníkov*, ed. Zuzana Kiselyová, et al. (Univerzita Komenského, Právnická fakulta, 2013) 928–933.

a lack of legitimacy in contracts that treat children as transferable objects as well as the probable uneforcability of surrogacy arrangements under contract law.[345] At the same time, administrative practice creates a de facto pathway for the recognition of parentage established abroad, even in cases that would not be legally permissible under domestic law. This effectively allows Slovak citizens to circumvent domestic restrictions through reproductive tourism, and exposing the inconsistency between formal legal norms and practical enforcement.

1.2.2 Child's right to identity

In Slovakia, as in many European jurisdictions, the legal framework addressing the child's right to identity exists at the intersection of family law, constitutional law, and international human rights obligations.[346] The legal frameworks ensuring a child's right to know their origins are fundamental to the healthy development of their personality. This right encompasses access to information regarding the circumstances of their birth, which becomes particularly significant in cases of ambiguous identity, such as adoption, donor conception, or secret birth[347]. While surrogacy is not legally permitted in Slovakia, examining the existing legal protections for a child's identity in other contexts can provide valuable insights into how a child's right to know their surrogate mother might be protected should such arrangements occur.

It is noteworthy that the Act on Family does not explicitly establish the child's right to know their biological parents. In fact, the Family Act does not expressly state anywhere that a child has the right to know their parents or the right to have them legally determined.

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[345] Andrea Erdősová, "Náhradné materstvo právne a eticky, alebo nakoľko platí: *mater semper certa est, pater incertus*," *Justičná revue* 66, no. 12 (2014): 1474–1493.
[346] Pavelková, *Zákon o rodine*, 42.
[347] The Act on Healthcare in §11 (11) allows a woman to request that her identity remain confidential in relation to childbirth. When a woman makes this request in writing, separate special health documentation is maintained for her pregnancy and delivery, containing her personal data. This legal frameworks ops for strict protection of confidentiality to the mother, nor the presumed father, nor close persons not even courts can access the data without die reasoning. There is a special regime for releasing individuals from this confidentiality obligation - only a court can release persons who ensure the recording and storage of special health documentation from their duty of confidentiality. The legislation fawoirs the mother's confidentiality over the child's interests.

This legislative gap raises questions about the extent to which Slovak law protects the child's right to identity in accordance with international human rights standards.[348]

In cases of adoption, According to Section 97(1) of the Family Act, adoption creates a relationship between the adoptive parent and the adoptee that is equivalent to the relationship between parents and children.[349]The Family Act explicitly stipulates in Section 108 that the adopter shall be recorded in the registry in place of the parent of the adoptee based on a court notification. Therefore, in the child's birth certificate, the person who has legally adopted them will be designated as their parent. At the same time, based on the registered change, the registry will issue the child a new birth certificate, in which the adopters, or the adopter, will be listed as the parents who have replaced the original ones.[350]For this reason, when looking at the birth certificate, an adopted child will not discover who their biological or previous parents are It can thus be summarized that in the case of adoption, the Act on Family works with the terms adopters and adoptee, or parents of the adopted child, and does not in any way specifically reflect the biological parents of the child. The Act on Family addresses the issue to know one's origins, as it leaves it to the judgment of the adopters whether they will provide the child with access to information about their parents or provide information that they themselves possess. Most significantly, §106 (3) introduces a conditional right to information about the child's biological origins. It states that if it is in the best interest of the adoptee, adoptive parents may facilitate access to information about the child's biological parents or provide information they possess, unless otherwise restricted by a special regulation. This provision does not establish an absolute right for the child to know their biological parents,

[348] The Family Act, similar to international legal frameworks, does not employ the term „biological parent," consistently using only the terms "parent," "mother," and "father" throughout the text. This raises the question of whether the concept of "parent" within the Family Act should be interpreted with an emphasis on the natural, biological/genetic connection between children and their parents, or rather with a focus on the legal status of a person as a legally determined parent of a child. This distinction becomes particularly relevant when examining how Slovak law might protect a child's right to identity in cases of surrogacy, should such arrangements come to be recognized.
See: Peter Koromház, "Právo dieťaťa poznať svojich rodičov v kontexte osobitostí rodinného práva," in *Košické dni súkromného práva IV,* ed. Peter Molnár, Viktória Koľveková and Miroslava Kušníriková (ŠafárikPress, 2022), 60-62.
[349] §97 (1) of the Act on Family establishes the legal equivalence between adoptive relationships and biological parent-child relationships, without acknowledging the distinct nature of these relationships from the perspective of a child's identity formation.
[350] Pavelková, *Zákon o rodine*, 634.

it opens the possibility for such access, depending on the child's best interests, the adoptive parents' discretion, and relevant privacy or data protection laws. This phrasing also implies that access to this information is not automatic or unconditional, but rather subject to contextual assessment and potential legal limitations.

Additionally, the child's right to know his or her origins are feasible in Act No. 154 of 1994 on Civil Registries, prescribes the circumstances to access to Civil Registry as well as to make Extracts from it. In the context of adoption, §18 (4) stipulates, that *,,In the case of adoption, the registry office shall allow access to the adoption record and permit extracts to be made only by the adoptive parents and, after reaching the age of majority, by the adoptee."* From the given legal regulations we can derive, that the child under the age of majority, cannot access information about his or her origins. The UN CRC in Art. 1 defines the child as *,,every human being below the age of 18, unless the applicable law recognizes an earlier age of majority."* While Slovak law lacks universal definition on the term of the child, although stipulates Act No. 40 of 1964 the Civil Code section 8 §2 stipulates that the age of *,,Majority shall be attained at the age of 18. Prior to attaining that age, majority can only be attained upon marriage. The thus attained majority shall not be lost upon the termination of marriage or declaration thereof null and void."* Accordingly, a minor child cannot make any legal claim to access information on his or her biological family, unless the the adopted parents decide to do so.

Although, the best interests of the child principle is one of the overreaching principles of family law stipulated in Art. 5 (f) on the Act on Family, as the best interests of the child is the primary consideration in all decisions affecting the child, including the particular attention shall be given to the child's identity preservation, development of his or her abilities and talents. This comprehensive principle is not necessarily and specifically expressed or reflected in either of the above-mentioned sources of law.

Conclusively, for the child to access identifiable or any information on the circumstances of birth, origins and family relations is omitted from the Slovak legislation, by not introducing an balancing act to enhance proportionality between the two competing interests.

2.3 Public law considerations

The Slovak legal system explicitly focuses on the protection of family, marriage and children through multiple public law provisions. The Constitution[351] roboustly protects t the institution of family within the interpretation of heterosexual marriage as well as gurarantees enhanced protection as follows *„Marriage, parenthood, and family are under the protection of the law. Special protection of children and minors is guaranteed".*[352] Thus the traditional form of family is recognized as heterosexual marriage with children and the parent-child relationship within this formulation. Furthermore, Art. 41 (4) vests the upbringing of the children to the hands of the parents, as long as it is in the best interest of the child. This provision establishes a strong presumption in favor of maintaining the relationship between children and their biological parents, except in cases where judicial intervention is necessary for the child's welfare. These constitutional principles are further developed in the previously mentioned basic principles of the Act on Family. Interpreting these basic principles with the constitutional provisions, the articulation of parenthood follows the traditional values, which represent challenges surrogacy arrangements, particularly those involving single individuals or same-sex couples.

Additionally, the Constitution establishes that *„anyone can act which is not forbidden by law."*[353] The constitutional framework, creates an unregulated sphere on surrogacy arrangements and leaves the practice in legal „grey zone". However, most recently there has been political and social discourse initiated on reproductive rights as well as surrogacy. The Christian Democratic Movement[354] has proposed constitutional amendments that include a ban on surrogacy. Majerský justifies this proposal by claiming that wealthy people in Slovakia can "buy" children through surrogacy arrangements, and argues that the war in Ukraine has expanded child trafficking. The chairman Milan Majerský specifically mentioned concerns about Ukrainian women in Slovakia potentially being exploited through surrogacy. The proposal aims to strengthen existing prohibitions and prevent any future legalization attempts.[355] This development indicates that

[351] Act No. 460 of 1994 the Constitution of the Slovak Republic.
[352] Ibid, Art. 41 (1).
[353]Ibid, Art. 2 (3).
[354] In Slovak: Kresťanskodemokratické hnutie (KDH).
[355] This proposal is part of a broader package of eight constitutional amendments KDH has introduced, which also includes strengthening conscience rights (including conscientious objection), enhancing parental rights over children's education in alignment with their religious and philosophical beliefs, and various other changes related to the electoral system, public finances, and business freedoms. The timing of these

reproductive rights issues, particularly surrogacy, are becoming increasingly politicized in Slovakia's constitutional discourse, with conservative forces seeking to permanently restrict certain reproductive technologies through constitutional amendments rather than ordinary legislation.

Furthermore, if we venture to the filed of criminal law, it is wort to examine the domestic regulation on how conduct which is performed during surrogacy arrangements, could be possibly illegal, if we consider some practices of surrogacy as crimes. While Slovakia lacks specific legislation explicitly criminalizing surrogacy, the legal framework creates conditions where surrogacy arrangements could trigger criminal liability under existing provisions of the Act No. 300 of 2005 the Criminal Code. Although, by the above provided analysis of legal circumstances, the legislature remains largely silent on surrogacy itself, two key provisions in the Criminal Code may apply to surrogacy arrangements. §180 criminalizes the transfer of a child for adoption purposes, which is characterized as being without financial compensation; while §181 criminalizes the transfer of a child for purposes other than adoption when remuneration is involved, potentially encompassing commercial surrogacy arrangements. Surrogacy arrangements contain elements that potentially fit within the scope of child trafficking under Slovak law: the handover of a child to intended parents, the surrogate mother relinquishing parental rights, and financial compensation.

However, prosecuting surrogacy as child trafficking faces significant practical challenges. Financial aspects of surrogacy arrangements can be disguised as legitimate expenses such as medical care, travel, and living costs, making the commercial nature difficult to prove. Cross-border prosecution becomes particularly problematic when surrogacy occurs in countries where such contracts are legal and enforceable, such as Ukraine. When surrogate mothers are Ukrainian nationals operating under their country's legal framework, Slovak authorities face jurisdictional and evidentiary hurdles in

proposals has raised questions about possible coordination with Prime Minister Robert Fico's Smer party, coming shortly after Fico invited KDH to build a "huge dam against liberalism and progressivism." While Majerský denies direct negotiations with Smer on these amendments, he acknowledges that the proposals could be seen as testing Smer's commitment to conservative values.
See: Michal Katuška, "Majerský k nápadom na zmenu ústavy: Desaťkrát môžem zopakovať, že s Ficom som o tom nehovoril," *SME*, July 19, 2024, https://domov.sme.sk/c/23359621/majersky-k-napadom-na-zmenu-ustavy-desatkrat-mozem-zopakovat-ze-s-ficom-som-o-tom-nehovoril.html.

establishing criminal activity. Furthermore, the practice of reproductive tourism to Ukraine and other surrogacy-friendly countries remains largely hidden, operating outside regular channels. This latent nature of cross-border surrogacy arrangements contributes to the rarity of successful criminal prosecutions, despite the potential applicability of trafficking statutes under Slovak criminal law.[356]

Conclusively, the public law framework suggests, that surrogacy arrangements are not necessarily supported legally, which was further underscored by the Judgement II. ÚS 424/2015 of the Constitutional Court. On the intersection of surrogacy arrangements and privacy rights, the Court came to some key conclusions on the navigation of law. While the case itself concerns media publication of photographs without consent, the underlying issue involved a person who had placed an advertisement seeking a surrogate mother. The Court considered that by publishing this advertisement, the person had voluntarily entered the public domain and should have anticipated public interest in his activities. Furthermore expressed, that *„It is possible to agree with the legal opinion that a surrogacy agreement would clearly be invalid due to being contrary to good morals, Slovak legal regulation is strict in this regard. In Slovakia, so-called "womb rental" is therefore not permitted."*

3. Surrogacy in the Czech Republic[357]

3.1 Overview of legal framework on ART and surrogacy

The origins of ART in the Czech Republic are identical to those in Slovakia, as the first legal considerations emerged during the existence of Czechoslovakia in the 1980s. As we will see, after the separation of the two countries, the Czech Republic adopted a more liberal approach to ART and surrogacy than Slovakia.[358]

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[356] Elena Júdová and Martin Píry, "Surrogacy motherhood in the Slovak Republic – an illegal immigrant?," in *Fundamental legal problems of surrogate motherhood: Global perspective*, ed. Piotr Mostowik (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 790-791.

[357] In the Czech legal terminology, the terms "náhradní mateřství" (substitute motherhood) and "surogátní mateřství" (surrogate motherhood) are both used. The term "náhradní mateřství" directly translates to "substitute motherhood," implying a supportive role without necessarily commercial implications. "Surogátní mateřství," derived from the English term "surrogacy," is used in more technical and international contexts.

[358] The ART clinics in the town Brno has been gradually utilizing the most modern techniques even during the common statehood with Slovakia, which eventuated in the birth of the first „test-tube baby" in former Czechoslovakia.

The first regulation dates back to 1982, when the Ministry of Health of the Czech Socialist Republic adopted the Measure on the Conditions for Artificial Insemination[359]. The Measure restricted the access of ART, basically just AI to married spouses, with the involvement of either the husband's or donor sperm. Furthermore, the AI is only admissible due to medical reasons, which involves male infertility, anatomical disorders in the female reproductive system or the risk of genetic disease or developmental defects of the embryo. Only woman preferably under 35 years of age were eligible for this medical procedure. Overall, the first legal measure on ART can be characterized as fairly strict eligibility criteria, besides due medical oversight. Although donor sperm could be used in the procedure, only complete donor anonymity was allowed, which aligned with the socialist values of the time.

Throughout the post-communist period, as reproductive technologies advanced and became more accessible, the Czech legislature did not take definitive steps to either explicitly permit or prohibit surrogacy arrangements. This silence might be interpreted not as oversight but as a deliberate policy choice, allowing surrogacy to exist in practice while avoiding the controversial task of establishing a comprehensive legal framework.[360] The lack of explicit prohibition has allowed reproductive medicine clinics to offer services that facilitate surrogacy arrangements, particularly gestational surrogacy, where the surrogate mother has no genetic connection to the child. These services have developed within the broader framework of the well-established Czech fertility industry, which has gained international recognition for its high standards and relative affordability compared to Western European countries.[361]

The 1990s was a period of intense debate about ART especially surrogacy, where a certain shift towards the more liberal approach was predominant during the professional debates of medics and ethicists. Among the emerging issues, the moral status of the human embryo, the importance of the prenatal period for the child's future development and

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See: „Před 40 lety se ve FN Brno narodilo první „dítě ze zkumavky," *Fakultný Nemocnice Brno*, November 11, 2022, https://www.fnbrno.cz/pred-40-lety-se-ve-fn-brno-narodilo-prvni-dite-ze-zkumavky/t7607.

[359] Measure OP-066.8.-18.11.1982 on the Conditions for Artificial Insemination

[360] Katerina Buresova, "Surrogacy legal issues in the UK and the Czech Republic," *Lawyer Quarterly* 7, No. 1 (2017): 29-39, https://tlq.ilaw.cas.cz/index.php/tlq/article/view/220.

[361] Renata Švestková et. al., "Legal Position of an Agency Intermediating Surrogacy in the Czech Republic, *Lawyer Quarterly* 10, No. 2 (2020), https://tlq.ilaw.cas.cz/index.php/tlq/article/view/400.

maternal bonding, and the perception of unethical motivations for surrogacy, e.g. aesthetic reasons, the classical issue of the commercialization, risk of unethical and coercive practices were considered. Subsequently, the Ethics Commission of the Section of Assisted Reproduction's opinion emphasized the altruistic and non-commercial motivations that can exist, such as helping someone have a genetically related child, especially within families, e.g., a woman carrying a child for her daughter or sister. In response to the ongoing ethical discourse, the Ethics Commission of the Section of Assisted Reproduction issued a statement acknowledging that surrogacy can be ethical in medically justified cases. However, it concluded that the use of this method is currently not recommended in the Czech Republic.[362] Another, key development reflecting the shift towards the more liberal perspective was expressed in the proposal to revise the Civil Code, where principle no. 68 stipulated that the donors of the embryo cannot be considered legal parents, as long as a prior agreement stated otherwise. This meant a major step in implicit acceptance of the determination of legal parenthood through contractual terms, which presents key controversy surrogacy arrangements entail.[363]

The fundamental rules on healthcare is stipulated in Act no. 37 of 2011 on Health Services and Conditions for Their Provision More comprehensively MAR is regulated by a number of laws currently, e.g. Act no. 296 of 2008 on Human Tissues and Cells, Act no. 227 of 2006 on Research on Human Embryonic Cells, and with the most essential being Act no. 373 of 2011 on Specific Health Services, which regulates several ART processes with great precision. This Act defines a This assisted reproduction as *„medical procedures involving the collection and manipulation of reproductive cells (eggs and sperm) to create embryos outside the body for artificial insemination."*[364]. Furthermore, the legislation detailly defines the fundamental legal definitions of infertile couples, anonymous donors, the principle of mutual anonymity between donors and infertile couples.

[362] T. Burnog, „Intrauterine Growth Retardation of the Foetus and Pregnancy," in *Česka gynekologie* 6, No. 3 (1996): 198, https://kramerius.medvik.cz/search/i.jsp?pid=uuid:556bf591-5a88-11e7-8040-d485646517a0#periodical-periodicalvolume-periodicalitem-page_uuid:2c064611-5a88-11e7-8040-d485646517a0

[363] Karel Knap, *Ochrana osobnosti podle občanského práva*. *3. vyd.* (Linde, 1996) 366.

[364] Act no. 373 of 2011 on specific health services § 3

ART are permitted on medical grounds, for the purpose of treating infertility when natural conception is improbable or impossible or other treatments have failed or when the woman cannot carry a viable pregnancy to term, and when alternative treatments have failed or are highly unlikely to result in pregnancy. Additionally, the Act on Specific Health Services allows ART when early genetic screening of embryos is necessary due to documented risks of inherited genetic disorders or abnormalities from either the woman or man that could compromise the future child's health.[365] The law essentially establishes a comprehensive framework ART while maintaining strict controls on how genetic material can be obtained, used, and donated. Furthermore, the Act stipulates, that ART for woman can take two forms, either direct insertion of sperm into the female reproductive system, or IVF and embryo transfer to the female reproductive system.[366] The Act contains specificities regarding the reproductive material, which can be utilized during ART by determining the source of admissible gametes. According to these rules, in ART the woman's own eggs, the) sperm from their male partner who is participating in the fertility treatment or anonymously donated gametes from a third party can be used.[367] Additionally the Act establishes strict age restrictions, limiting female donors to those between 18 and 35 years old, and male donors to those between 18 and 40 years old.[368] There are eligibility criteria on the side of the infertile couple as well, based on which assisted reproduction can be accessed to woman of reproductive age but not older than 49 years, accompanied a by written application no older then 6 month, from both the woman and man. Thus, besides the age requirements, a partnership criteria is introduced, although the specific legal form of partnership is not determined. Additionally, the Act stipulates incest prevention measure.[369]

The Act on Specific Health Services does not list surrogacy as one of the ART, and has not ever been regulated nor elaborated on within the field of medical law in the Czech legal system.[370] Although, evidently the area of medical law „enables" surrogacy as it can

[365] Ibid,
[366] Ibid, § 3 (3)
[367] Ibid, § 3 (4)
[368] Ibid.
[369] Ibid, § 6
[370] F. Haderka, "Náhradní Mateřství (Surrogate Motherhood)," *Právný Obzor* 69, No. 10 (1986) 917–934.

be found as a feasible medical service in several fertility clinics in the Czech Republic.[371] This can be possible due to the only mention of surrogacy in the legal system of the Czech republic. The Act. no. 89 of 2012 the Civil Code among the rules of adoption stipulates, that *„Adoption is excluded between persons who are related in the direct line and between siblings. This does not apply in the case of surrogate motherhood."*[372]. This is the only legal stipulation explicitly mentioning surrogacy, although no other measures prescribe the conditions, requirements, eligibility criteria and additional important features of the procedure. Consequently, we assume that, the legislator is aware, and acknowledges surrogacy arrangements and choose to implicitly allow it or just merely presumed that the practice does not concern the Czech Republic. The legislator does not express the will to introduce comprehensive legal framework for surrogacy, which would be necessary to ensure clear legal boundaries and legal certainty to all parties involved, which opens up a pathway for exploitativepractices.[373] Although the existing law, suggests, that only altruistic surrogacy is allowed, while encouraging surrogacy within in the close family, e.g. when a mother carries the IVF embryo of her daughter, in such case adoption cannot adoption can be a mechanism of the transfer of legal maternity from the birthmother to the intended mother, what is, perhaps the ethically most justifiable form of surrogacy arrangements, reflecting true altruism. The unique solution of the Czech Republic „greenlighting" surrogacy arrangements, while still deliberately refraining from comprehensively regulating the phenomenon, its essence and criteria for its lawfulness.

[371] Fertility clinics, e.g. Reprofit in Brno openly publishes on their online platforms the services of surrogacy arrangements. The website is available in multiple languages, indicating the possibility of foreign couples to access these services. What shall be underscored that the clinics does not act as intermediaries and does not perform tasks necessary for searching for, finding, and matching the surrogate mother with the intended parents. Although several social online platforms and portals are available for the intended parents to meet the surrogate mothers, as well as specific groups and chats are present, where the involved can share their experiences (websites include: je Modrý koník, Instagram, Facebook). It is not unlikely, that certain target groups are approached online for offering surrogacy services or vice versa. The Czech approach appears to separate medical treatment from matching services, relying on personal connections and online communities for surrogate-parent matching while limiting clinic involvement to purely medical aspects.

[372] Act. no. 89 of 2012 the Civil Code § 804

[373] In 2024 a long ongoing surrogacy fraud was tackled down by the police, where a former nurse falsely offered surrogacy services for intended couples. She claimed to act as a surrogate mother, although never underwent the necessary ART and medical checks, scamming payments out of the intended parents ranging from CZK 10,000 to CZK 50,000, then disappearing with the money.
See: Josef Gabzdyl, "Žena se nabízela jako náhradní matka. Páry podvedla, přes milion si nechala," *iDnes,* August 15, 2024, https://www.idnes.cz/ostrava/zpravy/nahradni-matka-policie-cr podvodnicenovojicinsko.A240815_084748_ostrava-zpravy_jog.

This under-regulation specifically addressing surrogacy arrangements helped the practice to flourish, and it is left to the practice to define the guidelines to ethically carry out surrogacy.[374]

Although, the debate of revising the current legal framework occasionally emerge on the political field. In 2022, Members of Parliament Zuzana Ožanová and Helena Válková, representing the ANO 2011 party, introduced a legislative proposal to amend both the Civil Code and the Criminal Code with the aim of restricting commercial surrogacy in the Czech Republic.[375] Their initiative sought to criminalize participation in commercial surrogacy arrangements, including the possibility of imprisonment, based on concerns that such practices may have harmful consequences for women and children. A key element of their proposal was the removal of the current exemption in the Civil Code that permits adoption between relatives in the context of surrogacy. In addition, they recommended changes to the Criminal Code to allow for the prosecution and potential imprisonment of individuals who facilitate surrogacy through actions such as recruitment, negotiation, inducement, transportation, concealment, or delivery of a person for the purpose of surrogate motherhood.[376]

Additionally, since 2023 the topic of reshaping the laws concerning surrogacy has been eagerly voiced by professionals from multidisciplinary fields. Under the auspices of the Constitutional Legal Committee of the Czech Parliament fundamental guiding

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[374] Legal scholars slightly differ on the opinion of whether the current legal circumstances are satisfactory in the Czech Republic regarding surrogacy, but the overwhelmingly agree that the current Czech legal framework for surrogacy is unsatisfactory and fails to meet society's needs. The Civil Code's approach, which only addresses surrogacy through an exception in section 804 allowing adoption between relatives, is considered insufficient.
See: Kraličkova, Zdeňka. Komentař k § 775 OZ. [Commentary on Section 775 of the Civil Code], [in:] Hrušakova, Milana; Kraličkova, Zdeňka; Westphalova, Lenka et al. Občansky zakonik II. Rodinne pravo (§655–975). Komentař. [Civil Code II. Family Law (ss. 655-975). Commentary], 1st ed. Praha: C. H. Beck, 2014, p. 515.; Frintova, Dita. Komentař k § 775 OZ. [Commentary on Section 775 of the Civil Code], [in:] Švestka, Jiři; Dvořak, Jan; Fiala, Josef et al. Občansky zakonik. Komentař. [Civil Code. Commentary] Vol. II. Praha: Wolters Kluwer, a. s., 2014, p. 282.; Šinova, Renata. Komentař k § 775 OZ [Commentary on Section 775 of the Civil Code], [in:]Melzer, Filip; Tegl, Petr. Občansky zakonik – velky komentař [Civil Code – Large Commentary] Vol. IV. ss. 655–975. Praha: Leges, 2016, p. 865.

[375] Martina Machová, "Za sjednání náhradního mateřství do vězení, navrhují poslankyně ANO," *Seznam* Správy, April 26, 2023, https://www.seznamzpravy.cz/clanek/domaci-politika-za-zjednani-nahradniho-materstvi-do-vezeni-navrhuji-poslankyne-ano-229962.

[376] Government's opinion on the bill submitted by MPs Zuzana Ožanová and Helena Válková for the enactment of a law amending Act No. 89/2012 Coll., the Civil Code, as amended, and Act No. 40/2009 Coll., the Criminal Code, as amended (Parliamentary Document No. 424).

principles for the revision of surrogacy laws has been established by the expert group. A consensus has been reached, that legal regulation of surrogacy has to be clearer in order to facilitate and support the legal certainty of all parties involved.

The outcome of the common efforts experts cumulated in the document entitled *Analysis of the Institute of Surrogacy*[377] and thoroughly presents the preferred legislative intent regarding surrogacy regulation in the Czech Republic.

In summary, the experts offered two possible pathways, either not changing the regulation, or initiating positive legislative change, which is preferred by the expert group. The latter approach advocates for minimal but still precise legal intervention, primarily focusing on introducing clear criteria for accessing surrogacy, introducing judicial oversight as well as concrete determinants of legal parentage, while still keeping the framework conservative and minimally invasive.[378]

The proposal contains several key points and thorough legal and moral reasoning accompanying the suggestions. These include determining the eligibility for only heterosexual couples either married or living in cohabitation strictly on medical grounds.[379]

On the side of the surrogate mother, she shall be required to be between the age 18–40 years having one biological child on her own. Moreover, to act as a surrogate mother shall be limited to two occasions, where both physical and psychological assessment shall be carried out. The surrogate mother shall be a permanent residence of the Czech Republic in order to prevent exploitative practices and trafficking international surrogate mothers.[380]

Regarding the types of surrogacy the expert groups opts for allowing only gestational surrogacy, where at least one of the intended parent has to provide the genetic material for IVF. Importantly, a judicial overview shall be incorporated, and the approval of the Court has to be mandatorily granted before the embryo transfer, with public hearing and

[377] Ministerstvo spravedlnosti České republiky, *Analýza institutu náhradního mateřství* (Ministerstvo spravedlnosti České republiky, 2024) https://eudeska.justice.cz/Lists/EUD/Attachments/5335/MSP-734_2024-OSV-OSV-p%C5%99%C3%ADloha.pdf
[378] Ibid, p. 6.
[379] Ibid, p. 47-48.
[380] Ibid.

assignment of parental rights by a court decision is needed, in order to prevent post birth disputes.[381]

The proposal incorporated contractual limits, allowing only altruistic surrogacy, in which intended parents can reimburse only the reasonable expenses such as lost income and expenses in connection with the pregnancy. The arrangements cannot include excessive clauses about aspects of private life which would render the surrogate mother into a subordinate position.[382]

Importantly, the children's legal status has been addressed, too in regards to parenthood. From the moment of birth, the intended parents will be recognized as the legal parents of the child and recorded as such on the birth certificate, based on a court decision. The surrogate mother will have no legal relationship to the child and must hand the child over to the intended parents as soon as reasonably possible after birth, which has been approved by the court before the execution of the surrogacy arrangement itself. The proposal vouches for establishing clear legal parenthood prior to the child's conception and birth is considered essential to prevent disputes. Although it is suggested to go both ways, thus the intended parents could not refuse to take care of the child especially in cases of disability or relationship breakdown, as the child will have the same legal status as if he or she was born directly to them.[383]

The social and labor law aspects have been addressed, too. It is articulated that the intended parents shall get adapted rights to maternity or parental leave including all their benefits, while the intended mother is regarded altogether 22 weeks of maternity benefits. In regards to the surrogate mother, she should benefit from a 14 weeks long maternity benefit.[384]

Furthermore, in connection of the child's right to identity, the intended parents shall be morally inform the child about their birth circumstances when developmentally appropriate, while upon adulthood the child shall gain the access to all the relevant medical

[381] Ibid, p. 50.
[382] Ibid, p. 49.
[383] Ibid, p. 52.
[384] Ibid, p. 53-55.

and judicial documents containing comprehensive information about the circumstances of his or her birth.[385]

Other provisions of the proposal incorporate a general ban on the possibility of advertise surrogacy services, applicable to commercial brokerage and intermediaries to facilitate commercial surrogacy arrangements. What although shall be allowed is solely non-profit mediating through the healthcare providers consent.[386]

Conclusively, the current legal approach to surrogacy in the Czech Republic is unique within Europe. Although, regulation remains minimal, the legislature effectively tolerates the practice. Moreover, Czech experts and society tend to be more open to utilize the new ART and actively seek to create an environment that integrates surrogacy into evolving trends of child-rearing and family formation. As a result, there are growing calls to regulate surrogacy while establishing clear legal prerequisites to minimize risks and ensure legal certainty for all parties involved.

Despite this tolerance, the current legal framework remains insufficient and fails to provide adequate legal certainty, which is creating potential risks for human rights violations. Nevertheless, experts recognize the benefits of a minimalist but strictly regulated legal approach. In the Czech context, this appears to be the most viable path forward, as under-regulation would push the practice into legal grey areas, while overregulation could drive intended parents abroad to jurisdictions with less oversight with increased the risk of human rights abuses.

3.2 Private law considerations

The private law framework relevant to surrogacy in the Czech Republic is primarily contained in the Civil Code, which offers a comprehensive legislation governing various aspects of private relationships, including family law provisions that directly impact surrogacy arrangements.

[385] Ibid, p. 55-57.
[386] Ibid, p. 51-52.

3.2.1 Parentage and legal recognition of children born via surrogacy arrangements

In general, the rules on the presumptions on maternity and paternity are rooted in the traditional concepts of family formation. The sole legal presumption on maternity stands in line with the Roman law principle of mater semper certa est, thus recognizing maternity of the woman who gave birth to the child.[387] The stipulation is relatively straightforward, and represent a mandatory rule, from which deviation is not permitted neither through unilateral actions nor contractual arrangements.[388] The fact of childbirth determines legal maternity, rendering it inadmissible for an egg donor to claim maternal status. Consequently, in order for the intended mother's social parentage to be legally recognized, the relevant adoption regulations must be applied. In other words, adoption serves as the legal mechanism for implementing surrogacy arrangements. Although the recognition of the intended mother in surrogacy arrangements, through adoption is fairly complex as there are only limited grounds for denying maternity. Still, a notable provision that could be interpreted as strengthening the protection or legal status of surrogate mothers is the six-week period following the birth of the child, after which the biological mother is permitted to give consent to adoption. Similarly, the presumed father of the child cannot give consent to adoption before birth of the child.[389] Additionally, the surrogate mother may withdraw her consent within three months from the date it was given.[390]

The presumptions of paternity in the Czech Republic is put on three legal presumptions which apply gradually. According to the first presumption the birthmother's husband is presumed to be the father if the child is born in wedlock or within 300 days of the termination of the marriage.[391] The second presumption is established by recognition or acknowledgement of the man who states being the father, expressing his autonomous the will of the child's parents.[392] The last presumption is determined by the instant of sexual intercourse in the critical period, meaning within the period of 160 days till the birth and within the period not exceeding 300 days before the birth unless his fatherhood is excluded

[387] Civil Code §775
[388] Zdeňka Králíčková, "On the Family and Family Law in the Czech Republic," 94.
[389] Civil Code § 813.
[390] Ibid, § 817.
[391] Ibid, § 776.
[392] Ibid, § 779.

by serious reasons.[393] The presumption based on the voluntary acknowledgement of the man who claims to be the father, can recognize the child on the condition of the mother's consent, which is essential in ART and surrogacy arrangements. In such cases, if a man consents to artificial insemination of an unmarried woman so the surrogate mother, he may be presumed to be the father. This declaration can be made even during the surrogate's pregnancy and is frequently regarded by the intended parents as a safeguard, anticipating the postnatal transfer of the child into their care. However, even when paternity arises from this consent, a formal declaration before the registry is still required to legally establish paternity under the second presumption.[394] This is why it is preferable for the intended parents to choose a surrogate, who is unmarried, otherwise the presumed father stays the spouse of the surrogate mother.

It has been highlighted before, that the intended parents can legalize their legal parenthood through adoption. Although, the surrogate mother based on the fact of childbirth becomes the legal mother of the intended child initially. After the necessary period of times elapses, the surrogate mother can in line with the surrogacy arrangement initiate adoption of the child before court, through the form of direct adoption. Additionally, the provisions of adoption in the Civil Code stipulates an additional protective measure for the woman consenting to adoption, by guaranteeing the right to revoke this consent up to three years following the final court decision on adoption.[395] As in the Czech legal system surrogacy arrangements are not enforceable, it stays in the discretion of the surrogate mother to execute the arrangements accordingly by handing over the child and also applying for adoption procedures.

The allowing legal framework to perform domestic surrogacy, this does not necessitate that Czech national engage into surrogacy arrangements abroad, although the opportunity is given. Rather the reverse could applicable, that Czech Republic is a destination for foreign intended parents for the welcoming legal environment. However, the Czech Republic is not generally listed among the most favorable choices for surrogacy tourism, as the establishment of legal parenthood can be achieved only through adoption. The legal

[393] Ibid, § 783.
[394] Šárka Špeciánová, "The Czech legislation on surrogacy and its comparison with foreign standards," *Kontakt* 26, No. 3 (2024): 300-308, DOI: 10.32725/kont.2024.040.
[395] Civil Code § 840.

rules does not allow for deviation of the mater cemper certa est principle on maternity. In contrast, the most prominent choice still remains Ukraine, where the intended mother is immediately listed as the legal mother of the child, and the establishment of parenthood does not necessitates adoption procedures. The likelihood that Czech nationals seek surrogacy abroad is not typical.[396] Although, in such cases we again venture into the territory of international private law, and the recognition of foreign birth certificates, where Act no. 91 of 2012 on Private International Law is applicable alongside with the Act no. 301 of 2000 on Registers of Births and Deaths, Name and Surname, and on Amendments to Some Other Acts.

For the determination of parentage, the governing law state whose citizenship the child acquires by birth. If the child acquires multiple citizenships by birth, Czech law applies. If the child acquires Czech citizenship and the citizenship of another state, the Czech law takes precedence.[397] The Act on Private International Law also list the public policy exemption articulated in § 4. Although, the applicable bilateral or multilateral agreements with other states, the Czech Republic does not necessitate the need of legalization nor further authentication.[398] In practice, although it is up to the discretion of the competent authority to further investigate the circumstances of the authenticity of the foreign birth certificate, as long as it does not imply the legalization of unconventional family forms, which are not recognized by the Czech law.[399]

3.2.2 Child's right to identity

The Civil Code recognizes and grants protection to both biological and social parentage, by stipulating, that *„Kinship is a relationship between persons based on a blood tie or established through adoption."*[400] It is definite, that biological or genetic parentage and parenthood are both of significant importance, and maintaining a balance

[396] Dita Frintová and Ondřej Frinta, "Surrogacy from the Czech Perspective: 'Past the Point of No Return,'" in *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, ed. Piotr Mostowik (Warsaw: Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019), 659–709.
[397] Act no. 91 of 2012 on Private International Law § 54.
[398] E. g. the Convention Abolishing the Requirement of Legalisation for Foreign Public Documents in the Czech Republic under No. 45/1999 Sb
[399] For critical analysis see: Zdeňka Kraličkova, "Mater semper certa est! O nahradnim a kulhajicim mateřstvi" in *Pravni rozhledy* 23, No. 21 (2015) 731–732, https://www.muni.cz/vyzkum/publikace/1313706.
[400] Civil Code § 771.

between these categories is essential.[401] The infamous § 804 of the Civil Code refers to the eligibility of adoption between members of the family in direct line in cases of surrogacy arrangements. Although, in the context of surrogacy, the Civil Code does not contain provisions on how the identity issues of the child shall be navigated, so we look at identity protection of the child in cases of adoption. The Civil Code stipulates, the possibility of secret adoption, where both the adoptive parent or adoptee can request their identity not be enclosed alongside with their required consent to adoption.[402] Although, granting the requirement of keeping secrecy is not automatic, it is bound to adequate justification, and the discretion of the court, too.[403] There are significant consequences in relation to the child, if the court accepts the request of secret adoption. Namely, the child will have possibility to consult the documentation on adoption only after reaching the age of full legal capacity, thus 18 years of age. Moreover, the Civil Code contains provisions granting the child's right to express their views regarding changes to their legal status. The minimum age requirement is 12, when the child has to express his or her consent to adoption in order for the adoption procedure to proceed.[404] While children, younger then 12 years of age, they have the right to be informed about the adoption no later than the beginning of compulsory schooling, in accordance.[405] with Section 836 of the Civil Code. Although, the obligation to disclose the fact of adoption is vested in the adoptive parents, although the determination of the appropriate time and means of communication is left to their discretion.[406] This obligation does not include the information about the biological parents, nor the circumstances, reason of adoption at all. Thus, Czech legal system ensures, the child's right to get to know his or her origins, although the court may decide to keep the circumstances of adoption secret, which can be disclosed upon reaching the

[401] Zdeňka Králíčková, "Tension between Legal, Biological and Social Parentage in the Light of the Best Interest of the Child," *Legal Studies and Practice Journal* 16, No. 3 (2008): 275–282, https://journals.muni.cz/cpvp/article/view/6890.
[402] Civil Code § 837 and § 809.
[403] Mostly, information which enable precise identification of the biological parent include name, surname, date of birth, personal identification number, residence and other data can be requested to be kept confidential. These although does not include essential information about the medical or social background of the biological parents.
See: Sedlák, P. § 837 [Utajení osvojení]. In: Králíčková, Z. a kol. Občanský zákoník II. Rodinné právo (§ 655−975). 2. vydání. Praha: C. H. Beck, 2020, str. 680.
[404] Civil Code § 806 (1).
[405] Ibid, § 836.
[406] Ibid.

age of maturity. Basically, keeping full anonymity of the information about the biological family and the fact of adoption is not guaranteed, as adoption proceedings are conducted publicly, meaning that the parents or relatives of the child may still attend as members of the public. Moreover, the parents' information will still be recorded in the case file, regardless of whether they gave consent to the adoption. The legal framework shelters the child from potential adverse personal consequences that might arise from disclosing information about the biological parents, and prioritizes establishing a harmonious family environment for the child to grow up in, at the price of the limiting to access to information until the child reaches legal adulthood.

Despite the child's right to identity in adoption is dully regulated, it is not the case with the possibility of secret births.[407] According to the law, single woman with permanent residency in the territory of the Czech Republic has a right to have her identity hidden in connection with birth, accompanied by a declaration that she does not intend to care for the child.[408] Although, her identifying information is sealed and may only be accessed in specific legal proceedings, as the parentage determination lawsuit under § 783 of the Civil Code.[409] This proceeding is also feasible in cases when a child is abandoned in baby boxes, which enables to anonymously abandon unwanted children, what is tolerated by the Czech law. These exist in hospitals and social care institutions, and serves the mothers in crisis or in need, to leave their newborn in a safe place, if they are unable of do not want to care for the child upon birth.[410] Although, the CRC has expressed concerns about how the child's right to know his or her origins can be guaranteed if baby boxes and are tolerated by law.[411]

The Czech law presents dichotomy in addressing identity issues in cases of a child's identity can be compromised. If the mother of the child decides to stay completely anonymous, the institute of baby boxes are available, while in cases of secret births and

[407] Based on Act No. 372 of 2011 on Health Services.
[408] Ibid, § 37 (2).
[409] See more in: Milana Hrušáková and Zdeňka Králíčková, "Anonymní a utajené mateřství v České republice – utopie nebo realita?," *Právní rozhledy* 13, No. 2 (2005) 53, https://www.muni.cz/vyzkum/publikace/628609.
[410] For critical analysis see: František Schneiberg, "Babyboxy – pomoc dítěti nebo past?," *Zdravotnictví a právo* 13. No. 6 (2009): 6, https://sancedetem.cz/publikace/babyboxy-pomoc-diteti-nebo-past.
[411] Government of the Czech Republic, *UN Committee on the Rights of the Child: State Party Report: Czech Republic*, CRC/C/83/Add.4 , UN Committee on the Rights of the Child (CRC), 17 June 2002, https://www.refworld.org/reference/statepartiesrep/crc/2002/en/31509.

secret adoption the eventual reveal of the child's biological mother is possible. This can be analogically applied to surrogacy arrangements, although the legal obligation to expose the fact of surrogacy arrangement to the child born via it, is not embedded in law, nor is in the interest of the intended parents.

3.3 Public law considerations

The Charter of Fundamental Rights and Freedoms[412] form an integral part of the Czech legal order. The Charter in Art. 32 stipulates, that *„parenthood and family are under the protection of the law".*[413] The foundational family values are in depth articulated in the Civil Code[414], although the Czech constitutional system expresses that the family is regarded as a fundamental social unit, which definitely deserves special legal protection. Notwithstanding, as there is no precise legal definition, the term „family" can be flexibly and broadly interpreted.[415] From the above-mentioned Article 32, we can derive a general value statement on the family. However, when supplemented by the Civil Code's provisions on marriage and partnerships, a more comprehensive understanding of the family emerges in the Czech Republic, while still primarily emphasizing the institution of marriage, particularly as it relates to the purpose of establishing a family with children.[416]

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[412] Constitutional Act No. 23/1991 Coll., the Charter of Fundamental Rights and Freedoms, re-adopted under No. 2/1993 Coll., as amended.

[413] Ibid, Art. 32.

[414] The Civil Code builds family and childrearing on the existence of marriage, what is defined as an union between man and woman, thus there is no gender neutral approach to marriage. The purpose of marriage is founding a family, proper upbringing of children, and mutual support and assistance. Although there is no gender-neutral approach to marriage, the Civil Code in the same paragraph addresses partnership, defined as a permanent union between two people of the same sex, which is formed in a same manner as marriage. Additionally it has been established by the Civil Code, that unless otherwise specified by law or other legal regulations, provisions concerning marriage, spousal rights and obligations, and widows/widowers apply similarly to partnerships and partners' rights and obligations.
See: Civil Code, § 655.

[415] Zdeňka Králíčková, *Lidskoprávní dimenze českého rodinného* (Masarykova univerzita, 2009) 39-40..

[416] We shall also highlight, that the case law of the Constitutional Court in the Czech Republic evolved in a progressive way regarding the adoption of homosexual couples. In its ruling, the Constitutional Court deemed discriminatory § 13 (2) of Act No. 115/2006. Coll., on Civil Partnership and on Amending Certain Related Acts, which prohibited individual living in civil partnership from adopting a child. The exclusion of the possibility of adoption to these individuals were not in line with their human dignity and a violated of their right to respect for private life. This decision resulted in allowing registered partners to adopt a children, although individually not jointly.
See: Decision of the Constitutional Court, Pl. ÚS 7/15, 2016/06/14 (Online) Available at:chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl._US_7-15.pdf

Furthermore, the special legal proception of children is embedded in the Charter. It is also stipulated, that children cannot be discriminated against on the fact whether they are born in or out of wedlock. The marital status of the parents cannot constitute a disadvantage for the practice of the rights of the child.[417] Additionally, the best interests of the child principle, although not explicitly included, but still is stemming from the constitutional legal framework, as it operates on a child's welfare principle.[418] These provisions are significant, and could be applicable to children born through surrogacy arrangements, as regardless of the circumstances of birth, the parent- child relationship, the parent's marital status, the fundamental principles of child protection are established.

The evolution of the interpretation of children's right and surrogacy can be followed by the activity of the Constitutional Court, where the previously addressed broad interpretation of family and its protection has been underscored. Most notably, the Constitutional Court in the case I.ÚS 3226/16 of June 29 2017[419] dealt with legal issues arising from the recognition of parenthood of same-sex partners who conducted surrogacy arrangements abroad. One of the Applicants was a Czech citizen, who was married legally to the other Applicant a Danish citizen in the USA in California. The couple entered into a surrogacy arrangement there, where the surrogate mother carried and delivered their child, using an anonymous egg donor and sperm from one of the men. Neither of the Applicants was sure which of them was the biological father of the child. Upon returning to the Czech Republic the foreign birth certificate of the child was partially recognized, as the Czech Applicant became the legal father of the child, although the Supreme Court in its ruling refrained from granting recognition to the Danish Applicant, as it would be contrary to public policy. The Constitutional Court annulled this decision, as it violated the child's right to have decisions made in their best interest and the second father and child's right to family life. The Constitutional Court highlighted in its reasoning the existence of de facto family life between the parties, and that by the non-recognition the child's best interests evaluation was not primary considered, which should have been the

[417] Constitutional Act No. 23/1991 Coll., the Charter of Fundamental Rights and Freedoms, re-adopted under No. 2/1993, Art. 32.
[418] Westphalová, L. (2014). '*Princip nejlepšího zájmu dítěte'* in M. Hrušáková et al., Občanský zákoník II: Rodinné právo (§ 655−975) (Prague: C.H. Beck) 893-898.
[419] Constituional Court, case I.ÚS 3226/16 of June 29 2017.

leading benchmark during performing the balancing between the public and private interests. Additionally, welfare concerns of the child were raised, as the legal recognition of the existing family bond serves the child's interests the best. Without the legal recognition of the other Applicant, whenever the child is in his care, they may endure practical difficulties in connection with the access to healthcare, travelling to the extended family, as well as inheritance rights could be compromised.[420] The Constitutional Court in this ruling followed the established international human rights standards in surrogacy, moreover stated that the protection of the traditional family values in the Czech law could not justify refusing to recognize an already established legal parent-child relationship.[421]

The Czech constitutional framework alongside with the example of the Constitutional Court's case-law vividly illustrates the unique approach of the Czech Republic to the societal changes in family values and the formation of family. On one hand, it loyally upholds traditional family values, while on the other, it proactively seeks to adapt to societal changes brought about by ART and the ongoing gradual transformation of family structures and values.

Continuing with the criminal law framework, the Criminal Code[422] does not contain provisions criminalizing surrogacy, understandably. Similarly, to the other analyzed countries, some acts carried out during surrogacy arrangements could fit under some provisions of the Criminal Code, especially provisions concerning illegal adoption, human trafficking and exploitation.

Firstly, Title III. of the Criminal Code contains provisions related to human trafficking, which could be applicable to surrogate motherhood. Additionally, § 168 of the Criminal Code addresses human trafficking which is defined broadly, including the use of another person for various purposes, e.g. *„removal of tissue, cells, or organs from his body".*[423] § 168 on Human trafficking, although does not list adoption, as a purpose of exploitative practices, thus this paragraph cannot be directly applicable to standard surrogacy arrangements. Nevertheless, this provision reflects the Czech legal system's

[420] Ibid, para. 39.
[421] Ibid, paras 47-50.
[422] Act No. 40 of 2009 the Criminal Code.
[423] Ibid, § 168 (2) b).

concern with preventing the commercialization of the human body and exploitation of vulnerable individuals.[424]

Additionally, the provision on „Entrusting another person with a child" deems it illegal to *„entrust a child into the care of another for the purpose of adoption or for another similar purpose."*[425] This provision is mainly referring to illegal adoption practices to hand over the child to another for renumeration, and thus could potentially target commercial surrogacy arrangements More precisely, one element of the surrogacy arrangements, namely the fact of handing over the child to the intended parents could constitute a crime under this provision.[426] Nevertheless, other conduct presented in surrogacy arrangements, e.g. undergoing ART, carrying and giving birth to a child on behalf of the intended parents is not stipulated in the Criminal Code. Although the criminal legal framework is potentially applicable, especially to commercial surrogacy arrangements, until recently there had been no concrete cases that were likely to be widely publicized.[427] The recent case from 2024 about the surrogacy fraud[428] although was not prosecuted under the crimes of human trafficking nor illegal adoption.

However, a large-scale baby trafficking business between Ukraine and the Czech Republic was uncovered in February 2025, presumably operating since 2020. Criminal investigators discovered, that the operation was carried out between the clinic Kharkiv, Ukraine, formally led by medical doctor Alexander Feskov. The surrogate mothers underwent IVF, and the were transported to Prague to give birth and after the birth the children were officially registered under the names of the male clients, who then took them abroad. The entire operation bypassed legal restrictions, as surrogacy for single individuals is illegal in both countries. Clients paid between €60,000 and €75,000 for the service, while the surrogate mothers received only a small portion of that amount. Financial transactions were routed through companies registered in Cyprus and

[424] For comparative analysis about criminal law aspects of surrogacy see: Ivana Honzová and Roman Svatoš, „Surrogacy – a comparison of criminal law in the Czech Republic and the Slovak Republic," *Košická bezpečnostná revue* 11, No. 2 (2021), 48 – 59, https://kbr.vsbm.sk/2021/n2/honzova_svatos.pdf.
[425] Ibid, § 169.
[426] See: Miroslav Mitlohner and Olga Sovova, *Pravni problematika uměle lidske reprodukce.1st ed.* (Hradec Králové, 2015) 30–31.
[427] Dita Frintová and Ondřej Frinta, "Surrogacy from the Czech perspective," 959-709.
[428] See: Josef Gabzdyl, "Žena se nabízela jako náhradní matka. Páry podvedla, přes milion si nechala," *iDnes*, August 15, 2024, https://www.idnes.cz/ostrava/zpravy/nahradni-matka-policie-cr podvodnicenovojicinsko.A240815_084748_ostrava-zpravy_jog.

Switzerland. The investigation revealed that some children ended up in unsuitable conditions or were left in the Czech Republic when clients failed to collect them. Despite the extensive investigation, no charges have been filed in the Czech Republic due to unclear legislation regarding surrogacy. However, six employees of the clinic in Ukraine have been charged with human trafficking. This case highlights the urgent need for clearer laws on surrogacy to prevent the exploitation of women and children in similar schemes.[429]

4. Surrogacy in Ukraine

Ukraine is one of the few countries near Central Europe where surrogacy arrangements are permitted on a commercial basis. The practice started to intensively flourish after the other popular destinations for „surrogacy tourism" e.g. India and Thailand introduced more restrictive legal approaches to accessibility to surrogacy arrangements for foreigners. The Ukrainian legal legislation on surrogacy is scattered in multiple sources of law, and is not thoroughly regulated, which definitely creates a suitable legal environment to foreign intended parents. It is important to emphasize that surrogacy in Ukraine is not only popular due to its favorable legal framework, but also because it is cost-competitive, being significantly more affordable than in the United States.[430] The practice of commercial surrogacy has been legal there since 1997.[431] However, only gestational surrogacy is allowed, with donor confidentiality strictly upheld to protect the

[429] Alena Potocká, „Surogátne materstvo / Český kriminalisti odhalili biznis s deťmi, klientmi boli najmä homosexuálne páry a starší single muži," *Denník* Postoj, February 20, 2025, https://www.postoj.sk/170815/ceski-kriminalisti-odhalili-biznis-s-detmi-klienti-boli-najma-homosexualne-pary-a-starsi-singles-muzi

[430] Prior to the pandemic, demand for surrogacy in Ukraine steadily increased, with estimates indicating that up to 2000 children were born through surrogacy each year. However, with such rapid growth come inevitable reproductive challenges, including conflicts of interest among parties, global inequalities, and discrepancies between national legal systems. These issues become even more pronounced during times of crisis, exposing the heightened vulnerability of surrogate mothers, intended parents, and the children born through these arrangements. Crises emerged during the COVID-19 pandemic as well as the armed conflict since 2022 February, elevated the risks already involved in surrogacy arrangements, when the intended parents could not cross the borders to get to their intended child. Thus, the fragilities and the complexities surrounding cross-border surrogacy arrangements has been came to the surface.
See: Kovaček-Stanić Gordana B. and Samardžić Sandra O., "Challenges facing surrogacy today," *Zbornik Radova: Pravni Fakultet u Novom Sadu* 58, No. 1 (2024): 37, https://doaj.org/article/46e246837b9446fc9aaa1d78b96407c4.

[431] Oleg M. Reznik and Yuliia M. Yakushchenko, "Legal considerations surrounding surrogacy in Ukraine," *Wiadomości Lekarskie* 73, No. 5 (2020): 1048-1055 https://www.wiadlek.pl/wp-content/uploads/archive/2020/WLek202005139.pdf

rights of all three parties involved, the intended parents, the surrogate mother, and the child.

Ukrainian domestic law protects reproductive rights, which are firmly established in legislation and guarantee the possibility of consciously making decisions regarding the birth of children, using assisted reproductive technologies as a method of treating infertility. Although surrogacy is not comprehensively regulated.

The Civil Code of Ukraine contains several Articles regulating different types and segments of ART. The donation of blood and its components, organs and other anatomical materials, reproductive cells is carried out in accordance with the law, by an adult with legal capacity. Additionally, only 18 aged persons can become a living donor of stem cells, according to Art. 290.[432] Furthermore, *Article* 291 of the Civil Code addresses the right to family, expressing that every individual, regardless of age or health status, has the right to a family. No one may be forcibly separated from their family unless permitted by law, and all individuals have the right to be with their family members, regardless of their current place of residence. The protection from undue interference in a person's family life is strictly prohibited, except for the listed circumstances in the Constitution of Ukraine. The access to ART is available for adult man or woman for health reasons in accordance with the procedure and conditions established by law, as stipulated in Article 281(7) of the Civil Code.

The most concrete and primary regulation refering to surrogacy arrangements is addressed by the Family Code, as According to Article 123 stipulates the establishment of maternity and paternity in cases of MAR as follows: *„1. If the wife is fertilized by artificial procreation techniques upon written consent of her husband, the latter is registered as the father of the child born by his wife. 2. If an ovum conceived by the spouses is implanted to another woman, the spouses shall be the parents of the child. 3. Whenever an ovum conceived by the husband with another woman is implanted to his wife, the child is considered to be affiliated to the spouses. "*[433] The phrasing of this Article overwrites the *mater cemper certa est* Roman law principle on maternity, thus rejects that the fact of birth determines maternity in opposition of the widely accepted legal

[432] Verkhovna Rada of Ukraine. Civil Code of Ukraine.
[433] Family Code of Ukraine no. 2947-III of January 10, 2002: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5d667af64.

presumption on gestational maternity in the neighboring countries, which is based on the fact of childbirth. Additionally, this Article recognizes and focuses on the biological link between the child and the intended parents, thus opens up the possibility for surrogacy arrangements. Moreover, Article 139, Part 2 of the Civil Code aims to minimize disputes over maternity by prohibiting challenges to maternity in cases where a human embryo, conceived by a couple through assisted reproductive technologies, has been transferred into the body of another woman.[434]

The more concrete regulation on surrogacy arrangements and ART are stemming from the Order of the Ministry of Justice of Ukraine No. 52/5 of 18 October 2000, Law on the Fundamentals of Ukrainian Legislation on Health Care of November 19 1992, and the Order of the Ministry of Health of Ukraine On approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine No. 787 of 09 September 2013.[435]

The definition of ART is stemming from Order of the Ministry of Health of Ukraine "On approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine" No. 787 of 09 September 2013, and is defined as one of the assisted reproductive technologies, which allows a couple to become the biological parents of their child if one of them has congenital or acquired diseases that cause infertility. This Order in detail contains provisions on the conditions and accessibility criteria to be fulfilled in order to initiate the surrogacy program.

The conditions to carry out surrogacy involves, the justified medical reason[436], submission of required documentation[437], a genetic link with at least one of the intended

[434] Verkhovna Rada of Ukraine. Civil Code of Ukraine. https://natlex.ilo.org/dyn/natlex2/natlex2/files/download/65221/UKR-65221%20(EN).pdf

[435] International Agency. "Assisted Motherhood" : Ukranian Legislation. http://www.surrogacy.in.ua/en/legal_system_in_ukraine.html.

[436] E.g. absence of the uterus (congenital or acquired)); severe somatic diseases in which the pregnancy threatens the further health or life of the recipient, but which do not affect the health of the unborn child; unsuccessful repeated attempts at ART (4 or more times) with repeated production of high quality embryos, the transfer of which did not lead to pregnancy), etc;

[437] These might involve copy of the surrogate mother's passport; copy of the surrogate mother's marriage or divorce certificate (except for single women); copy of the child's (children's) birth certificate; consent of the surrogate mother's husband to participate in the surrogacy program; statement of the patient / patients on the use of ART; copies of passports; copy of marriage certificate; notarized copy of the written joint agreement between the surrogate mother and the woman (husband or spouse).

parents, and the surrogate mother should not have any genetic connection to the child, meaning only gestational surrogacy is allowed in Ukraine.[438]

The conditions for intended parents require that they must be a married heterosexual couple, either Ukrainian citizens or foreign nationals. Only spouses whose marriage is officially registered in accordance with the law are eligible to participate in surrogacy arrangements. Individuals, whether single or in a civil, so unregistered partnership, are not permitted to engage in surrogacy in Ukraine. They can be both citizens of Ukraine and foreigners, but a mandatory condition is that they must be a man and a woman who are married.

The conditions for becoming a surrogate mother include being a legally competent woman between the ages of 18 and 36, in good physical, mental, and social health. The surrogate must lead a healthy lifestyle, free from harmful habits. She is also required to have at least one biological child of her own, born at least one year prior to entering into a surrogacy arrangement. In addition, the surrogate mother must be a Ukrainian citizen and must submit a voluntary written application to participate in a surrogacy program. Furthermore, a surrogate mother can become the intended parents' close relative like mother, sister or cousin if she fits the above-mentioned criteria. What is additionally important, that if the surrogate mother is married, the application to become a surrogate has to be acompanied by the consent of her husband to participate in the program.[439]

Additionally, there are certain conditions, which has to be fulfilled on the side of the clinic, who can carry out the surrogacy procedure. Only those medical institutions can perform this type of ART, which are accredited by the Ministry of Health. These institutions have to posses a license to implement economic activity in medical practice, appropriate equipment and facilities, the requirements for which are established by the Order, can be the subjects of legal relations.[440]

The most decisive legal implications applicable to surrogacy arrangements are established in Decree No. 52/5 of the Ministry of Justice of Ukraine, concerning the issue how to draft the birth certificate of the intended child. The Rules of State Registration of

[438] Order of the Ministry of Health of Ukraine "On approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine" No. 787 of 09 September 2013 paragraph 1.8 and 1.7
[439] Ibid, paragraph 6.4
[440] Ibid, paragraph 1.4

Civil Status Acts in Ukraine enacted by the above-mentioned Decree, stipulates, that „*When a child is born by a woman who was implanted a human embryo conceived by the spouses as a result of the use of assisted reproductive technologies, state registration of birth shall be made upon the application of spouses who consented to such implantation. In such case, the document confirming the child's delivery by such woman shall be accompanied by a statement confirming her consent to registration of the spouses as parents, the authenticity of signature on which shall be notarized, and a certificate of genetic affinity of the parents/mother or father/ with the fetus"*[441] This regulation serves as a most distinctive and appealing feature of Ukrainian surrogacy arrangements, as the intended parents are immediately recognized as the legal parents of the child. Originally, the surrogate mother is listed on the birth certificate, alongside with the intended father, although must submit a notarized declaration requesting that the intended parents be listed as the child's legal parents. This document enables the removal of the surrogate mother from the birth certificate and the registration of the commissioning woman as the child's mother. Alongside the official birth document, the surrogate mother must submit a notarized declaration requesting that the intended parents be listed as the child's legal parents. Additionally, documentation confirming the genetic relationship between the child and at least one of the intended parents must be provided.

It is evident that Ukraine lacks a comprehensive and specific legal framework governing surrogacy, leaving significant legal gaps unresolved despite ongoing legislative efforts. One potentially valuable legislative development would be the clear definition of the form, conditions, and formal requirements for surrogacy agreements between intended parents and surrogate mothers. Currently, the structure, features and legal nature of such arrangements have largely been shaped by legal scholarship and judicial interpretation.[442]

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[441] Decree No. 52/5 of the Ministry of Justice of Ukraine on October 18, 2000, paragraph 11, chapter 1, section III

[442] The contract must be concluded in writing, although notarization is *not legally required*, but strongly recommended in practice; the parties to the arrangement shall be specifically indicated including the surrogate mother and the intended parents. If the surrogate is married, notarized written consent from her husband is required.
The agreement must be signed *before* any medical procedures are carried out in a licensed medical institution.
Additionally, confirmation is required to be included, that the surrogate mother agrees to transfer the child to the biological parents after birth, accompanied by the duty of the biological parents to register and adopt the child if necessary. If the arrangement is drafted o a financial basis, the exact renumeration to the surrogate mother shall be included, as well as the reimbursement of pregnancy- and birth-related expenses

Notably, in its decision in case No. 645/9412/14-ts dated 25 June 2015, the Kharkiv Regional Court of Appeal confirmed that surrogacy services are contractual in nature and fall under the scope of civil law. The court recognized surrogacy as a type of reproductive technology in which some or all stages of conception and early embryonic development take place outside the body of the genetic mother. Surrogate motherhood was defined as the process of artificial insemination, gestation, and childbirth performed by a woman with the aim of transferring the child to the intended parents, either with or without compensation. A surrogate mother is characterized as a woman who voluntarily agrees to carry and give birth to a child genetically unrelated to her, with the explicit intention of transferring the child to the biological parents for upbringing.[443]

Although current legislation does not explicitly mandate notarization of surrogacy agreements, the Procedure for the Application of Assisted Reproductive Technologies requires a notarized copy of a written joint agreement between the surrogate mother and the intended parents. This provision implies that the original agreement must be certified by a notary. Notarization of the arrangement is advisable taken into account the risks of possible disputes and to establish liability of the parties for breach of contract, although in judicial practice the lack of thereof does not constitute a ground for invalidating such transaction.[444]

(e.g., food, transport, housing, medical costs). It is advisable, that the financial terms are drafted in case of early contract termination or unforeseen events.

The surrogacy arrangement shall address the concrete medical interventions which might be carried out during the performance of the ART procedure and during childbirth. In connection to this, it is not unusual to include clauses addressing the surrogate mother's obligation to follow medical advice as well as to specify the lifestyle changes the surrogate mother shall refrain from during pregnancy (e.g. smoking, bad habits, sexual intercourse) in order to guarantee the healthy development of the embryo. What is a rather sensitive area, although the arrangement shall include, is the condition on the termination or non-termination of the pregnancy without consent or medical necessity. Furthermore, contingency clauses shall be drafted regarding the cases of multiple pregnancies, genetic disorders or birth defects, death of one or both intended parents, unexpected termination of pregnancy and the death of the surrogate mother. The intended parents shall have their right to information extended, to know about the surrogate's age, physical and mental health, and pregnancy progress.

Conditions regarding the termination of the contract shall include mutual termination before embryo transfer and termination due to force majeure (e.g., miscarriage, medical complications).

The potential dispute resolution and liability issues shall be clarified in the arrangement, including the clearly defined responsibilities and penalties for breach of contract.

[443] Viktoriia V. Nadon et. al., „The private-legal nature of the application of the methods of assisted reproductive technologies in Ukraine," *Wiadomości Lekarskie* 77, No. 7 (2024): 1476-1484, https://www.wiadomoscilekarskie.pl/pdf-186906-113602?filename=The%20private_legal%20nature.pdf

[444] Medical procedures related to surrogacy may only begin in a medical institution accredited by the Ministry of Health once a formal agreement has been signed between the surrogate mother and the biological

The legal framework in Ukraine is not so specific and comprehensive, on the other hand it perfectly fits to reply for the growing global demand for surrogacy services from the perspective of foreign intended parents. Firstly, Ukrainian legislation lacks a clear legal definition of surrogacy, existing only conceptually within social relations connected to modern reproductive technologies. Besides the lack of legal definition, the absence of comprehensive guidance on the concrete rights and obligations of all the subjects of the surrogacy arrangements is a significant shortcoming. This goes hand in hand with the liability standards for violations during the different stages of surrogacy arrangements, stemming from the inconsistencies and omissions of critical clauses from the arrangement. One of the most acute legal problems is that the interests of the intended children conceived through surrogacy remain largely unprotected. The legislation does not specify procedures for registering such children with the Bureau of Vital Statistics of Ukraine in these challenging circumstances, leaving their legal status and future uncertain. Without clear provisions addressing these situations, the fate of children born through surrogacy arrangements can remain in limbo, highlighting a significant gap in Ukraine's otherwise permissive surrogacy framework.

Despite significant legal gaps, international surrogacy tourism in Ukraine continues to thrive. Neither the COVID-19 pandemic nor the Russian-Ukrainian war[445] brought a definitive halt to surrogacy arrangements. While these crises highlighted the fragility of international surrogacy systems, they also underscored the remarkable adaptability and swift response of the parties involved particularly on the part of the clinics.[446] Practically,

parents. Early termination of the agreement is allowed either by mutual consent, provided it occurs before the embryo transfer, or in cases of unforeseen circumstances, such as a medically necessary termination of pregnancy, serious threats to the surrogate mother's health, or her death. In the event of the death of one of the intended parents, the agreement remains valid and unaffected. Should both intended parents pass away, they are still registered as the legal parents of the child, and custody is determined according to the relevant provisions of Ukrainian law.
See more in: Alla Anatoliivna Herts, "Surrogate motherhood in Ukraine: method of infertility treatment, judges' activism and doctrine" in *Fundamental Legal Problems of Surrogate Motherhood: Global Perspective*, ed. Piotr Mostowik (Wydawnictwo Instytutu Wymiaru Sprawiedliwości, 2019) 435.

[445] For more about the surfaced extra vulnerabilities and risks in wartime see: Zsófia Nagy and Andrea Erdősová, „Surrogacy in Wartime," *PRAWO I WIĘŹ* 49, No. 2 (2024):185-207, https://doi.org/10.36128/PRIW.VI49.595.and S. Marinelli et. al., "The armed conflict in Ukraine and the risks of inter-country surrogacy: the unsolved dilemma," *European Review for Medical and Pharmacological Sciences* 26, No. 16 (2022): 5646-5650, https://pubmed.ncbi.nlm.nih.gov/36066135/

[446] The adaptability of the „surrogacy industry" is notable, highlighting the strong supply-and-demand dynamics of reproductive tourism, a trend that is likely to continue in the coming years. This reflects broader social changes in how family is defined and established, as well as the postponement of childbearing among

the minimal but enabler legal environment is practically governed by subjects of the surrogacy arrangements, where the intermediaries and the clinics take a leading role in carrying out the procedures. It is the case in Ukraine also, the fertility clinics take the leading role in connecting the intended parents with the most suitable surrogate mother. These organizations and clinics oversee and guide the entire surrogacy process. Starting from identifying and screening surrogate mothers, to providing infertility treatments, prenatal and delivery care, and ongoing support for the surrogate. They also offer administrative services for intended parents, including travel and accommodation arrangements, and assistance with documentation and legal procedures. The overall cost typically covers all of these services and is structured according to an individualized plan.[447]

The phenomenon of surrogacy is very dynamic in practice as well as in legislation, at the same time remains the most popular destination for reproductive tourism in Europe.[448]

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younger generations. Demographic challenges suggest a need for reform in reproductive trends, in which surrogacy may play an increasingly significant role. Age-related factors and evolving lifestyle trends also indicate ART will continue to be widely utilized. Basically, despite the most recent crises presented by the pandemic and the war, and the introduction of prohibitive legislation, the surrogacy clinics and those involved presented great skills of adaptability, and relocated or reformed their functioning framework. These interconnected supply chains (reprowerbs) posess great flexibility and rediness in order to continnue their operation through several practices (e.g. surrogate mothers traveling to countries that allow same-sex surrogacy, receiving treatment and giving birth there to circumvent restrictions, relocating of fertility clinic and staff, transporting surrogates.). Such adaptibility create elevated risk and vulnerability factors regarding the legal certainity, limited oversight, power inbalances.
See more about the surrogacy and the reproweb operations in:
Kovaček-Stanić Gordana B. and Samardžić Sandra O., "Challenges facing surrogacy today," *Zbornik Radova: Pravni Fakultet u Novom Sadu* 58, No. 1 (2024): 37, https://zbornik.pf.uns.ac.rs/wp-content/uploads/2024/06/doi_10.5937-zrpfns58-49040.pdf.

[447] The websites of concrete clinics facilitate the intermediary and preparatory processes. See: „Surrogacy easy way to baby born in 2025 with Feskov surrogacy agency", FESKOV, https://www.mother-surrogate.com/ and https://biotexcom.com/category/surrogate-motherhood/

[448] The most relevant legal and research initiatives include: On Amendments to Certain Legislative Acts of Ukraine Regarding the Protection of Children's Rights When Using Assisted Reproductive Technologies (Draft Law No. 8625 from 18 July 2018) by People's Deputies P. Ya. Unguryan, O. V. Bilozir, I. V. Sysoenko, Yu. I. Solovei, M. I. Lavryk, and O. Yu. Kryshyn; Draft Law No. 3488 (from 15 May 2022) initiated by People's Deputy of Ukraine O. A. Danuts; Draft Law No. 6517 proposing amendments to the Criminal Procedure Code (from 13 January 2022) by S. Antonov, PhD;
Additionally, the Committee on National Health, Medical Care and Health Insurance initiated a series of draft laws: „On Assisted Reproductive Technologies" (Draft Law No. 6475, 2021); „On the Application of Assisted Reproductive Technologies" (Draft Law No. 6475-1, 2022); „On the Use of Assisted Reproductive Technologies and Surrogacy" (Draft Law No. 6475-2, 2022).
See: Khrystyna Maikut et. al., "Legal regulation of surrogacy: International experience, status and prospects for development in Ukraine," *Social and Legal Studies* 7, No. 3 (2024): 169-177, https://sls-journal.com.ua/en/journals/tom-7-3-2024/pravove-regulyuvannya-surogatnogo-materinstva-mizhnarodniy-dosvid-stan-ta-perspektivi-rozvitku-v-ukrayini

Although, the national legislation is not without flaws, the ,,under regulation" at the same time creates an adequate environment for the practice to bloom. Regardless, the relatively unproblematic execution of the surrogacy arrangements from beginning to finish in Ukraine, the real factual and legal obstacles arise on the way home, when the intended parents try to establish their legal parental status to the intended child. The interests of both national prohibitive legislation and the intended parents' desire to unite their family are legitimate. Unfortunately, it is often the child who ends up caught in the middle, as two seemingly irreconcilable moral arguments clash above their head. As surrogacy increasingly crosses international borders, the international community should take legislative initiatives to address the critical issues and, at the very least, emphasize the shared interest at the heart of the matter, the well-being of the child, even when the practice is legally discouraged by the nation state.

5. Surrogacy in the United Kingdom

The UK can serve as another intriguing example on what kind of normative pathway a state can choose when framing the national legal landscape on ART and surrogacy. An argument for providing insight on the UK legislation on surrogacy to the comparative chapter is that, the UK has a long-standing legal tradition on these issues, as since the emergence of these new techniques, it has carefully tried to tackle the issue both through scientific debate from both the bioethical and legal disciplines. Furthermore, besides the legislation, the UK has considerable experience with regulating non-commercial surrogacy, as well as substantial case-law.[449]

The overall approach of the UK to the new ART is quite spectacular, as instead of the inherent prohibitively cautious reaction from other European countries, or the lack of reaction, UK has chosen to follow the permissively cautious pathway, opting to directly regulate ART and surrogacy. This has not become a surprise, as the UK has been quite liberal and acceptive of other issues related to reproductive rights, like abortion.[450] We

[449] See more case law on p. 68 of the dissertation.
[450] Their first Abortion Act from 1967 confirms the above-mentioned liberal approach, as the Act advocates for the decriminalisation of abortion, although did not definitely decriminalized it. Rather, the Act has established clear circumstances and fix legal conditions for legally carrying out abortions. According to the

can assume that the UK has regarded IVF, ART, and surrogacy as a natural and necessary development of medicine. Accordingly, when regulating these issues, the focus was placed on their practical use and on how these scientific advancements could be beneficially applied in society.[451]

Basically, the UK comprehensively regulate the issue of ART and surrogacy in the Surrogacy Arrangements Act of 1985 and the Human Fertilisation and Embryology Act from 1990 and 2008. Although, prior to the enactment of these laws, these topics have been widely debated on both the scientific and political forums. Since the birth of the first ,,test-tube baby" Louse Brown, many ethical and considerations and reports by experts has been presented. The most intriguing among them is, perhaps, the Warnock Report[452] from 1984, which comprehensively analyzed what are the ethical and moral implications of the new reproductive techniques. Triggered by the mixed reactions to the successful IVF treatments as well as the birth of Louise Brown, the UK Government requested a special committee to research the potential outcomes of the utilization of the new ART, their effect on society, reproductive medicine and the law. The Committee of Inquiry into Human Fertilisation and Embryology, lead by outstanding philosopher Baroness Mary Warnock and development biologist Anne McLaren, collected evidence-based data from the representatives of different sciences and communities, i.e. medicine, biology, anti-abortion groups, church members. The Warnock Report addressed a great number of topics including status of the embryo, embryo research, assisted reproduction, infertility, gamete donation, anonymity, storage of gametes which influenced the current legislation in the UK. The Warnock Report was published in 1984 containing 64 recommendations to the above-mentioned subjects. One of the groundbreaking outcomes was the determination of the status of the human embryo, finding that *,,the embryo of the human*

Act the based on the opinion of two medical practitioners, a registered medical practitioner can carry out the termination of pregnancy up to the 24th week of pregnancy if its continuation would risk the physical or mental health of the pregnant woman or any of her existing children. Also, abortion can be carried out without time limit if the pregnancy risks the woman's life, to prevent grave permanent injury to the physical or mental health of the woman, or if the child would be born with substantial risk of mental or physical abnormalities.
See: Abortion Act 1967, Available online: https://www.legislation.gov.uk/ukpga/1967/87/section/1

[451] Navratyil, *A varázsló eltöri a pálcáját*, 71.

[452] Mary Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (London: Her Majesty's Stationery Office, 1984).

species ought to have a special status"[453]. Additionally, the Warnock Report suggested strict oversight on the research on embryos, and determining a time limit for research to the first 14 days of the embryo development. The 14-day principle became internationally influential and was later enshrined in UK law in the Human Fertilisation and Embryology Act 1990. It also introduced regulation in three key areas of assisted conception, the creation and use of embryos outside the body via IVF, the use of donated gametes in treatment, and the storage of embryos, sperm, and eggs. This stance was later reflected in the Human Fertilisation and Embryology Act of 1990, which was detailly shaped by the findings of the Warnock Report.[454] The Human Fertilisation and Embryology Act established the Human Fertilisation and Embryology Authority, the world's first independent regulator in this field. The report also inspired the creation of the Progress Educational Trust in 1992, a charity dedicated to public debate and policy on reproductive and genetic science.[455]

Since its publication, the Warnock Report has continued to shape debate and policy on the bioethical advancements in reproductive medicine.[456] In the topic of surrogacy was also addressed. It defines surrogacy as an arrangement in which a woman carries a child for another person or couple, with or without genetic connection, often involving payment, which shall be carried out only as a last resort. The Report has foreseen potential legal conflicts, but siding with the sentiment to guarantee protection to the surrogate mother if she decides to keep the child after birth, thus rendering the enforceability of the surrogacy arrangement to be avoided. The Report expressed objection towards surrogacy, based on three arguments. Firstly, the confusion of the parent-child relationship, secondly the disruption of the emotional bond developed between the surrogate mother and the child

[453] Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology,* 90.
[454] Jacqui Thornton, "The Warnock Report: 40 Years On," *The Lancet*, 404 no. 10440 (December 21/28, 2024): 2501–2502.
[455] Ibid. p. 2501
[456] It encouraged reflection on whether the conclusions reached in 1984 remain adequate or whether they should be reconsidered in light of new ethical and scientific developments. Marking its 40th anniversary, the Progress Educational Trust organised a conference that revisited the Report's key questions about the embryo's status. The conference was aimed at motivating the inclusion of the new generation of professionals to reimagine the findings. Besides, the Human Fertilisation and Embryology Authority proposed extending the permissible limit for embryo research from 14 to 28 days. The argument for initiating this change is, that it could propose enhancement success rates for IVF and support scientific research in embryology.
See more in: Thornton, *The Warnock Report: 40 Years On*, 2501–2502.

developing in her womb, and lastly the additional risk for the surrogate mothers to be used as means to an end, opening up a path for exploitation. Adding the legal unenforceability and the foreseeability of the outcomes, the report opposed surrogacy arrangements, as well as recommending to establish criminal liability for surrogacy arrangements and their facilitators.[457]

Despite the initial discouragement from introducing surrogacy arrangements as a viable option for infertility treatment, the Surrogacy Arrangements Act of 1985 and the Human Fertilisation and Embryology Act of 1990 and its revision, the Human Fertilisation and Embryology Act of 2008, governs surrogacy arrangements. Based on these, the UK system opted for allowing altruistic and not legally enforceable surrogacy arrangements. Moreover, the Surrogacy Arrangements Act of 1985 explicitely discourages commercial surrogacy including activities connected with the advertisement of commercial surrogacy services, acting as a surrogate mother for monetary compensation and acting as an intermediary.[458]

Human Fertilisation and Embryology Act list the actual circumstances for accessing surrogacy arrangements as well as navigates the legal aftermath of the parental status of the subjects involved. The UK system runs on an ex-post recognition model of surrogacy arrangements.[459] More precisely, the intended parents must apply for parental order at the court, which requests the transfer of the legal parenthood to the intended parents from the surrogate mother. We see that the parenthood of the intended parents is not automatic, a court has to carry out an assessment when changing the legal parent-child relationship.[460]

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[457] Warnock, *Report of the Committee of Inquiry into Human Fertilisation and Embryology,* 46-47.
[458] Surrogacy Arrangements Act of 1985 points 2-4.
[459] Dufalová, *Surogačné materstvo,* 125.
[460] Additionally, the provisions of the Adoption and Children Act provides a welfare checklist, which navigates the evaluation of the best interests of the child in adoption, but analogically it can be applicable during the request of the parental order in surrogacy cases.
The Checklist sets out seven factors for the court's assessment, including the child's wishes and feelings, their physical, emotional, and educational needs, and the likely impact of any change in circumstances. It also requires consideration of any harm the child has suffered or may be at risk of suffering, as well as an evaluation of the ability of the intended parent or parents to meet the child's needs. Finally, the court must take into account the range of powers available to it when determining the most appropriate order.
Based on this the child's welfare must be assessed from a lifelong perspective rather than solely during childhood, it is no longer merely one factor among many the paramouth consideration of the child's best interests means, that the child's concerns are an overriding priority in all decision-making processes instead, the child's best interests are given overriding priority in these situations. Although, the paramouth consideration of the best interests of the child assessment, can rarely be the case of denial of the parental order. This „inability" to refuse parental orders based on the best interests of the child has been observed in

Nevertheless, granting the parental order is subjected to specific statutory conditions, which have to be met. The applicants must both be at least eighteen years of age at the time of the application, and if there are two applicants, they must be either married, in a civil partnership, or in an enduring family relationship. At least one applicant must be domiciled in the United Kingdom, the Channel Islands, or the Isle of Man at the time of the order, and the gametes of at least one of them must have been used in the creation of the embryo. The application must be handed in more than six weeks but fewer than six months after the birth of the child, who must be living with the applicants at the time of the proceedings. In addition, the surrogate mother must give free consent to the application of the order no earlier than six weeks after the birth. Finally, no money or benefit beyond the reimbursement of reasonable expenses may have been given or received by the applicants in connection with the arrangement, the handover of the child, or the granting of the order.[461]

We can see, that the UK system has introduced a protection mechanism towards the surrogate mother, as application for the parental order cannot be made immediately after birth, but the intended parents have to wait 6 weeks, during which time the surrogate must also provide her consent to the transfer of parental status. This safeguard ensures that the surrogate obtains a degree of leverage, that she would be the one ultimately deciding about keeping or not keeping the child.[462]

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the case law, especially in Re L (a minor) [2010] EWHC 3146 (Fam). In this case the British intended parents wanted to achieve legal recognition of the parenthood to the child born from commercial surrogacy arrangement in the USA. The Court granted the parental order retrospectively, thus basically authorising the effects of foreign commercial surrogacy in the UK, although without granting the parental order, the foreign child would be left stateless and parentless. Hedley J acknowledged the conflict between jurisdictions, while the payments were lawful in Illinois, they were unlawful under the UK's Human Fertilisation and Embryology Act 2008. Nevertheless, the court prioritised the child's best interests over the strict prohibition on commercial surrogacy. Anyhow we can see, that the value balancing is very hard and delicate if on one side we have a child without legal parents, and on the other hand public policy on prohibition of commercial surrogacy. Once the child is here, the court is ought to be more flexible and prioritize the child in expense for bending the public policy concerns. Moreover, in the case of Re P-M [2013] EWHC 2328 (Fam), the court held that *"if the granting of a parental order is in the best interests of the child, the court would only consider refusing it in the event of a clear abuse of public policy."* Unless such an abuse is demonstrated, the court should issue a parental order whenever it serves the child's welfare.
See more in: Bianca Olaye-Felix, Deborah Emma Allen, and Neil H. Metcalfe, "Surrogacy and the Law in the UK," Postgraduate Medical Journal 99, no. 1170 (April 2023): 358–62.

[461] Human Fertilisation and Embryology Act 2008 p. 54, 54-A, 55.

[462] The tendency of giving parental orders have been substantially rising since 1995. While in 1995 yearly 33-50 parental orders were granted, although in 2011 yearly 149 parental orders were granted. Some authors caution the latency in the surrogacy arrangements. See more in: Wendy Norton et al., "A Survey of UK

In practice, there have been cases when the parental order was not given and the child remained with the surrogate mother. In the case of Re TT[463] the surrogate mother and the intended parents drafted a surrogacy arrangement after they got in touch online. Here traditional form of surrogacy was carried out, thus the surrogate mother was inseminated by the intended parents sperm. During the pregnancy the relationship between the parties deteriorated causing the surrogate mother to change her mind and wanting to keep the child. Because surrogacy arrangements are not legally enforceable, the commissioning parents had no means of securing legal parenthood before the child's birth. After the birth, they therefore applied for a Residence Order in order to obtain legal recognition as the child's parents. The court awarded recognition of parenthood to the surrogate mother, governed by the fact of biological relation as well as the guiding welfare principle of the child. The child in the early developments is very sensitive, thus based on the attachment to the surrogate mother, breastfeeding, and the potential emotional harm which the separation may cause rendered the court to deny the parental order of the intended parents.[464]

If we look at the current cases, it is worth highlighting the Re Z (Foreign Surrogacy) from 2024, which involved a same-sex couple as intended parents engaging into foreign surrogacy. The intended parents were UK citizens and travelled to Cyprus to visit a surrogacy agency. Although, in Cyprus it is prohibited to carryout surrogacy arrangements for same-sex couples, the intended parents were assured the procedures will take place regardless. The arrangement involved an anonymous egg donor, one intended father's gametes, and a surrogate introduced by the agency. The surrogate carried the child, who was later born in a different country to ensure passport acquisition. She was unaware of the intended parents' same-sex relationship until after the birth but nevertheless supported their application. The court highlighted the requirements to grant parental order under the section 54 and 54A of the Human Fertilisation and Embryology Act 2008. There were

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Fertility Clinics' Approach to Surrogacy Arrangements," Reproductive Biomedicine Online 31, no. 3 (2015): 327–38

[463] Re TT (a Minor) [2011] EWHC 33 (Fam)

[464] Mr Justice Baker elaborated on the attachment between the surrogate mother and the child, and its importance as *„...natural process of carrying and giving birth to a baby creates an attachment which may be so strong that the surrogate mother finds herself unable to give up the child".*
See more in: Amel Alghrani, "Surrogacy: 'A Cautionary Tale': Re T (a Child) (Surrogacy: Residence Order) [2011] EWCH 33 (Fam)," Medical Law Review 20, no. 4 (2012): 631–41

problematic and unclear actions in regards to the time frame of the application, the payment made for the foreign agency as well as the required consent of the surrogate mother. The circumstances of the case were clearly not ideal involving several mis-steps and a hidden intention to circumvent UK law on surrogacy. The most troubling issue was that the arrangement deliberately circumvented restrictions in the agency's home jurisdiction and involved concealing the intended parents' relationship status. Judge Theis criticised the couple for ignoring clear warning signs and shifting responsibility onto the agency. Nonetheless, denying a parental order on public policy grounds would have harmed the child's lifelong welfare by leaving her legal status unresolved. Nevertheless, the paramoucity of the child's welfare principle ultimately motivated the court to secure the legal relationship with the intended parents. The case, however, stands as a cautionary reminder that surrogacy arrangements abroad can generate significant ethical, legal, and practical challenges, and that the intended parents must carefully assess risks before deciding upon such arrangements.[465]

We can see that the approach of the UK to regulate surrogacy is ambitious and normatively sound with strict requirements and clear boundaries, this does not necessary mean striking the optional balance between the public policy concerns and the child's best interests principle. Although, to access surrogacy arrangements as an option to have a child is very broad, meaning it is a viable option for couples or individuals, they may be heterosexual or same-sex couples in a marriage, civil partnership or living together, or individuals regardless of their relationship status.[466] Regardless, intended parents often pursue surrogacy arrangements abroad, which are the primary source of legal risks. In 2023, the Law Commission of England and Wales together with the Scottish Law Commission published their final report on surrogacy, recommending substantial reforms to UK law, where they advocated for a *new pathway* under which intended parents would be recognised as the child's legal parents from birth, provided the surrogate had not withdrawn consent. This pathway, limited to domestic arrangements, would be overseen

[465] Re Z (Foreign Surrogacy) EWFC 304 (24 October 2024)

[466] The Surrogacy Pathway: Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales, GOV.UK (updated April 25, 2024), "Surrogacy and the Legal Process for Intended Parents and Surrogates in England and Wales," accessed [12 July 2025], https://www.gov.uk/government/publications/having-a-child-through-surrogacy/the-surrogacy-pathway-surrogacy-and-the-legal-process-for-intended-parents-and-surrogates-in-england-and-wales

by Regulated Surrogacy Organisations, responsible for approving agreements before conception. In cases outside this framework a revised version of the current parental order process would determine legal parentage.[467] Upon revisiting the legal framework on surrogacy in the UK, a forthcoming POSTnote will examine current UK surrogacy practices and reform proposals, drawing on research evidence and stakeholder perspectives from both domestic and international contexts. It will also address the ethical, social, and medical dimensions of surrogacy, including issues of access and the rights of surrogates, intended parents, and children. Work on this POSTnote is scheduled to begin in September 2025, with publication planned for January 2026, and stakeholder submissions will close on 5 October 2025.[468]

Conlcusively, we can evaluate that the UK has developed a distinctive, cautious, and highly regulated framework for surrogacy, rooted in the Surrogacy Arrangements Act 1985 and the Human Fertilisation and Embryology Acts of 1990 and 2008, all shaped by the Warnock Report. The UK's approach to accept and positively regulate the new biotechnological advancement was fairly ambitious, although regardless of the good intentions and tolerance, the ethical, moral and legal controversies deeply embedded into surrogacy arrangements are still emerging. As the case law demonstrated courts consistently upholds the best interests of the child, sometimes even authorising payments beyond reasonable expenses or tolerating procedural defects, while still condemning attempts to circumvent UK law through foreign surrogacy. The question remains, that even a proactive and cautious approach to surrogacy arrangements present significant challenges. How shall we as a society address them? The UK has offered a clear response by continually revisiting the underlying concerns, re-evaluating earlier ideas, and fostering public and expert debate aimed at shaping a bioethical framework acceptable to its citizens.

[467] Law Commission of England and Wales and Scottish Law Commission, Building Families through Surrogacy: A New Law. Volume I: Core Report, Law Com No. 411, Scot Law Com No. 262, HC 1236, SG/2023/76 (London: The Stationery Office, 2023).
[468] "Approved Work: Surrogacy – Current Practice and Proposed Reforms," POST, UK Parliament, published August 1, 2025, accessed [24 August 2025], https://post.parliament.uk/approved-work-surrogacy-current-practice-and-proposed-reforms/

6. Surrogacy and the European Union[469]

We have established the complexities cross-border ART and especially surrogacy arrangements encompass, thus this phenomenon has been addressed in the field of the EU. It is crucial to understand that the EU lacks competence in the field of substantive family law harmonization. The Maastricht Treaty of 1992 enabled the EU to navigate and create political cooperation between member states, focusing on the protection of European citizens' political and economic rights and their free movement. Additionally, based on the Charter of Fundamental Rights, the EU shapes social rights in relation to family protection, non-discrimination, human dignity, protection of marriage, and the best interests of the child. It is an ongoing debate whether the EU can become an adequate field in navigating the surrogacy issue, as it does not have competence in shaping substantive family law, and the member states understandably hold on to their national values in the field of family law. This approach demonstrates that the EU generally refrains from imposing legally binding solutions for substantive family matters or bioethical questions related to assisted reproductive technologies. Ultimately, the cross-border reproductive care situations challenge international regulations regarding birth certificate registration and recognition of legal parentage established abroad.

Although, he contemporary European legal and ethical landscape lacks a unified regulatory approach, resulting in a fragmented patchwork of national laws that range from strict prohibition to permissive regulation. At the heart of this regulatory divergence lies the fundamental principle that substantive family law remains the exclusive competence of EU Member States.[470] However, the EU's core freedoms, particularly the free movement of persons and services, have created opportunities and challenges in cross-

[469] Hereinafter: EU.

[470] The EU has the right to act in accordance with the principles of the division of competences in cases with cross-border implications. The founding treaties of the EU, specifically the Treaty on the Functioning of the European Union (TFEU), stipulates the legal basis for the possibility of action in such matters.
Article 81(1) of the TFEU stipulates, that *„The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States."* Additionally, Article 81(3) of the TFEU creates the possibility to strengthen judicial cooperation in family matters that have cross-border elements, so the Council may implement relevant measures. This power can only be exercised following a proposal submitted by the Commission, and requires both unanimous agreement among all Council members and consultation with the European Parliament through a designated *special legislative procedure*.

border reproductive care and family formation. This tension between national sovereignty in family matters and the EU's jurisdiction over cross-border implications exemplifies the delicate balance that characterizes EU governance in sensitive social domains.[471]

The current legal landscape is diverse, so are the EU initiatives, as thorough the last 10 years the EU has been showcasing hesitancy in its initiatives varying from supporting to strictly hindering surrogacy arrangements. Understandably, the EU's approach aligns with the political constellation of each of its functioning institutions. Surrogacy has been a subject of ongoing discussion at both the European Commission[472] and the European Parliament[473], alongside relevant jurisprudence from the European Court of Justice[474].

6.1 EU initiatives

The EU's early concerns regarding ART were articulated in the 1988 Rothley Report[475] and Cassini Report[476]. These documents explicitly opposed scientific experimentation on embryos unless such procedures directly benefited the embryo's health and development. They emphasized that human beings must not be treated as objects and that their inherent dignity must be respected. Significantly, these reports advocated for the protection of the right to life beginning at conception.[477]

Initial considerations from the side of the EU were skeptical towards surrogacy practices, thus rejecting surrogacy as a whole, on the rationale of commodifying woman and their reproductive role, as well as the exploitation of the human body for financial or other gains, respectively harming vulnerable groups of society in the developing countries.[478] As time progressed, the underlying issues stemming from cross-border surrogacy surfaced, and thus the EU institutions tried to develop a feasible and pragmatic approach to tackle the key problems.

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[471] Anica Čulo Margaletić, Barbara Preložnjak and Ivan Šimović, "Presumptions of Motherhood on Crossroad of Surrogacy Arrangements in EU." *EU and Comparative Law Issues and Challenges Series (ECLIC)* 3, (2019): 799, https://doi.org/10.25234/eclic/9031.
[472] Hereinafter: EC.
[473] Hereinafter: EP.
[474] Hereinafter: CJEU.
[475] A.2-327/88 of the European Parliament on genetic engineering
[476] A.2-372/88 on artificial insemination
[477] Gábor Jobbágyi*, Az élet joga - Abortusz - eutanázia - művi megtermékenyítés* (Szent István Társulat, 2004) 82-83.
[478] 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 (2015/2229(INI) para. 115.

Although, legal issues stemming from surrogacy arrangements has appeared before the judiciary of the CJEU, focusing mainly on the rights of social nature, involving the subjects of such arrangements.[479] Among the cases we are ought to highlight the *Pancharevo case*[480] at is contains significant implications applicable to cross-border establishment of family, as well as unconventional family forms within the EU. The case involved a same-sex couple, a Bulgarian citizen and a British national, who had a child in Spain via assisted reproduction. The child was issued a Spanish birth certificate, listing both women as her legal parents. When the couple attempted to obtain a Bulgarian birth certificate, the Bulgarian authorities refused to recognize both mothers as parents, stating that Bulgarian law does not recognize same-sex marriage or parentage. The authorities argued that issuing a birth certificate with two mothers would be against Bulgaria's public order, based on national constitutional principles defining family as a union between a man and a woman.[481] The outcome of the Pancharevo case was significant also in connection to the applicability of the public policy exemption. The ruling underscored that when a child is an EU citizen and has a birth certificate issued by the competent authorities of the host member state that designates two persons of the same sex as the child's parents, the member state of which that child is a national is obliged to issue to that child an identity card or passport without requiring a birth certificate to be drawn up beforehand by its national authorities. Additionally, recognition is required, as is any other member state, of the document from the host member state that permits that child to exercise, with each of the two persons, the right to move and reside freely within the territory of the member

[479] The cases directly referring to surrogacy arrangements mostly had dealt with the applicability of social rights for the intended mothers. Firstly, the case *C-167/12, C.D. v. S.T* (18 March 2014) addressed maternity leave rights for intended mothers, where the CJEU ruled that EU law does not require maternity leave for women who become mothers through surrogacy. The decision highlighted the gap in labor law protections for intended parents. Similarly, the *case C-363/12, Z v. A Government Department* (Judgment of the Court Grand Chamber, 18 March 2014), touched upon the potential discrimination of intended mothers, whom maternity leave was denied. The CJEU in its ruling expressed, that maternity leave protections apply only to biological or adoptive mothers. The judgment reinforced state discretion in regulating surrogacy-related employment rights.

[480] C-490/20 - Stolichna obshtina, rayon "Pancharevo" (14 December 2021)

[481] More about the examination of the public policy exemptions see: Dominika Moravcová, „Výhrada verejného poriadku v kontexte náhradného materstva v rozhodovacej činnosti súdov SR a iných členských štátov EÚ," *Justičná revue* 75, No. 8-9 (2023): 913 – 935, https://www.legalis.sk/sk/casopis/justicna-revue/vyhrada-verejneho-poriadku-v-kontexte-nahradneho-materstva-v-rozhodovacej-cinnosti-sudov-sr-a-inych-clenskych-statov-eu.m-3687.html

states.[482] Subsequently, the EU member states must recognize the parenthood of a child as established in another member state for the purpose of the right that the child derives from EU law, under the union law of free movement including directive 2004/38/EC, although not for the purpose of national law.

This approach has been expressed in the European Certificate on Parenthood[483] proposal from 2022. This proposal aimed to strengthen the protection of children's rights in cross-border situations and ensure legal certainty regarding international jurisdiction and applicable law for establishing parenthood applicable in cases of cross-border surrogacy as well as families of homosexual couples, where there is a risk of non-recognition in the national law of the member state. The proposed regulation intended to cover recognition of parenthood „*irrespective of how the child was conceived or born and irrespective of the type of family of the child*," including children born through surrogacy arrangements. Its central principle is that „*a court decision concerning parenthood issued in one Member State shall be recognized in all other Member States without any special procedure being required".*[484] Some of the member states expressed concerns in the reasoned opinion during the scrutinizing phase[485] of the legislative process, Italy and France argued against the compliance with the principle of subsidiarity, as the proposal does not adhere to the principles of subsidiarity and proportionality, particularly because it allows invoking public order grounds only on a case-by-case basis and does not provide for its invocation to deny recognition of the European Certificate of Parenthood.[486] The public policy concerns, as well as the limited competence of the EU to shape substantive

[482] Ibid, para. 69.

[483] Proposal for a Council 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 (COM2022 695), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0695

[484] Ibid.

[485] Based on the Article 5.3 of the Treaty on the European Union, national parliaments review EU draft legislation through a proactive oversight mechanism known as the „early warning system." This ex ante process enhances their supervisory role in EU lawmaking by allowing them to submit formal reasoned opinions to the Presidents of the European Parliament, Council, and Commission. These opinions must explain why they believe a proposed legislative act violates the principle of subsidiarity and must be submitted within an eight-week timeframe after receiving the proposal.

[486] Hélène de Lauzun, "French Senate Rejects European Regulation On Parenthood," *The European Conservative*, May 2, 2023, https://europeanconservative.com/articles/news/french-senate-rejects-european-regulation-on-parenthood/ and *Alessia Voinich,* "The Italian Senate against the EU proposal for a Regulation in matters of parenthood," *Famimove*, April 19, 2023, https://famimove.unimib.it/the-italian-senate-against-the-eu-proposal-for-a-regulation-in-matters-of-parenthood/

family law, this proposal although gained support from the EP, the Council of the EU by unanimity has to reach an agreement and accept the proposal in order step into force. Ultimately, the threshold of unanimity is fairly unlikely to be achieved in such a delicate and controversial topic, thus the proposal is probably destined to be shelved.[487]

Besides the pro-recognition of foreign birth certificates on the rationale of child protection, the most recent development within the auspices of the EU is pointing to the completely opposite direction. The European Parliament on 23 April 2024, voted for introducing an amendment to the Directive on preventing and combating trafficking in human beings[488] in order to extend the exploitation of surrogacy as a minimum practice in trafficking of human beings. The Amendment[489] was published in the Official Journal on 24 June 2024, stipulating, that *„The exploitation of surrogacy, of forced marriage or of illegal adoption can already fall within the scope of offences concerning trafficking in human beings as defined in Directive 2011/36/EU, to the extent that all the criteria constituting those offences are fulfilled".* Thus, surrogacy could qualify under the umbrella term of „trafficking in human beings", expressed in the Directive. The Member states have the obligation to criminalize such conduct by ensuring punishment by effective, proportionate and dissuasive penalties. Surrogacy falls within the new types of exploitation if reaches the threshold of reproductive exploitation. The Amendment states, that although the Directive has already been applicable to surrogacy to the extent that all the criteria constituting those offences are fulfilled, in order to effectively tackle those surrogacy practices which targets those who coerce or deceive women into acting as surrogate mothers.[490] The Co-rapporteur Eugenia Rodrigez Palop welcomed the more comprehensive and nuanced changes introduced to the Directive. With the emergence of new forms of exploitation, EU law has to adapt to these changes in order to effectively

[487] FAFCE, „European Certificate of Parenthood : no clear solution to the deadlock," *FAFCE*, March 14, 2025,
https://www.fafce.org/european-certificate-of-parenthood-no-clear-solution-to-the deadlock/#:~:text=For%20reminder%2C%20the%20European%20Commission,of%20this%20regulatio%20is%20the

[488] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (hereinafter: Directive)

[489] Directive 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

[490] Ibid.

combat the newly arising challenges. She elaborated, that *„Twelve years after adopting the directive, MEPs have had to overhaul EU rules, as trafficking has become more sophisticated and the resources at our disposal remained rudimentary. We need to be able to find victims early, and protect and support them. Trafficking is torture; perpetrators must pay for what they have done and victims must receive compensation and redress for their suffering."*[491] It is important to highlight, that the Directive has not introduced a *blanket ban* on surrogacy practices, only those which meet the criteria of *„coercion or deception of women"* and the additional criteria which meets the threshold of exploitation and trafficking. The Amendment states that the inclusion of surrogacy to the Directive was made „ *without prejudice to the national rules on surrogacy, including criminal law or family law."*[492] Conclusively, those member states, where surrogacy is allowed, can preserve their national competence in shaping their legislation on ART and surrogacy, as long as the ongoing surrogacy arrangements does not involve coercion, deception and exploitation.

The voting ratio demonstrates, that the revision was much needed in reference to the development of political, social and legal debate on surrogacy and its link to exploitative forms, although experts argue, that the term „exploitation" still leaves space for interoperation, which can undermine the potential uniform applicability of the Directive. Furthermore, an additional weakening aspect is that surrogacy does not apply to children born through surrogacy arrangements, unless the surrogate mother is a child. This distinction can be subjected to criticism as, regardless of the form of surrogacy, the child is a subject of an act of disposal, thus is commodified. This indicates the potential application of international legal documents of slavery.[493]

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[491] News European Parliament, „Trafficking in human beings: MEPs adopt more extensive law to protect victims," *News European Parliament*, April 23, 2024, https://www.europarl.europa.eu/news/en/press-room/20240419IPR20580/trafficking-in-human-beings-meps-adopt-more-extensive-law-to-protect-victims.

[492] Directive 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 para. (6).

[493] European Institue of Bioethics, „The European Parliament lists "the exploitation of surrogate motherhood" as an act of human trafficking," *European Institue of Bioethics,* May 31, 2024, https://www.ieb-eib.org/en/news/early-life/surrogacy/the-european-parliament-lists-the-exploitation-of-surrogate-motherhood-as-an-act-of-human-trafficking-2255.html

Conclusively, the most recent development under the auspices of the EU mirrors inherent dichotomy surrogacy embodies within contemporary society. On one hand surrogacy provides an opportunity for individuals and couples confronting either social or medical infertility to fulfill their profound desire and longing for a child. On the other hand, the practice, particularly when operating within market-based frameworks, which can exhibit exploitative characteristics whereby the human rights of vulnerable and socioeconomically disadvantaged women may be violated, as well as the intended child.

The EU evidently sensed this dichotomy, which explains simultaneous advancement of two seemingly contradictory initiatives regarding surrogacy at the policy negotiating table. The EU draws a distinction between ethically acceptable surrogacy arrangements and exploitative practices by incorporating the latter within the human trafficking Directive, while simultaneously demonstrating hesitation to address the practical and legal complexities arising from cross-border surrogacy arrangements with respect to children's rights and status.

Currently, the EU has paradoxically both provided and withheld a solution. The transnational dimensions of surrogacy inherently necessitate cross-border regulatory frameworks, however, while public policy exemptions continue to overwritten when a child's best interests are at stake. The concerns on the side of the member states are appropriate, although best interests of the child principle, seems to be the undoubtedly noblest was to follow, as comprehensive prohibition appears improbable.

The fundamental challenge stems from what might be characterized as the ,,false promise" of liberal society, which has elevated reproductive autonomy to such a degree that individuals pursue parenthood despite medical or biological impossibilities. The prevailing value system appears to sanction the pursuit of this objective regardless of consequences. Nevertheless, it is imperative to establish boundaries that preserve human dignity, a value potentially compromised in surrogacy arrangements, to prevent children from remaining in legal uncertainty.

6. Concluding remarks

This comparative analysis of surrogacy regulation in Hungary, Slovakia, the Czech Republic, Ukraine, and the European Union context reveals a remarkably diverse legal landscape that reflects deeper societal tensions regarding reproduction, family formation, and the legal status of children in the midst of the MAR techniques. The hypothesis that *the legal frameworks of Slovakia, Hungary, and the Czech Republic either oppose or refrain from legalizing surrogacy* has been proven to be true, though with notable variations in approach among these Central European countries.

In Hungary, the legal framework demonstrates a deliberate opposition to surrogacy arrangements. The legislative history reveals that although altruistic surrogacy had initially been included in the Draft on the Act on Healthcare to take effect in 2000, these provisions were ultimately removed before coming into force. The Constitutional Court's subsequent ruling reinforced that access to ART, including surrogacy, is not recognized as a fundamental right, and surrogacy remains outside the taxative list of permitted reproductive procedures. The current legislative framework in Hungary is pointing toward opposing the legalization of surrogacy, as well as refraining from comprehensively further legislating ART or reforming the currently adopted laws. There are no initiatives towards legalizing surrogacy, and both private and public law considerations, from the *mater semper certa est* principle to constitutional protections of family and children, create significant barriers to surrogacy arrangements.

Similarly, Slovakia exhibits a notably conservative stance on reproductive rights. The Slovak legislation neither explicitly permits nor prohibits surrogacy, creating a legal vacuum. However, the Act on Family provision stipulating that *„agreements and contracts that contradict"* the principle that the mother of a child is unequivocally defined as the woman who gave birth to the child are invalid, effectively renders surrogacy arrangements legally unenforceable. The current legislative framework in Slovakia, like in Hungary, is pointing toward opposing the legalization of surrogacy, with no initiatives toward comprehensive ART regulation reform. The Constitutional Court'' position that surrogacy agreements would *„clearly be invalid due to being contrary to good morals"* further underscores this opposition.

The Czech Republic stands in contrast as the only one of the three countries where surrogacy is recognized by the legislator, albeit not explicitly. The Czech legal environment does not state any specific regulations as to how to arrange surrogacy arrangements but appears to regardless accept their existence. The legislator recognizes and knows that surrogacy arrangements are feasible and are practiced in the country, although does not addressing it specifically. However, surrogacy seems to be underregulated in the Czech Republic, this legal environment enables the practice to flourish and navigate freely. The under–regulation does not necessarily create pressing issues, although some changes should be introduced to tackle exploitative practices and to ensure legal certainty for all parties involved.

Ukraine's legal framework, included in this analysis as a popular surrogacy destination for Europeans, demonstrates a markedly different approach. Ukrainian legislation expressly permits commercial surrogacy and provides a legal pathway for intended parents to be registered as the legal parents of children born through surrogacy arrangements. This enabling framework, despite its shortcomings in comprehensive regulation, has made Ukraine a hub for reproductive tourism, particularly for citizens from countries with restrictive surrogacy laws.

The conclusion to be drawn from the UK represents a legal pathway worth observing. Its approach does not seek to deny the scientific and medical advancements of ART but instead confronts them directly, combining regulation with ethical debate and continuous legislative refinement. By opening these issues to broad societal, scientific, and political discussion, and by creating mechanisms for reform, the UK demonstrates how a state can maintain both caution and openness in regulating one of the most sensitive fields of modern reproductive medicine

At the European Union level, the cross–border implications of surrogacy have necessitated engagement with this issue despite substantive family law remaining within member states' competence. The EU's approach reflects the inherent dichotomy that surrogacy embodies within contemporary society, on one hand acknowledging its existence through initiatives like the European Certificate of Parenthood proposal, while on the other hand including exploitative surrogacy within the human trafficking Directive. This tension reflects the broader ethical and legal challenges surrounding the practice.

The comparative analysis reveals that while Hungary and Slovakia maintain restrictive approaches rooted in traditional conceptions of family and motherhood, the Czech Republic has adopted a more permissive, if underregulated, stance. Ukraine, meanwhile, has embraced commercial surrogacy with an enabling legal framework that attracts international clientele. These divergent approaches within a relatively small geographical area demonstrate how deeply contested surrogacy remains, touching as it does on fundamental questions of human dignity, reproductive autonomy, children's rights, and the definition of family. The findings of this comparative study suggest that legal harmonization on surrogacy across Europe remains unlikely in the near future, given the profound ethical divisions and different constitutional and cultural traditions. Furthermore, the phenomenon of reproductive tourism to countries with permissive surrogacy laws will likely continue, raising complex questions about cross–border recognition of parentage and children's rights to identity.

Nevertheless, several expert initiatives at the international level have attempted to address these challenges and provide guidance for policymakers and practitioners to navigate the issue of surrogacy arrangements, with focusing either on the intended child's perspectives or the surrogate mother's. The Verona Principles, developed by the International Social Service in 2021, offer a child–rights based framework for the regulation of surrogacy arrangements.[494] The Verona Principles, developed by international experts under the auspices of the NGO International Social Service, primarily focus on protecting children born through surrogacy. However, Principle 7 also provides guidance on informed consent for surrogate mothers, emphasizing that their decision to participate in surrogacy arrangements must be made independently and free from exploitation or coercion.[495]

In stark contrast to frameworks that seek to regulate surrogacy, opposing expert voices and initiatives are also emerged, notably the Casablanca Declaration, which represents a significant abolitionist stance. Launched in March 2018 at a conference in Casablanca, Morocco, this initiative was spearheaded by the International Coalition for the Abolition of Surrogate Motherhood, a coalition of feminist organizations and activists from various

[494] Verona Principles, adopted 25 February 2021, ISBN: 978–2–940629–17–6
[495] Principle 7: Consent of surrogate mother, points: 7.1 – 7.5, Verona Principles, February 25 2021

countries.[496] Furthermore, the Casablanca Declaration advocates consider surrogacy as incompatible with women's human rights and dignity, regardless of whether the surrogate mother receives payment. Their position is that surrogacy inherently reduces women to reproductive vessels and children to objects of contracts, potentially violating fundamental principles of human dignity and rights. The Declaration has gained significant traction, with supporters in over 70 countries, and has been instrumental in influencing policy discussions at national and international levels.[497] Notably, the Casablanca Declaration advocates have been particularly active in European Union forums, most recently achieving a significant victory with the 2024 reform of the Directive on preventing and combating trafficking in human beings. This amendment represents the first time that surrogacy has been explicitly linked to human trafficking in EU legislation, potentially paving the way for more restrictive approaches to cross–border surrogacy arrangements involving EU citizens.[498]

Perhaps most significantly, the Hague Conference on Private International Law has been engaged in the Parentage/Surrogacy Project since 2011, working toward developing international private law instruments to address the legal challenges arising from international surrogacy arrangements.[499] The HCCH's work focuses particularly on the cross–border recognition of legal parentage and the prevention of statelessness, aiming to develop a multilateral convention and or protocol that could provide greater legal certainty and protect the rights of all parties involved, especially children. While progress has been made, the complexity of the ethical, legal, and cultural issues involved has necessitated a cautious and deliberative approach.[500]

As this comparative analysis has demonstrated, the diverse approaches to surrogacy regulation within Central Europe reflect broader global tensions between traditional

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[496] See the text of the: *The Casablanca Declaration for the universal abolition of surrogacy, signed by 100 experts (lawyers, doctors, psychologists, philosophers etc.) of 75 nationalities, was made public in Casablanca (Morocco) on March 3, 2023. on the following link: https://declaration–surrogacy–casablanca.org/text–of–declaration/*

[497] Ibid.

[498] h Casablanca Declaration, „Exploitation of surrogacy as a minimum case of trafficking at European level," news release, April 23, 2024, https://declaration–surrogacy–casablanca.org/surrogacy–as–a–minimum–case–of–trafficking–at–european–level/

[499] https://www.hcch.net/en/projects/legislative–projects/parentage–surrogacy

[500] „Parentage / Surrogacy Project," Hague Conference on Private International Law , https://www.hcch.net/en/projects/legislative–projects/parentage–surrogacy

conceptions of family and motherhood and the emerging reproductive autonomy and freedom, notwithstanding and children's rights.

Conclusion

This dissertation has examined the complex legal, ethical, and social dimensions of surrogacy arrangements across multiple jurisdictions, with particular attention to the European human rights framework and the legal environments of Hungary, Slovakia, the Czech Republic, and Ukraine. Through comprehensive analysis of national legislation, case law, and international legal instruments, several significant findings have emerged regarding the hypotheses that guided this research.

The research substantiates the hypothesis of *Children conceived and born through surrogacy face unique risks of having their fundamental rights compromised* with compelling evidence. Children born through cross-border surrogacy arrangements indeed face distinctive vulnerabilities that other children do not encounter. These risks manifest primarily in three dimensions: legal identity uncertainty, obstacles to accessing information about origins, and potential commodification.

The legal ambiguity surrounding their status, particularly when returning to countries where surrogacy is prohibited, can leave children in a precarious legal *limbo*, sometimes facing statelessness or parentlessness. This uncertainty directly impacts their fundamental rights to identity, nationality, and family life. The gap between permissive and prohibitive jurisdictions creates situations where children may find their legal status contested, their parentage uncertain, and their access to citizenship jeopardized.

The child's right to identity, encompassing knowledge of biological, gestational, and social origins, is frequently compromised in surrogacy arrangements. Birth certificates often exclude information about surrogate mothers and donors, creating what has been described as *an „identity vacuum"* that may persist well into adulthood. Unlike adoption, where legal frameworks increasingly recognize the child's right to know their origins, surrogacy arrangements frequently lack transparency and mechanisms for preserving essential identity information.

Finally, commercial surrogacy raises profound concerns about potential commodification, with some arrangements potentially constituting the sale of children under international law. The intersection between commercial surrogacy and child trafficking remains contentious, with the UN Special Rapporteur on the sale and sexual exploitation of children warning that certain forms of surrogacy may amount to the sale

of children. This creates additional vulnerability for surrogate-born children, as their very existence may arise from arrangements that potentially violate fundamental human rights principles.

The second hypothesis stating *that the European human rights system's approach to surrogacy focuses primarily on protecting children's interests, potentially undermining national legislation based on public order considerations* is largely confirmed by the jurisprudence of the ECtHR which has increasingly prioritized children's interests over national public policy concerns in cross-border surrogacy cases. The landmark Mennesson v. France case established that while states retain a wide margin of appreciation in regulating surrogacy domestically, this margin narrows significantly when it comes to legal recognition of the parent-child relationship, particularly when a biological link exists between the child and an intended parent. The Court emphasized that a child's right to identity, as an aspect of private life under Article 8, includes the right to legal recognition of biological parentage. Subsequent cases, including Foulon and Bouvet v. France, D v. France, and the Advisory Opinion requested by the French Court of Cassation, have further developed this child-centered approach. The ECtHR has consistently held that national authorities must provide a pathway for establishing legal parenthood between a child born through surrogacy and at least the biological intended parent. For the non-biological intended parent, states must offer some legal mechanism, such as adoption, to recognize the parent-child relationship.

This jurisprudence has effectively limited states' ability to use public policy exceptions to deny recognition of foreign surrogacy arrangements, potentially creating what some critics have described as a *„loophole"* in prohibitive legislation. By prioritizing the child's best interests and right to identity, the Court has indirectly facilitated a pathway for recognition of surrogacy arrangements that circumvent national prohibitions. Notably, the case of KK and Others v. Denmark exemplifies this tension, where the Court found that Denmark had failed to strike a fair balance between the child's interest in obtaining legal recognition of the relationship with the intended mother and the general interest in discouraging commercial surrogacy. This decision has been criticized for potentially undermining national sovereignty in matters of public policy and bioethics.

Lastly, the hypothesis about the *legal frameworks of Slovakia, Hungary, and the Czech Republic either oppose or refrain from legalizing surrogacy* is largely confirmed by the comparative analysis of Central European jurisdictions, though with important nuances between the countries examined.

The two clearly opposing countries are Hungary and Slovakia, where both private and public law frameworks create significant barriers to surrogacy arrangements. Although, Hungary had political will about introducing the form of altruistic surrogacy as a specific type of ART in the 1990's, thus started a thorough societal, legal and political debate on the matter, Slovakia has not clearly and openly addressed the issue similarly. Slovakia continues to exhibits a notably conservative stance on reproductive rights, which includes the debate on surrogacy arrangements as well as the lack of proactive support for biomedical advancements in the field of law. Nevertheless, neither of these countries' legislation did not introduce an explicit ban on the practice, the whole legal environment as a whole showcases silence, grey zone and implicit prohibition.

The Czech Republic represents a slight divergence from this pattern as the only one of the three countries where surrogacy is recognized by the legislator, albeit not explicitly regulated. The Czech Republic falls into a third category of countries that neither ban surrogacy nor sufficiently regulate it, although implicitly allows the practice. The unique Czech approach creates a situation where surrogacy exists and even thrives, despite the risks associated with legal uncertainty. This under-regulation enables the practice to develop within certain parameters while still creating significant challenges for intended parents, surrogates, and ultimately, the children born through these arrangements. Overall, Czech legislation does not appear to be particularly liberal, but it still embraces the opportunities that reproductive technologies offer for treating infertility. This approach reflects the notion that overregulation cannot guarantee everything; however, clear guidelines should be established to protect the interests of all parties involved in the future.

Consequently to the findings, cross-border surrogacy arrangements require cross-border solutions through enhanced cooperation among international organizations and expert groups. There is no turning back from the reality that reproductive technologies exist and that infertile couples will pursue these technologies regardless of prohibitive

legislation. A pragmatic approach that acknowledges this reality while establishing safeguards is necessary.

Secondly, Europe's diversity in legal approaches to surrogacy should be respected, with each region adhering to its bioethical and national value systems. Countries that permit surrogacy should not face sanctions, while those that prohibit it should maintain their sovereignty in this domain. Nevertheless, all states within the UN and EU frameworks should work together to address exploitative surrogacy practices, even if precise legal and ethical definitions remain challenging. The European community has chosen to build its identity on ensuring human dignity, which can be undermined by certain forms of surrogacy arrangements. Future legislative frameworks should explicitly address and prevent practices that compromise this foundational value, particularly commercial arrangements that risk commodifying women and children. It is definite, that greater attention must be paid to the implications for children born through surrogacy, who experience the most significant legal, moral, and ethical repercussions, especially regarding access to information about their origins. Future legislation should establish clear requirements for preserving and providing access to information about genetic and gestational origins, similar to the evolving standards in adoption law. In order to contextually interpret the implications surrogacy arrangements trigger, an analogy for adoption can be drawn for representing the key distinctions, which necessitates different approaches, too. Evidently, the fundamental difference between adoption and surrogacy must be acknowledged in any regulatory framework. While adoption seeks a family for a child who already exists, surrogacy seeks the tools for the conception of a child for a family that desires one. This reversal of purposes carries profound ethical implications. The desire for a child is particularly evident in surrogacy cases, where intended parents have often endured multiple failed attempts at conception. However, this should not turn children into "achievements" rather than "gifts," nor should it relegate the child's interests to the background after birth. Ultimately, children should not be disadvantaged by the decisions their parents make regarding conception or the circumstances of their birth, whether they are conceived naturally or through surrogacy arrangements.

In conclusion, the legal landscape surrounding surrogacy remains deeply divided. While complete harmonization seems unlikely in the near future, incremental progress

toward addressing the most pressing challenges, particularly those affecting the rights and welfare of children born through surrogacy, remains both possible and necessary. The path forward requires balancing respect for national sovereignty with the imperative to protect the fundamental rights of all individuals involved, especially the children whose very existence emerges from these complex arrangements.

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