International surrogacy arrangements and the establishment of legal parentage

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Introduction

Due to scientific as well as social developments in the last decade, the number of people wanting to undergo the process of surrogacy has increased enormously. There is on one side the declining fertility rate (the total world fertility rate[1] in 2000 was 2.8 while 2014 it decreased to 2.43 children born per woman) which affects especially industrialised countries (e.g. in 2012 European countries had total fertility rates between 1.1 and 1.6 children born/woman[2]). On the other side there are the growing scientific achievements in the field of in-vitro-fertilisation (hereinafter IVF) which make it possible to circumvent infertility in an increasing number of cases. Furthermore the acceptance within the world population for such methods has risen. As a consequence from the medical point of view it has become fairly easy for couples, who have the desire to have children, to have their "own" baby. From the legal point of view these possibilities lead to various problems.

One part of the problem is that in some countries surrogacy is explicitly prohibited and most countries still don't have any regulations concerning surrogacy. In Europe e.g. Denmark, Greece, Ukraine and the United Kingdom (at least partly, namely only in cases where the surrogate mother is not paid beyond her "reasonable expenses") allow surrogacy while in other European states surrogacy is either prohibited or not regulated. In countries which allow surrogacy, medical clinics providing surrogacy have been established and as a result of globalisation, the international mobility is greater than ever before. Just a few clicks on the internet are needed to get in contact with such clinics and enter into an international surrogacy arrangement (hereinafter ISA). Due to these facts the wish of couples to have their "own" baby has become an international matter.

Besides the restriction in the home country, there is also another reason for having an abroad surrogacy. The costs in some countries are significantly lower than in others. In India for example the costs for surrogacy are around $ 30.000,-- while in the US there can be costs rising up to $ 120.000,--.[3] Therefore the market for commercial surrogacy tourism is becoming bigger and bigger. Worldwide in 2013 more than 6.000 babies were delivered to

[1] The total fertility rate is a figure for the average number of children that would be born per woman if all women lived to the end of their childbearing years and bore children according to a given fertility rate at each age. https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html (last consulted March 2015).
[2] http://www.indexmundi.com/map/?v=31 (last consulted 24 March 2015).
[3] http://www.mtqua.org/2014/09/29/commercial-surrogacy-cost/#more-6592 (last consulted 25 March 2015); Hague Conference on Private International Law, "A preliminary report on the issues arising from international surrogacy agreements", Preliminary Document No. 10 (March 2012) 6f.

medical tourists.[4]

There are a lot of topics – ethical as well as legal ones – worth being discussed concerning surrogacy. This paper focuses on the ISAs and the consequences concerning recognition and establishment of legal parentage, meaning acquiring the legal status of being a parent of the child born to the surrogate mother with all rights and obligations tied to this status under the relevant law.[5] The paper will mainly focus on the ex post point of view, meaning that the surrogacy has already taken place, the child has been born and handed over to the intended parents.

Assuming, that a child was born in state A, where surrogacy is allowed and regulated, the intended parents will be seen as the legal parents according to the law of state A. As a consequence the child often does not acquire the nationality of state A. If the intended parents want to move back with "their" baby to their state of habitual residence (state B), where surrogacy is forbidden, that state may answer the question of legal parenthood differently. According to the law of state B, the woman who has given birth to the child - in this case the surrogate mother - and her husband will be the legal parents of the child. As a consequence from the point of view of state B the child does not acquire the nationality of state B and is often refused a visa to enter state B territory.

Paradoxically there may be less problems concerning the legal parenthood, if the intending parents enter an illegal surrogate. The surrogate mother will be automatically seen as the legal mother. Nevertheless, the intended father can (at least if the surrogate mother isn't married) acknowledge the paternity and be therefore registered as the legal father in the birth certificate. Back in the receiving state, he can apply for sole custody after a few months and the courts will most probably transfer custodial rights to him, since the surrogate mother will not be interested in having shared custody. The question or doubt may not even arise, if the child was born out of a surrogacy. Afterwards, the intended mother can adopt the child legally.

Austria was informed about some of these cases, since Czech and Slovakian child protecting authorities are well aware of this problem. However, the estimated number of such cases is unpredictable.

[4] http://www.mtqua.org/2014/09/29/commercial-surrogacy-cost/#more-6592 (last consulted 25 March 2015).
[5] HCCH Preliminary Document No. 10 (March 2012), Annex.

Even though the question of legal parenthood might be "easier" to solve in such illegal cases, the surrogacy agreement as such is not enforceable in this country. Additionally, couples wanting a child will usually not think about legal parenthood in the first place but about the costs and the enforcement of such an agreement and will therefore tend to enter into surrogacy agreements in states where they are allowed.

As to the fact that private international law approaches of states differ a great deal, cross-border cases are difficult to handle, which leads to the question of whether an international set of rules is needed and can as well be achieved in order to give an answer to the remaining question: **Who are the child's legal parents?**

I. What is surrogacy?

1. Definition

Surrogacy means that a woman called surrogate or surrogate mother gets pregnant with the intention of giving the child away to someone else after giving birth to it. She agrees to carry the child and to give up legal parentage after the child is born. The persons who ask the surrogate to carry "their baby" and who will take custody after the birth are called intending or intended parents. They can but don't have to be genetically related to the child. In case the intending parents cannot provide their own egg or sperm for the IVF they will need gamete donors. In some states these donors are paid beyond their expenses, while in others they are not. Also the question of donors' anonymity is handled differently from state to state.[6]

2. Types of international surrogacy arrangements

International surrogacy arrangements (hereinafter ISA) are arrangements between the surrogate mother and the intending parents of a child. When it comes to ISAs, the name itself implies, that there are at least two states involved in cross-border surrogacy agreements, namely the State, where the child was born ("state of origin"), and the receiving state, where the intended parents usually have their habitual residence or live.[7] Depending on the case, a donor residing in a third state might also be involved. Due to the fact the states have different legal approaches towards surrogacy and gamete donation these kinds of arrangements have become a worldwide phenomenon, in the past years. Before going into detail about the legal

[6] HCCH Preliminary Document No. 10 (March 2012), Annex.
[7] HCCH Preliminary Document No. 10 (March 2012), Annex.

difficulties related to the ISAs a quick overview over the different kinds of arrangements shall be given.

A subdivision can be either made by the used genetic material (traditional or gestational surrogacy) or by the compensation that has to be paid to the surrogate mother (commercial or altruistic surrogacy). Both traditional and gestational surrogacy arrangements can be either commercial or altruistic.

Traditional surrogacy arrangement: In this kind of arrangement the surrogate provides her own genetic material by using her own egg for conception. There can also be natural conception or artificial insemination procedures involved.[8]

Gestational surrogacy arrangement: In such arrangements the surrogate doesn't provide her own genetic material and there is an IVF treatment involved. The gametes may be provided by both intending parents, only one of them or none.[9]

Commercial surrogacy arrangement: In a commercial surrogacy arrangement the intending parents pay the surrogate a certain amount of money which goes "beyond her expenses". This can be referred to as compensation for "pain and suffering" or a fee that the surrogate charges for being pregnant and giving birth to the child.[10]

Altruistic surrogacy arrangement: Arrangements are called altruistic when the surrogate is only paid for the "reasonable expenses" that result from the surrogacy. Usually these arrangements are set between intending parents and a surrogate who already know each other. Most countries that allow surrogacy allow this type.[11]

II. Problems following international surrogacy arrangements

1. Introduction

As mentioned above, the question of who is determined as the parents of a child becomes more complex and challenging than ever before. National family law often reacts slowly to the described societal and scientific developments.[12] Also in the case of establishment and

[8] HCCH Preliminary Document No. 10 (March 2012), Annex.
[9] HCCH Preliminary Document No. 10 (March 2012), Annex.
[10] HCCH Preliminary Document No. 10 (March 2012), Annex.
[11] HCCH Preliminary Document No. 10 (March 2012), Annex.
[12] Hague Conference on Private International Law, "The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project", Preliminary Document No. 3B (March 2014), 9.

contestation of legal mothership, the states have only just begun to tackle these questions in the last few years.

Many important rights of children, such as parental responsibility, financial support, inheritance and nationality derive from legal parenthood. But also rights established in international law, such as the right not to suffer adverse discrimination on the basis of birth or parental status (Art 2.1 UNCRC), the right to have his or her best interest regarded as a primary consideration in all actions concerning him or her (Art 3.1 UNCRC) or the right to preserve his or her identity (Art 8.1 UNCRC), are linked to the legal status. Even though the term "parent" is used in the UNCRC several times, there is no indication as to whether the term refers to the child's genetic, social or legal parents.[13]

Since many rights depend on the legal parenthood, problems will arise, if the question of legal parenthood is answered differently in the states. Therefore it is necessary to determine who the parents of a child are, to avoid the legal status of the child being uncertain or "limping". Additionally the situation itself may breach fundamental rights of the child found for example in Art 7 and 8 of the UNCRC.[14]

The state authorities may become aware of the surrogacy or the problems arising out of it in three different cases:

1.) If the intended parents request a passport or another travel document from the overseas embassy/consular authorities to travel back to their state of residence
2.) If they wish to regulate the child's legal status in the state of residence by either applying for registration of the foreign birth certificate or by applying for recognising a foreign judgment
3.) If the issue of parentage is an incidental question to a custody or maintenance dispute

[13] HCCH Preliminary Document No. 3B (March 2014), 10.
[14] HCCH Preliminary Document No. 3B (March 2014), 11: According to Art 7 and 8 UNCRC the child shall be registered immediately after birth, shall have the right to acquire a nationality and, as far as possible, have the right to know and be cared for by his or her parents. State 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. Furthermore, the State Parties undertake to respect the right of the child, to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference. In the case of illegal deprivation of some or all of the elements of his or her identity, State Parties shall provide appropriate assistance and protection with a view to re-establishing speedily his or her identity.

In an overview there are many different policy approaches among the states. Within this variety of approaches to surrogacy one can find many similarities in terms of legislation and even judicial trends. What all the states have in common, is that they are all confronted with a fait accompli, namely the fact that the child has already been born, and at the same time face the challenge of having to prioritise the best interest of the child.

Due to the lack of EU law or harmonized private international law instruments regulating cross border surrogacy agreements or their legal effects, the authorities in the receiving state have to deal with the question of legal parenthood and nationality according to their national substantive law, which their "national" private international law declares applicable.

2. Approaches to surrogacy in national laws and policies

2.1. States which prohibit surrogacy agreements

Some states expressly prohibit surrogacy agreements by law. Germany and Switzerland for example find in such agreements a violation of human dignity and a reduction of both the surrogate mother and the child becoming mere objects of contracts. In some countries even criminal sanctions for acting contrary to the prohibition have been established, either for the parties or for any intermediaries or medical institutions enabling such agreements.

As a consequence surrogacy agreements entered in breach of the law are void and unenforceable in terms of their legal effects. In general, national law (including private international law of the state) on legal parentage will apply to a child born out of such an agreement: usually the gestational surrogate mother will be incontestably deemed as the legal mother. If she is married, the surrogate mother's husband will be considered the legal father. This may be a contestable presumption. Adoption can sometimes be a way to acquire legal parentage, but may be illegal, if the future adoptive parents have already taken part in an unlawful intervention before.[15]

Mostly a ban has eliminated the practice of surrogacy within the states. But still there are two ways to avoid the prohibition of surrogacy agreements: either it is conducted in the

[15] *The 1993 Hague Convention* regarding intercountry adoption for example regulates in Art 29 that there shall be no contact between the prospective adoptive parents and the child's parents until it is established that the child is adoptable, an intercountry adoption is in his/her best interest, the prospective parents are eligible and suited to adopt and all necessary consents have been given under conditions established in Art 4, sub-paragraph c). In case of surrogacy these conditions cannot be met and an intercountry adoption within the scope of application of the 1993 Hague Convention regarding intercountry adoption would not be possible.

"underground" surrogacy business of the state or the intending parents habitually resident in these states travel to more permissive states to enter into surrogacy agreements there.[16]

Among these states in which surrogacy is forbidden there are some Member States of the European Union, like France, Germany, Italy or Spain.[17]

2.2. States in which surrogacy is largely unregulated

In this second group of states the law does not state a general prohibition of surrogacy agreements, but they are either under general law principles void and unenforceable. In some states for example there is an explicit prohibition of egg donations, which consequently leads to a prohibition of certain forms of surrogacy. In some countries only commercial surrogacy is forbidden, sometimes even by express criminal law provisions.

Like in the first group of states, which expressly prohibit surrogacy, the general national rules determine the legal parentage of the children born as a result of such an agreement. One can observe a slight trend in the judiciary of these states to make it easier to establish legal parentage for a genetically-related intending mother. In some states even legislation concerning surrogacy is in preparation.[18]

In context of the European Union Member States without an express provision for surrogacy are for example Romania and Austria.[19]

2.3. States which expressly permit and regulate surrogacy

The number of this third group of states has increased over the last years. The approaches can either be to permit all types of surrogacy agreements (e.g. India), or to permit only certain types, for example only altruistic surrogacy agreements (e.g. UK). States usually define eligibility criteria for intending parents and regulate the legal parentage following such agreements. Overall there are two totally different forms of regulations of the states to permit surrogacy:

1.) One option is comparable to a "pre-approval"-system: intending parents and the surrogate mother have to present their arrangement to an installed body to be approved prior to any medical treatment. In consequence, the legal parenthood will

[16] HCCH Preliminary Document No. 10 (March 2012), 9f.
[17] European Parliament, Directorate General for Internal Policies, Policy Department Citizens' Rights and Constitutional Affairs, "A Comparative Study on the Regime of Surrogacy in EU Member States" (2013), 105ff.
[18] HCCH Preliminary Document No. 10 (March 2012), 10f.
[19] European Parliament, A Comparative Study (2013). 72ff.

be automatically transferred to the intended parents after the birth of the child (e.g. in Greece[20]).

2.) The second way is to establish ex post a procedure for the intending parents to obtain legal parentage for a child born as a result of a surrogacy agreement. The legal parentage is transferred post-birth after a retrospective consideration of the agreement regarding the legal conditions. Usually the birth certificate mentions the intended parents as legal parents of the child, sometimes also stating, that birth was given by the surrogate mother (e.g. Ukraine[21]).

In most states the surrogacy agreement itself still remains contractually unenforceable. In the states with a pre-approval procedure however, the surrogate mother generally cannot break the agreement, because she has already given her consent.[22]

Residents from other states however do not travel to countries that have very strict standards in their legislation concerning the habitual residence of the intending parents and/or the surrogate. "Reproductive Tourism" shall thus be prevented. Intending parents not meeting the severe eligibility criteria of their state of residence often travel to more permissive states, where commercial surrogacy is permitted.[23] Even procedures are provided to establish legal parentage to one or both intending parents after a surrogacy agreement and sometimes the intended parents are not even required to be domiciled or to have their habitual residence in the state of origin for the intending parents. This situation is often a consequence of an economic policy trying to encourage "medical tourism" and the absence of a regulation.[24]

3. International Approaches

There can arise many different kinds of challenges regarding international surrogacy arrangements, from contractual issues (e.g. disputes about contractual terms) to enforcement issues (e.g. obligation to hand over the child or refusal of compensation for the surrogate mother). Besides that, there may also arise issues in reference to the conferral of legal parenthood and the attribution of parental rights and responsibilities ("parental civil status issues"), the determination of a child's status, his/her rights, including the right to depart from the state where he was born and to enter the receiving state, and citizenship ("child civil status

[20] European Parliament, A Comparative Study (2013), 45.
[21] European Parliament, A Comparative Study (2013), 89.
[22] HCCH Preliminary Document No. 10 (March 2012), 12ff.
[23] HCCH Preliminary Document No. 10 (March 2012), 15.
[24] HCCH Preliminary Document No. 10 (March 2012), 16.

issues"). While the birth of the child is a necessity for latter, contractual or enforcement issues may already arise before at any point of the arrangement.

3.1. European Union Law

The leading principle in European Union Law of the freedoms of movement (Art. 20 and 21 TFEU) is helping to develop EU law even in the area of family law in Europe. Free movement only applies to EU citizens moving from one Member State to another. As the non-recognition of a status received in another Member State is likely to hinder this fundamental principle, the European Court of Justice would probably try to ensure full effect in the decision of a future case brought to it.[25]

There is already plenty of case law concerning the question of recognition of a civil status, which was obtained in one Member State. In the case *Eftalia Dafeki v. Landesversicherungsanstalt Württemberg (Case C-336/94)* the ECJ ruled that the institutions and the courts of a Member State must accept certificates and documents concerning the personal status issued by the competent authorities of another Member State. It thus stated the presumption of mutual recognition between Member States. In the decision of *Carlos Garcia Avello v. État belge (Case C-148/02)* the ECJ based its ruling on the EU citizenship and the principle of non-discrimination to give a right to have a Spanish name in Belgium and explains that this is implied by the useful effect of the movement of citizens. In two other cases, however, namely *Runevic-Vardyn (Case C-391/09)* and *Ilonky Sayn-Wittgenstein v. Landeshauptmann von Wien (Case C-208/09)* the Court ruled, that states can limit the recognition in the light of their sovereignty, when it comes to constitutional traditions. Taking these rulings into consideration it is easy to imagine that public policy arguments could also be used by the ECJ in a case concerning the civil status of a child born out of an international surrogacy agreement.[26]

Besides using the principle of movement of citizens within the EU there is another approach that can be followed on European level to answer questions of legal status: the principle of mutual recognition. Following the lack of an EU private international law regulation of surrogacy per se the states apply their internal jurisdiction regulations and their international

[25] European Parliament, A Comparative Study (2013), 152f.
[26] European Parliament, A Comparative Study (2013), 153.

private law (to establish the applicable law) on a case-by-case basis.[27]

3.2. Jurisdiction and applicable law

Within the scope of *Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility* (Brussels II *bis*)[28] you can only find the attribution, the exercise, the delegation and the restriction or termination of parental responsibility (Art 1.1.b). The establishment or contestation of a parent-child relationship is explicitly excluded from the regulations' scope of application (Art 1.3.a), since this is a different matter from the attribution of parental responsibility.[29]

Like Brussels II *bis,* the *1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*[30] expressly does not apply to the issue of establishing or contesting a parent-child relationship (Art 4.a).

Even if the issue arising from a surrogacy arrangement is a contractual one, it must be noted, that the *Regulation (EC) No 593/2008 on the law applicable to contractual obligations* (Rome I)[31] is not applicable, since questions involving the status or legal capacity of natural persons (Art 1.2.a) and obligations arising out of family relationships (Art 1.2.b) are expressly excluded from the scope of this regulation. The latter is stated in *Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations* (Rome II)[32] as well, hence this regulation also being non-applicable.

3.3. Recognition and Enforcement

In respect of recognition and enforcement issues problems may occur with recognition and enforcement of the contract as such and, more importantly, with recognition (and sometimes enforcement) of foreign judgments, birth certificates and the legal effects of surrogacy.

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[27] European Parliament, A Comparative Study (2013), 154.
[28] Regulation (EC) No 2201/2003 of the Council 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, L 338/1 (Brussels II *bis*).
[29] Regulation (EC) No 2201/2003, Recital 10.
[30] HCCH, 34. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children of 19 October 1996 (1996 Hague Convention).
[31] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, L 177/6 (Rome I).
[32] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, L 199/40 (Rome II).

Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I *bis*)[33] shall not apply to the status or legal capacity of natural persons (Art 1.2.a). Since the establishment of parenthood, even if it was done by a judgement or a decree, is a question of the status or legal capacity of natural persons, the recognition of those acts must be answered by the application of the relevant international law rules of the state. In some states different rules may be applicable depending upon whether the intending parents seek recognition of a birth certificate (confirmation of a legal 'fact'), an acknowledgment of paternity (a legal 'act') or a judgement.[34] However, many states may refuse the recognition referring to the public policy exception.

3.4. Private international Law

At the moment, neither EU law nor harmonized private international law instruments regulate cross-border surrogacy arrangements or the legal effects thereof. The already existing acts can merely help to deal with specific questions arising in this context, yet none of them provides a solution for the establishment or contesting of parenthood. Due to that, the states will apply their own private international law concerning the question of legal parenthood. And as shown above, these rules differ greatly.

3.5. Nationality and statelessness

There is no harmonized international law concerning the question of nationality. To answer the question, whether or not the child is a national of the receiving state, the state will apply its own internal rules. In states, where nationality is granted by descents (like in Austria), the legal parent must first be determined in order to acquire citizenship. This may lead to vicious circles: e.g. according to the Austrian Citizenship Act *(Staatsbürgerschaftsgesetz)* the child will acquire Austrian citizenship, if his/her mother or father is an Austrian national. Due to the lack of harmonized rules, the question of legal parentage, however, will be answered by applying the private international law rules *(IPRG)*, which state e.g. in Austria for children born to an unmarried woman, that the rules applying for the child depend on his/her nationality. This circular argument (both rules refer to each other), is solved by the judiciary by always applying national law to establish legal motherhood, i.e. the mother of a child is also the woman who has given birth to the child according to article 143 of the Austrian Civil

[33] Regulation (EC) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, L 351/1 (Brussels I *bis*).
[34] HCCH Preliminary Document No. 10 (March 2012), 21.

Code (*ABGB*). As a consequence the child won't be granted Austrian citizenship. On the other hand, it will not be seen as a citizen of the state of origin from the legal point of view of the state as well, since for this state the intended parents are the legal parents. As a result, the child is de facto stateless in the worst case. For stateless persons, the Austrian private international law provides the applicability of the Austrian legal status, but merely if the person has his/her habitual residence in Austria. Nevertheless, the child will not acquire Austrian citizenship, since the legal mother according to Austrian rules will be the surrogate mother.

4. Recent developments

4.1. Decisions of the European Court of Human Rights (ECtHR)

4.1.1. S.H. and Others v. Austria (No. 57813/00)

The applicants were two married couples living in Austria. Both women suffered from infertility, hence they wished to use medically-assisted procreation techniques, which were not allowed under Austrian law. Mrs H. could produce ova, but was not able to get pregnant naturally. Her husband, Mr H., was infertile. For them only an IVF with the sperm of a donor would have enabled them to have a child. Mrs E.-G. in contrast couldn't produce ova at all, while her husband, Mr G., could produce sperm fit for procreation. They would have needed an IVF with a donated egg. Both methods were prohibited under Austrian law.

The Austrian Constitutional Court ruled that there was an interference with the applicants' right to respect for family life, but stated, that it was justified since these provisions were to avoid the forming of unusual personal relations, such as a child having more than one biological mother (a genetic one and one carrying the child). They wanted to avoid the risk of exploitation of women, as pressure might be put on a woman from an economically disadvantaged background to donate ova.

According to the applicants' point of view, the prohibition of sperm and ova donation for an IVF violated their right to respect for family life under Article 8 (right to respect for private and family life). Additionally, there is a violation of Article 14 (prohibition of discrimination), by the difference in treatment compared to couples who wished to use medically-assisted procreation techniques, but did not need to use ova or sperm donation for IVF.

Court's judgement

The Court observed that there was a trend in the legislation of the Member States towards allowing gamete donation for the purpose of IVF, but stated, that this was not based on settled principles, but it reflected a stage of development within a particularly dynamic field of law and thus did not decisively narrow the margin of appreciation of the State. Since the Austrian legislature had not completely ruled out artificial procreation, as it allowed the use of homologous techniques and additionally didn't ban individuals from going overseas for infertility treatment, Austria had tried carefully to reconcile social realities.

The Court concluded that Austria had not, at the relevant time, exceeded the margin of appreciation afforded to it, neither as regards the prohibition of ovum donation for the purposes of artificial procreation nor as regards the prohibition of sperm donation for IVF. There had accordingly been no violation of Article 8 in the applicants' case. Although there was no violation in the applicants' case, the Court underlined that the field of artificial procreation, being subject to a particularly dynamic development in science and law, had to be kept under review by the Member States.

4.1.2. Mennesson vs France (No. 65192/11) and Labassee vs France (No. 65941/11)

The applicants in the first case were a French married couple and twins born out of a surrogacy arrangement which were American nationals. The applicants in the second case were also a French married couple and a child, which was American national and also born out of a surrogacy arrangement. Due to the infertility of the women, the couples used surrogate treatments in the United States, where surrogacy is legal. Both embryos were formed with the sperm of the intending fathers. According to judgements of the American Courts Mr and Mrs Mennesson and Mr and Mrs Labassee respectively were the childrens legal parents.

The French authorities refused to enter the birth certificates into the French register of births, marriages and deaths, respectively wanted to annul the entries in the Mennesson case, since surrogacy arrangements were unlawful and the recourse to surrogacy is even punishable. The French Court of Cassation dismissed the claims on the grounds that recording such entries in the register would give effect to surrogacy agreements which were void under the French law.

The applicants complained that, to the detriment of the childrens best interests, they were unable to obtain recognition in France of the legal parent-child relationship lawfully

established abroad between the first two applicants and the third and fourth applicants born abroad as the result of a surrogacy agreement.

Court's judgement

The Court stated, that the contracting states generally enjoyed a substantial margin of appreciation whether or not special measures are necessary in a democratic society. Yet the scope of the states' margin of appreciation will vary according to the circumstances, the subject matter and the context. One of the relevant factors may be the existence or non-existence of common ground between the laws of the contracting states. The Court examined the situation in Europe and concluded, that there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad.

According to the Court, there is no violation of Article 8 concerning the applicants' right to respect for their family lives, since the national courts found a fair balance between the interests of the applicants and those of the state.

Yet, due to the essential aspect of the identity of individuals, the margin of appreciation needed to be reduced in the present case and the Court found a violation concerning the childrens right to respect for their private lives. Both the nationality and the biological parentage are important elements of a person's identity.

Critics

In *Wagner and J.M.W.L. v. Luxembourg (No. 7624/01)* Luxembourg refused to recognize the adoption by a single mother. The Court ruled, that there had been a violation of Article 8 concerning the applicant's right to respect for family life, since the social reality was ignored by authorities and the non-recognition of the adoption lead to obstacles in daily life.

This is even more the case in Mennesson and Labassee, regarding the genetic link between the intended fathers and the children. However, the Court ruled in these cases, that there was no violation of Article 8 concerning the right to respect the family life. Following the case law of the ECtHR with respect of the private life of the children and the importance for the identity, nearly every child born out of a surrogacy agreement must be legally recognized, at least if there is a biological link between the child and the intended parent(s). Therefore, critics raised that these judgments laid the foundations for a change in liberal jurisprudence

whereby states must justify every limitation and consequently every infringement of rights and freedoms.[35]

4.1.3. Paradiso and Campanelli v. Italy (No. 25358/12)

The applicants were an Italian married couple. Since a normal IVF wasn't successful, they entered into a surrogacy agreement in Russia, where the child was eventually born. According to Russian law, the applicants were registered as the child's parents, yet the Italian authorities refused to register the birth to the Italian birth register. Instead, the applicants were charged of violation of the adoption legislation by not complying with the authorization to adoption obtained by them earlier, which ruled out the adoption of such a young child. Additionally, proceedings to free the child for adoption were started, since under Italian law the child had been abandoned. Finally a DNA test revealed, that Mr Campanelli was not the biological father of the child. Hence, the child was immediately taken away from the applicants and was placed under guardianship, and later given to foster parents.

Court's judgement

With regard to the complaint concerning the child's removal and placement under guardianship, the Court noted, that there had de facto been a family life for about six months before the child was taken away, since that period covered important stages in his/her young life and the applicants had behaved as parents towards it during that period.

The Court noted, that the removal from the applicants had been an interference of the applicants' private life. It was in accordance with the law and pursued the legitimate aim of "prevention of disorder". However, the best interest of the child must be taken into consideration, irrespective of the parental relationship, genetic link or otherwise. The removal of a child is an extreme measure, which requires immediate danger to be justified. That the child would have developed closer ties with his intended parents, which would have made a separation even more problematic, was not sufficient to justify the removal. According to the Court the authorities had failed to find a fair balance between the interests at stake and finds a violation of Article 8. Though the court also stated, that finding a violation does not mean that the Italian authorities must return the child to the applicants, since meanwhile there are undoubtedly emotional ties with the foster family as well.

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[35] Grégor Puppinck, ECHR: Towards the Liberalisation of Surrogacy: Regarding the Mennesson v. France and Labassee v. France Cases (N°65192/11 & N°65941/11) (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500075).

Critics

The decision contains a dissenting opinion of Judges Raimondi and Spano:

> *"In substance, the position of the majority amounts to denying the legitimacy of the choice of the State to not recognize the effects of the surrogate motherhood. If it [is] sufficient to create an illegal connection with the child abroad to oblige the national authorities to recognize the existence of a "family life", it is clear that the freedom of States not to recognize the legal effects of surrogacy, freedom yet recognized by the jurisprudence of the Court (Mennesson v. France, No. 65192/11), 26 June 2014, § 79, and Labassee v. France (No. 65941/11), 2 June 2014, § 58) is reduced to nil"* (§ 15 of the dissenting opinion)[36]

The Court underlined in a press release that the focus within that decision lay on the removal of the child and his placement under guardianship and not on the issue of surrogacy.[37] However, the fact remains, that the child was born out of a surrogacy agreement.

Besides that, for the applicants the judgement is most probably without any consequence. Although the Court found a violation of Article 8, the Court stated, that there is no obligation to hand over the child to them.

4.2. Other International developments

Important investigations and impulses in the area of legal parentage following ISAs over the last few years are owed to the important work of the Hague Conference on Private International Law:[38] Since 2010 the Hague Conference on Private International Law has been working intensely in the area of private international rules concerning legal parentage and issues arising from ISAs. It produced an often-cited preliminary report on ISAs in 2012[39] and in the following distributed questionnaires to Member States and interested other states to gather more information concerning private international law issues regarding legal parentage,

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[36] Translation according to a press release of the ECLJ (http://www.eclj.org/releases/Read.aspx?GUID=ec4d5af3-db22-4b01-8b44-2ab3846b770e).

[37] ECtHR, Questions and Answers on the Paradiso and Campanelli v. Italy judgment, 27 January 2015, Press Release (http://www.echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf).

[38] With 78 Members (77 states and the European Union) representing all continents, the Hague Conference on Private International Law is a global inter-governmental organization. The statutory mission of the Conference is to work for the "progressive unification" of the private international law rules of the different Member States. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas (http://www.hcch.net/index_en.php?act=text.display&tid=26).

[39] HCCH Preliminary Document No. 10 (March 2012).

especially in the context of international surrogacy. The results were evaluated and summarised in "A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements" in 2014.[40] This study is linked with Preliminary Document No. 3B dealing with the desirability and feasibility of further work in the area of legal parentage following surrogacy arrangements.[41] In 2015 an updating note was published giving an overview over the recent key developments.[42] The Hague Conference on Private International Law agreed upon continuing its work concerning the feasibility of a multilateral instrument for the "Parentage/Surrogacy Project" (sic!) in the next year.

III. Conclusions and solutions

As pointed out in the last chapter the problems concerning ISAs are mainly of international nature. Therefore, the problem can most likely not be solved by individual state action. In the past years several states have sought to enter into multilateral cooperation in order to find a proper solution. The prior need to be met is to agree on a multilateral instrument that introduces structures as well as procedures to enable states to ensure that the obligations concerning the rights and interests of the child are met.[43]

Thinking about a European regulation in this field, first of all there has to be a legal basis in the EU treaties. The EU does not have a general competence in the area of fundamental rights and according to the treaties, the case law of the ECJ is not allowed to extend its competences by using fundamental rights.

As a consequence, the EU can only regulate this area if it manages to prove subsidiarity, which means that there is a cross-border dimension which requires action on EU-level. Furthermore, the principle of proportionality must be met and the action must not violate the Member States' competences. There are various competences which would allow the EU to take action in this field, if the described principles are met. There are first of all the fundamental rights, which according to Article 6.2. TEU must be respected by the EU. The main fundamental right to be respected in connection with the framing of surrogacy is the protection of children, regulated in Art 24 of the charter of fundamental rights and Art 3 TEU.

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[40] Hague Conference on Private International Law, "A Study of Legal Parentage and the Issues arising from International Surrogacy Arrangements", Preliminary Document No. 3C (March 2014).
[41] HCCH Preliminary Document No. 3B (March 2014).
[42] Hague Conference on Private International Law, "The Parentage/Surrogacy Project: an Updating Note", Preliminary Document No. 3A (February 2015).
[43] HCCH Preliminary Document No. 10 (March 2012), 26.

But there are also other competences that could allow a positive action, namely the freedom of movement of patients (Art 56, 34, 114 and 168 TFEU), the freedom of movement of cells (Art 114 and 168 TFEU), the freedom of movement of citizens and European citizenship (Art 20 and 21 TFEU), non-discrimination (Art 19 TFEU), and European international private law (Art 67 (4) and 81 TFEU).[44]

As there is no consensus within the Member States on prohibiting or authorising ex-ante mechanisms of conception of the surrogate child, the only regulation possible would be regulating the ex-post mechanisms of recognition. It would still be a very difficult regulatory option because it affects the sovereignty of the Member States in the delicate field of family law.[45]

Due to the fact that ISAs are causing serious legal problems because of their international nature, an international agreement of as many states as possible could be a sustainable and reasonable solution. The substance of the *1993 Hague Convention on protection of children and co-operation in respect of intercountry adoption*[46] as one of the most successful Conventions regarding the number of Member States could for example be considered as a role model. It was set up to ensure that intercountry adoptions take place in the best interest of the child and with respect for his/her fundamental rights. A similar convention concerning surrogacy would in our opinion be feasible.

The main agreements and principle features within the *1993 Hague Convention regarding intercountry adoption* are: it aims to be child-centred, ethical and to meet the fundamental principle of the child's best interest. Hence, the convention sets some rules for the states, e.g. states must consider a national solution first, ensure the child is adoptable, evaluate thoroughly the prospective adoptive parents and match the child with a suitable family, ensure that the persons, institutions and authorities whose consent is necessary have given their consent freely, not being induced by payment and that the biological mother has given her consent only after she has given birth to the child. Moreover, states should establish safeguards to prevent abduction, sale and trafficking for adoption by: protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; regulating

[44] European Parliament, A Comparative Study (2013), 197f.
[45] European Parliament, A Comparative Study (2013), 197f.
[46] HCCH, 33. Convention on protection of children and co-operation in respect of intercountry adoption of 29 May 1993 (1993 Hague Convention).

agencies and individuals involved in adoptions by accrediting them in accordance with the convention standards. Additionally, the Convention established a system of automatic recognition of adoptions made in accordance with the Convention, which means that there is an immediate certainty to the legal status of the child within the contracting states without a further procedure.[47]

In order to achieve a regulation of this kind it is indispensable to find out on which matters a consensus can be found amongst the majority of states. As the recent judgements of the high courts in the majority of states showed, there is a consensus within states that the fundamental right of the best interest of the child has to be met. Furthermore, all states might agree that certain medical standards should be observed by the state in which the surrogate mother is giving birth to the baby, so that health risks are kept as low as possible. The receiving state as well as the state of origin should be obliged to evaluate thoroughly the suitability of both the intending parents as well as the surrogate mother in order to avoid child trafficking and exploitation. For the part of the surrogate mother it might be recommendable to regulate, that only women who already have given birth to a child are chosen, because they already know about pregnancy and maybe – because they already have a child of their own – will not get too attached to the child she is supposed to give away after birth. In addition to that, the state of origin should be obliged to ensure that the surrogate mother has given her consent "freely, unconditionally and with full understanding of what is involved".[48]

A lot of difficulties may arise when it comes to commercial surrogacy agreements because the states' attitudes towards this topic differ highly due to the fact that a lot of states fear that it might come to an exploitation of surrogate mothers. Another question arising is whether the child should have the possibility to trace back his/her genetic and birth origin and if so, how this can be handled. Furthermore, it should be a major concern that child abandonment is avoided which means that there might be a need to set up a regulation on contract enforcement. Although a lot of work still remains and agreements might be difficult to achieve, an international regulation is still preferable compared to the realities of what is currently happening.

[47] 1993 Hague Convention on protection of children and co-operation in respect of intercountry adoption, Outline.
[48] HCCH Preliminary Document No. 3A (February 2015), Annex II.

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