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Πρωτότυπη Εργασία

# Surrogacy in France: A summary of the situation

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**Abstract**

Since the first law on bioethics in France in 1994, surrogacy is prohibited. With the liberalization of our society, some occidental countries accepted surrogacy under a specific legal framework. Still, France did not bend to this and always stated that surrogacy must be forbidden. However, with globalization, that facilitates fertility tourism across Europe and even further, France faced an issue with intended parents traveling abroad to have surrogacy and went back to France with children having uncertain civil status. The French legislation has been modified, taking into account all the issues that may arise. Sometimes France took the relevant initiative, but in other cases, the legal developments resulted from the pressure of international institutions. The purpose of this paper is to present a short and concise overview of the state of surrogacy in France and the steps which led to the current situation.

**Keywords:** Surrogacy, France, transcription of an act of birth.

# Παρένθετη μητρότητα στη Γαλλία: Περίληψη της κατάστασης

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**Περίληψη**

Από τον πρώτο νόμο για τη βιοηθική στη Γαλλία το 1994, η μέθοδος της παρένθετης μητρότητας έχει απαγορευθεί. Με τη φιλελευθεροποίηση των σύγχρονων κοινωνιών, κάποιες χώρες τη νομιμοποίησαν, υπό συγκεκριμένους όρους της νομοθεσίας τους, τάση την οποία δεν έχει ακολουθήσει η Γαλλία. Ωστόσο, η παγκοσμιοποίηση και η διευκόλυνση του αναπαραγωγικού τουρισμού στην Ευρώπη και πέρα από αυτήν, δημιούργησε ένα ζήτημα: Γάλλοι υπήκοοι ταξιδεύουν στο εξωτερικό για να προσφύγουν στη μέθοδο και επιστρέφουν στη χώρα τους έχοντας αποκτήσει έτσι παιδιά, με το καθεστώς των οποίων όμως να παραμένει σε εκκρεμότητα. Αυτή η πραγματικότητα προκάλεσε αλλαγές στη νομική αντιμετώπιση της μεθόδου, είτε με εθνική πρωτοβουλία είτε ύστερα από πίεση διεθνών οργανισμών, ώστε να υπάρξει προσαρμογή στα προβλήματα που προκύπτουν. Στο άρθρο παρουσιάζεται μια σύνοψη της νομικής κατάστασης που αφορά την παρένθετη μητρότητα στη Γαλλία και των εξελίξεων που έχουν οδηγήσει στη σημερινή εικόνα.

**Λέξεις κλειδιά:** Παρένθετη μητρότητα, Γαλλία, μεταγραφή ληξιαρχικής πράξης γέννησης.

## Introduction

Even though surrogacy was used in a private context in France, since 1989, the year in which the French supreme court (*Cour de Cassation*) ruled to forbid this practice altogether, a substantial public debate took place in the mediatic, political, and more widely in the social realm. Before talking further about this practice in France, we must define surrogacy. According to the Cambridge dictionary: surrogacy is "the action of a woman having a baby for another woman who is unable to do so herself." This short definition may seem simple, but actually, it is an incomplete one. Indeed, since 2013, with the opening for homosexual couples to civil weddings and adoption in France, surrogacy became an activity for women to have a baby for men or women who cannot reproduce naturally. Science improvements in the field of medically assisted procreation have generated a decreased need for surrogacy for women. Several types of surrogacies depend on the use or not of an embryo or gametes. This paper will focus on the principle of surrogacy itself, the legal issues that emerged, and how it is considered in France. First of all, we will see some principles relevant to the question of surrogacy to understand French positions better, then we will draw a timeline of important moments in the debate, and finally, in conclusion, we will analyze the current situation. This article aims to present the problem in France in the most objective approach, not reflecting the author's personal opinion.

Two principles are fundamental in the matter of surrogacy in France. The first one is the principle of "unavailability of person's condition" (in French "*indisponibilité de l'état des personnes*"). It states that persons cannot change their juridical personality absurdly. Persons can do so only if the law allows the change (such as changing name, sex, or nationality). The issue that may arise with surrogacy is that the alleged mother will not be the one who has given birth. In a strict interpretation, this can be seen as an unlawful modification of a person's condition, that is, the matter of lineage. It was the argument of the French C*our de Cassation* in 1989 and 1991.

The second important principle is the "unavailability of the human body" (in French "*indisponibilité du corps humain*"), according to which the human body or its products cannot be the object of a contract. This principle is the main argument used to forbid surrogacy in France. Indeed, suppose one cannot enter into a contract with the human body as a transaction object. In that case, it is understandable that a surrogacy contract can be forbidden, and therefore it is considered invalid. This principle has also been used by the "*Cour de Cassation*" in 1989 and 1991, but it is still relevant when the court feels it necessary to remind that surrogacy is forbidden in France.

## Timeline

The first important decision about surrogacy in France is the one by the "*Cour de Cassation*" on 13/12/1989 (n° 88-15-655). In this decision, based on the unavailability of the human body and unavailability of a person's condition principles, the court ruled to completely forbid surrogacies and rendered relevant contracts voided. As a legal basis, this decision refers to Article 1128 of the French civil code providing that only commercial things may be the object of a contract; thus, the human body, by not being considered as commercial, is excluded.

On 31/05/1991 (n°90-20105), the "*Cour de Cassation*" in her highest formation called "A*ssemblée Plénière*" (which deals with significant law debates in France), ruled again against surrogacy, using the same two principles. In the meantime, the court rejected the demand for a plenary adoption (as opposed to the simple adoption which is easier to claim but less important regarding the adopted person's rights) presented by the intended parent of a child born through surrogacy. The court ruled as: "This adoption was only the final phase of an overall process designed to enable a couple to receive a child into their home, conceived in the execution of a contract tending to abandon the child at birth by its mother, and that, by undermining the principles of the unavailability of the human body and the person's condition, this process constituted a misuse of the institution of

adoption." Therefore another argument against surrogacy in France is that the alternative of the "institution of adoption," can help couples unable to reproduce to have a child.

To clarify French legislation about all these new questions on surrogacy and other means of assisted procreation as well, the French parliament enacted a law on bioethics in 1994 (law n°94-653). This law added Article 16-7 to the Civil Code, which forbids surrogacy contracts. It considers this prohibition a public order disposition, which involves the impossibility of going beyond by contract.

On 4/05/2011(n°348778), the administrative supreme court of France (*Conseil d'Etat*) addressed the issue of surrogacies performed abroad. It ruled that consulates shall give a "*laissez-passer*" to a child born by surrogacy abroad to allow residence in France along with the father and intended parents. The court referred to the child's superior interest within the meaning of article 3-1 of the International Convention on Child Rights. We can see, here, consideration for children born by surrogacy in the name of their best interest.

On 17/05/2013, France allowed civil union for same-sex couples, and consequently, it allowed them to have access to the adoption process. This opening had several consequences on the legal perception of surrogacy in France, combined with supranational decisions.

On 26/06/2014, The European Court of Human Rights rendered two decisions based on surrogacy issues in France. It was the *Menesson v France* and *Labassé v France* decisions. Both of them considered that France violated article 8 of the European Convention on Human Rights (ECHR) recognizing the right to private life. Based on the child's best interest and the right to private life, the court ruled that the rejection of a transcription of a foreign birth certificate established abroad, based on the fact that the intended parent is not the real one, was an obstacle to the recognition of the child's lineage, and thus a violation of article 8 of ECHR. However, the court did not sentence France for prohibiting surrogacy, considering that it was a matter of state sovereignty ("margin of appreciation" doctrine).

On 12/12/2014, the *Conseil d'Etat* ruled again to protect the child's interest. Indeed, a circular issued by the French government asked the consulates to deliver French nationality certificates to children born abroad from parents with French nationality, as defined in the French Civil Code (article 18 stating that, a person who has at least one French parent, is French). An association against surrogacy challenged that circular before the "*Conseil d'Etat,"* and the court ruled again based on the child's best interest, and especially the right to private life (article 8 ECHR). We can see the link of this judgment with the European Court of Human Rights decisions of 2014.

Some months later, the *Cour de Cassation* on the 3/07/2015 (decision n°14-21223) ruled that surrogacy abroad does not represent a fraud against the law requiring rejection of transcription of a foreign birth certificate, if this one complies with dispositions of the French civil code (article 47). Y*et al*l these evolutions focusing on the child's interest were not fully considered by some French jurisdictions because the reference to the intended parent instead of the biological mother was (and still is) considered as an obstacle to the full transcription.

On 21/07/2016, the European Court on Human Rights sentenced France again in *Foulon and Bouvet v France*. Once again, the decision was based on the child's right to private life; the court ruled that France did not consider enough the duty to transcript the birth certificate. For instance, in 2015, the court of appeal of Rennes did not agree to transcript a birth certificate when the intended parent is mentioned on it. The European Court on Human Rights ruled again against France on 19/01/2017 on the same basis in the decision *Laborie v France.*

On 18/11/2016, the French legislator introduced articles 452-1 to 452-6 to the judiciary organization code. These articles allow asking the consulate to transcribe, *inter alia*, a birth certificate that has been rejected before French sentences from the European Court on Human Rights.

On 5/07/2017, the "*Cour de Cassation"* (n°16-16455) ruled in favor of a simple adoption (as opposed to full adoption) of surrogacy children if the surrogate mother and the father

agree. Also, the court ruled for a partial transcription of the act of birth (decision n°16-16901). The court allowed transcription only for the biological father. In the argument developed, we can see that the court intended to discourage surrogacy travels and wished to protect the child and the surrogate mother.

On 10/04/2019, the European Court on Human Rights issued an advisory opinion about the state of surrogacy across Europe. The court acknowledged the lack of consensus, but it considered that, based on the respect of private life, States should allow recognizing the lineage with the intended mother. In France, since the adoption of law on same-sex couples (2013), we can consider that the intended mother's motion can be extended to the intended father. The court went deeper by assuming that the recognition does not have to be in the form of the birth act's transcription, as long as the process is performed with promptness and secures the child's interest.

On 31/07/2019, the *Conseil d'Etat* (decision n°411984) issued a reminder to the minister of interior, stressing that a surrogacy child's foreign birth certificate, even not transcribed, express the lineage with the mentioned parents (even with the intended parent). On the other hand, on 4/10/2019, the *Cour de Cassation* recognized the full transcription of such a certificate, but some commentators saw this case as an exceptional one.

Finally, on 12/12/2019, the European Court on Human Rights, referring to its advisory opinion of April 2019, considered that French judicial institutions have no responsibility for not having fully transcript a birth certificate, given that the intended parents can use the process of adoption to establish the lineage.

**Summarization of the situation of surrogacy in France**

After drawing what can be seen as a real legal serial, we will summarize the situation in France when it comes to surrogacy. First, how France deals with surrogacy inside the country? As we saw, surrogacy is prohibited on the ground of public order, both in civil and criminal law. The civil prohibition finds its origins in the Cour de Cassation's first decisions in 1989 and 1991. The effect of this jurisprudence is that a contract "by which a woman agrees, even for free, to conceive, carry and then abandon a child is against the principles of unavailability of the human body and unavailability of the person's state". Nullity is the sanction for this kind of contract. Prohibition of surrogacy was established in the French Civil Code in 1994, with article 16-7. Therefore, a surrogacy contract is not enforceable under French law, if an issue occurs (for instance, the birth mother does not want to give the child anymore to the intended parents).

Under the criminal law's view, if someone is entering into a surrogacy process in France, faces several offenses, such as the offense of artificial insemination (the fact to process insemination out of a legal framed medical act) prohibited under article 511-12 of the French criminal code, the incitement to abandon a child prohibited under article 227-12 of the code, and the child substitution offense (when a woman declares on the birth certificate that she is the mother of a child she has not been pregnant of) punished under the article 227-13 of the code. Sometimes, judges can be comprehensive, sympathetic when they are facing surrogacy cases. For instance, the criminal jurisdiction of Bordeaux (the "*Tribunal Correctionnel*") on 1/07/2015 sentenced a couple of men to a conditional fine amounting to 7500 euros for the offense of incitement to abandon a child. Usually, if judges would have applied the criminal code strictly, the sentence would have been six months of incarceration and a fine of 7500 euros; therefore, we see judges considering the authentic will of intended parents to have children.

In France, the criminal law can only be applicable for actions committed on French territory. Therefore, an offense following the French criminal law, committed in another country that does not prohibit surrogacy, cannot be sentenced in France; that is why many couples choose to go abroad for having access to surrogacy services. This fact generates a vast debate about the child's return to France, as we have seen above. To summarize the situation, the debate was crystallized around the transcription

of a foreign birth act. Until 2015, French authorities were not forced to transcript this act. Since 2014 (26/04), in two relevant judgments, the European Court of Human Rights ruled against France on this constant impossibility for children to see their foreign birth act being transcript. Based on article 8 of the ECHR and the right to private life, the court ruled that the national authorities act against the child's best interest when refusing transcription on the basis that the intended parent is not the real one. Therefore, the "*Cour de Cassation*," on 3/07/2015, made its position evolved and considered that surrogacy is not a fraud that can justify the rejection of a transcript request by the competent authorities; the French administration may provide at least a partial certificate. Therefore, if the foreign certificate is in conformity with article 47 of the French civil code, and the only issue for the French administration is the reference to the intended parent as a real parent, the courts will probably allow parents a partial transcription, mentioning the biological parent (as all recent decisions of supreme courts showed). Indeed, following the Strasbourg Court's decision of 12/12/2019, this possibility is still an option for the French administration. Since a couple may opt for a child's adoption, France does not have an obligation to fully transcript the foreign birth certificate. Some may argue that even if in April 2019, the European Court on Human Rights considered that transcription was not an obligation for states if they have other means to establish the child's lineage, the process of adopting a child remains long and complicated in France. This fact may not meet the requirement of a fast process as the court prescribed it on the advisory opinion of April 2019. Nevertheless, a child born by surrogacy abroad can be adopted by the intended parent if the condition of this adoption is reunited (article 343 to 349 of the French Civil Code).

Recently (18/12/2019), and to add some complexity, the French Cour de Cassation agreed to fully transcript a birth act of a baby born through surrogacy in the U.S., mentioning two fathers as parents. The court considered that because the birth act was compliant with U.S. law, it is possible to transcript it. On 31/07/2020, the "Assemblée Nationale", a chamber of the French parliament, ruled that the recognition of the lineage of a child born by surrogacy must be assessed in the light of French law. This rule has, *in fine*, countered the Cour de Cassation decision.

Some voices tried to argue that the French position on surrogacy is at least ambiguous, and at worst contradictory. Indeed, by refusing to transcript a foreign birth certificate on the basis that it will not correctly establish lineage, French jurisdictions attempt to prevail the reality of the child's birth. On the other hand, they allow the possibility to create a lineage through adoption, which certainly does not represent the reality of birth. Therefore, we can argue that this different treatment between the two institutions is maintained in a way to avoid the *de facto* acceptance of surrogacy. However, it is not the only contradictory fact raised to denounce the prohibition of surrogacy. Indeed, when it comes to the principle of unavailability of the human body, some may argue that "renting" a uterus is the same as "renting" arms for more "regular" work. This debate touches the field of individual freedom, and asks to what point are we free with our bodies. In the matter of surrogacy, some national legal systems accept that being pregnant for another couple is an aspect of freedom over your body, while others consider that concepts such as dignity and ethics cannot conciliate with this particular expression of personal freedom that understands pregnancy as something else than being the real parent. Surrogacy may also be used against inequality before infertility, implying that all couples must be entitled to have a baby, no matter their biological particularities. This argument may refer to the opening of some medically assisted procreation techniques and adoption for same-sex couples with the law of 2013.

Still, even if reproduction as a right is unquestionable, this does not justify any procreation method in France. This debate is wide and encourages arguments for legalizing surrogacy, even if in France this is not the case so far. Indeed, it is implausible that the French position on surrogacy will evolve towards the method's legalization, as said N. Belloubet, French minister of Justice, on 21/01/2020.

However, as we have seen, the child's best interest holds now a central place in the debate, as well as the will of couples to have a child. It is likely that these developments may influence French legislation in the future.

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