

ECHR: Towards the Liberalisation of Surrogacy

Regarding the *Mennesson v France* and *Labassee v France* cases
(n°65192/11 & n°65941/11).

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The Court considers surrogacy compatible with human rights; it nevertheless tolerates France's choice to refuse it for ethical reasons, but in practice restricts the effects of this refusal with regards to respect for private and family life, condemning France in these cases to acknowledge at least the paternal relationship of the applicant's children. More generally, these judgments illustrate the method the Court uses to impose the liberalisation of prohibited practices in national law without these being guaranteed by the Convention. This liberalisation goes contrary to existing norms in International law.

On June, 26th 2014, the European Court of Human Rights released a long awaited judgment on two cases of surrogate mothers involving French couples. The facts are similar and the Court's ruling is identical in both cases. The citations are extracts from the *Menesson* judgment. (Unofficial translation)

In 2000 and 2001, the *Menessons* on the one hand and the *Labassees* on the other, obtained children through surrogate mothers following an oocyte donation in the United States- where surrogacy and oocyte donations are remunerated. The wives were 45 and 49 years old respectively. On the American birth certificates, the applicants were indicated as the fathers and mothers of the children but they did not obtain the transcription on the French civil records. In these judgments on April, 6th 2011, the Court of Cassation stated that it is "*contrary to the principle of the unavailability of the status of persons, an essential principle of French law, to give effect with regards to kinship, to a convention on pregnancy for someone else*" or invoke the apparent status (*possession d'état*) to establish kinship. The Court specified that the refusal of transcription, "*which does not deprive children of the maternal and paternal relationship that the Californian law recognizes them, and does not prevent them from living with the *Menessons* in France, does not violate these children's right to respect for private and family life under Article 8 of the Convention (...) nor the best interests of the children guaranteed by Article 3 Para. 1 of the Convention on the Rights of the Child.*"

In both cases, the applicants complained to the European Court first that, on the detriment of the best interests of the child, they were unable to obtain recognition in France of parent-child relationships that had been legally established abroad (Art. 8 ECHR and Art 3 CRC). Secondly, arguing that their children had been placed in a discriminatory legal situation compared with other children when it came to exercising their right to respect for their family life (Art. 8 + 14 ECHR).

The Court examined surrogacy from the point of view of the applicant's children (I), acknowledging the prohibition of this practice in theory, but limiting its scope especially when there is a biological link with one of the parents. These judgements will have serious consequences on national law as well as European and International law. (II)

I – THE INTEREST OF CHILDREN BORN THROUGH SURROGACY IS ABOVE SOCIETY'S INTEREST TO FORBID THIS PRACTICE.

The fact that the Court, like the States, is placed in front of the *fait accompli* by existing 'families' leads it to consider the facts not from the point of view of the prohibition of surrogacy but from the adults' situation and even more from the children's one. The Court tolerates the refusal of the principle of surrogacy but restricts its significance by appearing to distinguish it according to the existence or not of a biological link between the child and one or both commissioning adults.

A – The Court allows surrogacy to be prohibited but restricts the impact of the prohibition

1 – The Prohibition of surrogacy is possible in principle

In this case, the Court does not directly reach a decision on the prohibition of surrogacy with regards to the Convention: this wasn't the issue. Nevertheless, it makes note of the diversity of legislature in Europe and admits "*that resorting to surrogacy raises delicate ethical questions*" (ECHR, June, 26th 2014, n°65192/11, Para. 79). According to the Court, the States have "*an ample margin of appreciation, concerning not only the decision on whether or not to authorise this method of procreation but also on whether or not to recognise the line of kinship between children who are legally conceived by surrogacy and the intended parents.*" (ECHR, 26 June 2014, n°65192/11, Para. 79) However, this freedom of principle is "mitigated" by the practical need to "*take into account the fact that an essential aspect of the identity of individuals is at stake when it comes to kinship.*" (ECHR, 26 June 2014, n°65192/11, Para. 80)

The Court considers that the applicants' situation questions the right to respect of private and family life guaranteed under Article 8 of the Convention. The Court notes that on the one hand, the applicants "*do not distinguish themselves in their "family life" in the usual sense of the word*" (ECHR, 26 June 2014, n°65192/11, Para. 45), and on the other hand that "*private life requires that everyone can establish details of his human identity*" (ECHR, 26 June 2014, n°65192/11, Para. 46). In so doing, the Court extends Article 8 by developing the idea of a "*right to identity*" present in both the *Jaggi v. Switzerland* (ECHR, 13 July 2006, n°58757/00) and *Mikulić v. Croatia*, (ECHR, 7 Feb. 2002, n° 53176/99) judgments. This right to identity is in fact based on the 1989 Convention on the Rights of the Child in which the "*States Parties undertake to respect the right of the child to preserve his or her identity*" (CRC, Article 8). This commitment immediately follows that of guaranteeing children "*as far as possible, the right to know and be cared for by his or her parents.*" (CRC, Article 7)

Noting an interference in the right to respect for the private and family life of the applicants, the Court admits "*that France's refusal to recognize a parent-child relationship between children born abroad by surrogacy and the intended parents*" pursues a legitimate aim since it "*proceeds from the desire to discourage its nationals from resorting to a method of procreation outside national territory which it prohibits on its territory, according to its perception of the issue, in order to preserve the children and (...) the surrogate mother.*" (ECHR, 26 June 2014, n°65192/11, Para. 62)

After having observed the absence of a European consensus on the legitimacy of surrogacy which "*raises delicate ethical questions*" (Paras. 78-79), the Court considers that consequently, France may prohibit this "*method of procreation*". It indicates that it does not intend to "question as such" (ECHR, 26 June 2014, n°65192/11, Para. 84) the "*choice of ethics of the French legislature to prohibit surrogacy*" (ECHR, 26 June 2014, n°65192/11, Para. 83), but to judge the consequences. The Court thus claims to spare the principle of prohibiting surrogacy while handing out a ruling on the practical consequences of this prohibition in the case in point. In other words, it separates the standard from its sanction to be able to judge the sanction of the prohibition, but not (frontally) attack

the ban itself, leaving each country at liberty to carry out a prohibition. The Court is of the opinion that the reason for the prohibition of surrogacy depends on the “perception of the problem”, it would not be the ethical choice but a choice of ethics, relative and contingent as the absence of a consensus confirms, while the effects of this prohibition would in fact be the only concrete and objective reality, accessible to the Court’s rational judgment.

Thus, while considering not legitimate, but only “conceivable” (ECHR, 26 June 2014, n°65192/11, Para. 99), that France wishes to discourage its citizens to use surrogacy abroad, the Court implicitly accepts this practice and ensure that the effects of its refusal to be limited and conform to its interpretation of Article 8 of the Convention.

2 – The effects of the prohibition of surrogacy infringes the private life of the children in this case

Overlooking the issue of prohibiting surrogacy, the Court focused its judgement *in concreto* on the consequences of this prohibition, specifically in the case of the consequences of the refusal of transcription of the nationality on the family life and private life of the applicants guaranteed in Article 8.

a) With regards to family life

Under this, the Court notes that the applicants “do not show that the impossibility of having a parent-child relationship recognized under French law prevents them from enjoying the right to respect of family life in France” (ECHR, 26 June 2014, n°65192/11, Para. 92). In other words, the concrete effects of the refusal to recognize the parent-child relationship under French law do not exceed the margin of appreciation which the States have with regards to the respect given to family life.

The judge reaches at this observation after having observed in particular that the French authorities take into account the relationship established abroad in the applicants’ daily lives. Article 8 has therefore not been violated from the point of view of respect for family life.

b) With regards to private life

The Court concentrates on examining the consequences of the refusal of the transcription on the children’s private life and considers them out of proportion.

The Court sees a contradiction in the fact that “without ignoring that [the children] had been identified elsewhere as the children of the first applicants, France nevertheless denies them this quality in the legal system” and considers that “such contradiction violates their identity within the French society.” (ECHR, 26 June 2014, n°65192/11, Para. 96). The Court views a contradiction between the law and the practice where the application of the judicial principle of non-recognition of the effects of surrogacy is subdued in practice by a tolerance. According to the formal logic of the Court, neither the principle nor practical tolerance in themselves violate identity, but their coexistence.

In a similar way, the Court moreover considers that the children are placed in a situation of « *troubling uncertainty* » about the possibility for them to be recognized as French citizens caused by confusion of French law. In fact, this uncertainty results from the latest comments by the Government arguing that children could obtain French nationality under the so-called *Taubira* circular of 25th January 2013

(ECHR, 26 June 2014, n°65192/11, Para. 74). The Court further notes that the refusal of the authorities infringes their inheritance rights.

The Court concluded that under French law, the effects of refusing to recognize a parent-child relationship influences children's right to have their private life respected, "*which implies that everyone can establish the essence of his or her identity, including their relationship*". (ECHR, 26 June 2014, n°65192/11, Para. 99). The Court observes the interference and considers that it "*raises an important issue on the compatibility of this situation with the best interests of children and that should guide every decision concerning them*" (ECHR, 26 June 2014, n°65192/11, Para. 99)" but does not yet conclude to a violation at this stage of analysis. Although the Court talks about *the "serious issue"* it does not indicate if these interferences alone have attained a level of gravity that is sufficient to breach the Convention. One can seriously doubt of it. What will enable the Court to find a violation in a conclusive way is the existence of a biological link between father and child.

It should be noted that, surprisingly, the motive which prevents the breach of a violation of family life is precisely that which causes the observation of an infringement of private life, namely the attribution in practice of certain effects to the American documents. In fact, the Court sees a contradiction and an uncertainty where there is tolerance for the situation. On the one hand, it appreciates this tolerance as it allows it to preserve the family life, and on the other hand, it reproaches it as it would create a judicial uncertainty which violates private life.

B – A distinction depending on the existence of a biological link?

The reasoning developed by the Court allows it to distinguish cases according to the existence of a biological link.

1 – The existence of a biological link is crucial

It should be noted that the Court examines the children's situation and sees an interference with their rights, at first without taking into account their biological relationship with the father. Only then, in a distinctive manner, does the Court observe that "*this analysis takes on particular importance when, as in this case, one of the intended parents is also the child's biological parent*" (ECHR, 26 June 2014, n°65192/11, Para. 100). The Court, noting the existence of such a biological link with the father, emphasizes "*the importance of a biological relationship as part of an element of each person's identity*" and asserts that it is contrary "*to the interests of a child to deprive him of a legal bond of this nature while the biological reality of this link has been established and both the concerned parent and child claim its full recognition*" (ECHR, 26 June 2014, n°65192/11, Para. 100). Consequently, the impossibility of establishing a father-child relationship is sufficient to conclude that France went beyond its margin of appreciation and therefore violated the respect due to the private life of children.

Thus, when a biological link exists between the child and one or both commissioning parents, the Court clearly states that this link should be able to be recognized and legally established. The Court does not say that such parentage must also be established with respect to the spouse of the biological parent, in the

case in point the wife, if the latter does not have a biological relationship with the child. One can even consider that the Court would not necessarily censure a country's decision to only recognize the relationship established abroad towards the only biological parent (most often the father) and exclude his spouse. This does not prejudice the ability for the latter to establish a relationship in France through adoption.

2 – In the absence of a biological link

The fact that the Court examines the children's situation without initially taking into account their biological relationship with their father indicates that the Court reasons firstly in the hypothesis of a fully heterologous surrogacy, *i.e.* without any biological link with the commissioning adult(s) ; and it concludes to the existence of an interference.

The Court considers it appropriate to preserve the right to children's identity within the society. It would be violated not by the refusal to transcribe the relationship established abroad in itself. But it would be violated by the contradiction of the national authorities consisting of accepting to give effect to foreign civil-status records in practice, while legally refusing to recognize the relationship that these acts establish. Thus with regards to heterologous surrogacy, the judgments show that above all, States have the duty to protect the child's identity particularly by avoiding legal confusion. It would therefore be unreasonable to deduce from the judgments that the national authorities must necessarily accept the transcription of foreign civil-status records in the case of totally heterologous surrogacy, all the more so as these judgments insist on "*the importance of filiation as an element of one's identity*" (ECHR, 26 June 2014, n°65192/11, Para. 100). Now, recognising a biologically false relationship violates the identity. Thus, these judgements which seem contradictory on many fronts also contain affirmations which support the refusal of totally heterologous surrogacy. In this context, it should be noted that Western countries which accept surrogacy most often demand that the gametes from at least one member of the commissioning couple should be used, as is the case in the United Kingdom and South Africa and from the two members in the Netherlands and Russia, and refuse to call surrogacy a totally heterologous pregnancy. In fact, this practice shows more of the sale of a child than of medically assisted procreation.

Paradoxically, these judgments gave the Court the opportunity to reaffirm an attachment to a biological relationship, relativized in other cases (for example ECHR, *X and others v. Austria*, 19 Feb. 2013, n° 19010/07). There is however another contradiction: for the true part of the relationship to be recognised in a particular case, the Court validates in a general way a practice which is assumed to falsify the other party in the relationship and which therefore violates "*the right to know one's lineage*" affirmed by the Court in the *Jäggi v. Switzerland* judgment (ECHR, 13 July 2006, n° 58757/00, Para. 37). Another paradox about these judgments is that France disregarded a child's right to respect its identity specifically because it refused to recognise a partly distorted relationship. Finally, another contradiction is that even though the Court claims to affirm an attachment to the biological relationship in the interest of the child, it totally ignores the maternal biological relationship with the children, although it is just as real as the paternal relationship. In fact accepting the principle of surrogacy does not leave it

any other choice. The final criteria for the relationship with children born from surrogacy is not biology but rather the gestational surrogacy contract, as the Court ignores the biological relationship which does not tally with what is provided for in the contract. By ignoring the central problem of maternal relationship –contrary to French authorities– the Court accepts *in fine* the gestational surrogacy contract and its effects.

Moreover, the Court intends to dissociate surrogacy, which can be forbidden, from parentage which must be recognised in the case in point. However this dissociation is factitious. In fact, the gestational surrogacy contract involves the procreation of a child and necessarily includes a clause by which a surrogate mother waives every right to him, *i.e.* every claim of parentage. The gestational surrogacy contract therefore concerns the parentage of the child given to the commissioning partners. The contracting adults have both the child itself and its parentage at their disposal.

Furthermore, the Court cannot conform to the *Marckx* judgment regarding natural children, even if the *Mennesson* and *Labassee* judgments also intend to, *in fine*, restrict the consequences of a “guilty” conception. The *Marckx* judgment led to the abolition of the distinction between legitimate children and natural children (ECHR, *Marckx v. Belgium*, 13 June 1979, n°6833/74). In order to force Belgium to abandon necessary proceedings for recognition and adoption in order to establish the maternal relation with a natural child, the Court had emphasised that it “*cannot but be struck by the fact that the domestic law of the great majority of the member States of the Council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full juridical recognition of the maxim “mater semper certa est.”*”(ECHR, 213 June 1979, n°6833/74, Para. 41). On the contrary, in the *Mennesson* and *Labassee* cases, the Court accepts the negation of this fundamental principle even though surrogacy is only legal in a small minority of European States (ECHR, 26th June 2014, n°65192/11, Para. 41).

II – IMPLICATIONS OF THE MENNESSON AND LABASSEE JUDGMENTS

These judgments have consequences on French law and at the same time on European and International Law.

A – Consequences on law

In this case, it has to do with identifying only the legally required minimal consequences of these judgments and not the political use which may be made.

The Court carefully clarifies that it does not directly adjudicate on surrogacy as such. These judgments do not intend to oblige France to legalise surrogacy, but they already implicitly, indicate that this practice is not necessarily contrary to human rights particularly women’s and children’s rights. The Court, with all its moral authority, accepts the very principle of this practice. Consequently, it does not consider it to be intrinsically contrary to dignity and human rights. In this regard, the Court considers that this practice finds its place in the context of human rights, like other procreation techniques and as such may give rise to a subjective right. As such, refusing to authorise surrogacy already constitutes an interference with the right to privacy just like prohibiting other MAP techniques (ECHR, *S. H.*

v. Austria, 3 November 2011, n°57813/00). Subsequently, the request of an individual about not having access to surrogacy in France would not be inadmissible *rationae materiae* by the Court, nor rejected as constituting an abuse of rights (Conv EHR, Art. 17), but would compel France to justify its legislative choice, in its principles as in its implementation. Therefore, nothing in the judgment opposes the fact that the Court's jurisdiction evolves towards a progressive restriction of the States' competence to restrict access to surrogacy. On the contrary, these judgments lay the foundations for such a change in liberal jurisprudence whereby States must justify every limitation, and consequently every infringements of rights and freedoms.

Henceforth, these judgments demand that France puts an end to the "contradiction" and a "juridical uncertainty" which, according to the Court, children born abroad through surrogacy are placed in.

With regards to totally heterologous surrogacy, strictly speaking, this contradiction could be suppressed, by refusing in practice every effect of the visibly false foreign civil-status records. But this might provoke a violation of the right to family life. This was Italy's choice where a child was taken away from an elderly couple. This couple had obtained the child from a Muscovite surrogacy agency, and then had gone to the Italian authorities equipped with a regularly established civil status documents under Russian law. After genetic analysis, it appeared that this child had no relation with the couple. The child was very quickly taken away from the intended couple and placed for adoption. The couple referred the case to the ECHR and now complains of a violation of their private and family life (*Paradiso and Campanelli v. Italy*, n°25358/12). The case is currently pending.

With regards to children born through surrogacy and conceived using gametes of one or both intended parents, the judgments demand that France agrees to legally recognise the biological relationship which links the child to one or both intended parents and eventually reduces the possibility of refusing to recognise the foreign status to the only parent without a biological link. This bodes the future of the judgments of the Court of Cassation that the recognition of children born through surrogacy by the genetic father is revoked if they were subject to an application before the Court.

The *Mennesson* and *Labassee* judgments condemn the French pattern of dissuasion of procreative tourism through surrogacy and oblige France to abandon it, at least in part. At this moment, these judgments may encourage evasion of the law since they deprive France of the main means for ensuring respect for public order. However, they do not prevent another deterring and sanctioning mechanism from being instituted as long as it does not disproportionately violate the respect for private and family life and the other provisions of the Convention.

Nothing therefore prevents the existing penal apparatus from being reinforced or strengthened even if it means adding other sanctions apart from imprisonment and fines which are least suited to this case in point. Surrogacy already falls within several propositions of the French Penal Code such as "*the incitement of the parents or one of them to abandon a born or unborn child, made either for pecuniary gain, or by gifts, promises, threats or abuse of authority*" (Penal code, Art. 227-12) and the "*wilful substitution, false representation or concealment which*

infringes the civil status of a child” (Penal Code, Art. 227-13). In this case in point, criminal proceedings against the Mennessons were abandoned because the acts were committed abroad. However, the criminal judge may have jurisdiction if one of the acts constituting the infraction was committed in France (for example a preparatory letter to the contract or a bank transfer) or if the consequence of the infraction was “felt” in France (Cass. crim., 6 June 1991, n° 90680.755, Bull. crim., n° 240, and Cass. crim., 29 Jan 2002, n° 01-83122, Bull. crim., n° 13), which was evidently the case in the *Mennesson* and *Labassee* cases. Moreover, the French judge is declared competent if the facts are punished by the legislation of the country where they were committed or if it has to do with a crime. (Penal code, Art. 113-6). Knowing the surrogacy falls perfectly under the definition of the sale of a child, the legislator could qualify surrogacy as a crime.

Hereafter, these judgments undermine the French legal framework: what can the effective impact of the prohibition of surrogacy on the French territory be if the Court now compels France to endorse surrogacy abroad? With such a contradiction, this time very real, in the French legal framework, the legalisation of surrogacy in France will quickly be demanded to put an end to what will be presented as *hypocrisy* which consists in accepting abroad what is denied on home soil, and as a *discrimination* reserving surrogacy for couples who are wealthy enough to go to California or Ukraine. Nobody doubts that “made in France” surrogacy will be presented as more ethical than “made in India” surrogacy and its legalisation will therefore be seen as progress.

This jurisprudence is transferrable to the case of children conceived through surrogacy upon the request of same sex couples, the Court having judged that they were as capable of leading a normal family life as couples of different sexes (ECHR, *Schalk and Kopf v. Austria*, 24 June 2010, n°30141/04, Paras. 94 and 99), and there is no “*evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs.*” (ECHR, 19 Feb. 2013, n°19010/07, Para. 142)

Hereafter, it can be considered that the logic of these judgments authorise legal *dumping* and will work towards the recognition of other personal statuses obtained by violating national law. This is the case, for example of incestuous families that the French law refuses to recognise (Civil Code, Art. 310-2), or of people who will have contracted an illegal marriage abroad, in their country of origin, for example a polygamous marriage, or with a person of the same sex or who is not yet of marriageable age, and who will ask that their status be recognised in the name of respecting their private and family life. Several cases are currently pending before the European Court introduced by homosexual Italian couples who got married in America (*Oliarai and others v. Italy* and *Felicetti and others v. Italy*, n°n° 36030/11 and 18766/11).

Furthermore, these judgments also include a provision with strong potential: the assertion according to which Article 8 “*implies that everyone can establish the essence of his identity*” (ECHR, 26 June 2014, n°65192/11, Para. 99) is likely to carry the Court’s jurisprudence very far in the context of the multiplication of individual identity claims.

Finally these judgments prevent the anonymity of a gamete donation from being questioned by specifying that the refusal to recognise the biological relationship is contrary to the child's interest when "*the child and the concerned parent demand full recognition*" (ECHR, 26 June 2014, n°65192/11, Para. 100).

B – Judgments which disrupt International Human Rights

1 – Judgments which attest to the Court's activism

These judgments contribute to making known the Court's influence on European political and ethical choices. More and more often, the Court makes rulings on legislative choices regarding matters which are far off from Convention's initial scope. The evolutionary interpretation of the Convention is not only intended to change the meaning of conventional propositions, but above all to spread its impact beyond the original intention of writers and high contracting parties. Therefore legislations compliant with the Convention for decades can finally be reached by the expansion of the Convention and censured. Among the provisions of the Convention which had the most extensive content, article 8 which guarantees respect for private and family life appears first and foremost. The extension of this article reflects the change in Western culture, making individual autonomy the new fundamental value.

a) The method of liberalising prohibitions

Both the *Mennesson* and *Labassee* judgments allow one to describe the method the Court regularly uses to impose the liberalisation of practices prohibited in internal law whose exercise is not guaranteed in the Convention. Before applying this to the surrogacy in this case in point, the Court used this approach to liberalise assisted suicide (*Koch v. Germany case*, (ECHR, 19 July 2012, n°497/09); *Gross v. Switzerland* (ECHR, 14 May 2013, n°67810/10)), abortion (*A. B. and C. v. Ireland*, (ECHR, 16 Dec. 2010, n°25579/05); *R.R. v. Poland*, (ECHR, 26 May 2011, n°27617/04)), pre-implantation diagnosis (ECHR, *Costa and Pavan v. Italy*, 28 August 2012, n°54270/10), heterologous *in vitro* fertilisation (ECHR, *S.H. v. Austria I*, 1st Apr. 2010, n°57813/00).

This method of *liberalisation* of national law operates by a three-part reasoning:

– Firstly, it involves finding the fulcrum in national law which falls within the Convention's scope and which the applicant's conventional right can be based on. In order to find such national rights these reasoning are based upon, the Court has for example considered that Irish, Italian and German legislations, did not forbid, respectively, abortion, eugenics and assisted suicide and consequently, individuals could claim to have a national right to carry out these practices. This right, which is guaranteed in national law and not in the Convention, falls within the Convention's scope and should therefore be able to be exercised in full conformity with the Convention's demands, particularly its procedural demands and principle of non-discrimination.

– Secondly, the Court identifies an incoherence or an inaccuracy within the national legal framework preventing the applicant from suitably exercising his right (allegedly) available in domestic law. Often, this uncertainty or incoherence in the legislative framework results from the coexistence of a prohibitive principle and

exceptions or tolerances which subdue it, as in this case. However, according to the dialectic approach which consists in opposing what is in fact complementary, the Court therefore uses the tolerance or exception to the principle to question it like so here. The legislation's consistency is judged by placing the principle and the exception on the same level. This may even mean recognising to the exception a superior value to the principle since, with regard to a prohibitive principle that only expresses an abstract *choice of ethics*, only the exception would really have a practical impact.

– Thirdly, the Court judges that this inaccuracy and the uncertainty which the applicants would be plunged regarding their rights causes an infringement of their conventional right. Due to the inability to conclude to an interference in a substantial conventional right, (as the Convention does not guarantee the right to surrogacy and to assisted suicide...), it is from the perspective of procedural obligations attached to the Convention that the Court decides on the violation of the Convention. According to this approach, the procedural obligations stemming from the Convention directly apply to national rights – without it even being necessary to establish interference in the substantial conventional right – as long as the object of national right falls within the scope of the Convention. It is therefore the internal legal framework itself which proves to be the cause of the State's violation of the Convention, obliging the State to modify its legislation. (Puppinc G., Procedural Obligations under the ECHR, an Instrument to Ensure a Broader Access to Abortion, *Zeszyty Prawnicze* 13.1, Varsovie, 2013) ;

– Eventually, in order to execute these judgments and render a coherent legislation, the State therefore has the choice in theory between removing the prohibitive principle and removing the exception. In the end, the substantial national law is in practice strengthened and progressively absorbed in conventional law, supported in this sense by the eventual extension of the European consensus (Puppinc G. and La Hougue (de) C., The right to assisted suicide in the European Court of Human Rights' decisions, *Jusletter*, 27 Jan 2014) ;

A similar method is set up to directly apply the conventional principle of non discrimination to national law, as soon as the subject-matter of proceedings falls under the Convention's scope, and without the Court having to find a breach of a Conventional right beforehand. In this case, the State has the choice between removing the right granted to certain people or granting it to everyone. (ECHR, *Vallianatos and others v. Greece*, 7 Nov 2013, n°29381/09 and 32684/09).

Thus, when dealing with a particular case in the framework of *strategic litigation* (as in the aforementioned *Oliarai and others v. Italy* and *Felicetti and others v. Italy*, cases), the Court directly affects a law through a particular case even if the Court makes it a point to declare it doesn't judge the law in general.

b) The Court's attitude towards national ethical choices

The *Mennesson* and *Labassee* judgements also provide the opportunity to observe the Court's attitude towards national ethical choices. On several occasions, the Court censured the ethical choices which suggested the prohibition of a practice in order to impose a more liberal position. This was the case in both bioethics and family issues. It did not hesitate to censure choices resulting from long legislative proceedings such as the prohibition of pre-implantation diagnosis in Italy, refusal to allow same sex couples coparental adoption in Austria, or same sex civil union

contract in Greece or even the prohibition of abortion in Ireland although confirmed three times by referendum. The *ultima ratio* in each of these cases was more philosophical or ideological than strictly juridical. As can be seen in the remarkable *obiter dictum* of the *Vallianatos and others v. Greece*, where the Court stated that, henceforth, when a European state legislates on family issues, it “*in its choice of means [...], must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life*” (ECHR, 7 Nov 2013, n°29381/09 and 32684/09, Para. 84). The Court therefore ensures that European States adapt their legislation to (its own perception of) the evolution of values.

2 – Problems caused by surrogacy remain

The difficulties encountered by surrogate-born children are real, and the Court has taken this into consideration. On the other hand, the Court has at no point made mention of the situation of the genetic mother of the children, nor that of the biological (surrogate) mother. They are completely ignored by the Court and reduced to an instrumental function. However, surrogacy is more often carried out at the expense of the exploitation of women, and sometimes in places like Ukraine, Russia and India, at the cost of their lives. Surrogacy also causes violations of the rights of the child, as in this case.

The Court failed to grasp the problem of surrogacy as a whole, or did not want to. It regarded the matter solely from Western couples’ point of view. It is to be hoped that subsequent cases, especially ones concerning children born in India (*Foulon v. France*, n°9063/14), in Ukraine (*Laborie v. France*, n°44024/13; *D. & R. v. Belgium*, n°29176/13) and in Russia (*Paradiso and Campanelli v. Italy*, n°25358/12) will open the eyes of judges in Strasbourg to the whole issue of surrogacy, in particular its commercial nature and its links with prostitution. It appears that another case was recently introduced to the Court by a surrogate mother prosecuted because of her refusal to deliver the child. Surrogacy cannot be reduced to a simple “method of procreation” among others, as the Court does.

Saying that the judgment passed by the French legislature concerning this practice is only a matter of “perception” is tantamount to denying the very faculty of moral judgment of the act by relativizing this faculty in a supposed absolute subjectivity of the legislator.

The Court claims not to make a ruling on the “*choice of ethics of the French legislator*” but only “*verifies if the national judge has duly taken into consideration the need to conserve a proper balance between the interest of the community in order that its members submit to the choice made democratically and the interest of the applicants –including the best interest of the children– fully to enjoy their rights to respect for family and private life*” (ECHR, 26 June 2014, n°65192/11, Para. 84). For the Court, the authorities’ legitimate interest is targeted at the respect of positive norms (submitting to the choice made) and not the respect of interest and values that this norm intends to protect. In weighing these matters, the Court opposes the formal respect of the law to the interest of the applicants. It hides the reason for this democratic ethical choice – protecting the most vulnerable. However, France tends to ensure an equilibrium between the competing interests of commissioning adults, children and women involved. The

balancing carried out by French law cannot be reduced to an opposition between a formal respect of the law and that of the family situation, between *legalism* and *humanitarianism*.

The Court has swept the interests of the State regarding the protection of the weakest and made prevail isolated individual cases over the general rule, which will result in exposing a greater number of vulnerable people to a practice that violates their human rights. Looking only at the position of the applicants, the Court ignores the sordid market that underlies and helps support the growth of a very lucrative industry, if not respectful of human dignity. It thus contributes to the development of globalized liberalism, denying national sovereignty and ultimately imposes uniformity and ethics by leveling down.

That being said, the issue concerning the conventionality of surrogacy remains. Indeed, this practice, even tolerated by the ECHR, goes against well-established standards of international law, in particular the provisions of the conventions relating to international adoption, the Convention on the Rights of the Child and its Optional Protocol on the sale of children.

Both the Hague Convention on the protection of children and co-operation on international adoption (Hague Conv., 29 Mai 1993, art. 4) and the revised European Convention on the adoption of children (27 November 2008, art. 5) require that the consent of the parents should not have been obtained in return for money or compensation of any kind and that the consent of the mother should have been given only after the birth of the child. The Optional Protocol defines the sale of children which applies perfectly to surrogacy 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”* (CRC optional protocol 25 Mai 2000, art. 2 a).

Only an international treaty seems able to restore the respect of these norms and contain the liberalisation of surrogacy. By such a treaty, which could follow the 1989 opinion on “surrogate mothers” of the ad hoc Committee of Experts of the Council of Europe on Progress in the Biomedical Sciences (CAHBI) , States would undertake to guarantee that:

1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother.
2. Any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable.
3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited.

The main obstacle to the conclusion of such a treaty is the lack of political willpower knowing that reproductive tourism is a market worth several billions of dollars, quickly implantable in poor countries. Due to the lack of political willpower currently, it would probably mean waiting for a generation and numerous tragedies, and for surrogate-born children to be old enough to express themselves and to prosecute those who sold and bought them, intentionally depriving them partially or totally of their biological link and finally of their dignity of human beings born “free and equal in dignity and rights.”