To Recognize or Not to Recognize? That Is the Question!

Motherhood in Cross-Border Surrogacy Cases

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Abstract

This article describes the status quo in cross-border surrogacy cases, more specifically how national courts deal with the recognition of parenthood validly established abroad. As the recognition of motherhood is deemed to violate the national ordre public, the solutions so far, i.e. recognition of fatherhood and adoption, will be examined. Moreover, the arguments for an alleged ordre public-violation concerning motherhood will be presented. Finally, the question whether the European Human Right Convention has an impact on the interpretation of the best interest of the child will be answered.

Keywords: cross-border surrogacy, motherhood, private international law, ordre public, European Human Right Convention.

A Cross-Border Effects of ART

Since new possibilities of artificial reproductive medicine (ART) as in vitro fertilization (IVF) and intracytoplasmic sperm injection (ICSI) have led to solutions overcoming childlessness, couples and singles respectively – herein named intended parents – being infertile or sterile could ask for a surrogate mother to carry a child for them with the intention to hand it over after the birth.[1] Especially same-sex male couples depend on a surrogate mother to have a child of their own. Their wish to be legal parents of that child is even more comprehensible in view of the increasing legalization of same-sex partnerships and marriages. When modern medicine started to provide new methods of medically assisted reproduction, discussions in various countries began which techniques should be legalized, regulated or prohibited. Such discussions began, for example, in Germany in the (late)

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1 This is the general definition of surrogate motherhood. The German and Austrian wording is 'Leihmutterschaft' or 'Ersatzmutterschaft' (the latter one chosen by the German legislator), 'draagmoederschap' in Dutch law and 'gestation pour autrui' (GPA) or 'mère porteuse' in French terminology.

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1980s and led to a criminal sanction of surrogate motherhood.[2] Countries such as Austria or Switzerland created special laws on the topic of medically assisted reproduction or even dealt with them in their constitution.[3] Other countries allowed surrogacy, some in a restricted, others in a broader way.[4] When surrogacy is not allowed in the home countries of the intended parents, couples and singles cross borders in order to make use of surrogacy abroad.

B Legal Limbo for Children Born Abroad by a Foreign Surrogate Mother for Intended Parents

Consequently, several European courts had to deal with cross-border surrogacy cases, *e.g.* in Germany,[5] the Netherlands,[6] the United Kingdom,[7] Belgium,[8] Aus-

2 *See* § 1 para. 1 Nr. 7 Embyronenschutzgesetz and §§ 13 lit. c, d conj. 14 lit b Adoptionsvermittlungsgesetz.

3 *See* for Austria the Fortpflanzungsmedizingesetz from 1992; for Switzerland *see* Fortpflanzungsmedizingesetz from 1998 and Art. 119 of the Swiss Constitution; *see* also for Spain Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida; for Italy Law nr. 40 of 19 February 2004 (Norme in materia di procreazione medicalmente assistita).

4 The requirements are very different and a lot comparative law research has been made on this topic. For some recent research, *see* K. Trimmings & P. Beaumont, *International Surrogacy Arrangements*, Oxford, Hart Publishing 2013; Brunet *et al.*, *European Parliament, A Comparative Study on the Regime of Surrogacy in EU Member States*, 2013; F. Monéger, *Gestation pour autrui: Surrogate Motherhood*, Paris, Société de Législation Comparée 2011; in German *see* also N. Dethloff, 'Leihmütter, Wunscheltern und ihre Kinder', *Juristenzeitung* (JZ), 2014, pp. 922 *et seq*.; T. Helms, 'Leihmutterschaft – ein rechtsvergleichender Überblick', *Das Standesamt* (StAZ), 2013, pp. 114 *et seq*.; in Dutch *see* the UCERF-Report 'Draagmoederschap en illegale opneming van kinderen', available at <http://ucerf.rebo.uu.nl/wp-content/uploads/2013/07/WODC-Rapport-Draagmoederschap.pdf>.

5 *See* for example *Kammergericht* Berlin from 1 August 2013, *Das Standesamt* (StAZ), 2013, 348 (repealed by the *Bundesgerichtshof* (Federal Court of Justice) from 10 December 2014, Az. XII ZB 463/13, available at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=1&nr=69759&pos=44&anz=574>; *see* for a recent overview N. Dethloff, 'Leihmütter, Wunscheltern und ihre Kinder', *Juristenzeitung* (JZ), 2014, pp. 929 *et seq*.

6 *See* for example *Rechtbank* The Hague of 14 September 2009, *Jurisprudentie Personen- en familierecht* (JPF) 2011/36; also I. Curry-Sumner & M. Vonk, 'National and International Surrogacy: An Odyssey', *International Survey of Family Law*, 2011, pp. 259 *et seq*.

7 *See* for example X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).

8 For an overview J. Verhellen, 'Intercountry Surrogacy: A Comment on Recent Belgian Cases', *Nederlands Internationaal Privaatrecht*, 2011, pp. 657 *et seq*.

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tria,[9] Switzerland[10] and Italy.[11] In many cases, married or unmarried hetero- and homosexual couples go to countries such as India, Ukraine, Russia or several US states such as California or Georgia. In some cases, both gametes of the intended parents are used to create an embryo and placed into the surrogate mother's womb. Sometimes, gametes of (anonymous) sperm or egg donors are used. Rarely, the surrogate mother herself provides her own egg cell. After giving birth, the child is handed over to the intended parents. Delicate questions arise when these parents turn to their national embassy abroad applying for a passport or travel documents for the child. In countries following the ius sanguinis principle, nationality can be only derived from parentage,[12] but parentage is often denied due to public policy (ordre public) considerations. As surrogacy and avoidance of the birth-mother rule violates fundamental principles of the national law, the parentage of the intended parents legally established abroad is not recognized. Cases are easier when the child is born by a surrogate mother in the USA. Due to the US-American ius soli principle,[13] the child is granted US-American citizenship so that the child could easily travel to the country of origin of the intended parents. However, problems could arise when the intended parents want the US-American birth certificate to be recognized by the competent register office later. Lacking the required documents, the child can be stateless and/or parentless and faces the danger of being left in a country without legal parents and no citizen rights. The (long-awaited) decision by the German *Bundesgerichtshof* (Federal Court of Justice) from 10 December 2014 finally voted against an ordre public violation of parentage validly established abroad in cross-border surrogacy cases:

> All issues considered, the foreign judgment declaring the intended parents as the legal parents of the child does not violate the fundamental principles of German law so that recognition of this judgment would be unacceptable. Even Basic Rights (Grundrechte) or Human Rights do not hinder the recognition in principle. Rather, the best interest of the child argues for rather than against a recognition.[14]

9 *Verfassungsgerichtshof* from 14 December 2011, *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 2013, pp. 275 *et seq*., commented by D. Coester-Waltjen, 'Herausforderungen für das deutsche Familienrecht', *Forum Familienrecht* (FF), 2013, pp. 48 *et seq*.; E. Bernat, *Recht der Medizin*, 2012, pp. 107 *et seq*. and *Verfassungsgerichtshof* from 11 October 2012, *Praxis des Internationalen Privat- und Verfahrensrechts (IPRax)*, 2013, pp. 271 *et seq*., commented by E. Bernat, *Recht der Medizin*, 2013, p. 39.

10 *See Verwaltungsgericht* St. Gallen from 19 August 2014, available at <www.gerichte.sg.ch/home/dienstleistungen/rechtsprechung/verwaltungsgericht/entscheide-2014/b-2013-158.html>, at the moment pending at the *Bundesgericht* (Federal Court), commented by S. Gössl, *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 2015 (forthcoming).

11 Italian Supreme Court from 12 November 2014, *see* <www.rte.ie/news/2014/1112/658747-italy-surrogacy/>.

12 Such as Germany, the Netherlands, France and Austria (*e.g*. in Germany, §§ 1, 4 Staatsangehörigkeitsgesetz).

13 *See* 14th amendment to the U.S. Constitution.

14 *Bundesgerichtshof* from 10 December 2014, marg. nr. 44 (translation by the author).

Though most German lower courts used to affirm an alleged ordre public violation, this decision adequately reacts to crucial issues in this case, where a male same-sex couple living in registered partnership according to German law were declared as legal parents by a Californian court before the surrogate mother gave birth to twins, genetically linked to one of the intended fathers.

C Various National Rules on Surrogacy and Consequences for Parentage

This legal limbo is founded on the fact that countries have different rulings on surrogacy and consequently on parentage. In sum, the parentage concept can be classified in six types when it comes to surrogacy.[15] First, there are countries such as Germany, France or Austria which strictly prohibit surrogacy and thus always determine the birth mother as the legal mother following the paroemia 'mater semper certa est'. Furthermore, there are countries which allow surrogacy in a very strict way, mostly when altruistic, and require intended parents to follow adoption proceedings (the Netherlands) or adoption-like proceedings (United Kingdom, some states and territories of Australia and Israel). But the birth-mother rule remains valid in those countries. Some countries which allow surrogacy, like Greece or South Africa, provide for automatic parenthood for the intended parents but require participation of a court. Some other countries provide for automatic parenthood without any state participation, *e.g.* Russia or Ukraine. Lastly, there are countries like India or Thailand where surrogacy was not regulated and proceeded in a broad manner, but now prohibitions or regulations are planned or have been established due to the above-mentioned problematic cross-border cases.

D Adoption and Recognition of Fatherhood: Inadequate Solutions

Instead of focusing on the problems of legal motherhood in cross-border cases and answering the delicate question whether the birth-mother rule is of essential

15 *See* for details the national reports mentioned in *supra* n. 4. For some private international law aspects *see* also D. Gruenbaum, 'Foreign Surrogate Motherhood: mater semper certa erat', *American Journal of Comparative Law*, Vol. 60, 2012, pp. 475 *et seq*.

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value in national concepts, many authors[16] and even courts[17] refer to the way of adoption for the intended mother. Another solution is not to analyse the problem of motherhood but to establish parentage of the father so that the intended mother can adopt the child later.

I Establishing Fatherhood

Fatherhood can be established in a lot of European countries in three ways whereby mostly a once established fatherhood hinders the establishment of another fatherhood. First, there is a presumption of fatherhood for the father who is married to the birth mother; second, if the parents are not married, the father can recognize the fatherhood, whereby the recognition is mostly a mere declaration of intent; and last, fatherhood can be determined by a court which is based on a genetic examination.[18] Thus, in cases where the surrogate mother is not married, the father could recognize his fatherhood (mostly with the agreement of the surrogate mother)[19] regardless of his genetic link to the child. In those cases, the recognition of fatherhood is especially successful in countries where the national law itself only allows unmarried women to be surrogate mothers.[20]

In the situation that the surrogate mother is married, it is more complicated. According to German law, for example, the husband of the surrogate mother

16 Adoption here means adoption after surrogacy proceedings, not adoption in general as an alternative to artificial reproduction techniques. Some authors prefer the way of adoption instead of artificial fertilization, *see* for Germany, T. Rauscher, Staudinger, Commentary, BGB, Anh. zu § 1592, marg. nr. 5 to the topic of heterologous insemination: "Rather, adoption is an existing way to fulfil the wish to have a child, furthermore, it is a perspective for parentless children, which should be supported by the state more than producing children artificially" (translation by the author). But *see* also K. Boele-Woelki, 'Wie zijn de juridische ouders naar Nederlands recht bij een international draagmoederschap?', *in* S. Rutten (Ed.), *Van afstamming tot nationaliteit*, Deventer 2013, p. 10, where intended parents wish to have their own child and thus, adoption is the second best solution. *See* also A. Struycken, 'Surrogacy, A New Way to Become a Mother? A New PIL Issue', *in* Boele-Woelki *et al*. (Ed.), *Convergence and Divergence in Private International Law*, Liber Amicorum K. Siehr, p. 359: "Adoption is about trying to find a solution for a child without family while surrogacy is about making a child for a family without a child."

17 *See* for example *Rechtbank* The Hague from 24 October 2011, *Jurisprudentie Personen- en familierecht* (JPF), 2012/13: "Zolang de Nederlandse wetgeving dienaangaande geen andere mogelijkjeden biedt, kan de vrouw niet zonder meer als juridisch moeder van de minderjarige worden aangemerkt en dient de vrouw naar het oordeel van de rechtbank de minderjarige te adopteren, om zich als juridische moeder te kunnen laten registeren in de registers van de burgerlijke stand." In Germany, *see Verwaltungsgericht* Berlin of 5 September 2012, *Das Standesamt* (StAZ), 2012, p. 383: "Der einzige Weg, die genetische Mutter zur Mutter im Rechtssinne zu machen, ist nach deutschem Recht die Adoption (…)".

18 *See* § 1592 German Civil Code (GCC); Art. 1:199 Dutch Civil Code (DCC); Art. 312, 316 French Civil Code (FCC); § 144 Austrian Civil Code (ACC).

19 *See* for example § 1595 sec. 1 GCC, whereas this means that the surrogate mother is seen as the legal mother, which is actually in question.

20 For example, in Germany *Amtsgericht* Nürnberg of 14 December 2009, *Familienrecht und Familienverfahrensrecht* (FamFR), 2010, p. 119, and *Oberlandesgericht* Düsseldorf of 26 April 2013, *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 2014, pp. 77 *et seq*., commented by C. Mayer, 'Sachwidrige Differenzierungen in internationalen Leihmutterschaftsfällen', *Praxis des Internationalen Privat- und Verfahrensrechts* (IPRax), 2013, pp. 57 *et seq*.

would be the legal father. So first of all, the German intended father has to challenge this fatherhood before he could establish his fatherhood. In most cases, the husband of the surrogate mother does not wish to be the legal father of the child so that the procedure of challenging his fatherhood will, in the end, be successful.[21]

II Establishing Motherhood through Adoption

One could rely on a very simple way by which a foreign child becomes one's own child: adoption. But on first sight, this solution seems to be somehow inadequate, as a parent has to adopt his own genetic child. Adoption also seems to be inadequate since the role of the intended parents is totally different. In normal adoption procedures, the intended parents did not participate in creating the child. In surrogacy cases, the intended parents are *causal* for the creation of the child and therefore are not comparable with intended parents in adoption proceedings.[22] Anyhow, many German court proceedings deal with adoption of children born abroad by a foreign surrogate mother. This solution has a clear advantage: according to German law, the best interest of the child has to be served which can be objectively examined by the court.[23] As the child is genetically linked to the parents in most cases and lives together with his intended parents as a family, the best interest of the child and thus, adoption was mostly but not always[24] confirmed by German courts.

III Disadvantages of Both Solutions

Both solutions, the recognition of fatherhood and adoption, have clear disadvantages as they appear to not be a legally certain and fast way to establish motherhood for the intended mother.

1 Recognition of Fatherhood: Mere Relocation of Problems

Concerning the recognition of fatherhood, the intended mother is highly dependent on the intended father: on the one hand, she cannot initiate surrogacy proceedings herself if she is single, and on the other hand she has to rely on the

21 *See* on the topic of fatherhood and surrogacy in German law, N. Witzleb, '„Vater werden ist nicht schwer?" – Begründung der inländischen Vaterschaft für Kinder aus ausländischer Leihmutterschaft', *in* Witzleb *et al.* (Eds.), *Festschrift D. Martiny*, Tübingen, Mohr Siebeck 2014, pp. 203 *et seq*.

22 For the first time seen by the *Bundesgerichtshof* from 10 December 2014, marg. nr. 60: "The intended parents would be dismissed of their responsibility, though they initiated the artificial reproductive proceedings and the child owes his existence to their decision" (translation by the author).

23 *See* A. Diel, *Leihmutterschaft und Reproduktionstourismus*, Frankfurt am Main, Wolfgang Metzner Verlag 2014, p. 175, where this is not necessary when 'adoption-like' examinations on the best interest of the child have been made in the country where parentage was determined for the intended parents; also C. Benicke, 'Kollisionsrechtliche Fragen der Leihmutterschaft', *Das Standesamt* (StAZ), 2013, p. 112.

24 *See Amtsgericht* Hamm from 22 February 2011, *Familienrecht und Familienverfahrensrecht* (FamFR), 2011, p. 551, where adoption was denied as mere family life would be sufficient and adoption would not influence the child's welfare. *See* also the Italian decision where adoption of the intended parents was denied, *supra* n. 11.

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intended father's behaviour. As the consent of the surrogate mother is mostly necessary, even the intended father depends on her goodwill. If the surrogate mother is married, the fatherhood of her husband has to be challenged first, which extends the entire process. Thus, recognition of fatherhood can be a time-consuming process with legal pitfalls.

In some countries, recognition of fatherhood was instead totally denied, such as by the French *Cour de Cassation* due to the (material) evasion of law (*fraude à la loi*).[25] According to the court's view, recognition of fatherhood would undermine the applicable rules of adoption. Even if the father is genetically linked to the child and, thus, wants to establish fatherhood due to genetic proof, this procedure is not secure. In a Dutch case,[26] fatherhood was denied even though one of the two intended fathers could prove his genetic connection to the child. Moreover, due to Dutch law, this establishment of fatherhood is actually only possible if the man is the *verwekker* (genetic father by natural intercourse). Because in this case the insemination was medically assisted, courts referred to Art. 8 ECHR to apply the Dutch rule of fatherhood.[27] In sum, recognition of fatherhood does not solve the surrogacy problem but seems to be a mere relocation of problems.

2 Adoption Proceedings: Legal Uncertainty for the Child

Even adoption has clear disadvantages which lie in the adoption proceeding itself. The process duration is like the Sword of Damocles pending above the child. What if the intended parents break up or get divorced during the adoption proceedings or one of them is not interested in the child anymore? What if one of the parents passes away? Moreover, what if the intended parents are not married, living in registered partnership or do not fulfil other requirements and, thus, cannot claim for adoption according to some laws? In some legal systems, questions arise whether the parents' behaviour could influence considerations regarding the child's best interest.[28] In Germany, discussions also arose on the standard of the child's welfare in adoption proceedings. In some cases, adoption is only possible if

25 *Cour de cassation* of 13 September 2013, *Actualité Juridique famille* (AJ fam.), 2013, p. 579. According to Art. 336 FCC, the public prosecutor can challenge the recognition of fatherhood on indications that the legal filiation is made under the evasion of law.

26 *Rechtbank* The Hague from 23 November 2009, Zaak nr 328511/FA RK 09-317 (not published), *see also* K. Boele-Woelki 2013, describing this as a double limping legal relation.

27 *Rechtbank* The Hague of 21 June 2010, ECLI:NL:RBSGR:2010:BN1309, *see* also K. Boele-Woelki 2013, p. 17.

28 *See Amtsgericht* Düsseldorf from 19 November 2010, available at <www.justiz.nrw.de/nrwe/lgs/duesseldorf/ag_duesseldorf/j2010/96_XVI_23_09beschluss20101119.html>, concerning a male homosexual couple who applied for adoption: "With their applications to adopt the children the participants try to get proceedings, which are sanctioned in Germany, subsequently legalised under the disguise of the best interest of the child. They accepted tacitly that their children will be burdened with finding their identity as they will never meet their genetic mother and live with the fact, that two mothers handed them over in return for money." (translation by the author).

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it is not only beneficial but necessary for the best interest of the child.[29] In France, even adoption in cross-border surrogacy cases is just not allowed.[30]

Neither of these two solutions can establish the parentage of the child in a fast and safe way. They are more or less threatening the status of the child, and these threats must be reduced to a minimum, or even eliminated. An automatic filiation could be a better solution if it serves the best interests of the child. Anyhow, the alleged 'best interest of the child' seems to be a hollow phrase and has to be concretized for the law of parentage. A basic principle may be called *proparentality* which favours the establishment of parentage, at first instance irrelevant to who is the 'right' parent but to at least have a parent. This principle has to be joined by the principle of 'status clarity' as parentage has effects *erga omnes* and not only between parent and child. The status has to be stable and should not be altered when crossing borders to avoid limping legal situations. Lastly, 'status verity' should come to an effect, meaning that whenever possible genetic and – when possible – biological relations (meaning facts about the birth mother) should be given primary concern so that genetic/biological status and legal status would be in congruence.

In addition, general principles in private international law influence the discussion on the right solution of automatic (original) or derived parentage (as in adoption), *i.e.* the international harmony of decisions to avoid limping legal relations, legal certainty meaning a clear status for the child and, moreover, the creation of 'real' decisions. Emphasis should be laid on this last principle. If the private international law of some countries refers to the birth-mother rule,[31] this will not solve the case. If the child is already with his intended parents in their home country, the child has to be brought back to the surrogate mother. This is problematic as the surrogate mother is not interested in the child anymore which she had already demonstrated by handing over the child to the intended parents and, more importantly, is not obliged to care for the child as she is not the legal mother due to the laws of her home country. Thus, the child will likely end in state care as an orphan. Besides, by having no clear legal mother, the child will (in countries with ius sanguinis principles) be stateless as it cannot derive its nationality from a parent. Relating to the birth-mother rule would thus create an unrealistic solution which is not in line with the best interest of the child.

29 German law foresees two standards of the examination of the child's welfare, § 1741 sec. 1 GCC. Basically, the adoption is admissible, when it is beneficial (dienlich) for the child's welfare. If the adopter participates in an unlawful placement of the child, the adoption is only allowed if this is necessary (erforderlich). Which standard is applicable in cross-border surrogacy cases was determined by German courts unequally. *See Landgericht* Frankfurt am Main from 3 August 2012, *Das Standesamt* (StAZ), 2013, pp. 222 *et seq*.; agreeing A. Botthoff & A. Diel, 'Voraussetzungen für die (Stiefkind-) Adoption eines Kindes nach Inanspruchnahme einer Leihmutter', *Das Standesamt* (StAZ), 2013, pp. 211 *et seq*.

30 *See Cour de cassation* Assemblée plénière, du 31 mai 1991, Rec. Dalloz 1991, pp. 417 *et seq*.

31 For example, German law in Art. 19 sec. 1 sentence 1 Introduction Law to GCC (ILGCC), relying on the habitual residence of the child. If the child habitually resides in Germany, the German birth-mother rule is applicable and, therefore, the surrogate mother should be the legal mother. *See* also the following considerations.

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Taking these principles into account leads to the answer that only automatic recognition would therefore be a safe tool to avoid motherlessness (and statelessness). This was also (correctly) demonstrated by the German *Bundesgerichtshof* in its recent decision: "Moreover, the adoption – besides the difficulties of a cross-border adoption where the intended parents are already recognized as legal parents of the child in the country of origin – holds additional threats for the child compared to an automatic establishment of parentage. Even after the birth the intended parents could choose arbitrarily whether to adopt the child or – if the child were disabled – deny adoption. Even if the intended parents break up or regret their decision, the parent not genetically linked to the child can easily avoid the establishment of parentage. Thus, the child would be left parentless in his country of origin and cannot establish a legal bond to the birth mother."[32]

Automatic recognition of motherhood validly established abroad has often been squashed with the argument of an alleged ordre public violation. Before demonstrating the main arguments, interesting differences between the recognition of parentage shall be shown.

E Recognizing Parentage Established Abroad: Connecting Factors vs. Recognition Method

When it comes to the recognition of parentage which has been legally established abroad, two types of recognition are possible. If the motherhood of the intended mother is established through a court decision, international civil procedural law will determine the recognition of this judgment. If there is no participation of a foreign court, like in Ukrainian law, or this participation has no constitutive character for the parentage, the intended parents will most likely ask for recognition of the birth certificate they received abroad. The recognition of such a birth certificate is treated differently in European countries.

According to German, French and Austrian law, for example, a birth certificate cannot be recognized. Instead, civil registrars and courts determine the applicable law of parentage according to the very classic Savignian way: the applicable law on parentage is determined according to their national conflict of laws rules which use different connecting factors. A multitude of problems arise with these connecting factors like the habitual residence of the child, nationality of one of the parents, nationality of the child or the law applicable to the marriage of the parents. If the law of the 'habitual residence' (in German private international law and Austrian international procedural and private law) applies, questions arise where this habitual residence exactly is. If the child cannot enter the country of origin of its intended parents since parenthood and, thus, the granting of nationality is denied due to ordre public considerations, the habitual residence is then established abroad so that foreign law and mostly parenthood of the intended parents is established – a paradox which is inherent in this connecting factor.[33]

32 *Bundesgerichtshof* from 10 December 2014, marg. nr. 59 (translation by the author).

33 On that problem, *see* B. Heiderhoff, 'Der gewöhnliche Aufenthalt von Säuglingen', *Praxis des Internationalen Zivil- und Verfahrensrecht* (IPRax), 2012, p. 525.

Moreover, some connecting factors themselves include the term 'mother'[34] by determining motherhood or parenthood which leads to circular reasonings. Same circular reasonings appear if the connecting factor of the child's nationality in Austrian law[35] is used as the nationality is derived from parenthood.

The Dutch legislator has opted for a different approach regarding the recognition of foreign birth certificates. The general starting point is mutual trust. A foreign birth certificate is to be recognized if a competent civil registrar has correctly recorded the birth according to his national rules. This approach has its advantages: since there is no conflict of laws test,[36] the parentage already established abroad also has effects in the Netherlands. Hence, situations of limping legal status are avoided. This method is similar to the recognition of judgments which is often easier because irrespective of the applicable law that has been applied by the foreign competent authority, the foreign judgment will generally be recognized. Recognition of foreign birth certificates may however be refused if it violates public order.

F Alleged Violation of Ordre Public in Different Countries

All of these recognition methods include an ordre public rule, whereas recognition can be denied if this violates the national ordre public.[37] The arguments for an alleged violation of the national ordre public were different and similar at the same time.

German courts often argued with the same arguments that the national legislator used to reason his prohibition of surrogate motherhood with. There, the recognition of the parentage of the intended parents and therefore recognition of the foreign surrogacy agreement would violate the human dignity of the child and the surrogate mother. Moreover, surrogacy agreements neglect the importance of the prenatal development of the child. Surrogacy agreements create possible conflicts for the surrogate mother, and problems when it comes to the handing over of the child should be avoided. Lastly, the child would be rendered as a mere 'trade object', and it should be avoided that the surrogate mother is financially forced to enter into a surrogacy agreement.[38] This view is misleading: the courts

34 *See* in German law Art. 19 sec. 1 sentence 3 ILGCC; in French law Art. 311-14 FCC.

35 *See* B. Verschraegen, Commentary, ABGB, Vol. 2, 3rd edition 2004, § 21 IPRG marg. nr. 8; B. Verschraegen, *Internationales Privatrecht*, Vienna, Manz 2012, marg. nr. 178, refers to the 'awkward wording'; in detail M. Adensamer, 'Änderungen des internationalen Abstammungsrechts durch das KindRÄG 2001 – besonders zur Wechselbezüglichkeit von § 21 IPRG und § 7 StbG', *in* Bundesministerium für Justiz Zivilrechtssektion (Ed.), *Festschrift G. Hopf*, Wien, Manz 2007, p. 3.

36 *See* K. Boele-Woelki, 'Afschaffing van de conflictenrechtelijke toets binnen de Unie: Nederland strekt tot voorbeeld', *in* T. de Boer *et al.* (Eds.), *Strikwerda's conclusies*, Deventer, Kluwer 2011, p. 51.

37 *See* for example in German law Art. 6 ILGCC for applicable foreign law and § 109 sec. 1 Nr. 4 FamFG for foreign judgments.

38 To all of these arguments, *see* Official record of the Bundestag (Bundestag-Drucksache) 13/4899, p. 82; 11/4151, p. 6; 11/5460, pp. 15, 17.

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fully ignore that public policy restrictions are only valid if the *result* in the *concrete* case violates national fundamental principles. Thus, the discussion is not about general arguments for or against surrogacy but about the question if the concrete parenthood of the intended parents for the child who is already born would violate the national ordre public. When it comes to parentage, the German birth-mother rule seems to be of strong character (challenging motherhood is not allowed according to German law),[39] but it is not consequent at all: when it comes to incestuous relations or grounds of prohibition of marriage, the genetic relation to the mother is relevant.

Also the Dutch courts referred to the strong meaning of the birth-mother rule.[40] In cases where no mother is mentioned on the birth certificate, recognition was denied as this would violate the right of the child to know its own origins according to Art. 7 UN Convention on the Rights of the Child.[41] This argument was even raised when the intended mother was mentioned on the birth certificate. The Dutch judgments seem to interpret Art. 7 UN Convention in a way that right to know one's origin only encompasses the information about the birth mother. This ignores the genetic link between the child and the intended mother, if it exists. This interpretation would violate the child's right concerning his *genetic* origins.

The French *Cour de cassation* argued with the indispensability of a person's status which is a legal principle in French law, Arts. 16-7 and 16-9 CC.[42] Similar to German law, this argumentation mixes argumentation concerning the national prohibition of surrogacy and the parenthood of the already existing child. The French approach is very strict; as has been discussed, even fatherhood and adoption were denied. Other ways, such as transcription of the birth certificate and recognizing the authenticity of the birth certificate according to Art. 47 CC, were strictly denied.

Many more questions arise in combination with surrogate motherhood. What if the surrogate mother gives birth in a country where anonymous birth is allowed?[43] What if male same-sex parents try to get their parenthood recognized and, thus, no mother is mentioned on the birth certificate?[44] What if the surrogate mother is the female (registered or married) partner of the genetic mother and the recognition of this co-mother shall be recognized?[45]

39 This was before introducing the birth-mother rule in 1998 and still is highly controversial, *see*, for example, J. Backmann, *Künstliche Fortpflanzung und internationales Privatrecht unter besonderer Berücksichtigung des Persönlichkeitsschutzes*, München, C.H. Beck 2002, p. 111.

40 *See Rechtbank* The Hague from 24 October 2011, *Jurisprudentie Personen- en familierecht* (JPF), 2012/13: "een beginsel weer van juridische en sociale aard dat in de Nederlandse samenleving als fundamenteel wordt beschouwd".

41 *Rechtbank* The Hague of 14 September 2009, *Nederlands Internationaal Privaatrecht*, 2010, Nr. 3.

42 *Cour de Cassation* from 6 April 2011, pourvois N°09-664 86, 09-17.130, N° 10-19053.

43 *See* the *Rechtbank* The Hague of 14 September 2009.

44 As the *Kammergericht* Berlin from 1 August 2013.

45 This is an entirely new question; *see* on the introduction of the Dutch Co-Motherhood M. Vonk, *Same-sex parents in the Netherlands*, available at <http://machteldvonk.files.wordpress.com/2013/08/same-sex-parents-in-the-netherlands.pdf>.

Another approach was chosen by the Austrian Constitutional Court.[46] Although Austria prohibits surrogacy, the best interest of the child demands a recognition of the parenthood established in Ukraine or in Georgia, USA. Any other solution would be 'unthinkable' (denkunmöglich): "it would violate the child's best interest, if (...) the surrogate mother were forced to be the legal mother, though she is neither genetically the mother nor according to the personal law of the child, nor wants to be the mother and cannot be the mother and has not created family ties between her and the child." The Austrian Constitutional Court also refers to Art. 8 EHRC, by which the best interest of the child should determine the entire discussion.

G Implications of European Human Rights, Art. 8 EHRC

In this context, it should be examined whether and to what extent Art. 8 EHRC has some influence on these developments.[47] Though the EHRC has a different position in the various national legal systems,[48] member states have to consider those rights directly or indirectly.

Much attention was given to three recent decisions by the European Court for Human Rights (ECHR). The case of *Mennesson* was one of them: the French intended parents went to California where twins were born by a surrogate mother. The French authorities registered these children as their children, but the Court of Appeal in Paris voted for the annulment of this decision. In April 2011, the *Cour de cassation* decided that the revised decision was correct due to a violation of the French (international) ordre public. When the *Mennesson* family (and additionally the family *Labassée*)[49] turned to the ECHR, it decided that non-recognition of the parentage established abroad would violate Art. 8 EHRC.[50]

With regard to the family life of the children and parents, the court, however, stated that it was not affected or threatened by the French authorities as they could live jointly in France. However, the private life of the children was violated,

46 *Supra* n. 9.

47 It is also influenced by Art. 7 UN Convention on the Rights of the Child, which cannot be discussed here. It may also be argued that Art. 21 Treaty of the Functioning of the European Union claims for a mutual recognition in European Law, *e.g.* on the basis of ECJ Case Grunkin Paul C-353/06, *see* also K. Saarloos, *European Private International law on legal parentage*, Maastricht 2010. But this would lead to a different treatment of children born by surrogate mothers in the European Union and children born outside the European Union. Justification of this different treatment can be barely reasoned.

48 In the Netherlands, the EHRC is ranked higher than the Dutch Constitution; in Austria, it is part of the Austrian Constitution; in France and Germany, the EHRC is ranked on the level of a sub-constitutional law but plays a major role in the national legal system (either through factual priority or interpretation), *see* for example in Germany the highly discussed case of *Görgülü*, BVerfGE 111, p. 307; for France *see* the case *Nicolo*, Conseil d'Etat from 20 November 1989, Rec. Lebon 1989, p. 190.

49 *See* also the third case *D. and others v. Belgium* (application no. 29176/13), where there was no breach of Art. 8 EHRC by the Belgian authorities in carrying out checks before allowing a child who had been born in Ukraine to a surrogate mother to enter Belgium.

50 Application no. 65192/11 (*Mennesson*) and application no. 65941/11 (*Labassée*).

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especially because the genetic link between the father and the children was ignored. But the decision of the ECHR does not answer all the questions and, therefore, is not the expected breakthrough in international surrogacy cases. Does the reasoning of the ECHR mean that there is no violation of Art. 8 EHRC if the child can be adopted or recognized by the (genetic) father? Is there a violation of Human Rights if only motherhood is concerned? As there is no common core concerning the motherhood, this would on first sight confirm a broad margin of appreciation of the contracting states so that a violation would fail even though the aforementioned problems would still exist. What if the child cannot enter the country of origin of the intended parents? Would this create a violation of the guaranteed family life? As Art. 8 EHRC also embraces future family relations which cannot be realized due to circumstances for which the applicant is not responsible,[51] family life is also protected if the child cannot enter the country of the intended parents. In both cases, the question arises if Art. 8 ECHR claims for a positive obligation to 'legalize' family ties. Though the decision *Marckx v. Belgium* of 1979 claims more or less for a birth-mother rule by natural conception and birth, the ECHR confirmed, for the first time, the necessity for a state to establish legal rules so that family life can be lived in a sufficient way. Also another decision seems helpful in answering that question: the decision *Wagner and JMWL v. Luxembourg* of 2007 dealt with the recognition of a foreign adoption judgment in Luxembourg. A Luxembourgian single woman adopted a child in Peru. Returning home, the competent authorities denied recognition of the Peru adoption judgment as adoption in Luxembourg is not allowed for single persons. With regard to the child's welfare, the ECHR argued that non-recognition of the parentage established abroad would violate Art. 8 EHRC as "(t)he applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family."[52] Thus, legal existence of family ties should be recognized "to take in account of the social reality of the situation." This understanding of a *fait accompli* would also lead to a recognition of parenthood in cross-border cases. There would be an additional violation of private life if the child is genetically linked to the intended mother, although not too much emphasis should be laid on the question of a genetic link – as an existent genetic link does not solve the question of parentlessness and statelessness.[53]

51 *See* ECHR *Anayo v. Germany* (application no. 20578/07), marg. nr. 61; *D. and others v. Belgium*, marg. nr. 49, though in this case there was no violation of Art. 8 EHRC by the Belgian authorities which had the right to conduct legal checks for four and a half months, especially to ask for sufficient evidence of the intended parents to demonstrate their genetic ties to the child.

52 Application no. 76240/01, marg. nr. 132. However, this decision was also based on the fact that the Luxembourgian authorities used to accept those decisions and the change of legal practice was not foreseeable for the plaintiff.

53 Mostly, authors differ between the cases where a genetic link between intended parents and child is existent and the non-existence of such genetic link where, in the latter case, adoption proceedings shall apply, *see* for example R. Frank, 'Rechtliches Vater-Kind-Verhältnis von "Leihmütter-Kindern"', *Zeitschrift für das gesamte Familienrecht* (FamRZ), 2014, p. 1529 or I. Curry-Sumner & M. Vonk 2011, p. 280.

H Lessons to Be Learnt

Which lessons can be learnt? Denying parentage would on the one hand prevent other couples to go abroad and guarantee obedience of general preventive considerations. On the other hand, the child's welfare will be ignored as the child will be left parentless and often stateless. General considerations can never overrule concrete situations. Thus, recognition of parentage validly established abroad would serve the concrete principles of parentage best – the child would at least have legal parents, a clear status which would not be limping in different countries and, moreover, would be congruent with genetic reality in most cases. This would even render a real decision and international harmony of decisions in private international law. After the Austrian, German and also the European Court of Human Rights (to some extent) came to the same results, this may have implications for lower and high courts and even national legislators in other countries.

Finally, to reply on the question posed in the title of this contribution: recognition of the legal status obtained abroad by the intended mother seems to be the correct starting point.

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