SPANISH BIOETHICS COMMITTEE REPORT ON THE ETHICAL AND LEGAL ASPECTS OF SURROGACY

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Introduction

Surrogacy or gestational surrogacy is one of the most controversial bioethical topics today, due to its disruptive nature in terms of the way in which human procreation and the resulting relationships of motherhood and parenthood have been construed and regulated until now. For the first time in history, this raises the possibility of dissociating gestation from maternity.

In order to put the transcendence of this phenomenon into perspective, it has been argued that it does no more than to put into effect what is already brought about by adoption, namely, to establish the distinction between the legal and the biological mother. Yet it is obvious that in adoption there is no prior agreement between the woman who gestates a child and the persons who will assume its parentage, which, nonetheless, is the root cause of all gestational surrogacy. Hence, it has been an unprecedented practice until recent times and one with an enormous impact on all levels of human life -cultural, social, ethical and legal.

In recent years, it has sparked off a heated debate worldwide as to whether surrogacy should be prohibited or permitted and, in the latter case, on what terms it should be regulated. Although the first cases occurred more than forty years ago, for a long time the practice had a limited scope. It has been in the last fifteen years that the practice has spread and, in particular, become internationalised. The media have been carrying an increasing number of surrogacy-related news items which have attracted public attention. On the one hand, cases of famous celebrities -men and women, homosexual and heterosexual, individually or as a couple- who have resorted to this medium to be parents, have had a great repercussion in the media; on the other, there have also been reports of court battles for the paternity or maternity of children born in this way. Perhaps the best known, and one of the first in the judicial history of surrogacy, was that of Baby M, in which the surrogate (and genetic) mother brought an action against the intending or intended rearing parents, claiming the maternity over her child after birth. In recent years, there have been frequent stories in the news about scandalous, or at least highly controversial, situations linked to this practice. In many of them, it so happened that the surrogate mother came from a different (and, in general, much poorer) country than that of the intending parents. In cases such as these, there has been talk of reproductive exploitation.

Spanish society has not remained on the periphery of this debate. Surrogacy has become a highly controversial topic. The degree of passion that it arouses is reminiscent of so many other bioethical debates, such as those surrounding

abortion, euthanasia, and embryonic stem cells. This topic has been statutorily regulated in Spain for the last thirty years. Specifically, Article 10 of the 1988 Assisted Human Reproduction Technology Act (*Ley 35/1988, de 22 de noviembre, sobre técnicas de reproducción humana asistida*) provides: "1. Any agreement whereby gestation is entrusted, with or without monetary consideration, to a woman who waives maternal parentage in favour of the other contracting party or a third party shall be null and void. 2. The parentage of children born by gestational surrogacy shall be determined by birth." This Act was partially amended by Act 45/2003, which was in turn revoked by the 2006 Assisted Human Reproduction Technology Act (AHRTA) (*Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida*). Notwithstanding this, in neither of these two interventions on the subject did the legislature deem it necessary to amend the regulation of gestational surrogacy laid down in that pioneering 1988 Act.

Despite the above-mentioned legal framework, hundreds of Spaniards have resorted to this practice in order to be fathers or mothers. To this end, they have sought surrogate mothers abroad who, in general, have been fertilised with the sperm of the intending father. At the present time, Spanish Law offers no uniform response to the registration of parentage of children born in this way. There is a diversity of positions between the Directorate-General for Registries and Notaries and the Supreme Court, which in turn generates legal uncertainty for the affected parties, and for the children in particular.

Generally speaking, there are two principal legal problems relating to surrogacy which arise in Spain. One has to do with the fact that surrogacy is contrary to the law of the land, and yet many Spanish citizens manage to become parents by resorting to this in other countries where it is legal. Can one claim that the laws passed in Spain are genuinely effective and that they do not solely apply to those who, for lack of funds and temerity, are unable to circumvent them abroad? There are other spheres where this issue poses no problem whatsoever, and the actions are liable to prosecution, even criminally, despite being committed abroad, as is the case with obtaining or trafficking in human organs (punishable under Article 156 *bis* of the Criminal Code).

The other problem has to do with the fact that, apart from any possible successful circumvention of the prevailing legislation and violation of internal or international public policy, there is a new human life whose interests the law must safeguard. An essential aspect of these interests consists of recognising the child's legal parentage, which in turn gives rise to a further question, i.e., should the intending parents be recognised as possessing the legal parentage of a child conceived to order, even

though the illegality of the process is acknowledged, or would it be more coherent not to recognise such parentage, so as to disincentivise the population from regarding this as a means of achieving something that is prohibited by law? Rulings on this issue have been made by the highest courts of law, including the Spanish Supreme Court and the European Court of Human Rights (ECHR).

Aside from these matters, this opens the debate as to whether prevailing Spanish legislation should be reformed to allow surrogacy under certain conditions or, alternatively, should be maintained "as is" and measures adopted to reinforce its efficacy. In 2016, this debate was first aired in a regional parliamentary seat, specifically that of the Madrid Regional Assembly. Here, the discussion centred on a White Paper that urged, "the Madrid Autonomous Regional Authority, in turn, to press the Spanish Government to introduce a gestational surrogacy act without delay which would guarantee the rights of all persons involved in the process and, in particular, of children resulting from this reproduction technique". This initiative failed to prosper because, despite having the combined support of the *Partido Popular* (People's Party) (save three of its MPs) and the *Ciudadanos (Citizens)* Party, it met with the opposition of the Socialist (*Partido Socialista Obrero Español/PSOE*) and *Podemos* Parties.

In view of this panorama of notable complexity and controversy, the Spanish Bioethics Committee, as an independent collegiate body acting in a consulting capacity in matters relating to the ethical and social implications of Biomedicine and Health Sciences, decided at the Plenary Meeting held on 6 September 2016 to draw up a report on the ethical and legal aspects of surrogacy. In this Report, taking the current state of the issue as our starting point, we set out the principles and reasons which we regard as fundamental when it comes to maintaining a coherent position on this practice. In doing so, we hope to contribute to the public debate on a matter that has an impact, not only on the persons directly affected (i.e., children resulting from this practice, surrogate mothers, intending parents and, where applicable, gamete donors), but also on society as a whole, insofar as it leads us to reformulate the way in which human procreation and the ensuing relationships of parenthood should be ranked.

This report is structured in three sections:

a) The practice of gestational surrogacy and its different modalities. The terminological battle and its repercussions. The most relevant scientific aspects, and particularly, the relationship between the foetus and the

surrogate mother. The conditions for a rational, non-ideological appraisal of this practice.

b) Ethical issues. This involves a critical analysis of the arguments for and against gestational surrogacy which are having most impact on public opinion and legal doctrine, with a view to establishing the reasons that we see as having the greatest consistency and cogency.
c) Legal perspective. Here we review the positions of intergovernmental bodies which have addressed the issue, and specifically analyse the legal status of children born through gestational surrogacy in Spain.

We are aware that there are many issues which remain to be dealt with and that those selected have been addressed somewhat succinctly. However, we do not see our mission as being to offer a comprehensive response to each and every question raised by this practice, but rather that it falls to us to clarify the terms of the debate, and then set out our thoughts and the results of our deliberations.

Part I: Gestational surrogacy: classification, conditions for the debate, and scientific aspects

Gestational surrogacy occurs when a woman agrees to gestate a child, for the purpose of handing it over after birth to the person or persons who have commissioned it and are going to assume its parentage. There are many ways of bringing this about, depending on all the variables in play. What all forms of gestational surrogacy have in common is the intent to deprive the person who has given birth to a child of her motherhood status, and attribute such status instead to another person or other persons. It should be borne in mind here that the first entry given as the definition of "mother" in the Dictionary of the Spanish Royal Academy (*Real Academia Española*) is "*Hembra que ha parido*" (Female who has given birth), though the second definition widens the scope of the term to "*Hembra respecto de su niño or niños*" (Female with respect to her child or children).

1.- Types of gestational surrogacy

There are multiple ways in which gestational surrogacy can be carried out, and these can be classified by reference to the following criteria: (1) the intent with which the surrogate mother acts; (2) the existence or non-existence of affectional or family bonds between the child's surrogate mother and the legal parents (the so-called intending parents); (3) the conditions of the child's transfer; (4) the origin of the child's genetic endowment; (5) the type of intending parents; (6) the reason for resorting to surrogacy; (7) the geographical location of the intending parents and surrogate mother; (8) the surrogate mother's level of knowledge and freedom; (9) the type of legal relationship established between the intending parents and surrogate mother; (10) the existence of a legal framework that would or would not ensure legal certainty; and, (11) sundry technical aspects.

(1) *The intent with which the surrogate mother acts may be altruistic or lucrative*. In the former case, the woman receives no remuneration for her service. She could only receive some compensation for expenses or loss of earnings occasioned by the gestation. In the latter case, the surrogate mother renders a service in exchange for a certain consideration.

(2) *The existence or non-existence of affectional or family bonds between the surrogate mother and the intending parents*. If there is a family tie, the surrogate mother could be the mother, sister or daughter, or alternatively, an aunt, cousin or niece. In such cases, the child would have a double bond with the surrogate mother,

i.e., that deriving from gestation and that deriving from legal parentage. For instance, if a mother gestates on behalf of a child of hers, the resulting baby would legally be the grandchild of the surrogate mother, but also her "child" insofar as gestation is concerned. Where there is no family or affectional bond, the surrogate mother may be any woman whatsoever. Some authors have gone still further, by suggesting that gestational surrogacy should be undertaken by women who devote themselves professionally to this task.

(3) *The conditions of the child's transfer*. It is possible for the parties to agree that the surrogate mother will not waive maternity before the birth and will be free, in the days following the birth, to decide whether she will finally relinquish the child that has been born to the intending parents, or keep it. On the other hand, it is equally feasible to provide that the surrogate mother will waive her parentage rights prior to the birth, and that the child will thus be transferred to the intending parents after birth. In the case of remunerated gestation, it is practically impossible to envisage a situation where the terms of the agreement would recognise the surrogate mother's freedom, after the birth, to decide whether or not she will waive her parentage rights. Standard practice in such cases is to provide that the waiver be made before the birth, and that in the event of the surrogate mother being in breach of her obligation, she will incur liability.

(4) *The origin of the child's genetic endowment*. The ovum may come from the surrogate mother, the intending parent, or a third party who has donated or sold it. The sperm, in turn, may come from the intending parent or a third party, on the same conditions as the egg (donation or sale). There are six possible combinations. A child can thus have as its "genetic parents": the male and female intending parents of the gestational surrogacy; the intending parent and the surrogate mother; the intending parent and an egg donor; a sperm donor and the intending parent; a sperm donor and the surrogate mother; or a sperm donor and an egg donor. Each of these combinations may be attributable to any one of a variety of reasons and will have a different impact on the child, depending, to a large extent, upon whether or not the anonymity of the gamete donors has been provided for. Obviously, from the moment it becomes possible to create and use "artificially" obtained gametes (i.e., those induced by means of cellular reprogramming) for reproduction, the possible combinations of children's genetic load will be increased.

(5) *The type of legal parents that the child will have.* The legal parent may be a heterosexual couple, a male or female homosexual couple, a single woman or man, more than two persons in different modalities (polygyny, polyandry or polyamory), or even a legal person or entity.

(6) *The cause of gestational surrogacy*. This may be a medical reason, such as a woman's inability to gestate; a biological impossibility, where the couple lack a womb (fundamentally male couples), or where it is a single male who desires to be a father; or a professional, social or personal reason (e.g., when a woman does not wish to gestate because of the drawbacks that this would have for her professional life, or because she is afraid of or averse to gestation).

(7) *The geographical location of the intending parents and the surrogate mother*. They may be from the same country, and even be in close proximity and have continued contact during gestation and after the birth. However, they may also be from different countries, so that the surrogate mother carries her pregnancy to term and gives birth in a country other than that of the intending parents. In such cases, it can be presumed that there was no previous relationship between both parties, and likewise, that this will not be maintained once the child has been handed over.

(8) *The surrogate mother's degree of knowledge and freedom*. Although it is usually taken for granted that the surrogate mother is a woman who freely and knowingly consents to performing this service, this is not always the case. Instead, one has to accept that circumstances of all types -preeminent among which are without doubt the negligible legal guarantees that may surround any gestational surrogacy- determine the surrogate mother's degree of knowledge and freedom in this process.

(9) *The characteristics of the legal relationship between the intending parents and surrogate mother*. Here too one finds very diverse variables. There may be detailed or generic agreements. The most common, particularly in cases where surrogacy is of a commercial nature, is that the relations between the surrogate mother and the intending parent are handled by a broker, which may well be a company that provides the complete reproductive service to the intending parents, a mediator who puts the intending parents in touch with the surrogate mother, or a public agency that acts as the intermediary and/or ensures the smooth running of the whole process.

(10) *The existence or absence of a legal framework that ensures legal certainty*. There are countries which have not specifically regulated the matter, countries which have regulated it but are not capable of guaranteeing generalised compliance, and countries in which there are clear rules and regulations that are obeyed. However, where one is dealing with international surrogacies, the regulations of two different countries come into play: these are not always properly

co-ordinated and, in such a case, generate serious situations of legal uncertainty and lack of legal protection for all the parties involved, especially for children born as a result of this practice.

(11) *Sundry technical aspects*. Gestational surrogacy can have its origin in artificial insemination or *in vitro* fertilisation. The most usual situation is that the embryo which is implanted in the surrogate mother is a product of *in vitro* fertilisation. In this case, gestation may require one or more ovarian stimulations and can be achieved by the implantation of one or more embryos. These embryos can be fresh or frozen. The surrogate mother may be primipara or the mother of some other child; indeed, she is frequently required to have had a minimum of one pregnancy prior to this type of gestation. She may be undergoing this treatment for the first time or have done so on other occasions. In cases of multiple gestations, provision may be made for what has come to be called "embryo reduction" (elimination of one or more of the embryos implanted). Not only do all these circumstances affect the level of risk assumed by the surrogate mother, but they also affect the success rate of the process and the number of children that the intending parents will receive.

2.- The rules of the bioethical debate in surrogacy

In order for the deliberation process to be productive, we consider it important to avoid some frequent risks which tend to arise in bioethical debates and which have already begun to arise in that surrounding gestational surrogacy. Mention is now made below of three which may easily hinder genuine debate, i.e., disputes about terminology, resort to sensationalism, and ideological disparagement.

2.1.- Terminological disputes

In bioethical debates, it is common to use terms that in themselves already contain an ethical appraisal of the issue, when, in principle, this should be no more than stated. For instance, it is not exactly the same to talk of "voluntary abortion" or "voluntary interruption of the pregnancy", "therapeutic cloning" or "cloning of human embryos for research", "saviour baby" or "saviour sibling", "animal experimentation" or "animal abuse". Hence, in order to ensure that the debate is not biased from the outset, it is important to agree on terms that are clear in their meaning and, as far as possible, neutral in their ethical appraisal.

The practice being subjected to ethical scrutiny in this Report has been given a multiplicity of names. Depending on the aspect being singled out for attention and, more particularly, on the ethical appraisal being conducted, recourse is had to one

term or another, e.g., surrogacy, womb for rent, gestational surrogacy, gestational surrogacy, motherhood for hire, surrogate motherhood, etc.

If we opt for the expressions "womb for rent ", "surrogate motherhood" or even "gestational surrogacy", we find that these are no mere euphemisms when what being sought is to contract a woman to incubate an embryo obtained by fertilisation *in vitro*. Firstly, it is not a womb for rent but rather a "mother to rent", since what one is doing is to contract the person as a whole, and not merely her womb, so that she will perform the task of gestation which the intending parents are unable (or unwilling) to perform. Neither is it correct to talk of "surrogate motherhood" because from the biological and genetic perspective, motherhood is not replaceable: there is either genetic maternity (the mother who contributes the egg) or physiological maternity (surrogate mother). Lastly, to call this practice "gestational surrogacy" or "gestational surrogacy" amounts to concealing the word "maternity", which is inappropriate since "mother" means far more than gestating and giving birth to a child.

To prevent the terminological dispute from becoming a hindrance when it comes to engaging in ethical reflection, in this Report the terms "surrogacy", "gestational surrogacy" or "gestational surrogacy", are used indiscriminately. While fully aware that each of these terms possesses a certain judgemental load that may serve to reinforce one or another position, we nonetheless prefer to leave the terminological debate to one side and centre our thoughts on the ethical debate. At all events, it should be borne in mind that "gestational surrogacy" is the legal term in Spain for this technique, as laid down by Article 10 of the 2006 AHRTA.

2.2.- Resort to sensationalism

Although surrogacy is a relatively recent practice, and one that is quantitatively of little significance, it has attracted enormous attention worldwide. This is understandably so because it amounts to a genuine revolution in the way the relationship between gestation and maternity is perceived, and because of the enormous impact it has on the persons directly affected (the child, the surrogate mother and the intending parents).

Among the cases of surrogacy that have occurred to date, there is already a highly varied range of precedents. It is common to resort to one example or another, either to oppose the practice or to maintain its lawfulness. For instance, the proponents of legalising it tend to seek support in cases of couples who, after many attempts, have not been able to carry the gestation of a child to term, and so resort to someone close who will, disinterestedly, undertake to gestate it but conceives

using gametes from the couple. The detractors of this practice cite truly intolerable cases, such as that of the intending parents who, of the two children to whom the contracted surrogate mother had given birth, kept the child who had been born healthy and left the surrogate mother with the child who had been born with Down's syndrome. It seems that the correct way of proceeding would be to treat the usual as usual and the exceptional as exceptional, and endeavour to ensure that one's overall ethical judgement (and, more to the point, any legal regulation) be formed on the basis of the general rather than the exceptional situations.

This said, recourse to specific cases should not be ruled out on principle, since they can serve to capture both the complexity of the practice, and the social changes that might be quietly taking place. To illustrate the former, mention might be made of two cases that displayed important similarities and differences.

In 2016, Tracey Thompson, aged 54, gave birth to her daughter' daughter in Texas, thereby becoming her legal grandmother and surrogate mother. Kelley, the girl's mother, aged 28, and the father, aged 33, had spent three years trying to have children by their own means, and had undergone numerous fertility treatments. Kelley had experienced three miscarriages. This being so, the mother offered to gestate the child that her daughter, despite many attempts, had not managed to carry to term. The embryos implanted in Mrs. Thompson were the result of *in vitro* fertilisation performed with the couple's gametes.

One year previously, in 2015, Anne-Marie Casson, aged 46 years, had gestated and given birth to Miles, a son for her own son, Kyle Casson, a single gay man aged 27 years, who had wanted to be a father for some considerable time. The child was conceived with a donated egg and Kyle's sperm. Anne-Marie thus became Miles' surrogate mother and legal grandmother, while Kyle, for his part, became Miles' legal father and "brother", since, while they do not share the same genetic origin, they do share the same surrogate mother.

Whereas the first of the cases was cited as an example of disinterested help to enable a couple to carry out their parental project, the second was the subject of enormous controversy and gave rise to a notable degree of social rejection. Do the two warrant the same ethical, positive or negative appraisal?; or, on the contrary, does the first merit approval and the second not? Undoubtedly, knowing the different elements that come into play in every gestational surrogacy serves to better understand the case and tailor any ethical appraisal accordingly. However, focusing on specific cases increases the risk of emotions influencing the impartiality of ethical judgement.

2.3.- Ideological disparagement

Where greater interest lies in imposing one's own point of view than in seeking the correctness of ethical judgement, it is frequent to resort to discrediting an interlocutor who disagrees with what one is saying. It has always been far easier to assert that one's opponents do not know what they are talking about, or are in the grip of prejudice, rather than to try and refute their position with arguments. When it comes to assessing surrogacy ethically this is also the case. Many of the supporters of surrogacy discredit their opponents, accusing them of seeking to foist their religious views on those who do not think the way they do, or alternatively, an outmoded feminism that even the majority of women no longer defend. In contrast, among those who reject this practice, it is common to discredit the opposite point of view, by disparagingly calling it neoliberal and patriarchal insofar as it reduces fundamental aspects of individual and social life to an item of commerce and treats women as an object at the service of the well-funded demands of the market. By sounding this warning, we are in no way standing in the way of someone arriving at any of these conclusions about the other side. Yet rather than the starting point, it should be the conclusion from which one then sets out to caricature an opponent.

The panorama of many of the contemporary bioethical debates has changed substantially. When it comes to defining positions with respect to many of the biotechnological advances, the "conservative-progressive" framework is no longer applicable. In the face of genetically modified organisms, genetic editing, artificial intelligence or human genetic improvement, assigning labels of "conservative" or "progressive" is not that simple. This is, without doubt, what is happening with surrogacy. Is the greatest proponent of progress a person who defends a woman's freedom to offer gestation services, or one who condemns these practices as perpetuators of patriarchy?

Precisely because this "ideological" labelling has frequently served in the past to discredit those who dissent from one's own viewpoint, and because it in no way caters to the diversity of stances currently held by both proponents and critics of gestational surrogacy, we propose that, in this debate, ideological aspersions should be definitively replaced by the presentation of reasons. Only in this way will it be possible to enter into a dialogue, seek as much common ground as possible, and issue a reasoned, well-founded ethical judgement.

3.- Biological and psycho-social aspects of the mother-child relationship during gestation

No ethical appraisal of a human action can be made without accurate knowledge of the content and effects of such action. Some actions are easy to understand, regardless of the ethical appraisal that one might subsequently make of them. Yet others, particularly some of those performed by means of the most novel biotechnologies, are not so readily comprehensible. Surrogacy contains no biotechnological elements that are difficult to understand. However, to the extent to which gestation is separated from the subsequent rearing of the child, any ethical appraisal must necessarily start from the knowledge of the mother-foetus relationship that is established during gestation and the effects that separation after birth may have on each. Gestation is a form of temporary symbiosis between the child and the mother, which generates a permanent bodily imprint on both parties. This information does not in itself determine the ethical judgement, yet without it, any ethical judgement is incomplete.

This relationship is briefly addressed below.

3.1.- The surrogate mother

The surrogate mother's body, and her brain in particular, change during pregnancy.

a) The surrogate mother retains the memory of each pregnancy in her body, especially because it incorporates stem cells from the blood of those whom she has gestated. These are stored in niches, in the bone marrow in particular, and are dispersed throughout the mother's organs. These "pregnancy-associated progenitor cells" present in the maternal blood in a proportion of 2 to 6 cells per millilitre, are immature cells with full potential for differentiation. Some cases have been documented in which these have actually collaborated with the adult stem cells in the regenerative function of the woman's body.

b) Pregnancy is marked by a 10- to 100-fold increase in progesterone in the hypothalamic brain region, which reduces the emotional and physical stress response, preventing cortisol (stress hormone) from damaging the organic development of the foetus. Sex hormones act as an important regulator of neuronal morphology and brain architecture. Gestation increases the production of cerebral neurotransmitters, such as oxytocin, prolactin and dopamine. These molecules regulate the specific activity, develop the social brain's connections and create the bond of cognitive-affective attachment characteristic of the maternal brain. Accordingly, pregnancy is associated with brain maturation mainly in the regions

involved in the processing of interpersonal relationships, which include the networks governing feelings of empathy and the ability to understand the mental state of others.

c) The profound impact of pregnancy on brain architecture is lasting and provides preliminary support for the adaptative process that helps facilitate the transition to maternity. A number of studies on what occurs in the brain on seeing or hearing a small child in varying circumstances, have highlighted the fact that the social maternal brain is a brain that is motivated, naturally indulgent, empathetic and expectant to the needs of the child, with it being prepared over the course of the natural biological process of pregnancy to respond to the basic demands that it receives from the foetus.[1]

3.2.- The child's relationship with the mother who gestates it

While it develops in the interior of the mother's body, the foetus prepares itself to incorporate and assimilate its own environment, and this enables it to adapt to its peculiar world. This forms part of the natural tasks of maternity.

The voice, taste and smell of the mother's body are not alien to a child's affective fabric. Its brain shapes and develops the auditory, gustatory and olfactory systems in the second stage of its uterine life.[2]

During pregnancy, a series of psychological changes takes place in the surrogate mother. The psychological relationship which she maintains with the child contributes to the construction of the latter's future personality, inasmuch as a so-

[1] There are many studies published on brain changes produced by pregnancy hormones. The following are cited by way of example: Atzil, S., Hendler, T., Feldman, R. (2011) Specifying the neurobiological basis of human attachment. Brain, hormones, and behaviour in synchronous and intrusive mothers. Neuropsychopharmacology 36(13):2603–2615; Bornstein, M.H., Arterberry, M.E., Mash, C. (2013) Differentiated Brain Activity in Response to Faces of ''Own'' Versus ''Unfamiliar'' Babies in Primipara Mothers: An Electrophysiological Study. Dev Neuropsychol 38(6): 365–385; Brunton, P.J., Russell, J.A. (2008) The expectant brain: adapting for motherhood. Nat Rev Neurosci.9, 11-25L; Fonagy, P., Montague, R. (2008) What's in a Smile? Maternal Brain Responses to Infant Facial Cues. Pediatrics, 122 (1): 40-51; Hoekzema, E. Barba-Müller E., Pozzobon, C., Picado M., Lucco, F., et al. (2017) Pregnancy leads to long-lasting changes in human brain structure. Nat Neurosci. 20(2):287-296; Nishitani, S., Doi, H., Koyama, A., Shinohara, K. (2011) Differential prefrontal response to infant facial emotions in mothers compared with non-mothers. Neurosci Res 70(2): 183–188; Slattery, D., Inga, D., Neumann A. (2008) No stress please! Mechanisms of stress hyporesponsiveness of the maternal brain. J Physiol 586: 377–385.

[2] Mogi, K., Nagasawa, M., Kikusui, T. (2011) Developmental consequences and biological significance of mother-infant bonding. Prog. Neuropsychopharmacol. Biol. Psychiatry 35 (5): 1232–1241.

called psychological space of gestation is established between the two. This engagement with the mother, naturally positive and gratifying, opens it to subsequent interpersonal encounters, sometimes hostile, throughout life. The powerful bond initiated during its uterine life equips it affectively. As has been recently ascertained, the social brain develops a map of personal relationships with the yardstick of affective distances. It is a large sphere which plots relationships with respect to others by reference to different axes centred on the affiliation axis. Hence, both this and successive family engagements focus affectivity in such a way that it amounts to an affective guide.

A natural bond is likewise generated in the adoptive parents, and, in general, in persons after daily intimate contact with a child. There are data on the need for and the enormous influence of a bond of attachment in a child's development. We lack data on the influence had by replacing the surrogate mother with another, genetic or otherwise. Breast feeding is known to reinforce the relationship; in this respect, it is understandable that, after the birth of the child whose gestation was entrusted to another woman, the official mother requested induction of lactation.

At all events, account must be taken of the question of whether everybody's right to unity in his/her origin is not greater than or at least equal to "reproductive rights".

3.3.- Gestational surrogacy linked to assisted human reproduction technology

The most comprehensive retrospective study, published in 2015, covers 333 gestational surrogacies between 1998 and 2012, and performs a multidisciplinary analysis of the medical, legal and psychosocial implications, both for parent(s) and the gestational carrier. It underscores the fact that, due to surrogacy's potential exploitive nature in respect of the surrogate mother, there is need, not only for a legal agreement, but also for thorough psychosocial evaluation and counselling. Preliminary assessment would examine the variable concept of "family" based on the genetic bond, social bond and gestational bond, and redefine what it means to be a family undergoing assisted reproduction techniques. The opportunity of post-natal counselling is offered to all parties, to address any psychosocial problem that may arise during the process or thereafter. Among the important matters for counselling is that of future contact between the surrogate mother, child and parents, as well as the future information that the child should receive about his/her origin.[3]

[3] The following reviews covers aspects of interest: Dar, S., Lazer, T., Swanson, S., Silverman, J., Wasser C., et al, (2015) Assisted reproduction involving gestational surrogacy: an analysis of the medical, psychosocial and legal issues: experience from a large surrogacy program. Hum Reprod, 30 (2), 345–

As yet, not enough studies have conducted a long-term follow-up of children born by surrogacy, of their occasional problems, whether psychological or of another type associated with this origin, or of the relationship with the surrogate mother which they or the parents might have. The only one existing at this time is a recent review published in *Human Reproduction,*[4] which collects information on surrogacy data of a biomedical nature from 1795 papers. Among its conclusions, it notes that children aged 5 to 15 years born of surrogacy did not display significant psychological differences with respect to children born as a result of *in vitro* fertilisation, embryo transfer (IVF-ET) or natural conception. It adds, by way of a sensitive subject warranting attention, that there have been no studies to date on children born through surrogacy and reared by gay parents.

352; Dermount, S., van de Wiel, H., Heintz, P., Jansen, K., Ankum, W. (2010) Non-commercial surrogacy: an account of patient management in the first Dutch Centre for IVF Surrogacy, from 1997 to 2004. Hum Reprod 25 (2), 443–449; De Wert, G., Dondorp, W., Shenfield, F., Barri, P., Devroey, K. et al. (2014) ESHRE Task Force on Ethics and Law 23: medically assisted reproduction in singles, lesbian and gay couples, and trans-sexual people. Hum Reprod, doi:10.1093/humrep/deu183.

[4] Söderström-Anttila, V., Wennerholm, U.B., Loft, A., Pinborg, A., Aittomäki K, Romundstad, L.B., Bergh, C. (2016) Surrogacy: outcomes for surrogate mothers, children and the resulting families -a systematic review. Hum Reprod Update 22(2) 260-76.

Part II: Ethical aspects of surrogacy

1.- The crux of the matter

In 2010, the English physiologist, Robert Edwards, was awarded the Nobel Prize for Medicine. This, according to the official press release of the Nobel Prize Foundation, was, "for the development of human *in vitro* fertilisation (IVF) therapy. His achievements have made it possible to treat infertility, a medical condition afflicting a large proportion of humanity including more than 10% of all couples worldwide".

It is well known that in 1978, Louise Brown, the world's first "test-tube baby", was born as a consequence of the IVF technique used by Drs. Edwards and Steptoe. Lesley and John Brown had spent nine years trying to have a child but the obstruction of Mrs. Brown's Fallopian tubes had rendered this impossible. Finally. they succeeded in having their daughter, Louise, thanks to IVF.

The above-mentioned press release emphasises the contribution of IVF to ending the infertility of so many couples around the world. Even so, it fails to pinpoint the genuine revolution which this technique brought about, i.e., that of creating human life in the laboratory and revolutionising the possibilities of human reproduction. Edwards and Steptoe will not go down in history for having put an end to couples' sterility or infertility problems, but rather for creating an alternative form of reproduction to that of sexual intercourse between a man and a woman. IVF not only made it possible for couples with sterility problems to have a child, but also made sexual intercourse unnecessary in order for a woman to be able to give birth to a child.

Since the birth of Louise Brown, IVF and assisted human reproduction technology (AHRT) in general have developed at great speed, both from a technological standpoint and due to the use to which they have been put. The acceptance of *post mortem* fertilisation or recourse to AHRT by single women, lesbian couples and heterosexual couples, without the need to provide evidence of sterility problems, soon highlighted the fact that these techniques served, not only to overcome couples' infertility problems, but also to free human beings from the biological "impositions" of human reproduction. A genuine revolution in human reproduction thus came about with hardly any social debate on the topic. Some were quick to talk of a progressive emancipation of the human being with respect to biology, which until then had made human procreation conditional on sexual intercourse between a man and a woman; others felt that these techniques could pose a threat to the ideal framework for procreation, namely, that in which new human lives are born and cared for by the man and the woman who have engendered them. The majority

of society has remained on the sidelines of this debate, accepting to a greater or lesser extent the possibilities afforded by these techniques.

Europe, like the rest of the world, reflects the diversity of conceptions about human procreation in the laws of its respective countries. It is not a question of north and south, Catholic or Protestant, western or oriental, fragile or consolidated democracies. Countries as different as France, Sweden, Austria and Turkey ban recourse to AHRT, for both single women and lesbian couples, whereas others such as Belgium, Finland, Bulgaria, United Kingdom or Spain allow it.

The European Court of Human Rights has itself declared, in the sphere of assisted human reproduction, that there is a wide range of national stances adopted by states, so that it can be said that there is no model of regulation of the matter deriving from the European Convention on Human Rights and, specifically, Article 8 thereof. This doctrine is reflected, *inter alia*, in the decisions handed down in Evans v. United Kingdom, 2007, S.H. and others v. Austria, 2010, or, more recently, in Parrilla v. Italy, 2015. In the second of the above cases, the Court held that, although the right to resort to the techniques is entrenched in Article 8 of the Convention, on being a clear expression of the right to respect for private and family life, this is in no way a bar to states having a wide margin of decision as regards its scope and limits.

The effect of this plurality of laws on access to AHRT has been what could be termed "international reproductive tourism": people who have been prohibited from acceding to specific uses of AHRT in their home countries and have the necessary financial means, travel to others in which they face no legal difficulties in making use of such techniques. Confronted by this reality, countries tend to relax their own regulations, i.e., what is the sense of maintaining a restrictive law, if it does not serve to safeguard the moral good sought (e.g., ensuring that children of AHRT have a father and a mother) and bars the development of an economic activity which is ultimately undertaken in other countries?

The reference to AHRT is pertinent because it is a precursor of what is now happening with gestational surrogacy. Initially this practice was justified, in order to enable infertile couples (those who are unable to carry the gestation of their children to term) to be parents too. Why stop my sister or my friend from gestating the child that my partner and I cannot have due to infertility problems? What was first seen as an exceptional solution to address an exceptional situation, soon gave way to the emancipatory version of gestational surrogacy: why should we subject ourselves to the cultural yoke that has been forcing human beings throughout

history to accept that children necessarily belong to those who give birth to them? Hence, the emancipatory process initiated by the laws that permitted single women and lesbian couples to be mothers without sharing their status with any male, now also extended to single men, homosexual male couples, heterosexual couples who do not wish to gestate their own children, or even to other affective (e.g., polyamorous) groupings.

Legal regulation of gestational surrogacy comes up against a difficulty similar to that which arose when AHRT was regulated. There are countries in which it is prohibited and others in which it is permitted to a greater or lesser extent. The effect is the same as with AHRT, i.e., those who are prohibited in their countries from resorting to this practice but have the financial capacity, travel to other countries to fulfil their desires. States that prohibit surrogacy find themselves being unable to safeguard the moral good which they sought to safeguard (namely, that maternity remains linked to birth), and thereby miss the chance to undertake an activity in their territory which meets the demands of some citizens and is provided with such legal guarantees as are deemed appropriate.

That said, however, this neutralising effect of restrictive regulations has another two relevant consequences in the case of surrogacy. The first is that even in countries where it is accepted, many citizens choose to contract it abroad. In those in which only altruistic gestational surrogacy is allowed, there is the possibility that a person might not find a "disinterested surrogate mother" and opt for commercial gestational surrogacy abroad. Yet even where commercial gestation is permitted in a country, it may well happen that its citizens will nonetheless resort to going abroad if this proves more economical. The second consequence pertains to the position of children born through surrogacy in cases where the state does not permit the practice. The complex legal problems which this poses vis-à-vis parentage are discussed below in Part III of this Report.

When we ask ourselves about the lawfulness of resorting to gestational surrogacy, the first issue that we should address is the objective or purpose of the action: are we seeking to cater for exceptional situations, such as sterility problems of heterosexual couples, or are we also offering an alternative, so that any man or woman can satisfy his/her desire to be a father or mother?

In brief, AHRT and gestational surrogacy pose two challenges of enormous significance. The first obliges us to ask ourselves whether procreation requires respect for some minimal conditions in order for it to be conducive to the good of the parties directly involved. This question tends to elicit two mutually incompatible

answers. One considers that maintaining the bond between sexual relations, gestation and parenthood is important for the parties affected in procreation, for the child, and for correct social order. Consequently, the possibility of resorting to AHRT and/or gestational surrogacy is seen as a measure to be applied only in exceptional cases, provided that certain circumstances are present. The other position holds that there is no need for sexual relations, gestation and parentage to remain linked, because, in any event, what should prevail is the individual desire to have a child, which can be obtained by AHRT and/or gestational surrogacy.

The second challenge relates to the fact that any restrictive regulation that one might wish to adopt in respect of AHRT and surrogacy will have very limited efficacy. Ultimately, the threshold of what is allowed and the effectiveness of the laws that regulate these practices will, in good measure, be determined by the most permissive regulation which exists and guarantees minimal legal certainty. This being so, the ideal thing would be to introduce a basic universal regulation. If one is of the opinion that, rather than having to ensure that children are linked to a father and a biological mother, the state should ensure that every individual is able to reproduce under the conditions that he/she deems most appropriate (provided that these do no directly harm the child), then it follows that access to AHRT and surrogacy should be universally permitted. Indeed, such a health care service would have to be guaranteed, in order to avoid a situation where people with lower incomes had fewer options of seeing their “reproductive rights” exercised. If, in contrast, one considers that the best interests of children are associated with a situation where it is their mother who gives birth to them, then a universally applicable regulation should be implemented which would limit the use of these practices to exceptional situations. In this way, one would protect all children equally and prevent people in the higher income brackets from having choices that were barred to those who were less well off.

Evidently the chances of achieving a universal convention on the regulation of these practices are extraordinarily small, mainly due to the plurality of positions which exist in this respect. Accordingly, below we ask ourselves about the ethical appraisal that should be made of surrogacy in pluralistic and democratic societies such as ours, and about the legal response that our legal system should give.

This in no way detracts from the fact that it is important to promote a convention at an international level, as has occurred in other fields such as organ trafficking, without the use of this example being necessarily seen as a suitable framework for the future development of a common, universal regulation of the problem addressed in this Report.

2.- Is it still important to link gestation and maternity?

Throughout history, human beings have invoked the Roman Law principle "*Mater sempre certa est*", as one of the most fundamental maxims of social organisation. Rather than being confined to confirming a factual reality (i.e., that every human being has had a known progenitor, except where pregnancy and birth have been intentionally concealed), this principle seeks to sanction a prescriptive criterion, namely, that the child's progenitor shall be its legal mother. The law thus decided to maintain continuity between genetic, physiological and legal maternity. While the principle rests on a biological basis, it actually goes far beyond this by presuming that the child's progenitor is the person who, as its mother, is best equipped to take care of it. Humankind has maintained this principle uninterruptedly throughout its history. It is true that there has been no shortage of proposals to regulate procreation and parental relationships, thereby decoupling gestation from motherhood. Plato proposed that the children of the guardians of the *polis* be raised by persons other than their parents (The Republic, 460 c and d). These proposals were never implemented, and when they were, had a fleeting duration. The criterion that maternity corresponded to having given birth, remained constant.

With the emergence of assisted reproduction techniques, which enabled genetic maternity to be separated from physiological maternity, this criterion continued to be maintained. It was with the passage of years that new demands arose, i.e., why was it that a woman could be the mother if she gestated the embryo, even though she had not provided the egg in the AHRT, and yet in contrast, could not be the mother if she had not gestated the egg? Why could a single woman -but not a man (with or without homosexual partner)- be a mother by means of AHRT? In both cases, the link between gestation and maternity, maintained constantly throughout history, appeared as an obstacle which had to be removed in order to achieve procreative freedom and equality.

This proposal came to completely transform the regulation of human procreation. It had been understood until then -and to this day, many people continue to think so and inform the laws of many countries accordingly- that the parenthood relationships of new human beings should be established with the man and woman who had made their existence biologically possible. In this context, AHRT are seen as an expedient to enable couples with sterility problems to become parents. Now, however, it is proposed that this regulation of parenthood relationships be replaced by another, in which the biological basis of parentage will be ousted by individuals'

procreative desire. This alternative way of viewing procreation and parentage has three major effects. Firstly, procreation ceases to be seen as a natural phenomenon of maximum relevance (i.e., the appearance of a new human being), which society decides to confront by attributing parental responsibility to its progenitors. Instead, procreation comes to be conceived as a desire/right of the individual, which must be fulfilled by the AHRT required in each case. Secondly, and as a consequence of the first, the biological conditions needed for procreation come to be viewed as possible obstacles which must be circumvented in order to satisfy the individual's procreative desire. Thirdly, gestation ceases to be regarded as the first stage of the mother-child relationship, in which fundamental bonds are established that will endure throughout life and afford the most ideal basis for the construction of the mother-child bond, and comes to be seen instead as a service that any woman can provide to another woman or man, disinterestedly or for profit, though without any special negative effects for her of for the child that she has gestated. The break between gestation and maternity is regarded as far less important than the satisfaction of having a child by someone who cannot (or does not even want) to gestate it.

In order to maintain the superiority of the procreative criterion over that of biological desire when it comes to determining the mother-child bond, three arguments are put forward. Firstly, it is taken for granted that every individual has the right to have a child, and that technology is there precisely to surmount the limitations imposed by biology when it comes to catering to this right. Secondly, those who defend the need to respect certain biological limits are accused of being naturalists who convert biology into an irrefutable moral rule. Thirdly, it is asserted that acknowledging some guiding criterion in human biology is a moral option which might be tolerated but never converted into a guiding criterion of pluralistic societies such as ours.

None of these three arguments is consistent. Firstly, it remains to be seen -if indeed it exists at all- what the content of the right to a child should be, i.e., whether it is the right to avoid impediments to the free exercise of sexual-reproductive activity or, alternatively, to guarantee the technological means to ensure that every individual who wants to have a child, can have one. Secondly, those who argue that the mother must be the one who actually gives birth, do not necessarily commit a naturalist fallacy. It may well be that many of those who defend the idea of linking gestation and maternity, do so only because they feel that any alternative would entail disproportionate risks, not only for the surrogate mother but also for the child. However, not even those who maintain that specific biological conditions are

required to ensure certain basic human goods should have to face the accusation of being naturalist. There would only be place for such an accusation, if they were to insist on the sanctity of the reproductive processes and the illegitimacy of any interference with these. Thirdly, while linking motherhood and gestation is certainly a moral option, it is no less so to proclaim the supremacy of the procreative desire. The question lies in ascertaining whether either of these two positions is suited to regulating procreation and parental relationships in democratic and pluralistic societies.

The principle "Mater sempre certa est" has been kept in force from time immemorial until the present without anyone questioning it insofar as the regulation of parental relationships is concerned. Generation after generation has corroborated that the best guarantee of a child's development is to attribute legal maternity to the person who has given birth to it. Hence, in order to propose a change to the criterion for attribution of parentage, albeit for a small number of cases, the first step would consist of showing that the criterion of separating legal and biological maternity was as ideally suited to the best interests of the child as that which is currently in force.

It has often been said that the desire to have a child is the best guarantee that he/she will be loved and cared for. Yet, this is not exactly so. The desire may change, and spoil what promised to be an idyllic relationship. It is one thing to want something and quite another to assume responsibility of a child over time and under any type of circumstance. Our society has tended to encourage individual's to put more store in satisfying their own desires than assuming the responsibilities that such desires can entail. We are accustomed to looking for new desires once we have achieved what we want, rather than committing ourselves to the consequences of these desires over time. In an age that proclaims the freedom of the individual to change his/her identity whenever he/she desires, it cannot be said at one and the same time that this desire is any guarantee of compliance with the commitments undertaken. Furthermore, even though the desire may exist and remain steadfast over time, this in itself is no assurance that the child is going to receive the best care and education. For this to happen, such a desire must be neither pathological, immature nor selfish. This was precisely the view expressed by the Grand Chamber of the European Court of Human Rights in the 2017 case of Paradiso and Campanelli, to which fuller reference will be made in Part III. The Court of Strasbourg supports the assessment made by the Minors Court of Campobasso (Italy) on finding that the married couple acted from a narcissistic desire or as a way of resolving problems in their relationship. This deprived them of the most basic

affective and educational abilities to rear a child, which led the court to hold that the best interests of the child would be served by separating it from the couple (paragraphs 37, 190 and 207 of the 2017 Decision).

To date, societies have neither allocated children to those who most desire them, nor even assumed that woman who gives birth to the child is the one who most desires it and should thus become its mother. Without further ado, they have simply deemed the surrogate mother to be the most ideal person to assume legal maternity. The biological and/or physiological bond is perceived as being the most ideal basis for ensuring a deeply rooted desire to be a mother and assume the responsibilities of this status.

3.- The gestational carrier: free or slave?

When it comes to evaluating surrogacy ethically, special attention must be paid to the two parties most directly affected by this practice, the gestational carrier and the child.

As regards the role of the surrogate mother, three ethical appraisals can be singled out.

A.- *The lawfulness of altruistic gestational surrogacy*. The point of departure here is the recognition that gestating the child of another is an action involving the utmost commitment, since it means taking charge of a human being during the first months of his/her existence, just when its life can only be developed in a woman's womb. It is felt, however, that if this action is performed disinterestedly, it can be extraordinarily valuable because it serves to provide a child to someone who could not otherwise have one.

This stance gives rise to two doubts: the first affects the action *per se*, while the second pertains to the consequences that this might entail.

Firstly, can a woman be allowed to perform an action of this type? Just as *inter vivos* organ donations are subject to certain conditions to ensure that the donor's altruism does not compromise his/her life and liberty, an even stronger case can be made for proposing that this form of gestation be restricted or even prohibited for various reasons. Ethics and the law have traditionally considered that decisions which entail an important sacrifice for the individual or, in essence, compromise his/her physical integrity and are remunerated, are not taken freely but rather in a context of vulnerability, so that, by eliminating this specific context, the individual

would not take the same decision. Hence, such decisions which affect spheres very directly linked to human dignity are subject to the requirement of charge-free provision, as a guarantee of freedom. If there is no consideration, it is easier to assume that the person is acting freely, altruistically. In this connection, reference can be made to the 2013 UNESCO International Bioethics Committee Report on the Principle of Respect for Human Vulnerability and Personal Integrity and the 2015 Report on the Principle of the Sharing of Benefits. The latter notes that organ donation is one of the primary examples of the way charge-free provision acts as a guarantee against compromising situations.

One reason to support prohibition might lie in the law's inability to prevent commercial gestation, once altruistic gestation has been accepted. Current experience tells us that altruistic gestation is accompanied by commercial gestation, either because it is ultimately accepted in the same country where altruistic gestation has been accepted, or because those who cannot fulfil their desire in their own country by means of altruistic surrogacy, will be driven to make use of commercial gestation abroad.

Secondly, if one thinks that satisfying someone's desire to have a child is so important that it justifies a woman's total involvement for nine months in gestating a child for another, does it then make sense for it to be good fortune that selects the privileged individuals who will be eligible to become parents via this practice? Seen from the logic of an "altruistic lottery", it is only reasonable that intending parents may regard this modality of gestation as an appropriate but inadequate option, if it cannot be supplemented by commercial surrogacy.

B.- *The lawfulness of any form of gestational surrogacy, altruistic or commercial, which would exclude exploitation*. From this standpoint, it is argued that a woman is mistress of her body and, in the exercise of her autonomy, can do with her bodily functions as she likes. Consequently, not only is it legitimate for a woman to agree to gestate the child of another altruistically, but it is equally legitimate for her to do so in exchange for remuneration. There are a further two situations which display certain analogies with this, namely, the sale of organs and prostitution. The former tends to be generally rejected, since it is acknowledged that there is a high risk of exploitation: only people with very little money appear willing to sell organs. Prostitution, in contrast, is the subject of intense controversy. Whereas to some it is an expression of sexual exploitation which men have exercised over women for centuries , others want to see it regulated because they feel that to prohibit it would be an exercise of inadmissible paternalism and amount to a curtailment of women's freedom.

Without going into the finer details of this debate, a wide consensus can be reached on the plausibility of banning commercial gestational surrogacy on the basis of the experience gained until now. The countries in which commercial surrogacy has been most widely practised are, in general, poor countries in which the women live in a situation of greater inequality than the men. The USA is the leading exception, though the social differences existing among its citizens should not be overlooked. Women who subject themselves to this process, do so mainly to cover, albeit only temporarily, the needs of their families. Aside from the impact on such women of gestating a child who will not be their legal child, attention should be drawn to the social stigma to which they are generally subjected. A symptom of this latent or patent state of exploitation they suffer is to be found in the legislative reforms that have been implemented in some of these countries in recent years, banning international surrogacy. India, Thailand and Cambodia are clear examples of this. Once it is established that commercial surrogacy, particularly that which is international in scope, entails the habitual exploitation of the women who undergo it, it can be concluded that this practice should be considered unlawful. This is a point on which all parties can agree, both those who categorise all manner of commercial surrogacy as exploitation and those who defend the freedom of the woman to trade on their gestational capability, provided that this does not lead to their exploitation.

C.- *The unlawfulness of gestational surrogacy*. This point of view is held on a dual basis, giving rise to two similar, though not identical, positions. Some consider that a woman who lends her body for the purpose of gestating the child of another consents to the fact that a third party reduces her to the status of a mere instrument. It is obvious that we all consent to a certain degree of instrumentalisation when we render our services in exchange for a remuneration. Yet, except where the conditions of this exchange are abusive, we do not consider that the service provider is a pure instrument in the hands of whoever is paying her. This happens where either the conditions are abusive, or an action or service is performed that that temporarily deprives a person of control over him/herself. Such loss of control can take place when someone gains ascendancy over another, whether in terms of the latter's freedom or corporeality. It is not the same for someone to write the speeches of a politician with whose ideology he/she is not in agreement, as to vote in the elections for the political party for which the politician tells him/her to vote. While the former would be ethically irreproachable, the latter would be an assault on human dignity, even where consent had been given. The right to vote is inalienable.

Similarly, to care for a child that is not one's own may be a laudable action, whereas gestating the child of another is to alienate the inalienable.

Others insist on the unlawfulness of all forms of gestational surrogacy, not because they consider it alienating *per se*, but because they see it as practically impossible to ensure conditions that would not amount to exploitation, or that would not promote the exploitation of other women. From this standpoint, the illegality of this practice is urged, albeit accepting, at least at a theoretical level, that there might be exceptional situations in which it could be lawful. As situations of this kind would be few and far between and there would be a high risk of such abuses being committed, a complete ban on the practice is also usually called for by this school of thought.

Apart from ethical appraisals of surrogacy from the surrogate mother's side, it is well to note the conflict of interests which inevitably arises between the surrogate mother and the intending parents. The proponents of this practice insist on the good relations which, as a rule, exist between the two parties. However, a keener look reveals a more complex panorama, with greater potential for dissension. Three principal scenarios can be identified:

a.- The surrogate mother is a person who acts disinterestedly and who, in general, has some type of relationship with the intending parents. This relationship may be one of friendship or kinship. In the latter case, these bonds are undeniably put to the test: if the surrogate mother is the mother of one of the intending parents, she becomes the legal grandmother and gestational carrier; if the surrogate mother is a sister, she becomes the legal aunt and gestational carrier; and so on successively, according to the degree of kinship. As highlighted in the following section, children will also be affected by a family panorama which, at first sight at least, is not easy to understand.

b.- The surrogate mother maintains a commercial relationship with the intending parents in the same country. The fact that the two parties are subject to a common national law and, as a rule, share a language and a culture, facilitates comprehension between the surrogate mother and the intending parents and reduces the risks of exploitation.

c.- The surrogate mother lives in a country other than that of the intending parents. Currently this is the most frequent case. This relationship contains many elements that can lead to exploitation of the surrogate mother. In the normal course of events, there tends to be a wide social and economic gap between the surrogate mother and the intending parents, and the surrogate mother may well experience

difficulties in understanding the language of the intending parents and the terms of the agreement. Under such conditions, the risks of exploitation multiply.

Regardless of the specific conditions on which the relationship between the surrogate mother and intending parents is established, however, it is obvious that each party's interests are different and, as a rule, antagonistic. The intending parents desire a healthy child and want the surrogate mother to contribute to achieving this in the way that they consider best. They will seek to ensure that the service proves to be as economical as possible (in gestational surrogacy of a commercial nature). They will want to have the power to decide on aspects as important as: the number of embryos to be implanted in the surrogate mother; whether or not an "embryo reduction" or abortion is to be performed; and the type of birth (natural, caesarean) to be undertaken. In contrast, the surrogate mother will try to reduce to the minimum any emotional involvement in the gestation of a child that will not be hers. She will endeavour to obtain the maximum financial benefit from a service that will inevitably compromise her life over the course of nine months and entail additional risks to gestations resulting from a sexual relationship (she will be hyperstimulated and fertilised with one or more embryos, on one or more occasions until pregnancy is achieved). Logically, she will strive to maintain control over her own life and her gestational process, by trying to reduce the risks to her health. To ignore this conflict of interests, the difficulty of resolving it, and the risk of the surrogate mother getting the worst end of the bargain is to ignore reality.

At the beginning of 2017, the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology approved a new version of the Recommendations concerning the conditions with which surrogate mothers and intending parents have to comply, in order to prevent complications during pregnancy and the complex medical and psychological problems that tend to coincide in the practice of gestational surrogacy. Lying at the heart of this is the conflict of interests referred to above: on the one hand, the decisions of the intending parents vis-à-vis the surrogate mother and, on the other, the risk of attachment to the child, which makes it necessary to evaluate the woman's emotional ability to separate herself from it and relinquish it at birth. To counteract this risk, it is considered highly advisable that the surrogate mother should have a stable family that will give her the necessary support to cope with the additional tension of the pregnancy.[5]

[5] Practice Committee of the American Society for Reproductive Medicine; Practice Committee of the Society for Assisted Reproductive Technology (2015) Recommendations for practices utilizing gestational carriers: a committee opinion. Fertil Steril 103(1):e1-8.

To avoid this eventual conflict between the surrogate mother and intending parents, some countries have opted for a position where the surrogate mother retains the status of the child's mother until after the birth. Once the child has been born, then, if she consents, parentage is assigned to the intending parents. The risk of exploitation for the surrogate mother is thereby reduced. Yet there can be no doubt that this increases the legal uncertainty surrounding the child, since, throughout the pregnancy and until some weeks have elapsed after the birth, there is no way of knowing who its legal parents are. In any event, pursuing such a course comes close to a sale of children.

4.- Best interests of the child

Is it good for children to be the outcome of surrogacy? The answer will depend on the appraisal made of the process of the child's gestation. If linking gestation and maternity is deemed to be a fundamental guarantee of the child's dignity and development, the fact that the law separates these two aspects will be rejected. On the contrary, if gestation is deemed to be a simple biological process which can be separated from the rearing of the child after the birth without in any way diminishing its dignity or development, then surrogacy must be accepted as a reproductive option which, duly regulated, may prove to be as ideal as any other. The basic issue consists of deciding whether it is gestation or the reproductive desire that makes for the most appropriate conditions for being parents and assuming responsibility for children.

The advocates of gestation as an essential element for attributing parentage do not deny the importance of the person's desire. On the contrary, they see such desire as fundamental, though always associated with gestation. They feel that reproductive and parental desire responds to biology, so that the woman's preparation to become a mother must take place on the biological bases of freely accepted conception and pregnancy. They are of the opinion that it is not good for the child to be linked, from conception to birth, to legal parents who have not participated in this gestation process despite having been able to initiate and direct it. In their view, the gestation process within the woman is not an arbitrary imposition of biology but rather the ideal way of providing the new-born child with origins, with an interpersonal bond from the first moment of its existence which is then prolonged throughout life, and with a set of ideal conditions for its early development. Moreover, this way of coming into the world is a valuable protection for the child against the risk of being seen as the property of another. From this perspective, far from being viewed as human progress, the future appearance of any artificial womb

or other technological alternative for replacing maternal gestation would instead be judged a threat for the children so engendered.

In contrast, the proponents of the supremacy of the reproductive urge regard biology as only imposing arbitrary limits, and feel that the human being should be able to overcome these by means of technology. Inexorably linking motherhood to gestation would amount to accepting the tyranny of biology over individual freedom. Consequently, the transcendence of gestation should be seen in a relative light and individuals' desire prioritised, both in the case of the intending parents, who are assigned the paternity of a child that they have not gestated but want to have, and in that of the woman who is willing to gestate a child that she will at no time come to regard as her own. From this perspective, there is a tendency to think that, if technology were to dispense with the need for children to be gestated in a woman' womb in future, this would represent progress for humanity, since it would increase humans' reproductive options without any detriment whatsoever to the ensuing children. All those who were unable or unwilling to gestate but nonetheless wanted to be parents, would not have to suffer the inevitable problems entailed by surrogacy.

This Committee is of the view that the importance of gestation in the procreative process and in the life of each human being should not be relativised and that, consequently, the bond between each human being and his/her biological mother should be protected. Even so, some of its members argue that this bond could be severed in those cases where people who wanted to have children but were unable to gestate them, resorted to a woman so that she undertook this task, provided that this was possible without detriment to the rights of the surrogate mother and the child. The preceding section referred to the problems posed by this approach to the dignity and the freedom of the surrogate mother. Below, we focus on the risks to the child.

A.- Risk of child trafficking. Within the framework of the United Nations, the Convention on the Rights of the Child was introduced in 1989 and has since been ratified by all states in the world (except the USA). The year 2000 saw the adoption of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography (2000). This Protocol has likewise been ratified by the immense majority of countries around the world, including the USA. In Article 2, it lays down the following definition of sale of children: "For the purpose of the present Protocol: (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration." Insofar as it involves remuneration to the surrogate mother,

surrogacy could be deemed to be one of the cases included in this definition. Against this interpretation, it could be argued that, where children born in this way have a genetic load from one of the intending parents, they are not the subject of sale, given that at least one of their progenitors is also their legal parent. Yet, even in these situations, it cannot be denied that there is a person who is being paid to relinquish a child to whom she has given birth. This case could come under Article 3 of the above Protocol, which provides that, "1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether these offences are committed domestically or transnationally or on an individual or organised basis:

a) In the context of sale of children as defined in Article 2 (…):

ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption".

The Committee on the Rights of the Child, a body created to ensure compliance with the Convention and its optional protocols by the states that have ratified it, has expressly referred to this issue in its concluding observations on the periodic reports presented by some states. Specifically, in 2014, on examining India vis-à-vis the Convention, it mentioned its concern at the fact that, "Commercial use of surrogacy, which is not properly regulated, is widespread, leading to the sale of children and the violation of children's rights". To prevent this situation, the Committee recommends that laws be passed which contain "provisions which define, regulate and monitor the extent of surrogacy arrangements and criminalise the sale of children for the purpose of illegal adoption, including the misuse of surrogacy. This should include ensuring that action is taken against all those who have undertaken illegal adoptions".[6] India subsequently amended its laws governing the matter, banning international surrogacy.

When the Committee on the Rights of the Child examined the USA's degree of compliance with the optional protocol relating to the sale of children, it noted certain shortcomings with respect to surrogacy: "(a) Ambiguous definitions and legal loopholes persist despite the new accreditation act, such as for example the fact that payments before birth and other expenses to birth mothers, including surrogate mothers, continue to be allowed, thus impeding effective elimination of the sale of children for adoption; (b) The absence of federal legislation with regard

[6] Committee on the Rights of the Child, *Concluding observations on the consolidated third and fourth periodic reports of India adopted by the Committee at its sixty-sixth session (26 May to 13 June 2014), pp. 13-14.*

to surrogacy, which if not clearly regulated, amounts to sale of children". To resolve this situation, it strongly recommended that the USA, "Define, regulate, monitor and criminalise the sale of children at federal level and in all states in accordance with the Optional Protocol, and in particular the sale of children for the purpose of illegal adoption, in conformity with Article 3, paragraphs 1 (a) (ii) and 5, of the Protocol; including issues such as, surrogacy and payments before birth and the definition of what amounts to "reasonable costs"."[7] Although the recommendation is confusing, it is undeniable that it links surrogacy and the illegal adoption and sale of children. While it certainly does not reject any form of surrogacy, it nevertheless makes it clear that the regulation in force in that country does not sufficiently prevent the above-mentioned problems.

In the face of the risks of sale in commercial surrogacy, a case has been made for the alternative of altruistic surrogacy, in which there is no payment whatsoever for the service provided. However, this proposal comes up against two difficulties, one conceptual and the other of a practical nature.

Firstly, a doubt arises as to the aim of the relationship between the surrogate mother and the intending parents. To some, this relationship would simply consist of the woman providing the intending parents with the service of gestating child that is not her own. In favour of this position, it will be alleged that the surrogate mother gave her consent to being implanted with and gestating a child that has no connection with her but has, in contrast, a connection with the intending parents, who may possibly have contributed genetic material to the conception and, at all events, have manifested their procreative desire. Others, in contrast, see the aim of the relationship as being the eventual delivery to the intending parents of a child that properly belongs to the woman, since it was she who has made it possible for the embryo of a few cells to become a child capable of living outside the mother's womb. They consider that, during gestation, rather than providing a service, the woman undergoes an experience that involves her 24 hours of the day for nine months, and has a decisive impact, both on her life and on that of the baby which is forming inside her. So much so that, as has already been stated, practically all cultures have not hesitated in linking gestation and birth to parenthood, i.e., the child belongs to whoever gestates it. In the first case, the child is seen as belonging to the intending parents from the outset of gestation. In the second, the child is

[7] Committee on the Rights of the Child, *Concluding observations on the second periodic report of the United States of America submitted under article 12 of the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography, adopted by the Committee at its sixty-second session (14 January– 1 February 2013), p. 9.*

seen as belonging to the surrogate mother, as long as she does not consent, once the child has been born, to waive her motherhood. Should she do so, parentage is automatically conferred on the intending parents without their having the option of changing their minds. The conclusion is that, if the aim of the relationship is gestation, one is faced with a situation where the surrogate mother voluntarily submits to the will of the intending parents during the period of the pregnancy. If, on the other hand, the aim of the relationship is understood to be the child, then the situation becomes one of child trafficking, even though there may be no monetary consideration.

However, regardless of whether surrogacy constitutes the transfer of a child or the provision of a gestation service, the second difficulty would arise, namely, how would one ensure that the surrogate mother received no remuneration whatsoever? From the moment that the intending parents and surrogate mothers meet, and in altruistic surrogacy this is most likely to be the case, it is extraordinarily difficult to establish that the surrogate mother has not obtained any remuneration whatsoever. Only in those cases in which the altruistic motivation is patently obvious, by virtue of kinship or friendship, can the surrogate mother be presumed not to have acted for money. Such a highly predictable future scenario will, moreover, bring about relevant alterations in the very institution of the family, as will be described below.

B.- Risk of objectification of the child and reproduction. Advocates of surrogacy usually insist that the existence of a firm procreative desire on the part of an individual or couple is what a child fundamentally needs for its development, and is thus the best foundation and support for the parent-child relationship. Yet this desire to have a child is not, in itself, a guarantee that the best interests of the child will be the guideline according to which the parents will act. It only tells us that someone wants to have a child. The risk that this desire may impact negatively on the child, because it may lead to it being perceived as an object that has to meet the standards imposed by the desire, cannot be ignored. This risk of objectification of the child is present in all parent-child relationships, and the existence of a desire to have a child at all costs may exacerbate this. Responsible parents are not those who simply have a strong desire to be parents but rather those who direct this desire to the full development of their children rather than to their own personal satisfaction.

In children born through commercial gestational surrogacy, this risk may be increased to the extent that the intending parents have the option of choosing aspects which directly affect the conditions of the child's development and future characteristics. They can choose the characteristics of one or both gametes.

Similarly, they can request a pre-implantation genetic diagnosis which would identify certain diseases (and, in this case, cause the embryo to be discarded) or certain qualities that they wish the future child to have; specifically they can choose the sex. To a greater or lesser degree, all these possibilities of choice are present in assisted reproduction techniques. Surrogacy allows for all of these plus one that is exclusive to it, namely, the possibility of choosing the surrogate mother, i.e., what characteristics she has to have and in what context her pregnancy must take place. In a global, poorly regulated market, with laws which in many cases are not observed, the decisive criterion about what is or is not done in this field is often determined by the well-funded demands of the intending parents.

Agencies which mediate in gestational surrogacy commonly try to attract demand by two means: on the one hand, by offering financial services that enable the high costs involved to be met; and on the other, by offering a wide range of possibilities of choice for the intending parents with respect to the characteristics of the surrogate mother, follow-up of the pregnancy, manner of birth and, needless to say, the characteristics of the child. Hence, the websites of these organisations ensure the possibility of choosing Caucasian egg donors, whose phenotypical characteristics can be ascertained through photographs. They offer the possibility of choosing the sex of the child. The decision regarding the number of embryos (from one to three) to be implanted in the surrogate mother is left to the intending parents. These gestational surrogacy packages, as they tend to be called, generally include three implantations. However, more implantations may be needed for the gestation to reach term. Each time an implantation is performed the surrogate mother must undergo endometrial stimulation. Logically, the surrogate mothers' respective success rates lead to "natural selection" among them: those who achieve better implantation rates will be more sought after, while those who prove less "productive" will have to remain on the sidelines of the market. The agencies guarantee that intending parents will be informed of the medical progress of the pregnancy and may even attend the medical monitoring of the pregnant woman. Assurances are given that the surrogate mother will be a young woman, in a good state of health, and psychologically prepared to avoid generating affectional bonds with the child that she is to gestate. Although, such agencies tend to say that the decision about the birth is left to the surrogate mother, birth by caesarean section is encouraged, since in this way the child runs fewer risks and the possibilities of the surrogate mother creating affectional bonds with the child are reduced. The possibility that the intending parents will maintain contact with the surrogate mother after the birth is left in their hands, by unilaterally deciding if they wish to maintain contact with the surrogate mother, or if they prefer to do what they can to conceal the origins of gestation from the child. Whether the

desires of the intending parents are satisfied in all respects will in large measure be determined by their financial capacity.

In a legal context which ranges from a lack of regulation to impunity, the gestational surrogacy agencies have held or participated in "trade fairs" in Spain to publicise and promote their services. This means that they have obtained the pertinent administrative permits and that both the government authorities and the Department of Public Prosecutions (DPP) itself have done nothing to impede publicity, visibility and a semblance of normality being given to an activity which involves concluding agreements that are null and void in our legal system and may thus entail the ensuing legal responsibility. Aside from what might be considered correct in terms of regulating this activity, it would appear self-evident that, at the present time, the law in force in Spain should be obeyed and enforced.

Perplexity is similarly generated by the way that some egg-donation management agencies advertise their services, which, at the very least, is on the borderline of legality. This type of approach is very negative, since it serves to link assisted reproduction to a business in which almost everything can be bought and sold.

The intending parents' desire to have a child tends to be identified with a guarantee that the best interests of the child will be safeguarded. This idea is reinforced by an argument that is as effective as it is inconsistent. The courts tend to award intending parents the parentage of children born through gestational surrogacy, based on the right to protection of family life. Based on these court decisions, a leap tends to be taken which is without foundation and consists of asserting that parentage resulting from the procreative desire fully ensures the best interests of the child. Although one may agree that the best interests of the already born child are best protected if the child is not separated from the intending parents and is acknowledged as a child of theirs, there can be equally strong reasons for maintaining that it is contrary to said best interests for a child to come into the world as a consequence of a surrogacy agreement. This is what is asserted by those who argue that, being gestated by a woman who will never become its mother, is contrary to the best interests of the child. Along these same lines, the European Court of Human Rights held, in its 2017 decision in Campanelli and Paradiso v. Italy, that the right to family life consists of protecting already existing families which have a "life", but not in authorising the creation of a *ad hoc* family at any price.

At all events, the transformation of the child that one wants to have into some sort of consumer item, rather than guaranteeing that child's best interests, ensures quite the opposite: there are things that money simply cannot buy. Furthermore, if

environment of choice and selection surrounding the unborn baby is -as agencies are wont to do- beset by proposals to obtain the best product, the best child, it takes little imagination to foresee that, when the child fails to meet the expectations for which it was acquired, this will not be easily accepted by those who sought to buy perfection.

C.- Between legal uncertainty for the child and exploitation of the woman. Determination of parentage in cases of gestational surrogacy can be carried out in two ways: either by attribution of parentage to the intending parents before the birth of the child, or alternatively, after the birth, if the surrogate mother confirms her willingness to relinquish the child that she has gestated. In principle, the first way provides the child with total legal certainty but at the cost of instrumentalising the woman. The second allows leeway for the woman's autonomy, while generating enormous uncertainty as to who the child's parents will be.

The first way of attributing parentage makes it possible to know with total certainty from the outset of gestation who the parents of the child are. However, this legal certainty is achieved at the cost of imposing a state of affairs on the surrogate mother which, though freely accepted before gestation, may run counter to her most genuine desire during the pregnancy or after the birth. If the decision about the life of the unborn child is left in the hands of the intending parents, they take possession of the body of the surrogate mother during the pregnancy; and, if the surrogate mother is denied the possibility of assuming motherhood of the child whom she has gestated and to whom she has given birth, one is belittling the value that the experience of the pregnancy may have, both on the life of the surrogate mother and on her relationship with the child so gestated.

The second way of attributing parentage leaves space for the woman's freedom. It is accepted that no-one other than the woman herself may decide about the life of the *unborn child*; and it is she who, after the pregnancy and birth, waives or does not waive motherhood. In this case, however, the price of guaranteeing the surrogate mother's freedom is to place the child in a situation of great uncertainty because it will not be known, until after the birth, who his/her parents will be.

D.- Risks to the health and wellbeing of the child. Since the 1950s, a culture of pregnancy and growingly medicalised child-rearing has spread rapidly throughout the West, and has somehow transferred to the sphere of the beginnings of life the technocratic and developmentalist movement that informed areas of public action as diverse as urbanism, transport, or healthcare as a whole. The institutionalisation of births, the technification of births and generalisation of caesarean sections, the

trend to separate the mother from the child after birth, and the replacement of maternal breast feeding by bottle feeding, were some of its main manifestations. With the intention of ensuring the birth of a healthy baby without detriment to the mother's health, far less prominence was given to the importance that the birth process has on the woman's life, her emotional wellbeing and adaptation to motherhood, and on the establishment of the bond with her son or daughter, the success of breast feeding, the style of child rearing, and the subsequent development of boys and girls.

Since the 1970s, some of these abuses have been gradually corrected. Specifically, the World Health Organisation and many international scientific organisations have been promoting other practices that better guarantee the birth of a healthy child and maternal health, such as: normal birth, construed as a sufficiently medicalised birth if appropriate, in the interests of the best health of the mother and child, in which the mother plays a leading role both before and after giving birth; maternal breast feeding; and the close relationship between mother and child during the pregnancy and, more especially, after the birth. It is not only a matter of ensuring the wellbeing of the surrogate mother and foetus (or of the already born child), but also of facilitating the relationship between mother and child, in order to strengthen a bond that will be essential for both throughout their lives.

Gestational surrogacy completely truncates this process. On the one hand, it seeks to prevent the surrogate mother from generating an affectional bond with the child that may put the latter's amicable transfer at risk, or may, at the very least, generate a negative emotional impact on the surrogate mother. On the other hand, it deprives the child of continuity in the physical and emotional relationship which it had established with the surrogate mother and prevents it from being fed with milk of the person who gestated it. Stripping the biological, emotional and affective processes that surround gestation and birth of value harks back to certain past practices which were shown to be inappropriate for women and children alike, and are fortunately being changed for the better.

E.- Problems linked to knowledge of the child's biological origins. In countries which have regulated gestational surrogacy, two basic types are found. In one, the surrogate mother waives motherhood before the pregnancy. Her womb is contracted for the purpose of gestating the child of another. Consequently, in the eyes of the law, she never gets to enjoy the status of the mother of the child that she has gestated. In the other type, the woman gestates her child, though she may have no genetic participation in it whatsoever, and decides whether or not to relinquish it in favour of the intending parents.

In the first case, it could be argued that the child is not entitled to investigate his/her maternity, since he has had no mother (or father) other than the one determined contractually. That said, can one tell someone -given that the person who gestated him/her was never his/her mother from the legal point of view- that he/she has no right to know anything about her? We feel that the biological maternity performed by the surrogate mother during the pregnancy cannot be reduced to an irrelevant fact for the life of the child, and that the child's right to know these biological origins should thus be acknowledged. The case displays a certain analogy with the anonymity that is established by the laws governing assisted reproduction in some countries (such as ours), which have enshrined the anonymity of the gamete donors and, by extension, the impossibility of children ascertaining their biological origins. In other countries, this anonymity has never been established or has been reversed (as happened in the United Kingdom), on the grounds of being contrary to the best interests of the child.

In the second case, there has been a biological mother who, at the given time, waives motherhood so that other persons may then assume it. In this situation, it is evident that the parents themselves will reveal the identity of his/her first mother to the child since, in the majority of cases, this will be someone close to the family (a relative or friend) who has offered to gestate that child in order to transfer it afterwards to the intending parents. We feel that the law should in every case guarantee children's right to know their biological origins, with the reinforced argument that it is about ascertaining who their first mother was. It is not only a matter of knowing the circumstances relating to the surrogate mother and the pregnancy which may affect their own health, but also of knowing the identity of the person who gestated them. Leaving this information to the discretion of the intending parents would seem to be a serious violation of everyone's right to know his/her own biological origins.

Our legal system is already showing signs of moving in this direction, in that it makes provision for minors' right to know their biological past, though fundamentally limited to the sphere of adoption: "6. Adopted persons, after reaching legal age or while being underage, represented by their parents, shall be entitled to know any data relating to their biological origin." (Article 180.6 of the Civil Code, as amended and revised by Act 26/2015 of 28 July). In the field of assisted reproduction techniques, access to this information is more restricted: "Children born are entitled, by acting on their own behalf or through their legal representatives, to obtain general information about donors, which may not include their latter's identity" (Article 5.5 of the AHRTA).

Part III: Political and legal aspects of surrogacy

Ethical considerations relating to gestational surrogacy are a necessary element when it comes to considering the position that the law should adopt in respect of this practice. It is also of great interest to know both the statements and opinions of intergovernmental bodies and the comparative law on the matter. Special attention should be paid to the way in which states' statutory regulation has influenced the development of international surrogacy, i.e., that which takes place when the intending parents and surrogate mother reside in different countries. Reference will be made below to intergovernmental bodies that have addressed this issue, the regulation of some states which allows for international surrogacy, and the laws and jurisprudence that directly affect Spain in this area.

1.- Regulation of surrogacy: international perspective and comparative law

Directly or indirectly, the following international bodies have addressed the issue of surrogacy: the United Nations Organisation (UNO), the Hague Conference on Private International law, the Council of Europe, and the European Union (EU).

1.1.- The United Nations Organisation

In 1989, the UNO adopted the Convention on the Rights of the Child, which enshrined the principle of the best interests of the child: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration" (Article 3.1). The Committee on the Rights of the Child has insisted that this principle informs all the laws and regulations that pertain to children: "The extension of States parties' obligation to their "legislative bodies" shows clearly that Article 3, paragraph 1, relates to children in general, not only to children as individuals. The adoption of any law or regulation as well as collective agreements (…) should be governed by the best interests of the child".[8] Pursuant to this, Spain has the duty to protect the child's family relationships as regulated under the country's laws. Consequently, this principle should inform all regulation governing surrogacy. Obviously, one of the requirements deriving from this principle is the prohibition of child trafficking.

Precisely to pursue this scourge more effectively, in 2000 the United Nations passed the Optional Protocol to the Convention on the sale of children, child prostitution and child pornography. Although it boasted almost as many ratifications as the

[8]Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1).

Convention and entered into force in 2002, child trafficking has continued to grow in recent years. It is unquestionable that the sale of children and surrogacy have a point in common, in that both seek to procure a child for someone who wants one. There is a radical difference between the two practices, however: one is universally recognised as contrary to the dignity of the child and is prosecuted as a crime, whereas the other is considered in some countries as a lawful practice to the extent that it conforms to certain requirements. One sector of public opinion maintains that commercial surrogacy is invariably a form of sale of children because a child is exchanged for money. Another, in contrast, considers that, if there is a prior agreement between the parties, and the embryo which is implanted lacks a genetic bond with the surrogate mother, one cannot talk of a sale but rather of a gestational surrogacy service.

Beyond this diversity of positions, there is unanimity about the need to pursue child trafficking. Yet, the question then arises as to whether banning international surrogacy contributes to preventing the black market in children or, rather, to fostering it. There are arguments to support both positions. To some, legalising international surrogacy amounts to legitimising an immediate increase in demand, and boosting the appearance of a black market in which the demand may be met without the restrictions stipulated by law and under more economical conditions. To others, regulation makes it possible to satisfy the desire to have a child within the framework of the law, and prevents the risk of any illegal offers appearing to cater to such a desire.

International surrogacy, insofar as it is of a commercial nature and resorts, by way of surrogate mothers, to women who are in a financial and social situation of vulnerability, can be categorised in most cases as child trafficking and exploitation of women, regardless of the fact that there might be a legal framework underpinning it. In this respect, reviewing the map of countries which permit international surrogacy is striking. They tend to be poor countries and/or countries in which there are enormous social and economic inequalities. They are also usually countries with a culture in which practically everything is for sale and/or in which women are regarded by the society as having an inferior status to that of men.

The experience of these recent years tells us that the demand for these services tends to shift from countries in which the guarantees for the surrogate mother and child as well as the costs of the service are higher, to others in which the intending parents' wishes can be better served at a lower cost. A paradigmatic example of this is to be found in the way in which the English, despite having legalised surrogacy in their own country, have overwhelmingly resorted to India to carry this out. Whilst

India offers an effective, economical service, with a less restrictive regulation for intending parents, in the United Kingdom the assisted reproduction process with donation of eggs is expensive and, in addition, uncertain because the surrogate mother is under no obligation to relinquish the child after birth. Furthermore, the intending parents cannot exercise control over the surrogate mother's pregnancy. In contrast, in countries like India, during the pregnancy surrogate mothers live in residences in which all aspects of their life that may affect the progress of gestation are controlled, e.g., diet, physical activity, sexual relations (which may be prohibited), etc. The medication and healthcare that they receive prioritises the best development of the child rather than the health of the woman. The agreement that governs the relationship between the surrogate mother and the intending parents provides for mandatory transfer of the newly born child to the intending parents.

The Convention has another two articles that have a direct link with surrogacy. Article 7 states that, "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality *and, as far as possible, the right to know and be cared for by his or her parents*". Article 7 (2) lays down that States Parties "shall ensure the implementation of these rights in accordance with their national law." Hence, in accordance with the Convention on the Rights of the Child, if a country such as Spain stipulates that parentage is determined by birth, it should prevent children from being separated from their mothers and ensure that they are cared for by them. Along the same lines, Article 8 lays down that, "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and *family relations as recognised by law without unlawful interference*". It seems logical to conclude from this undertaking that a country with surrogacy laws such as Spain's should not permit alterations in family relationships arising from unlawful interference (such as gestational surrogacy agreements signed abroad). The following section discusses this point in greater detail.

The same Convention contains another Article, which should not be overlooked, as it deals with surrogacy. Article 24, devoted to protecting the right to health, states that States Parties shall take appropriate measures: "e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding". Recognising the importance of maternal breastfeeding for the child is not a reason for unconditional rejection of surrogacy, but is something to be borne in mind when it comes to weighing the costs for the wellbeing of the child entailed by this practice.

In 1979, the UNO promulgated an important Convention which is also related to the question of surrogacy, namely, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 4, which upholds the lawfulness of inverse discrimination measures until the goals of equality of opportunity and treatment have been achieved, states expressly that: "2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory". It has sometimes been advanced, as an argument to defend surrogacy, that to prohibit it would create a kind of discrimination, with respect to the reproductive freedom of men and women who are unable to gestate vis-à-vis women who are able to do so. Aside from any other observations that might be made, the Convention deems that protection of motherhood can justify the adoption of special measures. One of these could be that of preventing the separation of gestation and maternity, insofar as this entails objectifying the process of pregnancy (and consequently of the woman who is undertaking it) and depriving the child of the bond with the woman who gestated it.

Article 6 of the CEDAW, for its part, provides that, "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women". There are some –including members of this Committee- who feel that all forms of surrogacy are a form of women trafficking, since it amounts to making use of a woman to procure a child for another. Yet, even those who accept the possibility that surrogacy may take place without reducing the woman to a mere instrument at the service of others, acknowledge that the experience of these past years, during which this practice has fundamentally become internationalised, highlights the fact that the trafficking and exploitation of women is the most frequent outcome.

1.2.- The Hague Conference on Private International Law

The Hague Conference on Private International Law (HCCH) is a supranational organisation which encompasses close on 80 states and is aimed at harmonising the norms of Private International Law around the world. Since 2012, it has concerned itself with the issue of international surrogacy and particularly the problems relating to the parentage of children born through this practice. Currently, it has an experts' group on the subject, created with the remit of studying the possibilities of advancing in the field of Private International Law on issues relating to the status of children resulting from international surrogacy arrangements. The most recent experts' group report published to date, dating from mid-2016, concludes that the difficulty of the issue and the variety of views held by the different states render any

progress inviable. Accordingly, it recommends that the experts' group mandate be maintained and that it continue working on the matter.[9] In the medium term, it does not seem that the overall panorama can be made sufficiently clear for the HCCH to agree on a minimal regulation that would be international in scope.

At all events, a 2015 HCCH report warned of the serious threats posed to human rights, including those of the child, by international surrogacy arrangements (ISAs). Specifically, it indicated five: 1) child abandonment by the intending parents, whether for health reasons, or alternatively, for reasons of gender preference; 2) the unsuitability of some intending parents and possible child trafficking; 3) the child's right to know his/her origins; 4) concerns regarding the consent of surrogate mothers; and 5) malpractice by ISA intermediaries.[10]

1.3.- Council of Europe

In October 2016, the Parliamentary Assembly of the Council of Europe rejected a proposed Recommendation urging the adoption of directives to guarantee children's rights in respect of surrogacy arrangements. This proposal was based on a report drawn up by a Belgian parliamentarian at the instance of the Committee on Social Affairs, Health and Sustainable Development of the Council of Europe, which had appointed him rapporteur for the purpose of drawing up a report on the ethical aspects of surrogacy the previous year. The first version of this report was rejected by the Social Affairs Committee in March 2016. In September of that same year, the same parliamentarian re-submitted the issue of surrogacy to the Committee, focusing this time on children's rights. The new recommendation was approved and forwarded to the Parliamentary Assembly, which, however, rejected it. The ballot, with a total of 167 votes cast, yielded a close result, with 83 against, 77 for, and 7 abstentions. It should be noted that this matter has brought about a split in the unity of the vote of the majority of the parliamentary groups present in the Parliamentary Assembly of the Council of Europe, e.g., although the sponsor of the recommendation was a socialist, a good part of his fellow socialists in the Assembly voted against it.

Beyond the controversy about the fundamental issue, these initiatives have been the subject of intense debate, both as regards the person sponsoring them and as

[9] Cf. The Hague Conference on Private International Law, *Report of the February 2016 Meeting Experts' Group on Parentage / Surrogacy*, https://assets.hcch.net/docs/f92c95b5-4364-4461-bb04-2382e3c0d50d.pdf (consulted on 10 January 2017).

[10] Cf. The Hague Conference on Private International Law, *The parentage/surrogacy project. Preliminary Document No 3A of February 2015 for the attention of the Council of March 2015 on General Affairs and Policy of the Conference*, https://assets.hcch.net/docs/82d31f31-294f-47fe-9166-4d9315031737.pdf (consulted on 10 January 2017).

regards the manner of doing so. The rapporteur is a gynaecologist and pursues her activity in the field of assisted reproduction, participating in surrogacy processes. Hovering over her is the suspicion of a conflict of interests when it comes to acting as rapporteur of a report which deals precisely with surrogacy. The voices raised in denouncing this situation complained that the Committee on Social Affairs failed to submit the matter of the rapporteur's possible conflict of interests to a secret vote. Furthermore, the first rejection of the recommendation by the Committee on Social Affairs, far from bringing the process to an end, resulted in it again being put to the vote some months later. In any event, the hard-fought final rejection of the proposal indicates the clash between two seemingly irreconcilable positions: on the one hand, those who consider the protection of the rights of children and surrogate mothers to be incompatible with gestational surrogacy; and on the other, those who consider that the rights of some and the desires of others can be accommodated.

1.4.- European Union

The only EU institution to have expressly stated its position on surrogacy is the European Parliament. It did so in conclusive terms in 2015, within the framework of the Annual Report on Human Rights and Democracy in the World (2014). In this report, the European Union, "Condemns the practice of surrogacy, which undermines the human dignity of the woman, since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments".[11] The 2015 report, which was published in 2016, included no reference to the topic, something that allows for two wholly different interpretations: either (a), in 2016 it proved impossible to reach the agreement on this point which had been arrived at the previous year; or (b), it is considered that the EU's position has already been made known and that there is therefore no need to go over the same ground.

1.5.- Comparative law on surrogacy

Regulation of surrogacy around the world is characterised by its diversity, complexity, variability, and ensuing uncertainty. There are countries which permit gestational surrogacy for all types of intending parents, i.e., single individuals or

[11] European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter (2015/2229(INI)); http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0470+0+DOC+PDF+V0//EN (consulted 31 October 2016).

couples, homosexual or heterosexual. Others, in contrast, restrict the supply of this service to infertile heterosexual couples. Some only accept gestational surrogacy, while others also accept traditional surrogacy (in which the surrogate mother contributes genetic material). Some allow agreements under which the intending parents become parents from the onset of pregnancy, and others stipulate that the surrogate mother is the mother, and it is only after the birth that she may relinquish the child. Some offer surrogacy services to foreigners and others solely to their nationals. Some have more detailed regulations and others leave greater leeway for the freedom of the contracting parties.

On every continent there are countries which ban surrogacy in its various forms and others which have not passed any laws in this regard. There are also those that have been debating for years about the appropriate regulation. To enrich this debate and guide public policies, national bioethics committees or *ad hoc* commissions have drawn up reports. One of the countries concerned is Sweden: three years ago, its National Bioethics Committee published a report which envisaged the possibility of regulating altruistic surrogacy. February 2016 saw the publication of another report, which the government had commissioned an interdisciplinary committee presided over by Judge Eva Wendell Rosberg to draw up. Unlike its predecessor, this report proposes maintaining the unreserved rejection of this practice. The main reason lies in the pressure which its approval would mean for women to act as surrogate mothers, thereby having to assume all the risks entailed by pregnancy and giving birth. The same report recommends the adoption of measures targeted at dissuading people from entering into surrogacy agreements abroad, so as to prevent the exploitation of women in the poorest countries.

Along with a great diversity of regulatory criteria, there are also widely varying economic conditions and techniques. End-users tend to search for the legal framework that is most secure and protective of their interests, along with better reproductive quality and gynaecological services, and the most favourable financial conditions. There is a wide range to choose from, and every option is stronger in some aspects and weaker in others.

This rather uneven and patchy scenario becomes more complex still, if one looks at the variability of the regulations. In recent years, as a consequence of better informed public opinion regarding the conditions in which gestational surrogacy is performed, the problems that these practices have occasionally entailed, and a number of scandalous cases that were spotlighted by the mass media and caused social alarm, some of the leading countries supplying these services have drastically restricted their services in this field. The best known and most representative

example is India, which permitted international gestational surrogacy for years and came to be a genuine paradise of surrogacy at reasonable prices, but decided to ban it in November 2015. This happened not only in India but also in other Asian countries, such as Thailand, Nepal and Cambodia (in 2016), and made for a situation in which new countries that until then had hardly engaged in this activity, began to develop it. The most significant case is Vietnam. Other countries, like Ukraine, Russia or some USA states, have been offering the service for some considerable time. In recent years, Portugal and Greece, have passed laws which permit this practice to a greater or lesser extent.

This state of affairs has two undesirable effects which are difficult to combat. On the one hand, it gives rise to situations where there is substantial lack of protection or even exploitation of surrogate mothers and child trafficking. This is what has often been happening until now (cases such as that of India are a good example), and at this point in time there is no effective mechanism capable of preventing it in the future. On the other hand, the level of protection of the parties affected in surrogacy is ultimately determined by the countries which pass the laxest laws, since demand shifts to where it can be met, and once the child is obtained, the intending parents' country of origin is "obliged" to grant them parentage in order to avoid going against the interests of the children.

2.- The legal situation in Spain

As has been mentioned, Spanish law renders gestation agreements null and void, and provides that the parentage of children born through gestational surrogacy shall be determined by birth. Nevertheless, this regulation does not provide a clear and specific answer to a particularly sensitive question, namely, what is to be done when intending parents from Spain arrive with a child obtained through surrogacy from another country, in which it has been recognised as a their child? On the one hand, these people obtain a result (the child) by means of a procedure (contracting a woman to gestate an embryo and transfer it to them after birth) which in Spain is considered unlawful. It seems logical that the state should impede the culmination of this attempted fraud, by refusing to register parentage at the Civil Registry. On the other hand, here is a new human life whose interests must be preferentially protected by the law. This child is entitled to an identity, parents, and a nationality. The unlawful action of those who have brought about its existence may not cause harm of any kind to the child, but may equally not, in itself, constitute a legitimate right to anything.

This dilemma has already reached the highest jurisdictional instances in Spain. It has also been brought before the European Court of Human Rights, whose judgements bind Spain as a member of the Council of Europe. What follows below contains a summary of the grounds underlying the decisions of the Supreme Court on the matter, as well as the reasoning of the Court of Strasbourg underlying some of its leading decisions on international surrogacy.

2.1.- Supreme Court (SC) decision of 6 February 2014

The first Supreme Court Decision, and the only one thus far, handed down in a case of international surrogacy dates from 6 February 2014. An account of the background facts that led up to the judgement, the grounds on which the majority of the judges relied, and the grounds for the dissenting opinion is now given below.

A.- Background. On 6 February 2014, the Civil Chamber of the Supreme Court sitting in Plenary Session rendered judgement dismissing an appeal brought by a married couple from Valencia (intended rearing parents) against the judgement of the Provincial High Court which, upholding a prior decision of the Court of First Instance, annulled the registration of the birth of two children at the Spanish Consular Registry in Los Angeles, with mentions of parentage from which it appears that they are the children of E. and G., and ordered the cancellation of the registration. The Plenary Session of the Civil Chamber of the Supreme Court, made up of nine Judges, took the decision to dismiss the appeal by a majority of 5 votes to 4, with the minority then delivering a dissenting opinion in favour of maintaining the registration of the children's birth at the Spanish Civil Registry.

In the case which gave rise to this decision, two Spanish males married to each other applied to register the birth of two children born on 24 October 2008 through gestational surrogacy, at the Spanish Consular Civil Registry in Los Angeles (California), where said registration was refused by the Registrar pursuant to Article 10 of the 2006 AHRTA.

The applicants filed an appeal before the Directorate-General for Registries and Notaries (*Dirección General de los Registros y el Notariado/DGRN*), which issued a ruling on 18/02/09, upholding their appeal and ordering that the birth of the children be registered at the Civil Registry in accordance with the certificate issued by the San Diego County Recorder's Office (California).

The Department of Public Prosecutions (DPP) filed suit in the Lower Courts of Valencia (parents' place of residence) challenging the *DGRN*'s ruling, arguing that

the registration made by the Consular Civil Registry was in breach of Article 10 of the AHRTA, since it contravened Spanish public policy.

After the complaint had been duly answered and contested by both the intended rearing parents and the State Legal Service (*Abogacía del Estado*), a rather unusual situation arose, in that two state bodies found themselves on opposite sides in a court action, i.e., the DPP, which challenged the registration of parentage, and the *DGRN*, which defended its pertinence.

Court of First Instance no. 15 of Valencia handed down judgement on 15/09/2010 upholding the claim filed by the DPP against the *DGRN*'s ruling and annulling the latter's registration of the birth at the Consular Civil Registry in Los Angeles.

The parents (though not the *DGRN*) filed an appeal against this judgement, which was subsequently dismissed by Valencia Provincial High Court decision no. 826/11 of 23 November. This was in turn taken on appeal by the same appellants to the Supreme Court on a point of law, with this appeal being dismissed by decision of 06/02/14, discussed below.

B.- Grounds for withholding recognition of parentage in Supreme Court Decision 835/2013. The Supreme Court dismissed the only ground of the appeal, a plea of an alleged breach of Article 14 Spanish Constitution by reason of violation of the principle of equality in respect of the minors' right to their own personal identity and the best interests of children, enshrined in the Convention on the Rights of the Child (1989). The lower court's decision was upheld on the following grounds:

a) Respect for Spanish international public policy. The Supreme Court holds that, rather than a conflict of laws, the case turns on an issue pertaining to the recognition of the decision of a foreign administrative authority pursuant to Article 85 of the Civil Registry Rules & Regulations.

Under Article 23 of the Civil Registry Act, two requirements must be met for recognition of a foreign registry certificate. First, the registry must have guarantees comparable to those required for registration in Spanish law, in terms of the facts that are certified, an aspect as to which the Supreme Court has no doubts in this case. The second requirement is that the fact registered must conform with legality in accordance with Spanish law. This is so in any case where the fact certified by the foreign authority is in accordance with the norms, principles and values that comprise Spanish international public policy. The judgement clarifies that such public policy is made up of *"the system of individual rights and freedoms guaranteed*

under the Constitution and international human rights conventions ratified by Spain, and the values and principles that these embody".

The Supreme Court deems that the fact registered does not comply with international public policy, which defines the limit of any recognition of decisions of foreign authorities. This is so because such public policy is made up of the fundamental rights and principles contained in Title I of the Spanish Constitution insofar as these regulate the fundamental aspects of the family and, within this, parent-child relationships. Specifically, it partly consists of "the free development of the personality, construed as the autonomy of the person to choose freely and responsibly, from among diverse life options, that which is most in accordance with his/her preferences (Article 10.1 of the Constitution), the right to marry (Article 32), the right to family privacy (Article 18.1), protection of the family, full protection of children, who are equal before the law, regardless of their parentage, and of mothers, whatever their marital status (Article 39). Likewise forming part of this public policy is the protection of children, who shall enjoy the protection provided for in the international agreements that safeguard their rights (Article 39.4 of the Constitution). Similarly, subjects' right to physical and moral integrity enjoys constitutional recognition (Article 15), and respect for their dignity constitutes one of the constitutional foundations of political order and social peace (Article, 10.1 of the Constitution)" (FJ 5).

Hence, it is in this respect for personal dignity, as the basis of the rights of the person and limit of any action, that the Supreme Court finds the ground which justifies denial of registration at the Spanish Civil Registry of any children born through surrogacy.

The Court holds that, though the law does not currently establish biological grounds as the exclusive source of parentage, and allows for determination thereof by reference to different criteria which do not constitute a contravention of Spanish public policy, such as adoption or consent to fertilisation with contribution from a donor, it does not accept that the dignity of the surrogate mother and the child may be violated by: "commercialising gestation and parentage; "objectifying" the surrogate mother and the child; permitting certain intermediaries to do business with them; enabling the exploitation of the state of need in which young women in a situation of poverty find themselves; and creating some form of "census citizenship" in which only the wealthy can establish parent-child relationships that are barred to the majority of the population" (FJ 6).

Finally, the Supreme Court points to a possible way out that would enable the registry-based parentage of the intended rearing parents to be established, on noting that, insofar as the biological father is concerned, the AHRTA leaves his legal action to claim paternity untouched.

b) Non-existence of sexual discrimination by reason of sex or sexual orientation. In the appeal, it was pleaded that refusal to permit registration at the Spanish Civil Registry of parentage in favour of two males is discriminatory, since it is possible for parentage to be registered in favour of two women in a case where one of them undergoes assisted reproduction treatment and the other is her spouse. In the Supreme Court's opinion, the plea is groundless because "the arguments put forward in the appealed judgement clearly show that the reason for withholding registration of parentage is not that the applicants are both male, but rather that the parentage sought derives from a gestational surrogacy contracted by them in California" (FJ 4). The response would have been the same if the registration had been sought by a homosexual marriage between women, a heterosexual married couple, a common law marriage, or a single person, male or female.

c) Best interests of the child. On this point the appellants maintain that, as persons who have given their consent to being parents, they are the best parents that the children can have. The woman who bore them, for her part, confined herself to performing the services undertaken by virtue of the agreement and there would be no sense in attributing parentage to her. Moreover, they assert that the minor is entitled to his/her own personal identity, which must be respected regardless of national frontiers, on the basis of the principle of the best interests of the child included in the Convention on the Rights of the Child (1989).

The Supreme Court holds that the best interests of the child is an indeterminate legal concept, a general clause subject to precise definition, which, by virtue of its very nature, becomes an "essentially controversial concept". It holds that if the arguments of the appellants were accepted *prima facie*, this would lead to allowing determination of parentage in favour of persons from developed countries in a sound financial situation, who might have succeeded in having a child transferred to them from destructured families or impoverished areas, with complete disregard for any violation of the other legal rights and interests taken into consideration by the national and international legal system (cf. FJ 5).

The decision explains that said best interests must be defined, taking into consideration the values which have been adopted by society as its own and are contained in the legal rules and principles that inspire national legislation and

international conventions. Ranking high among these is the dignity and moral integrity of the surrogate mother, which calls for preventing the exploitation of the state of need of women in a situation of poverty and curbing the commercialisation of gestation and parentage.

The Court deems that deciding parentage in favour of the person who commissions the birth via a gestation agreement amounts to an attack on the dignity of the child, by converting him/her into an item of trade. It thus concludes that to protect the latter's dignity, registration of parentage in favour of the intended rearing parents must be prevented, bearing in mind that our legal system deems it prejudicial for the child to maintain a given parentage which does not accord with the legal criteria for establishing it. To this end, it notes that the Civil Code does not require the establishment of an alternative parentage when an action to challenge parentage is brought (thus highlighting the fact that the legislature accepts that some persons may not have their parentage fully established, as in the case in point).

d) There is no violation of the child's right to his/her personal identity. The Court holds that this is not a case in which the child has an effective link with two different states, Spain and the USA, since the intended rearing parents only went to California because it was possible there to enter into a gestational surrogacy agreement with determination of parentage in their favour, something that is prohibited in Spain. Consequently, the Court sees no real risk of violation of the children's personal identity.

e) There is no violation of the right to respect for private and family life recognised in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHR). The Supreme Court justifies interference in the sphere of family life that entails refusal of recognition of parentage, since it meets the two requirements which, according to the doctrine of the European Court of Human Rights in its decision of 28 June 2007 in the case of Wagner and another v. Luxembourg, have to be present in order to be able to do so: (i) it must be envisaged by law, in that the law requires recognition of decisions of foreign authorities to be in accordance with international public policy; and, (ii) it is necessary in a democratic society, in that it protects the interests of the child and other legal rights of constitutional transcendence, such as "respect for the dignity and moral integrity of the surrogate mother, preventing the exploitation of the state of need in which young women in a situation of poverty find themselves, or curbing the commercialisation of gestation and parentage" (FJ 10).

Indeed, withholding registration is based on the thrust of Article 10 of the AHRTA, on holding that said provision ensures the protection of and respect for the human dignity of both surrogate mother and newborn, something that lies at the basis of social order.

f) The children are not left unprotected. In a final section, the Court states that it is aware of the fact that the decision adopted is by no means inconsequential for the protection of minors, and that it may cause them some difficulty, but explains that, in its opinion, the children will neither be left unprotected nor sent to either an orphanage or to the USA.

However, such protection can be achieved, not by unquestioningly accepting the consequences of gestational surrogacy agreement, but rather by its being based on the laws and conventions applicable in Spain, for the purpose of which the Court invokes the doctrine of the European Court of Human Rights on interpreting Article 8 of the Convention (decision in Wagner v. Luxembourg of 28/06/07), holding that wherever a family relationship with a child is established, the state should act with the aim of allowing this bond to develop and granting such legal protection as would make the child's integration into the family possible.

The Court deems that there is no evidence to show that either of the appellants contributed his gametes to the gestation, and states that, applying said jurisprudence, if such a family nucleus did currently exist and the children had "*de facto*" family relationships with the appellants, any solution sought would have to be based on this fact; and in an effort to offer a solution to the appellants, indicates that Article 10 of the AHRTA itself makes provision for a claim of paternity on the part of the biological father, and that there are the legal concepts of foster-care and adoption.

This reasoning leads to the inclusion of a third point in the rulings of the judgement, whereby the Court urges the DPP to take all necessary actions to determine, as far as possible, the children's correct parentage and their protection, taking due account of their effective integration into a "*de facto*" family nucleus.

C.- Grounds of the dissenting minority opinion in the Supreme Court Decision. As stated above, the Court decided by five votes to four. One of the judges of the plenary session filed a separate dissenting opinion, to which the other three judges subscribed. This divergence centred on three specific points:

a) Admittance to the Registry of the certificate issued by the Californian administrative authority. Agreeing with the majority in that the technical point

applicable to the case is not that of conflict of laws but rather of recognition of a decision of a foreign authority, the minority opinion holds that this foreign decision's admittance to the Spanish Civil Registry should not raise problems in terms of applicable law.

Pursuant to Article 81 of the Civil Registry Rules & Regulations, the document submitted, in which there is no mention of the existence of a gestation agreement, comes within the category of document whose registration at the Civil Registry is permitted without any need to verify its legality under Spanish law, due to its having been issued in accordance with Californian law. Article 10 of the AHRTA must thus be deemed inapplicable, since parenthood has already been determined by a foreign authority.

b) No breach of public policy. This ground is explained in several stages:

- A distinction must be drawn between acceptance of gestational surrogacy and its effects, in a case where these originate in a country in which the practice is allowed and has binding force, since what is being submitted to the Spanish authority is not the lawfulness of the agreement but rather the recognition of a foreign decision that is both valid and lawful under its own laws.

- The dignity of the surrogate mother and child is not violated by commercialising gestation and objectifying the surrogate mother and the child, since gestational surrogacy is recognised by a state with which we share privileged spheres of legal co-operation. "Moreover: a) it amounts to a manifestation of the right to procreate, something that is especially important for those who are unable to have a child that is genetically theirs, as in this case; b) one cannot simply underestimate the surrogate mother's capacity of consent; c) the mother's consent is given in the presence of the legal authority tasked with ensuring that such consent is given freely and with due knowledge of the consequences; and, d) being a free and voluntary agreement, it is unlikely that the surrogate mother would be exploited and objectified against her free will and autonomy; and in no case does this affect the interests of the child, which is born into a family that loves it. It is the family that is given to the child, not the child to the family."

- There is a trend in comparative law towards regulation and flexibilisation of these types of cases. An instance of this is to be found in the *DGRN's* Directive of 5 October 2010 on the registry rules governing the parentage of children born through gestational surrogacy, which authorises registration thereof at the Civil Registry, provided that the children are born in countries whose laws permit it and that one of the parents is Spanish.

- “Breaches of international public policy can only be established case by case. It is for the Spanish courts to decide the issue of whether the effects caused by a foreign decision in Spain fly in the face of constitutional principles, and not those [principles] which derive from a law that annuls an agreement yet does not eliminate its consequences once produced”.

- “The decision from which this opinion dissents, protects the public policy exception preventively, over and above the facts of the case submitted for the Chamber’s consideration in the Supreme Court appeal on a point of law. The legislature’s obligation is to provide a legal framework that would guarantee the rights of all the parties involved, not only of the children, removed from this type of commercial relationship, but also of the surrogate mothers who waive their rights as mothers, particularly those who come from economically underprivileged groups, and of those who seek to be parents. The obligation of the Judges and the Courts is to resolve and protect specific situations, such as that which is the subject of appeal”.

c) The interests of the child are seriously affected. According to the dissenting opinion, the judgement places children in an uncertain legal limbo in terms of the solution to the conflict and the response that this may have whilst they continue growing and creating irreversible affective and family bonds.

It goes on to maintain that the interests of the child are uppermost and also form part of public policy, “and this principle is defended, not against children, but rather on the basis of a regulation that might prevent it from being violated. The right to non-discrimination by reason of parentage forms part of public policy and "the unlawful nature of parentage in no way justifies different treatment" by public authorities or private institutions (Madrid Supreme Court Decision -Chamber for Social and Labour Matters- 13 March 2013)”.

It states the child’s best interests are protected before and after gestation, and in the face of a *fait accompli*, such as the existence of children in a family which acts socially as such and has acted legally under the foreign law, applying internal law as a matter of public policy, prejudices children who could well see themselves headed for situations of abandonment, and deprives them of identity and a family nucleus in contravention of international laws that require the interests of the child to be safeguarded.

D.- Supreme Court Order of 2015. Following the judgements of the ECHR in which France was ordered to register the parentage of children born through gestational surrogacy abroad, the married couple that had been denied the right to register

parentage by the Supreme Court in its 2014 decision, filed an appeal for annulment of proceedings. In February 2015, the Supreme Court issued a court order stating that the refusal of registration of "direct" parenthood on behalf of both males does not violate the right to respect for the private life of children. The appellants then had recourse to the Constitutional Court and filed an appeal for legal protection against the above Supreme Court rulings. The Supreme Court disallowed the appeal in July 2016.

E.- Review of the Supreme Court Decision. Aside from the observance necessarily required of any Supreme Court Decision, this decision is open to, at least, three completely different appraisals.

1.- To some it will represent a reasonable effort to reconcile the prevailing legal situation in Spain in matters of parentage with protection against the risk of abandonment of children resulting from surrogacy agreements.

2.- To others it will come as an inadequate solution because, while it leaves it crystal clear that the Spanish legal system cannot accept registrations contrary to international public policy, such as those which result from gestational surrogacy arrangements entered into abroad, it nevertheless concludes by indicating the path that any intending parent in Spain can follow in order to have a child by gestational surrogacy abroad. Needless to say, it is a tortuous path, yet one which ultimately culminates in providing the desired child. In this respect, it would amount to a judgement that served to sanction two types of legal status among people who wanted to have a child and needed surrogacy to achieve this. On the one hand, there is the status of those who have the means to undertake this project abroad, and contribute a male gamete to the embryo's conception. Although registration of parentage may initially be denied to them, they know that they will be entitled to claim biological paternity pursuant to Article 10 of the AHRTA and will finally succeed in securing registration. On the other hand, there is the status those who lack the means to embark upon this enterprise, or of single women who want to have a child and are unable to do so.

3.-Lastly, others will consider that this decision overreaches itself, on refusing registration of parentage in Spain in accordance with the provisions laid down by the authorities of another state, since, as the dissenting opinion of the judgement points out, it applies international public policy incorrectly and arbitrarily, and ignores the principle of the best interests of the child.

2.2.- The doctrine of the European Court of Human Rights: special reference to the decisions in Mennesson v. France, Labassee v. France (June, 2014) and Paradiso and Campanelli v. Italy (2015-2017).

Given the fact that Spain forms part of the Council of Europe, the ultimate jurisdictional instance in matters of fundamental rights is neither Spain's Supreme Court nor its Constitutional Court, but rather the ECHR. To date, the latter court has handed down three rulings on matters relating to the registration of parentage of children born through international gestational surrogacy. The first is that which jointly decided the appeals in Mennesson and Labassee v. France in 2014, since it is this which establishes the Court's position on the issue. On this same point, it handed down the decision in Paradiso and Campanelli v. Italy in 2015, which was taken on appeal to the Grand Chamber of the ECHR. In January 2017, the Grand Chamber decided this appeal by partially reversing the earlier judgement and finding in favour of Italy. The following section firstly sets out the most relevant grounds on which the ECHR ruled against France and ordered it to register the children's parentage in favour of the Mennesson and Labassee couples respectively. Thereafter, mention will be made of the specific points raised by the Paradiso and Campanelli case and the two judgements to which it was subject.

A) *Decisions in Mennesson v. France, Labassee v. France (June, 2014).* Two French married couples, who could not carry their parental project to fruition due to the wives' infertility, decided to travel to the USA to resort to *in vitro* fertilisation with gametes of their respective husbands and ova from a donor. The fertilised embryos were implanted in the womb of women other than those who had contributed the eggs.

The married couple formed by Dominique and Sylvie Mennesson had twin daughters born in California in 2000, while that formed by Francis and Monique Labassee, had a daughter born in Minnesota in 2001. The Courts of the States of California and Minnesota handed down judgements recognising the French spouses as parents of the girls born through gestational surrogacy.

On returning to France, however, they were refused registration of the newborns at the French Civil Registry under Article 16 of the Civil Code, which stipulates that any agreement for the procreation or gestation by a third party is null and void, and deems said prohibition to be a matter of public policy. This public policy embodies the ethical and moral principles which bar the human body from being an object of trade and children from being reduced to the subject of an agreement.

After unsuccessfully exhausting all possible court remedies in France, both couples filed a claim before the ECHR pleading, in both instances, breach of Article 8 of the CPHR, which lays down that, "Everyone has the right to respect for his private and family life, his home and his correspondence." They held that the French authorities' refusal to register parentage in their favour constituted an interference with the respect for their family life.

The Court decided both appeals simultaneously and delivered judgement on the same day on the basis of the same grounds. Although the decision states that there is no breach of Article 8 of the CPHR in respect of the appellant couple's right to family life, it holds, in contrast, that there is a violation of the children's right to private life on the basis, among other reasons, of the principle of the best interests of the child.

In the Mennesson Decision, which is the one that contains the grounds on which the decision on the two appeals is based, the Court finds that the Mennesson spouses have taken care of the twins "as parents….since birth, and that all four live together in a way that is in no way different to family life as it is usually accepted." In this context, the right to identity forms an integral part of the notion of private life, there being a direct relationship between the private life of children born through gestational surrogacy and legal determination of parentage.

Article 8 of the CPHR envisages the possibility of interference by the public authorities with this right, provided that such interference "is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The Court acknowledges that the signatory states of the CPHR have a "wide margin of appreciation " as to what is "necessary in a democratic society" to attain these goals. However, said margin should be reduced, nuanced or relativised where the problem involves parentage, inasmuch as this is an essential aspect of the child's identity, "In any case where a particularly important aspect of the existence or identity of the individual is at stake, the margin left to the State would ordinarily be restricted".

In such circumstances, states should aspire to strike a balance between the community's interest in its members observing democratically adopted decisions and the interests of citizens –and the best interests of the child in particular- in fully enjoying their rights to respect for their private and family life. The Court deems that the failure of the law of a state to recognise the bond of parentage with the

intending parents may result in the family life of the child being destroyed as a consequence.

The Court acknowledges that, in the absence of a birth-registry entry or family record book, the intending parents are obliged to produce the certificate of the foreign Civil Registry, accompanied by an officially sworn translation, each time proof of parentage must be shown to exercise a right or gain access to a service. This state of affairs arouses the suspicion or, at least, incomprehension of those with whom the intending parents have to deal in the exercise of their interim or presumptive parental authority (*patria potestad*). Access to social security, the school canteen, summer camp or financial benefits are only some of the difficulties that arise in such families' day-to-day routine.

An additional effect of not recognising parentage is the non-attribution to the child of the parents' nationality, something that complicates family travel plans and may raise doubts on the part of the authorities as to the legality of the child's stay on the national territory -and the very stability of the family itself- especially after the child reaches the age of legal majority.

Accordingly, the Court concludes that the refusal to recognise parentage in favour of the intended parents did not only have consequences for them. The effects also extended to the situation of children themselves, whose right to respect for their private life –which implied that everyone should be able to establish "the essence of his or her identity," including his or her parentage– was significantly affected. There was therefore "a serious issue as to the compatibility of that situation with the children's best interests, which must guide any decision concerning them", and must be taken in favour of the latter.

The reasoning underlying this important decision can be summarised in the following points:

a) The applicants (spouses and children) cohabit in way that differs in no respect from family life as usually accepted, so that the action filed for violation of family life should be admitted.
b) In order for the state's interference with the right to family life to be justified, in addition to being envisaged by law pursuant to Article 8.2 of the CPHR, the Court indicates that this internal law must be accessible and foreseeable, inasmuch as it clearly indicates the cases in which it should be applied. In this respect, it recognises that the French Civil Code lays down with due clarity that gestational surrogacy arrangements are null and void on the grounds of public policy, and that said provision is aimed at discouraging French

nationals from resorting to a method of procreation abroad that is banned within the national territory.

c) As to the question of whether the ban on surrogacy is necessary in a democratic society, the Court said nothing. It acknowledges that this raises important moral and ethical issues, and that there is no consensus between the Member States of the Council of Europe as regards regulation thereof. Hence, it holds that states have a wide margin of appreciation to pass such laws as they deem fit.

d) It is at this point that the Court distinguishes between respect for the family life of the parents, and respect for the private life of the girls born in the USA.

e) It finds no violation of the parents' right to family life, since the latter have experienced no insurmountable obstacles of any type: they have settled and taken up residence in France, where they live together with their daughters like other families, so that their situation has not been affected by the decisions of the French authorities.

f) It arrives at quite another conclusion in the case of protection of the girls' private and family life. The Court holds that they are in a situation of legal uncertainty, since they are not recognised in France as daughters of their parents, something that undermines their identity within French society. Moreover, denial of nationality can negatively affect their own identity, creating complications when they travel, generating concern about their residence in France (especially when they reach legal majority), and affecting the stability of the family unit.

   In this case, on withholding recognition of the bond of parentage between the girls and their intended rearing parents, the state had overstepped the permissible limits of its margin of discretion. This negates an essential aspect of the girls' identity, such as their parentage (and, by extension, their nationality as well), which amounts to a violation of their right to private and family life (Article 8 of the CPHR). The Court thus orders the French State to set aside its negative rulings and proceed to effect the registration sought.

B) Decisions in Paradiso and Campanelli v. Italy (2015-2017). A few months after the Mennesson and Labassee decisions, in January 2015, the ECHR handed down the Decision in Paradiso and Campanelli v. Italy (case 25358/12). This case involves an Italian married couple with infertility problems who entered into a gestational surrogacy agreement in Russia. After the birth of the child, it was registered in Russia as a child of both progenitors, without any mention of the agreement from which it stemmed. When paternity testing was performed in Italy, this showed that Mr. Campanelli was not the father. Both reasons (the omission of the reference to

the surrogacy agreement and the lack of a genetic link with the progenitors) led to the Italian State acting against the couple on the grounds of falsifying civil status and submission of false documents. The child was given in adoption. The intended rearing parents exhausted the court remedies against this decision, until reaching the Strasbourg Court. The ECHR held that during the months they lived together with the child, *de facto* ties of a family nature had been created that were eligible for legal protection. Furthermore, it held that public policy did not justify the child's separation from his/her family environment and that, in this case, the best interests of the child should take precedence over public policy. It concluded that there had been a violation of Article 8 of the CPHR, and thus ordered Italy to pay a fine. It did not however order that the child leave its adoptive family and return to the Campanelli couple, with whom it had ceased to cohabit in 2011, five months after it had been born.

Italy took the judgement on appeal to the Grand Chamber, which rendered judgement in January 2017. This is the first time that the Grand Chamber of the ECHR had pronounced on the matter. In this new judgement it found in favour of the Italian Government. The decision was based on the following grounds.

a) Lack of family life. Bearing in mind the absence of a biological tie between the child and the intending parents, the short duration of their relationship and the uncertainty of legal ties, the conditions enabling the Grand Chamber to conclude that a "family life" existed between the intending parents and the child as defined by Article 8 of the Convention, have not been met.

b) Legitimate intervention in private life. The Grand Chamber deems the decision to divest the couple of the custody of the child to be proportionate, particularly because their conduct violates Italian legislation governing adoption and artificial reproduction techniques.

c) The state's competence to determine parentage. According to the Grand Chamber, the Italian courts acted with the legitimate aim of "preventing disorder and protecting the rights and freedoms of the child". The Italian State had exclusive competence to recognise a legal parent-child relationship, and this solely in the case of a biological tie or lawful adoption.

d) Fair balance between the relevant competing interests in play. The Grand Chamber accepts that the Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them.

The decision highlights the fact that in international surrogacy there are no *faits accomplis*, as if judges had no option other than to consent to the parentage of children obtained abroad in violation of countries' internal laws. The termination of the relationship between the intending parents and the child is, in the Court's opinion, a consequence of the legal uncertainty that they themselves created on engaging in conduct contrary to Italian law. Furthermore, the Court takes into account the swift reaction of the Italian authorities in requesting the suspension of parental authority and opening proceedings to make the child available for adoption.

The decision is also important because it underscores the relevance of national legislation when it comes to regulating surrogacy. In the face of the endeavours of judicial activism, which seek to replace parliaments in the regulation of parental ties, the Grand Chamber makes it clear that Italy has a legitimate interest in doing so.

The decision is accompanied by a joint concurring opinion of Judges De Gaetano, Pinto de Albuquerque, Wojtyczek and Devod, who set forth a series of arguments that are applicable, not only to cases in which there is no genetic tie whatsoever between the child and the intending parents, but also to those in which it may exist.

- It brings to mind legal principles that are relevant for shedding light on the solution to international surrogacy, namely, *Nemo auditur propriam turpitudinem allegans* ("no one can be heard to invoke his own turpitude"[2] or "no one shall be heard, who invokes his own guilt") and *Ex iniuria ius non oritur* ("law does not arise from injustice"). Applied to the case in point, the Court holds that it is not possible to establish the existence of family ties which must be protected by law, when such ties have been created in breach of the law (paragraph 3).

- It is held that the existence of a "parental project" or of a clear procreative desire should not be considered an argument in favour of the protection of the ties that have arisen between the intending parents and the child. On the contrary, the existence of the couple's "parental project" acts as an aggravating circumstance of their responsibility, since it implies that, for the sake of this procreative desire and after much deliberation and reflection, the Campanellis have violated Italian law on international adoption, not in ignorance or without premeditation, but knowingly and wilfully (paragraph 4).

- Furthermore, protection of parenthood may not be linked to the existence of a parental project because the law is there to protect the fact of parentage, irrespective of whether or not it falls within a broader life project. There is no stronger protection for "premeditated" paternity.

- Remunerated gestational surrogacy leads to the situations described in Article 1 of the Protocol to the Convention on the Rights of the Child (sale of children) and is banned in almost all European countries.

- In cases such as that of Paradiso (surrogacy agreements where there is no biological or gestational bond with the child), what there is simply human trafficking (paragraph 6).

- The opinion concludes by stating its opposition to these practices, considering them counter to human dignity and, consequently, to the values that underlie the Convention. "More generally, we consider that gestational surrogacy, whether remunerated or not, is incompatible with human dignity. It constitutes degrading treatment, not only for the child but also for the surrogate mother. Modern medicine provides increasing evidence of the determinative impact of the prenatal period of human life for that human being's subsequent development. Pregnancy, with its worries, constraints and joys, as well as the trials and stress of childbirth, create a unique link between the biological mother and the child. From the outset, surrogacy is focused on drastically severing this link. The surrogate mother must renounce developing a life-long relationship of love and care. The unborn child is not only forcibly placed in an alien biological environment, but is also deprived of what should have been the mother's limitless love in the prenatal stage. Gestational surrogacy also prevents development of the particularly strong bond which forms between the child and a father who accompanies the mother and child throughout a pregnancy. Both the child and the surrogate mother are treated not as ends in themselves, but as means to satisfy the desires of other persons. Such a practice is not compatible with the values underlying the Convention. Gestational surrogacy is particularly unacceptable if the surrogate mother is remunerated. We regret that the Court did not take a clear stance against such practices." (paragraph 7).

2.3.- Some conclusions about regulation of the parentage of children born through surrogacy.

The current situation surrounding the registration of parentage of children born through international gestational surrogacy is exceedingly uncertain, both in Spain and in many Member States of the Council of Europe, for a number of reasons.

1.- The clash between the best interests of children born through international gestational surrogacy, which require them to be provided with parents, and the laws of States which legitimately ban surrogacy, has not been settled in manner that is sufficiently clear. The solutions furnished by national or ECHR jurisprudence serve only for those cases adjudicated by such courts and, while they offer guidance as to

the way in which they will decide in analogous situations, they do not provide a pre-established solution for the variety of cases that may arise. Although it denied the applicants' right to registration, the Spanish Supreme Court indicated that recognition of such parentage could be achieved by means of the biological father filing a paternity claim, pursuant to Article 10.3 of the AHRTA. Whereas this solution served for the case that it heard, it is not applicable to others that may arise, e.g., where neither of the men seeking to be father has contributed the male gamete, or where surrogacy has been exclusively sponsored by women (whether single or a couple), in view of the fact that they cannot bring a maternity claim under the law in force.

The ECHR found France to be at fault for not having registered parentage in favour of the Mennesson and Labassee spouses respectively. Yet it recognises that states are entitled to ban this practice, thereby indirectly accepting that they may adopt effective dissuasive measures to prevent their citizens from resorting to international surrogacy.

2.- The ECHR has yet to have its final say on the matter. Other appeals on this issue have reached the ECHR, and will give rise to new rulings and, inevitably, new arguments, insofar as such cases contain new elements with respect to those that have already been decided.

3.- As mentioned above, the *DGRN* and DPP have taken diametrically opposed positions on the registration of births of children resulting from international surrogacy. This conflict appeared to have been given a Solomonic solution by the Supreme Court Decision. Nevertheless, after the publication of the ECHR's decisions in Mennesson and Labassee, the Ministry of Justice issued a Directive addressed to Civil Registry offices, both consular and territorial, instructing them to resume registering children born through international surrogacy, as children of the intending parents. In 2014, the Ministry of Justice undertook to carry out a legislative reform with respect to this matter, which would afford legal certainty to all parties concerned but, to date, no Bill has been tabled. The most notable sign that there is still an ongoing conflict which is currently being inadequately dealt with, is to be found in the 2016 Attorney General Department's Annual Report (*Memoria de la Fiscalía General del Estado*), which states, "With regard to registrations of the birth of infants born through gestational surrogacy, the situation continues be the same as in previous years.

In line with the criterion laid down by the Supreme Court Decision of 6 February 2014 and Supreme Court Order of 2 February 2015 (Plenary Session of the Civil

Chamber), the Public Prosecutor objects to the registration of birth and parentage, holding that the agreement under which gestational surrogacy is contracted is contrary to Spanish international public policy, pursuant to Article 10 of the AHRTA, which declares this type of agreement to be null and void. This is also the criterion cited by the DPP of the Civil Chamber.

In contrast, in its Rulings of 29 December 2014 (51st) and 16 January 2015 (2nd), the *DGRN* directs that the birth of those born through gestational surrogacy be registered. In these Rulings, which postdate the Supreme Court Decision of 6 February 2014 and Order of 2 February 2015, the Directorate-General makes no reference to the jurisprudential criterion established in the matter and applies its Directive of 5 October 2010, which laid down the criteria to be followed for registering the birth of children born through gestational surrogacy".[12]

This situation is, to say the least, irregular, and at all events should have been settled in the wake of the Supreme Court Decision of 2014 and the Supreme Court Order of February 2015. The legal framework is clear, as is the jurisprudence. Proof of this is the inadmissibility of the appeal filed in the Constitutional Court for legal protection against the Supreme Court Order of 2015. Accordingly, there is no alternative but to demand that the government authorities (specifically the *DGRN*) and citizens submit to the law in force as interpreted by the Supreme Court.

3.- Three regulatory models of surrogacy: a critical analysis

At present, we are witnessing an intense public debate, both in Spain and around the world, about the way in which surrogacy should be regulated. There is practically universal agreement on the need to find an effective way of banning all practices that entail the exploitation of the women subjected to this process and/or the sale of children. Even so, starting from this common basis, we find three general substantially different regulatory proposals, each of which can in turn be implemented in different ways. They are now outlined below, highlighting the advantages and shortcomings displayed by each.

3.1.- Accepting surrogacy as a manifestation of the autonomy of women and an ideal expedient to fulfil the desire of all persons who, while wanting to have a child, are unable to gestate it.

Taking this as one's point of departure, an argument is made for the legitimacy, not only of altruistic gestational surrogacy, but also of gainful gestational surrogacy

[12] *Memoria de la Fiscalía General del Estado*, 2016, p. 785.

arrangements, both national and international. This is, without doubt, the *de facto* position that has been consolidated over the last fifteen years worldwide, since there is no state regulation whatsoever that is capable of arresting or withstanding the force of the *faits accomplis* of international surrogacy. It has to be said however that this situation has been arrived at without taking the following facts into account:

- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography defines the sale of children 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".

- The UN Commission on the Rights of the Child has advised some of the countries in which these practices are undertaken, of the need to establish guarantees that would prevent child trafficking.

- it is evident that vast majority of women who act as surrogate mothers are women without means, especially vulnerable or socially excluded, who resort to this option as a means of enabling them and their families to survive.

- More often than not, surrogate mothers' criteria of choice and living conditions during pregnancy are exclusively determined by reference to the interests of the intending parents.

- Social stigma marks many of the women who have accepted surrogacy arrangements over the course of their lives.

- Some countries which were once the leading destinations for these practices (India, Thailand, Nepal and Cambodia) have decided to put an end to international surrogacy following the scandals that have surrounded many of these actions.

- Many of the countries in which this service continues to be provided are characterised by their lack of consideration for the woman and the ease with which they reduce her to being an object of sexual or reproductive exploitation.

Moreover, the myth is still being put about that women who offer these surrogacy services do so as a declaration of their total autonomy over their bodies. However, those who support this hypothesis furnish no evidence whatsoever of there being even a minimal proportion of women who really opt for surrogacy for liberal, moral or philanthropic motives, rather than because they have little or no alternative of earning a living. Consequently, it would seem no exaggeration to say that it is the

best interests of the market that are imposed on surrogate mothers and the children born as a result of this practice.

Logically, the proponents of this option state that, aside from the abuses that will always be committed, women who enter into these agreements do so freely and obtain a fair remuneration for the service they provide. They say that, to prevent abuse, the right thing to do would be to enact the appropriate regulations and not impose a ban, since this would amount to limiting women's freedom of choice.

Despite the fact that the argument of woman's autonomy may be valid in another context, to use it to justify that anyone can satisfy her desire to have a child is not acceptable and is, in fact, widely rejected, not only by those who see in commercial surrogacy a business that runs counter to the dignity of women, but also by many who advocate the possibility of international regulation of this practice. Both sides acknowledge that the current situation is inadmissible and that surrogate mothers' rights and their children's interests must be effectively guaranteed as a matter of urgency.

To deny that today international surrogacy is associated with the exploitation of women is to deny reality. This risk would only be allayed, if an effective regulation of universal scope were to be implemented, which ensured that the woman's decision was taken freely and that her freedom was protected by law throughout pregnancy. The truth to date, however, is that no initiative of any kind has been launched at an international level aimed at regulating this business, so as to ensure that abuses are prevented; and, as of now, the possibilities of achieving a regulation that met these conditions are negligible. Is it at all conceivable that countries which have ratified neither the Convention on the Rights of the Child nor the CEDAW (two of the most widely supported international conventions by the international community), would submit to a rights-based convention on international surrogacy?

However, until such a time as an international rights-based legal framework is agreed upon, to support these practices is an exercise of complicity with the exploitation of women. Furthermore, such complicity can also be indirect: in other words, it is totally inconsistent to ban the practice on one's own territory and yet recognise the outcome when it has been performed abroad. To be specific, is it consistent for a state to accept altruistic gestational surrogacy on its territory (or even to declare it null and void, as in Spain) and yet, at the same time, automatically register all parentages resulting from commercial gestational surrogacy abroad? This approach gives rise to serious inequality of treatment, among intending parents and surrogate mothers alike. If the intending parents have the necessary wherewithal,

they will then be able to contract gestation abroad by gaining access to a wide range of reproductive possibilities; but if they lack such means, they will, in contrast, have to resign themselves to the possibility of a woman appearing who is willing, disinterestedly, to gestate the child that they desire. If the surrogate mother performs her service in a country which only allows for altruistic surrogacy, she will, in principle, have certain guarantees to prevent her exploitation. If, on the contrary, she performs this service in a country in which there are no guarantees of protection of women's freedom, the risks of exploitation will multiply. Indeed, it is no exaggeration to say that the countries which have provided the greatest number of surrogate mothers to date have been unable to ensure the absence of exploitation.

3.2.- Exclusively accepting altruistic surrogacy as a means to fulfil the desire of people who want to have a child but are unable to gestate it.

In some countries, including Spain, initiatives have arisen aimed at regulating surrogacy in terms that seek to safeguard the dignity of surrogate mothers and the interests of children. To this end, certain guarantees of the freedom of the woman are proposed, targeted in particular at preventing the agreement from being a source of profit.

Assuming that the procreative desire of the intended rearing parents is a valid ground for registering parenthood –an issue that generates many doubts for the reasons noted above- it is of interest to analyse the terms on which regulating altruistic surrogacy is usually proposed.

- *Altruistic surrogacy*. Gestational surrogacy may only be undertaken with women who consent to do so disinterestedly and altruistically. The surrogate mother may only be compensated for the expense or inconvenience caused.
- *Requirements for surrogate mother*. The usual requirement is that she has previously had a child and that the child that she is gestating has no genetic bond with her. There is some debate as to whether the surrogate mother may or may not have some type of family bond with the intending parents.
- *Requirements for intending parents*. In general, they are required to resort to this process only when they have no other alternative. It is not essential, however, for the children to have a genetic relationship with either of the intending parents.
- *Determination of parentage*. In Europe there are two basic models: the British, which declares parentage in favour of the intending parents once the child has been born and the surrogate mother confirms that she is

relinquishing it; and the Greek, which allocates the child to the intending parents from the onset of pregnancy. In order for such effects to arise, fertilisation may only be performed with judicial authorisation.

- *Decision about abortion and other conflictive situations during pregnancy*. Although the surrogate mother is not barred from aborting under the terms of the law in force, some regulatory proposals establish that, if she does so, she may lose all right to compensation and must refund any sums she may have received. Other situations which may arise (e.g., that the abortion is decided by the intending parents, that the child is premature, etc.) are usually left to whatever the parties to the agreement decide.
- *Ethical and judicial controls*. Some regulatory proposals require that, for fertilisation to be performed, there must be a prior report from a bioethics committee plus a judicial authorisation. The latter may only be issued if it is shown that there is no risk of the woman being exploited or of child trafficking. In his/her decision, the judge must take into account the bioethics committee report and review the content of the agreement.
- *Government authority's supervisory role*. This is usually entrusted to the government authority responsible for setting up Surrogate Mother Registries to control the number of times that women act as such and prevent them from endangering their health. Similarly, this government authority is the body that is usually tasked with periodically deciding on the appropriate compensatory payments.

Each of these points generates ethical and legal problems of a complex, almost intractable nature. The former pertain to the moment from which the child is deemed to be the offspring of the intending parents. The most reasonable solution would -as in the United Kingdom- appear to be for the intending parents to assume parenthood after the birth of the child and the surrogate mother's waiver; only in this way can the freedom of the surrogate mother be ensured. However, the most widespread proposal consists of attributing parentage to the intending parents from the precise moment that the embryo is transferred to the surrogate mother, once the agreement has been signed and judicially authorised. It has to be said, however, that what this approach actually ensures is the outcome sought by the intended rearing parents, though at the cost of the woman's freedom. This being so, the surrogate mother will be compelled to gestate the child in accordance with the wishes of those who are its parents, and avoid generating any affectional bond with the child.

Every woman who has experienced pregnancy knows that gestation is not merely a biological process that can be undertaken in isolation from her daily life. On the contrary, gestation imposes the need to take endless decisions about lifestyle, insofar as these have a direct impact -to a greater or lesser extent- on the child. Yet only she (together with her partner, where applicable) is in a position to take such decisions. When gestation is undertaken by other parties, and particularly if the child already belongs to the other parties before the birth, the risk of conflict between the surrogate mother and the intending parents is very high. The surrogate mother's work day, her lifestyle and diet, and the treatment for any illness from which she may suffer, will be evaluated by the intending parents, who may even seek to dictate these. Given that the child belongs to them, they will want to assert their status of parents over that of the surrogate mother. They will state that she undertook to gestate on their behalf and that they are the ones who should decide on the best interests of the child. Quite aside from whether or not they succeed in breaking the surrogate mother's will, there will invariably be an unacceptable intrusion into her private life.

By virtue of the surrogacy agreement she has signed, the woman knows that she will not be the (legal) mother of the child she is gestating and that she must therefore repress all affection which might reinforce the bond between the two of them and hamper separation after the birth. This requirement is upheld in a view of motherhood in which the volitional factor is accentuated and the bodily dimension is reduced to irrelevance. Just as there are persons who devote some time a week to voluntary work, it is conceivable that there might be women who devote their reproductive capacity on one or more occasions to providing a child to another person. Yet, can an analogy really be established between voluntary work and altruistic surrogacy? Is the impact had by a pregnancy on the totality of a woman comparable with that entailed by disinterestedly devoting some hours a day to a job? Gestational surrogacy entails a genuine exercise of self-denial to fulfil the desire of another person. Voluntary work, in contrast, seeks to put personal capacities to the service of a cause which the individual in question regards as worthy, so that it contributes to the full and free development of her personality. In the former case, the woman is destined for conflict with the intending parents because each party has different (and, at times, opposing) interests. In the latter case, the individual's own interests tend to merge with the common interest. In the former case, it is an activity that involves the person in her entirety, i.e., her whole body and all of her time, emotions, feelings and dreams. In the latter case, it is an activity which can be delimited in time, and in which each person decides on her particular level of involvement.

Seen in this light, once the time of the birth arrives, the woman will not have the chance to decide whether she does or does not wish to take charge of the child that she has brought into the world, because the agreement between her and the intending parents determines that the child is not and has never been hers. It cannot be denied that, during the nine months of the pregnancy, the woman is converted into an instrument at the service of other persons. Consent and the lack of remuneration can in no way alter this reality.

Furthermore, surrogacy laws and regulatory proposals that establish parenthood at the onset of pregnancy usually require the surrogate mother to have previously had a child. This seeks to reduce the risk of her developing an affectional bond with the child. However, some very debatable assumptions underlie this approach. Firstly, it takes for granted that gestation is no more than a purely physiological, thoroughly innocuous process in a woman's life. Gestation and maternity are viewed as two perfectly separable realities, with the former being linked to biology and the latter to desire. Nevertheless, establishing this separation runs counter to the ordinary experience of building an affectional bond between the woman and the child. This bond does not arise from pure individual desire but rather from the merging of the bodily and volitional elements over the course of the pregnancy. The second presumption takes it as self-evident that the woman can waive motherhood before the pregnancy is initiated and that requiring such a waiver after the birth of the child is thus perfectly admissible. However, this is not reasonable: a woman who gestates is only in a real position to be able to decide freely, once the child has been born.

Legislative proposals usually ban so-called traditional surrogacy –that in which the surrogate mother also provides the egg- and only permit gestational surrogacy in which the surrogate mother lacks a genetic bond with the child. Such proposals also usually envisage that at least one of the gametes should come from one of the intending parents. In this way, the agreement is made between a surrogate mother who will have no genetic relationship with the child and the intending parents who will have such a relationship. The genetic bond, associated with the procreative desire, is thus converted into the right and title for attribution of parentage.

However, the evidence shows that the biological bond between the surrogate mother and the child forged during nine months, taken together with the will to assume the motherhood that may arise over the course of the pregnancy, is much stronger than the simple contribution of gametes, and constitutes an equally (or more) valid title for determining parenthood. To concentrate on the genetic load to the exclusion of all other factors, and minimise the transcendence of gestation by

reducing it to an irrelevant process of incubation, is not a position that can be defended *per se*, nor does it favour the woman's freedom of choice.

Doubts are similarly raised by the question of the impact of previous relationships that might exist between surrogate mothers and intending parents. It seems logical to suppose that if a woman wishes to gestate altruistically for others, she might do so because she knows the persons who want to be parents. Admittedly, this bond may also conceal some kind of conditioning or constraint when it comes to taking a free decision about gestation. Given that the existence of family, work, institutional or hierarchical relationships between the intending parents and surrogate mother may amount to an undue incentive for the woman's willingness, some regulatory proposals require that surrogate mother have no bonds with the intending parents. Then again, how many women are willing to gestate a child for an unknown person completely altruistically? Finding such a woman seems even more difficult than locating a living donor for some unknown person requiring a transplant.

The experience of those countries in which altruistic gestational surrogacy is regulated shows, as mentioned above, that the person who volunteers to gestate for another or others is, in the great majority of cases, a woman who comes from the direct family circle of the intending parents, be it the mother of one of them, a sister, or some other relative (cousin or niece) who is very closely related to the person or persons seeking said gestation. And this fact determines a fundamental reality: any person who altruistically consents to being a surrogate mother, already having a bond of kinship with the person who will be the legal father or mother of the child so gestated, assumes a double kinship with respect to the latter, i.e., that of mother, and that which derives from the existing blood tie with the intending parent. What this means is that the surrogate mother can simultaneously be the child's mother and grandmother, or its mother and aunt, etc.

Irrespective of the fact that in our law the most diverse forms of family enjoy recognition and protection, as guaranteed by the open and inclusive tenor of Article 39 of the Constitution, what is beyond doubt is that the definition of family member is determined by a single bond of kinship, as provided by civil law, i.e., one is a descendent or ancestor, in the direct or collateral line, in a certain degree of consanguinity. This has extremely important legal implications in the sphere of succession, the right to support, etc. Gestational surrogacy performed by a family relative would destroy these cases because it would enshrine a double kinship between surrogate mother and child.

On declaring that the public authorities shall ensure the social, economic and legal protection of the family, the above-mentioned Article 39 of the Constitution endows the family with an institutional guarantee, such that any decision by the legislature which might alter the essential features of the institution is proscribed, thereby requiring objective protection which must guarantee that the legislature neither annuls nor subverts the master copy of the institution. Hence, in its Decision 116/1994 the Constitutional Court stated that the Constitution guarantees the institution of the family and, ultimately, the existence of an "impregnable bastion or essential nucleus", which, under the Constitution, must be preserved in terms that are recognisable for the image held of it by the social conscience at any given time and place.

Such a guarantee amounts to incorporating into our internal legal system something that is a requirement under International Law, and, in this respect, Article 16 of the 1948 Universal Declaration of Human Rights proclaims that, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the state", and Article 10 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966, states that, "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for the establishment thereof and while it is responsible for the care and education of dependent children. …"

As pointed out above, the concept of family may certainly find different interpretations in today's more complex and pluralistic society, with legal status being conceded to persons lacking a blood tie, and new concepts arising, such as that of the social parent, which is divorced from filiation to make way for a new notion of parenthood that accentuates voluntarily assumed responsibility in the exercise of parental function. These are transformations which in some cases culminate in the dissociation of parentage and kinship, and the emergence of new ideas of parenthood, i.e., decoupled from the strictly biological and from filiation. New actors thus appear, with the result that family relationships are not now necessarily confined to persons who have blood ties or affinity by marriage. Volitional, affectional, social and cultural factors intervene. The Supreme Court (Chamber 1) recognises this in its Decision of 12-V-2011, when it stated that, "The current family system is pluralistic, i.e., from a constitutional point of view, families are deemed to be any group or unit which constitutes a nucleus of coexistence, regardless of the manner used to form it and the sex of its components, provided that the constitutional rules are respected". Nevertheless, the same Court sounds a reminder in its Order of 2-II-2015 (rec. 245/2012), to the effect that the right to

create a family is not unlimited and does not include the power to establish parental ties by means not recognised as such by the legal system, or only recognised by legal systems other then Spain's. While the Spanish legislature enjoys a certain leeway in attributing the nature of parent-child relationship to certain relationships other than biological paternity or maternity, this in no way gives rise to the obligation of public authorities to grant recognition of parenthood automatically to legal relationships which are recognised as such in foreign legal systems but not in the Spanish legal system.

The social transformation of the family model is no obstacle to acknowledging that, if it is at least possible to infer some minimum characteristic elements which shape the institution's essential nucleus or at least its most traditional roles, even though other new elements may be incorporated and be supplemented, these cannot be substantially altered when they are maintained or sought to be maintained; and prominent among these is the presence of a series of kinship relationships which correspond to each of its members and together go to make up the family. What the Constitution protects, from the standpoint of an institutional guarantee, is the basic nucleus of the institution, with it being possible to claim that such roles form part of said nucleus. A simple perusal of Article 39 of the Constitution allows one to infer that the family is intrinsically and essentially determined by the fact of human generation and the ensuing relationships of paternity, maternity and parenthood, to which this provision expressly refers. Indeed the Dictionary of the Spanish Royal Academy itself defines family on the basis of these roles, which set it apart, identify it, and form part of its essential nucleus. The first two definitions given of "family" are: 1. A group of persons related to one another who live together; and 2. A set of ancestors, descendants, collateral relatives and persons related by marriage to a lineage.

Our constitutional order has not dispensed with at least a minimum whereby the family can be differentiated from other institutions or forms of social coexistence or grouping, or whereby, in similar terms, the traditional roles that have set it apart can -other than being supplemented by others- be seen to be substantially altered. The latter can be accommodated within the contemporaneous concept of new family roles, but not so as to cause any substantial alteration to those already in existence, on pain of violating the institutional guarantee. Parliament can create legal ties similar to those deriving from the biological ties that exist between parents and children as a consequence of the biological relationship of filiation, but cannot substantially alter these or permit that they be altered, something that would happen in cases in which the same person were to play a dual biological role, such

as, say, that of mother and aunt, mother and cousin, or grandmother and mother. This might be allowed from the perspective of mere social roles, but not when one enters into the biological relationships of parentage. Whereas social paternity may allow for different forms of expression, biological paternity may not do so without detriment to the best interests of the child. Not everything that is possible should necessarily be permitted, given that the law has a function of instilling order, the main aim of which is to structure parentage so as to ensure protection under conditions of equality and respect for the dignity and freedom of all.

This essential family nucleus may be substantially altered by altruistic gestational surrogacy, insofar as the dynamics of the latter will alter the kinship relationships that enable the family to be identified and differentiated from other institutions. Hence, such legalisation will mean, as happens in the sphere of living organ donations, that the person who is usually willing to cede her womb to carry the future child of some third parties will be a family relative -someone close belonging to the family nucleus- something that will ultimately cause a change in or concurrence of family roles, affecting the features that identify the family and set it apart. Roles will eventually end up changing and duplicating, as has indeed already occurred and been described in this Report by reference to a series of examples. The status of grandmother will thus coincide with that of mother (i.e., where the mother of one of the intending parents agrees to lend her womb temporarily) or aunt or cousin. This change in the roles on which the family is based and which makes it unique and different from other forms of social grouping amounts, purely and simply, to an alteration in its essential features, which is precisely what the Constitution prohibits on vesting the institution with an institutional guarantee. An alteration of this type especially affects the best interests of the child since, as the ECHR ruled in the case of Frette v. France on 26 February 2002, it is the family that is given to the child, not the child to the family.

This line of reasoning can be countered, even by citing the example of living organ donations, by arguing that the approval of gestational surrogacy in our legal system does not necessarily imply that such roles or bonds will be superimposed and thereby altered, since there is also the possibility that a third party outside the family might freely cede her womb, as in fact occurs with the above-mentioned living organ donations. Yet, this argument ignores the fact that, if one refers to the statistics of living organ donations, one will see that the majority or almost all of the cases take place within the family circle because, in the absence of the bonds or moral commitments that families generate, it is difficult to find a third party who would be willing to donate an organ to a stranger. While the case of the good

Samaritan has existed in this country, it is very much the exception. Such a possibility has actually been raised where chain donations are involved, but this very specific eventuality would not appear to be feasible in the case of gestational surrogacy. The National Transplant Organisation itself records in its statistics that altruistic living donors who had no family relationships with the recipients accounted for 1% of all living donations in 2010. The statistics show that donors who were friends as opposed to family accounted for 8% of all living donations in 2014 and 7% in 2015.

Hence, should altruistic gestational surrogacy be introduced into our legal system, it is going to be almost exclusively developed within the framework of biological family relationships, as does in fact already occur in other spheres such as living organ donations. This will inevitably entail a substantial alteration, not only to the family as such, but also to the biological roles that coexist within it, thereby bringing about a duplication of such roles, something that may be deemed contrary to the constitutional protection afforded to the family as well as the best interests of the child.

Even where a hypothetical law were to lay down that biological parentage, as determined by the birth, would have no legal consequences (something that is today prohibited by Article 10 of the AHRTA) and that the only legal maternity and parentage would be that established by virtue of surrogacy, what cannot be denied is the reality, namely, the duplication of kinship that has been engendered vis-à-vis the child and the consequences that this might have at an emotional level, once the child learns of this. As shown by the most consistent psychological studies on attachment (J. Bowlby and M. Answorth),[13] the first mother-child relationship is

[13] Attachment theory, initiated by the work of John Bowlby (see BOWLBY. J. (1998) "Attachment and Loss". Barcelona. Ed. Paidós) and profiled and developed by Mary Ainsworth (see AINSWORTH, M.D. (1989). "Attachment beyond infancy", American Psychologist, 44, 709-716), states that the principal affectional bond and the most enduring of all is that which is established between the mother and the newborn. This bond will be the basis on which all the other ties that the human being will establish with the rest of persons throughout his/her life will be developed. The studies of both authors and those who have followed in their path indicate that this bond begins with the interactions in the gestation, continues with breastfeeding, and are forged in the period between 3 and 36 months. When this bond between mother and child is secure, stable and lasting, it has a decisive influence on the child's self-esteem and his/her ability to establish healthy relationships throughout his/her life. It is capable of establishing a good social adjustment. In contrast, the rupture or fragility of this bond (physical or emotional separation from the mother, absence of affection or care), can provoke an affective disorder or an asocial personality in the child. According to this research, low self-esteem, vulnerability to stress and problems in social relationships are associated with weak mother-child bonds. If the experiences of attachment (of the mother-child affectional bond) have been seriously negative, the child is highly prone to develop psychopathological disorders in the future. It is mother-child interactions that have most influence on socio-emotional

absolutely decisive in the process of the child's maturing, self-esteem and development: hence, the crisis that tends to be generated in those who discover that their legal mother is not their biological mother, and their ensuing anxiety to meet and get to know her. Added to this critical situation is the emotional impact entailed by the discovery of this fact when the surrogate mother has, moreover, a very close degree of kinship with the child (being his/her grandmother or aunt, etc.).

Regardless of the fact that in this case the child would be entitled to the right to investigate of his/her maternity (Article 39.3 of the Spanish Constitution, only envisaged in relation to the father until now, would have to be reinterpreted thus) where he/she harboured doubts, there would be no need to have recourse to this right, given that it is highly probable, if the kinship between the surrogate mother and the intending parent is very close, that the relationship between the biological mother and the child has likewise been very close, and that sooner or later the child will come to know about this, whether due to the family environment or the surrogate mother's confession.

Accordingly, in such a situation, it would not seem easy for a child to identify what type of emotional relationship it should establish with someone who is, for instance, his/her grandmother but also his/her mother, and vice-versa. Neither would it seem easy to determine how the surrogate mother, after the intense experience which gestation entails and her likely involvement in the first months of the child's life, could emotionally readjust and adopt a family role completely different to that dictated by her biological maternity, when there is such a direct and constant relationship with the child.

Indeed, the alleged moral excellence that leads a woman to volunteer altruistically to gestate for a close relative could become a double-edged sword, in view of the fact that: it can easily generate a serious emotional conflict in the child, on making the discovery of an unexpected reality; it can generate emotional conflicts in the surrogate mother herself, if she is incapable of emotionally assuming a role other than that of mother in the context of a close relationship with the child; and, it can come to cause relationship conflicts with the family relative who is the intending parent, when it comes to determining the role that the surrogate mother should play vis-à-vis the child.

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development and on the child's current and future conduct (see Delgado, A. O., & Oliva Delgado, A. (2004). "*Estado actual de la teoría del apego*". Revista de Psiquiatría y Psicología del Niño y del Adolescente, 4(1), 65-81).

Another problem posed by attributing parentage to the intending parents from the onset of pregnancy is the clash this causes with the law, an example being the provision in force in Spain, which permits women to abort in the first 14 weeks of pregnancy. In order to bring both sets of regulations into alignment, it is proposed that surrogate mothers may abort a child which, despite being gestated by her, is not hers by law but rather the child of the intending parents. This said, however, in order to try to dissuade the surrogate mother from her possible desire to have an abortion against the wishes of the intending parents, it is proposed that women who abort in this way should reimburse "any sum which they might have received from the surrogate progenitors, and compensate them for the harm caused". On the one hand, it is said that the surrogate mother will be compensated, by the intending parents for physical discomfort, occupational and travelling expenses, etc. Yet if she aborts, it seems that there would now be nothing to compensate her for: on the contrary, *she* would be under an obligation to compensate the intending parents. It is further proposed that the withdrawal of compensations and the surrogate mother's obligation to indemnify the intending parents would be accompanied by a prohibition on her ever exercising as a surrogate mother again. This manner of treating the woman signals respect, not for her freedom, but rather for the protection of the interests of the intending parents at the cost of reducing gestation to a service which, in the event of non-performance, generates compensation. An especially egregious case would be one where the surrogate mother, in exercise of her rights under the law, decided to abort the pregnancy at an advanced stage, claiming health-related problems. Would she have to indemnify the intending parents in such a case too?

Regulatory proposals for altruistic surrogacy insist on the charge-free nature of the agreement and on the fact that any consideration received by the surrogate mother is of a merely compensatory nature to cover the expenses and inconvenience caused, plus any loss of earnings. Even so, reference to such compensation tends to be couched in sufficiently broad and ambiguous terms so as to be able to encompass what could properly be termed remuneration. One cannot ignore that the line between "compensate" and "remunerate" is hazy, and that in these types of practices there is a serious risk of straying towards a pure sale.

However, aside from any difficulties which may arise when it comes to putting into objective terms the compensatory payments that a surrogate mother should receive in order for her service to qualify as altruistic, one has to ask if disinterest and altruism can really be guaranteed in such actions. It is practically impossible to prove that the intending parents make no gifts or hand no sums of money to the surrogate

mother which might be deemed remunerative. Then again, it could almost be considered unnatural that someone who has had a child through surrogacy might not "thank" the surrogate mother for the service, with whatever generosity he/she might wish to show.

In light of the above, the lawfulness of altruistic surrogacy may eventually become a subtle form of remunerative or commercial gestation, or what is worse, turn into some kind of consented exploitation, in which the woman who gestates the child of another does do so neither disinterestedly nor for remuneration, but instead in the hope of receiving something in return that will make it worth her while.

In this connection, it should be recalled here that Article 5.3 of the AHRTA lays down that "The Ministry of Health & Consumer Affairs will, subject to the National Assisted Human Reproduction Committee's report, periodically set the basic conditions that ensure respect for the charge-free nature of the donation". Since the Act was passed, however, the Ministry has never complied with this mandate. To assume that it is now going to comply scrupulously with a similar measure for cases of gestational surrogacy is, to say the least, a naïve act of faith.

Despite Spain's many years of experience in assisted reproduction, to date not enough study has been conducted into the profile of egg donors, the reasons for their decision, and whether they regard the amount they receive as a compensatory or, alternatively, as a remunerative payment. It would be of interest to have such studies before any form of legalisation of altruistic surrogacy is proposed.

There are also two situations relating to the fate of the child, which cannot be overlooked. Firstly: what happens when the unborn child is suffering from health problems and, as a consequence, the intending parents want the woman to abort but she is not willing to do so? One might well think that, within the framework of an altruistic relationship in which the surrogate mother is trying to satisfy the wishes of the intending parents, the surrogate mother will accommodate to what they say. Yet it does not necessarily have to be like this, as is illustrated by the case of Delaney Skye: a lesbian woman gestated a daughter for a lesbian couple, who, on learning that the child had Down's Syndrome, asked the surrogate mother to have an abortion. However, the latter, in agreement with her partner, decided to continue with the gestation and take charge of it. In such circumstances, it is not too farfetched to suppose that the intending parents would try to persuade the surrogate mother to abort a child that had nothing to do with her. Firstly, the two solutions that the law offers are clearly wanting, namely, either to force the surrogate mother to keep a child that she was not gestating as her own, or to

impose a parentage on the intending parents which is in no wise what they sought. Furthermore, to maintain that these problems should be settled in the surrogacy agreement is likewise unsatisfactory, since matters in which fundamental rights are at stake cannot be left entirely to the autonomy of will.

The second situation arises where the child is left without intending parents before being born. The regulatory proposal for Spain maintains the parentage in favour of the intending parents. The effect of this decision is to gestate an orphan before it is even born. In such a case, the surrogate mother could be given the option of becoming the mother of the child. Yet this alternative also poses problems.

The regulatory proposals for altruistic surrogacy being contemplated today clearly favour the interests of the intending parents at the expense of the other parties involved. One specific item of evidence confirms this opinion. When it comes to the registration of the new child at the Civil Registry, it is usually laid down that data from which the nature of generation can be inferred, will not be shown. Consequently, a child born through surrogacy will only be able to obtain information about its biological origins insofar as the parents so desire. A provision of this type, coupled with the anonymity of gamete donations stipulated by the AHRTA, enshrines the superiority of the interests of the intending parents over those of the child in knowing about its origins.

Given the complexity of situations that might arise and the possible conflicts that might be generated, regulatory proposals for altruistic surrogacy generally require the creation of a National Gestational Surrogacy Registry. At such a registry, women who wanted to be surrogate mothers would be entered on the books and gestational surrogacy arrangements would be registered and deposited. This instrument would serve to prevent unlawful practices. Moreover, on having all the information relating to gestational surrogacy undertaken in Spain, it would, in turn, enable studies to be conducted, which would then serve as a public policy guide in this field.

This said, one cannot be unaware of the apparent lack of interest shown by government authorities towards this type of registry. For over fifteen years, Canada has been regulating altruistic gestational surrogacy on very broad terms. It accepts both traditional surrogacy and gestational surrogacy, and the fact that the intending parents may be national or foreign. It is, moreover, a state with a solid institutional and administrative structure. To date, however, it still has no registry which would enable information relating to these processes to be reliably obtained. Something similar happens in Spain, not with gestational surrogacy, but with gamete donors. At

this point in time, Spain is still without a Gamete and Pre-embryo Donor Registry, despite the fact that this was already envisaged under the 1988 AHRTA and was again provided for by the prevailing 2006 Act. Throughout these years, there has been no lack of government announcements about the imminent promulgation of a decree to create this registry. Yet we still do not have one.

From an overview of the matters affecting altruistic surrogacy which must necessarily be regulated, it can be concluded that the problems raised are extraordinarily complex and that the responses which these have received to date unduly curtail women's freedom and neglect some interests of the child, which, as noted above, enjoy preferential status. Moreover, the regulatory experiences of surrogacy in those countries where it is currently envisaged do not serve as reference, whether because they fail to cater to the demand for this service in such countries, or because they have ended up converting surrogacy into a mere business. An example of the former is the United Kingdom, where there are few cases of domestic gestational surrogacy and the great majority of British citizens resort to this avenue abroad; an example of the latter are countries such as India, Thailand, Mexico, Russia and the Ukraine. Over the last two years, India, Thailand and Mexico (specifically Tabasco State, which was the only one that permitted it) have banned access to surrogacy by foreigners, due to the scandals that have arisen in many cases. Russia and Ukraine in particular, have taken advantage of this state of affairs to boost their own supply. Lastly, as noted above, national surrogacy cannot be addressed in isolation as something separate from international surrogacy. Taking surrogacy seriously starts by adopting measures to ensure that prosperous citizens cannot engage in actions that are prohibited in Spain, violate national or international public policy, and are frequently undertaken in countries where the rights of surrogate mothers and children are not sufficiently guaranteed.

Lastly, it has to be borne in mind that the legalisation of surrogacy in a country automatically brings an increase in demand, because people who have never entertained or envisioned this possibility, begin to take into consideration as soon as it becomes available. No-one can be blind to the fact that altruistic gestational surrogacy could not possibly cover the demand that would foreseeably grow with its legalisation. Faced with this situation, it is inevitable that alternatives will be sought, either herein Spain by lobbying to have commercial gestational surrogacy legalised as well, or on the international market, where countries that see it as a good business are always to be found.

Against those who maintain that legalisation is the best antidote to combat the international surrogacy market, the contrary can be argued, namely: that restrictive

regulation, such as the sanctioning of altruistic gestational surrogacy, is clearly inadequate to cater to existing demand; that the natural tendency will be to relax certain conditions (principally, passing off genuine payments as compensation); and that, in a legal framework of acceptance of the practice under certain conditions, the applicants for these services will feel even more justified in resorting to the international supply and continuing to exert pressure on the state to register the parentages of children obtained outside Spain. Furthermore, it is easy to foresee that recourse to gestation abroad would be the chief option, since for many couples or individuals, the territorial distance between such intending parents, the child and the surrogate mother is not only a necessity but is in fact viewed as convenient to avoid any relationship between the child and the woman who has been carrying it in her womb for nine months.

Hence, if one of the overriding aims of consenting to gestational surrogacy in its altruistic version is to prevent people from continuing to resort to gainful surrogacy abroad, then it is perfectly predictable that this aspiration will come to naught, and will culminate in legitimising gainful surrogacy abroad, since it will be difficult to bar somebody from doing something outside Spain which is permitted at a national level, albeit with the requirement that it be free of charge. In this respect, it is important to re-emphasise the differences between the current context of organ donation and gestational surrogacy, given that, whereas the prohibition against living donations is fully effective in view of the difficulties that any individual comes up against if he/she seeks to circumvent the national ban by going abroad, in the case of gestation the same thing does not and will not happen, due to the lack of an international convention.

For all the above reasons, we consider it imprudent to regulate altruistic gestational surrogacy. In this respect, the proposal tabled by the Socialist group last year when the Madrid Regional Assembly debated the possibility of urging the Spanish Government to regulate surrogacy is regarded as a positive step. It recommended, “urging the Spanish Government and urging the Spanish Parliament to form a study subcommittee for the purpose of opening up a space for reflection and decision to put forward legal reforms of gestational surrogacy within our country, in every case guaranteeing the reproductive rights, the rights of women, and the rights of parentage and nationality of the children affected, particularly, with respect to

foreign countries and, specifically, measures against human trafficking and abuse of women in the framework of gestational surrogacy."[14]

3.3.- Maintaining the nullity of gestational surrogacy arrangements at a national level

It is true that some countries in our part of the world permit surrogacy under conditions of one type or another. Greece and Portugal are more or less recent examples. Nonetheless, the majority of countries ban it or deem it be null and void, and they do so because they hold that this practice amounts to an outright assault on the dignity of the woman and the best interests of the child. It attacks the dignity of the woman, since it allows her body to be converted for a space of nine months into a mere instrument to fulfil the wishes of others. At all events, this is what happens in commercial surrogacy, though -in the opinion of the majority of the members of this Committee- it is also what happens in altruistic surrogacy. In both modalities, birth amounts to the rupture of the strongest human bond that can exist, namely, that which unites a mother and her child, because it is based as much on will as on body. It likewise attacks the best interests of the child because it severs the maternal bond after the birth, and exposes it to a frequent and serious risk of objectification.

These were the reasons that inspired the regulation of surrogacy in Spain under the 1988 AHRTA, a pioneering enactment of its type in the world. These same reasons led to the regulation governing this matter being left intact after the reform of the 2006 AHRTA. However, even though one might argue that surrogacy does not, *per se*, have to amount to an assault on either the dignity of the woman or the best interests of the child, and that it can be regulated in such a way as to prevent all manner of exploitation of women and child trafficking, we feel that there are arguments of a prudential nature to maintain the law in force in Spain:

- *Caution recommends waiting in order to appraise the consequences of sanctioning gestational surrogacy in neighbouring countries*. The relentless progress of science and technology that has characterised these early decades of the 21st century and is unrivalled by any other era of history, serves to hinder the legislator's task to an enormous degree. The framework of certainty and foreseeability in which legislative activity has traditionally been carried out seems to have already melted away into different areas of the regulation. Although lack of certainty is something that defines the very existence of the human being, and risk has been inseparable from

[14] Diario de Sesiones de la Asamblea de Madrid (Transcript of Madrid Assembly Debates), no. 166, 17 March 2016, p. 9272.

his daily routine since the origin of mankind, the context has changed notably in recent years. Added to the great benefits for humanity brought to us by this progress are new risks, not known until now and, above all, new dilemmas and unknowns which substantially affect the taking of legal decisions about their authorisation and tolerance. This new panorama finds its maximum expression or legal translation in the appearance of a new principle, the precautionary principle, which is already being incorporated into the majority of legal systems in the region, whether in the form of a mere inspiring principle of legislation, or in the form of decision-making element. It was incorporated into our legal system by Article 2 f) of the Biomedical Research Act 14/2007 of 3 July, which lays down that "Research shall be undertaken in accordance with the precautionary principle to prevent and avoid risks to life and health". It is also expounded in Article 3 d) of the General Health Act 33/2011 of 4 October, "Precautionary principle. The existence of sound evidence of a possible severe threat to the health of the population, even where there might be scientific uncertainty about the nature of the risk, will determine the cessation, prohibition or limitation of the activity to which such evidence points". In the almost contemporaneous Food Safety and Nutrition Act 17/2011 of 5 July, this principle is embodied in its provisions under the head of precautionary principle, though it is cited in its most common form in the Preamble, "The new Act addresses the classic aspects of food safety, such as the detection and elimination of physical, chemical and biological risks, from a new anticipatory approach which is legally based on the precautionary principle".

The appearance of the principle thus responds to the need to adopt a precautionary approach to new policies and ascertain whether relevant risks may be posed to, *inter alia*, the environment or public health, arising out of scientific and technological innovations. It raises lawmakers' awareness to the uncertainties surrounding the risks that may accompany the advance of science and technology.

Admittedly, the application of this principle is, in the strict sense, confined to spheres directly linked to technological development, in which such development raises uncertainties about the possibility of it resulting in harm to people or the environment. These are therefore spheres in which there is uncertainty about causality, i.e., scientific uncertainty about the effects of technology as opposed to uncertainty about the social impact of the law.

The European Commission (Communication from the Commission on the precautionary principle of 2 February 2000) states that recourse may be had to the principle where preliminary objective scientific evaluation indicates that there are reasonable grounds for concern that the potentially dangerous effects on the

environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community. In the words of the Commission, "Recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty. The implementation of an approach based on the precautionary principle should start with a scientific evaluation, as complete as possible, and where possible, identifying at each stage the degree of scientific uncertainty."

However, a sector of the doctrine, in a broad interpretation of the principle which goes beyond its original formulation and sphere of efficacy, and which links up with the general idea of prudence *per se* that should inform the work of the legislator insofar as legal rules and regulations have coercive power, has invoked this principle in the sphere of gestational surrogacy to recommend or suggest not sanctioning altruistic gestational surrogacy, owing to the uncertainty of the social consequences which this may have for the children themselves and the family. Such precaution or prudence is especially advisable in the current context, in which it might be advisable -save where some social need or emergency might render its enactment necessary- to wait and see what effects its regulation has in neighbouring countries such as the United Kingdom, insofar as the legal status of the minor, who is the biological child of at least one of the intending parents, is guaranteed and protected.

- *Intergovernmental bodies that have issued statements on surrogacy have adopted positions of rejection or caution***.** The UNO, through its Committee on the Rights of the Child, has warned certain countries such as India and the USA of the risks of child trafficking in connection with these practices. In its Annual Report on Human Rights and Democracy in the World in 2014, the European Union has described them as contrary to the dignity of woman; the Parliamentary Assembly of the Council of Europe has rejected a proposed regulation of surrogacy agreements; and the Hague Conference on Private International Law, while not having reached a consensus on the position to be followed in the international sphere, has nonetheless spelt out the serious risks entailed in surrogacy.

- *Attempts to regulate altruistic gestational surrogacy, no matter how rigorous and rights-based they seek to be, generate serious problems of an almost intractable nature*. This option is neither adequate to cater to the demand, nor does it resolve the problem of international surrogacy. To pass an Act that seeks to satisfy the parental desire through altruistic surrogacy will only serve to make way for remunerated gestation and the need to unconditionally accept registrations of

parentage deriving from international surrogacy arrangements. Even in countries such as Canada, in which surrogacy is permitted under certain conditions, many of the persons or couples who want to have a child by this means resort to commercial gestation abroad.

- *The type of surrogacy that has mainly been developed worldwide, i.e., international commercial surrogacy, appears (at least in many cases) to be linked to the exploitation of surrogate mothers*. Altruistic gestational surrogacy has a residual nature. Before proposing any form of legalisation of surrogacy, it would seem advisable to have reliable information about the socio-economic profile of the women who undergo these practices and about the level of knowledge and freedom with which they have participated. There are extremely good grounds for suspecting that these are poor women, in situations of social exclusion, or women who seek to obtain some income and have no problem with seeing the process of gestation in this light and relinquishing the child gestated in order to achieve this.

The current law has not prevented commercial international surrogacy from proliferating in Spain. To this end, advantage has been taken of a purported legal vacuum (despite the fact that the Supreme Court Decision of 2014 made it clear that no such vacuum existed) and the administrative coverage of the *DGRN* Directive, contrary to the doctrine of the Supreme Court. This anomalous state of things must be resolved immediately. In the meantime, there are still people who are resorting to these practices abroad, trusting that, in respect of such children commissioned abroad, they will then be able to register parentage in their favour here in Spain. The agencies which act as their intermediaries, far from warning them of the irregularity of the situation and the ensuing margin of legal uncertainty in which these actions are taken, assume that there is no legal problem whatsoever.

We are of the opinion that this situation cannot be maintained indefinitely and that it calls for an effective response from Parliament. The proposal with which we conclude this Report is precisely targeted at ensuring what the AHRTA sought to guarantee both in 1988 and 2006, namely, the nullity of gestational surrogacy arrangements, regardless of where they are entered into, in order to prevent the exploitation of women and violation of the best interests of all children.

Conclusion

Throughout this Report, we have seen that there are solid reasons for rejecting surrogacy. The desire of a person to have a child, no matter how noble that may be, cannot be realised at the cost of the rights of others. The majority of the Committee deems that every gestational surrogacy agreement entails exploitation of the woman and harm to the best interests of the child and, as such, cannot be accepted in principle. Other Committee members, while accepting in principle that this practice could be regulated in a manner that combined the satisfaction of the desire of some to have a child with the guarantee of the rights and interests of others, are unable to discern a way of achieving this in the current context. The regulatory proposals mooted -altruistic and commercial surrogacy in its various formats- are clearly wanting in terms of safeguarding the dignity and rights of the surrogate mother and child, for the reasons outlined above.

Spain, along with many other countries in our cultural milieu and in the rest of the world, has consistently rejected this practice. It did so when it passed the first law on assisted human reproduction in 1988 and ratified it both in the 2003 reform and in the new 2006 law on assisted human reproduction. However, the experience of recent years has shown that the prevailing law is not sufficiently effective to attain the goal it pursues, namely, the nullity of surrogacy agreements. Taking advantage of the permissive laws of some countries, Spanish citizens enter into these types of agreements abroad and then succeed in registering the parentage of children so obtained at the Civil Registry in Spain. These types of agreements and registrations fly in the face of the considered opinion of the Supreme Court, which ruled on the matter in 2014 and 2015, declaring them and any effects flowing therefrom to be null and void.

In view of the fact that we are neither lawmakers nor a body created for technical-legal counselling, we feel it is not our place to set forth the proposed reform of the prevailing Act, which we see as being necessary to ensure the continued achievement of the goal for which it was created. At all events, we feel that said reform should be guided by three fundamental criteria:

- Minimum intervention principle. The Act in force establishes the nullity of gestational surrogacy arrangements; it does not penalise those who seek to carry them out. The reform of the law should be geared to ensuring that the nullity of such agreements is also applicable to those concluded abroad. To contribute to the effectiveness of the measure, consideration should be given to the possibility of penalising the agencies that engage in this activity. Only in the event that such

measures prove inadequate to stop gestational surrogacy abroad, should the possibility of resorting to other legal compliance-strengthening measures be considered.

- Towards a universal ban on international surrogacy. The unfortunate experiences of countries in which this practice has crudely highlighted the exploitation to which surrogate mothers are subjected, is a strong reason for Spain to go before the international community and advocate the adoption of measures targeted at banning the conclusion of gestational surrogacy arrangements at an international level.

- Safe transition. The fact cannot be ignore that at this point in time, an indefinite number of Spanish people are involved in international surrogacy processes. It is important that the transition to a more effective regulation should not produce the collateral effect of leaving children who are born through these processes, unprotected. To this end, there will be a guarantee that registration of their parentage abroad shall be done in accordance with the doctrine established by the Supreme Court.

Madrid, 19 May 2017

Separate opinion regarding the Report on the Ethical and Legal Aspects of Surrogacy, issued by Spanish Bioethics Committee Member, Carlos María Romeo Casabona

I issue this separate opinion with every respect for the criterion expressed by my fellow Spanish Bioethics Committee members in the above-referenced Report, making it quite clear that I am essentially in agreement with same, without prejudice to the fact that, with the brief comments made below, I seek solely to nuance some lines of reasoning in the Report and leave open some avenues of reflection with respect to the future, insofar as the situation, legal certainty, and social appraisals render this advisable.

There can be no doubt that surrogacy, in all the variant forms which it assumes and are meticulously recorded in the Report, displays a complexity that has increased considerably with the passage of time, and has seemingly become an assisted reproduction technique to which many couples from Spain and elsewhere have been resorting with growing frequency.

The Report reminds us that the agreement on which this technique seeks to base itself has been consistently deemed to be null and void under our legal system since it was first regulated in 1988, i.e., it has no legal effect: maternity is determined by birth. Similarly, sight should not be lost of the fact that this technique is not prohibited, *per se*, and that its use thus carries no penalty whatsoever, at least for the persons most directly involved (in this respect, the surrogate mother and intending parents).

In our country, this statutory formula has not resulted in Spanish citizens refraining from resorting to surrogacy. This has been done, albeit abroad, by means of the legal procedure described in detail in the Report, namely, registration of the child born of another woman (surrogate mother) as one's own (intending parents) at the relevant Spanish Consulate, in order to subsequently complete the corresponding formalities at the Civil Registry, once back in Spain. This procedure, which gives rise to perplexity, and sometimes even concern, in the population, has been branded as a clear case of fraud by the bulk of legal scholars, who tend to consider that this situation would affect public policy, construed in this context and in a simplified form (given that it is a legally indeterminate, very broad and multifaceted concept), as a set of principles and institutions regarded as fundamental for the smooth running of a society, its institutions and its legal system. In themselves, these two negative labels amount to acknowledging an appreciable erosion of the guarantee of legal certainty. Hence, we have two categories of citizens in terms of access to

surrogacy, namely: those who benefit from it because they have sufficient means to afford what it costs abroad; and those who have no access to it due to a lack of means or because they wish to show respect for law, something that might also happen. On airing this thought, I am in no way seeking to resort to schematic and demagogic arguments: it is simply how things stand at present. This situation is further complicated by the fact that private intermediary agencies seeking to make a profit, move about our country with total freedom, offering their mediation services abroad to couples and persons who want to have descendants through the medium of surrogacy.

One can appreciate that there are desperate couples who wish to have children despite their pathological or functional infertility (homosexual couples). It takes somewhat more of an effort to feel a certain empathy for those who, of their own accord, prefer to resort to surrogacy instead of natural reproduction, or are not infertile couples. Our legal system protects procreative or reproductive freedom, construed as freedom of decision about having or not having descendants, about the number of children and their distribution over time. The public authorities are not entitled to interfere in these decisions. Yet, from this procreative freedom, one cannot then infer the "right to the child", since in reality this so-called right comes within the compass of the right to protection of health and the protection and weighing of the interests of any third parties who may become involved, i.e., as the Report reminds us, essentially the interests of the future child and the rights and interests of the surrogate mother, regardless of whether or not the latter contributes her own biological material.

Consequently, faced with this situation of a certain lack of control and contempt or disregard for our legal system, on the one hand, and of the inequality that it causes among citizens and the negligible sensitivity for the individual situation in which many surrogate mothers who have been led to carry their role of mothers to term (I prefer not to generalise or simplify), may find themselves, the unanimous criterion adopted by the Committee strikes me as prudent. Given the present chaos, without forgetting the efforts being made by the Supreme Court to redirect this towards a certain regulatory coherence, at present there is, in my opinion, no better response than that of accepting the nullity of the gestational surrogacy agreement as laid down by the AHRTA. I am aware that this is not a fully satisfactory solution and that it is not shared by various population sectors, since it does not address other views and needs that warrant additional consideration. Nonetheless, of all the positions covered by the Spanish Bioethics Committee Report -and I can say without hesitation that we have not neglected to mention at least the most significant- I

believe that for the time being and until some kind of order has been introduced into the current situation, there is no other clearly preferable solution.

On the other hand, it does not seem satisfactory to me to advocate maintaining the current legal regime without put forward other proposals targeted at reinforcing it, to ensure that the legislative intent is effectively respected. Firstly, because it could be interpreted as assuming that the current situation is deemed desirable or at least satisfactory, accepting the violation of our legal system with the breach thereof abroad and, by extension, the continuity of its fraudulent application. Secondly, because it would somehow mean accepting the inequalities that are generated among couples by reference to their financial capacity, and the fact that the resort to surrogacy by our fellow citizens abroad is encouraged on the quiet by some institutions and openly so by some intermediary agencies. Thirdly, because it is true that with the current situation there is no regulatory limit whatsoever, since couples can choose the country that legally adapts best to their needs or private aspirations. Accordingly, the public authorities should intervene with the aim of adopting such legal and other types of measures as may be required to curtail the situation radically, with the ensuing legal effects, provided that the latter entail no prejudice to or harm for the rights and interests of babies born through these techniques. In the Report, mention is made of some but I think there could be other additional measures that would be no less effective.

That said, it also seems to me that the above should not be taken as the definitive response. In a hopefully, not too distant future scenario of greater legal certainty, the possibility could be raised of opening surrogacy to certain situations, in all cases viewed as exceptional. By way of its premises, one would have to know, as mentioned above, how to juggle and combine the interests of the children, the surrogate mothers, and the intending parents in that order. I cannot overly expand on this point in a separate opinion which in essence concurs with the Report but which now also seeks to look towards the future.

As a point of departure, I feel that surrogacy is not without ethical values that should be recognised and promoted, provided that we are capable, at the same time, of eliminating or reducing others which are rejected, at least by some sectors, and which could disregard such values. Indeed, it cannot be denied that it can (admittedly, not always) foster solidarity between persons, as well as altruism. It is often argued that these values are only imaginable among people who previously enjoy close ties, particularly if they are family relatives, because only among these can it be presumed that they act out of solidarity and due to altruism. Without ignoring the reality on which this argument may be based, I find it difficult to

concede that there might not be women without family ties capable of a relevant gesture of solidarity, regardless of the fact that in all the cases mentioned some kind of compensation might be given to them (to draw the dividing line between compensation and price is by no means an easy task, but I cannot enter into this here; nor can I enter into a discussion of the opposite position, which holds that it is better to exclude the kinship relationship in order to prevent the confusion of roles that might arise between the two mothers, and the surrogate mother in particular, i.e., mother and grandmother, mother and aunt, etc.; there are competent specialists to identify this risk and its magnitude, to the point of even leading to pathological manifestations, which should be treated on a case-by-case basis). With these unfortunately brief thoughts, I wish to draw attention to positions which are at times maximalist and insufficiently nuanced. Surrogacy does not, in itself, amount to exploitation of the woman -surrogate mother- but, as we know, there is the real risk that this may happen; it does not, *per se*, amount to a sale of children, but it may well place the commercial aspect at the very core of gestation. And one could go on like this, brandishing arguments of a similar nature.

Given that surrogacy is not without fostering the virtues and even legal values mentioned above -we are not going to categorise them now- as well as others; and given that it may serve to enable (pathologically or functionally) infertile couples, heterosexual or homosexual, to have offspring within a set of principles and rules, we should stay alert in order to spot the right time (let's hope that day is not too far off) for Parliament to intervene and open the door to surrogacy.

We know full well that any legal framework that opens the way to surrogacy entails the risk of aberrations and covert corrupt practices of one degree or another. As a first step, one would therefore have to think about assessing this and whether it would be possible to construct the means to prevent, expose or curb it efficiently. Bear in mind that that the effect of this legal framework would (should) be that the bulk of these cases would be undertaken in our country, where the usual supervision and control mechanisms in health matters would come into operation -or should come into operation, it has not always been so simple- particularly taking into account that fact that we are dealing with procedures that are more readily available in the private as opposed to the public sector; and that any variants excluded from this future hypothetical legal framework, which might then be sought to be undertaken abroad, should face the full force of the law in respect of any fraud thereby committed, ensuring in every case that, as I have repeatedly stated, the legitimate interests of the children so born are safeguarded. Similarly, one would have to think of other responses, such as the possibility of the tasks of

intermediation, which would foreseeably be considerably reduced both in our country and abroad, being exclusively performed by mixed non-profit entities. In comparative law we have a series of legal solutions and highly valuable judgements from the ECHR, which have left us with some extremely cogent lines of reasoning and rulings. In the current situation, however, I do not feel that internationalisation of the responses against surrogacy or, as the case may be, against its excesses, would be a profitable path.

Although surrogacy has proved to be a very complex matter, replete with nuances and subtleties, which give rise to and call for much thought, reflection and public debate (humanly, socially, ethically and legally it presents fascinating aspects, which should, nonetheless, be handled dispassionately and with exquisite sensitivity and equanimity), I feel I should not elaborate any further on the matter.

However, I do wish to conclude by saying that both the authorities and the public will find in the Report abundant, pertinent and varied information in all its diverse aspects, since it is a document which has been discussed, reasoned and drafted with painstaking care, and to which we have all contributed what, to the best of our understanding, may be pertinent. Despite the fact that neither the authorities nor the public might completely agree with the conclusions reached by the Committee - inasmuch as it is all too plain that this would not seem possible nowadays- they will nevertheless find sufficient elements to form their own reasoned opinion. Needless to say, in this opinion I seek to convince no-one, since as has been seen, in no part does it entirely ally itself with any one position in particular, something that leaves it even more open to criticism. But this I accept.

Bilbao, 16 May 2017.