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Committee on Social Affairs, Health and Sustainable Development

Minutes

of the Hearing on “Human rights and ethical issues related to surrogacy” held in Paris on Friday 11 September 2015

Opening of the meeting

The Chairperson opened the hearing held in the framework of the report on “Human rights and ethical issues related to surrogacy”, for which Ms De Sutter is the Rapporteur, and welcomed the three experts:

- **Ms Laura Martínez-Mora**, Principal Legal Officer, Permanent Bureau of the Hague Conference on Private International law;
- **Professor Susan Golombok**, Director, Centre for Family Research, Faculty of Social and Political Sciences, University of Cambridge, United Kingdom; and
- **Professor René Frydman**, Hôpital Foch, Department of Obstetrics, Gynecology and Reproductive Medicine, Suresnes, France.

The Chairperson drew participants attention to the background note in the files providing information about the experts as well as to the new hearing format applied for the first time at the present meeting, involving a moderation of the hearing by the Rapporteur. In her capacity as moderator, Ms De Sutter would put specific introductory questions to the experts who would then have five minutes each to reply, before opening the exchange of views between all Committee members and the experts. He encouraged all members to actively participate in the hearing and gave the Chair to Ms de Sutter for her introduction.

Ms De Sutter thanked the Committee for the opportunity to hold this important hearing for her report through which she wished to examine in particular the ethical rather than the medical aspects of interventions and procedures linked to surrogacy, then put her questions to the experts.

Question to Professor Frydman: As a pioneer of “in vitro fertilisation” (IVF) in France, and given the fact that surrogacy (French: “gestation pour autrui”) generally involves IVF, what is your point of view on surrogacy, which is prohibited in your country?

Professor Frydman first of all saw the need to distinguish (1) the genetic “project” to have one’s own child - which could also be realised through a donation of gametes (NB: reproductive cells in a stage of maturity ready to merge with other gametes to create new life) given that 50% of couples were

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estimated not to be able to fulfill their desire for a child naturally and (2) the emotional project to carry and give birth to one's own child. For him, surrogacy could not take place without commercialisation and without creating a (psychological) debt towards a third party. Just like organ donation, surrogacy involved a commercial aspect, because clients "rent" the uterus and body of a third person.

In this context involving several women, men and children, the greatest risk existed for the surrogate mothers; physical risks (linked to child birth), psychological risks (e.g. the separation from the newborn child) as well as ethical risks (renting out one's body). The desire to have a child was comprehensible but the surrogate mothers, making themselves available voluntarily or not, could not expect or ask for much except for financial compensation, so they were the ones to be protected. This was also the result of recent research in this field involving the examination of 600 cases of surrogate mothers.

Question to Professor Golombok: What is your experience with families and children having gone through surrogacy procedures?

Professor Golombok explained that her findings stemmed from a long-term longitudinal study, involving a variety of research methods (interviews with standardised questionnaires and many others) comparing 42 children born through surrogacy with a number of naturally conceived children (respectively at the ages of 1, 2, 3, 7, 10 and 14). The main findings were that:

- surrogate children did not differ from others at pre-school age, and that they often benefitted from positive parenting relationships (being very "wanted" children), especially with their fathers;
- at age 7, surrogate children had a higher increase in behavioural problems (though not at clinical level but still within the range of normal behavioural functioning), similar to adopted children of the same age group, whilst they returned to "normal" behaviour at age 10;
- little was yet to say about the age group 14 which was currently being examined, but that at this age, relationships with parents seemed to be positive overall and the surrogacy origin not a big issue, even if the family had contacts with the surrogate mother (which were welcome in most cases);
- 60% of families were still in contact with surrogate mothers when the child reached the age of 10, and had positive relationships with them.

Question to Ms Martinez-Mora: Could you please elaborate on your work on a possible transnational legal framework in this field?

Ms Martinez-Mora explained that the current project led by the Hague Conference on Private International law (HCCH) had a broader scope than surrogacy arrangements: it dealt with private international law issues surrounding the status of children (e.g. problems concerning the establishment or recognition of legal parentage when persons undertook cross-border reproductive care or when same-sex parents decided to move to another country). However, surrogacy was still a major aspect of the HCCH project. Research had been undertaken in over 50 countries and had shown the need for further work in the area of parentage, including surrogacy. The work involved the examination of the desirability and feasibility of an international instrument. The next stage, due in 2016, was the creation of an Experts' Group to study its feasibility. The Experts' Group would also study international surrogacy arrangements in light of human rights (women's and children's rights in particular). Whilst the HCCH Secretariat had to maintain a neutral position, HCCH member States had widely differing positions. With regard to surrogacy, both States where children were born and "receiving" States would be represented in the upcoming Experts' Group (e.g. India and the USA). If the HCCH member States then decided to work on a future treaty, the objective would not be to harmonise legislation in an exhaustive manner or to define precise criteria of eligibility for people, but to build bridges between different legal systems, to propose a global solution (any country could become a party to HCCH Conventions) and to offer a high degree of security in cross-border relations and activities. The aim would be to find an *ex ante* solution, i.e. a baby was born of a surrogate arrangement. All HCCH Conventions were meant to provide answers to (some or all) matters of jurisdiction, applicable law, recognition and enforcement and legal co-operation. They were based on human rights, including children's rights, and were widely ratified.

Question to Professor Frydman: With a view to linking up the three points of view just heard, would the evidence presented by Professor Golombok provide arguments in favour of surrogacy?

Professor Frydman wondered if it was possible to draw conclusions from only 42 cases and who were the responding families; in terms of methodology, the rate of non-respondants in such a survey should be minimal, children, due to their differences, were not always comparable and such surveys did not always show how children really felt. His main concern was still the vulnerable, birth-giving women, of whom he had seen two highly traumatised cases in a context of surrogacy, mainly due to the separation from the child. If a family had the genetic objective of having their own child (not fulfillable through adoption), they should make use of methods of reproduction where risks were taken by themselves and not imposed on others.

Professor Golombok did not see her role as advocating surrogacy but believed that her in-depth psychological study (based on a variety of scientific methods, thus not only a survey) provided scientific evidence and was a contribution to well-founded opinion-building in this field. The sample chosen had been representative, not only including those who were satisfied with their surrogacy experience. From her experience, and even though all children responded differently when they learned about their origins, of the 300+ yearly surrogacy cases in the United Kingdom, only a very small proportion went wrong, often due to a lack of counseling and people falling victim to pure commercial interests. Physical and psychological risks should not be unduly confounded.

Question to Ms Martinez-Mora: If regulation is needed, what exactly needs to be regulated?

Ms Martinez-Mora explained that, if it was agreed to work on regulation, such regulation should strike a balance between the different human rights. She acknowledged the expertise of the Council of Europe in this domain. Both organisations had the challenge to discuss if it was feasible to reach an agreement between member States with diverging positions on how to protect women, families and children likewise. She also underlined the fact that an instrument setting a framework for co-operation and the prevention of abuses, should be distinguished from an effort to promote international surrogacy.

Ms De Sutter then opened the floor for discussion for all members.

Ms Magradze believed that adoption or surrogate origins could be similarly painful experiences for children. In her country, Georgia, the context had been sensitive until a few years ago: telling children about their origins was criminal, parents did not want anyone to interfere in family relations and the church had quite a strong position against surrogacy. Given that legislation would always be different, could it not be left to the countries themselves if they wanted to allow for or prohibit surrogacy?

Ms Martinez-Mora pointed out that issues arising around surrogacy often had an international character linked to different countries involved (according to the origin of the gamete donors, the surrogate mothers and intending parents). Therefore, even if surrogacy was forbidden in one country, people could still go to another country and this would still put the receiving State in a difficult situation.

Professor Frydman underlined that the principle of surrogacy had to be discussed at the ethical level. One could not reject the death penalty and then start legislating on it. Reproductive cloning was well forbidden at international level and no one questioned it. Regulating surrogacy meant accepting the ethical principle, and this issue needed to be solved before passing on to legislation and procedures.

Mr Kiral was convinced that regulation was required at the international level and that an exchange of good practice between member States would be useful in this respect. From Ms De Sutter's report, he would expect some hint to appropriate methodology as regarded procedures and the collection of reliable data (without interfering with people's privacy). His country, Ukraine, was a "surrogacy-positive" country and had procedures in place but lacked quality data, because surrogacy was often mixed with IVF and families were reluctant to report. According to the latest available data though, of 7,000 cases of IVF, only about 80 were linked to surrogacy.

Ms Kalmari drew attention to the fact that, according to her own experience, children would be happy to be welcomed by a family, and therefore did not see the problem.

Mr Ghiletschi wished to know what Professor Frydman thought about the recent European Court of Human Rights (ECtHR) case where France was called upon to accept the naturalisation of surrogate children. He also wondered what mechanisms were in place in the United Kingdom to protect surrogate mothers and if families were legally obliged to inform surrogate children about their origins. What legal framework did HCCH offer with regard to the protection of surrogate mothers from commercial exploitation? Was the legal framework not destined for rich families anyway, given that poor families could often not afford surrogacy?

Professor Golombok explained that a legal obligation to inform children only existed for cases where the surrogate mother was genetically involved, and that some parents found it difficult to inform their child. Of 34 surrogate mothers included in her study, most had not encountered problems of any kind, and the children had been pleased to meet them and their half-siblings. Proper screening and clinical support for surrogate mothers would be important, but it was not yet clear who would pay for that.

Mr Kiral explained that the Ukrainian legislation obliged the surrogate mother to give consent to registering the intended parents on the birth certificate.

Professor Frydman, from a legal point of view, did not find it logical that a mother giving birth to a child from a donated ovocyte was considered the mother, but not the surrogate mothers giving birth to someone else's child. Why had so few studies been undertaken in countries with a high number of surrogacy cases? Would a couple report if things went wrong in their case? He still saw a methodological bias in working with samples of volunteers (referring to a French study which was stopped because people did not want to answer), and was convinced that studies had to be pursued beyond the age of 14 of surrogate children where further problems would arise. He was not in a position to say if France would change its attitude and legislation after the recent ECtHR judgment.

Ms Martinez-Mora believed that co-operation between the Council of Europe and HCCH in this field was important. She underlined the need to have more data about surrogacy and the need to clearly distinguish surrogacy from adoption.

Ms Maury Pasquier pointed to the fact that wanting a child of one's own in genetic terms was not the only reason to choose surrogacy today, but that adopting a child had become really difficult. As a trained midwife, she was very much aware of the risks involved both for women and children, and was convinced that minimum standards were required both at national and international level. In a context of financial discrimination of poorer families both for surrogacy and IVF, notably the children were in need of protection.

Mr Recordon was surprised about the diversity in national legislations and believed that HCCH would find it difficult to harmonise them. He wondered where the true need for protection was; in some cases future parents might have to be protected from fraudulent surrogate mothers? He recalled that no person had a legal right to a child of his or her own.

Ms Martinez-Mora agreed that there was indeed no legal right to a child. She was also convinced that legislating should not be abandoned in the face of the matter's complexity, and was pleased that different parties with diverging positions had been ready to gather around the table today. With regard to HCCH Conventions, she mentioned that the Conventions used broad terms which were then defined in more detail at domestic level (for example, in the case of the 1993 Hague Adoption Convention: eligibility, suitability, adoptability, accreditation). This allowed for a greater number of States to decide to become party to the treaty, as they could define according to their internal laws whether a child was adoptable, whether parents were eligible and suitable to adopt, whether an agency was accredited, etc.

Professor Frydman called for more comprehensive studies in countries practicing surrogacy; the fact that the IVF involved in surrogacy procedures and the follow-up of pregnancy was not done in the same place posed a problem for data collection. The status of the mother needed better definition: the current confusion between the genetic mother and the birth-giving mother was not healthy and could have consequences for the child.

Ms De Sutter thanked all experts and members for their contribution to this hearing and handed the floor back to the Chairperson who then recalled the tight deadlines for finishing this report with a view to presenting it to the Assembly for debate during the January 2016 part-session.

Ms Iliescu, representing the Romanian Embassy in Paris, thanked the Committee for having allowed her to participate in the meeting and this hearing and expressed her congratulations to the Committee on its most interesting work.

Committee on Social Affairs, Health and Sustainable Development
Commission des questions sociales, de la santé et du développement durable

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 Paris, 11 September / *11 septembre 2015*

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