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**A Comparative Analysis of France and the UK's Policies
towards Surrogacy through a Marxist and Gender Approach**

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ABSTRACT

This research paper aims to analyze France and the UK's policies on surrogacy from a marxist and gender perspective. It will also look at the EU's normative role as surrogacy is a practice that can be perceived as contradictory to the EU's values as there are a number of issues that arise due to cross-border surrogacy arrangements. There are four main issues when it comes to surrogacy practices: the exploitation of women, the commodification of women, the commodification of children, and an indirect issue which is the definition of legal parentage which determines the citizenship of the child which is essential when it comes to cross-border surrogacy arrangements.

This paper concludes that the lack of common regulation is problematic. As there is no consensus, cross-border surrogacy arrangements are on the rise which exacerbates the exploitation of surrogate women from developing countries. This, in turn, deepens the divide between developed and developing countries. Lastly the lack of consensus on legal parentage leads to citizenship issues which put individuals at the risk of being stateless.

Keywords: surrogacy, cross-border surrogacy arrangements, marxism, gender, class, statelessness, citizenship, feminism, EU, France, the UK.

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1. Introduction:

Surrogacy is the practice by which a woman who is called a surrogate mother becomes pregnant and gives birth to a baby (or several) so as to give it to someone who cannot have children, in exchange for financial compensation or for altruistic reasons. It is illegal in most countries primarily because of ethical issues - one of the reasons is because some states think it is child trafficking when there is money involved in exchange for a person. There are two types of surrogacy arrangements: one is commercial i.e. the surrogate mother is paid, and one is altruistic: the expenses of the surrogate mother (mostly health, but it could also mean food and, or lodging) are covered.

Despite sharing some similarities, the EU surrogacy legislation is rather varied. As Assisted Reproductive Technology (ART) is a sensitive issue, politicians are cautious and tend not to take a clear standpoint towards the issue. Feminist approaches also vary. On the one hand, some feminists view surrogacy as a form of slavery as the surrogate mother 'rents' her body which leads to exploitation. On the other hand 'liberal' feminists think that the parties involved in a surrogacy arrangement know what is best for their own welfare. Besides, there has been some ethical concerns as the surrogacy industry is essentially a baby-selling market.

Other important factors are the role of culture, attitudes towards new technologies and ethical dilemmas. While most EU member states have banned commercial surrogacy, there is no specific regulation that prohibits citizens from going abroad and going through the surrogacy process elsewhere, and other member states have no policy regarding surrogacy at all which roughly translates to 'what is not prohibited is allowed' (Brunet et al., 2013).

No clear regulation leads to transgressions and often cross-border surrogacy. Indeed want-to-be parents choose to go abroad to countries where surrogacy is legal and where the legislation is rather loose: Ukraine, a few states within the US or India (until November 2015) to name a few. Others find loopholes within the European Union.

Furthermore, as the world system is anarchic (Burchill et al, 2005), there is no worldwide government that tells sovereign states what to do in cases where two states have

a different approach towards legal parenthood which can create citizenship issues. For example: under Californian law, the intended mother (i.e the mother who intends to raise the child) is automatically regarded as the legal mother, whereas legal motherhood is attributed on the basis of parturition - which is the act of giving birth - in most EU member states. Similar predicaments can also happen in regards to legal fatherhood, as well as in same-sex parents cases. For instance, in some states the surrogate's husband is considered the father even if the baby is not biologically his. In some cases, this has led children to become not only legally parentless, but also stateless. It becomes even more complicated when the surrogate-born baby needs travel documents (a passport), but also a visa to enter the EU, and instead is stuck in a 'legal limbo' abroad (Brunet et al., 2013).

Globalization and the abundance of communication and information technologies have given a boost to the surrogacy industry. Surrogacy has become a service to the most privileged ones in a global market, while being done by the least privileged people. Yet there is still no clear-cut common EU regulation, which in turn leads to more legal and ethical problems.

1.1 Aim of the study:

As stated above, surrogacy and more specifically cross-border surrogacy arrangements have become a growing issue within the EU. Ethical issues in terms of the exploitation and commodification of both surrogate women and children are at odds with the EU's normative stand on human rights. At the same time, legal issues surrounding surrogacy are a source of problem for everyone involved, first and foremost to the children, but also to the commissioning parents, the surrogate mother, and eventually to the states themselves. Thus it is constructive to examine surrogacy policies in the EU member states.

There are essentially two main views within the EU surrogacy policies. Some states consider that regulating surrogacy practices would be agreeing to a practice that exploit women so the state decides to ban it completely. Others consider that heavily regulating the practice would limit the risk of exploitation, and thus allow it under some conditions. It is

worth noting that commercial surrogacy is banned throughout the EU so the latter policy choice would only allow for altruistic surrogacy under some terms and conditions.

The purpose of this research paper is twofold. First, it aims at analyzing the surrogacy policies in France and in the UK through a class and gender perspective in light of the EU being seen as a 'normative actor'. Thus it will seek to answer why these two states chose a certain model of policy over another, and if there is a policy that is more coherent in light of the EU's commitment to human rights. Secondly, it aims at showing the consequences of policy gaps in cross-border surrogacy arrangements as both France and the UK have had to cope with citizenship issues. Thus it will examine the concept of citizenship and statelessness as well as the European and international instruments that were put into place to avoid statelessness issues.

1.2 Research Questions:

As a result of the research problem, several questions seem to emerge in order to frame the research issue surrounding the practice of surrogacy.

What is the origin of surrogacy?

What are the official stands towards surrogacy in the EU member states in particular France and the UK and what are the considerations behind the different legal stands?

Are there any legal instruments at the international and EU level to harmonize legal parentage - which is the main source of citizenship issues?

The first research questions aims at laying the foundation of the research paper as Assisted Reproductive Technologies which includes surrogacy can be very confusing. As it is often a controversial topic, most people have some limited notions of what ART is, and how it functions. Nevertheless ART is a specific and complex phenomenon which needs basic understandings of its policy and medical development. It lays some key words which will be used throughout the research paper. It will also examine the controversial nature of surrogacy by using different theories which frame the research problem.

The second question will look at the response towards surrogacy in the EU member states and in particular in France and the UK as these two states embody the distinction between the two main views of the practice within the EU. This will help in gaining greater awareness and a deeper understanding of the social reality of surrogacy in different national contexts.

The second question will also underline that issues of statelessness arise as some states refuse to recognize foreign birth certificates due to the prohibition of surrogacy practices or they will heavily delay granting a EU citizenship to a child born from a cross-border surrogacy arrangement which puts the children at risk and could leave them potentially stateless. Thus the concept of statelessness will be explored further and it is considered important to look at the instruments at the international and European level to examine the safeguards of human rights as the EU is considered to be a normative actor in the international arena with strong focus on the importance of human rights.

1.3 Scope and Limitations:

The first limitation is due to the lack of data such as the fact that there is no public records of babies born from the surrogacy industry anywhere. Additionally, foreign surrogacy agencies are under no obligation to share the number of couples seeking surrogacy arrangements, how many couples go through with the procedure, how many In Vitro Fertilization procedures are successful, and how many of these births lead to legal issues due to domestic laws. Thus it is difficult to know the full extent of the issue.

The second limitation is that any research paper is a direct result of interpretation and theorizing (Bryman, 2012: 578). Thus research papers' rely on the awareness of the analyst towards certain issues and topics. As a result, research studies can be quite subjective as the analyst is responsible for selecting and interpreting the data.

1.4 Outline of the thesis:

After introducing the research problem in the first chapter, the methodology that will be used throughout the paper will be presented in the second chapter which will prepare for the analysis. Then the third chapter will be the background for this research paper and will

be divided into five categories: the technical and policy development of surrogacy as key terms will be introduced and will thus be useful for the rest of the research paper, the official stands towards surrogacy in the EU and the increasing demand of procreative tourism, the previous research in the field of surrogacy with a particular focus on India as it is one of the rare states where commercial surrogacy was allowed and which received a lot of international coverage due to human rights concerns as well as a quick literature review. The fourth chapter will be the theoretical framework which is feminism and critical theory under a marxist perspective as both theories seek to improve human condition and look at power dynamics within international relations. The fifth chapter will be the comparative analysis between British and French legislation towards surrogacy using the theoretical framework used in the fourth chapter. The sixth chapter will look at the international and European instruments that were put into place in order to avoid citizenship issues. The final chapter will be the conclusion.

2. Methodology:

Methodology is the use of different techniques in order to gain knowledge (Della Porta, 2008: 25). It combines ontology and epistemology questions, respectively the study of the nature of reality, and how this 'reality' came about. « Methods of social research are closely tied to different visions of how social reality should be studied. Methods are not simply neutral tools: they are linked with the ways in which social scientists envision the connection between different viewpoints about the nature of social reality and how it should be examined » (Bryman, 2006: 19).

2.1 Epistemological Considerations: Interpretative Approach

There are two epistemological considerations: positivism and interpretivism (which is also referred to as hermeneutics - a term that is initially taken out of theology, which studies the « theory and method of the interpretation of human action » (Bryman, 2006: 28) when it is applied to social sciences.

« Positivists assume that facts and values can be separated; second, that it is possible to separate subject and object » (Burchill et al; 2013: 164). Thus it entails that the world is objective and independent of human consciousness and that an objective knowledge of social reality is possible (Burchill et al; *ibid*).

One of the main criticisms of positivism is whether the social sciences should be studied according to the same principles as the natural sciences; as social sciences are not a natural phenomena and are therefore subject to varying intellectual traditions or outside influences. Interpretivism, on the other hand shares the view that social sciences are essentially people and institutions and they are thus fundamentally different from natural sciences. Social sciences require therefore a particular logic that will « respect the differences between people and the objects of the natural sciences » (Bryman, 2006: 30).

This paper is based on an interpretivist approach as a positivist approach is only applicable to a certain extent in a social science research. Indeed the interpretivist approach emphasizes human volition and it stresses the limits of mechanical laws. It emphasizes the fact that individuals are 'meaningful' actors thus it seeks at discovering the meaning behind

actors' actions instead of relying on universal laws that are external to actors. Thus an interpretivist approach is necessary because the reality of the actors is not objective, and instead consists of individuals' interpretations which shape their actions and society (Della Porta, 2008: 25).

2.2 Research Strategy:

This research paper is based on a qualitative method but it will make use of quantitative elements.

Qualitative method emphasizes the role of words rather than quantification in the collection of data and its analysis. One of the advantages of qualitative method is that it is considered to be more fluid and flexible than quantitative method as it emphasizes discovering unanticipated findings and there is the possibility of altering the research plans as the study progresses (Bryman, 2006, 78).

Multiple sources of data and data collection will be used in this research paper, which involves both qualitative and quantitative data collection techniques.

The qualitative data is mostly comprised of policy documents in order to show the evolution of surrogacy policies in the UK and in France, statements by the European Court of Human Right as there are a number of court cases predominantly against France because of their refusal to transcribe foreign birth certificates of children born through a cross-border surrogacy arrangement, and statement by state officials which explain the state's position towards their policies. Primary official documents of international instruments, and EU institutions such as treaties will be referred to mainly in the sixth chapter in order to check the legal provisions that were put into place to avoid legal issues. Secondary sources include relevant research literature, and academic journals which will be used in the theoretical part and in the comparative analysis, as well as news reports.

The quantitative data comes from a secondary analysis that examined the increasing number of parental orders in the UK. It will be used to show the growing interest in surrogacy practices in order to support the qualitative data.

2.3 Reliability and viability

In social research, reliability is concerned about the stability of a concept so that the results of a study can be replicated. The notion of reliability is particularly significant when it comes to quantitative data (Bryman, 2012: 46). However the quantitative data in this research paper is very limited due to a lack of transparency and the absence of statistics within surrogacy arrangements.

Viability, on the other hand, is considered to be the most important criteria of social research as it « is concerned with the integrity of the conclusions that are generated from a piece of research » (Bryman, 2012: 47).

Variability is differentiated into four different types: measurement viability which applies mostly to quantitative analysis and therefore is not applicable here; internal validity which relates to the issue of causality i.e. whether a conclusion that includes a causal relationship is valid; ecological validity which is concerned with whether social scientific findings apply to individuals' everyday social settings, and lastly external validity which is concerned about whether the findings of a study can be generalized beyond the specific research problem (Bryman, 2012: 46-47). It is worth noting that although some consider external validity to be useful in social science research (Bryman, 2012: 47), others suggested that external validity has become outdated especially in the field of qualitative study or at the very least, it does not fully apply (Payne & Williams, 2005; Flyvberg, 2006; Alvesson & Kärreman, 2011).

As it is difficult to get a perfect understanding of the social world, it is impossible to attempt any kind of validation of its objective reality. Thus there should be less emphasis on validation and the use of empirical data should be used as whether or not something is true (Alvesson and Kärreman, 2011: 27).

2.4 Comparative design

A comparative design aims to study two contrasting cases by using 'more or less' the same method (Bryman, 2012: 72). It assumes that a social phenomenon is better understood

when two contrasting situations or cases are compared (Bryman, *ibid*). Hantrais argued that a comparative research occurs « when individuals or teams set out to examine particular issues or phenomena in two or more countries with the express intention of comparing their manifestations in different socio-cultural settings (institutions, customs, traditions, value systems, life styles, language, thought patterns), using the same research instruments either to carry out secondary analysis of national data or to conduct new empirical work. The aim may be to seek explanations for similarities and differences or to gain a greater awareness and a deeper understanding of social reality in different national context » (Hantrais, 1996; Bryman, 2012: 72).

Thus this research paper will do a comparative analysis on the practice of surrogacy in the UK and in France in order to gain a better understanding of the social reality of the issue through a class and gender perspective. This paper will aim at showing the similarities and differences between the British and French surrogacy policies considering that both France and the UK are part of the European Union which is considered to be a normative actor in the international arena with strong focus on the importance on human rights.

2.5 Selection of Case Studies

In this research paper, France and the UK were selected because they belong to the same geographical area, and are both members of the European Union (at least until October 2019). Although they have a shared history and similar cultural traits, they have approached the surrogacy industry from a completely different perspective. Thus a comparative analysis is deemed to be fruitful.

Social research findings are often specific to a culture, it involves a certain sensitivity towards the social context and the culture of the cases that were selected. This is why cross-cultural research can be limited (Bryman, 2012: 72). These two states were selected due to several reasons.

The UK is not the only state in the EU to have a permissive policy towards altruistic surrogacy. Greece is one of the other European states to allow it as well. Yet the UK was selected.

First and foremost, the geographical proximity of the two states presupposes common values based on their history and cultural traits even though these two states have a different policy towards surrogacy. This limits the variables at play in a comparative analysis as a comparative analysis « aims at establishing general, empirical relations between two variables and controlling them by keeping all other variables constant » (Della Porta, 2008, 201, Lijphart, 1971).

In addition, these two states were selected partially due to linguistic reasons. There is very limited data accessible in English in non-English-speaking states when it comes to domestic laws which can be potentially problematic.

However France was selected because it received a lot of international backlash because of its ruling in French Court against recognizing birth certificates of children born out of international surrogacy arrangements despite the disastrous consequence of the lack of citizenship on individuals, and France has been condemned multiple times by the European Court of Human Rights.

3. Background:

As far as 'new' reproductive technologies are concerned, it can be noted that surrogacy actually dates back to Biblical times. For instance, in the Old Testament, Sarah the infertile wife of Abraham, commissions her maid to seduce her husband (Abraham) so that she can bear her (Sarah) a child. Likewise Jacob's barren wife (Rachel), asks Bilhah, her maid to bear her a child by seducing Rachel's husband (Jacob). What is interesting here is the class distinctions between the commissioning person (the wives) and the surrogate (the maids) which reflect modern day practices (Rengachary Smerdon, 2009: 32).

Likewise, instances of surrogacy are also found within Hindu mythology. « In the Bhagvata Purana, Vishnu heard Vasudev's prayers beseeching Kansa not to kill all sons being born. Vishnu heard these prayers and had an embryo from Devaki's womb transferred to the womb of Rohini, another wife of Vasudev. Rohini gave birth to the baby, Balaram, brother of Krishna, and secretly raised the child while Vasudev and Devaki told Kansa the child was born dead » (Rengachary Smerdon, 2009: 32). What is interesting in this particular case is that it reflects the secrecy that surrounds surrogacy to this day.

3.1 Technical Development:

It is necessary to understand the basic concepts of ART in order to understand the issues related to cross-border ART, and in particular surrogacy. Thus the following part will look at the recent ART developments, and will include a quick recapitulation of the most controversial procedures of ART.

Before recent developments and research were made in the area of reproductive medicine, there were mostly two legal options available to infertile couples: they could either remain childless, or they could go through the adoption process.

Since then, technical advances in the field have made different treatment options available for want-to-be parents.

Assisted Reproductive Technology (ART) is the umbrella term given to various medical technologies that can be performed to achieve pregnancy other than sexual intercourse as a mode of reproduction (Reich and Swink, 2011: 246). There are different

ART techniques. It varies from fertility medication (drugs that are used to enhance reproductive fertility), to intracytoplasmic sperm injections (ICSI) (injecting a single sperm directing into an egg), gamete intrafallopian transfer (GIFT), zygote intrafallopian transfer (ZIFT), In Vitro Fertilization (IVF) (implanting a fertilized embryo inside the female's uterus).

The sole purpose of those procedures is to fertilize a human egg, which will result in an embryo. That embryo can then either be stored for future use, or directly implanted into a woman's uterus for gestation, sometimes through the use of a surrogate (Reich and Swink, 2011: 246).

A surrogacy agreement is the carrying of a pregnancy by a woman for intended (or commissioning) parents.

Scientifically, there are two types of surrogacy: gestational surrogacy also known as traditional surrogacy where the surrogate is impregnated (either naturally or artificially) so the resulting baby is genetically related to the surrogate; and gestational surrogacy, also known as full surrogacy, where the surrogate is transferred an embryo that was created scientifically via in vitro fertilization (IVF) so the resulting child has no genetic link to the surrogate mother.

The IVF is a process where an egg is fertilized by sperm outside the body. 'In vitro' means in glass. While the IVF technique first came to life through Aldous Huxley's *Brave New World* in 1932 under the name of 'test-tube babies', it was only successfully achieved in 1978 in England.

ART practices have observed a massive growth, scientifically, first and foremost, but also in the way it is now perceived, a trend that is likely to be even more substantial for several reasons.

First the need for ART practices is increasing. This is due partly to economics, culture, legal constraints, and biology or a combination of these and other factors (Reich, Swink, 2011: 247). Indeed more and more people have difficulty conceiving, which has made infertility a public health issue. The birth rates of the European Union have declined dramatically with a rate of 1.52 children per women in the EU in 2013 compared to 2.43 in 1970 (OECD, 2019). Besides same-sex couples and single people cannot conceive without

an outside ‘help’; which can be problematic if their domestic laws hinder or completely prohibit the whole process. This may force them to find that help elsewhere.

Secondly ART is more common and thus more socially acceptable, most likely because of the overload of information from the Internet or TV, and several public cases of celebrities undergoing ART procedures. « It is no coincidence that Internet usage and ART growth mirror each other. The fact is that the Internet allows prospective ART buyers and sellers to find each other in ways unimaginable even a decade ago. Many ART buyers and sellers find each other online, but that pre-supposes awareness of the existence of the ‘other party’. While it is impossible to quantify, there is no doubt that some people get the initial idea to pursue ART activities from the internet. » (Kergel and Heidkamp, 2017: 47).

Although this paper focuses on surrogacy practices, it is worth taking into account that surrogacy is not the only controversial practice within ART procedures which led to huge public debate, and is still regarded with wariness.

Apart from surrogacy, one can find among the most controversial aspects of ART the preimplantation diagnosis which is a technique that identifies genes that are responsible for serious diseases such as trisomy, myopathy, cystic fibrosis.... A preimplantation diagnosis can be done very early on in the embryos obtained via IVF. After the results, only the embryos free of genetic diseases will be transferred into the woman’s body (Matthys-Rochon and Savatier, 2012: 25).

The prenatal diagnosis is done within three to five months of gestation. It is done via a sampling of the amniotic fluid. These blood tests are done to detect serious conditions.

The prenatal diagnosis is heavily criticised as a form of eugenics because it allows for the selection of the ‘abnormal’ embryos, leaving out the healthiest. It makes one wonder if there is such a form of acceptable eugenics (Matthys-Rochon and Savatier, *ibid*).

In public debates, this technique was compared to practices made during world war II by opponents of both prenatal diagnosis and preimplantation diagnosis. The opponents to that practice, including parents of trisomic children, consider that people carrying a genetic anomaly have the right to existence (Matthys-Rochon and Savatier, *ibid*).

Another deeply controversial ART development technique is what is called the ‘baby-medicine’. Within a family, when a child has a rare genetic disease that could kill

them, in some cases the child can be cured by injecting stem cells from another child whose genetic heritage is very close to the child being sick (Matthys-Rochon and Savatier, 2012: 26).

Scientifically-speaking, the most ideal thing would be to get those stem cells from a brother or sister who is disease-free. The parents can then decide to make another child in order to cure the one being sick. It involves the IVF technique, and also the preimplantation diagnosis since only the embryos that are not carriers of the genetic anomaly will be injected into the woman's body (Matthys-Rochon and Savatier, 2012: 27).

The whole procedure is controversial because even the name assimilates the child as a medicine. Similarly to surrogacy and the fact that children born out of a surrogacy arrangement are made into objects, the baby medicine is made into an object as well (Matthys-Rochon and Savatier, 2012: 27).

3.2 Policy Development:

In the 1950s, there was some pressure from the US society towards its citizens to have a 'perfect American family' which involved marriage and children. Those who did not fit into the perfect American family category faced social stigmatization and disadvantage. In order to fight this social stigmatization, American couples sought to adopt children, in particular children that could look like their own natural children, which led to baby shortages. The number of children considered 'in demand' was not sufficient enough for the number of people that sought to adopt. This context is what gave a push for medical advances so as to treat infertility problems, as well as other methods of ART (Nichol, 2016).

Even though artificial insemination became relevant in the 1930s, it only gained more visibility until after World War II. The first IVF took place in 1978, which led to the concept of surrogacy.

Indeed the concept of surrogacy was deemed a good alternative to adoption, and a better opportunity for same-sex couples, single individuals, and infertile couples to become parents.

Surrogacy first originated in the USA as early as the 1970s. Advertisements began to appear in American newspapers where men -whose wives were infertile- were looking for a woman who was willing to bear them a child in exchange for money. It was done through insemination and the fathers later on 'adopted' the babies. It was on a relatively small-scale basis. Seeing the potential for profit, lawyer Noel Keane established an agency meant to connect the fertile women and infertile couple. He gained a positive reputation because of several appearances on talk shows, and his agency spread within the USA. Surrogate mothers were seen as good samaritans, who were charitable and wanted to help infertile couples. And surrogacy had a fairly good reputation (Ekman, 2013: 126).

However, it did not take long before a custody battle of a baby born via surrogacy arose, publicly known as the « Baby M case ». In 1986, Mary Beth Whitehead -a lower-middle class woman- agreed to bear a child for an upper middle-class couple: the Sterns. She was inseminated with Bill Stern's sperm and she signed a contract which dictated that she would get \$10, 000 when she would give up the child. However after Whitehead gave birth, she decided that she could not give up the baby. She then ran off with the baby. The police followed her and took the baby away where Whitehead threatened to commit suicide. The surrogacy contract was nullified in court, even though in the end the baby stayed with the Sterns because the judge decided they were more financially stable. This case is the reason why so many states within the USA are divided between surrogate-friendly (like the state of California, but also Arkansas, Nevada, etc...) and those which banned it completely (like Indiana, the state of New York, Utah, Hawaii and so on...) (Ekman, 2013: 127).

This is the main reason why gestational surrogacy is usually preferred by infertile couples, since babies born via the IVF technique will have no genetic link to the surrogate mother. This has possibly two advantages: one is that it would seem easier for the surrogate mother to part with the child (or children) as it is not related to her, the other one being that commissioning parents would potentially win a trial if the surrogate mother were to cancel the surrogacy arrangement and keep the baby, as the baby 'belongs' to the commissioning parents by blood depending on the legislation.

To give an indication, there were 30,000 healthy children available for adoption in 1999 whereas there were 76,000 children successful ART births annually in the US (Nichol, 2016: 914).

3.3 Official Stands towards surrogacy in the EU:

While the area of reproductive medicine has had major breakthroughs, and enabled couples that were bound to remain childless at one point to become biological parents, unfortunately the law did not follow the same pace as current medical advances and social developments. Not only is there no international regulation at all as none of the existing international instruments contain specific texts regarding the regulation of this emerging area of international family law but « many legislatures have failed to enact laws governing these medical practices and surrogacy arrangements; rather, they rely on the courts to handle disputes on a case by case basis » (Brill, 2017: 241).

The legal treatment of surrogacy in the EU is a supremely national issue. Indeed whether a state chooses to prohibit or regulate the question of surrogacy depends mainly on their concept of parentage, kinship, and procreation. This conception is linked to the culture, the history, and more broadly speaking, to the identity of the state, which makes it extremely variable from one State to another (Ruffieux, 2014: 2).

Not only are there differences between states who choose to regulate surrogacy (like the UK), and states that choose to prohibit it (like Germany and France), and states that choose to ignore it (like Belgium), but there are also differences between the countries that choose to regulate it but differ on whether the surrogate mother should be allowed to receive some sort of payment beyond the expenses encountered for her pregnancy (also called as commercial surrogacy), or whether surrogacy agreements should be legally enforceable.

As a consequence, this led to what can be called a ‘forum shopping’ where infertile want-to-be parents who seek to have a child through surrogacy will travel from one country to another, and will purposely choose surrogate-friendly jurisdictions as their destinations (Trimmings and Beaumont, 2011: 630). As states do not necessarily have the same definition of legal parenthood, it can raise difficulties in terms of international law.

Indeed, one of the most challenging, if not the most challenging issue when it comes to surrogacy is identifying the legal parents of the child born via surrogacy. Historically, the two biological parents were usually considered the legal parents of a child born ‘naturally’. However surrogacy challenges this traditional view of parentage because of all the different parties involved in a surrogacy arrangement. When it comes to cross-border surrogacy, this is an even more complicated concept where states are split on who to identify as the legal parent. Some states have moved on from the biological interpretation (like India for instance). Instead they identify the legal parents as the commissioning parents. Moreover, parties with a biological connection that are not the commissioning parents (surrogate mothers) are required to relinquish their rights to the child born via surrogacy. Even though many states have started to change the way they consider legal parentage when it comes to surrogacy contracts, there is no unified view on this. It is essential to look into state laws when it comes to international surrogacy insofar as surrogacy is within the area of family law, which is a matter that is left for the states to decide (Nichol, 2016).

Table 1: legislation regarding surrogacy in EU countries (Brunet et al., 2013)

EU member states	Both Commercial and altruistic Surrogacy is banned	Commercial surrogacy is banned *	Unregulated
Austria			X
Belgium		X	
Bulgaria	n/a		
Croatia			X
Cyprus	n/a		
Czech Republic			X
Denmark		X	
Estonia			
Finland	X		
France	X		
Germany	X		
Greece		X	

Hungary		X	
Ireland	n/a	n/a	
Italy	X		
Latvia	X		
Lithuania			X
Luxembourg			X
Malta	n/a		
Netherlands		X	
Poland			X
Portugal		X	
Romania			X
Slovakia	n/a		
Slovenia	X		
Spain	Surrogacy is illegal within Spain, but it is legal to perform the surrogacy in a country where it is legal.		
Sweden	X		
UK		X	

* i.e countries where altruistic surrogacy is either legal or not legally prohibited

*

As the global market for international adoption gets increasingly restrictive and there is a massive expansion of surrogacy programs, it is almost certain that cross-border surrogacy arrangements will flourish (Rengachary Smerdon, 2009: 32).

Cross-border travel for the sole purpose of hiring a surrogate mother is now being referred to as ‘procreative tourism’ or ‘reproductive tourism’, or ‘cross-border reproductive care’. It has been defined as « ‘the travelling by candidate service recipients from one institution, jurisdiction or country, where treatment is not available to another institution, jurisdiction or country where they can obtain the kind of medically assisted reproduction they desire » (Pennings, 2002: 339).

By far, the majority of tourists going abroad for surrogacy purposes are Western couples who are attracted by low-cost surrogacy services in places such as India (where the surrogacy industry was legal and booming until 2015), but also in Eastern Europe (Ukraine for instance), and South America.

There are other motives such as faster procedures, protection of privacy, higher success rates, lower costs, higher standards of care.

Unfortunately there has been little empirical research on this topic. The European Society of Human Reproduction and Embryology (ESHRE - which is the main European scientific association in infertility) recently financed a study in 6 European countries in order to collect data on the reasons behind why individuals seek reproductive treatment abroad. Those who participated in the study stated several reasons: legal barriers, high costs, the fact that the treatments are only available for couples (heterosexual and homosexual) and are not allowed for single people, restricted access due to age, vicinity of treatment. Other reasons included exclusion on the basis of age, marital status, sexual orientation, inadequate safety guarantees, high demand, unavailability of the treatment because of lack of personal or technology, privacy issues, prohibition due to ethical and, or religious reasons, and high costs (Pennings, 2008: 2182-2184).

3.4 Previous Research:

Most of the empirical research that has been done on the surrogacy industry was focused on the exploitation of women, in particular in India insofar as it was the country where the surrogacy legislation was the loosest until November 2015. India was considered as the main state to go to when it comes to procreative tourism. The surrogacy industry claimed to give women the opportunity to escape poverty by becoming a surrogate mother. It implied that surrogacy was a win-win situation for everyone: the commissioning parents who left India with a blood-related baby, and the surrogate mother who got a relatively high salary compared to Indian standards and a ridiculous amount compared to American standards (Ronan, 2015). A surrogacy arrangement in India would cost around \$20,000 and the surrogate would get approximately 1/4 (\$5,000) which is roughly a 10-year salary for rural Indians. However surrogacy in California can cost up to \$100,000 and American

surrogates would get around \$30,000. India was interesting for several reasons. First, as mentioned above, India's surrogacy legislation was extremely loose and quite cheap, which used to make it particularly easy for the commissioning parents to go through the process as long as they were married and heterosexual. It was not allowed for same-sex couples, single want-to-be parents and non-married couples. Secondly, considering the fact that human trafficking is forbidden in India (with little success) and that so is prostitution (except in private property), the fact that surrogacy was legally allowed and publicly accepted was quite surprising.

As mentioned above, although surrogacy policies were loose in India, it was not allowed for single individuals, homosexual couples, and non-married couples. Government officials stated that this particular ban was because homosexuality was anti-ethical to Indian culture, and that children had the right to be raised in a traditional (heterosexual) family. This discrimination received a lot of backlash from the industry for two reasons: infertility agencies claimed that they were concerned about homophobia, but most importantly a percentage of their clientele was cut out of the market (Rudrappa et al., 2018: 1091).

Instead of reducing the number of people seeking a surrogacy arrangement in India, this ban deepened the vulnerabilities of Indian surrogate women. Some agencies decided that if potential clients could not come directly to India due to legislation, then Indian surrogates could be moved to a neighboring country such as Nepal to facilitate the trade. Interestingly enough, surrogacy was legal until 2016 on Nepalese soil as long as the surrogates were not Nepalese citizens. The process was more or less the same as any surrogacy arrangement with couples who were legally able to, except for the fact that the surrogates had to move to Nepal in order to give birth in Kathmandu, where the commissioning parents could pick up their children (Rudrappa et al., 2018: 1091).

This reproductive trade route between India and Nepal ceased after the earthquake that hit Nepal in 2015 which killed 8,000 people and left 21,000 people injured. Surrogate mothers and babies born through a surrogacy arrangement had to be airlifted back to the country of the commissioning parents (Time, 2015). Nepal was unfortunately not the only state within these 'reproductive trade routes'. Countries such as Kenya were also evoked in recent studies (Rudrappa et al., 2018: 1092), as well as states in South-East Asia.

Following these ‘unforeseen consequences’ of India’s surrogacy policies which entail what is mentioned above but also cases of babies born through a surrogacy arrangement in India being unable to travel to their commissioning parent’s home country due to domestic legislations (Rudrappa et al; *ibid*), or a baby born with autism who was abandoned by its commissioning parents and later adopted by the surrogate herself (this particular case happened in Thailand), the Indian government decided to ban cross-border surrogacy arrangements on its soil with the Surrogacy Bill in 2016. This new piece of legislation restricts surrogacy arrangements to Indian nationals who are married and heterosexual and the arrangement must be altruistic (and the surrogate must be within the family circle) (Majumdar, 2018: 211).

Considering that surrogacy is a \$2,3 billion industry (Das Gulpa et al, 2014), the sudden push towards altruism in surrogacy in India was quite surprising and it was the result of a will to separate the notion of motherhood from the notion of commerce. Indeed many states consider commercial surrogacy unlawful because of the commodification of the body of the surrogate mother and thus its repercussions on the concept of motherhood. The concept of motherhood, family, and business are all linked together in the surrogacy industry under an idealised ‘gift-giving’ version of surrogacy (Majumbar, 2018: 211).

However recent debates regarding commercial surrogacy have focused on the poor Indian surrogate who does labour for the wealthy commissioning parents (Majumbar, 2018: 211). This kind of labour is within the scope of ‘stratified reproduction’ which is a concept that was initially developed by anthropologist Shellee Colen in order to describe the economic forces regarding the experiences of West Indian childcare workers who took care of wealthy New Yorkers’ families so they could provide for their families back home. By ‘stratified reproduction’, Shellee Colen meant that “physical and social reproductive tasks are accomplished differently according to inequalities that are based on hierarchies of class, race, ethnicity, gender, place in a global economy, and migration status, and that are structured by social, economic, and political forces. [...] Stratified reproduction, particularly with the increasing commodification of reproductive labor, itself reproduces stratification by reflecting, reinforcing, and intensifying the inequalities of which it is based.” (Colen, 1995: 78). To put it simply, social class will affect how some categories of people will be able to

reproduce while others will be disempowered. This reflects “the transnational hierarchies that are the legacy of colonial, imperial and diasporic ‘non-flat world’ routes along which gendered and racialized reproductive and productive labour move” (Smietana et al, 117)

Thus, in the case of commercial surrogacy in India, stratified reproduction manifests itself through different kinds of exploitation. Recent studies have documented how In-Vitro Fertilization (IVF) clinics socially construct the relationship between surrogates and clinics as beneficial for both parties. The clinics are perceived as generous insofar as they help poor Indian women to provide for their families. Becoming a surrogate is thus deemed as ‘a gift’ (Smietana et al, 118).

The focus on the notion of ‘gift-giving’ is associated with altruism within commercial surrogacy arrangements in order to eclipse the downside of surrogacy arrangements: namely their exploitative side. However there is very limited research on altruistic surrogacy arrangements by scholars. This may be explained by the fact that the notion of altruism itself is questionable.

Before delving deeper into the Surrogacy Bill in terms of its consequences, it is worth noting that this new bill could potentially protect babies born through a surrogacy arrangement. Indeed reproductive tourism has brought an international clientele to India because of lower costs, and most importantly because of legal restrictions against surrogacy in the state of origin of individuals seeking a surrogacy arrangement, which led to many cases of babies being stranded in India due to legislation conflicts.

However the ban on commercial surrogacy in India could be just as problematic and deepen exploitation. The new Surrogacy Bill allows altruistic surrogacy for Indian heterosexual couples who have been married for five years or more and are childless due to medical reasons. Needless to say that unmarried couples, homosexual couples, single women or men, foreigners and married couples with children (either out of an adoption process or biologically achieved) are specifically forbidden to seek a surrogacy arrangement. It also prohibits any kind of monetary compensation. Furthermore if the father has had children through a prior relationship or marriage, the married couple is ineligible even if the wife is infertile. The surrogate mother must be married, and a ‘close relative’ of the couple, and she must have had given birth to a healthy child. She can only be a surrogate

mother once in her life and she cannot by law receive any kind of payment for her ‘services’. The idea behind this legislation is that the surrogate does it out of selflessness, and thus purely based on altruism (Rudrappa et al., 2018: 1093).

Considering the patriarchal society that is India, this bill can be very problematic and the reasons why that is were best described by the 102nd report of the Parliamentary Standing Committee (of India) which heavily criticised the ban on commercial surrogacy in favor of an altruistic version.

“[T]he Committee is convinced that the altruistic surrogacy model as proposed in the [2016 Surrogacy] Bill is based more on moralistic assumptions than on any scientific criteria and all kinds of value judgments have been injected into it in a paternalistic manner. Altruistic surrogacy across the world means compensated surrogacy and a range of monetary payments to surrogate mothers are permitted as reasonable compensation. The Bill limits the circle of choosing a surrogate mother from within close relatives. Given the patriarchal familial structure and power equations within families, not every member of a family has the ability to resist a demand that she be a surrogate for another family member. A close relative of the intending couple may be forced to become a surrogate which might become even more exploitative than commercial surrogacy. The Committee, therefore, firmly believes that altruistic surrogacy only by close relatives will always be because of compulsion and coercion and not because of altruism” (Parliament of India, Rajya Sabha, 2017: Clauses 5.21 and 5.22).

Lastly, judging by the reproductive trade routes that were the direct result of prohibition of surrogacy practices towards single individuals and homosexual couples, there is always the possibility that surrogacy brokers map out new reproductive routes to continue the trade in reproduction, moving working class pregnant women from one state to another by taking advantage of « the uneven juridical-legal terrain of country-specific laws that govern surrogacy. [...] Working-class women of the global South become cargo carriers of life—life that a priori belong to clients—across borders to facilitate family-making in the global North » (Rudrappa et al., 2018: 1093).

3.5 Literature Review:

Swedish feminist Kajsa Ekis Ekman in her book *Being and Being bought, Prostitution, Surrogacy, and the Split Self* focused on the mental distance that surrogate mothers must have in order to be able to give up the baby they carried for nine months. Part of her argument will be used in theoretical framework. Ekman compared surrogacy to prostitution, saying that surrogacy was in a way much harder because a surrogate mother cannot have the most common coping mechanisms that prostitution and overall society has, that is drinking, smoking, over-training, or taking drugs. She cannot numb her body. And it is a 'duty' that she has to perform 24 hours a day for 9 months, without any breaks. Working is necessary, but unlike 'regular' work where people can take time off and have breaks, and refresh during their leisure time, surrogates have no leisure time. Being a surrogate is not something you do, it is something you are (Ekman, 2013: 173-176).

Sylviane Agacinski is a French feminist philosopher. Her arguments in 'Corps en Miettes' would fit into a socialist feminist perspective as it draws attention to the exploitative side of surrogacy under capitalist structures. 'Corps en Miettes' is the result of the 2010 constitutional revision to France's BioEthics Law of 1994 which laid the ground for the prohibition of surrogacy. She argued that 'renting' the female womb is a form of alienation which inevitably leads to the commodification of the woman's body. It makes no difference whether the surrogate gave her consent or the fact that the financial compensation is supervised by a judge insofar as the practice of surrogacy is a violation of the dignity of the individual (Agacinski, 2009: 75). It transforms the woman into a human tool and the baby into an object. Ultimately, the procreative industry a sort of biological alienation (Agacinski, 2009: 92).

Besides one of the pillars of the Bioethics Law of 1994 is that donations are supposed to be free. This is the reason why sperm donation, gamete donation, blood donation and so on are free in France in comparison to other states like the US that gives monetary compensation in exchange for cell donation. Surrogacy would open the gate to see the body as transactional.

Throughout the book, Agacinski rejects the idea that surrogacy is merely a tool to help infertile couples in having a biological child because surrogacy tend to exploit the most vulnerable people under a capitalist system under a veil of compassion towards couples suffering from infertility issues (Agacinski, 2009).

4. Theoretical framework:

Historically-speaking, reproductive technologies have always been controversial and the subject of moral, ethical, legal, and political debates because they challenge long-term assumptions about reproduction, sexuality, marriage, and what constitutes a family (Gimenez, 1991: 335).

As mentioned above, surrogacy is not new. What is new however is its increasing demand and use due to new technologies and medical advances. This has increased public awareness of the availability of surrogacy. Nevertheless considering the controversial nature and high cost of surrogacy, there are relatively few people who are financially and also psychologically able to use these new technologies. That being said, « social practices that seem deviant and limited in their scope today are often anticipations of future taken-for-granted social patterns » (Gimenez, 1991: 335) and thus need to be further researched.

Like all medical advances, reproductive technologies (which includes surrogacy) have the potential to change lives. Their effect however will depend on a few factors such as the social and political context in which one is born into. In a context in which gender inequality still persists, in particular among the less privileged, the negative effects of reproductive technologies are not surprising (Gimenez, 1991: 336).

Based on the facts mentioned above, two theoretical theories seem to stand out in order to gain a better understanding of surrogacy within a theoretical framework: critical theory based on a marxist perspective and feminism.

Despite sharing some similarities as both theories focus on social and economic inequality, and both seek to create change, critical theory and feminism have developed quite independently from each other (Martin, 2002: 2-3).

While there is an obvious focus on gender within the feminist field, critical theorists tend to neglect gender in favor of class.

Within the feminist theory, we can differentiate three sub-categories: one is empirical feminism which focuses on women, and which explores gender as an empirical dimension of international theory, the second one is analytical feminism which uses gender as a theoretical category in order to reveal the gender bias of the concepts of international relations, and the last one is « normative feminism which reflects on the process of

theorizing as part of a normative agenda for global, social, and political change » (Burchill et al, 2005). Although feminism tends to have a heavy connotation nowadays, it was chosen as a theoretical framework because women are, by nature, at a risk of exploitation and commodification due to the very nature of surrogacy. Thus the two theoretical framework combined give a class and gender perspective on the issue of surrogacy.

4.1 Feminism

What is interesting about the question of surrogacy is the shift in the tone used to question it over the past decades, for instance in France, where the Court de Cassation made surrogacy contracts null and void based on two principles in the 1990's. One is bodily integrity which « is the inviolability of the physical body and emphasizes the importance of personal autonomy and the self-determination of human beings over their own bodies ». It means that the human body cannot be the subject of any contract. The second one is called 'l'indisponibilité de l'état de la personne' in French, which roughly means that a person cannot make transactions or changes when it comes to their civil status. The latter has obviously several exceptions: from the change of last names (by marriage or by will), surnames, change in citizenship, gender reassignment, and so on...) (Agacinski, 2009: 75).

This protection finds its roots in the Christian idea of the sanctity of the human body which should be protected and respected above all.

In the 2010s, there was a clear shift in the approach to surrogacy and in a larger sense, to reproductive rights broadly-speaking. Whether in France or elsewhere, the arguments were less about bodily autonomy, and the 'unavailability of the state of the person' and more about women's conditions, their bodies, their socio-economic situation, and their relation to motherhood.

« Feminism shifts the study of international relations away from a singular focus on inter-state relations toward a comprehensive analysis of transnational actors and structures and their transformations » (Burchill et al., 2013: 237).

One important factor of feminism is that there is no unified feminist theory. Nevertheless there are tendencies that are common within the multiple feminist theories.

These tendencies include using gender as the main category of analysis, and applying the findings in order to improve the socio-economic conditions of women (Syme Anderson, 2016: 37). Thus there are several approaches that both condemn surrogacy and legitimate it which shows the controversial nature of the practice.

The current debates surrounding the meaning of womanhood, and motherhood are the effects of material changes in women's lives which reflect the socio-economic and class divisions among women as well as the impact of reproductive technologies regarding the relation of women towards pregnancy (Gimenez, 1991: 346).

When Shulamith Firestone (central figure in the development of radical feminism) wrote 'The Dialectic of Sex: The Case for Feminist Revolution' in 1971, she thought that technology would « liberate women from the burden of motherhood » (Gimenez, 1991: 337). Yet to this day, feminists are still divided upon this particular assessment. Radical feminism considers that men's systemic oppression of women - patriarchy - is the concept that is the most useful in order to explain gender inequality. By bringing the attention to (sexual and otherwise) exploitation, and the objectification of women, radical feminism raises awareness regarding equity issues.

For radical feminists, the personal is political (Syme Anderson, 2016: 40). When it comes to surrogacy, it is very difficult to uproot the personal from the political sphere as being pregnant is not something that one can turn off. This is the reason why there has been a lot of comparisons between prostitution and surrogacy because it can be said that both use the body as a commodity. However the main difference is that surrogates perform their duty during 9 months, 24 hours per day. There is no time off and there are restrictions that come with it. Surrogates are not allowed to over-exercise themselves, or smoke or drink or take drugs. And if the intended parents want her to, surrogates must go through medical tests. The whole process is demanding, both physically and emotionally. Simultaneously they must distance themselves from the baby they are carrying because it is not meant to be theirs (Ekman, 2013: 173-176).

In order to break the bond and give up the child, the surrogate mother needs to de-personalise the whole process of pregnancy and childbirth. It means that surrogates need to

become objects and thus a commodity. However it also entails that surrogates are at a higher risk of exploitation (Tieu, 2009: 174).

One central theme surrounding the criticism of surrogacy is that the whole concept of parenthood is fragmented. Typical parenthood usually involves two parties: the parents; but when it comes to surrogacy: the process involves more than the intended parents. There can be as far as five person involved in the process: the intended mother, the intended father, the surrogate mother, the egg donor, and the sperm donor. It is unclear who the parent is, and who will have the legal responsibility to raise the child (or children). Consequently both biological and social parenthood need to be re-conceptualised. Biological parenthood presupposes a genetic bond between the parent and the child while social parenthood is defined by social norms. And the physical link between the surrogate mother and the child she is carrying cannot be ignored.

According to common law in most states including the UK and France, maternal filiation is established by childbirth, except for adoption. Gestation comes from the latin root that means to carry. And the gestation period is far from limiting itself to a shield. There is an undoubtable connection between the uterine environment and the embryo and the lifestyle of the surrogate is a huge factor in the formation of the embryo. Besides scientific studies have shown that the ontogeny - which is the development of an individual - is not developed during conception, and that its genetic heritage is not enough to develop the embryo. Thus it shows that individuals and embryos keep transforming thanks to the constant interaction with the uterine environment (Agacinski, 2009: 80).

Based on this fact, there is no reason to give the surrogate mother a secondary or temporary role, and there is no reason to 'undo' the connection between parturition, pregnancy and motherhood (Agacinski, 2009: 80).

In the technical sense, IVF procedures allow women to carry someone else's child in which case, the surrogate mother is not called the child's 'genetic mother'. However motherhood is not purely genes. The whole concept of the genetic mother is the direct result of an overvaluation of the role of genes, and the juxtaposition of the masculine and feminine roles: the genetic mother has the exact same role as the father who gave his sperm. However the woman who carries the child has a specific role which is to ensure the development of

the embryo. Her body will allow for the embryo to develop, without which the embryo would be just cells, and it is her body that will give birth (Agacinski, 2009: 81).

This is the reason why maternal filiation is based on parturition in most states. That being said, the physical connection between the embryo and the surrogate mother does not solely determine the bond that a mother has towards her child. It is however worth keeping in mind that this bond exists and develops itself initially through the gestation period. Thus according to socialist feminism, whether the surrogate is or is not the genetic mother, she is the mother (Agacinski, 2009: 81).

Unlike radical feminism, liberal feminism is a sub-branch of feminism which drew heavily from liberalism. It mainly aims at ensuring that women have equal opportunities as men in the workplace, higher education and in government. Liberal feminism seeks to increase equitable outcomes for women. In this regard liberal feminism has dramatically improved the lives of women over the past decades as they have fought for reforms regarding voting rights, equal pay, maternity leave, women's access to higher education (Syme Anderson, 2016: 40). However when it comes to reproductive rights, it focuses on the ability of women to maintain their equality with their own choices and actions (Tong, 1992). Liberal feminism approaches stress that the state ought to stay neutral when it comes to moral standards, based on the principle by John Stuart Mill that only practices that are harmful should be prohibited and that individuals have the ultimate say about their own body and mind (Hatzis, 2003: 421). « Parenthood is not essentially biological. It is social: it comes about when people develop social expectations and assume responsibilities » (Brenner and Resnick, 1987: 4). Ultimately liberal feminism considers that women should determine what is best for them when it comes to their reproductive rights and whether they wish to enter into a legal contract. The issue is particularly sensitive because it touches upon the subjects of family structure, the nature of motherhood, the welfare of the children.

Other form of feminism consider that surrogacy and broadly-speaking reproductive technologies reflect the main pattern: either the major role of patriarchy in oppressing women through the use of reproductive technologies, or the link between patriarchy and capitalism. « Regardless of theoretical orientation, feminists share a common concern with

the fact that these technologies have undermined hitherto taken-for-granted relationships between biology, women's identity and the meaning of motherhood » (Gimenez, 1991: 337).

Radical feminism also focuses on the words being used when it comes to surrogacy. A surrogate mother is, in essence, a substitution mother, a temporary one. Surrogates are also sometimes called 'gestational carriers'. The choice of words is self-explanatory and quite enlightening.

4.2 Critical theory under a Marxist perspective

Horkheimer distinguished two different conceptions of theory: one is traditional, and the other critical. Within the traditional conception of theory, the theorist is supposed to leave behind any opinions, values, and ideological beliefs in order to approach the research problem objectively and comprehensively. Theory is then only possible on the condition that a subject can be studied without any biases. This traditional conception differs greatly from critical theory which denies the possibility of an analysis deemed as 'value free' (Burchill et al., 2013: 161).

Unlike traditional conception of theories, critical international theorists reject this particular idea that theoretical knowledge is non-political or neutral as Robert Cox said « Theory is always for someone, and for some purpose. » (1981)

Instead of legitimating and consolidating existing social norms, critical theory aims at improving human existence by seeking to abolish injustice. It aims at stimulating change. This theory is based on several strands of Western political, social, and philosophical thought so as to reveal the subtle forms of domination and injustice in society. It challenges the traditional theories and seek to dismantle social injustice (Burchill et al., 2013: 162).

Critical international theory not only aims at understanding and explaining the realities of world politics, but it also and most importantly aims at criticizing them for the purpose of introducing change (Burchill et al; 2013: 167).

In the mid 1840s, Karl Marx wrote that the international trades system was transformed by the capitalist globalization. He believed that there would be no end in sight of the competition between nation-states due to the division between the two main social

classes: the national bourgeoisie which controlled systems of government and the cosmopolitan proletariat (Burchill et al, 2005: 111).

Although marxism has been heavily criticized by the international community because of the fact that the marxist theory underestimated the importance of nationalism, the significance of balance of power, the state, international law, and the role of diplomacy within world politics (Burchill et al, 2005: 111), marxism remains a useful theoretical framework in the context of reproductive technologies because it looks at the power dynamics in reproductive rights. As a matter of fact, Karl Marx laid the foundation for critical theory because marxism had a normative interest.

Marx believed that « individuals were trapped within an international social division of labour, exposed to unfettered market forces and exploited by new forms of factory » (Burchill et al; 2009: 114) .

From a Marxist perspective, human beings are « ensemble of social relations » (Gimenez, 1991: 339; Marx and Engels , 1976: 4) and the most crucial relation in determining opportunities and historical identities is the relation with nature through sexuality and procreation, and through labour (Gimenez, 1991: 339).

The concept of production within marxist theory is twofold. It combines the ‘production of life’ and the production of things (Gimenez, 1991: 339; Engels , 1972: 71). « Production presupposes reproduction: the reproduction of life, biologically, physically, and socially, is part of the material basis of social organization » (Gimenez, 1991: 339). Under marxism, the mode of production refers to the combined elements within the production process: means of production, subject of labour. To put it simply, reproduction is associated with production in the case of surrogacy insofar as surrogate women will use their body for whichever economic or otherwise reason to produce and sell towards individuals from a more wealthy background.

« Fertility differentials according to social class, and the presence of a substantial proportion of the population living below or near poverty level in all capitalist countries test to the subordination of reproduction to production under capitalist conditions (Gimenez, 1991: 342).

Marx wrote that « production accordingly produces not only an object for the subject, but also a subject for the object » (Marx, 1970: 197). Thus production produces consumption because first it provides the material of consumption (the baby), it determines how (the surrogate), and it invites the consumer in thinking they have a need for an object that it presents as a product. By separating the reproduction from the mode of production, new technologies not only create ‘new’ objects for sale (or for rent), (wombs but also sperm, embryos) but it also ‘creates’ new subjects who are willing to enter into these contracts: women who are willing to bear another a child, women who donate their eggs, men who donate their sperms, couples who can become parents by having another woman carry a child for them (Gimenez, 1991: 348).

Marx argued that by upholding the rule of law, private property, and money, states conceal capitalism’s alienation and exploitation behind the bourgeoisie’s ideals of freedom and ‘equality’ (Burchill et al; 2013: 170). He claimed that someone who works in a capitalist system is alienated in four ways: from nature, from his/ her own role in the production process, from the social aspects of work and from other people. But that is too restrictive when it comes to surrogates insofar as surrogates are also estranged from their own body and the child (or children) growing inside them (Ekman, 2013: 173-176).

Sylviane Agacinski wrote that ‘the will to seek a biological child, which is different from the will to adopt, lead to the use of children as commodities based on one’s own genes. The surrogate mother is asked to put her organs at the service of others, as if her womb was a production tool, and the human being a negotiable product’ (Agacinski, 2009: 54).

Besides, it is not only the commodification of women, but also the commodification of children. By the very nature of surrogacy, children born out of a surrogacy arrangement are made ‘on demand’. Indeed «when market norms are applied to the ways we allocate and understand parental rights and responsibilities over children, children are reduced from subjects of love to objects of use. When market norms are applied to the ways we treat and understand women’s reproductive labour women are reduced from subjects of respect and consideration to objects of use. (...) That children are treated as commodities in surrogate arrangements can be seen from the fact that while parties to such arrangements profit from them, no one represents the interests of the child » (Anderson, 1993). Commercial surrogacy

is then a ‘baby-selling’ factory. Moreover a ‘surrogacy contract’ is to legally endorse that surrogate mothers relinquish all rights they had in exchange for economic gains. It is not made in the best interests of the child, but for the interests of the surrogate and intended parents (Anderson, 2000: 21).

In addition, as surrogacy is not free, there is the issue of reproductive justice. « Unequal access to these technologies could become a new form of eugenics¹, with only the most educated, most industrious, most financially secure same-sex and, or infertile heterosexual couples able to use ART to form a family » (Winddance Twine, 2011: 78).

Indeed ART is only available to the most privileged people. The price of a surrogacy arrangement in California, USA is around \$100,000. It includes the ‘wages’ of the surrogate mother, health insurance, various expenses (maternity clothes, hospital bills, agency fees, attorney fees and so on ...). From the standpoint that intended parents are just using their right to ‘family life’, everyone should be allowed to have a child even if infertile. But with fees this high, commercial surrogacy has become a way to reproduce a particular ‘race’ and class (Colen, 1995). In the end, ART « helps to support the existing power structures, because it provides reproductive assistance to the affluent and accepts the view that it is more important for the privileged to produce children of their own genetic type » (Sherwin, 1992).

Transactions are supposed to be a free trade between the buyer and the seller. This is a complicated concept when the object of the transaction is the seller as a person within a working contract. In a working environment, people who sell objects in order to live are under no obligation to sell or rent part of their bodies. They usually sell a particular knowledge, an expertise, a physical strength. Thus there will always be some part of the population who will accept working conditions that would not be acceptable to another part of the population (the ‘bourgeoisie’ or middle class, and upper class). Labour market is not built upon the notion of free will, but on necessity (Agacinski, 2009: 99).

Since the intended parents or commissioning parents are wealthy, and the price is high, so are their expectations, which can result in ‘designer babies’. Contracting couples

¹ A science that deals with the improvement (as by control of human mating) of hereditary qualities of a race or breed.

pay a higher price for attributes that they find better. It can range from physical traits, to eye color, high IQ, good education, good looks, and last but not least skin color. Like egg donors, surrogates must also go through an intensive questionnaire that asks for their physical appearance, medical file of the want-to-be surrogate and her family, education, career plans, occupation, and so on. The purpose of that questionnaire is that commissioning parents choose the surrogate that is the most likely to deliver healthy and 'ideal' babies (Iona Institute, 2012: 7).

« One might argue that such conditions are also encountered in the case of adopted children. However, the difference lies in the fact that, unlike adoption, which is a conscious decision to serve the best interests of the child, surrogacy is about a mutual decision between the surrogate and the commissioning parents taken before the birth of the child and having as primary objective not the welfare of the child, but the utility (fulfillment) of an infertile couple » (Tieu, 2009).

Regarding altruistic surrogacy, it has been pointed out that if women were to become surrogate mothers out of sheer altruism based on concern for want-to-be parents who are infertile, there would be more women from a particular background (middle-class, and upper-class) who would bear children for the working class couples, who would never be able to afford such an arrangement, which would make it an even greater form of altruism. Regardless if that were the case, surrogacy would still be an exploitative and commodifying arrangement.

One other issue is when surrogates that are in need of financial compensation agree to become surrogates, in which case there is no real choice. It is not always the case, one other main reason why surrogates do what they do is because they previously had an abortion and they feel guilty over it. Surrogacy involves significant health risks for the surrogate so whoever is willing to go through that process needs to be aware of the risks. However, the lack of financial independence will force women to become surrogate and that is not a real choice. Of course it is even worse when it comes to cross-border surrogacy whereby surrogate mothers live in extreme poverty (Brunet et al., 2013: 24).

The idea of informed consent is key here. It is assumed that a woman who is willing to become a surrogate make the decision out of her own free will. However one should not

forget about the factors behind her decision, namely whether it is economic pressure for commercial surrogacy, or emotional pressure for altruistic surrogacy.

When it comes to cross-border surrogacy, the notion of free choice and self-determination is even more debatable. Clear examples of such situations can be seen in the case of India, where Indian women agree to surrogacy arrangements in order to earn money so that they can pay urgent medical care for loved ones, or to win back children that they lost, or to pay for their children's dowries, and in most cases to raise children when they are the sole breadwinner of the family or if they are a single parent. While going to India is considered cheap for foreigners in comparison to what they would pay in the US, an Indian surrogate mother would earn a lot more in comparison to the current woman's standard of living in India. With so few options, Indian women can also be pressured by their families, and by personal circumstances to lend their bodies in exchange for money (Rengachary Smerdon, 2009: 32).

There is still the question of what is meant by informed consent, and the extent to which surrogate mothers receive the proper documentation, counseling, and explanation about the physical risks of surrogacy. Indeed « the physical hazards of gamete transfer, embryo implantation, pregnancy, and birth are multifold and include perforation of organs, increased risk of ectopic pregnancy, complications from multiple pregnancies, fetal reduction, and cesarean sections. Some posit that "the relative biological strangeness of the fetus to the gestational mother, as compared to a woman carrying a child conceived through sexual intercourse," carries with it an "even greater biological investment from her during pregnancy. As such, the gestational mother may face even greater risks of developing severe pregnancy complications » (Rengachary Smerdon, 2009: 32).

Not only that, but as surrogacy is not such a tolerated concept, women may feel forced to hide or make up stories about their pregnancy (for example by saying that their baby has died in childbirth or that they went away for months visiting their family) in particular in states such as India where traditional attitudes towards sex and procreation are rather strict. This can be an additional cause for stress.

Notwithstanding the physical impact of pregnancies, there is also the fact that surrogate women in developing countries (such as India) stay confined within a clinic so

that they could be monitored, which not only has consequences when it comes to their psychological state but also the fact that they cannot see their families.

There is also one last aspect from surrogacy that is problematic. As said above, when unregulated, surrogacy has become some sort of baby selling factory. In this aspect, it is very easy for commissioning parents to be lured into a surrogacy arrangement through unethical practices, or with false hope.

It is important to stress the fact that in-vitro fertilizations are not infallible. Even though there are no studies about this in developing countries, the U.S. Center for Disease Control reported that only 22,4% of all IVF procedures (which includes surrogacy as well) are successful and result in live births. Therefore failure rates are extremely high. It is expected that rates in developing countries are similar. As a result, infertility specialists choose younger women's eggs, healthy sperm, and 'hire' surrogates who are at an ideal fertility age in order to increase the odds of a pregnancy. Despite these 'safety measures', there is no guarantee of a pregnancy, let alone a successful live birth (Rudrappa et al., 2018: 1091). Besides there is also the chance of having multiple births as ART is involved in a surrogacy process which might create some issues insofar as the commissioning parents usually have the intention of having only one child (Brunet et al, 2013: 32).

Judging by websites of surrogacy agencies, there is a lack of transparency so the success rate is not telling because there is a lack of data, and the website is filled with glowing testimonials of success stories, some media hype, which creates some huge publicity and keeps silent the number of miscarriages and failures.

5. Considerations behind the different EU legal stands:

Surrogacy remains a very controversial topic and the role of the media contributes to its negative image, as they only highlight the cases where things have gone wrong. It is only very recently that surrogacy became a method chosen by both gay and heterosexual celebrities and has thus received positive media coverage (Brunet et al, 2013: 32). Yet most intended parents initially got the idea through television documentaries or magazines and now celebrities. To give a few examples of surrogacy in popular culture, there are TV shows such as *Friends*, *The Handmaid's Tale* (albeit in a more negative light), as for books: the most recent example to date is *Little Fires Everywhere* (also in a negative light). As for celebrities: there are Nicole Kidman and her husband, TV presentator Jimmy Fallon and his wife, singer Elton John and his husband, actress Lucy Liu, Ellen Pompeo, Jessica Chastain, and many more...

These references might seem trivial but the fact that these are such high profile cases of celebrities or fictional characters undergoing a surrogacy process is bound to have an impact on the perception of surrogacy within society (and thus on the number of people seeking a surrogate as well).

« Theories of international relations, like any knowledge, necessarily are conditioned by social, cultural and ideological influence, and one of the main tasks of critical theory is to reveal the effect of this conditioning. » (Burchill et al; 2013: 165). As critical international theory views social life as being intertwined with cognitive processes, it rejects the positivist approach that divides fact and value, object and subject, and in simpler terms rejects objective knowledge in order to expand theoretical reflexivity. The aim of critical theory is to bring to attention the commitments, values and interests in order to shape the theoretical framework. This reflexivity focuses on the research problem and on the historical dynamics which brought about the conditions in which the problem arose (Burchill et al: *ibid*).

By adopting a critical reflexive theory with a marxist and gender approach, this paper seeks to challenge the inequality and injustice into the prevailing world order in the context of surrogacy. This theory takes the research problem and asks how the configuration of power relations came about, and what costs it brings with it.

5.1 The UK:

The first British legislation that relates to surrogacy is the Surrogacy Arrangement Act of 1985. It came as a response to the case of Baby Cotton of 1985.

Baby Cotton was born on January 4th, 1985. Her father was American and his semen was used to artificially inseminate the surrogate mother Kim Cotton - whom he'd never met. After the baby was born, the social services put the baby in safety under the Children and Young Person Act of 1969; which prevented the surrogate mother to relinquish the baby to the father as was planned. The biological father then sought to be granted legal guardianship of the baby, as well as take the child back to the USA. The judge found that the surrogate mother had relinquished her rights to the child, and that the American father and his wife were better apt at taking care of the baby (Latourette, 1990: 60).

The main purpose of the legislation was to avoid commercialization. At that time, the main mean to transfer legal parentage from the surrogate to the commissioning parents was through adoption. Later on, the Human Fertilization and Embryology Act of 1990 introduced Parental Orders (PO) following surrogacy cases. It transfers the legal parents status from the surrogate to the commissioning parents.

In order to apply for a PO, there are several requirements. The intended parents must be married, and they must be at least 18, and living in the UK, Channel Islands, or Isle of Man (with the intent to remain in the UK), and at least one of them has to be genetically related to the child. The application has to be made within 6 months of the child's birth. The surrogate mother (and her husband) must give their explicit consent at least after six weeks of the child's birth (similarly to British adoption law) and only 'reasonable expenses' have been paid. The Human Fertilization and Embryology Act of 2008 extended the legal parentage right to the same-sex couples, or to « two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship to each other' (hereafter called 'an enduring family relationship' ». Interestingly enough, despite the fact that the UK extended the eligibility criteria to same-sex couples, it did not extend the same courtesy to single people.

What is interesting here is that the UK's legal framework in regards to surrogacy arrangements seems to apply even when the surrogacy agreement took place elsewhere. As

a consequence, foreign birth certificates and court order from another jurisdiction will not be recognized and the commissioning parents will have to apply for a PO so as to establish legal parenthood (Crawshaw, 2012: 269).

To make the process of PO smoother, courts appoint a social worker to those seeking a PO in England, Wales and Northern Ireland - retitled a Parental Order Reporter in England and Wales. The role of the social worker is to investigate both parties (the surrogate mother and her husband should she have one, and the intended parents), and to provide a report to the Court.

The numbers of POs issued each year in the UK had been quite stable at between 33 and 50 per year from 1995 until 2007 (Crawshaw, 2012: 269) but since then they have quadrupled insofar as the number of people seeking POs in 2013 was 202 (Crawshaw, 2012, *ibid*). This might be partly explained due to the Act of 2008 whereby same-sex couples were granted the same rights as heterosexual couples benefited regarding surrogacy.

However British surrogacy agencies estimate that from 1995 to 1998, a total of 332 of surrogate births occurred. It means that only half of commissioning parents actually sought to obtain POs. It also implied that half of surrogate babies are being raised by parents who neither have the legal parentage rights, nor the legal parental responsibility. It also means that those babies had had their birth incorrectly registered (Crawshaw, 2012: 270).

International surrogacy in the UK is becoming an issue because « there is no requirement to apply for a PO, and because there are limits on who may do so, parental order records themselves are not a true indicator of how many surrogacy arrangements are entered into, or where they take place.» (Alghrani and Griffiths, 2017: 170)

The role of PO is essential insofar as it results in the commissioning parents being appointed as the legal parents of the child born out of surrogacy, and considers that the surrogate mother is no longer the legal mother. This gives the commissioning parents parental rights. Without a parental order, the commissioning parents are under no obligation to provide for the child legally which can lead to a few problems later on, such as inheritance issues as the child will not be considered as the commissioning parents' rightful heir. Most importantly this can have legal issues in terms of paperwork (passport, ID, ...).

The role of POs was also to ensure that surrogate mothers consented freely and were not forced into a surrogacy contract.

High Court Judge Dame Lucy Theis said that « without a court-sanctioned parental order and improved international legal frameworks children could end up “stateless and parentless” » (The Guardian, 2015) Her concern is primarily for people who are not making applications which she referred to as ‘a legal ticking timebomb’ which will arise over a parent’s death, or even a parent’s divorce, or a renewal of a legal travel document (The Guardian, 2015).

Under the Surrogacy Arrangements Act of 1985, offering payment to the surrogate is not illegal as long as the person offering payment is one of the commissioning parents, nor is it illegal for the surrogate mother to receive payments. However it is prohibited for any other person (such as agencies) to offer, or to take payments in terms of a surrogacy arrangement. Thus commercial surrogacy agencies were initially illegal. Besides, it was also illegal to advertise surrogate motherhood services (whether they are commercial or they are not). Consequently even if surrogate agencies were legal then, they would not have been allowed to advertise their services which would have made it very hard for them to continue providing their services.

By banning commercial surrogacy agencies, the UK aimed at restricting the involvement of third parties in surrogate arrangements as it would have led to the exploitation of surrogate mothers. In this case, exploitation means that women would have agreed to surrogacy arrangements either because they are in dire need of financial compensations, or because of ignorance (Alghrani and Griffiths, 2017: 170).

In 2008, the Human Fertilization and Embryology Act was changed and it permitted surrogacy advertising by non-profit agencies. It is worth noting that it is still illegal for third parties to charge for surrogacy services as commercial surrogacy remains banned. These non-profit agencies establish contact between the different parties of a surrogacy arrangement: the commissioning parents and the surrogate mother. However the new law involved complex rules regarding legal parenthood, and it presupposes the consent of both the surrogate mother and her husband should she have one.

Under the Human Fertilization and Embryology Act of 1990, the commissioning couple are directly considered as the legal parents as long as the surrogate mother only received payments due to pregnancy-related expenses under a limiting set of circumstances. However, if the surrogate mother received an amount superior to pregnancy-related expenses, then the commissioning couple must adopt the child in order to become its legal parents. It can be noted that technically if the surrogate was 'paid' more than pregnancy-related expenses, it is in direct breach of the Adoption Act of 1976. In practice, it does not generally prevent the commissioning parents from adopting the child, but in principle it could. It can also be noted that this will force the commissioning parents to go through a time-consuming and costly legal procedure (Galbraith et al., 2005: 11).

One other key element of the Surrogacy Arrangements Act (1985) and section 36 (1) of the Human Fertilisation and Embryology Act (1990) is that no surrogacy arrangement whatsoever is enforceable by law. It means that the surrogate mother can change her mind at any time, and remain the legal mother of the child. Likewise should there be a disagreement when it comes to handing over the child born out of the surrogacy arrangement, the surrogate mother has the legal right to keep the child as her own under British law. This is so even in the case where one of the commissioning parents or both are the genetic parents by blood through an IVF procedure with sperm donation, or egg donation. The logic behind this policy choice is to prevent surrogate women from signing a legally binding contract which they might not be able to fulfill once the baby is delivered. This would otherwise lead to the exploitation of surrogate mothers. (Brunet et al, 2013: 33; Galbraith et al, 2005).

In essence, British legislation is made to heavily hinder impersonal exchanges within surrogacy. As the law restricts the amount that can be paid to a surrogate mother, there is little incentive for the surrogate mother to carry a child for someone she does not already know. By prohibiting commercial agencies, and making the contracts unenforceable, a surrogacy arrangement is rendered by the state extremely risky both for the surrogate mother and for the commissioning parents unless there already is some sort of trust between the different parties in the arrangement (Galbraith et al., *ibid*).

While British legislation make surrogacy feasible on the basis of personal exchange, there are serious limitations for the commissioning parents. Indeed British individuals who

seek such an arrangement would have to ask a close friend, or a member of their family to become a surrogate for them. While the law limits, but does not completely exclude impersonal arrangements, such sort of arrangements are made more complicated than they need to be (Galbraith et al., *ibid*).

As a consequence, it is much more attractive for British want-to-be parents via a surrogacy arrangement to look for it elsewhere as the process is faster, better organized and where, more importantly, the contract is enforceable. Nevertheless, British law is bound to have an impact on the commissioning parents and their baby born out of a surrogacy arrangement upon their return on British soil (Galbraith et al., *ibid*).

Lastly, following numerous cross-border surrogacy arrangements, the UK published guidelines regarding immigration, travel documentation, and most importantly citizenship for the commissioning parents who did a surrogacy arrangement abroad. It must be noted that « these are merely guidelines on the existing law: no special legal measures have been put in place and parties who plan to engage in a cross-border surrogacy agreement are still strongly advised to obtain legal advice relating to their specific circumstances » (Brunet et al., 2013: 71-72).

In the case of X and Y, a couple sought a parental order when they had in fact sought a commercial surrogacy arrangement in Ukraine. The judge in charge of the case made the judgment in open court so as to draw attention to the problem. This case was particularly problematic because the commissioning parents could not legally stay in Ukraine, and the child could not enter British soil due to the fact that commercial surrogacy is unlawful and there was a legal parentage issue. In the end, the judge accepted the parental order and concluded that the payments were deemed ‘acceptable’ mainly because the child would have otherwise become parentless and stateless (Case of X and Y, 2008).

5.2 France:

While many think that surrogacy is a new concept, it has long been tolerated in France until it became explicitly forbidden by a bill on bioethics in 1994. Until then, carrying another person's child used to happen within family circles when a couple was

suffering from infertility issues, and there was and still is such a social stigma around infertility that it was kept hidden (Ruffieux, 2014).

The bioethics law of 1994 was a major legal step because it put limits on what science can do. At the time, there were major scientific breakthroughs in terms of procreative technology and it was as miraculous as it was worrying to the French people, which led to many ethical questions which in turn led to the bioethics law. This law is a principle of constitutional value which is a norm that aims at protecting the fundamental rights of individuals (Agacinski, 2009: 75).

The law stipulates that « Everyone has the right to respect for his body. The human body is inviolable. The human body, its elements and its products cannot be the object of a patrimonial right. » (1994) It means that property rights do not apply to the human body as the human body is not considered as a property, and thus there can be no legal contract. As the human body is by essence the individual's body, it cannot be alienated (nor sold, or given, or rented). It prohibits anything that is prejudicial to human dignity (Agacinski, 2009: 75).

It is then the legislative authority (and not ethics) that leads to the fact that the human body cannot be treated as a thing. In principle, parts of the human body cannot be given or sold. Although this has its limitations as the law allows for organ donations under strict rules and by excluding any commercial exchange (Agacinski, 2009: 75). « The integrity of the human body cannot be impaired except if there is therapeutic necessity or medical emergency» (1994). However surrogacy is neither, and thus would not be legally allowed under the law (Agacinski, 2009: 76).

There has been some comparison between anonymous births and surrogacy practices. Interestingly enough, anonymous births are legal in France. They are called 'accouchement sous X' in French whereby mothers give birth to children and have the right not to disclose their identity, thus their identity will remain unregistered (Agacinski, 2009: 84). One could wonder why anonymous births where mothers give up their child are legally allowed whereas surrogacy practices where surrogate give up their child as well is not. This policy can be considered quite unusual considering the prohibition of surrogacy. As women are the ones who give birth, they are directly responsible for the child once it is born, and the child

depends entirely on the mother during its first days. When the situation of mothers was more precarious than it is today because of several factors such as the fact that abortion was prohibited, and there was no birth control, and there was a social stigma around single mothers, the rate of child neglect, infant abandonment, and infanticide was quite high (Agacinski, 2009: 85). Thus the policy of anonymous births came about, and allowed mothers to give up their child without any consequences.

When it is legal, surrogacy on the other hand enacts the abandonment of a child. From a radical feminist perspective, it is 'against nature' to give up the child that one has been carrying due to legal papers. Radical feminism considers that the relation between the surrogate and the embryo entails a feeling of responsibility towards the child and its wellbeing, which is not mutual, and not contractual. Yet surrogacy prevents this feeling of responsibility towards the child which is deemed as a moral violence towards the surrogate (Agacinski: 2009: 86).

Up until now, surrogacy has been explicitly prohibited in France at the risk of severe sentences. The law prohibits surrogacy whether altruistic or commercial and any contract regarding surrogacy is considered null and void (Agacinski, 2009: 76).

However France's firm stand against surrogacy within its borders just relocated it outside of France. Indeed, want-to-be parents willing to go through the surrogacy process but unable to do it within France will just go abroad in another country where it is legal, and where they will follow the law of the state where it is legally implemented (California, USA for instance). This can be called the 'strategy of the *fait accompli*' which author Robert Greene - whose books on power and manipulation is considered a modern version of Machiavelli's *The Prince* - describes in his book 'The Concise 33 Strategies of War'. The strategy is rather simple: in order to avoid any judgment, or argument, or a flat refusal, it is best to do it and deal with the consequences later on (Ruffieux, 2014).

The main issue is to know whether or not a surrogate mother abroad prevents the commissioning parents to establish their parentage according to French law. The logic is different depending on how one looks at maternal filiation or paternal filiation.

According to French law, France still follows the latin 'rule' « *Mater semper certa est.* » which literally translates to 'the mother is always certain.' It means that the mother of

the child is always known in comparison to the father. « Pater semper incertus est. » which translates to the identity of the father is uncertain. With the scientific developments in regards to fertility, in particular the IVF technique, the Roman law principle nowadays no longer applies, but France, like many European countries, still follows the rule that whoever is the mother in legal terms is the woman who gave birth, no matter if the birth occurred from surrogacy or traditional procreation. Even if the surrogate mother does not put her name on the birth certificate whether because she requested anonymity or because she gave birth in a country that does not recognize her as the legal mother, the commissioning mother will not be able to adopt the baby because French law considers this as a fraudulent act and a law violation (Roman, 2012).

Paternal filiation is different because until now, the legal father is the man who claims the child as his own in France so long as it is in line with the genetic truth, which means that the commissioning father transmits to his child his genetic pool. However in 2013, in a case where a man went to India to hire a surrogate mother so that he could have genetic children, the court of cassation made the paternal filiation null and void because the commissioning father violated the law by going to India and going through the surrogacy process as it is explicitly forbidden in France. This ruling was very controversial because it did not refute that the commissioning father was the legal father of the children based on biology, but they essentially prioritized one law over another, namely it showed that to French legislators, respecting the law is more important than the right of the child. French legislators said that ‘if maternal filiation is the direct result of fraud, paternal filiation is the result of the overall process sought by couples’ (Ruffieux, 2014: 2).

Unfortunately in most cases where French citizens went abroad for the purpose of procreative tourism, until very recently, France refused to recognize the transcription of foreign birth certificates and the establishment of parentage because France considers that giving French citizenship to surrogate babies born outside of France would be a tacit agreement to surrogacy, which it is against. The argument that people who violated French law, and then complained about the government that refuses to give them the necessary documents for their children, makes the law meaningless.

Former Prime Minister Manuel Valls said that « France is opposed to surrogacy because it is opposed, in the name of her values, in the name of progress and humanism, to all forms of commercialization of human beings and experimentation in this area. » (Le Monde, 2014)

However former Justice Minister Taubira said at a general assembly in 2015 that punishing children for something that the parents did was not the solution and undemocratic. Refusing the recognition of the birth certificate issued in the state of the surrogate mother can have disastrous consequences in terms of citizenship and statelessness. Besides these children are still ‘children of the French Republic’.

Indeed the lack of birth registration can lead to statelessness as a birth certificate provides proof of parentage as well as where a person was born. Both of which are key elements to establish a citizenship. Unfortunately « without any nationality, stateless persons often do not have the basic rights that citizens enjoy. Statelessness affects socio-economic rights such as: education, employment, social welfare, housing, healthcare as well as civil and political rights including: freedom of movement, freedom from arbitrary detention and political participation » (UNHCR).

Apart from the possible consequences of statelessness, the refusal to transcribe children’s birth certificates as a result of surrogacy means that there is no official establishment of parentage between the commissioning parents and the child. Consequently the commissioning parents are under no legal obligation to support the child. They have no parental rights, and the child born out of surrogacy will not be a compulsory heir.

As a consequence of its firm stand against surrogacy, France has been condemned multiple times by the European Court of Human Rights (ECtHR).

In the Mennesson case, a couple went to California, USA for the purpose of procreative tourism, and had twins. According to Californian law, the commissioning parents (Mennesson) were the legal parents of the twins born out of surrogacy which was written on the birth certificate. However when they went to the French consulate in the USA, French authorities refused to transcribe the birth certificate onto French civil registers as there was no proof that Mme Mennesson had given birth to the twins. The French Court de Cassation dismissed their case as recognizing children born out of gestational surrogacy

would infringe upon the key principles of French law. The couple then filed an appeal to the ECHR.

In 2014, while the European court underlined that « France's refusal to acknowledge parentage between children born abroad from gestational surrogacy and the couple having recourse to this practice is based on the willfulness to discourage its nationals from using a method of procreation that has been banned on its territory, intended to preserve children as well as the surrogate mother involved. », (AllianceVita, 2014) the ECtHR condemned France as the French ruling harmed the children's identity since there was a violation of the children's rights concerning the respect of their private life. The ECtHR concluded that the condemnation of France for the refusal to transcribe birth certificates of children born abroad out of surrogacy practices does not force « France to legalize Gestational Surrogacy, but they imply that France acknowledges the consequences in terms of parentage and civil status in France of an act performed abroad » (AllianceVita, 2014).

Following this case, the Court of Cassation made a request for an advisory opinion from the ECtHR which will be explored further in the following part.

The latest development of surrogacy in France suggests that the law regarding surrogacy is about to be changed as a Court recognized on May 24th, 2019 the commissioning mother as the legal mother since she was the genetic mother due to a gamete donation (Le Monde, 2019). This establishment of legal parentage gives French citizenship to the child and thus avoids any uncertain statelessness consequences.

5.3 Comparative Analysis:

Many studies have focused on the role and identity of the European Union, and in particular on the concept of 'normative power' which was developed by constructivist Ian Manners (Manners, 2002). Manners argues that the EU is a different kind of actor in the international system because it is contrary to the self-interest of states (Manners, 2002: 140). The fact that the EU has a constitution means that European states share common values. The most significant ones are: sustainable peace, social freedom, consensual democracy,

associative human rights, supranational rule of law, inclusive equality, good governance, sustainable development, and social solidarity (Manners, 2002: 242).

These norms are deeply intertwined with the European identity, and human rights are referenced in the Treaty of Amsterdam, the Treaty of Lisbon, the Maastricht Treaty, and the European Security Strategy which supports Manners' argument about the EU being a normative actor (Nourredine, 2016: 113).

Aggestam argued that the role of the EU in international affairs is perceived as an ethical power (Aggestam, 2008: 2). There has been a shift in the role of the EU and its aspirations from « what it 'is' to what it 'does': from simply representing a 'power of attraction' and a positive role model to proactively working to change the world in the direction of its vision of the 'global common good' » (Aggestam, *ibid*). As a normative actor, the EU is contributing to a better world by establishing order (with effective multilateralism), promoting human rights, and strengthening justice (Aggestam, 2008: 3). Here, both notions of the EU as a normative actor, and an ethical power are not seen as an empirical statement, but rather as a concept from a critical theory perspective.

Regarding state intervention in surrogacy arrangements, there are essentially two main opposing views, either the state legitimizes the problematic practice, or the state regulates it in order to limit the risks of exploitation in an 'industry' that has the potential of being exploitative of women yet can be helpful for families (depending on one's view) (Dougal et al, 2016: 42).

Opposition to surrogacy based on deontology is opposed to legalizing surrogacy to any extent. This view considers that regulating it even if heavily would still be a tacit approval of a practice that denigrates women and views them simply for their reproductive capacities (Dougal et al, 2016; Field, 2014).

On the one hand, there is France which completely prohibits surrogacy and surrogacy agreements because French legislation considers that it would be agreeing to the exploitation of women, and because human beings cannot be the objects of contract.

This line of reasoning fits into a Marxist perspective. It is worth noting that the child's best interest is never considered in a typical cross-border surrogacy arrangement.

The commissioning parents choose the state with the loosest surrogacy laws, or they use an

agency in order to avoid their home's state strict surrogacy laws. There is then the contract between the commissioning parents or individual and the surrogate mother, followed by the IVF procedure. Then the commissioning parents obtain an official document stating that they are the legal parents in a local court at the place of birth. In every single step of the surrogacy arrangement, the child is considered an object. Before the child even comes into existence, it is an object of a contract, with usually money exchanged (Thomale, 2017, 466).

On the other hand, the UK allows surrogacy under some strict conditions in order to limit the exploitative side. It will also not enforce a surrogacy contract against a surrogate mother's will because British legislation considers that surrogate mothers are allowed to change their minds. This shows the ethical consideration behind the policy and its limitation towards the exploitation of surrogate mothers. However there is still an issue with cross-border surrogacy arrangements within the UK. As explained in the UK surrogacy part above, some couples or individuals still choose to go abroad to get a child via a surrogate mother as the process is 'easier', or allowed (when it comes to single individuals for instance) and more secretive. The secretive aspect in regards to surrogacy is not as new as one might think as mentioned in the background part if one takes the example of Hindu mythology where the surrogate mother lies about the fate of the child she was carrying by saying it died, which reflects the secrecy surrounding surrogacy even then. From a marxist perspective, cross-border surrogacy arrangements are problematic because there are a number of issues that arise due to the cross border nature of the practice despite the UK's comprehensive regulatory framework towards surrogacy.

As the surrogate agencies are abroad, there is limited information accessible to the social worker in charge of investigating the commissioning parents for the granting of a PO which will establish legal parentage. The social worker will have a limited access on the agencies' assessment of the couples, the 'reasonable expenses' that were paid, there is also a concern about the surrogate woman's own children as surrogate mothers from third world countries are, more often than not, put in a clinic where they will be monitored day in and day out with limited time spent with their own family. (Crawshaw, 2012: 274). There is still the issue of the reasons behind the women's choice of becoming a surrogate mother. Medical informed consent presupposes that the woman made her decision will all the facts

which includes the health risks but also the mental aspect of having to relinquish the child that the surrogate has to carry for months, the fact that the surrogate mother will probably have to stay away from her family for months; and it also means that the surrogate accepts her duty free from coercion whether it means socially (for instance the new law in India stipulates that the surrogate must be from the family of the commissioning parents which can lead to social pressure), but also economically. (Brunet et al, 2013: 27; Deonandan, 2013). Lastly there is some concern about the health of the surrogate mother as well insofar as the surrogate's health is only taken into account as far as the health of the baby that they are carrying is concerned. The commercial aspect of the surrogacy practice, in particular whenever there is money exchanged, means that the surrogate mother is only given resources to produce a healthy living baby. Her own health is secondary. (Brunet et al, 2013: 34; Deonandan et al, 2012). The fact is that surrogacy practices in third world countries provide little regulation to protect the surrogate women, but also the children, and to a lesser extent the commissioning parents.

As British legislation was specifically made to heavily limit the exploitation of surrogate women and the commodification of children, cross-border surrogacy arrangements are at odds with the legislation. There is a lack of regulation in terms of cross border surrogacy arrangements in the UK.

Based on the normative role of the EU, and its emphasis for instance on the dignity of human beings as established in the European Convention on Human Rights and Fundamental Freedoms (1950), gestational surrogacy should be incompatible with human dignity whether it is remunerated or not. « It constitutes degrading treatment, not only for the child but also for the surrogate mother [...] 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 practice is not compatible with the values underlying the Convention » (ECtHR, 2017). From this perspective, the UK's surrogacy policy contradicts the EU's emphasis on human rights and norms since British legislation tolerates altruistic surrogacy practices which is considered as agreeing with the exploitation of women.

Likewise, the fact that France refused to transcribe foreign birth certificates of children born through surrogacy practices even though the legal repercussions are endless

can be considered at odds with the EU's emphasis on human rights and the best interests of the child principle. According to the latest report of the ECtHR, there is a negative impact on the child's right to respect for private life when there is a lack of recognition of a legal relationship between the commissioning mother and the child that is born through a surrogacy arrangement (2019). There are other important aspects such as the possibility of knowing one's origins and protection against the risk of abuse that surrogacy arrangements may represent. Considering the fact that a child's right to respect for private life and that it is in the best interest of the child that there is a legal identification of the individual or people that will be responsible for the child's needs and ensuring his welfare, so that the child can live in a stable environment, the ECtHR considers that the lack of recognition of a legal relationship between the commissioning mother and the child born through a surrogacy arrangement is incompatible with the child's best interests (ECtHR, 2019). Thus it is in the best interest of the child that the uncertainty regarding a child born through a surrogacy arrangement abroad is as short lived as possible (ECtHR, *ibid*).

Thus, both the UK and France have surrogacy policies that are somewhat at odds with the EU's normative role in terms of the commodification of women on British soil (and abroad), and the commodification of children. That being said, despite such drastic different views of dealing with surrogacy, the analysis of the UK and France's policies towards surrogacy showed that these policies were not contradictory, *per se*, to the EU's standards to human rights from a certain perspective. Indeed British legislation was the result of a deeply well-documented case which shook the UK and led to a law that would allow for altruistic surrogacy under some terms and conditions in order to regulate the practice and limit the exploitation and prevent further high profile cases of surrogacy issues.

As for France, French legislation considers that motherhood should be outside the reach of contracts. The complete prohibition of surrogacy is due to France's bioethics law towards the sanctity of the human body. One could say that French legislation is a sort of guardian of individuals and their bodies. According to French law, individuals are not allowed to do whatever they want with their bodies which includes surrogacy, but also technically-speaking committing suicide (Agacinski, 2009: 75). Under a marxist perspective, this could be explained by the fact that labour market is driven by necessity and

not by free will. In this context, the state limits the 'free will' of individuals and the French government has the role of the safe keeper of the individuals' bodies.

The fact is that surrogacy is a negative sum-situation whether the state chooses to prohibit the practice (like France) or tolerates it under some conditions (like the UK). Despite different views, both France and the UK have had legal issues surrounding the practice. The main reason why the UK did not have such high profile surrogacy cases is because of the good will of the British judges who wanted to avoid legal difficulties for citizens who sought a surrogacy arrangement and tolerated expenses superior to an altruistic arrangement.

That being said, as long as there are states that legalize commercial surrogacy (like California, USA), surrogacy arrangements will remain an issue within the EU.

There is currently no legal framework at an international level, or European level. As it is an ethical issue, the member states are left with a wide margin of discretion when it comes to surrogacy. As a consequence, there is a huge disparity between member states as seen with the case of France which prohibits it, and the UK that allows it under some conditions. This leads to a great uncertainty not only for the want-to-be parent (s) but also for the children.

From a marxist perspective, the fact that France prohibited the surrogacy practice will only export the issue outside of France as French citizens will go abroad, most likely to third world countries. Not only will this increase the inequality between third world citizens and citizens from the Western part of the world, but it will, probably, lead to a lack of regulation in terms of protection of surrogate women. The fact is that 'race' is irrelevant when it comes to gestational surrogacy. This means that there will be an increasing number of women of color who will offer their 'services' to well-off (Western) white couples. This will, in turn, deepen the cleavage between the North and the South (Brunet et al, 2013: 34).

Besides there is an obvious lack of transparency within surrogacy practices. Surrogacy agencies are under no legal obligation to state the number of people seeking surrogacy arrangements, or the number of surrogate women that are working for them. At the same time, there is no official or otherwise statistics to date of citizens seeking a surrogacy arrangement within the EU and going through with the process, and there are no

birth records of babies born out of a surrogacy arrangement. This is problematic not only because the lack of transparency could expose the unethical, unprofessional, and illegal practices, but also insofar as it is difficult to know the full extent of the problem with the lack of data (Alghrani and Griffiths, 2017: 171).

Reproductive tourism makes it an obligation for every state to make a stand, not only in domestic law, but also when it comes to the consequences of its national citizens going abroad to do the surrogacy process legally implemented there (Ruffieux, 2014: 2). The fact that there is no adequate regulation will only contribute to « the maintenance of a global black market of surrogacy services, with considerable risks and exposure of women to trafficking, exploitation, coercion » (Brunet et al; 2013). As mentioned in the background part where surrogacy agencies developed ‘surrogacy routes’ with pregnant Indian surrogate women traveling to Nepal in order to give birth to a child for a couple that was initially not allowed to get a child via surrogacy in India, a complete prohibition will only lead to a black market, with even more dangerous ‘surrogacy routes’. One of the main issues with black markets is that there is no guarantee that the medical protocol is followed, or that the standards of safety are being followed, and that the practice is somewhat ethical.

Prohibiting the practice would only export the problem and lead to the expansion of a foreign market and it would be a tacit agreement to the exploitation of women elsewhere which would reinforce the power dynamics between the working class, and the ‘bourgeoisie’, and from the Global North and the Global South. From a critical theory perspective, states ought to consider the consequences of their restrictive policies towards surrogacy insofar as prohibiting the practice does not equal the eradication of the problem.

One recurring argument against regulating surrogacy is that judging by the ethical questions related to surrogacy, regulations would have the unintended consequence of encouraging more international surrogacy arrangements. However if such regulations were to happen at an international level, it would create minimum standards when it comes to health issues, informed consent, and the suitability of the commissioning parents and of the surrogate mother. It is hoped that such regulations would be a deterrent to those who would want to take advantage of the different parties involved in a surrogacy arrangement (Trimmings and Beaumont, 2011: 647).

Lastly it is very likely that an attempt to enforce a complete prohibition on international surrogacy arrangements in an increasingly globalized world are doomed to fail. A complete ban on surrogacy would only move surrogacy arrangements underground, which would expose the different parties to a greater risk of exploitation (Trimmings and Beaumont, 2011: 630). There is no doubt that the commodification arguments about children and women's bodies being used as 'rented wombs' are valid. Nevertheless a ban on surrogacy out of ethical consideration leaves the road open to exploitation of groups that are socially vulnerable and who are at the mercy of market interests, and who lack protection, in particular when it comes to cross-border surrogacy as the commissioning parents are willing to avoid their home state's strict regulation by signing contracts elsewhere (Brunet et al, 2013: 33).

In addition to the exploitation of surrogate women, there is also another worrying aspect regarding cross-border surrogacy arrangements. In 2010, the Hague Convention of May 29, 1993 on Protection of Children and Cooperation In Respect of Inter-country Adoption (also known as the Hague Adoption Convention) identified the issue of cross-border surrogacy arrangements as « an emerging international family law issue that required further study and discussion by the Special Commission » (Trimmings and Beaumont, 2011: 630). The Commission noted that the number of international surrogacy arrangements was rising rapidly, and voiced its concern "over the uncertainty surrounding the status of many of the children who are born as a result of these arrangements". The Commission also noted that the use of the Adoption Convention in cases of international surrogacy was inappropriate » (Trimmings and Beaumont, *ibid*) as the Adoption Convention does not refer at all to surrogacy practices.

The prohibition of surrogacy practices will lead to legal issues regarding the citizenship of the children born out of a (cross-border) surrogacy arrangement which would make them even more vulnerable to abuses of human rights.

Indeed, one problem that seems to emerge when looking at the surrogacy policies in the UK and in France is that there is no consensus on legal parentage. As this paper has shown, both France and the UK follow the Roman law according to which the mother is the woman who gives birth. However the Roman law is not followed throughout the world and

this is particularly problematic when it comes to cross-border surrogacy arrangements as domestic laws of the state of the commissioning parents and the state of the surrogate can clash and create legal issues.

Indeed states - even at the EU level- have maintained their sovereignty over their citizenship systems. This can lead people to fall outside of the system when there is a conflict in domestic policies (Stein, 2016: 602). The citizenship system is roughly divided into the *ius soli* system and the *ius sanguini* system. The *ius soli* system is linked to territory. One gets the citizenship of the state in which they were born into (like the US). The *ius sanguini* system literally means 'the law of blood' which means that one gets the citizenship of their parents (like in Finland, Italy, ...) (Stein, 2016: 602). Theoretically the use of different systems is not problematic however cross-border surrogacy arrangements imply the movement of people and the crossing of borders which can then become very problematic.

While France has been condemned multiple times by the European Court of Human Rights on the account of not registering the births of children born out of cross-border surrogacy arrangements, the UK has had a more diplomatic view of the issue and handled it better in terms of human rights in order to avoid legal consequences for the child and its family altogether.

Nevertheless the fact that there is no European definition of legal parentage as of to date, and that States are reluctant to limit their sovereignty in that regard shows that statelessness is a possibility due to domestic policies that mismatch.

« In theory, statelessness need not pose a problem. The rights as set forth in the *crc*, for example, apply to all children regardless of their nationality or lack of it (art. 2, *crc*). However, in practice, as a result of the above-mentioned causes, many stateless children are at risk of lacking protection within the international as well as the national framework and face many other hardships » (Stein, 2016: 602).

Besides as the case of France has shown, most infertile individuals will go outside of the EU to go through a surrogacy process. As the world is anarchic which means that there is no ultimate governing power that dictates states what to do when issues arise (Burchill et

al; 2013: 31-32), it is difficult to 'force' states into closing the gaps between different citizenship systems (Stein, 2016, 600).

- 5.3.a Statelessness

This part will talk briefly about the concept of statelessness and its consequences.

In *the World of Yesterday*, a memoir of Stefan Zweig where he recalls the golden age of Vienna, and the end of the Austro-Hungarian empire, he wrote « Formerly man had only a body and soul. Now he needs a passport as well, for without it he will not be treated as a human being. » (Zweig, 1964) This quote is often cited when dealing with statelessness. In the book, Zweig recalls a time when he had never questioned the way he should be treated by officials as a 'citizen of good standing' as an Austrian citizen. Back then, he had loved the idea of statelessness, or not belonging to any country, and of being 'free'. The reality is very much different. Zweig realized how disastrous the lack of a citizenship could be when he petitioned an English official for papers while he was no longer considered an Austrian citizen. From that moment on, he was no longer treated as a citizen for « all countries were suspicious of the sort of people of which I had suddenly become one, of the outlaws, of the men without a country » (Zweig, 1964).

Indeed, the basic definition of being 'stateless' means that the person is not a citizen anywhere. Political scientist Hannah Arendt associated citizenship with the right to have rights. Conversely, without a citizenship, a stateless person essentially loses his right to have rights which would include the rights to an education, health care, work, voting, political activities, social activities. The Office of United Nations High Commissioner for Refugees (UNHCR) defines statelessness as people « who [are] not considered as a national by any State under the operation of its law » (Conventions relating to the status of stateless persons, 1954: art1).

Moreover statelessness is not only a violation of the right to a citizenship which is outlined by international human rights frameworks, but it is also a root cause of additional rights abuses. Indeed because of their lack of legal status, stateless individuals are more vulnerable to human rights abuses as they have no legal protection. Stateless individuals fall outside of a state's protection system. Previous research link the lack of

legal nationality to violations including arbitrary detention and inequality before the law, denied economic rights to safe working conditions and to livelihood, denied health rights, and human trafficking (Bloom et al; 2017). Furthermore, individuals who are already vulnerable to abuse and exploitation face a ‘compound deprivation’ when they cannot access legal citizenship. What is even more problematic is that such deprivation of rights for children can have long-term consequences when it comes to their social, economic and personal development which will often lead to social problems such as infant mortality, labour exploitation, poverty, and human trafficking (Bloom et al, 2017).

In addition, « as stateless people are likely to stay ‘under the radar’, stateless children « run the risk of being exposed to illegal practices, such as trafficking, sexual or other exploitation, child recruitment by armed forces, or early marriage. If these practices do come to public light, it could be difficult for such children to obtain protection from the State if the latter’s protection system applies only to nationals » (Stein, 2016, 602-603).

6. Legal Provisions:

Citizenship is a human right and as thus, mentioned in many international instruments, consequently the prevention of statelessness is to be expected as well. This section aims to look into the international and European instruments put into place which can be relevant to prevent citizenship issues when it comes to surrogacy. This section will also demonstrate the shortcomings of these treaties.

6.1 *The Hague Conference*

The Hague Conference on Private International Law (HCCH) is an intergovernmental organization in the field of private international law. It is the most high-profile organization that addresses issues related to children crossing international borders. So far, the Hague conference has only addressed inter country adoption through The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, also referred to as the Hague Adoption Convention, but it recognizes the need for a unified approach towards cross-border surrogacy in order to protect children.

The convention was created in 1993 in an effort to prevent international child abduction and trafficking. Another element of the convention was inter country adoption by underlining that adoptive children need to be protected.

6.1.a *The Hague Conference on Inter-country adoption*

For inter country adoptions (also referred to as international adoptions), the Hague Convention requires that the states involved have a Central Authority. The Central Authorities of the States are to make sure that regulations are followed, and to prevent the exploitation of human rights. In order to be in compliance with the Hague treaty, there are several standards both for the receiving State, which is the state where the intended parents who want to adopt a child live; and for the State of origin, which is the state where the child is being adopted from. Both the receiving state and the state of origin are required to work together, and share information in order to make sure that they comply with the Treaty's standards regarding adoption proceedings. The receiving state must do a report on the prospective parents about their personal situations, their motivation, their qualifications and

qualities which is then sent to the State of origin. As for the state of origin, they must do a report on the child and the intended placement which is then sent to the receiving state (Hague Conference on Private International Law, 1993).

Even though the Hague Convention was created out of a concern for children crossing international lines, and to avoid commercialization of children, the convention does not strictly apply to cross-border surrogacy or any other ART issues. Nevertheless the Hague Conference recognized that international surrogacy arrangements are a growing phenomenon and the issues surrounding surrogacy in particular regarding parentage and citizenship need to be addressed. Thus it established a committee in order to examine the current issues related to international surrogacy agreements. There was also the creation of an Expert's Group in 2015 so as to 'explore the feasibility of advancing work in this area'. Although the Hague Convention has yet to determine minimum standards in the establishment of parentage in order to protect children, it recognized that children born out of cross-border surrogacy arrangements should have the basic right of being born with a citizenship (Nichol, 2013: 931-932).

6.2 International Covenant on Civil and Political Rights

Article 24 of the International Covenant on Civil and Political Rights (ICCPR) deals with the protection of children and provides that 'every child has the right to acquire a citizenship.' It is worth noting that the emphasis is put on children and not on individuals. Some states were reluctant to extend the right of citizenship to adults as they did not view citizenship as a human right (UN General Assembly, 1966).

Article 31 of the Vienna Convention regarding the Law of Treaties which states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose' applies to the ICCPR (United Nations, 1969).

Even though article 24 of the convention does not make it mandatory for states to adopt the *ius soli* principle, its purpose is to avoid statelessness. Even though the ICCPR deals with citizenship issues so as to prevent statelessness, it does not specify which States have the responsibility to provide the rights of citizenship to children.

6.3 Convention of the Rights of the Child

Article 7 of the Convention of the Rights of the Child (CRC) 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 citizenship and, as far as possible, the right to know and be cared for by his or her parents. » and that « States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless. » (UN General Assembly, 1989)

It is worth noting that the CRC is almost universally legally-binding insofar as 196 states have signed and ratified it which gives the CRC more potential to fight statelessness. The US is the only state who has not ratified it.

6.4 Convention on the reduction of statelessness

The Convention on the Reduction of Statelessness is the most comprehensive convention to prevent the statelessness issue.

The Convention combines both the *ius soli* also known as birthplace citizenship and the *ius sanguini* (meaning right of descent) principles in order to prevent statelessness. Articles 1 and 4 of the convention are particularly important when it comes to surrogacy as they are dedicated to prevent statelessness by birth. In article 1, there is the application of the *ius soli* principle for children ‘who would otherwise be stateless’ (Boillet & Akiyama, 2017, 518). The UNHCR published some guidelines and made the meaning out of ‘who would otherwise be stateless’ more clearer. It means that « the child would be stateless unless a Contracting State with which he or she has a link through birth in the territory or birth to a national of that State grants that child its nationality ».

Article 1 of the convention requires the contracting states to give a citizenship to a child born in the territory of the state if the child does not acquire any other citizenship. Article 4 of the convention establishes that if no citizenship is conferred to the child, then the *ius sanguini* principle is to be applied. The convention tries to prevent statelessness by combining both the *ius soli* and the *ius sanguini* principles.

Nevertheless, while the convention seems to be the most advanced in preventing statelessness, the Convention has only been signed by 73 states as of September 2018.

France initially signed it on May 31st, 1962 but never ratified it. France also emitted a reservation when they signed regarding article 8 which states that « Contracting States shall not deprive people of their citizenship so as to render them stateless. (Exceptions: where otherwise provided in the Convention; where nationality has been acquired by misrepresentation or fraud; disloyalty to the Contracting State) » (UN General Assembly, 1961).

However the UK both signed on August 30th, 1961, and ratified it in March 29th, 1966. They emitted the same reservation that France did regarding the deprivation of their citizenship based on a few conditions.

6.5 European Convention on nationality:

The European Convention on Nationality was adopted on November 6, 1997 by the Council of Europe. It outlined important principles such as the right to a citizenship, the principle that no individual should be deprived of his citizenship, and that statelessness must be avoided.

In regard to children, article 6 states that children who did not acquire a citizenship at birth are entitled to acquire the nationality in the state in which they were born (the *ius soli* principle), and that states should facilitate the naturalization of stateless individuals. Based on those principles, the European convention on citizenship seems rather exhaustive but not all European states have ratified it or even signed it at all. France never ratified it, and the UK has never signed it (Council of Europe, 1997).

6.6 The European Convention on Human Rights

Even though the European Convention on Human Rights does not technically guarantee the right to a citizenship, the European Court of Human Rights recently stated that the denial of recognition of citizenship « might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual. » (ECtHR, 2016, 727). The role of the European Court of Human Rights is to examine

whether decisions taken by member states have impacts considered contradictory to what is laid down in the Convention (Boillet & Akiyama, 2017, 520; Marchadier, 2012, 69).

Thus, and considering the Menesson case mentioned above, the European Court of Human Rights can have an impact and play a role in preventing statelessness, but the number of cases are few and far between so its role remains limited.

7. Conclusion

This research paper aimed at analyzing the surrogacy policies in the UK and in France from a class and gender perspective in order to highlight the issues that arise from surrogacy practices in particular when it comes to international surrogacy practices.

There are four main issues when it comes to surrogacy: the exploitation of women, the commodification of women being used as ‘rented wombs’, the commodification of children who are, by the very nature of surrogacy, made on demands, and one indirect but very important issue nonetheless which is the question regarding legal parentage which will determine the citizenship of the child being born out of a cross-border international surrogacy arrangement.

International commercial surrogacy is thus even more problematic as it creates legal issues in terms of citizenship and it provides very little security to surrogate women, which accentuates the exploitative aspect of surrogacy. It also draws attention to the fact that in most cases of cross-border commercial surrogacy contracts, surrogate women are from developing countries while the baby is usually intended for Western and most likely white individuals. This deepens the clash between the North and the South.

As there is no European consensus on surrogacy, let alone international consensus, it falls within the States’ margin of appreciation to choose whether they will prohibit or allow surrogacy practices and the means to establish legal parentage between the commissioning parents and the children born out of a surrogacy arrangement should their citizens do a cross-border surrogacy arrangement.

This research paper showed that there are mainly two policy choices in the EU when it comes to surrogacy. Either the states prohibits it completely like France, or it tolerates it under some strict conditions like the UK.

As a normative actor, the EU’s focus on norms and human rights can be quite challenged by surrogacy practices as there does not seem to be win-win situation either way. Even when states choose a certain policy which is in compliance with the values of the EU in terms of human rights, there are negative consequences insofar as protecting certain values will be at the expense of others.

A complete prohibition only seems to export the problem outside of the state's jurisdiction which deepens the clash between developed countries and developing countries, as it provides very little security towards the surrogate women.

On the other hand, regulating the practice of surrogacy seems like a tacit agreement to the exploitation and commodification of women within European borders and outside, and to the commodification of children.

Lastly the very nature of cross-border surrogacy arrangements entails a clash between domestic policies as states do not have the same definition of legal parentage and have the sovereignty over their citizenship systems which leads to statelessness issues in some cases.

International commercial surrogacy poses a very contemporary challenge because it challenges the concept of motherhood and family, and legal parentage.

With that in mind, the lack of common regulation is very problematic. As it is a globalized world and there is no consensus on surrogacy, cross-border surrogacy arrangements are on the rise which is problematic in terms of the exploitation of surrogate women from developing countries (with little security), and regarding legal parentage which leads to legal issues and put individuals at the risk of being stateless.

As globalization is the main driving force behind the growing surrogacy market, it « ought to be coupled with the aspiration of globalizing norms determining surrogacy arrangements so that a global regime of surrogacy emerges, in which negative dimensions are mitigated and the North/South divide as to income, education and power is not mirrored in the surrogacy arena » (Brunet et al; 2013).

References:

Bibliography:

Agacinski, S (2009), *Corps en Miettes*, Flammarion

Anderson, E. (1993) *Values in Ethics and Economics*, Cambridge, MA: Harvard University Press.

Bloom T, Tonkiss K, Cole P. (2017) *Understanding Statelessness*. Routledge;. Accessed May 12, 2019 from <https://search-ebSCOhost-com.e.bibl.liu.se/login.aspx?direct=true&db=cat00115a&AN=lkp.992204&site=eds-live&scope=site>.

Bryman, A. (2012). *Social Research Methods*. 4th ed. Oxford: Oxford University Press.

Burchill, Scott et.al., (2013), *Theories of International Relations*, Houndmills: Palgrave. 5th ed.

Colen, Shellee, (1995). Stratified reproduction and West Indian childcare workers and employers in New York. In: Ginsburg,Faye, Rapp, Rayna (Eds.), *Conceiving the New World Order: The Global Politics of Reproduction*. University of California Press,Berkeley and Los Angeles, pp. 78–102

DasGupta, Sayantani, and Shamita Das Dasgupta. (2014) *Globalization and Transnational Surrogacy in India: Outsourcing Life*. N.p.: Lexington. Print

Deonandan, R. (2013) ‘An introduction to the ethical dimensions of reproductive medical tourism’ in *Travelling Well: Essays in Medical Tourism*, Institute of Population Health: University of Ottawa, pp.151-177, available at: <http://www.iph.uottawa.ca/eng/transdis/files/Volume%204%20Issue%201.pdf>

Della Porta, D. and Keating, M. (Eds.). (2008). *Approaches and methodologies in the social sciences: A pluralist perspective*. Cambridge University Press.

Ekman Kajsa Ekis, (2013) *Being and Being Bought: Prostitution, Surrogacy, and the Split Self*. Spinifex Press.

Hatzis, Aristides N.(2003), 'Just the Oven': A Law & Economics Approach to Gestational Surrogacy Contracts. In *Perspectives for the Unification or Harmonisation of Family Law in Europe*, pp. 412-433, Katharina Boele-Woelki, ed., Antwerp: Intersentia, 2003. Available at SSRN: <http://ssrn.com/abstract=381621> or <http://dx.doi.org/10.2139/ssrn.381621>

Huxley, A. (1932) *Brave New World*. New York: Harper Brothers. Print.

Kergel David and Heidkamp Birte (2017) ‘Media Change—Precarity Within and Precarity Through the Internet’, *Precarity within the Digital Age : Media Change and Social Insecurity. (Prekarisierung und soziale Entkopplung – transdisziplinäre Studien)*, p. 9. doi: 10.1007/978-3-658-17678-5_2.

Marx, Karl (1970), *A contribution to the critique of political economy*. New York: International Publishers.

Marchadier, F (2012). L'articulation des sources du droit de la nationalité. In *Droit international et nationalité Colloque SFDI de Poitiers*. Pedone, 2012, pp. 59-78

Matthys-Rochon, Elizabeth; Savatier, Pierre (2012) *Biotechnologies: quelles conséquences sur l'Homme à venir?* L'Harmattan.

Reich, J. B. and Swink, D. (2011) 'Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era', *Journal of Health Care Law & Policy*, 14(2), pp. 241–297. Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=a9h&AN=65149258&lang=sv&site=eds-live&scope=site> (Accessed: 14 May 2019).

Sherwin S (1992), *No Longer Patient: Feminist Ethics and Health Care*. Philadelphia: Temple University Press.

Tong, Rosemarie (1992). Liberal feminism. *Feminist thought: a comprehensive introduction*. London: Routledge.

Trimblings, Katarina and Beaumont, Paul (ed.), (2013). *International Surrogacy Arrangements*. Oxford: Hart Publishing Limited.

Twine Winddance France, (2011) *Outsourcing the Womb: Race, Class, and Gestational Surrogacy in a Global Market*, Londres, Routledge.

Zweig, S. (1964) *The World of Yesterday*. Lincoln: University of Nebraska Press.

Articles

Aggestam, L. (2008), Introduction: ethical power Europe?. *International Affairs*, 84: 1-11. doi: 10.1111/j.1468-2346.2008.00685.x

Alghrani, A. and Griffiths D, D. (2017) 'The regulation of surrogacy in the United Kingdom: the case for reform'. Accessed on May 20th 2019 from: <https://search-ebscohost-com.e.bibl.liu.se/login.aspx?direct=true&AuthType=ip,uid&db=edsbas&AN=edsbas.2F31C5CF&lang=sv&site=eds-live&scope=site>

Alvesson, M. and Sandberg, J. (2011). Generating research questions through problematization. *Academy of management review*, 36(2), 247-271. Retrieved on 20.04.2019 from: http://meipe.yolasite.com/resources/Alvesson-2011_AMR.pdf

Anderson, E (2000), "Why Commercial Surrogate Motherhood Unethically Commodifies Women and Children: Reply to McLachlan and Swales", *Health Care Analysis* 8: 19-26.

Arnaud de Nanteuil (2012), Réflexions sur le statut d'apatride en droit international, in: *Colloque de Poitiers, Droit international et nationalité*, Paris 2012, p. 320.

Besson, S. and Utzinger, A. (2008), Toward European Citizenship. *Journal of Social Philosophy*, 39: 185–208. doi: 10.1111/j.1467-9833.2008.00421

Boillet, V. and Akiyama, H. (2017) *Statelessness and International surrogacy : from the international and European legal perspectives*. Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=edsbas&AN=edsbas.297101CE&lang=sv&site=eds-live&scope=site> (Accessed: 15 May 2019).

Brenner, Johanna, and Bill Resnick, (1987), Baby M, Family love and the market in women. *Against the Current* 5:3-6

Brill L.A, (1999 - 2000) “When Will the Law Catch Up with Technology? Jaycee B v Superior Court of Orange County: An Urgent Cry for Legislation on Gestational Surrogacy” 39 *Catholic Lawyer* 241, 241.

Brunet L, Carruthers J, Davaki K et al. (2013). A comparative study of the regime of surrogacy in EU Member States: 2013. Report submitted to the European Parliament’s Committee on Legal Affairs. Director General for Internal Policies, Policy Department C: Citizen’s Rights and Constitutional Affairs, European Union. (p.24) Retrieved on 08/04/2016 from: [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf)

Cox, R. W. (1981) Social Forces, States and World Orders: Beyond International Relations Theory. *Millennium* 10 (2), 126–155.

Crawshaw, M., Blyth, E. and Van den Akker, O. (2012) ‘The changing profile of surrogacy in the UK - Implications for national and international policy and practice’, *Journal of Social Welfare and Family Law*. doi: 10.1080/09649069.2012.750478.

Flyvberg, B. (2006). Five Misunderstandings About Case-Study Research, *Qualitative Inquiry*, Vol. 12, No. 2, pp. 219-245. Retrieved on 27.04.2019 from: <http://qix.sagepub.com/content/12/2/219>

Iona Institute (2012) *The Ethical Case Against Surrogate Motherhood: What We Can Learn From the Law of Other European Countries*, Dublin: Iona Institute.

Galbraith M, McLachlan HV, Swales JK.(2005) Commercial Agencies and Surrogate Motherhood: A Transaction Cost Approach. *Health Care Analysis*;(1):11. <https://search-ebscohost-com.e.bibl.liu.se/login.aspx?direct=true&db=edsbl&AN=RN167249095&site=eds-live&scope=site>. Accessed May 12, 2019.

Gimenez, Martha E. (1991) The Mode of Reproduction in Transition: A Marxist-Feminist Analysis of the Effects of Reproductive Technologies." *Gender and Society* 5, no. 3 (1991): 334-50. <http://www.jstor.org/stable/189844>.

Hantrais, L. (1996). ‘Comparative Research Methods’, *Social Research Update*, 13. Retrieved on 13/05/2019 from <http://sru.soc.surrey.ac.uk/SRU13.html>

Latourette, A. W. (1990) *The Surrogate Mother Contract: In the Best Interests of Society?* Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=edsbas&AN=edsbas.AF3B704F&lang=sv&site=eds-live&scope=site> (Accessed: 20 May 2019).

Lijphart, A (1971) 'Comparative Politics and the Comparative Method', *American Political Science Review* 65: 682–93.

Majumdar, A. (2018). Conceptualizing Surrogacy as Work-Labour: Domestic Labour in Commercial Gestational Surrogacy in India. *Journal of South Asian Development*, 13(2), 210–227. <https://doi.org/10.1177/0973174118778481>

Manners, I. (2002). Normative Power Europe: A Contradiction in Terms? *Journal of Common Market Studies* 40(2), pp. 235-258.

Martin, J. (2002). Feminist theory and critical theory: Unexplored synergies. In M. Alvesson & H. Willmott (Eds.), *Critical management studies* (pp. 1-7). London, UK: Sage.

Marx Karl, and Engels Friedrich (1976), 'Manifesto of the Communist Party' in *Collected Works*. Vol.6. New York: International Publishers.

OECD (2019), Fertility rates (indicator). doi: 10.1787/8272fb01-en (Accessed on 14 May 2019)

Nichol BM. (2016) *A Child Without a Country: Dissolving the Statelessness of Children Born Through Surrogacy*. <https://search.ebscohost.com/login.aspx?direct=true&db=edsbas&AN=edsbas.11DCA764&site=eds-live&scope=site>. Accessed May 12, 2019.

Noureddine, R. (2016) 'Normative Power Europe and in Field of Human Rights: is the EU a Force for Good in the World?', *Australian & New Zealand Journal of European Studies*, 8(2), pp. 111–118. Available at: <https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=a9h&AN=124345899&lang=sv&site=eds-live&scope=site> (Accessed: 13 May 2019).

Payne, G., and Williams, M. (2005). Generalization in qualitative research. *Sociology*, 39(2), 295-314. Retrieved on 20.04.2019 from: http://studysites.uk.sagepub.com/gray/Website%20material/Journals/soc_payne.pdf

Pennings G (2002) Reproductive tourism as moral pluralism in motion. *Journal of Medical Ethics*; 28:337-341.

Pennings, G., de Wert, G., Shenfield, F., Cohen, J., Tarlatzis, B., Devroey, P. (2008) ESHRE Task Force on Ethics and Law, 'Cross-border reproductive care', *Human Reproduction*: 2182-2184.

Rengachary Smerdon U, (2008-2009) Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India 39 *Cumberland Law Review* 15, 32.

Roman Diane, (2012) « La gestation pour autrui, un débat féministe ? », *Travail, genre et sociétés*,

2012/2 (n° 28), p. 191-197. DOI : 10.3917/tgs.028.0191. URL : <https://www.cairn.info/revue-travail-genre-et-societes-2012-2-page-191.html>

Ronan A, 'Inside the Dark Realities of the International Surrogacy Industry'. March 30, 2015. *New York Magazine*. Available at:

<http://nymag.com/thecut/2015/03/dark-side-of-international-surrogacy.html>

Rudrappa, S. (2018). Reproducing Dystopia: The Politics of Transnational Surrogacy in India, 2002–2015. *Critical Sociology*, 44(7–8), 1087–1101. <https://doi.org/10.1177/0896920517740616>

Ruffieux G. (2014) Retour sur une question controversée : le sort des enfants nés d'une mère porteuse à l'étranger. *Revue des droits et libertés fondamentaux*, Centre de Recherches Juridiques de Grenoble, chron. n°07, <<http://www.revuedlf.com/personnes-famille/retour-sur-une-question-controversee-le-sort-des-enfants-nes-dune-mere-porteuse-a-letranger-article-2/>>. <hal-01935982>

Smietana, M (1), Thompson, C (2) & Twine, FW (3) n.d., 'Making and breaking families – reading queer reproductions, stratified reproduction and reproductive justice together', *Reproductive Biomedicine and Society Online*, viewed 24 May 2019, <<https://search.ebscohost.com.e.bibl.liu.se/login.aspx?direct=true&AuthType=ip,uid&db=edselc&AN=edselc.2-52.0-85059636095&lang=sv&site=eds-live&scope=site>>.

Stein, J (2016), 'The Prevention of Child Statelessness at Birth: The UNCRC Committee's Role and Potential', *International Journal of Children's Rights*, vol. 24, no. 3, pp. 599–623, viewed 16 May 2019, <<https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=a9h&AN=119101338&lang=sv&site=eds-live&scope=site>>.

Syme Anderson, H (2016), 'Feminisms in Canadian Educational Contexts: A Literature Review', viewed 26 May 2019, <<https://search.ebscohost.com/login.aspx?direct=true&AuthType=ip,uid&db=edsbas&AN=edsbas.41FA4315&lang=sv&site=eds-live&scope=site>>.

Tieu M. M., (2009) 'Altruistic surrogacy: the necessary objectification of surrogate mothers', *Journal of Medical Ethics*; 35:

Thomale C (2017) State of play of cross-border surrogacy arrangements – is there a case for regulatory intervention by the EU? *Journal of Private International Law*, 13:2, 463-473, DOI: 10.1080/17441048.2017.1353783

Press articles

Bowcott Owen (2015), 'Unregistered surrogate-born children creating 'legal timebomb', judge warns', *The Guardian*. Accessed on 05/04/2019 from: <https://www.theguardian.com/lifeandstyle/2015/may/18/unregistered-surrogate-born-children-creating-legal-timebomb-judge-warns>

Kamin Debra, (2015), 'Israel Evacuates Surrogate Babies From Nepal but Leaves the Mothers Behind', *Time*. Accessed on 15/05/2019 from: <https://time.com/3838319/israel-nepal-surrogates/>

Dupont Gaëlle, (2014), 'Gestation pour autrui : le spectaculaire retournement de Manuel Valls', *Le Monde*, 03/10/2014. Accessed on 11/04/2019 from https://www.lemonde.fr/famille-vie-privee/article/2014/10/03/gpa-le-spectaculaire-retournement-de-manuel-valls_4499925_1654468.html

(2019) 'Enfants nés par GPA : l'évolution de la justice', *Le Monde*. Accessed 24/05/2019 from https://www.lemonde.fr/societe/article/2019/05/24/enfants-nes-par-gpa-l-evolution-inedite-de-la-justice_5466906_3224.html

(2014), 'Gestational Surrogacy: the European Court of Human Rights condemns France', *AllianceVita*. Accessed on 15/05/2019 from <https://www.alliancevita.org/en/2014/06/gestational-surrogacy-the-european-court-of-human-rights-condemns-france/>

(2015), 'La GPA est interdite dans notre code civil", rappelle Taubira dans un échange musclé à l'Assemblée', *BFMTV*, 19/05/2019. Accessed on 10/04/2019 from <https://www.bfmtv.com/politique/la-gpa-est-interdite-dans-notre-code-civil-rappelle-taubira-dans-un-echange-muscle-a-l-assemblee-888218.html>

Treaties and laws

X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam). Retrieved on May 20th from: <https://www.familylawweek.co.uk/site.aspx?i=ed28706>

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <https://www.refworld.org/docid/3ae6b3b04.html> [accessed 15 June 2019]

Council of Europe, *European Convention on Nationality*, 6 November 1997, ETS 166, available at: <https://www.refworld.org/docid/3ae6b36618.html> [accessed 16 May 2019]

ECtHR, Case of Ramadan v. Malta, 21 June 2016, Application no. 76136/12, para. 84–85; Fr.d.ric Sudre, *Droit européen et international des droits de l'homme*, 13th ed., Paris 2016, p. 727 para. 481

ECtHR (2019), *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother*. Accessed from <http://hudoc.echr.coe.int/eng?i=003-6380464-8364383> on 22/05/2019

ECtHR No. 25358/12, Grand Chamber, 24 January 2017 – *Paradiso and Campanelli v Italy*, joint concurring opinion of judges de Gaetano, Pinto de Albuquerque, Wojtyczek and Dedov at para 7.

Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May 1993, 33, available at: <https://www.refworld.org/docid/3ddcb1794.html> [accessed 17 May 2019]

Parliament of India, Rajya Sabha. (2017). *One hundred and second report on the Surrogacy Regulation Bill*, 2016. New Delhi: Rajya Sabha Secretariat. Retrieved from <http://www.prsindia.org/uploads/media/Surrogacy/SCR-%20Surrogacy%20Bill,%202016.pdf>

Secrétariat de la Commission des Episcopats de la Communauté Européenne, (2015) *Avis du Groupe de réflexion bioéthique sur la gestation pour autrui : La question de sa régulation au niveau européen ou international*. Comece.

UN General Assembly, *Convention on the Reduction of Statelessness*, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <https://www.refworld.org/docid/3ae6b39620.html> [accessed 17 May 2019]

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html> [accessed 17 May 2019]

UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, United Nations, Treaty Series, vol. 360, p. 117, available at: <https://www.refworld.org/docid/3ae6b3840.html> [accessed 15 May 2019]

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aa0.html> [accessed 17 May 2019]

UNHCR, *What Is Statelessness*. Retrieved on April 3rd, 2019
<https://www.unhcr.org/ibelong/wp-content/uploads/UNHCR-Statelessness-2pager-ENG.pdf>

United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html> [accessed 17 May 2019]

Appendix: Key Definitions:

Commissioning / intended parents: « This is the woman, man and / or couple, who either alone, or with a female, male partner, commissions the pregnancy and enters into a commercial contract with another woman who agrees to be implanted with an embryo that consists of her ovum or donated ovum, and sperm usually from one of the intended parents if they are a gay-male same-sex couple or a heterosexual couple. The individuals who initiate the contract are understood to be the ‘intended parents’ (also known as the commissioning parents) ». (Twine Winddance, 2011: 13-14)

Gestational surrogate: « The woman is paid as a laborer working on a nine-month contract. As an employee, this woman gestates a fetus, but has no genetic tie to the child she births. She is working under a pregnancy labor contract that usually involves a third party mediator such as an agency. She is not the intended parent and has no expectation that she will be legally or socially responsible for the child that she is carrying after it is born ». (Twine Winddance, *ibid*)

Traditional surrogates: « In contrast to a gestational surrogate, the surrogate has a genetic tie to the child she is carrying. She is both the genetic mother (contributes the egg) and the gestational surrogate who carries the pregnancy to term and gives birth to the child». (Twine Winddance, *ibid*)

Altruistic surrogacy: « This is a form of surrogacy in which no third party payment or commercial transaction is involved. A woman agrees to be implanted with the embryo that may or may not be genetically related to her because she is ‘helping’ another individual or couple (often related or a friend) but is not motivated by a profit motive. The surrogate is not engaged in a commercial pregnancy contract and is not expected to receive any money except for pregnancy-related expenses, but it is assumed that no additional fees are paid». (Twine Winddance, *ibid*)

Commercial surrogacy: A woman agrees to be implanted with the embryo that may or may not be genetically related to her in exchange for monetary compensation. (Twine Winddance, *ibid*)