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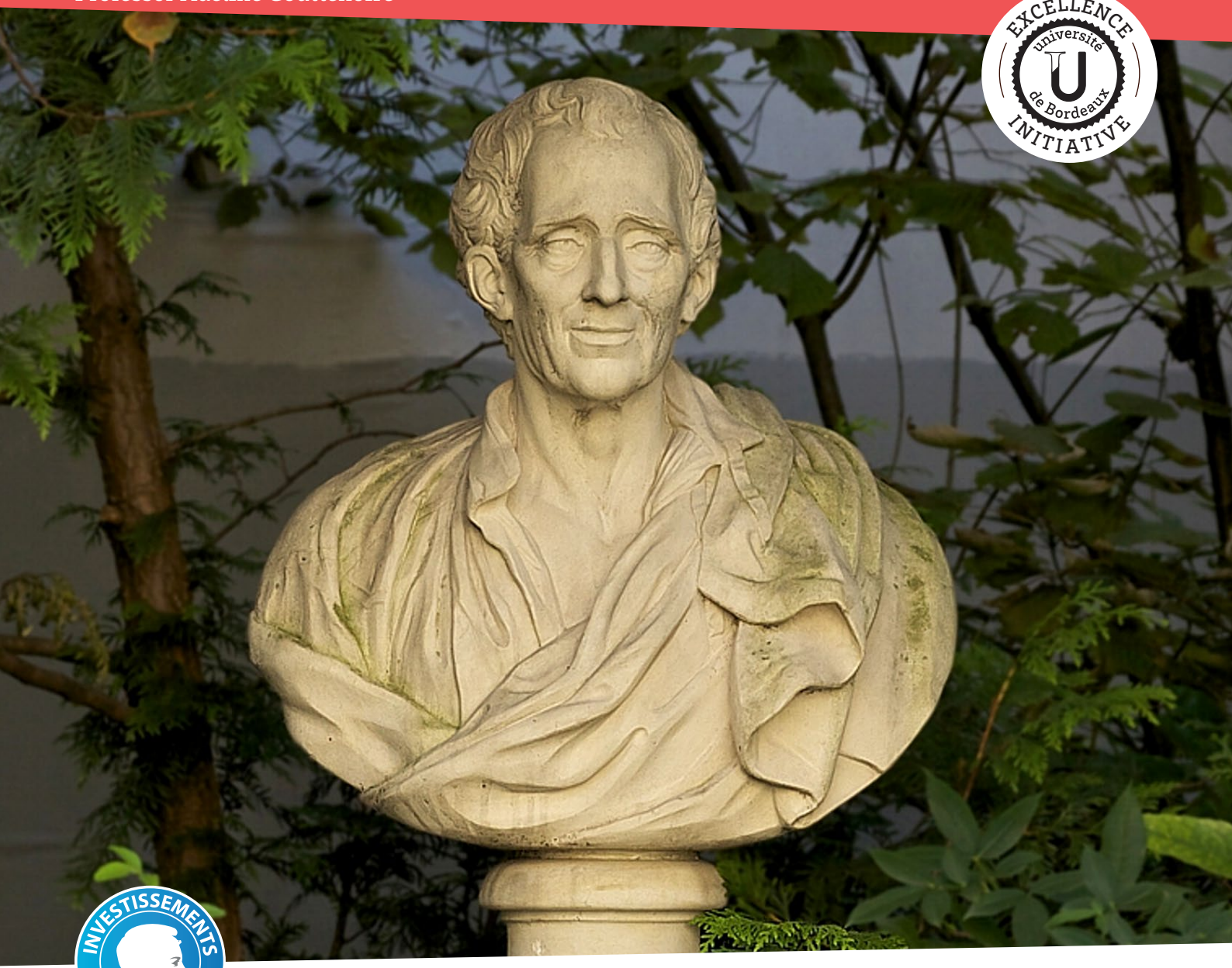

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European law (ECHR):

Surrogacy agreements: at last, the primacy of the child's interests

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ECHR, *Mennesson v France*, Application no. 65192/11, 26 June 2014
ECHR, *Labassee v France*, Application no. 65941/11, 26 June 2014

With its decisions of 26 June 2014 in *Mennesson v France* and *Labassee v France*, the European Court of Human Rights finally gave a glimmer of hope for the "ghost children" whose parentage is not recognised in France. The European Court clearly condemned France for her refusal, and indeed that of the Court of Cassation in its decisions of 6 March 2011 (1), to recognise the filiation of children born to surrogate mothers overseas with their "intended" French parents.

The decisions concerned the Mennesson case, widely reported in France, and another similar case in which a French couple used an American surrogate. In both scenarios, the applicants – the parents and children – claimed that there had been an infringement of their right to respect for private and family life owing to the impossibility for them to secure recognition in France of the parentage legally established overseas.

In both decisions, the European Court proceeded with a detailed and subtle analysis of the situation brought about individuals entering overseas into an agreement that is prohibited in the national territory, by seeking to strike a balance between France's refusal to permit surrogacy agreements and the interests of the children concerned. The solution is ultimately quite measured in that it does not allow the enshrinement of a right to parenthood but protects the child's right to his or her identity.

Positioning itself on what it termed "negative obligations", the Court proceeded with a proportionality test, in terms of both the right to the respect of family life and the right to the respect of private life. In light of Articles 16-7 and 16-9 of the French Civil Code, which expressly provide for the nullity, on grounds of public policy, of agreements pertaining to the "procreation or gestation on account of a third party", and the decisions in which the Court of Cassation had held that such agreements contravened the principles of the inalienability of the human body and of civil status, the Court considered that the interference was provided by law. The ECHR also admitted that the refusal to recognise the parentage between children born overseas to a surrogate and the intended parents was founded on an intention on the part of the French State to deter her citizens from resorting overseas to a method of procreation that is prohibited on national territory.

The European Court did not call into question the objection on grounds of international public policy employed by the Court of Cassation, but it held that it was necessary of verify "*whether in applying that mechanism to the present case the domestic courts duly took account of the need to strike a fair balance between the interest of the community in ensuring that its members conform*

to the choice made democratically within that community and the interest of the applicants – the children's best interests being paramount – in fully enjoying their rights to respect for their private and family life" (para. 84). One might think that the European Court would follow the same line of reasoning with regard to the Court of Cassation's 2013 and 2014 decisions (2), which were not based on public policy but rather on fraud.

The Court observed that there was no consensus in Europe either on the legality of surrogacy or on the parentage between intended parents and children thus legally conceived overseas, and that "*[t]his lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions*" (para. 79). While the European Court admitted that States must, in principle, be afforded a wide margin of appreciation when it comes to authorising surrogacy agreements and recognising the parentage of children legally conceived as a result of a surrogacy agreement overseas, it considered that this margin of appreciation ought to be reduced where parentage, an essential aspect of the identity of individuals, is at stake. Thus, the Court considered that it was incumbent to it to establish whether a fair balance had been struck between the interests of the State and those of the individuals directly affected by this solution, in light of the basic principle under which, each time a child's situation is at issue, the latter's interests must take precedence.

The Court proceeded with this test, firstly on the basis of the right to family life of all applicants, then on that of the right to private life of the children alone.

I – No infringement of the right to respect of family life

Existence of family life

Referring to its decisions of 22 April 1997 and 28 June 2007 (3), the Court noted first of all that there was indeed a family life between the children born as a result of the surrogacy agreement and their parents, who had raised them since birth (the children being aged 13 and 14), stating that "*what matters in this type of situation is the concrete reality of the relationship between the interested parties. It is clear in this case that the first applicants have taken care as parents of the third and fourth applicants since birth, and that all four live together in a way that is in no way different to family life as it is usually accepted"* (para. 45).

Infringement of the right to respect of family life

According to the Court, the absence of recognition of parentage under French law necessarily affected the family life of the applicants. More specifically, the Court referred to the impossibility encountered by the children concerned to obtain French nationality (at this point, the Taubira circular of 25 January 2013 (4) had not been implemented in such cases) and the concerns relative to maintaining that family life between the intended mother and the children in the event of the death of the intended father or the separation of the intended parents.

No infringement of the right to respect of family life

However, the Court noted that the applicants were able to live together in France "*in conditions broadly comparable to those of other families and that there is nothing to suggest that they are at risk of being separated by the authorities on account of their situation under French law*" (para. 92). It therefore deduced that "*the situation brought about by the Court of Cassation's conclusion in the present case strikes a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life is concerned*" (para. 94). In doing so, the

European Court of Human Rights refused to impose a duty on the State to recognise family life which exists *de facto*, as it had already done in its decision in *Harroudj v France* of 4 October 2012 (5) or *Gas & Dubois v France* of 15 March 2012 (6).

II – Infringement of the right to respect of private life

The parentage aspect of private life

The European Court stated that the respect of private life required that each person be able to establish the details of his identity as a human being, of which parentage is an essential aspect, and asserted that there was "*a direct relationship between the private life of the children born as a result of a surrogacy arrangement and the legal determination of their parentage*" (para. 46).

Infringement of the right to private life

Firstly, the European Court generally characterised an infringement of the children's right to private life without distinguishing between maternal or paternal filiation. It noted that the children found themselves in a position of legal uncertainty as to their parentage owing to the refusal on the part of the French authorities to grant any effect to the American ruling, as the French authorities, fully aware that they had been identified elsewhere as the children of their intended parents, nevertheless denied them that status in the French legal system. The Court considered that the same contradiction constituted an infringement of their identity in French society and the effects of the failure to recognise their parentage in France had consequences not only for the parents "*who have chosen a particular method of assisted reproduction prohibited by the French authorities*" (para. 99), but also for the children. This therefore raises the issue of the compatibility of that situation with the children's best interests, respect for which must guide any decision concerning them.

Nationality and inheritance

More specifically, the Court noted that the children were faced with a "*worrying uncertainty*" (para. 97) as to the possibility of obtaining recognition of French nationality, which could negatively affect the definition of their own identity. Furthermore, the failure to recognise their parentage entailed a lack of legal rights to inherit from their parents which could not be compensated by their appointment as universal legatees, which would place them in a clearly unfavourable position as third parties.

Paternal filiation

Secondly, the Court focused more specifically on its analysis of paternal filiation. It highlighted the importance of biological filiation as an aspect of each person's identity and asserted that "*it cannot be said to be in the interests of the child to deprive him or her of a legal relationship of this nature where the biological reality of that relationship has been established and the child and parent concerned demand full recognition thereof*" (para. 100). The Court of Cassation's refusal to allow the recognition of the children's paternal filiation, be it by the transcription of the foreign birth certificate, paternal recognition, or even adoption or *de facto* enjoyment of civil status, was viewed by the ECHR as a serious restriction on identity which went beyond that which was permitted by the State's margin of appreciation, "*[h]aving regard also to the importance to be given to the child's interests when weighing up the competing interests at stake*" (para. 101). The Court therefore concluded that there had been an infringement of the children's right to respect for their private life.

Maternal filiation

However, in limiting part of its reasoning to paternal filiation, the Court appears to be restricting its condemnation to the non-recognition thereof. This would mean that the non-recognition of maternal filiation had not been condemned by the European Court. Such a solution would be in line with established ECHR case law, which tends to refuse to impose a duty on States to recognise or establish filiation which does not correspond to a biological link (7), aside from the context of adoption. Such an interpretation of the *Mennesson* and *Labassee* decisions is confirmed by the press release issued by the Registry, which announced a condemnation for a failure to recognise paternal filiation where it corresponds to biological reality.

Limited effect of the condemnation

Ultimately, the sole effect of the Court's condemnation of France in these two cases may be to impose a duty on the State to recognise the paternal filiation of the children concerned. In order to meet the Court's requirements, the French authorities do not need to amend existing legislation as this does not preclude the recognition of paternal filiation based on biological reality. It would simply be a matter of the Court of Cassation amending its case law either so as to admit the transcription of the foreign birth certificate as regards paternal filiation, or so as not to annul any recognition as may be granted in France.

We can only hope that the Court of Cassation will not have to rule again in such cases and that prosecutors will now draw the appropriate conclusions from the ECHR's judgment by no longer challenging paternal filiations established with regard to children born as a result of surrogacy agreements made overseas; this would effectively give precedence to the child's best interests, assessed in practical terms, as required under Article 3 (1) of the UN Convention on the Rights of the Child. A circular issued by France's Ministry of Justice on this topic would be more than welcome.

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Notes:

(1) Cass. civ. 1, 6 April 2011, three judgments, n° 09-66.486, n° 10-19.053 et n° 09-17.130, FP-P+B+R+I; nos obs., *Convention de **gestation** pour **autrui** à l'étranger : l'intérêt de l'enfant sacrifié sur l'autel de l'ordre public*, Lexbase Hebdo n° 436 du 14 avril 2011, D., 2012, p. 22, obs. F. Granet-Lambrechts ; Dr. fam., 2012, n° 5, p. 19, obs. C. Neirinck.

(2) Cass. civ. 1, 13 September 2013, 2 judgments, n° 12-18.315, et n° 12-30.138, FP-P+B+I+R ; obs. A. Gouttenoire, *La fraude plus forte que l'intérêt supérieur de l'enfant !*, Lexbase Hebdo n° 542 du 3 octobre 2013 - édition privée ; RJPF, 2013, n° 11, p. 6, obs. M.-C. Le Boursicot, D., 2014, p. 1171, obs. F. Granet-Lambrechts ; Cass. civ. 1, 19 March 2014, n° 13-50.005, FS-P+B+I, RJPF, 2014, n° 5, obs. I. Corpart ; D., 2014, p. 905, obs. H. Fulchiron et C. Bidaud-Garon.

(3) ECHR, *X, Y & Z v UK*, 22 April 1997, Application no. 75/1995/581/667; ECHR, *Wagner & JMWL v Luxembourg*, 28 June 2007, Application no. 76240/01, RTDCiv., 2007, 738, obs. J.-P. Marguénaud.

(4) *Circulaire du 25 janvier 2013, JUSC1301528C, relative à la délivrance des certificats de nationalité française - convention de mère porteuse - Etat civil étranger*, Dr. fam., 2013, comm. 42, obs. C. Neirinck. [Circular of 25 January 2013, JUSC1301528C, concerning the

issuing of certificates of French nationality – surrogacy agreements – Overseas civil status]

(5) ECHR, *Harroudj v France*, 4 October 2012, Application no. 43631/09.

(6) ECHR, *Gas & Dubois v France*, 15 March 2012, Application no. 25951/07.

(7) F. Sudre (ed.), *Les grands arrêts de la Cour européenne des droits de l'Homme*, PUF, 2014, forthcoming, comm. n° 51.