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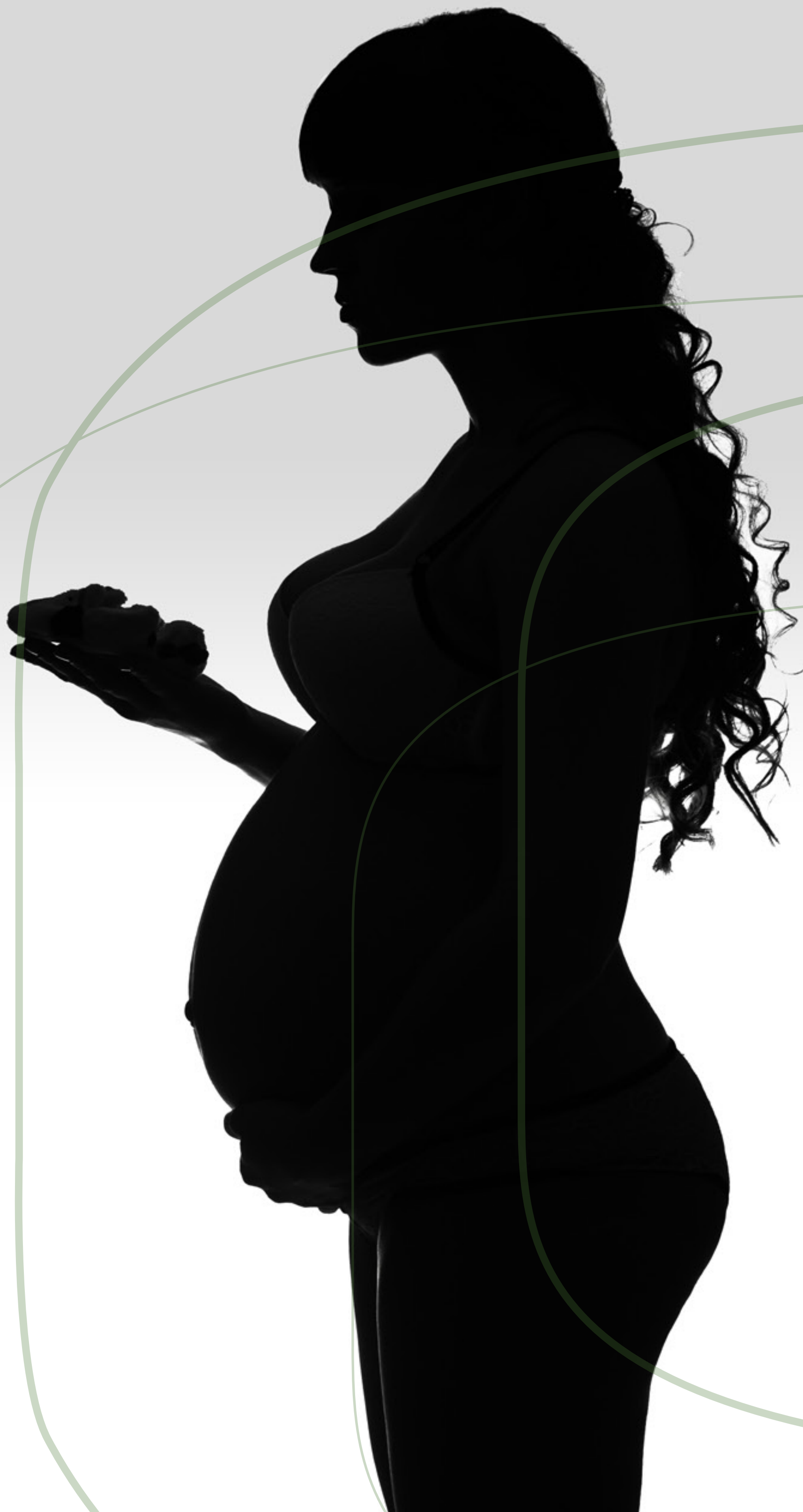
Reproductive Technology and Surrogacy

A Global Perspective



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Hrafn Ásgeirsson and Salvör Nordal

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Nordic Council of Ministers
Ved Stranden 18
DK-1061 Copenhagen K
Phone (+45) 3396 0200

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Contents

Introduction 7
Complex issues in Global Perspective 7
Foreword 11
1. Salla Silvola, Senior Advisor, Ministry of Justice, Finland 13
1.1 Regulations in the Nordic Countries 13
1.2 IVF surrogacy is prohibited in all the Nordic countries 13
1.3 Upcoming domestic reforms 14
1.4 Cross-border issues 14
2. Helga Sól Ólafsdóttir, Social Worker and Assistant Professor, University of Iceland 17
2.1 Counselling and ART 17
2.2 "What is wrong with me?" 17
2.3 A process that goes on for years 18
2.4 "The law does not make sense" 18
2.5 Reluctant to seek help 19
3. Ole Schou, Managing Director of Cryos International, Danish Sperm Banks 21
3.1 A change in demand 21
3.2 Ethical dilemmas 22
3.3 We need pragmatic regulations 23
4. Guido Pennings, Professor of Ethics and Bioethics at Ghent University 25
4.1 Harmonisation blocks future change 25
4.2 What are we going to harmonise? 25
4.3 Basic rights 26
4.4 What do we mean by harmonisation? 26
4.5 Do we agree on where to go? 27
4.6 Legal diversity is better 27
5. Ástríður Stefánsdóttir, Associate Professor, University of Iceland 29
5.1 Surrogacy as adoption rather than a health care service 29
5.2 Surrogacy as a health care service 29
5.3 The dual status of the surrogate 30
5.4 Surrogacy as adoption 30
6. Mala Naveen, Journalist and Author, Norway 33
6.1 If you can't have a baby, how far will you go to get one? 33
6.2 Infertility is a crisis 33
6.3 Not stereotypical career women 33
6.4 The Indian women 34
6.5 The book and the debate in Norway 35
7. Ruth Macklin, Professor, Albert Einstein College of Medicine, New York 37
7.1 Surrogacy provides wider range of options for Indian women 37
7.2 Is it exploitation? 37
7.3 Coercion or lack of dignity 38
7.4 The motivation of Indian women to act as surrogates 38
7.5 Prohibition decreases options 39

8. Laurence Brunet ... 41
8.1 Disparities in surrogacy legislation within the European Union ... 41
8.2 A common trend: gradual recognition of the parenthood of the intended parents of a child born through surrogacy ... 42
Sammenfatning ... 45
Abstracts from the PhD Sessions ... 47
Anna Arvidsson, PhD Student, Department of Women's and Children's Health, Uppsala University ... 47
Kristin Engh Forde, PhD candidate, University of Oslo, Norway ... 47
Elina Helosvuori, Doctoral Student, M.Soc.Sci, Unit of Sociology, Department of Social Research, University of Helsinki ... 48
Tiia R. Junnonaho ... 49
Mag. Daniela Schuh, University of Vienna ... 49
Jane Stoll, Faculty of Law, Uppsala University ... 50
Sarah Jane Toledano, Department of Thematic Studies, Linköping University ... 51
Tatiana Tolstoy, PhD Student at the Faculty of Law, Lund, Sweden ... 51

Introduction

Complex issues in Global Perspective

Over the past years we have witnessed an increasing use of reproductive technologies, especially cross-border treatment in order to achieve pregnancy, where people go to India or Ukraine to find surrogate mothers or to Denmark or Spain for sperm or egg donation. Children born through surrogacy may have uncertain legal standing when brought to their parent's home country. In the Nordic countries, where surrogacy is not allowed, there have been a number of such cases which put pressure on legislators and policy makers to reform national legislation. Iceland's parliament has decided to permit altruistic surrogacy and legislation has been prepared accordingly; in Sweden a committee has been formed to look into the question whether surrogacy should be permitted, and in the other Nordic countries the issue is being debated. However, surrogacy raises number of ethical issues concerning the rights of those directly involved in surrogacy, as well as the children born through surrogacy. The conference *Reproductive technology and surrogacy – a global perspective*, held in Reykjavik 25-27 August 2013, addressed these issues with a special focus on issues related to reproductive labor and tourism, aspects of surrogacy which are difficult to regulate from a legal perspective since they are often transnational in nature.

The legal issues where addressed in several presentations at the conference. In the opening lecture *Salla Silvola* gave an overview of the legislation in the Nordic countries on reproductive technology and discussed some cases where courts have decided on parenthood for children born abroad of surrogate mothers. This issue is particularly complex since no binding international agreement exists concerning the recognition of paternity and maternity decisions made in other countries. For this reason it is currently discussed whether regulations regarding surrogacy and reproductive technology should be harmonized within the Nordic countries or even within Europe. In his presentation *Guido Pennings* discussed the complexity of harmonizing legislation on a EU level and argued for legal diversity, as different legislation allows us both to learn from each other and makes it easier to overturn mistakes. Nevertheless he argued that that some issues could be harmonized such

as safety and quality standards. In 2012 EU issued a comparative study showing great diversity of legislation on surrogacy within Europe. *Laurence Brunet,* who presented the main findings of the report, regards an EU regulation on surrogacy unlikely. Brunet discussed different regulations and drew particular attention to two radically opposed models of surrogacy, one in the UK where the legislation is minimal and the parenthood transferred after the child's birth, and the other in Greece, which has comprehensive legislation with legally binding agreements and where parenthood is decided before pregnancy. *Ole Schou* explained in his presentation the changing demands sperm banks are experiencing with new clients such as lesbians and single women who, unlike heterosexual couples, want to have the option of revealing the donor's identity to the child. It was Schou's view that strict regulation would encourage cross-border treatment and increase the gray market.

The wish for a child is regarded as one of the most basic of all human desires. *Helga Sól Ólafsdóttir,* who has long experience as a counselor at a fertilizing clinic, discussed how couples experience fear, shame, and guilt associated with infertility. She emphasized the importance of counseling and having regulation that makes sense to people who are dealing the situation. *Mala Naveen* discussed her own experience trying to get pregnant and the trauma involved. Her personal experience led her to interview women in Norway who had opted for Indian surrogate mothers. She also visited the several clinics in India and interviewed Indian surrogate mothers and painted a rather bleak picture of their situation.

How should we protect surrogate mothers both during the pregnancy and after birth? *Ástríður Stefánsdóttir* argued against viewing surrogacy and infertility primarily as medical problems. Surrogacy accords the surrogate mother a dual status within the health care system, both as a treatment for infertility and as any other pregnant woman. According to Stefánsdóttir this dual status is best addressed by viewing surrogacy as a form of adoption rather than as a medical treatment. *Ruth Macklin* discussed the surrogate mothers in India and critically examined several arguments against surrogacy, which sees it as a kind of exploitation, and which emphasise the lack of dignity and/or coercion involved. Instead Macklin argued that if surrogacy is reviewed in the light of the risks and benefits to the surrogate mother, it becomes apparent that surrogacy presents options for Indian women which they should be able to choose. In addition, several PhD-students discussed their projects focusing on the experience of surrogate mothers in a separate session.

The debate on reproductive technologies and surrogacy tends to focus on the intending parents rather than the rights and well-being of the

children born by surrogacy. Whether people have a right to procreate with the help of others is debatable. However it is in the interest of all children to have good and loving parents, and in the UN convention on the rights of the child, a child has a right to maintain personal relations and direct contact with both parents on a regular basis. The issue of biological and social parenthood therefore, needs to be addressed with the interest of the child in mind. However, as this report shows, this is becoming more and more complex with more options available through reproductive technologies. It remains to be seen in what way each country will deal with these issues and whether we will see an international consensus on any of them.

Foreword

The mission of the Nordic Committee on Bioethics is to foster cooperation between the Nordic countries by bringing together representatives from different backgrounds to discuss issues in bioethics in order to achieve greater awareness, promote common understanding, improve policymaking and present a Nordic perspective on bioethical challenges. With this in mind, the committee has, over the years, organised several conferences every year on topics related to medical, genetic and environmental ethics. When organising its conferences, the Nordic Committee on Bioethics has made a point of bringing together a variety of stakeholders and people representing different disciplines.

During the past few years, reproductive technology and surrogacy have emerged in a number of European countries as issues of debate. There has been a steady increase in the use of reproductive technology in the Nordic countries, as well as an increase in the use of cross-border medical treatment in order to achieve pregnancy. At the same time, a number of ethical issues have been raised concerning the rights of the participants, including the children. In the fall of 2013, the Nordic Committee on Bioethics organised a conference in Reykjavik that focused on the current situation in the Nordic countries and on the global aspects of reproductive technology and surrogacy, including the market that is emerging in this field. The conference attracted stakeholders from health care, government and interest groups, as well as the general public. The outcome was an important dialogue between different stakeholders from all the Nordic countries. This conference summary highlights the main ethical issues facing researchers, policymakers and practitioners who deal with these issues. The committee hopes that the report will be a resource for everyone interested in these matters, and that the conference has made as an important contribution to this topic.

Titti Mattsson
Chair 2013
Nordic Committee on Bioethics

1. Salla Silvola, Senior Advisor, Ministry of Justice, Finland

1.1 Regulations in the Nordic Countries

Salla Silvola gave an overview of Nordic surrogacy law and discussed how cross-border surrogacy is putting pressure on some Nordic countries to change their regulations.

1.2 IVF surrogacy is prohibited in all the Nordic countries

Silvola began by discussing the law in each of the Nordic countries. Iceland was the first to mention surrogacy directly in the 1996 Act on Artificial Fertilisation, in which surrogacy is prohibited. A year later, Denmark addressed surrogacy in its Act on Assisted Fertilisation. In both Denmark and Iceland, the Acts on Children explicitly state that the woman who bears the child is considered to be the mother. In Norway and Sweden, however, surrogacy is banned only indirectly. According to the Norwegian Act on Biotechnology from 2003, "a fertilised egg shall not be inserted into the uterus of a woman other than the one from whom the egg has been derived," and in Sweden the Act on Genetic Integrity from 2006 "prohibits insertion of a fertilised egg into a woman, if both the egg and the sperm are donated." In each of these four Nordic countries, acts concerning children and parenthood say that the woman who gives birth to a child is regarded as the mother.

In Finland, however, the situation is different. At the moment, there is no law that clarifies who is considered to be the mother, although "legal practice so strongly favours the woman who gives birth that nobody has tried to argue otherwise. *Mater semper certa est.*" Until Parliament passed the Act on Assisted Fertility Treatment in 2006, surrogacy was allowed by default. "Before that, there were around 20 surrogacies in Finland, including couples from Sweden, Norway and Denmark."

It should be noted that legislation in the Nordic countries addresses mainly IVF assisted surrogacy but not traditional surrogacy. "Surrogacy arrangements without assisted fertilisation is currently allowed."

1.3 Upcoming domestic reforms

There are discussions of legal reform in the Nordic countries. "In Finland, the national ethics committee recommended in 2011 that IVF assisted surrogacy could be ethically acceptable in restricted cases. Nevertheless, the government has decided not to go ahead with changes during this term." In Iceland, Parliament has decided to permit altruistic surrogacy and legislation is currently being prepared. "There is similar activity going on in Sweden. They have formed a committee with the mandate to look into the question of whether surrogacy should be allowed. If the committee recommends allowing surrogacy, it will be restricted to altruistic surrogacy. Norway has done a lot to clarify legal issues arising from cross-border surrogacy, but there are no plans to allow surrogacy either in Norway or in Denmark."

1.4 Cross-border issues

There is no binding international agreement concerning the recognition of paternity and maternity decisions made abroad. However, the Nordic countries recognise such decisions amongst themselves. "We have a framework agreement from 1979 which says that if you have a paternity decision from a Nordic country it shall be recognised in the other Nordic countries. And this concerns not only court decisions but also decisions made by authorities on the basis of a recognition."

As with most other Western countries, there have been cases in which Nordic citizens go abroad for surrogacy, generating problematic cross-border issues. Silvola discussed two cross-border surrogacy cases in Finland, one regarding an arrangement in Saint Petersburg and one in Mumbai, India. "According to Russian legislation, the intended parents are considered to be the legal parents of the child and they therefore have a birth certificate issued by Russian authorities. In this case, the appeal court of Helsinki decided that the Russian birth certificate was considered a foreign decision that ought to be recognised by the international private law provisions of the Finnish paternity act." But other

complexities remain and, in particular, “the whole issue of motherhood is left to solve.”

India, unlike Russia, does not have any legislation regarding surrogacy, which makes the Indian case significantly more complicated. “There are some new guidelines, but the couple had entered into the surrogacy arrangement before they were issued. In addition, there is – as far as I know – a ‘pater est’ rule in India, and the Indian surrogate mother was married at the time of birth.” In this case, the Helsinki court decided that it was in the best interest of the child to recognise the Finnish man as the child’s father, and the child was therefore allowed to enter Finland.

At the end of her talk, Silvola briefly discussed a case from Norway where there is new interim legislation regarding the parenthood of surrogacy children who already live in the country and who have been born abroad, “but there are some conditions that have to be fulfilled. The surrogate mother or her legal representative has to consent to the transfer of parenthood to the mother. What was especially difficult in this case was that there was a disagreement amongst the intended parents.” Therefore, difficult surrogacy questions are being debated in the courts of the Nordic countries, although surrogacy remains prohibited for the time being.

2. Helga Sól Ólafsdóttir, Social Worker and Assistant Professor, University of Iceland

2.1 Counselling and ART

Helga Sól Ólafsdóttir has extensive experience as a counsellor for couples dealing with infertility, and for her PhD thesis did research on the decision-making process of infertile couples in the Nordic countries. "We need to think about the people who need our help. People who want what is the norm in our society; to be able to form a family with a child to love and care for."

2.2 "What is wrong with me?"

There are two basic reasons for infertility: biological infertility, explained by various biological factors, and social infertility, experienced by homosexual couples and single persons. "What we need to remember is that assisted reproduction treatment is not the first choice for people looking to have children."

People who suffer from infertility experience moral and identity conflict. They often ask themselves: "What is wrong with me?". And here, unfortunately, they may be told that "maybe it wasn't supposed to happen, that this is nature's way of telling you." As a result, they often feel that they are not fit to be parents. And they may have their own prejudices against seeking help and often experience fear, shame, and guilt associated with their problem.

"Feelings are usually mixed at the first treatment. It can be a relief to be in the care of the specialist, yet scary to enter an unknown territory, and people often do not fully understand what the doctor is telling them." People may also have unrealistic hopes or worry about whether

they are making the right decision. “Am I taking it too slow, too fast?” “Should I do something else?”

2.3 A process that goes on for years

When people have been going through fertility treatments for a few years, “they tend to get tired and start to show emotional distress. Studies show that the incidence of depression increases in women undergoing IVF.” This is not surprising, since people invest emotionally, financially, and physically in this process.

The first priority is the child. “Couples do not seek IVF treatment for selfish reasons. Instead, they focus on the interest of the child.” And there are lot of decisions to make. For instance, if couples use donor eggs or donor sperm, “they worry about the potential consequences for the child. They wonder, for example, if the donation should be open or anonymous.”

2.4 “The law does not make sense”

Legislation regarding IVF needs to be reasonable and adapt to a changing environment. Most people respect the law and are hesitant to break it. Some Norwegians, for example, come to Iceland to get donor eggs, since such donations are not permitted in Norway. But why should it be more difficult for a child to be conceived using donor eggs in Norway than in the other Nordic countries?”

“It is important to keep in mind that the legal consequences of breaking the surrogacy law are often unclear. In Iceland, for example, surrogacy is forbidden but still performed. Surrogacy is one of the oldest solutions to infertility, and when people don’t see much risk of punishment, they are tempted to try.”

People also worry about what life is going to be like after treatment. “I am often asked what the separation rate is in couples dealing with infertility, since it is so difficult and exhausting to go through. As it turns out, the separation rate is the same as in couples who conceive children naturally. But infertility is a lifetime crisis, one that doesn’t end. Infertile couples experience a recurrence of their initial crisis several years later when their peers start having grandchildren – they again get the feeling of not being part of the norm.”

2.5 Reluctant to seek help

Studies show that people who need infertility treatment are reluctant to seek psychosocial help, because IVF treatment requires them to be mentally and socially healthy. "How are you going to approach your doctor and ask for help when you are supposed to be mentally healthy? My study also showed that people are often not aware of the psychosocial help available, or they assume that it is reserved for those in severe need of help. However, my study also showed that in each of the Nordic countries, help is available – very good help."

3. Ole Schou, Managing Director of Cryos International, Danish Sperm Banks

Ole Schou, founder of the largest sperm bank in the world, has been in this business for almost thirty years. Larger sperm banks have a greater selection of donors and can therefore handle a variety of demands. Schou explained how demands concerning donor sperm have changed over the years. He also discussed the effects that strict regulations have on the demand and supply of donor sperm.

3.1 A change in demand

Information on donors is available on Cryos' website. "The website is multi-lingual, and our clients have a variety of purchase options, which they can simply put in their virtual shopping basket, pay for with credit card, and have shipped to a clinic or home," says Schou. "In 1991, we were only helping heterosexual couples, but in 2013 heterosexual couples were 40% of our clients, 50% were single women, and 10% were lesbian couples." And different clients have different needs. "Heterosexual couples normally prefer anonymous donors with a basic profile – a profile only containing basic characteristics or phenotypes. This means that their identity must be kept confidential forever. This is usually done both to protect the interest of the donor and to avoid having a 'third wheel' in the family. In most cases, heterosexual couples prefer having no information at all about the donor."

Single women and lesbians often make different choices. "If it is available, these groups usually want a non-anonymous donor, which means that his identity can be released to the child when they are 18 years old." Often, they also want extensive donor profiles containing, for example, photos, psychological profiles, and handwritten messages. "They predict that when the child is around three or four years old, he or she will start to ask who their actual father is and why there is no man around. This is one of the main reasons people want information about

the donor – to be able to provide the child with some answers to these questions. As a sperm bank, we need to adapt to this development."

Schou says this also means that more counselling is needed, "because there are so many options and many different scenarios depending on what the client decides to do." Schou also discussed whether this proliferation of options meant that people were "designing" babies. He argued that it did not – in fact, in his view the choice is "more akin to natural selection, since females generally tend to select their partners based on a vast variety of information."

3.2 Ethical dilemmas

There are many ethical issues related to sperm donation. Should the identity of the donors be confidential or not? Should the donors be paid? What is the appropriate number of children per donor? How much information should we collect about donors? And how should donors be selected and screened? What should be done when malformation in a child is reported? Should the donors be fathers themselves? And many more.

The intention behind increased regulation regarding donor sperm is good enough, Schou says, but the problem is that regulation primarily has an impact on supply. The demand remains unchanged, which creates an incentive for people to seek cross-border reproductive care.

As an example, Schou discussed the consequences of strict regulation in Sweden, "which resulted in Swedes seeking treatment outside their home country." The problem, Schou said, is that most donors prefer to keep their identity confidential. "All our donors used to be anonymous. In 2005, we asked our donors how they would react if anonymity were abolished, and 72% said they would not continue to donate under those conditions. In 2006, when we started to also take in non-anonymous donors, only 25% chose to be non-anonymous, while 75% preferred their identity to remain confidential." This suggests that if anonymous donation were prohibited, the general impact on the use of donated sperm would be very great, "not because people wouldn't want to have treatment but simply because there would be only very few donors left."

3.3 We need pragmatic regulations

"Strict regulation always increases cross-border care. It also means expansion of the 'grey' market – of unauthorised persons offering their services with less or no screening, which carries the risk of sexually transmitted diseases. Treatment abroad also carries more medical risk, legal risk and risk of various other complications."

"We can conclude, therefore, that strict conservative regulation does not achieve its intended aims but rather decreases domestic supply of donor sperm, which for various reasons lessens our control of the activity. So my suggestion is to liberalise the sperm bank industry, in part by removing strict regulation."

4. Guido Pennings, Professor of Ethics and Bioethics at Ghent University

4.1 Harmonisation blocks future change

Guido Pennings discussed the costs and benefits of harmonising surrogacy law within Europe. One of the challenges is to figure out what it is exactly that should be harmonised and on what level. Assuming this can be done, however, “we are not necessarily getting better law by harmonising.” Instead, he argued, legal diversity is more likely to lead to good law.

4.2 What are we going to harmonise?

Pennings said law evasion was the main reason people went to other countries for treatment. This tends to happen “if the technology is prohibited for certain groups, such as lesbians or singles, or if there is a prohibition on certain techniques, such as egg donation.” Another reason is the shortage of eggs, but quite a number of countries still prohibit egg donation, including Norway, Austria, and Germany. “So, the fact that there are different legal regulations in different countries is one of the main drivers of cross-border reproductive care.”

“Harmonising legal regulation is a complex issue, but many argue that we should at least be able to harmonise safety and quality standards. This is an interesting example because when you look generally at such standards you will find large differences between the European countries.” Pennings discussed multiple pregnancies as an example. “Everyone agrees that multiple pregnancies are high risk, but there are enormous differences between countries in multiple pregnancy rates following infertility treatment.” The rate is 5.7% twins in Sweden, 13% in Belgium, 20% in France, and 23% in the United Kingdom. The reason for this variation is the different attitude towards the safety of transferring multiple embryos, which tends to make harmonisation difficult and controversial. But, given the low rate in Sweden, could we perhaps at

least manage to beneficially harmonise regulation regarding the number of embryos transferred? Maybe, but even if we could, we would also have to harmonise a wide variety of related regulation – including, but not limited to, reimbursement policies for embryo transfers. It is difficult to see how such general and extensive harmonisation would be possible."

4.3 Basic rights

"Countries react very differently to cross-border movement. In Ireland, for instance, the government has tried to prevent women from going abroad to have an abortion." Given this difference, how optimistic should we be about bringing harmony to issues like patient mobility?

Some would argue that people have certain basic rights which the European Court of Human Rights can help to protect regardless of national legislation. Pennings argued, however, that it is not helpful to say that we need to protect basic rights. "People often believe that there is consensus about what counts as basic rights, but we have no such consensus." And even if we did, this would not solve the matter, since "in most problem cases, there is almost always conflict between such so-called basic rights. Consider, for example, the possible conflict between the donor's right to anonymity, the right of parents to organise their families, and the right of the child to know his or her origins."

4.4 What do we mean by harmonisation?

Pennings explained that it is not always clear what we mean by legal harmonisation. "Does it mean that we all have the same law?" It is also necessary to ask on what level we are seeking to harmonise legislation. "Are we going to adopt a top-down procedure and legislate at the European level? But why should the rule in one country be exactly the same as the rule in another country? This seems very strange, except in cases where people share culture and values." And this is certainly not the case throughout Europe.

Pennings also argued that it is not obvious that we get better law with harmonisation. "There is no reason to assume that a harmonised law would be a better law. I cannot think of any good reason for believing so. On the contrary, what I would expect, given the differences between countries and the controversy regarding many of the relevant

issues, is some sort of compromise law. And compromise law is not necessarily going to make us better off."

4.5 Do we agree on where to go?

The main problem facing the harmonisation of surrogacy law is that there is no consensus on the basic question – on whether or not to allow surrogacy. "We can of course avoid legal conflicts if all countries prohibit or allow surrogacy. But we do not have such agreement. So the first thing we need is agreement on where we are going. But this is an ethical question and the European Union does not have legislative competence regarding ethical matters."

There is an additional problem, especially if the suggestion is to prohibit surrogacy in all EU countries. "The whole idea of prohibiting something presupposes that what is prohibited is wrong. Laws adopted to harmonise national legislation with international development may therefore create internal conflicts and/or create a feeling of complicity with the alleged wrongdoing."

4.6 Legal diversity is better

Pennings argued against harmonisation for several reasons. "We can consider each piece of legislation as a 'natural experiment', allowing us to study the consequences of introducing them. And it is a lot easier to reverse mistakes on a smaller scale. Differing legislation also allows us to learn from what our neighbouring countries are doing. Therefore, harmonisation may block future change, or at least render it more difficult. Harmonisation also ignores the local and national circumstances, such as the contextualisation of moral codes and differing cultural attitudes."

"However, if harmonisation is ever implemented, it should be a voluntary and deliberative process, rather than something imposed or forced on countries top-down. But I think that harmonisation assumes a certain degree of consensus on common values that does not exist at the moment."

5. Ástríður Stefánsdóttir, Associate Professor, University of Iceland

5.1 Surrogacy as adoption rather than a health care service

In most countries, the discussion of surrogacy assumes that it is a possible solution to an infertility problem, one to which the health system should respond. Ástríður Stefánsdóttir questions this assumption and argues that it would be better to regard surrogacy as a form of adoption.

5.2 Surrogacy as a health care service

Surrogacy tends to be viewed as a form of medical treatment received from the health system, even though some groups (such as women past fertility age or homosexual couples) seek to use it for reasons other than medical conditions. Medical technology is thus used to solve problems for a constantly growing group of people, who become patients of the system and their problem is defined as a medical one. In this way, non-medical problems become "medicalised".

The services being offered create options amongst new groups, which may create needs and wants that were not necessarily there before; as a result, the problem of childlessness threatens to become greater and more widespread. In general, increased availability of new reproductive services tends to generate increased demand for them, because it increases the pressure on couples, and even individuals, to have children. Demand for new services goes more or less hand in hand with their availability, because as soon as they become available more people start to feel that they should take advantage of them and try to have a child.

The proliferation of technology also helps to sustain the view that childlessness is primarily a health problem. People who previously were generally not considered to be ill, or to have any reason to seek medical care due to childlessness (such as childless singles or homosexual cou-

ples), now suddenly have a need for medical service due to societal pressures and altered norms about having children.

5.3 The dual status of the surrogate

Surrogacy differs from most other remedies available through the health care services because another person is being used to reach the intended treatment goals. And it even differs from, say, organ donation, in that the donation is not separate from the donor – it is the donor herself. Surrogacy can thus lead medical professionals to have conflicting responsibilities, since they have to care for the surrogate like any other pregnant woman but also have to communicate with her as part of the medical service delivered to the couple or individual dealing with infertility. The surrogate therefore has something of a dual status within the health system.

Given this dual status of the surrogate, it is crucial that all professional processes and rules surrounding pregnancy and birth are well implemented, if surrogacy within the health system is to be possible without violating important human rights. During the surrogacy process itself, for example, there is a strong tendency, both by the intended parents and medical professionals, to try to exert control over the surrogate's body and daily activities. When surrogacy is recognised as part of the health services, therefore, there is a danger that the pregnancy becomes "technical"; in a sense, the surrogate becomes part of the medical technology used as a cure for infertility condition of the relevant couple or individual. It is clear, then, that there are significant consequences of viewing surrogacy as primarily a medical solution to infertility, to be offered by the health system.

5.4 Surrogacy as adoption

When a woman carries a child to term for another person or couple to raise after birth, it is neither just a case of medical treatment nor just a case of adoption. Rather, it is somewhere in between. In every successful surrogacy case, however, a gift is involved – the gift of the baby being born. And children have rights, including the right to have parents. The right to have children, however, has not been established. Thus, the welfare of the child is primary, and every decision regarding surrogacy must reflect this.

One way to ensure that the rights of the child are protected is to frame the entire discussion in a different way – by viewing surrogacy as a form of adoption rather than as a form of medical treatment. Instead of considering this process primarily as a medical one – as treatment for infertility – we should approach it primarily as a legal matter, aimed at establishing parental responsibility. This will allow us to shift the focus from intended parents to the child. It is a consequence of this approach that parental responsibilities related to children born by surrogates will not be transferred to the intended parents until after birth. As a result, the intended parents neither have a say in the life of the surrogate nor in the life of the child until it is born and has been legally adopted. This approach also makes it easier to protect the rights of the surrogate.

6. Mala Naveen, Journalist and Author, Norway

6.1 If you can’t have a baby, how far will you go to get one?

“My interest in surrogacy is closely tied to my personal history. When my husband and I thought we were ready to start our family, our bodies were not,” says Mala Naveen who wrote The Global Baby, a book in which she investigates the baby industry.

6.2 Infertility is a crisis

“The lack of a clear answer as to why we weren’t able to conceive was the beginning of a journey that would take us, and especially me, across the world,” says Naveen. “As a woman not able to conceive, I had to find my own way to handle this unforeseen crisis in our relationship, and as any woman taken aback by a body not willing to operate according to its main intention, I started to do the only thing any sensible woman would do – I went online. I found forms and research, and also started reading about surrogacy in India.”

Naveen went through several IVF attempts and was lucky. “On our third attempt I got pregnant again and nine months later I gave birth to my eldest son. When my baby, my eldest son, was six months old my diagnoses as infertile had somehow expired and it turned out I was pregnant again. So our story brought me to a point in life where I felt grateful for what we had and also sad for those who sat in these waiting rooms beside me and were fighting against all odds.”

6.3 Not stereotypical career women

“I dove into this topic asking myself how far I would have gone to get the family I wanted.” Naveen interviewed many women who had opted for surrogacy in India. Many of them said it was impossible to put into

words how thankful they were for their Indian surrogate mothers. “Far from being stereotypical career women who had ignored their biological clocks, these women were stay-at-home-moms – most of them with severe conditions like cancer or Crohn’s disease. They reassured me that the clinics in India were safe, but also admitted that they hoped that everything was in fact how the doctors described it and that the surrogates were being treated well.”

6.4 The Indian women

Naveen visited several clinics in India, including clinics in Anand, West India, and Gujarat, often referred to as ‘‘baby factories”. “Born to Indian immigrants in Norway, what I found was astonishing to me.” Naveen says it is hard to describe what she saw. “I met Indian families, activists, doctors, clinics, directors, and of course surrogate mothers. Their lives and their hardships felt so unfair, but at the same time, through their stories the women appeared strong, independent, and to some degree they even came across as resourceful, despite the fact that most of them had little or no schooling.” Naveen interviewed many surrogates during her visit. “I wanted to know how it felt to carry a child for someone else and have to give it up – to not connect.”

“One of the surrogate mothers told me that in case of missed miscarriage (also called missed abortion) they were not compensated by the clinic. They also had no knowledge about the hormones injected into them. And of course they were exhausted and missed their children and their husbands. To my surprise most of them confessed that their husbands didn’t want them to do this kind of work, but they had convinced them by explaining that this was science, and nothing personal. In addition to all this, the women were not permitted to leave the house where they were staying. And some of them had had as many as eight embryo transfers.”

Naveen also addressed rumours that Indian women are able to buy themselves a house after being surrogates. “This is incorrect,” she said, “or at least misleading. They would have to be surrogates at least two or three times to earn that much money.”

6.5 The book and the debate in Norway

Naveen discussed a few cases that have made headlines in Norway. "The same week my book came out, for example, the newspaper Aftenposten reported that an Indian surrogate had died after giving birth to twins, intended for a Norwegian couple. It turned out that she had had hepatitis and should not have made it through screening."

"I don't support everything that has been going on in India related to surrogacy. In fact, that would be impossible, due to the size of the industry and the lack of regulation. However, I do believe that India was on the path of forming an industry that could have been regulated. But managing this industry in such a large country is very difficult, and it is an open question whether the government is up to the task."

"I am pro surrogacy, on the condition that human dignity is preserved in all aspects of the process. To carry a child for someone else does not have to be forced labour, slavery, or embryo shopping. These are just labels that we are put on a process that can be very dignified, if done the right way. Surrogacy can be a very noble thing to do."

7. Ruth Macklin, Professor, Albert Einstein College of Medicine, New York

7.1 Surrogacy provides wider range of options for Indian women

Reproductive tourism
In her talk, Ruth Macklin discussed surrogacy in relation to reproductive tourism: the practice of individuals and couples from Western countries to make arrangements through brokers to have their genetically related offspring carried through pregnancy by an Indian woman. Macklin critically examined arguments against surrogacy based on exploitation, coercion, and violation of dignity, arguing rather for a utilitarian approach where the benefits are weighed against possible harm to the surrogates.

7.2 Is it exploitation?

One of the standard criticisms of commercial surrogacy is that it involves commodification of the child and of women's bodies and that reproductive tourism involves exploitation of poor women in developing countries. "Exploitation occurs when wealthy or powerful individuals or agencies take advantage of the poverty, powerlessness, or dependency of others and by using the latter to serve their own ends without adequate, compensating benefits for the less powerful or disadvantaged individuals or groups," explained Macklin. She asked if this was the case in India and argued that surrogacy was not exploitation because it made women better off than they otherwise would be. "Or is it the case that surrogate women are paid too little?" she asked. She concluded that surrogacy does not exploit poorer women so long as they do so by free choice.

It has been argued, however, that even if individual women freely choose to become surrogates, commercial surrogacy is a form of *class* exploitation. "But is this different from the practice of wealthy women

who pay poorer women to clean their houses?" Macklin asked. “Why is that not a form of class exploitation?”

7.3 Coercion or lack of dignity

According to Macklin, the exploitation argument can only work if the surrogates are paid too little, but that is not the case with the coercion argument where it is argued that surrogacy is a form of coercion because of the high payments to the surrogates. “It’s not coercion because coercion presents people with a choice between two undesirable options such as *your money or your life*. Payment to surrogates aims to make women better off – not worse off,” Macklin said and argued that the coercion argument fails as long as women are paid a fair wage.

It has also been argued that paying women to bear a child for others is degrading. In response, Macklin said the concept of human dignity is far too vague. “What is human dignity and how do we know when it is respected?” she asked, and said that the main problem with the dignity argument was that "there does not exist a satisfactory explication of the concept.”

7.4 The motivation of Indian women to act as surrogates

Macklin argued that instead of condemning commercial surrogacy by appealing to exploitation, coercion or dignity, we should review the risks and benefits to the surrogates to determine whether the current practice is ethically acceptable.

“We need to look at the motivation of Indian women and their conditions,” Macklin said. “The fact is that these women struggle to run a household, and no other work option enables earning such a large sum of money. It makes it possible for them to pay off debts, buy a house, and create savings for their children. Therefore, surrogacy may be a better option for them than domestic or factory work.”

“Of course, surrogates in poor countries are not always equal partners in contractual arrangements,” Macklin pointed out. “Women may be pressured by their husbands or families to become surrogates, which could involve genuine coercion.”

7.5 Prohibition decreases options

According to Macklin, banning surrogacy denies Indian women their autonomy, as “it would *decrease* options for women who already have few options.” The practice in India, as in most other countries, requires that surrogates have already borne children. “They have already experienced pregnancy so they know what they are getting into.”

Nevertheless, Macklin stressed that there are important questions about the practice that need to be addressed, issues such as possible coercion of women within their families and the conditions under which surrogates live during pregnancy. In this respect we need more empirical evidence. “We need to know whether surrogacy rights are respected in India and whether the lives of Indian women who become surrogates actually improve as a result of the money they earned.”

8. Laurence Brunet

The Regime of Surrogacy in EU Member States: Reconciling a variety of national legislation with the essential ethical responsibility to protect the rights of children born through these methods.

Brunet presented a comparative study of surrogacy law, commissioned by the European Parliament, carried out by a team of 17 European researchers trained in law. The study was coordinated by the London School of Economics Enterprise, on the basis of a call for tenders issued by the European Parliament Committee on Legal Affairs in June 2012. The study's primary goal was to study the legal problems raised by surrogacy, both in the EU Member States where the practice is permitted and in those where it is explicitly prohibited. Its secondary goal was to suggest an agenda and guidelines for the harmonisation of European legislation and the most appropriate instrument for achieving this harmony.

The key results of the study were, first, that the European Union is unlikely to regulate surrogacy because of the great diversity of legislation in the Member States and, second, that – nevertheless – a common trend in favour of recognising the parental rights of the intended parents of a child born in a foreign country by surrogacy is gradually emerging, even when the parents are citizens of a Member State that explicitly prohibits this particular form of assisted procreation.

8.1 Disparities in surrogacy legislation within the European Union

The report focused on 12 EU countries due to the resources available to the research team. The countries studied were classified in one of three categories, depending on whether their domestic legislation authorises and regulates surrogacy, prohibits it, or ignores it.

In the few Member States that have adopted specific legal provisions regulating surrogacy and facilitating the transfer of parental authority to intended parents, two models are radically opposed: one adopted by Greece, and the other by the United Kingdom. Greek legislation offers Europe's most comprehensive framework for gestational surrogacy. In contrast, British legislation intervenes *a minima,* providing only for the

conditions whereby parenthood is transferred *ex post facto*, after the child's birth, from the parturient mother to the intended parents. The opposition between these two models arises from a fundamental difference: according to Greek law, the gestational surrogacy agreement is valid and legally binding as long as it has been approved by the judge in charge of the case, whereas under British law this type of agreement is null and void.

In Greece, it is the judge's duty to verify that the gestation agreement complies with domestic law before the surrogate mother's pregnancy can begin. The judge must also verify that the recourse to surrogacy is a response to medical necessity and that the arrangement pursues an altruistic goal. The judge limits himself to a fairly procedural, administrative review of the various documents in the file submitted to him.

This *ex ante* framework for surrogacy and its impact on parenthood is in sharp contrast with the *ex post facto* mechanism for transferring parenthood following the child's birth, to which British law in this field is confined. British legislation is oblivious to the agreement leading to the child's birth by surrogacy. As a result, the surrogate mother who gives birth is considered to be the child's legal mother, under British law and, if she is married, her husband is presumed to be the legal father. Therefore, the United Kingdom and Greece have applied two strikingly different models for regulating surrogacy and the mechanisms to register the child's kinship to his intended parents. Nevertheless, both countries reserve entitlement to these provisions to future parents who are domiciled there.

8.2 A common trend: gradual recognition of the parenthood of the intended parents of a child born through surrogacy

The report also examined the case of countries where surrogacy is discouraged or simply ignored by the legislation. The review makes it clear that the primary goal of the courts has been to ensure the child's integration in his or her intended family.

The tendency to recognise the parenthood of the intended parents is most obvious in countries where no specific legislative provision is made for surrogacy. For example, rulings by lower courts abound in Belgium and the Netherlands, for cases involve both national and international issues. The fact that surrogacy has not been explicitly prohibited in either of these two countries, either by law or by high court juris-

prudence, has resulted in the development of the practice within national borders. Judges in both countries are, on the whole, concerned with the child's welfare. They are quite willing to adapt existing legal regulations – sometimes very liberally – in order to grant parenthood of the child to the intended parents. Belgian and Dutch judges demonstrated similar concern for the child's welfare when the intended parents had decided to travel to another country to find a surrogate willing to bear a child for them.

Other countries, such as Romania, lacking legislative provisions specifically regulating surrogacy demonstrate even more leniency. The authorities are willing to establish the child's filiation with his or her mother of intent without requiring a complex adoption procedure, knocking down the traditional rule whereby the mother is designated by the birth. The same tendency prevails in case law concerning cross-border surrogacy arrangements. As a result, the courts have generally validated foreign birth certificates establishing the child's filiation to his intended parents. The situation in Austria is exemplary in this respect. True, Austrian law does not expressly forbid surrogacy. Nevertheless, the legislation is clearly opposed to any division of maternal functions (egg donation is banned).

Overall, the study suggests that despite the fact that there are great disparities within the European Union in the legislation on surrogacy, they are at least partly compensated by the concern shared by many national judges for the welfare of the child born by surrogacy, regardless of where the birth took place. The report concludes that this concern for the child's welfare is the instrument that might be leveraged to lead to a rapprochement in policies on surrogacy throughout the European Union. The point is not to seek a single *ex ante* framework for surrogacy agreements, but to try to settle *ex post facto* the fate of children born as a result of such agreements.

Sammenfatning

Oppdraget til Nordisk komité for bioetikk er å fremme samarbeid mellom de nordiske landene gjennom å samle representanter med ulik bakgrunn for å diskutere spørsmål relatert til bioetikk. Formålet er å oppnå større bevissthet, fremme en felles forståelse, forbedre policyplanleggingen samt å presentere et nordisk perspektiv på bioetiske utfordringer. Med dette som bakgrunn har komiteen i flere år organisert konferanser om temaer relatert til medisinsk og genetisk etikk, samt miljøetikk. I forbindelse med organiseringen av disse konferansene har Nordisk komité for bioetikk lagt vekt på å samle en bred gruppe av interessenter og personer som representerer ulike disipliner og perspektiver.

I løpet av de senere årene har assistert befruktningsteknologi og surrogati dukket opp som diskusjonstemaer i flere europeiske land. Det har vært en jevn økning i bruken av assistert befruktningsteknologi i de nordiske landene, og i medisinsk behandling på tvers av landegrensene for å oppnå graviditet. Samtidig er en rekke etiske spørsmål reist vedrørende deltakernes rettigheter, innebefattet barna. Høsten 2013 arrangerte Nordisk komité for bioetikk en konferanse i Reykjavik som undersøkte den rådende situasjonen i de nordiske landene og de globale aspektene knyttet til assistert befruktningsteknologi og surrogati, inklusive det markedet som er i ferd med å vokse frem på dette området. Konferansen tiltrakk seg interessenter fra helsevesen, myndigheter og interessegrupper, samt fra allmennheten generelt. Dette resulterte i en viktig dialog mellom forskjellige interessenter fra alle de nordiske landene. Dette sammendraget fra konferansen belyser de viktigste etiske spørsmålene som forskere, policyplanleggere og praktiserende leger som beskjeftiger seg med disse spørsmålene, står overfor.

Komiteen håper at rapporten vil være til nytte for alle som er interessert i disse spørsmålene, og at konferansen har gitt et viktig bidrag til dette temaet.

Abstracts from the PhD Sessions

Anna Arvidsson, PhD Student, Department of Women's and Children's Health, Uppsala University

Situation on surrogacy in Sweden – Commissioning parents' and authorities' perspective

In Sweden it is not allowed to perform the medical procedures for surrogacy, and Swedish couples have turned mostly to India for surrogacy as a solution to obtaining a highly desired child. According to the National Board of Health and Welfare, there are about 100 children in Sweden born through surrogacy. We are conducting a study on the experiences and perceptions of surrogacy among couples using surrogacy and authorities dealing with surrogacy. The result shows that without laws regulating the use of surrogacy in India and Sweden, the child born through surrogacy risks being without a legal guardian in Sweden for a very long time. Without any laws, the couples and the authorities are left to solve the process around surrogacy themselves, and this has resulted in many different solutions among both couples and authorities. This makes the use of surrogacy complex and insecure for both the child and the intended parents.

Kristin Engh Forde, PhD candidate, University of Oslo, Norway

Win-win or exploitation? An ethnographic study of surrogacy in India

The globalisation of reproductive technology brings up political and ethical challenges and dilemmas to be discussed and new empirical fields to be explored. This is no less true in the case of transnational gestational surrogacy in India, which has proved to be a particularly controversial issue, also in public debate and politics in Western countries. The legitimacy of using Indian women's bodies to solve one's own fertility problems or realising a wish to establish a family outside the hetero-

sexual norm has been both questioned and defended. This project aims to inform the ethical and political debate with more empirical knowledge of the surrogacy process.

The study involves a series of empirical questions about the circumstances under which surrogates are recruited and employed, their experiences of the process and, not least, the short-term and long-term costs attached to it, physically, emotionally and socially. This study aims to provide answers to these empirical questions, in addition to exploring the motives, intentions and experiences of the intended parents travelling to India from Western countries.

Elina Helosvuori, Doctoral Student, M.Soc.Sci, Unit of Sociology, Department of Social Research, University of Helsinki

Naturalising through surrogacy? Treatment of the failing reproductive biology beyond borders

In my previous research on infertility, I have constructed a "logic of treatment" from the patient guidebooks handed to customers in clinics and Internet pages supported by private clinics in Finland. In these texts, which provide information to everyone who considers entering the IVF treatment cycle, infertility is described as a biological state *needing* medical treatment. IVF treatment is seen as a way to support the reproductive capacity of female (and also male) bodies. In addition, treatment of the failing reproductive biology is understood as "giving nature a helping hand."

In my presentation, I will ask whether surrogacy could be understood as complementing this idea that failing reproductive biology needs medical care. The discussion about the justification of surrogacy indicates a will to allow surrogacy in Finland in restricted cases. What could these cases be and what are the national versus international policy implications? My analyses show that *medical reasons* are given primary importance when considering justifications for surrogacy. Surrogacy can be seen as justified in the continuum of IVF techniques as long as the potentially global associations between borders – between bodies, gametes or nation states – are organised around the rationale of treatment within national boundaries, that is *treating* and *naturalising* a female body that lacks, for example, a functioning uterus. This can be seen as

paradoxical: the social implications and, for example, kinship ties extend far beyond the bodies "getting treatment."

Tiia R. Junnonaho

Womb Politics – Feminist Bioethics and Surrogacy

In my article, I discuss surrogacy from a feminist bioethics standpoint which deploys gender and heteronormativity as pivotal in analysing bioethical policies.

Surrogacy has been illegal in Finland since 2007. The National Advisory Board on Social Welfare and Health Care Ethics (ETENE) states that in certain isolated cases surrogacy treatment may be an ethically acceptable infertility treatment for married couples for whom having a child is physically impossible, for instance, because of the absence of a uterus. Further, ETENE states that surrogacy treatments should be subject to a permit, and surrogate motherhood should be based on a genuine desire to help rather than commercial gain and that the human rights of all parties must be respected.

I find ETENE's statement to contain ethically questionable predispositions which contradict its efforts to formulate a surrogacy policy that respects the human rights of those involved in the surrogacy process, since those eligible for the process are preselected based on marital status, gender and sexual orientation. By viewing surrogacy as "treatment" of "the absence of a uterus", ETENE constructs a peculiar concept of treatment by proxy. Moreover, the statement fails to acknowledge its predispositions of heteronormativity, reiterating women as the medical objects of reproduction politics. By viewing surrogacy as "motherhood" and "helping", it also neglects the discussions on reproduction tourism and surrogacy as work, i.e. the issues of global/social justice surrounding surrogacy.

Mag. Daniela Schuh, University of Vienna

Reframing parenthood and citizenship. The case of cross-border surrogacy in Germany and France

Cross-border reproductive travel has become a common response to restrictive access and illegalisation of assisted reproduction that indi-

viduals and couples of many European countries face. While the growing global industry around reproductive tourism sparked a wide range of legal, ethical and social concerns, my research focuses on international surrogacy arrangements and the way they challenge concepts of parenthood and citizenship. In fact, when European couples or individuals go abroad to conduct surrogacy, state authorities in their home countries might refuse to accept them as legal parents and further refuse to grant citizenship to the newborns. If the children's country of birth also refuses to accept them as citizens, they find themselves in a legal limbo, rendered stateless.

Proceeding from the perception of the media as a kind of *laboratory* in which the social acceptance of technology is negotiated, I am comparatively analysing how the cases of a German and a French couple who engaged a surrogate mother abroad were debated in the national media of the respective countries. At the core is the question of how citizens' perceptions of parenthood, as well as of "being French" or respectively "being German", are challenged by cross-border surrogacy arrangements and how different dimensions of parenthood and citizenship become reframed within these debates.

Jane Stoll, Faculty of Law, Uppsala University

Cross-border surrogacy and implications for the child's right to know his or her biological origins

The right to information about genetic origins is well established under international law. Two sources of the right are the Convention on the Rights of the Child (Articles 7 and 8) and the European Convention on Human Rights (Article 8). As regards the right's scope, however, not all contracting states agree. This is particularly evident where it concerns the right of donor offspring to access identifying information about the donor.

This paper considers the impact of cross-border surrogacy arrangements on the right of the surrogate-born child to information. Since cross-border surrogacy arrangements involve the addition of a third parent, the surrogate mother, it presents unique challenges for the way in which states interpret and support a child's right to know his or her origins. If the right to know is interpreted as applying to genetic origins and the commissioning parents are both the genetic parents of the surrogate-born child, where does this leave the gestational mother's contribution and on

what basis does the child have a right to know about the surrogate mother? How could, or should, this be facilitated by contracting states?

Sarah Jane Toledano, Department of Thematic Studies, Linköping University

Some Moral Reflections on the Phenomenology of Altruistic Surrogate Motherhood

Transnational surrogacy is rife with ethical and legal issues that pertain to the objectification and commodification of women and children, challenges to autonomy, exploitation of the poor and legal considerations of parenthood. Altruistic surrogacy seems to garner lesser criticisms than commercial surrogacy and have been recommended as the more acceptable form of surrogacy. In spite of such seeming acceptance of the unpaid and altruistically-motivated form of surrogacy, both the ethical and qualitative literature has been mainly conducted on commercial surrogacy, while there is a gap of knowledge on the dynamics of altruistic surrogacy.

Within the debate of allowing for transnational and commercial surrogacy, my project draws on concrete lived experiences of friends and family members who had successful or unsuccessful interfamilial altruistic surrogate arrangements. I aim to present the complex relational work that happens between intended parents and surrogate mothers that could inform our understanding of the significance of disclosure not only for the best interest of the resulting child but of the surrogate's own children as well; of the need to reframe dominant understandings of surrogate mother-child attachment; and of the meaningfulness of being unpaid on the quality of the surrogate's lived experience.

Tatiana Tolstoy, PhD Student at the Faculty of Law, Lund, Sweden

Belonging in a Global World – Born through Surrogacy

The technological and medical development creates families that no longer fit the image of a traditional nuclear family. Globalisation and social development on the whole has also created conditions for social acceptance of non-traditional family constellations. A child born through

surrogacy could, for example, end up having several different kinds of mothers, e.g. a biological, a genetic and a social mother. Nevertheless domestic law often recognises only one set of parents, i.e. the biological mother and the biological father, as being the legal parents of the child with the appurtenant legal rights and obligations. The child's sense of *belonging,* however, is dependent on the child having the opportunity to know at least who all his or her disparate parents are.

In his "hierarchy of needs", Maslow puts belonging on the third step, meaning that when our basic needs are satisfied, we all strive for a feeling of fellowship with others. *Belonging* is said to be, among other things, a process of identification with our social and material surroundings. In my thesis I use the concept of belonging to make the child's position in different types of family constellations legally clear and visible, to further an understanding of a developed construction of belonging in relation to the child in the family, e.g. in relation to the surrogacy. Alongside its interdisciplinary approach, the project is also a comparative study between different domestic family juridical institutes.

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DK-1061 Copenhagen K
www.norden.org

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Reproductive Technology and Surrogacy

During the past few years, reproductive technology and surrogacy have emerged in a number of European countries as issues of debate. There has been a steady increase in the use of reproductive technology in the Nordic countries, as well as an increase in the use of cross-border medical treatment in order to achieve pregnancy. At the same time, a number of ethical issues have been raised concerning the rights of the participants, including the children. In the fall of 2013, the Nordic Committee on Bioethics organised a conference in Reykjavik that focused on the current situation in the Nordic countries and on the global aspects of reproductive technology and surrogacy, including the market that is emerging in this field. This conference summary highlights the main ethical issues facing researchers, policymakers and practitioners who deal with these issues

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