View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Leiden University Scholary Publications

Visions on Surrogacy - From North to South: the approach of the Netherlands and South Africa to the issue of surrogacy and the child's right to know his origin

Simona Florescu[1] and Julia Sloth-Nielsen[2]

1. Abstract

This chapter compares the current situation regarding the requirement of a genetic link for the conclusion of a valid surrogacy agreement in South Africa, upheld by the recent Constitutional Court case of *AB and others* v *Minister of Social Development and Others (Centre for Child Law intervening as amicus curiae)*, CCT 155/15 (judgment of 29 November 2016), to the proposals for surrogacy published in December 2016 by the Government Committee on the Reassessment of Parenthood appointed in the Netherlands, also as regards the child's right to identity and the (possible) requirement of a genetic link. The different approaches for national and international surrogacy arrangements under both schemes are also discussed. Some conclusions are drawn regarding the more favourable alternative for implementation of the child's right to know his or her identity.

2. Surrogacy in The Netherlands

2.1. Placing the Netherlands in the broader European context

The status of surrogacy in Europe is at the moment subject to controversy. Pursuant to research conducted in 2014 covering 34 European states, surrogacy was expressly prohibited in 14 of them.[3] Ten other countries did not regulate it expressly, it being either prohibited under general legal provisions, not tolerated or left to legal uncertainty.[4] Further, according to the report, surrogacy is permitted under strict legal conditions in only seven of the 35 countries. These states are Albania, Georgia, Greece, the Netherlands, the United Kingdom, Ukraine and Russia.

---

[1] LLM, PhD Fellow, Department of Child Law, Faculty of Law, University of Leiden
[2] BA LLB LLM LLD Professor, Faculty of Law, University of the Western Cape and Professor of Children's Rights in the Developing World, Department of Child Law, University of Leiden.
[3] The research was conducted on the occasion of the delivery by the European Court of Human Rights of the judgment in the cases of *Mennesson v. France* (no. 65192/11, §§ 40-42, ECHR 2014 (extracts) and *Labassee v. France* (no. 65941/11, §§ 31-33, 26 June 2014, paras 31, 32. According to the research, the 14 states which expressly prohibit surrogacy are Germany, Austria, Spain, Estonia, Finland, Iceland, Italy, Moldova, Montenegro, Serbia, Slovenia, Suedia, Switzerland and Turkey.
4 These countries are Andorra, Bosnia Hertzegovina, Hungary, Ireland, Latvia, Lithuania, Malta, Monaco, Romania and San Marino.

Another controversial aspect is the recognition of filiation established following foreign surrogacy agreements. In this area the approaches seem equally diverse. Some countries ~~do~~ are more open to recognizinge~~e~~ (some) foreign birth certificates –provided the legal conditions where the surrogacy agreement was carried out were met-, others limit the recognition to the proof of a genetic link between one of the parents and the child, while others prohibit any kind of recognition.[5]

Against this diverse legal landscape where surrogacy agreements are clouded in legal uncertainty, in 2014 the Dutch Government commissioned a report seeking a complete reassessment of legislation in the field of parenthood in the Netherlands. On 7 December 2016 the report of the Government Committee on the Reassessment of Parenthood (*Staatscommissie Herijking Ouderschap*) was published[MB1].[6][A2] The report is structured in ten chapters covering existing legislation in the Netherlands in the field of parentage, custody and surrogacy and one chapter on proposals for amending the existing legislative regimes in this field. While such proposals have yet to become law, an overview on their content in the field of surrogacy is nevertheless interesting, especially against the prevailing legal landscape in Europe and the pragmatic approach of the Government Committee's proposals. This section will thus start with a brief overview of the existing regulation in the field of surrogacy, followed by a more detailed inspection of the proposals for change as well as their place within the broader European (human rights) framework. More attention will be devoted to the issue of requiring a genetic link with the commissioning parents, as well as the proposed regulation of the child's right to know his origins.

2.2 Existing legal framework in the Netherlands

As mentioned above, surrogacy at this moment is not illegal *per se*. However, the possibilities for surrogacy are heavily restricted to the point that in 2012 it was

---

[5] See *Mennesson v. France,* supra note 1, para 42~~33~~

[6] "Kind en Ouders in de 21ste eeuw." Rapport van de Staatscommissie herijking ouderschap" and in English "Child and parents in the 21st century. Report of the Government Committee on the Reassessment of Parenthood". It is available online here <https://www.tweedekamer.nl/kamerstukken/detail?id=2016D47681&did=2016D47681>>.

estimated that over the past ten years, roughly 10 children have been born through surrogacy.[7]

The only form allowed is altruistic surrogacy[MB3], i.e that is where the surrogate is not compensated in a commercial way. In the high-technological surrogacy cases – i.e. where the surrogate mother is not genetically linked to the embryo – surrogacy is only possible with the gametes of the commissioning parents.[8] There is one single Medical Centre in the Netherlands authorized to perform the procedure and this Centre has attached strict conditions for all parties involved, such as Dutch nationality for both the surrogate mother and the parents, residency in the Netherlands, etc.[9] Even though the Medical Centre requires that a contract be signed between the surrogate and the commissioning parents, it is agreed in practice that this contract is not enforceable.[10] In addition, the legal position[MB4] of child born following surrogacy is unclear as well as is the means of establishing parenthood for the commissioning parents.[11] In all cases, the surrogate mother will be the legal mother of the child, irrespective of any genetic links, and the commissioning parents may become the legal parents only following court procedures.[12] Commissioning parents may be registered as legal parents only if they adopt the child and this has to follow lengthy and cumbersome proceedings.

Commercial surrogacy is strictly prohibited.[13] Further, any activities that are perceived to encourage surrogacy such as using professional intermediaries or placing advertisements for surrogacy are criminalized.

Given the strict and unclear national regime on surrogacy it is speculated that some commissioning parents have resorted to international surrogacy, although there is no reliable data on the actual number.[14] In any event, commissioning parents wishing to have their child born via a surrogacy agreement abroad also face severe hurdles.

---

[7] N. Koffeman, *Morally sensitive issues and cross-border movement in the EU : the cases of reproductive matters and legal recognition of same-sex relationships,* Intersentia (2015), p. 295.
[8] N. Koffeman, *supra* note 4, p. 292
[9] N. Koffeman, *supra* note 4, p. 292
[10] I. Curry-Sumner and M. Vonk, Chapter 17: The Netherlands in K. Trimmings and P. Beaumont (eds.) *International Surrogacy Arrangements: Legal Regulations at the International Level*, Hart Publishing, Oxford, 2013
[11] N. Koffeman, *supra* note 4, p 293 and 2011 research report
[12] N. Koffeman, *supra* note 4, p 293.
[13] N. Koffeman, *supra* note 4, p 293.
[14] N. Koffeman, *supra* note 4, p 293.

Recognition in the Netherlands of a child born via surrogacy abroad can be divided into two main categories. First, there are the situations where the commissioning parents and the child are abroad and wish to either have the child recognized as their own by the Dutch Embassy abroad or require the issuance of a residence permit or other travel authorization of some kind for the child.[15]

The second scenario is that where the parents and the child have successfully arrived in the Netherlands (as for example where there was no need for a visa for the child) and wish to register the child as their own in the Netherlands.

Regardless of which scenario is applicable, the Dutch authorities will apply their private international law rules to recognize an act or fact created abroad.[16] (~~Book 10 of the Dutch Civil Code)~~[MB5]~~.~~ There are no specific rules yet on surrogacy. Even though recognition of foreign facts and acts are not in principle prohibited in the Netherlands, there are some situations where recognition would not be tolerated in the Netherlands. One such non-recognition ground is the public policy principle, under which Dutch authorities are not bound to recognize a foreign relation if the recognition would lead to a situation contrary to the fundamental principles and values of the Dutch system.[17] This ground was, for example, used in a situation where two homosexual men had a child via a surrogacy agreement in France. In France anonymous birth is permitted, hence they tried to register the child's birth certificate in the Netherlands without including the name of the mother. The registration was refused in the Netherlands on the ground that it was contrary to Article 7 of the Convention on the Rights of the Child (the 'CRC'), according to which each child has the right to know his or her own parents.[18]

While a lengthy discussion on how and when the relationship between Dutch parents and children born out of surrogacy agreements abroad may be recognized in the Netherlands is outside the scope of the present contribution, both the Government Committee's report as well as legal scholars agree that at present such recognition is clouded in legal uncertainty for all involved, i.e., the child, the surrogate[MB6] mother and the commissioning parents.

---

[15] I. Curry-Sumner and M. Vonk, *supra* note 9, p .15

[16] Book 10 of the Dutch Civil Code.

[17] L Strikwerda, *Inleiding tot het Nederlands Internationaal Privaatrecht* (Deventer, Kluwer, 2008) 53

[18] The District Court of The Hague, 14 September 2009, *LJN*: BK1197, also MV, p. 25

2.3 Current Government Committee proposal

Against this background, the Government Committee's proposal seeks to ensure legal certainty by putting forward solutions which in its view offer due respect and protection for the rights of all those involved in the surrogacy process. The main rights which were perceived to be at the core of the proposal were the right of the child to know his or her story of origin, as well as the rights of the surrogate mother to protection from exploitation. The Government Committee's proposal relates to both surrogacy within the Netherlands and surrogacy outside the Netherlands (i.e. rules on recognition).

2.3.1 National surrogacy

The new proposal for regulating national surrogacy is comprehensive and covers the position of the child, the surrogate and that of the commissioning parents. Under the new proposal, the only acceptable form continues to be altruistic surrogacy with the obligation for the commissioning parents to cover all actual costs incurred by the surrogate (medical, legal, employment, disability insurance, etc.). It is also estimated that an additional amount of 500 EUR/ month for the surrogate would be acceptable on account of carrying and delivering the child[MB7]. Such an additional amount would represent compensation for the surrogate's discomfort and pain during and after the pregnancy. Also, it would be most likely taxable income which entails that the surrogate would retain only a small amount. These factors together result in the agreement still being considered as altruistic.

The following sections will outline the main aspects of the proposal:

Availability of national surrogacy

The procedure will only be available if at least one of the commissioning parents as well as the surrogate have habitual residence in The Netherlands for the entire length of the surrogacy procedure. Nationality is not relevant; however situations where the habitual residence is established solely for the purpose of the surrogacy are excluded. It is not the aim to have the Netherlands become a destination for 'surrogacy tourism'.

Also, it is stressed that in principle there should be a genetic link between one of the commissioning parents and the child. This rule can be deviated from in exceptionally compelling circumstances (to be assessed by a court).

Furthermore, so as to make the procedure more accessible, it is proposed to that the government eliminate the criminal sanctions for the involvement of intermediaries. Under the new scheme, the Child Protection Board is to approve non-governmental organizations or private persons who may provide information on available surrogates for potential commissioning parents.

The procedure

The commissioning parent(s) and the surrogate are to enter into a surrogacy agreement which needs to be judicially approved prior to fertilization. The surrogacy agreement would be a family law type of contract (similar to marriage or legal partnership) and would follow general contract law rules of the Dutch Civil Code (Book 6, Articles 213 - 260). The surrogate must obtain independent legal advice prior to entering into the agreement.

As for the judicial approval, the Government Committee makes clear that the only viable option which would offer the best possible guarantees is that of *court approval*. Moreover, the Committee lays down clear guidelines on the scope of such judicial approval. Under these guidelines, courts would have to look at the following aspects of the surrogacy contract: free consent of the parties, remuneration, commissioning parents (criminal record, possibility of becoming a parent; genetic links or if not, compelling circumstances); the surrogate (receipt of independent legal advice, information and supervision, risks incurred, agreements on future access and contact rights with the child), habitual residence of the parties, and the possibility for the child to have access to his or her story of origin[MB8].

The court approval at first instance should not last longer than six months. After the court approval, the contract, including the identity of the surrogate, and the information about the gametes will be included in the Register of the Story of Origin which the child may access later in life.

The last step is to have the commissioning parents registered as legal parents of the child. This shall be effected[MB9] in the civil register on the basis of the court approved contract and registration in the Register of the Story Origin.

Even after the conclusion of the agreement and the court approval, there are situations where the surrogate mother can reconsider the handing over of the child. The proposed time allotted for such reconsideration is six weeks after giving birth. Also, there is no legal mechanism for allowing the surrogate to terminate the pregnancy, regardless of the considerations. Should they change their minds, the commissioning parents will become the legal parents even if they had wished the child not to be born. On the other hand, as long as the pregnancy has not started, any of the parties may terminate the agreement. After the pregnancy has started, in most cases the commissioning parents will be bound by the contract. They could only terminate such contract, and not be registered as legal parents, if there are no genetic links between either one of them and the child. Exceptionally, the intended parents may terminate the surrogacy agreement if there are no genetic links between the designated donor and the child , and they prove duress, mistake, fraud or misuse of power[MB10]. They may bring such an action at the latest within six weeks after the birth of the child. After this period, only the child will be allowed to bring a court challenge to terminate legal parenthood.

The rights of the child

The proposal for permitting national surrogacy is strongly based on the inherent rights of the child. The rights most prominently present are the child's right to know his origin, the child's right to a nationality, and the child's best interests.

It is thus perceived in the best interest of the child to create the so-called Story of Origin Register where the child can access comprehensive information on the identity of the genetic parents (wherever possible),the identity of the surrogate, and the circumstances of birth. The doctor or medical institution which provided assistance with fertilization as well as parents or third parties - with the permission of the parents - are entitled to register data on the Story of Origin Register. In the latter case, since they are not independent experts, they [MB11] would need to provide supporting documentation in order to register information. It is also interesting that it is expressly provided that the age limit for the child for accessing such information

should be removed[MB12]. Instead, a child of any age, if he or she is deemed to be able to reach a reasoned and valued assessment of his/ her interests, should be able to access the register.

On the child's right to a nationality, surrogacy agreements that would result in a child being stateless should not be court approved. The child should thus have the nationality of at least one of the commissioning parents, since the Netherlands does not automatically grant Dutch nationality at birth to children of foreign parents.

As part of the child's best interests assessment, the Government Committee also looked at the right of the child to have the parent-child relationship recognized in the country where the child will be raised. This issue would arise if the commissioning parents were habitual residents in the Netherlands but will move with the child after birth. Second, on the suitability of the commissioning parents to become parents, the question was whether the applicable scrutiny should be such a far-reaching one as that conducted in the case of adoption, or a looser one. The second test was preferred, given the difference between surrogacy and adoption. In the current proposal it was preferred to only restrict the accessibility to surrogacy for commissioning parents in cases of serious contraindications for parenthood. In other words, only if a high risk of serious harm to the child exists should the State refrain from cooperation in surrogacy plans.

2.3.2. Surrogacy outside the Netherlands

The Government Committee's proposal also extends to issues of recognition of foreign surrogacy agreements. The rule is that if foreign authorities have followed the same essential requirements as the Dutch Authorities would have, then the agreement would be recognized. Under this rule, if the foreign surrogacy agreement was subject to prior judicial oversight, the consent of the surrogate mother was freely given, and it was determined as such in court, and the child will have access to his or her story of origin, then there would be no issue to granting recognition in the Netherlands. On the other hand, Dutch authorities expressly mention that surrogacy via anonymous gametes and where there is no genetic link to at least one of the commissioning parents will not be recognized[MB13]. One change from the current system is that the Committee proposes that even if the birth mother remains anonymous, the surrogacy will be recognized, subject to compliance with the requirements above.

However, if the foreign process was not subject to judicial oversight and the birth mother's identity was not recorded in the birth certificate, such a situation would not benefit from legal recognition in the Netherlands. For all other situations where the surrogacy occurred abroad, but the mother is nevertheless registered on the certificate, it would be up to Dutch courts to issue a new birth certificate where the commissioning parents are registered as the child's legal parents. Such a process should be conducted in light of the child's best interests.

3. Surrogacy in South Africa

Two weeks before the release of the Government Committee's report in the Netherlands, the Constitutional Court of South Africa handed down the long awaited ruling in *AB and others v Minister of Social Development and others* (Case CCT 155/15). The case concerned the issue of surrogacy and in particular the Constitutional Court's position on the current legal requirement of a genetic link between at least one of the commissioning parents and the child.

This section will address in detail the questions put forth and the reasoning of the Constitutional Court in the case of *AB*. However, so as to relate the South African situation to the one in the Netherlands, the section will begin with an overview of the existing legal requirements in South Africa, followed by the analysis of the Constitutional Court's position and ending with the implications thereof for the position of the child born out of a surrogacy agreement, in particular on his right to know his origins.

3.1. Aspects of the current legal framework

In South Africa, Chapter 19, sections 292 to 303 of the Children's Act 38 of 2005 (fully in operation from 1 April 2010) are specifically dedicated to the issue of surrogacy. The act originated from a South African Law Commission Investigation (now South African Law Reform Commission) dating back to the early 1990s, largely before children's rights rose to such prominence. After 1994, the new Parliament appointed an *ad hoc* Committee which drafted a Bill on Surrogacy, which was however never tabled or adopted.[19] The inclusion of the chapter on surrogacy in the

[19] Draft Bill on Surrogate Motherhood, proposed by South African Law Commission, GN 512 GG 16479, 14 June 1995.

Children's Act, an Act which broadly speaking concerns the care, welfare and protection of children, gave effect to the Bill drafted a decade previously in an entirely separate process, as the Project Committee which had drafted the Children's Act had not debated surrogacy at all. The arguments of the *Ad hoc* Committee proved to be an important source of reasoning in the Constitutional Court in *AB*.

Sections 292 to 303, Chapter 19 of the Children's Act, delineate the procedural and substantive boundaries of surrogate motherhood agreements. Prior to April 2010, surrogacy was not regulated and the informal nature of the arrangement had led to legal uncertainty. It was widely accepted that altruistic surrogacy was allowed,[20] although the commissioning parents would have to have followed adoption procedures to establish legal parentage. Commercial surrogacy would have been considered *contra bonos mores*.[21] In [MB14] the current regulation, Section 301 prohibits the receipt of payment in respect of surrogate motherhood agreements, and provides for limited exceptions such as the payment of medical expenses. Commercial surrogacy is prohibited, and is a punishable criminal offence which carries with it the potential of 20 years imprisonment.

3.1.1. National surrogacy

Availability of the procedure

Section 292 clarifies that the surrogacy procedure in South Africa is available if at least one of the commissioning parents is domiciled in South Africa.[22] South African citizenship or permanent residence in South Africa does not, on its own, enable a person to become a commissioning parent or a surrogate mother in South Africa, as the requirement is domicile (see the Domicile Act 3 of 1992), which is found where a person is legally deemed to be constantly present (even if factually absent).[23] Also, the surrogate mother must be at the time of entering into the agreement domiciled in South Africa. What the Constitutional Court terms the "threshold requirement" is established by section 295(a), namely that the commissioning parent or parents must

[20] The issue came to the public attention in 1987 after a high profile case involving a mother who carried triplets for her daughter was reported in the press.

[21] ~~A. Louw "Surrogate motherhood" in T. Boezaart (ed) Introduction to Child Law in SouthAfrica, Juta and Co, Cape Town 2009~~L..Mills "Certainty about Surrogacy" 2010(3) *Stel L Rev* 429/

[22] "Domicile" requires that the person acquiring a domicile of choice must have reached the age of majority, have the mental capacity to make a rational choice, be lawfully present at the place where he or she has settled and must intend to settle at that place for an indefinite period. In the case of foreigners wishing to avail themselves of the South African surrogacy regime, it is doubtful whether they could satisfy the "intention to settle" requirement.

[23] H. Kruger and A. Skelton (eds) *The Law of Person in South Africa* Oxford University Press 2010.

not be able to give birth to a child and that such condition must be permanent and irreversible." A person is "conception infertile" if they are unable to contribute a gamete for the purposes of conception through artificial fertilisation. A person is "pregnancy infertile" if they are permanently and irreversibly unable to carry a pregnancy to term. In other words, both situations would meet the requirements of section 295(a) of the Children's Act. Once that "threshold" is established, the ~~prohibition at stake is contained in~~couple meets the requirement of s 294 which requires the parent(s) nevertheless to be able to provide a gamete for the purposes of fertilisation.[24]

Furthermore, Section 294 establishes that there should be genetic links between the child and both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, between at least one of the commissioning parents and the child. In the latter situation, it is possible to obtain the remaining gametes via anonymous donors. Thus, for instance, if a married father is able to donate gametes, the ovum could come from an anonymous source.[25]

The procedure

As in the Dutch proposal, in South Africa the procedure is based on a contract to be signed by the parties and approved in court. The agreements must be in writing and confirmed by a High Court prior to fertilisation in order for it to be valid. The Court must verify that all the conditions set out above have been met, including that the commissioning parents are fit to be parents and that the agreement is in the child's best interests. Section 293 advises when the consent of the husband, wife or partner of a commissioning parent is necessary, and when it can be dispensed with[MB15].[26] Section 297 speaks to the effect of surrogate motherhood agreements on the status of children. A child born ~~out of~~through surrogacy is for all purposes the child of the commissioning parents from the moment of her birth and the surrogate mother is obliged to hand over the child to them as soon as is reasonably possible thereafter. A

[24]Section 1 of the Children's Act 38 of 2005 defines a gamete as "either of the two generative cells essential for human reproduction."

[25] The Regulations Relating to Artificial Fertilisation of Persons, published in March 2012 (and updated in September 2016), issued in terms of the National Health Act regulate the use of IVF in the conception of a child. In terms of these regulations, the recipient of IVF treatment is not prevented from using both male and female donor gametes of their choice (*AB* par 100).

[26] According to section 293(3) the consent of a husband or partner of a surrogate mother who is not the genetic parent of a child can be dispensed with where it is unreasonably withheld.

surrogate motherhood agreement that does not comply with the Children's Act is invalid, and a child born of this agreement is deemed to be the child of the woman who gave birth to her. In addition, if the surrogate is also the genetic parent, she may, subject to court approval terminate the surrogate motherhood agreement within a period of sixty days after the birth of the child, according to s 298(1) of the Act. In this case, the surrogate mother who is ~~biologically~~ genetically related to the child will become the legal parent of the child. Section 300 subjects the continuation of the surrogacy agreement to the Choice on Termination of Pregnancy Act (92 of 1996) – and the decision to terminate lies solely with the surrogate mother (section 300(2). She must however inform the commissioning parents before the termination is carried out.

3.1.2 International surrogacy

The requirement of the Children's Act in section 292 to the effect that parties to a surrogate motherhood agreement must be domiciled in the Republic is generally thought to imply that surrogacy agreements concluded abroad will not be recognized in South Africa. However, the provisions of section 292(2) allow a High Court to dispense with the domicile requirement in relation to the surrogate mother – not the commissioning parents - 'on good cause shown" when deciding whether or not to confirm a surrogate motherhood agreement. This might occur, for instance, if a commissioning couple would like to use a foreign relative as a surrogate.

Heaton[27] has, however, argued recently that despite the fact that failure to comply with the domicile requirement would render the agreement invalid and unenforceable, there are indications that this requirement has not completely discouraged intermediary agencies from offering what appear to be international surrogacy services.[28] As regards South Africans obtaining a child via surrogacy abroad, the legal position is that they are not prevented from doing so, although they might encounter substantial difficulties in having their parentage recognised domestically.[29]

3.2 The Constitutional Court judgment

[27] J. Heaton "The Pitfalls of International Surrogacy: A South African Family Law Perspective" *Journal of Contemporary Roman-Dutch Law*, Vol. 78 (2015), p. 24-46, 2015
[28] Heaton note 26~~3~~ above at p32.
[29] Heaton note 26~~3~~ above at p41.

3.2.1 Background to the case

The facts in *AB* related to a situation of a single infertile woman who wished to have a child conceived via surrogacy. She could not have an agreement approved as it was not possible for her to have a genetic link with the prospective baby.

Specifically, during the period of 2001 to 2011 *AB*, who was 55 years old at the time of the initial High Court judgment in 2015, underwent a number of IVF cycles to conceive a child. Seemingly, 16 of the IVF cycles were done with embryos that had no genetic link to her. Of the 16, 14 used both male and female anonymous donor gametes. The IVF treatments twice resulted in pregnancy but ended in miscarriages. AB was advised to consider surrogacy as a means to have a child. She was however advised that she was not eligible to enter into a valid surrogacy agreement due to the requirements of s 294 of the Children's Act 38 of 2005, namely that there must be a genetic link between at least one of the commissioning parents and the baby to be conceived. *AB* then mounted a constitutional challenge to the validity of that requirement of section 294. In the High Court, *AB*[30] was successful, insofar as the judge ruled the "genetic link" requirement to be unconstitutional, striking down the impugned section, and referring the matter to the Constitutional Court for confirmation (as required by the Constitution).[31] A critical factor which prompted the High Court to declare Section 294 provisionally unconstitutional was the differentiation in law between the use of surrogacy and the use of IVF procedures. The IVF regime does not require that the parent or parents of a child to be conceived through IVF donate a gamete, while the surrogacy regime does. In the view of the High Court, this amounted to differential treatment, even though it was conceded that the two procedures were fundamentally different. The Court asked the question "how is the child's alleged interest in knowing its genetic origin promoted by targeting only surrogacy commissioning parents who elect to use double-donor gametes, but not prospective parents who use IVF and elect to use double-donor gametes?"[32][MB16][u17]

The constitutional challenge was further based on the grounds that the "genetic link requirement" in the impugned provision violates the rule of law and

[30] An organisation called the Surrogacy Advocacy Group joined the case as second applicant. The Centre for Child Law entered as amicus curiae.
[31] *AB v Minister of Social Development* [2015] ZAGPPHC 580; 2016 (2) SA 27 (GP) (High Court judgment). The referral for confirmation is required by section 167(5) of the Constitution.
[32] *AB* par 267.

AB's rights to equality, human dignity, privacy, reproductive autonomy and access to health care services.[33] The applicants [MB18]argued[u19] that there is no rational basis for the differentiation caused by the genetic link requirement. They argued that the exclusion of *AB* on the basis of infertility is discriminatory and unfair. The applicants also argued that the commissioning parents' rights to reproductive autonomy and human dignity are infringed by the genetic link requirement, because it prohibits the double-donor gametes decision by commissioning parents. Further, the applicants maintained that *AB*'s right to access to health care services and reproductive health care in terms of section 27 of the Constitution is violated.[34]

The Minister of Social Development, as the custodian of the Children's Act, opposed the application to strike down section 294 as unconstitutional on several grounds, namely that:

(a) It was not only *AB's* rights that were at issue, but also those of the child to be created by the surrogate mother and donor(s). The prospective child had the right to know its genetic origins.[35]

(b) The adoption process in South Africa catered for *AB*'s need to have a child.

(c) To allow a single infertile person to create a child with no genetic link to her would result in the creation of a "designer" child. This would not be in the public interest.

(d) Section 294 assists[MB20][u21] to prevent commercial surrogacy.

3.2.2. Reasoning of the Constitutional Court[36]

The Constitutional Court regards it as significant that the impugned provision resorts under the overarching principles of the Children's Act. Reference is made to Section 6(1)(a) which sets out general principles that guide the implementation of all legislation applicable to children, including the Children's Act. Section 6(1)(b)

---

[33] Par 238.

[34] *AB* par 270.

[35] Section 41 of the Children's Act makes provision for a child born as a result of surrogacy, or the guardian of that child, to have access to any medical information or other information concerning the child's genetic parent(s) after the child reaches the age of 18 years. This is consistent with the object of section 294 to ensure that the child becomes aware of its genetic origin. This is so even if the provision does not allow access to information regarding the identity of the surrogate mother in terms of section 41(2) (*AB* par 254).

[36] The Court was split 7-4, with both majority and minority writing lengthy reasoned judgments. Som~~n~~e reference is made to the minority judgement where appropriate.

provides that these principles will guide "all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general". In terms of Section 6(2)(a) to (c) all proceedings, actions or decisions in a matter concerning a child must—

"(a) respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interests of the child standard set out in section 7 and the rights and principles set out in this Act, subject to any lawful limitation;

(b) respect the child's inherent dignity;

(c) treat the child fairly and equitably".

Section 7 deals with the best interests of the child standard which must be applied in relation to all decisions taken in terms of the Act. The child's best interests are also a constitutional standard, encapsulated in section 28(2) of the Bill of Rights. Section 9 goes further to underscore the best interests of the child standard, in harmony with Section 28(2) of the Constitution. It provides that "[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied. Section 294 therefore [must] ~~falls to be considered~~ [MB22] in [u23] the context of the Children's Act as a whole…[t]he legislative scheme under Chapter 19, especially the impugned provision, also protects the child by ensuring that a genetic link exists when that child is conceived."[37]

In determining first whether the prohibition in section 294 infringes *AB*'s equality rights[38] in that it posits an irrational legal differentiation between would be surrogacy participants and IVF beneficiaries (because the IVF regulations permit double-donor gametes which section 294 does not), the Court notes that "[t]he correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection between the means chosen and the objective sought to be achieved. A mere differentiation does not render a legislative measure irrational. The differentiation must be arbitrary or must manifest "naked preferences" that serve no legitimate governmental purpose for it to render the measure

[37] See *AB* par 279 – 281.
[38] Section 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law."

irrational..”[39] Furthermore, the two procedures (IVF and surrogacy) are regulated under different statutes, each of which has different objectives. Rationality of a provision under one statute cannot be measured against the rationality of a provision in a different statute. Only when the regulatory measure itself does not serve a legitimate government purpose can it fall foul of section 9(1) of the Constitution.[40]

According to the majority judgment,

> “[t]he requirement of donor gamete(s) within the context of surrogacy indeed serves a rational purpose – the public good chosen by the lawgiver – of creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interests of the child-to-be born so that the child has a genetic link with its parent(s). Therefore, a rational connection exists.”[41]

Second, it is rational because it safeguards the child’s genetic origin, in the best interests of the child, in the view of the Court.[42]

Dealing with the finding of the High Court that, because gamete provision is not required in the context of IVF where double-donation of gametes is permitted, it should not be required in the context of surrogacy either, the Court hinged its arguments on the fact that a IVF parent would have gestational links to the child to be born, and more cogently that the risk

> “to children’s self-identity and self-respect (their dignity and best interests) is, unquestionably, all important. The fact that these rights are placed at similar risk in another context [IVF] is hardly a reason to find their protection irrelevant.”[43]

---

[39] *AB* par 285
[40] *AB* par 286
[41] *AB* par 287.
[42] *AB* par 288. The Court compares the disqualification of persons unable to donate a gamete to those with defective vision (blindness) or uncontrolled epilepsy and uncontrolled diabetes mellitus, who are disqualified from obtaining a driver’s license.
[43] *AB* par 290. The minority judgment views this entirely differently: “The second differentiation further demeans the dignity of the conception and pregnancy infertile by compelling them to accept that the law does not deem it necessary to police the implications of the choices of people who elect to use IVF, but does where surrogacy is employed”……(par 120)…”If all children must have a genetic link to at least one of their parents in order to have a worthwhile life, then this logic must apply in both the IVF and surrogacy contexts: it is discriminatory to require a genetic link in only one of these cases” (par 122).

The Court rejected the applicants' submission, originally endorsed by the High Court, that the "legal conception of family" was of critical importance to the determination of the matter. Rather, the Court held that it could not interfere with a lawfully and rationally chosen measure on the ground that the Legislature should have taken other considerations into account, or that it should have considered a different decision that is more preferable.[44]

Having determined that the prohibition in Section 294 met a legitimate government purpose and was not irrational, the next question to be determined was whether section 294 limited *AB*'s equality rights so as to constitute unfair discrimination. The High Court had held that the differentiation based on the genetic link requirement constitutes discrimination because it has the effect of excluding infertile persons who could not donate gametes "from accessing surrogate motherhood as a reproductive avenue."[45] The Constitutional Court did not agree. The alleged ground of discrimination is not based on the attributes and characteristics of *AB* or of other similarly placed persons, the Court said:

> "The impugned provision does not disqualify commissioning parents because they are infertile. It affords infertile commissioning parents the opportunity to have children of their own by contributing gametes for the conception of the child contemplated in the surrogate motherhood agreement …. But if that parent cannot contribute a gamete, the parent still has available options afforded by the law: a single parent has the choice to enter into a permanent relationship with a fertile parent, thereby qualifying the parent for surrogacy.[46] It is therefore the exercise of this personal choice that disqualifies her, not her infertility or the impugned section[MB24][u25]."[47]

[44] *AB* par 292. See too at par 294: "the substance below the surface is the need for a genetic link between a child and at least one parent. The importance of this genetic link is affirmed in the adage "ngwana ga se wa ga ka otla ke wa ga katsala" (loosely translated the adage means "a child belongs not to the one who provides but to the one who gives birth to the child").Hence clarity regarding the origin of a child is important to the self-identity and self-respect of the child. There is a rational nexus between the purpose of the legislative scheme, including section 294, that provides a framework within which individuals are able to have children and become parents in circumstances where they would otherwise not have been."

[45] *AB* par 298.

[46] *AB* par 302.

[47] The minority judgment disagreed, finding that the psychological impact that section 294 has on the excluded infertile persons was of such a magnitude as to limit their rights unfairly.

Having found no discrimination, it was therefore unnecessary to consider the question as to whether the discrimination was unfair.[48] Although outside of the scope of this chapter, it suffices to mention that the Constitutional Court also rejected the contention that the provisions of section 294 constituted an infringement of *AB*'s rights to freedom and security of the person and to reproductive autonomy (to make reproductive decisions), arguing that was an unduly strained interpretation of the constitutional right to make decisions concerning reproduction, given the context of surrogacy, in which the reproductive decision does not concern the woman's own body, but that of another: the surrogate, a point upon which the minority judgement diverges completely.[49] Similarly, the Court found that the Constitution does not give anyone the right to bodily integrity in respect of someone else's body.

4. Surrogacy and the right to know one's origins

The examples of The Netherlands and South Africa are illustrative both for the approaches taken to surrogacy as well as highlighting the continuing and divergent debates on the topic. Clearly, important factors which play a role in choosing to regulate surrogacy include the rights of the surrogate and those of the child. Ultimately, however, we believe that it is key to protecting the interests of the child to be born. Here guidance is to be found in the CRC which, even though drafted at a time when surrogacy was not on the international agenda, remains the only comprehensive treaty covering the rights of the child.

The child's right to know his origin is included in Articles 7 and 8 of the CRC. The relevant parts read as follows:

[48] The minority judgment deals with the issue as part of its limitations analysis (par 139 et seq.). Reviewing the objectives alluded to by the respondent Minister, the minority found there were adequate provisions to curb commercial surrogacy, including hefty criminal sanctions, without relying on a genetic link. Second, the minority Court was confounded by the assertion that section 294 would prevent "designer children" (whatever these were and whether they were backed by any scientific evidence). Third, it was argued that the purpose of section 294 is to ensure that children born of surrogate motherhood agreements will be able to know the identity of one of their genetic parents, or, ideally, both. But then logically, the minority Court held that all children should have the right to know their genetic identity, which section 41 of the Children's Act prohibits: children born as a result of surrogate motherhood agreements or double donor gametes are, as of birth, barred by law from finding out the identity of any gamete donor who contributed to their conception. A child is entitled to medical and other information about the donor in terms of section 41(1), but that person's identity may not be revealed in terms of section 41(2). Thus, according to the minority judgment, section 204 cannot have as a purpose the aim of ensuring children born of surrogacy may know their genetic origin, since the Act is not even handed when it comes to which child may, and which may not, know their genetic origin. Dealing with the last argument, that section 294 prevents parents from circumventing adoption processes by requiring a genetic link, the minority finds this to be the true purpose of the section, but dismisses this as a basis for the limitation of rights inherent in requiring a genetic link: "adoption and surrogacy are fundamentally different, it cannot be correct to limit surrogacy purely because the outcome is the same as adoption' (par 184).

[49] *AB* par 75.

Article 7 (1): “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”

Article 8 (1): “States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

The text of Article 7 (1) is particularly relevant to the child’s right to know his origins in the context of surrogacy. Interestingly, the drafters appeared to intend to limit the right of the child to know his origins to situations where national legislation (for example) provides for anonymous adoption or in vitro fertilization. [50] Nevertheless, some argue that the inclusion of Article 8 (1) was effected precisely with the purpose of granting the child an unqualified right to preserve the identity, save for circumstances where it is factually impossible to do so.[51] The restriction of Article 7 (1) should only apply where it would be factually impossible to give effect to the right to know and be cared for by parents due, for example, to family separation occasioned by war or where the birth parents have voluntarily abandoned the child and they cannot be located.[52] While this argument is yet to be accepted across the board, in the case of surrogacy there is a growing movement in favour of the prohibition of using anonymous donor gametes on the basis that, among others, this would be contrary to the child’s right to know his identity.[53]

The discussion above should not necessarily lead to the conclusion that the child’s right to an identity is only preserved if surrogacy is conditioned on a genetic link with at least one of the commissioning parents. The cases of the Netherlands and South Africa are illustrative for diverging positions on this aspect, both motivated by the aim to secure the child’s right to an identity.

---

[50] D. Hodgson "The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness" (1993) 7 *Int'l JL Pol'y & Fam* 255 at 264-265.

[51] M. Giroux and M. De Lorenzi “Putting the child first” A necessary step in the recognition of the right to identity, 27 *Can. J. Fam. L.* 53 2011 p 77.

[52] M. Giroux and M. De Lorenzi, supra note 45, p. 74

[53] HCCH, A STUDY OF LEGAL PARENTAGE AND THE ISSUES ARISING FROM INTERNATIONAL SURROGACY ARRANGEMENTS, Prel. Doc. No 3C (The Study), March 2014; .Giroux and M. De Lorenzi, supra note 50~~45~~, p. 56.

In the Netherlands for example, the current Governmental Committee's proposal sees the genetic link between the child and the commissioning parents as important but not determinative. Thus, it is possible to have a surrogacy agreement in absence of a genetic link between the commissioning parents and the child if there are extraordinary compelling circumstances to be determined by a court. However, it is prohibited to use gametes from anonymous donors in all cases. Moreover, all available data shall be recorded in the Story of Origin Register, which the child shall have access to from the moment a judge determines that he or she possesses the requisite level of maturity. The genetic link between the child and at least one of the parents is however required in the case of international surrogacy. Also, in the case of international surrogacy, the Dutch authorities would in principle only recognize agreements where the child has access to the story of origin, and this requirement is rooted in Article 7 of the CRC. In other words, the approach seems to be rather pragmatic, in that the genetic link requirement becomes of crucial importance in international surrogacy where there is a higher risk for the child to have limited or no access to information surrounding his birth. In the national cases, where regulations will lay down clear conditions for registration in the Story of Origin Register, coupled with the prohibition of using anonymous donor gametes, the Government Committee has deemed that in certain limited circumstances the genetic link requirement may be dispensed with.

As discussed above, South Africa also allots significant weight to the child's right to know his origins. Yet, the way such right is preserved is different from that in The Netherlands. Arguing from a child rights perspective, the amicus curiae (The Centre for Child Law) in the case of *AB* had proposed that section 294 entailed that the child-to-be-created had the right to know about his genetic origins, which purposes were ensured by this section. Also, in the drafting of the provision, the rationale behind the *Ad hoc* Committee's recommendation was framed in the following terms:

> "In the instance where both the male and female gametes used in the creation of the embryo are donor gametes, it would result in a similar situation to adoption, as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child. This type of surrogacy was not preferred by

> commentators. It was felt in both partial and full surrogacy it should be a pre-condition that the child or children should always be genetically linked to the commissioning parent or parents."[54]

The same view was ultimately shared by the Constitutional Court which upheld the validity of section 294. However, in South Africa, as opposed to the Netherlands, while requiring a genetic link with at least one of the commissioning parents, it is allowed at the same time to use gametes from anonymous donors. Thus, there can be situations where a child has access to information about his story of origin story only in respect of one biological parent. Another difference is that in South Africa there is no comprehensive preservation of details in a Story of Origin Register, where the child could later in life have access to information about the circumstances of birth. (Although the Regulations Relating to Artificial Fertilisation of Persons of September 2016 do provide for comprehensive data on donors (including their identity) to be collected, revelation of this information is restricted by both the Regulations and section 41 of the Children's Act.) Seen in this light, it is not surprising that the genetic link requirement is so important in South Africa and could never be dispensed with. It is were not the case, there could be situations where the surrogate born child would have absolutely no identifying information about the circumstance of his birth, other than the limited information provided for in section 41, it medical information concerning the child's genetic parents (section 41(1)(a)) and any other information concerning the child's genetic parents except their identity, after the child reaches the age of 18 years (section 41(1)(b)).

6. Conclusions

This contribution presented two different and new positions in respect of surrogacy, focusing in particular on the genetic link requirement and the compatibility of such a requirement with the child's right to know his origins. Based on the analysis above, it could be concluded that allowing anonymous donations of gametes for the purposes of surrogacy is arguably not in line with this right; however in the case of South Africa, this has been partially alleviated by the obligation in all cases to establish a genetic link between the child-to-be and one of the parents in the context of surrogacy. A different solution was opted for in the Netherlands where, while

[54] Par 244.

permitting the genetic link requirement to be dispensed with in "extraordinary compelling circumstances," the new legislative proposal aims to fulfil the content of the right to an identity by banning anonymous donations of gametes in all cases and by setting up a Story of Origin Register for the child to have access to comprehensive information on the circumstances of birth. This proposal seems indeed to better achieve the underlying goal of ensuring the right to an identity, although it has not yet been tested and it is limited to national surrogacy. International surrogacy, which may have a significant impact on a small country like the Netherlands, remains prone to less legal certainty and to more situations where the right to an identity will not be fully complied with. It remains to be seen if the international community will achieve more harmonization in this controversial yet important area for the right of the child.