Reproductive BioMedicine and Society Online (2018) 7, 47–54

www.sciencedirect.com
www.rbmsociety.com

SYMPOSIUM: MAKING FAMILIES

At the nation's doorstep: the fate of children in France born via surrogacy

Jérôme Courduriès

Université de Toulouse Jean Jaurès, Toulouse, France
E-mail address: jerome.courduries@univ-tlse2.fr.

Jérôme Courduriès is an anthropologist who lectures at the University of Toulouse Jean Jaurès in France, and conducts research at the Centre d'Anthropologie Sociale, Laboratoire Interdisciplinaire Solidarités, Sociétés, Territoires. He is a member of the research team of the ETHOPOL programme funded by the French National Research Agency. His research is in the fields of kinship and gender anthropology. After his doctoral studies on gay couples, he became interested in the consequences of homosexuality on the experience of kinship. He currently works on surrogacy, and on the way that kinship relationships develop around a child born following this method of assisted reproduction.

Abstract Surrogacy has been prohibited in France since the Court of Cassation condemned it on the grounds that 'only merchandise can be the object of contracts' (in 1991), and decided that 'any contract concerning procreation or gestation on behalf of a third party is void' (in 1994). French people who undertake surrogacy abroad act knowingly against French law. Once a child is born through surrogacy on foreign soil, except in rare cases, the birth is not included in the French register and the newborn is thus held at the gates of the national community. Most of these children have a foreign birth certificate and the nationality of their land of birth. This paper presents research currently in progress, and reports on interviews conducted in France with 28 families, 16 of which were formed by gay male couples, 11 by heterosexual couples and one by an unpartnered gay man. One surrogacy arrangement took place in Russia, one in Poland and one in India; the others were completed in North America (mostly in the USA but also in Canada). The research method and the characteristics of the families are described briefly, in addition to the legal, ethical and political context concerning surrogacy in France. The situation of the children born abroad through surrogacy is then analysed, to demonstrate that it is reminiscent of the historical assimilation of filiation with transmission of French nationality, from which children considered illegitimate have been excluded.

KEYWORDS: surrogacy, civil status, kinship, nationality, France

Introduction

There are a number of restrictions surrounding assisted reproductive technology (ART) in France, including the degree of access to medically assisted reproduction for female couples and unmarried women, trans people and women over 43 years of age, as well as the ability to act as a surrogate for others. Such discrimination, where the law regulates who can and cannot access ART, does not mean

https://doi.org/10.1016/j.rbms.2018.11.003

that the French definitively renounce parenthood for these groups. Some turn to adoption, although very few become parents this way, given the increasing scarcity of children available for adoption not only in France but also abroad, where there has been significant demographic change and priority is now given to national adoption (in accordance with Article 4 of the Convention on 29 May 1993 on the Protection of Children and Cooperation in Respect of Intercountry Adoption) (Roux, 2015). A decline in the number of children available for adoption does not, however, suffice to explain the lack of enthusiasm of potential adoptive parents. For many, adoption becomes the default choice only when all attempts to have a biological child have proved unsuccessful, and as such is often only used as a back-up plan (Ramírez-Gálvez, 2014). All this leads men and women in France who are prevented from achieving paternity or maternity by institutional and legal channels to turn to other countries with less restrictive legislation.

When a child conceived by surrogacy is born abroad, in a country where this assisted reproductive technique is permitted (or at least not prohibited), a birth certificate is issued. In accordance with local legislation, the parents named on the birth certificate can be the intended father (or one of the two intended fathers in the case of gay couples) and the woman who gave birth, the intended father (or one of the two) alone, or both intended parents. The birth certificate is drawn up in compliance with local law governing parentage and, where applicable, surrogacy. In itself, the birth certificate has no effect in terms of French civil status, but must instead be transcribed by the Central Civil Registrar in Nantes, the sole body responsible for the civil status of French nationals abroad. The request may be made through the French consulate of the country of birth or directly to the Central Civil Registrar. Independently of obtaining this transcript, the parent on the foreign birth certificate, if the latter is French, can request a certificate of French nationality for the child. A number of parents are reluctant to declare the birth of their child out of a fear of prosecution, given the prohibition of surrogacy in France. In cases where the child does not have a passport due to being born in a country where 'jus soli' exists, the parents can nonetheless return to France after having obtained a consular pass. In theory, in order to remain on French soil, the parents must request a residence permit for the child and obtain its renewal. More often, however, families forgo applying for this document, and the child thus cannot leave the country or risks being unable to return to France.

Once parents have obtained the child's foreign birth certificate and passport or consular pass, they may safely return to France. The first real difficulties arise, however, when parents request the transcript of the birth certificate from the Central Civil Registrar, which has been denied in mnay cases. These refusals were systematic until 2015,[1] and if transcripts have been provided more recently, they do not resolve all of the issues which arise relative to parentage. Upon requesting a certificate of French nationality for their child, some of the parents in this study had still not received a response more than 1 year after their original request, although children with at least one French parent are supposed to become citizens automatically. In the majority of cases, children born abroad by surrogacy are denied French civil status, and there are delays in the issuing of certificates of French nationality. A form of distrust affects such children. This is linked to the illegitimacy of surrogate motherhood from the point of view of French law. However, it is also the result of a construction undoubtedly specific to France which assimilates the nation to the family, and thus weaves a close link between filiation and transmission of nationality (Robcis, 2013). In what follows, I provide a reflection on the variety of issues at play in the disapproval of children born via surrogacy abroad and of their parents, as well as the practical, symbolic and political implications of this exclusion of part of the national community.

Materials and methods

The findings presented in this paper form part of a larger on-going research project on surrogacy experiences that commenced in 2013. The study utilizes ethnographic methods: in-depth interviews; long-term exchanges with certain families; life histories; meetings with parents, children and, in a second phase, grandparents; and, in North America, meeting with surrogate mothers, their relatives and intermediary agencies.

To date, the project has included 28 families: 16 gay male couples, 11 heterosexual couples, and one man who was single when his child was born, but has since begun a relationship with another man. One surrogacy took place in Russia, one in Poland and another in India; the others took place in North America (primarily in the USA, but also in Canada). Most of the men and women who were interviewed became parents when they were aged 30–45 years. I conducted several interviews lasting several hours with most of these families in their own homes. While the analysis of the narratives of associations and the media suggests that heterosexual couples are the first to have resorted to surrogacy and that surrogacy is very popular among this group, gay couples were more numerous among the families I interviewed. I hypothesize that heterosexual couples are more attached to a form of discretion and hesitate to make themselves visible, whereas gay couples, in addition to surrogacy, more broadly defend the legitimacy of families founded by same-sex couples.

All of the couples I spent time with had sufficient financial means to cover the cost of a surrogacy. While some had relatively high incomes (e.g. executives, highly qualified engineers, business leaders), others were employees, shopkeepers, physiotherapists, nurses and teachers, who often had to borrow money to finance their plans.

I also met 21 magistrates and five lawyers in semi-directive interviews in their own offices. They received me in their offices during their working day, and these interviews were more formal and lasted between 45 min and 2 h. The judges I interviewed did not all have the same

[1] The Court of Cassation provided verdicts on two cases on 3 July 2015, each involving a male couple who had employed the services of a surrogate in Russia. On the birth certificates, the name of one of the men appeared together with that of the surrogate mother. The Court of Cassation ordered the transcription of the original birth certificate but did not pass judgement on the parentage of the other father.

skills in the field of surrogacy. Most of them, in the courts of first instance ('tribunaux de grande instance') throughout the national territory (total of 173), must decide on the application for adoption by the non-biological father in gay couples. One of the prosecutors from the Civil Prosecutor's Office in Nantes, with whom I had a long interview, is the only person involved in handling requests for the transcription of birth certificates of children born abroad via surrogacy.

I also scrupulously analysed the French bioethics laws first promulgated in 1994, the French court decisions concerning surrogacy, and decisions made by the European Court of Human Rights.

Surrogacy prohibited in France

The World Health Organization views surrogacy as a technique of medically assisted procreation (Zegers-Hoschschild et al., 2009). In some countries, such as Brazil, surrogacy is not covered by parliamentary legislation, but has been permitted and regulated since 1992 by the Federal Council of Medicine.[2] In other countries, like Israel, surrogacy has been regulated since 1996 by a law which provides that all requests be examined by a state medical commission which decides on the veracity of the couple's infertility (Teman, 2010). Up until the 1990s, there was nothing in French law on the practice of surrogacy, and thus the latter was neither regulated or prohibited. In 1991, the Court of Cassation condemned the practice of 'surrogate mothers' on the grounds that 'only those things in commerce can be the object of contracts' (Article 1128 of the Civil Code). The law of 29 July 1994 made the prohibition explicit, specifying that 'any contract concerning procreation or surrogacy for others is void' (Article 16–7 of the Civil Code). Moreover, the same article states that 'the provisions in the present chapter are of public order' (Article 16–9 of the Civil Code).

Despite the clear position of French law, surrogacy was at the heart of the fierce debate and controversy that shook France during review of Law No. 2013–404 of 17 May 2013, which opened marriage and adoption to same-sex couples.[3] In 2018, surrogacy became a subject of debate once more upon the re-examination of bioethics laws (CCNE, 2018). Defining the acceptable – or desirable – conditions for access to paternity and maternity of French nationals is one of the many contentious issues, as is the capacity of a woman to decide to bear a child for another, the appropriateness of remunerating her, and the admissibility of resorting to cross-border surrogacies. While these questions are most salient in public debate, they mask other questions that are no less important and which affect, in particular, the fate of children born abroad via surrogacy but who now live with their parents in France.

[2] See resolution CFM No. 1.358/1992, brought to my attention by Flávio Luiz Tarnovski. http://www.portalmedico.org.br/resolucoes/CFM/1992/1358_1992.htm (accessed 22 July 2017).

[3] Such attention was perhaps surprising given that this technique also concerns numerous heterosexual couples.

Discontinued lineages

Surrogacy is certainly a medical, and potentially a commercial, technique, but it is also a kinship practice that consists of giving a child to those without, and in doing so creates multiple kin ties around the child. Surrogacy thus also extends other forms of kinship, such as more traditional types of adoption and the circulation of children.

In situations where men and women become parents as a result of using ART or through adoption, the very fact of having developed a project of having a child always forms the foundation of the feeling of being the parent, as much for the biological parent as for the adoptive parent. This sentiment also forms the basis of their parentage in the eyes of their friends and family, of the surrogate mother and her family, of the egg donor, and of the intermediary agency in cases of surrogacy. Childhood professionals (e.g. teaching personnel, paediatricians, social security service providers, early childhood professionals, etc.) similarly consider them to be parents.

Parentage or filiation discussed here is thus to be understood in the sense of the experience of parents, children and the people and institutions that surround them. It is the 'practical kinship' described by Florence Weber (2013), anchored in daily experiences of care and of life spent together under the same roof, in turn producing consubstantiality (Carsten, 1995) and sentimental ties between parent and child. It is also the result of a de-facto recognition by childcare and health institutions of parents and children as such. In English, the word is 'parenthood', but in French, this term, used primarily by clinicians and social workers, is almost exclusively centred on care, educational tasks and parental love.

People who rely on a surrogate are perfectly aware that the family ties they endeavour to form are likely to be challenged. They also know that the genetic link between parent and child can, as a last resort, be called upon as irrefutable evidence. Furthermore, like their contemporaries and in accordance with Euro-American kinship ideology, they are convinced that ideal paternity and maternity is based on biogenetic ties. It is precisely for these reasons that resorting to the use of surrogacy abroad, despite debate over the latter in their own country, does not seem like such a bad solution. My research participants desired a biological child and were also aware that, within Western society, the biological link between parent and child is an important criterion for establishing and strengthening kinship ties. Take, for example, the following case of Arthur and Erwan.

Arthur (48 years old, entrepreneur) and Erwan (45, researcher) have two boys: Léandre, 7 and Barthélémy, 4. Both children were born by the same surrogate mother, Mircella, in the USA. Arthur is the father of their sons, as Erwan was unable to donate his sperm. While the grandparents on both sides are very actively involved, the two fathers remember that Erwan's mother was troubled by their decision to have children:

> I remember initially she wasn't sure she could think of him as her grandchild… because I am not the biological father. I remember now that it took her a while to understand. It was confusing for her. Would she really be the grandmother? What would be her

> place relative to the child? [that was before Léandre was born]. I know there were remarks: 'In any case, I'm not his grandmother' and I said, 'I will be his father, it's up to you whether you want to be his grandmother.'
>
> [(Erwan)]

Blood (or its metaphorical equivalent, genes) is always the primary medium of filiation, which links children and their parents, but also of lineage, joining generation to generation (Courduriès and Fine, 2014; Goodfellow, 2015). Certainly, in every family, blood and genes alone do not suffice to build emotional attachments among grandparents, parents and child; reciprocal affection and different dispositions favouring a form of symbolic recognition must also be taken into account. Today, the initial doubts of Erwan's mother about the genetic link are forgotten because upbringing and education have been equally important for establishing the ties with her grandchildren.

Parents who have used a surrogate welcomed their child upon birth; loving, caring, nurturing, raising and making decisions about their education from the very beginning. They think of themselves as the parents of their child, and the latter similarly sees them as such, as do their family, friends, and childcare and health institutions. In short, surrogacy, like other techniques of assisted reproduction such as adoption, fosterage and gamete donation, is a kinship technique (Courduriès, 2016). The aim is not, certainly, to equate assisted reproductive techniques with traditional practices enacted in the absence of a child, such as the gifting of children, fosterage, or the substitution of a husband by a third party for procreative purposes. Rather, when a couple is faced with infertility, these techniques constitute solutions, allowing them to become parents by dissociating procreation from filiation.

All of the parents I interviewed insisted that the recognition of the relationship between each of the two parents and their child by civil status would also make it possible to link their child to his or her grandparents. As French law, to date, does not guarantee this, parents use other strategies to confirm their child's family affiliation. For example, they choose first names for their children that are borrowed from grandparents, great grandparents or godparents (Courduriès, 2017a).

The project of having a child, providing care, reciprocal love, providing an education, recognition by others, and a biogenetic link are all important parts of filiation. Yet in order for this parentage to be entirely complete and the child to be conclusively inscribed within the lineage of each parent, and more broadly, within a group of relatives, another essential component is needed: the legal dimension. Legal recognition of parentage requires the issuance or the transcription of a birth certificate by the French Civil Registry. When a request for transcription for a child born via surrogacy abroad is denied by the Central Service of the Civil Registry, the child does not lack a civil status as they retain their US or Canadian birth certificate. A foreign birth certificate does not, however, provide all of the rights transcribed by the French Civil Registry. For example, when parents apply for a French passport or a national identity card for their child, the administration can consider the foreign birth certificate insufficient for proving French nationality, and can deny the request. A child with a US or Canadian passport can travel, but children born in countries where 'jus soli' does not exist, such as the Ukraine, India or Russia, do not have a passport. In such cases, the parents must obtain a consular pass allowing the child to return with them to France. It is perhaps within the realm of inheritance that the incompleteness of parentage is most discriminating. More specifically, in the absence of any recognition of filiation by the state via transcription in the French Civil Registry, or in the event of a partial transcription (whereby only the name of the biological parent appears), a child born by surrogacy abroad cannot inherit from either, or one, of his parents, depending on the case. The parents may choose their inheritance legacy, but the latter will be subject to a higher taxation rate foreseen for foreigners, as French law significantly favours transmission between (recognized) parents and children.

Such issues are not simply of a material nature, but affect the inclusion of the child within the lineage of each parent. In other words, most children born via surrogacy do not, under French law, have the same inheritance rights as those of all other children upon the death of their parents. Grandparents, parents and grandchildren are thus considered as foreigners, and the lineage is discontinued. To this regard, a study of the fate of illegitimate children who, from the modern period up until very recently, were excluded from the line of descent is striking (Steinberg, 2016). Laurence (47 years old, psychologist), partnered with Hervé (48 years old, nurse) spoke about this point. Hervé felt that her two children (12 years old at the time of our first interview) are 'ghosts of the Republic' ('des fantômes de la République'). This is an expression that has been mobilized in public debate by advocates for the recognition of parent–child relationships between parents and children born of surrogate gestation abroad. When I asked Hervé to clarify her thinking, she gave me some additional explanations:

> Today, my children are officially French. But they do not have a French birth certificate. The civil status considers that they do not exist.
>
> [(Hervé)]

In France, contemporary perceptions of the family as composed of child and parent(s) hide the fact that the child, once their civil status has been established, is linked with their parents and, beyond them, not only to their ancestors, but to the larger society to which they belong. In French, there is just one word which describes this mechanism: filiation. In comparison, the English language has a broader related vocabulary allowing, for example, British anthropology to distinguish between two concepts: filiation and descent. The first refers to the way in which one is related to one's father or mother, but also to the latter's parents and grandparents. In other words, the generation process. The second pertains to the way in which one enters, permanently and involuntarily, a group that is itself part of society. It is this dual aspect of filiation that is challenged in the French context, where the production of a birth certificate conditions the issuance of a national identity card and passport. The impossibility of producing the birth certificate in its French version compromises, at least for a time, the obtainment of a certificate of nationality.

An equivocal civil status

In many countries, the original birth certificate recognizes the biological father as the father of the child and the surrogate mother as the mother. A large number of North American states which allow and regulate surrogacy foresee that several weeks or months following birth, the surrogate mother may renounce her maternal rights, and a new birth certificate can be issued linking the child to the two intended parents (independent of whether they are a gay or heterosexual couple). This is typically done by a simple declaration recorded by a judge who establishes the child's new civil status; this can also be done before birth (the pre-birth parental order is available in California, for example). Occasionally, the establishment of filiation with another parent takes place through the adoption of a partner's child. All of these acts are performed in the state where the child was born, and thus have nothing to do with French law. In some situations, the surrogate mother continues to appear as the legal mother even if a number of years have passed since the birth of the child. This is the case, for example, for surrogacies in Russia, where the surrogate mother can never cease to be the legal mother.

At a daily and practical level, the surrogate mother is rarely recognized as the mother of the child, nor does she see herself as such (Ragoné, 1994; Teman, 2010). However, from the point of view of the Civil Registry, for several weeks, months or even years, she is the mother of the child she carried as a surrogate. From a legal standpoint, this means that she has the rights and duties of a mother during this time. However, during my research, I have not encountered any parents who thought that these rights and duties would have any effect whatsoever in practice.

Children born via surrogacy abroad to French parents have foreign birth certificates. The vast majority do not, however, have French civil status despite the fact that, under normal circumstances, a simple request made to the French Consular Services or to the French Civil Registry in Nantes would suffice. As soon as the Civil Registry Office suspects a surrogacy, however, the matter is referred to the Civil Prosecutor's Office in Nantes who, if the surrogacy is proven, often refuses transcription requests. The amount of attention that has been given to the issue of surrogacy in recent years in France is double-edged in that the practice is certainly better known and has become the subject of more informed discussion, but the suspicions of civil registry officials have been sharpened, and they have become more fastidious with regard to foreign birth certificates. It is also likely that the Ministry of Foreign Affairs and the Civil Prosecutor's Office remind them to be vigilant. According to members of family associations, more and more intended parents turn to places where the surrogate mother normally appears on the birth certificate, as opposed to countries where the preference is to immediately state the names of the intended parents as the legal parents. This can come as a surprise to those who have long aspired to have a child of their own. In fact, encouraged in this sense by specialized lawyers and associations of childless parents or parents of the same sex, they think that this will facilitate recognition of their parentage by the French Civil Registry. However, according to the public prosecutor in charge of the Civil Prosecutor's Office in Nantes, with whom I met in November 2015, a birth certificate bearing the names of two intended parents, and not the name of the woman who gave birth, cannot be transcribed, as the latter is not 'in compliance with the law'.

There are some exceptions, some of which date back quite a few years. When I met Nadine (48, decorator) and Louis (50, educator), they had two children, Sophie and Léo, both aged 9 years. The children had American civil status, as they were born via surrogacy in California. According to their birth certificates, Louis and Nadine are their intended parents, but also their biological parents. For 8 years following their birth, given that surrogacy was a clandestine practice and the couple feared possible criminal consequences, Nadine and Louis decided not to request the transcription of the birth certification by the French Civil Registry. However, because they were concerned about potential difficulties in the event of their deaths, and they felt that it was important that their children were fully recognized as their own in France, they finally decided to file a request for transcription in 2011. Three months later, the transcription was done. At the time, the couple knew families whose requests had been denied, and Nadine still cannot explain why their transcription was granted so easily. Perhaps their request was reviewed by a civil servant with little awareness of surrogacy or, conversely, who was particularly conciliatory. The fact remains that although a few transcriptions were granted after multiple appeals in 2016, this remains exceptional.

Upon being denied a transcription, some parents filed an appeal to the Court of Cassation and the European Court of Human Rights. In the cases of Labassé and Mennesson (two heterosexual couples who had used surrogacy in North America), the European Court of Human Rights delivered two judgements against France on 26 June 2014, finding a violation of Article 8 of the European Convention on Human Rights concerning respect for the privacy of children. Along similar lines, another judgement against France was delivered in the case of Foulon and Bouvet (two men who have a daughter and twins all born via surrogacy in India) on 21 July 2016. While these judgements go in the same direction, they contradict French legal decisions made before June 2014, which resulted in a refusal to transcribe birth certificates of children born via surrogacy and the confirmation of this decision upon appeal. However, according to the European Court of Human Rights, links with the birth parent (or, in this case, the biological father) should be recognized and transcribed to civil status. The Court of Cassation subsequently revised its positions in the judgements of 3 July 2015, mentioned above.

From the point of view of the Civil Registry, the fact that the parents deeply desired a child, that they raise and care for them, and that everyone around them recognizes them as the parents does not suffice. These are not the criteria that count in defining what parents and children are to one another. That is how the prosecutor from the Chief Prosecution Office in Nantes explained himself. Perhaps more surprisingly, the fact that one of the parents, or even both, is (are) the biological parent(s) is irrelevant. There are two explanations for this. The first explanation is that neither the Civil Registry nor the Civil Prosecutor's Office in

Nantes have the power to request a DNA test.[4] The second explanation regards the views of both civil registry officials and the Civil Prosecutor's Office relative to the birth and even the conception of a child. In order to justify why he had rejected all transcriptions up until July 2015, one of the prosecutors responsible for the cases filed to the Tribunal de Grande Instance of Nantes drew on the prohibition against surrogacy. His first argument was that of the protection of public order, whereby he told me he sees himself as 'somewhat of a guardian of the law, of public order'. In his view, a public order that is opposable to the notion of the child's best interests that underlies transcription requests for those born via surrogacy abroad.

My interview with the prosecutor from the Chief Prosecution Office in Nantes suggests that heterosexual couples, despite their apparent compliance with the standard of carnal procreation, find it difficult to have their relationships with their children recognized. The fact that another woman has substituted herself for the intentional mother to bear and give birth to her child seems incompatible, from the point of view of the French courts, with the legal definition of maternity in France: the mother is the one who gave birth to the child. The situation of Mr. and Mrs. Mennesson, who have been taking legal action since their daughters were born 18 years ago, confirms this analysis. The prosecutor from the Chief Prosecution Office in Nantes used this argument to explain his opposition to such transcriptions: 'In French filiation law, the legal mother is the person who gave birth'. This is, in fact, now the only argument that can be drawn upon since the 3 July 2015 judgements delivered by the Court of Cassation, which disqualified the motive of evasion of the law. Establishing parentage in the French Civil Registry cannot depart from that which lawyers call 'carnal procreation' ('procreation charnelle'). In the words of Article 311–25 of the Civil Code, 'filiation of the mother is established by mention of the latter on the birth certificate'. According to the magistrate, there are three typical problematic cases. First, a heterosexual couple where 'it is the wife who did not give birth' that appears on the foreign birth certificate. Second, a gay couple where both men appear on the birth certificate, and third, where only the father appears on the birth certificate without any mention of the mother. In the first two scenarios, the couple receives a firm refusal from the Civil Prosecutor's Office. The third situation requires further investigation, aimed at verifying whether the country where the child was born authorizes birth certificates where the mother is not mentioned. In other words, whether the state allows anonymous births. If this is not the case, it is assumed that the biological mother, or the woman who gave birth, was not made fully aware of her rights: 'in replacing the surrogate mother with an intended mother, the biological mother has been officially hidden'.

The assertion by the prosecutor from the Chief Prosecution Office in Nantes could seem strange to those who assume that if the woman who delivered the child is not mentioned on the birth certificate, this has been done in compliance with local law. In fact, what the magistrate is questioning is the discrepancy between the foreign birth certificate and the spirit of the French Civil Code. During an interview, the prosecutor from the Chief Prosecution Office in Nantes referred to Article 47 of the Civil Code multiple times, according to which:

> Every civil status act of French and of foreigners done in a foreign country and drafted according to the procedures commonly used in that country shall prevail, unless other acts or documents held, external information, or elements derived from the act itself establish, where needed and after all necessary checks, that the act is irregular, falsified or that the facts stated therein do not correspond to reality.

In the view of the prosecutor from the Chief Prosecution Office in Nantes, the last words of the article are of paramount importance. According to him, birth certificates issued abroad that do not mention the woman who gave birth as the child's mother do not reflect reality. In the context of these transcription requests, the reality should lie in the gestational maternity. Concealment of the latter on the birth certificate consequently amounts to falsification.

It is here that we reach the heart of the problem. The Civil Prosecutor's Office develops an implicit hierarchy of the national legal norms, with the provisions of the French Civil Code on the matter of filiation enthroned at the top of the pyramid.[5] The Latin adage, 'mater certa semper est', which forms the basis of the rule establishing maternity in the French Civil Code, thus becomes a defence against the recognition of children born via surrogacy.

Difficult to obtain French nationality

The challenges that parents of children born via surrogacy face in obtaining a certificate of French nationality were voiced by all of the families I spent time with, despite Article 18 of the Civil Code on the transmission of French nationality via parentage. The conditions under which these children were born are seen as questionable by the administration responsible for issuing certificates of nationality, leaving many requests pending and families mobilizing lawyers and legal advice to assist them in what they perceive, after their previous struggle to conceive, as yet another 'obstacle course'.

None of the couples I interviewed had been refused outright when they requested a certificate of French nationality for their child (Courduriès, 2017b). Nevertheless, they often waited months without receiving a response, sometimes more than 1 year. These delays do not have an adequate explanation: they simply must be granted to the extent that the law provides that a child who has at least one French parent automatically becomes French, and where the birth certificate clearly establishes the filial relationship between the child and French parent. In the situations reported by my informants, the original birth certificate clearly established filiation

[4] In France, a DNA test is only possible when ordered by a judge in cases where paternity has been challenged. A DNA test to determine maternity is never performed as it is the mother who delivers the child.

[5] This hierarchy between national legal norms and those of other countries is, of course, not specific to the domain of surrogacy or to the establishment of parentage.

with at least one French parent. Accordingly, there was nothing barring the transmission of nationality.

One might wonder whether it is absolutely necessary that these children be recognized as French. For those born in countries where 'jus soli' does not exist, this is indubitably essential. However, in those situations I came across in which children were born in places that recognize 'jus soli', they were not, materially or practically, stateless. More specifically, they hold either a Canadian or American passport. They thus have a nationality – that of the country where they were born – and can travel unhindered. These children would have dual nationality upon being granted French citizenship. As far as everyday life is concerned, obtaining French nationality is not essential for these children. Some parents take a pragmatic approach to this problem. For example, Gérald (33 years old, designer), who, together with his husband, was father to 1-year-old twins, both girls, at the time I met him, gives his point of view:

> I start from the notion that it is better to do more than to do less. So, if they are French and Canadian, it's certainly better than if they were only Canadian, as you never know what tomorrow will bring, the trips, and who knows what else. So if we can obtain French nationality for our daughters, to my mind that would be better.

The idea is to offer a wide range of opportunities to one's children, safeguarding their futures in view of their adult lives, in a world where they may be very mobile. For other parents, in a social world where surrogacy remains highly controversial and parentage with their children is relatively uncertain, it is a matter of making available to their children any number of documents that demonstrate, as much as a filial relationship, the bond between parent and child. For the informed, well versed in relevant law, the transcription of the birth certificate and obtainment of the certificate of French nationality are two different things. For many parents, however, there can be confusion and the two are often seen as closely related. It is in this light that we can understand the comments of Marc (41 years old, computer specialist) who lives with his wife, Emilie (39 years old, stay-at-home mother), who was unable to carry a child, and their 3-year-old son:

> We are a family. Our little boy is our child. We are his parents. I fail to understand why there is any issue with our family. If we had a French birth certificate and a certificate of nationality, we would be a family in the eyes of the world. He could inherit whatever little we have left […]

Passing on one's nationality allows parents to transmit not only their heritage to their child, but also to transfer an aspect that defines them and to which they are attached: French nationality. Recognizing a child as French helps to forge a bond with the rest of the nation, but also with other members of their kinship group.

Conclusions

Children born abroad via surrogacy remain, in many ways, excluded from the national community. The issue goes well beyond recognition of the relationships between parents and children. Parentage is, in fact, always established – on the foreign birth certificate – with the biological father and often the other parent as well (whether this is the mother in heterosexual couples or the other father in gay couples). However, the completion of administrative acts is certainly more complicated, in that parents must systematically provide the foreign birth certificate accompanied by a certified translation; provide additional explanations when difficulties arise in the registration, for example, of the child in the social security system; and regularly request the renewal of the child's residence permit by the prefecture. Generally, however, for everyday activities, a foreign birth certificate is sufficient for providing third parties with proof of parentage. Beyond parentage, often already established abroad, the main issue thus concerns recognition of the link between the child and their group of relatives, their lineage and the nation. The heart of the problem lies in the recognition, or rather the lack thereof, of the child by the French Civil Registry, hindered by the latter's identification mission, of particular importance since the rise of the democratic state and the welfare state in the late 19th century (Noiriel, 2001). Families formed through the use of surrogacy abroad come up against the French logic of identification, which is old and establishes an almost consubstantial link between descent and national belonging (About and Denis, 2010). The initiatives of these parents, on the fringes of French law, also stand against the logic of control of population and management of living beings that gradually imposed itself in France and in Western societies during the 20th century (Foucault, 2008). In a way, these contemporary family forms illustrate a form of competition between law and medical assisted reproduction techniques that push the limits of human reproduction (Bellivier and Brunet, 2001).

The documents that parents request for their children and which they do not obtain or have great difficulty obtaining (such as a certificate of nationality, a birth certificate transcribed in France, an identity card or passport) are important to them; they allow them to exercise the rights and obligations of the child and their kin. We also know that beyond the proof that they represent when one is asked to identify oneself, identity papers are one of the primary mediums not only of feelings of belonging to a national community (ibid.), but also sense of self.

National belonging depends on lineage. To this regard, Robert Estienne's dictionary, published in 1552, defines the concept of nation, which appeared in the Middle Ages, as 'at the crossroads of genealogy and geography: simultaneously race, species, lineage, family, people or country' (Masure, 2014: p. 57). With the Civil Code in 1804, French nationality was enshrined in law: filiation ensures the transmission of French nationality ('jus sanguinis'), and, in François Masure's words, 'the nation becomes an extension of the family' (ibid.: p. 75). Following her ethnographic research in the Central Civil Registry in Nantes, Sylvie Sagnes underlies that 'French nationals living abroad are given to seeing foreignness in otherness' (Sagnes, 2008: p.70). These observations might similarly apply to children born via surrogacy abroad, except that their birth, despite at least one of their parents being French, has not been recognized by the French Civil Registry. Although parentage has duly been established by

the country of their birth, the lineage of their relatives, from the point of view of the French justice system, is discontinued. Kept outside of their family group, these children remain at the nation's doorstep.

Acknowledgements

I extend my deep thanks to my colleagues Michelle Giroux, Martine Gross and Laurence Brunet for the work accomplished together under the programme I coordinated with Michelle Giroux and which was supported, in France, by the Mission de recherche Droit et Justice. My research on surrogacy benefits from the support of the ETHOPOL – Du gouvernement des sentiments familiaux programme financed by the National Research Agency (n°ANR-14-CE29-0002). I thank its coordinator, my colleague Sébastien Roux, as well as Marcin Smietana, Irène Théry, Agnès Fine, Agnès Martial, Flávio Luiz Tarnovski, Mélanie Gourarier and Laurent Gabail for the stimulating discussions which have enriched my reflections.

References

About, I., Denis, V., 2010. Histoire de l'identification des personnes. La Découverte, Paris.

Bellivier, F., Brunet, L., 2001. Évolution des catégories normatives de jugement de la vie et droit de la bioéthique. In: Iacub, M., Jouannet, P. (Eds.), Juger la vie. Les choix médicaux en matière de procréation. La Découverte, Paris, pp. 186–203.

Carsten, J., 1995. The Substance ok kinship and the heat of the hearth: feeding, personhood, and relatedness among Malays in Pulau Langkawi. Am. Ethnol. 22-2, 223–241.

Comité Consultatif National d'Éthique (CCNE), 2018. Contribution du Comité consultatif national d'éthique à la révision de la loi de bioéthique. Avis n°129. http://www.ccne-ethique.fr/sites/default/files/avis_129_vf.pdf.

Courduriès, J., 2016. What Surrogacy Produces. J. Anthropol. 144-145, 53–76.

Courduriès, J., 2017a. Nommer son enfant dans les couples de même sexe. Clio Femmes Genre Hist. 44, 151–169.

Courduriès, J., 2017b. La lignée et la nation. État civil, nationalité et gestation pour autrui. Genèses 108, 29–47.

Courduriès, J., Fine, A. (Eds.), 2014. Homosexualité et parenté. Armand Colin, Paris.

Foucault, M., 2008. The Birth of Biopolitics. Lectures at the Collège de France 1978–1979. Palgrave Macmillan, New York.

Goodfellow, A., 2015. Gay fathers, their children and the making of kinship. Fordham University Press, New York.

Masure, F., 2014. Devenir français ? Approche anthropologique de la naturalisation. Presses Universitaires du Midi, Toulouse.

Noiriel, G., 2001. État, nation et immigration. Vers une histoire du pouvoir. Belin, Paris.

Ragoné, H., 1994. Surrogate Motherhood. Conception in the Heart. Westview Press, Boulder, Oxford.

Ramírez-Gálvez, M., 2014. L'adoption d'enfants et le recours à la reproduction assistée : interconnexions et déplacements. Enfances Fam. Génér. 21, 96–117.

Robcis, C., 2013. The Law of Kinship. Anthropology, Psychanalysis and the Family in France. Cornell University Press, Ithaca.

Roux, S., 2015. La circulation internationale des enfants. In: Steiner, P., Trepeusch, M. (Eds.), Les marchés contestés. Quand le marché rencontre la morale. Presses Universitaires du Midi, Toulouse, pp. 29–61.

Sagnes, S., 2008. Aux marges de l'état civil : étranges Français et Français de l'étranger. In: Fine, A. (Ed.), États civils en questions. Papiers, identités, sentiment de soi. Éditions du CTHS, Paris, pp. 54–75.

Steinberg, S., 2016. Une tâche au front. La bâtardise aux XVIe et XVIIe siècles. Albin Michel, Paris.

Teman, E., 2010. Birthing a Mother. The Surrogate Body and the Pregnant Self. University of California Press, Los Angeles, London, Berkeley.

Weber, F., 2013. Penser la parenté aujourd'hui. La force du quotidien. Presses d'Ulm, Paris.

Zegers-Hoschschild, F., et al., 2009. The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology. Hum. Reprod. 24 (11), 2683–2687.

Declaration: The author reports no financial or commercial conflicts of interest.

Received 13 September 2017; refereed 26 October 2018; accepted 19 November 2018.