HOW DO HUMAN RIGHTS AND SURROGACY INTERSECT?

By Stephen Page

When I had my first surrogacy case, back in 1988, it was at a stage when women's and children's rights were coming to the fore. The need to protect women was seen as an imperative. The report Beyond These Walls was released, which called for laws to allow civil protection orders to be made in domestic violence cases, given the ongoing failure of police to enforce the criminal law (which seems to have an ongoing issue ever since). The following year, Queensland's first domestic violence laws were enacted.

1988 was 5 years after litigation here in Queensland in a case called *Kerr*, where a husband, supported by the State, sought to stop his wife having an abortion. The primary judge, in response, said that the woman had bodily autonomy. That view was upheld on appeal, and again upheld on a refusal to grant special leave to appeal by the Chief Justice of the High Court, Sir Harry Gibbs.

1988 was also 9 years after CEDAW was signed- the UN Convention on the Elimination of all Forms of Discrimination against Women, which includes the phrase to be able to determine the number and spacing of their children.

1988 was also the year of the enactment in Queensland of the Surrogate Parenthood Act 1988, which criminalised all surrogacy – whether within Queensland or anywhere else if done by Queensland residents, out of concern of commodification of women and children.

1988 was also the year that the Family Court held that there was a right to reproduce, or at least a freedom under the common law to reproduce, in the case of *Re Jane*.

1988 was the year before the UN International Convention on the Rights of the Child was entered into, and well before the UN Convention on the Rights of Persons with Disabilities was entered into in 2006.

Back in 1988, it was considered that the best interests of the child were paramount, but surrogacy, at least gestational surrogacy, was a new concept, with the recent advent of IVF, 10 years before, and the first egg donation case (in Australia), 5 years before.

The world was rapidly changing.

It is no surprise then, that when the Surrogacy Act 2010 was enacted in Queensland, it pioneered the concept in statute in Australia that the surrogate had bodily autonomy. This was copied by Tasmania in 2012. I and others advocated for this change whenever surrogacy reform was considered. As a result, since then every other Australian State and Territory (with the exception of NSW) has now legislated to uphold this bodily autonomy.

I was delighted in 2019 that the then South Australian Attorney-General, Vickie Chapman, accepted my submission that the human rights of all concerned, including any child born through surrogacy, must be respected be a principle of what became the Surrogacy Act 2019 (SA).

And it is also no surprise that every Australian State and Territory says in its surrogacy laws that the best interests of the child are the paramount concern.

But what human rights are implicated by surrogacy?

There are a series of international human rights statutes and principles that are implicated by surrogacy. Human rights implicating surrogacy is at an early stage, as Human Rights Watch and International Women's Health Coalition said a few years ago. I have set these out in the tables below.

Table 1: Children's human rights implicated by surrogacy arrangements

Human rights of children	Reference
The best interests of the child as a primary consideration	UNCRC 3.1 General Comment No 14 (2013) Verona Principle 6
Right to equality and non-discrimination	UDHR, arts. 1, 2, 24.1, 25.2 ICCPR, arts. 24, 26 ICESCR, art. 2 CRPD, art. 5.1 Verona Principle 2, 3
Right to identity, access origins and family environment	UNCRC arts. 7, 8, 9, 10, 18, 20 ICCPR, art. 24 Verona Principle 10, 11, 12
Right to nationality	UDHR, art. 15 ICCPR, art. 24 ICESCR, art. 5 UNCRC, art. 7 UN 1961 Convention on the Reduction of Statelessness, arts. 3, 8 Verona Principle 13
Right not to be sold	UNCRC, art. 35 Optional Protocol Verona Principle 14
Right not to be trafficked	UNCRC, arts. 11, 35 Palermo Protocol Verona Principle 14
Right to privacy	UNCRC, art.16 UDHR, art. 12 ICCPR, art. 17 CRPD, art. 22

Human rights of children	Reference
Right to take advantage of scientific progress	UDHR, art. 27.1 ICESCR, art. 15(b)
Right to information	UNCRC, art. 17 UDHR, art. 19 ICCPR, art. 19
Right to have the family protected	UDHR, art. 16.3 CRPD, art. 23
Rights of persons with disabilities	CRPD, arts 5, 6, 7, 12, 17, 22, 23
Right to health	UDHR, art. 25 ICESCR, art. 12 Verona Principle 4

Table 2: The surrogate's human rights implicated by surrogacy arrangements

Human rights of surrogates	Reference
Right to equality and non-discrimination	UDHR, arts. 1, 2, 25.2 ICCPR, art. 26 ICESCR, art. 2 CRPD, art. 5.1
Right not to be trafficked	Palermo Protocol Yogyakarta Principle 11 Verona Principle 7
Right to privacy	UDHR, art. 12 Verona Principle 7
Right to benefit from scientific progress	UDHR, art. 27.1 ICESCR, art. 15(b)
Right to information	UDHR, art. 19 ICCPR, art. 19 Verona Principle 7
Right to have the family protected	UDHR, art. 16.3 ICCPR, art.23 CRPD, art. 23
Rights of persons with disabilities	CRPD, arts 5, 6, 7, 12, 17, 23
Right to health	UDHR, art. 25 ICESCR, art. 12 CEDAW. art. 12 Verona Principle 7

Human rights of surrogates	Reference
Right of bodily autonomy	Common law ICCPR arts 7,17 CEDAW, art. 12, GR 24 Verona principle 7
Right to decide number and spacing of children	CEDAW, art. 16
Legal professional privilege	Common law, statute

Table 3: The intended parent's human rights implicated by surrogacy arrangements

Human rights of intended parents	Reference
Right to equality and non-discrimination	UDHR, arts. 1, 2, 25.2 ICCPR, art. 26 ICESCR, art. 2 Yogyakarta Principles 1, 2
Right not to be trafficked	Palermo Protocol
Right to privacy, including the right to found a family and to access ART	UDHR, art. 12, 16 ICCPR, art. 16, 23, GC 19 Yogyakarta Principle 24
Right to benefit from scientific progress	UDHR, art. 27.1 ICESCR, art. 15(b) Verona Principle 8
Right to information	UDHR. art. 19 ICCPR. art. 19
Right to have the family protected	UDHR, art. 16.3 ICCPR, art. 23 CRPD, art.23
Rights of persons with disabilities	CRPD, arts 5, 6, 7, 12, 17, 23
Right to health	UDHR, art. 25 ICESCR, art. 12 CEDAW, art. 12 Yogyakarta Principle 17
Reproductive autonomy	Common law CESCR, GC 22 CEDAW, art. 12, GR 24
Legal professional privilege	Common law, statute

The right to access ART/reproduce

United States

The United States Supreme Court has held that there is a right to procreate (in the context of eugenics): *Skinner v Oklahoma* 315 US 535 (1942):

> *"We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty."*

Common law

In the United States, England and Australia, under the common law there has been recognised a right or freedom to reproduce. Nicholson CJ in *Re Jane* [1988] FamCA 57said:

> *"In the case of Re Grady N.J. 426A 2(d) 467, Pashman J. in giving the principal judgment of the Supreme Court of New Jersey said:*
>
> *"Sterilisation may be said to destroy an important part of a person's social and biological identity — the ability to reproduce. It affects not only the health and welfare of the individual, but the well being of all society. Any legal discussion of sterilisation, must begin with an acknowledgement that the right to procreate is fundamental to the very existence and survival of the race. Skinner v. Oklahoma [1942] USSC 129; 316 U.S. 535 at p. 541. This right is a basic liberty of which the individual is forever deprived through unwanted sterilisation."*
>
> *His Honour went on to say that in the U.S.A., at least, there is also a constitutional right to be sterilised as part of a right to control one's own body, citing cases such as Griswold v. Connecticut381 U.S. 79, Eisenstadt v. Baird [1972] USSC 61; 405 U.S. 438 and other more recent cases. His Honour pointed out that although the U.S. Supreme Court had not as yet specifically recognised such a right, it has been recognised by a number of state appellate courts in the U.S.A. His Honour continued:*
>
> *"Having recognised that both a right to be sterilised and a right to procreate exist, we face the problem as in Quinlan 355A 2(d) 647, that L is not competent to exercise either of her constitutional rights. What is at stake is not simply a right to obtain contraception or to attempt procreation, implied in both these complementary liberties, is a right to make a meaningful choice between them."*
>
> *I find the analysis of Pashman J. to be a useful one for present purposes.* ***It involves a clear recognition of the right to procreate or reproduce as being a basic human right recognised by the common law****. In view of the fact that such a right appears to have been*

recognised by superior appellate courts in the United Kingdom, Canada and the United States, I am confident that such a right would also be recognised as forming part of the common law of Australia.

I also consider, however, that ***in Australian law*** *as in U.S. law****, there is no reason to suggest that there is not a right to refuse to procreate****, i.e. a right to contraception whether by chemical means or sterilisation. Such a right appears to have been recognised in England…*

I consider that the rights in question may be better characterised as liberties to reproduce or not reproduce as the case may be."(emphasis added)

The matter was further raised in ***The Marriage of F*** [1989] FamCA 41. The husband sought to restrain the wife from having an abortion. The husband said that the basis of the injunction, to protect the unborn child, was not based on judicial authority, but, following Re Jane "upon the common law right of every human being to procreate or reproduce".

Lindenmayer J stated:

"He conceded that that right, or perhaps more accurately that liberty, must be exercised with the concurrence and consent of some member of the opposite sex. He also conceded that if every human being has a legal right to procreate, then he or she also has a right to refuse to procreate and that these competing rights are of equal strength."[1]

Further:

"Mr Theobald, for the wife, contended that if the husband has a legal right to procreate, the wife has an equal right to refuse to procreate and that the husband's right does not extend to giving him the right to insist that the wife carry his child through to birth in order to preserve his right. He further submitted that there has never been such a right recognized by the common law."[2]

Lindenmayer J stated:

"I am nevertheless unable to conclude that the husband's so-called right to procreate extends to giving him a right to force the wife to carry through her pregnancy to the birth of the child, contrary to her wish not to do so."[3]

European Court of Human Rights

In ***Dickson v United Kingdom*** [2007] ECtHR, Application No. 44362/04, the Court held that Mr Dickson, a prisoner, had a right to assisted reproductive technology and that the choice to

[1] [24].
[2] [26].
[3] [27].

become a genetic parent was a *"particularly important facet of an individual's existence or identity"*.[4]

This right was founded in Article 8 of the *European Convention of Human Rights* which provides:

> *"Right to respect for private and family life*
>
> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

Inter-American Court of Human Rights

In ***Artavia Murillo v Costa Rica*** [2012] the court held that there was a right to access assisted reproductive technology, under article 11 of the *Inter-American Convention on Human Rights*.

Article 11 provides:

> *"Article 11. Right to Privacy*
>
> 1. *Everyone has the right to have his honor respected and his dignity recognized.*
>
> 2. *No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.*
>
> 3. *Everyone has the right to the protection of the law against such interference or attacks."*

Both the *Inter-American Convention*, art. 11 and the European Convention, art. 8 are in similar terms to the *Universal Declaration of Human Rights*, art. 12 and *International Covenant on Civil & Political Rights,* art. 17 (and UNCRC, art. 16*)*.

Art. 12 of the UDHR provides:

> *"No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks."*

[4] At [78]. Cf. *Smith v Chief Executive, Queensland Corrective Services* [2024] QSC 288, the appeal form which has been heard but not determined. Human rights issues were not raised in that case.

Article 17 of the ICCPR provides:

> *"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks."*

Art. 23.1 and 23.2 of the ICCPR provide:

> *"1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*
>
> *2. The right of men and women of marriageable age to marry and to found a family shall be recognized."*

Article 16 of the UNCRC provides:

> *"1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.*
>
> *2. The child has the right to the protection of the law against such interference or attacks."*

The Court in *Artavia Murillo* said (citations removed):

> *"144. The Court considers that this case addresses a* ***particular combination of different aspects of private life that are related to the right to found a family, the right to physical and mental integrity and, specifically, the reproductive rights of the individual.***
>
> *145. First, the Court emphasizes that, unlike the European Convention on Human Rights, which only protects the right to family life under Article 8 of this instrument, the American Convention contains two articles that protect family life in a complementary manner. In this regard, the Court reiterates that Article 11(2) of the American Convention is closely related to the right recognized in Article 17 of this instrument. Article 17 of the American Convention recognizes the central role of the family and family life in a person's existence and in society in general. The Court has already indicated that the family's right to protection entails, among other obligations, facilitating, in the broadest possible terms, the development and strength of the family unit. This is such a basic right of the American Convention that it cannot be waived even in extreme circumstances. Article 17(2) of the American Convention protects the right to found a family, which is also comprehensively protected in different international human rights instruments.* ***For its part, the United Nations Human Rights Committee has indicated that the possibility of procreating is part of the right to found a family.***

146. *Second,* ***the right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right.*** *The right to reproductive autonomy is also recognized in Article 16(e) of the Convention for the Elimination of All Forms of Discrimination against Women, according to which women enjoy the right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means that enable them to exercise these rights." This right is violated when the means by which a woman can exercise the right to control her fertility are restricted. Thus, the protection of private life includes respect for the decisions both to become a mother or a father, and a couple's decision to become genetic parents.*

147. *Third, the Court emphasizes that, in the context of the right to personal integrity, it has analyzed some of the situations that cause particular distress and anxiety to the individual, as well as some serious impacts of the lack of medical care or problems of accessibility to certain health procedures. In the European sphere, case law has defined the relationship between the right to private life and the protection of physical and mental integrity. The European Court of Human Rights has indicated that, although the European Convention on Human Rights does not guarantee the right to a specific level of medical care as such, the right to private life includes a person's physical and mental integrity, and that the State also has the positive obligation to ensure this right to its citizens. Consequently, the rights to private life and to personal integrity are also directly and immediately linked to health care.* ***The lack of legal safeguards that take reproductive health into consideration can result in a serious impairment of the right to reproductive autonomy and freedom.***

    Therefore, there is a connection between personal autonomy, reproductive freedom, and physical and mental integrity.

148. *The Court has indicated that States are responsible for regulating and overseeing the provision of health services to ensure effective protection of the rights to life and personal integrity. Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity. In relation to the right to personal integrity it is important to highlight that, according to the Committee on Economic, Social and Cultural Rights, "reproductive health means that women and men have the freedom to decide if and when to reproduce, and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as the right of access to appropriate health care services." The Programme of Action of the International Conference on Population and Development, held in Cairo in 1994, and the Declaration and Platform for Action of the Fourth World Conference on Women, held in Beijing in 1995, also contain definitions of reproductive health and of women's health. According to the International Conference on Population and Development (1994), "[r]eproductive rights embrace certain human rights that are already recognized*

in national laws, international human rights documents and other relevant UN consensus documents. ***These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health****." Moreover, adopting a broad and integrated concept of sexual and reproductive health, it stated that:*

"Reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity – in all matters relating to the reproductive system and to its functions and processes. Consequently, reproductive health implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so. Implicit in this is right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility, which are not against the law, and the right of access to health-care services that will enable women to go safely through pregnancy and childbirth."

149. *Furthermore, according to the Conference's Programme of Action, "in vitro fertilization techniques should be provided in accordance with ethical guidelines and appropriate medical standards." In the Declaration of the Fourth World Conference on Women (1995), the States agreed to "guarantee equal access to and equal treatment of men and women in [...] health care and promote sexual and reproductive health." The Platform for Action, approved jointly with the Declaration, defined reproductive health care as the "constellation of methods, techniques and services that contribute to reproductive health and well-being by preventing and solving reproductive health problems." According to the Pan-American Health Organization (PAHO), sexual and reproductive health "implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so." The right to reproductive health entails the rights of men and women to be informed and to have free choice of and access to methods to regulate fertility, that are safe, effective, easily accessible and acceptable.*

150. *Finally,* ***the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right****. The right to enjoy the benefits of scientific progress has been internationally recognized and, in the inter- American context, it is contemplated in Article XIII of the American Declaration and in Article 14(1)(b) of the Protocol of San Salvador. It is worth mentioning that the General Assembly of the United Nations, in its declaration on this right, described its connection to the satisfaction of the material and spiritual needs of all sectors of the population. Therefore, and in keeping with Article 29(b) of the American Convention, the scope of the rights to private life, reproductive autonomy and to found a family, derived from Articles 11(2) and 17(2)*

> *of the Convention, extends to the right of everyone to benefit from scientific progress and its applications.* ***The right to have access to scientific progress in order to exercise reproductive autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques, and, consequently, the prohibition of disproportionate and unnecessary restrictions, de jure or de facto, to exercise the reproductive decisions that correspond to each individual.****"* (emphasis added)

The Court in the subsequent decision of ***Gomez Murillo v Costa Rica*** (2019), noted that Costa Rica had initiated a discussion about surrogacy, which it welcomed as part of its reparations *in order to enable reproduction through ART*[5]. The Court made plain, in so doing, that it considered that the right to access ART included, for those for whom surrogacy is necessary, the right to access surrogacy.

Supreme Court of Mexico

The Supreme Court followed *Artavia Murillo* in ***Amparo in Revision 553/2018*** (2018). It held:

> *"The concept of family whose protection is ordered by the Constitution is not identified or limited to a single type of family, but in the context of a democratic State of Law in which plurality is part of its essence, it must be understood that* ***the constitutional norm it refers to is the family as a social reality****, which is why is protects all its forms and manifestations as an existing reality.*
>
> *Among the ways in which a family can take place is that formed by same-sex couples, regarding which it has been recognized their right to marry…*
>
> ***Regarding the right of every person to decide freely, responsibly and informed about the number and spacing of their children[6], must be considered to fall within the scope of freedom and private life of people, regarding which there should be no arbitrary interference by the State, in which it remains understood the right to decide to procreate a child****. The Inter-American Court of Human Rights has interpreted Art. 11 of the American Convention on Human Rights, referring to privacy and family, in the sense that it constitutes the right of every person to organize his or her life in accordance with the law individual and social according to their own choices and convictions; and that the decision to be or not to be a mother or father is part of the right to private life and includes the decision to be a mother or father in the genetic or biological sense, that is, their reproductive rights.*
>
> *In this regard, the Inter-American Court points out that* ***the right to private life is related to reproductive autonomy and access to reproductive health services, which involves the right to access the medical technology necessary to exercise that right****. Therefore, the protection of privacy includes respect for the decisions of both becoming a parent, including the couple's decision to become genetic parents. This links to the article 14.1.b*

[5] At [31], [32], order 2(d).
[6] Which language echoes that of CEDAW, art. 16(1)(e).

of the San Salvador Protocol, which recognizes the right of every person to enjoy the benefits of scientific and technological progress[7]*, in the understanding that the aforementioned Court has indicated that reproductive health involves the rights of men and women to be informed and have free choice and access to methods to regulate fertility, which are safe, effective, easily accessible and acceptable.*

This the Inter-American Court has recognized the right to access assisted reproduction techniques to achieve birth of a child, referring to couples with infertility problems.

In the case of same-sex couples, a situation arises similarly, not because of infertility of one of the members of the couple, but because in their sexual union there is no possibility of conception of a new being, understood as the fusion or fertilization of the egg (female element) by the sperm (male element).

In this sense and consider that the right to become a father or mother is understood to be given to every person, without distinction as to sexual preference…the rights of homosexual couples must be recognised to access scientific advances in assisted reproduction, and become parents through these techniques*."* (emphasis added)

The case involved a gay couple from Yucatan who sought that they both be recognised as the parents. The Supreme Court, in referring to homosexual couples, was clearly referring, in the case of gay couples, to being able to access surrogacy.

Amparo in revision 129/2019 **(2021)**

The Mexican Supreme Court held that a law of the state of Tabasco that outlawed surrogacy agencies was invalid, as was a law that prohibited foreigners from undertaking surrogacy- as the right to access ART extended to foreigners.

The Court held that the prohibition on surrogacy agencies was unconstitutional because:

> *"Although it would be legitimate to regulate this type of service and even prohibit of sanction certain specific actions or practices that objectively put minors at risk from assisted reproduction techniques, to pregnant women or the contracting parties themselves, which is not permitted in terms of article 5 of the constitution, is to absolutely and completely prevent without reasonable justification, that people engage in the profession, industry, commerce or work that suits them, provided that it is lawful."*[8]

The Court held that the *"arbitrary"* law *"openly and absolutely discriminates against foreign people, without any reasonable or justifiable justification for this"*[9], and was therefore invalid.

The Tabasco law required two steps to enable recognition of the surrogacy contract:

[7] Which echoes CESCR, art. 15.
[8] P.12.
[9] P.16.

1. Notarial formalisation. The notary had to satisfy themselves that the contract was compliant with the statute, and if not, then the notary could be sanctioned; and then, only if step 1 had been complied with:

2. Court order. It was unclear to the Supreme Court whether or not the order had to be obtained before or after the birth of the child.

Because the parties could not proceed to court other than first obtaining notarial formalization, the law was invalid, by violating access to jurisdiction.

UN Human Rights Committee

The UN Human Rights Committee in General Comment No 19 (1990) said of ICCPR, art. 23:

> *"1. Article 23 of the International Covenant on Civil and Political Rights recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. Protection of the family and its members is also guaranteed, directly or indirectly, by other provisions of the Covenant. Thus, article 17 establishes a prohibition on arbitrary or unlawful interference with the family. In addition, article 24 of the Covenant specifically addresses the protection of the rights of the child, as such or as a member of a family. In their reports, States parties often fail to give enough information on how the State and society are discharging their obligation to provide protection to the family and the persons composing it.*
>
> *2.* ***The Committee notes that the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition. However, the Committee emphasizes that, when a group of persons is regarded as a family under the legislation and practice of a State, it must be given the protection*** *referred to in article 23… In view of the existence of various forms of family, such as unmarried couples and their children or single parents and their children, States parties should also indicate whether and to what extent such types of family and their members are recognized and protected by domestic law and practice…*
>
> *5.* ***The right to found a family implies, in principle, the possibility to procreate and live together****."*

Australia has recognised that the right of consenting adults to marry, irrespective of sexuality, with the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), following the passage of the postal plebiscite. Given that Australia is recognising that gay couples can marry, therefore the effect of GC No 19 in Australia is the ability of gay couples to access surrogacy, it being the only method by which we can procreate.

Yogyakarta Principles

That conclusion as to the impact of GC No 19, is strengthened by Yogyakarta Principle 22, The Right to Found a Family, which states:

> *"**The Right to Found a Family***
>
> *Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members.*
>
> *States shall:*
>
> *a)* ***Take all necessary legislative**, administrative and other **measures to ensure the right to found a family, including through access to** adoption or **assisted procreation** (including donor insemination), **without discrimination on the basis of sexual orientation** or gender identity;*
>
> *b) Ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;*
>
> *c) Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such best interests;*
>
> *d) In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;*
>
> *e) Take all necessary legislative, administrative and other measures to ensure that in States that recognise same-sex marriages or registered partnerships, any entitlement, privilege, obligation or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;*
>
> *f) Take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;*

g) *Ensure that marriages and other legally-recognised partnerships may be entered into only with the free and full consent of the intending spouses or partners."*

Tokyo Declaration (2025)

The International Federation of Fertility Societies has issued the Tokyo Declaration, calling for the protection of human rights in assisted reproductive treatment[10]. The Declaration includes these statements:

> *"3. Equality and Freedom from Discrimination*
>
> *Access to reproductive care, clinical assessment, diagnosis, and/or treatment (and associated practices) should uphold the right to equality of all people and be free from discrimination based on such things as race, color, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, or other status.*
>
> *4. Prohibition of Exploitation and Human Trafficking*
>
> *Access to reproductive care, clinical assessment, diagnosis, and/or treatment (and associated practices) should never involve exploitation or human trafficking of the parties involved. This includes prohibiting exploiting and/or trafficking potential parent(s), surrogates, gamete donors, and/or the people born as a result of such practices and requires protection of vulnerable people and/or populations.*
>
> *5. Free and Informed Consent*
>
> *All parties involved in or receiving reproductive care, clinical assessment, diagnosis, and/or treatment (and associated practices), and their partners (if any), must give free and informed consent to such treatment and any processes involved. This includes any person accessing reproductive clinical assessment, diagnosis, assisted reproductive treatment, donating gametes or embryos (or other genetic material), and or acting as a surrogate. Information informing consent must be provided in a language that each of the parties understands, at a level the parties comprehend. No undue influence or coercion should occur.*
>
> *6. Independent legal advice, counselling, and the provision of information*
>
> *Recognizing, respecting and supporting that most countries choose to prohibit surrogacy or limit its practice (for example, to altruistic arrangements, prohibition of commercial surrogacy, and or limiting practices to people domiciled within a particular jurisdiction); when surrogacy is practised, appropriate screening of intended parents and independent legal advice and counselling should be required and available for each party independently of each other, from the antenatal interval through the postnatal period, in a language that each of the parties understands, at a level the*

[10] By way of disclosure, I am Secretary of the Fertility Society of Australia and New Zealand. The FSANZ Board, of which I am part, endorsed the Declaration before its release.

parties comprehend, and independent of clinics or agents. A freely chosen support person, for each party, should be permitted at any time.

Similarly, where gamete or embryo donation occurs, all donors, recipients, and their partners, if any, should undergo any relevant assessments (for example, medical assessment and history), and should be provided with counselling and advice about the implications of donor conception.

7. Freedom of movement, personal autonomy, control

At all times, a person undergoing reproductive care, clinical assessment, diagnosis, and/or treatment (such as assisted reproductive treatment, gamete donation, surrogacy, or other practices) should maintain their right to self-determination. This includes but is not limited to decisions about pregnancy, self-care, and the medical procedures and treatments they will or won't accept. Freedom of movement is essential; such persons should not be limited in their movements nor held or detained against their will.

8. Quality of Care

Delivery of safe, high-quality care is essential for all people who are undergoing clinical assessment, trying to conceive, who are pregnant (antenatal and postnatal), who have experienced miscarriage/termination of a pregnancy, or where a person has given birth (whether a live birth or otherwise). This includes but is not limited to all those who are receiving fertility care and treatment (such as assisted reproductive treatment, gamete donation, surrogacy, or other practices). Assuring quality of care in these circumstances aligns with human rights values.

9. Welfare, health and well-being of children born as a result of Assisted Reproductive Treatment

The welfare, health, and well-being of a child(ren) born as a result of assisted reproductive treatment and/or associated practices must be recognized as paramount. This should include but is not limited to, ensuring best medical practices, recognition of legal parentage, and access to information about medical history, identity, and gestational/genetic heritage (see Principle 10). It should also include screening of donors, surrogates, and recipients for risk(s) that may impact a child's welfare, physical or mental health, and/or well-being."

The child's rights to having its birth registered, privacy, identity, nationality and to have a legal relationship with the intended parents

The various rights of the child have been considered internationally, and in Australia.

European Court of Human Rights

In similar manner to the upholding the right to access ART, the European Court of Human Rights has upheld the child's right to privacy, so that the child's identity with that of the

intended parents has been upheld. In doing so, that court has not been consistent, seemingly being more convinced when the method by which parentage has been established has been by way of court order (and not by operation of law) and that there is a genetic relationship between the intended parent and the child. The leading decisions are that of *Mennesson v France* and *Advisory Opinion P16-2018-001* (which also concerned the Mennesson family).

The child's right to know and be cared for by their parents, i.e., the child's right to privacy, has been considered on many occasions by the European Court of Human Rights such as in *Mennesson v France* ECtHR Application No. 65192/11 (2014) where the court held[11]:

> *"75. The Court notes the Government's submission that, in the area in question, the Contracting States enjoyed a substantial margin of appreciation in deciding what was "necessary in a democratic society". It also notes that the applicants conceded this but considered that the extent of that margin was relative in the present case.*
>
> *76. The Court shares the applicants' analysis.*
>
> *77. It reiterates that the scope of the States' margin of appreciation will vary according to the circumstances, the subject matter and the context; in this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for example, Wagner and J.M.W.L., and Negrepontis-Giannisis, both cited above, §§ 128 and 69 respectively). Accordingly, on the one hand, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see, in particular, S.H. and Others v. Austria, cited above, § 94).*
>
> *78. The Court observes in the present case that there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appears to be possible in eleven other States (including one in which the possibility may only be available in respect of the father-child relationship where the intended father is the biological father), but excluded in the eleven remaining States (except perhaps the*

[11] At [75]-[94].

possibility in one of them of obtaining recognition of the father-child relationship where the intended father is the biological father) ...

79. *This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents.*

80. *However, regard should also be had to the fact that an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned. The margin of appreciation afforded to the respondent State in the present case therefore needs to be reduced.*

81. *Moreover, the solutions reached by the legislature – even within the limits of this margin – are not beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration and leading to the solution reached and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution (see, mutatis mutandis, S.H. and Others v. Austria, cited above, § 97). In doing so, it must have regard to the essential principle according to which, whenever the situation of a child is in issue, the best interests of that child are paramount (see, among many other authorities, Wagner and J.M.W.L., cited above, §§ 133-34, and E.B. v. France [GC], no. 43546/02, §§ 76 and 95, 22 January 2008).*

82. *In the present case the Court of Cassation held that French international public policy precluded registration in the register of births, marriages and deaths of the particulars of a birth certificate drawn up in execution of a foreign decision containing provisions which conflicted with essential principles of French law. It then observed that under French law surrogacy agreements were null and void on grounds of public policy, and that it was contrary to the "essential principle of French law" of the inalienability of civil status to give effect to such agreements as regards the legal parent-child relationship. It held that, in so far as it gave effect to a surrogacy agreement, the judgment delivered in the applicants' case by the Supreme Court of California was contrary to the French concept of international public policy and that, as the US birth certificates of the third and fourth applicants had been drawn up in application of that judgment, the details of those certificates could not be entered in the French register of births, marriages and deaths (see paragraph 27 above).*

83. *The applicants' inability to have the parent-child relationship between the first two applicants and the third and fourth applicants recognised under French law is therefore, according to the Court of Cassation, a consequence of the French legislature's decision on ethical grounds to prohibit surrogacy. The Government pointed out in that connection that the domestic courts had duly drawn the*

consequences of that decision by refusing to authorise entry in the register of births, marriages and deaths of the details of foreign civil-status documents of children born as the result of a surrogacy agreement performed outside France. To do otherwise would, in their submission, have been tantamount to tacitly accepting that domestic law had been circumvented and would have jeopardised the consistent application of the provisions outlawing surrogacy.

84. *The Court observes that that approach manifests itself in an objection on grounds of international public policy, which is specific to private international law. It does not seek to call this into question as such. It must, however, verify whether in applying that mechanism to the present case the domestic courts duly took account of the need to strike a fair balance between the interest of the community in ensuring that its members conform to the choice made democratically within that community and the interest of the applicants – the children's best interests being paramount – in fully enjoying their rights to respect for their private and family life.*

85. *It notes in that connection that the Court of Cassation held that the inability to record the particulars of the birth certificates of the third and fourth applicants in the French register of births, marriages and deaths did not infringe their right to respect for their private and family life or their best interests as children in so far as it did not deprive them of the legal parent-child relationship recognised under Californian law and did not prevent them from living in France with the first and second applicants (see paragraph 27 above).*

86. *The Court considers that a distinction has to be drawn in the instant case between the applicants' right to respect for their family life on the one hand and the right of the third and fourth applicants to respect for their private life on the other hand.*

87. *With regard to the first point, the Court considers that the lack of recognition under French law of the legal parent-child relationship between the first and second applicants and the third and fourth applicants necessarily affects their family life. It notes in this regard that, as pointed out by the applicants, the Paris Court of Appeal acknowledged in this case that the situation thus created would cause "practical difficulties" (see paragraph 24 above). It also observes that, in its report of 2009 on the review of bioethical laws, the Conseil d'État observed that "in practice, families' lives [were] more complicated without registration, because of the formalities that had to be completed on various occasions in life" (see paragraph 68 above).*

88. *Accordingly, as they do not have French civil-status documents or a French family record book the applicants are obliged to produce – non-registered – US civil documents accompanied by an officially sworn translation each time access to a right or a service requires proof of the legal parent-child relationship, and are sometimes met with suspicion, or at the very least incomprehension, on the part of the person dealing with the request. They refer to difficulties encountered when*

registering the third and fourth applicants with social security, enrolling them at the school canteen or an outdoor centre and applying to the Family Allowances Office for financial assistance.

89. *Moreover, a consequence – at least currently – of the fact that under French law the two children do not have a legal parent-child relationship with the first or second applicant is that they have not been granted French nationality. This complicates travel as a family and raises concerns – be they unfounded, as the Government maintain – regarding the third and fourth applicants' right to remain in France once they attain their majority and accordingly the stability of the family unit. The Government submit that, having regard in particular to the circular of the Minister of Justice of 25 January 2013 ..., the third and fourth applicants could obtain a certificate of French nationality on the basis of Article 18 of the Civil Code, which provides that "a child of whom at least one parent is French has French nationality", by producing their US birth certificates.*

90. *The Court notes, however, that it is still unclear whether this possibility does actually exist. Firstly, it notes that according to the very terms of the provision referred to, French nationality is granted on the basis of the nationality of one or the other parent. It observes that it is specifically the legal determination of the parents that is at the heart of the application lodged with the Court. Accordingly, the applicants' observations and the Government's replies suggest that the rules of private international law render recourse to Article 18 of the Civil Code in order to establish the French nationality of the third and fourth applicants particularly complex, not to mention uncertain, in the present case. Secondly, the Court notes that the Government rely on Article 47 of the Civil Code. Under that provision, civil-status certificates drawn up abroad and worded in accordance with the customary procedures of the country concerned are deemed valid "save where other certificates or documents held, external data, or particulars in the certificate itself establish ... that the document in question is illegal, forged, or that the facts stated therein do not match the reality". The question therefore arises whether that exception applies in a situation such as the present case, where it has been observed that the children concerned were born as the result of a surrogacy agreement performed abroad, which the Court of Cassation has deemed a circumvention of the law. Although they were invited by the President to answer that question and specify whether there was a risk that a certificate of nationality thus drawn up would subsequently be contested and annulled or withdrawn, the Government have not provided any indications. Moreover, the request lodged for that purpose on 16 April 2013 with the registry of the Charenton-le-Pont District Court by the first applicant was still pending eleven months later. The senior registrar indicated on 31 October 2013 and on 13 March 2014 that it was "still being processed in [his] department pending a reply to the request for authentication sent to the consulate of Los Angeles, California" (see paragraph 28 above).*

91. To that must be added the entirely understandable concerns regarding the protection of family life between the first and second and the third and fourth applicants in the event of the first applicant's death or the couple's separation.

92. However, whatever the degree of the potential risks for the applicants' family life, the Court considers that it must determine the issue having regard to the practical obstacles which the family has had to overcome on account of the lack of recognition in French law of the legal parent-child relationship between the first two applicants and the third and fourth applicants (see, mutatis mutandis, X, Y and Z [v. the United Kingdom, 22 April 1997], § 48[, Reports of Judgments and Decisions 1997-II]). It notes that the applicants do not claim that it has been impossible to overcome the difficulties they referred to and have not shown that the inability to obtain recognition of the legal parent-child relationship under French law has prevented them from enjoying in France their right to respect for their family life. In that connection it observes that all four of them were able to settle in France shortly after the birth of the third and fourth applicants, are in a position to live there together in conditions broadly comparable to those of other families and that there is nothing to suggest that they are at risk of being separated by the authorities on account of their situation under French law (see, mutatis mutandis, Shavdarov, cited above, §§ 49-50 and 56).

93. The Court also observes that in dismissing the grounds of appeal submitted by the applicants under the Convention, the Court of Cassation observed that annulling registration of the details of the third and fourth applicants' birth certificates in the French register of births, marriages and deaths did not prevent them from living with the first and second applicants in France (see paragraph 27 above). Referring to the importance it had attached in Wagner and J.M.W.L. (cited above, § 135) to carrying out an actual examination of the situation, the Court concludes that in the present case the French courts did duly carry out such an examination, since they considered in the above-mentioned terms, implicitly but necessarily, that the practical difficulties that the applicants might encounter in their family life on account of not obtaining recognition under French law of the legal parent-child relationship established between them abroad would not exceed the limits required by compliance with Article 8 of the Convention.

94. Accordingly, in the light of the practical consequences for their family life of the lack of recognition under French law of the legal parent-child relationship between the first and second applicants and the third and fourth applicants and having regard to the margin of appreciation afforded to the respondent State, the Court considers that the situation brought about by the Court of Cassation's conclusion in the present case strikes a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life is concerned."

However, the approach by the Court has been mixed:

1. In *KK v Denmark*, ECtHR Application no 25212/21 (2022), the intended mother was not allowed to adopt, nor was her parentage recognised following egg donation and surrogacy in Ukraine (where parentage is established by operation of law).

2. In *Paradiso and Campanelli v Italy,* ECtHR Application no 25358/12 (2015), the child was removed from the intended parents for the purposes of adoption, as the intended mother had lied in the eyes of Italian authorities when she said that she was the mother. Surrogacy was undertaken in Russia (where parentage is established by operation of law). It transpired that the intended father was not the genetic father. While the Court opined that there was a right to de facto family life, the removal by authorities of the child so quickly after it had arrived in Italy from Russia, combined with no genetic link to the intended parents meant that the de facto family life had not arisen.

3. In *Valdís Fjölnisdóttir v. Iceland*, ECtHR Application no 71552/17 (2021), a lesbian couple underwent sperm donation, egg donation and surrogacy in the United States. A judgment issued there declaring them to be the parents. As there were no actual, practical hindrances for their private life, the complaint that there was a breach by Iceland of Art. 8 of the ECHR was rejected.

4. In *AM v Norway*, ECtHR Application no 30254/18 (2022), a former couple, man and woman, underwent surrogacy and egg donation in the United States. A judgment issued in the United States declaring them to be the parents. The Court rejected that the intended mother was a parent.

5. In *DB v Switzerland*, ECtHR Applications no 58817/15 and 58252/15 (2023), a gay couple living in a civil partnership underwent egg donation and surrogacy in the United States. A judgment issued in the United States declaring the couple to be the child's parents. The Court recognised the parentage of the non-biological father, as the refusal to do so was in breach of the child's right to privacy under Art. 8 of the ECHR.

6. In *Advisory Opinion No P16- 2018- 00,* which also concerned the Mennesson family, the Court set out the test as to Article 8:

> *"In a situation where, as in the scenario outlined in the questions put by the Court of Cassation, a child was born abroad through a gestational surrogacy arrangement and was conceived using the gametes of the intended father and a third-party donor, and where the legal parent-child relationship with the intended father has been recognised in domestic law:*
>
> 1. *the child's right to respect for private life within the meaning of Article 8 of the Convention requires that domestic law provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate legally established abroad as the "legal mother";*
>
> 2. *the child's right to respect for private life within the meaning of Article 8 of the Convention does not require such recognition to take the form of entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child's best interests."*

The Court stated at [52]-[54]:

> *"(T)he Court considers that Article 8 of the Convention does not impose a general obligation on States to recognise ab initio a parent-child relationship between the child and the intended mother. What the child's best interests – which must be assessed primarily in concreto rather than in abstracto – require is for recognition of that relationship, legally established abroad, to be possible at the latest when it has become a practical reality. It is in principle not for the Court but first and foremost for the national authorities to assess whether and when, in the concrete circumstances of the case, the said relationship has become a practical reality.*
>
> 53. *The child's best interests, thus construed, cannot be taken to mean that recognition of the legal parent-child relationship between the child and the intended mother, required in order to secure the child's right to respect for private life within the meaning of Article 8 of the Convention, entails an obligation for States to register the details of the foreign birth certificate in so far as it designates the intended mother as the legal mother. Depending on the circumstances of each case, other means may also serve those best interests in a suitable manner, including adoption, which, with regard to the recognition of that relationship, produces similar effects to registration of the foreign birth details.*
>
> 54. *What is important is that at the latest when, according to the assessment of the circumstances of each case, the relationship between the child and the intended mother has become a practical reality (see paragraph 52 above), an effective mechanism should exist enabling that relationship to be recognised. Adoption may satisfy this requirement provided that the conditions which govern it are appropriate and the procedure enables a decision to be taken rapidly, so that the child is not kept for a lengthy period in a position of legal uncertainty as regards the relationship. It is self-evident that these conditions must include an assessment by the courts of the child's best interests in the light of the circumstances of the case."*

If there were any doubt about the possible impact on the child of non-recognition of parentage, the Court said:

> *"The lack of recognition of a legal relationship between a child born through a surrogacy arrangement carried out abroad and the intended mother thus has a negative impact on several aspects of that child's right to respect for its private life. In general terms, as observed by the Court in Mennesson and Labassee, cited above,* ***the non-recognition in domestic law of the relationship between the child and the intended mother is disadvantageous to the child, as it places him or her in a position of legal uncertainty regarding his or her identity within society*** *(§§ 96 and 75 respectively). In particular,* ***there is a risk that such children will be denied the access to their intended mother's nationality which the legal parent-child relationship guarantees; it may be more difficult for them to remain in their intended mother's country of residence*** *(although this risk does not arise in the case before the Court of Cassation, as the intended father, who is also the biological father, has French nationality);* ***their right to inherit under the intended mother's estate may be impaired; their continued relationship with her is placed at risk if the intended parents separate or the intended father dies; and they have***

no protection should their intended mother refuse to take care of them or cease doing so.

41. The Court is mindful of the fact that, in the context of surrogacy arrangements, the child's best interests do not merely involve respect for these aspects of his or her right to private life. They include other fundamental components that do not necessarily weigh in favour of recognition of a legal parent-child relationship with the intended mother, such as protection against the risks of abuse which surrogacy arrangements entail (see Paradiso and Campanelli, cited above, § 202) and the possibility of knowing one's origins (see, for instance, Mikulić v. Croatia, no. 53176/99, §§ 54-55, ECHR 2002-I)."(emphasis added)

The Court considered Articles 2, 3, 7, 8, 9 and 18 of the UNCRC, articles 1 and 2 of the Optional Protocol, taken into account the activities of the Hague Conference on Private International Law and considered the 2018 report of the then United Nations Special Rapporteur. The effect of the Special Rappporteur's report, when taken in the context of the Mennesson case, was that a surrogacy arrangement of the type engaged in by the Mennesson's amounted to the sale of the child[12]. It is clear that the Court prioritised the need for the child's parentage to be speedily recognised over other factors, given the impact on the child.

Mexico

The Supreme Court in ***Amparo in Revision 553/2018*** (2018) discussed the child's right to an identity, including under UNCRC, at length. It said[13]:

"When establishing the parentage of minors and resolving conflicts int his regard, there are several purposes to be fulfilled in order to satisfy the best interests of the child that could come into conflict: allowing the minor to know his biological origin, maintain the minor's relationship with the biological family, protect the stability of relationships with family members, protect established filiation identities and guarantee the fulfillment of obligations arising form affiliation that are necessary for proper development, among others…

(T)hrough the recognition of children, rights and obligations are assumed derived from paternity ***regardless of whether there is a biological link between the author of the recognition and the recognized****… What would have to be proven is the determining reason of the will that is not attributable to the author of the recognition"* (emphasis in original)

[12] Because, according to the Special Rapporteur, any of these three things amount to the sale of a child in breach of the Optional Protocol: 1. A pre-birth order. 2. A binding contract. 3. Payment to the surrogate of an amount greater than her reasonable expenses. The Mennesson's underwent surrogacy in California. As such they would have had: 1. A pre-birth order. 2. A binding contract. 3. Payment to the surrogate of an amount greater than her reasonable expenses. I discuss the Special Rapporteur's views in my discussion of the Verona Principles at page 114 below.

[13] At [39] and [54].

A gay married couple who had undertaken gestational surrogacy and egg donation in Yucatan sought that they both be recognised as the parents of the child. The birth certificate had issued naming the genetic father and the surrogate (as the birth mother) as the parents. There was a written agreement between the three of them by which the surrogate agreed that the parents of the child were the intended parents:

> *"It was clear from the beginning that it was a procedure in which* [the would be surrogate] *would act as a surrogate mother, given the impossibility of the complainants both being biological parents, and was always aware that the legal paternity of the child would be one of these."*[14]

It was clear that the surrogate did not intend to be a parent[15].

The Court concluded that taking into account the best interests of the child and protecting the right to identity, specifically, to be registered immediately after birth and already have a name, and considering that the child is under the care and within the family of the complainant's partner, that filiation must be considered to be established with respect to them.[16]

The intention to parent, or as described in the judgment, procreative will, was a fundamental factor:

> *"[T]he procreative will is a fundamental factor expressed by the homosexual couple and the consent expressed by the pregnant mother in terms of not claiming rights and accepting that they are the biological father and his partner who act as the child's parents and consequently assume all obligations arising from the affiliation. Will that was expressed by an adult woman, over the age of majority, with legal capacity…"*[17]

If there were any doubt about the priorities should be about how the varying human rights should be applied, the Court made that plain:

> ***"[E]stablishing the filiation of the minor with respect to the complainants is that which requires the best interests of the child in this case. The child requires for its proper development, to have all the rights and benefits derived from filiation, such as food rights, inheritance, as well as to receive care, education and affection. The most is advisable that it be cared for by the people who want to take care of him and have done so since his birth***[18].
>
> *In this regard, it is important to reiterate that the surrogate mother has so far stated that she had no interest in taking care of the minor and fulfill all obligations arising from legal motherhood."*[19](emphasis added)

---

[14] At [92].
[15] For example, at [98].
[16] At [101].
[17] At [102].
[18] Echoing what the High Court said about intent in *Masson,* as concerned Mr Masson at [54].
[19] At [103].

The Court held that the child had a right to know his biological origin, i.e., through surrogacy at the moment he decides, as part of his right to identity[20].

The Court recognised:

- The child's right to an identity and have its birth registered;
- The right of the intended parents to their private life and procreate through ART;
- The right of the surrogate to her private life and free development of personality[21].

Indirect Amparo Trial 1206/2021 **(2021)**

The approach in *Amparo in Revision 553/2018* was applied by the Federal Court of Mexico in Jalisco in this case, with particular emphasis on the rights of the child to an identity.

A single man and a gestational altruistic surrogate entered into a written agreement for her to be his surrogate, and for him to be the only parent. At the time of hearing, the child had not been born. The Court found that the man was a parent and that the surrogate was not, primarily based on the rights of the child to its identity, which was described as *"a fundamental human right"*[22]. In doing so, it relied on UNCRC, art. 8, and UDHR, art. 6. It said:

1. The child's right to an identity, which constitutes an element inherent to the human being, both in relations with the State and with society, which is built through multiple psychological and social factors

2. The person's self-image is determined largely by the knowledge of their origins and affiliation, as well as the identification the person has in society between a name and a nationality

3. Therefore, the right to an identity necessarily includes correlated others, such as the right to know a proper name, to know the filial history itself, to the recognition of the legal personality and nationality, among others.[23]

4. The right to an identity, where a child is procreated through ART, moves away from the idea of identity as synonymous with nothing more than a biological or genetic link and is inspired by the content of the right to identity in a broad and multifaceted sense, even aspects that are linked to the identity in a dynamic sense.[24]

5. That a child ought not be discriminated against in their method of conception, consistent with the principle of equality and non-discrimination.[25]

6. *"The right to identity consists of legal and social recognition of a person as a subject of rights and responsibilities and, in turn, of their belonging to a State, a territory, a society and a family, a necessary condition to preserve individual identity and collective of*

[20] At [105].
[21] At [106].
[22] At p.31.
[23] At p.26.
[24] At p.29.
[25] Ibid.

people…[I]dentity is not just one of the elements that make up the attribute of the human being as such, but represents the individuality of each person and the potential for development as a person and as part of a social group, to take advantage of all the natural and acquired attitudes and aptitudes, as well as the enjoyment and exercise of the freedoms and rights that the legal system recognizes and grants."[26]

7. *"The birth record constitutes a portal of rights, which certifies the existence of the child and his or her relationship with their parents, which is also essential for the realization of their human rights, which although by itself does not guarantee their education, health, protection and participation, their absence leaves it invisible and therefore excluded, out of reach of those who have the responsibility to ensure their needs and rights.*

   In other words, the lack of compliance with the right to identity places the child in a situation of extreme vulnerability and generates the impossibility of receiving protection from the State to access its protection and benefits.

   Hence guaranteeing the right of children to identity, allowing them to apply for a passport in the future, to enter into marriage, open a bank account, obtain credit, vote or be voted in, find employment and inherit property.

   Therefore, the lack of compliance with the right to identity involves the denial of the child's rights and can produce a chain of violations of their human rights."[27]

8. *"[T]he registration of the birth of an individual is the civil registry is part of his right to identity."*[28]

Regional Plenary in Civil Matters of the Central-South Region sentence at Jalisco 69/2023 (February 2024)

Three Magistrates had to determine which approach was correct:

a) Whether to recognise the parentage of a child, not yet born, based on the surrogacy contract; or

b) To wait until the child was born, and determine parentage at that point.

The Court, in applying *Amparo in Revision 553/2018,* chose the former, concluding it was:

> *"appropriate to grant provisional suspension against the determination of the Civil Registry that denies the future registration of an unborn person, without the data of the pregnant person, when it occurs on the occasion of his birth resulting from a surrogate maternity contract concluded by complaining persons, provided that the complaining persons exhibit the surrogate maternity contract and those documents that give an account of the pregnancy period."*[29]

---

[26] P.30.
[27] P.33.
[28] P.34.
[29] At [11].

Colombia

Surrogacy in Colombia is not regulated. The Constitutional Court has called repeatedly for it to be regulated, out of concerns, including potential trafficking. Parentage through surrogacy by case law has been determined based on procreative will, in the same way as that of the Supreme Court of California in *Johnson v Calvert.*

Judgment *T-968/09*

The Court noted that the duty to uphold the best interests of the child prevailed over any other social, political, legal or economic consideration, and their rights prevail over the rights of others.. The best interests of the child had first been recognised under the Geneva declaration of 1924, then in UDHR, then the Declaration on the Rights of the Child of 1959, ICCPR and UNCRC.

The Court noted UNCRC, arts. 3.1 and 3.2 and held:

> *"The best interests of the minor is not an abstract entity, devoid of links to concrete reality, on which they can formulate general rules of mechanical application. On the contrary: the content of this interest, which is of a real and relational nature, can only be established giving due consideration to individual, unique and unrepeatable of each minor, who as a worthy subject, must be cared for by the family, society and the State with all the care that requires your personal situation".*

The particular matters to be applied to determine the best interests of each child, depending on his or her own particular circumstances were:

1. ensure the integral development of the child.
2. guarantee the conditions for the full exercise of the fundamental rights of the minor.
3. protect the child form prohibited risks such as alcoholism, drug addiction, prostitution, violence physical or moral, economic or labour exploitation, and in general, disrespect for human dignity in all its forms.
4. in balancing the rights of the child and that of the parents, that of the child prevail.
5. provide a family environment suitable for the development of the child
6. there must be powerful reasons justifying State intervention in paternal/maternal relations, including that the family is a necessary condition for the satisfaction of most fundamental rights of minors.

The Court called for regulation of surrogacy:

(i) that women have a medical need for surrogacy;

(ii) that surrogacy be gestational, not traditional;

(iii) that there was an altruistic purpose, not lucrative end as its motive ;

(iv) that pregnant women meet a number of requirements such as majority, psychophysical health, having had children, etc.;

(v) that the pregnant woman has an obligation to undergo the relevant examinations before, during and after pregnancy, as well as psychological assessments;

(vi) the identity of the parties is preserved;

(vii) that the pregnant woman, once having given informed consent, and the reproductive material has been implemented or gametes, cannot retract the delivery of the child;

(viii) that the biological parents cannot reject the child under any circumstances;

(ix) that the child is not left unprotected by the death of the biological parents before birth; and

(x) that pregnant woman could only terminate pregnancy by medical prescription, among others.

Judgment *T-275/22*

A single father through surrogacy sought paternity leave. The Court noted that there was no mother[30]. Based on the intentions of the parties, he was the only parent[31]. He decided to assume *the* care of his daughter *alone*, it being his intention to volunteer to be a father and take care of his daughter *in solitude*.[32]

The Court noted that there had, between 1998 and 2021, been 16 bills before the Colombian Congress to regulate surrogacy[33]. None had been enacted. None made reference to maternity or paternity leave arising from surrogacy.

The Court held that maternity and paternity leave are a guarantee of the exercise of the child's fundamental rights [34] and constitute fundamental and subjective rights of the mother and father.[35]

Based on the principles of equality and the best interests of children, the benefits of maternity leave were extended to the father. [36]

Further, the surrogate was entitled to one week leave before birth and six weeks leave post-birth, not being maternity leave, but "the time required under normal conditions for women to recover from the process of gestation and childbirth", being medical incapacity, as she was not the child's mother.[37]

---

[30] At [86], [87].
[31] At [87].
[32] At [92].
[33] And a further two in 2023: *T-124/24* at [129].
[34] At [63].
[35] At [64].
[36] At [102].
[37] At [109], [115].

Judgment *T-127/24*

A single intended father, from the United States, underwent surrogacy in Colombia. In accordance with the usual practice in Colombia, following the birth of the child he was recognised by a Colombian court as the only parent.

The man subsequently applied with a Colombian consulate in the United States, for the child to have a Colombian passport. The application was rejected.

The father sought that the passport issue, in part relying on equality and non-discrimination under UDHR, art. 1, and the right of the child to have a name and acquire a nationality: UNCRC, art. 7.1. His application was unsuccessful.

After a long discussion of various human rights principles, the Constitutional Court stated that:

> *"Two main conclusions can be drawn from the above. First, boys and girls born through surrogate gestation processes have the same rights as all children, and second, have the right to equality and therefore cannot be discriminated against on the basis of all children as to the method of their birth. In addition, these children must be guaranteed equal treatment in the face of its family, in front of society and in the face of the State."*[38]

The Court raised concerns about:

a) the vulnerability of the human rights of children.

b) The prohibition on the sale of children

c) The sexual exploitation of women

d) People trafficking

The Court dismissed the application, noting that the child was not entitled to Colombian citizenship because the surrogate was not its mother, and that there was no violation of the child's rights, such as risk of statelessness, because the child's name was reflected in the civil registry and had United States citizenship.

Judgment *T-232/24*

A single Ukrainian man became a parent through surrogacy in Colombia. The child was initially granted a Colombian passport, as the surrogate was shown as the mother upon birth. However, in accordance with Colombian practice, a Colombian court found that she was not a parent of the child.

He then sought to update the passport. The father and girl then travelled to Spain. At about the time of arrival in Spain, the Colombian passport had been cancelled. As they had entered Schengen, they travelled to Hungary. The father then left the girl in the care of relatives, when

[38] At [121].

he proposed to move to Australia for work, as he was unable to remain in Hungary. He made *"multiple efforts for his daughter to acquire a nationality without success."*[39]

Issuance of the Colombian passport was refused, because the Colombian surrogate was not a parent of the child (*jus sanguinis*) and nor was the father domiciled in Colombia at the time of birth (*jus soli*).

His daughter was unable to obtain a Ukrainian passport (as Ukrainian authorities recognised the surrogate as the mother, even though she was not recognised as the mother in Colombia). The father had to prove that the mother had died, declared incapable or deprived of her parental rights, in order to be able to obtain a Ukrainian passport for the child:

> *"Indeed, [the father] reported that in Ukraine, for the recognition of the nationality of children of Ukrainians born abroad, registration of the mother and father in the civil birth register. On the other hand, for children recognized as nationals of another country (in this case, Colombia) do not It requires the registration of both parents. So, if the girl had her Colombian nationality, the requirement to have both parents on their registration would not be required and thus accessed to Ukrainian nationality without problem."*[40]

The father was unable to bring his daughter to Australia with him, because she did not have a passport. Australian authorities required that the girl have another nationality.[41] She was, in effect, rendered stateless. He subsequently returned to Ukraine from Australia, to be with his daughter[42].

The court noted that the right to nationality was a human right, under UDHR, art. 15, UNCRC, art.7, ICCPR, art. 24 and ICESCR, art. 5, being a *"fundamental law as an attribute of personality."*[43]

The Court found that authorities had violated the girl's right to nationality, identity and equality as well as her fundamental right to protection versus statelessness[44]:

> *"In sum, Leticia must not bear the consequences that she was born without regulation nor the bureaucratic burdens required to enjoy her rights. Therefore, the Court shall protect her right to have a nationality, a defined personal identity, equality before the law and non-discrimination. Mr Boris will be entrusted with the special care, attention and love his daughter deserves, in front of whom he will have his duty to ensure full growth, free from violence and with the guarantee that She can exercise her rights as a Colombian citizen throughout her life."* [45]

Argentina

---

[39] At [199].
[40] At [9].
[41] At [200].
[42] It is unclear how she entered Ukraine from Hungary.
[43] At [85].
[44] At [228].
[45] At [230].

***IN v A, CL re challenge to parentage* (2024)**

The Supreme Court held that the surrogate was a parent. The biological father and the surrogate, being the birth mother, were the two parents to be named on the birth certificate in Argentina. The Civil and Commercial Code required that the woman who gave birth was the mother, and that there was a limit of two parents.

A gay couple entered into a surrogacy contract with a surrogate, on the basis that they would be the parents, and she would not. The surrogate did not wish to be registered as the mother. Based on public policy rules, the surrogate remained as a parent. Because there as not a persecutory purpose of the law, it did not violate the plaintiffs' right to equality.

The plaintiffs relied on UNCRC, arts. 3, 7 and 8.1, among other provisions, including the right to personal autonomy, right to privacy, to found a family, to equality and non-discrimination and to identity. They submitted that they should be recognised as parents as they had exercised procreative will *"and is a consequence of due respect for the right of every person to form a family according to their individual choices and regardless of their sexual orientation, as it constitutes the only option that a homosexual couple composed of two men- biological- has to have a child that is genetically their own (although only form one of them)."*[46]

They also submitted that they had a right to access ART, as per *Artavia Murillo v Costa Rica*, and that failure to recognise their parentage did not give priority to the best interests of the child nor granting the child protection of its identity or family relationships.

The Court held that it was not relevant that there was a surrogacy agreement nor that the pregnant woman expressed her will not have a legal relationship with the child, as the statute as to filiation was based on reasons of public order to attribute the link in a certain and determined way.[47] The surrogate was a parent under "the clear text of the law" [48]. The law was clear that there were two parents, i.e., the surrogate and the biological father, and that *"to admit a different interpretation, based on personal autonomy, would have the consequence of destroying the public order that governs this matter"*. [49]

The *Civil and Commercial Code* did not prevent the right to found a family nor impose a single concept of family, but rather limits itself to regulating the determination of the filial bond where ART is used.[50]

The Court considered that there was no breach of UNCRC, art. 3 when it had not been established that the regulation of family relations was unreasonable in the way it addressed the best interests of the child as a primary consideration in addition to other interest that contribute to public order in matters of filiation.[51]

---

[46] At [3].
[47] At [15].
[48] At [16].
[49] At [18].
[50] At [20].
[51] At [22].

Nor was there a harm to the identity of the child, as the child's identity was established by the legal system of filiation, which records a biological reality- gestation.[52]

United Kingdom

***A v. P* [2011] EWHC 1738 (Fam); [2012] 3 WLR 369**

Both Articles 8 of the UNCRC and the European Convention on Human Rights were considered in a surrogacy case. Theis J was considering s. 54 of the UK Act, which is equivalent to Australian provisions as to parentage orders, such as the *Surrogacy Act 2010* (Qld), s.22, which concerns the ability to make a parentage order transferring parentage from the birth parents to the intended parents.

She stated at [28]:

> *"The concept of identity includes the legal recognition of relationships between children and parents. In ZH (Tanzania) v Secretary of State for the Home Department UKSC 2011 4 Baroness Hale considered that the courts in this jurisdiction and decision makers had to have regard to the key principles of the UNCRC, both in respect of Article 8 of the ECHR and in its application to decisions by authorities in this jurisdiction (paras 22 – 25). If the consequences of a purposive construction of s 54(4) is that the child's identity with his biological father is preserved and the child's identity is linked to both Mr and Mrs A the court may consider itself bound to arrive at such a conclusion on the combined reading of Article 8 ECHR and Article 8 of the UNCRC."*

In that case, Mr A was the biological father. Mr and Mrs A were the intended parents of a child born through surrogacy.

***Re X (A Child) (Surrogacy: Time Limit)* [2014] EWHC 3135 (Fam)**

Munby P followed the "powerful analysis"[53] in *A v P*, stating:

> *"Section 54 goes to the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are. It is central to his being, whether as an individual or as a member of his family. As Ms Isaacs correctly puts it, this case is fundamentally about Xs identity and his relationship with the commissioning parents. Fundamental as these matters must be to commissioning parents they are, if anything, even more fundamental to the child. A parental order has, to adopt Theis J's powerful expression, a transformative effect, not just in its effect on the child's legal relationships with the surrogate and commissioning parents but also, to adopt the guardian's words in the present case, in relation to the practical and psychological realities of X's identity. A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in Re J (Adoption: Non-Patrial) [1998] INLR*

[52] At [23].
[53] At [53].

424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible: see G v G (Parental Order: Revocation) [2012] EWHC 1979 (Fam), [2013] 1 FLR 286, to which I have already referred. And the court considering an application for a parental order is required to treat the child's welfare throughout his life as paramount: see in In re L (A Child) (Parental Order: Foreign Surrogacy) [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143. X was born in December 2011, so his expectation of life must extend well beyond the next 75 years. Parliament has therefore required the judge considering an application for a parental order to look into a distant future."

Australia

***KRB and BFH v. RKH and BJH* [2020] QChC 7**

The approach in *A v P* and *Re X* was followed[54]. Coker DCJ stated:

"[9] Australia is a signatory to the International Convention on the Rights of a Child. Article 8 of the convention is relevant here. It relates to states entering into particular agreements with regard to the rights of children. Article 8 in particular provides:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law, without unlawful interference.

[10] And secondly:

Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

[11] These considerations are reflected in the Surrogacy Act 2010 Queensland, sections 5 and 6. Section 5 relates to the objects of the Act and is in these terms:

5 Main objects of Act

The main objects of this Act are -

(a) To regulate particular matters in relation to surrogacy arrangements, including by prohibiting commercial surrogacy arrangements and providing, in particular circumstances, for the court-sanctioned transfer of parentage of a child born as a result of a surrogacy arrangement; and

[54] Although the case does not cite *A v P* or *Re X*, those cases were cited by me in my submissions to the Court, which submissions were accepted by the Court. I appeared for the applicants.

(b) In the context of a surrogacy arrangement that may result in the court-sanctioned transfer of parentage of a child born as a result:

(i) to establish procedures to ensure parties to the arrangement understand its nature and implications, and

(ii) to safeguard the child's wellbeing and best interests.

[12] Section 6 then goes on to detail what are called the 'Guiding Principles', and I note in particular that they are as follows:

6 Guiding principles

(1) This Act is to be administered according to the principle that the wellbeing and best interests of a child born as a result of a surrogacy arrangement, both through childhood and for the rest of his or her life, are paramount.

(2) Subject to subsection (1), this Act is to be administered according to the following principles:

(a) A child born as a result of a surrogacy arrangement should be cared for in a way that

(i) ensures a safe, stable and nurturing family and home life; and

(ii) promotes openness and honesty about the child's birth parentage; and

(iii) promotes the development of the child's emotional, mental, physical and social wellbeing.

(b) The same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of –

(i) how the child was conceived under the arrangement; or

(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement; or

(iii) the relationship status of the persons who become the child's parents as the result of a transfer of parentage.

(c) The long-term health and wellbeing of parties to a surrogacy arrangement and their family should be promoted, and

(d) The autonomy of consenting adults in their private lives should be respected.

[13] The parties to this application have been mindful of these guiding principles and have done all that they can to comply with the law, and they now seek that the law's protection for Baby P be provided through the parentage order."

SURROGATE'S RIGHT TO BODILY AUTONOMY

Under Australian common law, the baby does not a separate legal identity until it is born. Therefore, a man cannot obtain an injunction to prevent a woman having an abortion, as she has bodily autonomy[55].

That principle has been reflected in the Surrogacy Acts in each State and Territory (except NSW), starting with Queensland in 2010, and being enacted most recently in Western Australia in 2025.

Mexico

Amparo in revision 63/2024 **(2025)**

The Supreme Court held that the rights of the surrogate, including her right to bodily autonomy, needed to be protected. Accordingly:

- The surrogacy agreement needed to be fair, and not oppressive of her rights.
- The surrogate was entitled to independent legal and medical advice and psychological support before entry into the agreement.
- The surrogate was entitled to psychological support during the surrogacy journey.
- The surrogate had bodily autonomy, and could therefore choose to have an abortion, if she so wished.
- The surrogate was entitled to independent legal representation at the hearing for the amparo order.

[55] *K v T* [1983] 1Qd R 396; *Attorney-General (Qld) (ex rel. Kerr) v T* [1983] 1 Qd R 404; *Attorney-General (Qld) (ex rel. Kerr) v T* (1983) 57 ALJR 285; *F & F* [1989] FamCA 41.