

/ANALIZA ZAKONODAVSTVA

UDK 347.634(698.2); 341.96:347.634

CERIF: S 130

DOI: 10.51204/Anali_PFBU_22209A

Goran GEORGIJEVIC, PhD*

LEGAL ASPECTS IN MAURITIUS OF MEDICAL PROCEDURES PERFORMED ABROAD

There are several medical procedures that may be undergone by Mauritian citizens abroad where no harm is suffered by a patient, and yet, important legal questions may stem from them. The main examples of it are surrogacy medical procedures and medically assisted reproduction procedures performed abroad on a Mauritian citizen. The legal aspects of those types of medical procedures performed abroad, which could one day become legal issues before the Mauritian Supreme Court are analyzed in this paper.

Key words: *Mauritius. – Medical. – Procedure. – Law. – Surrogacy. – Assisted. – Procreation.*

* Lecturer in Law, Law Department, Faculty of Law and Management, University of Mauritius, Mauritius, g.georgijevic@uom.ac.mu.

The situation may occur, and it probably happens very often in everyday life, that Mauritian citizens travel abroad and undergo medical procedure in foreign countries¹ either because that particular type of procedure is not available in Mauritius or because the service available abroad is of higher quality. In most cases, medical procedures performed abroad do not raise important legal questions in Mauritius, except the issue of the damage suffered by a patient due to fault or negligence of a medical practitioner who performed the procedure abroad. However, there are few cases of medical procedures undergone by Mauritian citizens abroad where no harm is suffered by a patient, and yet, important legal questions may stem from those procedures. The main examples of it are surrogacy medical procedures and medically assisted reproduction procedures performed abroad on a Mauritian citizen. The legal aspects of those types of medical procedure performed abroad, which could one day become legal issues before the Mauritian Supreme Court, will be analyzed in this paper.

The method used in the preparation of this paper is essentially critical analysis based on desk research. This paper addresses issues pertaining to the Mauritian civil law. Thus, French case law and French scholarly writings, which, for historical reasons,² represent a persuasive authority in Mauritius,³ are taken into account (Law Reform Commission 2010; Domingue 2002, 62; Agostini 1992, 21; Venchard 1982, 31; Angelo 1970, 237; Bogdan 1989, 28; Burgeat 1975, 315; Marrier d’Unienville 1969, 96; Moolan 1969, 137; Palmer, 2012). French Law is a persuasive and not a binding authority, which means that Mauritian judges do not have any formal

¹ For example, an intervention performed on a cardiac patient, a plastic surgery, etc.

² The French Civil Code of 1804 was incorporated into the positive law of Mauritius in 1805, because Mauritius was a French colony in the early 19th century. After the English took possession of the Island, the Mauritian Civil Code remained in force, thanks to Article 8 of the Act of Surrender, signed in 1810, which stipulated that the people of the island would maintain their religion, laws and customs.

³ In the judgement of the Supreme Court of Mauritius *Lingel-Roy M. J. E. M. and ORS v. The State of Mauritius and Anor* 2017 SCJ 411 we can read: “It is appropriate to recall the practice that when it comes to the interpretation of a law borrowed from French law we stand guided for its interpretation by French doctrine and case law. One can quote in that respect the following passage from *L’Etendry v The Queen* [1953 MR 15]: ‘the normal rule of construction laid down time and again by this court (...) is to the effect that when our law is borrowed from French law we should resort for guidance as to its interpretation to French doctrine and case law.’ But, it has to be pointed out that the practice of relying on French authorities has always been for guidance and not in application of the stare decisis principle.” (highlighted by author)

obligation to follow the decisions of their French counterparts.⁴ A Mauritian judge will only cite and follow the reasoning developed in a judgement of the French Court of Cassation if the judge considers them appropriate for the Mauritian context. For the above-mentioned reasons, our analysis will draw upon the French case law and doctrine but the outcome will not necessarily be the same as in French law.

1. LEGAL ASPECTS OF A SURROGACY PERFORMED ABROAD

Surrogacy can take two different forms (Garrigue 2018, 702; Courbe, Gouttenoire 2017, 430–431; Hess-Fallon, Simon 2014, 193; Neirnick 2019, para. 48). First of all, there can be gestational surrogacy, where an embryo has been conceived with the gametes (genetic material) of the couple wishing to have a baby or with the gametes of another donors and, after that, the embryo has been transferred into the surrogate mother's uterus. The surrogate mother is supposed to forfeit the baby after she gives birth and to hand it over the child to the couple which are usually called *the intended parents*. The intended parents may sometimes use the medical technique known as *surrogate mother*, where the surrogate mother is inseminated artificially with the sperm of the intended father. Of course, as it is also the case in gestational surrogacy, the surrogate mother will forfeit and hand over the child to the intended parents, after giving birth. This second technique of surrogacy differs from the first one in that the surrogate mother will not only carry the child but also conceive it with her genetic material. The surrogate mother gives her genetic material for the conception of the child and carries it to term, when it will be handed over to the intended parents. In other terms, the surrogate mother is in every possible way the baby's biological mother (Mirkovic 2008, 1–2).

Surrogacy is a legal gap in the current legal system in Mauritius (Law Reform Commission of Mauritius, 2013). Thus, there are no rules pertaining to it either in the Mauritian Civil Code nor in a special legislation. From the point of view of the current legislation in Mauritius, surrogacy, performed either in Mauritius or abroad, is not prohibited by any law. As already

⁴ This rule has been applied, for instance, to the issue of reparation for indirect damage suffered by an unmarried partner in the event of the death of the other partner. See the judgements of the Mauritian Supreme Court in *Jugessur Mrs Shati & ORS v. Bestel Joseph Christian Yann & Anor* 2007 SCJ 106 and *Naikoo v. Société Héritiers Bhogun* 1972 MR 66 1972, as well as the judgements of the French Court of Cassation ch. mixte, 27 February 1970 n° of pourvoi: 68–10276, and Cass. crim. 17 March 1970 n° of pourvoi: 69–91040.

outlined in the introduction of this paper, Mauritian citizens will sometimes have recourse to medical procedures abroad, if a procedure is not available in Mauritius or is available but with many obstacles and difficulties or is of lesser quality than the same procedure performed abroad. This also applies to surrogacy.⁵ Thus, the performance of a surrogacy can be the purpose of a trip of a Mauritian citizen abroad. The first legal issue which arises from that kind of tourism is the treatment that a Mauritian Judge will give, from the legal point of view, to a child conceived abroad with the aid of a surrogate mother. In certain countries surrogacy is legal. For instance, for many years, India was an ideal destination for medical tourism aiming at surrogacy. There were many prospective surrogate mothers in India, the country has broadly allowed this medical practice and the financial cost was not unreasonable. Moreover, medical facilities, such as private clinics, are well equipped to perform this kind of procedure. However, since 2015, major legislative changes have been brought to Indian legislation and now the intended parents have to be Indian. Foreigners cannot come in India and have recourse to a surrogate or gestational mother (Surrogate.com 2022a; The Guardian 2015; Sherwell 2015). Moreover, surrogacy is legal in some other countries, and especially in the United States of America (Intraius Legal Consulting 2018). In some of them surrogacy is available to foreigners.⁶ For example, “if you live outside of the United States and are looking to have a child via surrogacy in another country, using an American surrogacy agency is likely your best choice. Many surrogacy professionals in the States have developed programs specifically for international parents where you can connect with qualified American surrogates who are more than happy to carry a child for an international couple” (Surrogate.com 2022b). As previously pointed out, for historical reasons, Mauritian civil law is strongly influenced by French law. Even today, the judgments of the French Court of Cassation on civil law issues are considered as persuasive authority by Mauritian courts of justice, and the legal reasoning of French judges will often (but not always⁷) be followed by their Mauritian counterparts. Thus, there is a strong probability that, if and when a legal issue pertaining to a surrogacy performed abroad

⁵ As far as we are aware, and after having discussed with medical practitioners and other professionals, surrogacy is not performed in Mauritian clinics and hospitals.

⁶ “Experts say that countries popular with parents for surrogacy arrangements are the US (...) Thailand, Ukraine and Russia. Mexico, Nepal, Poland and Georgia are also among the countries described as possibilities for surrogacy arrangements” (Cheung 2014).

⁷ Thus, the question of compensation of unmarried partner as indirect victim for the detriment suffered is differently solved in French Law and in Mauritian Law. See: *Lingel-Roy M. J. E. M. & Ors v The State of Mauritius & Anor* 2017 SCJ 411; *Jugessur*

for the benefit of Mauritian citizens (e.g. in the United States of America) is raised, a Mauritian judge will follow the solutions and spirit of the French Court of Cassation, which is the persuasive authority in Mauritius.

1.1. Prohibition of Surrogacy Agreements

Article 16–7 of the French Civil Code formally prohibits the surrogacy contracts (Garrigue, 2018, 701; Le Gidec, Chabot 2019, para. 35; *see* Dekeuwer-Défossez, Leroyer, Dionisi-Peyrusse 2018, 583; Pichard 2017, 1143 *ff.*; Le Gac-Pech 2016, 486; Tourame 2016, 275 *ff.*), because, “any agreement relating to procreation or gestation on behalf of others is void.” This rule is directly linked to the public interest, i.e. the directional public order (*ordre public de direction*) (Porchy-Simon 2021, 152; Tranchant, Egea 2021, 44–45; Ancel 2020, 57 *ff.*), which is comprised of the fundamental values in French society such as the dignity of women (Courbe, Jault-Seseke 2019, 16). That is why the nullity of surrogacy agreements is an absolute one (Hess-Fallon, Simon 2014, 193). Any interested person can invoke this nullity (Courbe, Gouttenoire 2017, 431.) and the surrogacy contract cannot be confirmed by the gestational/surrogate mother and the intended parents. Even before Article 16–7 of the French Civil Code came into force, surrogacy agreements were strictly prohibited by the French Court of Cassation. In the famous judgment of all chambers of the Court of Cassation given on 31 May 1991 (Courbe, Gouttenoire 2017, 430, translated by author), we can read: “Considering Articles 6 and 1128 of the Civil Code, together Article 353 of the same Code; whereas, the convention by which a woman undertakes, even free of charge, to conceive and carry a child and to abandon it after its birth is contrary both to the public order principle of the unavailability of the human body as well as to the principle of the unavailability of the state of persons”. This position led the French Court of Cassation to declare the adoption, by the intended parents, of the child carried by a surrogate mother, void and without legal effects, because this kind of adoption amounts to a fraud. On the other hand, the link of filiation⁸ could be established between the child and its biological mother, who was the surrogate mother (Fenouillet 2019, 500).

Mrs Shati & ORS vs Bestel Joseph Christian Yann & ANOR 2007 SCJ 106; *Naikoo vs Société Héritiers Bhogun* 1972 MR 66; *Moutou vs Mauritius Government Railways* 1933 MR 102.

⁸ The link of filiation is a legal bond between a child and its parent to which the Mauritian Civil Code attach certain rights and obligations. For instance, parents have the right and the obligation to educate their children (Article 371 *ff.* of the Mauritian Civil Code), to provide food and clothes to them (Article 203 of the

In other words, the refusal by the French Civil Code and the Court of Cassation to validate contracts on surrogacy is based on the idea that a woman and her body should not be used as a mere production tool. The capacity to carry a child is not something ordinary but one of the most intimate aspects of a women's existence. The pregnancy is not and cannot be considered as usual work (Mirkovic 2008, para. 8; Courbe, Gouttenoire 2017, 430). Moreover, the idea to abandon a baby, a human being as a whole, to a couple who "ordered" it seems to be morally shocking (Garrigue 2018, 702,)), and that is why the French Court of Cassation, in its decision dated 31 May 1991 cited Article 1128 of the Civil Code, prohibiting an object of contract which would not be in conformity with the law, public interest and good morals. It is certain that a baby (a human being) cannot be considered as an ordinary goods nor handed over by one party to a contract to another.

As mentioned previously, the case law of the French Court of Cassation is the persuasive authority in Mauritius regarding civil law cases. Thus, if and when in the future the legal issue of validity of surrogacy agreements, concluded abroad by Mauritian citizens, is raised before the Supreme Court of Mauritius, there is a strong probability that the Supreme Court will follow its French counterpart and will declare this type of agreement null and void, whether consideration is given or promised to the surrogate mother or not. Even though the principle of the unavailability of the human body is not explicitly set out in the Mauritian Civil Code, there is no doubt that it can be inferred from the existing legislation in Mauritius (*Cf.* Marais 2018, 173–174). Section 6 of the Mauritian Constitution prohibits slavery,⁹ which means that no one in Mauritius can be sold for good consideration and deprived of his or her liberty. The human body as a whole is a material object that cannot be sold by contract (Penneau, Terrier 2019, para. 55). This rule stems also from Articles 1128 and 1598 of the Mauritian Civil Code.¹⁰ For the same reason, contract on surrogacy should be illegal in Mauritius. This type of contract seems to be contrary to the public interest mentioned in Article 6 of the Mauritian Civil Code (Marais 2018, 174), as well as to the dignity of the child, who cannot be treated as an object for sale. Moreover, the dignity of a

Mauritian Civil Code), etc. On the other hand, children have the right to bear their father's family name (Article 27 of the Mauritian Civil Code), to receive part of their parents' property upon the parents' death (Article 913) of the Mauritian Civil Code, etc.

⁹ "No person shall be held in slavery or servitude".

¹⁰ On other illegal objects from the point of view of the Mauritian Contract Law, see: Section 6 of the Dangerous Drugs Act 2000; section 3 of the Firearms Act 2006; sections 4, 5 (1) and 17 of the Human Tissue (Removal, Preservation and Transplant) Act.

mother prohibits her body from being treated as a simple tool of production in Mauritius. Thus, if a child is born abroad thanks to a surrogacy to which Mauritian citizens have reverted, it seems that the recourse to this technique should be declared illegal in Mauritius. The next issue which that will be considered is the legal status in Mauritius of a baby conceived abroad, carried by a surrogate mother and handed over to Mauritian intended parents (Garrigue 2018, 703).

1.2. Impossibility to Establish the Link of Filiation in Mauritius of a Baby Born Abroad to a Surrogate Mother

On 6 April 2011 the French Court of Cassation answered an important question of the legal status of a surrogacy performed abroad by French intended parents. The French Ministry of Justice (Attorney General's Office) had required that the Civil Status Service refuse to transcribe in the French Civil Status Register the filiation link of the child conceived abroad (in the United States of America) with the aid of a surrogate mother. This refusal of the French Court of Cassation is based on the principle of the unavailability of the status of persons (Neirinck 2011, abstract; Fenouillet 2019, 500 *ff.*, para. 581; Garrigue 2018, 706). However, this position of the French Court of Cassation has been criticized by the European Court for Human Rights in its judgments in *Menesson* and *Labassee* dated 26 June 2014 (Garrigue 2018, 707–708; Hess-Fallon, Simon 2014, 197; *see* Hilt 2019, 2190 *ff.*). According to the Court, the refusal to bestow upon a child a link of filiation is contrary to the right of the child to its private life. The French Court of Cassation has followed in the steps of the European Court for Human Rights and has abandoned its position taken on 6 April 2011. Thus, when a child is conceived abroad with the aid of a surrogate or gestational mother, its link of paternal filiation established abroad could be transcribed in the French Civil Status Register (Fenouillet 2019, 503–504). This rule was set out in several judgments of the French Court of Cassation dated 5 July 2017 (Garrigue 2018, 711).¹¹ As from the day those judgments have been given, the paternal filiation established abroad can be transcribed in the French Civil Status Register, because it is contrary to the supreme interest of the child not to have such a filiation. According to some French academics, the position adopted by the French Court of Cassation has abolished Article 16–7 of the French Civil Code prohibiting surrogacy agreements (Chenede 2017, 375). On the other hand, it has to be noted that the abovementioned solution will

¹¹ Cass. 1st Chamber, 12 September 2019, comment ChénéDé 2019, 531.

not apply to the woman who has not given birth to the child, even though she may have given her genetic material for the child's conception. Her link of filiation will not be transcribed in the French Civil Status Register, because the biological mother (gestational or surrogate mother) is mentioned in the civil status document produced abroad. However, the intended mother will be able to establish the link of filiation through an adoption of the child (Fenouillet 2019, 505–506; Garrigue 2018, 711–712; *see* Granet-Lambrechts, 2017, 729 *ff.*, Part III, sub-part B).¹² In October 2019, the French Court of Cassation allowed for the transcription of the link of filiation of the intended mother in the French Civil Status Register.¹³

It is the author's opinion that the solution adopted by the European Court for Human Rights and followed by the French Court of Cassation is the most suitable one for Mauritius. The supreme interest of the child should not be used as the argument authorizing the intended parents to circumvent the prohibition on surrogacy agreements. This prohibition does not prevent the surrogate mother, who gave birth to the child, from establishing her link of filiation, but the intended parents should not be able to do so. The acknowledgement in Mauritius of the link of filiation established abroad for the benefit of intended parents would amount to fraud, given the recommendation that surrogacy agreements be considered void in Mauritius.

2. MEDICALLY ASSISTED PROCREATION

In Mauritius, medically assisted procreation is a legal gap, i.e. this medical mechanism is not regulated by any law. However, according to available data, some private clinics in Mauritius offer the services that qualify as medically assisted procreation.¹⁴ Thus, *in vitro* and *in vivo* inseminations are performed in Mauritius. These techniques do not entail anything bad

¹² Cass. 1st Chamber, 12 September 2019, comment ChénéDé 2019, 531.

¹³ Cass. Pl. Ass. 4 October 2019; *see* Cass. Pl. Ass. 5 October 2018; and ECHR Opinion 10 April 2019.

¹⁴ "At Wellkin Hospital, the following fertility services are provided:

- Intra Uterine Insemination;
- In Vitro Fertilization with Intra Cytoplasmic Sperm Injection (ICSI);
- Cryopreservation of Embryos, Spermatozoa and Eggs;
- Frozen embryo transfer;
- Semen testing" (Wellkin Hospital. 2018. In Vitro Fertilisation (IVF). <https://www.wellkinhospital.com/medical-specialities/in-vitro-fertilisation-ivf/> (last visited 18 May 2022)).

or illegal. The desire of a married couple, or even of an unmarried one, to conceive and give birth to a child is easy to understand and if the medical science can help them in doing so, it should not be a priori illegal. However, two types of issues may arise from this type of medical procedure. The first is under what conditions may a married and/or unmarried Mauritian couple legally have access to medically assisted procreation. The second is determining the legal consequences in Mauritius of a medically assisted procreation performed abroad.

2.1. Uncertainty Pertaining to the Conditions for Medically Assisted Procreation

Unlike Mauritius, France has regulated the conditions under which a couple may have recourse to medically assisted procreation. In France, on one hand, the Code of Public Health (*Code de la santé publique*) sets out the conditions required for an individual to be eligible for medically assisted procreation, whereas, on the other hand, the French Civil Code governs its effects. Medically assisted procreation is defined by article L. 2141-1 of the French Code of Public Health as “clinical and biological practices allowing in vitro conception, preservation of gametes, germinal tissues and embryos, embryo transfer and artificial insemination.” The common characteristic of all those techniques (*see Amice, Beuvillard, Piraud 2015, 1 ff.*) is the absence of the conception of a child in a natural way, i.e. through sexual relationship between the parents (Courbe, Gouttenoire 2017, 421). The list of medically assisted reproduction techniques available to the future parents is defined by a decision of the Minister of Health. Those techniques have to conform to the public order, i.e. with the core principles of the French society, such as human dignity, security of the mother and child, etc. (Fenouillet 2019, 481 *ff.*).

Article L. 2141-2 (1) of the French Code of Public Health provides that “the purpose of medically assisted procreation is to remedy the infertility of a couple or to avoid transmission to the child or to a member of the couple of a disease of a particular gravity” (Courbe, Gouttenoire 2017, 425; Mallet-Bricout, 2004, alert 46; Neirinck, 2013, landmark 2). Thus, the French legislator has specified in which cases a couple living together in a stable and continuous manner, whether married or not, may have recourse to medically assisted procreation. Those cases seem to justify properly the recourse to medically assisted reproduction techniques, and it is highly probable that the Supreme Court of Mauritius will not consider illegal the desire of the parents who cannot conceive a child naturally, or who wish to avoid the birth of a sick child, to have recourse to medically assisted procreation.

However, as we have already mentioned, medically assisted procreation is not currently regulated by Mauritian law; there is a legal gap pertaining to this medical technique. Thus, the question might be raised before the Supreme Court of Mauritius whether medically assisted procreation techniques can be used in circumstances different from those mentioned in article L. 2141–2 (1) of the French Code of Public Health, for example, in order for an individual (a woman) living alone to ensure offspring (Fulchiron 2014, para. 1).

It is not certain how the Supreme Court of Mauritius would resolve such an issue, and what would be the position of the Mauritian Supreme Court when, for instance, a widow wishes to implant into her uterus an embryo created with her egg and the sperm of her husband or non-married partner while he was still alive (Blanc 2015, 44). On one hand, every individual in Mauritius has the right to their private life including the right to create a family (Fenoullet 2019, 477). This right is guaranteed by Article 22 of the Mauritian Civil Code. However, and on the other hand, it is in the best interest of the child to have both parents and to be raised in the best possible environment (Blanc 2015, 49; Courbe, Gouttenoire 2017, 434–435). It is the author's opinion that the latter argument should prevail. Medical aid and assistance in a conception of a child should be a remedy to serious difficulties and problems that some Mauritian couples might be facing and such aid and assistance have to lead to the creation of a stable family background, which is one of the core values in Mauritius (*ordre public*). Medically assisted procreation must not be used as a tool for satisfaction of an individual's selfish interests or desires.

Article L. 2141–2 of the French Code of Public Health provides that medically assisted reproduction is available only to the couples composed of a man and a woman (Fenoullet 2019, 483; Courbe, Gouttenoire 2017, 433–434; Garrigue 2018, para. 1116 *ff.*);¹⁵ they must be alive, of reproductive age and must consent to the medical procedure before the embryo transfer or artificial insemination. The aim of those conditions is, on one hand, to allow people to get offspring and, on the other hand to protect the interests of the child – which is to have a stable family environment. Those conditions prevent some categories of persons in France from having recourse to medically assisted procreation. Thus, single women, widows, and women who are getting divorced cannot be medically assisted in order to ensure offspring. Elderly couples are also excluded from medical assistance in order to get a child (Fenoullet, 2019, 483–484). It is currently uncertain what the position of the Supreme Court of Mauritius would be regarding such questions if an issue pertaining to a procreation performed abroad is raised before the

¹⁵ They can be legally married or not (unmarried partners).

Court. There is nothing in the current legislation in Mauritius to prevent a single woman, not married (Fenouillet 2019, 479; Courbe, Gouttenoire 2017, 432–433; Pichard 2019, 2143 *ff.*) or a widow (Blanc 2015, 44; *see* Labrusse-Riou 2019, para. 61),¹⁶ or an elderly married or unmarried couple to have legally recourse to medically assisted reproduction performed abroad (*see* Blanc 2015, 45–46). In the author’s opinion, despite the legal gap, the abovementioned groups of individuals should be excluded from the right to medically assisted procreation. Indeed, such aid and assistance must lead to the creation of a stable family situation, which is one of the core values in Mauritius (*ordre public*). Moreover, medically assisted procreation cannot be used as a tool for satisfaction of an individual’s selfish interests and desires.

2.2. Legal Consequences in Mauritius of a Medically Assisted Procreation Performed Abroad

As previously explained, there does not exist any reason, in the current Mauritian law, why medically assisted procreation should be prohibited in Mauritius when a woman who gives birth to the child is his intended mother and when she lives in a couple. Thus, where a medically assisted reproduction has been performed abroad for the benefit of a Mauritian couple of reasonable age, they will be able to establish in Mauritius the link of filiation with the child in conformity with the Mauritian Civil Code. In other words, the link of filiation will be established between the child created by medical procedure and the intended parents.

Article 311–20 (2) of the French Civil Code stipulates that “the consent given for medically assisted procreation excludes any action for the purpose of establishing or contesting the link of filiation unless it is proved that the child is not created by a technique of medically assisted procreation or that the consent has been deprived of effect” (translated by author). Moreover, article 311–19 of the French Civil Code stipulates that “in case of a medically assisted procreation with a third donor, no link of filiation may be established between the author of the donation and the child born out of that procreation”. In addition, this article provides that “no liability action can be brought against the donor” (Fenouillet 2019, 497; Courbe, Gouttenoire 2017, 440). Thus, where a medically assisted procreation is

¹⁶ According to some authors, the possibility for a widow to have recourse to a medically assisted procreation after the death of her husband or unmarried partner would contribute to the blurring of the lines between life and death.

performed abroad with the aid of a third donor, i.e. with the help of a donor of sperm or of an egg, such a donor, whether a man or a woman, cannot come before a court in order to establish his or her link of filiation with the child. The French law considers that the intended parents of the child, i.e. the woman who gave birth to the child and her spouse or partner, are the biological parents and thus, they are the only persons who are parents of the child from the legal point of view. It is the author's opinion that the same logic should be respected by the Supreme Court of Mauritius if the issue is raised one day before the Court. Thus, the members of a married couple are considered as parents of the child and the link of filiation will be established between them and the child. Moreover, even if the members of the couple are not married, the link of filiation with the child will be established between them and the child, through acknowledgment (*reconnaissance*). The third donor, who gave his or her genetic material for the conception of the child will not be able to contest this link. On the other hand, the link of filiation can be contested for the reasons applicable to all parents, for instance if the child is not created by a medically assisted procreation but is the result of an adultery committed by his mother.¹⁷

Article 311–20 (4) of the French Civil Code creates an obligation for the man who is the intended father to recognize the natural child born out of a medically assisted procreation. A man (the intended father) who does not comply with this obligation would incur “the responsibility towards the mother and towards the child”. Moreover, the paternity of such a father may be judicially declared, i.e. it can be established by the court (Fenouillet, 2019, 495–496). The similar question may be raised one day before the Supreme Court in the case of a child conceived abroad with the aid of a medically assisted reproduction. In other terms, if the Supreme Court considers that a medically assisted reproduction performed abroad is not illegal when unmarried partners living together in a stable and continuous manner have recourse to it abroad, the father of such child will be allowed to establish his link of filiation through acknowledgement. This is stipulated in Article 334 of the Mauritian Civil Code.¹⁸ The refusal of the intended father to do so could be construed as abusive behavior and impose an obligation upon him to make up the material and moral damage caused to the mother and/or the child.¹⁹ The abuse stems from the contradictory nature of the father's

¹⁷ Article 312 (2) of the Mauritian Civil Code and article 315.

¹⁸ “The acknowledgement of a natural child will be made in an authentic act, when it has not been in his birth certificate”.

¹⁹ Articles 1382 and 1383 of the Mauritian Civil Code.

behavior: after having encouraged the intended mother (his unmarried partner) to resort to medically assisted reproduction, the intended father has changed his mind and does not want to assume the material and legal responsibility for the child by acknowledging it.

The Mauritian Civil Code does not prevent the mother of a child, conceived abroad with the aid of a medically assisted reproduction to bring an action before the Supreme Court of Mauritius in order to establish the link of filiation between her unmarried partner and the child. In fact, Article 340 of the Mauritian Civil Code provides that “paternity outside marriage can be judicially declared (...) in the case where the alleged father and the mother lived in notorious cohabitation state during the legal period of conception”.

The situation is much simpler where a Mauritian married couple goes abroad for a medically assisted reproduction and returns to Mauritius. According to Article 312 (1) of the Mauritian Civil Code, the man who was, at the time of conception, the husband of a mother who gave birth to a child, will be considered by law as the child’s father, i.e. the link of filiation will be automatically presumed (Courbe, Gouttenoire 2017, 439). The fact that the child was conceived with the aid of a reproductive technique does not change anything regarding his link of filiation with the child.

3. CONCLUSION

In this paper it has been shown that medical tourism, involving Mauritian citizens going abroad and undergoing medical procedures, may raise some practically very important and theoretically very interesting questions, especially when a Mauritian couple goes abroad and resorts to surrogacy or to medically assisted procreation. On one hand, it is the author’s opinion that civil law surrogacy agreements are not in conformity with the current law and public interest in Mauritius, and that the link of filiation between a child and the intended parents, established abroad, cannot be recognized in Mauritius. On the other hand, it is the author’s opinion that, provided the fulfillment of certain conditions, medically assisted procreation is in conformity with the current law and public interest in Mauritius. If it is performed abroad, the link of filiation between the intended parents, married or not, and the child can be recognized in Mauritius.

REFERENCES

- [1] Agostini, Eric. 1992. Heurs et malheurs du mariage religieux à l'Île Maurice. 21–33 in *Etudes offertes à Pierre Jobert*, edited by Gérard Aubin. Bordeaux: Presses universitaires de Bordeaux.
- [2] Amice, V., D. Beuwillard, M. Piraud. 2015. Présentation des techniques de l'assistance médicale à la procréation. 1 in *La procréation pour tous*, edited by Astrid Marais. Paris: Dalloz.
- [3] Ancel, Pascal. 2020. *Droit des obligations en 12 thèmes*. 2nd ed. Paris: Dalloz.
- [4] Angelo, A. H. 2/1970. Mauritius: The Basis of the Legal System. *The Comparative and International Law Journal of Southern Africa* 3: 228–241.
- [5] Blanc, Nathalie. 2015. La procréation *post mortem* ouverte aux veuves. 44 ff in *La procréation pour tous?*, edited by Astrid Marais. Paris: Dalloz.
- [6] Bogdan, Michael. 1989. *The Law of Mauritius and Seychelles: A Study of Two Small Mixed Legal Systems*. Lund: Jurisförlaget I Lund, Wallin & Dalholm Boktryckeri.
- [7] Burgeat, Éric. 1975. La revision du Code civil à l'Île Maurice. *Annuaire des Pays de l'Océan Indien* 2: 315–321.
- [8] Chénéde, François. 2017. De l'abrogation par refus d'application de l'article 16–7 du code civil. *AJ Famille*: 375.
- [9] Chénéde, François. 2019. Cass. 1st Chamber, 12 September 2019, comment. *AJ Famille*: 531.
- [10] Cheung, Helier. 2014. Surrogate babies: Where Can You Have Them, and Is It Legal?. *BBC*, 6. August. <https://www.bbc.com/news/world-28679020> (last visited 3 January, 2022).
- [11] Courbe, Patrick, Adeline Gouttenoire. 2017. *Droit de la famille*. 7th ed. Paris: Sirey.
- [12] Courbe, Patrick, Fabienne Jault-Seseke. 2019. *Droit des personnes, de la famille et incapacités*. 10th ed. Paris: Dalloz.
- [13] Dekeuwer-Défossez, Françoise, Anne-Marie Leroyer, Amélie Dionisi-Peyrusse. 2018. Remise en cause de l'interdiction de la GPA en France?. *AJ Famille*: 583.

- [14] Domingue, Pierre Rosario. 2002. The Historical Development of the Mixed Legal System of Mauritius during the French and British Colonial Periods. *Research Journal, Law, Management and Social Sciences* 4: 61–93.
- [15] Fenouillet, Dominique. 2019. *Droit de la famille*. 4th ed. Paris: Dalloz.
- [16] Fulchiron, Hughes. 2014. La Lutte contre le tourisme procréatif: vers un instrument de coopération internationale. *Journal du Droit International* 2: 563–588.
- [17] Garrigue, Jean. 2018. *Droit de la famille*, 2nd ed. Paris: Dalloz.
- [18] Granet-Lambrechts, Frédérique. 2017. Droit de la filiation, January 2016–February 2017, *Recueil Dalloz*: 729 ff.
- [19] Hess-Fallon, Brigitte, Anne-Marie Simon. 2014. *Droit de la famille*. 9th ed. Paris: Sirey.
- [20] Hilt, Patrice. 2019. Repenser la maternité. *Recueil Dalloz*: 2190 ff.
- [21] Intraius Legal Consulting. 2018. Countries where Surrogacy is Legal. <https://intraius.com/en/countries-2/> (last visited on 3 January, 2022).
- [22] Labrusse-Riou, Catherine. 2019. *Rép. civ. Dalloz, Filiation: généralités, Notion de filiation*. Paris: Dalloz.
- [23] Law Reform Commission. 2010. Background Paper, Reform of Codes. <http://lrc.govmu.org/English/Reports/Pages/Reports-and-Papers.aspx> (last visited 18 January, 2022).
- [24] Law Reform Commission of Mauritius. 2013. Review Paper, Law on Surrogacy (Maternité pour autrui). <https://lrc.govmu.org/lrc/?p=2599> (last visited 18 January, 2022).
- [25] Le Gac-Pech, Sophie. 2016. Pour une indispensable légalisation des conventions de mère porteuse. *AJ Famille*: 486.
- [26] Le Gidec, Raymond, Gérard Chabot. 2019. *Rép. civ. Dalloz. Filiation: modes extrajudiciaires d'établissement. – Etablissement de la filiation par effet de la loi*. Paris: Dalloz.
- [27] Mallet-Bricout, Blandine. 2004. L'assistance médicale à la procréation dans la loi "bioéthique" du 6 août 2004: quelques avancées dans la continuité. *Droit de la Famille* 10: 46.
- [28] Marais, Astrid. 2018. *Droit des personnes*. 3rd ed. Paris: Dalloz.

- [29] Marrier d'Unienville, Raymond. 1969. L'évolution du droit civil mauricien, 96 in *Etudes de droit privé français et mauricien*. Congrès tenu à Saint-Denis de la Réunion (1er au 4 juillet 1965). Paris: Presses universitaires de France.
- [30] Mirkovic, Aude. 2008. A propos de la maternité pour autrui. *Droit de la famille* 6: 15.
- [31] Moolan, Hamid. 1969. Les difficultés d'application des codes français à l'île Maurice et les projets de codification. 137 in *Etudes de droit privé français et mauricien, Congrès tenu à Saint-Denis de la Réunion (1er au 4 juillet 1965)*. Paris: Presses universitaires de France.
- [32] Neirinck, Claire. 2011. La gestation pour autrui pratiquée à l'étranger et l'Etat civil français de l'enfant qui en est né. *Droit de la famille* 5: 14.
- [33] Neirinck, Claire. 2013. Réforme de la PMA: la création de la famille par convenance personnelle. *Droit de la Famille* 2: 2.
- [34] Neirnick, Claire. 2019. *Rép. civ. Dalloz, Enfance – Enfant, un être à protéger*. Paris: Dalloz.
- [35] Palmer, Vernon Valentine (ed.). 2012. *Mixed Jurisdictions Worldwide, The Third Legal Family*. 2nd edition. Cambridge: Cambridge University Press.
- [36] Penneau, Jean, Emmanuel Terrier. 2019. *Rép. civ. Dalloz, Corps humain, Bioéthique*. Paris: Dalloz.
- [37] Pichard, Marc. 2017. La commande d'enfant par son géniteur (est-elle une hypothèse de gestation pour le compte d'autrui?). *Recueil Dalloz*: 1143 ff.
- [38] Pichard, Marc. 2019. Toutes les femmes?. *Recueil Dalloz*: 2143 ff.
- [39] Porchy-Simon, Stéphanie. 2021. *Droit des obligations 2022*. 13th ed. Paris: Dalloz.
- [40] Sherwell, Philip. 2015. India Surrogacy Ban Dismays British Couples: Government Stops Foreign Would-Be Parents from Paying Local Women to Carry Their Unborn Babies. *The Telegraph*, 18. November. <https://www.telegraph.co.uk/news/worldnews/asia/india/12001903/India-surrogacy-ban-dismays-British-couples.html> (last visited 3 January, 2022).
- [41] Surrogate.com. 2022a. Intended Parents: All You Need to Know About Completing a Surrogacy in India. <https://surrogate.com/intended-parents/international-surrogacy/surrogacy-in-india/> (last visited 3 January, 2022).

- [42] Surrogate.com. 2022b. About Surrogacy: What is International Surrogacy?. <https://surrogate.com/about-surrogacy/types-of-surrogacy/what-is-international-surrogacy/> (last visited 3 January, 2022).
- [43] *The Guardian*. 2015. India Bans Foreigners from Hiring Surrogate Mothers. 28 October <https://www.theguardian.com/world/2015/oct/28/india-bans-foreigners-from-hiring-surrogate-mothers> (last visited 3 January, 2022).
- [44] Tourame, Pierre. 2016. Quelle liberté pour la mère porteuse, *Les Cahiers de la Justice*: 275.
- [45] Tranchant, Laëtitia, Vincent Egea. 2021. *Droit des obligations 2021*. 24th ed. Paris: Dalloz.
- [46] Venchard, Loise-Edwin. 1982. L'application du droit mixte à l'île Maurice. *Mauritius Law Review* 4: 31-44.

Article history:

Received: 15. 3. 2022.

Accepted: 27. 5. 2022.