



JURISTES POUR L'ENFANCE

ASSOCIATION FOR THE PROMOTION AND DEFENSE OF CHILDREN'S RIGHTS

Consultant to the UN Economic and Social Council

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Report presented in French and English on August 1, 2023 by

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Ladies and Gentlemen Rapporteurs,

We have the honour of sending you herewith the communication drafted by the ASSOCIATION JURISTES POUR L'ENFANCE for the 74th session of the Committee on Economic, Social and Cultural Rights.

JURISTES POUR L'ENFANCE (JPE) is a non-political association (civil society organization) bringing together jurists and people involved in children's issues who wish to use their expertise to defend children's rights. It has consultative status with the UN Economic and Social Council (ECOSOC).

Juristes pour l'enfance relies on :

- its expertise, developed since 2008, for which it is solicited by Members of Parliament, international experts, national authorities, professionals in the children's sector, as well as parents and children;
- its multi-disciplinary studies and research carried out with professionals committed to the cause of human rights in general and children's rights in particular;
- its exchanges with French citizens via its website and at events in which the association participates (conferences, symposia).

The present communication concerns France's compliance with its international obligations in terms of protection and assistance for the family, particularly mothers, and the right to education.

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I. Protection and assistance for the family, especially mothers. Dignity of woman and child.

"Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (Preamble to the Covenant on Economic, Social and Cultural Rights).

"The States Parties to the present Covenant recognize that:

The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. (...)

Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. (Article 10 of the Covenant).

1. In France, the surrogacy contracts are null and void in accordance with article 16-7 of the Civil Code that states that "any agreement on procreation or gestation for others is void". The offence of matchmaking for the purpose of a surrogacy and the offence of induction to the abandonment of a born or unborn child are punished (article 227-12 of the penal Code). The court of cassation considered that "the agreement through which a woman undertakes, even if gratuitous, to conceive and bear a child to abandon him/her upon his/her birth is an infringement to the fundamental principles of unavailability of the human body and the unavailability of the civil status of the individuals" (Cass. ass. plén., May 31 1991, no. 90-20105). French President Emmanuel Macron and French Minister of Justice Eric Dupont-Moretti publicly asserted several times that surrogacy is a red line that France shall not cross. The national advisory Council on ethics ("Conseil consultatif national d'éthique"), in an advice dated June 15, 2017, opposed to surrogacy because of the "violence (...) on the women recruited as gestational carriers and on the children that are born and are object of agreements executed between very unequal parties". It indicated being in favor of the elaboration an international convention to ban surrogacy.

2. Surrogacy violates the women's rights as the children's rights. Woman's dignity is questioned due to her use as a machine to manufacture a child and often due to the exploitation of her precarious or distressed situation. It constitutes a new form of slavery for women, insofar as the use of their body and their very person is made available to orderers or intermediaries 24 hours a day. The child, on the other hand, is the subject of a contract of disposal, as regards both his person and his filiation. The co-contractors freely dispose of the child between themselves, as they would do with an object, in order to exchange it and create a fictitious filiation.

3. Despite France's official position, we note with concern that the rights of women and children are being violated by a step-by-step implementation of surrogacy. Indeed:

4. The Cour de cassation accepts the transcription of foreign birth certificates for the biological parent. As far as the intended parent is concerned, whether a woman or a man, the law of August 2, 2021 on bioethics is supposed to have put an end to the automatic transcription of the birth certificate with regard to the intended parent, who must establish filiation via an adoption procedure. But once the



child has entered France with his or her intended parent, and in the name of the child's best interests and the need to protect him or her, adoption is granted even if France's commitments under the 1993 Hague Convention have not been respected (consent of the surrogate mother obtained before birth and child given in exchange for money).

This in no way discourages French nationals from going abroad to carry out surrogacy operations that are nevertheless against the law, since the fictitious filiation imposed on the child by the surrogacy contract is regularized on their return to France.

5. In 2022, against a backdrop of war, French nationals who had signed surrogacy contracts in the Ukraine brought the Ukrainian surrogate mothers to France, where they gave birth under X and abandoned the child so that the orderers could have a civil status document established establishing a filiation link between the child and themselves. Some of these women have left their young children behind in Ukraine, and have only come to France to complete their pregnancy and give birth, before returning to their war-torn country. These facts constitute incitement to abandon a child, an offence punishable under the French penal code. They constitute a misappropriation of the birth under X and the offence of simulation undermining the child's civil status, also punishable under the Penal Code. It also constitutes a misuse of the institution of adoption. The distress of Ukrainian women is being exploited. Yet none of the French orderers of this exploitation have been prosecuted.

6. Foreign companies marketing surrogacy offers regularly canvass French people with impunity by organizing trade shows in full view of the authorities (such as the Désir d'enfant trade show held in 2020 and 2021 in Paris). Despite a ruling by the French Supreme Court (Cour de Cassation) on November 23, 2022¹, which held that the website of a foreign company offering its services as an intermediary between a woman and people wishing to have a child has manifestly illicit content, the foreign companies offering their surrogacy services to the French public have never been worried and continue their trade with complete impunity. Complaints have been lodged on several occasions, but to date the French justice system has still not examined them.

7. A draft Code of Private International Law drawn up by a group of experts set up by the Minister of Justice includes a provision that would unconditionally endorse surrogacy carried out abroad, through the direct application of foreign law by the French judge. This will legalize the circumvention of French law, and deprive the child and the women of the protection afforded by French law when it invalidates the surrogacy.

8. The stance adopted by France is particularly open to criticism, as it continues to prohibit surrogacy on its own soil, but does everything in its power to make it easier for its nationals to carry out surrogacy abroad. Like the hundred or so experts of 75 nationalities who signed the Casablanca Declaration of March 3, 2023 for the universal abolition of surrogacy², we call on France to put an end to this resignation and even this complacency encouraging surrogacy abroad, and to adopt more ambitious measures to combat surrogacy.

9. Recommendations:

¹ Cass. 1^{ère} Civ. November 23, 2022, n°21-10.220

² <http://declaration-surrogacy-casablanca.org/index.php/casablanca-declaration-abrogation-gpa/>



- R1. Clarify the offence of intermediation with a view to surrogacy so that foreign companies canvassing the French and marketing surrogacy offers fall within the scope of the law.
- R2. Punish individuals and corporations acting as intermediaries between the surrogacy mothers and the orderers.
- R3. Introduce in the law a specific offence to prosecute French individuals who have recourse to a surrogate mother on the French territory or outside the French territory
- R4. Defend the best interests of children and the rights of women by committing to the drafting and ratification of an international legal instrument bearing global prohibition of the surrogacy.

II. Right to education. Parents' freedom to choose their school

"The States Parties to the present Covenant undertake to respect the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions". (Article 13.3 of the Covenant)

10. Since 1882, parents in France have had the legal right to educate their children within the family, subject to a simple declaration of this choice, but the law of August 24, 2021³ abruptly ended this right, making it a derogatory type of instruction, subject to a restrictive authorization regime.

11. In order for a child to be educated at home, prior authorization must now be obtained, and only for one of specific cases strictly defined by law: the child's state of health or disability, intensive sports or artistic activities, the family's itinerant nature or geographical distance from any state school establishment, the existence of a situation specific to the child that justifies the educational project, provided that the persons responsible for the child can justify their ability to educate the child at home. Authorization must be requested and obtained for each school year and for each child in the family, independently of each other.

12. Two years after the law was passed, requests for instruction within the family are still being met with great severity⁴ :

- For reason n°1, linked to the child's state of health or disability, 15.7% of requests were refused. The school doctor went against the advice of another doctor.
- For reason n°2 relating to intensive sporting or artistic activities, 18.1% of requests were refused, preventing children from pursuing a dual academic and artistic or sporting project.
- For reason n°3, linked to the family's itinerancy in France or geographical distance from any public school, 32.3% of requests were refused, even for families living more than 25 miles from a state school.

³ Law no. 2021-1109 of August 24, 2021 consolidating the principles of the Republic
<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778>

⁴ Answer from the Ministry of Education and Youth published on April 27, 2023:
<https://www.senat.fr/questions/base/2023/qSEQ230306069.html>



- And for reason no. 4, relating to the existence of a situation specific to the child, 37.6% of requests were refused. Yet this is the main reason given by families who choose to home-school their children, in order to offer them a pedagogy and content that are adapted to and in line with their convictions.

In addition, there is a huge disparity between the different regional education authorities: some massively refuse to grant authorization for family instruction. This is particularly the case in the regional education academy of Toulouse, where 90% of requests have been refused.

13. This law runs directly counter to the rights and freedoms guaranteed by article 13.3 of the Covenant on Economic, Social and Cultural Rights. In her opinion of January 21, 2021⁵ on the law of August 24, 2021, the Rights Defender (“Défenseure des droits”) pointed out that the freedom to raise one's children in accordance with one's religious and moral beliefs is undermined by the law. In addition, an earlier law of 2019 for a school of trust provided a better framework for pedagogical controls on instruction in the family. Perhaps there was a lack of resources to carry them out. But "inapplicability of legislation due to a lack of means requires reinforcing the means, not modifying the legislation"⁶.

14. Every week, our association receives letters from distraught parents faced with a refusal to allow their child to be educated at home, even though their child has a proven disability recognized by the departmental office for the disabled (MDPH⁷) and requires appropriate care; or for a child who, after being bullied at school, has a school phobia and needs to be educated at home to regain his or her self-confidence; or for a child whose siblings are home-schooled and who has been refused permission to do so. These parents are frightened by the harmful consequences of refusing instruction within the family for their children's physical and psychological health.

15. The government had justified the August 24, 2021 law by the need to combat separatism and strengthen citizenship. However, according to the figures communicated by the government in April 2023, only 47 requests for authorization for instruction within the family out of a total of 60,638 (i.e. 0.077%) were refused because the person responsible for the child's instruction was registered in the national governmental registers so-called “FIJAIS” (perpetrators of sexual or violent offenses) and “FIFAIT” (perpetrators of terrorist offenses). The risk of radicalization as a result of home schooling is therefore derisory, and these few cases in no way justify depriving the entire population of this right⁸.

16. At the same time the riots of June 2023, which were largely led by minors attending state schools, demonstrated the failure of the French education system to educate children for citizenship, in addition to its failure to pass on basic knowledge: 40% of French pupils cannot read and write properly

⁵ Opinion of the Défenseur des droits n°21-01

https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=20384

⁶ Pierre Delvolvé, member of the Institut de France, professor emeritus of constitutional law at the Université Panthéon-Assas Paris II, 2021: <https://www.liberteeducation.com/la-liberte-dinstruction-en-famille-est-constitutionnelle/>

⁷ Maison départementale des personnes handicapées (departmental office for the disabled) in charge of recognizing disability and entitling people to rights and benefits

⁸ <https://www.senat.fr/questions/base/2023/qSEQ230306069.html>



when they enter sixth form⁹, and French pupils are at the bottom of the European and OECD league tables¹⁰. More than 10% of schoolchildren are victims of bullying¹¹.

17. In these circumstances, the determination of French policy to ban instruction within the family is incomprehensible, and parents must regain the right to home school their children.

18. Recommendations:

- R1. Clearly enshrine in law the pedagogical freedom of parents, their children's first educators.
- R2. Amend legislation to allow applications for instruction within the family to be submitted during the course of the year.
- R3. Amend legislation to remove the 4^{ème} reason of the child's specific situation and replace it with the transmission of a personalized educational project adapted to the child's abilities and learning pace, while respecting the child's right to education.
- R4. Amend legislation to grant automatic authorization for the following year if the current year's inspection is positive.
- R5. Involve associations representing homeschooling families in drawing up a Vade mecum of the instruction within the family
- R6. appoint a referent for family instruction from an association representing families in each academy to create a constructive dialogue between the parties.
- R7. Forge a constructive partnership between associations representing homeschooling families and the French Ministry of Education.
- R8. provide transparent information on the fate of authorization requests, academy by academy and reason by reason, with figures for refusals and the reasons for them.

⁹ <https://www.lesechos.fr/politique-societe/societe/a-lentree-en-sixieme-pres-dun-eleve-sur-deux-na-pas-le-niveau-de-fluidite-requis-en-lecture-1263596>

¹⁰ https://www.francetvinfo.fr/societe/enfance-et-adolescence/niveau-en-maths-et-sciences-les-eleves-francais-classes-parmi-les-derniers-d-europe-et-de-locde_4210837.html

¹¹ <https://www.observatoire-sante.fr/harcelement-scolaire-chiffres-causes-et-consequences/>

