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Surrogacy before European Courts

The Gender of Legal Fictions

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10.1 INTRODUCTION

In Europe, the landscape of surrogacy continues to be quite diverse. Whilst the practice is allowed in a few jurisdictions, the majority of legal frameworks prohibit it or leave it unregulated.[1] Regardless of the legal approach taken, surrogacy has always raised a multiplicity of legal questions, some of which have reached European supra-national courts. The European Court of Human Rights (ECtHR) has been mostly concerned with the determination of legal parenthood, in particular the recognition of the parent–child relationship between children born from surrogacy abroad and their intended parents. The Court of Justice of the European Union (CJEU) has so far dealt with the issue of maternity leave for intended mothers of children born from surrogacy. The different thematic focus – and the significantly more frequent interventions by the ECtHR – is explained by the European Union's (EU) lack of competence in substantive family law issues, which limits its contact with surrogacy to questions of equality and employment rights.[2] In spite of addressing different questions, both European courts ground their construction of

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1 See, for example, J. M. Scherpe, C. Fenton-Glynn, and T. Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019); K. Trimmings, S. Shakargy, and C. Achmad (eds), *Research Handbook on Surrogacy and the Law* (Edward Elgar Publishing 2024).

2 See also the recent proposal for a Regulation aimed at harmonising the rules of private international law relating to parenthood at the EU level: European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood, COM(2022) 695 final.

legal motherhood in gestation and birth, thus failing to reflect the lived realities of those involved in surrogacy arrangements and placing intended mothers in a precarious position, especially compared to intended fathers. This differential treatment, I argue in this chapter, reveals the gender of legal fictions in the determination of legal parenthood in Europe.[3]

The analysis is divided into three main sections. Sections 10.2 and 10.3 explore the CJEU and ECtHR case law on surrogacy with the aim of reconstructing the emerging understandings of motherhood and fatherhood and, more broadly, the gendered assumptions underlying the attribution of legal parenthood and related parental rights. It will be shown that one of the assumptions which remains central and uncontested in both systems is the conflation of gestation and motherhood.

This will give rise to reflections on the broader issue of legal fictions in the attribution of legal parenthood in Section 10.4 of the chapter. In Western jurisdictions, legal fictions have played a central role in the legal architecture of parenthood. Whilst the attribution of motherhood follows the *mater semper certa est* rule, according to which the person who gives birth is the child's mother, the marital presumption provides that the father of a child born during marriage is the husband of the child's mother. Section 10.4 sheds light on the gendered lives of these rules and foregrounds the immutability of the *mater semper certa est* rule in contrast with the adoption of various context-specific tests to determine legal fatherhood following social and technological developments. In the context of surrogacy, the gendered lives of these presumptions help explain the imbalance between intended mothers and intended fathers, and the different ways in which their claims for legal parenthood are handled by courts in general. Whilst genetics suffice for intended fathers to establish legal fatherhood, birth-givers are bound to legal motherhood regardless of the circumstances, even if someone else actually *mothers* or *parents* the child.

10.2 SURROGACY BEFORE THE CJEU

In 2014, the CJEU was confronted with two preliminary references that raised the question of whether a woman is entitled to maternity leave with respect to her child born from a surrogate. Whilst surrogacy as such does not fall within

[3] I borrow this expression from H. Charlesworth and C. Chinkin, 'The gender of jus cogens' (1993) 15 Human Rights Law Review 63, later adopted by Ç. Başak and L. Helfer, 'The gender of treaty withdrawal: Lessons from the Istanbul Convention' (*EJIL: Talk!*, 28 November 2022) <www.ejiltalk.org/the-gender-of-treaty-withdrawal-lessons-from-the-istanbul-convention/>.

the competence of the EU, maternity leave is regulated by EU law. In *CD v ST*, the intended mother (CD) had a child conceived with her partner's sperm and the eggs of the surrogate.[4] CD breastfed the newborn until the age of three months, and both she and her partner were granted parental responsibility. Before the child was born, CD had unsuccessfully applied for paid time off for surrogacy under her employer's adoption policy. Subsequent to the birth, her employer eventually granted CD paid leave on a discretionary basis. The Employment Tribunal in Newcastle upon Tyne (UK) referred the issue of whether the refusal to grant paid leave equivalent to adoption and maternity leave to an intended mother was contrary to the Pregnant Workers Directive,[5] and constituted discrimination on the grounds of sex, contrary to the Equality Treatment Directive.[6] The second case, *Z v Government Department and the Board of Management of a Community School*, stems from similar facts.[7] Before the child was born, Z, the intended genetic mother, applied to her employer for leave equivalent to adoption leave.[8] The employer rejected her request but offered unpaid leave to attend the child's birth in California, and statutory parental leave for the period subsequent to birth. Just like in *CD*, the Irish Equality Tribunal asked the CJEU whether a failure to provide for surrogacy leave was a breach of EU gender equality law.[9]

Interestingly, the CJEU did not join the two preliminary references, and Advocate General Kokott in *CD* and Advocate General Wahl in Z took quite different approaches. Following a 'contextual and teleological' approach to interpretation, Advocate General Kokott argued in favour of an EU right to maternity leave for intended mothers.[10] She explained that, just like a woman

[4] Case C-167/12 *CD v ST* EU:C:2014:169.

[5] Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L348/1.

[6] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[7] Case C-363/12 Z *v Government Department and the Board of Management of a Community School* EU:C:2014:159.

[8] In Ireland, surrogacy was and is still unregulated, but draft legislation is currently being discussed.

[9] See n 6, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16. In Z, the intended mother suffered a rare condition where she had no uterus and therefore could not undertake a pregnancy. She complained also of a discrimination on the grounds of disability, but without success.

[10] M. Finck and B. Kas, 'Surrogacy leave as a matter of EU law: *CD* and Z' (2015) 52 Common Market Law Review 281, 284.

who has given birth to her child, 'an intended mother has in her care an infant for whose best interests she is responsible'.[11] Precisely because she had not been pregnant herself, the intended mother is confronted with 'the challenge of bonding with that child, integrating it into the family and adjusting to her role as mother'.[12] Advocate General Kokott, therefore, concluded that in light of recent medical advances, the personal scope of the Pregnant Workers Directive is to be understood in 'functional rather than monistic biological terms'.[13] Advocate General Wahl, on the contrary, argued in Z that the protection of the special relationship between mother and child was to be interpreted 'as a logical corollary of childbirth (and breastfeeding)'.[14] Broadening the personal scope of the Directive would result in a contradictory situation whereby an employed intended mother would be entitled to paid (maternity) leave, but an adoptive mother or a father would not have such a right.[15]

The Grand Chamber held that, under EU law, maternity leave presupposes that the worker was pregnant and gave birth.[16] The fact that, in the first case, CD was breastfeeding the child did not make any difference.[17] The CJEU clarified the twofold goal of maternity leave: the protection of the health of the mother 'in the especially vulnerable situation arising from her pregnancy';[18] and, the protection of the special relationship between a woman and her child, which applied 'only [in] the period after pregnancy and childbirth'.[19] It was therefore concluded that the Member States are not required to extend maternity leave to intended mothers but may, of course, adopt more favourable provisions.[20] Also, according to the CJEU, the exclusion of intended mothers from maternity leave did not constitute direct or indirect discrimination on the ground of sex because an intended father would be treated in the same way, and there was no evidence that the refusal at stake placed working women in a disadvantageous position compared to working men.[21]

[11] Opinion of Advocate General Kokott in Case C-167/12 *CD v ST* EU:C:2013:600, para 46.
[12] Ibid.
[13] Ibid, para 48.
[14] Opinion of Advocate General Wahl in Case C-363/12 *Z v Government Department and the Board of Management of a Community School* EU:C:2013:604, para 47.
[15] Ibid, para 51.
[16] *CD v ST* (n 4), para 37; *Z v Government Department and the Board of Management of a Community School* (n 7), para 58.
[17] *CD v ST* (n 4), para 40.
[18] Ibid, para 35.
[19] Ibid, para 36.
[20] Ibid, para 42.
[21] Ibid, paras 47–50.

The decisions in *CD* and Z lay bare the decisive role given to gestation and birth in defining what is meant by 'being a mother' under EU law, and the resulting gap between the realities of contemporary families and EU law. As observed by Caracciolo di Torella and Foubert, the EU framework on the protection of maternity at work is firmly grounded in the assumption that the person who is pregnant and gives birth is the child's legal mother, in line with the *mater semper certa est* rule.[22] The CJEU rulings in *CD* and Z are cases in point: the Pregnant Workers Directive, as interpreted by the Grand Chamber, incorporates a gestational understanding of motherhood, whereby pregnancy is the trigger for its application. Whilst it is true that the EU has over the years succeeded in developing a framework where pregnancy and maternity in the workplace are protected, this framework remains nonetheless ill-equipped to deal with the diversity of contemporary families, including those created through surrogacy.

CD and Z also reveal 'the gendered character' of EU conceptions of parenthood.[23] Through these decisions, the CJEU supports and 'further entrenches the protection of the special relationship between a woman and her child … as a natural addendum of the Directive's health and safety protection'.[24] By excluding intended mothers from the personal scope of the Directive, the CJEU reserves this protection to women and newborns who have a gestational link, thus ignoring the experiences of CD and Z as actual carers of their children. On this point, the Opinion of Advocate General Wahl takes an important step forward. In spite of concluding against a broad interpretation of the personal scope, he suggested that the 'special relationship' objective should be given 'independent significance', namely detached from pregnancy and birth.[25] In his words, 'the scope of protection afforded by Article 8 of Directive 92/85 could not … be meaningfully limited only to women who have given birth, but would necessarily also cover adoptive mothers or indeed, any other parent who takes full care of his or her newborn child'.[26] In spite of supporting an undesirable practical outcome, the reasoning offered by Advocate General Wahl has the potential to challenge the gendered assumption that gestational mothers, and mothers more broadly, always have a stronger connection with the child and should therefore take

[22] E. Caracciolo di Torella and P. Foubert, 'Maternity rights for intended mothers? Surrogacy puts the EU legal framework to the test' (2014) 2 European Gender Equality Law Review 5, 5.
[23] Finck and Kas (n 10) 291.
[24] Caracciolo di Torella and Foubert (n 22) 8.
[25] Opinion of Advocate General Wahl in Z *v Government Department and the Board of Management of a Community School* (n 14), para 47.
[26] Ibid, para 47.

more leave to look after their newborns than fathers. One could therefore argue that Advocate General Wahl subtly calls for a 'commitment to the social value of parenthood'[27] and suggests care as the ground for attributing paid leave from work. The CJEU, on the contrary, remains anchored to the *mater semper certa est* rule and, accordingly, continues to treat pregnancy and maternity as a continuum.

The next section argues that a gestational understanding of motherhood runs also through the case law of the ECtHR. In that context, where the case law offers more insight into the Court's reasoning, the precarious position of intended mothers is closely connected to – and actually a consequence of – a genetic understanding of fatherhood.

10.3 SURROGACY BEFORE THE ECTHR

10.3.1 *The Relevance of Genetics*

Transnational surrogacy has become a matter of frequent discussion at the ECtHR. Widespread legal bans at the domestic level have led some intended parents to resort to surrogacy abroad, with the aim of benefitting from more permissive legal frameworks and intention-based regulations of legal parenthood. Even in cases of transnational surrogacy, however, the journey to fulfil one's wish to have a child often comes with significant challenges. Regarding legal challenges, it is not uncommon for intended/social parents and their children born from surrogacy to encounter difficulties when demanding legal recognition of their parent–child relationships, lawfully formed abroad, in their country of residence. The ECtHR has been an important agent in strengthening the legal protection of family relationships created through transnational surrogacy: through its rapidly growing case law, this Court has created space for the experiences of (some of) these families within domestic legal frameworks which prohibit surrogacy arrangements.

The trajectories along which this process has developed have benefitted some intended parents more than others. One of these trajectories lies in the relevance attributed to genetics, which can be traced back to the ECtHR decision in the early case of *Mennesson v France*.[28] This case was the first to bring the issue of recognition of foreign birth certificates following transnational surrogacy to the ECtHR's table. The couple's twins, who were

[27] S. Fredman, 'Reversing roles: Bringing fathers into the frame' (2014) 10 *International Journal of Law in Context* 442, 442.

[28] *Mennesson v France*, Application no 65192/11 (extracts). See also *Labassee v France*, Application no 65941/11.

conceived using the gametes of the intended father and donor eggs, were born from a surrogate in California. French authorities had refused to transcribe the Californian birth certificates indicating Mr and Mrs Mennesson (the intended parents) as parents of their daughters. They reasoned that doing so would be against public order due to the domestic prohibition of surrogacy.

In the view of the ECtHR, the position of legal uncertainty in which the children were placed as a consequence of non-recognition of their family ties compromised their ability to establish 'details of their identity as individual human beings, which include[d] the legal parent–child relationship'.[29] This assumed 'special' relevance, the Court emphasised, because one of the intended parents was also genetically linked to the children, and genetic parentage constitutes an 'importan[t] … component of identity'.[30] Non-recognition was therefore considered to breach the children's right to respect for private life. In contrast, no violation of the applicants' right to respect for their family life was found on the ground that they could settle in France and enjoy their daily family life 'in conditions broadly comparable to those of other families' with no risk of being separated, even in the absence of legal recognition.[31] As explained below, the ECtHR's emphasis on genetics ended up marginalising the experience and claim of Mrs Mennesson, even if she had been involved in the surrogacy arrangement and later in the children's upbringing as much as her husband, thus legitimising an imbalance between intended fathers and intended mothers.

Even if the intended parents' rights under Article 8 ECHR were not formally considered to be breached, the relevance attributed to genetics in finding a violation of the child's right to respect for private life eventually had positive consequences for the legal position of Mr Mennesson. At the domestic level, the French Court of Cassation tempered its stance, allowing for the registration of the intended genetic father in accordance with the foreign birth certificate, unless evidence indicated that the document was irregular, falsified, or that the facts did not reflect biological reality.[32] As concerns the intended mother, the Court of Cassation reiterated its commitment to the *mater semper certa est* rule and, in 2017, clarified that if the mother was married to the father, she could nonetheless seek to adopt the child, provided that the statutory requirements were met and adoption was in the child's best interests.[33]

[29] *Mennesson* (n 28), para 96.
[30] Ibid, para 100.
[31] Ibid, para 92.
[32] Cour de Cassation, Assemblée plénière, Nos 619 and 620 of 3 July 2015.
[33] Cour de Cassation, 1ère Chambre Civile, Nos 824–827 of 5 July 2017.

The issue of legal recognition of intended motherhood, in particular of Mrs Mennesson, came under the spotlight again in 2019, when the Grand Chamber issued its first advisory opinion under Protocol 16 upon a request by the French Court of Cassation.[34] The Grand Chamber clarified that domestic law is required to provide a possibility of recognition to the relationship lawfully established abroad between the child and the intended mother, who is designated as the legal mother on the birth certificate. The principle of the child's best interests was a decisive factor in reaching this conclusion. The Grand Chamber noted that the lack of legal recognition of the intended mother–child relationship had negative consequences on several aspects of the child's respect for private life, ranging from nationality and inheritance rights to the risk of the relationship being discontinued in case of parental separation or the father's death.[35] In the Grand Chamber's view, the child's best interests also entailed 'the legal identification of the persons responsible for raising him or her, meeting his or her needs and ensuring his or her welfare, as well as the possibility for the child to live and develop in a stable environment'.[36] Hence, the general and absolute impossibility of obtaining legal recognition of the intended mother–child relationship was incompatible with the child's best interests, which required at a minimum that each situation be examined on a case-by-case basis.[37]

As concerns the choice of the means of recognition, the ECtHR held that states are not obliged to register the details of the foreign birth certificate nor to recognise the relationship between a child and their intended mother *ab initio*.[38] Considering the child's best interests as paramount, recognition has to be possible 'at the latest when [the relationship between a child and their intended mother] has become a practical reality'.[39] It follows that, depending on the circumstances of the specific case, adoption may offer a valid legal avenue for recognising the relationship between the child and the intended mother, as long as 'the procedure enables for a decision to be taken rapidly'.[40]

After reading the Advisory Opinion, one would expect intended fathers and intended mothers to be on a more equal footing when seeking recognition of

[34] Advisory Opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother [GC], request no P16–2018–001, French Court of Cassation, 10 April 2019.
[35] Ibid, para 40.
[36] Ibid, para 42.
[37] Ibid, para 42.
[38] Ibid, paras 50 and 52.
[39] Ibid, para 52.
[40] Ibid, para 54.

their parent–child relationships following transnational surrogacy – especially because Mrs Mennesson was considered to deserve recognition in spite of having no genetic link with her children. Subsequent case law, however, suggests the opposite. In fact, whilst the Advisory Opinion has served to extend legal recognition to, for instance, the intended non-genetic father in a registered partnership with the intended genetic father,[41] the original imbalance between intended mothers and intended fathers in different-sex couples has been left untouched.

10.3.2 *The Gendered Effects of Genetics*

This section takes the above argument on the relevance of genetics further, and traces the gendered effects of genetics with respect to the determination of legal motherhood and legal fatherhood following transnational surrogacy. To do so, it focuses on the ECtHR decision in the case of *D. v France*, where – in contrast to previous cases – both intended parents were genetically linked to their child born from surrogacy in Ukraine.[42] The foreign birth certificate indicated the intended parents as legal parents, with no mention of the surrogate. Whilst French authorities registered the legal relationship between the child and the intended father, the mother was offered the possibility to apply for step-child adoption.

The applicants argued that the refusal to register the Ukrainian birth certificate with respect to the relationship between the intended mother and the child breached the child's right to respect for private life, and amounted to discrimination on the grounds of birth contrary to Article 14.[43] No violation was found. Given the likelihood of a positive and speedy decision,[44] the ECtHR considered step-child adoption to meet the requirements set by the Advisory Opinion. As it will be shown, this decision adds nuance to what Levi defines as the ECtHR's 'genetic essentialism' by bringing the gendered effects

[41] *D.B. and Others v Switzerland*, Application nos 58817/15 and 58252/15. In this case, the Court considered the absolute impossibility for the non-genetic intended father to have his ties with the child born from surrogacy in the United States recognised for a period of seven years and eight months in violation of the child's right to respect for private life.

[42] *D. v France*, Application no 11288/18. The text of the judgment is available only in French. All translations are my own.

[43] More specifically, they argued that their daughter was in an analogous position to any other French child born abroad, but was treated less favourably (i.e. with only partial recognition of the foreign birth certificate) because she was born from surrogacy.

[44] *D. v France* (n 42), para 67.

of genetics to the fore.[45] In particular, it foregrounds the different degree of decisiveness that genetics holds for obtaining the recognition of legal fatherhood and legal motherhood, respectively.

In *D. v France*, the ECtHR began by clarifying its approach in *Mennesson*. In particular, it explained that genetics does not give rise to an obligation to recognise the relationship between the intended father and the child specifically by means of the transcription of the foreign birth certificate.[46] The Court also reiterated the legal principle established in the Advisory Opinion, according to which domestic law must offer a possibility of recognition of a legal parent–child relationship with the intended mother, although the choice of means falls within the state's margin of appreciation.[47]

According to the ECtHR, there was no reason to depart from these principles in the case at hand, even if the intended mother was genetically linked to the child.[48] Requiring the intended genetic mother to initiate adoption proceedings was considered compatible with Article 8 ECHR. Even if – the Court acknowledged – the intended mother might have difficulties envisaging adoption as the route to be legally recognised given her genetic link, step-child adoption constituted an 'effective and sufficiently rapid mechanism' of recognition, which did not exceed the state's margin of appreciation.[49]

On the surface, the reasoning presents the situation of intended fathers and intended mothers as equal, but when transposed into practice, the state's obligation to allow for recognition of the relationship between intended parents in different-sex couples de facto brings unequal benefits to intended mothers and intended fathers.[50] Whilst intended genetic fathers tend to enjoy automatic recognition of the foreign birth certificate, intended genetic mothers still need to initiate adoption proceedings to be recognised as legal mothers. In the case at hand, the ECtHR explicitly acknowledged the existence of a differential treatment between intended genetic fathers and intended genetic mothers, but did not rule on this aspect because the application exclusively concerned the rights of the child.[51] Even if the Court does not

[45] M. Levy, 'Surrogacy and parenthood: A European saga of genetic essentialism and gender discrimination' (2022) 29 Michigan Journal of Gender and Law 121, 130.
[46] *D. v France* (n 42), para 50.
[47] Ibid, para 51.
[48] Ibid, para 59.
[49] Ibid, paras 63 and 64.
[50] A. Margaria, 'Genetics and the construction of parenthood: The ECtHR jurisprudence on transnational surrogacy' in N. Dethloff and K. Kaesling (eds), *Between Sexuality, Gender and Reproduction – On the Pluralisation of Family Forms* (Intersentia 2023) 197.
[51] *D. v France* (n 42), para 61. Moreover, the applicants had not informed French authorities and courts that the intended mother was genetically linked to the child; that circumstance had

formally take a position on the gender discriminatory dimension of the case, *D. v France* shows that an imbalance between intended fathers and intended mothers still persists after the Court's Advisory Opinion. As will be explained in the next subsection, this imbalance is due to the status of genetics as a decisive marker of legal fatherhood and, at the same time, the uncontested primacy of gestation and birth in determining legal motherhood.

10.3.3 *The Trumping Effects of Genetics*

This imbalance between intended fathers and intended mothers emerges even more clearly from the case of *A.M. v Norway*, decided in March 2022.[52] The Court was confronted with a novel factual scenario, which the Grand Chamber had already contemplated in the Advisory Opinion, when reflecting on the negative impact of non-recognition of the intended mother–child relationship on the child's private life: that of an intended non-genetic mother whose relationship with the child born from transnational surrogacy is at risk because of her separation from the intended father.[53] In this case, X was born from surrogacy in 2014, with A.M. (the intended mother) and E.B. (the intended father) recorded as legal parents on the Texan birth certificate. Although their relationship had ended well before the birth, E.B. and A.M. had remained in contact and carried on with their joint surrogacy plan. The sperm of E.B. and donor eggs were used for conception.

In the weeks following the birth and upon their return to Norway, X lived with the applicant A.M. whilst E.B. (who had meanwhile bought a new flat and was living with a new partner) visited daily. E.B.'s acknowledgment of paternity was recognised. A.M., however, could not be registered in the National Population Register as X's mother in the absence of a valid adoption because the Norwegian Children Act provides that the woman who gives birth is to be regarded as legal mother. For a period of time, since A.M. and E.B. could not reach an agreement on the child's residence, X moved between their houses on a daily basis. In August 2015, when the child was around seventeen months old, E.B. decided to cut off contact between A.M. and X, who has since lived with E.B. and his new partner. A.M. initiated administrative proceedings to be recognised as X's mother or, alternatively, to adopt the child, but her application was dismissed. According to Norwegian law, the

become known only before the ECtHR, following a request for clarification by the Chamber: see para 81.

[52] A.M. *v Norway*, Application no 30254/18.

[53] Advisory Opinion (n 34), para 40.

surrogate is to be regarded as X's mother in accordance with the *mater semper certa est* rule. Adoption was not a viable alternative because E.B., who had sole parental responsibility, did not consent.

In April 2016, A.M. initiated further legal proceedings before the Oslo City Court to be recognised as X's legal mother or, alternatively, to be granted contact rights. The City Court held that the guiding factor in deciding upon A.M.'s request for recognition was the child's best interests.[54] In that regard, it noted that 'X had been living in a safe, adequate environment since then, with E.B. as his father, H. as his stepmother, and with his halfsibling and other family members'.[55] It followed that, even if A.M. had 'everything necessary to offer X a safe and good relationship', this was not a sufficient ground for taking the risk of going back to a situation characterised by conflict between A.M. and E.B.[56] As to A.M.'s request for contact rights, the City Court dismissed it on the ground that there was no legal basis to grant contact rights to a person in her position. The City Court's ruling was upheld by the High Court, and the Supreme Court refused the applicant leave to appeal.

The ECtHR considered the lack of recognition of A.M. as X's mother compatible with Article 8 ECHR alone and in conjunction with Article 14 ECHR.[57] Whilst acknowledging that the applicant's situation was 'particularly harsh since E.B. had prevented her from maintaining her relationship with X and essentially put an end to [her] parental project', the Court was of the view that this could not be attributed to the authorities.[58] Domestic courts had, according to the Court, carried out a close examination of the case and ascertained that the child's best interests did not require a solution different from what the Children Act and adoption legislation mandated.[59] Therefore, even if 'the applicant acted as a mother for X ... with the intention that she would continue to do so in the future' and they had 'forged emotional bonds',[60] the *status quo* established by the father's unilateral decision to keep the child away from the intended mother coupled with the passage of time (the child was eight years old at the time of the ECtHR proceedings) ultimately prevailed and left the intended mother with no legal protection at all.

[54] A.M. *v Norway* (n 52), para 49.
[55] Ibid, para 54.
[56] Ibid, para 55.
[57] The issue of denial of contact rights was not examined by the ECtHR because A.M. had raised it before the City Court and the High Court, but failed to include it in the appeal before the Supreme Court. See ibid, para 104.
[58] A.M. *v Norway* (n 52), para 133.
[59] Ibid.
[60] Ibid, para 108.

If read against the background of previous case law, two factors may explain why the impossibility for A.M. to establish legal parenthood was considered not to breach Article 8 ECHR. First, X was not a party before the Court. A.M.'s long struggle to obtain legal recognition of motherhood or at least contact – though recognised by Judge O'Leary in her concurring opinion as 'a testament to her commitment to [the child]'[61] – did not provide a legal basis to represent the child's interests and right to family ties before domestic courts. Therefore, the applicant could not benefit from the centre-stage position given to the interests of children in previous case law.[62] Second, unlike in previous cases, the intended mother's request for recognition was opposed – rather than supported – by the intended and legal father.[63]

The ECtHR's decision lays bare not only the gendered effects but also the trumping power of genetics. Apart from confirming the precarious (legal) position of intended mothers, *A.M.* displays their (legal) subordination to the will of intended fathers. As expressed by Judge Jelić in her dissenting opinion, 'E.B. ha[d] exclusive power to decide over the applicant becoming the mother of a child who was intended to be hers, when she had been unable to procreate biologically'.[64] By finding no violation, the Court's majority turns a blind eye on the far-reaching consequences of a genetic understanding of fatherhood which – in case of tension between the intended parents – may go so far as to permanently exclude the intended mother from the life of the child she took care of and intended to raise.

To be sure, the intended mother's *mediated* right to recognition can be traced back to the Advisory Opinion, where the Grand Chamber found it important to contextualise the relationship between Mrs Mennesson and her daughters before delving into the issue of recognition of intended motherhood. In the ECtHR's own words, the question at stake 'explicitly includes the factual element of a father with a biological link to the child in question' and 'the Court will limit its answer accordingly'.[65] This contextual remark seems to suggest that, in *Mennesson*, the intended mother was given a possibility for recognition because of her involvement in the children's lives, but also in her capacity as the wife of the genetic father.[66] This helps to explain why the

[61] Concurring Opinion of Judge O'Leary in *A.M. v Norway*, Application no 30254/18, para 19.
[62] Ibid, para 15. See also *Paradiso and Campanelli v Italy*, Application no 25358/12.
[63] This was also pointed by Judge O'Leary in her Concurring Opinion in *A.M. v Norway* (n 61), para 16.
[64] Dissenting Opinion of Judge Jelić in *A.M. v Norway*, Application no 30254/18, para 44.
[65] Advisory Opinion (n 34), para 36.
[66] A. Margaria, 'Parenthood and cross-border surrogacy: What is 'new'? The ECtHR's first Advisory Opinion' (2020) 28 Medical Law Review 412, 424.

Court found no violation in A.M., especially considering the close emotional bonds the applicant had established with X before their contact was terminated by E.B., as well as her uncontested parental suitability.

Apart from reflecting a preference for stability in the form of the intact biparental heterosexual family, the outcome in A.M. is closely interwoven with the automatic recognition of genetic intended fathers following transnational surrogacy. Genetics places intended fathers in a position of privilege over intended mothers from the very beginning – an imbalance that is legally fortified if the relationship deteriorates.

10.4 GOING TO THE ROOTS: EXPLAINING THE PRECARIOUS POSITION OF INTENDED MOTHERS

The decision in A.M. *v Norway* is paradigmatic of a stratified access to legal parenthood following transnational surrogacy. In particular, to quote Judge O'Leary's concurring opinion, it demonstrates that the journey of resorting to transnational surrogacy to avoid domestic bans is 'particularly precarious for non-biological parents and even genetic (not gestational) mothers, in relation to whom the law has not kept apace either of social reality or of science'.[67] As mentioned above, the central role given to genetics in establishing legal fatherhood places intended genetic fathers in a privileged position as compared to mothers, as they obtain automatic recognition of their ties and, as a result, their legal presence in their child's life is guaranteed *ab initio*. This section seeks to dig deeper into the roots of this imbalance, and reflects on two interrelated reasons: (1) an enduring fear of disaggregating (legal) motherhood; and (2) the immutable character of the *mater semper certa est* rule, in contrast with a concomitant openness to rethinking legal fatherhood in times of social change and family diversity. The combination of these two reasons underpins what I call 'the gender of legal fictions' governing the attribution of legal parenthood.

10.4.1 *Normative Legal Fictions and the Attribution of Legal Parenthood*

This section connects the imbalance between intended mothers and intended fathers supported by the ECtHR case law on transnational surrogacy to the broader regulation of motherhood and fatherhood in Western legal systems. Two basic rules have traditionally informed the attribution of legal motherhood and legal fatherhood, respectively: *mater semper certa est*, according to

[67] Concurring Opinion of Judge O'Leary in A.M. *v Norway* (n 61), para 23.

which legal motherhood is attributed to the person giving birth, and therefore on the grounds of gestation and birth; and *pater est quem nuptiae demonstrant*, also called the marital presumption, according to which when a child is born during marriage, the mother's husband is presumed to be the father. Whilst these rules may often reflect the social reality, they are grounded in legal fictions, namely in 'presumptions created by law because it is socially and legally convenient to assume that they are true'.[68]

Legal fictions are common devices in legal architecture and serve different purposes. They can be 'devices of pragmatism and efficiency, aimed at saving costs and avoiding time wasting'.[69] In some contexts, legal fictions are 'deliberately generated in response to uncertainty' – like in the case of the marital presumption.[70] Whilst the marital presumption may simply confirm the genetic father's identity, it also allows the system to conceal the issue of extramarital conception, which is considered to transgress the norm of the nuclear family.[71] Like any legal fiction, therefore, the *pater est quem nuptiae demonstrant* rule is not used to represent an actual reality but is rather a technique to successfully reach certain ends:[72] first, to give uncertainty the appearance of certainty, and second, to safeguard the traditional family unit.[73] More than a reflection on genetic truth, therefore, the marital presumption is an 'expression of a normative [legal] standpoint . . . towards transgressive sexual relationships'.[74]

Even if the determination of legal parenthood has been conventionally presented as a 'neutral, objective and purely factual enquiry', it actually involves judgement.[75] It presupposes making decisions about who deserves recognition as legal parent, even in the paradigm case of a child conceived through sexual intercourse and raised by both their genetic parents. Jackson explains that requiring the surrogate to relinquish all parental rights over the child is 'a choice which is obscured by the law's insistence that gestation – as

[68] N. Milanich, 'Certain mothers, uncertain fathers – Placing assisted reproductive technologies in historical perspective' in Y. Ergas, J. Jenson, and S. Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalised World* (Columbia University Press 2017) 22.

[69] Z. Rathus, 'Social science or "Lego science"? Presumptions, politics, parenting and the new family law' (2010) 10 QUT Law Review 164, 178.

[70] Milanich (n 68) 24.

[71] E. Jackson, 'What is a parent?' in A. Diduck and K. O'Donovan (eds), *Feminist Perspectives on Family Law* (Routledge 2006) 62.

[72] R. Michaels and A. Riles, 'Law as technique' in M.-C. Foblets and others, *The Oxford Handbook of Law and Anthropology* (Oxford University Press 2022) 872.

[73] Jackson (n 71) 59.

[74] Milanich (n 68) 26.

[75] Jackson (n 71) 73.

opposed to genetic relatedness or the intention to raise the child – is the defining feature of motherhood'.[76] *Mater semper certa est* is therefore 'more [a] normative dogma than a descriptor of a social, much less natural, reality'.[77] This in turn reveals not only the 'purposeful' nature of legal fictions, but also their power as 'tool[s] for governing' society.[78] In the context of legal parenthood, legal fictions may serve as instruments of reproductive politics by providing a mechanism for the implementation of specific policy objectives,[79] such as the primacy of the heterosexual and cisgender biological family and the exclusion of LGBTIQ+ persons from the realm of family relationships.

This risk becomes particularly 'real' when the temporality of legal fictions, and therefore their fictitious nature, is forgotten or not taken seriously.[80] By definition, a fiction does not resolve the ultimate question at stake; 'it simply creates a provisional solution subject to future re-evaluation'.[81] In practice, however, protracted provisionality may turn into continuous – quasi automatic – applicability, as the tenacity and immutability of the *mater semper certa est* rule demonstrates. As will be explained later, when the social forces and ideals which have shaped filiation rules are forgotten, left unquestioned, or interiorised, legal fictions may pose a real harm to those falling outside the paradigm case.

10.4.2 *The Gendered Life of Legal Fictions*

Social and scientific developments, such as assisted reproductive technologies, surrogacy, DNA testing, and the proliferation of de facto cohabitation, have foregrounded the temporality of both *mater semper certa est* and *pater est quem nuptiae demonstrant*, and de facto jeopardised their validity and reliability. De jure, however, these two rules have not been subject to the same degree of questioning and contestation. Whilst legal frameworks have shown an increased openness to depart from the marital presumption when determining legal fatherhood, *mater semper certa est* remains 'one of the most immutable facts' of Western family laws.[82] As will be elaborated upon later, this is

[76] Ibid, 68.
[77] Milanich (n 68) 24.
[78] Michaels and Riles (n 72) 873.
[79] Rathus (n 69) 179.
[80] Ibid, 166.
[81] Michaels and Riles (n 72) 873.
[82] Z. Mahmoud and E. C. Romanis, 'On gestation and motherhood' (2023) 31 Medical Law Review 109, 109 (referring specifically to English family law).

attributable to the 'trope of maternal certainty'[83] that treats gestation, motherhood, and mothering as a continuum.

Over the decades, legal frameworks have demonstrated a certain flexibility and attention to context in determining legal fatherhood. In fact, the marital presumption has always been rebuttable by proof that the mother's husband could not be the child's genetic father. Before DNA testing became available, the type of evidence which could displace the presumption was that the husband was sterile, impotent, or outside the country at the time of conception (*extra quatuor maria* in English law, 'beyond the four seas of England').[84] Since the 1940s, DNA technology has assisted in identifying a child's legal father with an increasing degree of accuracy, now close to full certainty. In the context of rising divorce rates and non-formalised adult relationships, this technological development has enabled legal frameworks to react to the steadily diminishing pre-eminence of marriage by adopting genetics as the primary vehicle for grounding legal fatherhood.

Genetics, however, does not work as a father–child connector in all contexts. In the case of sperm donation, for instance, genetics is trumped by the intention to become a father. When fertility treatment is provided by licenced clinics, legal fatherhood is attributed to the consenting husband or heterosexual partner of the woman undergoing treatment, rather than to the sperm donor. Outside the paradigm case, therefore, the determination of legal fatherhood rests on different tests depending on the specific circumstances.

In sharp contrast, the definition of legal motherhood continues to be 'rigidly inflexible and inattentive to the different contexts in which children are conceived'.[85] Even if there have long been multiple paths to motherhood, such as adoption and fostering, a 'mother' has been conventionally understood to be a woman who both bears and cares for a child.[86] Shifts in social and legal norms, technological advances, and the development of markets in both procreation and care have made motherhood 'a choice for more women'.[87] In *social* terms, therefore, we have witnessed a certain 'liberalisation of motherhood'[88] entailing greater possibilities to choose how to mother, although not everywhere and for everyone. When it comes to *legal*

[83] Milanich (n 68) 28.
[84] Jackson (n 71) 62.
[85] Ibid, 66.
[86] Y. Ergas, J. Jenson, and S. Michel, 'Introduction' in Y. Ergas, J. Jenson, and S. Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalised World* (Columbia University Press 2017) 1.
[87] Ibid, 2.
[88] Ibid.

motherhood, however, the attribution of this status continues to be shaped by a sort of 'biological determinism'[89] and parturition tends to remain the 'non-negotiable criterion for motherhood'.[90] Law fails to distinguish between the physical act of 'giving birth and being a mother';[91] rather, it tends to equate the physical act of giving birth with motherhood.

Whilst motherhood may subsequently be transferred by adoption, at the moment of birth, a child's legal mother will generally be the birth-giver.[92] As Mahmoud and Romanis put it, legal motherhood is perceived as '*innately* existing within a particular individual' and therefore '*truly* irrebuttable'.[93] Even if there are other ways to obtain the status of legal mother, they are predicated on the primary ascription of the maternal status to the birth-giver.[94] Adoption, for example, presupposes the consent of the birth mother and/or a court decision establishing that the birth mother is unavailable, unable, or unwilling to take care of the child.[95] From this perspective, adoption does not contradict, but rather presupposes and confirms the *mater semper certa est* rule.[96] The same holds true for surrogacy. Even in jurisdictions where surrogacy is allowed and surrogacy contracts are valid, the structure of that contract tends to presuppose the birth mother's priority. The intended parents acquire legal parenthood because and only if the birth mother agrees to waive her rights; and if she does not agree, she will be the child's legal mother regardless of the child's genetic origins and mode of conception.[97] These examples demonstrate that motherhood and procreation have been historically difficult to disassemble, potentially more than motherhood and care.[98]

The inflexibility of the *mater semper certa est* rule leads to many problematic outcomes. In the context of surrogacy, one of the practical consequences of the gestation-based test is that the child is born into a legal limbo which, depending on the specific case, will characterise at least their first moments of life. To identify the surrogate as legal mother *ab initio* may bring the practical

[89] Mahmoud and Romanis (n 82) 114.
[90] F. Swennen, 'Motherhoods and the law' in H. Willekens, K. Scheiwe, T. Richarz, and E. Schumann (eds), *Motherhood and the Law* (Göttingen University Press 2019) 103.
[91] K. O'Donovan, 'Constructions of maternity and motherhood in stories of lost children' in J. Bridgeman and D. Monk (eds), *Feminist Perspectives on Child Law* (Routledge 2000) 73.
[92] H. Willekens, 'Motherhood as a legal institution: A historical-sociological introduction' in H. Willekens and others (eds), *Motherhood and the Law* (Göttingen University Press 2019).
[93] Mahmoud and Romanis (n 82) 118.
[94] Willekens (n 92) 31.
[95] Ibid.
[96] Ibid.
[97] Ibid, 33.
[98] Ergas, Jenson, and Michel (n 86) 7.

advantage of ensuring the child's survival *on paper*, but 'the price to pay for this simplicity is a fundamental misrepresentation of a reality of this child's parentage'.[99] Far from creating certainty, therefore, the application of the *mater semper certa est* rule creates uncertainty and instability from a child's (rights) perspective and for the whole family.

Apart from the practical inconveniences identified by the Grand Chamber in the Advisory Opinion, the non-recognition of the relationship between the intended mother and the child amounts to denying weight to and, consequently, devaluing the social aspects of parenthood, in particular of motherhood. Moreover, conflating gestation with motherhood ignores the experience of many surrogates who do not see their undertaking of gestational labour as an act of mothering, do not consider themselves as 'mothers', and – even more importantly – do not intend to mother, thus harming their autonomy.[100] Outside the context of surrogacy, the current conceptualisation of legal motherhood also poses real harm to birthing parents who do not identify as women.[101] With few exceptions, the predominant trend is to register trans birthing men as legal mothers of their children by virtue of their biological role in gestation and childbirth, in contrast with their male (legal) gender identity and lived experience as 'fathers'.[102]

Overall, the rigid application of the *mater semper certa est* rule fails to reflect contemporary diversity in family formation. This concern was also raised by Judge Jelić in her dissenting opinion in *A.M. v Norway*.[103] Considering recent developments in reproductive rights and the diversity of motherhoods in the twenty-first century, she considers the conflation of gestation and legal motherhood 'overly simplistic', and wishes for 'a more lenient law which is able to assess individual situations of mothers and which determines the legal status of a mother on a case-by-case basis'.[104] Judge Jelić's opinion echoes scholarly calls for rethinking the 'single-static-status approach' to legal

[99] Jackson (n 71) 68.

[100] Z. Mahmoud, 'Surrogates across the Atlantic: Comparing the impact of legal and health regulatory frameworks on surrogates' autonomy, health and wellbeing' (PhD thesis, University of Exeter 2022).

[101] Mahmoud and Romanis (n 82) 31.

[102] See, for example, the case of Freddy McConnell decided by English courts: *Re TT and YY* [2019] EWHC 2384, 25 September 2019; *R (McConnell and YY) v Registrar General* [2020] EWCA Civ 559, 29 April 2020. See also *O.H. and G.H. v Germany*, Application nos 53568/18 and 54741/18.

[103] Dissenting Opinion of Judge Jelić in *A.M. v Norway* (n 64).

[104] Ibid, para 34.

motherhood, which does not account for the multiple ways in which motherhoods – as fluid kinship nodes – are actually practiced.[105]

10.4.3 *Explaining the Gender of Legal Parenthood*

The previous section showed that, whilst the marital presumption and the broader regulation of legal fatherhood have proven adaptable, the definition of legal motherhood as grounded in gestation and birth has proven largely resistant to social and technological changes. This section takes a step further and identifies two structural factors underlying the asymmetrical evolution of the *mater semper certa est* and *pater est quem nuptiae demonstrant* rules: (1) a long-standing socio-legal desire to preserve the unitary status of motherhood, and (2) gendered notions of care and parenting underlying the regulation of legal parenthood, which remain largely uncontested.

In Western legal systems, the regulation of parent–child relationships is based on the 'unalterable two-parent paradigm', according to which a child can only have two parents: one father and one mother.[106] This goes hand in hand with the unitary nature of legal motherhood. As explained by Swennen, motherhood has traditionally been understood as an 'indivisible bundle of parentage, parenthood and parenting rights and obligations', which is conferred solely upon the birth-giver.[107] Accordingly, and in spite of the pluralisation and fragmentation of motherhood on the ground, Western legal frameworks have generally shown resistance to disaggregating motherhood, not only from gestation but also from care. In other words, gestation, motherhood, and mothering tend to be treated as a continuum in law and society.

An enlightening example of this supposed continuum is the prohibition of egg donation as compared to the typically more permissive attitude towards sperm donation, which persists in some Western jurisdictions.[108] The case of *S.H. and Others v Austria*, decided by the Grand Chamber of the ECtHR in 2011, triggers some important reflections in this regard.[109] This case stemmed

[105] Swennen (n 90) 101. See also Chapter 3 by David Archard and Chapter 4 by Ségolène Barbou des Places.

[106] J. Scherpe, 'Breaking the existing paradigms of parent–child relationships' in G. Douglas, M. Murch, and V. Stephens (eds), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (Intersentia 2018) 345.

[107] Swennen (n 90) 103.

[108] See C. M. Romeo Casabona, R. Paslack, and J. W. Simon, 'Reproductive medicine and the law: Egg donation in Germany, Spain and other European countries' (2013) 38 Revista de derecho y genoma humano 15. Egg donation is still prohibited in Germany and Switzerland. In Norway, Italy, and Austria, previous bans have been lifted in recent years.

[109] *S.H. and Others v Austria*, Application no 57813/00.

from the complaint of two couples who needed *in vitro* fertilisation (IVF) treatment, the first with the use of donor sperm and the second with the use of donor eggs, to have children genetically linked with at least one of the prospective parents. Under Austrian law at that time, egg donation was prohibited in all circumstances, while sperm donation was allowed only for *in vivo* fertilisation. The Grand Chamber considered the restrictions imposed by Austrian law to be compatible with Article 8 ECHR.[110] The margin of appreciation doctrine played a central role in reaching this conclusion. Given that IVF raised sensitive moral and ethical issues on which an 'emerging',[111] but 'not yet clear common ground' existed, states enjoyed a wide margin of appreciation in regulating the fast-moving field of assisted reproduction.[112]

The Austrian Government had put forward various justifications for its restrictions, including the need to protect women from exploitation and humiliation, and the fear of selective reproduction.[113] The Austrian legislature had also been guided by the idea that the *mater semper certa est* principle effectively prevents the possibility of tension between a biological and a genetic mother, both of whom could claim the status of legal mother.[114] This was considered a 'valid wish' by the Grand Chamber,[115] which appreciated the legislature's attempt to reconcile the desire to make assisted reproductive technologies available and the unease among large parts of society as to the ethically and morally sensitive issues triggered by these technologies.[116]

When hearing the applicants' complaint, the Austrian Constitutional Court held that allowing *in vitro* fertilisation with donor sperm but not with egg donation did not amount to discrimination, because sperm donation 'was not considered to give rise to a risk of creating unusual family relationships which might adversely affect the well-being of a future child'.[117] The German Government, intervening as a third party, similarly explained that in Germany, the prohibition of egg donation was necessary 'to protect the child's

[110] Before, the Chamber had found the Austrian regulation in violation of Article 8 taken in conjunction with Article 14: ibid.
[111] Ibid, para 96.
[112] Ibid, para 97.
[113] Ibid, para 101.
[114] Ibid, para 104.
[115] A. Timmer, 'S.H. and Others v Austria: Margin of appreciation and IVF' (*Strasbourg Observers*, 9 November 2011) <https://strasbourgobservers.com/2011/11/09/s-h-and-others-v-austria-margin-of-appreciation-and-ivf/>. See also W. Van Hoof and G. Pennings, 'The consequences of S.H. and Others v Austria for legislation on gamete donation in Europe: An ethical analysis of the European Court of Human Rights judgments' (2012) 25 Reproductive BioMedicine Online 667.
[116] *S.H. and Others v Austria* (n 109), para 104.
[117] Ibid, para 25.

welfare from the unambiguous identity of the mother'.[118] According to the German Government, 'splitting motherhood might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity'.[119] More radically, the Italian Government – also a third-party intervener – argued that 'to call maternal filiation into question by splitting motherhood would lead to a weakening of the entire structure of society'.[120]

As these quotes suggest, egg donation was and, in some contexts, still is considered to generate 'a problematic situation of unmanageable uncertainly and destabilisation'.[121] Whilst it is true that legal frameworks have already had to deal with a fragmentation of motherhood in the context of adoption, the Grand Chamber of the ECtHR acknowledged that egg donation brings about a split of motherhood which 'differs significantly from adoptive parent–child relations and ... add[s] a new aspect to this issue'.[122] By disaggregating the genetic and the gestational components, egg donation breaks away from the understanding of gestation and motherhood as coterminous and turns maternal certainty into ambiguity.

Interestingly, in *S.H. and Others*, similar concerns were not raised in relation to the potential fragmentation of fatherhood following sperm donation. Split fatherhood seems not to give rise to uncertain and problematic situations or, as Palumbo frames it, the resolution of the situations it is perceived to trigger is more straightforward.[123] In the case of sperm donation, the father is simply the person who has consented to the treatment, and this is not considered to negatively affect the child's welfare.[124] Reflecting upon Norwegian law, which prohibited egg donation but allowed (and still allows) sperm donation, Melhuus observes that the reason for accepting sperm donation has to do with an 'intrinsic uncertainty about paternity': unlike eggs, sperm comes from outside the body, thus creating no different situation from sexual intercourse.[125]

As pointed out by Willekens in his historical-sociological account of motherhood, the universal function of the *mater semper certa est* rule is to

[118] Ibid, para 70.
[119] Ibid.
[120] Ibid, para 73.
[121] L. Palumbo, 'The borders of legal motherhood: Rethinking access to assisted reproductive technologies in Europe' in Y. Ergas, J. Jenson, and S. Michel (eds), *Reassembling Motherhood: Procreation and Care in a Globalised World* (Columbia University Press 2017) 82.
[122] *S.H. and Others v Austria* (n 109), para 105.
[123] Palumbo (n 121) 82.
[124] Ibid.
[125] M. Melhuus, 'Better safe than sorry: Legislating assisted conception in Norway' in C. Krohn-Hansen and K. Nustad (eds), *State Formation: Anthropological Perspectives* (Pluto 2005) 227.

ensure children's and group survival.[126] Since children are unable to survive without the care provided by adults for a number of years, a responsible person must be allocated to them at birth. Because the woman giving birth is considered most likely to take care of the child spontaneously,[127] it is efficient for legal frameworks to place the primary responsibility for childcare on her.[128]

That being said, when reflecting upon the rationale of *mater semper certa est*, it is also important to keep in mind the normative character inherent in the allocation of legal parenthood mentioned in Section 10.3.1, and in particular its gendered substrate. As observed by McCandless, the allocation of parenthood has always been informed by gendered perceptions of the two-parent family model.[129] The 'normative politics of family life'[130] rests on the notion that children have, at most, two different-sex parents, and is grounded in a 'principle of gender asymmetry assigning different and complementary roles to men and women'.[131] That explains why, throughout history, legal mothers have been granted rights and duties different from those attributed to legal fathers. It also explains why legal efforts to keep fathers in the family picture, especially in the post-separation/divorce context, have often aimed at ensuring men's role as breadwinners rather than their emotional presence. The principle of gender asymmetry underlying the allocation of legal parenthood also helps explain why the *mater semper certa est* rule was established in the first place, and why it retains its primacy in spite of increasing family diversity on the ground. The person giving birth has been considered the most likely to take responsibility for the newborn not only due to her gestational involvement but also, and especially, in her capacity as a woman.

The continuous application of the *mater semper certa est* rule over the centuries has only consolidated this notion. As argued by Mahmoud and Romanis, the automatic attribution of motherhood to those who give birth 'binds and confines women to a biological destiny, assuming that caring responsibilities after birth innately accompany gestation'.[132] People who do not gestate and give birth enjoy greater freedom to make social determinations

[126] Willekens (n 92) 41.
[127] Ibid 42.
[128] Ibid.
[129] J. McCandless, 'Reforming birth registration law in England and Wales?' (2017) 4 Reproductive BioMedicine and Society Online 52, 56.
[130] Ibid.
[131] Willekens (n 92) 23.
[132] Mahmoud and Romanis (n 82) 119. Of course, adoption is always a possibility. Yet, apart from involving delicate decisions at a personal level, from a technical-legal point of view, it presupposes the prior registration of the birth-giver as 'mother'.

about their parental legal status.[133] This applies *in primis* to legal fathers, who, in Czapanskiy's terminology, have often been constructed as 'volunteer parents', with limited parental duties but extensive protection of their autonomy to take part (or not) in a child's upbringing.[134] Legal mothers, on the contrary, have been defined as 'draftees'.[135] They can walk away less easily, if at all, from their extensive parental duties, and their autonomy with respect to mothering is given little and marginal protection.

In spite of a shift to gender neutrality on the face of family laws, legal parenthood remains a highly gendered institution in the fine grains of legal practice. The different evolution that the *mater semper certa est* and *pater est quem nuptiae demonstrant* rules have undergone largely attests to this. The inflexible application of the *mater semper certa est* rule to establish legal motherhood supports and reinforces traditional notions about gender roles: most of all, the notion that it is ideal for the newborn to be taken care of by the birthing person and, relatedly, that 'at the moment of birth, the person who is ready and able to become responsible for the care of a newly born child is who we call a "mother"'.[136] At the same time, the more context-specific approach to determining legal fatherhood and, in the context of surrogacy, the emphasis on the genetic link of intended fathers confirm that men's intention to parent or not to parent is taken more seriously than women's, and therefore that intention is supportive of a 'male approach to parenthood'.[137] More generally, Western legal frameworks seem to have more easily accepted the fragmentation of fatherhood than of motherhood because mothers continue to be perceived as, and to a great extent still are, the primary caregivers.[138]

10.5 CONCLUSION

In spite of the many social and technological changes which have transformed and diversified how family ties are created and experienced, the legal definition of motherhood endorsed by European supranational courts remains grounded in gestation and birth. As a result, intended mothers of children

[133] Ibid.
[134] K. Czapanskiy, 'Volunteers and draftees: The struggle for parental equality' (1991) 38 UCLA Law Review 1415, 1415–1416.
[135] Ibid.
[136] A. Margaria, 'Trans men giving birth and reflections on fatherhood: What to expect?' (2020) 34 International Journal of Law, Policy and the Family 225, 235.
[137] G. Douglas, 'The intention to be a parent and the making of mothers' (1994) 57 Modern Law Review 636, 638.
[138] See also Chapter 2 by Alina Tryfonidou.

born through surrogacy are often placed in a precarious or disadvantaged legal position, being denied legal rights reserved for birth-givers, such as maternity leave, and the legal recognition of their parent–child relationship – at least *ab initio*.

The immutability of the *mater semper certa est* rule and the precarious position of intended mothers are not solely indicative of a wider socio-legal reluctance to accept the fragmentation of motherhood. They are tangible outcomes of the gender of the legal fictions governing the attribution of legal parenthood. Different from the *mater semper certa est* rule, the *pater est quem nuptiae demonstrant* rule has undergone greater scrutiny and reevaluation. This has resulted in a context-sensitive approach to determine legal fatherhood, wherein also mere genetics or the intention to be a father count as legitimate and sufficient grounds for establishing legal fatherhood. By demonstrating less flexibility and adaptability to the determination of legal motherhood, legal systems reinforce the expectation that (gestational) mothers bear the primary responsibility for childcare, whilst fathers may determine their degree and type of involvement without necessarily jeopardising their legal status. These gendered expectations, which are reflected in current practices of attributing legal parenthood, act as stumbling blocks to meeting the needs and realities of many contemporary families.