OS REFLEXOS DA CONFERÊNCIA DE HAIA SOBRE DIREITO INTERNACIONAL PRIVADO EM RELAÇÃO À ANACIONALIDADE DECORRENTE DA MATERNIDADE DE SUBSTITUIÇÃO TRANSNACIONAL

THE REFLECTIONS OF THE HAGUE CONFERENCE ON PRIVATE LAW IN RELATION TO NONNATIONALITY ARISING OUT OF TRANSNATIONAL SUBSTITUTION MATERNITY

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RESUMO

Esta pesquisa se debruça sobre a temática da maternidade de substituição no direito internacional privado e se justifica em razão do intenso progresso médico-científico na área e dos conflitos e lides propostas para o reconhecimento da nacionalidade de crianças oriundas dos procedimentos de maternidade substitutiva, dado que cada país legisla de acordo com a realidade nacional, necessitando-se discutir sobre a harmonização dos interesses no âmbito internacional. Assim, a pesquisa pretende questionar quais as contribuições da Conferência de Haia sobre Direito Internacional Privado para a harmonização dos ordenamentos jurídicos em matéria de maternidade de substituição e, especialmente quais os reflexos para o ordenamento jurídico brasileiro. Para tanto, investiga-se os avanços da técnica da reprodução humana medicamente assistida com foco na maternidade de substituição, de modo a averiguar como o direito comparado tem encontrado respostas para as questões oriundas do procedimento. Posteriormente, o estudo discorre sobre as disposições do direito brasileiro relacionado e o esforço internacional verificado pela Conferência de Haia. Ao final, o trabalho identifica que o direito interno sofre limitações para resolver os problemas oriundos da maternidade de substituição transnacional e, por isso, ressalta-se a necessidade de cooperação multilateral para que, em uníssono, sejam garantidos os direitos das crianças. Nesse aspecto, destacam-se os resultados práticos verificados a partir da Conferência de Haia na solução do problema da anacionalidade. A temática ainda impõe desafios para o futuro no que concerne ao tráfico de crianças, à vulnerabilidade das mulheres envolvidas na gestação de substituição e à própria onerosidade do contrato.

PALAVRAS-CHAVE
Maternidade de substituição. Direito brasileiro. Direito comparado. Anacionalidade.

ABSTRACT
This research focuses on the issue of surrogate motherhood in private international law and is justified because of intense medical and scientific progress in the area and conflicts and litigations proposals for recognition of the nationality of children from the surrogate motherhood procedures as each country legislates according to the national reality, requiring discussions about the harmonization of interests internationally. Thus, the research seeks to question the contributions of the Hague Conference on Private International Law to the harmonization of legal systems in the field of surrogacy and especially what are its effects to the Brazilian legal system. To this end, the first topic investigates advances in assisted human reproduction technique focusing on surrogacy in order to find out how comparative law has found answers to the questions arising from the procedure. Subsequently, the study focuses on the study of Brazilian law and the related international effort verified by the Hague Conference. Finally, the paper identifies the national law suffers limitations to solve the problems arising from transnational surrogacy, and therefore the need for multilateral cooperation is emphasized so that, in unison, children's rights are guaranteed. In this regard, we highlight the practical results obtained from the Hague Conference on resolving the problem of nonnationality. The theme also poses challenges for the future with regard to trafficking in children, the vulnerability of women involved in surrogate motherhood and the very burden of the contract.

KEYWORDS
Surrogate motherhood. Brazilian law. Comparative law. Nonnationality.

INITIAL CONSIDERATIONS

Research on replacement maternity in private international law is justified by the intense medical-scientific progress in the area and the facilitated mobility experienced by the most economically powerful people. Above all, it finds justification in the conflicts and in the proposals for recognition of the children's nationality from substitute maternity procedures, since each country legislates according to its national reality. It is therefore necessary to discuss the need for harmonization of interests at the international level.

The research adopts the functional method so that, through the comparison, one will seek to perceive similarities, but mainly distinctions between the compared systems. Also, through micro-comparison, it intends to analyze the substitution maternity institute in several countries, verifying their differences. In these terms, the method assumes new contours in a postmodern scenario when Erik Jayme proposes the paradigm of difference breaking with universal thinking and the idea of colonialism.

So, the theory behind this original article is the one from Erik Jayme, who breaks with the universal thinking through the investigation of differences between the institutes, allowing the verification of the best contours for the institute in national law. In this sense, the research intends to question the contributions of the Hague Conference on Private International Law to the harmonization of legal systems in matters of substitution maternity and, especially, the reflexes to the Brazilian legal system.

For this, the essay was divided into two moments: first, the research focuses on the technique of assisted human reproduction, focusing on substitution maternity, in order to find out how the comparative law has found answers to questions arising from this procedure. In the second subsection, the study focuses on the analysis of substitutive motherhood in Brazilian law and in private international law, notably the international effort verified at The Hague Conference.

1 REPLACEMENT MATERNITY, SUB-ROGER OR RENTAL BELLY

Artificial human reproduction, called medically assisted, is on the agenda of the discussions on the 21st century. Man's eagerness to challenge the boundaries of the known has given humanity important achievements such as maternity for sterile women, advanced women who biologically could not have children, and for homosexual couples (BRAUNER, 2003).

The current stage of human reproduction medicalization shows the idea of the breakup and the separation between human reproduction and sexuality. According to Sandel, the improvement of the technique also allows the intervention in the genetic characteristics of the children, giving the choice of the sex and the preferential characteristics of the parents (SANDEL, 2003, p. 34).

The terms used to nominate the technique are: artificial reproduction, artificial conception, artificial fertilization, fertilization or assisted fertilization, or even, human assisted reproduction, the term used in this research. In this sense, the technique is defined by Scarparo (1991, p. 242) as "a set of techniques that aim to provoke gestation by replacing or facilitating some stage that is deficient in the reproductive process," consisting of "the process that causes the egg to come into contact with the spermatozoid, resulting in a human being without carnal copulation".

The history of mankind reflects man's intentions to carry out projects of maternity and paternity from unconventional methods. The Greek myth of Perseus' birth, in which Acrisius, king of Argos, cloistered his daughter Danae, the woman wanted by Zeus, in

an underground chamber because, according to the prophecy, the king would be killed by his grandson. "Zeus, however, in the form of a shower of gold, entered through a cleft into the compartment which seemed inviolable, and seduced Danae, who joined him and became pregnant. Months later, Perseus was born" (RAMOS, 2015).

In the Holy Bible, the first mention to substitute motherhood is found in the book of Genesis, chapter 16, verse 2, when Sarah realizes her sterility and suggests to Abraham that she take her slave Agar to bear his children (BÍBLIA, 2004).

According to the Gospel of Luke 18, X, the angel Gabriel said to Mary, "Behold, you shall conceive, and bear a son, whom thou shalt call the name of Jesus", and in the book of Isaiah we read "Behold, *the virgin* shall be with child, and shall bear a son, and his name shall be Emmanuel, God with us!" (BÍBLIA SAGRADA, 2004, emphasis added).

In this sense and facing such circumstances, childbirth has traditionally been the event that legally defined maternity. Gruenbaum states that "traditionally, according to the law is the birth that can confer maternity, because no one else could give birth to the child other than the mother" (GRUENBAUM, 2012, p.475, translation by the authors).

And man's curiosity led him to seek the limits and test the unknown. Aldous Huxley's fable, "Brave New World", created in 1932, a work of fiction, describes the creation of human beings in laboratories from processes of artificial fertilization including the creation of twins, and outlining a caste society by scientific intervention for the production of leaders, intellectuals and workers (Huxley, 2003).

Nowadays, medically assisted human reproduction is possible in many ways, using the germ cells of the people involved in the parental project, i.e., ova and spermatozoa of those who naturally cannot have children, which is called homologous fertilization; or with the use of genetic material from third parties, named heterologous fertilization (DINIZ, 2014).

The techniques employed are diverse. Diniz emphasizes the artificial insemination, characterized by the introduction of the masculine genetic material in the body of the woman; there is still the possibility of *in vitro* fertilization, in which the fertilization of the egg takes place in the laboratory and the embryo is introduced into the body of the woman in which it will be gestated. This technique allows fertilization from ova and spermatozoa from third parties (2014).

In Brauner's view (2011, p. 57):

> […] although adoption is an enriching experience, and should be encouraged day by day, it does not represent the path chosen by all who cannot generate naturally, so recognition must be given to the methods offered by modern science to deal with infertility and sterility, given that sterility is not readily accepted, which is why sterile women rely on medically assisted reproduction methods, among which the substitution gestation becomes relevant.

Meirelles explains that the use of this artificial reproduction method can rise to different figures of mother, such as the social mother who assumes motherhood towards the creation of the child, the genetic mother who donates her egg for fertilization, and the biological mother who begets the child. In this sense, it will still be possible for two of these figures to be reunited in a single person as in the case of the genetic mother being the woman who succeeds the child (1998).

This is what Schwenzer refers to the concept of split motherhood, that is, the concept that motherhood is no longer one, insofar as there are possibilities of up to three pretensions of motherhood: one anchored in gestation, another in origin genetics and another, in the parental project (apud ARAÚJO, VARGAS and MARTEL, 2014).

As mentioned, gestation due to substitution brings important repercussions on the determination of motherhood. For centuries it has been understood that there is no doubt about who the mother of a child is because of childbirth. However, biotechnology has altered roles, making it possible to identify the pregnant woman as a biological mother, the donor of genetic material as a genetic mother, and the author of the maternity project as an affective mother.

Concerned to this, a woman who does not intend to assume motherhood gives in to her body to raise a child for another. Literature also calls this technique “maternity of subrogation” and, in some countries, it is known as “surrogacy”, in which case there is remuneration to the pregnant woman who renders the child-raising service for the applicant.

Maternity replacement is defined by Dias (2013, p. 379) as the

> […] gestation on behalf of others, maternity by substitution or subrogation are expressions that mean nothing more than the known surrogacy. […] Replacement gestation would be a legal business of behavior, comprising for the “surrogate mother” obligations to do and not to do, culminating with the obligation to give, consistent with the delivery of the child.

This subrogation is carried out because the pretense parents cannot have children naturally. There are cases in which homosexuals want to have their own children. The best-known example is Elton John and David Furnish, who have two children born through the technique (BENICKE, 2013).

Because of the success and diffusion achieved by both techniques, it is indispensable that the process maintains as a primary objective the promotion of the dignity of the human beings

involved: men, women and children gathered by the project of parenthood. In this way, it is fundamental to understand that the dignity of the human person consists on

> [...] the intrinsic and distinctive quality of each human being that deserves the same respect and consideration on the part of the State and the community, implying, in this sense, a complex of fundamental rights and duties that assure the person against any degrading act and inhumane, as it will be guaranteed the minimum existential conditions for a healthy life, as well as fostering and promoting their active and co-responsible participation in the destinies of their own existence and life in communion with other human beings (SARLET, 2001, p. 60).

Therefore, the techniques mentioned here, as a parenting project, should reinforce the affirmation of human beings' dignity, constituting a real limitation to scientific procedures. In the same sense is the reference of Brauner, when affirming that:

> The new reproductive technologies offer a range of possibilities to women and men, involving the possibility of realizing their project of parenthood, and a reflection on which procedures can be carried out without directly addressing the fundamental rights of each of them and, equally, of the child who should have the right to be born with the dignity due to all human beings (2003, p. 70).

In this respect, it is important to emphasize that because of all scientific progress in the area and the innumerable benefits derived from the procedures of human assisted reproduction, the possibility of trivializing the technique cannot be solved. For this reason, bioethical principles[1] are the guidelines for scientists, who must have as their basis the dignity of the human person.

The principle of autonomy informs that the persons involved have the right to know about the objectives of the procedure, its risks and benefits, as well as the forms of accompaniment and assistance offered by the scientist through the offer of the Informed Consent Form, which must be signed as a measure of authorization to carry out the procedure(s) (CONSELHO FEDERAL DE MEDICINA, 2013).

The principle of beneficence and non-maleficence is recognized as the duty of health professionals to do good to the patient and not to do evil (DINIZ, 2014). This understanding stems from the lesson learned from Nazi experiences in which practices far removed from the ideals of doing good were characterized by speculation about results.

In addition to preserving people directly involved in the reproductive process, observance of the principles also protects the professional performance. About this aspect, Brauner stresses as

[1] In this sense, the mentioned principle is presented as a result of the Nuremberg trial in 1948 in which health professionals working in the Nazi concentration camps were tried and convicted because they have made use of persons as objects of a purely speculative science (DINIZ, 2014). The Nuremberg Code has thus incorporated the ethical lesson of this historical moment by broadcasting to the world the message that the use of people for scientific purposes requires observance of such principles.

fundamental the promotion of a broad debate about the circumstances that should counter the use of medically assisted human reproduction, as well as the responsibilities of the professionals of the area (BRAUNER, 2003).

In these directions, Brauner (2003) says that considering the right to have access to medical health care,

> […] sterility must be included as a reproductive health problem and therefore it authorizes the use of medicine to solve it, however, conclude that all possibilities offered by medicine can be accepted and used without limitations by man and woman.

In the meantime, the development of the technique provides, through pre-implantation diagnosis, knowledge about the genetic characteristics of the embryo and future diseases, which makes possible an effective intervention to promote health to the embryo. However, the domain of the technique even allows the selection of genetic characteristics such as sex, eye color, among others, which can stimulate eugenics practices in disagreement with the right to genetic identity and therapeutic purpose, so this should therefore be avoided (DINIZ, 2014).

Some situations due to the medicalization of human reproduction are especially delicate. The hypothesis of single parenthood of the woman who uses science to be a mother from the use of genetic material from anonymous donors is mentioned; to the case of the woman who uses the genetic material of the dead husband/partner, the so-called *post-mortem* artificial insemination; and also the circumstance of substitute motherhood. In the first and second cases, the child is conceived and born orphan, deprived of a father as referred by Casabona (1994), as the main objection.

With regard to substitution maternity, the possibility of remuneration to the woman who succeeds the child is presented as an element of reflection. In this context, Brauner questions "[…] the guarantees that the child is not only an object to be claimed by the woman who gave up the uterus, but also confronts difficulties in determining the child's motherhood, in the current legislation" (BRAUNER, 2003).

It is worth mentioning Mantovani's point of view, for whom substitution motherhood is an offense to the dignity of the mother, since the leasing characterizes motherhood by reducing the woman to a mere reproductive organism and the unborn child to the economically sensible thing (apud BRAUNER, 2003).

In this context, it is especially important to highlight the need to protect children from medically assisted reproduction, given their peculiar vulnerability and aggravated by the interests that may prevail in the procedure.

2 RESPONSES OF COMPARATIVE RIGHT IN CONTEMPORANEITY

Different perceptions of substitute motherhood exist in the world: countries that allow it without or with few restrictions, even in commercial contracts; countries that allow it in a very restrictive way; countries that expressly prohibit it in any condition and countries that do not mention the consequences of the technique. In the first group there are some jurisdictions from the United States, Canada, the United Kingdom, Israel, Greece, the Netherlands, India and Ukraine. Nevertheless, in this group there are those who have specific legislation and those whose practice is allowed by the absence of prohibition or restrictions. In the second, we can include Argentina and China, where the permit has a number of limitations. In the third group are those countries where substitution gestation is forbidden in any way, such as France and Germany, which prohibit any kind of hiring, and Spain, which in addition to the restriction has an express rule that mother is the one who gives birth (BENICKE, 2013).

In Brazil, the circumstance is that there is no legislation on the subject, so that only the resolutions of the Federal Council of Medicine guide the practice.

These differences allow people, to elude the prohibitions of their domestic legislation and to carry out their parental project, to seek a country whose legislation is more permissive. As a result, what has become known as "reproductive tourism" has proliferated, with countless consequences for private international law. Because of the prohibition in domestic law, it remains to answer the question of what to do with the effects of situations occurring abroad, often in an attempt to evade the law.

Recently, in Argentina, the New Civil and Commercial Code, as far as the subject is concerned, brought important considerations such as the provision that there are necessarily only two filial links, whatever the nature of the affiliation, according to article 558[2] of the law. In addition, it established in its article 562a maternity/paternity by *procreational will*, recognizing as parents, the parturient and the man or woman who gave his/her informed consent. Note:

> Art. 562.-Voluntad procreacional. Los nacidos por las técnicas de reproducción humana asistida son hijos de quien dio a luz y del hombre o de la mujer que también ha prestado su consentimiento previo, informado y libre en los términos de los artículos 560 y 561, debidamente inscripto en el Registro del Estado Civil y Capacidad de las Personas, con independencia de quién haya aportado los gametos.

[2] "ARTICULO 558- Fuentes de la filiación. Igualdad de efectos. La filiación puede tener lugar por naturaleza, mediante técnicas de reproducción humana asistida, o por adopción. La filiación por adopción plena, por naturaleza o por técnicas de reproducción humana asistida, matrimonial y extramatrimonial, surten los mismos efectos, conforme a las disposiciones de este Código. Ninguna persona puede tener más de dos vínculos filiales, cualquiera sea la naturaleza de la filiación" (ARGENTINA, Law 26.994, October, 7th, 2014).

The establishment of maternity is of paramount importance to safeguard the interests of the child in any situation, especially with regard to the new contours provided by the substitution maternity. In this sense, in some systems, there is a clear answer: it is considered legal mother of the parturient child in Chile, Germany, Austria, Holland, Spain, Portugal, United Kingdom, Switzerland. Especially in Germany, the Civil Code considers the parturient to be the legal mother for all purposes, even in the case of ovum donation and substitution maternity. In the State of California, the definition of motherhood is pretense and not childbirth, so that there are two concepts of mother: genetics and parturient. In France and Japan, in the absence of specific legislative mention, a mother is assumed to be a parturient woman (GRUENBAUM, 2012). In Ukraine, contracting parents, whether or not they are genetic parents (BENICKE, 2013) are considered to be parents of the child from the surrogate motherhood.

Many legal systems in continental Europe consider that the contract of belly rental is invalid, or at least unenforceable, or because the law expressly foresees this consequence, these are the cases of France, Portugal and Spain. Austria and Italy prohibit heterologous fertilization with donated eggs, in Germany such techniques are criminalized, while severe fines are imposed in Italy (GRUENBAUM, 2012).

Germany is particularly cautious because of the history of human rights violations in World War II. Therefore, replacement maternity is prohibited and the mother of the child is considered to be the parturient regardless of genetic background. This has repercussions of a practical nature. Gruenbaum notes that there are many German parents who would like to hire surrogate mothers abroad in which the contract is lawful, as in the United States, specifically in California and in New York, or in countries like Russia, Ukraine and India (GRUENBAUM, 2012).

The same author refers to the case of a German couple who held a surrogacy contract in Ukraine. The woman who gave up her uterus to gestate the child was married and implanted in her the embryo resulting from the previous fertilization with genetic material of the would-be parents. Ukrainian legislation provides that the intended parents are the legal parents of the child and therefore the birth certificate was issued with the names of the German parents, however, the application for issuing a German passport for the children was denied because, according to the German criterion, the children would have acquired Ukrainian nationality. In another case, the German parents hired a surrogate in California; the twins born were unable to obtain a German passport, so they were taken by parents to Germany with US passports (GRUENBAUM, 2012).

In Argentina, the new Civil and Commercial Code, which came into force on August 1st, 2015, eliminated the mention of rental belly for the purpose of assisted reproduction. However, it

established the requirement of the procreational will, according to the previously mentioned article 562. It is possible to note the uncoupling of gametes donors and the necessary link with the claim to be father and mother, as well as the established bond with the parturient. Argentine courts have already consolidated jurisprudence since 2013 to recognize even dual paternity or double maternity from substitute maternity.

Lamm emphasizes that the concept of affiliation has gained new contours with the debiologization and the determination of the affiliation by the volitive criterion (LAMM, 2012). One of the major issues to be discussed, however, concerns maternity due to cross-border subrogation.

It should be noted that the authors of the parental project (the parents who hire the uterus) are nationals of a country that does not allow or recognize the practice and to achieve the goal of having a child, they go to a country like India and Nepal, which are countries that recognize as valid the substitute maternity contract adopting a favorable legislation to the recognition of filiation by the would-be parents or, in another sense, do not adopt childbirth as a criteria for determination of the filiation. On the other hand, if the country of origin of the pretense parents does not recognize the technique by prohibiting or punishing this, it does not recognize the birth in another country, since the child (ren) was born of a woman of another nationality (BENICKE, 2013).

The rules of the Brazilian Federal Council of Medicine (FCM) do not prohibit the use of substitution gestation by foreign persons, but restrictions in Brazil - especially regarding the kinship relationship between the pregnant woman and the parents - make it difficult to use foreigners and by non-residents, discouraging “reproductive tourism”. Notwithstanding the fact that the alleged foreign parents are resident or non-resident in Brazil, once the child is born, from a foreign father or mother, the option to register the birth is possible before a foreign consular authority. The registration in the name of the alleged mother can be granted without problems if the legislation of the foreign country permits so; or denied, if it damages its public order, as it would be the case in France. If the alleged parents choose to register with the Brazilian authorities, the child born in Brazil will be registered according to our law and will have the Brazilian nationality assured, since the rule of law applies to him/her.

So, in the Brazilian system, the rule for nationality is *ius soli*, that means Brazilian citizens are all those born in Brazil. However, the system is mixed, also presenting the criterion of *ius sanguinis*. Thus, the children of Brazilian people born abroad will be considered Brazilian born in two hypotheses: the first, automatically, if there is a birth record in the Brazilian Consulate; the second, by the exercise of the option, when, in the absence of registration, subsequently resides in Brazil and makes the option before the federal court (BRAZIL, 1988). In the latter case, although it

is necessary to prove certain requirements, the sentence is merely declaratory of a pre-existing state (DEL'OLMO, 2002).

The opposite situation - if the child is born abroad of a Brazilian father or mother - another order of questions appear, among which the following stand out: the determination of the Brazilian nationality of children born abroad, the possibility of carrying out onerous contracts of substitution gestation, and, finally, the recognition of foreign decisions for execution in Brazil. So, in the case of those born abroad with Brazilian parents, the issue of nationality is compounded by the problems related to the registration of natural persons, due to the functions performed by the Brazilian consulates, which register the birth of the children of Brazilians born in the outside (DEL'OLMO, 2016).

The Brazilian nationality, based on the *ius sanguinis* criteria requires that one of the parents must be Brazilian. If the author of the parental project is not considered as a mother by Brazilian law in the process of doubt, and the father is unknown or foreign, it is possible to verify an issue of difficult solution for the recognition of the Brazilian nationality. In this case, if the local law does not use the *ius soli* rule, and the Brazilian nationality is not attributed by Brazilian law, the child will be stateless, which means that it has no link with any nation. In this sense, Del'Olmo refers to the term *anational* as more appropriate to the circumstances (DEL'OLMO, 2009), because it denotes the idea of a transient circumstance in the child's life.

3 REGULATION BY BRAZILIAN LEGAL ORDER

Because this is a new topic, the Brazilian legal system does not provide a standard to regulate it. The matter is oriented according to rules on non-standard contracts. In this aspect, the requirements in article 104 of Brazilian Civil Code are elements to be observed, the capacity of agents is highlighted, the object must be lawful, as the contract has to be possible and determinable. The majority of the doctrine understands that the pact signed for the purpose of contracting an uterus is unlawful and therefore has no legal validity. Venosa, in pointing out that Brazilian law

does not mention the topic, talks about the contract of gestation, as the denomination itself, when observing that "in the absence of a norm, among us, an onerous contract of this kind must be considered null, because its object is immoral, and the obligation derived from it can be considered, at most, a natural obligation" (VENOSA, 2008, p. 230).

Diniz believes that the fact of effecting a contract involving the uterus involving payment would imply an immoral pact and contrary to good manners and should therefore be prohibited by law. For the author, in the free contract, she also argues that

> […] there will always be the possibility of the biological mother or hostess repenting, attempting abortion, or refusing to surrender the child to the genetic or institutional mother. The surrogate gestational mother technique, that means, the practice of using the substitutive mother should be strictly prohibited or strictly limited. (DINIZ, 2014, pp. 175-185).

In Brazil, membership is determined by childbirth. Maternity is presumed in favor of the one that appears at the end of the child's birth, according to articles 1,603 and 1,608 of the Civil Code, in accordance with the Declaration of Live Birth, according to article 10, item IV of Law 8.069/90. Paternity, in turn, is understood in favor of the husband as to the children who was born in the constancy of the marriage, even if they were made by artificial heterologous insemination in accordance with articles 1,597 and 1,600 of the Civil Code.

It is presumed, therefore, mother the one who gave birth, regardless of the origin of the egg, which is done according to the principle *mater semper certa est*. Regarding to paternity, article 1,597, inc. V, of the Civil Code of 2002, which states: "The children shall be presumed to have been conceived in the course of their marriage: by artificial heterologous insemination, if there has been prior authorization by the husband" (BRASIL, Lei 10,406/02).

Nor does the Child and Adolescent Statute (CAS) have an specific provision regarding the determination of maternity. There is a presumption that it is the mother the one who gives birth, as it is clear from article 10 of the CAS. Of particular interest for this presumption there is the clause II of the aforementioned article, in which the registration of the newborn and his mother (here it can only be interpreted as the one who gave birth) must happen at the time of delivery, including to avoid exchange of babies and other identification problems. However, there is no concern that the parturient is not the donor of the genetic material nor the author of the parental project, much less that there has been prior consent in the treatment of replacement gestation.

According to Venosa, the woman who had her egg fertilized should be considered as the baby's mother since transaction is not allowed on family aspects (VENOSA, 2007, p. 224). On the

other hand, Gama supports that the will should prevail to the best interest of the child (GAMA, 2003, pp. 862-863).

According to FCM Resolution n. 2,013/2013, there must be a guarantee of the civil registry of the child that will be born by the genetic parents, and documentation must be provided before the end of the pregnancy (CORREGEDORIA NACIONAL DE JUSTIÇA, 2016).

In the absence of specific norms on this matter, the Federal Council of Medicine edited the first resolution on medically assisted human reproduction, Resolution FCM 1,957 of 2010 - a guide on the conduct of physicians to be adopted when facing problems related to the practice of assisted reproduction, normalizing the ethical conduct to be obeyed in the exercise of assisted reproduction techniques. FCM Resolution 1,957/10 was satisfactory and effective, establishing the control of assisted fertilization processes.

Resolution 2013 of the Federal Council of Medicine establishes guidelines on the subject in its item VII, determining the use of human assisted reproduction techniques in cases in which the genetic donor is sterile or in case of contraindication or, in case of homoaffective union. It also determines that gestation occurs through temporary donation of the uterus, that is, there should be no remuneration. In this sense, the temporary donor of the uterus must belong to the family of the partners in blood relationship up to the fourth degree, that means that it must be someone from the mother (first degree), sister or grandmother (second degree), aunt (third degree); or cousin (fourth degree). In any case, the maximum age of fifty years to gestate the child must be observed (CONSELHO FEDERAL DE MEDICINA, 2013).

Reproduction clinics should keep in the patient's medical record a medical report on the psychological profile of the temporary donor of the uterus, attesting to the emotional and clinical appropriateness of this person. The Informed Consent Form, signed by the patients (genetic parents) and the temporary donor of the uterus, must also be included, stating the motivation of the procedure, such as sterility, contraindication or even shared gestation between homoffective hypotheses in which there is no infertility (CONSELHO NACIONAL DE JUSTIÇA, 2002).

The contract signed between the genetic parents and the temporary donor of the uterus should be presented. This requirement accurately identifies the child's affiliation derived from the medically assisted human reproduction procedure that is born from the womb of a woman who cannot be seen as the mother because by of the demonstrated contract. In addition, if the temporary donor of the womb is married or is living in a stable union, she must attach the declaration of approval of the spouse or partner, in order to ensure the registration of the child by the genetic parents. In addition, the aforementioned

Resolution prohibits termination of pregnancy when the initiation of the gestational process has already begun, except in cases authorized by law or by court (FEDERAL JUSTICE COUNCIL, 2002).

Therefore, based on the legislative gap and taking into account that the Federal Council of Medicine rules are deontological, with effectiveness only in relation to doctors, it is essential to develop studies that allow a greater understanding of the role of law in the search to give solution to possible conflicts through the communion of ethical and legal principles (BARUFFI; MORAIS, 2015).

The 1st Civil Law Conference, of 2002, discussed affiliation when there is scientific intervention in the maternity. Among other things, paragraph 129 of the aforementioned Journey, established that, in cases of assisted reproduction techniques, maternity will be established in favor of the one who provided the genetic material (CONSELHO FEDERAL DE JUSTIÇA, 2002).

So, it is understood that the *mater semper certa est* principle has been doubted because, in the case of substitution maternity, the woman who generates and gives birth to the child cannot be presumed to be a mother. This is due to the fact that the donor of the uterus only "contributed so that the being generated could be viable to be born, without the contribution of its germ cells, and that it became pregnant only to help in the conception of the child of another, altruistically." (CANEZIN, 2007, p. 203).

Temporary cession of the uterus is part of assisted reproduction techniques, and thus, according to the mentioned before, the mother who donated the genetic material, rather than the one who lent the uterus and gestated the child, is considered a mother. So, proving the relationship or marriage, is enough to proceed to registration, because this is not considered to be an adoption.

In the next topic, the research identifies ways in which countries have promoted international consensus.

4 STABILIZATION ATTEMPTS THROUGH THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

The Hague Conference on Private International Law (HCPIL) is a world-wide intergovernmental organization, which began its activities in 1893 and became permanent in 1951 when its Statute was adopted. Seventy-four countries are part of it, and a regional integration organization, the European Union, as a member. It is devoted to the progressive harmonization and unification of private international law by means of regulatory powers in various areas, especially in

the area of family law, so that its main objective is the elaboration of international instruments for the protection of children, as a global vocation to deal with subjects of the international life of the person (ARAÚJO and POLIDO, 2014).

Among the various conventions adopted at The Hague Conference there are the Convention on the Civil Aspects of Child Abduction of 1980; the 1993 International Adoption Convention; and the Convention on the Protection of Children, 1996. Araújo, Vargas and Martel (2014) state that HCPIL is held annually at the beginning of April, when its agenda items and terms of office are decided by its Members. From this, the American Association of Private International Law (AAPIL), an organization composed by teachers and professionals of the area, has prioritized the prior discussion of the subject matter of HCPIL contributing to the multilateral negotiations in that scope.

The issue of substitute motherhood emerged during the AAPIL in 2011 and was mentioned during the HCPIL meeting in 2012, which highlighted the importance of the issue to protect children and vulnerable women in the substitution maternity. Following the elaboration of a questionnaire to the participating HCPIL countries, the report entitled Preliminary Document no. 03B, 2014, which can be accessed on the conference website as General Affairs (ARAUJO, VARGAS and MARTEL, 2015).

The instrument made it possible to note the great problem of the determination of membership at the international level, given that the internal solution of the countries is internationally objected in the case of transitional maternity, requiring specific regulation. The document also pointed to the need for legal certainty in proving the legal status of children by determining their kinship in case of transboundary substitution maternity, as well as the protection of the child's, parents' and other people's involved in the contract in accordance with the diplomas. In these directions, the risks inherent in substitution maternity may be irremediable. Note the demonstrations of Annex II of The Hague Conference of 2015 as the abandonment of newborns, as in the case "baby Gammy" in which the boy was abandoned by the would-be Australian parents because he had Down Syndrome; and also there's a belief children are still being trafficked because a wealthy Japanese businessman has contracted sixteen times and thus has sixteen children from substitute maternity in Thailand (CONFERÊNCIA DE HAIA…, 2015).

Other issues identified in Annex II of the HCPIL concern to the right of the child to know its origins and about the conditions under which surrogate consent was processed. It occurs that the documents are written in English and celebrated by women

who do not know the language, generating a vicious contract regarding the manifestation of will (CONFERÊNCIA DE HAIA…, 2015).

In this sense, there is urgency in the harmonization of substitution maternity rules and the determination of kinship. What has been agreed so far, among the States, as an initial step, concerns to the creation of soft law rules and principles.

From this point of view, it is possible to identify judgments about kinship recognition, demonstrating the influence of the work of The Hague, which can be found in Annex I of The Hague Conference, as follows.

In Germany, in a recent trial, the Federal Supreme Court in reversed the lower court's decision recognizing the German nationality for a child born to a surrogate motherhood in the state of California in the United States of America. The court invoked the best interest of the child and that it could not be penalized by the actions of the parents. In that sense, the Court rejected the case of adoption determined by the lower court, since adoption would entail the risk that parents would change their mind and not adopt the child after birth. It is pointed out that it would be possible for the parents by pretense to have no responsibility to the child (CONFERÊNCIA DE HAIA…, 2015)

The second case is Swiss. It concerns to the registration of a child born to substitute maternity because of the homoaffective relationship maintained by two men. The Court ruled that a contrary decision could have negative consequences for the child who could not invoke liability or any rights related to the maintenance of survival or inheritance related to the second parent by claim (CONFERÊNCIA DE HAIA…, 2015).

The third case is Spanish. The General Directorate of Registries and Notaries issued a circular stating that the records should now revert to their own 2010 instruction for a more "liberal" approach to recognition of parenthood of a surrogate child. Besides, on December 11th, 2014, the Spanish Minister of Justice declared that an amendment to the law on civil registries currently under consideration by the Parliament would be proposed to ensure that parental recognition by claim is consistent with recent judgments of the European Court of Human Rights (ECHR) (CONFERÊNCIA DE HAIA…, 2015).

The fourth case is French. In a controversial decision from December 12th, 2014, the State Council confirmed the validity of the circular issued on January 25th, 2013 by the Minister of Justice on the issuance of citizenship certificates for children born abroad due to maternity of substitution. The *Conseil d'Etat* considered that

even if the French law considered the replacement maternity contract to be invalid, it could not deprive the child of French nationality. Referring to the ECHR decisions, he said that a counter-approach would be a "disproportionate interference" in children's rights and respect for privacy (CONFERÊNCIA DE HAIA…, 2015).

In Ireland, in an internal substitution maternity case, the mother for pretense did not have a kinship relationship with the child from a substitute motherhood, and the mother who gave birth to her was recognized as the mother. The first-degree decision was amended so that the Supreme Court decided that there was no related law and that the Irish Parliament had to fill in the "legal void". The decision was based on ECHR decisions, in the sense that it did not distinguish the interests of the intended parents and the rights of the children (CONFERÊNCIA DE HAIA…, 2015).

In addition, because of the Hague's works, India and Thailand have pledged, in the long term, to pass a legislation to solve some of the problems, demonstrating the scope of the results of The Hague Conference on Private International Law. These decisions demonstrate the State's efforts to recognize the best interests of the child and to respect the human rights.

5 FINAL CONSIDERATIONS

In the 21st century, science offers many benefits to humanity such as the possibility of having children with the donation of third-party genetic material and, through gestation by others, the object of study in this research. Considering the state of art with regard to medically assisted human reproduction, especially to substitute motherhood, it is possible to mention that, in addition to the trafficking and sale of children, the extreme vulnerability of women who agree to beget the children of others is another great concern.

Rules of law can create contingency when the cases have transnational repercussions as when German parents seek to hire replacement maternity in India. In this sense, according to Indian law, the child will acquire the birthright of his German parents' nationality, while according to German law the child acquires Indian nationality. The result of the conflict is a stateless child, that means, without nationality.

Anationality is a condition that cannot be tolerated by states in times of globalization and mobility. It consists in the absence of nationality and in violation to human dignity, because the child ends up being penalized for something that did not choose or because his parents were not

fully aware. It should be noted that, in this respect, domestic law suffers from limitations to solve the problems of transnational substitution maternity, and so the need for multilateral cooperation is stressed so that the rights of children are guaranteed in unison.

In the context of technological advances arising out of the medicalization of human reproduction, it is necessary to consider the personal options of individuals, based on the possibilities that science allows, considering that maternity from the gestation of substitution is a reality that cannot be ignored. However, within this reality, it is necessary to define the limits of individuals' private autonomy.

Argentina has demonstrated its efforts in its new Civil and Commercial Code, which came into force in August 2015, in which it predicted the establishment of a double bond of affiliation: the one considered the pregnant woman necessarily the mother of the child; besides the bond of affiliation that concerns the man or woman who hired replacement maternity.

In the case of Brazil, it can be verified that there is no standardization, only the resolutions of the Federal Medical Council about the issue. Thus, because of a legislative gap, any attempt should contemplate the gratuity and/or onerousness of the contract; the establishment of maternity under the contract, which implies the registration of the child's membership regardless of the name of the woman included in the declaration of live birth, and also the implications arising out of the acquisition of nationality.

Another aspect that should be considered by the Brazilian legislature is to clearly determine the limitations imposed on pregnant women in relation to their relationship with the child and the parents. In addition, it is necessary to supervise the clinics involved with this kind of technique in relation to the medical aspects, but also to observe the norms that regulate the bioethical medical practice. It is also important to emphasize the urgency of regulation that is attentive to reproductive tourism.

At the international level, The Hague Conference has given rise to debate and approximation in the understanding of States, as demonstrated by the judgments listed in Annex II of The Hague Conference: countries such as Germany, Spain, Switzerland, France and Ireland have recognized the parents' the nationality of their countries. However, from what has been done so far, it has become clear that there is a need to move forward with a multilateral instrument bringing legal certainty to children as regards their kinship ties when they are forced to move outside their country of origin. source. Uniform rules of private international law on the determination of legal kinship are necessary both in the context of a traditional conception and that obtained through the gestation of substitution.

Last, it should be mentioned that the studies undertaken by The Hague Conference have made important contributions to the theme, since in countries of *ius sanguinis* tradition there have already been cases of recognition of the affiliation to the parents by pretension. Such circumstances also serve the Brazilian case, in the sense of legislating on medically assisted human reproduction, and especially on substitution maternity.

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