SURROGACY AND POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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ABSTRACT

The purpose of this paper is to examine surrogacy in the light of human rights law. In particular, it explores the protection of the practice of surrogacy within the European Convention on Human Rights, as a feature of individuals' reproductive rights. After defining the concept of surrogacy and examining the current situation in Europe, the main part of the paper concentrates on the positive obligations of Contracting States. More concretely, it examines the possibility of surrogacy constituting a positive obligation by analysing the case law of the European Court of Human Rights.

Keywords: surrogacy, reproductive rights, European Convention on Human Rights, positive obligations, European Court of Human Rights.

RESUMEN

El objetivo del presente estudio es analizar la maternidad subrogada a la luz de los derechos humanos. En concreto, examina la protección de la práctica de "alquiler de vientres" en el marco del sistema del Convenio Europeo de Derechos Humanos como parte de los derechos reproductivos de los individuos. Después de definir el concepto de la maternidad subrogada y presentar la situación actual en Europa, el desarrollo del estudio se concentra en las obligaciones positivas de los Miembros contratantes. En particular, se investiga la posibilidad de que la gestación por sustitución constituya una obligación positiva para los estados, con base en el análisis de la jurisprudencia del Tribunal Europeo de Derechos Humanos.

Palabras clave: maternidad subrogada, derechos reproductivos, Convenio Europeo de Derechos Humanos, obligaciones positivas, Tribunal Europeo de Derechos Humanos.

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INTRODUCTION

Prompted by the famous *Baby M* case in the USA, the issue of surrogacy has aroused a great deal of attention over the past several years and it is still highly controversial. It came to alter the Roman principle *mater semper certa est*, according to which the mother of the child is always certain, and pose ethical dilemmas. In *Baby M*[1], the surrogate mother, after giving birth, refused to surrender the child to the intended parents, who got a court order so as to enforce the surrogate agreement and take the custody of the child. This generated a great debate among philosophers, legal practitioners and scholars about the legitimacy of such methods and the enforceability of such contracts.

Nowadays, there is a new phenomenon regarding surrogacy that made the dilemma present at an international level; cross-border surrogacy. Many states prohibit any form of surrogacy, but, despite this, couples frequently travel to surrogacy-friendly countries to become parents (so-called procreative tourism), which can create problems in terms of legal recognition of parenthood in their home country. According to a statistical survey conducted by scholars, 'the majority of intended parents (60 per cent) came from Europe, in particular Germany (26 per cent), Italy (16 per cent), France and Spain (6 per cent each)'.[2] These are all countries prohibiting surrogacy and they are all part of the European Convention on Human Rights (hereinafter ECHR or the Convention), which makes interesting how the European Court of Human Rights (from now on ECtHR, the Court or Strasbourg Court) would resolve problems related to surrogacy.

The Strasbourg Court has so far delivered three judgments regarding cross-border surrogacy, one of them recently released by the Grand Chamber.[3] In its judgments, the ECtHR has not addressed important issues related to surrogacy, but, instead, it focused only on the best interests of the child. However, there are many aspects worth investigating, including: surrogacy as a reproductive right, the balance between public policy arguments and the right to procreate, human dignity and its violation when a child is treated as a commodity and the danger of exploitation of the gestational mother. These are all questions that the Court has failed to address, either because the specific case brought before it did not require it or due to its general line of avoiding being profound regarding issues of delicate nature, such as moral and ethical dilemmas. Nevertheless, it is important to assess whether and how surrogacy should be treated within the framework of the ECHR and to study whether pre-emptive protection is possible to avoid the problems emerging from cross-border surrogacy at European level (and within the framework of the ECHR). In particular, it is crucial to identify whether surrogacy could be protected by the Convention as a positive obligation undertaken by the Contracting States. This is the purpose of the present paper:

[1] *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988), New Jersey Supreme Court.

[2]BEAUMONT, P., TRIMMINGS, K., *International Surrogacy Agreements*, Hart Publishing, Oxford, 2013, p.468

[3] Case of *Mennesson v. France,* application no. 65192/11, 26 June 2014, *Labassee v. France,* application no. 65941/11, 26 June 2014, *Paradiso and Campanelli v. Italy,* application no. 25358/12, 24 January 2017.

assess whether a Contracting State forbidding surrogacy has a positive obligation to provide it to its citizens.

At this point it is necessary to note that it is only the position of the intended parents that will be considered, as they are the subjects of the right to procreate and it is their interests this paper is going to analyse. As mentioned before, there are various aspects worth investigating regarding the issue of surrogacy, as many conflicting rights and freedoms arise from its practice, especially when taking into account the position of the surrogate mother and the child born through surrogacy. However, given the specific needs and nature of this paper, it will concentrate on the reproductive right of the intended parents and its possible protection as a positive obligation by the article 8 of the Convention.

I. SURROGACY AGREEMENTS

1. The concept of surrogacy

Surrogacy is one method of the assisted reproductive technology (hereinafter ART), according to which a woman carries in her womb a child for a couple otherwise unable to conceive naturally. As defined legally,

> 'Surrogate Motherhood: A relationship in which one woman bears and gives birth to a child for a person or a couple who then adopts or takes legal custody of the child; also called mothering by proxy. In surrogate motherhood, one woman acts as a surrogate, or replacement, mother for another woman, sometimes called the intended mother, who either cannot produce fertile eggs or cannot carry a pregnancy through to birth, or term'.[4]

In other words, a couple not able to reproduce turns to surrogacy in order to have children. The participants in the process are usually three people: the prospective, commissioning or intended parents (intended father, intended mother) and the surrogate mother who carries the child. Nonetheless, surrogacy is not intended only for heterosexual couples, but it, as well, introduces an important way of reproduction for homosexual couples or people wishing to become single parents. In such cases or in case the parents are not able to offer their cells, there are two additional people: a sperm donor and/or an egg donor. There are two key distinctions of surrogacy: traditional or gestational surrogacy, commercial or altruistic surrogacy.

In traditional surrogacy, also called genetic, straight or partial surrogacy, the surrogate mother falls pregnant naturally by the intended father or undergoes an artificial insemination with the sperm of the intended father or of a donor. The intended mother has a problem both

[4] 'Surrogate Motherhood', http://legal-dictionary.thefreedictionary.com/Surrogate+Motherhood (last visit: 27 April 2016).

with the genetic material and the gestation, while it is the surrogate mother offering the genetic material and undergoing the gestation. It is clear that in this case the surrogate mother is related genetically to the child, fact that makes it a very problematic practice. As Eleonora Lamm observes, the type of traditional surrogacy based on natural conception can be found in the Bible, when Sarah asked Abraham to sleep with their servant, Hagar, so that they become parents.[5] This type of surrogacy was the common one before the revolution of the reproductive technology. Then a new way of surrogacy became available; the artificial insemination. Artificial insemination means the *in vivo* fertilisation of a woman's uterus without a sexual intercourse, medically defined as the 'introduction of semen into part of the female reproductive tract (as the cervical opening, uterus, or fallopian tube) by other than natural means'.[6] The first case deciding over the validity of surrogacy agreements in the United States, the *Baby M* case[7], was a traditional surrogacy of artificial insemination. Nowadays, traditional surrogacy is not used commonly, because of the genetic relationship between the child and the surrogate mother.

On the other hand, gestational surrogacy is operated through *in vitro* fertilisation, where the egg and the sperm could be provided by the intended parents or by other donors (egg or sperm or both) and the surrogate mother is the carrier of the child. *In vitro* fertilisation, meaning fertilisation in glass, is the method where the embryo is created in a laboratory and then it is implanted in the womb of the surrogate mother.

> 'Gestational surrogacy differs medically from traditional surrogacy in that it involves harvesting ova from either the intended mother or a third party and then fertilizing them outside the womb. After fertilization, the fetus, or often fetuses, is implanted in the surrogate's uterus for her to carry to term and give birth, presumably for the intended parents to raise as their own'.[8]

Given the above, it is possible for both the intended father and mother to be biological parents via IVF, when it is their egg and sperm that are turned into an embryo in the laboratory. There are other possible combinations available, as mentioned before, based on the infertility problem of the couple: gestational surrogacy and egg donation (use of the sperm of the intended father and the egg of another woman, not the intended mother nor the surrogate mother), gestational surrogacy and donor sperm (use of the sperm of a donor and the egg of the intended mother), gestational surrogacy and donor embryo (use of the sperm of a donor and the egg of another woman, not the intended mother nor the surrogate mother). However, in gestational surrogacy, the child cannot be related genetically to the surrogate mother. Since there is no biological relationship between the child and the surrogate mother,

[5]LAMM, E., *Gestation by Substitution (Gestación Por Sustitución. Ni Maternidad Subrogada Ni Alquiler de Vientres)*, Universitat de Barcelona, Barcelona, 2013, p.19 (this author's translation).

[6] 'Artificial Insemination', http://www.merriam-webster.com/medical/artificial%20insemination (last visit: 27 April 2016).

[7] *In re Baby M*, *op.cit.*1.

[8]HOLLAND, M., «Forbidding Gestational Surrogacy: Impeding the Fundamental Right to Procreate», *UC Davis Journal of Juvenile Law and Policy*, 17:2 (2013). p.6.

legal systems are more eager to establish the kinship of the child with the intended parents and, consequently, gestational surrogacy is the most common practice of surrogacy these days.

Then again, depending on the potential profit in terms of monetary exchange, surrogacy is either altruistic or commercial: altruistic is the surrogate agreement between a couple and the surrogate mother that does not imply a monetary transaction aiming to profit, while commercial surrogacy is the surrogate contract based on a specific price leading to an economic profit for the surrogate mother. It is the commercial surrogacy that is the most problematic, given the issues emerging related to the commodification of the child and the exploitation of the surrogate mother.

2. Systems of surrogacy in Europe

The Member States of the Council of Europe have adopted different approaches towards surrogate agreements. There are states that have approached surrogacy in a liberal way, some allowing it under certain conditions, others not addressing it at all and even prohibiting it completely.

A liberal approach is observed in countries allowing the most debated form of surrogate agreements; commercial surrogacy. Among others, Russia, Ukraine and Georgia are some of the few countries worldwide that allow commercial surrogacy. In those states surrogacy is viewed as an economic exchange, as a type of job. The absence of regulation over the admission of only altruistic surrogacy and the amount of the agreed price has made these countries surrogate friendly and has attracted the so-called procreative tourism. In these cases, traditional surrogacy is prohibited and the only way for the commercial agreement is through gestational surrogacy. The baby born may be registered immediately as the child of the intended parents with the birth certificate not mentioning anything about the mother. Then, the legal framework each state has established varies. For instance, Russia gives the surrogate mother the right to keep the child[9], while in Ukraine exists, supposedly, a right for the mother to ask for the registration of the child in her name, although the intended parents are fully protected by the Family Code where it is stated expressly that they are the parents of the child and this overrides any other administrative act.[10]

Then, the majority of states allowing and regulating surrogacy do so in its altruistic form. Nevertheless, there is an important distinction made between states regulating altruistic surrogacy in terms of the enforceability of the contract. They could be divided into two categories: the agreement is not binding and the agreement is strictly binding by judicial authorisation. In the first category, there is the example of the United Kingdom. In the United Kingdom surrogacy is legal, although the agreement is not binding. This means that the contract is not enforceable and the surrogate mother is not forced to give up the child after the

[9] BEAUMONT, TRIMMINGS, *op.cit.* 2, p.319.
[10] Ibid. p.358.

birth.[11] In addition, under the UK legal framework the surrogate mother is allowed to reasonable expenses, without, however, establishing the criteria for what constitutes a reasonable expense. In the second category, there is the example of Greece. With an innovative – compared to the rest of its legislation – regulation, Greece gives the option to couples not able to conceive children to undergo gestational surrogacy. The peculiarity of this type of surrogacy is that it needs a judicial authorisation before the beginning of the process. The consequence is that the intended parents are considered parents of the child after the birth and the surrogate mother does not establish any legal relationship with the child. A vital factor of this gestational surrogacy is the absence of an economic exchange, although some expenses regarding the pregnancy and the absence of work for the surrogate mother are allowed and are not considered a monetary exchange.[12]

Many states do not regulate surrogacy at all, which can lead to two results; its prohibition or its practice. In Hungary, the Act on Health Care, listing a number of reproductive methods, does not include surrogacy and therefore it is considered illegal and it is prohibited. On the contrary, in Ireland and Czech Republic the absence of regulation has resulted in its practice and tolerance of only altruistic surrogacy.

Lastly, many states prohibit it explicitly in each possible form and consider the agreement null and void (e.g., Spain, France, Germany[13]), while they even criminalise the surrogacy treatments (France, Germany[14]). It is to these states that the present paper is addressed. In states prohibiting surrogacy, could it be claimed that surrogacy, as a reproductive right, constitutes a positive obligation undertaken by the states based on the ECHR?

3. Surrogacy and the right to procreate

The existence of the right to procreate, but, also, the right not to procreate (abortion), although still controversial, is more or less accepted at an international level[15]. Regarding the issue of surrogacy, the right to procreate does not refer only to natural means of becoming a parent, but, additionally, to an access to reproductive technology methods.

[11] Ibid. p.376.

[12] KOUNOUGERI-MANOLEDAKI, E., *Family Law (Οικογενειακό Δίκαιο)*, 4th edn., Sakkoulas Publications, Athens-Thessaloniki, 2008, Vol. II, p.50 (this author's translation).

[13] Spain: article 10 of the Spanish Law on Assisted Reproduction Techniques, France: articles 16-17 of the Civil Code, Germany: section 134 BGB in conjunction with criminal sanctions. Beaumont and Trimmings. *op.cit.* 2

[14] Ibid. France: articles 227-12, 227-13, 511-24 of the Penal Code, Germany: Embryo Protection Act (section 1, §1, no 2, 6, 7 and §2).

[15] There are still many states that make the access to abortion conditional on factors as rape, danger of life of the mother etc., but still the great majority of the states allow it. The ECtHR has held that '(w)hile the Court has held that Article 8 cannot be interpreted as conferring a right to abortion, it has found that the prohibition of abortion when sought for reasons of health and/or well-being falls within the scope of the right to respect for one's private life and accordingly of Article 8'(Case of *P. and S. v. Poland*, application no. 57375/08, §96, 30 October 2012, ECtHR).

> 'A right to procreate may also be grounded in the strong interest people have in creating a child, giving birth, and parenting (Robertson 1994). Because this justification does not concern a right to use one's body, but to realize the important interest in creating and rearing a child, it implies a positive (as well as negative) right to procreate, most often understood as entailing a right to access ART (Robertson 1994, 2004–05)'.[16]

Consequently, surrogacy, as an ART method, is perceived as a right to procreate, which, among others, falls within the category of reproductive rights[17]. Reproductive rights have been mentioned for the first time at the Proclamation of Teheran in 1968 where '(p)arents have a basic human right to determine freely and responsibly the number and the spacing of their children'.[18] But, it was in 1994 at the International Conference on Population and Development (ICPD) in Cairo that they were first declared and conceptualised. The Cairo Programme of Action, as it is commonly referred to, defined reproductive rights as following:

> 'Reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents'.[19]

The following year, in the Fourth World Conference on Women: Action for Equality, Development and Peace in Beijing, it was stated that '(t)he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence'.[20]

As is clear from the nature of these documents, they are not binding for the states and they could rather be considered as soft law instruments. Although there are legal systems protecting them[21], reproductive rights as such are not safeguarded by a binding international

[16]BRAKE, E., MILLUM, J., «Parenthood and Procreation», *The Stanford Encyclopedia of Philosophy*, Spring (2016) <http://plato.stanford.edu/entries/parenthood/>.

[17] Other reproductive rights are, for example, the right to an abortion, the right to use contraception, the right not to be forced to sterilization or abortion etc.

[18] Proclamation of Teheran, Final Act of the International Conference on Human Rights, Teheran, 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), article 16.

[19] Programme of Action adopted at the International Conference on Population and Development, Cairo, 5–13 September 1994, U.N. Doc. A/CONF. 171/13, §7.3.

[20] Fourth World Conference on Women, Action for Equality, Development and Peace, 4-15 September 1995 - Beijing, China, A/CONF.177/20/Rev.1, Annex II, Platform for Action, §96.

[21] For instance, the U.S. Supreme Court, since *Skinner v. Oklahoma* (1942), has granted a constitutional protection to the right to procreate.

or regional treaty, as is the ECHR. Be that as it may, it is certain that soft law has been used as a tool to solve many disputes presented before international courts. The ECtHR is not an exception, as it has considered the very same Cairo Programme and the Beijing Platform for Action to decide on its case-law[22]. Nevertheless, it is not essential to resort to soft law instruments, as the Strasbourg Court has recognised the existence of the right to become or not to become a parent in its own case-law, as an aspect of private and family life. As observed in *Evans v. UK*,

> 'The Grand Chamber agrees with the Chamber that "private life", which is a broad term encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see Pretty, cited above, § 61), incorporates the right to respect for both the decisions to become and not to become a parent'.[23]

In addition and more explicitly, the Court, in following cases, held that 'Article 8 is applicable to the applicants' complaints in that the refusal of artificial insemination facilities concerned their private and family lives, which notions incorporate the right to respect for their decision to become genetic parents'[24] and that 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose is also protected by Article 8, as such a choice is an expression of private and family life'.[25] This case-law is important and it points the way to consider the protection of surrogacy by the ECHR. In addition to this jurisprudence, in the factsheet emitted by the press unit of the Strasbourg Court[26], surrogacy and its case-law appear among other reproductive rights.

It is essential to highlight that the Inter-American Court of Human Rights has, also, recognised the protection of reproductive rights. In *Artavia Murillo et al. v. Costa Rica*, the Inter-American counterpart of the ECtHR held that

> 'the right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right… Thus, the protection of private life includes respect for the decisions both to become a mother or a father, and a couple's decision to become genetic parents (§146) Finally, the right to private life and reproductive freedom is related to the right to have access to the medical technology necessary to exercise that right... The right to have access to scientific progress in order to exercise reproductive

[22] Case of *A, B and C v. Ireland*, application no. 25579/05, 16 December 2010, ECtHR, where both were used as part of the ¨Relevant European and international material¨.
[23] Case of *Evans v. UK*, application no. 6339/05, §71,10 April 2007, ECtHR (this author's underline).
[24] Case of *Dickson v. UK*, application no. 44362/04, §66, 4 December 2007, ECtHR.
[25] Case of *S.H. and others v. Austria*, application no. 57813/00, §82, 3 November 2011, ECtHR.
[26] Factsheet of December 2015, http://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf . As adverted, the factsheet is not exhaustive and does not bind the Court.

autonomy and the possibility to found a family gives rise to the right to have access to the best health care services in assisted reproduction techniques...(§150)'.[27]

Given all the above and to conclude this first section, it is important to make the following remarks: surrogacy is a reproductive right and as such embraces 'certain human rights that are already recognized in national laws, international human rights documents and other consensus documents'.[28] So, based on this definition and although the ECHR does not expressly include reproductive rights, the case-law of the ECtHR has showed a way to consider their protection. After making these significant observations, it is now time to study the positive obligations doctrine and the possibility of surrogacy being one.

II. POSITIVE OBLIGATIONS UNDER THE ECHR

The European Convention on Human Rights, a regional convention on human rights inspired by the Universal Declaration of Human Rights, was drafted with the aim of reconstructing Europe after the Second World War, in order to prevent the atrocities committed during the same and to safeguard European countries from communism.[29] The rights and freedoms enshrined in the Convention do not only impose the respect and non-interference with the rights of the individuals by the Contracting States, but they, additionally, guarantee affirmative actions to be taken, so that individuals can truly exercise the rights and freedoms provided by the ECHR. Although there are few provisions on the body of the Convention that expressly create a positive obligation for the Contracting States, the ECtHR, through its case-law, has established that rights not providing explicitly for an affirmative action may create an obligation for one[30]. This is how the doctrine of positive obligations was created. The Court built the doctrine of positive obligations around the principle of effectiveness, which is, as well, the bedrock of the dynamic and evolutive interpretation of the ECHR. In continuance, a brief reference will be made to the principle of effectiveness in the interpretation of the ECHR to finally define the doctrine of positive obligations in general.

[27] Case of *Artavia Murillo et al. ("in vitrofertilization") v. Costa Rica*, (Preliminary objections, merits, reparations and costs), Judgment of November 28, 2012 Series C Nº 257.
[28] Cairo Programme, *op.cit.*19.
[29] HARRIS, D. J., O'BOYLE, M., WARBRICK, C., *Law of the European Convention on Human Rights*, 2nd edn, Oxford university Press, Oxford, 2009, p.1.
[30] MERRILLS, J. G., *The Development of International Law by the European Court of Human Rights*, Manchester University Press, Manchester [etc.], 1993, p.103.

1. *The principle of effectiveness in the interpretation of the ECHR*

The interpretation of the ECHR stands at the epicentre of a great debate dating back to the late 1970s, regarding the creation of new rights by the jurisprudence of the Strasbourg Court. The States have not welcomed at all this 'judicial activism'; contrary, they have opposed it from the outset.[31] The debate mainly involves the evolutive interpretation and the positive obligations, which as a trend reveals a turn to the effective protection of the rights and freedoms enshrined in the Convention. As Ed Bates observes, 'the case law of the late 1970s left a formative imprint on the law of the ECHR for it expounded a strong, teleological approach to the interpretation of the substantive text'.[32] Even before, the ECtHR identified the necessity to interpret the Convention not in a strict sense of the text, but in a way to make its provisions effective. As stated in the *Wemhoff v. Germany* case,

> 'Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties'.[33]

Then, in the *Golder* case, the Court reached its judgment founded, again, on the object of the Treaty, by making reference to the Vienna Convention on the Law of Treaties[34] and 'having regard to the object and purpose of the Convention, a lawmaking treaty (…), and to general principles of law'.[35] The reference to the object and purpose of the Convention - which in turn is based on the article 31§1 of the Vienna Convention[36]- is significant, given that '(t)he basic point of departure for this approach (before described as a strong, teleological approach to the interpretation of the substantive text) is the notion that the 'object and purpose' of the Convention is to provide for the effective protection of the rights it covers'.[37] In conjunction with this idea, according to Commissioner Kellberg, this reference was the starting point to reach a judgment where it was considered that the ECHR is a living instrument.[38] The Commissioner refers to the *Tyrer v. UK* case, where the Court for the first time stated that 'the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions'.[39] Then followed the

[31] For example, the British government's warning of the danger of the interpretative process crossing the legislative line, as mentioned by BATES, infra note 32, p. 294.

[32] BATES, E., *The Evolution of the European Convention on Human Rights : From Its Inception to the Creation of a Permanent Court of Human Rights* (New York : Oxford University Press, 2010).p.321

[33] Case of *Wemhoff v. Germany*, application no. 2122/64, §8, 25 April 1968, ECtHR.

[34] The ECtHR, since the *Golder case*, uses the Vienna Convention on the Law of Treaties (concluded at Vienna on 23 May 1969) and, specifically, its articles 31 to 33 as a guide for the interpretation of the ECHR.

[35] Case of *Golder v. UK*, application no. 4451/70, §36, 21 February 1975, ECtHR.

[36] '*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*'.

[37] BATES, *op.cit.*32 (this author's parenthesis).

[38] Comments made by Commissioner Kellberg in the *Tyrer* case, as cited by BATES, *op.cit.*32, p. 329.

[39] Case of *Tyrer v. UK*, application no. 5856/72, §31, 25 April 1978, ECtHR.

judgment of *Marckx v. Belgium*, where the ECtHR imposed the doctrine of positive obligations.

> 'As the Court stated in the "Belgian Linguistic" case, the object of the Article is "essentially" that of protecting the individual against arbitrary interference by the public authorities (...). Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life'.[40]

It was after the *Marckx* case that the Court, finally, held in an explicit manner that it protects effective and not unreal rights. In *Airey v. Ireland*, it was declared that '(t)he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[41]

This short historical reflection of the case-law of the Strasbourg Court was made in order to understand better the function of the principle of effectiveness in interpreting the Convention, as captured by the jurisprudence of the Court. In general, the principle of effective interpretation or principle of effectiveness, deriving from the Latin maxim *ut res magis valeat quam pereat*,[42] reflects the general rule of interpretation defined as 'a means of giving the provisions of a treaty the fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning'.[43]So, through this brief background illustrated, it is observed that, when it comes to the interpretation of the Convention, the Court, through the use of the principle of effectiveness, treats the ECHR as a living instrument that should be given an evolutive and dynamic interpretation, it deduces positive obligations from rights not providing them explicitly and indicates the protection of practical and effective rights. Certainly, there are various international courts using the principle of effectiveness[44] and the articles of the VCLT.[45] Nonetheless, an emphasis should be given to the peculiar and unique character of the judgments of the ECtHR. As Letsas stresses out, in a similar way,

> 'Close as its methods are to the general rule of purposive interpretation under art 31 VCLT, the European Court has created its own labels for the interpretative techniques that it uses such as 'living-instrument', 'practical and effective rights', 'autonomous concepts' etc. What all these methods have in common is the rejection of the idea that the Convention rights must be interpreted in the light of what their meaning was taken to be back in the 1950s. The

[40] Case of *Marckx v. Belgium*, application no. 6833/74, §31, 13 June 1979, ECtHR (this author's underline).
[41] Case of *Airey v. Ireland*, application no. 6289/73, §24, 9 October 1979, ECtHR.
[42] 'That the thing may rather have effect than be destroyed'.
[43] MERRILLS, *op.cit.* 30, p. 98.
[44] 'The judgments and opinions of the International Court of Justice support the assertion that the principle of effectiveness has on the whole prevailed in the court's interpretation of the charter' according to Lauterpacht as cited at 'World Court and United Nations Charter: The Principle of Effectiveness in Interpretation', *Duke Law Journal*, 85-96 (1962). p.85.
[45] Kasikili/Sedudu Island, Botswana v Namibia, Judgment, Merits, [1999] ICJ, §§18-20, 13th December 1999, International Court of Justice [ICJ].

> European Court has repeatedly stressed that the Convention is a 'living instrument' which must be interpreted 'in the light of present-day conditions'. This is in line with art 31 para 1 VCLT which prioritizes the 'object and purpose' of treaties as a general rule of interpretation and assigns to preparatory works a supplementary role'.[46]

Needless to say, the application of the principle of effectiveness has been highly criticised not only by the States, as mentioned before, but also by scholars.[47] There are many sounding the alarm on the adverse effects this 'judicial activism' could provoke[48] and others who warn that a line should be drawn between judicial interpretation and judicial legislation.[49] Nevertheless, this is an extensive issue that does not contribute directly to the matter subject of this paper. For this reason, the author is refrained to say that there are limits to the principle of effectiveness, as it will be seen later when addressing the positive obligations.

To summarise this subsection, '(i)t was use of the object and purpose provisions of the Vienna Convention in the context of the European Convention which opened the door to this approach to interpretation of the Convention',[50] meaning it opened the door for the implementation of the principle of effectiveness. This principle is deep-rooted in the case of the ECtHR since the late 1970s and it is particularly important so as to understand the background of the positive obligations. Having explained the origins of the principle of effectiveness, it is now more convenient to follow the next step of this paper: analyse the doctrine of the positive obligations as formulated by the Court until now through its case-law.

2. The doctrine of positive obligations

'Positive obligations is a label used to describe the circumstances in which a Contracting Party is required to take action in order to secure to those within its jurisdiction the rights protected by the Convention'.[51] While it is true that '(m)ost of the rights under the Convention are negative rights, or rights to freedom from interference (and) a few rights impose obligations on the state to take positive action to protect people',[52] the case-law of the

[46] LETSAS, G., *A Theory of Interpretation of the European Convention on Human,* Oxford University Press, Oxford, 2007, p.59.

[47] For instance, Rigaux and Bossuyt, as mentioned by BATES (*op.cit.*32, p.340 footnote 122).

[48] Fears about the future of the Court expressed by Helgesen given the scepticism towards judicial review in national as well as international level. HELGESEN, J. E., «What Are the Limits to the Evolutive Interpretation of the European Convention on Human Rights?», *Human Rights Law Journal*, Vol.31.No.7 (2011).p.278.

[49] HARRIS, O'BOYLE, WARBRICK, *op.cit.* 29, p.7.

[50]WHITE, R. C. A., OVEY, C., JACOBS, F. G., *Jacobs, White and Ovey : The European Convention on Human Rights*, Oxford University Press, New York, 2010). p.73

[51] Ibid, p.100.

[52] FELDMAN, D., *Civil Liberties and Human Rights in England and Wales*, 2nd edn, Oxford University Press, Oxford, 2002, p.53

ECtHR has considered inherent positive obligations in rights with a primary negative aspect. As shown before, the doctrine of these implied positive obligations is the fruit of the implementation of the principle of effectiveness and, nowadays, the imposition of positive obligations to states is extremely common. However, this did not happen overnight. Since the very first cases seen in the previous subsection, the jurisprudence of the Court has been enriched by a number of cases where protection was offered to individuals via this doctrine. For instance,

> '(t)he Court has found that such obligations may arise under Article 2 (see, for example, McCann and Others v. the United Kingdom, § 161, and Osman v. the United Kingdom, §§ 115-117) and Article 3 (see Assenov and Others v. Bulgaria, §102), as well as under Article 8 (see, amongst others, Gaskin v. the United Kingdom, §§ 42-49) and Article 11 (see Plattform "Ärzte für das Leben" v. Austria, § 32)'.[53]

The positive obligations evolved through time and, at the moment, it is possible to identify several of its elements, albeit examined with caution, as the Court has never made a statement of what exactly this doctrine consists. In continuance, the most important aspects of the positive obligations will be highlighted, as established by the case-law of the ECtHR.

First, positive obligations are divided to substantive and procedural.

> 'Substantial obligations are therefore those which requires the basic measures needed for full enjoyment of the rights guaranteed, for example laying down proper rules governing intervention by the police, prohibiting ill-treatment or forced labour, equipping prisons, giving legal recognition to the status of transsexuals, incorporating the Convention rules into adoption procedures or more broadly into family law, etc. As for procedural obligations, they are those that call for the organisation of domestic procedures to ensure better protection of persons, those that ultimately require the provision of sufficient remedies for violations of rights. This provides the background against which the right of individuals (alleging violation of their rights) to an effective investigation and, in the wider context, the duty of the state to enact criminal legislation which is both dissuasive and effective, must be seen; and also, in the particular context of Article 8, the requirement that parents participate in proceedings which may affect their family life (adoption proceedings, placement of children, decisions about custody or visiting rights, etc.)'.[54]

[53] Research Report of the Council of Europe/European Court of Human Rights, *Positive Obligations on Member States under Article 10 to Protect Journalists and Prevent Impunity*, December 2011. p.4, http://www.echr.coe.int/Documents/Research_report_article_10_ENG.pdf .

[54] AKANDJI-KOMBE, J., *«Positive Obligations under the European Convention on Human Rights»*, Human Rights Handbooks, No. 7, 2007. p.16 http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-07(2007).pdf

An example of substantive positive obligation was the *Marckx v. Belgium* judgment of the Court. As mentioned before, this was the first judgment proclaiming that, apart from the obligation of non-interference and with the purpose of securing an effective protection for the respect for private and family life, there are positive obligations inherent in these rights.[55] In *Marckx v. Belgium*, the ECtHR dealt with the issue of an illegitimate child. In accordance with the Belgian laws, there was no legal bond between a mother and her illegitimate child and in order to strengthen its status there was a necessity for the parents to adopt it. This is attributed to the fact that there was an unequal legal status of inheritance for a recognised illegitimate child compared to other children. It is a case of substantive positive obligation, as there were no measures for Mrs Marckx to enjoy the rights guaranteed by the ECHR. On the other hand, *Airey v. Ireland* shows us the procedural positive obligations. In this judgment, where it was first held in an explicit way that the Convention protects effective and practical rights,[56] a woman could not get a judicial separation from her abusive husband due to the costs that such a procedure implicated, given the absence of a legal aid for her to contract a lawyer. This was a case of procedural positive obligation, as there was a measure, however not effectively accessible for people like Mrs Airey.

Then, positive obligations do not involve only state actions, but, also, the actions of private actors. Although the horizontal application of the Convention is not possible[57], according to the case-law of the ECtHR, states can be held liable when they fail to protect an individual from a violation of the rights and freedoms protected under the umbrella of the ECHR by another individual or private (non-state) entity. The first case where the *Drittwirkung*[58]doctrine was introduced into the jurisprudence of the Strasbourg Court was the *X & Y v. The Netherlands*[59], where a mentally handicapped woman could not bring criminal proceedings against her rapist.

> 'The Court recalls that although the object of Article 8 (art. 8) is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life (see the Airey judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves'… 'Thus, neither Article 248 ter nor Article 239 para. 2 of the Criminal Code provided Miss Y with practical and effective protection. It must therefore be concluded, taking account of the nature of the wrongdoing in question, that she was the victim of a violation of Article 8 (art. 8) of the Convention'.[60]

[55] *Marckx v. Belgium, op.cit* .40.

[56] *Airey v. Ireland, op.cit.* 41.

[57] It is not possible to bring a claim against an individual, but, according to articles 33 and 34 of the ECHR, a claim can be brought from an individual against a state or a state against another state (inter-state application).

[58] Translated as Third Party Effect, it was first developed in Germany.

[59] Case of *X and Y v. The Netherlands*, application no. 8978/80, 26 March 1985, ECtHR.

[60] Ibid, §§ 23,30.

According to this aspect of positive obligations, '(t)he state becomes responsible for violations committed between individuals because there has been a failure in the legal order, amounting sometimes to an absence of legal intervention pure and simple, sometimes to inadequate intervention, and sometimes to a lack of measures designed to change a legal situation contrary to the Convention'.[61] By amplifying the states' obligations, the Convention is given a horizontal effect, aiming at a more thorough protection for the European citizens. In order to check whether there is a responsibility of the state for private actions, Andrew Clapham has proposed the 'but for' test, according to which '(s)tates will be liable under the Convention where, 'but for' the absence of legislation prohibiting the behavior complained of, the violation of human rights would probably not have occurred'.[62] However, this 'but for' test, as Clapham himself admits, does not solve the ambiguity of the issue, but it helps understand better the way this liability of a state works.

Last but not least, how does the Strasbourg Court examine whether there is a positive obligation? An early judgment of the Court proposed the 'fair balance' test:

> 'In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention ... In striking this balance the aims mentioned in the second paragraph of Article 8 (art. 8-2) may be of a certain relevance, although this provision refers in terms only to "interferences" with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A no. 31, p. 15, para. 31)'.[63]

This fair balance test, as established in the *Rees* judgment, was highly criticised, as it makes the positive obligations subject to a general interest of the community, without any other reference as to what this general interest should consist of. Then, again, it involved the concept of the margin of appreciation.

> 'As the Court pointed out in its above-mentioned Abdulaziz, Cabales and Balkandali judgment the notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not - or does not yet - exist. It would therefore be true to say that

[61] AKANDJI-KOMBE, *op.cit*. 54, p.15.
[62] CLAPHAM, A., *Human Rights in the Private Sphere*, Clarendon Press, Oxford,1993, p.196.
[63] Case of *Rees v. UK*, application no. 9532/81, §37, 17 October 1986, ECtHR.

> there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation'.[64]

The margin of appreciation, a doctrine developed by the ECtHR's case-law for the interpretation of the Convention, 'is used to indicate the measure of discretion allowed the Member States in the manner in which they implement the Convention's standards, taking into account their own particular national circumstances and conditions'.[65] In the above mentioned paragraph of the judgment, the Strasbourg Court used the doctrine of margin of appreciation to justify why protection should not be granted to Mr. Rees, but did so without its counterweight, the principle of proportionality. As Dimitris Xenos comments, 'a balance test (*Rees* style) has been allowed to operate through the state's margin of appreciation in the absence of concrete, and more importantly, binding legitimate aims. Consequently, that test constitutes an arbitrary deviation from the express provisions of the Convention and the predictability of its codified norms'.[66]

In those early cases of positive obligations emerged the problem of the distinction between positive and negative obligations and the observance that it was not clear how to distinguish between them in concrete cases presented before the Court. As a consequence, there have been suggestions to consider the protection of positive obligations the way it happens with the interference at §2 of articles 8 to 11.

> 'In my view, it would therefore be preferable to construe the notion of "interference" so as to cover facts capable of breaching an obligation incumbent on the State under Article 8 para. 1 (art. 8-1), whether negative or positive. Whenever a so-called positive obligation arises the Court should examine, as in the event of a so-called negative obligation, whether there has been an interference with the right to respect for private and family life under paragraph 1 of Article 8 (art. 8-1), and whether such interference was "in accordance with the law", pursued legitimate aims and was "necessary in a democratic society" within the meaning of paragraph 2 (art. 8-2)'.[67]

In later judgments, the ECtHR has somehow followed this approach, but with some peculiarities. For instance,

> 'Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of

[64] Ibid.

[65] ARAI-TAKAHASHI, Y., *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp [etc.], 2002, p.2.

[66] XENOS, D., *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge, New York, 2012, p.61.

[67] Case of *Stjerna v. Finland*, application no. 18131/91, 25 November 1994, ECtHR, Concurring opinion of Judge Wildhaber.

> Article 8 or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph may be of a certain relevance (see Powell and Rayner, p. 18, § 41, and López Ostra pp. 54-55, § 51, both cited above)'.[68]

This approach seems to combat the problem generated by using the 'fair balance' test and the margin of appreciation at §1 of these articles without the guarantees of §2.[69] Nonetheless, the fact that the protection of positive obligations is independent of §2 and it lies at the heart of §1 should not be ignored. As the Court has pronounced in the very first case of positive obligations:

> 'As envisaged by Article 8 (art. 8), respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family. In this connection, the State has a choice of various means, but a law that fails to satisfy this requirement violates paragraph 1 of Article 8 (art. 8-1) without there being any call to examine it under paragraph 2 (art. 8-2)'.[70]

It should, also, be noticed that '(f)urthermore "fair balance" and "margin of appreciation" are part of the proportionality analysis – part of the determination as to whether an interference which is "prescribed by law" and for a "legitimate aim" is "necessary in a democratic society". In other words, while they are relevant at the "justification" phase it is difficult to see how they can be used to decide whether or not a positive obligation exists in the first place'.[71]

After these observations, it is now important to identify indicators facilitating the recognition of the existence of positive obligations, always in accordance with the case-law of the ECtHR. Hugh Tomlinson has identified three interrelated indicators:[72]

1. The interference by a non-state entity or the action required by the state should be encountered at the core of the right invoked.

[68] Case of *Hatton and others v. UK*, application no. 36022/97, §98, 8 July 2003, ECtHR.
[69] XENOS, *op.cit.* 66, p.64.
[70] *Marckx v. Belgium*, *op.cit.* 40.
[71] TOMLINSON, H., «*Positive Obligations under the European Convention on Human Rights*», 2012, p.10. <https://www.google.gr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj55IfNwrHNAhUHiRoKHeRLBoYQFggaMAA&url=http%3A%2F%2Fwww.adminlaw.org.uk%2Fdocs%2FSC%25202012%2520by%2520Tomlinson%2520QC.docx&usg=AFQjCNGIfphLexyU_SefygKtUvUMLff_-g&si>.
[72] Ibid. p.10-11.

2. The state should reasonably be expected to act in order to prevent or stop the alleged violation of the rights.
3. It is crucial to take into account the so-called European consensus[73] or consensus even at an international level.

These indicators are very helpful when examining positive obligations. Nonetheless, as Tomlinson observes, '(t)he Court rarely conducts an explicit analysis in terms of these factors, often subsuming considerations of this kind in a general reference to a "fair balance" between the general interest of the community and the interests of the individual'.[74]

In a similar sense, a Report of the Council of Europe has highlighted the below:

- 'Regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.
- The scope of the obligation will vary, having regard to the diversity of situations in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources.
- The obligation must not be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, among other authorities, Rees v. the United Kingdom, § 37, and Osman, cited above, § 116)'.[75]

Lastly, Dimitris Xenos, emphasising on the positive obligations of a state provoked by acts of individuals, has identified two conditions particularly important in the case of implied positive obligations[76]:

1. As happens when a state interferes with the rights of the Convention, the element of knowledge is of a great significance in the case of positive obligations. The reason why this is certain lies in the fact that the element of knowledge creates a kind of a state's involvement in those circumstances where an active protection, as part of a positive obligation, might arise. It is, then, important to examine whether there is such knowledge on the part of the state.
2. As positive obligations arise from §1 of articles 8 to 11, this paragraph should be applied directly, without invoking §2, and when the obligation refers to the core content of the right allegedly violated, then states cannot uphold the claim of a justifiable interference.

[73] *The concept of European consensus in the case law of the ECtHR may be defined as a general agreement among the majority of Member States of the Council of Europe about certain rules and principles identified through comparative research of national and international law and practice*. DZEHTSIAROU, K., «European Consensus and the Evolutive Interpretation of the European Convention on Human Rights», *German Law Journal*, 12 (2011).p.1733.

[74] TOMLINSON, *op.cit.* 71, p.11.

[75] Research Report of the Council of Europe/European Court of Human Rights, *op.cit.* 53.

[76] XENOS, *op.cit.* 66, p. 206-207.

From the above consideration, the below results can be inferred: notwithstanding its extensive use, the positive obligations doctrine is very vague and the Court has yet to provide a more precise guidance. Nevertheless, in accordance with the previous mentioned information, when considering whether surrogacy could constitute a positive obligation under article 8, special attention should be given to the fair balance between community interests and the interests of the individuals, by highlighting European consensus, the core of the rights invoked, the reasonable expectance for the state to act and the element of knowledge.

III. SURROGACY AND POSITIVE OBLIGATIONS

The ECHR applies when a certain matter brought before the Strasbourg Court falls within the scope of one or more rights guaranteed in its body (substantive norm). The Convention has a scope of application *ratione temporis, ratione loci, ratione personae* and *ratione materiae*. In particular, for the purpose of the current paper, what should be considered is the field of application of article 8, as the right to procreate has been traditionally invoked under the protection enshrined in article 8, constituting an important facet of one's identity and personal life. Nonetheless, as it considered in continuance, it could also be shielded by the aspect of family life.

Now, '(t)he determination of a complaint by an individual under Article 8 of the Convention necessarily involves a two-stage test'.[77] When applying the two-stage test, the first step taken is to consider whether the issue at hand concerns one or more of the personal interests protected (private life, family life, home and correspondence). Once assessed that a matter falls within the scope of application of article 8, then follows the second stage: examine if there has been an interference with this right and if so, whether the interference is in accordance with law, if it pursues a legitimate aim and if it is necessary in a democratic society.[78] According to this two-stage test, the positive obligation is examined in the first stage, right after the scope of application of article 8 and before the interference part. However, as already stated in the previous section, in practice the Court uses a peculiar system to consider positive obligations, a system that resembles the examination of interference by the State.

The question of this paper, as posed before, is the protection of surrogacy by the ECHR. Accordingly, the first part of the present section will consider the *ratione materiae* field of application of the article 8, so as to establish its material scope in relation to surrogacy. The second part will directly address the issue of surrogacy as a positive obligation, taking into account the elements presented in the end of the former section: the fair balance between community interests and the interests of the individuals, by highlighting

[77] KILKELLY, U., «*The Right to Respect for Private and Family Life; A Guide to the Implementation of Article 8 of the European Convention on Human Rights*», Human Rights Handbooks, No. 1, 2003. p.8 http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01(2003).pdf

[78] Ibid., p.9.

European consensus and the core of the right invoked, while the reasonable expectance for the state to act and the element of knowledge are considered to be of secondary importance, since the former refers to a significant expenditure on the part of the state to provide a service and the latter refers mainly to the positive obligation of a state to stop or prevent a violation caused by another individual.

1. Scope of application of article 8 of ECHR

The issue at hand should be questioned in terms of the material scope, as *ratione loci* and *ratione temporis* do not seem to pose a problem, given that an application would be presented by individuals, citizens of a state that prohibits surrogacy and is already a member of the Council of Europe. On the other hand, regarding the field of application *ratione personae,* it is important to notice this:

As mentioned in the previous section, when examining the horizontal effect of the Convention,[79] an application can be brought by an individual against a state (article 34) or by a state against another state (article 33). Speculating about the assumption of individuals desiring to become intended parents through surrogacy, it would certainly indicate the provision of article 34 and, based on this provision, an individual can bring a claim against a state for not providing the reproductive method of surrogacy by claiming to be victim of such violation. It has been witnessed that in cases where individual claims are directed against a prohibition imposed by a law, the Court has attributed them the status of a victim.[80] In support of this, 'the Court has consistently held that a violation is conceivable even in the absence of any detriment'.[81] In case an individual has suffered damage, he or she may ask for it to be repaired, but the damage *per se* does not constitute any conditions to file an individual lawsuit.[82]

Now, regarding the *ratione materiae,* in the case of surrogacy it is important to consider the notion of private and family life. The right for respect to private and family life does not refer exclusively to one of the two notions and there might be an interference with both.[83] For both scopes of application, the Court has repeatedly held that they are broad terms and there is no exhaustive definition neither of the concept of private life nor of family life and it should be examined case by case so as to determine whether a matter falls within their ambit.[84] It has been considered that 'cases falling under the notion of private life may be

[79] *op.cit.* 57.

[80] For example, individuals turning against the law that prohibited the IVF technique, Case of *S.H. and Others v. Austria, op.cit.* 25.

[81] Case of *Huvig v. France*, application no. 11105/84, §35, 24 April 1990, ECtHR.

[82]CASADEVALL, J., *The European Convention on Human Rights, the Strasbourg Court and Its Jurisprudence (El Convenio Europeo de Derechos Humanos, El Tribunal de Estrasburgo Y Su Jurisprudencia),* Tirant lo Blanch, Valencia, 2012, p.59 (this author's translation).

[83] Among others, Case of *Burghartz v. Switzerland,* application no. 16213/90, §24, 22 February 1994, ECtHR.

[84] Among others, Case of *Niemietz v. Germany*, application no. 13710/88, §29, 16 December 1992, ECtHR.

grouped into three categories: (i) a person's physical, psychological or moral integrity, (ii) his privacy and (iii) his identity'.[85] In the first occasion of the person's physical, psychological or moral integrity, the Court has accepted that it encompasses, among others, 'the right to respect for the choice to become or not to become a parent, in the genetic sense (*Evans v. the United Kingdom* [GC], § 71), including the right to choose the circumstances in which to become a parent (*Ternovszky v. Hungary*, § 22, concerning home birth)'.[86] Regarding the sphere of family life, it has been said that it is an autonomous notion and its application depends on the real existence of family ties, even in the absence of any legal recognition (de facto family ties).[87] Then,

> 'Like the notion of "private life", the notion of "family life" incorporates the right to respect for decisions to become genetic parents (Dickson v. the United Kingdom [GC], § 66). Accordingly, the right of a couple to make use of medically assisted procreation comes within the ambit of Article 8, as an expression of private and family life (S.H. and Others v. Austria, § 60). However, the provisions of Article 8 taken alone do not guarantee either the right to found a family or the right to adopt (E.B. v. France [GC])'.[88]

These considerations confirm that it may be the case that a right not expressly recognised as such in the Convention, may apply and offer an indirect protection by means of another provision of the same text.[89] The above affirms the protection –or at least the consideration- of reproductive rights, as already established in the first section of the present paper.[90] Consequently, reproductive rights, and surrogacy as one, fall within the material scope of article 8, as aspect of both private and family life.

2. *Surrogacy as a positive obligation*

Taking into account that surrogacy falls within the material scope of article 8, it is now time to consider the above-mentioned analysis that has helped in identifying the core of positive obligations' speculation. The important issues to be covered, when making a hypothesis as to whether a subject-matter falls within the notion of positive obligations, are the fair balance between community interests and the interests of the individuals, European consensus and the core of the rights invoked. These elements are to be considered in relation to surrogacy in the light of the question posed throughout the paper: could surrogacy stand as a positive obligation under the ECHR? It is important to notice that European consensus and

[85] Report of the Council of Europe/European Court of Human Rights, *Practical Guide on Admissibility Criteria*, 2014, p.66 <http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf>.
[86] Ibid, p.67
[87] Among others, Case of *Kroon and others v. The Netherlands*, application no. 18535/91, §30, 27 October 1994, ECtHR.
[88] Report of the Council of Europe/European Court of Human Rights, , *op.cit.* 85, p.71.
[89] CASADEVALL, *op.cit.* 82, p.56.
[90] p.12-13 of the present paper

the core of the rights invoked are part of the fair balance test followed by the Court and this is the reason why the two elements will be considered in conjunction with this balance test.

To begin, it is true that the Court is confronted with the question whether an application brought before it should be considered in terms of positive or negative obligation.[91] This confusion is reflected in the test followed by the ECtHR regarding the existence of positive obligations: the fair balance between community interests and the interests of the individuals. The Court has reiterated that it is trivial whether the case is examined in the context of the State's positive or negative obligations, given that in both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

By way of illustration, there is the case of *Evans v. UK*.

> 'In the domestic proceedings, the parties and the judges treated the issue as one involving an interference by the State with the applicant's right to respect for her private life, since the relevant provisions of the 1990 Act prevented the clinic from treating the applicant once J had withdrawn his consent. The Court, however, considers that it is more appropriate to analyse the case as one concerning positive obligations. The State has chosen to establish, in the 1990 Act, a detailed legal framework authorising and regulating IVF treatment, the principal aim of which is to facilitate conception by women or couples who would otherwise find it impossible or difficult to conceive by ordinary means. The question which arises under Article 8 is whether there exists a positive obligation on the State to ensure that a woman who has embarked on treatment for the specific purpose of giving birth to a genetically related child should be permitted to proceed to implantation of the embryo notwithstanding the withdrawal of consent by her former partner, the male gamete provider. The Court does not in any event find it to be of central importance whether the case is examined in the context of the State's positive or negative obligations. The boundaries between the two types of obligation under Article 8 do not always lend themselves to precise definition and the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a certain margin of appreciation (*X., Y. and Z. v. the United Kingdom,* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 41). The breadth of this margin will vary in accordance with the nature of the issues and the importance of the interests at stake (*Pretty*, § 70)'.[92]

On the other hand, *S.H. and others v. Austria*.

> 'The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance to be struck between the competing interests (see *Odièvre v. France* [GC], no. 42326/98, § 40, ECHR 2003-III, and *Evans*, cited above, § 75)…In the Grand Chamber's view, the legislation in question can be

[91] p.22 of the present paper

[92] Case of *Evans v. UK, , op.cit.* 23, §§58, 59, (this author's underline).

> seen as raising an issue as to whether there exists a positive obligation on the State to permit certain forms of artificial procreation using either sperm or ova from a third party. However, the matter can also be seen as an interference by the State with the applicants' rights to respect for their family life as a result of the prohibition under sections 3(1) and 3(2) of the Artificial Procreation Act of certain techniques of artificial procreation that had been developed by medical science but of which they could not avail themselves because of that prohibition. In the present case, the Court will approach the case as one involving an interference with the applicants' right to avail themselves of techniques of artificial procreation as a result of the operation of sections 3(1) and 3(2) of the Artificial Procreation Act since they were in fact prevented from doing so by the operation of the law that they unsuccessfully sought to challenge before the Austrian courts. In any case, as noted above, the applicable principles regarding justification under Article 8 § 2 are broadly similar for both analytical approaches adopted (see *Evans*, cited above, § 75, and *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290)'.[93]

Through these examples, it is shown that the Court could treat the prohibition of surrogacy as a positive obligation or as interference by the State[94], but in both cases, it would have to go through the fair balance test. In the case of surrogacy, this test would involve balancing the interests of the individuals to become parents and the interests of the society/state to 'protect' women from exploitation and children from becoming objects of transaction (*res extra commercium*[95]). In particular, a State could hold before the Court that the ban of surrogacy 'reflected ethical and moral principles according to which the human body could not become a commercial instrument and the child be reduced to the object of a contract'.[96] It could even be held that it creates unusual family relationships by splitting motherhood, against the principle of *mater semper certa est*. Conversely, the interest of the individuals, in this case the intended parents, would be based on their right to procreate, their interest to become parents and the impossibility to procreate in another way. In accordance with its jurisprudence, it is observed that in balancing the interests, the ECtHR uses some of its interpretation tools.

First, it has been established by the Court that the margin of appreciation[97] is to be involved whenever a balance has to be struck. This doctrine, dating back to 1958[98], is a tool of jurisprudential origin and it grants a certain room for manoeuvre to the Contracting States when applying the convention. The margin of appreciation permits a restriction on convention rights and freedoms, for in some cases the national authorities are considered to know best the interests and the needs of the society. It should be noted that these restrictions

[93] Case *S.H. and others v. Austria*, *op.cit*. 25, §§87,88, (this author's underline).

[94] The way the Court assesses a matter in terms of positive or negative obligations seems arbitrary, although by applying the same balance argument it could be held that legal certainty is restored.

[95] Roman maxim according to which there are certain things not eligible to be traded.

[96] As did the French government in the Case of *Mennesson v. France*, *op.cit*. 3, §60, so as to justify the prohibition of the surrogacy technique in their country.

[97] As defined by ARAI-TAKAHASHI, *op.cit*. 65.

[98] First used by the Commission's report in the *Cyprus case* (Greece v. UK), considering the vital interests of the nations.

cannot apply to every provision of the ECHR (like the right to life or prohibition of torture) and, in general, various factors should be taken into account in order to apply the margin of appreciation, such as the type of the provision invoked, the interests at stake, the aim pursued by the impugned interference, the context of the interference, the impact of consensus, the impact of the proportionality principle, the comprehensive analysis by superior national courts etc.[99] Regarding article 8, the Court has held that:

> 'In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. In the context of "private life" the Court has considered that where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted (see, for example, *X and Y*, cited above, §§ 24 and 27; *Christine Goodwin*, cited above, § 90; see also *Pretty v. the United Kingdom*, no. 2346/02, § 71, ECHR 2002-III). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports* 1997-II; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; and *Christine Goodwin*, cited above, § 85). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights'.[100]

So, in implementing their positive obligation under Article 8, the States enjoy a certain margin of appreciation that might be restricted when a particularly important facet of an individual's existence or identity is at stake, like becoming a parent. However, in issues that do not enjoy European consensus, especially in sensitive moral or ethical matters, or when the State has to strike a balance between competing private and public interests or convention rights, as in the hypothesis examined by this paper, the margin will be broader. The lack of European consensus is sometimes referred to as 'diversity of practice'.

> 'The Court observes that most of the Contracting States do not have legislation that is comparable to that applicable in France, at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues to keep her identity secret from the child she has brought into the world. However, it notes that some countries do not impose a duty on natural parents to declare their identities on the birth of their children and that there have been cases of child abandonment in various other countries that have given rise to renewed debate about the right to give birth anonymously. In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that States must be afforded a margin of appreciation to decide which measures are apt to ensure

[99] SPIELMANN, D., «Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?», *CELS Working Papers Series*, February (2012). p. 11-23/30.
[100] Case of *Oliari and others v. Italy*, applications nos. 18766/11 and 36030/11, §162, 21 July 2015, ECtHR.

> that the rights guaranteed by the Convention are secured to everyone within their jurisdiction'.[101]

In general, it is shown that when assessing the margin of appreciation, it is inevitable to consider European consensus, which, as already mentioned, should be examined in relation to positive obligations. European consensus comes into play when addressing the issue of margin of appreciation, which in turn is essential for the fair balance test.

So, now, is there European consensus regarding the issue of surrogacy? In 2014, the ECtHR had the chance to examine whether there is European consensus in the matter of surrogacy and the answer was negative.

> 'The Court observes in the present case that there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad. A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appears to be possible in eleven other States (including one in which the possibility may only be available in respect of the father-child relationship where the intended father is the biological father), but excluded in the eleven remaining States (except perhaps the possibility in one of them of obtaining recognition of the father-child relationship where the intended father is the biological father) ...'.[102]

European consensus has been given a great significance and is nowadays considered an important parameter – even a prerequisite – of positive obligations, evolutive interpretation and in general of the system of the protection guaranteed by the ECHR. 'European consensus possesses legitimizing potential… (and) (i)t is persuasive because it is based on the decisions that are made by democratically elected bodies; and it can positively affect the clarity of the ECtHR's reasoning'.[103] Nevertheless, criticism has been made that it does not take into account the 'quality' of the legislation found in the states of the Council of Europe, e.g. the most suitable for the protection of the rights enshrined in the Convention. European consensus is seen from a majoritarian point of view rather than a human rights friendly aspect. It is true that European consensus has been used in order to establish positive obligations and is used by the ECtHR as a mean to legitimise its decisions, given that it is

[101] Case of *Odièvre v. France*, application no. 42326/98, §47, 13 February 2003, ECtHR(this author's underline).
[102] Case of *Mennesson v. France*, *op.cit*. 3,§78.
[103] DZEHTSIAROU, *op.cit*. 73, p.1734 (this author's parenthesis).

easier for the states to accept an almost homogeneous practice in Europe. However, the lack of consensus should not constitute an impediment for the protection of human rights. In words of Letsas,

> 'Member States agreed in the aftermath of the Second World War to undertake the legal obligation towards their own people to respect human rights; they did not undertake the obligation to respect what, at each given time, most of them take these rights to be. There is moreover a further difficulty with the idea of a piecemeal evolution. ECHR rights are legal rights that condition when the use of coercion by Member States is legitimate. Legality insists that the benefit of the moral principles that justify these rights must be extended equally to all. If Europeans have the right to marry their heterosexual partner or practise their sexual preference without criminal prosecution, then the applicants in Rees, Cossey and Sheffield also had the right to have their birth certificates changed so that they can get married. For the same moral principle justifies both rights, namely that no one should be deprived of a liberty or an opportunity on the basis that others despise his or her way of life. By denying them this right, the European Court of Human Rights treated the applicants in an unprincipled manner. For 16 years, until the Court reversed its case law in 2002, some people (like the applicant in Dudgeon) could rely on the European Court to benefit from this moral principle but others (like the applicants in Rees, Cossey and Sheffield) could not. Piecemeal evolution of the ECHR standards according to how many states have abandoned moralistic preferences in different areas of national law deeply offends the values of legality and equality'.[104]

In a similar reasoning, Eyal Benvenisti identifies two flaws of the doctrine of consensus: the first in a theoretical perspective and the other in a practical perspective.

> 'From a theoretical perspective, this doctrine can draw its justification only from nineteenth-century theories of State consent. Given the importance of State sovereignty, the only way to impose on State parties newly evolving duties is by resorting to the notion of emerging custom, or "consensus." By resorting to this device, the court eschews responsibility for its decisions. But the court also relinquishes its duty to set universal standards from its unique position as a collective supranational voice of reason and morality. Its decisions reflect a respect of sovereignty, of the notion of subsidiarity, and of national democracy. It stops short of fulfilling the crucial task of becoming the external guardian against the tyranny by majorities. The consensus rationale is also flawed from a practical perspective. The question is whether this doctrine is an optimal device to promote human rights given political constraints. One wonders to what extent it is really possible to envision credible threats by member States to challenge the court's authority in reaction to unpopular judgments. One wonders also to what extent that threat is actually open to abuse by those who wish to justify the perpetuation of ossified and untenable positions. What is certain is that in terms of the allocation of resources, this policy puts quite a heavy burden on the advocates of the promotion of individual and minority rights who must spread their resources among the diverse national institutions in their effort to promote human rights. Only if they succeed in a sufficient number of jurisdictions will the court be convinced that the status quo has changed

[104] LETSAS, *op.cit*. 46, p.124.

> and react accordingly. Such a policy cannot be said to be promoting human rights, especially not minority rights'.[105]

In the light of the criticism presented above, the author of the present paper believes the Court should change its vision of European consensus or at least give more emphasis to the quality of the European legislations and not focus on a simple number majority. Nonetheless, being realistic, consistent with the way the Court functions and according to its jurisprudence, it is probable that the Court would allow a broad margin of appreciation to the State, taking into consideration the lack of European consensus in the area of surrogacy.

Nevertheless, the Court, in other cases, has also considered consensus at national level. As seen in *Oliari and others v. Italy*[106], the ECtHR reiterated that the area in question (same-sex couples' legal recognition) is one of evolving rights with no established consensus, just as is surrogacy. Then, although it concerns an important facet of an individual's existence, it is an issue of moral and ethical overtones (§177) and for this reason the State is the adequate one to assess the community interests. Nevertheless, Italy failed to incorporate the sentiments of the majority of the Italian population, as, in addition to the social reality, even the highest courts of the country (the Constitutional Court and the Court of Cassation) had held that there was a need for legislation that would protect and recognise same-sex relationship. To summarise, the Court showed deference towards Italy through the doctrine of margin of appreciation, but finally found a violation, because Italy failed to assess and hear to the cries for legal recognition of same-sex couples within its territory. The ECtHR in issues like the Oliari takes state consensus very seriously and is reluctant to an innovation. Examining the margin of appreciation, European consensus is given a decisive importance and here there is no European consensus, but an evolving right. Nonetheless, when deciding the violation, as stated in §185, Italy has violated art.8 because 'in the absence of a prevailing community interest' and 'in light of domestic courts' conclusions on the matter' the government has 'overstepped their margin of appreciation'. Otherwise it 'would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective' (§186). It is shown that the changes in Italy are taken into account, in the author's view, as a *sine qua non* condition for the violation. In addition, in the concurring opinion in the case, it is seen that the judges 'are careful to limit their finding of the existence of a positive obligation to Italy and to ground their conclusion on a combination of factors not necessarily found in other Contracting States'.[107] For the above reasons, the Court expressly grants a wide margin of appreciation due to the lack of European consensus, but, nonetheless, taking into account the national circumstances, finds a violation.

In the issue at hand, it could be held that the ECtHR should take into account the consensus inside the Contracting State. It is important for the Court to assess whether the

[105]BENVENISTI, E., «Margin of Appreciation, Consensus, and Universal Standards», *International Law And Politics*, Vol.31:843 (1999). p.852-853.
[106] *Oliari and others v. Italy*, *op.cit*. 100.
[107] Concurring opinion of judge Mahoney joined by judges Tsotsoria and Vehabovic, §10 of the judgment.

citizens of the State are frequently involved in surrogacy agreements through cross-border surrogacy and whether the majority of the society accepts this reproductive technique. Bearing in mind the above, in case there is national consensus, the Court could approve the existence of the positive obligation for the particular State to allow surrogacy, given the particular circumstances within the State and without a need for European consensus. Recalling the introduction of the present paper, there is great probability for an application to prosper in those countries where there are high rates of cross-border surrogacy.[108]

The importance of the domestic consensus can be detected in the case of abortion, where even in the existence of consensus among the majority of the rest Contracting States, the Court granted a wide margin of appreciation to Ireland, based on the national circumstances.

> 'There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention…However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus. The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with Tyrer v. the United Kingdom (25 April 1978, § 31, Series A no. 26), the Convention being considered a "living instrument" to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention…In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than Ireland namely, a prohibition on abortion regardless of the risk to the woman's life. Certain States have in recent years extended the grounds on which abortion can be obtained (see paragraph 112 above). Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion…However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State'.[109]

[108] BEAUMONT, P., TRIMMINGS, K., *op.cit.* 2.

[109] Case of *A, B and C v. Ireland*, *op.cit*. 22, §233-236.

It seems as if the Court uses consensus at the European or at national level towards its wish to rule, as a way to justify its ruling. Sometimes the ECtHR bases its judgment on the existence of European consensus, while in other cases, even when there is European consensus, takes into consideration the national circumstances.

Then, the margin of appreciation does not cover only the matter of European consensus. The core of the right protected should be equally – or much more – important as consensus. Article 8 seeks to provide respect for private and family life and the magnitude of the issue at hand for one's identity, as mentioned above, should limit the margin of appreciation. More concretely, the ECtHR has held that:

> 'Because of the special importance of the right to found a family and the right to procreation, the Contracting States enjoyed no margin of appreciation at all in regulating these issues. The decisions to be taken by couples wishing to make use of artificial procreation concerned the most intimate sphere of their private life and therefore the legislature should show particular restraint in regulating these matters'.[110]

Even in the absence of European consensus, the margin of appreciation is wide only in principle, meaning that there are other elements important for the fair balance test.

> 'This lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions. It also confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision not only whether or not to authorise this method of assisted reproduction but also whether or not to recognise a legal parent-child relationship between children legally conceived as the result of a surrogacy arrangement abroad and the intended parents…Moreover, the solutions reached by the legislature – even within the limits of this margin – are not beyond the scrutiny of the Court. It falls to the Court to examine carefully the arguments taken into consideration and leading to the solution reached and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution (see, *mutatis mutandis*, *S.H. and Others*, cited above, § 97)'.[111]

Nonetheless, in assessing positive obligations, the Court seems to give a decisive significance to European consensus in order to allow a broad margin of appreciation and not just in principle, as it has held. To cite an instance, in *Evans v. UK*, where the Court examined the application in terms of positive obligations, it changed the range of margin of appreciation based on the absence of European consensus.

> 'The applicant argues that while the State may have a broad margin in deciding whether or not to intervene in the area of IVF treatment, once it does so, the relative importance of the competing interests entails that the State's margin in deciding where to strike the balance is

[110]Case *S.H. and others v. Austria*, *op.cit.*25, §57.

[111]Case of *Mennesson v. France*, *op.cit.*3, §§79, 81 (this author's underline).

> extremely limited or non-existent… The Court observes that there is no international consensus with regard to the regulation of IVF treatment or to the use of embryos created by such treatment… Since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (see the above-mentioned X., Y. and Z judgment, § 44)'.[112]

This has led many scholars and European legal practitioners to confront the doctrine of margin of appreciation with mistrust, mainly because it seems like a way for the ECtHR to avoid the justification of its judgments. In accordance with Letsas' critique,

> '(t)he idea of the margin of appreciation in itself clearly lacks any normative force that can help us strike a balance between individual rights and public interest. Whether the complained acts fall within or outside the margin of appreciation, whether, that is, the interference with the freedom is permissible all things considered, is what the Court in each case is asking. It cannot answer this question on the basis that the complained acts fall within the state's margin of appreciation. This would beg the question'.[113]

In a similar sense, Rabinder Singh has held that:

> 'The margin of appreciation is a conclusory label which only serves to obscure the true basis on which a reviewing court decides whether or not intervention in a particular case is justifiable. As such it tends to preclude courts from articulating the justification for and limits of their role as guardians of human rights in a democracy'.[114]

Despite this criticism, based on the way the Court resolves the issues brought before it, an application brought before the Court by intended parents against a State that prohibits surrogacy would not prosper, but for the existence of consensus at a national level. In the present situation of non-existent European consensus, although the matter of becoming a parent lies at the heart of the right for respect of private and family life, the margin of appreciation for the Contracting State will be broad. The only way possible to accept surrogacy seems through the existence of consensus at national level, where the Court would take into account the number of the citizens undergoing surrogacy and the mentality of the rest of the people and, in case these indicators are significant, there is a probability to witness the same application as in *Oliari and others v. Italy*.

It is important, at this point, to highlight that, even if the fair balance test (as established nowadays) is accepted, it barely takes into consideration the interests of the

[112] *Evans v. UK*, *op.cit.* 23, §60-62.

[113] LETSAS, *op.cit.*46, p.86-87.

[114] SINGH, R., «Is there a role for the "Margin of Appreciation" in national law after the Human Rights Act?» *European Human Rights Law Review* (1999) 4, as cited by LETSAS, Ibid., p.87.

individual. What it does is justifying or not a broad margin of appreciation. When the Court finds the existence of a positive obligation, it holds that the State has overstepped its margin of appreciation and, when not, it seems enough to simply grant a wide margin of appreciation. In the author's opinion, in the case of surrogacy and given its peculiarities, in striking a balance between the interests of the community and those of an individual an insight into the interests at hand is essential. On the one hand, there is the interest to become a parent and, on the other, the interest to protect women from exploitation and children from being treated as a commodity. It cannot be held that, as surrogacy is a controversial issue and there is no consensus, States are given a wide margin of appreciation. Given that the fair balance test resembles the interference questions, what is appropriate to do is consider how the prohibition is in the best interests of the society. For instance, the exploitation and commodification of human beings or splitting up motherhood can be avoided by ensuring an adequate legislation, e.g. instead of allowing commercial surrogacy, allow its altruistic form and include guarantees for both the intended parents and the surrogate mother. However, without explaining the interest on the total prohibition of a reproductive technique to protect the community, the State seems to abuse its margin of appreciation. In words of Judge Rozakis,

> 'the Court should carefully reconsider the applicability of the concept of the margin of appreciation, avoid the automaticity of reference to it, and duly limit it to cases where a real need for its applicability better serves the interests of justice and the protection of human rights'.[115]

The Court seems to hide behind the fact that States can assess better the circumstances in their territory. By way of illustration, *S.H. and others v. Austria*:

> 'The Court considers that concerns based on moral considerations or on social acceptability must be taken seriously in a sensitive domain like artificial procreation. However, they are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ovum donation. Notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner which allows the different legitimate interests involved to be adequately taken into account…The Court accepts that the Austrian legislature could have devised a different legal framework for regulating artificial procreation that would have made ovum donation permissible. It notes in this regard that this latter solution has been adopted in a number of member States of the Council of Europe. However, the central question in terms of Article 8 of the Convention is not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, but whether, in striking the balance at the point at which it did, the Austrian legislature exceeded the margin of appreciation afforded to it under that Article (see Evans, cited above, § 91). In determining this question, the Court attaches some importance to the fact that, as noted above, there is no

[115] Case of *Egeland and Hanseid v. Norway*, application no. 34438/04, 16 April 2009, ECtHR, Concurring opinion of Judge Rozakis.

> sufficiently established European consensus as to whether ovum donation for in vitro fertilisation should be allowed'.[116]

The way the Court goes back and forth with reference to the range of the margin of appreciation seems rather disturbing for the protection of human rights.

In addition to this, unless the Court offers a solution for parents opting for surrogacy, a double standard will be introduced. There are already two final judgments of the Grand Chamber telling French authorities to recognise the parental relationship created between children born via surrogacy and French citizens that committed cross border surrogacy.[117] These judgments, considered by many as a back door legitimation of surrogacy, would bring the problem of discrimination between couples that opt for cross border surrogacy and those opting for national surrogacy.[118] The former will have their children registered as their own, while the latter will not be able to undergo surrogacy. It would seem like surrogacy would be an elite right to procreate, only for those couples that can afford the cost of traveling abroad, paying a significant amount of money in the surrogacy process, then return to their home country and prepare the documents of the filiation.

CONCLUSION

From the above analysis, it is possible to infer the below conclusions:

While it is true that surrogacy as a reproductive right would be considered as an issue falling within the material scope of article, the likelihood of success of an application brought before the European Court of Human Rights against a Contracting State that prohibits surrogacy seems bleak.

Based on the case-law of the ECtHR, the criterion to apply, when studying the existence of a positive obligation for a state, is the fair balance test. In accordance to this test, what should be balanced is the interests of the individuals and the interests of the community as presented by the government. In order to assess this balance test, as established by the Court, a consideration is made based on the nature of the interests of the individual and whether they lie at the heart of the right protected, which as a consequence limits the margin of appreciation that the Court grants to a state. In addition, a consideration is made as to whether there is European consensus in the matter at hand and, in case there is no consensus at a European level, the margin of appreciation is wide. According to the case-law of the

[116] *S.H. and others v. Austria*, *op.cit.* 25, §§100,106 (this author's underline).

[117] Cases of *Mennesson v. France*, *Labassee v. France*, , *op.cit.* 3.

[118] BEAUMONT, P., TRIMMINGS, K. «Recent Jurisprudence of the European Court of Human Rights in the Area of Cross-Border Surrogacy: Is There Still a Need for Global Regulation of Surrogacy? », *Working Paper No. 2015/2, University of Aberdeen*. p.11 https://www.abdn.ac.uk/law/documents/Recent_jurisprudence_of_the_European_Court_of_Human_Rights_in_the_area_of_cross-border_surrogacy.pdf

ECtHR, it seems that it is the absence of European consensus that constitutes the decisive factor and this allows a broad margin to appreciation to the state. The above is certain in the absence of domestic consensus. When there is consensus at national level, it is probable that the Court will take this point as the crucial one and accept the existence of a positive obligation.

Applying this reasoning of the Court to surrogacy, the following is observed: the Court has already stated that the right to become a parent is protected under the provision of article 8 of the European Convention on Human Rights. However, it has already stated in 2014 that in the issue of surrogacy there is no European consensus. From the above, it is speculated that the ECtHR would grant a wide margin of appreciation to a state and, thus, not accept a positive obligation to allow the reproductive technique of surrogacy. The only element that appears to stand a chance in such a situation is the existence of consensus at national level. In the event that a domestic consensus is present, it is probable for the Court to recognise a positive obligation to allow surrogacy.

There are many criticisms about the way the Court assesses the applications regarding positive obligations. The core of such reviews focuses on the uncertainty by which the ECtHR applies its standards. Through examples, it has been shown that depending on the result the Court wants to justify, it may use European consensus in various ways: either to impose a positive obligation or grant a wide margin of appreciation. Then, the margin of appreciation appears to be presented as panacea every time the Court does not want to go deep in a controversial matter. This inconsistency creates legal uncertainty and doubts over the Court's legitimation. Furthermore, there are two judgments of the ECtHR holding that states prohibiting surrogacy should register the relationship of parenthood between the intended parents and the children born via surrogacy in another state. This reality raises many questions about the violation of the principle of non-discrimination, given that in case the Court denies the positive obligation to allow surrogacy, it seems to promote cross border surrogacy and prohibit domestic surrogacy.

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