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**SURROGACY AND THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

MARIANNA ILIADOU

**A Thesis submitted for the Degree
of
Doctor of Philosophy**



**Durham Law School
Durham University
2020**

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MARIANNA ILIADOU

ABSTRACT

This thesis explores surrogacy and its possible protection under the umbrella of the European Convention on Human Rights (ECHR). The examination undertaken aims at providing a solution to the current problem of cross-border surrogacy due to the detrimental effects it might have, mainly on the resulting children. It does so by advocating for an *ex ante* solution whereby the ECHR framework is used to lift the blanket ban on surrogacy in European States. This way, it is argued, States would have to advance a lawful domestic surrogacy regulation, which could eventually lead to the decline of cross-border surrogacy cases.

In particular, the *ex ante* ECHR framework is examined through the outcome of a hypothetical referral to the European Court of Human Rights by individuals against a Contracting State with a blanket ban on surrogacy, claiming a violation of their right to respect for private and family life (Article 8 ECHR). The Court has acknowledged the existence of the right to respect for the decision to become a parent, which this thesis extends to surrogacy and argues that it should prevail against the blanket ban on surrogacy in the clash between the private and public interests involved.

In the course of this thesis, special consideration is given to the concept of human dignity within the Convention and the use of the ‘margin of appreciation’ doctrine, facilitating an understanding in order to interpret dignity coherently and advancing a framework in order to apply the margin of appreciation doctrine effectively. Finally, there is an examination of the need for an international convention on surrogacy through the lens of the ongoing Parentage/Surrogacy Project of the Hague Conference on Private International Law.

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LIST OF ABBREVIATIONS

AI	Artificial Insemination
ART.....	Artificial Reproductive Technology/Technologies
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CJEU	Court of Justice of the European Union
CoE	Council of Europe
ECHR.....	European Convention on Human Rights
ECtHR.....	European Court of Human Rights
EU	European Union
FWCW	Fourth World Conference on Women: Action for Equality, Development and Peace
GIFT.....	Gamete Intra-Fallopian Transfer
HCCH	Hague Conference on Private International Law
HRC	Human Rights Committee
IACtHR.....	Interamerican Court of Human Rights.
ICCPR.....	International Covenant on Civil and Political Rights
ICESCR.....	International Covenant on Economic, Social and Cultural Rights
ICJ.....	International Court of Justice
ICPD	International Conference on Population and Development
ISA	International Surrogacy Arrangements
ISS.....	International Social Service
IVF	<i>In Vitro</i> Fertilisation
MAP	Medically Assisted Procreation
MAR	Medically Assisted Reproduction
PGD.....	Preimplantation Genetic Diagnosis
UDHR	Universal Declaration of Human Rights
UKSC.....	United Kingdom Supreme Court
UN.....	United Nations
VCLT	Vienna Convention on the Law of Treaties
ZIFT	Zygote Intra-Fallopian Transfer

STATEMENT OF COPYRIGHT

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DEDICATION

This thesis is dedicated to my parents and my siblings, without whose love and support I would not have been able to complete this degree. Thank you!

Στους γονείς μου και τα αδέρφια μου. Χωρίς την αγάπη και τη βοήθεια τους, η ολοκλήρωση των διδακτορικών μου σπουδών δεν θα ήταν εφικτή.

CHAPTER 1: INTRODUCTION

1.1 This Thesis

This thesis examines the issues raised by surrogacy (where a woman undertakes the gestation of a child for someone else) within the framework of the European Convention on Human Rights (ECHR or the Convention).¹ Some Contracting States prohibit surrogacy arrangements in their territory leading to travel to other jurisdictions for access to surrogacy services (cross-border or international surrogacy). When those who have accessed cross-border surrogacy services return home, legal questions are posed about parentage and the child's citizenship. The European Court of Human Rights (ECtHR or the Strasbourg Court) has been called upon to rule in cases involving surrogacy on six occasions, while also emitting one advisory opinion.² Outside the context of surrogacy, the ECtHR has recognised a 'right to respect for the decision to become a parent' within Article 8 of the ECHR.³

This thesis focuses on two significant, inter-linked questions that have yet to be addressed by the Court: the relationship between surrogacy and the right to respect for the decision to become a parent, and the balance between public policy and the right to respect for the decision to become a parent. These questions require consideration of whether and when the blanket prohibition on surrogacy would be a violation of the right to respect for the decision to become a parent. When that right is violated, there is a further question of what this requires of Contracting States. Both questions necessitate examination of the appropriate weight to be given to public policy concerns, such as the possible exploitation and commodification of women and children.

¹ Surrogacy is discussed here only in terms of the involvement of artificial reproductive technology (ART). Therefore, surrogacy created through sexual intercourse between the intended father and the surrogate are not considered. For more: Chapter 2 (2.1).

² *Mennesson v France* [2014] ECHR 664, *Labassee v France* [2014] ECHR 668, *Foulon and Bouvet v France* App nos 9063/14 and 10410/14 (ECtHR, 21 July 2016), *Laborie v France* App no 44024/13 (Committee, 19 January 2017), *D and Others v Belgium* App no 29176/13 (ECtHR, 8 July 2014), *Paradiso and Campanelli v Italy* [2017] ECHR 96 and Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (ECtHR, Grand Chamber, 10 April 2019).

³ *Evans v UK* (2008) 46 EHRR 34, *Dickson v UK* (2008) 46 EHRR 41, *SH and Others v Austria* [2011] ECHR 1879.

By addressing these questions, the overall aim of this thesis is to mitigate *ex ante* the complications caused by cross-border surrogacy, such as rendering children stateless/parentless, States not being able to monitor potential abuses to surrogates, surrogacy being an option only for intended parents able to travel abroad, etc.⁴ If imposing a blanket ban on surrogacy at national level is incompatible with the Convention, Contracting States would have to provide domestic surrogacy;⁵ hence, being given the option of lawful domestic surrogacy, citizens could choose national instead of cross-border surrogacy and, therefore, avoid the latter's complications. Other essential considerations made in this thesis are the effects of globalisation, the interaction of cross-border surrogacy with international adoption and the call for an international convention on surrogacy. The reason behind these considerations lies in the fact that they demonstrate the need to overcome effectively the cross-border surrogacy complications.

It should be highlighted at the outset that this study addresses cross-border surrogacy in the sense of offering a solution to its complications, but, in the course of this thesis, wider issues on surrogacy as a whole are also discussed. While its main focus is the blanket ban on surrogacy, this thesis also shows the potential of the ECHR to address further issues, such as discrimination, access criteria, etc.⁶ Therefore, cross-border surrogacy is the main focus, but broader issues on surrogacy are also discussed, always through the ECHR framework or compared to it. Hence, the proposal at hand focuses on States that ban surrogacy but can also apply to States that restrict surrogacy.⁷

However, what is under examination here is the blanket ban on surrogacy and not the specific degree of restriction, which further means that this thesis argues in favour of lifting the blanket ban on surrogacy to enable domestic surrogacy. It does not focus on the exact regulation that the States would adopt after such lifting of the blanket ban, but rather indicates that if this is done inadequately, the ECHR can again provide a useful framework for those excluded from surrogacy. Finally, *ex ante* refers to the ECHR being used to enable domestic surrogacy through Article 8 rather than using the Convention *ex post facto* to tackle issues of cross-border surrogacy, e.g. legal parentage.

⁴ The complications caused by cross-border surrogacy are discussed in detail Chapter 2 (2.3).

⁵ The duty of the States to redress a violation is elaborated in Chapter 6.

⁶ More on this can be found in Chapter 3.

⁷ Chapter 3 and Chapter 6 reflect and elaborate the States' restrictions imposed on surrogacy.

1.2 Research Questions

The general questions posed by this investigation are:

- a. How would the Strasbourg Court assess an application against a Contracting State for violating an individual's right to respect for the decision to become a parent by imposing a blanket prohibition on surrogacy?
- b. Does the right to respect for the decision to become a parent through surrogacy clash with human dignity? How should the Court resolve the clash between individual versus public interests?
- c. How has globalisation affected the problem before the ECtHR? Does cross-border surrogacy create a need for an international convention on surrogacy?

In order to answer these questions, this thesis is conducted through desk and library-based research, as it analyses doctrinal and theoretical questions. The research consists of the use of the European Convention on Human Rights and the case law of its Court as primary sources in order to answer the aforementioned questions. The secondary sources considered in this thesis derive mainly from written documents, such as books, journal articles, case reports and other relevant sources.

The research questions of this thesis are not purely descriptive. While there is a consideration of how the Court would assess such claims, the response is not merely a prediction. This thesis takes forward the claims and advances a new framework for the Court to follow, framework which would essentially change the current way of resolving matters brought up before the Court. This is done principally through the interpretation of the right to respect for the decision to become a parent in light of surrogacy, the understanding of human dignity within Article 8 ECHR and the proposed assessment of what is 'necessary in a democratic society', as elaborated below in the Chapter Breakdown.

1.3 Chapter Breakdown

In order to answer the aforementioned questions, the chapter breakdown of this thesis is as follows:

Chapter 1: *Introduction*

The current chapter provides an introduction to this thesis, acting as a roadmap to the investigation undertaken. It focuses on the overall aim of the thesis, presents the research questions and the chapter breakdown, while it outlines the original contribution of this project. Potential limitations of this thesis are also discussed briefly.

Chapter 2: *An Overview of Surrogacy and the Complications Created by Cross-border Surrogacy*

This chapter demonstrates the nature of surrogacy and the current complications at European level, focusing on the divergent regulatory approaches among the Contracting States of the ECHR. To further illustrate the diversity of surrogacy policies, there is a brief consideration of five additional jurisdictions outside the ECHR's reach,⁸ chosen due to their importance for cross-border surrogacy either as destination or receiving States.⁹ Taking into account the difficulties resulting from cross-border surrogacy, this thesis suggests that the ECHR can provide an effective framework to address the above complications. It does so through the lenses of a hypothetical referral to the ECtHR where individuals would claim that a blanket prohibition on surrogacy imposed by a Contracting State violates their right under Article 8 ECHR, i.e. their right to respect for private and family life.

Chapter 3: *Surrogacy and the Right to Respect for the Decision to Become a Parent*

This chapter unfolds the hypothetical referral to the Court. The very first consideration is that individuals would base their claim on Article 8 ECHR and the right to respect for private and family life. The Court has already recognised the existence of the right to respect for the decision to become a parent and this chapter shows how this right should be extended to the practice of surrogacy. Although Article 8 ECHR is the main basis of the applicants' hypothetical claim, there is a separate consideration on Article 12 (the right to marry and found a family), while Article 14 and the prohibition of discrimination is also briefly discussed. This chapter does not simply indicate the basis for the hypothetical referral. It further praises the approach taken by the Court, holding that the recognition of the right to respect for the decision to become a parent is in accordance with the nature of the Convention

⁸ The additional jurisdictions considered are Australia, Canada, India, Israel and USA.

⁹ Receiving is the State where the intended parents reside and wish to return upon completion of the surrogacy procedure abroad, while destination is the State where intended parents undertake surrogacy services.

as a living instrument and follows the national/international trend towards the recognition of the right to become a parent and reproductive rights in general.

Chapter 4: *Surrogacy and the Danger of Exploitation and Commodification*

This chapter focuses on the reasons behind the prohibition of surrogacy by Contracting States and attempts to clarify how these reasons would be framed within the ECHR context. In particular, this chapter examines the extent to which surrogacy enables the exploitation and commodification of women and children. These are the ‘fears’ put forward by Contracting States when prohibiting surrogacy and are translated into public policy arguments presented before the Court. It is argued that such claims would fall under the umbrella of ‘the prevention of disorder/crime, the protection of health or morals and the protection of rights/freedoms of others’ found in Article 8(2) ECHR. The aim of this chapter is to establish the compatibility of surrogacy with the Convention and notably ‘human dignity’, while holding that a blanket ban on surrogacy is not necessary. By drawing on comparative materials, it is argued that unpaid (altruistic) surrogacy is less likely to exploit women and commodify children than commercial surrogacy agreements.

Chapter 5: *Surrogacy and the Clash of Interests*

This chapter brings together the findings of the two previous chapters and suggests an answer to the question of which interest should prevail (public policy arguments versus the right to respect for the decision to become a parent). It identifies how the ECtHR would be likely to resolve a clash of interests and advances a new ECHR framework for the Court to resolve this clash. Notably, it is demonstrated that if the Strasbourg Court assessed such a clash of interests, it would most likely find no violation of Article 8 ECHR. Nonetheless, this chapter criticises the ‘necessary in a democratic society’ assessment currently carried out by the Court, mainly due to its use of ‘margin of appreciation’ and ‘European consensus’. It is argued that the Convention’s concept of European consensus is applied inconsistently and the doctrine of margin of appreciation lacks coherent principle. Therefore, this chapter attempts to reconstruct the ‘necessary in a democratic society’ assessment in order to provide a solution to its current shortcomings. It does so by highlighting the limits of the current ECtHR’s policy of addressing a potential clash of interests and by applying a new framework where the principle of proportionality plays a central role. It is lastly argued that if the Court would apply this reconstructed framework, the blanket prohibition on surrogacy would constitute a violation of Article 8 ECHR.

Chapter 6: *Surrogacy and International Agreement*

After having presented the new ECHR framework in Chapter 5, this chapter starts with specifying how the aforementioned framework could provide an effective way to address the complications created by cross-border surrogacy, reflected already in Chapter 2. Nonetheless, it is argued that no matter how successful the ECHR framework is going to be, if followed, it could help lessen the frequency of cross-border surrogacy but not eradicate it. To illustrate the above, this chapter further assesses, through examination of comparative materials, the effects of globalisation on surrogacy and the rapid expansion of commercial surrogacy agreements (reproductive tourism/cross-border reproductive treatment). It also considers how the spread of cross-border commercial surrogacy could have an adverse effect on international adoption. Given the above, particular emphasis is given to the need for an international agreement on surrogacy, discussing, in essence, the ongoing Parentage/Surrogacy Project convened by the Council on General Affairs and Policy of the Hague Conference on Private International Law. This is currently the only proposed solution to the cross-border phenomenon of surrogacy.¹⁰ Nevertheless, it is argued that even if an international agreement were to be concluded, there would still be a need for a regional framework that would lead to lawful domestic surrogacy in order to combat the shortcomings of cross-border surrogacy. Therefore, the proposed ECHR framework is essential with or without the private international law agreement.

Chapter 7: *Conclusion*

This chapter explains how this thesis has helped clarify the debate by reflecting on the various considerations made in its main body. The ECHR framework has been deemed essential to ‘fight’ the repercussions created by cross-border surrogacy. In particular, the last chapter brings together the strands of the argument on the potential of the ECHR to combat the negative effects of cross-border surrogacy and ‘enable’ surrogacy across Europe.

¹⁰ There is additionally an ongoing development of non-binding principles undertaken by the International Social Service (ISS). Due to its non-binding nature and the fact that many experts of this project are also members of the Experts’ Group of the HCCH, emphasis is placed solely on the Parentage/Surrogacy Project. For more on the ISS project: ‘International Social Service Works to Improve Protections for Children Born through Surrogacy’ <<https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy>> accessed 4 December 2019.

1.4 Originality

The novelty of this thesis rests on the new understanding that it brings to surrogacy and the ECHR. This new understanding is built around three elements. First, it changes the focus from international to national surrogacy, applying the ECHR framework in order to enable lawful domestic surrogacy rather than simply mitigate the effects of cross-border surrogacy. Second, it is argued that the most coherent way to interpret Article 8 ECHR within the human dignity discourse is through a focus on autonomy and self-determination rather than restriction. Third, it is held that the ECHR framework should follow the ‘traditional’ tripartite proportionality test (as happens within the European Union order) to assess whether State interference is ‘necessary in a democratic society’, combining it with other elements found within the current ECHR necessity assessment.

To further elaborate on these points, the majority of the literature written on surrogacy and the ECHR attempts to solve problems deriving from the judgments of the Strasbourg Court on cross-border surrogacy. While the literature engages with the problem of establishing legal parentage via Article 8 ECHR, this thesis considers it essential to analyse surrogacy as a right to respect for the decision to become a parent and focus on enabling domestic surrogacy. This is done in order to lessen, as much as possible, the numbers of cross-border surrogacy and thus their potential problems for intended parents and resulting children from surrogacy.

In addition, this thesis brings a new understanding to the concept of human dignity within Article 8 ECHR. Human dignity within the Convention seems to take both a restrictive and a permissive approach to certain practices, hence potentially supporting positions that restrict surrogacy in terms of human dignity. Nonetheless, it is argued that the most coherent way of interpreting Article 8 ECHR within the human dignity discourse is to acknowledge it as an article enabling autonomy and self-determination. Through the lens of such understanding, surrogacy should be seen as a practice compatible, in principle, with the Convention rather than clashing with human dignity.

Most importantly, this thesis provides a new framework for the Strasbourg Court’s assessment of State interference with individual interests under Article 8 ECHR. It does so by reconstruing the ‘necessary in a democratic society’ examination by following a precise structure and placing proportionality in the centre of such examination (following the

tripartite proportionality test employed by the European Union institutions). Analysing surrogacy this way enables addressing the uncertainty of domestic surrogacy versus cross-border surrogacy and the fact that surrogacy is (seemingly) offered to an elite group, namely, those able to afford the cost of traveling and arranging surrogacy in another State.

These aspects have not yet been considered by the European Court of Human Rights. A creation of an *ex ante* surrogacy framework within the ECHR is deemed essential by this thesis as a potential response to the cross-border surrogacy complications.¹¹ Bearing in mind the lacuna in the current literature with regard to the aforementioned issues and the increasing number of cross-border surrogacy arrangements in Europe, reconsideration and clarification of the *ex ante* regime is absolutely necessary.

The need for an *ex ante* consideration of surrogacy within the ECHR framework is further evidenced by problematic cases like *Paradiso and Campanelli v Italy*,¹² where the Court found no violation of the Convention when intended parents were separated from their child even after eight months of cohabitation starting from birth. This author has argued elsewhere that the Court, by adopting a restrictive approach, did not acknowledge the existence of family life between the intended parents and the resulting child due to the absence of biological ties, short duration of cohabitation and legal uncertainty created by the applicants themselves; eventually, this is deeply problematic, because it relies on a distinction that the Court has long held to be arbitrary, namely that of legitimate and illegitimate families.¹³ The proposed ECHR framework aims to prevent such occurrences from happening, by invoking Article 8 not merely to mitigate the effects of cross-border surrogacy, but to avoid it where possible.

1.5 Limitations

There are certain limitations acknowledged within this thesis. The current investigation focuses on the ECHR framework in order to provide a solution to the repercussions created

¹¹ A solution to the problems raised by cross-border surrogacy has been described as a children's interests imperative by the Hague Conference on Private International Law (HCCH): HCCH Permanent Bureau 'The Desirability and Feasibility of Further Work on the Parentage / Surrogacy Project' (Prel Doc No 3 B, March 2014) 18.

¹² *Paradiso and Campanelli v Italy* (n 2).

¹³ Marianna Iliadou, 'Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v Italy*' (2019) 27 *Medical Law Review* 144. More on this in Chapter 3.

by cross-border reproductive treatment on surrogacy. In particular, applying the ECHR framework *ex ante* would entail Contracting States to lift the blanket ban on surrogacy and render domestic surrogacy lawful. Nonetheless, the Strasbourg Court cannot demand the respondent State to take a particular approach or set the exact features that a potential regulation of domestic surrogacy should have.¹⁴ This means that even after enabling domestic surrogacy, cross-border surrogacy could still be preferred by the citizens of that State, in case the domestic regulation adopted is too rigid or even ineffective.¹⁵ Nonetheless, it was already mentioned that even in such cases the ECHR provides tools to tackle additional issues on access to surrogacy, discrimination, etc.

In addition, the ECHR framework might be attacked on its suitability to provide a solution to the international phenomenon of surrogacy. Cross-border surrogacy is identified by this thesis as a global phenomenon, with its repercussions not being limited to the geographical scope of Europe (or the States of the Council of Europe).¹⁶ Therefore, it might seem that addressing this global phenomenon by limiting it only in one geographical area is not adequate. Nevertheless, this thesis holds that the proposed ECHR framework, if applied by the Strasbourg Court, could potentially change the surrogacy reality worldwide due to two significant features: first, the fact that Europeans are among the top ‘users’ of the cross-border reproductive treatment in surrogacy and, second, the impact the ECHR and its Court exert on other judicial authorities (national or international) outside the Council of Europe.¹⁷

Furthermore, this project argues for an enhanced role of the Convention at domestic level as a solution provided before surrogacy takes place. Through the proposed ECHR framework, this thesis endorses the claim that a blanket ban on surrogacy violates Article 8 ECHR and, therefore, should be lifted. Nonetheless, the success of such framework eventually depends on the willingness of the Court to adopt the proposed structure of the ‘necessary in a democratic society’ assessment. It is acknowledged that the current approach by the Strasbourg Court does not seem to uphold the claim of this thesis. Hence, currently, the

¹⁴ ‘Respondent State’ is the term used within the ECHR framework to refer to the State brought before the Strasbourg Court.

¹⁵ This is connected to the existence of the cross-border phenomenon even in States where domestic surrogacy is lawful and is reflected in detail in Chapter 6.

¹⁶ The Council of Europe (CoE) is the organisation behind, among others, the creation of the European Convention on Human Rights. For more: Council of Europe ‘Who We Are’ <<https://www.coe.int/en/web/about-us/who-we-are>> accessed 4 December 2019.

¹⁷ Further elaboration of this point is found in Chapter 2.

existing ECHR framework does not seem to provide the desired solution, which can only occur if certain features of the Court's adjudication are altered.

Lastly, it could seem that enabling domestic surrogacy through the ECHR framework in States where it is prohibited goes beyond the subsidiary role of the Convention. It is well established within the Convention's system that the protection of the rights and freedoms enshrined in the ECHR is principally entrusted with the Contracting States and the role of the Court is supplementary.¹⁸ Therefore, issues of overriding the existing policy adopted by national parliaments, who enjoy democratic mandate and represent the will of its people, could be potentially raised. Nevertheless, this thesis rejects such approach. The essence of having a European Court of Human Rights is exactly the protection from State interference, when unjustified. It is the Court's role to assess whether a violation has occurred and the State's subsequent obligation to undo this violation in the way the State considers it most appropriate.¹⁹ Holding the position that the Court should not interfere with decisions by the democratically endowed national parliaments could be very dangerous for the protection of individual rights enshrined in the Convention.²⁰ This thesis acknowledges that the adjudication of cases needs to be principled to avoid judicial arbitrariness (as demonstrated in Chapter 5); however, holding that the Court should not interfere with an otherwise legitimate domestic policy would entail denying, in essence, the Court's role, while it would leave the ECHR system with no real effect.

¹⁸ This derives from Article 1 ECHR: Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 51.

¹⁹ Combining subsidiarity with an actual assessment of the cases brought before the ECtHR is considered in Chapter 5.

²⁰ In particular for minorities: Chapter 5 (5.3).

CHAPTER 2: AN OVERVIEW OF SURROGACY AND THE COMPLICATIONS CREATED BY CROSS-BORDER SURROGACY

2.1 Introduction to Surrogacy and Basic Concepts

This chapter provides a detailed mapping of surrogacy, its different forms and characteristics. It further discusses the disparity of surrogacy policies found throughout Europe and in some key jurisdictions, based on their importance either as destination or receiving States of surrogacy.¹ It is this disparity and the restrictive approach towards surrogacy that escalates the gravity of its cross-border phenomenon created in Europe and abroad. Given the repercussions of reproductive tourism in the field, this thesis proposes the ECHR framework as a potential solution to the problem of cross-border surrogacy by defending the claim that a blanket ban on surrogacy is a violation of the Convention. It does so through examining a hypothetical referral of a blanket ban on surrogacy before the Strasbourg Court.

Starting with an overview of surrogacy, it is essential to become familiar from the very beginning with concepts that are deemed necessary in order to have a better understanding of this thesis and surrogacy in general. The first key term to define is ‘assisted reproductive technology’ (ART).²

ART is the term referring to the various techniques used to achieve pregnancy by means other than sexual intercourse and includes in vitro fertilization, gamete donation, donor insemination, intracytoplasmic sperm injection, and intrauterine insemination.³

In essence, via ART, it is possible to procreate/reproduce by engaging in fertilisation methods instead of the traditional way of coital acts. One form of ART is surrogacy,⁴ although, as explained later, it is not based solely on ART and could be the result of sexual intercourse. It is additionally crucial to note at the outset that surrogacy is not an independent ART method, but it rather combines other types of ART, as elaborated below.

¹ Receiving is the State where the intended parents reside and wish to return upon completion of the surrogacy procedure abroad, while destination is the State where intended parents undertake surrogacy services.

² Technology is used here widely to refer to any type of assisted conception, even the turkey baster conception.

³ Alessandro Stasi, ‘Protection for Children Born Through Assisted Reproductive Technologies Act, B.E. 2558: The Changing Profile of Surrogacy in Thailand’ (2017) 11 *Clinical Medicine Insights: Reproductive Health* 1.

⁴ IVF Australia ‘What Is Surrogacy?’ <<https://www.ivf.com.au/fertility-treatment/donor-program/surrogacy>> accessed 4 December 2019.

A simple way to describe a surrogacy agreement is as ‘an undertaking by a woman to bear a child for someone else’.⁵ Thus, surrogacy involves an agreement between a woman and another person, according to which the former will gestate a child for the latter.⁶ The above definition, referring to its legal dimension rather than the medical, comprises three important elements: i) at least two people involved in the process, ii) the gestation of the child and iii) an agreement.

Commencing with the people participating in this method, surrogacy involves a woman and ‘someone else’. This ‘someone else’ could be an opposite-sex couple, a same-sex couple or an individual (woman or man), depending each time on the regulation and permissibility in terms of marital status provided by each State, as elaborated in the next section. The woman that agrees to undergo the surrogacy treatment and uses her womb to gestate the child is called gestational carrier, gestational/surrogate mother or simply surrogate,⁷ while the people interested in becoming parents are referred to as commissioning/intended/prospective parents. Although the terms are used interchangeably throughout this thesis, the terminology preferred is surrogate and intended parents, typically the intended mother and intended father. Other parties that may participate in the process are sperm and egg donors (depending on the possible formulations of surrogacy), agencies that facilitate or provide the agreement (usually called intermediaries) and clinics/health professionals involved in surrogacy. It should not be overlooked, however, that the most important stakeholder in surrogacy is the resulting child.

Secondly, the embryo gestated can be conceived in two ways, creating accordingly a vital distinction in surrogacy: traditional surrogacy and gestational surrogacy. Traditional surrogacy, which might be referred to as genetic/straight/partial surrogacy, can be based on ART or not. In its simple version, it requires sexual intercourse between the intended father and the surrogate, resulting in the impregnation of the latter. It is commonly held that

⁵ Denise Meyerson, ‘Surrogacy Agreements’ (1994) 1994 Acta Juridica 121.

⁶ This thesis acknowledges that trans men could also gestate a child; e.g. Simon Hattenstone, ‘The Dad Who Gave Birth: “Being Pregnant Doesn’t Change Me Being a Trans Man”’ *The Guardian* (20 April 2019) <<https://www.theguardian.com/society/2019/apr/20/the-dad-who-gave-birth-pregnant-trans-freddy-mcconnell>> accessed 4 December 2019. However, the focus here is exclusively on women with the ability to gestate, as so far there are no surrogacy cases reported with trans men gestating a child for someone else.

⁷ Opponents of surrogacy object to the removal of the word mother: Renate Klein, *Surrogacy: A Human Rights Violation* (Spinifex Press 2017) 48-49. However, at least in the UK, it seems that surrogates do not view themselves as mothers of the child: Kirsty Horsey, ‘Surrogacy in the UK: Myth Busting and Reform. Report of the Surrogacy UK Working Group on Surrogacy Law Reform’ (Surrogacy UK, November 2015) 35.

traditional surrogacy was first documented in the Bible, where Sarah urged Abraham to have sexual relationships with Hagar, her handmaiden, in order to have the resulting child as their own.⁸

Following the breakthrough of artificial reproductive methods, this practice was abandoned and, instead, couples or individuals opted for ART, this being the reason why this thesis focuses exclusively on surrogacy via ART. Through ART, this result is achieved by introducing the sperm of the intended father (or a donor) through insemination to the surrogate's womb. More concretely, the ART method used for this option is artificial insemination. Also known as intrauterine insemination, artificial insemination is defined as 'the introduction of semen into the vagina or cervix by artificial means',⁹ directly to the woman's womb and without coital acts. Due to the fact that fertilisation takes place inside the woman's body, traditional surrogacy through artificial insemination is often called *in vivo* fertilisation.¹⁰

It is essential to highlight that through traditional surrogacy, in its natural or artificial insemination form, the gestational carrier is genetically linked to the child. For it is the surrogate offering her reproductive material as well as her womb, as the intended mother is not able to gestate, and neither is her egg able to be fertilised. Alternatively, traditional surrogacy occurs due to the absence of an intended mother, pointing to cases with only intended fathers (either a same-sex male couple or a single intended father).

⁸ Eleonora Lamm, *Gestación Por Sustitución. Ni Maternidad Subrogada Ni Alquiler de Vientres* (Universitat de Barcelona 2013) 19. Anleu as well notes that surrogacy 'is not a new technology, indeed it is not a technology at all but a social arrangement with ancient origins. Examples of surrogacy exist in the Bible - Abraham and Sarah, Rachel and Jacob': Sharyn L Roach Anleu, 'Reinforcing Gender Norms: Commercial and Altruistic Surrogacy' (1990) 33 *Acta Sociologica* 63.

⁹ W. A. Newman Dorland, *Dorland's Illustrated Medical Dictionary* (32nd edn, Elsevier Saunders 2012) 943.

¹⁰ Artificial insemination can be either homologous or heterologous. Homologous is the insemination that uses the sperm of the husband or partner, while heterologous is the insemination using the sperm of a donor. In the words of Guttmacher, '[i]n the human the semen employed in artificial insemination may be from the husband (A.I.H.) or from some other donor (A.I.D.); in medical terminology the former is referred to as homologous and the latter as heterologous insemination': Alan F Guttmacher, 'Artificial Insemination' 18 *DePaul Law Review* 566. This distinction, however, does not apply to surrogacy, as surrogacy, by nature, cannot be based on homologous insemination, given that it is not the intended mother (if there is one), but the surrogate inseminated with the sperm of the intended father or donor.

The case that sparked the debate over surrogacy as ART was a case of artificial insemination in its traditional form. This first case, known as the *Baby M* case,¹¹ involved the artificial insemination of the surrogate's womb with the sperm of the intended father. When the process was successfully carried out and the baby was born, the surrogate (who was genetically linked to the child in this case) decided to defy the agreement with the intended parents and keep the child. This led to a long court dispute regarding the custody/parental responsibility of the child, which resulted in favour of the intended parents, based on the best interests of the child. Given the implications of the surrogate being genetically linked to the child born through surrogacy and the problems resulting from this genetic relationship, many legal systems do not allow traditional surrogacy to avoid kinship and custody complexities.¹²

On the other hand, gestational surrogacy involves fertilisation taking place outside the woman's body, in a laboratory.¹³ Consequently, gestational surrogacy is operated via *in vitro* fertilisation (IVF).¹⁴ Literally meaning fertilisation in glass, *in vitro* fertilisation involves the creation of the embryo in a laboratory and its subsequent implantation in the uterus of the surrogate. The sperm used could belong to the intended father or a sperm donor, while the egg may belong to the intended mother or another egg donor, but for the gestational carrier.¹⁵ Accordingly, the genetic material might originate from both intended parents, from one of them interchangeably with donors or from donors only, while the role of the surrogate is limited to being only the carrier of the child. In the scenario of using the sperm and egg of the intended couple, surrogacy attracts those able to become genetic parents, where for some reason there is a problem with the intended mother's gestation. However, as mentioned before and given the possible combinations, it is a significant way of reproduction for same-sex couples and single individuals.

¹¹ *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 02/03/1988), New Jersey Supreme Court, USA.

¹² See below in section 2.2.

¹³ In theory, it is possible to operate gestational surrogacy through GIFT or ZIFT. GIFT (Gamete intra-fallopian transfer) means that an egg and a sperm are mixed and immediately transferred together in the fallopian tube; therefore, a fertilisation process that takes place inside the woman's body rather than in a laboratory. ZIFT (Zygote intra-fallopian transfer) is the fertilisation process where an embryo fertilised already in a laboratory is transferred into the fallopian tube. However, although it would be possible to use these two methods, in practice, the method used for gestational surrogacy is IVF.

¹⁴ The first gestational surrogacy reported was in 1984 in Cleveland, Ohio: Wulf H Utian and others, 'Successful Pregnancy After an In-Vitro Fertilization-Embryo Transfer from an Infertile Woman to a Surrogate' (1985) 313 *The New England Journal of Medicine* 1351.

¹⁵ If it is the genetic material of the surrogate used for IVF, then this would not be considered gestational surrogacy, but an uncommon traditional surrogacy.

A defining feature of gestational surrogacy seems to be that the surrogate can never be the genetic mother.¹⁶ Given the absence of a genetic bond between the child and the surrogate,¹⁷ States seem keener to accept the legal parentage created between the child and the intended parents, this being one of the reasons why gestational surrogacy is more popular in practice than traditional surrogacy.¹⁸

As mentioned before, surrogacy embraces other types of ART which can be independent from it. For instance, both *in vivo* and *in vitro* fertilisation can be carried out involving only the couple, without the need for a gestational carrier. This is the case when the sperm of the male partner is inseminated in the female partner's womb (*in vivo* fertilisation) or when the sperm and the egg of the couple are joined in the laboratory and then the embryo is implanted in the female partner's womb (IVF). Then again, it is possible to use a sperm donor for *in vivo* fertilisation, while for IVF it is possible to use sperm and/or egg donors, with or without the genetic material of the intended parents. In the above scenarios, a surrogate is not a necessary component, because surrogacy is connected to the gestation of the child.

Thirdly, surrogacy agreements can be either lawful or unlawful. Surrogacy agreements are unlawful in a particular legal system when they are explicitly prohibited or deemed null and void, which go beyond its unenforceability due to the accompanying criminal sanctions. In States where surrogacy arrangements are lawful, there are three approaches that could be taken based on enforceability. These are enforcement through contract, enforcement through pre-authorisation (judicial or extra-judicial) and non-enforceable agreements. Without entering into the debate on which form of enforceability is the most adequate, it is essential to understand the existing different types to later comprehend the different policies adopted by States, which are examined in the next section.

A surrogacy contract is an agreement between the intended parents and the surrogate according to which the latter becomes pregnant and agrees to hand the baby to the intended

¹⁶ Erin Y Hisano, 'Gestational Surrogacy Maternity Disputes: Refocusing on the Child' (2011) 15 *Lewis & Clark Law Review* 517, 520.

¹⁷ The phrase 'genetic link' is preferred to 'biological link', because, given the gestation of the child, it can be held that there is a biological connection between the surrogate and the child, which, however, does not amount to a genetic connection.

¹⁸ Susan L Crockin, 'Growing Families in a Shrinking World: Legal and Ethical Challenges in Cross-Border Surrogacy' (2013) 27 *Reproductive BioMedicine Online* 733, 734.

parents after its birth in return for payment.¹⁹ The payment might serve to cover the actual costs of surrogacy, might be given as compensation or aim at profit for the surrogate.²⁰ The type of costs covered by the payment is a key for the distinction between altruistic and commercial surrogacy, explained later on in this section. Depending on the behaviour of the parties and their will to abide by the contract, complexities might emerge, leading to judicial disputes which are solved on the basis of breach of contract, enforceability, etc. These are judicial disputes mainly on legal parentage and parental responsibility, which seems problematic from a legal certainty point of view.²¹

There is a significant divide in the academic circles on whether a contract is adequate for surrogacy arrangements. Some invoke the freedom to contract and its restriction is perceived as a restriction to procreative liberty,²² while others question the freedom of choice in surrogacy for surrogates,²³ appealing additionally to the power imbalance between the parties of the surrogacy contact.²⁴ More on reproductive freedom is discussed in Chapter 3 and on the power imbalance in surrogacy in Chapter 4.

Pre-authorisation in terms of surrogacy means that before initiating the medical process, the intended parents are granted a pre-birth certification or a pre-conception/pre-birth approval. These can be obtained either by the judiciary or another authority.²⁵ Hence, an order/approval is acquired before commencing the surrogacy treatment and prior to the child's birth. Once the child is born, the order/approval becomes effective and the intended parents are declared the legal parents. Depending on the policy adopted, it might be possible for the surrogate to contest the establishment of the legal parentage. As with contracts, there might be a payment received by the surrogate.²⁶

¹⁹ Anleu (n 8) 64.

²⁰ Kirsty Horsey, 'Surrogacy in the UK: Further Evidence for Reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform' (Surrogacy UK, December 2018) 15-16.

²¹ For example: Oliver Holmes, 'Gay Couple Win Custody Battle against Thai Surrogate Mother' *The Guardian* (Bangkok, 26 April 2016) <<https://www.theguardian.com/world/2016/apr/26/gay-couple-win-custody-battle-against-thai-surrogate-mother>> accessed 4 December 2019.

²² John A Robertson, 'Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction' (1985) 59 *Southern California Law Review* 939, 961.

²³ Rosalind Pollack Petchesky, 'Reproductive Freedom: Beyond "A Woman's Right to Choose"' (1980) 5 *Signs* 661, 668-669.

²⁴ Paula Gerber and Katie O'Byrne, *Surrogacy, Law and Human Rights* (Routledge 2016) 17.

²⁵ Non-judicial authorisation could be provided by a committee or another authority established for this specific purpose.

²⁶ cf policy in Greece (no profit) with California (for profit) discussed in the next section.

A major advantage of the pre-authorisation system is legal certainty for the intended parents and the child, as his or her status is secured from the very beginning of their existence. Judicial disputes are less likely to occur, as legal parentage lies with the intended parents and only marginally can it be contested by the surrogate. There are additional practical benefits deriving from such system, mainly the intended parents having direct/exclusive access and control regarding the treatment of the child immediately after its birth, while they can receive the child directly from the hospital and they are documented in the hospital's original birth record, so they do not need to modify the birth certificate.²⁷ However, it can be criticised as too restrictive for the surrogate's rights over the resulting child.

Finally, the last form of surrogacy arrangements is that of an unenforceable agreement. This category encompasses all types of agreement that are neither binding nor enforceable. In practice, after the birth of the child, there are legal pathways for the intended parents to acquire legal parentage or parental responsibility/custody. In this sense, it seems as a post-authorisation, as compared to the pre-authorisation system discussed above. There might be a payment received by the surrogate for the actual expenses incurred, received as a compensation or amounting to profit. The main issues that might arise in such system are legal disputes and no protection provided to the different parties of surrogacy, in particular when the intended parents or the surrogate change their mind, as their agreement is not enforceable.

However, an advantage could potentially be the flexibility of the system to apply the best interests of the child, without the involvement of a contract or a pre-authorisation certification. For instance, in a relatively recent judgment in the UK, where surrogacy agreements are not enforceable, the parental responsibility of the child born through surrogacy was passed to the intended parents, although the surrogate wanted to keep the baby.²⁸ In contrast, in a more recent judgment by the same judge (Ms Justice Russell), the parental responsibility was granted to the surrogate.²⁹ The outcome might differ, but the basis for both cases was the same legal principle: the best interests of the child. This deliberate

²⁷ Steven H Snyder and Mary P Byrn, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' 39 *Family Law Quarterly* 633, 634.

²⁸ *H v S (Surrogacy Agreement)* [2015] EWFC 36.

²⁹ *Re Z (Surrogacy Agreements: Child Arrangement Orders)* [2016] EWFC 34. Russell J's judgment was later upheld by the Court of Appeal: *Re M (Child)* [2017] EWCA Civ 228.

uncertainty is the result of systems, such as the one in the UK, where priority is given to the interests of the child rather than legal certainty. It is important to highlight, however, that this policy is under examination due to many of its problematic aspects,³⁰ meaning that it could well be the case that the UK will change completely its current stand.³¹

Lastly, based on compensation, surrogacy can be either altruistic or commercial. In altruistic surrogacy, the surrogate does not aim to make a profit from bearing the child for the intended parents. Hence, in altruistic surrogacy, although it is common for some of the surrogate's expenses to be covered by the intended parents, this does not lead to her enrichment nor do the expenses take the shape of an exchange. Such expenses were mentioned above as covering the actual costs incurred or those given as compensation. Contrary to that, surrogacy is commercial if it is, at least in part, aimed at achieving a financial profit for the surrogate. An agreed amount of money is transferred to the surrogate, constituting a financial exchange from the intended parents to her for offering her 'service' to them. It is not always straightforward what amounts to profit payment and what not, making it difficult to draw the line between altruistic and commercial surrogacy. The involvement of payment is controversial due to the danger of exploitation of the women participating in the process and the treatment of children as goods that are exchanged at the altar of economic profit, as discussed in Chapter 4.

Having identified the basic concepts of surrogacy, what follows now is an overview of surrogacy policies found in Europe and in key jurisdiction for cross-border surrogacy. This is done with a view to comprehending the diversity in surrogacy policies, which in combination with restrictive approaches has strong cross-border implications. It is also helpful to keep in mind that should the ECtHR declare the blanket ban on surrogacy to be a violation of Article 8 ECHR, as supported by this thesis, States would need to decide on the different elements of surrogacy, presented above, and/or follow existing (or a combination of existing) surrogacy policies, where surrogacy is lawful.³²

³⁰ More on this in the next section (2.2).

³¹ As per the 2019 Consultation Paper, the current proposal is to adopt a new legal pathway that would establish the intended parents as the child's legal parents from the child's birth: Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law. A Joint Consultation Paper* (Law Com CP No 244/Scot Law Com DP No 167, 2019).

³² Detailed information on what would happen if the hypothetical referral were to succeed can be found in Chapter 6.

2.2 Surrogacy Policies

After having presented the basic concepts of surrogacy, it is now time to consider how States have regulated surrogacy domestically. All around the world, States approach surrogacy differently, according to their legal and ethical standards. It is difficult to enumerate the policies found throughout the Contracting Members of the ECHR, as most regimes are a combination of various elements found in distinct policies, and to catalogue each would be a work of its own right. However, there are patterns observed and identifying them enables a better understanding of the surrogacy panorama within the Council of Europe (CoE) and beyond.

The range of surrogacy policies, starting from its prohibition to its commercial acceptance, demonstrates its controversial nature and the disparity of its regulation worldwide. It is of paramount significance to study this disparity of policies in order to understand how they facilitate the present phenomenon of cross-border surrogacy. This section, therefore, aims at demonstrating the disparity in Europe and beyond, pointing out the ‘need’ for citizens of many States to resort to cross-border surrogacy, examined in the next section. Also, it is important to highlight that there is no regional or international surrogacy regulation at the moment,³³ which means that domestic regulation is currently the only available source.

Broadly speaking, surrogacy policies can be divided into three wide categories: policies where surrogacy is unlawful through regulation/case law, policies where surrogacy is lawful through regulation/case law, or policies where surrogacy is unregulated and there is an absence of case law, which could result in its practice being lawful or unlawful. To demonstrate each category, there are different European jurisdictions discussed. These jurisdictions are representative of different policies and not an attempt to exhaust surrogacy regulation in Europe.

Starting with policies where surrogacy is unlawful, the strictest form can be found among Contracting Members of the ECHR with legislation that expressly prohibits surrogacy in every possible modality. This policy provides for the criminalisation of such acts mainly for

³³ There is an ongoing Parentage/Surrogacy Project convened by the Hague Conference on Private International Law, striving for international agreement on, among others, legal parentage issues in surrogacy. For more on the project: Chapter 6.

the physicians and intermediaries (rarely also for the intended parents and the surrogate), while it is usually followed by a prohibition of surrogacy advertisement. This is the case in Italy, Switzerland and Germany.

In Italy, Article 4(3) of Law No 40 of 19 February 2004 on medically assisted reproduction (MAR) holds that the use of heterologous forms of MAR is prohibited, by heterologous meaning any form of MAR that includes a sperm donor or an egg donor or both.³⁴ The Italian system is very restrictive and, specifically for surrogacy, it holds that ‘[w]hoever, in any form, produces, arranges or advertises ... subrogation of motherhood is punished with imprisonment from three months to two years and a fine’.³⁵ Interestingly, through different judgments the Italian Constitutional Court held that various provisions of this law are unconstitutional.³⁶ However, the same was not extended to surrogacy.³⁷

In Switzerland, according to Article 119(2)(d) of the Federal Constitution of the Swiss Confederation, ‘[t]he donation of embryos and all forms of surrogate motherhood are unlawful’,³⁸ prohibition which is repeated in Article 4 of the Prohibited Practices of Swiss Reproductive Medicine Act 1998.³⁹ Furthermore, this Act provides for punishment imposed on clinicians and intermediaries in the course of surrogacy.⁴⁰ Similarly, in Germany, surrogacy is prohibited and its advertisement is banned by sections 13c and 13d respectively of the Adoption Placement Act,⁴¹ while its section 14b⁴² and the Embryo Protection Act of

³⁴ cf footnote 10.

³⁵ Article 12(6) Law 40/2004 <<https://www.ieb-eib.org/ancien-site/pdf/loi-pma-italie-english.pdf>> accessed 4 December 2019. Translated in English by the European Institute of Bioethics.

³⁶ Irene Riezzo and others, ‘Italian Law on Medically Assisted Reproduction: Do Women’s Autonomy and Health Matter?’ (2016) 16 BMC Women’s Health 44.

³⁷ For example, the prohibition on ‘surrogate pregnancies’ was upheld as valid and effective in paragraphs 9 and 11.1 (pages 12 and 14 respectively) of the Judgment No. 162/2014 of the Italian Constitutional Court <http://old.iss.it/binary/rpma/cont/162_2014_en.pdf> accessed 4 December 2019.

³⁸ Federal Constitution of the Swiss Confederation 1999 <<https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>> accessed 4 December 2019.

³⁹ ‘Ovum and embryo donation and surrogate motherhood are prohibited’: Article 4 Federal Act on Medically Assisted Reproduction 1998 <<https://www.admin.ch/opc/en/classified-compilation/20001938/index.html>> accessed 4 December 2019.

⁴⁰ *ibid* Article 31.

⁴¹ Adoption Placement Act 2001 <<https://germanlawarchive.iuscomp.org/?p=766#s13c>> accessed 4 December 2019.

⁴² *ibid*.

1990 in section 1(1)(7) provide for criminal sanctions for those involved in surrogacy,⁴³ except for the intended parents and the surrogate.

Another strict policy, where surrogacy is also unlawful, is to consider any surrogacy contract null and void, without a straightforward prohibition. This could be done by judicial involvement in common law systems or more commonly by legislation, which, similarly to the abovementioned policy of explicitly prohibiting surrogacy, is frequently followed by criminal sanctions and a prohibition of surrogacy advertisement. Examples of this category are France and Spain. France, in its Civil Code, states that ‘all agreements relating to procreation or gestation on account of a third party are void’.⁴⁴ It additionally criminalises the action of every person involved in a surrogacy agreement in its Penal Code.⁴⁵ In the case of Spain, any type of surrogacy contract (with or without payment) is null and void, legal motherhood is established based on birth, while there is a possibility for the genetic father to demand the recognition of his legal paternity.⁴⁶ In addition, the Spanish Criminal Code provides for criminal punishment on commercial surrogacy and its concealment from the authorities, according to its Articles 220-221.⁴⁷

Notwithstanding the strict approach towards domestic surrogacy, in practice, States where surrogacy is unlawful legalise the effects of cross-border surrogacy either through judicial channels or administrative acts. While this is elaborated in detail in the next section, it is important to highlight here that legalising its effects comes as a response to the problem of cross-border surrogacy and thus creates a problematic regulatory distinction between the treatment of domestic and cross-border surrogacy. In particular, while legalising the effects of cross-border surrogacy is vital for the best interests of the children born through surrogacy, among other inconveniences, it creates a random inequality between those who can afford travelling abroad to undertake surrogacy and those who cannot.

⁴³ Section 1(1)(7) of the Act for Protection of Embryos or The Embryo Protection Act 1990 <https://www.rki.de/SharedDocs/Gesetztexte/Embryonenschutzgesetz_englisch.pdf?__blob=publicationFile> accessed 4 December 2019.

⁴⁴ Article 16(7) of the French Civil Code (Napoleonic Code) 1804 (Revised in 2016) <https://www.legifrance.gouv.fr/content/download/1950/13681/version/3/.../Code_22.pdf> accessed 4 December 2019. Translated by Professor Georges Rouhette with the assistance of Dr Anne Rouhette-Berton.

⁴⁵ Article 227(12)-(14) of the French Penal Code 1994 <<https://www.legifrance.gouv.fr/content/location/1740>> accessed 4 December 2019.

⁴⁶ Article 10 of the Spanish Law 14/2006 on Human Assisted Reproduction Techniques.

⁴⁷ Spanish Criminal Code 1995 <www.legislationline.org/documents/id/18769> accessed 4 December 2019.

Proceeding to a more permissive approach where surrogacy is lawful, there are policies affirming the validity of surrogacy contracts, without making a distinction between commercial and altruistic surrogacy. Such are the examples of policies found in Russia, Ukraine and Georgia. According to section 51(4)(2) of the Russian Family Code, given the surrogate's consent, it is possible for the intended parents to be registered as the legal parents of the child.⁴⁸ Although the regulation does not distinguish between altruistic and commercial surrogacy, the Federal Law on the Basis of Protection of Citizens' Health (2011) in section 55(10), sets up some conditions to be fulfilled.⁴⁹ According to these conditions, the surrogate must be between twenty and thirty-five years old, have at least one healthy child of her own, have received a medical certificate of good health and give her written informed consent to the medical intervention. In case the surrogate is married, a written consent of the spouse is also required. More importantly, according to the Russian law, traditional surrogacy is not allowed and the surrogate cannot be both the egg donor and the gestational carrier of the child.⁵⁰ A crucial change introduced by this Federal Law is that the intended parents have to provide their own genetic material, something that was repeated by the Decree no. 107 of the Minister of Health on 30 August 2012.⁵¹ Lastly, a significant feature is that the surrogate has the right to keep the child, should she change her mind, while surrogacy is available to opposite-sex married and unmarried couples as well as single women, excluding same-sex couples and single men.⁵²

In contrast, in Ukraine, surrogacy is permitted only to (opposite-sex) married couples.⁵³ Beyond that, traditional surrogacy is not accepted and the couple opting for surrogacy must suffer from an infertility problem, while disputes arising from the contract between the intended parents and the surrogate are resolved in favour of the intended parents.⁵⁴ In the case of Georgia, IVF is allowed in evidence of infertility problems and the intended parents must

⁴⁸ The Family Code of the Russian Federation 1995 <<http://www.jafbase.fr/docEstEurope/RussianFamilyCode1995.pdf>> accessed 4 December 2019.

⁴⁹ Federal Law No. 323-FZ of 21 November 2011 on Basics of Health Protection of the Citizens in the Russian Federation (as amended on 29 December 2015).

⁵⁰ *ibid.*

⁵¹ Cited in *Paradiso and Campanelli v Italy* [2017] ECHR 96, para 74.

⁵² For further information: Olga Khazova, 'Russia' in Katarina Trimmings and Beaumont Paul (eds), *International Surrogacy Arrangements* (Hart Publishing 2013) 311.

⁵³ Article 123(2) of the Family Code of Ukraine 2002 <http://jafbase.fr/docEstEurope/FAMILY_CODE_OF_UKRAINE.pdf> accessed 4 December 2019.

⁵⁴ Gennadiy Druzenko, 'Ukraine' in Katarina Trimmings and Beaumont Paul (eds), *International Surrogacy Arrangements* (Hart Publishing 2013) 357.

provide their written consent for the process, while a donor or the surrogate cannot claim legal parenthood of the child.⁵⁵

Departing from surrogacy contracts, there are legal systems that allow surrogacy in its altruistic form, without, however, allowing the enforceability of surrogacy agreements. In the UK, the Surrogacy Arrangements Act 1985 declares that no surrogacy arrangement is enforceable by or against any of the persons making it.⁵⁶ This means that the surrogate can refuse to surrender the child to the intended parents if she wishes to do so. Surrogacy is open to both opposite and same-sex couples or single individuals. Advertising and commercial dealings constitute an offence,⁵⁷ albeit reasonable expenses are to be covered to the surrogate; yet there are no established criteria or guidance as to what embraces a reasonable expense.

The surrogate is the legal mother of the child, as legal motherhood is established by birth,⁵⁸ while her husband or partner, if any, is the legal father where he consents.⁵⁹ Therefore, the intended parents need to acquire legal parenthood by either adoption or a parental order. The latter has to be requested within six months of the baby's birth,⁶⁰ while the intended parent or one of the intended parents must be genetically related to the child.⁶¹ In addition, for the parental order to be granted, the courts must be satisfied that no prohibited payment (which excludes reasonable expenses) has been made, unless authorised by the court.⁶² Courts are often 'obliged' to authorise retrospectively what would otherwise amount to prohibited payment, based on the best interests of the child.⁶³ Many of these conditions are considered problematic and, as mentioned above, there is an ongoing project undertaken by the Law Commission of England and Wales and the Scottish Law Commission to propose a new surrogacy legislation.⁶⁴

⁵⁵ Article 143 of the Law of Georgia on Health Protection 1997 <<http://www.surrogacy.ge/en/2013-03-12-09-59-47>> accessed 4 December 2019.

⁵⁶ Surrogacy Arrangements Act 1985, s.1A.

⁵⁷ *ibid* ss.2-3.

⁵⁸ Human Fertilisation and Embryology Act 2008, s.33.

⁵⁹ *ibid* ss.35-36.

⁶⁰ *ibid* s. 54(3) and s.54A(2).

⁶¹ *ibid* s.54(1)(b) and s.54A(1)(b).

⁶² *ibid* s.54(8) and s.54A(7).

⁶³ For example: *Re C* [2002] EWHC 157, as highlighted by Shaun D Pattinson, *Medical Law and Ethics* (5th edn, Sweet & Maxwell 2017) 309. The case refers to s.30 of the 1990 Human Fertilisation and Embryology Act, which was amended and is now s.54 of the 2008 Act.

⁶⁴ Law Com & Scot Law Com (n 31).

A different policy is encountered in States that, in order to avoid legal uncertainty and the complexities of contracts and unenforceable agreements, have developed a pre-authorisation system. For instance, in Greece, the intended mother needs to lodge an application before the courts and receive an authorisation, allowing the ‘parties’ to proceed to surrogacy, which further means that, after birth, there is an assumption that the intended mother is the mother of the child.⁶⁵ However, the surrogate or the intended mother can contest the legal parenthood within six months from birth, if it is proven that the resulting child is genetically related to the surrogate.⁶⁶

In this system, therefore, the only form permitted is gestational surrogacy and the surrogate does not establish any kinship with the child, apart from the above exception. The court provides the authorisation based on the fulfilment of the criteria set up by legislation.⁶⁷ The criteria established, among others, are the health inability of the intended mother to gestate, the psychological evaluation of the surrogate, age limits for both women, private agreement of the participants before a notary, etc. The criterion that both women should be domiciled in Greece was amended in 2014,⁶⁸ making it acceptable if at least one of them is domiciled or a temporary resident in Greece, which has opened the door for cross-border surrogacy for those wishing to undergo surrogacy in Greece.

The peculiarity of the Greek system is that apart from the judicial pre-authorisation, the application before the Court should be submitted by the intended mother only; it cannot be presented by the intended father.⁶⁹ In addition, same-sex couples and single men are deprived of the right to access surrogacy.⁷⁰ As mentioned already, altruistic surrogacy is the only acceptable form of surrogacy under the Greek law. There is no room for financial exchange between the intended parents and the surrogate, although it is possible to cover expenses

⁶⁵ Article 1464 of the Greek Civil Code 1946.

⁶⁶ *ibid.*

⁶⁷ Combination of Article 13 of Law 3305/2005 and Article 1458 of the Greek Civil Code 1946.

⁶⁸ The change was introduced by Article 17 of Law 4272/2014, which modified Article 8 of Law 3089/2002.

⁶⁹ For example, there is an appeal court ruling rejecting the judicial pre-authorisation application submitted by an intended father after the public prosecutor challenged the first instance judgment accepting the same application: Judgment No 3357/2010 of the Court of Appeal of Athens. However, based on the first instance pre-authorisation, the surrogacy process was initiated and, by the time of the Court of Appeal rejection, the twins born through surrogacy were already one year old.

⁷⁰ The prevailing view is that the idea behind surrogacy is the inability of a woman to carry a child, hence only women can apply for judicial pre-authorisation: Takis Vidalis, ‘The Family Imperative: The Constitutionality of the Law on “Medical Assistance to Human Reproduction” (Το πρόταγμα της οικογένειας: Η συνταγματικότητα του νόμου για την «ιατρική υποβοήθηση στην ανθρώπινη αναπαραγωγή)»’ (2003) 51 *Nomiko Vima* 389.

related to pregnancy, childbirth, puerperium and absence of work, given that these expenses are not considered as aiming at profit and there are price limits established by the authorities.⁷¹

Finally, there are legal systems that lack any type of legislation regarding surrogacy. In such cases, there is some type of soft-law regulation, ethical guidelines that either permit or prohibit surrogacy in practice. For instance, in Ireland, domestic surrogacy does take place without being regulated.⁷² While the proposal of the Commission on Assisted Human Reproduction to regulate domestic surrogacy with the presumption that the intended parents are the legal parents has yet to be incorporated into the legislation,⁷³ there are currently some formal guidelines that lead to the acceptance of cross-border surrogacy.⁷⁴ The scene in Ireland is soon to be changed, as there is an ongoing legislative proposal on surrogacy, resembling the current UK approach.⁷⁵ In the Netherlands, although promoting commercial surrogacy is prohibited by the Dutch Criminal Code in its Articles 151b-c,⁷⁶ there are specific guidelines regulating IVF surrogacy.⁷⁷ In contrast, in Hungary, in the absence of surrogacy on the exhaustive list of reproductive methods that are considered legal in the Act on Health Care, surrogacy is considered illegal and not practised.⁷⁸

Although the main focus of this thesis is surrogacy in Europe, examples of other jurisdictions can help illustrate that similar policy patterns and disparities in surrogacy are to be found worldwide, which further contributes to the phenomenon of cross-border surrogacy. In

⁷¹ Article 13(4) of Law 3305/2005.

⁷² Alison O'Reilly, 'The Woman Who Proves Ireland Needs a New Law on Surrogacy' *Extra.ie* (2 April 2019) <<https://extra.ie/2019/04/02/news/real-life/becky-loftus-dore-surrogacy-laws>> accessed 4 December 2019.

⁷³ Citizens Information 'Surrogacy' <https://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/surrogacy.html> accessed 4 December 2019.

⁷⁴ Department of Justice and Equality, 'Citizenship, Parentage, Guardianship and Travel Document Issues in Relation to Children Born as a Result of Surrogacy Arrangements Entered into Outside the State' <http://www.justice.ie/en/JELR/20120221_Guidance_Document.pdf/Files/20120221_Guidance_Document.pdf> accessed 4 December 2019.

⁷⁵ For more: Brian Tobin, 'An Appraisal of Ireland's Current Legislative Proposals for Regulating Domestic Surrogacy Arrangements' (2019) 41 *Journal of Social Welfare and Family Law* 205.

⁷⁶ Dutch Criminal Code 1881 <http://www.ejtn.eu/PageFiles/6533/2014_seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf> accessed 4 December 2019. Translated by the European Judicial Training Network (EJTN).

⁷⁷ Guidelines on IVF-surrogacy by the Dutch Society for Obstetrics and Gynaecology 1999.

⁷⁸ Csongor István Nagy, 'Hungary' in Katarina Trimmings and Beaumont Paul (eds), *International Surrogacy Arrangements* (Hart Publishing 2013) 175, 177.

addition, Europeans travel to many jurisdictions outside Europe to undertake cross-border surrogacy. Therefore, there is a brief presentation of five jurisdictions, chosen due to their importance for cross-border surrogacy either as destination or receiving States of surrogacy.

In Australia, a significant receiving State for reproductive purposes,⁷⁹ surrogacy is legal in its altruistic form, except for the Northern Territory, where there is no legislation regarding surrogacy.⁸⁰ In some States and Territories, traveling overseas to engage in surrogacy is considered a criminal act and entails imprisonment.⁸¹ Access to surrogacy for intended parents is an option for everybody regardless of their gender, sexual orientation or relationship status,⁸² while it could also be restricted only to opposite-sex couples or women.⁸³ There was a recommendation made to the Australian Law Reform Committee in 2016,⁸⁴ aiming to develop a model national law to regulate altruistic surrogacy, which, however, has not led to any action taken so far.⁸⁵

In a similar vein, commercial surrogacy is a prohibited activity in Canada, while altruistic surrogacy is the only form permitted, although at federal level here.⁸⁶ Canada is important both as destination and receiving State of surrogacy.⁸⁷ An important advantage it offers as a destination State is that intended parents are granted a birth certificate and they are regarded

⁷⁹ Horsey (n 20) 29-30.

⁸⁰ Alison Barrett and Jillian Barrett, 'Surrogacy: Who Can Have Your Baby in Australia?' *Brisbane Times* (2 December 2016) <<https://www.brisbanetimes.com.au/national/queensland/surrogacy-who-can-have-your-baby-in-australia-20161202-gt2rbb.html>> accessed 4 December 2019.

⁸¹ These are the Australian Capital Territory (ACT), New South Wales and Queensland: Australian Government-Department of Home Affairs, Immigration and Citizenship 'International Surrogacy Arrangements' <<https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements>> accessed 4 December 2019.

⁸² Barrett and Barrett (n 80). This happens in Queensland, Victoria, New South Wales and Tasmania.

⁸³ *ibid.* In Western Australia, South Australia and the ACT.

⁸⁴ Cross-party House of Representatives Standing Committee on Social Policy and Legal Affairs Inquiry Report 'Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements' (Commonwealth of Australia, April 2016) <https://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/Inquiry_into_surrogacy/Report> accessed 4 December 2019.

⁸⁵ The Australian Government has replied to the suggestions of the Committee in November 2018, supporting some recommendations and rejecting others: Australian Government Response to the House of Representatives Standing Committee on Social Policy and Legal Affairs Report: Surrogacy Matters <<https://www.ag.gov.au/Publications/Pages/AustralianGovernmentresponsetothehouseofrepresentativesstandingcommitteesocialpolicyandlegalaffairsreport.aspx>> accessed 4 December 2019.

⁸⁶ Assisted Human Reproduction Act 2004.

⁸⁷ For example: Alison Motluk, 'How Canada Became an International Surrogacy Destination' *The Globe and Mail* (5 October 2018) <<https://www.theglobeandmail.com/opinion/article-how-canada-became-an-international-surrogacy-destination/>> accessed 4 December 2019.

the legal parents of the child from the outset.⁸⁸ Also, children born through surrogacy in Canada acquire a Canadian passport, which makes the return to the receiving State smoother for intended parents and their children.⁸⁹

India is a prime example of how domestic regulation can change drastically due to the influence of cross-border surrogacy. While for many years India was a popular surrogacy destination because of its lenient rules,⁹⁰ it gradually became unavailable to foreigners. In 2015, a change was introduced for foreigners, requiring them to have alongside their visa application a letter stating that commercial surrogacy is legal in their State of origin/receiving State.⁹¹ In 2016, a Bill that prohibits commercial surrogacy was introduced by the Indian parliament, allowing altruistic surrogacy only to opposite-sex married couples, which was passed in 2018.⁹² Similar changes to domestic law have been introduced in Thailand, Nepal and Mexico, again in order to eliminate cross-border surrogacy taking place in their States.⁹³

In Israel, surrogacy arrangements are regulated through legislation.⁹⁴ Surrogacy is allowed only to opposite-sex married couples and single women.⁹⁵ A request for approval of a surrogacy agreement has to be submitted to the Fetus Carriage Agreements Approval Board/Committee.⁹⁶ Its peculiarity lies on the fact that the intended parents and the surrogate must share the same religion, as, in Judaism, the religion of the child is based on the mother's

⁸⁸ 'Surrogacy in Canada' (*Brilliant Beginnings*) <<https://www.brilliantbeginnings.co.uk/intended-parents/surrogacy-in-canada>> accessed 4 December 2019.

⁸⁹ 'Surrogacy in Canada' (*Sensible Surrogacy*) <<https://www.sensible-surrogacy.com/surrogacy-in-canada/>> accessed 4 December 2019.

⁹⁰ India was even named the 'mother destination' of surrogacy: Sharmila Rudrappa, 'Working India's Reproduction Assembly Line: Surrogacy and Reproductive Rights?' (2012) 66 *Western Humanities Review* 77.

⁹¹ Ministry of Home Affairs of India 'Circular No.25022/74/2011-F.I(Vol.III)' (November 2015) <https://mha.gov.in/PDF_Other/surrogacy03112015.pdf> accessed 4 December 2019.

⁹² Vaibhav Tiwari, 'Surrogacy Regulation Bill Passed In Lok Sabha: 10 Points' *NDTV* (New Delhi, 19 December 2018) <<https://www.ndtv.com/india-news/surrogacy-regulation-bill-passed-in-lok-sabha-10-points-1965215>> accessed 4 December 2019.

⁹³ An example can be found in: Victoria Burnett, 'As Mexican State Limits Surrogacy, Global System Is Further Strained' *The New York Times* (23 March 2017) <<https://www.nytimes.com/2017/03/23/world/americas/as-mexican-state-limits-surrogacy-global-system-is-further-strained.html>> accessed 4 December 2019. However, it is shown in this thesis how the law-on-the-books does not always reflect the law-in-practice.

⁹⁴ Agreements for the Carriage of Fetuses (Approval of Agreement and Status of the New Born) Law, 5756-1996.

⁹⁵ Jen Willows, 'Protests in Tel Aviv as Gay Amendment in Israeli Surrogacy Bill Thrown Out' *BioNews* (23 July 2018) <https://www.bionews.org.uk/page_137284> accessed 4 December 2019.

⁹⁶ Elly Teman, 'Surrogacy in Israel: State-Controlled Surrogacy as a Mechanism of Symbolic Control' in Eric Scott Sills (ed), *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (2016) 165, 168.

religion.⁹⁷ However, if not all parties are Jewish, the Committee might still permit the surrogacy agreement, following the opinion of the clergyman part of the Committee.⁹⁸ Due to its restrictive policy, many Israelis seek surrogacy abroad, making it a significant receiving State.⁹⁹

Lastly, in the United States of America, in some States, surrogacy contracts or agreements are void and unenforceable,¹⁰⁰ although many of these States tolerate surrogacy.¹⁰¹ Some States lack any regulation and, as there is no statute that either permits surrogacy or prohibits it, surrogacy is practised.¹⁰² Beyond this, surrogacy agreements might be permitted by established case law¹⁰³ or are lawful according to a statute.¹⁰⁴ It seems that gestational surrogacy is prevailing against traditional surrogacy.¹⁰⁵ The eligibility for the intended parents varies among States, with some States allowing surrogacy only for opposite-sex married couples¹⁰⁶ or for both opposite and same-sex married couples,¹⁰⁷ while others allow surrogacy even for unmarried couples or single individuals.¹⁰⁸ Lastly, in some States, it is possible to be granted a pre-birth parentage order. This is a highly ‘desirable’ trait that leads many individuals or couples to California,¹⁰⁹ one of the most important destination States for cross-border surrogacy, attracting intended parents from both American States and worldwide (Europeans and non-Europeans).¹¹⁰

⁹⁷ Abraham Benshushan and Joseph G Schenker, ‘Legitimizing Surrogacy in Israel’ (1997) 12 Human Reproduction 1832.

⁹⁸ *ibid.*

⁹⁹ Horsey (n 20) 29-30.

¹⁰⁰ For example: New York Domestic Relations Law 1896, Article 8(122).

¹⁰¹ Notwithstanding the ‘surrogate parentage contracts’ prohibition, surrogacy is practised in Arizona after the judgment *Soos v Superior Court*, 897 P.2d 1356, 182 Ariz 470 (1994), Court of Appeals of Arizona, USA.

¹⁰² ‘Alabama’ (*Creative Family Connections*) <<https://www.creativefamilyconnections.com/us-surrogacy-law-map/alabama/>> accessed 4 December 2019.

¹⁰³ Gestational surrogacy in Ohio since *JF v DB* 116 Ohio St.3d 363, 2007-Ohio-6750, Ohio Supreme Court, USA.

¹⁰⁴ 2014 Florida Statutes, Title XLIII, Chapter 742, Section 15.

¹⁰⁵ Traci C Johnson, ‘Using a Surrogate Mother: What You Need to Know’ *WebMD* (7 September 2017) <<https://www.webmd.com/infertility-and-reproduction/guide/using-surrogate-mother#3>> accessed 4 December 2019.

¹⁰⁶ 2016 Louisiana Laws, Revised Statutes, Title 9, §2718.

¹⁰⁷ Florida (n 104).

¹⁰⁸ Nevada Revised Statutes, Chapter 126, 126.500-126.810.

¹⁰⁹ 2011 California Code, Family Code, § 7960.

¹¹⁰ Jancee Dunn, ‘How California Became the World’s Fertility Treatment Destination’ *Vogue* (13 March 2019) <<https://www.vogue.com/article/california-worlds-fertility-treatment-destination?verso=true>> accessed 4 December 2019.

This panorama of policies found throughout Europe and beyond demonstrates how diverse surrogacy regulation is. Although there are discernible patterns in surrogacy policies, even within those patterns there are many differences from one jurisdiction to another.¹¹¹ The diversity and disparity of regulation has facilitated the phenomenon of cross-border surrogacy. It is not to say that cross-border surrogacy is solely the ‘product’ of this disparity, but, as elaborated in the next session, it seems to indeed lead people from States with strict surrogacy policies to seek the service in surrogacy-friendly States. The problem regarding the wide range of surrogacy policies has been identified by the Council on General Affairs and Policy of the Hague Conference (HCCH), which convened a group of experts (Experts’ Group) in order to explore the feasibility of reaching a multilateral agreement among the different States. This is called the ‘Parentage/Surrogacy Project’, but, until now, a significant advance towards an international convention has not been possible.¹¹²

After having shown the disparity of surrogacy policies, it is now time to consider the problematic phenomenon of cross-border surrogacy. The spectrum of surrogacy policies was given in order to acquire a better understanding of surrogacy and its cross-border phenomenon. From the above overview of surrogacy policies, this thesis addresses only the restrictive approaches in Europe that render surrogacy unlawful or, notwithstanding their unregulated nature or lack of case law, are considered unlawful, mainly through the potential application of other (general) criminal sanctions against those involved in surrogacy.¹¹³ It is against these States that the hypothetical referral to the ECtHR would be lodged, claiming that a blanket prohibition of surrogacy is a violation of Article 8 ECHR. Nevertheless, it was already mentioned that other States, where domestic surrogacy is lawful but ineffective due to restrictive policies, can also benefit from the ECHR framework.¹¹⁴

Furthermore, although there is a difference between explicitly prohibiting surrogacy agreements, considering them null and void with accompanying criminal sanctions, or leaving them unregulated while applying general criminal sanctions, their result is essentially the same for the purposes of this thesis, i.e. they render domestic surrogacy unlawful. Therefore, a blanket ban or prohibition on surrogacy, phrase used throughout this thesis, is

¹¹¹ For example: cf pre-authorisation in Greece and Israel.

¹¹² Greater elaboration of this point can be found in Chapter 6.

¹¹³ For example, this occurs in Hungary: Nagy (n 78) 177.

¹¹⁴ Restrictive and ineffective policies where domestic surrogacy is lawful are discussed mainly in Chapter 3 and Chapter 6.

meant to cover all three possibilities: explicitly prohibiting surrogacy, considering surrogacy agreements null and void (where the activity is criminalised) or where surrogacy is unregulated but prohibited in practice. Lastly, a ban/prohibition refers to the inability to enter into the agreement and initiate the medical process of surrogacy, given that this is unlawful, and does not focus on its criminalisation (or advertisement) prohibition, although it essentially derives from the latter.

2.3 Blanket Ban and Cross-border Surrogacy

Having presented the different surrogacy policies, the reason why this thesis focuses on the most restrictive ones is because it considers the blanket ban on surrogacy problematic. This is attributed mainly to three factors: surrogacy as a method of reproduction, cross-border surrogacy and black-market surrogacy. This chapter examines cross-border reproductive treatment in the form of international surrogacy originating from Contracting States with a blanket prohibition on surrogacy. However, cross-border reproductive treatment can originate even from Contracting States where domestic surrogacy is performed lawfully, showing that it is not an outcome based only on the unlawfulness of surrogacy. The latter is examined in Chapter 6 together with the need for an international agreement on surrogacy.

The most apparent reason why prohibiting surrogacy is problematic lies in the fact that it can constitute a major method of reproduction. The desire to have children can be very strong and sometimes surrogacy is the sole means of bringing this dream to fruition. Hence, surrogacy benefits people who suffer from infertility or are otherwise involuntary childless and can become parents through access to ART and surrogacy in particular. Prohibiting surrogacy would impede this type of parenthood for those with involuntary childlessness, which, however, has been enabled by developments in assisted reproduction. Some Contracting States of the ECHR have opted for a blanket prohibition of surrogacy aiming at shielding surrogates and children from abuses.¹¹⁵ Nevertheless, this blanket prohibition forms a barrier to a practice that can be highly valuable for some individuals/couples and the society, practice that, through rigorous regulation, can be performed without abuses. This final point is discussed further in Chapter 4.

¹¹⁵ More on the States' arguments against surrogacy in Chapter 4.

Enabling the desire to become a parent is certainly not the only reason why prohibiting surrogacy is problematic. A further reason why surrogacy should be allowed is that a blanket prohibition of surrogacy has proven to be unsustainable. Instead of relying on the process domestically, citizens of such jurisdictions travel abroad to engage in surrogacy. Hence, the State fails to protect the interests it claims to uphold, i.e. shielding surrogates and children born through surrogacy. It just pushes the problem outside its borders. This creates (or rather aggravates) the phenomenon of cross-border surrogacy and, in extreme cases, results in the emergence of black-market surrogacy. For cross-border surrogacy, the problem lies both in the creation of the cross-border phenomenon in its current magnitude and, additionally, the inequality between cross-border surrogacy and domestic surrogacy.

Although a disincentivising factor, a blanket ban on surrogacy has not succeeded in keeping citizens from engaging with surrogacy. Instead, it has driven citizens to surrogacy-friendly States, creating the phenomenon of cross-border surrogacy. Cross-border surrogacy, as defined in Chapter 1, is the phenomenon of travelling to other jurisdictions for access to surrogacy services. The cross-border phenomenon is not unique to surrogacy. Cross-border reproductive treatment, i.e. the practice of seeking reproductive services abroad, is common in other fields as well, e.g. gamete donation.¹¹⁶ This is often referred to as medical and, in particular, reproductive tourism, which, however, is heavily contested, mainly due to its implication of pleasure and leisure.¹¹⁷ Therefore, alternative phrases, such as ‘reproductive mobilities’, are frequently used instead of reproductive tourism, as they are deemed more adequate.¹¹⁸ The term preferred by this thesis is ‘cross-border reproductive treatment’.

There are certain problems and risks associated with cross-border reproductive treatment in general.¹¹⁹ Nonetheless, crossing the border to receive treatment is particularly problematic in the field of surrogacy because of its various repercussions primarily on the children born through cross-border surrogacy. More often than not, children born through cross-border surrogacy linger in a legal limbo, as the receiving State does not acknowledge the parental

¹¹⁶ Françoise Shenfield and others, ‘Cross Border Reproductive Care in Six European Countries’ (2010) 25 *Human Reproduction* 1361.

¹¹⁷ Emily Jackson, *Medical Law: Text, Cases and Materials* (5th edn, Oxford University Press 2019) 798.

¹¹⁸ More on the term debate and its alternatives: Carolin Schurr, ‘Multiple Mobilities in Mexico’s Fertility Industry’ (2019) 14 *Mobilities* 103, 104-106.

¹¹⁹ Anna P Ferraretti and others, ‘Cross-Border Reproductive Care: A Phenomenon Expressing the Controversial Aspects of Reproductive Technologies’ (2010) 20 *Reproductive BioMedicine Online* 261, 264-265.

relationship between the children and the intended parents, rendering them parentless.¹²⁰ The children's limping legal status is coupled with the receiving State denying to award them its nationality.¹²¹ In the worst case scenario, the children might even be stateless, when the destination State does not award them its nationality either.¹²² Both cases frequently end up with children and intended parents trapped for a long period of time in the jurisdiction where surrogacy was performed until a potential solution is reached by the receiving State, either by just allowing them entrance to the State¹²³ or by registering the children before their Consulate/Embassy and issuing them a passport.¹²⁴ This precarious legal status of children born through cross-border surrogacy is of utmost concern to the Experts' Group of the HCCH in their quest to find a potential solution for international surrogacy arrangements.¹²⁵

International surrogacy arrangements are growing fast, with surrogacy destinations often called booming industries.¹²⁶ It is difficult to know the exact number of children born through surrogacy, mainly because there seems to be no formal documentation at national or international level and no legal framework either, in particular where there is a blanket ban on surrogacy.¹²⁷ However, in 2016, the International Social Service (ISS) in its call for action, based on the 'urgent need for regulation of international surrogacy and artificial reproductive technologies', estimated that there are at least 20,000 children born through cross-border

¹²⁰ This happened in the cases *Menesson* and *Labassee* mentioned below.

¹²¹ This is a consequence of failing to establish any 'link' with the receiving State, as the parental relationship or birth certificates are not recognised, where *jus sanguinis* is followed, or they were not born in that State, where *jus soli* applies.

¹²² For example, Baby Manji, born through surrogacy in India, was not awarded either the Indian or the Japanese nationality (that of her intended parents): *Baby Manji Yamada v Union of India & Anr* [2008] INSC 1656.

¹²³ *Jan Balaz v Anand Municipality and Ors* [2010] AIR Guj 21. In this case, twins born in India to an intended father, a German citizen, were eventually allowed entrance to Germany and, once there, the adoption procedure was followed.

¹²⁴ This is the case of Spain, where children are usually registered in the Spanish Consulate or Embassy in the destination State and then travel back to Spain with the intended father and his spouse/partner, if any. For complications in the process: Silvia Blanco, 'Spanish Couples Undergoing Surrogacy Processes Left in Legal Limbo in Ukraine' *El País* (Madrid, 31 August 2018) <https://elpais.com/elpais/2018/08/30/inenglish/1535636353_685609.html> accessed 4 December 2019.

¹²⁵ HCCH 'The Parentage/Surrogacy Project' <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>> accessed 4 December 2019.

¹²⁶ Claire Fenton-Glynn, 'Surrogacy: Why the World Needs Rules for "selling" Babies' *BBC* (University of Cambridge, 26 April 2019) <<https://www.bbc.co.uk/news/health-47826356>> accessed 4 December 2019.

¹²⁷ Similar reasons are noted in: European Parliament, 'A Comparative Study on the Regime of Surrogacy in EU Member States' (2013) 9 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET\(2013\)474403_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf)> accessed 4 December 2019. An example on the difficulties of estimating the surrogacy numbers at national level can be found in Horsey (n 20) 20 onward.

surrogacy every year, with numbers increasing.¹²⁸ Similarly, although holding that an exact number is impossible, the HCCH Parentage/Surrogacy Project emphasises the evolution of the surrogacy phenomenon with an accompanying demand for its services.¹²⁹

There are various reasons why individuals or couples choose cross-border treatment and, given the disparity of surrogacy regulation shown in the previous section, a range of options is available to them. A study conducted in 2010 among six European States showed that the main reasons to cross the border were legal restrictions due to the ban of a particular ART, or because it is not possible to access the domestic treatment based on the characteristics of the patient (age, sexual orientation or civil status).¹³⁰ The latter partially explains why international surrogacy originates even from States where domestic surrogacy is lawful, which, coupled with other reasons, comes as no surprise.¹³¹ Nevertheless, given the unavailability of the reproductive method, cross-border surrogacy is a necessity among Contracting States of the ECHR that prohibit surrogacy.¹³²

Notwithstanding the absence of official records,¹³³ there are different studies with statistics on cross-border surrogacy originating from Europe, which indicate that intended parents originate primarily from States with a blanket prohibition on surrogacy.¹³⁴ These statistics are based on agencies that were willing to cooperate with the academics conducting the surveys, hence a very small sample of the real numbers of people undertaking surrogacy. However,

¹²⁸ 'Call for Action 2016: Urgent Need for Regulation of International Surrogacy and Artificial Reproductive Technologies' (*International Social Service (ISS)*, 2016) <https://www.iss-ssi.org/images/Surrogacy/Call_for_Action2016.pdf> accessed 4 December 2019.

¹²⁹ HCCH Permanent Bureau 'A Preliminary Report on the Issues Arising from International Surrogacy Arrangements' (Pre Doc No 10, March 2012) 6-8.

¹³⁰ Shenfield and others (n 116) 1363.

¹³¹ This is further elaborated in Chapter 6.

¹³² In a similar vein, the Permanent Bureau HCCH argues that 'prospective intending parents are often using surrogacy services abroad because they are prohibited or restricted at home', without confining this to Europe. HCCH Permanent Bureau (n 129) 7.

¹³³ A simple explanation is that surrogacy is unlawful in most receiving European States and, therefore, the activity is not documented properly, as discussion arises mostly through judicial cases.

¹³⁴ For example, Germany, Italy, France and Spain top one of the surveys in Paul Beaumont and Katarina Trimmings, *International Surrogacy Agreements* (Hart Publishing 2013) 468. The same goes for Sweden and Norway (in both surrogacy is prohibited), as shown by the 'International Trends in Utilisation of Surrogacy' report of 'Families Through Surrogacy' in Horsey (n 20) 30.

the abundance of cases in Europe, brought to light by the media or through judicial cases, are strong indications in favour of the aforementioned assumption.¹³⁵

It becomes apparent that having a blanket prohibition has not proven to be efficient for these States to stop surrogacy. Instead, it has exacerbated the phenomenon of cross-border, making it a necessity to travel abroad to undertake surrogacy. This, in conjunction with the diversity of surrogacy policies worldwide, has brought the cross-border surrogacy phenomenon to its current magnitude. Although there are no statistics for surrogacy in particular, a study investigating ‘reproductive migration’ in Italy showed that the introduction of the (restrictive to ART) 2004 Law caused a rise from 1,066 couples seeking treatment abroad in 2003 to 4,172 in 2005.¹³⁶ As the authors note, cross-border reproductive treatment already existed before the restrictions, but once the law was passed, in only a matter of months, the number quadrupled.¹³⁷ It would not be uncalled for to speculate that a similar rise in numbers has probably occurred with surrogacy.

In addition, notwithstanding the blanket ban on surrogacy, the frequency of international surrogacy arrangements and their severe consequences, mainly for the children, as described above, has led receiving States to adopt different policies to mitigate the effects of cross-border surrogacy. On the one hand, domestic surrogacy is not permitted and there are criminal sanctions for the intermediaries involved in the process alongside prohibitions on advertisement. On the other hand, the same States have changed their policies to allow the registration of children born through cross-border surrogacy. Consequently, although domestic regulation remains strictly prohibited, there is a legalisation of the effects of cross-border surrogacy.

This legalisation of the effects of cross-border surrogacy was influenced by the ECtHR findings in *Labassee*¹³⁸ and *Menesson*.¹³⁹ In these two key judgments, the ECtHR held that it is in the best interests of the children born through cross-border surrogacy to be registered in the receiving State. If national authorities deny the civil registry of the children, this

¹³⁵ An example of high profile cases that caught the media attention: Blanco (n 124). For judicial cases, see below the example of France.

¹³⁶ Study by the Centre d’Etude et de Conservation des Oeufs et du Sperme, as presented in Ferraretti and others (n 119) 263.

¹³⁷ *ibid.*

¹³⁸ *Labassee v France* [2014] ECHR 668.

¹³⁹ *Menesson v France* [2014] ECHR 664.

constitutes a violation of the children's right to respect for private and family life (Article 8 ECHR), albeit not the right to respect for private and family life of the intended parents. The aforementioned judgments exerted a significant influence on Contracting States with a strict line towards surrogacy, who eased their prohibitive policies either through domestic case law or administrative acts.

In Spain, surrogacy contracts are considered null and void and there are criminal sanctions for commercial surrogacy and its concealment from the authorities.¹⁴⁰ However, an Instruction emitted in October 2010 by the Spanish Directorate General of Registries and Notaries regulated the enrolment of children born via cross-border surrogacy in the civil registry, when specific requirements have been fulfilled.¹⁴¹ Notwithstanding this instruction, on 6 February 2014, a Spanish Supreme Court judgment ruled that a birth certificate deriving from cross-border surrogacy cannot be transcribed into the civil registry, as birth certificates, apart from authentic, should not be inconsistent with the Spanish public order.¹⁴² Instead, the Supreme Court offered the solution for the genetic father to acknowledge legal paternity and then register the child.

Nonetheless, influenced by the two aforementioned judgments of the Strasbourg Court delivered on 26 June 2014, i.e. *Mennesson* and *Labassee*, the Spanish Ministry of Justice emitted a press release on 9 July 2014 aiming to facilitate the civil registration of the children born through cross-border surrogacy.¹⁴³ Furthermore, the Spanish Directorate General of Registries and Notaries issued a subsequent Circular stating that national authorities should continue applying the 2010 Instruction despite the judgment of the Spanish Supreme Court.¹⁴⁴ It seems that the reason behind this 'disobedience' towards the findings of the Spanish Supreme Court by national authorities is attributed to the ECtHR's case law and the practical need to tackle the adverse consequences that cross-border surrogacy creates.

¹⁴⁰ See above, section 2.2.

¹⁴¹ For the Spanish version: 'Instrucción de 5 de Octubre de 2010, de La Dirección General de Los Registros y Del Notariado, Sobre Régimen Registral de La Filiación de Los Nacidos Mediante Gestación Por Sustitución' <<http://www.boe.es/boe/dias/2010/10/07/pdfs/BOE-A-2010-15317.pdf>> accessed 4 December 2019.

¹⁴² Judgment of the Spanish Supreme Court 247/2014 of 6 February 2014. For more: Eduardo Corral García, 'Saying No to Surrogacy: A European View' in E Scott Sills (ed), *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (Cambridge University Press 2016) 78, 81.

¹⁴³ Eleonora Lamm, 'Gestación Por Sustitución. La Importancia de Las Sentencias Del Tribunal Europeo de Derechos Humanos y Su Impacto' (2014) 2 *Ars Iuris Salmanticensis* 43, 49.

¹⁴⁴ HCCH Permanent Bureau 'The Parentage/Surrogacy Project: An Updating Note' (Prel Doc No 3A, February 2015) Annex I, ii.

A similar approach can be observed in other Contracting States of the Convention. In Germany, where surrogacy is prohibited by legislation, a controversial judgment of the German Federal Court of Justice acknowledged the legitimacy of a birth certificate based on cross-border surrogacy with regard to a same-sex couple and their child.¹⁴⁵ The case was delivered by the German court on 10 December 2014, a few months after the two judgments of the Strasbourg Court. There is currently a push to legalise surrogacy in Germany, proposed by Members of the Parliament.¹⁴⁶

Along the same lines, in France, clearly influenced by the ECtHR's judgments against it, the *Conseil d'État* affirmed that children born through cross-border surrogacy should receive French nationality.¹⁴⁷ It ruled that a child born out of cross-border surrogacy should be granted entry in the civil registry, as child of the genetic father and the surrogate, and obtain French citizenship, due to the genetic father being a French citizen. A further development was achieved on 5 July 2017 when the French Supreme Court ruled in a series of judgments that the intended mother, if also the genetic mother (in case she provides the egg), but even the intended parent that is not genetically linked to the child, can adopt the child of their spouse.¹⁴⁸ There is a current debate in the French Parliament on the new bioethics bill and whether it should be amended to recognise directly the legal parentage of children born via cross-border surrogacy established abroad, with Members of the Parliament voting in favour and the government opposing it, calling for a second consultation.¹⁴⁹

The above approach of the national authorities, be it the judiciary or administrative bodies, comes as a response to the problem of cross-border surrogacy. Nevertheless, the legalisation of the effects of cross-border alone, with a strict prohibition of domestic surrogacy, is unreasonable or even arbitrary. In their attempt to solve the issues deriving from cross-border surrogacy, Contracting States make highly problematic the distinction between domestic and

¹⁴⁵ Supreme Court of Germany decision XII ZB 463/13 (Bundesgerichtshof Beschluss XII ZB 463/13).

¹⁴⁶ Jen Willows, 'Move to Legalise Egg Donation and Surrogacy in Germany' *BioNews* (19 August 2019) <https://www.bionews.org.uk/page_144456> accessed 4 December 2019.

¹⁴⁷ Judgment of the French Council of State (n°365779) of 12 December 2014.

¹⁴⁸ The list of the judgments can be found in French: 'Lire Les Arrêts GPA de La Première Chambre Civile' <https://www.courdecassation.fr/jurisprudence_2/communiqués_presse_8004/etranger_transcription_8306/gpa_1re_37269.html> accessed 4 December 2019.

¹⁴⁹ 'French MPs Vote to Recognise Filiation for Surrogacy Children Born Abroad' *RFI* (4 October 2019) <<http://www.rfi.fr/en/france/20191004-french-mps-vote-recognise-filiation-children-born-through-surrogacy-abroad>> accessed 4 December 2019.

cross-border surrogacy. To avoid legal and practical hurdles they have created a double standard between domestic surrogacy and cross-border surrogacy, which further results in an inequality among the citizens. Surrogacy becomes available only to an elite of people able to afford the cost of traveling to another jurisdiction and undertake surrogacy there. Furthermore, it still does not eliminate the uncertainty for the children, who are placed in a legal limbo until a solution is found, or the amount of time spent in a different jurisdiction until intended parents and children are able to enter the receiving State.

Also, by legalising the effects of cross-border surrogacy, States might have to turn a blind eye to abuses taking place in a different jurisdiction or alternatively deny resulting children their legal status.¹⁵⁰ Similarly, this *ex post facto* solution to the effects of cross-border surrogacy is not deemed adequate by some judges, who feel it is too late to ‘exercise any meaningful control’, as any decision at that point would have to be led by the child’s best interests.¹⁵¹ Therefore, notwithstanding its apparent advantages for the children born through international surrogacy arrangements, the legalisation of the effects of cross-border surrogacy by itself should not be considered an appropriate solution to this problem. Besides, it seems that this solution is applied only when there is a genetic link with at least one of the intended parents, which leaves outside its protective umbrella the children born through surrogacy with no genetic link to the intended parents.¹⁵²

Following from the above is that a blanket prohibition has resulted in an exacerbated cross-border phenomenon and an incoherent approach towards domestic and cross-border surrogacy. This shows that sustaining a blanket prohibition of surrogacy is not viable, this being the reason why national authorities try to find a way out and ease this strict regulation towards surrogacy, which, however, does not amount to a solid solution.

Finally, coming down hard on all forms of surrogacy runs the risk of aggravating the dangers of underground surrogacy. It seems only apparent that it is better to regulate surrogacy than

¹⁵⁰ In this sense, due to fears of medical malpractice and human trafficking, the Spanish Consulate in Kiev saw itself forced to treat pending cases individually and promised to reject new cases: Marta Rodriguez Martinez and Rachael Kennedy, ‘Spain to Reject Registration of Babies Born to Surrogate Mothers in Ukraine’ *Euronews* (20 February 2019) <<https://www.euronews.com/2019/02/20/spain-to-reject-registration-of-babies-born-to-surrogate-mothers-in-ukraine>> accessed 4 December 2019.

¹⁵¹ HCCH Permanent Bureau (n 144) 6.

¹⁵² This is discernible when comparing the *Mennesson* and *Labassee* cases with *Paradiso* (n 51), discussed in detail in Chapter 3.

letting it operate illegally. Although in Europe such concern has been raised less intensely,¹⁵³ in States like Mexico and China, black-market surrogacy is a real threat.¹⁵⁴ Not regulating surrogacy and operating it underground can amount to child trafficking¹⁵⁵ and result in severe health issues for women due to a precarious treatment, including over-dosage of hormones, multiple embryo implantations, abortions, even the danger of mortality.

To conclude this section, having a blanket ban on surrogacy restricts an otherwise valuable reproductive method for intended parents. Also, it has proven inefficient to stop surrogacy, as, coupled with the policy disparities worldwide, it gave rise to the cross-border surrogacy phenomenon to its current extent, which can be detrimental to the legal status of the resulting children. Given these repercussions, the European States with a blanket ban on surrogacy have essentially legalised the effects of cross-border surrogacy, which, among others, has resulted in an incoherent approach towards domestic versus international practice and, when considered thoroughly, does not provide a real solution to the problem. In addition, this has not been effective to safeguard the interests it wishes to uphold,¹⁵⁶ as abuses might still take place abroad. Lastly, although marginally, there is also the risk of creating a black-market of surrogacy, amounting to child trafficking and serious health risks for surrogates.

The above show that the current approach of a blanket prohibition on surrogacy is not sustainable and does not provide a solid solution to its cross-border problem, which further implies that there needs to be a different approach. It is in this context that the ECHR framework proposed by this thesis comes into play, in order to provide a solid solution, as explained in the next section.

¹⁵³ For example, a case in Spain where a woman and two men were arrested after illegally arranging domestic surrogacy: Nick Lyne, 'Illegal Adoption in Spain: Spanish Police Arrest Three over Illegal Womb-for-Rent Arrangement' *El País* (Cádiz, 30 November 2016) <https://elpais.com/elpais/2016/11/29/inenglish/1480426054_414168.html> accessed 4 December 2019.

¹⁵⁴ After the ban of surrogacy in the State of Tabasco – Mexico, a flourishing black-market has emerged: Carolin Schurr, "'Trafficked' into a Better Future? Mexico Two Years after the Surrogacy Ban' *HSG Focus* (2018) <<https://magazin.hsgfocus.ch/hsg-focus-1-2018-arbeit/artikel/trafficked-into-a-better-future-mexico-two-years-after-the-surrogacy-ban-12299>> accessed 4 December 2019. In China, the underground business of surrogacy is flourishing in rural villages: Didi Tang, 'Chinese Women Profit as Illegal Wombs-for-Hire Business Booms' *The Times* (Beijing, 2 January 2018) <<https://www.thetimes.co.uk/article/chinese-women-profit-as-illegal-wombs-for-hire-business-booms-0j7gq00f7>> accessed 4 December 2019.

¹⁵⁵ Similar concerns found in: International Social Service (n 128).

¹⁵⁶ The interest of protecting the surrogates and the children born through surrogacy is discussed in detail in Chapter 4.

2.4 The ECHR Framework

Previous sections have demonstrated the inconveniences created by the disparity of surrogacy policies globally, which essentially exacerbates the phenomenon of cross-border surrogacy. States with a blanket ban on surrogacy significantly reinforce this phenomenon, while they attempt to tackle the negative outcome of cross-border surrogacy by essentially legalising its effects. This is an *ex post facto* solution provided mainly to ensure the legal status of the children born through surrogacy.¹⁵⁷ Nonetheless, it was already shown that legalising the effects of cross-border surrogacy is not a solid solution. Instead, a need arises for a different solution, one which avoids, insofar as possible, cross-border surrogacy, contrasting fundamentally the one that seeks to ease its effects. The focus on an *a priori* solution was highlighted by the early work on the Parentage/Surrogacy Project, with the HCCH Permanent Bureau emphasising that any international agreement should seek to secure a legal status for the child before the medical treatment begins.¹⁵⁸

What should the solution look like? The solution provided should be one that takes place before initiating surrogacy, avoiding essentially the inconveniences primarily for the children born via surrogacy, which could potentially be stateless, parentless and/or trapped in between two jurisdictions. This *ex ante* solution would also have to be domestic, in order to undo the random inequality created between domestic and cross-border surrogacy mentioned above. Furthermore, a domestic *ex ante* solution can help avoid potential abuses towards surrogates and the resulting children, which seems to be the real reason behind a blanket ban on surrogacy, by supervising the process.

This thesis argues that the ECHR could potentially constitute an effective framework to address these complications and provide a solution to the problem of cross-border surrogacy. In essence, the ECHR framework would lead to the adoption of a domestic framework for surrogacy. The proposed ECHR framework is presented through a hypothetical referral of a Contracting State with a blanket ban on surrogacy before the Strasbourg Court. The applicants, potential intended parents, would argue that a blanket ban on surrogacy violates

¹⁵⁷ In a similar vein, the HCCH Permanent Bureau calls them remedies to a situation that is a *fait accompli*: HCCH Permanent Bureau 'Preliminary Note on the Private International Law Issues Surrounding the Status of Children' (Prel Doc No 11, March 2011) 11.

¹⁵⁸ HCCH Permanent Bureau 'The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project' (Prel Doc No 3 B, March 2014) 25.

their right to respect for their decision to become parents (Article 8 ECHR). If this claim were to be successful, the Contracting State would have to provide a domestic framework where surrogacy would be lawful. As a result, it would no longer be a necessity to resort to cross-border surrogacy.¹⁵⁹

The proposed ECHR framework is an *ex ante* remedy, because it would be a solution provided before surrogacy is initiated, hence prior to the birth of the child. This is because there will already be a legal framework in place that renders surrogacy lawful. It is also a domestic solution, as, although via the Convention, the change would be introduced at national level, changing domestic legislation/regulation to allow surrogacy. This would additionally undo the inequality between domestic and cross-border surrogacy, which is prevalent in many Contracting States with a blanket ban on surrogacy. Finally, the ECHR framework as a domestic *ex ante* solution could help keep at arm's length abuses, which further gives the opportunity to Contracting States to regulate surrogacy in a way compatible with their own peculiar national circumstances. Given these characteristics, the remedy provided by the ECHR framework would be solid and durable.¹⁶⁰

The reason why the ECHR framework is chosen as an adequate solution to the current cross-border surrogacy problem in Europe lies in the Convention's importance in the region. The ECHR and its Protocols exert a significant influence in the European human rights protection.¹⁶¹ In particular, its adjudicative body, the Strasbourg Court, has shaped human rights protection in Europe from corporal punishment to same-sex marriage.¹⁶² These significant changes at domestic level across Europe have been possible due to the ECHR and its interpretation by the Court. This makes the Convention highly valuable and renders the ECtHR probably the most important non-state actor in the region.¹⁶³ Also, by employing a dynamic and evolutive interpretation of the ECHR, the Strasbourg Court has managed to

¹⁵⁹ Each of these elements are considered separately in different chapters. See Chapter 1 (1.2).

¹⁶⁰ This is further illustrated in Chapter 6.

¹⁶¹ Some of the accomplishments are found in the official website of the Council of Europe under 'Achievements' <<https://www.coe.int/en/web/about-us/achievements>> accessed 4 December 2019.

¹⁶² Cases *Tyrer v UK* (1978) 2 EHRR 1 and *Oliari and Others v Italy* [2015] ECHR 716 respectively.

¹⁶³ On the value of the ECtHR: Merris Amos, 'The Value of the European Court of Human Rights to the United Kingdom' (2017) 28 *European Journal of International Law* 763, 768-772.

keep up with the times and give the desired flexibility to the text of the Convention so it does not become obsolete.¹⁶⁴

Furthermore, States make internal changes based on the ECHR and the Court's case law, without necessarily having a case brought against them. Notwithstanding its dependency on the willingness of each State, Contracting States have identified policies that are contrary to the Convention and have introduced internal changes to overcome any potential violation. Such recent example is the legislative reform regarding parental orders in the UK, which have now become available to single applicants as well and not only couples, as the old regime envisaged.¹⁶⁵ The change came as a result of the incompatibility of the previous regime with Article 8 and Article 14 ECHR.¹⁶⁶ Initiating changes of their own motion shows the great significance of the ECHR for the Contracting States and its central role in protecting different interests in Europe.

Moreover, the role of the Convention and the power of the Court do not seem to decline in time. Instead, there are additional 'tasks' awarded to the Court. A glaring illustration of this is Protocol 16, which entered into force in 2018. This 'dialogue Protocol' provides for specified courts of the Contracting States to request the ECtHR to provide an advisory opinion on the interpretation and application of the Convention and its Protocols.¹⁶⁷ The main aim of the Protocol is to reduce the Court's workload, but, by doing so, it provides an opportunity for national courts to ensure the protection of the rights and freedoms enshrined in the ECHR at domestic level. Notwithstanding the small number of Contracting States that ratified the Protocol, there is potential for further growth over time.¹⁶⁸

This importance of the ECHR and the case law of the Strasbourg Court is indeed apparent in the field of surrogacy. It was already explained in the previous section how its case law has

¹⁶⁴ Márton Varju, 'Transition as a Concept of European Human Rights Law' (2009) *European Human Rights Law Review* 170, 172.

¹⁶⁵ This change was introduced in January 2019, when the remedial order came into force, adding section 54A into the Human Fertilisation and Embryology Act 2008. See above in section 2.2.

¹⁶⁶ This was the finding of Justice Munby J in *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), which triggered the remedial order.

¹⁶⁷ Protocol No 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms <<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214>> accessed 4 December 2019.

¹⁶⁸ In 2019, Protocol 16 was ratified by three additional Contracting States (Andorra, Greece and Netherlands): 'Chart of Signatures and Ratifications of Treaty 214' <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/214/signatures?p_auth=PinLNMuP> accessed 4 December 2019.

shaped the way cross-border surrogacy is addressed in Europe. Although criticised for leading to the legalisation of the effects of cross-border surrogacy, it nonetheless shows the significant impact the institution exerts. In addition, the example given above on the parental orders in the UK affected the regulation on surrogacy, as parental orders in the UK constitute a way of awarding legal parentage to intended parents.¹⁶⁹ Finally, the first ever advisory opinion to be given by the ECtHR was in the field of surrogacy, where the French Court of Cassation asked the Strasbourg Court about registering birth certificates of children born through surrogacy and the possibility of using the adoption process.¹⁷⁰

These examples show the paramount significance of the ECHR for surrogacy in Europe. However, this thesis does not necessarily support the approach taken so far by the Court. Legalising the effects of cross-border surrogacy is not a solid remedy to the phenomenon¹⁷¹ and utilising adoption for surrogacy is deemed flawed.¹⁷² Instead, taking the *ex ante* approach through the ECHR framework, as demonstrated above, can lead to a positive change and a durable solution to the cross-border surrogacy problem. Therefore, the examples are used to show that there is a greater role for the ECHR than has hitherto been recognised, not that the ECtHR is infallible.

There are still pending questions on the suitability of the ECHR framework. When discussing surrogacy policies and the problems created by cross-border surrogacy, it became apparent that the problem is not confined to Europe. Instead, it is a global phenomenon, which seems to require international action. This leads to two intertwined questions. Why should the solution be European and not global? Why does this thesis focus on human rights and not private international law?

Providing a European rather than a global solution can be seen as a potential limitation of this thesis, as discussed in Chapter 1. The idea underpinning this thesis, however, is that cross-border surrogacy could potentially be minimised by lifting the blanket prohibition on surrogacy. In order to achieve this, there is already an existing instrument in Europe that

¹⁶⁹ See above in section 2.2.

¹⁷⁰ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (ECtHR, Grand Chamber, 10 April 2019).

¹⁷¹ Although it does provide a solution to the children born through surrogacy, which can now be registered in the receiving State, the flaws of such approach were already explained in the previous section.

¹⁷² The reasons why using adoption for surrogacy is wrong are examined in Chapter 6.

individuals or couples can utilise. The change the Court has brought so far, i.e. legalising the effects of cross-border surrogacy, needs to be followed up with changes introduced to domestic surrogacy. The ECHR, with its aforementioned significance, comes into play as an existing option, which can change remarkably the surrogacy reality in Europe. By (this time) bringing a more adequate solution, it can possibly change the surrogacy reality worldwide, as European States are among the top ‘users’ of cross-border surrogacy services.¹⁷³

Moreover, it should not be overlooked that the role of the European Court of Human Rights has been significant in developing not only regional, but international law as well.¹⁷⁴ The Strasbourg Court’s case law has a notable influence on the Inter-American Court of Human Rights (IACtHR).¹⁷⁵ This is not one sided, but, instead, there seems to be a judicial dialogue between the two institutions.¹⁷⁶ The influence of the Court does not stop in its Latin American counterpart, as the case law of the ECtHR has been used in Canada,¹⁷⁷ Australia,¹⁷⁸ Hong Kong,¹⁷⁹ etc. Therefore, although far-fetched, the results and approach of the ECHR framework could positively influence other jurisdictions and help reduce the cross-border surrogacy phenomenon universally.

Regarding the focus on human rights instead of private international law, both approaches seem plausible. On the one hand, it is possible to approach surrogacy under reproductive rights and reproductive freedom, children’s rights, women’s labour rights, etc.¹⁸⁰ On the other

¹⁷³ See above (n 134).

¹⁷⁴ For more: JG Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993).

¹⁷⁵ For example: Eduardo Andrés Bertoni, ‘The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards’ (2009) 3 *European Human Rights Law Review* 332.

¹⁷⁶ See European Court of Human Rights, Research Division ‘References to the Inter-American Court of Human Rights and Inter-American Instruments in the Case-Law of the European Court of Human Rights’ (November 2016) <https://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf> accessed 4 December 2019.

¹⁷⁷ Gianluca Gentili, ‘Enhancing Constitutional Self-Understanding through Comparative Law – An Empirical Study of the Use of Foreign Case Law by the Supreme Court of Canada (1982–2013)’ in Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015) 376.

¹⁷⁸ Michael Kirby, ‘Australia’s Growing Debt to the European Court of Human Rights’ (2008) 34 *Monash University Law Review* 239.

¹⁷⁹ Simon NM Young, ‘Constitutional Rights in Hong Kong’s Court of Final Appeal’ (2009) 27 *Chinese (Taiwan) Yearbook of International Law and Affairs* 67, 82.

¹⁸⁰ Specific examples of the human rights involvement in surrogacy can be found in: Yasmine Ergas, ‘Thinking “Through” Human Rights: The Need for a Human Rights Perspective with Respect to the Regulation of Cross-Border Reproductive Surrogacy’ in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements* (Hart Publishing 2013) 427, 428.

hand, it is possible to attempt the creation of an international instrument on private law, aiming at harmonising or unifying the rules for legal parentage. For the latter, there is an ongoing Parentage/Surrogacy Project convened by the HCCH, as repeatedly mentioned in this chapter.¹⁸¹ Nevertheless, given the diversity in internal policies, it seems difficult to reach an international consensus on legal parentage and surrogacy. The difficulty lies essentially in the pragmatic limitation that there is no consensus regarding surrogacy, not only regarding its lawfulness but also specific criteria, for example as to what type of surrogacy is accepted, who should have access to the treatment, etc.¹⁸² This difficulty has been acknowledged by the Experts' Group, who decided to address surrogacy separately from other cases of establishing legal parentage.¹⁸³

Nonetheless, even if international consensus were to be attained, it would still fall short on achieving the objective of decreasing insofar as possible the phenomenon of cross-border surrogacy, which this thesis seeks to achieve. It would instead facilitate smoother transition from one jurisdiction to another. This is also connected to the aforementioned focus that change needs to occur at national level. Apart from the pragmatic limitation of reaching an agreement, there is an additional conceptual limitation. An international consensus could facilitate either the recognition of the legal parentage established abroad or the adoption of the same rules to establish legal parentage. Both would still fail to address concerns regarding the difference in treatment between domestic and cross-border surrogacy discussed above. The fact that attention has been wrongly placed solely at international level instead of national and the necessary interplay of the two is further elaborated in Chapter 6.

A question might arise as to why, although opting for a regional solution, there is no mention of the European Union (EU), as it has also shaped significantly the legal landscape in Europe. Apart from the differences in the nature of the two institutions,¹⁸⁴ the EU is comprised of 28 States (soon 27 if/when Brexit materialises), significantly less than the Contracting States of the ECHR which are 47. This would further hinder the potential international outreach of the solution, as, additionally, the EU has not exerted the same human rights influence on other

¹⁸¹ This is currently the only attempt for a binding instrument in cross-border surrogacy, although there is also an ongoing project to develop non-binding principles on surrogacy by the ISS. See Chapter 6.

¹⁸² In a similar vein: Crockin (n 18) 739.

¹⁸³ HCCH Permanent Bureau 'Report of the Experts' Group on the Parentage/Surrogacy Project' (Prel Doc No 2 B, February 2019).

¹⁸⁴ These differences are discussed in detail in Chapter 5.

jurisdictions as has the ECHR and its Court. Also, looking only at EU would leave outside important (for surrogacy) States, such as Russia, Ukraine and Georgia.

In addition, there is the right to free movement, facilitating the movement of EU citizens to receive surrogacy services elsewhere,¹⁸⁵ which undermines once again the blanket ban on surrogacy in some EU States. However, this means that the EU solution would still mean that intended parents would need to move to another State to use the reproductive services available there, hence not resolving the domestic versus cross-border surrogacy issue. This was identified previously as a conceptual limitation of the private international law agreement. An EU solution would focus as well on the harmonisation or unification of the rules for legal parentage,¹⁸⁶ which is further evidenced by the fact that there is no current initiative/independent action of the EU on surrogacy, except for its direct involvement and support for the Parentage/Surrogacy Project of the HCCH.¹⁸⁷

Lastly, this thesis does not hold that the ECHR framework, seen as upholding the rights of the intended parents, is the only plausible framework to provide a solution to the problem of cross-border surrogacy. For example, it might be plausible to approach surrogacy through the rights of the surrogate or through a public international law instrument, although the latter would still face the pragmatic limitation of reaching an international consensus. Nonetheless, it is argued here that the ECHR framework through the intended parents' right can indeed provide a solid and durable solution due to its potential to reshape domestic regulation. This is attributed to the existence of a right to respect for the decision to become a parent recognised by the Court that can be extended to surrogacy and a framework that can potentially render domestic surrogacy lawful. Reshaping domestic regulation by essentially lifting the blanket ban on surrogacy seeks to reduce as much as possible its cross-border dimension, which additionally allows States to closely monitor surrogacy procedures and avoid potential abuses.

¹⁸⁵ '[T]he freedom of movement of patients is authorised and promoted and as a consequence, national rules on rights to treatment cannot prevent citizens of the EU seeking treatment elsewhere in the EU, however unethical the treatment is in the State of origin': European Parliament (n 127) 142.

¹⁸⁶ *ibid* 191-192.

¹⁸⁷ Amalia Rigon and Céline Chateau, 'Regulating International Surrogacy Arrangements - State of Play' (Policy Department C: Citizens Rights and Constitutional Affairs - European Parliament Legal Affairs Briefing Note, August 2016) 4-5.

2.5 Conclusion

Surrogacy involves at least two parties, the surrogate and the intended parents. The gestation of the child could be carried out through traditional surrogacy, where the intended father's (or a donor's) sperm is inseminated inside the surrogate's womb, making her the genetic mother of the child. Alternatively, gestational surrogacy utilises IVF, where the genetic material from the intended parents and/or donors is joined in the laboratory and the embryos created are implanted to the surrogate's womb. In practice, gestational surrogacy is more common than traditional surrogacy, as it poses less challenges for the establishment of legal parentage.

Considering the disparity of surrogacy policies in Europe and worldwide, the problem of cross-border surrogacy becomes apparent. The surrogacy policies found within States are diverse: surrogacy can be unlawful/lawful/unregulated, can take the form of a contract/pre-authorisation/unenforceable agreement, can cover actual costs, compensation or lead to a profit for the surrogate. This disparity and the restrictive approach taken by different States have led to an exacerbated cross-border surrogacy phenomenon with serious dangers for the stakeholders. In an attempt to undo some of the harmful effects to the resulting children, States have legalised the effects of cross-border surrogacy, while keeping domestic surrogacy unlawful. This, however, does not lead to a solid solution.

Instead, the ECHR framework proposed by this thesis could lead to a solid and durable solution. The ECHR framework would be an *ex ante* domestic solution, by essentially leading to the lawfulness of surrogacy at domestic level. This way it provides a valuable reproductive method to intended parents, avoids insofar as possible the need to resort to cross-border surrogacy and the creation of black-market surrogacy. It additionally avoids the inconvenience created by the lack of international consensus on surrogacy, which makes a private international law instrument in the field extremely difficult.

After these preliminary remarks, it is now time to examine the ECHR framework by starting with the hypothetical referral presented before the Strasbourg Court. Therefore, the next section discusses the claim potentially mounted by the applicants/intended parents against a State with a blanket ban on surrogacy about the violation of their right to respect for the decision to become parents. This is done with a view to dismantle its protection under the umbrella of the ECHR and, in particular, Article 8.

CHAPTER 3: SURROGACY AND THE RIGHT TO RESPECT FOR THE DECISION TO BECOME A PARENT

3.1 Introduction

In an attempt to reduce the numbers of cross-border surrogacy, this thesis supports the lifting of a blanket ban on surrogacy. The aim of the current chapter is to demonstrate the content of a prospective application against a Contracting State of the ECHR with a blanket ban on surrogacy, indicating how it would prosper in terms of admissibility. The ECtHR has already held that the right to respect for the decision to become a parent via ART is protected under the scope of Article 8 ECHR. As mentioned in the second chapter, surrogacy is an ART method. Hence, it is argued that the right to respect for the decision to become a parent through ART should be read as a right to respect for the decision to become a parent through surrogacy.¹ After displaying that the potential application before the ECtHR would prosper under the material scope of the Convention, this chapter aims to further justify the proposed approach as consistent with the ECHR's nature (living instrument) and the national/international trend towards the recognition of the right to become a parent and reproductive rights in general.

In order to examine the hypothetical referral regarding the right to respect for the decision to become a parent through surrogacy, this chapter is divided into three parts. First, there is a definition of the right to respect for the decision to become a parent. What follows is an exploration of such right under the ECHR, its admissibility *ratione materiae* and how this should be extended to surrogacy. Lastly, the above approach is justified based on the living instrument doctrine as well as the international/national trends regarding reproductive rights.

3.2 Defining the Right to Respect for the Decision to Become a Parent

Before examining whether the claim made by the applicants in the hypothetical referral would prosper in terms of admissibility, it is essential to understand its basis, i.e. the 'right to respect for the decision to become a parent'. This term, although found within the judgments of the ECtHR and the Inter-American Court of Human Rights (IACtHR), is not frequently

¹ It is helpful to repeat that this thesis focuses only on surrogacy operated through ART: Chapter 2 (2.1).

encountered elsewhere. Instead, as apparent in the penultimate section of this chapter, the dominant term in case law, Constitutions and statutes is the right to procreate or right to reproduce.² In light of this and given that the Strasbourg Court has not yet provided a definition, it is helpful to identify aspects of the right to procreate before defining the right to respect for the decision to become a parent. The latter is the central term utilised by this thesis, given its focus on the Convention and the case law of the ECtHR.

Defining the right to procreate has proven to be a daunting task, mostly due to the plurality of terms used to refer to this specific right. Many scholars use the terms reproductive freedom, procreative autonomy and reproductive rights interchangeably with the right to procreate. Notwithstanding their similarities, these concepts are not identical and should be differentiated from both the right to procreate and the right to respect for the decision to become a parent.

Starting with the term ‘reproductive freedom’, it involves both uncoerced choice about whether to engage in reproductive activity and uncoerced choice whether to prevent reproduction.³ Similarly, ‘[r]eproductive autonomy is having the power to decide and control contraceptive use, pregnancy, and childbearing’.⁴ The two terms seem to coincide in that both refer to the freedom/autonomy of controlling one’s reproductive activity, affirmatively or negatively. It is important to highlight that reproductive freedom/autonomy does not refer simply to ‘natural’ ways of reproduction, but it additionally entails access to ART.⁵

Moving on to reproductive rights, they appear to be particular expressions of the above notions, taking the form of specific entitlements.

Reproductive 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

² The term ‘right to procreate’ might conjure up religious associations in contrast with the ‘right to reproduce’, which provides a more modern view of reproduction. Nevertheless, both terms will be used interchangeably, disconnected from religious attachments. In addition, these terms should not be confused with the right to reproduce/reproduction related to intellectual property.

³ Allen E Buchanan, *From Chance to Choice: Genetics and Justice* (Cambridge University Press 2000) 209.

⁴ Bixby Center for Global Reproductive Health, University of California-San Francisco (UCSF) ‘Measuring Women’s Reproductive Autonomy’ <<https://bixbycenter.ucsf.edu/news/measuring-women’s-reproductive-autonomy>> accessed 4 December 2019.

⁵ Buchanan (n 3).

reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.⁶

It seems that reproductive rights presuppose reproductive freedom/autonomy, but go beyond that, as they include standards of sexual and reproductive health. Some reproductive rights are ‘an individual's right to plan a family, terminate a pregnancy, use contraceptives, learn about sex education in public schools, and gain access to reproductive health services’.⁷

Keeping the above in mind, the right to procreate should not be understood as ‘a right to be supplied with children to adopt’ or to coerce someone to become a co-parent without their consent.⁸ Instead, the right to procreate is defined more accurately as a right ‘against coercive interference in decision regarding procreation ... [and as] an entitlement to assistance in procreation’,⁹ by procreation understood in this thesis as producing offspring. This shows that the right to procreate can be both negative and positive respectively.¹⁰ It is also specifically related to the act of begetting a child, as opposed to the act of abstaining from reproducing, which would be the right not to procreate. Given this definition, the terms reproductive freedom/autonomy and reproductive rights seem broader than the right to procreate, as they encompass the right not to procreate. Therefore, the aforementioned terms should not be used interchangeably.

The right to procreate should also be distinguished from the right to parenthood/parenting. Producing an offspring is not the same as being a parent, as parenthood refers to the situation of being a parent to a child (with or without having parental responsibility). Parenthood does not necessarily entail reproducing that child, as one can become a parent of an existing child, e.g. through adoption. In addition, there are different types of parenthood: legal, genetic,

⁶ World Health Organisation ‘Gender and Reproductive Rights’ <<https://web.archive.org/web/20090726150133/http://www.who.int/reproductive-health/gender/index.html>> accessed 4 December 2019. The WHO seems to repeat the Cairo Programme of Action: infra (n 152).

⁷ ‘What Are Reproductive Rights?’ (*FindLaw*) <<https://family.findlaw.com/reproductive-rights/what-are-reproductive-rights-.html>> accessed 4 December 2019.

⁸ Suzanne Uniacke, ‘In Vitro Fertilization and the Right to Reproduce’ (1987) 1 *Bioethics* 241.

⁹ Elizabeth Brake and Joseph Millum, ‘Parenthood and Procreation’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2018) Edward N Zalta (ed) <<https://plato.stanford.edu/archives/spr2018/entries/parenthood/>> accessed 4 December 2019.

¹⁰ On the distinction between positive and negative rights: Leif Wenar, ‘Rights’, *The Stanford Encyclopedia of Philosophy* (Fall edn, 2015) Edward N Zalta (ed) <<https://plato.stanford.edu/archives/fall2015/entries/rights/>> accessed 4 December 2019.

social, etc.¹¹ Therefore, the right to parenthood should be considered broader than the right to procreate.

Coming now to the right to respect for the decision to become a parent, the starting point is that its protection is absent from the text of the Convention and it has been upheld by the Strasbourg Court as part of the right to respect for private and family life enshrined in Article 8 ECHR.¹² Therefore, to understand what it means, it is essential to analyse the Court's relevant case law, emphasising on three – paramount for its establishment – judgments. What follows this analysis is an attempt to provide a definition based on its findings.

The first judgment where the Court used this term was in *Evans v UK* (the *Evans* case), where the Court held 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, incorporates the right to respect for both the decisions to become and not to become a parent.¹³

The *Evans* case dealt with the disagreement between Ms Evans and her ex-partner on using the frozen embryos created by their gametes before their separation. Ms Evans wished for the embryos to be implanted, emphasising that it was her only opportunity to have offspring genetically related to her, as she underwent a (surgical) oophorectomy. Given this, the Court held that while Ms Evans could still become a parent by adopting or through ovum donation and IVF, it would accept that ‘this more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, also falls within the scope of Article 8’.¹⁴

The second important case for the right to respect for the decision to become a parent is *Dickson v UK*.¹⁵ In the *Dickson* case, in the absence of the possibility of conjugal visits, a convict and his wife requested access to ART in order to have children, which was denied to them. However, access to ART was available in the UK. The Court established that:

¹¹ Brake and Millum (n 9).

¹² More on Article 8 ECHR in the next section.

¹³ *Evans v UK* (2008) 46 EHRR 34, para 71.

¹⁴ *ibid* para 72.

¹⁵ *Dickson v UK* (2008) 46 EHRR 41.

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.¹⁶

The last significant judgment under examination is *SH and Others v Austria* (the *SH* case), where the use of sperm and egg donors was restricted through legislation. The Court held 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.¹⁷

As apparent from the above passages, the Court does not use the same term each time. Nevertheless, the 'right to respect for the decision to become a parent' is the umbrella term used by this thesis to cover all cases related to the same right. This is because of the practical need to avoid the plurality of terms used to describe the same right, as there is evidence of continuity between the interests protected by the Court in these judgments. In particular, notwithstanding the different terms used, there is a continuity in the Strasbourg Court's case law. In new cases, the Court repeats each time the previous case law, starting from *Evans* onward, so as to justify the protection of different aspects of this right. Before recognising new aspects of this interest, the Court first refers to the *Evans* case, then the *Dickson* and then the *SH* case. For example, in *Costa and Pavan v Italy* (the *Costa* case):

Factors such as sexual identity, orientation and life also fall within the personal sphere protected by Article 8 ... as does the right to respect for the decisions to become or not to become a parent (see *Evans*, cited above, § 71...) Under Article 8 of the Convention, the Court has also acknowledged a right to respect for the decision to become genetic parents (see *Dickson v. the United Kingdom...*) and concluded that Article 8 applies to heterologous insemination techniques for *in vitro* fertilisation (see *S.H. and Others v. Austria ...*). In the present case the Court considers that the applicants' desire to conceive a child unaffected by the genetic disease of which they are healthy carriers and to use ART and PGD to this end attracts the protection of Article 8, as this choice is a form of expression of their private and family life. Consequently, this provision is applicable in the present case.¹⁸

¹⁶ *ibid* para 66.

¹⁷ *SH and Others v Austria* [2011] ECHR 1879, para 82.

¹⁸ *Costa and Pavan v Italy* App no 54270/10 (ECtHR, 28 August 2012) paras 55-57.

This thesis argues that the continuity in the case law suggests that the right to respect for the decision to become a parent is the broader interest protected, under which its subsequent aspects fall. Although without defining the specifics of the right, the ECtHR's rulings include several elements that help identify the nature of the right to respect for the decision to become a parent.

The Court has recognised both the right to respect for the decision to become a parent and its counter-part, the right to respect for the decision not to become a parent.¹⁹ For the purposes of this thesis and given the claim at hand, its examination is restricted to the right to respect for the decision to become a parent. Although the wording used is 'to become a parent', it should not be considered as establishing the right to parenthood/parenting explained above. Instead, it seems to be connected to the right to procreate, in the sense that it protects the interest of producing offspring. This becomes apparent from the use of *Evans* in subsequent case law, where the Court either uses its exact wording (passage above) or phrases it as 'the right to respect for both decisions to have and not have a child'.²⁰ This understanding of the right is also consistent with the Court's case law, holding that '[t]he provisions of article 8 do not guarantee either the right to found a family or the right to adopt'.²¹

The right to respect for the decision to become a parent is recognised in a way that entails access to ART. Be it through implantation of frozen embryos, artificial insemination or PGD, the case law of the Court explicitly recognised that the right to respect for the decision to become a parent through access to ART is protected under Article 8 ECHR.²² It also touches upon the applicants' both private and family life, while it applies to couples and single individuals, although for the latter only as an aspect of their private and not family life. Additionally, the right protects the interest of becoming a genetic parent, but this is considered a more limited issue.²³ Hence, the genetic sense is included as a special feature in the right to respect for the decision to become a parent, which, however, is broader and does not rest necessarily upon a genetic link.

¹⁹ However, this refers to cases such as the *Evans* case, which should not be confused with the right to abortion. More on the ECHR and abortion: Rosamund Scott, 'Reproductive Health: Morals, Margins and Rights' (2018) 81 *The Modern Law Review* 422.

²⁰ *Knecht v Romania* App no 10048/10 (ECtHR, 2 October 2012) para 54.

²¹ *EB v France* [2007] ECHR 211, para 41.

²² *SH and Others v Austria* (n 17).

²³ *Evans v UK* (n 14).

Additionally, the right to respect for the decision to become a parent may infer both negative and positive obligations.²⁴ The Court has always been very vague in distinguishing positive and negative obligations under Article 8 ECHR,²⁵ claiming that they ‘do not lend themselves to precise definition’.²⁶ Notwithstanding the above, the approach on the right to respect for the decision to become a parent seems to be divided between whether the prohibition/refusal of access to ART is an interference with the applicants’ existing right to beget a child (negative) or it is a failure of the State to permit access to certain forms of ART (positive).²⁷ The relevant case law shows that the Court takes both approaches, in some cases considering the right to respect for the decision to become a parent as a positive obligation,²⁸ whereas in others as a negative obligation.²⁹ Given this, both approaches are plausible and the examination under one of them is to be decided on a case by case basis.

It is crucial to underline that a positive obligation for the right to respect for the decision to become a parent has not been acknowledged as an obligation of States to provide free access to ART or funds through the national health care system. Such approach would contradict the premise that the ECHR ‘does not guarantee a right to health-care or a right to be healthy’.³⁰ Instead, the right to respect for the decision to become a parent refers to either the permissibility of ART or non-interference with someone’s decision to beget a child, not an entitlement to assistance for ART.³¹ On that account, a positive obligation that would require States to provide the means and resources for ART goes beyond the scope of this thesis and, therefore, shall not be touched upon.³²

²⁴ Negative and positive obligations arise from negative and positive rights respectively, i.e. to avoid interference or take positive action: *Wenar* (n 10).

²⁵ More on the topic: Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 261.

²⁶ *Keegan v Ireland* (1994) 18 EHRR 342, para 49.

²⁷ In a similar vein: *SH and Others v Austria* (n 17) para 88.

²⁸ *Evans v UK* (n 13) para 75-76, *Dickson v UK* (n 15) para 69.

²⁹ *SH and Others v Austria* (n 27), *Costa and Pavan v Italy* (n 18) para 58 onward, *Knecht v Romania* (n 20) para 56.

³⁰ European Court of Human Rights, Jurisconsult’s Department ‘Health-Related Issues in the Case-Law of the European Court of Human Rights’ (2015) 4 <https://www.echr.coe.int/Documents/Research_report_health.pdf> accessed 4 December 2019. Similarly: Maša Marochini, ‘Council of Europe and The Right to Healthcare - Is the European Convention on Human Rights Appropriate Instrument for Protecting the Right to Healthcare?’ (2013) 34 (2) *Collected papers of the Law Faculty of the University of Rijeka* 729.

³¹ In this sense, it does not coincide with the right to procreate, as defined above.

³² For further information on the debate of the positive right to access ART via public resources: Muireann Quigley, ‘A Right to Reproduce?’ (2010) 24 *Bioethics* 403, 408-409.

Taking into consideration the above, a possible definition of the right to respect for the decision to become a parent, as established by the Court, would be the prerogative of an individual or a couple to the permissibility of ART in order to beget a child or the non-interference with someone's decision to have offspring by not prohibiting certain forms of ART. Given this definition, it becomes apparent that while its content coincides with many aspects of the reproductive freedom/autonomy, reproductive rights and the right to procreate (defined above), it should be distinguished from them as a narrower concept.

Having defined the right to respect for the decision to become a parent, there is a pending question regarding the nature of the right. The right to respect for the decision to become a parent is a legal right, since it has been established by virtue of the ECtHR judgments.³³ The existence of a moral right to respect for the decision to become a parent could be paralleled to the moral right to procreate, which is, nonetheless, disputed. While some affirm its existence and ground it either in autonomy or in the strong interest of begetting a child, others reject it.³⁴ This thesis welcomes the idea of a right to respect for the decision to become a parent both as moral and legal right, but the emphasis here is placed on the legal recognition of the above right by the jurisprudence of the ECtHR.³⁵

3.3 Admissibility of the Claim under the European Convention on Human Rights

Having shown what interest is protected by the Strasbourg Court, it is now time to consider whether the hypothetical referral on surrogacy would prosper in terms of its material scope. Before examining the material scope of the Convention and the potential application of the right under consideration to surrogacy, it is important to outline the origins of the European human rights protection system and to indicate the admissibility criteria of the applications lodged before the Strasbourg Court. This necessary step to understand the ECHR fundamental rights protection facilitates the overall understanding of a potential protection of the right at hand through access to surrogacy.

³³ 'Legal rights are, clearly, rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them': Kenneth Campbell, 'Legal Rights', *The Stanford Encyclopedia of Philosophy* (Winter edn, 2017) Edward N Zalta (ed) <<https://plato.stanford.edu/archives/win2017/entries/legal-rights/>> accessed 4 December 2019.

³⁴ Brake and Millum (n 9).

³⁵ Moral underpinnings of the right are considered in Chapter 4.

3.3.1 General Considerations Regarding the European Human Rights Protection System

The Council of Europe (CoE) was founded in 1949 by Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden and the United Kingdom, and has since increased its number to 47 members.³⁶ In 1950, the Council of Europe drafted the Convention for the Protection of Human Rights and Fundamental Freedoms or, as typically called, the European Convention on Human Rights, which came into force in 1953, in the aftermath of the Second World War.³⁷ Following the Universal Declaration of Human Rights (UDHR),³⁸ the Convention was adopted at a regional level as an attempt to prevent the outburst of violence in Europe and secure democracy against communism.³⁹ What followed was the establishment of its Court, which was carried out in 1959. Throughout its existence, the ECtHR, by interpreting and applying the Convention, has always been the driving force of change and respect of human rights in the continent of Europe and has greatly influenced other regional human rights protection systems.⁴⁰

The ECHR system of human rights protection is ‘premised on the principle of subsidiarity’,⁴¹ where citizens of the Contracting States can lodge applications before the Strasbourg Court once they have exhausted domestic remedies. As a permanent court, the ECtHR receives annually a tremendous number of applications and, for instance, 43,100 applications were allocated to a judicial formation in 2018.⁴² There are two types of cases brought before the Strasbourg Court: inter-State cases and individual applications. In the hypothesis scrutinised,

³⁶ For further information: Council of Europe ‘Who We Are’ <<http://www.coe.int/en/web/about-us/who-we-are>> accessed 4 December 2019.

³⁷ Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, Oxford University Press 2012) 1-9.

³⁸ The ECHR draws its inspiration from the UDHR, but it does not simply duplicate it: Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 3.

³⁹ David Harris and others, *Harris, O’Boyle & Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 3.

⁴⁰ For instance, for the influence of the ECtHR in the IACtHR: Gerald L Neuman, ‘The External Reception of Inter-American Human Rights Law’ (2011) (Special Ed) *Quebec Journal of International Law* 99.

⁴¹ The Council of Bars and Law Societies of Europe (CCBE), ‘The European Court of Human Rights - Questions & Answers for Lawyers’ <https://www.echr.coe.int/Documents/Guide_ECHR_lawyers_ENG.pdf> accessed 4 December 2019.

⁴² European Court of Human Rights ‘Analysis of Statistics 2018’ (January 2019) <https://www.echr.coe.int/Documents/Stats_analysis_2018_ENG.pdf> accessed 4 December 2019.

the Court would receive an individual application, this being the reason why inter-State cases are not examined by this thesis.

With regard to individual applications, for a matter to fall under the protective umbrella of the Convention, certain requirements have to be fulfilled. The admissibility criteria are as follows: the applicant, claiming to be a victim,⁴³ should exhaust domestic remedies and lodge the application within six months from the date of the final decision at domestic level.⁴⁴ Additionally, the application lodged before the ECtHR should not be anonymous, substantially similar to a matter already examined by the Court and it should not have been submitted to another international body.⁴⁵ Furthermore, the application should not be manifestly ill-founded or constitute an abuse of the right of individual application, while the applicant must have suffered a significant disadvantage and his/her application should fall within the temporal (*ratione temporis*), territorial (*ratione loci*), personal (*ratione personae*) and material scope (*ratione materiae*) of the Convention.⁴⁶

The above criteria are equally important, but the particular challenge for the hypothetical application examined by this thesis would be its compatibility *ratione materiae*, given that there is no express protection of the right to respect for the decision to become a parent through access to surrogacy in the text of the Convention. Therefore, for its protection, it is necessary to understand the applicability *ratione materiae* through the Strasbourg Court's interpretative tools and current jurisprudence. In particular, it is necessary to explore the requirements of the material scope of Article 8 ECHR, which would be invoked in the hypothetical case examined in this thesis, while also address briefly relevant considerations arising from Article 12 ECHR.

3.3.2 Applicability *Ratione Materiae*

When it comes to the material scope of the Convention, the applicants of a case raised before the ECtHR should invoke a right enshrined in the ECHR or its Protocols. In cases where it has been called upon to provide protection to the right to respect for the decision to become a

⁴³ Article 34 ECHR.

⁴⁴ Article 35(1) ECHR. This time will be reduced to four months when Protocol 15 of the ECHR will be ratified by all the Contracting States.

⁴⁵ Article 35(2) ECHR.

⁴⁶ Article 35(3) ECHR.

parent, the Strasbourg Court has considered that this right is incorporated in the right to respect for private and family life, enshrined in Article 8 ECHR. It is worth repeating, however, that the right is not explicitly incorporated in Article 8 ECHR. Consequently, it is important to refer to the concepts of private and family life, as interpreted by the Court, in order to clarify how the Court has acknowledged the right to respect for the decision to become a parent. Finally, while it can be claimed that the right to marry and to found a family, embodied in Article 12 ECHR, can also be invoked, the Court has not accepted its involvement with the right to respect for the decision to become a parent.

Article 8 ECHR

The Court has acknowledged a variety of interests as aspects protected under the applicants' private and family life.⁴⁷ In this sense, its ambit is wide, the rights incorporated in it refer to a broad scope of activities (e.g. *in vitro* fertilisation) and some are based on social and scientific progress, while traditions, morals and ethics are determining factors for its protection.⁴⁸ In addition, even when an interest is considered worthy of protection, it is well known that the ECHR contains absolute rights, which can never be limited, and rights that may be limited if certain circumstances and requirements are fulfilled (limited and qualified rights).⁴⁹ The right to respect for private and family life, as enshrined in Article 8(1) ECHR, is not an absolute but a qualified right, which means that it can be limited in accordance with the stipulations of Article 8(2) ECHR.⁵⁰ As a result, the application of Article 8 involves a two-stage test.⁵¹

⁴⁷ For a thorough study on the interests protected in Article 8: European Court of Human Rights, Jurisconsult's Department 'Guide on Article 8 of the European Convention on Human Rights' (31 August 2019) <https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf> accessed 4 December 2019.

⁴⁸ Andrea Büchler and Helen Keller, *Family Forms and Parenthood: Theory and Practice of Article 8 ECHR in Europe* (1st edn, Intersentia 2016) 9.

⁴⁹ For the three broad categories of rights found in the ECHR (absolute, limited and qualified rights): Angus Evans and Iain McIver, 'The European Convention on Human Rights in the United Kingdom (SPICe Briefing)' (25 September 2015) 5-6 <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-59_The_European_Convention_on_Human_Rights_in_the_United_Kingdom.pdf> accessed 4 December 2019.

⁵⁰ *ibid.*

⁵¹ Ursula Kilkelly, '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, August 2003) <[http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01\(2003\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01(2003).pdf)> accessed 4 December 2019.

The initial stage, relevant to its material scope, involves an assessment as to whether the case encompasses one of the four areas of personal autonomy guaranteed by Article 8, namely the right to respect for private and family life, home and correspondence. The second (and last) stage is an assessment of whether the interference with this right can be justified. This is if the interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.⁵² Therefore, the applicability/material scope of Article 8, examined in this section, is only a preliminary issue, as the actual protection depends on the justification of the interference, which is examined in Chapter 5. However, this preliminary issue is vital to trigger the examination of the right.

From the aforementioned four areas of personal autonomy safeguarded by Article 8, the Court has utilised the right to respect for private and family life for the protection of the right to respect for the decision to become a parent. The ECtHR has reiterated that both concepts – private and family life – are broad and cannot be subject to an exhaustive definition,⁵³ while the case law falling under their scope shows that they are particularly fruitful for the application of the living instrument doctrine through a dynamic and evolutive interpretation.⁵⁴ Therefore, a right not explicitly guaranteed by the ECHR can be upheld by falling into the broad terms of private and family life.

Private life provides protection to cases that may fall within one of the following three groups: i) physical, psychological and moral integrity, ii) privacy or iii) identity and autonomy.⁵⁵ The right to respect for the decision to become a parent falls within the first category of physical, psychological and moral integrity, according to the case classification provided by the Jurisconsult's Department of the ECtHR.⁵⁶ It could be argued, however, that it can also fit under the identity and autonomy group, as shown through the case law that was used to define this right, which was discussed in the previous section.

⁵² Article 8(2) ECHR.

⁵³ *Niemetz v Germany* (1992) 16 EHRR 97, para 29.

⁵⁴ *Büchler and Keller* (n 48) 5. The living instrument doctrine is explained in the next section, when justifying the protection of the right to respect for the decision to become a parent through surrogacy.

⁵⁵ ECtHR, Jurisconsult's Department (n 47) 20.

⁵⁶ *ibid* 23.

Meanwhile, it has been held that the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found one.⁵⁷ As reiterated by the Court, family life is an autonomous concept and the decisive factor for its implication is not the legal recognition of the relationship or the genetic ties.⁵⁸ Instead, it is a question of whether real and close personal ties exist in practice.⁵⁹ This is broadly referred to as *de facto* family ties and there are different features to be taken into account for its assessment, e.g. cohabitation, length of relationship, commitment, etc.⁶⁰ The right to respect for the decision to become a parent has been acknowledged as an aspect of family life whenever the application was lodged by a couple.⁶¹

However, this line of jurisprudence has been disrupted and the Court now appears to be stricter in its application of the concept of family life. Through a ground-breaking judgment in January 2017, the Grand Chamber in *Paradiso and Campanelli v Italy* (the *Paradiso* case) carried out a very restrictive interpretation of family life and reshaped the notion of *de facto* family ties by narrowing it down.⁶² In particular, the Court did not acknowledge the existence of family life between the intended parents and the resulting child even after eight months of cohabitation, starting from birth.

This author has argued elsewhere that the *Paradiso* case is a milestone for the concept of family life within the ECHR and that the findings of the Court rested on the combination of three factors: absence of biological ties, short duration of cohabitation and legal uncertainty created by the applicants themselves.⁶³ In particular, this last element is seen as deeply problematic by this author, because it relies on a distinction that the Court has long held to be arbitrary, namely that of legitimate and illegitimate families.⁶⁴ This problematic case additionally demonstrates why the current ECHR solution to surrogacy – using Article 8 to mitigate the cross-border surrogacy effects – is not appropriate and calls for an *ex ante* solution, as explained in Chapter 1 under ‘Originality’.

⁵⁷ *Fretté v France* (2002) 38 EHRR 438, para 32.

⁵⁸ *Kopf and Libberda v Austria* [2012] ECHR 50, para 35.

⁵⁹ *K and T v Finland* (2003) 36 EHRR 255, para 150.

⁶⁰ ECtHR, Jurisconsult’s Department (n 47) 54.

⁶¹ Contrasting the *Dickson*, *SH* and *Costa* cases to the *Evans* case, mentioned in the previous section.

⁶² *Paradiso and Campanelli v Italy* [2017] ECHR 96, paras 142-158.

⁶³ Marianna Iliadou, ‘Surrogacy and the ECtHR: Reflections on *Paradiso and Campanelli v Italy*’ (2019) 27 *Medical Law Review* 144.

⁶⁴ For the author’s view see: *ibid.* For the Court’s rejection of this distinction see: e.g. *Marckx v Belgium* (1979) 2 EHRR 330.

The fact that the *Paradiso* case is a milestone in the Court's case law regarding family life can be observed in the subsequent case law. For example, in the *Nedescu* case, despite having a married couple alleging that prevention from retrieving their frozen embryos violated their private and family life – and despite the Court mentioning the passages from the *SH* case referring to both concepts – it went on to consider the violation as an aspect of private life only.⁶⁵ Although the Court did not explain why it did not consider the concept of family life, it did base its material scope on the *Paradiso* case in its section of the principles established by the Court's case law.⁶⁶ Had it not been for the *Paradiso* case, it is not clear why the Court would not include the concept of family life.

Given the above, although the right to respect for the decision to become a parent has been held to fall within the notion of family life, a new application of a couple might fall outside its scope. It is difficult to predict with certainty the Court's approach, but if the *Nedescu* case (based on the *Paradiso* case) is followed, it seems that family life will not be engaged. Nonetheless, private life would be definitely engaged.

Considering these features of Article 8 ECHR, the question remains as to whether the above can apply to surrogacy. In essence, what needs to be determined is whether the right to respect for the decision to become a parent, as recognised by the Court, can be extended to include surrogacy, be it through private life only or private and family life. To assess this, surrogacy is examined in light of the definition of the right to respect for the decision to become a parent given in the previous section, keeping in mind the material scope of Article 8 ECHR.

Before this assessment, it should be underlined that the Court has already accepted that in surrogacy 'what is at issue is the right to respect for the applicants' decision to become parents',⁶⁷ through the aspect of private life only. However, the claim in the *Paradiso* case focused on the issue of cross-border surrogacy and the subsequent separation of the intended parents and the child. Given the different claim and facts, it is important to check whether

⁶⁵ *Nedescu v Romania* [2018] ECHR 62, para 75.

⁶⁶ *ibid* paras 66-67.

⁶⁷ *Paradiso and Campanelli v Italy* (n 62) para 163.

access or non-interference through a blanket ban on surrogacy would fall within the material scope of Article 8, as an aspect of the right to respect for the decision to become a parent.

The right to respect for the decision to become a parent was defined as the prerogative of an individual or a couple to the permissibility of ART in order to beget a child or the non-interference with someone's decision to have offspring by not prohibiting certain forms of ART. Applying its essential characteristics to surrogacy, it becomes evident that surrogacy could potentially afford protection under this right, as protecting the same interest. First, the decision to undertake surrogacy is a decision to become a parent. It additionally leads to begetting a child and not parenting in general. Surrogacy is indeed an ART.⁶⁸ It entails medically assisted procreation, through either artificial insemination (AI)⁶⁹ or IVF.⁷⁰ It is different in the sense that it requires the participation of a third person, the surrogate. However, a third person participates in sperm and egg donation as well, i.e. the donor, aspect which was already recognised by the Court to be a protected interest.⁷¹ Therefore, the gestation of a child by a third person by itself should not hinder surrogacy's protection. A blanket ban on surrogacy would engage both private and family life or private life only, depending on the applicant (individual or couple) and the Court's restrictive approach to family life. Finally, the right to respect for the decision to become a parent through surrogacy could entail both a positive and negative obligation, i.e. the failure of the State to permit surrogacy in the former and the interference with the applicant's right to beget a child by prohibiting surrogacy in the latter.

The above demonstrate that surrogacy fulfils the criteria and can be recognised as an interest protected by the umbrella term 'right to respect for the decision to become a parent'. This, coupled with the nature of Article 8 ECHR established in this section, indicates that a potential application by an intended parent or intended parents against a complete ban on surrogacy would fall under the material scope of the Convention. In particular, given its proximity to the claim found in *SH and Other v Austria* as a claim against an ongoing prohibition/ban on a reproductive method,⁷² the claim upheld by this thesis is that of a

⁶⁸ This was already discussed in Chapter 2 (2.1). Similarly: Athena Liu, *Artificial Reproduction and Reproductive Rights* (Dartmouth 1991) 14.

⁶⁹ The right to respect for the decision to become a parent through AI was disputed in the *Dickson* case.

⁷⁰ IVF was discussed in the *SH* case.

⁷¹ *SH and Others v Austria* (n 17) para 82.

⁷² *ibid* para 88.

negative obligation, i.e. non-interference with surrogacy through a blanket ban. This is contrasted with the non-availability of a particular ART method to a particular type of applicant or due to a missing element such as consent, examined in the *Dickson* and *Evans* cases respectively, where the Court considered the right under positive obligations.⁷³ Lastly, it is most likely that the application would be accepted as both an aspect of private and family life, but, in the event that a strict application of the family life concept would be followed,⁷⁴ it would still be accepted under the notion of private life.

Having shown that surrogacy would satisfy the applicability *ratione materiae*, it should not be overlooked that this is only the first step in the two-stage test explained above. The incorporation of surrogacy to the right to respect for the decision to become a parent does not necessarily lead to its protection. For the claim to be successful, it is necessary to fulfil the second step of Article 8. When a matter falls under the material scope of the Convention, this triggers the application of Article 8 ECHR. The violation of the right, however, depends on whether the interference by the State is justified or not. In practice, this means the application of the fair balance test; an evaluation of whether the State has struck a fair balance between the competing interests.⁷⁵ Nevertheless, more often than not, the Court, when applying this fair balance test, grants a wide margin of appreciation to the Contracting States, allowing them to decide over issues endowed with moral and ethical dilemmas.⁷⁶ In the three aforementioned leading cases, the Court found a violation of the right to respect for the decision to become a parent only in the *Dickson* case.⁷⁷

This second step of Article 8 and the potential protection of the applicants' interests through surrogacy is examined in Chapter 5. It is in that chapter that the doctrine of margin of appreciation is discussed thoroughly, in attempt to identify its problematic use and suggest a new framework for its application. This chapter established that surrogacy can potentially afford the Convention's protection through the right to respect for the decision to become a parent, while Chapter 5 discusses how this interest can be upheld before the ECtHR, as an

⁷³ See above (n 28).

⁷⁴ See the *Paradiso* case and its effect on the *Nedescu* case, as discussed above.

⁷⁵ For instance: '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': *Keegan v Ireland* (n 26) para 40.

⁷⁶ 'Margin of appreciation' is the latitude granted to a government when assessing factual situations and putting in application international human rights treaties: Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 2.

⁷⁷ *Dickson v UK* (n 15) paras 77-85.

unjustified interference with the applicants' private and family life. Therefore, for the purposes of this chapter, it suffices to say that surrogacy would fall under the material scope of Article 8 ECHR through the right to respect for the decision to become a parent.

Article 12 ECHR

While Article 12 ECHR upholds the right to marry and to found a family,⁷⁸ the Court has not so far provided protection to the right to respect for the decision to become a parent through this article. Although it has been considered as more adequate than Article 8 for the protection of the right to procreate,⁷⁹ this thesis argues that Article 12 cannot serve as a basis for the protection of the right to respect for the decision to become a parent through surrogacy. Instead, the suitable basis for the hypothetical claim underpinning this thesis is Article 8 ECHR. This is attributed to a variety of reasons.

First, Article 12 ECHR has been interpreted in a strict way by the Strasbourg Court.⁸⁰ While the Court has acknowledged the progress in the concepts of marriage and founding a family, it has not provided a proper space within Article 12 for the doctrine of living instrument to prosper.⁸¹ This can be clearly seen in same-sex marriage cases, where the ECtHR went so far as to recognise that nowadays the right to marriage should no longer, and in all circumstances, be limited to opposite-sex couples.⁸² Nonetheless, the progress in the field was not enough to provide protection to same-sex marriage under Article 12,⁸³ leaving Article 8 the only available option for protection.⁸⁴ In this sense, the interpretation of Article 12 contrasts with Article 8 and the latter's extensive dynamic and evolutive interpretation, as established above. The interpretation of Article 8 makes it more fruitful for the protection of the right to respect for the decision to become a parent, as it is closely related to societal and technological advances.

⁷⁸ Article 12 ECHR: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right'.

⁷⁹ Marleen Eijkholt, 'The Right To Found A Family As A Stillborn Right To Procreate?' (2010) 18 Medical Law Review 127, 148-149.

⁸⁰ Harris and others (n 39) 735.

⁸¹ An exception is found in transsexual marriage. See: *Goodwin v UK* (2002) 35 EHRR 18, paras 74-75.

⁸² *Schalk and Kopf v Austria* (2011) 53 EHRR 20, para 61.

⁸³ *Oliari and Others v Italy* [2015] ECHR 716, para 192.

⁸⁴ *ibid* paras 185-186.

Furthermore, regarding its restrictive interpretation, the notion of family found in Article 12 is not as wide as the one found in Article 8. In Article 8, *de facto* family ties are deemed sufficient to invoke its protection. In contrast, Article 12 ‘does not guarantee the right to have children born out of wedlock’.⁸⁵ Similarly, a restrictive interpretation is reflected in the type of applicants that can be protected under the umbrella of Article 12. The Court has held that it applies only to married couples, while it is not clear if unmarried couples could be protected.⁸⁶ Nonetheless, it is not considered a right available to a single individual, as the existence of a couple is fundamental.⁸⁷ The above further show that Article 12 would fail to uphold the hypothetical claim supported by this thesis, i.e. the right to respect for the decision to become a parent of an intended or intended parents, the latter being connected through legally recognised or *de facto* family ties.

In a similar vein, the right to marry and to found a family is treated as one single right.⁸⁸ This is further evidenced by the use of ‘this right’ at the end of Article 12, instead of ‘these rights’, contrasting other – more modern – legal instruments.⁸⁹ The above has not allowed the right to found a family to flourish independently. While it could be argued that the central reason of founding a family is having offspring, Article 12 is not subject to the ability to procreate in order to enjoy the right to marriage⁹⁰ and procreation is not its single aim.⁹¹ Quite the opposite: it is commonly understood that the right to marry does not depend on the ability to procreate and found a family, but instead ‘the right to found a family enshrined in Article 12 exists only within marriage’.⁹² Again, this goes against the hypothesis of this thesis, wishing to extend its protection beyond marriage.

In addition, the interests upheld by Article 12 are subject to national laws governing the exercise of this right, which has been used by the Court in a way to reduce its protection.

⁸⁵ *X v Belgium and Netherlands* App no 6482/74 (Commission Decision, 10 July 1975) 77.

⁸⁶ Eijkholt suggests that the protection is extended to unmarried couples: Eijkholt (n 79) 134-135, footnote 41. However, the early case law suggests that it does not: Harris and others (n 39) 743-744.

⁸⁷ *X v Belgium and Netherlands* (n 85).

⁸⁸ *ibid.*

⁸⁹ e.g. the EU Charter of Fundamental Rights: Rainey, Wicks and Ovey (n 38) 398.

⁹⁰ *Goodwin v UK* (n 81) para 98: ‘The Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision’.

⁹¹ Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: ‘Living Instrument’ or Extinguished Sovereignty?* (Hart Publishing 2017) 126.

⁹² Harris and others (n 39) 742.

Allowing the interference with Article 12 to rest upon national laws, without defining what the interests for the interference could be, makes the protection of the right more susceptible to arbitrary intervention.⁹³ While the ECtHR holds that the limitations imposed by national law ‘must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’,⁹⁴ it has been held that this leaves national authorities with substantial discretion capable of reducing the efficiency of the Article, ‘especially since the essence of Article 12 seems obscure’.⁹⁵ This is contrary to Article 8, where an interference can be justified only under the circumstances stipulated in Article 8(2), making the examination of an interference more consistent. In turn, examination under Article 8 would make the interference with the right to respect for the decision to become a parent through surrogacy more rigorous and less arbitrary.

It is discernible from the case law of the ECtHR that whenever there is an overlap between Article 8 and Article 12, the Court considers the claim solely under Article 8 ECHR.⁹⁶ Article 8 is particularly preferred in cases of medically assisted procreation.⁹⁷ In cases where the ECtHR acknowledged the right to respect for the decision to become a parent, the Court, without discussing in detail whether Article 12 is engaged, simply affirmed that there are no separate issues arising from this article.⁹⁸ Therefore, it seems apparent that if the hypothesis of this thesis would reach the Court, the ECtHR would discuss the right to respect for the decision to become a parent through surrogacy solely under Article 8.

Finally, its inadequacy for the protection of the right to respect for the decision to become a parent, as interpreted by the Court, lies in the fact that Article 12 is not considered independently, but in conjunction with Article 8 ECHR. The Court has reiterated that ‘an interference with family life which is justified under paragraph 2 of Article 8 of the Convention cannot at the same time constitute a violation of Article 12’.⁹⁹ Consequently, if there is no violation of the right to respect for the decision to become a parent according to Article 8, there can be no violation under Article 12 either. This further illustrates that the

⁹³ The Court, however, seems to have the opposite view: *O’Donoghue and Others v UK* [2011] ECHR 2268, para 84.

⁹⁴ *Rees v UK* (1987) 9 EHRR 56, para 50.

⁹⁵ *Eijkholt* (n 79) 136.

⁹⁶ For exceptions: *Goodwin v UK* (n 81) para 101 and *Schalk and Kopf v Austria* (n 82) para 101.

⁹⁷ *Harris and others* (n 39) 735-736.

⁹⁸ e.g. *Dickson v UK* (n 15) para 86.

⁹⁹ *Boso v Italy* [2002] ECHR 846, para 3.

protection under Article 8 is more rigorous than Article 12. There can be no violation of a matter falling under both articles when Article 8(2) has been satisfied, which shows that Article 8 is more specific and Article 12 allows for broader interests to be taken into account when justifying State interference, based on national law.¹⁰⁰ In this sense, the Court has acknowledged that Article 8, although with a more general purpose and scope regarding the interests protected,¹⁰¹ should be treated as *lex specialis* when overlapping with Article 12.¹⁰²

However, the previous is an estimation based on the current jurisprudence of the Strasbourg Court. Article 12 ECHR could serve as a basis for the protection of the right to respect for the decision to be a parent, since it protects the right to found a family. This would occur in the occasion of interpreting Article 12 as encompassing two rights: the right to marriage and the right to found a family. It would then need to expand the latter's protection to unmarried couples and single individuals, making the two rights independent from each other. However, based on the aforementioned analysis, this seems highly unlikely, as the protection of the two rights seems intertwined so tightly within the Court's case law that could amount to an inherent connection. Only a drastic change in the interpretative line for Article 12, in particular through the Court's living instrument doctrine, could support a claim based on the protection of the right to respect for the decision to become a parent through surrogacy.

While the Commission, when it had quasi-judicial powers, stated that 'it is implicit in Article 12 that it guarantees a right to procreate children',¹⁰³ the Court in 2003 held that 'the right to have grandchildren or the right to procreation is not covered by Article 12 or any other Article of the Convention'.¹⁰⁴ As Draghici holds:

It is not clear what purpose the addition 'or the right to procreation' serves; against the background of numerous rulings recognising the right to be a parent, it cannot be interpreted as a retraction of the 'right to have children'. The Court arguably contests only the existence of a wider right to perpetuation of one's genetic heritage beyond one's offspring.¹⁰⁵

¹⁰⁰ This does not agree with *O'Donoghue and Others v UK* (n 93).

¹⁰¹ *Schalk and Kopf v Austria* (n 82) para 101.

¹⁰² *P, C and S v UK* (2002) 35 EHRR 1075, para 142.

¹⁰³ *X and Y v UK* [1977] ECHR 3, 34. The Commission held that the right to procreate, however, does not as such guarantee a right to adopt.

¹⁰⁴ *Sijakova and Others v the Former Yugoslav Republic of Macedonia* App no 67914/01 (ECtHR, 06 March 2003), para 3.

¹⁰⁵ Draghici (n 91) 127, footnote 12.

Nonetheless, even if considered that the Court addressed the right to procreate as such, the cases mentioned previously regarding Article 8 ECHR (*Evans, Dickson, SH*) are subsequent case law and could thus be considered a change in the jurisprudence of the ECtHR. In any case, although the right to procreate as such has not been acknowledged by the Court, it was already established that the right to respect for the decision to become a parent through ART falls under the material scope of Article 8 ECHR.

Concluding this subsection, the above analysis has showed that a complaint over the blanket prohibition of surrogacy could be rooted on Article 8 ECHR and the right to respect for private and family life as non-interference with the right to respect for the decision to become a parent. This right has a strong background in the Court's jurisprudence that would allow its admissibility, particularly *ratione materiae*. Whether its protection could be upheld through Article 8(2) or not is discussed in Chapter 5. In contrast, Article 12 ECHR cannot provide a basis for the right to respect for the decision to become a parent through surrogacy, as it lacks the required flexibility.

3.3.3 *Relevant Issues Emerging Regarding the Rights-holders*

It was already established what action the asserted right requires (non-interference of the State by not banning surrogacy) and why the rights-holder has the right (its existence as a legal right acknowledged by the ECtHR to be encompassed in Article 8 ECHR). However, there is still a pending question on the potential rights-holders, asking, in essence, who the holder of this right can be. The need to explore this additional matter lies within the fact that the rights-holder is an essential component of the right and, when discussing who should have access to ART and surrogacy in order to become a parent, one comes across questions regarding people's civil status, sexual preferences, age and other similar requirements.

The rights-holder should be distinguished from a potential applicant of the claim against the blanket ban on surrogacy. Based on Article 8, the applicant of such hypothetical claim could be, for instance, a single individual or a couple: same-sex or opposite-sex/married or unmarried. However, the question of the rights-holders refers to its actual protection, i.e. who can be granted the protection of this right. While the type of applicant would not alter the above examination on admissibility of the right to respect for the decision to become a parent,

as each type of applicant would at least have their case examined, the rights-holder impacts decisively the potential protection under Article 8(2) ECHR.

The afforded protection to the right to respect for the decision to become a parent through surrogacy under Article 8(2) ECHR is examined in detail in Chapter 5. However, the focus in Chapter 5 lies in the justification of State interference by banning access to surrogacy in general, not by banning its access to a particular type of applicant. Therefore, issues related to rights-holders are discussed in this chapter, as issues emerging from the right to respect for the decision to become a parent through surrogacy.

Although this thesis analyses the right to respect for the decision to become a parent as acknowledged by the ECtHR in its case law, the question of the rights-holders is closely related to each national law/regulation. The different barriers that can be placed at domestic level to surrogacy in terms of its rights-holders are discussed first and what follows afterwards is an evaluation of these barriers by the Strasbourg Court.¹⁰⁶ If the Court were to accept the claim that States should not interfere with Article 8(1) by having a blanket ban on surrogacy, it would then have to additionally assess the type of applicant that could be a rights-holder. This section also serves for Contracting States where surrogacy is currently lawful, but access is restricted to citizens that fulfil certain criteria.

Access to surrogacy may be conditional upon an array of factors imposed by the State: civil status, gender, sexual orientation, involuntary childlessness, ability to establish a genetic link with the resulting child, age, etc.¹⁰⁷ This means that not everyone would be a rights-holder of the right to respect for the decision to become a parent through surrogacy, but only those that fulfil these criteria. Similarly, the Court might uphold the right for only some categories of applicants, depending essentially on the aforementioned factors.

Taking into account what was already mentioned in Chapter 2 (2.2 Surrogacy Policies), surrogacy might be available to opposite-sex married couples, but not same-sex, unmarried couples (either in civil partnership or not) or a single person. Even if available to single

¹⁰⁶ The assessment is speculated based on the current case law of the Court.

¹⁰⁷ Additional limitations can be found for the surrogate, as, for example, age limits, having a child of her own before undergoing surrogacy, etc. Nevertheless, this thesis focuses on the intended parents, considering, in particular, the right to respect for the decision to become a parent.

individuals, it might be an option for women only and not men. Surrogacy could only be solicited if the involved applicant(s) suffer from medical conditions that render them infertile or unable to gestate or those that suffer from another type of involuntary childlessness. It could also be limited to those who can establish a potential genetic link with the resulting child and, in case of two intended parents, both of them or at least one with the use of a donor. It might also be restricted to people within a certain age range. It goes without saying that general rules on capacity would also apply, e.g. cognitive or other abilities for a legally recognised decision, age limit to contract marriage, etc.

So far, the cases brought before the Strasbourg Court regarding the right to respect for the decision to become a parent have been presented by either opposite-sex married couples or single women.¹⁰⁸ The protection was upheld for married couples only, but this is mainly due to the nature of the claim by the single women rather than their civil status.¹⁰⁹ Whether the protection for surrogacy could be extended to single men or opposite-sex unmarried couples or same-sex married/unmarried couples, is a matter of domestic law. For example, if the Court finds that a blanket ban on surrogacy goes against Article 8, where access to ART and adoption is open for same-sex couples, unmarried couples or single individuals, a potential discrimination against them would fall under Article 14 ECHR.¹¹⁰ However, where the above would not be allowed, the Court would show deference to States, as they are better placed to assess their internal matters.¹¹¹ The Court was recently faced with the question of access to ART for same-sex couples.¹¹² The case was dismissed on grounds of admissibility (non-exhaustion of domestic remedies) and the Court missed the chance to rule on the discrimination of access to ART, named by some as a restraint solution.¹¹³

¹⁰⁸ For example, the *Costa* and *Evans* cases respectively.

¹⁰⁹ In the *Evans* case, it was her right to become a mother and the right of her ex-partner not to become a father. Upholding the right not to become a father (by declaring that the UK did not overstep its margin of appreciation) seems like a conflict of rights solution rather than an absence of Ms Evans right. Also: *Knecht v Romania* (n 20).

¹¹⁰ ‘The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’.

¹¹¹ This is connected to the doctrine of margin of appreciation, lack of European consensus in the field and subsidiarity of the ECHR protection, which are discussed in detail in Chapter 5.

¹¹² *Charron and Merle-Montet v France* App No 22612/15 (ECtHR, 16 January 2018).

¹¹³ ‘“MAP for All”: A “Restraint Solution” Adopted by the ECHR’ *Généthique* (1 March 2018) <<http://www.genethique.org/en/map-all-restraint-solution-adopted-echr-69277.html#.XWajGihKg2x>> accessed 4 December 2019.

What seems to be more decisive is the requirement of establishing a genetic link with the resulting child from surrogacy or whether double donation is allowed. Currently, many States, where domestic surrogacy is lawful, require a genetic link with at least one of the intended parents, while others do not ask for such requirement.¹¹⁴ This criterion has raised issues of discrimination, described even as an ‘insult’ to families where parents lack a genetic bond with their children.¹¹⁵ In the UK, there is currently a debate to lift this requirement, which is further supported by the Law Commission’s consultation paper.¹¹⁶

Nevertheless, the ECtHR’s take on this issue seems to reinforce such criterion. As discussed in Chapter 2, the Strasbourg Court has shaped the way cross-border surrogacy is treated in Europe. The Court ruled in *Mennesson v France*¹¹⁷ and *Labassee v France*¹¹⁸ that it is in the best interests of the children born through surrogacy abroad to be registered in their home country, legalising, in essence, the effects of cross-border surrogacy. The genetic bond was given particular emphasis by the Court in the above cases, which, as ‘a component of identity’,¹¹⁹ led to the recognition of the intended father as the legal father, but not the intended mother, given that he was the one providing the genetic material alongside egg donation.¹²⁰ This can be further contrasted with the *Paradiso* case, where the lack of genetic link was one of the reasons why the existence of family life was not acknowledged by the Court.¹²¹

The significance of the genetic link is apparent in the first ever advisory opinion of the Court, where the ECtHR reiterated that ‘to date, it has placed some emphasis in its case-law on the existence of a biological link with at least one of the intended parents’.¹²² Although the Court held that even when there is no genetic link between the child and the intended mother, once

¹¹⁴ Russia is an example of the former and Greece is an example of the latter. See Chapter 2 (2.2).

¹¹⁵ *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580 (South Africa) para 84.

¹¹⁶ Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law. A Joint Consultation Paper* (Law Com CP No 244/Scot Law Com DP No 167, 2019) 282 onward.

¹¹⁷ *Mennesson v France* [2014] ECHR 664.

¹¹⁸ *Labassee v France* [2014] ECHR 668.

¹¹⁹ *Mennesson v France* (n 117) para 100.

¹²⁰ The main issue is that the legal mother in France (as in many other Contracting States) is the one that gives birth to the child.

¹²¹ *Iliadou* (n 63).

¹²² Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (ECtHR, Grand Chamber, 10 April 2019).

their relationship has become a practical reality ‘an effective mechanism should exist enabling that relationship to be recognised’,¹²³ it nevertheless emphasises that the force is stronger when the intended mother is genetically linked to the resulting child.¹²⁴ Therefore, the genetic link is clearly favoured by the Strasbourg Court and seems highly plausible that, in the absence of an existing child, it could be upheld as a valid condition for the rights-holders of the right to respect for the decision to become a parent through surrogacy.¹²⁵

Lastly, regarding the age range for the intended parents or the existence of medical/biological reasons,¹²⁶ the ECtHR, even if it were to provide protection to the right to respect for the decision to become a parent through surrogacy, it would not enter into details about the specific regulation of surrogacy. Any such requirement could be accepted if a Contracting State provides a reasonable justification for the interests protected under Article 8(2) ECHR.¹²⁷ As with the previously presented conditions, these limitations could raise the issue of discrimination through Article 14 ECHR.

To summarise the above, given the deference shown to States by the ECtHR, the rights-holders of the right to respect for the decision to become a parent through surrogacy might be limited to individuals/couples that fulfil certain criteria. Although the Court itself shows a particular preference to specific requirements, such as the genetic link, Article 14 ECHR could potentially be used to extend the right to those deprived of its protection.

3.4 Justification of the Proposed Approach

Having established the right to respect for the decision to become a parent by the Strasbourg Court, the purpose of the present section is to demonstrate that the acknowledgment of such right through surrogacy is grounded in a sound basis. The two arguments presented are, first, the living instrument doctrine, established by the Court itself, and, secondly, the trends towards the recognition of reproductive rights and the right to procreate both at international and national level. This on a larger scale justifies and supports a prospective application of

¹²³ *ibid* para 54.

¹²⁴ *ibid* para 47.

¹²⁵ Nonetheless, the existence of a genetic link does not seem to be crucial to the well-being of the resulting child: Katherine Wade, ‘The Regulation of Surrogacy: A Children’s Rights Perspective’ (2017) 29 *Child and Family Law Quarterly* 113, 118-119.

¹²⁶ i.e. infertility, inability to gestate or other reasons of involuntary childlessness.

¹²⁷ The justification under Article 8(2) ECHR is discussed in detail in Chapter 4 and Chapter 5.

individuals desiring to become parents through surrogacy against a blanket ban imposed by a State.

3.4.1 *The Convention as a Living Instrument*

Since its creation, the Strasbourg Court has evolved not only structurally,¹²⁸ but also in substantive terms. In particular, the ECtHR is renowned for the different interpretative tools it has adopted throughout its years of existence in order to resolve the cases brought before it. Some of the most important methods of interpretation utilised by the Court are: the living instrument doctrine connected to the evolutive and dynamic interpretation of the Convention, the principle of effectiveness, the creation of positive obligations, the doctrine of ‘margin of appreciation’ as deference granted to States and the doctrine of European consensus or diversity in practice. Examining the interpretative tools used for the right to respect for the decision to become a parent, the prevalent doctrine in this area is the principle of effectiveness, which in turn has led to the prominent living instrument doctrine. The Court built the living instrument doctrine around the principle of effectiveness, hence facilitating the dynamic and evolutive interpretation of the ECHR. Consequently, this subsection briefly examines the principle of effectiveness and then analyses the living instrument doctrine. The above are carried out with a view to justifying the acknowledgment of the right to respect for the decision to become a parent through surrogacy.

The interpretation of the Convention has always been the focus of attention for academics and legal practitioners when considering the role of the ECtHR. The controversy surrounding the interpretation of the ECHR originated in the late 1970s, when the ‘sleeping beauty’ awoke.¹²⁹ The Strasbourg Court, in its approximately twenty years of moderate impact, started to take a more active role.¹³⁰ As a result, it raised the issue of the creation of new rights and judicial activism.¹³¹ This creation of new rights referred mainly to the development of the living instrument doctrine, enabling the dynamic and evolutive interpretation of the

¹²⁸ For a brief trajectory of the Court’s structure: ‘The Court in Brief’ <https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf> accessed 4 December 2019.

¹²⁹ Jochen Abr Frowein, ‘European Integration Through Fundamental Rights’ (1984) 18 *Michigan Journal of Law Reform* 5, 8.

¹³⁰ Ed Bates, *The Evolution of the European Convention on Human Rights : From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010) 257-258.

¹³¹ Along these lines of the ECtHR reading into the Convention ‘elements, quite extraneous to its true meaning and intention’: *Marckx v Belgium* (n 64) Dissenting Opinion of Judge Fitzmaurice, para 21.

Convention. In its attempt to provide a more thorough and effective protection for the rights guaranteed in the ECHR, the Court comprehended the need to read the Convention in a more progressive way. An early case shows that due to its nature as a law-making treaty, its interpretation should be directed ‘to realise the aim and achieve the object of the treaty’.¹³²

This was the beginning of a subsequent dynamic and evolutive interpretation of the text of the ECHR, based on a teleological rather than a grammatical or originalist approach. However, it was the *Golder* case that marked the beginning of this new era of applying extensively the principle of effectiveness. In *Golder v UK*,¹³³ the Court made reference once again to the object and purpose of the ECHR, citing the Vienna Convention on the Law of Treaties (VCLT), according to which the interpretation should be done ‘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’.¹³⁴

This emphasis on the object and purpose of the Treaty gave a new impetus to the interpretation of the ECHR, given that the object and purpose of a text are closely related to the effective protection of the rights enshrined in it.¹³⁵ In general, the principle of effectiveness, having its origins in the Latin maxim *ut res magis valeat quam pereat*,¹³⁶ manifests the general rule according to which the provisions of a treaty are to be granted the fullest possible effect and weight through a harmonised interpretation so that ‘every part of it can be given meaning’.¹³⁷ Following the *Golder* case, the Strasbourg Court started utilising the principle of effectiveness and the VCLT for the interpretation of the Convention by mentioning its Articles 31 to 33.

These two judgments paved the way for *Tyrer v UK*, where the Court for the first time stated that ‘the Convention is a living instrument which ... must be interpreted in the light of present-day conditions’.¹³⁸ This judgment represented a historic moment for the future of the

¹³² *Wemhoff v Germany* [1968] ECHR 2, para 8.

¹³³ *Golder v UK* (1975) 1 EHRR 524, para 36.

¹³⁴ Article 31(1) of the Vienna Convention on the Law of Treaties 1969.

¹³⁵ *Bates* (n 130) 321.

¹³⁶ ‘So that the matter may flourish rather than perish’: Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009).

¹³⁷ JG Merrills, *The Development of International Law by the European Court of Human Rights* (2 edn, Manchester University Press 1993) 98.

¹³⁸ *Tyrer v UK* (1978) 2 EHRR 1, para 31.

Court, as it initiated a jurisprudence focused on the dynamic and evolutive interpretation of the ECHR.

Before analysing the living instrument doctrine and the implications it entails, it should be mentioned that *Tyrer v UK*, in turn, paved the way for the doctrine of positive obligations. Positive obligations are imposed upon Contracting States in order to secure the conventional rights by taking positive action rather than merely abstaining from interfering.¹³⁹ They are either implicit or explicit, as even in rights with a primary negative aspect, like Article 8 discussed in the previous section, it has been considered that there are inherent positive obligations.¹⁴⁰ The doctrine of positive obligations was firmly established through *Marckx v Belgium*¹⁴¹ and *Airey v Ireland*, where the Court explicitly held that the ECHR ‘is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’.¹⁴² As mentioned above, this thesis approaches the right to respect for the decision to become a parent as non-interference with surrogacy through a blanket ban, therefore positive obligations are not the focus of this analysis.

Nonetheless, the aforementioned help estimate the scope of interpretation of the ECHR. Through this early ECtHR case law, it becomes apparent that the Court 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. This is achieved through the principle of effectiveness.

In particular, the dynamic and evolutive interpretation of the Convention indicates that a certain level of flexibility is granted to the Strasbourg Court in order to uphold effectively the rights and freedoms enshrined in the ECHR and its Protocols. By treating the Convention as a living instrument and interpreting it in light of present-day conditions, the ECHR loses the rigidity of an old Convention. Taking into consideration that the Convention was drafted back in 1950, the living instrument doctrine is essential for the effective protection of its rights. Social and scientific changes alter rapidly modern life, as it was observed earlier with ART,

¹³⁹ Merrills (n 137) 103.

¹⁴⁰ For more information on positive obligations and the ECHR: Lavrysen (n 25).

¹⁴¹ *Marckx v Belgium* (n 64), para 31.

¹⁴² *Airey v Ireland* (1979) 2 EHRR 305, para 24.

and the living instrument doctrine is the tool that helps the Court adapt to such changing times.

The approach given to the Convention is not unprecedented. At national level, there is a similar doctrine found in Canada, where its Supreme Court has developed the ‘living tree doctrine’, according to which the Canadian Constitution is organic and should be interpreted in a wide and liberal way so as to adjust it to the new realities. The ‘living tree doctrine’ was established in *Edwards v Canada (AG)* in 1929 and has since been used extensively by the Canadian Supreme Court.¹⁴³ At international level as well, many courts resort to the principle of effectiveness and the VCLT.¹⁴⁴ However, the doctrine, as shaped by the Strasbourg Court, has a peculiar and unique character. As Letsas observes, notwithstanding the similarity with the purposive interpretation found elsewhere, the ECtHR ‘has created its own labels for the interpretative techniques that it uses’, rejecting the idea that the ECHR rights are to be interpreted according to their meaning at the time when the Convention was drafted, hence rendering its *travaux préparatoires* supplementary.¹⁴⁵

It goes without saying that the application of the two doctrines, the principle of effectiveness and the living instrument doctrine, have been heavily criticised by Contracting States of the Convention.¹⁴⁶ Academics/legal practitioners have also expressed fears of judicial activism and its serious repercussions,¹⁴⁷ while some emphasise the difficulty of drawing a line between judicial interpretation and judicial legislation.¹⁴⁸ Furthermore, special importance is given to the subsidiarity of the European human rights protection system, which places domestic protection at the forefront.¹⁴⁹

¹⁴³ *Edwards v Canada (Attorney General)* [1930] 1929 UKPC 86.

¹⁴⁴ *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6 (International Court of Justice) paras 41 and 51.

¹⁴⁵ George Letsas, *A Theory of Interpretation of the European Convention on Human* (Oxford University Press 2007) 59.

¹⁴⁶ Bates (n 130) 294-295.

¹⁴⁷ Marc Bossuyt, ‘Judicial Activism in Strasbourg’ in Karel Wellens (ed), *International Law in Silver Perspective*, vol 90 (Brill | Nijhoff 2015) 31.

¹⁴⁸ Harris and others (n 39) 8.

¹⁴⁹ In Chapter 5, it is demonstrated how subsidiarity has been reinforced from 2014 onward, in the ‘Age of Subsidiarity’ (as per judge Robert Spano), and recently with the Copenhagen Declaration in April 2018.

However, it seems that, in general, the Court's early case law was received positively.¹⁵⁰ In addition, the need for an interpretation of the Convention in light of present-day conditions is undeniable. It is undisputable that, for example, the concept of family life is very different from the one that the founding fathers of the Convention had in mind or envisaged. In addition, many Contracting States did not have the opportunity to shape the Convention when it was drafted, as many were not signatories when it first came into force. It would be anachronistic, to say the least, to insist on a grammatical interpretation or originalism. A teleological, dynamic interpretation of the Convention is essential in order to make use of the Convention and give meaning to its stipulations.

The above analysis shows that the ECtHR cannot turn a blind eye to the developments of ART and surrogacy in particular. At the time of drafting the Convention, the European society was strikingly different from the one today. For example, it would make no sense to try and interpret family life as the union between a man and a woman, when more and more Contracting States legalise same-sex marriage or civil partnerships. Similarly, it would make no sense to try and avoid all new assisted reproductive methods available to people suffering some type of involuntary childlessness. Surrogacy is a reality both in Europe and worldwide, as are the different possibilities given to individuals/couples to become parents. To hold otherwise would be tantamount to being oblivious of the domestic and cross-border surrogacy reality in Europe, as discussed in Chapter 2. The living instrument doctrine is the tool providing flexibility to the Court in order to respond to these new challenges, particularly in the field of private and family life. If the Court would fail to recognise the right to respect for the decision to become a parent through surrogacy, it would fail to rise to those challenges and live up to its role as the guardian of human rights in Europe.

3.4.2 *The National and International Trends*

In line with the Strasbourg's living instrument doctrine, this section shows the particular innovations in the field of reproductive rights and the right to procreate, which further supports the recognition of the right to respect for the decision to become a parent through surrogacy. Examining the trends towards these rights show that if the Court wants to provide effective protection to the ECHR rights, taking into account present-day conditions of ART,

¹⁵⁰ For example, for the *Marckx* case: Michael D Goldhaber, *A People's History of the European Court of Human Rights* (Rutgers University Press 2007) 21.

it should protect surrogacy. Therefore, what follows aims to justify the approach supported by this thesis, according to which the Strasbourg Court would need to acknowledge a right to respect for the decision to become a parent through surrogacy.

Following international trends, there has been a significant movement at national level towards the recognition of reproductive rights and the right to procreate. This occurs vice versa too. National developments urge and push for the adoption of international instruments. Hence, it is crucial to keep in mind that these trends are closely intertwined, which consequently reinforces reproductive rights at both levels, without either one becoming dominant or dominated.

Also, notwithstanding the differences established at the beginning of this chapter between the right to procreate, procreative freedom/autonomy and the right to respect for the decision to become a parent, this sections deals with trends in recognising all the aforementioned rights/freedoms, as an attempt to show the progress in the field rather than in one particular area. Only at the end of each subsection is surrogacy mentioned, in an attempt to connect the findings in the broader field with the specific area.

International Trends

Starting with the international trends in legislation, there is no hard-law instrument at international level recognising the right to become a parent or the right to procreate as such. However, there has been a gradual recognition of reproductive rights. The first reference to the concept at international level was made in 1968 at the Final Act of the International Conference on Human Rights in Teheran, known as the Proclamation of Teheran, where it was stated that '[p]arents have a basic human right to determine freely and responsibly the number and the spacing of their children'.¹⁵¹ It was much later, in 1994, that the concept of reproductive rights was recognised and defined. During the International Conference on Population and Development (ICPD) and the subsequently adopted Cairo Programme of Action, it was stipulated that:

¹⁵¹ 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.

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.¹⁵²

A year after this declaration, during the Fourth World Conference on Women: Action for Equality, Development and Peace (FWCW) in Beijing, scholars similarly held that:

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.¹⁵³

The aforementioned legal instruments lack a binding nature and are regarded as soft-law mechanisms, i.e. States do not have to abide by them. Nonetheless, these soft-law instruments were used as an inspiration and guidance for the new or amended constitutions from 2000 onward. For example, in the spirit of these non-binding instruments, Ecuador, in its Constitution (dealt with in detail later), has recognised the right to health and the right to access to reproductive health.¹⁵⁴ But even before 2000, these soft-law instruments influenced Constitutions to recognise the right to determine freely and responsibly the number and spacing of their children. For instance, Article 4 of the Mexican Constitution states that ‘[e]very person has the right to decide, in a free, responsible and informed manner, about the number of children desired and the timing between each of them’.¹⁵⁵ This provision was adopted by a Decree published in the Official Gazette of Mexico on 31 December 1974, six years after the Proclamation of Teheran.

¹⁵² Programme of Action adopted at the International Conference on Population and Development, Cairo (5–13 September 1994) U.N. Doc. A/CONF. 171/13, para 7.3.

¹⁵³ Fourth World Conference on Women, Action for Equality, Development and Peace, Beijing (4–15 September 1995) U.N. Doc. A/CONF.177/20/Rev.1, Annex II, Platform for Action, para 96.

¹⁵⁴ Susy Garbay Mancheno, ‘Derechos Sexuales y Derechos Reproductivos En La Normativa Constitucional e Internacional’ [2006] Repositorio UASB. Also: *infra* (n 174).

¹⁵⁵ Article 4, Constitution of the United Mexican States <https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en> accessed 4 December 2019.

In addition, the aforementioned non-binding instruments have been utilised judicially by national and regional courts. For instance, the Colombian Constitutional Court, in a case regarding abortion, held that Colombia must respond to the commitments made at the ICPD and the FWCW to adopt measures in order to ensure the full exercise of sexual and reproductive rights, including the right to free choice of maternity.¹⁵⁶ Similarly, at regional level, the Strasbourg Court has utilised these soft-law instruments as part of the ‘relevant international law’ section of its decisions.¹⁵⁷

When it comes to legally binding international treaties, there is no stipulation of the right to procreate as such. However, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), in its Article 16(1)(e) states that:

Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

CEDAW is legally binding and its compliance is monitored by a Committee, although only through drafting periodic reports and recommendations.¹⁵⁸ Nonetheless, as mentioned in detail in the next section, the Colombian Constitutional Court used this article of CEDAW to provide protection to the right to procreate, revealing its importance to the protection of the right to become a parent.¹⁵⁹

Apart from CEDAW, there are no other international treaties with binding force that contain similar stipulations. Nevertheless, international treaties providing protection to the right to marry and the right to found a family can be considered to enshrine the right to reproduce. As with the ECHR, this is possible through the interpretation of these rights in terms of present-day conditions. For instance, Article 16 of the UDHR, regarding the right to marry and to

¹⁵⁶ A summary of the judgment in English can be found in: Colombian Constitutional Court, *Case C-355/06* [2006] <<https://www.globalhealthrights.org/health-topics/roa-lopez-ors-v-colombia-c-35506/>> accessed 4 December 2019.

¹⁵⁷ *A, B and C v Ireland* (2011) 53 EHRR 13, para 104 onward.

¹⁵⁸ Office of the High Commissioner for Human Rights (UN Human Rights) ‘Committee on the Elimination of Discrimination against Women’ <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>> accessed 4 December 2019.

¹⁵⁹ *infra* (n 180).

found a family, could be subject to an evolutive interpretation that grants protection to the right to procreate.¹⁶⁰

At regional level, the counterpart of the Strasbourg Court, the IACtHR, has considered that the right to private life as enshrined in its convention does indeed encompass reproductive autonomy and the access to reproductive health services through ART. In *Artavia Murillo et al v Costa Rica*, the IACtHR upheld that the right to private life is related to reproductive autonomy and access to reproductive health services, ‘which includes the right to have access to the medical technology necessary to exercise this right’.¹⁶¹ The resemblance between the findings of the two regional human rights tribunals is glaring. Despite this similarity, the approach on deference towards the Contracting States is different. While the ECtHR, using the doctrine of margin of appreciation, did not grant protection against the ban on the use of donated gametes in the process of IVF,¹⁶² the IACtHR condemned the ban of IVF without granting wide discretion to the State.¹⁶³

Furthermore, the (regional) Istanbul Convention of the CoE includes a provision that condemns forced abortion and sterilisation.¹⁶⁴ While this addresses women solely and is applicable to a specific area of reproductive autonomy, it still shows further developments in the area and the willingness of States to protect specific reproductive rights. The efficacy of the Istanbul Convention is ‘secured’ through a monitoring system.¹⁶⁵

Finally, the European Union through its Charter of Fundamental Rights guarantees protection to the right to respect for private and family life as well as the right to marry and right to found a family.¹⁶⁶ However, the Court of Justice of the European Union (CJEU), when confronted with the matter of ART and, more concretely, in its two (so far) judgments

¹⁶⁰ ‘(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.

¹⁶¹ *Artavia Murillo et al (“in vitro fertilization”) v Costa Rica* [2012] Series C N° 257, para 146.

¹⁶² *SH and Others v Austria* (n 17).

¹⁶³ *Artavia Murillo et al* (n 161) paras 314-316.

¹⁶⁴ Article 39 Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) 2014.

¹⁶⁵ Council of Europe ‘About Monitoring’ <<https://www.coe.int/en/web/istanbul-convention/about-monitoring1>> accessed 4 December 2019.

¹⁶⁶ Articles 7 and 9, Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

regarding surrogacy, did not mention the right to reproduce or reproductive rights.¹⁶⁷ This could be attributed to the nature of the conflicts, as both cases involved the right to maternity or paternity leave after surrogacy and did not address the issue of access to ART.

From the above, there appears to be an interplay between legislative and judicial recognition at international level. Judicial recognition has taken place through an interpretation of either the particular international instruments on reproductive rights or through an interpretation of existing private and family life provisions. With regards to surrogacy in particular, it was already mentioned in Chapter 2 that there is currently no international or regional agreement, while there is an ongoing Parentage/Surrogacy Project convened by the HCCH, aiming at providing a private international law agreement. However, the aforementioned progress has a direct impact on surrogacy, particularly where ART is involved, as evidence of acceptance of medically assisted reproduction.

National Trends

Moving to the national level, here as well the recognition of reproductive rights has been carried out either through legislation or judicially. Some of the changes at national level were inspired by the international soft-law instruments and vice versa.¹⁶⁸ Also, an important element not to be dismissed is that in States where the right to procreate is constitutionally acknowledged, access to ART and surrogacy, if prohibited, has a solid ground of protection: the Constitution, the highest in rank norm where existent.

Starting with legislation, the right to procreate is expressly recognised constitutionally by a handful of States. Serbia, North Macedonia and Indonesia are the only States hitherto that acknowledge this right in their written Constitutions. Serbia, through its new constitution adopted in 2006, upholds the freedom on whether to procreate or not,¹⁶⁹ while, in 2011, North Macedonia included in its Constitution that ‘[i]t is a human right freely to decide on the

¹⁶⁷ Case C-167/12 *CD v ST* EU:C:2014:169 and Case C-363/12 *Z v A Government Department and the Board of Management of a Community School* EU:C:2014:159.

¹⁶⁸ It is commonly held that reproductive rights have their origin in the US Supreme Court *Skinner* case: infra (n 178).

¹⁶⁹ Article 63 Constitution of The Republic of Serbia 2006, translated by the International Labour Organisation <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/74694/119555/F838981147/SRB74694Eng.pdf>> accessed 4 December 2019.

procreation of children'.¹⁷⁰ Indonesia amended its constitution in 2002 and, under the title Human Rights, included Article 28B(1), which acknowledges the right to procreate based, however, upon lawful marriage.¹⁷¹

Similarly, the constitution of Bolivia expressly guarantees the exercise of sexual and reproductive rights to men and women,¹⁷² while the recent Cuban Constitution ensures the exercise of women's sexual and reproductive rights.¹⁷³ Ecuador recognises the right to health and respect for the reproductive rights of the employees, using the term reproductive health, in a more general sense.¹⁷⁴ In particular, the wording of Article 66(10) of the Ecuadorian Constitution is identical to the international soft-law instruments mentioned above.¹⁷⁵ There are also many constitutions mentioning reproductive health, without, however, any mention to the right to procreate, reproductive rights or reproductive freedom.¹⁷⁶

The aforementioned constitutions have a common feature: they have all been adopted or amended recently, making them responsive to contemporary trends regarding reproduction and its acceptability. This again demonstrates the clear tendency of States towards guaranteeing reproductive rights and the right to procreate. As mentioned already, apart from justifying the approach taken by the ECtHR, this demonstrates that, where the right to procreate is constitutionally acknowledged, access to ART and surrogacy has an additional ground of protection: the Constitution.

In contrast, many constitutions that have not explicitly enshrined the right to procreate and reproductive rights are considered to incorporate them implicitly. This is done usually

¹⁷⁰ Article 41 Constitution of North Macedonia 1991 (rev. 2011), translated in <https://www.constituteproject.org/constitution/Macedonia_2011#s153> accessed 4 December 2019.

¹⁷¹ Article 28 Constitution of the Republic of Indonesia 1946 (rev. 2002), translated in <https://www.constituteproject.org/constitution/Indonesia_2002?lang=en> accessed 4 December 2019.

¹⁷² Article 66 Constitution of the Plurinational State of Bolivia 2009, translated in <https://www.constituteproject.org/constitution/Bolivia_2009.pdf> accessed 4 December 2019.

¹⁷³ Article 43 Constitution of Cuba 2019 <https://www.constituteproject.org/constitution/Cuba_2019#s267> accessed 4 December 2019.

¹⁷⁴ Articles 32, 66, 332 and 336, Constitution of Ecuador 2008 (rev. 2015) translated in <https://www.constituteproject.org/constitution/Ecuador_2015#s193> accessed 4 December 2019.

¹⁷⁵ *ibid*: 'The right to take free, responsible and informed decisions about one's health and reproductive life and to decide how many children to have'.

¹⁷⁶ Article 38(1) Constitution of Fiji, Art. 212J(2)(k) Constitution of Guyana, Art.43(1)(a) Constitution of Kenya, Art.38(2) Constitution of Nepal, Art.61 Constitution of Paraguay, Art.27(1)(a) Constitution of South Africa, Art.76 Constitution of Zimbabwe. Translated in English: <<https://www.constituteproject.org/search?lang=en>> accessed 4 December 2019.

through judicial recognition, either through the constitutionally recognised right to marry and to found a family, or even the right to privacy.¹⁷⁷ Supreme courts or constitutional courts worldwide engage in such interpretation of their national constitutions with a view to guarantee the protection of the right to procreate. What follows is a demonstration of the different constitutional avenues for such protection.

For example, in the *Skinner* case, the US Supreme Court declared that the right to procreate is a fundamental right, ‘one of the basic civil rights of man’, as ‘[m]arriage and procreation are fundamental to the very existence and survival of the race’.¹⁷⁸ Since the *Skinner* case, subsequent cases show that the right to procreate is a well-established right in the American legal system, endowed with constitutional protection.¹⁷⁹ Here, however, the violation of the right to procreate is not based on the right to privacy, but instead on Due Process and the Equal Protection Clauses.

A more recent example can be found in Colombia, where the Constitutional Court in 2012 acknowledged the existence of sexual and reproductive rights.¹⁸⁰ The Constitutional Court of Colombia mentions explicitly that based on its constitution, the constitutional jurisprudence and the international human rights treaties ratified by Colombia, it is possible to affirm that reproductive rights acknowledge and protect i) reproductive self-determination and ii) access to reproductive health services.¹⁸¹ The violation in this case was found in terms of Article 42 of the Colombian Constitution, which holds that ‘[t]he couple has the right to decide freely and responsibly the number of their children’,¹⁸² and Article 16(1)(e) of CEDAW, which was mentioned previously.

In a similar vein, other States recognise reproductive rights through national laws or they specifically regulate the practice of ART. Even in such cases, it is possible to link the protection back to the Constitution. In Greece, for instance, as mentioned in Chapter 2, ART

¹⁷⁷ Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (Knopf 1993) 157.

¹⁷⁸ *Skinner v Oklahoma* 316 US 535 (1942) para 541. This was a case of non-consensual sterilisation.

¹⁷⁹ *Griswold v Connecticut* 381 US 479 (1965), *Eisenstadt v Baird* 405 US 438 (1972), *Carey v Population Services International* 431 US 678 (1977), etc.

¹⁸⁰ A summary of the judgment in English can be found in: Colombian Constitutional Court, *Case T-627/12* [2012] <<https://www.globalhealthrights.org/health-topics/medicines/case-t-62712/>> accessed 4 December 2019.

¹⁸¹ *ibid* para 33.

¹⁸² Article 42 Constitution of Colombia 1991 (rev. 2015) as translated in <https://www.constituteproject.org/constitution/Colombia_2015?lang=en> accessed 4 December 2019.

and surrogacy are practised lawfully, always subject to restrictions imposed by law.¹⁸³ Although there is no provision in the constitution regarding the right to procreate and reproductive rights, it is commonly held by Greek scholars that Article 5(1) of the Greek Constitution (right to the free development of one's personality) encompasses the right to reproduce.¹⁸⁴ Indeed, this was the reason provided by the explanatory report for the draft bill of Law 3089/2002 regarding medically assisted human reproduction.¹⁸⁵ Greek academics have argued that the right to procreate guaranteed through the right to the free development of one's personality refers not only to natural reproduction, but also to reproduction through ART.¹⁸⁶

So far it was shown that States are moving towards the recognition of reproductive rights and, in most cases, the bedrock of this protection is the constitution, either through an express provision or through judicial interpretation. A constitution can be considered as the main basis of such recognition even in cases where there are national laws/regulation that facilitate access to ART and, consequently, the right to procreate. Alternatively, such protection can derive from common law.¹⁸⁷

Particularly on surrogacy, different surrogacy policies were elaborated in Chapter 2. While it became apparent that there is disparity and diversity on surrogacy regulation, there seems to be a trend towards favouring and legalising surrogacy through legislation. A remarkable example can be found in USA, where, between 2018 and 2019, four States have adopted permissive surrogacy legislation: New Jersey, Vermont, Oklahoma and Washington.¹⁸⁸ In Europe, the latest change was introduced in Portugal in 2016, altering its blanket ban by

¹⁸³ Chapter 2 (2.2).

¹⁸⁴ Article 5 Constitution of Greece 1975 (rev. 2008) translated by the official website of the Hellenic Parliament <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156_aggliko.pdf> accessed 4 December 2019.

¹⁸⁵ For the Greek version: <http://www.medlawbioethics.gr/images/nomothesia/AIT_EKΘΕΣΗ_N_3089.pdf> accessed 4 December 2019.

¹⁸⁶ Efi Kounougeri-Manoledaki, *Artificial Fertilisation and Family Law: The New Law 3089/2002 for the Medically Assisted Reproduction (Τεχνητή Γονιμοποίηση Και Οικογενειακό Δίκαιο: Ο Νέος ν. 3089/2002 Για Την Ιατρική Υποβοήθηση Στην Ανθρώπινη Αναπαραγωγή)* (Sakkoulas Publications 2003) 8-9.

¹⁸⁷ In Ireland, it was argued by Denham J, in *Roche v Roche* [2010] 2 IR 321, that the right to procreate was recognised by the Supreme Court in *Murray v Ireland* [1985] IR 532, which held that married couples have the right to procreate through natural procreation, subject to limitations. However, this does not refer to ART.

¹⁸⁸ More on State regulation: Creative Family Connections 'Gestational Surrogacy Law Across the United States' <<https://www.creativefamilyconnections.com/us-surrogacy-law-map/>> accessed 4 December 2019.

legalising altruistic surrogacy via Law 25/2016.¹⁸⁹ Although the Portuguese Constitutional Court rendered some of the surrogacy provisions unconstitutional,¹⁹⁰ this refers to specific features of the law, while surrogacy *per se* was not considered unconstitutional.¹⁹¹

Also, other States, previously (in)famous surrogacy destinations, have now closed their door to foreigners and commercial surrogacy.¹⁹² However, they have done so in order to combat cross-border surrogacy and abuses that the previous regime allowed. In these States, domestic surrogacy is still allowed, but restricted to nationals of the State and/or in its altruistic form.¹⁹³ In addition, even States with strict surrogacy policies have found ways to legalise the effects of cross-border surrogacy.¹⁹⁴ This is another indication that there is an attempt to accommodate surrogacy at national level.

To summarise, the aforementioned trends demonstrate the existence of numerous international mechanisms, constitutions and national laws/regulation that uphold reproductive rights, reproductive freedom/autonomy and the right to procreate. Particularly in the field of surrogacy, there seems to be a trend towards legalisation at national level, mainly through legislation. The recognition of the right to respect for the decision to become a parent through surrogacy by the Strasbourg Court would be justified by all these advances, as to do otherwise would mean that the Court ignores these developments and isolates itself from the international community.

3.5 Conclusion

The claim against a blanket ban on surrogacy would rest upon the right to respect for the decision to become a parent through surrogacy, which is the entitlement of an individual or a couple to be able to resort to surrogacy free from State prohibition. For this claim to be granted protection, the material scope requirements of the Convention should be fulfilled. In

¹⁸⁹ Article 8 of the Portuguese Law 25/2016 on Surrogacy.

¹⁹⁰ Judgment of the Portuguese Constitutional Court 225/2018 of 25 April 2018.

¹⁹¹ Teresa Violante, '(Not) Striking Down Surrogate Motherhood in Portugal' *Verfassungsblog* (28 April 2018) <<https://verfassungsblog.de/not-striking-down-surrogate-motherhood-in-portugal/>> accessed 4 December 2019.

¹⁹² Some are India, Thailand, Nepal, Mexico. These have been examined under the Indian policy in Chapter 2 (2.2).

¹⁹³ For example: Pongchompoo Prasert, 'Strict Surrogacy Law Bans Financial Gain' *The Nation (Thailand)* (4 February 2018) <<https://www.nationthailand.com/national/30337939>> accessed 4 December 2019.

¹⁹⁴ This was discussed in Chapter 2 (2.3).

this sense, the right to respect for the decision to become a parent has been recognised by the ECtHR through the *Evans*, *Dickson* and *SH* cases based on Article 8 ECHR, which upholds the right to respect for private and family life. Consequently, although absent from the text of the Convention, this right is still protected through a broad interpretation of private and family life. This thesis argues that the recognition of the right to respect for the decision to become a parent should be extended to surrogacy, because it satisfies all the necessary components of the right, as acknowledged by the Court.

Such approach is justified on two grounds. First, the Convention is a living instrument which should be interpreted in light of present-day conditions. This gives the ECtHR the desirable flexibility to adjust the Convention to new challenges caused by societal and scientific changes. Second, national and international trends support the recognition of reproductive rights and the right to procreate. Considering the international mechanisms, constitutions and national laws that favour reproductive rights, the Court would be blinkered if it ignored all these advances and isolated itself from the international community. This is further supported by the surrogacy legalisation trend. Ideally, the Court will engage in judicial dialogue with national and international courts, while being inspired by international soft and hard-law instruments.

The above findings are crucial to the hypothesis underpinning this thesis. In Contracting States with a blanket prohibition on surrogacy, individuals could challenge this prohibition by invoking Article 8 ECHR, which would be *prima facie* accepted by the Court, as falling within its material scope. The next step to follow is to examine potential State arguments against surrogacy under Article 8(2) that would be held against the right to respect for the decision to become a parent through surrogacy.

CHAPTER 4: SURROGACY AND THE DANGER OF EXPLOITATION AND COMMODIFICATION

4.1 Introduction

As an alternative method of reproduction, surrogacy has been welcomed by many who perceive it as their only opportunity to become parents. The social reality of parenthood has extended and so has access to ART. Keeping that in mind, one might wonder why surrogacy is prohibited in many Contracting States of the ECHR; what are the arguments put forward by States to justify this prohibition?

This chapter investigates the extent to which surrogacy enables the exploitation of women and commodification of children through the ECHR framework. These are the main ‘fears’ put forward before the Strasbourg Court by Contracting States when prohibiting surrogacy. The aim of the chapter is to assess these State arguments and establish the compatibility of surrogacy with the Convention, in particular with human dignity. This serves two purposes: it identifies the legitimate aims presented by the States and demonstrates that a blanket ban on surrogacy is not necessary. In turn, this serves the ‘clash of interests’ assessment in Chapter 5: whether State interference (through a blanket ban on surrogacy) can be justified or constitutes a violation of the right to respect for the decision to become a parent through surrogacy.

Given the above, the chapter is divided into three parts. The first part briefly presents the States’ arguments against surrogacy by examining cases presented before the ECtHR in previous surrogacy cases. The second part focuses on the compatibility of surrogacy with the Convention through human dignity. Finally, the last part assesses the remaining dangers presented by the States, arguing that a blanket ban is not necessary and altruistic surrogacy is less likely to exploit and commodify women and children. For the purposes of this chapter, special consideration is given to the difference between altruistic and commercial surrogacy and domestic versus cross-border surrogacy.

4.2 States' Arguments Against Surrogacy

When Contracting States of the ECHR ban surrogacy, they usually invoke public policy arguments,¹ such as exploitation of women and commodification of children. Some of these reasons can be found in cases brought already before the Court, although presented in the course of cross-border surrogacy cases. Considering them, however, can help 'predict' the possible argumentation in the hypothesis underpinning this thesis. What would States argue before the ECtHR to justify their interference with the right to respect for the decision to become a parent by placing a blanket ban on surrogacy?

In order to justify State interference with the right to respect for the decision to become a parent through surrogacy, the reasons presented by the States have to fall within (at least) one of the interests included in Article 8(2) ECHR.² Therefore, after presenting the different reasons invoked by States, there is also a systematic classification of the interest within the Convention's stipulations. Acknowledging the interests does not mean the interference is justified, but that it merely fulfils one of the conditions for a justified interference under Article 8(2) ECHR, i.e. the legitimate aim.³

The ECtHR has been called upon to rule in cases involving cross-border surrogacy on six occasions, while also emitting one advisory opinion. The first two judgments were the *Menesson*⁴ and *Labassee* cases,⁵ where the ECtHR found that the denial of civil registration for children born through cross-border surrogacy violated the children's right to respect for private and family life. Based on these two judgments, the Court reached the same result in *Foulon and Bouvet v France*⁶ and *Laborie v France*.⁷ The fifth case was *D and Others v Belgium*,⁸ where the Court was called to examine the initial refusal of Belgium to authorise the arrival of a resulting child with his intended parents from Ukraine. The Court, however, discarded this case as partially inadmissible and partly struck out of its list of cases. Belgium

¹ This means that the regulation has been established in order to protect something so fundamental for the society that citizens cannot deviate from this regulation. See *infra* (n 13).

² More in Chapter 3 (3.3.2).

³ The other two are 'in accordance with the law' and 'necessary in a democratic society'. While these conditions are discussed in detail in Chapter 5, this chapter considers whether banning surrogacy is necessary or not.

⁴ *Menesson v France* [2014] ECHR 664.

⁵ *Labassee v France* [2014] ECHR 668.

⁶ *Foulon and Bouvet v France* App nos 9063/14 and 10410/14 (ECtHR, 21 July 2016).

⁷ *Laborie v France* App no 44024/13 (Committee, 19 January 2017).

⁸ *D and Others v Belgium* App no 29176/13 (ECtHR, 8 July 2014).

had acted within its margin of appreciation and, additionally, at the time the application reached the Court, the intended parents were already living with the child in Belgium. The final judgment is *Paradiso and Campanelli v Italy* (the *Paradiso* case),⁹ where a child born through surrogacy was removed from the intended parents and placed in foster care. In this case, the ECtHR did not find a violation of Article 8 ECHR. Lastly, in the advisory opinion, the Court advised France on the necessity of establishing parentage between the intended mother and the resulting child.¹⁰

From the aforementioned decisions on cross-border surrogacy, only in three of these did the ECtHR consider the merits of the case in question: in the *Mennesson*, *Labassee* and *Paradiso* cases. These cases do mention the dangers of surrogacy as perceived by the specific Contracting States. This in turn shows the potential arguments the States with a blanket ban on surrogacy would put forward, when faced with the accusation of violating the right of individuals to respect for their decision to become parents.

In the first two surrogacy cases (the *Mennesson* and *Labassee* cases), the French government referred to surrogacy as a practice contrary to the State's public policy. This approach dates back to 1991, when, for the very first time, surrogacy was found to oppose the public policy principle by the State's highest civil court, *Cour de Cassation*.¹¹ The hostile approach towards surrogacy was later established through the Bioethics Act of 1994 and it was included in the Civil Code, whereby all contracts of surrogacy are null,¹² a provision which is of *ordre public*.¹³

It was, hence, argued in the *Mennesson* case that surrogacy clashes with the public policy tenet that the human body and civil status are inalienable,¹⁴ while it is in conflict with ethical

⁹ *Paradiso and Campanelli v Italy* [2017] ECHR 96.

¹⁰ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (ECtHR, Grand Chamber, 10 April 2019).

¹¹ Judgment of the French Court of Cassation (Civ 1, 88-15655) of 13 December 1989.

¹² Articles 16(7) and 16(9) of the French Civil Code. For more information: Chapter 2 (2.2).

¹³ A matter of public policy 'refers to matters which the laws of a state or state courts have determined to be of such fundamental importance that contracting parties are not free to avoid or circumvent them': Honourable Joseph R Nuss, 'Public Policy Invoked as a Ground for Contesting the Enforcement of an Arbitral Award, or for Seeking Its Annulment' (2013) 7 *Dispute Resolution International* 119.

¹⁴ *Mennesson v France* (n 4) para 55.

and moral principles whereby the human body is not to be commercialised and the child should not be reduced to the object of a contract.¹⁵

The Government stressed that in the interests of proscribing any possibility of trafficking in human bodies, guaranteeing respect for the principle that the human body and a person's civil status were inalienable, and protecting the child's best interests, the legislature – thus expressing the will of French people – had decided not to permit surrogacy arrangements.¹⁶

Based on these, in the two cases in question, France argued that the legitimate aims for interference were the prevention of disorder or crime (as an act formally forbidden and punishable if performed in France), the protection of health and the protection of the rights/freedoms of others, although the Court accepted only the last two aims, rejecting the first one.¹⁷

In the *Paradiso* case, it was held that 'the prohibition on surrogate motherhood in Italian law was a criminal-law one ... intended to protect the surrogate mother's human dignity and the practice of adoption'.¹⁸ While the repercussions of surrogacy to adoption are considered in Chapter 6, the term 'human dignity' can be rather confusing, as at no point of this judgment is human dignity defined. This becomes more apparent when considering the plurality of approaches towards the notion of human dignity and, hence, its different meaning for those who use the term, as seen in the next section of this chapter. A closer look, however, shows that the Italian legal system, by prohibiting surrogacy, seeks to protect the women (surrogates) and children involved in this process.

By prohibiting surrogacy arrangements, Italy has taken the view that it is pursuing the public interest of protecting the women and children potentially affected by practices which it regards as highly problematic from an ethical point of view. This policy is considered very important, as the Government have pointed out, where, as here, commercial surrogacy arrangements are involved.¹⁹

¹⁵ *ibid* para 60.

¹⁶ *ibid* para 72.

¹⁷ *ibid* paras 60 and 62 respectively. Same in *Labassee v France* (n 5) paras 45 and 54 respectively.

¹⁸ *Paradiso and Campanelli v Italy* (n 9) para 70.

¹⁹ *ibid* para 203.

In the *Paradiso* case, Italy argued for the legitimate aims of preventing disorder and protecting the child's rights and freedoms, which were accepted by the Grand Chamber.²⁰

Arguments against ART, hinted in the above surrogacy cases, can be found in the *SH* case.²¹ The Austrian government, in an attempt to balance the conflicting interests of human dignity/right to procreate/well-being of children,²² puts forward the risk of exploitation of women as ovum donors (particularly the financially disadvantaged), the creation of unusual family relationships (having a genetic mother and one carrying the child), fears with regard to the well-being of children, in terms of their health and rights, and the risk of commercialisation.²³ The legitimate aims acknowledged by the Court were the protection of health or morals and the protection of rights/freedoms of others.²⁴

As explained in Chapter 2, for gestational surrogacy, where the surrogate is not related genetically to the child, ovum donation is a prerequisite. The ovum may come from the intended mother or a donor. The fears related to donation can apply to surrogacy, given that gestational surrogacy is more frequent than traditional,²⁵ by traditional surrogacy meaning that the surrogate is also genetically linked to the child.²⁶

While States have presented different arguments and interests protected against surrogacy, a need arises to clarify these arguments and classify the interests under Article 8(2) ECHR. The need arises due to the plurality of terms dominating the current discussion before the Court, while the fact that they are not expressed systematically (on the contrary, arguments are spread all over the judgments) is not helpful either.

Accordingly, it can be distilled from the aforementioned that the main concerns expressed by the Contracting States prohibiting surrogacy are: human dignity concerns on treating the human body as an object and its commodification/commercialisation or inalienability, human trafficking of children and women, circumvention of adoption laws, exploitation of

²⁰ *ibid* paras 175-178.

²¹ *SH and Others v Austria* [2011] ECHR 1879.

²² *ibid* para 19.

²³ *ibid* para 19, 20 and 66.

²⁴ *ibid* para 90.

²⁵ Susan L Crockin, 'Growing Families in a Shrinking World: Legal and Ethical Challenges in Cross-Border Surrogacy' (2013) 27 *Reproductive BioMedicine Online* 733, 734.

²⁶ See Chapter 2 (2.1).

surrogates, health risks for women/children and the creation of unusual family relationships. The involvement of ethical and moral values is particularly important, while there is a (negative) emphasis on the commercial nature of surrogacy.

It should be highlighted that the argument regarding commodification is divided into two considerations: first, to reflect what this thesis captures as the human dignity debate (i.e. whether one is treated as an object) and, second, to the sale of children and women's bodies (human trafficking). This is because, as explained below, different people use the term 'commodification' in different ways, while this thesis considers that the controversy regarding commodification is better reflected through human dignity concerns and issues related to human trafficking.

Coming back to the Convention, the interests invoked under Article 8(2) ECHR have so far been the prevention of disorder/crime, the protection of health or morals and the protection of rights and freedoms of others. Therefore, in an application lodged against States with a blanket ban on surrogacy, it seems that the legitimate aims pleaded by the States could be the prevention of disorder/crime (human trafficking), the protection of health (of children and surrogates) or morals (questions related to human dignity)²⁷ and the protection of rights/freedoms of others (exploitation of surrogates). The creation of unusual family relationships could be considered in terms of the child's welfare, because (as argued by the Austrian State) splitting motherhood would lead to the ambiguousness of the mother's identity, which 'might jeopardise the development of the child's personality and lead to considerable problems in his or her discovery of identity'.²⁸ Hence, it could be considered under either the protection of (mental) health of the resulting children or the protection of their rights and freedoms. The creation of unusual family relations can further serve legal certainty, similarly to the inalienability of civil status,²⁹ which could be invoked under the protection of the rights/freedoms of others.

The prevention of disorder or crime by arguing that surrogacy is a crime (presented in the cross-border surrogacy cases) could not be invoked here, given that this is the very thing the

²⁷ Sometimes dignity is also invoked in connection with the protection of rights/freedoms of others. However, this thesis addresses it solely as part of morals to avoid repetition.

²⁸ *SH and Others v Austria* (n 21) para 70.

²⁹ *AP, Garçon and Nicot v France* [2017] ECHR 338, para 132.

hypothetical referral to the Strasbourg Court would challenge. Additionally, the potential circumvention of adoption laws by surrogacy is discussed separately in Chapter 6, under the international aspects of surrogacy, as it refers to cases where surrogacy has taken place abroad to circumvent adoption laws or the adoption laws are used to mitigate the effects of cross-border surrogacy by establishing legal parentage.

While this section has categorised the different claims by States, this is done for clarification purposes. As apparent from the above, some of the reasons presented by States can be considered under more than one legitimate aim found in Article 8(2) ECHR. In practice, when assessing the existence of a legitimate aim, the Court rarely finds an interference unjustified based on this condition,³⁰ as it can cover a variety of interests. This can be observed in surrogacy and the legitimate aims established above, which cover four broad interests.

These interests ‘threatened’ by surrogacy further demonstrate that its problems go beyond the mere recognition of the legal parentage between intended parents and the resulting children. In this sense, it has already been argued in this thesis that a potential solution to the cross-border surrogacy phenomenon should focus on domestic regulation through the ECHR framework, as the current focus on a private international law agreement on surrogacy, even if achieved, would fall short on addressing these further issues.³¹

Having identified the legitimate aims that could be presented by the States in the hypothesis underpinning this investigation, it is now time to evaluate them within the ECHR framework. This is crucial, as their evaluation would have a major impact in the clash of interests, analysed in the next chapter. While Chapter 5 addresses the clash of interests in the sense of the mechanism triggered by the current ECHR framework and how this should be altered, this chapter discusses the actual arguments. To assess the arguments/interests, it is essential to, first, consider the compatibility of surrogacy with the Convention in respect of the arising issues of human dignity and, second, check whether the pleaded interests make necessary the blanket ban on surrogacy. The arguments presented by the States are not always clearly articulated or elaborated, which calls for occasional references to the relevant academic debate.

³⁰ For an exception: *Toma v Romania* App no 42716/02 (ECtHR, 24 February 2009) para 92.

³¹ This was argued in Chapter 2 (2.4) and is further elaborated in Chapter 6.

4.3 Surrogacy, Human Dignity and the ECHR

Some of the Contracting States' arguments against surrogacy are directly related to human dignity. In particular, objectification, commercialisation or commodification and inalienability of the human body can all be assessed as matters of human dignity.³² This is because human dignity is frequently invoked in the debate on the new reproductive methods or the human rights/bioethics discourse on what can be done (or not) to the human body, what one is free to do with their body, etc.³³

The question of human dignity is particularly important within the ECHR framework, given that the Court has held that the 'very essence of the Convention is respect for human dignity and human freedom',³⁴ while the Convention's Protocol 13 acknowledges 'the inherent dignity of all human beings'.³⁵ In this sense, if surrogacy clashes with human dignity it would be incompatible with the ECHR, which gives greater weight to this claim than treating it merely as an argument justifying State interference under Article 8(2) ECHR. However, this section argues that surrogacy is compatible with the Convention. In doing so, it rejects the arguments on objectification, commodification and inalienability in terms of human dignity, holding that both altruistic and commercial surrogacy are compatible with the Convention.

First and foremost, there is no common ground on what human dignity is, making its nature rather elusive. Throughout the years, different approaches of human dignity have been formulated, deriving from at least four sources.³⁶ First, the classical antiquity of *dignus* and *dignitas*, where dignity is attributed to something outstanding that is worthy of respect.³⁷ Second, the Biblical religion and the idea that humans have dignity because they were made

³² Issues related to commodification/commercialisation that go beyond human dignity are discussed in the next section under human trafficking.

³³ e.g. Audrey Chapman, 'Human Dignity, Bioethics, and Human Rights' (2011) 3 Amsterdam Law Forum 3.

³⁴ *Pretty v UK* (2002) 35 EHRR 1, para 65.

³⁵ Preamble of Protocol No 13, ECHR.

³⁶ Adam Schulman, 'Bioethics and the Question of Human Dignity' in *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (1st edn, The President's Council on Bioethics 2008) 3, 6 onward.

³⁷ For dignity as status and social role: Hubert Cancik, 'Dignity of Man' and 'Persona' in Stoic Anthropology: Some Remarks on Cicero, *De Officiis* I, 105-107' in David Kretzmer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 19.

in the image of God.³⁸ Third, the Kantian approach giving emphasis on autonomy and the immorality of using someone as means to an end.³⁹ Four, the 20th century human dignity as enshrined in constitutions and international declarations, where human dignity, although not defined explicitly, serves as a supreme value and reflects a rather political consensus for the adoption of these declarations.⁴⁰

Given the plurality of approaches and its uncertain application in bioethics, many have argued that human dignity, as a concept, is useless.⁴¹ Others have argued for its legal understanding as a minimum. This minimum content of human dignity means that:

each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa. The fault lines lie in disagreement on what that intrinsic worth consists in, what forms of treatment are inconsistent with that worth, and what the implications are for the role of the state.⁴²

Lastly, different scholars take different positions on human dignity, formulating their theories based on one of the four aforementioned sources.⁴³

Notwithstanding this plurality of sources and meanings attached to it, human dignity is invoked as an objection to surrogacy in the bioethical debate based on the objectification, commercialisation or inalienability of the human body. In order to assess these arguments, it is important to elaborate them in an attempt to understand them.

In the process of surrogacy, a woman gestates and gives birth to a child for someone else. For example, a typical objection against surrogacy (for women) is that this practice uses female

³⁸ For instance: Giovanni Pico della Mirandola, *Oration on the Dignity of Man* (eBooks@Adelaide) <https://ebooks.adelaide.edu.au/p/pico_della_mirandola/giovanni/dignity/> accessed 4 December 2019.

³⁹ Immanuel Kant, *The Metaphysics of Morals* (Mary J Gregor tr, Lara Denis ed, 2nd edn, Cambridge University Press 2017).

⁴⁰ For instance: Doron Shultziner, 'Human Dignity: Functions and Meanings' (2003) 3 *Global Jurist Topics* 1, 5.

⁴¹ Ruth Macklin, 'Dignity Is a Useless Concept' (2003) 327 *BMJ* 1419.

⁴² Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *The European Journal of International Law* 655, 723.

⁴³ For example: Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press 2001).

bodies primarily for others' benefit and commercialises (sells) them for others' benefit.⁴⁴ These are two claims: objectification of the body and commodification of body parts. The former focuses on the use of the body as a tool for someone else's purposes, while the latter talks about the introduction of body parts into the market. In this context, objectification is further understood as instrumentality, i.e. the use of female bodies as mere instruments to serve someone else's means. While commodification is necessarily objectification, in the sense of treating somebody as an object, objectification as instrumentality can stand independently and each claim has different implications. Finally, there is no need to consider the inalienability of the human body separately, as the argument to not alienate the human body is connected to its objectification and commercialisation.

The objectification (as instrumentality) of the human body accuses surrogacy of using the female body as vessel for someone else's desires, 'an incidental incubator detached from ... social, affective, and moral meanings associated with procreation'.⁴⁵ The instrumentalisation of female bodies is detached from the payment involved in commercial surrogacy, as it objects to the use of women's body as an instrument for gestating children irrespective of an exchange offered. Therefore, it applies to both commercial and altruistic surrogacy.

When surrogacy involves payment, attention is geared towards the commodification or commercialisation of the human body. Surrogacy is called a 'womb for rent' with regard to the surrogate⁴⁶ or baby selling with regard to the resulting child.⁴⁷ This objection refers exclusively to commercial surrogacy. Here, the argument goes, the human body is treated as a commodity, given market value, up for exchange. The commercialisation of surrogacy involves the pricing of female body parts (womb) or its services (gestation), while the resulting children are equated to commodities, something you can buy for an exchange of

⁴⁴ April L Cherry, 'The Rise of the Reproductive Brothel in the Global Economy: Some Thoughts on Reproductive Tourism, Autonomy, and Justice' (2014) 17 *University of Pennsylvania Journal of Law and Social Change* 257, 280.

⁴⁵ Janice G Raymond, 'Reproductive Gifts and Gift Giving: The Altruistic Woman' (1990) 20 *The Hastings Center Report* 7, 11.

⁴⁶ For instance: Ashley Hope Elder, 'Wombs to Rent: Examining the Jurisdiction of International Surrogacy Comment' (2014) 16 *Oregon Review of International Law* 347.

⁴⁷ e.g. Miranda Davies, *Babies for Sale? Transnational Surrogacy and the Politics of Reproduction* (Zed Books 2017).

money. This commodification ‘devalues them (and all children), treating them like products or pets for our own pleasure’.⁴⁸

This instrumentalisation of women and the commercialisation of the human body of women and children resulting from surrogacy is connected to the aforementioned Kantian human dignity approach that nobody should be treated merely as means to an end. This further addresses what one can or cannot do with one’s body. However, it is debatable when one is treated as means to an end and whether this occurs in surrogacy.

In modern bioethical debate, human dignity is approached in two different ways: ‘dignity as empowerment’ and ‘dignity as constraint’.⁴⁹ The two approaches agree that human dignity is an intrinsic value,⁵⁰ while they differ over the attributes required to possess dignity, with the empowerment position resting dignity upon agency and the constraint position on being a living member of the human species.⁵¹ However, the emphasis for the purposes of this thesis is placed on when the will of an agent or human being can be defensibly constrained. While the empowerment view supports in principle individual autonomy, the opposite view constrains autonomy.⁵² Depending on the account of human dignity adopted, surrogacy can be either permissible or impermissible.⁵³ While both approaches reject the idea of using somebody as a mere object, they take a different approach on what this entails.

In a few words, human dignity as empowerment is the idea that human beings have intrinsic value and the focus is placed on individual autonomy and informed choice (rights-based

⁴⁸ George J Annas, ‘Death without Dignity for Commercial Surrogacy: The Case of Baby M’ (1988) 18 *The Hastings Center Report* 21, 22.

⁴⁹ Beyleveld and Brownsword (n 43). Other positions that deny the importance of dignity are not discussed here, as, in such cases, surrogacy would not be rejected as opposing dignity, which is the States’ argument under examination in this section.

⁵⁰ The intrinsic or inherent value refers to the worth that is attributed to every human being *qua* human being: Daniel P Sulmasy, ‘Dignity and Bioethics: History, Theory, and Selected Applications’ in *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics* (1st edn, The President’s Council on Bioethics 2008) 469, 473.

⁵¹ Beyleveld and Brownsword (n 43) 15-16 and 32-33. Agency is understood as the capacity for autonomous action: Markus Schlosser, ‘Agency’, *The Stanford Encyclopedia of Philosophy* (Fall edn, 2015) Edward N Zalta (ed) <<https://plato.stanford.edu/archives/fall2015/entries/agency/>> accessed 4 December 2019.

⁵² Roger Brownsword, ‘Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the Dignitarian Alliance Symposium on Bioethics’ (2003) 17 *Notre Dame Journal of Law, Ethics & Public Policy* 15, 20.

⁵³ This distinction between human dignity as empowerment and as constraint is different from the distinction between surrogacy as empowerment and as exploitation discussed in the next section.

approach).⁵⁴ This means that surrogacy should be acceptable since it constitutes an expression of the individuals' autonomy (of the surrogate and the intended parents), emphasising the right of individuals to choose the way they want to lead their lives. Therefore, human dignity is violated when individual autonomy is not respected, i.e. when surrogacy is not consensual, and not otherwise. Dignity as empowerment is upheld by rights-based theories on moral permissibility,⁵⁵ where 'all moral obligations reduce to moral rights, understood as justifiable claims imposing correlative duties, the benefits of which are waivable by the rights-holder'.⁵⁶ According to this account of human dignity, limits to autonomy and self-determination can derive from the rights and freedoms of others.⁵⁷

On the other hand, human dignity as constraint goes beyond autonomous choice and allows constraint on individuals in order to protect their own interests (duty to oneself or God),⁵⁸ or to uphold what appeals to the interests of the community (communitarian view).⁵⁹ For the former, even when there is no harm caused to another person, an action can be controlled or prohibited in order to protect the stakeholder's dignity by not letting him/her engage in a degrading activity, where one is used as a mere thing.⁶⁰ According to this, surrogacy should be prohibited as violating human dignity. Similarly, the communitarian view renders surrogacy impermissible if it clashes with what is considered to be 'special about a particular community's idea of civilised life and the concomitant commitments of its members'.⁶¹ Additionally to the direct duty that one owes to others as respect of their dignity, one owes an indirect duty to others and their vision of dignity due to one's membership of the community.⁶² It becomes apparent that conceptualising dignity as constraint leads to the aforementioned State arguments concerning instrumentalisation and commodification, as this account does not accept particular practices regardless their consequences or the existence of consent.⁶³

⁵⁴ Beyleveld and Brownsword (n 43) 9.

⁵⁵ Shaun D Pattinson, *Medical Law and Ethics* (5th edn, Sweet & Maxwell 2017) 15.

⁵⁶ *ibid* 7.

⁵⁷ *ibid* 15.

⁵⁸ Beyleveld and Brownsword (n 43) 37. The connection to religious beliefs and duties to God, however, does not seem to carry much weight in the modern bioethical debate: *ibid* 10.

⁵⁹ Brownsword (n 52) 28.

⁶⁰ This is the approach taken by the *Conseil d'État* in the famous French dwarf-tossing case: Judgment of the French Council of State (n°136727) of 27 October 1995.

⁶¹ Brownsword (n 52) 28.

⁶² Beyleveld and Brownsword (n 43) 37.

⁶³ Pattinson (n 55) 14.

It should be recalled that there are many ways to approach human dignity and this is not its only potential understanding. For example, Siegel identifies three ways that courts reconcile commitments to dignity; dignity as liberty (engaging the values of autonomy and free development of personality), dignity as equality (concerns about standing, status and respect), and dignity as life (associated with the regulation of birth, sex, or death that protect or symbolically express the value of human life itself).⁶⁴ However, this thesis utilises the two rival concepts of dignity as empowerment and dignity as constraint due to their focus on the modern bioethical debate that is believed to best capture concerns over the acceptability of certain reproductive methods and their potential clash with human dignity.

Given these two approaches, it is essential to check which approach of dignity is supported by the ECHR. If seen through the lenses of the empowerment position, it seems that in principle surrogacy would be compatible with the Convention, giving emphasis to autonomy and self-determination. On the contrary, if seen through constraint, it could be potentially rejected as clashing with the ECHR, based on the assumption that one should not compromise their own dignity by undertaking surrogacy or because it could clash with the society's vision of dignity as a collective good.

Looking at the ECHR framework, the Convention does not include (human) dignity in its text. While this seems odd as most international and regional treaties adopted in the aftermath of World War II include the term, it should not be interpreted as indifference towards the concept, but instead attributed to the ECHR's pragmatic and practice-oriented nature.⁶⁵ Moreover, the preamble of the ECHR explicitly says that it aims to secure the rights enshrined in the Universal Declaration of Human Rights (UDHR),⁶⁶ where human dignity is asserted to be a foundational idea. The UDHR, in its Article 1, states that all human beings are born free and equal in dignity and rights. This has been understood to mean that all human beings have intrinsic worth and, therefore, human dignity is the ground for the

⁶⁴ Reva Siegel, 'Dignity and the Duty to Protect Unborn Life' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press/British Academy 2013) 513.

⁶⁵ Jean-Paul Costa, 'Human Dignity in the Jurisprudence of the European Court of Human Rights' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press/British Academy 2013) 393, 394.

⁶⁶ In particular: 'Considering the Universal Declaration of Human Right... Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared... Being resolved ... to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

possession of human rights, which every person holds equally.⁶⁷ Based on this reference, the UDHR is indirectly connecting the ECHR with human dignity as a justification for enforcing human rights.⁶⁸

This understanding of the UDHR (and hence the ECHR) is consistent with the approach taken in the other two international rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both recognise in their preamble the inherent dignity and the equal and inalienable rights of all members of the human family, while explicitly mentioning that these rights derive from the inherent dignity of the human person.⁶⁹ These three international instruments (UDHR, ICCPR and ICESCR) compose the International Bill of Rights.⁷⁰

An exception to the absence of dignity from the ECHR's text is found in the preamble of Protocol 13 of the Convention, whereby it recognises the inherent dignity of all human beings.⁷¹ Addressing the abolition of death penalty, it makes explicit (contrasting the indirect connection through the UDHR) that human dignity is understood as an inherent value within the ECHR, hence falling under the modern bioethical approach of human dignity.⁷² This, however, leaves room for interpretation on whether this is understood in terms of empowerment or constraint, as elaborated below.

In contrast, human dignity is frequently invoked in cases brought before the Court either by the parties of the conflict⁷³ or of the Court's own motion.⁷⁴ To understand human dignity within the ECHR framework, it is essential to detect the context in which it is used and then proceed to the view upheld by the Court: the empowerment, rested on autonomy and self-

⁶⁷ Brownsword (n 52) 21.

⁶⁸ David Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] Public Law 682, 689.

⁶⁹ 'Considering that ... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ... Recognizing that these rights derive from the inherent dignity of the human person'.

⁷⁰ For more: George Letsas, 'International Bill of Rights', *International Encyclopedia of Ethics* (2013) Hugh Lafollette (ed) <<https://doi.org/10.1002/9781444367072.wbiee731>> accessed 4 December 2019.

⁷¹ Protocol No 13 (n 35).

⁷² As already mentioned, in the modern bioethical debate, dignity is understood as an inherent/intrinsic value.

⁷³ Either by individuals, e.g. *Marckx v Belgium* (1979) 2 EHRR 330, para 66, or by States, e.g. *SAS v France* (2015) 60 EHRR 11, para 82.

⁷⁴ For example: *Chapman v UK* (2001) 33 EHRR 18, para 99.

determination, or the constraint, connected to the restriction of someone's actions even when consent is present.

The use of dignity in the case law of the Strasbourg Court is multifaceted. Dignity is used in many different ways and to cover many different aspects of human life, as shown below. The Court has never provided a definition of its meaning when it invokes the concept of dignity. It is in this sense that judges of the Court itself have criticised dignity's use within the case law.⁷⁵ Nonetheless, what follows is an attempt to 'decipher' the use of dignity within the Court's jurisprudence.

The starting point should be that dignity is held to be the very essence of the Convention alongside human freedom,⁷⁶ constituting, therefore, one of the (unwritten) underlying principles of the Convention.⁷⁷ Dignity can also be invoked within specific articles of the Convention.⁷⁸ For instance, in *Tyrer v UK*, it was established that one of the main purposes of Article 3 ECHR is 'to protect ... a person's dignity and physical integrity'.⁷⁹ It was, in effect, the *Tyrer* case where for the very first time the Strasbourg Court referred to the concept of dignity.⁸⁰ Subsequent use tends to combine the two.

Any interference with human dignity strikes at the very essence of the Convention ... For that reason any conduct by law-enforcement officers *vis-à-vis* an individual which diminishes human dignity constitutes a violation of Article 3 of the Convention.⁸¹

In addition, it seems clear that within the ECHR, one should not be objectified/instrumentalised. Whether this is to be understood as empowerment or constraint, i.e. based on the lack of consent or the act itself, is debatable. However, it is clear from the *Tyrer* case that treating somebody as an object in the power of the authorities violates this

⁷⁵ *Bouyid v Belgium* [2015] ECHR 819, Joint Partly Dissenting Opinion of Judges De Gaetano, Lemmens and Mahoney, para 4.

⁷⁶ *Pretty v UK* (n 34).

⁷⁷ As per Judge Martens in his dissenting opinion in *Cossey v UK*, respect for human dignity and human freedom is '[t]he principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention': *Cossey v UK* (1991) 13 EHRR 622.

⁷⁸ This is more frequent in the context of the so-called absolute rights, Articles 2-3 ECHR.

⁷⁹ *Tyrer v UK* (1978) 2 EHRR 1, para 33.

⁸⁰ Dignity was earlier discussed by the Commission in *East African Asians v UK* (1973) 3 EHRR 76, para 189, where it was held that the term 'degrading treatment' demonstrated that the aim of this provision is to 'prevent interferences with the dignity of man of a particularly serious nature'.

⁸¹ *Bouyid v Belgium* (n 75) para 101.

person's dignity,⁸² making clear that, at least in the absence of consent, instrumentalisation is repugnant.

So far it has been established that, within the ECHR, dignity is inherent to all human beings (Protocol 13), the justification for having human rights (UDHR), the very essence of the Convention (*Pretty* case) and is violated when somebody is treated as an object in the power of the authorities (*Tyrer* case). To further grasp human dignity within the ECHR framework, it is essential to examine the context in which it is used, given the absence of a definition provided by the Court.

In an attempt to clarify the appeals presented before the Court, it can be observed that dignity is used in two distinct contexts. First, dignity is invoked in the context of one's fundamental facets of personality regardless of others: the individual's autonomy, freedom and even its limits, in the sense of one's own capacity to choose what to pursue in life, what one is free to do or not with their body, etc. An example can be found in the end of life decisions.⁸³ Second, dignity appears in connection with others: (a) the treatment people receive by public authorities, (b) the provisions/resources the State has to provide to people to lead a dignified life and (c) the protection required by the State against other non-public authorities to have one's dignity respected. An example of (a) is seen in cases of degrading treatment by public authorities,⁸⁴ while (b) is seen in cases of the required living conditions to live in dignity⁸⁵ or in cases of access to medical treatment.⁸⁶ An example of (c) is the protection of one's reputation/honour against the press/media⁸⁷ and the protection of one's identity against provoking statements or hate speech.⁸⁸

While it is the first context that is relevant for this thesis, the above contexts do not necessarily need to be perceived as antagonising. For example, the end of life cases frequently refer to an undignified and distressing end of life, which could be seen as opposing leading a dignified life or the conditions to live in dignity. The reason why they are

⁸² *Tyrer v UK* (n 79).

⁸³ e.g. *Koch v Germany* [2012] ECHR 1621.

⁸⁴ *Yaroslav Belousov v Russia* [2016] ECHR 805.

⁸⁵ *Chapman v UK* (n 74) para 99: 'it is clearly desirable that every human being has a place where he or she can live in dignity and which he or she can call home'.

⁸⁶ *Lopes de Sousa Fernandes v Portugal* [2017] ECHR 1174.

⁸⁷ *Cumpănă and Mazăre v Romania* (2005) 41 EHRR 200, paras 92 and 109.

⁸⁸ *Perinçek v Switzerland* (2016) 63 EHRR 193, paras 227 and 252.

differentiated, however, is to illustrate the focus of some cases on issues of autonomy against State interference, while the other cases focus on State's assistance. Similarly, having someone's dignity respected in terms of their honour or identity can be seen in both contexts, with one focusing on State non-interference and the other focusing on adequate State protection against the State itself or third parties.

However, dignity is discussed here in its sense of self-determination and autonomy, the freedom to choose what purposes to pursue in life (i.e. the bioethical debate identified above). This thesis examines the freedom to undertake surrogacy against State interference and whether this clashes with human dignity as perceived within the ECHR framework. Nonetheless, the case law that is under consideration does not fall exclusively within the first context. In many cases, the matter was brought up in relation to either State authorities or third individuals/non-public entities. Finally, using the language of human dignity does not mean success of the claim, as the Court has to essentially evaluate the claim under the Convention.

In addition, there is a central difference on the dignity claim when invoked by States or by individuals. Individuals would invoke dignity as part of the right they are claiming that the State has violated, e.g. the notion of personal autonomy under Article 8 ECHR and the right to establish details of one's identity.⁸⁹ States, however, would invoke dignity as a justification for interference with the individuals' rights in order to protect morals or the rights/freedoms of others, e.g. prohibition of gamete donation or ban on full-face veil.⁹⁰ It is in this latter aspect that dignity is invoked in this thesis, i.e. whether surrogacy clashes with dignity and, therefore, dignity can be used by States as a legitimate aim to restrict the right to respect for the decision to become a parent. Nonetheless, the former aspect is crucial in order to comprehend what is understood by the dignity appeal within the ECHR framework. Consequently, for the purposes of this section, both aspects are examined side by side.

Going beyond these preliminary remarks, it seems that in the ECtHR case law dignity, as an underlying principle of the Convention materialised in its different articles, is upheld within the above context in both ways, i.e. as empowerment and as constraint. Nonetheless, these two approaches are irreconcilable. As seen before, if human dignity is to be seen through the

⁸⁹ *Goodwin v UK* (2002) 35 EHRR 18, para 90.

⁹⁰ *SH and Others v Austria* (n 21) and *SAS v France* (n 73) respectively.

lenses of empowerment, it cannot at the same time be seen as constraint, as they differ on the attributes required to possess dignity and the reasons behind the restriction of one's will.

The below examples show that the Court, without explicitly taking a side, has emitted rulings in favour of one of the two positions. In these rulings, though, there are points in favour and against each approach (either empowerment or constraint), which shows the internal lack of consistency, further illustrated by appeals to the Convention's text and its Protocols. While this suggests that the Court is inconsistent when it comes to the underlying moral principle, this thesis argues that the most coherent way of interpreting Article 8 ECHR and its case law is through a dignity as empowerment approach.

It should be highlighted that while dignity as empowerment and dignity as constraint are not compatible, they may lead to the same result. The reason of their incompatibility lies in the attributes one must have to have dignity and the type of limitations imposed by dignity to what one can or cannot do.⁹¹ They could, however, lead to the same result. For example, a certain limitation can be compatible with both positions: compatible with dignity as empowerment, as this position accepts that there are limits to autonomy and self-determination in order to protect the rights and freedoms of others; compatible with dignity as constraint, as this position accepts that restraints can be imposed based on duties one owes to oneself, duties owed to God or duties owed to the understanding of human dignity of the specific society to which one belongs.

Dignity as Empowerment

On the one hand, the most apparent connection between the ECHR and dignity as empowerment can be found in *Pretty v UK*.⁹² As Douglas observes, the Strasbourg Court favoured an understanding of human dignity focused on individual autonomy and choice, whereby a person should 'conduct one's life in a manner of one's own choosing'.⁹³

⁹¹ Brownsword (n 52).

⁹² *Pretty v UK* (n 34).

⁹³ Benedict Douglas, 'Too Attentive to Our Duty: The Fundamental Conflict Underlying Human Rights Protection in the UK' (2018) 38 *Legal Studies* 360, 361-363.

In particular, in the *Pretty* case, the ECtHR dealt with the issue of end of life decisions. Mrs Diane Pretty suffered from a degenerative condition and wished to end her life with the assistance of her husband, as due to her condition she could not do so without assistance. Nonetheless, assisting someone to commit suicide constitutes a crime under s.2(1) of the Suicide Act 1961. The applicant complained that, by not giving her husband the permission to assist her commit suicide, the UK was infringing several articles of the ECHR.

In adjudicating the matter, the Court connected the respect for human dignity with the respect for human freedom. The ECtHR confirmed that there are concerns arising with regard to Article 8 ECHR and the principle of personal autonomy in terms of the right to make choices about one's own body.⁹⁴ The Court eventually decided that there was no violation of the Convention, because the interference with the applicant's life was justifiable as necessary in a democratic society. As seen already in Chapter 3, this is part of the two-stage test, taking place within Article 8 ECHR.

The Strasbourg Court highlighted individual autonomy and choice under Article 8 and indicated this to be the way to approach dignity (and what the case discussed as dignified end of life), ergo human dignity as empowerment. It was not the harm to oneself, to God or the beliefs of dignity of the community that the Court considered to comply with the Convention, as it would happen with an approach of dignity as constraint. Instead, State interference was justified due to the potential harm to others under Article 8(2) ECHR, in the sense of regulating activities detrimental to the life and safety of others due to their vulnerability. This again is compatible with the empowerment account of human dignity. As mentioned above, there is a limit to one's autonomy and this can be derived from the rights and freedoms of others.

Nonetheless, the Court's approach is not entirely consistent with the dignity as empowerment position. The Strasbourg Court, while acknowledging that the essence of dignity is to choose how to conduct one's life, held that the right to life:

⁹⁴ *Pretty v UK* (n 34) para 66.

cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life.⁹⁵

The Court suggested that Article 2 ECHR establishes the State's obligation to protect life (positive aspect of the right to life), but it does not oblige States to protect the choice of death instead of life (which would be the negative aspect of the right to life). This seems inconsistent with the idea that all rights (or the benefits of these rights) are waivable, falling from rights-based theories on moral permissibility,⁹⁶ which uphold the dignity as empowerment position.⁹⁷ Within rights-based theories, individual rights can be restricted in order to protect the rights/freedoms of others, but one should in principle be allowed to choose death over life.⁹⁸ The Court's ruling is diametrically contrary to this idea.

However, the Court applied the above to Article 2 ECHR only, while it accepted that 'under Article 8 ... notions of the quality of life take on significance',⁹⁹ allowing for the right to self-determination to include one's ideas of self and personal identity, even the choice of death over life. This is further elaborated below, arguing that the most coherent way of applying Article 8 ECHR is through a dignity as empowerment approach.

Apart from the case law, there is another indication of empowerment within the Convention. Approaching human dignity as empowerment is supported by the preamble of the ECHR and its reference to the UDHR. Human dignity is asserted to be a foundational idea in the UDHR, where all human beings are born free and equal in dignity and rights. While this is understood to mean that dignity is the ground for the possession of human rights,¹⁰⁰ it has a further implication based on the historic context of the international human rights instruments. These instruments and the ECHR in particular, echoing the end of World War II, were put in place to reinforce individual autonomy against arbitrary State interference, in light as well of the

⁹⁵ *ibid* para 39.

⁹⁶ *Pattinson* (n 55) 7.

⁹⁷ *ibid* 15.

⁹⁸ *ibid* 511.

⁹⁹ *Pretty v UK* (n 34) para 65.

¹⁰⁰ *Brownsword* (n 52) 21.

Nazi experiments and Holocaust.¹⁰¹ The historical use of dignity through this emphasis on autonomy is also a clear indication of dignity as empowerment.¹⁰²

Dignity as Constraint

On the other hand, it seems that the ECtHR has taken the dignity as constraint approach in the *Vo* case, where the Court held that:

At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person ... require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2.¹⁰³

The above passage suggests that dignity does cover an embryo/foetus, even if not considered a person for the purposes of the Convention. In this sense, it does comply with dignity as constraint, given the attributes required to possess dignity, i.e. being a living member of the human species. This suggests that choice, freedom and self-determination of an individual could be constrained based on the dignity of the embryo/foetus. The difference with the empowerment approach lies in the fact that in the latter, although one’s choice can be limited, this happens based on the rights of other agents, not of an embryo/foetus.

The empowerment position does not suggest that non-agents are left without protection, but rather that their protection is indirect,¹⁰⁴ ‘derivative or secondary to the status of agents’.¹⁰⁵ Conversely, within the dignity as empowerment ‘camp’, there might be different variations that award the foetus/embryo some (limited) moral status.¹⁰⁶ This means that while – unlike the constraint position – they do not accept its full moral status, they might accept a limited (fixed or proportional) status, which, in essence, means that an embryo/foetus is entitled to

¹⁰¹ Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 3.

¹⁰² Pattinson (n 55) 15.

¹⁰³ *Vo v France* (2005) 40 EHRR 12, para 84.

¹⁰⁴ Beyleveld and Brownsword (n 43) 31-32.

¹⁰⁵ *ibid* 81.

¹⁰⁶ For example, to those who appear to be only partial agents: Deryck Beyleveld and Shaun D Pattinson, ‘Precautionary Reason as a Link to Moral Action’ in Michael Boylan (ed), *Medical Ethics* (Prentice Hall 2000) 39.

some protection, but not the same as agents who possess full status.¹⁰⁷ In this latter sense, the *Vo* case could be compatible with the empowerment position as well, although through a different wording.

It is important to notice, however, that in the *Vo* case, the Court did not use the dignity of the embryo/foetus to restrain abortion. Acknowledging that in the case at hand there was no conflict between the rights of the mother versus the father or the unborn child versus the parents, the Court referred to medical negligence, claiming that ‘the unborn child’s lack of a clear legal status does not necessarily deprive it of all protection under French law’.¹⁰⁸ The matter was resolved based on the existence of measures provided by the French law. The Court mentioned that ‘even assuming that Article 2 [the right to life] was applicable in the instant case’,¹⁰⁹ which is an issue the Court refused to address,¹¹⁰ there was no violation of the Convention and recourse to administrative courts was an effective remedy.

Therefore, although the ECtHR adopts a dignity as constraint approach as to whom dignity should be attributed, it does not render a decision compatible with this account of human dignity. If dignity as constraint were to be followed, the Court would have to declare the incompatibility of the absence of criminal remedies against the doctor’s negligence and subsequent killing of the embryo/foetus. This follows from the fact that commonly dignity as constraint awards full status to all biological human beings.¹¹¹ Had the ECtHR followed the dignity as constraint approach, it would have to declare that by not awarding the same protection to an embryo as to a fully developed human, France undermines human dignity, something the Court clearly did not do.

Apart from the case law, there is another indication of dignity as constraint within the Convention’s Protocols. Protocol 13 states that human dignity is inherent to all human beings,¹¹² which seems like a reinforcement of the idea that the attributes required to possess dignity are those of a biological human being. This contrasts with the use of ‘everyone’,

¹⁰⁷ Pattinson (n 55) 590-592.

¹⁰⁸ *Vo v France* (n 103) para 86.

¹⁰⁹ *ibid* paras 94-95.

¹¹⁰ *ibid* para 85.

¹¹¹ e.g. John Finnis, ‘The Rights and Wrongs of Abortion: A Reply to Judith Thomson’ (1973) 2 *Philosophy & Public Affairs* 117.

¹¹² Protocol No 13 (n 35).

found within the Convention, which can be argued to refer to rights-holders rather than all biological human beings, hence taking an empowerment approach.

The contrast between ‘all human beings’ and ‘everyone’ is more straightforward in the Convention on Human Rights and Biomedicine (the Oviedo Convention), the Council of Europe’s treaty on biomedicine.¹¹³ Article 1 of the Oviedo Convention stipulates that ‘parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine’. It seems that dignity and its protection are extended to all human beings, while rights are reserved for ‘everyone’, which would either involve or exclude developing or seriously impaired human beings.

As Beyleveld and Brownsword observe, the signatory States of the Oviedo Convention that do not agree that an embryo/foetus bears human rights, would accept that they are worthy of protection based on dignity.¹¹⁴ This is in line with the explanatory report to the Oviedo Convention, which states that in the absence of a unanimous agreement on the term ‘everyone’, its definition was decided to be left to domestic law for the purposes of the (Oviedo) Convention’s application.¹¹⁵ Applying the same premise to Protocol 13 would mean that it endorses an understanding of dignity in its constraint sense.

A final indication in favour of the constraint position is found in Article 8(2) ECHR. While most justifications for State interference (i.e. national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health) could be broadly interpreted as included in the rights and freedoms of others, thus compatible with the empowerment position, the protection of morals indicates an understanding of dignity as constraint. An appeal to morals could give rise to the empowerment position too; after all both approaches to dignity refer to its moral dimension. Nonetheless, a constraint understanding seems more likely due to its susceptibility to allow the majority’s view to prevail over different understandings of morality. The State, when protecting the morals of its

¹¹³ Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997.

¹¹⁴ Beyleveld and Brownsword (n 43) 32.

¹¹⁵ Explanatory Report to the Convention for the protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997, para 18.

society, is most likely upholding the views of the majority, which seems a more arbitrary interference than the rest of the justifications. Therefore, dignity could be understood in the sense of owing duties to oneself, owing duties to God (based on the majority's religion) or deriving from the community's understanding of dignity and the commitments it entails, hence limiting autonomy and self-determination for the sake of the State's morals.

This last interpretation of dignity places the individual within the community, indicating that an individual will be subjected to norms and values upheld by the specific community. This means that, unlike the empowerment position where constraints to autonomy and self-determination might be imposed based on the rights and freedoms of others, limitations might be imposed based on what the community determines as appropriate in defining dignity. Such approach could be rooted in Article 8(2) ECHR through an appeal to morals.

Therefore, it seems that the Court and the Convention take both approaches depending on the issue at hand. This can be explained when considering the nature of the Convention. Dignity was used by international treaties/instruments as a supreme value that reflects a political consensus, without, however, establishing an agreement on what it means in essence.¹¹⁶ Certain things are left to domestic level to avoid a potential bottleneck that these differences could create, threatening the very existence and ratification of the Convention.¹¹⁷ Consequently, there is lack of consensus on what the underlying ethical principles stand for and how these are to be applied in particular circumstances. This is further translated into an 'ethical' inconsistency in terms of the theory of dignity applied in the different cases presented before the ECtHR.

The lack of consensus on the underlying ethical principles or their application is not unique to the ECHR. Ensuring consistency is difficult even at national level. It is argued that, while the starting point for ART regulation in Italy was the constraint position, an empowerment approach seems to have prevailed through judicial interference.¹¹⁸ Similarly, Germany seems to combine elements of both dignity as constraint and empowerment in its judicial consideration of PGD¹¹⁹ and abortion regulations.¹²⁰ In fact, the ECtHR itself has

¹¹⁶ McCrudden (n 42) 678.

¹¹⁷ *Mutatis mutandis* Explanatory Report to the Oviedo Convention (n 115) para 18.

¹¹⁸ Volha Parfenchyk and Alexander Flos, 'Human Dignity in a Comparative Perspective: Embryo Protection Regimes in Italy and Germany' (2017) 9 *Law, Innovation and Technology* 45.

¹¹⁹ *ibid.*

‘condemned’ a State for its inconsistency, however, not within the same but on two separate yet connected regulations: PGD and abortion.¹²¹

The above do not suggest that having an ambivalent approach to dignity is praiseworthy. In contrast, the ECHR should become more consistent, because dignity as empowerment and dignity as constraint are two irreconcilable positions. For the reasons presented below, this thesis upholds the dignity as empowerment position and suggests that if the Court were to face the question of whether surrogacy clashes with human dignity, it should respond negatively.

Article 8 ECHR

This thesis upholds an understanding of human dignity as empowerment. Human dignity as empowerment has been associated with modern human rights thinking, as shown through the International Bill of Rights above. With human dignity being the basis for human rights,¹²² a prominent position is given to positive freedom and personal autonomy. In these terms, in any appealing notion of human dignity, personal freedom should have a central place.¹²³ What people value and regard as granting dignity to their (human) life is ‘our capacity to choose and pursue our conception of a worthwhile life’.¹²⁴ Emphasis should be also placed to the plurality/lack of homogeneity of moral and religious values in modern secular societies. Plural and multi-cultural societies, a reality most European countries face, should respect the differences between values shared by particular groups of such societies. Limiting autonomy and personal choices because they clash with the majority’s dignity notion, which is not shared by everyone, is considered inappropriate, to say the least. This does not mean that autonomy and lifestyle choices cannot be limited, but rather that they should not be limited by an appeal to an abstract conception of dignity not shared by everyone.¹²⁵

¹²⁰ Samantha Halliday, *Autonomy and Pregnancy: A Comparative Analysis of Compelled Obstetric Intervention* (Routledge 2016) 112-113.

¹²¹ *Costa and Pavan v Italy* App No 54270/10 (ECtHR, 28 August 2012) para 64.

¹²² Alain Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions* (Routledge 2017) 1.

¹²³ Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012) 41.

¹²⁴ James Griffin, *On Human Rights* (Oxford University Press 2008) 44.

¹²⁵ Some of the limits are discussed in the next section.

This thesis further holds that approaching dignity as empowerment is the most coherent way of interpreting Article 8 ECHR and its case law. This is demonstrated through cases on Article 8 that indicate an empowerment understanding of dignity and others that indicate its incompatibility with the constraint position. It is in this sense that surrogacy is seen as *prima facie* compatible with the Convention, hence rejecting the potential claim that safeguarding dignity justifies interference with surrogacy under Article 8(2) ECHR.

In particular, dignity as empowerment can be reinforced by the ‘moral’ underpinnings of the right to respect for the decision to become a parent. This thesis is based on the hypothesis of applicants bringing before the ECtHR a Contracting State with a blanket ban on surrogacy claiming a violation of their right to respect for the decision to become a parent (Article 8). It was established in Chapter 3 that the Court has acknowledged the protection of the interest of becoming a parent through access to ART. The acknowledgement of such right was achieved through references to the physical and social identity including the right to personal autonomy and personal development.¹²⁶ This shows how central autonomy is for both Article 8 ECHR and the Convention, which fits perfectly within the dignity as empowerment approach.

Certainly, the right to respect for the decision to become a parent has its limits. However, when analysing Article 8(2) and the protection of an embryo’s potential for life, the Court has deliberately avoided answering the question, claiming that it was the Government’s understanding in *Costa and Pavan v Italy*¹²⁷ that the protection of embryos falls under the rights and freedoms of others.¹²⁸ Instead, the ECtHR held that ‘this does not involve any assessment by the Court as to whether the word “others” extends to human embryos’.¹²⁹ The findings of the ECtHR indicate the unwillingness of the Court to accept that the protection of the rights/freedoms of others would extend to an embryo/foetus, opposing an understanding of dignity as constraint.

¹²⁶ *Evans v UK* (2008) 46 EHRR 34, para 71.

¹²⁷ *Costa and Pavan v Italy* (n 121) paras 45 and 69. Even in this case, however, the Court stressed that the concept of child ‘cannot be put in the same category’ with that of an embryo (para 62).

¹²⁸ *Parrillo v Italy* (2016) 62 EHRR 8, para 167: ‘The Court acknowledges that the “protection of the embryo’s potential for life” may be linked to the aim of protecting morals and the rights and freedoms of others, in the terms in which this concept is meant by the Government’.

¹²⁹ *ibid.*

Furthermore, the Court seems to reject the idea that people owe duties to themselves. The Court held that States could not invoke gender equality under Article 8 and 9 ECHR to prohibit a practice women defend, unless it adopted an understanding of individuals being protected from the exercise of their own fundamental rights.¹³⁰ This seems a clear rejection of the duties owed to oneself, which further enhances the view that Article 8 should not be interpreted as upholding dignity as constraint.

Additionally, dignity as constraint through the communitarian approach, i.e. a duty owed to society's notion of dignity, seems unlikely under Article 8. In the *SAS* case, while the Court held that France had a wide margin of appreciation in the matter and it was a choice of the society whether wearing a full-face veil should be allowed in public spaces,¹³¹ it held that 'however essential it may be, respect for human dignity cannot legitimately justify a blanket ban on the wearing of the full-face veil in public places'.¹³² This can be understood as a rejection of the idea that human dignity constitutes an obstacle to autonomy and self-determination due to society's vision of dignity. However, an interference is permitted based on factors outside dignity, namely the preservation of the requirements of 'living together' as a component of the 'protection of the rights and freedoms of others'.¹³³

When invoking morals to justify State interference within Article 8(2), it seems from the *Dudgeon* case that morals are not enough without more to override valid consent.¹³⁴ Although the ECtHR did not use the language of dignity, it touched upon the very essence of the debate captured by dignity as empowerment and constraint. Here, consensual same-sex sexual activity was criminalised, hence restricting the autonomy of those involved in such activity. However, the ECtHR held that:

the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent.¹³⁵

¹³⁰ *SAS v France* (n 73) para 119.

¹³¹ *ibid* paras 153-155.

¹³² *ibid* para 120.

¹³³ *ibid* para 157.

¹³⁴ *Dudgeon v UK* (1981) 4 EHRR 149.

¹³⁵ *ibid* para 61.

Making sense of this statement compels a reading that gives priority to autonomy over moral standards of a society, unless limiting autonomy is further reinforced by other considerations. In the *Brown* case, although the Court acknowledged the prerogative of States to deter particular practices on moral grounds, it only considered interference with sadomasochistic same-sex sexual activities in terms of health.¹³⁶ While the Court does not challenge this prerogative, it seems unlikely that it would justify State interference in the absence of health issues or based only on morals.

Finally, while choosing life over death, which should be *prima facie* allowed according to the empowerment position, was rejected by the Court for Article 2 ECHR, it was considered potentially acceptable for Article 8.¹³⁷ The reason was one's dignity and autonomy to shape one's identity and quality of life.¹³⁸ This is another strong indication that even if the empowerment approach of dignity is not followed in each article/right of the Convention, it is the most consistent approach for Article 8 and the right to respect for private and family life.

Therefore, although there is an ambivalence in the Court's case law and even in the text of the Convention, which hints to both approaches of dignity, Article 8 can be consistently interpreted in light of dignity as upholding autonomy and individual freedom. While it seems arbitrary that for some articles/rights the Court takes an empowerment and for others (or even for the same) a constraint position, the origins of dignity within the ECHR can offer an explanation. Dignity as an underlying principle of the Convention was based on a political consensus and on its importance as a core value, not its meaning. It is challenging to guarantee a consistent application of an underlying moral understanding of dignity throughout the Convention, bearing in mind that this is difficult even at national level. Nonetheless, given the nature of Article 8 ECHR, as established by the Court, the most consistent interpretation is approaching dignity as empowerment.

Such an understanding of dignity as empowerment within Article 8 denies that surrogacy clashes with human dignity. Thus, surrogacy is regarded as a practice that reinforces individual autonomy and allows one to conduct life in one's own choosing, which applies to both surrogates and intended parents. If consensual, there seems to be no reason why it would

¹³⁶ *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39.

¹³⁷ *Pretty v UK* (n 34).

¹³⁸ *ibid* para 65.

clash with human dignity. Its compatibility with the Convention does not necessarily mean its permissibility. Instead, it means that in principle human dignity arguments against surrogacy are not valid within the ECHR framework, unless surrogacy is non-consensual. Consequently, the mere practice of surrogacy *per se* does not render women to vessels and children to objects.

Hence, dignity arguments are not considered enough to justify a blanket ban on surrogacy under Article 8(2). This is based on the empowerment understanding of dignity instead of the constraint perception, as the former is the most consistent approach for Article 8 given the Convention's text and its case law. Different reasons discussed below might restrict surrogacy, but the understanding of human dignity should not. This is further reinforced by the fact that the Court did not address issues of human dignity in the cross-border surrogacy cases brought before it.¹³⁹

As a final remark, for the human dignity examination through the commodification and objectification arguments, the socio-economic background of the surrogate or the particular Contracting State is irrelevant. However, as seen in the next section, the ethnographic and geographical parameters of surrogacy are quite significant for other State arguments against surrogacy, mainly exploitation and trafficking.

4.4 Remaining State Arguments Against Surrogacy

As shown in the previous section, surrogacy does not clash with human dignity unless there is lack of consent. But human dignity is only one of many aspects questioned by the States when banning surrogacy; thus, this section provides an examination of the rest arguments. While it was argued before that both commercial and altruistic surrogacy do not in principle clash with human dignity and are, hence, compatible with the Convention, this section argues that commercial surrogacy could potentially be problematic; however, it is not necessary to ban surrogacy altogether in order to avoid the dangers presented by the Contracting States.

The remaining objections of Contracting States are: exploitation of surrogates, human trafficking, health risks for both the surrogate and the resulting child, creation of unusual

¹³⁹ i.e. the *Menesson*, *Labassee* and *Paradiso* cases.

family relations (including the inalienability of the civil status). Considering the emphasis of States on the commercial aspects of surrogacy, this thesis holds that some of the aforementioned dangers can be intensified in commercial surrogacy, while in such cases altruistic surrogacy is more adequate to balance the reproductive rights of the intended parents and simultaneously avoid exploitation and human trafficking. Hence, it is possible for the Court to uphold a blanket ban on commercial surrogacy, which would be easier to justify under Article 8(2); however, ultimately, this demonstrates that a blanket ban on surrogacy is not necessary, as altruistic surrogacy does not pose the same dangers.

In particular, the dangers intensified by commercial surrogacy are that of exploitation and trafficking, depending on the socio-economic circumstances found within a State, the potential negative effect it might have on children born through surrogacy and the possibility of enabling forum shopping. While forum shopping has not (yet) been presented by Contracting States as an argument against surrogacy, it is considered in this section as a matter closely connected to the underlying purpose of this thesis, i.e. using the ECHR framework to minimise cross-border surrogacy. In contrast, altruistic surrogacy poses challenges of emotional exploitation of women. However, this is not considered sufficient to impose a blanket ban on altruistic surrogacy.

Emphasising the dangers of commercial surrogacy, while comparing it with altruistic surrogacy, is in line with the States' arguments against surrogacy. The involvement of payment is highly controversial and the emphasis of the Contracting States on the commercial nature of surrogacy, when rejecting it, was present in all cases examined at the beginning of this chapter. In the *Menesson* case, it was held that the human body should not become a commercial instrument and the child an object of contract.¹⁴⁰ Similarly, in *Labassee*, the French government claimed it bans surrogacy in order to avoid any possibility of commercialising the human body.¹⁴¹ Lastly, in *Paradiso*, surrogacy was described by the Italian Government as an ethically unacceptable commercial practice.¹⁴² It is also worth repeating that the arguments presented by the States are not always clearly articulated or elaborated, which calls for occasional references to the relevant academic debate.

¹⁴⁰ *Menesson v France* (n 4) para 60.

¹⁴¹ *Labassee v France* (n 5) para 47.

¹⁴² *Paradiso and Campanelli v Italy* (n 9) para 130.

Exploitation

Opinion is divided between surrogacy seen either as empowering women and introducing their reproductive capabilities into the market¹⁴³ or as a ‘patriarchal reification of women as nature’,¹⁴⁴ with a broader exploitation of women. This matter has been a major bone of contention for feminists (and not only). While States in the scenario under examination have not expressed their view on whether surrogacy empowers women, they have expressed the exploitation fear. However, the idea of empowering women is discussed first in an attempt to provide an understanding of the counterargument presented by States, i.e. surrogates’ exploitation.

This thesis does not support any of the above positions, as surrogacy *per se* is seen neither as exploitation nor as empowerment of women. However, both are discussed as they have a major impact on the acceptance or not of commercial surrogacy and the blanket ban on surrogacy imposed by different Contracting States. It is argued here that, through commercial surrogacy, exploitation of surrogates is a real threat where socio-economic circumstances allow it.

Surrogacy is perceived as empowerment by those who envisage expanding the reproductive choices available to women. Otherwise called contract or choice-based feminists, they feel commercial surrogacy can empower women by introducing women’s reproductive abilities into the market, something traditionally denied to them, which can lead to a better power balance between men and women.¹⁴⁵

This thesis does not support the idea that surrogacy empowers women. While additional concerns to the commercialisation of the practice are presented below, the empowerment position assumes that the major reason why women would undergo surrogacy lies behind financial reasons. This, although true for some women, particularly in developing countries, is not true for others, as elaborated in the next few paragraphs. Also, depending on the State’s

¹⁴³ This empowerment of women should be distinguished from the empowerment versus constraint position on human dignity discussed above.

¹⁴⁴ Renate Klein, *Surrogacy: A Human Rights Violation* (Spinifex Press 2017) 56.

¹⁴⁵ Felicia Daunt, ‘Exploitation or Empowerment - Debating Surrogate Motherhood’ (1991) 55 *Saskatchewan Law Review* 415, 421.

socio-economic circumstances, commercial surrogacy fails to empower women, based on the high risk of exploitation that women run.

Many, therefore, claim that surrogacy entails an exploitation of women. Exploitation commonly refers to one taking unfair advantage of another.¹⁴⁶ There can be different types of exploitation: sexual, financial, social, emotional, etc. Surrogacy has been perceived as exploitation both in terms of men exploiting women and in terms of wealthy people exploiting women in financial need. This is mostly associated with commercial surrogacy, while emotional exploitation is considered under altruistic surrogacy.

In terms of women being exploited by men, feminists have considered surrogacy as an act that degrades women to a vessel where men implant their seed in order to continue their genes.¹⁴⁷ It reinforces patriarchy, the argument goes, as men are able to continue their blood line, while women are reduced to a simple incubator or breeder of the child. This argument was already rejected in the previous section under the objectification and commodification arguments associated with human dignity. Wilkinson refers to this type of exploitation as ‘making wrongful use’, while, for the sake of clarity, he objects to the use of the term exploitation, where the main issue is commodification or objectification.¹⁴⁸

The gender element in surrogacy cannot and should not be overlooked. Women (and trans men) are the only ones uniquely equipped with the capacity to gestate children.¹⁴⁹ However, if the intended mother can act as the egg donor, it is plausible for her to continue her genes through surrogacy. Therefore, it is not simply a solution for men to propagate their genes. After all, surrogacy is an option for many people that defy the ‘traditional’ or ‘conventional’ family; for example, surrogacy is nowadays a major reproductive method for same-sex couples.

¹⁴⁶ ‘the act of using someone unfairly for your own advantage’: ‘Exploitation’ (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/exploitation>> accessed 4 December 2019.

¹⁴⁷ Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (Norton 1989).

¹⁴⁸ Stephen Wilkinson, ‘Exploitation in International Paid Surrogacy Arrangements’ (2016) 33 *Journal of Applied Philosophy* 125, 127.

¹⁴⁹ The creation of artificial wombs is currently under experimentation by scientists. However, ectogenesis is not possible at the moment and, therefore, there is no form of growing an embryo or foetus outside a woman’s body.

This shows that although surrogacy has the potential to reinforce patriarchy, when used as means to continue descent through male line and maintain male dominance, it does not necessarily entail it. Nowadays, the gender element seems more relevant in terms of well-off individuals or couples exploiting financially disadvantaged women. This was the objection presented by the Austrian government, holding that ‘ovum donation might lead to the exploitation and humiliation of women, in particular those from economically disadvantaged backgrounds’,¹⁵⁰ which can also be read in light of surrogacy.

In the hypothesis underpinning this thesis, exploiting the financially disadvantaged is an argument expected to be invoked as a justification for State interference. Wilkinson calls this ‘unfair advantage exploitation’ and argues that it occurs either when one ‘derives (or is at risk of deriving) an unfairly low level of benefit and/or suffers an unfairly high level of cost or harm’ or when one’s consent is defective/invalid.¹⁵¹ Given that the purpose of this chapter is to address State arguments and that different States have different understandings of what unfair benefit and unfair harm is or when consent is defective,¹⁵² this chapter rests on a rudimentary understanding of these concepts that seems more likely to appeal to almost every Contracting State.¹⁵³

The first part of unfair advantage exploitation is discussed, therefore, under power imbalance and inability (for surrogates) to bargain.¹⁵⁴ The second part is discussed under consent, where consent is understood as the ‘permission or agreement to something’¹⁵⁵ and defective consent is discussed in terms of lack of information and voluntariness when background poverty has quasi-coercive characteristics.¹⁵⁶ When there is no consent at all, the discussion does no

¹⁵⁰ *SH and Others v Austria* (n 21) para 101.

¹⁵¹ Wilkinson (n 148).

¹⁵² Within the CoE and the ECHR, there is no effort of unification or harmonisation of laws, but rather a set of standards that States have to comply with for the harmonised protection of the rights and freedoms enshrined in it.

¹⁵³ It is assumed that every Contracting State raises concerns over the potential unfairness deriving from power imbalance and the inability to bargain or the problematic consent of those who do not understand the terms of an agreement they are undertaking or are driven to it due to extreme poverty.

¹⁵⁴ cf with Panitch, who considers this under the consent criterion: Vida Panitch, ‘Global Surrogacy: Exploitation to Empowerment’ (2013) 9 *Journal of Global Ethics* 329, 334.

¹⁵⁵ e.g. ‘Consent’ (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/consent>> accessed 4 December 2019.

¹⁵⁶ Wilkinson (n 148) 135-137. This notion does not only refer to lack of alternatives, but the systemic deficiency where a State fails to create welfare services or other policies for the development of other type of employment.

longer revolve around exploitation.¹⁵⁷ In light of the above, this thesis holds that depending on the socio-economic circumstances present in different States, commercial surrogacy can give rise to both aspects of unfair advantage exploitation.

It is often said that the majority of surrogates are of very low income. The reason women are driven to surrogacy is financial urgency, which makes them desperate to gain some income, and they cannot assess the pros and cons of surrogacy.¹⁵⁸ Others see in surrogacy an exploitation of poor women of colour by wealthy white people.¹⁵⁹ It is important, however, to differentiate between developing countries and developed countries.¹⁶⁰

The picture of surrogates in developed countries is different from the one described above. Empirical studies in the USA and Britain have shown that surrogates do not match the stereotype of a poor woman that financial or other difficulties pressurise her into surrogacy, that she is naively unaware of the risk she is undertaking. Instead, they are ‘mature, experienced, stable, self-aware, and extroverted non-conformists who make the initial decision that surrogacy is something that they want to do’.¹⁶¹ According to similar studies, surrogates in the USA were not experiencing financial distress and their family income was modest (not low), while their background was mostly that of working class.¹⁶² In addition, when asked about the motivation behind undergoing surrogacy, most developed world surrogates ‘reported enjoying pregnancy and childbirth, and many noted that surrogacy increased their fulfillment and self-confidence and opened up their social circles’.¹⁶³

¹⁵⁷ Stephen Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge 2003) 72-75.

¹⁵⁸ Laurie Nsiah-Jefferson, ‘Reproductive Laws, Women of Color and Low-Income Women’ (1989) 11 *Women’s Rights Law Reporter* 15, 35.

¹⁵⁹ Khiara M Bridges, ‘Windsor, Surrogacy, and Race’ (2014) 89 *Washington Law Review* 1125, 1134.

¹⁶⁰ This thesis acknowledges that this term is contested. However, it is used for convenience reasons, as most readers are familiar with it. In this sense: Marc Silver, ‘If You Shouldn’t Call It The Third World, What Should You Call It?’ *NRP* (4 January 2015) <<https://www.npr.org/sections/goatsandsoda/2015/01/04/372684438/if-you-shouldnt-call-it-the-third-world-what-should-you-call-it?t=1567961230910>> accessed 4 December 2019. The term is understood to cover ‘several factors that determine whether or not a country is developed, such as the Human Development Index, political stability, gross domestic product (GDP), industrialization and freedom’: World Population Review ‘Developing Countries 2019’ <<http://worldpopulationreview.com/countries/developing-countries/>> accessed 4 December 2019.

¹⁶¹ Karen Busby and Delaney Vun, ‘Revisiting the Handmaid’s Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers Rethinking Assisted Conception’ (2010) 26 *Canadian Journal of Family Law* 13, 51-52.

¹⁶² As reported in: Lina Peng, ‘Surrogate Mothers: An Exploration of the Empirical and the Normative’ (2013) 21 *The American University Journal of Gender, Social Policy & the Law* 555, 564.

¹⁶³ *ibid.*

In contrast, surrogates in developing countries have been described as in ‘desperate need of money for their children’.¹⁶⁴ India used to be the prime example of this. Surveys have shown that motivations for surrogates were primarily financial in nature.¹⁶⁵ Surrogates were mostly uneducated and even illiterate women.¹⁶⁶ Through surrogacy, they could manage to make a living, provide for their own children, secure their husband’s profession and through all this ensure family stability.¹⁶⁷

As with other reproductive services, developing countries attract many citizens of developed countries as a destination to undertake surrogacy.¹⁶⁸ This is based on a variety of reasons, the most common being the unavailability of the service in their home country, more favourable regulation and cheaper price.¹⁶⁹ It has also been observed that locals do not turn that often to surrogacy as foreigners do, making cross-border surrogacy most common than domestic surrogacy in developing countries.¹⁷⁰

Given the above, this thesis argues that commercial surrogacy poses significant threats of exploitation to women, in particular those from a disadvantaged financial background, by wealthy (or wealthier) individuals or couples. There is a difference in resources between the surrogates and the intended parents. This difference is usually translated into a power imbalance when arranging a surrogacy agreement, notably when this takes the form of a contract.

Power imbalance in itself does not necessarily mean exploitation. It does not mean that in every case of surrogacy there will be exploitation, but inequality of bargaining power is a

¹⁶⁴ Amrita Pande, ‘Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker’ (2010) 35 *Signs* 969, 975.

¹⁶⁵ Sharvari Karandikar and others, ‘Economic Necessity or Noble Cause? A Qualitative Study Exploring Motivations for Gestational Surrogacy in Gujarat, India’ (2014) 29 *Affilia: Journal of Women and Social Work* 224.

¹⁶⁶ Wilkinson (n 148) 133.

¹⁶⁷ As Madu Parmar, an Indian surrogate, narrates her story in ‘Wombs for Rent in India (RT Documentary) - YouTube’ <<https://www.youtube.com/watch?v=PSXZSdMmRdg>> accessed 4 December 2019.

¹⁶⁸ Karandikar and others (n 165).

¹⁶⁹ Guido Pennings, ‘Reproductive Tourism as Moral Pluralism in Motion’ (2002) 28 *Journal of Medical Ethics* 337, 338.

¹⁷⁰ Audrey Wilson, ‘How Asia’s Surrogate Mothers Became a Cross-Border Business’ *South China Morning Post* (4 June 2017) <<https://www.scmp.com/week-asia/society/article/2096675/how-asias-surrogate-mothers-became-cross-border-business>> accessed 4 December 2019.

strong indication that exploitation might take place. This is the reason why most contracts with such characteristics include mandatory terms or are not enforceable by courts.¹⁷¹ Hence, it becomes discernible that freedom of contract should not be taken for granted in surrogacy, making the expression of reproductive autonomy problematic. This is all the more apparent in developing countries, as surrogacy contracts are presented on a ‘take-it-or-leave-it’ basis or otherwise called adhesion contracts.¹⁷²

The background of surrogates in developing countries, as uneducated, illiterate women, makes commercial surrogacy problematic with greater reason. This occurs in terms of not only power imbalance and inequality of bargaining power, but consent as well. Informed consent of illiterate people is significantly difficult.¹⁷³ Surrogates might not fully understand what they are committing themselves to and the extent to which they commit themselves.¹⁷⁴ In extreme cases, they cannot even read the contract. This, in addition to the fact that the most common phenomenon in these countries is cross-border commercial surrogacy, shows the dangers of exploitation of women and, more specifically, women from disadvantaged financial background by wealthy people.

Questioning the existence of consent further indicates problems regarding dignity. It was argued in the previous section that surrogacy clashes with human dignity when it is non-consensual. Hence, an additional concern that goes beyond exploitation is that, in the absence of consent, surrogacy would equal the instrumentalisation and objectification of women and children.

Dignity concerns should be distinguished from exploitation concerns.¹⁷⁵ Nonetheless, while examining dignity in relation to gender inequality, Thiem argues that dignity concerns are often used to primarily protect women from exploitation; such discourse, however, does not necessarily lead to a positive outcome for gender inequalities, as frequently dignity is invoked

¹⁷¹ See for instance: Unfair Contract Terms Act 1977, section 3.

¹⁷² ‘If the prospective Indian surrogate attempts to bargain for better terms, the offer will just be made to someone who will not. She cannot really be said to be in a position to bargain if any attempt to do so will result in the offer’s disappearance’: Panitch (n 154) 333, talking about the fungibility of surrogates and their lack of bargaining power.

¹⁷³ Mahnaz Alaei and others, ‘Obtaining Informed Consent in an Illiterate Population.’ (2013) 5 Middle East Journal of Digestive Diseases 37.

¹⁷⁴ Wilkinson (n 148) 133.

¹⁷⁵ *ibid.*

to endorse rather than challenge existing gender norms.¹⁷⁶ This can be seen through the extensive regulation of women's reproduction, many times in the name of dignity.¹⁷⁷ Thiem adds that the dignity rhetoric can endorse stereotypes according to which poor women of colour need to be rescued.¹⁷⁸ However, dignity concerns aside, the reality of cross-border surrogacy should not be ignored.

Race and ethnographic elements in surrogacy are quite strong, which could prove right early feminists opposing surrogacy that predicted the use of 'third world' women as surrogates.¹⁷⁹ Similarly, others have argued that when it comes to cross-border surrogacy in developing countries that were previously colonised, surrogacy perpetuates the mindset that some people are superior to others, while those inferior are useful for low-status tasks.¹⁸⁰ A 'fertility tourist who uses this means to justify hiring a nonwhite woman to gestate a child for her perpetuates this kind of colonialist mindset'.¹⁸¹

Nevertheless, it is not only women of colour that find themselves in such position. There are other States that attract intended parents, as Ukraine for example, where women are also driven to surrogacy mainly due to financial incentives, having to choose sometimes between prostitution and surrogacy.¹⁸² This in turn shows that it is mostly the financial and educational status, rather than race, the most significant differentiating factor for the possible exploitation of surrogates.

The role of intermediaries in exploitation should not be left unnoticed. It has been observed that 'surrogates earn a relatively small share of the total price paid by intended parents, often

¹⁷⁶ Annika Thiem, 'Human dignity and Gender Inequalities' in Marcus Düwell, Jens Braarvig, Roger Brownsword, and Dietmar Mieth (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 498, 502.

¹⁷⁷ For example, mentioning, among others, abortion, ART and surrogacy: Paula Gerber and Katie O'Byrne, *Surrogacy, Law and Human Rights* (Routledge 2016) 23.

¹⁷⁸ Thiem (n 176) 504.

¹⁷⁹ Gena Corea, *The Mother Machine: Reproductive Technologies from Artificial Insemination to Artificial Wombs* (Women's Press 1988) 215 and 245.

¹⁸⁰ Argument based on Chandra Talpade Mohanty, *Feminism without Borders: Decolonizing Theory, Practicing Solidarity* (Duke University Press 2003).

¹⁸¹ Anne Dinchin, 'Reproductive Tourism and the Quest for Global Gender Justice' (2010) 24 *Bioethics* 323, 329.

¹⁸² Allison Herrera, 'In Ukraine, Surrogacy Is Legal, but Some Ask If It's Exploitation' *PRI* (29 June 2018) <<https://www.pri.org/stories/2018-06-29/ukraine-surrogacy-legal-some-ask-if-its-exploitation>> accessed 4 December 2019.

less than the agency fee and typically much less than the total price paid, which includes medical and legal expenses and the agency placement fee'.¹⁸³ This could be considered as an exploitation of both surrogates and intended parents by intermediaries. This, in correlation with cases of human trafficking, as discussed below, or surrogacy fraud cases by intermediaries,¹⁸⁴ reveals the horrendous extent commercial surrogacy can take if socio-economic circumstances allow it.

The possibility of exploitation of the intended parents by surrogates should not be overlooked either. Although not the most common fear, there are cases where a surrogate takes advantage of the vulnerability of the intended parents and their desire to become parents. For example, in the Baby Donna case, a woman undertaking surrogacy for a Belgian couple, using the sperm of the intended father, informed the couple she had a miscarriage and eventually 'sold' the child to a Dutch couple.¹⁸⁵ Fraud in surrogacy can be usual in places with no proper surrogacy regulation.

Reflecting on the above, where socio-economic circumstances permit it, exploitation via surrogacy is a real threat to women. In these terms, this thesis holds that while commercial surrogacy does not constitute an exploitation of women where they consent to it, free of pressure and in an informed manner with the chance of negotiating, in developing countries these conditions are frequently absent. Therefore, it would be easier for the Court to accept a blanket ban on commercial surrogacy. State interference would be justified since exploitation is highly likely to take place, as women choose surrogacy due to the financial pressure, they are not informed properly or cannot negotiate the commercial contract they are signing.

Finally, the plausibility of exploitation is assessed at a societal level, while there can be individual cases of commercial surrogacy that do not necessarily entail exploitation. However, the societal impact is extremely significant, as demonstrated in States like India and Thailand, which have drastically reformed their surrogacy regulation and opted for

¹⁸³ Kimberly D Krawiec, 'Altruism and Intermediation in the Market for Babies' (2009) 66 *Washington and Lee Law Review* 203, 244.

¹⁸⁴ Richard Vaughn, 'International Surrogacy Can Be Risky Business for Intended Parents, Surrogates | International Fertility Law Group' (*International Fertility Law Group*) <<https://www.iflg.net/international-surrogacy-can-be-risky-business-for-intended-parents-surrogates/>> accessed 4 December 2019.

¹⁸⁵ 'Court Upholds Suspended Jail Terms for Illegal Baby Adoption' *DutchNews.nl* (5 December 2013) <https://www.dutchnews.nl/news/2013/12/court_upholds_suspended_jail_t/> accessed 4 December 2019.

domestic altruistic surrogacy instead of cross-border commercial surrogacy.¹⁸⁶ It is not argued that commercial surrogacy should be banned because it always exploits the stakeholders. Abuses are likely to exist in almost ‘every area of human interaction’.¹⁸⁷ Nonetheless, this analysis aims to show that commercial surrogacy is particularly problematic in developing States, giving room to a number of abuses, which are not present in non-commercial surrogacy.

Hence, altruistic surrogacy, in the absence of a commercial transaction, does not pose the same threat of exploitation. Nevertheless, surrogacy could still imply an emotional exploitation of women. It is known that ‘family has not always been a safe place for women’.¹⁸⁸ It does not always take a financial incentive or contract to ‘force’ a woman into surrogacy. Based on family pressure, a woman might become a surrogate for a close family member.¹⁸⁹ Emotional exploitation can also be shaped as a factor discouraging surrogates to change their mind and keep the child, as by doing so, she could potentially be cast out by the family.¹⁹⁰

Another aspect of emotional exploitation has been considered in terms of the motivation of surrogates to undergo surrogacy. Often called reparative motive, the argument goes that women become surrogates because it serves as therapeutic atonement for a previous abortion or for placing a child for adoption. This was discussed by early feminists rejecting surrogacy¹⁹¹ and has been given great significance by some contemporary scholars.¹⁹²

While this thesis acknowledges the possibility of emotional exploitation in altruistic surrogacy, there seems to be no empirical research, to date, showing that this occurs in practice. In contrast, studies in the UK, where altruistic surrogacy is lawful, have demonstrated that only 10 out of 107 surrogates acted for a friend or family member,¹⁹³ hence

¹⁸⁶ For further details, see Chapter 2 (2.2).

¹⁸⁷ Peng (n 162) 560.

¹⁸⁸ Raymond (n 45) 9.

¹⁸⁹ Sharyn L Roach Anleu, ‘Reinforcing Gender Norms: Commercial and Altruistic Surrogacy’ (1990) 33 *Acta Sociologica* 63.

¹⁹⁰ Klein (n 144) 7-8.

¹⁹¹ Corea (n 179) 238-239.

¹⁹² Michelle Harrison, ‘Psychological Ramifications of “Surrogate” Motherhood’ in Nada Logan Stotland (ed), *Psychiatric aspects of reproductive technology* (American Psychiatric Press 1990) 97.

¹⁹³ Kirsty Horsey, ‘Surrogacy in the UK: Further Evidence for Reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform’ (Surrogacy UK, December 2018) 33.

weakening the narrative that if altruistic surrogacy is allowed, women will be forced to act as surrogates for their family. In addition, for the so-called reparative motive, empirical studies have found that this is not such a common motivation. For example, although (out of 125) few of the 44 women that had an abortion or put their child for adoption had what is called a reparative motive,¹⁹⁴ Parker places it as one of the main motivations for surrogacy.¹⁹⁵ As Teman mentions, these studies show there is little evidence of reparative motivation; however, the authors tend to place a disproportionate significance on the few cases of such motivation.¹⁹⁶

Cases of family pressure or reparative motives should be taken seriously.¹⁹⁷ Nevertheless, instead of placing a blanket ban on altruistic surrogacy on the account of such justification, a better solution would be to establish a body that would assess psychologically the surrogate before she undergoes the treatment. This body should be able to assess the given circumstances and decide whether surrogacy would be harmful for women due to potential family pressure, a reparative motive or other similar motivation. In most States where surrogacy is lawful such mechanism is already in place.

The difference with the above approach on commercial surrogacy lies behind the measures' intensity in order to avoid potential abuses.¹⁹⁸ The surrogate's psychological assessment before the treatment seems to be an essential part for both altruistic and commercial surrogacy, while to avoid the exploitation that commercial surrogacy entails is deemed more complicated. Checking for imbalance or absence of bargaining power and a potentially invalid consent seems more difficult to be detected beforehand. Safeguards to stop such abuses can indeed be imposed through careful regulation.¹⁹⁹ Nonetheless, their efficiency in States with the aforementioned socio-economic circumstances seems bleak. Regulating commercial surrogacy and ensuring compliance with such rules might seem burdensome for many States, while experience shows that developing States frequently find it easier to ban

¹⁹⁴ Philip J Parker, 'Motivation of Surrogate Mothers: Initial Findings' (1983) 140 *American Journal of Psychiatry* 117, 118.

¹⁹⁵ *ibid.*

¹⁹⁶ Elly Teman, 'The Social Construction of Surrogacy Research: An Anthropological Critique of the Psychosocial Scholarship on Surrogate Motherhood' (2008) 67 *Social Science & Medicine* 1104.

¹⁹⁷ In particular, with family pressure, the culture to which one belongs can directly affect the pressure imposed to a surrogate. The British culture might not necessarily entail this danger, hence the statistics.

¹⁹⁸ cf with Wilkinson, who argues that these concerns are weak to lead to a prohibition of commercial surrogacy: Wilkinson (n 148).

¹⁹⁹ For example: ensure the contractual terms are transparent, guarantee a minimum wage, etc.

commercial surrogacy than deal with its negative consequences.²⁰⁰ While it is not the Strasbourg Court's role to decide whether a State exhausted all possible alternatives before banning a practice, as explained in Chapter 5, it would be easier for developing States to justify their ban on commercial surrogacy under Article 8(2) rather than on altruistic surrogacy.

As elaborated in Chapter 6, once a blanket ban is lifted, the specifics of the regulation depend on the respondent State. This might raise questions about the possible absence of a psychological screening in the adopted regulation, which could potentially lead to the emotional exploitation of surrogates. However, should the States argue that they impose the blanket ban on surrogacy to avoid the emotional exploitation of surrogates, this would be rejected by the Court, given that a blanket ban does not seem necessary to achieve the aim. More on the proportionality assessment is discussed in Chapter 5.

Lastly, it is worth repeating that the boundaries between altruistic and commercial surrogacy are not always clear-cut. With altruistic surrogacy, there is a fear of a backdoor for-profit agreement between the surrogate and the intended parent. Similarly, there is always the debate on whether the different costs awarded to surrogates should be considered (lawful) expenses or (unlawful) payment. While eliminating all chances of abuse seems impossible, this thesis holds that, where commercial surrogacy is problematic, domestic regulation, once altruistic surrogacy is lawful, should clarify what can qualify as reasonable expenses or not, with further guidance on the type of payment which is not acceptable.²⁰¹

Human Trafficking

Connected to the above socio-economic circumstances is the fear of human trafficking. The commercialisation of surrogacy can potentially become an issue of women/child trafficking. Where socio-economic circumstances allow it, a black market of trafficking through surrogacy can arise, with all the dangers this implies. An example of human trafficking in terms of surrogacy can be traced in the case Baby 101, where Vietnamese women were held

²⁰⁰ e.g. Thailand, India, Nepal, etc.

²⁰¹ In line with the UK reform proposal: Horsey (n 193).

in Thailand on a baby-breeding farm.²⁰² At the time, commercial surrogacy was legal in Thailand and some of these women were lured into surrogacy based on payment incentives. The potential for human trafficking is particularly high in developing countries when surrogacy is unregulated or prohibited. In places of unregulated surrogacy like Nigeria, where baby factories have been reported,²⁰³ there are fears on how surrogacy can interact or ‘contribute’ to this type of human trafficking.²⁰⁴

The implications of commercial surrogacy on women and children are intertwined and mutually dependent. Where children are trafficked as commodities, most likely traffickers also prey on women’s vulnerability and lure them to surrogacy by deceiving them with false promises, as observed in the Baby 101 case. While it is not suggested that in all commercial surrogacy cases children are treated as commodities, it is the existence of a market combined with the socio-economic circumstances in developing countries that intensify the potential for abuse and human trafficking.

Thus, in Contracting States of the ECHR that circumstances allow it, human trafficking is indeed a real threat. Similar concerns have not been raised where altruistic surrogacy is lawful. This would essentially justify State interference in the sense of banning commercial surrogacy under Article 8(2) ECHR. The legitimate aims invoked could be: ‘prevention of crime’ and ‘protection of the rights and freedoms of others’. States could also allege that banning commercial surrogacy is part of their compliance with the obligation to ensure practical and effective protection from trafficking and put in place adequate measures regulating businesses often used as a cover for human trafficking.²⁰⁵

²⁰² Pete Shanks, ‘Criminal Surrogacy Ring Exposed in Thailand’ *Rewire.News* (17 March 2011) <<https://rewire.news/article/2011/03/17/criminal-surrogacy-ring-exposed-thailand/>> accessed 4 December 2019.

²⁰³ Baby factories refer to the infamous practice of kidnapping women and impregnating them to later sell their children. For example: Zamira Rahim, ‘Nineteen Pregnant Women Rescued from “Baby Factories” in Nigeria’ *The Independent* (30 September 2019) <<https://www.independent.co.uk/news/world/africa/nigeria-africa-baby-factories-lagos-pregnant-girls-rescued-a9126691.html>> accessed 4 December 2019.

²⁰⁴ Olusesan Ayodeji Makinde and others, ‘Baby Factories Taint Surrogacy in Nigeria’ (2016) 32 *Reproductive BioMedicine Online* 6.

²⁰⁵ More on this obligation through the ECHR: *Rantsev v Cyprus and Russia* [2010] ECHR 22.

Health Risks

Regarding the physical health risks surrogacy entails, some of which are preterm labour, placental abruption and the potential for a Caesarean-section,²⁰⁶ denying women the ability to undertake these risks and decide for themselves seems a direct threat to their autonomy. Engaging in surrogacy should be a personal decision and the State should not in principle deny them this freedom. According to Cannold, if egg donation – which, as mentioned before, is a prerequisite for gestational surrogacy – is considered by someone too risky, they have the right not to do it; however, they should not stop others from doing this, as women are capable of making their own ‘risk-benefit calculation and their own choice’.²⁰⁷ The same argument can apply for women undergoing surrogacy.

This is in line with the emphasis on autonomy discussed in the previous section on human dignity. However, autonomy and individual freedom can be limited for health reasons or for the protection of others’ rights/freedoms under Article 8(2) ECHR. Regarding the (physical) health risks to the surrogate, these do not differ from similar IVF treatments. If, therefore, IVF is lawful in a State, it seems inconsistent to reject surrogacy in terms of (the same) health risks.

Nevertheless, there can be a mental health impact on the surrogate, different from other pregnancies. Apart from the usual dangers, such as post-partum depression, relinquishing the child could have an adverse effect on one’s mental health. Relevant studies, however, suggest that surrogates ‘do not appear to experience psychological problems as a result of the surrogacy arrangement’.²⁰⁸ While there seems to be an agreement among experts that further evidence and studies need to be conducted on the topic, it seems that, regardless of fears about the surrogate’s emotional problems, these do not amount to a threat to her psychological health.²⁰⁹ It is suggested that surrogates who are mainly motivated by altruism

²⁰⁶ ‘What Are the Risks of Being a Surrogate Mother?’ (*How To Be A Surrogate Mother*) <<https://howtobeasurrogatemother.com/how-surrogacy-works/the-medical-surrogacy-process/risks-of-surrogacy/>> accessed 4 December 2019.

²⁰⁷ Leslie Cannold, ‘Women Can Still Say “No”’ *ON LINE opinion* (2006) <<http://www.onlineopinion.com.au/view.asp?article=5197&page=0>> accessed 4 December 2019.

²⁰⁸ Vasanti Jadva and others, ‘Surrogacy: The Experiences of Surrogate Mothers’ (2003) 18 *Human Reproduction* 2196.

²⁰⁹ Hoda Ahmari Tehran and others, ‘Emotional Experiences in Surrogate Mothers: A Qualitative Study’ (2014) 12 *Iranian Journal of Reproductive Medicine* 471.

(this could occur in both commercial and altruistic surrogacy) and who have a good communication with the intended parents have less difficulty relinquishing the child.²¹⁰ It seems also sensible to correlate better mental health with the support surrogates receive from clinics and health centres.

When it comes to children born through surrogacy, in terms of physical health, as with surrogates, there seems to be no difference with children born through other types of IVF. Regarding their mental health, it seems possible to raise questions of identity, given the plurality of family formation that can derive from surrogacy. Studies undertaken in the UK suggest that:

Overall, the findings of this longitudinal study of children born through egg donation, donor insemination, and surrogacy did not indicate raised levels of mother-adolescent relationship difficulties or adolescent adjustment problems compared with natural conception families ... it appears that the absence of a gestational link between mothers and their children does not have an adverse effect on the quality of mother-child relationships at adolescence.²¹¹

Most of these surveys were conducted in the UK, where the norm is altruistic surrogacy, although a number of UK citizens travel abroad for cross-border surrogacy, which is assumed to be mainly commercial.²¹² Also, these studies involved the presence of an intended mother, as it was the mother-child relationship under examination. It is unknown what the exact impact of other types of surrogacy is to children or whether they would differ in a State with predominantly commercial surrogacy. Although there seems to be no systematic empirical evidence on how children born through commercial surrogacy feel or have been affected by it, there are instances of children born through commercial surrogacy that condemn it.²¹³

It looks to me like I was bought and sold. You can dress it up with as many pretty words as you want... But the fact is that someone has contracted you to make a child, give up your

²¹⁰ Robert J Edelman, 'Surrogacy: The Psychological Issues' (2004) 22 *Journal of Reproductive and Infant Psychology* 123, 133.

²¹¹ Susan Golombok and others, 'A Longitudinal Study of Families Formed through Reproductive Donation: Parent-Adolescent Relationships and Adolescent Adjustment at Age 14' (2017) 53 *Developmental Psychology* 1966.

²¹² For further details: Chapter 6.

²¹³ For example: Jane Ridley, 'Child of Surrogacy Campaigns to Outlaw the Practice' *New York Post* (16 June 2014) <<https://nypost.com/2014/06/16/children-of-surrogacy-campaign-to-outlaw-the-practice/>> accessed 4 December 2019.

parental rights and hand over your flesh and blood child... When you exchange something for money it is called a commodity.²¹⁴

While the above could be isolated cases, experts do warn that studies on surrogacy should be interpreted with caution, particularly in light of the absence of studies for children born through cross-border commercial surrogacy.²¹⁵

Discussing the effect surrogacy has on children should not be limited to the child resulting from surrogacy. The existing children of the surrogate should also be taken into account,²¹⁶ particularly as having own offspring is a common requirement for surrogates.²¹⁷ Such studies are rare, but an existing one demonstrates that there is generally a positive attitude and acceptance of surrogacy, although it seems that a child's attitude is affected by the way in which the surrogate understands her role and how she conveys this to the child.²¹⁸

The Court seems to approach cases involving children with caution, allowing a wide margin of appreciation to States. For example, the Court has considered that:

it must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date.²¹⁹

Nonetheless, this was only one of the factors that were taken into account to reject the ECHR's violation. Subsequently, although very marginally and based on discrimination, the Court held that excluding same-sex couples or gay individuals from adoption is a violation of the Convention.²²⁰ It is not argued that the mere fear of negative impact on the child's mental

²¹⁴ Son of surrogate blog entry as quoted in 'I Am a Product of Surrogacy' <<http://theothersideofsurrogacy.blogspot.com/>> accessed 4 December 2019.

²¹⁵ Viveca Söderström-Anttila and others, 'Surrogacy: Outcomes for Surrogate Mothers, Children and the Resulting Families—a Systematic Review' (2015) 22 Human Reproduction Update 260.

²¹⁶ Katherine Wade, 'The Regulation of Surrogacy: A Children's Rights Perspective' (2017) 29 Child and Family Law Quarterly 113.

²¹⁷ For more: Chapter 2 (2.2).

²¹⁸ Vasanti Jadvia and Susan Imrie, 'Children of Surrogate Mothers: Psychological Well-Being, Family Relationships and Experiences of Surrogacy' (2013) 29 Human Reproduction 90.

²¹⁹ *Fretté v France* (2002) 38 EHRR 438, para 42.

²²⁰ e.g. *EB v France* [2007] ECHR 211, *X and Others v Austria* (2013) 57 EHRR 14.

health should be used against non-traditional families.²²¹ Nonetheless, in the absence of studies on the psychological impact on children born through commercial surrogacy, the Court might be more willing to accept such argument for the blanket ban on surrogacy (in addition to other factors) and award a wide margin of appreciation to States.

It can be distilled from the above that physical health risks for both surrogates and children that are similar to other types of ART, such as IVF, are less likely to be accepted by the ECtHR as a legitimate justification for a blanket ban on surrogacy. In contrast, the potential adverse effect on the mental health of children born through commercial surrogacy seems to be more plausible to succeed. It is not argued that in commercial surrogacy the mental health of children is adversely affected. Instead, it seems more plausible for the Court to accept that in the absence of evidence, placing a blanket ban on commercial surrogacy could be necessary in order to protect the children resulting from surrogacy. This argument seems less plausible against altruistic surrogacy, based on the existence of some evidence in the UK contradicting such arguments.²²² In either case, more evidence is required to shape a comprehensive understanding of surrogacy's impact on children.

The Creation of Unusual Family Relationships

Surrogacy comes to challenge the principle *mater semper certa est*, meaning that the mother is always certain.²²³ It divides motherhood possibly in three: the woman that gestates the child (gestational mother or carrier), the woman that provides the egg (genetic mother) and the woman that will assume the parental responsibility of the child as its social mother (intended mother). It additionally broadens the number of family forms, e.g. same-sex couples, single individuals, use of genetic material or gestation by a family member, etc. This has been a major concern mostly for the defenders of the 'traditional family'²²⁴ or those concerned with legal certainty issues that may emerge,²²⁵ complaining about the creation of

²²¹ This thesis supports the creation of non-conventional families and suggests that the ECHR does (and should) protect them, as seen in the next subsection.

²²² Golombok and others (n 211).

²²³ As opposed to the father (*mater semper certa est, pater numquam*).

²²⁴ Surrogacy as threatening 'accepted views of what a family is, of gender-appropriate parental behaviour, and of our ideas of what is natural in the realm of reproductive behaviour': Rachel Cook, Shelley Day Sclater and Felicity Kaganas, *Surrogate Motherhood: International Perspectives* (Hart 2003) 5.

²²⁵ In the sense of 'litigation' and 'custody battles': Mathew M Tieu, 'Altruistic Surrogacy: The Necessary Objectification of Surrogate Mothers' (2009) 35 *Journal of Medical Ethics* 171, 172.

unusual family relationships. Its potential harm to the child's mental health, mainly in terms of identity, was already discussed above.

This thesis holds that the creation of unusual family relationships should not be given undue emphasis, as the fragmentation of maternity is not exclusive to surrogacy: it happens with adoption, egg donation, etc. As Draghici notices, 'the notion of family is not static' and it has moved beyond 'families as legitimate unions founded on marital bonds and biological filiation within wedlock or adoption'.²²⁶ Looking into the ECtHR's case law, it becomes immediately apparent that the Convention protects non-traditional family forms. The Strasbourg Court held that 'the institution of the family is not fixed, be it historically, sociologically or even legally'.²²⁷ The ECtHR has shown in numerous occasions that it protects family life even in unusual family relationships, as the concept of family continues shifting. For example, family life includes 'illegitimate' children,²²⁸ same-sex relationships,²²⁹ non-cohabitation of couples,²³⁰ absence of biological link between a child and the parent,²³¹ etc. This should be applied with caution, however, in view of the recent restrictive approach taken by the ECtHR in the *Paradiso* case.²³²

Hence, the creation of unusual family relationships should not be an argument held against surrogacy, particularly as the Court has already accepted the creation and protection of family life in surrogacy.²³³ One could even argue that surrogacy is not that complicated as other modern reproductive techniques, as for instance three-parent babies,²³⁴ gene editing through CRISPR–Cas9 Genetic Engineering,²³⁵ etc.

²²⁶ Carmen Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law: 'Living Instrument' or Extinguished Sovereignty?* (Hart Publishing 2017) 26.

²²⁷ *Mazurek v France* (2006) 42 EHRR 9, para 52.

²²⁸ *Marckx v Belgium* (1979) 2 EHRR 330.

²²⁹ *Schalk and Kopf v Austria* (2011) 53 EHRR 20.

²³⁰ *Oliari and Others v Italy* [2015] ECHR 716.

²³¹ *Nazarenko v Russia* [2015] ECHR 775.

²³² Chapter 3 (3.3.2).

²³³ *Mennesson v France* (n 4), *Labassee v France* (n 5). Again, attention is needed in case the Court follows the *Paradiso* case and its 'legacy', which, however, is not clear yet.

²³⁴ Jessica Hamzelou, 'Exclusive: World's First Baby Born with New "3 Parent" Technique' *New Scientist* (27 September 2016) <<https://www.newscientist.com/article/2107219-exclusive-worlds-first-baby-born-with-new-3-parent-technique/>> accessed 4 December 2019.

²³⁵ Gavin J Knott and Jennifer A Doudna, 'CRISPR-Cas Guides the Future of Genetic Engineering' (2018) 361 *Science* 866.

In terms of the inalienability of civil status, as a safeguard for legal certainty, the Court has considered such arguments in cases of gender reassignment. The Court seems adamant in such cases that purely formal arguments, such as the inalienability of civil status, would not justify the State's failure to protect the applicant's right to respect for their private life.²³⁶

Notwithstanding the above, while the Court in the *SH* case, referring to the unusual creation of family relationships, held that 'a legal framework satisfactorily regulating the problems arising from ovum donation could ... have been adopted',²³⁷ in the absence of European consensus, it awarded a wide margin of appreciation to Austria.²³⁸ Whereas legal certainty can be guaranteed through proper regulation, it seems likely that the same argument on the margin of appreciation could be repeated by the Court today, although 8 years after the *SH* case IVF and ART have become more commonplace in Europe.

Therefore, although the Court takes a progressive stance on family relations, it seems that this argument could be potentially invoked as a legitimate justification for State interference by imposing a blanket ban on surrogacy (both altruistic and commercial). Nevertheless, this thesis holds that the use of margin of appreciation and European consensus by the Court in the *SH* case is flawed. This is further elaborated in the next chapter, where a new ECHR framework is proposed to address such flaws.

Forum Shopping

Forum shopping in private international law means choosing to bring a legal case to courts in one among different available forums (States) based on where one could get the most favourable result.²³⁹ In surrogacy, it is used in the sense of choosing to undertake surrogacy elsewhere than one's own State in order to benefit from that jurisdiction's advantages. However, this goes against the very idea this thesis seeks to tackle: the idea that cross-border surrogacy should be avoided due to the serious problems it poses, mainly to the resulting children (i.e. they might be rendered stateless, parentless, etc.).²⁴⁰

²³⁶ For a recent judgment: *SV v Italy* [2018] ECHR 335.

²³⁷ *SH and Others v Austria* (n 21) para 105.

²³⁸ *ibid* para 106.

²³⁹ 'The practice of choosing a country in which to bring a legal case through the courts on the basis of which country's laws are the most favourable. In some instances there is a choice of jurisdiction': Jonathan Law (ed), *A Dictionary of Law* (9th edn, Oxford University Press 2018).

²⁴⁰ Chapter 2 (2.3).

Forum shopping in terms of surrogacy can happen due to a variety of reasons, as for example eligibility to undertake surrogacy, availability of surrogates and treatment.²⁴¹ Nevertheless, allowing the commercialisation of surrogacy means that there will also be different prices among different States, which would essentially lead some to choose the cheapest destination.²⁴² This in turn brings the aforementioned problems for the resulting children and the surrogates, in terms of exploitation and even human trafficking. Therefore, it could be argued that, in light of the objective of this thesis and if presented by States, commercial surrogacy should be avoided to exclude, as far as possible, forum shopping. This could be invoked under the aim of the ‘prevention of disorder or crime’. The same does not seem to apply to altruistic surrogacy, as price as such would not be an issue there.²⁴³

To summarise this section, given the socio-economic circumstances of States, commercial surrogacy is prone to exploitation of surrogates and human trafficking. It could also be connected with the fear of poor mental health for children. Therefore, it seems that the Court could accept State interference to ban commercial surrogacy on these grounds under Article 8(2) ECHR. This thesis further considers that, if presented by States, enabling forum shopping could be also used against commercial surrogacy.

Keeping in mind the above and the fact that State objections are closely related to the commercial nature of surrogacy, a complete ban on surrogacy is not necessary, because States can opt for altruistic surrogacy as a safer option, while its ban seems less likely to be justified under Article 8(2) ECHR. The emotional exploitation that surrogacy could entail can be avoided by psychologically examining the surrogate before the procedure begins. An argument that could potentially succeed in terms of altruistic surrogacy (as well as commercial) is the creation of unusual family relationships. Nonetheless, the use of ‘margin of appreciation’ in such way is considered flawed and is discussed in detail in the next chapter alongside the new ECHR framework proposal.

²⁴¹ *ibid.*

²⁴² Cross-border surrogacy originating from States where domestic surrogacy is lawful is elaborated in Chapter 6, with special reference to the differences in price.

²⁴³ Differences in the medical fees, however, would still be relevant.

Finally, this thesis acknowledges that endorsing altruistic surrogacy (where socio-economic circumstances render commercial surrogacy problematic and due to forum shopping concerns) might lead to a shortage of surrogates. Demand for surrogacy seems to increase, as elaborated in Chapter 6, while banning commercial surrogacy could lead to less women 'signing up' for surrogacy. Nevertheless, it seems to this author as the best option to balance the different interests at stake: allow the exercise of the reproductive rights of the intended parents and simultaneously protect surrogates and resulting children.

4.5 Conclusion

This chapter has endeavoured to show that imposing a blanket prohibition on surrogacy is not necessary. On the one hand, there are legitimate fears presented by Contracting States of the Convention on the dangers that surrogacy may pose. On the other hand, it is clear that a blanket prohibition is not necessary to overcome these dangers. Building on the claim that, depending on the socio-economic circumstances, these dangers are materialised through commercial surrogacy, it is suggested that altruistic surrogacy seems a more adequate solution to balance the different interests at stake: reproductive autonomy, protection of surrogates and children born through surrogacy.

In particular, this thesis argues that surrogacy should in principle be permissible as it does not contradict human dignity. The use of human dignity within Article 8 ECHR can be understood and interpreted coherently through a focus on autonomy and self-determination. However, commercial surrogacy could potentially lead to the exploitation of surrogates and human trafficking, while it could be connected to the fear of having negative effects for the resulting children's mental health. In contrast, these do not seem to be present in altruistic surrogacy. An additional argument that could be presented by States and is related to the aim of this thesis is commercial surrogacy's potential for forum shopping, which does not seem to apply to altruistic surrogacy.

The aforementioned were examined with the intention of serving as a basis for the next chapter, where the assessment of the hypothetical referral to the Strasbourg Court is taking place. In essence, Chapter 5 demonstrates the mechanisms the ECtHR employs to resolve a clash of interests and how this should be altered, based on the new ECHR framework proposal advanced by this thesis.

CHAPTER 5: SURROGACY AND THE CLASH OF INTERESTS

5.1 Introduction

It was argued in Chapter 3 that, in order to challenge the blanket ban on surrogacy imposed by Contracting States of the Convention, individuals can rely on Article 8(1) ECHR and the right to respect for private and family life. However, as demonstrated in Chapter 4, these States can invoke public policy arguments, claiming that the prohibition of surrogacy is imposed for ‘the prevention of disorder/crime, the protection of health or morals and the protection of rights and freedoms of others’. These are all reasons found in Article 8(2) ECHR, justifying State interference with an individual’s private and family life. Given the above, a question arises: how would the ECtHR assess a hypothetical case where individuals challenge the prohibition on surrogacy?

This chapter identifies how the ECtHR would be likely to resolve the clash of interests and advances a framework for the Court to resolve this clash. In particular, it assesses the hypothetical surrogacy scenario at hand under Article 8(2) ECHR in depth. After demonstrating the limitations of the current Strasbourg approach, a suggestion is made as to the most appropriate way of applying the proportionality test, focusing on the reconstruction of the ‘necessary in a democratic society’ assessment through a comparison with the European Union’s proportionality evaluation. It is further argued that through this new understanding of the necessity in a democratic society, a blanket prohibition on surrogacy violates the right to respect for the decision to become a parent under Article 8.

5.2 Assessment of the Hypothetical Challenge by the ECtHR

This section focuses on the hypothetical assessment of the blanket ban on surrogacy conducted by the Strasbourg Court. After presenting the steps that the Court would have to follow, it is argued that when balancing the interests of the applicants against the interests of the State, the most relevant concepts are the ‘margin of appreciation’ and the ‘European consensus’.¹ It is further suggested that the current application of these two interpretative mechanisms would not support a hypothetical referral to the Court to the effect that the

¹ The two concepts have been mentioned in Chapters 3 and 4 and are elaborated below.

prohibition on surrogacy violates Article 8 ECHR. While the analysis is focused on Article 8 (and mainly on reproductive rights cases), many parts coincide with other rights of the Convention with a similar structure (i.e. Articles 9-11 ECHR), hence, some of the case law considered goes beyond Article 8.

As a starting point, the rights protected in Article 8 ECHR are qualified.² This means that an interference with the rights protected under the umbrella of the right to respect for private and family life can be justified when the interference is in accordance with the law, serves a legitimate aim and is necessary in a democratic society. Therefore, once Article 8(1) ECHR is engaged and the obligation of the State is identified as negative, i.e. non-interference, the next step is to check whether the interference with the right can be justified in conformity with Article 8(2).³ Due regard must be given to the fair balance test, which involves weighing the individuals' interests to become parents and the society/State's interest to protect the women and children involved in surrogacy. In essence, the Court assesses whether the State had struck a fair balance between the private and public interests.⁴

It should be stressed at the outset that the right to respect for the decision to become a parent, the basis of the individuals' claim, was established as a negative right in Chapter 3. As a result, what follows is to check whether State interference is justified. This is important, because, had the Court identified the obligation as positive, the assessment would have been slightly different. The difference can be found in the methodology and reasoning of the Court, 'reflected in a more deferential and less rigorous approach where positive obligations are concerned'.⁵

In this hypothetical case, the Court would need to establish whether a State's prohibition of surrogacy interfering with the right to respect for the decision to become a parent is justified under the three aforementioned prongs of Article 8(2) ECHR. While the first two elements

² The other two broad categories of rights found in the ECHR are absolute rights and limited rights. For more on the different types of rights, see Angus Evans and Iain Mciver, 'The European Convention on Human Rights in the United Kingdom (SPICe Briefing)' (25 September 2015) <http://www.parliament.scot/ResearchBriefingsAndFactsheets/S4/SB_15-59_The_European_Convention_on_Human_Rights_in_the_United_Kingdom.pdf> accessed 4 December 2019.

³ This is the two-stage test explained in Chapter 3 (3.3.2).

⁴ *Hämäläinen v Finland* [2014] ECHR 787, para 65.

⁵ Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia 2016) 241.

required for justifying the interference are quite straightforward, it is in the third one where the Court uses its interpretative tools and different principles to decide whether an interference is necessary in a democratic society.

First, the Court would need to establish whether the interference is in accordance with the law. This condition goes beyond the impugned measures being based on national law, as it additionally requires that the national law in question be both accessible to the person concerned and have foreseeable effects.⁶ In the case at hand, it would be quite simple for the States prohibiting surrogacy to prove that the interference is in accordance with the law. The reason lies in the fact that the hypothetical case examined would challenge legislation or regulation which explicitly prohibits surrogacy or considers surrogacy contracts null and void while criminalising the activity.⁷ This could be different in those States where surrogacy is unlawful, but the basis for it is rather obscure.⁸ In this case, it should be noted that if the requirement ‘in accordance with the law’ is not fulfilled, there is no need to go through the next two requirements, as it suffices to render the interference unjustified.⁹

Second, the Court would address the legitimate aim requirement. There must be a legitimate aim justifying State interference with the applicants’ private and family life. The legitimate aims that the interference seeks to achieve are explicitly named in Article 8(2).¹⁰ For this hypothetical case, the aims are ‘the prevention of disorder/crime, the protection of health or morals and the protection of rights and freedoms of others’. These aims were discussed in detail in Chapter 4. Although the ECtHR considers itself ‘to be quite succinct when it verifies the existence of a legitimate aim within the meaning of the second paragraphs of Articles 8 to 11 of the Convention’,¹¹ it can be observed that, in practice, the Court rarely finds an

⁶ *The Sunday Times v UK* (1979) 2 EHRR 245, para 49.

⁷ Chapter 2 has addressed the different legislative/regulatory approaches to surrogacy found throughout Europe.

⁸ For instance, it was held in Chapter 2 that in Hungary surrogacy is unlawful, because it is absent from Section 166 of the Act on Health, where all the special methods that may be applied to human reproduction are listed. This leads to the possibility of applying general criminal sanctions to surrogacy: Chapter 2 (2.2).

⁹ e.g. *Nedescu v Romania* [2018] ECHR 62, paras 85-86.

¹⁰ These are: in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

¹¹ *SAS v France* (2015) 60 EHRR 11, para 114.

interference unjustified based on this condition.¹² This can be attributed to the fact that the legitimate aims are interpreted so as to cover a variety of interests.¹³

The third and last requirement is ‘necessary in a democratic society’ (hereafter referred to as the ‘necessity condition/assessment/requirement’). The ECtHR formulated this requirement through its case law. It held that ‘necessary’ implies the existence of a pressing social need for the interference in question.¹⁴ Subsequently, the Court translated this condition into the following standardised set of questions: whether the reasons for interference are relevant and sufficient, whether the intervention respects the principle of proportionality and whether it is in accordance with the ‘margin of appreciation’ doctrine.¹⁵ The way the Court has applied these requirements is, more often than not, unclear and vague, this being the reason why the necessity condition comes under heavy criticism, as elaborated below.

Starting with the pressing social need related to the legitimate aims of the interference, to determine this requirement the Court looks at the peculiar facts of each case and the conditions that prevail in the specific State at the specific time.¹⁶ Similarly, the reasons for State interference must be relevant and sufficient. This again is something the ECtHR assesses depending on the case and questions that arise each time. In the scenario under analysis, it is hard to examine this requirement thoroughly, as there is a range of States prohibiting surrogacy and each has its own peculiar circumstances. An important factor, however, would be the frequency of cross-border surrogacy, which, as observed in Chapter 2, is a very common phenomenon among the Contracting States prohibiting surrogacy. What is even more crucial is the recognition of the effects of cross-border surrogacy. While this would be an indication that there is a pressing social need to address surrogacy, it also serves as a strong sign in favour of lifting the ban on domestic surrogacy, examined later under domestic consensus.

¹² A rare occasion where the Court found that the State failed to demonstrate the legitimate aim pursued by the interference is: *Toma v Romania* App no 42716/02 (ECtHR, 24 February 2009) para 92.

¹³ For example, the legitimate aim to protect the rights and freedoms of others can be invoked from the expansion of an airport (*Hatton and Others v UK* (2003) 37 EHRR 28, para 121) to the ban on wearing the Islamic headscarf in institutions of higher education (*Leyla Şahin v Turkey* (2007) 44 EHRR 5, para 99).

¹⁴ *Handyside v UK* (1976) 1 EHRR 737, para 48.

¹⁵ *Paradiso and Campanelli v Italy* [2017] ECHR 96, para 181.

¹⁶ Steven Greer, ‘The Exceptions to Articles 8-11 of the European Convention on Human Rights’ <[https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15\(1997\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-15(1997).pdf)> accessed 4 December 2019.

The next step is to examine proportionality. The Strasbourg Court has held that the principle of proportionality is inherent in the adjective ‘necessary’,¹⁷ as is ‘inherent in the whole of the Convention ... a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’.¹⁸ Proportionality checks whether the hypothetically impugned measures are proportionate to the legitimate aims pursued by the interference and, in particular, whether the national authorities, taking into account the range of deference accorded to them, have struck a fair balance between the competing interests.¹⁹ Therefore, what is substantially examined through proportionality at the Convention level is the fair balance test and the margin of appreciation granted to the Contracting States.

The fair balance test is an assessment of whether the State has struck a fair balance between the competing interests: the individual’s right affected by an interference (private interest) and the rights and protection of others and the society collectively (public interest).²⁰ The case law of the ECtHR suggests that, for the fair balance test, the Strasbourg Court utilises two of its (in)famous interpretive mechanisms: the margin of appreciation and the European consensus, both of which are examined below. Proportionality through the fair balance test is one of the main reasons why the necessity condition of Article 8(2) ECHR has been heavily criticised, as its application seems to focus on factors external to the actual pondering of interests.²¹ For example, when applying the fair balance test the Court held that:

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. In determining this

¹⁷ *Handyside v UK* (n 14) para 58.

¹⁸ *Soering v UK* (1989) 11 EHRR 439, para 89.

¹⁹ e.g. *Paradiso and Campanelli v Italy* (n 15) para 181.

²⁰ This has been identified as one type of proportionality used by the ECtHR, while the second type of proportionality has been linked to specific principles within the proportionality, i.e. the less restrictive alternative doctrine and the comparative method and evolutive interpretation: Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002) 15. However, emphasis is placed here on the first type of proportionality, for, as it is explained in the next section, the second type’s less restrictive alternative doctrine is very marginal, while the comparative method and evolutive interpretation are linked to the margin of appreciation and European consensus. Arai-Takahashi identifies the chilling effect doctrine as well, which, however, applies only to the freedom of expression.

²¹ George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705, 711.

question, the Court attaches some importance to the fact that, as noted above, there is no sufficiently established European consensus as to whether ovum donation for *in vitro* fertilisation should be allowed.²²

This does not mean that there are no exceptions to this approach or that other considerations are not important for the fair balance test and thus proportionality. For example, in *Hirst v UK*, the Court held that, notwithstanding the wide deference awarded to the State in the absence of European consensus, the fact that neither the judiciary nor the legislature weighed up the conflicting interests, made the blanket ban on the prisoners' right to vote a 'blunt instrument'.²³ Instead, the *Hirst* case demonstrates that only in the absence of any balancing considerations is the fair balance test compromised;²⁴ otherwise, the Court does not look at the balance reached, but only whether the State overstepped its margin of appreciation.²⁵ This further shows that the Court's approach towards the necessity condition and, in particular, towards the proportionality and fair balance test relies heavily on the deference given to States and the existence of a trend in Europe. For this reason, emphasis is placed on these two concepts, as they constitute the crucial assessment for the justification of the State's interference with the right to respect for the decision to become a parent.

The margin of appreciation is a doctrine formulated through the Court's case law, absent from the text of the ECHR, at least for the time being,²⁶ or even the *travaux préparatoires* to the Convention.²⁷ It can be traced back to 1958, used for the first time in emergency-related cases,²⁸ although it quickly spread to non-emergency cases. The doctrine is closely related to the 'better position rationale', as it shows deference to Contracting States when they apply the ECHR, based on the idea that States are better positioned to assess their internal matters.²⁹ It essentially allows Contracting States to interfere with the rights and freedoms enshrined in the Convention, because, depending on the case, they might be better suited to address and assess the interests and needs of the society.

²² *SH and Others v Austria* (2011) ECHR 1879, para 106.

²³ *Hirst v UK (No 2)* (2006) 42 EHRR 41.

²⁴ Similarly, *Dickson v UK* (2008) 46 EHRR 41, paras 82-85.

²⁵ e.g. *Evans v UK* (2008) 46 EHRR 34, para 91.

²⁶ As seen below, Protocol 15, once ratified by all Contracting States, will incorporate the margin of appreciation to the preamble of the ECHR: *infra* (n 94).

²⁷ Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer Law International 1996) 14.

²⁸ It was first used in terms of Article 15 ECHR by the Commission in its report in the Cyprus case - *Greece v UK* App No 176/56 (Commission Decision, 26 September 1958).

²⁹ *Müller and Others v Switzerland* (1988) 13 EHRR 212, para 35.

As mentioned earlier, the doctrine of margin of appreciation cannot apply to the so-called absolute rights of the Convention,³⁰ but it does apply to qualified and limited rights. For its application, a range of elements should be considered, such as:

the provision invoked, the interests at stake, the aim pursued by the impugned interference, the context of the interference, the impact of a possible consensus in such matters, the degree of proportionality of the interference and the comprehensive analysis by superior national courts.³¹

In terms of Article 8 ECHR in particular, the Court reiterates that a number of aspects must be taken into account when determining the scope of the margin of appreciation that States enjoy. In case of a particularly important facet of one's existence or identity, the deference should be restricted, while in case of diversity of practice in Europe, of the involvement of sensitive moral or ethical issues or when balancing private and public interests, the margin of appreciation is wider.³²

Assessing now the hypothetical case brought before the ECtHR, there is a particularly important facet of an individual's existence or identity at stake, namely becoming a parent, which should indicate that the margin of appreciation granted to States should be restricted. Indeed, the Court has held that the choice to become a (genetic) parent belongs to an area in which the State's margin of appreciation is restricted.³³ Nevertheless, it is essential to additionally examine whether in the issue at hand there is (or not) European consensus, if it involves sensitive moral or ethical matters, or if the State has to strike a balance between

³⁰ Namely, Articles 2-3 ECHR. The doctrine might apply, however, in the sense of what is, for example, understood as an appropriate length of prison sentences for the application of Article 3 ECHR: *Vinter and Others v UK* [2013] ECHR 645.

³¹ Dean Spielmann, 'Allowing the Right Margin the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) CELS Working Paper Series Version February 2012 <<https://www.scribd.com/document/84297501/Allowing-the-Right-Margin-the-European-Court-of-Human-Rights-and-the-National-Margin-of-Appreciation-Doctrine-Waiver-or-Subsidiarity-of-European-Revi>> accessed 4 December 2019.

³² *SH and Others v Austria* (n 22) para 94.

³³ *Paradiso and Campanelli v Italy* (n 15) para 195. The Court here mentioned genetic parenthood, while in the *Evans* case the Court held that genetic parenthood is a more limited area protected within the broader area of parenthood. This can be explained by the switch to a restrictive approach in *Paradiso* and the Court's general trend to uphold a genetic link, as elaborated in Chapter 3 (3.3.2 and 3.3.3). The above suggest that the Court could potentially apply this restrictive approach to parenthood through surrogacy and award a narrow margin of appreciation only to cases that involve genetic parenthood.

competing private and public interests or Convention rights. The above indicate a broad deference granted to the Contracting States of the ECHR.

The concept of consensus is employed by the Court to assess if there is a trend emerging among the States Parties to the Convention. The Court reflects on whether a specific practice is found among the various Contracting States of the ECHR in order to provide States with a wide or narrow margin of appreciation. This is referred to as European consensus or, when there is lack of consensus among the Contracting States, diversity of practice found among the legal systems and traditions. Other terms that might be encountered in the case law of the Strasbourg Court, referring to the same notion, are phrases like ‘common standards between the Member States of the Council of Europe’, ‘general trend’, ‘international consensus’, etc.³⁴ Consensus is measured either on the significance of the interests at stake or on how these interests are best protected.³⁵ Finally, it can be a double-edged sword, as its existence can lead to the protection of an interest (or the specific way this interest is protected) or allow a wide margin of appreciation and State interference where there is diversity of practice.

Coming back to the assessment of the hypothetical case, it has been already demonstrated that surrogacy involves sensitive moral or ethical matters,³⁶ while a balance must be struck between the competing private and public interests of the parties involved (individuals versus society/State). The pending issue for examination is, therefore, whether there is European consensus with respect to surrogacy. The ECtHR had the occasion to evaluate whether there is European consensus in the matter of surrogacy and the answer was negative. The Court observed that there is no consensus either on the lawfulness of surrogacy or the legal recognition of the parent-child relationship resulting from cross-border surrogacy.

In particular, a comparative law survey carried out by the Court in 2014 showed that, out of 35 Contracting States, 14 expressly prohibited surrogacy, 10 prohibited it through general provisions or did not tolerate it or its status was uncertain, while 7 States expressly authorised

³⁴ Christos Rozakis, ‘Foreword’ in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019) x, xi.

³⁵ Rosamund Scott, ‘Reproductive Health: Morals, Margins and Rights’ (2018) 81 *The Modern Law Review* 422, 423.

³⁶ As examined in Chapter 4.

it and 4 tolerated it.³⁷ For the parental relationship resulting from cross-border surrogacy, it was possible to obtain legal recognition in 13 Contracting States and seemed possible in other 11 States, while it was excluded in the remaining 11 States.³⁸ The above is affirmed by a more recent comparison (April 2019), where out of 43 Contracting States, 9 permit surrogacy, 10 tolerate it and 24 either explicitly or implicitly prohibit it; 31 States allow the establishment of paternity for the intended father in the existence of a genetic link, while 19 allow it for the intended mother with no genetic link to the child.³⁹ Although the numbers have shifted and accepting the effects of cross-border surrogacy seems more commonplace now, this does not amount to European consensus.

Based on the current case law of the Strasbourg Court, it is essential to consider the European consensus when considering the margin of appreciation. Although the Court does consider other elements to determine the range of the deference afforded to States, it seems that the decisive factor is the European consensus.⁴⁰ The case law demonstrates that, even when there is a particularly important facet of an individual's existence or identity at stake, a broad margin of appreciation is most likely accorded to States when there is a lack of consensus at European level.⁴¹

In light of the above, in the hypothetical case under examination, the diversity of practice, the involvement of sensitive moral or ethical matters and the fact that a balance must be struck between competing private and public interests would mean that interference with surrogacy would be justified as the State would enjoy a wide deference. This in turn would satisfy the necessity condition. A critical examination of the soundness of this assessment is provided in the next section.

Notwithstanding the above, a slight opportunity of success for the hypothetical claim might be presented by exploring the possibility of national consensus. There have been cases where

³⁷ *Mennesson v France* [2014] ECHR 664, para 78.

³⁸ *ibid.*

³⁹ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (ECtHR, Grand Chamber, 10 April 2019) paras 22-24.

⁴⁰ However, it seems that in cases of discrimination on the grounds of sex or sexual orientation examined under Article 14, the margin of appreciation is narrow even in the absence of European consensus. For example: *X and Others v Austria* (2013) 57 EHRR 14, para 99.

⁴¹ By way of illustration: *Evans v UK* (2008) 46 EHRR 34, *Hämäläinen v Finland* (n 4), etc.

the Court took into consideration the existence of consensus at domestic level and declared a violation of Article 8 ECHR, without the need for European consensus. Such is the case of *Oliari and others v Italy*, where Italy was found in violation of Article 8 ECHR for not recognising same-sex relationships, based mainly on the findings of domestic courts that the State overstepped its margin of appreciation, unwilling to recognise the changes in the Italian society and reluctant to apply the Convention in a practical and effective way.⁴² This is particularly interesting, as, despite the absence of European consensus and the subsequent wide deference given to Italy, the Strasbourg Court held that the State violated the Convention rights due to the peculiar national circumstances.

In the case of surrogacy, the Court would need to scrutinise the peculiar national circumstances and the possible consensus found within the Contracting State prohibiting surrogacy. A wide range of conditions should be examined: the frequency in which the State's citizens engage with cross-border surrogacy, the general feeling of the citizens towards surrogacy, judgments of domestic Courts regarding surrogacy, in particular those legitimising the effects of cross-border surrogacy, etc.

Having assessed these criteria, the ECtHR could uphold the applicants' complaint on the violation of the Convention in those States where the national circumstances indicate a strong trend in favour of surrogacy, even without the existence of European consensus. It is useful to reiterate at this point that the findings of Chapter 2 show the great probability of this scenario, as a wide range of European States have high rates of cross-border surrogacy and then later legitimise its effects. For example, France is among the top European States whose citizens are involved in cross-border surrogacy cases,⁴³ while a poll in 2017 indicated that 64% of the French population was in favour of surrogacy,⁴⁴ which could indicate a potential success in line of this argumentation.

To summarise this section, an interference with the right to respect for the decision to become a parent, established in Article 8(1) ECHR, by imposing a blanket ban on surrogacy would most likely be justified under the conditions of Article 8(2) ECHR. This would occur as the

⁴² *Oliari and Others v Italy* [2015] ECHR 716.

⁴³ See Chapter 2 (2.3).

⁴⁴ Walter Pintens, 'France' in Claire Fenton-Glynn, Jens M Scherpe and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 17, 18.

interference is in accordance with the law (when accessible with foreseeable effects), it serves a legitimate aim (one of the four interests identified in Chapter 4) and it is necessary in a democratic society (in the absence of European consensus, the margin of appreciation will be wide). Nevertheless, the claim might prosper if the Court takes into account national consensus, for those Contracting States where there is a trend among the society.

5.3 Criticism of the Current Necessity Assessment

The necessity assessment through the use of the ‘margin of appreciation’ and ‘European consensus’ doctrines is heavily contested. Legal scholars and practitioners have praised or severely criticised the two concepts,⁴⁵ although in particular for the margin of appreciation the scales are tipped against it.⁴⁶ While both doctrines seem to support the idea behind the subsidiarity of the European human rights protection system, this thesis argues that the Court’s concept of ‘European consensus’ is applied inconsistently and the ‘margin of appreciation’ lacks coherent principle, while there is no real proportionality assessment.

As the previous section showed, to check whether the interference of a Contracting State with the right to respect for private and family life was ‘necessary in a democratic society’, there are three things that need to be taken into account: the existence of a pressing social need, proportionality and margin of appreciation. However, for proportionality, the two important elements are a fair balance and the margin of appreciation. Then again, for the fair balance test, the important considerations are the European consensus and, once again, the margin of appreciation. This shows that in the process of the necessity assessment, the margin of appreciation is to be encountered three times. Then, the European consensus is also quite favoured in this assessment, as it can be encountered twice, the second time being when the breadth of the margin of appreciation is under consideration.

Based on the above findings, this thesis suggests that the figure below (Figure 1) represents the structure of the current necessity assessment for the right to respect for private and family

⁴⁵ A proponent of the use of margin of appreciation: Dominic McGoldrick, ‘A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee’ (2016) 65 *International & Comparative Law Quarterly* 21. An opponent of the doctrine: Letsas (n 21).

⁴⁶ Yutaka Arai-Takahashi, ‘The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry’ in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 62, 63-64.

life in its negative aspect, i.e. justification of interference under Article 8(2) ECHR. It is worth mentioning that this figure focuses on the most frequent structure followed by the Court in such cases. For example, as discussed below, the Court often focuses on the margin of appreciation and European consensus without even mentioning proportionality. Similarly, although marginally, the Court might assess proportionality when a measure is excessively broad and disproportionate or in its attempt for a fair balance test, also discussed below.

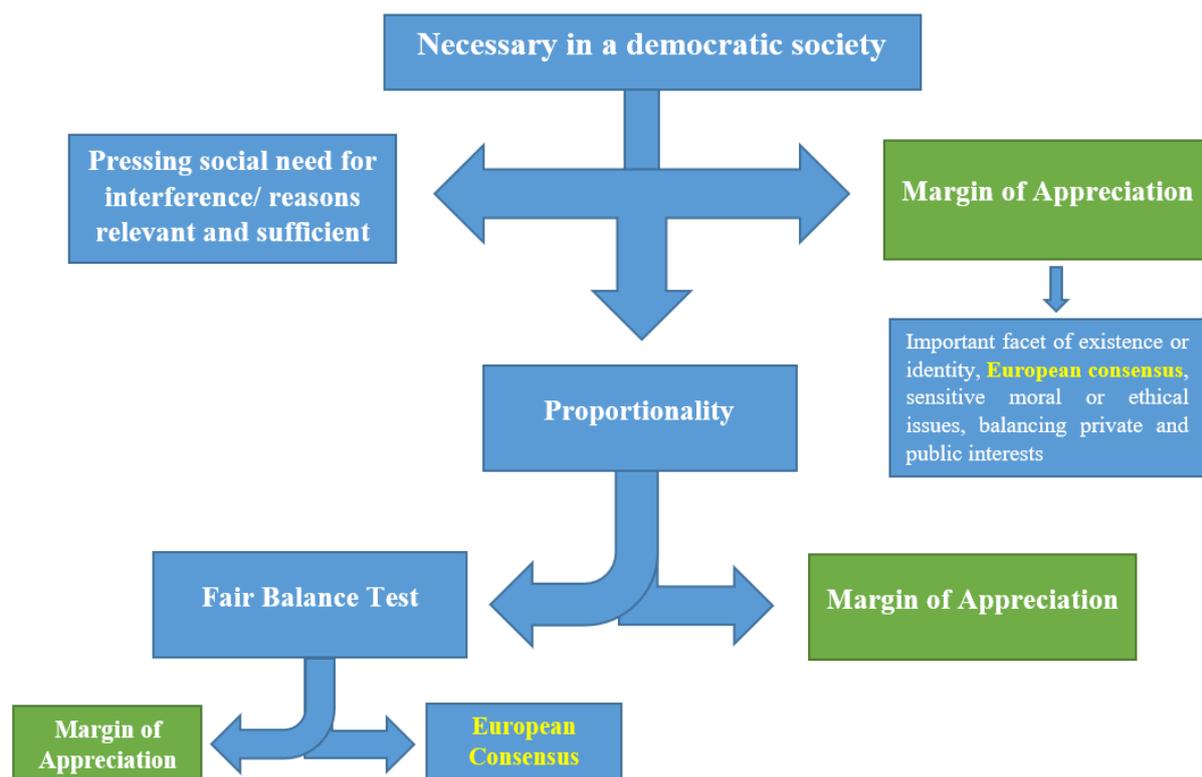


Figure 1. Structure of the Current Necessity Assessment.

This shows how central the margin of appreciation and European consensus are for the evaluation of the necessity requirement and how they undermine, in practice, the principle of proportionality. However, the efficiency of the deference and consensus doctrines for the protection of human rights is, to say the least, questionable. The criticism that follows focuses on the general concept of the two doctrines as such and, in particular, the specific way in which they are employed by the Court, undermining, in essence, the principle of proportionality.

Commencing with the margin of appreciation, the very first objection is usually encountered in the relativist approach towards human rights taken by the ECtHR. The criticism focuses on the premise that the protection of human rights should not be dependent upon national standards, which is contrary to what the margin of appreciation advocates. In particular, this means that, when particular circumstances are present,⁴⁷ the Court abstains from a rigorous assessment of whether States have violated a right of the Convention by simply referring to the broad margin of appreciation granted to them, allowing in this way States to apply their national standards. This goes against the idea that international and regional human rights adjudicative bodies are entrusted with the role of setting universal benchmarks for the protection of human rights and freedoms, which most notably results in the ‘[m]argin of appreciation, with its principled recognition of moral relativism, (being) at odds with the concept of the universality of human rights’.⁴⁸

Relativism aside, the inadequacy of employing the margin of appreciation is further illustrated by the doctrine’s origins and the type of ECHR articles to which it applies. As mentioned above, the margin of appreciation doctrine first appeared through State emergency cases and was later applied to other areas, like Article 8 ECHR. This idea to protect national security issues by invoking the concept of margin of appreciation is, as Yourow observes, an element of classical martial law.⁴⁹ Even if acceptable for emergency cases deriving from Article 15 ECHR,⁵⁰ this should not be the case with other provisions of the ECHR. This thesis argues that there seems to be no coherent ground for the Court to prioritise the State’s interests against individual interests without a proper assessment and by simply making reference to the deference granted to the State, when there seems to be no emergency at all.⁵¹ In particular, the doctrine may have had pragmatic relevance when the ECtHR was still finding its feet and establishing its authority, but it no longer needs to do so.

⁴⁷ e.g. lack of consensus, ethical and sensitive issues, etc.

⁴⁸ Eyal Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’ (1999) 31 *International Law And Politics* 843, 844.

⁴⁹ Yourow (n 27) 14.

⁵⁰ For criticism of the Court’s use of margin of appreciation in emergency cases: Oren Gross, ‘Once More unto the Breach: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’ (1998) 23 *Yale Journal of International Law* 437.

⁵¹ Considerations on the existence of emergency: European Court of Human Rights, Jurisconsult’s Directorate ‘Guide on Article 15 of the European Convention on Human Rights’ (30 April 2019) <https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf> accessed 4 December 2019.

The doctrine of margin of appreciation further threatens human rights protection by prioritising the interests of a State's majority. Allowing a margin of appreciation to States can seriously undermine minorities' interests and preferences by not scrutinising States' interference. This is also related closely to the aim the State interference serves. In particular, when it comes to the protection of morals, as is the case under examination, the Court, more often than not, associates morals with the preferences of the majority, which then amounts to a legitimate aim.⁵² This is deeply problematic, as it can render minorities' interests inferior to those of the majority and, hence, unprotected, without proper examination.

The aforementioned can be extremely dangerous for the protection of human rights when combined with European consensus. Taking a look at the European consensus, this mechanism has been perceived by many as a legitimising factor that rests upon decisions made by democratically elected bodies, which could contribute to the lucidity of the Strasbourg Court's reasoning.⁵³ It has also been connected with the Convention's dynamic and evolutive interpretation, allowing the ECtHR to adjust its case law to changes and developments emerging in the society, which the Court is now willing to accept and protect; for when there is a trend among Contracting States, the Court finds it easier to recognise the existence of a right.⁵⁴ However, there are serious shortcomings arising from the use of European consensus. This thesis argues that its biggest disadvantage lies at the heart of its quantitative nature. Instead of looking at the quality of the legal systems and traditions, the Court focuses on a numerical majority. Such stance deviates from the essence of human rights and freedoms, rendering their protection subject to their 'popularity' among European States.

In particular, notwithstanding the respect for subsidiarity and national sovereignty permitted by the use of European consensus and margin of appreciation, the ECtHR fails to protect individual and minority interests.⁵⁵ This can be observed when considering the nature of both doctrines. European consensus looks at inter-State level and it focuses on what the majority of States' stance is on a particular issue. Each State's stance is usually connected to its own majority preferences. Given that in the absence of European consensus on a particular issue,

⁵² Letsas (n 21) 729. See also Chapter 4 of this thesis.

⁵³ Kanstantsin Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights' (2011) 12 *German Law Journal*, 1734.

⁵⁴ For more on European consensus and the evolutive and dynamic interpretation of the Convention: *ibid.*

⁵⁵ Benvenisti (n 48).

i.e. when the majority's views in different States do not match, a wide margin of appreciation is granted to States. A wide margin of appreciation potentially allows the majority's views to prevail by using them as a shield when State interference is under examination. Nonetheless, the Court should not twiddle its thumbs, waiting until a European consensus is achieved and before that leaving these majorities' views unscrutinised.

It becomes apparent from the above that reproductive rights, in particular, are extremely vulnerable to this, as both doctrines are relied upon heavily in such ECtHR's judgments. There tends to be a significant discrepancy among Contracting States' practices in reproductive health and rights, hence granting a wide deference to the States. It is important to stress here that the concept of minority for the purposes of this example should be understood beyond its traditional or conventional definition⁵⁶ so as to include other 'political outcasts',⁵⁷ one of which could be those with involuntary childlessness.

Furthermore, the lack of consensus should not be a burden for the protection of human rights. Just because the Contracting States do not agree on a specific matter or do not follow the same line of regulation, this should not deter the Court from examining carefully potential human rights violations. In other words, the diversity of practice in Europe should not lead to a wide margin of appreciation and this wide margin of appreciation should not let State interference unexamined.

To summarise the above, the Court, by granting a wide margin of appreciation combined with a lack of European consensus, takes an approach that is majority friendly and can be detrimental to minorities' interests. The aforementioned further suggest that the Court, by taking a majoritarian approach, abstains from its duty to promote human rights in fear of rendering unpopular judgments and being accused of judicial activism.⁵⁸

In addition, this thesis holds that even if the margin of appreciation and European consensus are to be given great significance, both concepts are vague, lack clarity and are applied

⁵⁶ In its Article 1 the United Nations Minorities Declaration refers to 'national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories'. 'Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities Adopted by General Assembly Resolution 47/135 of 18 December 1992' <<https://www.ohchr.org/en/professionalinterest/pages/minorities.aspx>> accessed 4 December 2019.

⁵⁷ Benvenisti (n 48) 848-849.

⁵⁸ *ibid.*

inconsistently by the Court. The margin of appreciation, as mentioned above, is determined by the existence of a number of factors: a particularly important facet of one's existence or identity, European consensus, sensitive moral or ethical issues, balancing private and public interests. The Court has not articulated clearly which one of these should prevail and, in practice, it 'weighs them differently and comes to vastly inconsistent conclusions'.⁵⁹ McHarg observes that the interaction of these factors hinders the predictability of the Court's assessment on how wide or narrow the margin of appreciation should be, with visible variations not only in different exceptions, but even within the same exceptions but distinct circumstances.⁶⁰

A clear example of this can be found in the European consensus considerations. The Court keeps repeating that the existence of European consensus is a decisive factor and when there is lack of European consensus the margin of appreciation granted to States is wide.⁶¹ The existence of European consensus may be employed by the Court to protect individual rights in cases where the State brought before the ECtHR does not follow a trend, which is common in the majority of the Contracting States. This was, for example, the case in *Vallianatos and Others v Greece*, where due consideration was given to the fact that when Contracting States opt to enact legislation introducing a new system of registered partnership as an alternative to marriage, they include same-sex couples in its scope.⁶² It was, therefore, held that Greece by not offering the option of same-sex registered partnerships violated Article 8 ECHR.

However, in other cases, even when there is European consensus on a specific matter, the Court might not take it into account and instead focus on national consensus. This happened in *A, B and C v Ireland*, a case of abortion against Ireland.⁶³ The Court found that although there is an acute sensitivity of the moral and ethical issues raised by abortion, there is consensus among a substantial majority of the Contracting States granting greater legal access to abortion than the one offered by Ireland (at the time of the judgment). The Court

⁵⁹ Jeffrey A Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004) 11 Columbia Journal of European Law 113, 129.

⁶⁰ Aileen McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 The Modern Law Review 671, 687-688.

⁶¹ 'Interpretative Mechanisms of ECHR Case-Law: The Concept of European Consensus' <<https://www.coe.int/en/web/help/article-echr-case-law>> accessed 4 December 2019.

⁶² *Vallianatos and Others v Greece* (2014) 59 EHRR 12.

⁶³ *A, B and C v Ireland* (2011) 53 EHRR 13.

accepted that consensus has long played a role in the development and evolution of the Convention and has, therefore, been invoked to justify a dynamic interpretation of the Convention. However, it did not consider that this narrows the margin of appreciation; instead, it granted a wide deference to Ireland, based on the national circumstances.⁶⁴

Reflecting on the above, European consensus has been generally treated as a decisive factor, although, depending on the occasion, this might not be the case. It seems as if the Court uses consensus at European or national level to justify the ruling it considers adequate for each case at the given time. 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. It becomes evident that there is inconsistency in the Court's practice, which further hinders predictability and clarity of the judgments rendered by the Strasbourg Court. This thesis does not hold that there are no reasons behind the different treatment of the aforementioned cases, but rather that there seems to be no principle guiding them.

Most importantly, the margin of appreciation doctrine lacks coherent principle. Instead of establishing a standard to follow, a principle that can be applied when interference with a right is identified, the doctrine of margin of appreciation provides a leeway to the State. Through this leeway, the Contracting States are free to follow their own standard, which is not questioned by the Strasbourg Court, at least not in a coherent way. There is no principle to guide the justification of an interference with the substance of a right or with procedural matters related to it. A question of whether the interference was justified cannot be answered by simply referring to the wide margin of appreciation granted to the State.⁶⁵ What it does, in effect, is to allow abuses by States in the sense of not explaining the reason of the measure or, as is relevant for the hypothetical scenario under examination, not showing the interest on total prohibition of an artificial reproductive technology, such as surrogacy. The wider implication is, as McBride emphasises, the problematic use of the doctrine when it does not

⁶⁴ *ibid* paras 233-236.

⁶⁵ In a similar vein, Letsas held that the margin of appreciation lacks any normative force and reference to it is superfluous or question begging, as it cannot help 'strike a balance between individual rights and public interest': Letsas (n 21) 711.

articulate fully the ‘rationale’ behind its findings, making the judgments less principled evaluations and ‘more as its own arbitrary preference for the balance to be achieved’.⁶⁶

To better understand this point, it is useful to refer to an example utilised above, when assessing the potential success of the hypothetical claim against a State prohibiting surrogacy. In *SH and Others v Austria*, the Court held that the central question in terms of Article 8 ECHR is not whether a different solution might have been adopted by the legislature that would arguably have struck a fairer balance, which could have led to the protection of the Convention’s right.⁶⁷ Instead, the central question is 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.⁶⁸

This example is a clear demonstration of the Court’s failure to employ a coherent principle which can be used to promote and protect human rights. Granting a margin of appreciation and not requiring a solid justification on why the Contracting State decided to interfere with a right in such a way, in particular the reason behind this specific interference, is not sufficiently answered by showing deference to the State. It would have been different, for instance, if the Court granted a margin of appreciation to the State but still checked whether the measure adopted by the State was adequate to achieve the desirable goal, was the least onerous and respected a balance of costs against benefits. This would indeed assess whether there was a balance struck by the Contracting State. In contrast, examining what other European countries do and searching for a majority, a quantity rather than quality, is not sufficient for the protection of human rights.

The above criticism is essentially related to the substitution, in practice, of the principle of proportionality applied in the context of the Convention by the concept of margin of appreciation. Proportionality is connected with weighting the different interests at stake. It seems, therefore, arbitrary to prioritise the margin of appreciation when striking a fair balance between private and public interests. The margin of appreciation does not provide a specific

⁶⁶ Jeremy McBride, ‘Proportionality and the European Convention on Human Rights’ in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 23, 35.

⁶⁷ *SH and Others v Austria* (n 22).

⁶⁸ *ibid.*

guiding principle. Instead, it allows Contracting States to act without specific boundaries and obscures the real reasoning behind the Court's judgment.⁶⁹

In essence, the aforementioned refers to cases where, more often than not, there is no assessment of proportionality, as the above *SH and Others v Austria* showed.⁷⁰ However, the proportionality test lies at the heart of the necessity assessment. Many see the principle of proportionality as 'the other side' of margin of appreciation,⁷¹ in the sense that it limits the deference given to States.⁷² Nonetheless, in practice, it seems that when a broad margin of appreciation is granted to a Contracting State, hardly ever does the Court employ the proportionality test. Such cases are characterised by a rhetorical use of proportionality instead of a real assessment taking place.⁷³ Notably, this is frequent in reproductive rights cases.⁷⁴ However, an assessment of the clash among individual and public interests cannot occur without taking into account proportionality. 'Proportionality is inherent in adjudication, unless adjudication were to be reduced to a formalistic and unrealistic exercise'.⁷⁵ In a similar vein, it has been argued that:

Unfortunately, by invoking the margin, the Court avoid giving clear arguments as to why it interpreted the obligation in a certain way. The margin mantra does not help to solve the issues presented. On the contrary, it actually seems to work as a smoke screen. The margin is invoked as if it somehow resolved the dispute, as if it is an aid to, and even decisive in, the interpretation of the Convention in that particular circumstance. However, it does neither in these cases. If the issue is answering a general question, such as whether the Convention requires procedural guarantees in evictions, the Court should answer it by using some reasoning (such as necessity or reasonability).⁷⁶

⁶⁹ Using the margin of appreciation and obscuring the true basis on which the decision is made can be found in: Rabinder Singh, 'Is There a Role for the "Margin of Appreciation" in National Law after the Human Rights Act?' (1999) Issue 1 European Human Rights Law Review 15, 20.

⁷⁰ *SH and Others v Austria* (n 22).

⁷¹ *Arai-Takahashi* (n 20) 14.

⁷² Franz Matscher, 'Methods of Interpretation of the Convention' in Franz Matscher, Ronald St John Macdonald and Herbert Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff 1993) 63, 79.

⁷³ *Arai-Takahashi* (n 20) 16.

⁷⁴ For an exception: *Dickson v UK* (n 24).

⁷⁵ Jonas Christoffersen, 'Straight Human Rights Talk – Why Proportionality Does (Not) Matter' in Peter Wahlgren (ed), *Scandinavian Studies in Law Volume 55 – Human Rights - Limitations and Proliferation* (Stockholm University 2010) 11, 39.

⁷⁶ Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324, 336-337.

Even when the Strasbourg Court does invoke a proportionality test, it does so inconsistently. There is no clear structure of the proportionality test, such as guiding sub-principles that can help the Court reach its judgment in a clear and ordered way. It has been observed that when the ECtHR assesses proportionality it takes into account a number of factors: the overall effect of a particular restriction, asking whether it extinguishes the right or there is still scope for its exercise, if there is a sufficient basis for believing that a particular interest is in danger, considerations of the nature of the burden upon a particular individual, notably in property cases, and considerations of the specific context of a case.⁷⁷ While these are true, there is no clear guiding structure behind the assessment. As a result, there is lack of clarity and consistency in its application.

By way of illustration, there seems to be a tendency that ‘morals must be accorded whatever protection a State considers appropriate’.⁷⁸ In practice though, the Strasbourg Court has been inconsistent in this approach. In *Handyside v UK*, the Court, when evaluating the seizure of *The Little Red Schoolbook* and the conviction of its publisher, did not find a violation of the freedom of expression, based on the fact that such conviction was necessary in a democratic society for the protection of the society’s morals.⁷⁹ Nonetheless, some years later, in *Dudgeon v UK*, the Strasbourg Court found a violation of Article 8 ECHR caused by the criminalisation of same-sex sexual activity, where it was considered that morals are not enough without more to override valid consent.⁸⁰ The example attempts to illustrate that even if this thesis is against the idea of morals being used to hinder human rights protection, the Court uses morals inconsistently. In addition, it was already argued that the most coherent way to interpret the use of morals as a legitimate aim is through additional considerations as part of another legitimate aim,⁸¹ e.g. potentially the protection of young people in the *Handyside* case.

This goes against the idea that States should, as much as possible, keep to minimum interference with the rights enshrined in the Convention ‘by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards

⁷⁷ McBride (n 66) 24-27.

⁷⁸ *ibid* 30.

⁷⁹ *Handyside v UK* (n 14).

⁸⁰ *Dudgeon v UK* (1981) 4 EHRR 149.

⁸¹ For more, see Chapter 4 (4.3).

human rights'.⁸² Through this finding, it is observed that the Court favours the idea that balancing individual rights and public interests alone is not enough, but a consideration of alternative solutions and the least onerous way should be examined as well. The current framework, as analysed above, fails to do that.

Even in cases where the Court does employ a structured proportionality test, for example emphasising the necessity of the measure taken by the State, there seems to be no reason why the Court would mention the concept of margin of appreciation. As Judge Rozakis argued, when:

an abundance of elements leading to the conclusion that the test of necessity is satisfied by itself and embarks on a painstaking analysis of them, reference to the margin of appreciation should be duly confined to a subsidiary role.⁸³

In general terms, Judge Rozakis has been a critic of the margin of appreciation⁸⁴ and the automaticity by which it is employed by his colleagues through various concurring opinions.⁸⁵ Other judges of the Court have also joined the margin of appreciation debate, with Judge Paczolay arguing against its use to avoid 'the tyranny of the majority' on minorities⁸⁶ and Judge de Meyer criticising its relativist tendencies, while explicitly declaring that the concept of margin of appreciation should be abandoned.⁸⁷

Consistent to the above criticism, other international human rights adjudicative bodies, such as the Human Rights Committee and the Inter-American Court of Human Rights, have in general terms abstained from using the margin of appreciation doctrine. As Ghandhi observes, the Human Rights Committee (HRC) has not considered it appropriate to use the concept of margin of appreciation, even though the *travaux préparatoires* indicate that it could be applicable to derogation cases under Article 4 of the International Covenant on Civil

⁸² *Hatton and Others v UK* (n 13) para 86.

⁸³ *Odievre v France* [2003] ECHR 86. Concurring opinion of Judge Rozakis.

⁸⁴ cf Dean Spielmann, 'UCL - Current Legal Problems (CLP) Lecture: Whither the Margin of Appreciation?' (March 2014) <https://www.echr.coe.int/Documents/Speech_20140320_London_ENG.pdf> accessed 4 December 2019. The former President of the ECtHR held that the margin of appreciation is an analytical tool that prefers plurality to uniformity and pursues a systemic objective.

⁸⁵ For instance, *Egeland and Hanseid v Norway* App no 344 (ECtHR, 16 April 2009).

⁸⁶ Péter Paczolay, 'Consensus and Discretion: Evolution or Erosion of Human Rights Protection?', *Dialogue between judges, European Court of Human Rights, Council of Europe, 2008* <https://www.echr.coe.int/Documents/Dialogue_2008_ENG.pdf> accessed 4 December 2019.

⁸⁷ *Z v Finland* (1998) 25 EHRR 371. Dissenting opinion of Judge de Meyer.

and Political Rights.⁸⁸ Instead, its use by the HRC has been minimal and mostly implicit.⁸⁹ Schmidt explains that this is due to fears among the HRC members that such doctrine could trigger appeals to cultural relativism ‘however ill-defined or inappropriate in the circumstances of a given case, or to seek to justify serious human rights abuses’.⁹⁰

Similarly, the Inter-American Court of Human Rights (IACtHR) has indeed employed the concept of margin of appreciation. Although it has done so in an explicit way, the concept is used minimally.⁹¹ Cançado Trindade, former judge of the IACtHR and current judge at the International Court of Justice, held that:

How could we apply [the margin of appreciation doctrine] in the context of a regional human rights system where many countries’ judges are subject to intimidation and pressure? How could we apply it in a region where the judicial function does not distinguish between military jurisdiction and ordinary jurisdiction? How could we apply it in the context of national legal systems that are heavily questioned for the failure to combat impunity? . . . We have no alternative but to strengthen the international mechanisms for protection . . . Fortunately, such doctrine has not been developed within the inter-American human rights system.⁹²

5.4 Reconstruction of the Necessity Requirement

Notwithstanding the above criticism, recent developments welcome a more extensive use of the ‘margin of appreciation’ in the Strasbourg Court’s case law, which demonstrates that its role seems to strengthen with time, reinforcing its use by the ECtHR. There are two such developments. First, once Protocol 15 of the ECHR will be ratified by all Contracting States,⁹³ the term margin of appreciation will appear at the end of the Convention’s

⁸⁸ PR Ghandhi, *The Human Rights Committee and the Right of Individual Communication: Law and Practice* (Ashgate/Dartmouth 1998) 312.

⁸⁹ Arai-Takahashi (n 20) 4.

⁹⁰ Markus G Schmidt, ‘The Complementarity of the Covenant and the European Convention on Human Rights - Recent Developments’ in David Harris and Sarah Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law* (Clarendon Press 1995) 629, 657.

⁹¹ An example: *Advisory Opinion OC-4/84* of January 19, 1984 *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, Inter-American Court of Human Rights.

⁹² Antônio A Cançado Trindade, *El Derecho Internacional de Los Derechos Humanos En El Siglo XXI* (2008) as cited and translated by Andreas Follesdal, ‘Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights’ (2017) 15 *International Journal of Constitutional Law* 359, 362.

⁹³ Currently there are only two States that have not ratified the Protocol (Bosnia and Herzegovina, and Italy): ‘Chart of Signatures and Ratifications of Treaty 213: Protocol No. 15 Amending the Convention for the

preamble.⁹⁴ Second, the recent Copenhagen Declaration ‘welcomes the further development of the principle of subsidiarity and the doctrine of the margin of appreciation by the Court in its jurisprudence’.⁹⁵

Given this, instead of abandoning this doctrine, the present section reconstructs the necessity requirement of Article 8(2) ECHR to provide a more pragmatic solution to its problematic use whenever the Court addresses a potential clash of interests. It does so by changing the focus of the margin of appreciation doctrine and reshaping proportionality in such a way that it follows the more traditional tripartite proportionality assessment. Although acknowledging in the next section the possible limitations of the new framework, by applying these reconstructed tools, it is argued that a blanket prohibition of surrogacy would violate Article 8 ECHR.

5.4.1 Reconstructed Assessment

As mentioned already, based on the status reinforcement of the margin of appreciation, this thesis argues in favour of reconstructing the concept of proportionality alongside deference considerations towards the States, rather than abandoning the doctrine of margin of appreciation. The solution is thus based on practical and factual considerations. The suggestion is for the principle of proportionality together with the margin of appreciation to result in a thorough assessment of the given interference, achieving in this way what is deemed a ‘real’ proportionality test. This reconstructed framework would not affect the ‘pressing social need for interference/sufficient and relevant reasons’ assessment that would still precede the evaluation suggested below.

In order to respect subsidiarity but at the same time promote and protect human rights, a margin of appreciation can be granted to Contracting States and, depending on the nature of

Protection of Human Rights and Fundamental Freedoms’ <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=8BnEJQBR> accessed 4 December 2019.

⁹⁴ According to Article 1 of Protocol 15, at the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: ‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention’.

⁹⁵ Copenhagen Declaration issued on 12 and 13 April 2018. ‘Copenhagen Declaration’ <https://www.echr.coe.int/Documents/Copenhagen_Declaration_ENG.pdf> accessed 4 December 2019.

the matter at hand, be wide or narrow. To establish whether a State enjoys a wide or narrow deference regard must be given to whether the interference affects the essential core of the right at hand. In case it affects the essential core of the right, then the margin of appreciation should be narrow. This would mean that a strict test of proportionality would be employed by the Court. If the essential core of the right is not affected, the margin of appreciation will be wide, but it will still trigger the proportionality test, this time less rigorously. Thus, there are three important factors: essential core of the right, margin of appreciation and proportionality. After elaborating on these factors, a final consideration is made regarding the role of the European consensus within the new framework.

The idea of the essential core of a right within the ECHR is not new. The Court is familiar with the concept and has used it in different instances to express rights that are essential foundations of a democratic society, as the freedom of expression for example,⁹⁶ or core rights attracting the protection of Article 8 of the Convention.⁹⁷ Once the Court identifies them, it goes on and attempts to protect these essential foundations or core rights. In the ECtHR's own words, '[t]he limitations ... introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired'.⁹⁸ It is important to underscore that the essential core of a right should not be confused with the so-called core rights of the Convention,⁹⁹ which were referred to as absolute rights earlier in this chapter.¹⁰⁰ To avoid confusion, the term preferred is 'essential core of a/the right'.¹⁰¹

It has been suggested that '[t]he 'core' of a right can be interpreted as the importance that certain liberties have for the promotion of certain vital interests, for instance those linked to autonomy'.¹⁰² Along the same line, this thesis holds that the essential core of a right should be closely related to the nature of the individuals' interests. Notably, when it comes to Article 8 ECHR, this occurs when a particularly important aspect of the individual's existence and

⁹⁶ *Handyside v UK* (n 14) para 49.

⁹⁷ *Parrillo v Italy* (2016) 62 EHRR 8, para 174.

⁹⁸ *Sheffield and Horsham v UK* (1999) 27 EHRR 163, para 66.

⁹⁹ This terminology is used in: Council of Europe, 'Overview of the Case-Law of the European Court of Human Rights' (2019) <https://www.echr.coe.int/Documents/Short_Survey_January_June_2019_ENG.pdf> accessed 4 December 2019.

¹⁰⁰ See above (n 30).

¹⁰¹ This would be a similar concept to the essential core theory of European Union rights, but it should be differentiated from that theory due to the distinct nature of EU and ECHR rights. For more on the essential core theory of EU rights: Case C-34/09 *Ruiz-Zambrano* [2011] ECR I- 1177.

¹⁰² *Letsas* (n 21) 718.

identity is at stake. In other words, under Article 8 ECHR, a particularly important aspect of the individual's existence and identity should be converted from a mere factor of addressing the range of margin of appreciation, as it currently is, into a guiding principle for the assessment. This could also be applied to other qualified rights, such as Article 10 ECHR and the essential core of the freedom of expression.

Under the reconstructed necessity assessment, it is suggested that, once the Court identifies an interference with the essential core of a right, it should invoke a detailed proportionality assessment, minimising the margin of appreciation granted to Contracting States. The problem in the current necessity assessment derives from what could be regarded as mere lip service paid to the essential core of the rights. It is observed that, in practice, even when the essential core of a right is acknowledged, the deference granted to States is broad, virtually nullifying the useful effects for the protection of the right that such recognition could otherwise provide.¹⁰³

An essential element to take into account is that identifying the essential core of the right at hand does not render this right absolute. This is where the margin of appreciation would come into play. Having to deal with the essential core of the right would mean that there is still a proportionality test to be carried out. The difference is that deference to the Contracting States would be minimal, triggering a rigorous proportionality assessment. However, if the essential core of a right is not engaged, deference could be broader, meaning that there would still be a proportionality assessment through the proportionality test, but this time it would be more flexible, as explained below.

Coming to this pondering of interests, the proportionality test employed by the Court in the reconstructed necessity assessment would resemble the one found within the European Union context with some suggested changes. The principle of proportionality at a European Union (henceforward EU or Union) level has its origins in the field of administrative law developed in continental legal systems and, in particular, German administrative law.¹⁰⁴ It reflects the idea of a liberal State that does not interfere with individuals' rights and freedoms unless the

¹⁰³ *Handyside v UK* (n 14). The Court acknowledged the foundational significance of the freedom of expression for a democratic society but, nonetheless, emphasised the margin of appreciation granted to the State and its morals' protection.

¹⁰⁴ Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999) 107.

law/regulation serves a useful purpose and the interference is suitable to achieve the desired result (causal relationship).¹⁰⁵ Two main functions of the principle of proportionality can be observed in EU law:¹⁰⁶ first, the use of the principle as a ground for judicial review of an EU act (i.e. against EU institutions)¹⁰⁷ and, second, its use as a ground for the review of national regulation restricting fundamental EU freedoms and rights (i.e. against Member States of the Union).¹⁰⁸ It is interesting to note that the review of proportionality against Member States of the Union tends to be stricter than its review against EU institutions.¹⁰⁹

Although the idea reflecting the principle of proportionality was hinted at in previous cases,¹¹⁰ the first time the Court of Justice of the European Union (CJEU) expressly employed the proportionality test was in *Internationale Handelsgesellschaft*,¹¹¹ where the CJEU held that the system of import and export licences according to Council Regulations (EC) 473/67 and 120/67 did not violate the principle of proportionality. Since then, the proportionality test has been employed frequently by the CJEU and it has laid down three questions.

The three questions, as established in *Fedesa*,¹¹² ask whether the interfering measure is appropriate to achieve the aim pursued (is the measure adequate?), whether it is necessary in order to achieve the objectives pursued by the measure, as the least onerous option, (is it necessary?) and whether the disadvantages caused are not disproportionate to the aims pursued, in essence carrying out a balance of cost and benefits (is it proportional *stricto sensu*?). Accordingly, there are three elements within the principle of proportionality:

¹⁰⁵ Jürgen Schwarze, *European Administrative Law* (Sweet & Maxwell 2006) 678-679.

¹⁰⁶ Tridimas identifies three main functions, adding to the above the function of guiding the exercise of EU's legislative competence: Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 137. This third function is crucial, but not addressed here given that the relevance of the principle for this thesis is found in terms of the test applied for the judicial review of interference.

¹⁰⁷ Proportionality, as a general principle of EU law, falls under the broad category of infringement of the Treaties or of any rule of law relating to their application, as per Article 263(2) Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202.

¹⁰⁸ This occurs frequently in matters of internal market of the EU. By way of illustration: Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2nd edn, Cambridge University Press 2010) 879.

¹⁰⁹ *ibid* 368.

¹¹⁰ Tridimas (n 106) 141.

¹¹¹ Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹¹² Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and the Secretary of State for Health, ex parte: Fedesa and Others* [1990] ECR I-4023, paras 12-13.

suitability, necessity and proportionality in the strict sense. The necessity element or necessity test should not be confused with the necessity assessment, as the former is connected to the principle of proportionality, while the latter refers to the ‘necessary in a democratic society’ assessment.

A closer look at the EU case law reveals that the CJEU does not always distinguish between the three elements of proportionality. It has even been suggested that the principle encompasses two tests, that of suitability and necessity.¹¹³ In practice, it is quite frequent for the CJEU to just focus on one of the three aforementioned elements, the necessity test.¹¹⁴ This questions whether the three elements, i.e. suitability, necessity and proportionality *stricto sensu*, are sub-principles of the principle of proportionality or they are merely elements that materialise the general principle of proportionality.¹¹⁵ Notwithstanding the above, the reconstruction of the proportionality assessment within the ECHR is to follow the tripartite test as originally established in *Fedesa*.¹¹⁶ Therefore, proportionality within the new ECHR framework would follow three separate sub-principles/elements of proportionality, although with some adjustments to the ECHR system, coherent to the rest of the elements proposed for the ‘necessary in a democratic society’ assessment.

Commencing with suitability, this element refers to the measure being appropriate to achieve its goal, in effect taking into account the causal relationship between ends and means.¹¹⁷ In practice, the CJEU does not apply a strict suitability test, with violations being identified when the measure is evidently unsuitable for the achievement of the aim pursued, rejecting its fulfilment only in extreme cases.¹¹⁸ This, however, would differ in the reconstructed proportionality test within the ECHR. As mentioned above, the proportionality assessment would essentially depend on the scope of the margin of appreciation. When an essential core of the right is involved, the margin of appreciation would be narrow. This is translated into a rigorous proportionality test, which would eventually mean a stricter suitability test. In such

¹¹³ Tridimas (n 106) 139.

¹¹⁴ For example: Schwarze (n 105) 857.

¹¹⁵ *ibid* 854.

¹¹⁶ Case C-331/88 *Fedesa* (n 112).

¹¹⁷ Christoffersen suggests that ‘the ends-means-test can be viewed as a test of the level of information supporting the proposition that a given act or omission will produce a particular result’: Jonas Christoffersen, *Fair Balance: A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff 2009) 165.

¹¹⁸ Schwarze (n 105) 856-857.

cases, suitability would go beyond the mere appropriateness of the measure.¹¹⁹ It would further demand greater evidence from Contracting States to defend the suitability of a particular choice, which is consistent to the importance of the individual interest at stake:

The higher the standard of protection (importance) of the right, the higher standard of information is required to justify the application of a particular measure.¹²⁰

However, the suitability of such measure would be case and fact dependent so as to avoid the so-called ‘full effectiveness’ test that could paralyse State interference and be utterly counterproductive.¹²¹ In other words, the ECtHR would have to be practical and working according to the particular facts relating to each situation, relying on information and evidence presented by the parties.

In contrast, if the essential core of the right is not involved and, therefore, the deference shown towards States is wide, the suitability test would be less rigorous. This would essentially mean that suitability would be somehow constrained. Reversing the above phrase by Christoffersen, the lower the standard of protection (importance) of the right, the lower standard of information is required to justify the application of a particular measure. This is indeed a minimal reading of the suitability test, one that nonetheless would be appropriate to the individual interest at stake. The reason behind this can be found in the premise that, as the essential core of the right is untouched, it would be easier to justify suitability and demonstrate the causal relationship between means and ends as a more flexible test.

The second step within the proportionality test would be to check necessity. Necessity at EU level means that there is no other less restrictive or intrusive way of achieving the aim pursued. A typical example of such necessity test would be that one ‘must not use a steam hammer to crack a nut, if a nutcracker would do’.¹²² This least onerous approach is the main way in which the proportionality test is applied by the CJEU in practice. In a relatively recent

¹¹⁹ Beyond merely excluding ‘burdens ... without fault or benefits to those with no unusual merit, or otherwise ... burdens and benefits too widely or too restrictively’: Robert W Bennett, ‘Mere Rationality in Constitutional Law: Judicial Review and Democratic Theory’ (1979) 67 *California Law Review* 1049, 1065.

¹²⁰ Christoffersen (n 117) 191.

¹²¹ Janneke Gerards, ‘How to Improve the Necessity Test of the European Court of Human Rights’ (2013) 11 *International Journal of Constitutional Law* 466, 475.

¹²² Famous quote by Lord Diplock in *R v Goldstein* [1983] 1 ALL ER 434, 436.

case, the CJEU held that ‘an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure’ and if a regulation:

entails a wide-ranging and particularly serious interference with those fundamental rights in the legal order of the EU, without such an interference being precisely circumscribed by provisions to ensure that it is actually limited to what is strictly necessary... [it means that] the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality.¹²³

In the framework suggested for the ECHR, State interference would have to be assessed in accordance with the above CJEU evaluation. The difference would again be the extent of the review, depending on the range of the margin of appreciation. When the margin of appreciation is narrow, review would need to be more intense. This does not mean that the ECtHR would have to extensively discuss all alternatives, but, in doing so, it would have to take into account factual and statistical data provided by the different parties. To avoid again being counterproductive, what the Strasbourg Court would have to do is ‘consider the various possibilities and to make a well-informed choice between them, rather than having to delve deeply into a factual assessment of hypothetical alternatives and their possible effects’.¹²⁴

That said, if the margin of appreciation is wide, this means the Court would be less rigorous and asking, in effect, for the interference not to exceed what was necessary for the purpose pursued. This is similar to the current approach of necessity employed by the CJEU, as observed above. In essence, this would mean that even when the essential core of the right is not involved, there would still be a minimal threshold of a least onerous option that States would have to fulfil.

The last step of the assessment would be proportionality in the strict sense. Proportionality *stricto sensu* entails the pondering of costs and benefits in a way that, all things considered, the interference is not excessively burdensome to the rights of the individual. This is considered to be the principle that helps achieve a fair balance between the competing interests. The CJEU does not often reach this assessment, as it usually stops at necessity, or

¹²³ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland LTD v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland* [2014] ECR I- 238.

¹²⁴ Gerards (n 121) 487.

necessity might even be the only element that it takes into account.¹²⁵ In the proposed ECHR framework, however, the pondering of the interests would be the last bit of proportionality to be considered. This means that, once the Court would make a more concrete or procedural assessment through suitability first and after that necessity, it would then go on to consider a fair balance, which seems more intuitive. This would also be a case-by-case consideration, where very weighty interests of the individuals and the public would have to be contemplated carefully.

The proportionality approach suggested here is not entirely new to the ECtHR's case law. Although not frequent, there have been instances that the Court followed a suitability assessment.¹²⁶ More frequent to suitability is the necessity test, where the ECtHR considers that the measure taken was excessively broad and disproportionate to the aim.¹²⁷ The Court seems to reiterate in cases of discrimination on sex or sexual orientation that for the principle of proportionality the measures should not only be suitable but also necessary 'in order to achieve that aim, to exclude certain categories of people'.¹²⁸ Keeping this in mind, it has been held that traditional elements of the proportionality test could be potentially identified in the Court's case law.¹²⁹ However, the one the ECtHR is most familiar with is the last proportionality element, the fair balance test.¹³⁰ Even where there have been considerations in some Strasbourg judgments of the different elements of proportionality as presented above, this was never done systematically where one condition assessment follows after the other.

In light of the above, the aforementioned analysis of the elements of the tripartite proportionality test has attempted to codify in a concrete way practices already found within the ECtHR, which is apparent from its case law, as shown before. This has been carried out by pinning down the precise procedure to be followed by the Court, a procedure that should be systematic. The starting point for the necessity assessment would be, as with the current framework, the 'pressing social need for interference/sufficient and relevant reasons' assessment. Following this step would be identifying whether the essential core of the right at

¹²⁵ This is distilled from: Schwarze (n 105) 857.

¹²⁶ For example, the *Soltysak v Russia* case: Gerards (n 121) 471.

¹²⁷ e.g. *Obukhova v Russia* App no 34736/03 (ECtHR, 8 January 2009) para 27.

¹²⁸ e.g. *Vallianatos and Others v Greece* (n 62) para 85, *Oliari and Others v Italy* (n 42) para 121, etc.

¹²⁹ Oliver De Schutter and Françoise Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution' in Eva Brems (ed), *Conflicts between Fundamental Rights* (Intersentia 2008) 169.

¹³⁰ *Arai-Takahashi* (n 20) 193. Also, in this sense, see the cases mentioned above where there is no balancing between the interests (section 5.2).

hand is engaged, which would further show the range of margin of appreciation to be granted to Contracting States and how demanding the proportionality test should be. The above would constitute the essential steps the Strasbourg Court would have to follow each time it engages with an assessment of State interference in the so-called qualification or accommodation clauses.¹³¹ Suffice it to say that if one of the conditions of proportionality is not fulfilled, there is no need to go to the next, as this would automatically mean that State interference is disproportionate and, hence, fails the assessment.

The advantages of this ‘necessary in a democratic society’ assessment is shown by its structure. If it were to be adopted, it would be clear that the factor that triggers a wide or narrow margin of appreciation is the essential core of the right, not an interplay of factors that lack predictability and clarity as to their importance. Depending then on the margin of appreciation, the ECtHR would be more flexible or rigorous with its proportionality assessment. In addition, it is crucial to note that the proportionality test suggested would take the focus away from a merely fair balance test, which could be regarded as a simplistic approach to proportionality by pondering interests *ad hoc* without a proper structure. Instead, the suggested framework would lead to a more concrete and structured application of proportionality,¹³² not only an intuitive assessment by the Court which obscures the real basis of the judgment, as happens with the current fair balance test.

Finally, an important feature is that proportionality would play a central role in the necessity assessment. The importance of the proportionality test becomes apparent when considering its main function. This consists of giving ‘substance and meaning to the protection of fundamental’ rights and freedoms, while the exercise of a proper balance test is in turn furthering the principle of justice.¹³³ This is in line with the criticism of the current ECtHR framework that demands a closer connection of the assessment to ‘political values such as justice, legality and democracy’.¹³⁴ Again, this is something the Court itself has acknowledged, i.e. the importance of ‘some compromise between the requirements for defending democratic society and individual rights’, which ‘is inherent in the system of the

¹³¹ These are found in Articles 8-11 ECHR.

¹³² In a similar vein, Christoffersen (n 117) and Gerards (n 121), emphasising the advantages of a means-ends test.

¹³³ Gerards (n 121) 679.

¹³⁴ Letsas (n 21) 715.

Convention'.¹³⁵ What this would entail for the Convention is that it will better fulfil its obligation to protect human rights in Europe, while at the same time respect subsidiarity and deference towards Contracting States.

What, if any, would be the importance of the European consensus in such framework? This thesis rejects the application of the European consensus in the necessity assessment, for, as held before in the criticism section, a majority approach does not offer any value to the essence of the interference evaluation. Nonetheless, the role of European consensus would still be important within the Convention as a means to take into account recent developments in Europe that can be translated into 'new' interests to be protected under the rights and freedoms enshrined in the ECHR. This is consistent with the evolutive and dynamic interpretation of the Convention as a living instrument.¹³⁶

Therefore, European consensus would still be relevant for the first stage of Article 8 and its material scope, i.e. Article 8(1), but irrelevant for the second stage of assessing whether State interference is justified, i.e. Article 8(2). In this way, European consensus would not vanish from the ECHR picture, but only its useful role would remain. This could be seen as compatible with the ECHR's preamble regarding the protection of the rights and freedoms enshrined in the Convention by the Contracting States, asking for 'a common understanding and observance of the Human Rights upon which they depend'.

Based on the above, this thesis argues for the reconstruction of the necessity assessment within Article 8(2) ECHR, as demonstrated by the figure below (Figure 2). In particular, the proportionality test in correlation with the margin of appreciation assessment could also apply to the rest of the qualified or accommodation clauses in the ECHR, i.e. Articles 9-11 ECHR.

¹³⁵ *Klass v Germany* (1979) 2 EHRR 214, para 59.

¹³⁶ This has already been discussed in Chapter 3 (3.4.1).

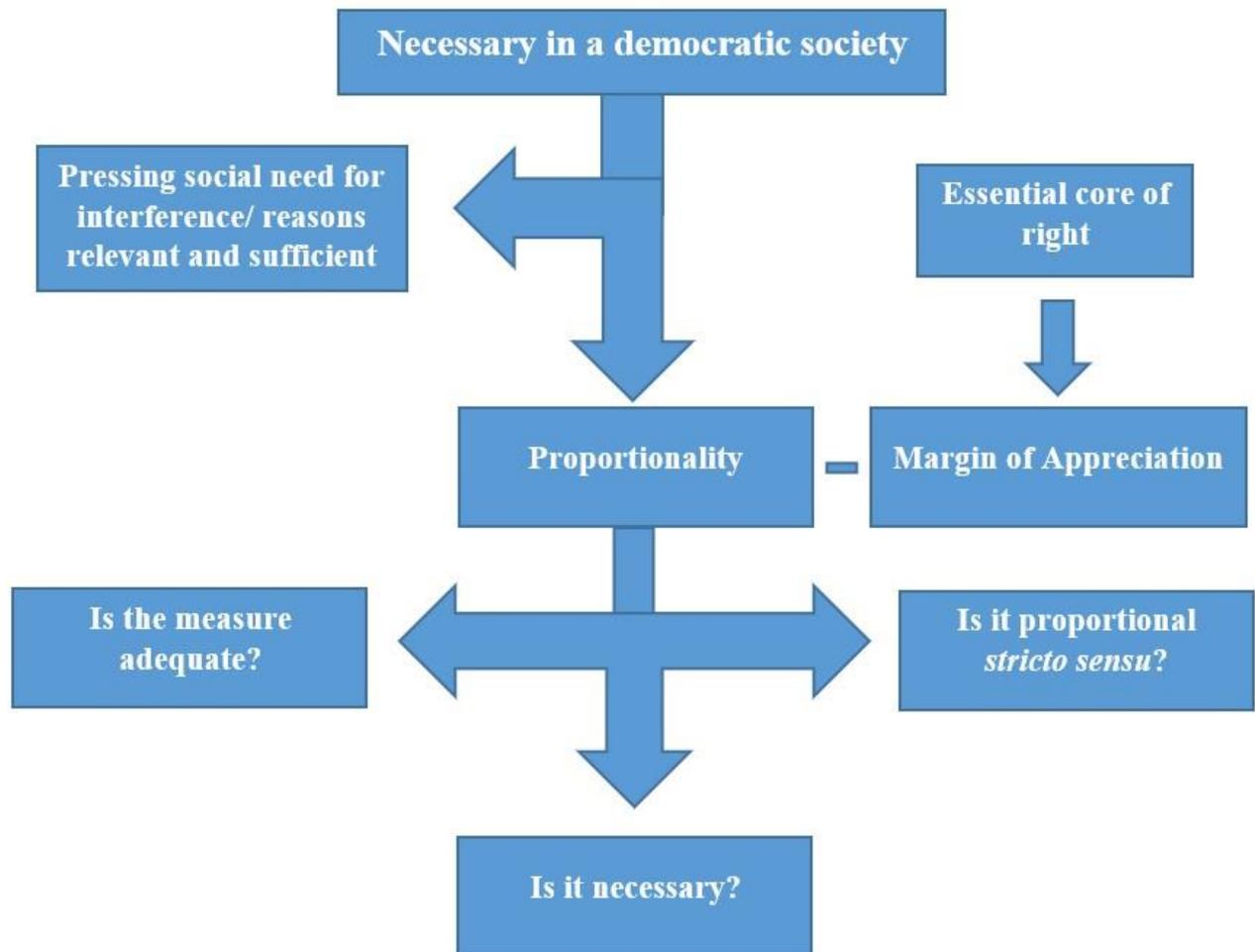


Figure 2. The Necessity Assessment Reconstructed.

5.4.2 Possible Limitations of the Reconstructed Assessment

This thesis acknowledges that there are some challenges to the suggested necessity assessment framework. Presenting the possible limitations aims at clarifying them and providing guidance as to how they can be avoided. The potential limitations of the proposed ECHR framework refer mainly to the borrowing of the tripartite proportionality test from EU to ECHR and the evaluation of the essential core of the right.

The first consideration has to do with the reason behind the ‘legal transplant’ from EU to ECHR. This might seem problematic at first sight given the differences between the two systems, taking into account the history, function, role and powers of each. The ECHR is a regional Convention on the protection of human rights, while the EU is a supranational

political, legal and economic union. Both came as a regional response to World War II; however, their nature differs. The EU started as a union aiming at a single market and it was at a much later stage of its existence that it included the protection of fundamental rights, mainly by establishing them as fundamental EU values through its case law.¹³⁷ Hence, notwithstanding the upholding of fundamental rights by the CJEU, it is not a human rights court, as opposed to the ECtHR.

In addition, the protection provided by two systems has a different function. While the ECHR provisions function as a minimum standard for the Contracting States and they can go beyond this minimum, the protection based on the EU could be not only the minimum but also the maximum standard for the protection of fundamental rights, beyond which the Member States could not go.¹³⁸ Also, cases reach the CJEU mainly via the preliminary reference procedure and, while the ruling of the CJEU is binding for the national court that initiated the preliminary reference, it is up to that court to adjudicate the case at hand.¹³⁹ This is opposed to a direct review of a matter by the CJEU, which is less accessible to individuals at EU level.¹⁴⁰ Conversely, the ECtHR adjudicates directly on the case at hand, after national remedies have been exhausted.¹⁴¹ It should be mentioned, however, that with Protocol 16 coming into force in August 2018, there is a new mechanism allowing the ECtHR to give an advisory opinion related to the interpretation or application of the ECHR.¹⁴²

Then, the ECHR and the EU fundamental rights have a different scope of application. Notably, for the material scope, on the one hand, the ECHR applies when the interests of a case fall within the range of one of the rights and freedoms enshrined in its text. For instance, concerning Article 8 ECHR, that would be the first part of the two-stage test.¹⁴³ On the other hand, for the protection of the EU fundamental rights, the CJEU can decide on a matter when either the general principles of EU or the Charter of Fundamental Rights of EU (from now on

¹³⁷ On the history of EU law: Robert Schütze, *European Union Law* (2nd edn, Cambridge University Press 2018).

¹³⁸ Case C-399/11 *Stefano Melloni v Ministero Fiscal* EU:C:2013:107.

¹³⁹ Catherine Barnard and Steve Peers, *European Union Law* (2nd edn, Oxford University Press 2017).

¹⁴⁰ On the difficulty of legal standing for individuals: Schütze (n 137) 363 onward.

¹⁴¹ European Court of Human Rights, Jurisconsult's Directorate 'Practical Guide on Admissibility Criteria' (31 August 2019) <https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf> accessed 4 December 2019.

¹⁴² The Court received its first request under Protocol 16 in October 2018 on surrogacy and subsequently emitted its first advisory opinion in April 2019: ECtHR, Advisory opinion (n 39).

¹⁴³ This was analysed in Chapter 3 (3.3.2).

the Charter) are engaged. This happens when Member States of the EU implement Union law (agency situation) or they derogate from it.¹⁴⁴ This, in practice, means that the CJEU cannot review mere national measures with no sign of EU law, as there needs to be a connection to EU law to trigger their examination. This is consistent to the principle of conferral that restrains the powers of the EU.¹⁴⁵ On the contrary, the Strasbourg Court can consider any type of national measures without such limitation, having the power to even review those national measures connected to EU.¹⁴⁶

In particular, when it comes to proportionality, at EU level, it started as a general principle of EU law that was later explicitly articulated in the Treaty on European Union¹⁴⁷ and the Charter.¹⁴⁸ Additionally, proportionality at EU level serves as a guiding principle not only for the CJEU when adjudicating cases, but for all EU institutions when exercising their legislative and other powers. In contrast, there is no mention of the principle of proportionality in the Convention, its Preamble or its Protocols.

Nevertheless, taking a closer look at the above differences, it becomes clear that they would not hinder the applicability of the tripartite test of the CJEU to State interference within the ECHR. This is simply because what is transferred is not the essence of the tripartite proportionality by the CJEU, but its structure. The ECtHR would not borrow the human rights protection provided by the CJEU, but only the proportionality test through its concrete formation. Even for the concrete structure, the steps to be followed under the suggested ECHR framework are the result of a mixture of considerations, distinct from the CJEU practice. It should be underlined that there is a judicial dialogue between the ECtHR and CJEU, in particular regarding the points they overlap.¹⁴⁹ There is also an ongoing debate on

¹⁴⁴ Barnard and Peers (n 139).

¹⁴⁵ Principle of conferral as established in Article 5(2) Consolidated Version of the Treaty on European Union [2016] OJ C202/01.

¹⁴⁶ For instance: *Avotiņš v Latvia* [2016] ECHR 440. Here, the ECtHR had to decide, among others, the compatibility of the Brussels I Regulation (EU) with Article 6 ECHR.

¹⁴⁷ Article 5(4) TEU.

¹⁴⁸ Article 52 Charter of Fundamental Rights of the European Union [2012] OJ C326/02.

¹⁴⁹ Dean Spielmann, 'The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or How to Remain Good Neighbours after the Opinion 2/13', *Brussels, 27 March 2017- FRAME* <http://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf> accessed 4 December 2019.

the accession of the CJEU to the ECHR.¹⁵⁰ However, what the present proposal suggests is the use of the EU's tripartite proportionality test through a Convention angle, which would respect the difference and peculiarity of the ECHR.

A more significant limitation of the proposed necessity assessment could be that the essential core of the right needs to be established beforehand in order to determine the scope of the margin of appreciation. The Court does already consider the essential core of the right in question in its judgments. What would happen, however, with cases that this has not been done beforehand? The proposed framework might be clear in provisions like Article 8 ECHR, as the essential core of the right would be connected to a particularly important facet of one's existence or identity. What about other articles? A simple response to the above would be the suggestion by Letsas that the essential core would have to be connected to vital interests of the individuals, such as autonomy.¹⁵¹ In addition, when there are new developments that have not been decided before or when there is a new emerging consensus, there is always the concept of evolutive and dynamic interpretation to lead the way for the assessment of the essential core of the right, as considered above.

In addition, the absence from the suggested framework of new tools for the necessity assessment could be perceived as a limitation. A defence to such criticism would be the idea mentioned at the very beginning of the reconstruction of the current ECHR framework. This thesis acknowledges the difficulties for the Strasbourg Court to incorporate new tools as political experience can show.¹⁵² Not only does it acknowledge the difficulties for the Court to adopt new methods, which although without official precedence, has been following the same line of argumentation for the past decades, but, as mentioned at the outset, recent developments show the persistence of the Contracting States to secure the subsidiary role of the ECtHR. This is the reason why the proposal aims at providing a coherent interpretation

¹⁵⁰ For more on the debate: Tobias Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights after Opinion 2/13: Is It Still Possible and Is It Still Desirable?' (2015) 11 *European Constitutional Law Review* 239.

¹⁵¹ Letsas (n 21) 718.

¹⁵² Contracting States have been 'threatening' the Court to withdraw their membership from the Council of Europe if it continues its 'judicial activism': Tom Casier, 'A Classic Dilemma: Russia's Threat to Withdraw from the Council of Europe | Heinrich Böll Stiftung European Union' (21 February 2018) <<https://eu.boell.org/en/2018/02/21/classic-dilemma-russias-threat-withdraw-council-europe>> accessed 4 December 2019.

and structure of the elements that the Court currently takes into account; that is, the margin of appreciation, the essential core of a right and the principle of proportionality.

Lastly, the proposed model does not abolish the concept of ‘margin of appreciation’. This might seem in stark contrast with the aforementioned criticism in section 5.3. Nonetheless, as already stated before, recent developments seem to favour a more extensive use of the doctrine. Given the reinforcement of the doctrine of margin of appreciation, this thesis advocates for a reconstructed assessment of Article 8 ECHR and what is necessary in a democratic society, without abolishing the doctrine but rather reconstructing the framework within which it is applied. This reconstruction, however, addresses only part of the criticism in section 5.3, leaving aside relativism versus universality of human rights and emergency cases. Nonetheless, it does address the lack of principle behind the doctrine, by applying the margin of appreciation alongside the principle of proportionality. In addition, through proportionality and the essential core evaluation, the judgments of the Court will no longer be based on random speculations, but clear and structured reasoning.

5.4.3 Application of the Reconstructed Assessment to Surrogacy

Applying the aforementioned ‘necessity condition’ model in the hypothetical scenario under examination, it is argued that a blanket prohibition of surrogacy would amount to a violation of the right to respect for the decision to become a parent under Article 8 ECHR. While the assessment of the two prongs of Article 8(2) ECHR would remain the same as at the beginning of this chapter, i.e. in accordance with the law and the interests protected,¹⁵³ the third prong is reconsidered in light of the new suggestions.

First, the pressing social need for the interference, which must be relevant and sufficient, would depend on the Contracting State brought before the ECtHR. As there is a range of States prohibiting surrogacy and each has its own peculiar circumstances, it is hard to tell beforehand the exact scope of the social need. Nonetheless, as discussed before, an important factor would be the frequency of cross-border surrogacy, and the legal recognition of its effects.

¹⁵³ First part of section 5.2.

Having passed the first step, the second would be to establish whether there is interference with the essential core of the right at hand. It was suggested above that the essential core of the right would be connected to the involvement of a particularly important facet of one's existence or identity. In the case in question, it is clear that the right to respect for the decision to become a parent, enshrined in Article 8(1) ECHR, does involve a particularly important facet of one's existence or identity.¹⁵⁴ Moreover, the Court has already established that prospective parenthood is a core right under Article 8 ECHR in *Parrillo v Italy*.¹⁵⁵ The essential core of the right would be profoundly affected if surrogacy is prohibited, as the right of the individuals to respect for their decision to become a parent through surrogacy would be impaired.

Having identified that the essential core of the right would be involved, this suggests that the margin of appreciation granted to the States should be narrow. This further implies a stricter assessment of the proposed tripartite proportionality test. In essence, this means that a blanket prohibition on surrogacy would essentially need to be an adequate measure (compared to the aim pursued), the least onerous and not disproportional in the strict sense.

Employing a more rigorous proportionality test would mean that suitability would look beyond the simple causal relationship between the prohibition of surrogacy and the interests protected, namely prevention of disorder/crime, protection of health or morals and protection of rights and freedoms of others. For, given the importance of the essential core of the right and the narrow deference given to the States, an evaluation of suitability would be connected to a more complex factual and statistical data assessment. This is extremely significant in cases where cross-border surrogacy is a common phenomenon in a Contracting State and, most crucially, when its effects are legalised. In such cases the suitability test would fail, as the means would not suffice to fulfil the ends. In simple words, if, in practice, cross-border surrogacy takes place and the State accepts its effects, always subject to its ability to be proved by empirical evidence, then the blanket prohibition of surrogacy is not suitable to protect the aims pursued by its prohibition.

¹⁵⁴ For its potential limitation to genetic parenthood, see (n 33).

¹⁵⁵ *Parrillo v Italy* (n 97). This was opposed to the right invoked by the applicant to donate embryos for scientific research.

If, however, due to the difficulty in proving the above, suitability would be fulfilled for the blanket prohibition of surrogacy, the necessity test would hardly do. For this test, it is important to keep in mind that, given the involvement of the essential core of the right, the deference granted to the State would be minimal. Considering whether there is a least onerous way to protect the interests pursued by State interference would take the ECtHR through considerations regarding the alternatives to a blanket prohibition. Generally speaking, this would be easy to identify when Contracting States would be unable to show that they have sufficiently explored other options that are least onerous than the total ban on surrogacy. The Court would not have to meticulously go through every single alternative to a blanket prohibition, but rather check whether at least less restrictive options have been taken into consideration before State interference. As the contested measure is a blanket prohibition on surrogacy, it would be relatively easy to conclude that such options were not explored (or not explored adequately).

Lastly, if a Contracting State manages to show that a blanket prohibition is the only way to protect the public interests at stake, which would only seem plausible if the Court upholds the State's prerogative on morals' protection,¹⁵⁶ this would trigger the last part of the proportionality test. Proportionality *stricto sensu* would essentially mean a fair balance test among the different interests. There are very weighty individual interests in surrogacy, with the prospective parenthood at stake. However, as this last proportionality element is not strictly speaking procedural, it seems the Court would most likely be reluctant to substitute the national authorities in the assessment of the clash of interests. This can be easily discerned on its current reluctant approach, as the last part of the proportionality suggested is very close to the present ECHR proportionality assessment.

Taking into account the above, this thesis holds that in States where cross-border surrogacy is a frequent phenomenon and its effects are recognised by the State, the new necessity framework would mean that a blanket prohibition on surrogacy violates Article 8 ECHR. This occurs because the measure is not suitable to achieve the goal pursued. If, however, there is difficulty in proving this problematic causal relationship, the Court would still find a violation of Article 8 ECHR, as a blanket prohibition is not the least onerous measure that can be taken to protect the interests threatened by surrogacy. Therefore, it is strongly

¹⁵⁶ However, it was argued in Chapter 4 that the protection of morals, without more, seems unlikely to succeed: Chapter 4 (4.3).

suggested that a blanket prohibition of surrogacy would not be able to pass this procedural (in a sense) proportionality assessment. The only way a blanket prohibition would stand without implicating a violation of Article 8 ECHR is if the last proportionality test is triggered, which, however, is considered highly unlikely.

5.5 Conclusion

This chapter has sought to address the clash of interests in surrogacy between individuals, through their right to respect for private and family life, and States' interests of public policy, in particular, arguments for the prevention of disorder/crime, the protection of health or morals and the protection of rights and freedoms of others. The point of departure has been an assessment of the clash of interests according to the current framework established by the ECtHR through analysing the different elements of Article 8(2) ECHR, as established through the Court's case law. After identifying that most likely the blanket prohibition of surrogacy would not be considered a violation of Article 8 ECHR, this thesis demonstrates the limitations of the current Strasbourg approach regarding what is 'necessary in a democratic society'. In particular, there is no real proportionality assessment by the Court; instead, the margin of appreciation, which lacks coherent principle, and the European consensus doctrines are employed inconsistently.

To tackle this issue and in an attempt to uphold the protection of human rights, a suggestion is made in order to reconstruct the necessity assessment. The suggestion implies addressing whether the essential core of rights is involved, which in turn would mean that the margin of appreciation granted to States would be narrow, triggering a rigorous tripartite proportionality test. This proportionality test is borrowed from the European Union's proportionality evaluation with a Convention angle. Although possible limitations of this reconstructed framework are considered, it is suggested that they can be easily dismissed. It is finally argued that through this new understanding of the necessity condition, a blanket prohibition on surrogacy violates the right to respect for the decision to become a parent under Article 8 ECHR. This is because it would be very difficult for a blanket prohibition to pass through the suitability and necessity test of the proportionality assessment.

CHAPTER 6: SURROGACY AND INTERNATIONAL AGREEMENT

6.1 Introduction

After having proposed a new ECHR framework in Chapter 5, this chapter commences with specifying how that framework could provide an effective way to address the complications created by cross-border surrogacy, which were identified in Chapter 2. It is argued, however, that no matter how successful the ECHR framework is going to be if followed, it could help lessen the frequency of cross-border surrogacy but not eradicate it. To illustrate the above, this chapter further assesses, through examination of comparative materials, the rapid expansion of cross-border surrogacy agreements (reproductive tourism) and the adverse effect this could have on international adoption. Given these considerations, particular emphasis is given to the need for an international agreement on surrogacy through the ongoing Parentage/Surrogacy Project, where experts have been summoned to work on the feasibility of an international convention on ‘burning’ issues of surrogacy, such as legal parentage. It is argued, however, that emphasis is wrongly placed on private international law, as given the difficulties of such international agreement on surrogacy and its potential shortcomings, the ECHR framework is still essential and provides a more viable solution.

To achieve this, this chapter is divided into three parts. The first part discusses the solution to the problems of cross-border surrogacy provided by the proposed ECHR framework and the mechanism followed once a claim is successful within the Convention’s system. The second part focusses on the problem of cross-border reproductive treatment and the effect it could have on the success of the proposed ECHR framework. The final part discusses the current Parentage/Surrogacy Project, arguing that even if it were to be successful, a regional solution (through the ECHR framework) is still essential.

6.2 The ECHR Framework as a Solution to Cross-border Surrogacy

It was established in Chapter 5 that, given the current Strasbourg Court’s approach to Article 8 ECHR, it seems highly unlikely that the Court would find a State’s blanket ban on surrogacy to be in violation of the Convention. However, this thesis advanced a new framework for the Court to follow, restructuring, in essence, the ‘necessary in a democratic

society' requirement and giving the principle of proportionality a central role. The result of this proposed ECHR framework would render the blanket prohibition on surrogacy incompatible with Article 8 ECHR and the right to respect for the decision to become a parent, as elaborated in the previous chapter.

Nonetheless, there is a pending question on what the impact of such success would be. The impact is discussed in two levels. First, the mechanism that is triggered once a claim is successful within the Convention's system. Second, the effect this could have on cross-border surrogacy. The reason behind the hypothetical scenario under examination (i.e. whether a potential application before the ECtHR would be successful in declaring the blanket ban on surrogacy as a violation of Article 8 ECHR) are the severe problems cross-border surrogacy causes.¹ The ECHR framework is examined as a potential solution to these problems; therefore, this section demonstrates the way this can occur.

This thesis has repeatedly held that if the Court finds that the blanket ban on surrogacy constitutes a violation of Article 8, States would have to lift the ban and further provide a lawful domestic surrogacy regulation. However, providing a lawful domestic surrogacy regulation is not necessarily a consequence of finding that the blanket ban on surrogacy violates the Convention. Nonetheless, as seen below, the Court additionally expects the State to take measures to cease the violation, which here would be the lawfulness of domestic surrogacy. Even if this would not be the case, this thesis takes the regulation of domestic surrogacy for granted once a Contracting State would lift the blanket ban on surrogacy. This is because, in practice, it seems inconceivable that a State with a blanket prohibition on surrogacy would suddenly allow surrogacy's free reign.

If States lift the ban, but do not regulate surrogacy with no safeguards provided for the stakeholders, it could exacerbate many problems related to surrogacy. This thesis has already considered in Chapter 4 (and elaborates on the next section) the problems potentially arising from surrogacy; the risks for abuses, exploitation, human trafficking. The least expected is that States would regulate surrogacy out of fear that, if the practice is not regulated, it would eventually lead to the occurrence of all the dangers that the same States took into account in order to place a blanket ban on surrogacy in the first place.

¹ Such as rendering children stateless, parentless, etc. See Chapter 2.

This depends on the judgment itself. While the Court could simply declare that the blanket ban is incompatible with the ECHR, it could potentially hold that States need to provide a lawful domestic surrogacy regulation. Therefore, it depends on the Strasbourg Court, how it would formulate the violation of the ECHR and whether it would ask the State to only lift the ban (which means that States would most likely regulate it of their own motion) or to also provide a domestic regulation (which States would have to follow in the way they consider most adequate). To understand the above, it is important to understand what happens after the breach of the Convention is acknowledged by the Court.

Once a breach is established, the individuals whose rights have been violated could be awarded just satisfaction according to Article 41 ECHR, amounting to pecuniary, non-pecuniary and/or costs and expenses remuneration.² This just satisfaction is not a right granted to individuals and it remains at the discretion of the ECtHR to award it or not.³ Although the Court recognises that its decisions will not be confined to a specific case, in particular when the violation stems from general provisions and not individual measures, it holds that the Strasbourg Court does not have the power to annul or repeal national provisions due to the declaratory nature of its judgments.⁴

However, the Court has reiterated that the respondent State is not only required to pay the awarded compensation to the applicants, but to additionally adopt general and/or individual measures to cease the violation and redress, if possible, its effects.⁵ The State is free to choose the way in which it will fulfil its legal obligation under Article 46 ECHR, subject to monitoring by the Committee of Ministers.⁶ Therefore, it is in principle up to the respondent State, i.e. the State before the Court, to choose the way to fulfil its legal obligations, provided that this means is compatible with the findings of the Court.⁷

² Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (7th edn, Oxford University Press 2017) 51.

³ David Harris and others, *Harris, O'Boyle & Warbrick: Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018) 164.

⁴ *Marckx v Belgium* (1979) 2 EHRR 330, para 58.

⁵ *Scozzari and Giunta v Italy* (2002) 35 EHRR 12, para 249. A reminder that respondent State refers to the State brought before the Strasbourg Court.

⁶ *ibid.*

⁷ Rainey, Wicks and Ovey (n 2). Article 46 ECHR stipulates, among others, that States 'undertake to abide by the final judgment of the Court in any case to which they are parties'.

Nonetheless, in exceptional cases, the Court might provide a ‘consequential order’ to the respondent State. Through a consequential order, the judgment will specify the general or individual measures that the respondent State needs to adopt. This, in practice, applies to indeed very limited cases and is exercised with great caution, some examples being *Assanidze v Georgia*,⁸ *Greens and MT v UK*,⁹ *Volkov v Ukraine*.¹⁰ In such cases, the required measures are laid down in the operative part of the decision, which makes them binding for the respondent State.

However, as indicated before, the norm is that the Court, upon finding a violation of the Convention, expects the respondent State to act in the means this State considers most adequate to fulfil its obligation under Article 46 ECHR. Even in cases where there is an indication – not in the operative part – as to what the best means of putting an end to the violation might be,¹¹ this indication is not binding and serves mostly the Committee of Ministers by guiding them as to the proper execution of the judgment.¹² Instead, the consequential order is binding if found in the operative part of the decision,¹³ either through a case-by-case adjudication or found in a pilot judgment.¹⁴

If the respondent State does not act to fulfil its obligation under Article 46 ECHR, the ECtHR has no real enforcement powers. In accordance with Article 46(4) ECHR, the infringement procedure allows the Committee of Ministers to refer a case back to the Strasbourg Court when the respondent State has refused to abide by the Court’s judgment. The Court passed a

⁸ *Assanidze v Georgia* (2004) 39 EHRR 32. The Court held inter alia that the respondent State must secure the applicant's release at the earliest possible date.

⁹ *Greens and MT v UK* (2010) ECHR 1826. In this case, regarding the prisoners’ right to vote, the UK was required to bring forward ‘legislative proposals intended to amend the 1983 Act and, if appropriate, the 2002 Act in a manner which is Convention-compliant’ (operative part).

¹⁰ *Oleksandr Volkov v Ukraine* App no 21722/11 (ECtHR, 9 January 2013). The ECtHR held, among others, that Ukraine should secure the applicant’s reinstatement to his post of a Supreme Court judge.

¹¹ For example, the ‘General measures to prevent similar violations’ section in *Savridin Dzhurayev v Russia* App no 71386/10 (ECtHR, 25 April 2013) para 256 onward.

¹² *Harris and others* (n 3) 172.

¹³ However, there seems to be a disagreement among judges of the Court regarding the legal effect of indications found in the main body and those found in the operative body. Some claim that both have the same legal force: Alice Donald and Anne-Katrin Speck, ‘The European Court of Human Rights’ Remedial Practice and Its Impact on the Execution of Judgments’ (2019) 19 Human Rights Law Review 83, 85.

¹⁴ A pilot judgment, designated as the principal judgment, speedily redresses violations for identical cases based on the same underlying systemic problem, ensures effectiveness and helps avoid congestion due to the massive workload of the ECtHR. More on the pilot judgment procedure: Dominik Haider, *The Pilot-Judgement Procedure of the European Court of Human Rights* (Martinus Nijhoff Publishers 2013).

judgment on an infringement procedure for the first time in May 2019 and found the respondent State to be in violation of Article 46(4) ECHR.¹⁵ Nevertheless, the Court cannot do more than acknowledge the violation and send the case back to the Committee of Ministers. Then, according to the statute of the Council of Europe, there is a possibility of expulsion and suspension from the Council of Europe, if the Committee of Ministers decides so.¹⁶

However, a suspension from the Assembly has been imposed only three times in the past: against Turkey in 1980 and Russia in 2000,¹⁷ and against Russia again in 2014, with its voting rights reinstated only recently.¹⁸ There has been no case of expulsion from the Council of Europe. Thus, the success of the ECHR protection system is dependent upon the political will of the Contracting States.¹⁹ Nevertheless, the issue of expulsion has been recently placed in the centre of discussion, as specific States systematically fail to abide by the ECtHR judgments,²⁰ which also shows the significance of the first ever use of the infringement procedure.

Applying the above to the hypothesis under examination, this would mean that individuals claiming a violation of Article 8 ECHR due to the blanket ban on surrogacy could potentially claim just satisfaction under Article 41 ECHR. It does not seem that the criteria for an exceptional case would be met here, which would call for general or individual measures that would be binding for the Contracting State, apart from the expectation that the State ceases the violation (i.e. lift ban) and ensures it is avoided in the future (i.e. regulate properly). It

¹⁵ Antoine Buyse, 'First Infringement Proceedings Judgment of the European Court: Ilgar Mammadov v Azerbaijan' <http://echrblog.blogspot.com/2019/05/first-infringement-proceedings-judgment.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+blogspot%2FKCGaBs+%28ECHR+BLOG%29> accessed 4 December 2019.

¹⁶ Statute of the Council of Europe, Article 8.

¹⁷ CVCE, 'Withdrawal, Expulsion and Suspension of a Member State of the Council of Europe' <https://www.cvce.eu/obj/withdrawal_expulsion_and_suspension_of_a_member_state_of_the_council_of_europe-en-f9b31f98-f1a1-407c-97ad-7e92363117fd.html> accessed 4 December 2019.

¹⁸ 'Council of Europe Assembly Authorises Russia's Return' *EURACTIV* (25 June 2019) <<https://www.euractiv.com/section/global-europe/news/council-of-europe-assembly-authorises-russias-return/>> accessed 4 December 2019.

¹⁹ Marinella Marmo, 'The Execution of Judgments of the European Court of Human Rights — A Political Battle' (2008) 15 *Maastricht Journal of European and Comparative Law* 235.

²⁰ Kanstantsin Dzehtsiarou and Donal K Coffey, 'Suspension and Expulsion of Members of the Council of Europe: Difficult Decisions in Troubled Times' (2019) 68 *International and Comparative Law Quarterly* 443.

would not, however, dictate the exact regulation to be adopted, e.g. altruistic or commercial surrogacy, traditional or gestational surrogacy, age restrictions, etc.

This follows from case law where the Court has dealt with issues of blanket prohibition of particular practices. In such cases, the Court in finding a violation, in particular of Article 8 ECHR, awarded just satisfaction to the applicants and although indicated that change is needed, it did not set the criteria for such change. For example, in *Oliari and Others v Italy* (same-sex marriage), the Court held that Italy failed to provide the applicants with a specific legal framework allowing for the recognition and protection of their same-sex unions.²¹ Thus, it granted just satisfaction to the applicants, without, however, mentioning what the framework for same-sex relationship recognition should be. In *Hirst v UK*, the Court held that:

In a case such as the present one, where Contracting States have adopted a number of different ways of addressing the question of the right of convicted prisoners to vote, the Court must confine itself to determining whether the restriction affecting all convicted prisoners in custody exceeds any acceptable margin of appreciation, leaving it to the legislature to decide on the choice of means for securing the rights guaranteed by Article 3 of Protocol No. 1.²²

It was only later that the Court gave a consequential order on prisoners' right to vote, when it considered that UK has failed to put an end to this violation and redress its effects.²³ This could be a possible scenario in cases on surrogacy, but one that would come some years after such first decision (condemning the blanket prohibition on surrogacy) would be delivered. Either way, the State could not just limit the remedy to a just satisfaction awarded to those that suffered a violation of their rights. Instead, it would need to take appropriate measures as well in order to avoid committing the same violation in the future.

Given the above, finding that a blanket prohibition on surrogacy violates the conventional rights of the individuals would require the State to change its policy in the area. It would essentially allow for domestic surrogacy, although in the chosen form of the Contracting State condemned for the violation of the ECHR. In other words, the Contracting State would have to provide a domestic framework for surrogacy, allowing its practice in the way it considers it most appropriate, taking into account its national circumstances. This is

²¹ *Oliari and Others v Italy* [2015] ECHR 716.

²² *Hirst v UK (No 2)* (2006) 42 EHRR 41.

²³ *Greens and MT v UK* (n 9).

consistent with the findings above that whenever the ECtHR finds a national practice/legislation/regulation to be in violation of the Convention, it lets domestic authorities to address the issue, as it is not the duty of the Court to suggest the exact framework the Contracting State has to adopt. Instead, it is primarily the States' responsibility under Article 1 ECHR to protect the rights and freedoms enshrined in the Convention.²⁴ If the State would fail to abide by its obligation to put an end to this violation, the ultimate measure taken against it could be an expulsion from its Council of Europe membership.

An immediate effect of lawful domestic surrogacy would be that citizens of the specific Contracting State would no longer need to travel to foreign jurisdictions to undertake surrogacy. This option would appeal to many intended parents who wish to procreate through surrogacy, but do not have the financial resources to travel abroad. In this sense, it will also undo the random inequality generated between domestic and cross-border surrogacy discussed in Chapter 2. To summarise briefly this position, due to the policy of registering children born abroad through surrogacy in some Contracting States, there is a current mismatch between domestic and cross-border surrogacy. This results in an inequality between those who can afford travelling abroad to undergo surrogacy and those who cannot.

Lawful domestic surrogacy would additionally help avoid the problems resulting from cross-border surrogacy. For example, there is usually a conflict between different national rules on filiation/legal parenthood, which can cause serious problems to children born through cross-border surrogacy, such as being stateless, parentless, etc.²⁵ It was also mentioned in Chapter 2 how legalising the effects of cross-border surrogacy was not a proper solution. This is because sometimes such solution only applies to those who can establish a genetic link or it might be too late for judges to exercise any meaningful control (e.g. on potential abuses that took place in the surrogacy arrangement), as the matter is *fait accompli*.

Finally, although the hypothetical judgment of the ECtHR condemning the blanket prohibition on surrogacy would address a specific State, this could serve as an example and precedent for the rest Contracting States that prohibit surrogacy, indicating that they would need to amend their practice/regulation/legislation. This has been observed indeed in cases of cross-border surrogacy. When France was condemned to register the children born through

²⁴ Rainey, Wicks and Ovey (n 2) 51.

²⁵ Chapter 2 (2.3).

cross-border surrogacy, soon after Germany and Spain followed suit by changing their policies.²⁶ Therefore, it is argued that if the Court were to find a violation of the ECHR based on the blanket ban on surrogacy for one State, other States with similar regimes would lift the blanket ban on surrogacy too.

It is helpful to repeat here the reason why the ECHR was selected as an adequate framework to provide a solution to the current cross-border surrogacy problem in Europe. The ECHR has played a crucial role in shaping human rights protection in Europe throughout its existence. The Strasbourg Court through the dynamic and evolutive interpretation of the Convention has been placed at the foreground of human rights protection as probably the most important non-state actor in the region.²⁷ States are, by and large, cooperating with the Strasbourg Court and they frequently bring changes to domestic law based on the ECHR and the Court's rulings of their own motion. Furthermore, the power of the Court seems to grow with time, as Protocol 16 and the advisory opinion mechanism proves.²⁸

The influence the Court exerts in Europe can be observed even in the topic of surrogacy. As discussed previously, the ECtHR ruled that it is in the best interests of the children born through cross-border surrogacy to be registered as citizens of their intended parents' home country. This has determined the way cross-border surrogacy is dealt with at European level. In addition, for positive changes brought by the State's own motion, a recent example is the parental order change in the UK, which was expanded to single applicants as a result of the incompatibility of the previous regime with Article 8 and Article 14 ECHR.²⁹ Finally, the important role of the Court in surrogacy can be observed as well through the first request and subsequent advisory opinion emitted in April 2019.³⁰

Nevertheless, there are still potential shortcomings from such framework that allows for domestic surrogacy. While there are remaining considerations of accessibility based on

²⁶ *ibid.*

²⁷ The role of the European Court of Human Rights has been significant in developing not only regional, but international law as well. For more: JG Merrills, *The Development of International Law by the European Court of Human Rights* (2nd edn, Manchester University Press 1993).

²⁸ Greater elaboration of these points can be found in Chapter 2 (2.4).

²⁹ This was the finding of Justice Munby J in *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), which triggered the remedial order to change previous *status quo*.

³⁰ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother (ECtHR, Grand Chamber, 10 April 2019).

financial recourses,³¹ the main issue highlighted here is the phenomenon of cross-border surrogacy in jurisdictions where domestic surrogacy is performed lawfully. According to a report carried out by ‘Families Through Surrogacy’, UK and France are on top of the list of countries with intended parents travelling abroad to pursue surrogacy.³² As mentioned throughout this thesis, while surrogacy is unlawful in France, it is lawful in the UK. Even outside the Contracting States of the ECHR, Israel is another State where surrogacy is lawful, but tops the above list of receiving States.³³ It becomes clear that rendering domestic surrogacy lawful does not guarantee that cross-border surrogacy is non-existent. This is problematic taking into account the aforementioned inconveniences cross-border surrogacy can create for intended parents and resulting children.

The above considerations show that allowing domestic surrogacy through the proposed ECHR framework would mitigate cross-border surrogacy, but it would not necessarily eradicate the phenomenon. There are two main elements identified by this thesis as responsible for this: the hurdles that intended parents might face as a result of the national framework and the cost of domestic surrogacy. This has been exacerbated by globalisation, as it is now much easier for individuals to travel from one jurisdiction to another and even receive treatment abroad. The aforementioned are examined in the next section under cross-border reproductive treatment/reproductive tourism within the context of medical tourism.

6.3 Cross-border Reproductive Treatment

Medical tourism occurs when individuals travel from one jurisdiction to another to receive treatment that is not available or is unlawful in their own jurisdiction, or simply because it is easier to receive the treatment in the destination jurisdiction or it is more affordable.³⁴ In this sense, it differs from ‘international medical travel’, where citizens from less developed jurisdictions would travel to jurisdictions providing higher medical treatments that were

³¹ This refers to, among others, the high cost of IVF cycles which are required for surrogacy even at domestic level: Shaun D Pattinson, *Medical Law and Ethics* (5th edn, Sweet & Maxwell 2017) 275. Nonetheless, this consideration goes beyond the scope of this thesis.

³² ‘International Trends in Utilisation of Surrogacy’ report of ‘Families Through Surrogacy’ as discussed in Kirsty Horsey, ‘Surrogacy in the UK: Further Evidence for Reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform’ (Surrogacy UK, December 2018) 30.

³³ *ibid.*

³⁴ On different definitions regarding medical tourism: Masoud Lajevardi, ‘A Comprehensive Perspective on Medical Tourism Context and Create a Conceptual Framework’ (2016) 20 *Journal of Tourism, Hospitality and Sports* 7, 11.

unavailable in their home country.³⁵ When it comes to assisted reproductive technologies (ART), the phenomenon of medical tourism is called reproductive tourism. This thesis prefers the term ‘cross-border reproductive treatment’.³⁶

In this thesis, cross-border reproductive treatment within the context of surrogacy has been examined in Chapter 2 in the form of cross-border surrogacy originating from Contracting States that prohibit surrogacy. However, as mentioned in the previous section, cross-border reproductive treatment can originate even from Contracting States where surrogacy is performed lawfully. The phenomenon can be attributed to the complications generated by the national framework, the cost of domestic surrogacy, the quality of the treatment, etc. The above are supported by surveys where intended parents have listed the reasons why they opted for cross-border surrogacy, which are elaborated in the next subsection. These considerations are crucial for the efficiency of the ECHR framework proposed by this thesis, as it shows that there is more to be done than merely lifting the blanket prohibition of surrogacy.

Furthermore, it was established in Chapter 2 that the phenomenon of individuals traveling from one jurisdiction to another to undertake surrogacy has risen in the last few years. It is useful to recall that there is a rise in the number of both cross-border surrogacy arrangements and clinics/agencies that offer surrogacy treatments.³⁷ Although there is a speculation that the majority of these surrogacy arrangements are commercial and gestational in nature, there might also be an increase in ‘altruistic’ surrogacy as well. Notwithstanding the lack of official data, it can be observed that States, such as Greece, have attracted cross-border reproductive treatment due to their permissive – depending on the type of applicant – character.³⁸ In this sense, recent developments where ‘traditional’ surrogacy destinations close their doors to

³⁵ Michael D Horowitz, Jeffrey A Rosensweig and Christopher A Jones, ‘Medical Tourism: Globalization of the Healthcare Marketplace’ (2007) 9 *MedGenMed: Medscape general medicine* 33.

³⁶ On the controversy on the term ‘reproductive tourism’, see Chapter 2 (2.3).

³⁷ HCCH Permanent Bureau ‘A Preliminary Report on the Issues Arising from International Surrogacy Arrangements’ (Prel Doc No 10, March 2012) 8.

³⁸ While there are no official data, a study conducted in 2017, based on the number of judicial authorisations on surrogacy in Greece, shows that there are indeed non-Greek intended mothers undertaking surrogacy in Greece. However, most of them were reported as residing in Greece, while the great majority of intended mothers are still Greek citizens. Interestingly, there is an increase of foreign citizens residing in Greece acting as surrogates, which are in fact the majority of surrogates: Pantelis Ravdas, ‘Surrogate Motherhood in Greece: Statistical Data Derived from Court Decisions’ (2017) 3 *Bioethica* 40.

foreigners do not essentially mean that cross-border surrogacy would vanish.³⁹ It seems as if there are always other destinations gaining popularity,⁴⁰ which further shows the limitations of banning domestic surrogacy and the need for a multilateral approach.

The reasons why cross-border reproductive treatment and international surrogacy should be avoided were discussed in detail at the beginning of this thesis. The main grounds presented in Chapter 2 referred to the difficulties it creates for resulting children and intended parents as well as domestic authorities, once surrogacy has been carried out abroad. However, cross-border reproductive treatment through surrogacy can create additional problems that are related to other practices. In particular, after considering the main reasons behind cross-border surrogacy in States where domestic surrogacy is lawful, this section considers the repercussions of cross-border surrogacy to adoption. Following these considerations on why the ECHR framework alone is not enough and how surrogacy can potentially affect adoption, it is then discussed whether there is a need for international agreement on surrogacy and the feasibility of such agreement.

6.3.1 Main Reasons Behind Cross-border Reproductive Treatment in Surrogacy

There have been few surveys carried out in Europe asking intended parents, coming from States where surrogacy is lawful, why they travel abroad for surrogacy. This is attributed mainly to the fact that most European intended parents that undertake cross-border surrogacy come from States where surrogacy is unlawful.⁴¹ Hence, the obvious reason they undertake cross-border surrogacy is the unavailability of domestic surrogacy. For States where surrogacy is lawful, the UK is a key example in Europe, with several surveys focusing on the intended parents and the reasons they might go abroad for surrogacy.

A survey conducted recently in the UK (2018) showed that intended parents choose a specific surrogacy destination to undertake cross-border surrogacy because of the pre-birth protection

³⁹ Examples of surrogacy destinations closing their doors to foreigners are India, Thailand, Nepal, etc.

⁴⁰ Destinations gaining popularity seem to be Ukraine, Georgia, Russia: Sarah Elizabeth Richards, 'Locked Out Of Asia, Americans Are Turning To Eastern Europe To Hire Gestational Surrogates' *HuffPost* (25 July 2017) <https://www.huffingtonpost.co.uk/entry/surrogacy-ukraine-russia-georgia-czech-republic_us_595fa776e4b02e9bdb0c2b47> accessed 4 December 2019.

⁴¹ These can be seen in surveys on cross-border surrogacy: Paul Beaumont and Katarina Trimmings, *International Surrogacy Agreements* (Hart Publishing 2013) 468. Similarly: 'International Trends in Utilisation of Surrogacy' report of 'Families Through Surrogacy' in Horsey (n 32).

found abroad, to establish themselves as legal parents of the resulting child or have their name on the birth certificate and the availability of surrogates.⁴² The survey conducted by the same people in 2015 showed that the most cited reasons on why a surrogacy destination was chosen by intended parents were: certainty, availability of surrogates, simplicity of entering a surrogacy arrangement and ethical reasons.⁴³ Another survey undertaken in the UK shows that the reasons behind cross-border surrogacy are the lack of a legal framework, shortage of surrogates, lack of professional services, informal matching methods.⁴⁴

Surveys that focus on cross-border reproductive treatment and the reasons why patients seek reproductive treatment abroad have identified similar trends. A survey conducted within six European States showed that the main factors leading to cross-border reproductive care were legal reasons, access difficulty, better quality of treatment and previous failure of treatment in the home country.⁴⁵ In a similar vein, in an international online survey of patients in collaboration with patient support groups in Australia and Canada, the main reasons cited were the availability of gamete donors, the success rates of the treatment, the short waiting time, the cost of the treatment and the unavailability of the treatment in their home country.⁴⁶

The above information is not a quest to exhaust available surveys and find the ‘truth’ behind intended parents traveling abroad to undergo surrogacy when this is lawful in their home country. In contrast, the aforementioned surveys serve the purpose of grouping the different reasons that might drive intended parents to seek cross-border surrogacy, in an attempt to examine closer the potential shortcomings of such practice. Based on the above, the main reasons behind cross-border reproductive treatment where domestic surrogacy is lawful are considered to be: the complications generated by the national framework, the cost of domestic surrogacy and the quality of the treatment.⁴⁷

⁴² Horsey (n 32) 39.

⁴³ Kirsty Horsey, ‘Surrogacy in the UK: Myth Busting and Reform. Report of the Surrogacy UK Working Group on Surrogacy Law Reform’ (Surrogacy UK, November 2015) 24.

⁴⁴ Vasanti Jadva, Helen Prosser and Natalie Gamble, ‘Cross-Border and Domestic Surrogacy in the UK Context: An Exploration of Practical and Legal Decision-Making’ (2018) *Human Fertility* 1, 6.

⁴⁵ Françoise Shenfield and others, ‘Cross Border Reproductive Care in Six European Countries’ (2010) 25 *Human Reproduction* 1361, 1364.

⁴⁶ Eric Blyth, ‘Fertility Patients’ Experiences of Cross-Border Reproductive Care’ (2010) 94 *Fertility and Sterility* e11, e13.

⁴⁷ This is additionally consistent with the reasons identified in Chapter 2 (2.3).

Starting with the difficulties at national level, the phenomenon of citizens seeking treatment abroad, although domestic surrogacy is lawfully performed, can be attributed to the complications arising from domestic surrogacy due to the national framework followed. Typical hurdles that intended parents have to face at national level are related to questions of obtaining legal parenthood, being granted parental rights/parental responsibility, issuing a birth certificate, get involved in a legal battle, etc.

UK domestic surrogacy is an example of a national framework that causes the above difficulties. To give an overview of this framework, surrogacy is lawful in the UK,⁴⁸ but the agreement is not enforceable.⁴⁹ This means that if the surrogate changes her mind, she might not surrender the child or even if she does, she can still ‘drag’ the intended parents into a legal battle. This is because motherhood is established by birth,⁵⁰ so the surrogate is the legal mother of the child and her husband or partner, if any, is the legal father of the child,⁵¹ unless they did not consent, which could leave the child fatherless.

The way intended parents in the UK can obtain the legal parenthood of the resulting child is through a parental order or through adoption. To apply for a parental order, the applicant or one of the applicants, in case of a couple, should have provided their gametes for the creation of the embryo.⁵² There is a time limit of six months from the child’s birth for intended parents to apply⁵³ and the court must be satisfied that any existing legal parent has consented freely and agreed unconditionally to the making of the order.⁵⁴ Commercial surrogacy is illegal, but reasonable expenses can be authorised retrospectively by the courts.⁵⁵ It is useful to repeat that there is an ongoing project undertaken jointly by the Law Commission of England and Wales and the Scottish Law Commission to change surrogacy regulation in the UK.⁵⁶

⁴⁸ Surrogacy Arrangements Act 1985.

⁴⁹ *ibid* s.1A.

⁵⁰ Human Fertilisation and Embryology Act 2008, s.33.

⁵¹ *ibid* s.35 and s.36.

⁵² *ibid* s.54(1)(b) and s.54A(1)(b). S.54A was introduced in 2019, following a remedial order due to the incompatibility of the previous discrimination against single intended parents with the ECHR: see (n 29).

⁵³ *ibid* s.54(3) and s.54A(2).

⁵⁴ *ibid* s.54(6) and s.54A(5).

⁵⁵ *ibid* s.54(8) and s.54A(7).

⁵⁶ Law Commission and Scottish Law Commission, *Building Families through Surrogacy: A New Law. A Joint Consultation Paper* (Law Com CP No 244/Scot Law Com DP No 167, 2019).

This has resulted in many UK citizens seeking surrogacy abroad, thus explaining the figures of Families Through Surrogacy mentioned in the previous section of this chapter.⁵⁷ A recent case brought before the British courts is *XX v Whittington Hospital NHS Trust*.⁵⁸ Due to clinical negligence failing to detect cancer of the cervix in time, Ms X became infertile, as it was no longer possible to receive treatment through fertility sparing surgery. Before receiving treatment for cancer, Ms X extracted and cryopreserved some of her eggs. She then went to California, USA, with her partner to try commercial surrogacy. This is a ground-breaking case, as the Court of Appeal, overturning the first instance ruling,⁵⁹ awarded recovery of the commercial surrogacy costs carried out in California, changing the current position under English law.⁶⁰

This case is crucial for the purposes of this thesis as well, because the Court of Appeal accepted the major advantages of having a surrogacy agreement in California compared to having it in the UK. Namely, in California, surrogacy is well-established, the surrogacy arrangement is binding, the intended parents can obtain a pre-birth order from the court regarding the legal status of the child, while the intended parents can choose the surrogate and not vice versa. It is easy to see the differences with the regime in the UK, as described in the previous paragraph, as, among others, the agreement in the UK is not enforceable, the legal mother of the child is the surrogate and there is a possibility of a legal battle arising between the intended parents and the surrogate. The case is now pending in the Supreme Court (UKSC) and it is interesting to see whether the UKSC will overturn or uphold the appeal court ruling.⁶¹

Notwithstanding the advantages of cross-border surrogacy in terms of certainty for legal parenthood, there are other hurdles that intended parents could potentially face through cross-border surrogacy. This is mostly due to the time spent abroad until it is possible to bring the child to the UK,⁶² the danger in the meantime for the child to be stateless,⁶³ applying for a

⁵⁷ ‘International Trends in Utilisation of Surrogacy’ report of ‘Families Through Surrogacy’, Horsey (n 32).

⁵⁸ *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832.

⁵⁹ *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB). In the first instance, Sir Robert Nelson awarded recovery only for reasonable expenses resulting from a surrogacy agreement.

⁶⁰ In *Briody v St Helens and Knowsley Area Health Authority* [2001] EWCA Civ 1010, the Court of Appeal rejected such claim.

⁶¹ The hearing date is set for 16 and 17 December 2019.

⁶² *Re X (Foreign Surrogacy: Child’s Name)* [2016] EWHC 1068 (Fam).

⁶³ *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam).

parental order,⁶⁴ receiving parental responsibility,⁶⁵ etc. It is also important to clarify that cross-border surrogacy is not the norm in the UK. There is this myth around cross-border commercial surrogacy being the norm for intended parents in the UK, which is not supported by evidence.⁶⁶

Similar considerations can be found in other jurisdictions where domestic surrogacy is lawful, but intended parents may still opt for cross-border surrogacy. Israel, for example, requires that both intended parents and surrogate share the same faith,⁶⁷ which decreases significantly the number of ‘compatible’ surrogates/donors.⁶⁸ In addition, it is not accessible for same-sex couples or single fathers.⁶⁹ This can explain why Israel is in the top list of States with intended parents travelling abroad and undertaking cross-border surrogacy.⁷⁰ Likewise, in Greece, the treatment is only available to single women or opposite-sex couples, excluding single men and same-sex couples.⁷¹ There are no current data suggesting that Greeks turn to cross-border surrogacy.⁷² Quite the opposite. Greece seems to be becoming now more popular among cross-border surrogacy destinations.⁷³ Nonetheless, it could be the case in the future, if Greece does not change its legislation.⁷⁴ Lastly, where commercial surrogacy is not available and advertising surrogacy is illegal, this has been associated with a shortage of available surrogates (in domestic surrogacy),⁷⁵ hence leading intended parents abroad.

⁶⁴ *Re B (Foreign Surrogacy)* [2016] EWFC 77.

⁶⁵ *Re A (Foreign Surrogacy - Parental Responsibility)* [2016] EWFC 70.

⁶⁶ Horsey (n 32) 59.

⁶⁷ June Carbone, ‘Law, Politics, Religion, and the Creation of Norms for Market Transactions’ (2005) 39 *Family Law Quarterly* 789, 797.

⁶⁸ Ruth Levush, ‘Israel: Reproduction and Abortion: Law and Policy’ (The Law Library of Congress, Global Legal Research Center, February 2012) <<https://www.loc.gov/law/help/il-reproduction-and-abortion/israel.php>> accessed 4 December 2019.

⁶⁹ Jennifer Willows, ‘Israel Rejects Bill to Extend Surrogacy to Same-Sex Couples’ *BioNews* (5 November 2018) <https://www.bionews.org.uk/page_139459> accessed 4 December 2019.

⁷⁰ ‘International Trends in Utilisation of Surrogacy’ report of ‘Families Through Surrogacy’, Horsey (n 32).

⁷¹ Greek courts have been persistently denying applications for pre-authorisation submitted by male intended parents. By way of illustration: Judgment No 3357/2010 of the Court of Appeal of Athens, Greece.

⁷² Eleni Zervogianni, ‘Greece’ in Claire Fenton-Glynn, Jens M Scherpe and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia 2019) 147, 161-163.

⁷³ The requirement that both women be domiciled in Greece changed in 2014 and it is now acceptable if one of the two is either domiciled or a temporary resident in Greece. For more: Chapter 2 (2.2).

⁷⁴ This has already been considered in Chapter 3, under Article 14 ECHR and the potential discrimination resulting from specific domestic surrogacy regulation.

⁷⁵ Australian Human Rights Commission, ‘Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements’ (Australian Human Rights Commission Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, February 2016) 14.

The UK framework and other jurisdictions were briefly presented to exemplify complications at national level that might push intended parents to seek surrogacy abroad. This in turn demonstrates that having a framework that allows for domestic surrogacy on its own does not necessarily eradicate the phenomenon of cross-border surrogacy, although it certainly lessens its frequency.⁷⁶ The above considerations do not necessarily mean that all the limitations imposed by States on domestic surrogacy must be abolished. However, they do contribute to the phenomenon of cross-border surrogacy.

Another important factor for intended parents to seek surrogacy abroad is the cost of domestic surrogacy. When surrogacy was labelled as a booming industry in the early 2010s, it was mostly destinations in Asia that attracted intended parents from developed countries.⁷⁷ Nowadays, some of these ‘traditional’ surrogacy destinations with more affordable prices, such as India, Thailand and Nepal, have closed their doors to foreigners, as discussed in Chapter 2.⁷⁸ Nonetheless, as mentioned previously in this chapter, there seems to be no ‘shortage’ of cross-border surrogacy destinations. Examples of current attractive surrogacy destinations due to lower prices are Russia, Ukraine, Georgia and Greece, as demonstrated below.⁷⁹

Accordingly, although domestic surrogacy might be lawful, prices can be prohibitive, leading intended parents abroad.⁸⁰ There are online websites helping intended parents to calculate approximately the cost of surrogacy in different destinations. Babygest is one of them and, according to the information in their web pages, the approximate costs of surrogacy in what they call ‘best countries’ are the below.⁸¹

⁷⁶ The fact that cross-border surrogacy is not the norm in the UK is a strong evidence of this (n 66).

⁷⁷ The terms ‘developing’ versus ‘developed’ countries are contested, but used by this thesis for convenience reasons, as most readers are familiar with it: Chapter 4 (4.3) footnote 160.

⁷⁸ Chapter 2 (2.2).

⁷⁹ It is important to repeat that although prices are lower, there might be other conditions that restrict access to surrogacy in these destinations, such as access criteria to the treatment (age, sex, civil status, etc).

⁸⁰ Frequently such stories attract the media attention. For example: Allison Herrera, ‘In Ukraine, Surrogacy Is Legal, but Some Ask If It’s Exploitation’ *PRI* (29 June 2018) <<https://www.pri.org/stories/2018-06-29/ukraine-surrogacy-legal-some-ask-if-its-exploitation>> accessed 4 December 2019.

⁸¹ Natalia Álvarez and Sandra F ‘International Surrogacy – Laws & Options for Surrogacy Abroad’ <<https://babygest.com/en/surrogacy-abroad/>> accessed 4 December 2019.

How Much Is Surrogacy?

The cost of gestational surrogacy in a country where it is legal depends on many factors. If we take all of them into account, we will be able to get a detailed cost estimate.

United States	\$120.000 - \$180.000
Greece	\$85.000 - \$96.000
Canada	\$113.000 - \$125.000
Ukraine	\$56.000 - \$68.000
Russia	\$68.000 - \$80.000
Georgia (Europe)	\$63.000 - \$68.000

GENERATE REPORT ↻

Figure 3. Surrogacy Costs by Babygest.

Another surrogacy website, called Sensible Surrogacy, provides an approximate cost of surrogacy with and without IVF, as shown in the figure (Figure 4) below. It also explains that there are many things to take into account when it comes to the cost of surrogacy, such as clinical fees, compensation for the surrogate and potential donors, legal fees, fertility medication, as well as travel expenses.⁸²

⁸² Bill Houghton 'How Much Does Surrogacy Cost?' <<https://www.sensible-surrogacy.com/surrogacy-costs/>> accessed 4 December 2019.

	Surrogacy Cost w/out IVF	Surrogacy Cost with IVF
United States (standard)	\$112,000 USD	\$146,500 USD
United States (negotiated)	\$85,000 USD	\$95,000 USD
United States (independent)	\$70,000 USD	\$80,000 USD
Ukraine	\$40,000 USD	\$49,000 USD
Colombia	\$42,000 USD	\$50,000 USD
United Kingdom	\$55,000 USD	\$85,000 USD
Canada	\$50,000 USD	\$80,000 USD
Kenya	\$39,900 USD	\$45,000 USD

Figure 4. Surrogacy Costs by Sensible Surrogacy.

Although the prices do not coincide exactly with the ones from Babygest, they are indicative and help intended parents to have an idea of the approximate cost of surrogacy in some of the most popular surrogacy destinations. The cost is also eye-opening in terms of surrogacy expenses, which could potentially lead citizens of States with higher prices to those with lower. A clear example is surrogacy in the USA, as shown above. Undertaking surrogacy in the USA could potentially mean paying a price three times higher than surrogacy expenses in other jurisdictions, which could explain the potential preference of some US intended parents towards cross-border surrogacy.

This additionally means that it is often the case, depending on the destination State, that cross-border surrogacy is more costly than domestic surrogacy. This is clearly the case of UK, but it was already shown why intended parents from the UK might opt for more expensive but more surrogacy friendly jurisdictions.

Lastly, the quality of treatment is another factor identified as a motive for cross-border reproductive care treatments. Although this factor has been documented less in the field of

surrogacy, it is still possible to drive intended parents to another jurisdiction.⁸³ This would essentially relate to the quality of the healthcare clinics,⁸⁴ the success rates of the IVF/surrogacy cycles,⁸⁵ even the interpersonal engagement of the medical staff.⁸⁶

These reasons behind cross-border reproductive treatment, originating from States where surrogacy is lawful, demonstrate that other factors beyond the lawfulness of surrogacy can lead to its international phenomenon. It further shows that States, once lifting the blanket ban on surrogacy and making domestic surrogacy lawful, need to take into consideration all the above if they are willing to bring an actual change and eliminate cross-border surrogacy. Ultimately, this indicates that factors beyond the ECHR framework are essential to secure an effective policy against cross-border reproductive treatment in the field of surrogacy, probably in the shape of an international agreement.

6.3.2 Repercussions of Cross-border Surrogacy on Adoption

The repercussions of cross-border surrogacy have been extensively discussed in the second chapter, while exploitation and commodification in terms of surrogacy were also presented in the fourth chapter. However, there is an additional concern that cross-border reproductive surrogacy treatment can be problematic with regard to adoption. While adoption is regulated at international level, there is no convention in the field of surrogacy. This evokes questions of potential abuse and fears of circumventing national or international adoption law. Furthermore, since the rise of cross-border surrogacy, there is an existing concern that international adoption rates will drop.

The reason why similarities to adoption are considered is because they further show that the ECHR framework alone is not sufficient to tackle issues arising from cross-border surrogacy. This is due to the nature of the ECHR framework, operating at national level and advocating for a lawful domestic surrogacy. Therefore, it is shown below how this adds to the need for

⁸³ Emily Jackson and others, 'Learning from Cross-Border Reproduction' (2017) 25 *Medical Law Review* 23.

⁸⁴ On the importance of the quality and safety standards of a clinic: Anna Pia Ferraretti and others, 'Cross-Border Reproductive Care: A Phenomenon Expressing the Controversial Aspects of Reproductive Technologies' (2010) 20 *Reproductive BioMedicine Online* 261.

⁸⁵ Factors that lead to higher success rates highlighted in: Kiran M Perkins and others, 'Trends and Outcomes of Gestational Surrogacy in the United States' (2016) 106 *Fertility and Sterility* 435. On the importance of success rates for the cross-border surrogacy choice: Jadva, Prosser and Gamble (n 44).

⁸⁶ Jackson and others (n 83) 44.

an international framework on surrogacy. To elaborate on the above, this section is divided into three parts. First, there is a brief explanation of the international adoption scenery. Second, there is a consideration of how surrogacy and adoption are inter-linked. Third, it is demonstrated how this can be harmful to international adoption.

As with surrogacy, adoption is another significant option for involuntary childlessness and has been a major way of creating families in the past, in particular when reproductive technologies were not so advanced.⁸⁷ Apart from domestic adoption, international adoption gained momentum, in particular as a response to the increased number of war orphans resulting from World War II, the Korean and the Vietnam War.⁸⁸ Due to its unregulated nature in the past, there were multiple human rights abuses recorded in intercountry adoption and additional concerns of child trafficking.⁸⁹

To tackle some of the issues related to international adoption, the Hague Conference on Private International Law undertook the task of working towards an international agreement. As a result, there is an existing intercountry adoption Convention (Hague Adoption Convention) with 101 States as Contracting Parties.⁹⁰ The Hague Adoption Convention aims to protect children and families from ‘illegal, irregular, premature or ill-prepared’ international adoptions.⁹¹ It functions through national Central Authorities that are placed in order to ensure cooperation between the Contracting Parties and limit potential abuses, with a focal point being that the best interests of the child are paramount.⁹² A crucial aspect of this multilateral instrument is that it does not unify adoption law but rather private international law rules on adoption.⁹³

⁸⁷ Richard F Storrow, ‘Marginalizing Adoption through the Regulation of Assisted Reproduction’ (2006) 35 *Capital University Law Review* 479.

⁸⁸ Judith Masson, ‘Intercountry Adoption: A Global Problem or a Global Solution?’ (2001) 55 *Journal of International Affairs* 141, 142.

⁸⁹ Damien Ngabonziza, ‘Inter-Country Adoption: In Whose Best Interests?’ (1988) 12 *Adoption & Fostering* 35, 37.

⁹⁰ Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption.

⁹¹ ‘HCCH Adoption Section’ <<https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption>> accessed 4 December 2019.

⁹² ‘Outline - Hague Intercountry Adoption Convention’ (January 2013) <<https://assets.hcch.net/docs/e5960426-2d1b-4fe3-9384-f8849d51663d.pdf>> accessed 4 December 2019.

⁹³ HCCH Permanent Bureau ‘The Implementation and Operation of the 1993 Intercountry Adoption Convention: Guide to Good Practice’ <<https://assets.hcch.net/docs/bb168262-1696-4e7f-acf3-fbbd85504af6.pdf>> accessed 4 December 2019.

Although international adoption can still be a business worth millions of dollars that gives rise to human rights violations,⁹⁴ the safeguards provided by the Hague Adoption Convention have significantly helped to lessen such abuses.⁹⁵ Cross-border surrogacy, however, can pose a significant threat to this, as it can potentially lead to the circumvention of the intercountry adoption safeguards. It is, therefore, important to understand where the two are connected and how this can be problematic for adoption.

Access to ARTs and surrogacy have been significantly facilitated in recent years and gained popularity for ‘treating’ involuntary childlessness, whereas adoption statistics show a fall in intercountry adoption numbers. Although official data are difficult to find, it is estimated that the numbers of cross-border surrogacy are rising.⁹⁶ For adoption, according to a study undertaken by Professor Selman and published in the Hague Conference on Private International Law website, there were 45,483 children adopted through intercountry adoption in 2004, which dropped to 28,831 in 2010 to finally fall to 9,387 children adopted in 2017.⁹⁷

The rise of surrogacy and fall of adoption could be attributed to the different advantages of surrogacy over adoption. For instance, the possibility of establishing a genetic link with their offspring is valued by many individuals or couples.⁹⁸ Nonetheless, it should not be overlooked that surrogacy does not necessarily entail the genetic link of one of the intended parents with the child.⁹⁹ An additional concern that affects the decision of prospective parents is that through adoption they might not be ready to deal with the existing children’s past experiences, or depending on the age of the adopted child they do not want to miss the early infant stage.¹⁰⁰

⁹⁴ Claire Fenton-Glynn, *Children’s Rights in Intercountry Adoption: A European Perspective* (Intersentia 2014).

⁹⁵ On some of the changes brought to intercountry adoption after the Hague Adoption Conference: HCCH Permanent Bureau ‘1993 Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption. 25 Years of Protecting Children in Intercountry Adoption’ (1993-2018) <<https://assets.hcch.net/docs/ccbf557d-d5d2-436d-88d6-90cddb78262.pdf>> 17, accessed 4 December 2019.

⁹⁶ HCCH Permanent Bureau Prel Doc No 10 (n 37).

⁹⁷ Peter Selman, ‘Global Statistics for Intercountry Adoption: Receiving States and States of Origin 2004-2017’ (November 2018) <<https://assets.hcch.net/docs/a8fe9f19-23e6-40c2-855e-388e112bf1f5.pdf>> accessed 4 December 2019.

⁹⁸ Saskia Hendriks and others, ‘The Importance of Genetic Parenthood for Infertile Men and Women’ (2017) 32 *Human Reproduction* 2076.

⁹⁹ Chapter 2 (2.1).

¹⁰⁰ Sophia Fantus and Peter A Newman, ‘Motivations to Pursue Surrogacy for Gay Fathers in Canada: A Qualitative Investigation’ [2019] *Journal of GLBT Family Studies* 1, 8.

Furthermore, the adoption process in many countries is complicated, highly bureaucratic and the waiting time is long.¹⁰¹ This clearly varies from country to country and depends on each domestic regulation.¹⁰² Multiple campaigns have been launched throughout the past 10 years aiming to fight bureaucracy and long waiting times for adoption.¹⁰³ Adding to the above the exclusion of certain people from adoption,¹⁰⁴ this has created issues of access to adoption.¹⁰⁵ The aforementioned factors can drive prospective parents away from adoption towards alternative ways of parenthood, one of which is surrogacy. This was ‘predicted’ in the early 2010s¹⁰⁶ and is now supported by different studies. For example, a study on the motivations behind gay fathers choosing surrogacy showed that surrogacy was seen as a safer, in terms of certainty, pathway to parenthood, while adoption was perceived as an unnecessarily time-consuming process that could eventually prove unfruitful.¹⁰⁷

It should be noted that access to surrogacy, as discussed in different parts of this thesis, does as well vary from jurisdiction to jurisdiction. The difference, however, is that in surrogacy, due to the potential genetic link of the intended father with the child, there is a possibility of establishing legal parentage.¹⁰⁸ Therefore, it is perceived by many male same-sex couples or male individuals as a more viable option than adoption.¹⁰⁹ Also, the way international surrogacy and intercountry adoption come into play is through cross-border reproductive treatment. Problems of domestic regulation on adoption and surrogacy might lead to seeking

¹⁰¹ Masson (n 88) 149.

¹⁰² For example, in Spain the waiting time is too long: ‘Six-Year Waiting List to Adopt Children at Home and Abroad’ *thinkSPAIN* (22 October 2017) <<https://www.thinkspain.com/news-spain/29676/six-year-waiting-list-to-adopt-children-at-home-and-abroad>> accessed 4 December 2019.

¹⁰³ One such campaign was ‘Both Ends Burning’: Craig Juntunen, *Both Ends Burning: My Story of Adopting Three Children from Haiti* (Outskirts Press Inc 2009). In 2017, this was renamed to ‘Both Ends Believing’.

¹⁰⁴ Many States close the door of adoption to same-sex couples: International Lesbian, Gay, Bisexual, Trans and Intersex Association: Lucas Ramón Mendos, ‘State-Sponsored Homophobia 2019’ (ILGA, March 2019) <https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019.pdf> accessed 4 December 2019.

¹⁰⁵ Elizabeth Bartholet, ‘International Adoption: The Child’s Story’ (2007) 24 *Georgia State University Law Review* 333, 371-376.

¹⁰⁶ Peter Selman, ‘The Global Decline of Intercountry Adoption: What Lies Ahead?’ (2012) 11 *Social Policy and Society* 381, 392.

¹⁰⁷ Fantus and Newman (n 100).

¹⁰⁸ Chapter 2 (2.3).

¹⁰⁹ This is still problematic, however, and could be considered discriminatory for women that provide their genetic material to the surrogacy arrangement, mainly due to the Latin maxim *mater semper certa est* that most States follow. This means that motherhood is established by birth; therefore, the surrogate would be the legal mother and there is no possibility to establish motherhood based on the genetic link.

parentage abroad. Intercountry adoption has proved time consuming and bureaucratic,¹¹⁰ while cross-border surrogacy is perceived to be faster and more convenient.¹¹¹ Therefore, the matter of surrogacy versus adoption moves from a national level to an international.

Nevertheless, it is crucial to highlight that international adoption numbers are not falling necessarily due to bureaucratic and time-consuming processes or the rise of surrogacy and other ARTs. The records of the US Central Authority (USCA) under the Hague Adoption Convention show a drastic fall of intercountry adoption to the US from 2000 (18,857) to 2010 (11,058) and finally 2018 (4,058).¹¹² The USCA in its 2018 report acknowledges that this can be attributed to ‘an improvement in economic circumstances and the sustained development of domestic permanency options for children’ in States like China, where the majority of intercountry adoptions to USA originate.¹¹³ The authority also recognises that part of the decline is due to concerns of other governments that illicit practices might still take place and that hosting programmes in the USA are often used to essentially circumvent international adoption law by identifying children for potential intercountry adoption that have not, however, been screened as eligible.¹¹⁴

Taking into account the above, adoption and surrogacy seem to be interlinked. On the one hand, when adoption numbers decline or it becomes difficult for prospective parents to adopt, childless couples or individuals could turn to surrogacy to become parents. On the other hand, with cross-border reproductive treatment and international surrogacy gaining ground, this could be detrimental to adoption, as individual would no longer need to engage in adoption arrangements, or even worse, they could evade international adoption rules through surrogacy.

¹¹⁰ Masson (n 88) 149.

¹¹¹ Marie Tusseau, Natalia Álvarez and Zaira Salvador, ‘Surrogacy vs Adoption Process, What Are the Differences?’ *Babygest* (25 March 2019) <<https://babygest.com/en/adoption-vs-surrogacy-in-united-states/>> accessed 4 December 2019.

¹¹² Travel State Government, US Department of State – Bureau of Consular Affairs ‘Adoption Statistics’ <https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics.html> accessed 4 December 2019.

¹¹³ ‘Fiscal Year 2018 Annual Report on Intercountry Adoption’ <https://travel.state.gov/content/dam/NEWadoptionassets/pdfs/Tab_1_Annual_Report_on_Intercountry_Adoptions.pdf> accessed 4 December 2019.

¹¹⁴ *ibid.*

Why is this problematic? It might not seem straightforward why it is negative to prefer cross-border surrogacy over intercountry adoption. Without entering into the debate of whether it is ethical to 'create' children while there are existing children waiting to be placed into families, for the purposes of this thesis the repercussions of shifting from adoption to surrogacy are examined at a regulatory level. It is argued that engaging with a practice that is well regulated rather than one that has no legal guarantees at international level is problematic. What is more significant, however, is that applying intercountry adoption rules to surrogacy can even lead to the circumvention of international adoption rules, which is clearly undesirable.

Elaborating on the above, it was discussed before how intercountry adoption is regulated through the Hague Adoption Convention since 1993, which further suggests that considerable work has been done both at national and international level. Although far from perfect, the Hague Adoption Convention has brought States together, has raised awareness of particular possibilities of abuse, has established international cooperation and has helped significantly to cease violations.¹¹⁵ In contrast, cross-border surrogacy is still a relatively new area with no international consensus. Not much has been done about it at international level, while domestic efforts to ban it have so far proved to be fruitless. There are currently no safeguards at international level to guide intended parents or domestic authorities when they encounter cross-border surrogacy difficulties, safeguards which could at least attempt to avoid abuses, as happens with adoption. Therefore, it seems highly problematic at the moment to stop engaging in not-perfectly but nevertheless regulated intercountry adoptions and rather 'endeavour' in the uncharted territory of cross-border surrogacy, an internationally unregulated and immensely challenging field.

Another problematic point regarding the interplay between adoption and surrogacy is that States approach cross-border surrogacy arrangements based on national or intercountry adoption rules. It is observed that, in practice, national adoption procedures are a common way of tackling legal parentage issues resulting from international surrogacy. It is common for States, when dealing with legal parentage established through cross-border surrogacy, to allow the intended parent with a genetic link to acknowledge paternity and then the partner/spouse of the intended father to become a legal parent of the child through

¹¹⁵ HCCH Permanent Bureau (n 95).

adoption.¹¹⁶ In other cases, adoption is considered to be the only possible way to become the legal parents of the child. Such is the stance taken by the courts in States like Germany.¹¹⁷ Nonetheless, as mentioned by Theis J in *CC v DD*, an adoption order is not suited for surrogacy and parental orders better reflect the child's identity as born through reproductive technologies rather than adoption.¹¹⁸ In addition, in *Re AB (Surrogacy: Consent)*, when deciding on a refusal of the surrogate to consent to a parental order, Theis J explained that the only alternative for the intended parents would be adoption, but the adoption order in such occasion would be 'inappropriate', because intended parents, such as the applicants in the particular case, would have to adopt their own children.¹¹⁹

This approach is more problematic in light of applying intercountry adoption rules to cross-border surrogacy. For example, in a cross-border surrogacy case, the Indian Supreme Court followed the rules of the Hague Adoption Convention in order to allow a German intended parent to leave India with his two twin children.¹²⁰ However, this cannot be deemed an appropriate approach to cross-border surrogacy. When intercountry adoption procedures are applied, they do so as to mitigate the cross-border surrogacy arrangement and justify the legal parentage. Nonetheless, this is problematic, because all the safeguards of the intercountry adoption law that come before establishing legal parentage are not applicable to surrogacy.

In this sense, the adequacy of applying intercountry adoption rules to cross-border surrogacy has been rejected by the Permanent Bureau of the Hague Conference on Private International Law.¹²¹ In an attempt to summarise their points, the Permanent Bureau argued that the reasons why intercountry adoption rules are inadequate for surrogacy are:

- i) while consent in adoption by the legal parents of the child is required after its birth, it is usually the case that the surrogate consents to relinquish the child before birth,
- ii) for the consent to be valid in adoption there should be no inducement of payment, which clearly clashes with cross-border commercial surrogacy,

¹¹⁶ e.g. France: Advisory opinion (n 30).

¹¹⁷ Chapter 2 (2.2).

¹¹⁸ *CC v DD* [2014] EWHC 1307 [40].

¹¹⁹ *Re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam) [31].

¹²⁰ *Jan Balaz v Anand Municipality and Ors* [2010] AIR Guj 21.

¹²¹ HCCH Permanent Bureau 'Preliminary Note on the Private International Law Issues Surrounding the Status of Children' (Prel Doc No 11, March 2011).

- iii) the subsidiarity principle in adoption, which calls for consideration on the potential of placing the child in the State of origin, cannot be followed in surrogacy,
- iv) the child is entrusted to the intended parents in cross-border surrogacy without any safeguards, clashing with the intercountry adoption regulation,
- v) except in cases of in-family adoption, there is a prohibition on contact between the prospective parents and the child's current parents, which again is at odds with surrogacy, where intended parents are usually in contact with the surrogate when entering into the surrogacy arrangement or even during the medical treatment.¹²²

Applying, therefore, intercountry adoption rules to the aforementioned case of the commercial surrogacy agreement in India between an Indian surrogate and the intended father is essentially a circumvention of the rule that there should be no inducement of payment for adoption. Even in altruistic surrogacy, there might be a close contact between the intended parents and the surrogate, which is not allowed according to the international adoption rules.

This, in essence, shows that there needs to be an international framework to address these issues emerging from cross-border surrogacy, as the proposed (by this thesis) ECHR framework would not address concerns on how international surrogacy could be addressed at national level. So far, this chapter explained that the role of the Convention is to acknowledge a violation of the rights and freedoms enshrined in it, while it is up to the States to redress this violation by taking measures they consider most adequate. Particularly for the interplay of surrogacy with adoption, the Court in its (first ever) advisory opinion held that:

In sum, given the margin of appreciation available to States as regards the choice of means, alternatives to registration, notably adoption by the intended mother, may be acceptable in so far as the procedure laid down by domestic law ensures that they can be implemented promptly and effectively, in accordance with the child's best interests.

This is in line with the premise that States are free to adopt the exact measures to address a potential violation of the ECHR's rights, as long as the protection is effective.

¹²² *ibid* 21.

To summarise, surrogacy in general can lead to the drop of adoption rates, mainly due to the fact that it seems easier to undertake international surrogacy than international adoption. However, it is considered problematic by this thesis, because in the absence of an international framework for surrogacy (or even a domestic one), adoption rules are used to mitigate the effects of cross-border surrogacy, which does not adequately represent the real relationship between the intended parents and the resulting child, while, most importantly, it allows the circumvention of intercountry adoption rules.

Given the above, it seems that a regional framework, as the one proposed by this thesis, might not be adequate to ‘combat’ the drawbacks and risks resulting from cross-border surrogacy and its interplay with intercountry adoption. In fact, the influence of cross-border surrogacy to intercountry adoption is one of the reasons why the Permanent Bureau insisted that there is an imperative to address cross-border surrogacy and legal parentage.¹²³ Therefore, the next section addresses the need for an international agreement in the field of surrogacy.

6.4 The Need for an International Agreement on Surrogacy

Previous sections have shown how cross-border reproductive treatment is central in surrogacy nowadays. The dangers of such practice were also highlighted, demonstrating the need for international agreement on surrogacy, as regional solutions might not be as effective. In a similar vein, Pennings notes that ‘the more widespread this phenomenon [cross-border reproductive treatment], the louder the call for international measures to stop these movements’.¹²⁴ Although not in terms of stopping this movements but rather ensuring intercountry cooperation, the need for international measures in surrogacy was identified early on by the Council on General Affairs and Policy of the Hague Conference. As a result, a group of experts was entrusted with the task to explore the viability of working towards an international agreement on surrogacy.

¹²³ The interplay between intercountry adoption and cross-border surrogacy was used as an indication that ‘there is now a human, including children’s, rights imperative to the cross-border continuity of the civil status of children’: HCCH Permanent Bureau ‘Background Note for the Meeting of the Experts’ Group on the Parentage/Surrogacy Project’ (January 2016).

¹²⁴ Guido Pennings, ‘Reproductive Tourism as Moral Pluralism in Motion’ (2002) 28 *Journal of Medical Ethics* 337.

This section analyses the ongoing Parentage/Surrogacy Project convened by the Council on General Affairs and Policy of the Hague Conference. It highlights the work carried out so far and reflects the considerations made by the Experts' Group. This is done with a view to recognising the difficulties in achieving international consensus on surrogacy and further suggest that an international agreement to at least some aspects of surrogacy is urgent. Nonetheless, this thesis holds that even if the Parentage/Surrogacy Project were to be concluded, it would fall short on addressing problematic aspects of surrogacy that go beyond parentage. Therefore, (not only in the absence of an international agreement) a regional solution, as the one proposed via the ECHR framework by this thesis, is required to mitigate the adverse effects of cross-border surrogacy.

The reason why the Parentage/Surrogacy is under scrutiny is that it is currently the only proposed solution to the cross-border surrogacy phenomenon. It was already mentioned in previous chapters that there is additionally an ongoing development of non-binding principles undertaken by the International Social Service (ISS). However, due to its non-binding nature and the fact that many experts of this project are also members of the Experts' Group, emphasis is placed solely on the Parentage/Surrogacy Project.

6.4.1 The Parentage/Surrogacy Project

As mentioned above, the call for international agreement on surrogacy was initiated by the Council on General Affairs and Policy of the Hague Conference. The Hague Conference on Private International Law (HCCH) is an intergovernmental organisation that concludes multilateral legal instruments, such as international conventions or soft-law instruments in the field of private international law.¹²⁵ The Council on General Affairs and Policy of the Hague Conference (hereinafter Council) is one of the governing bodies of the HCCH and in charge of its operation. In particular, it examines all proposals coming from the Permanent Bureau, its multinational secretariat, and determines the action to be taken with regards to these proposals.¹²⁶

¹²⁵ For more: 'Hague Conference on Private International Law' <<https://www.hcch.net/en/home>> accessed 4 December 2019.

¹²⁶ Statute of the Hague Conference on Private International Law 1951.

The origins of the Parentage/Surrogacy Project can be traced in 2001 during an informal consultation which suggested a project on ‘private international law issues surrounding the status of children and, in particular, the recognition of parent–child relationships’, i.e. filiation.¹²⁷ The main problem this project wishes to tackle is the disparity of the law on parentage. The advances in ART and changes in modern family formulations have aggravated the disparity of establishing legal parentage in different jurisdictions and there is currently no international agreement in the field. The Council was particularly ‘alarmed’ by the rise of cross-border surrogacy arrangements, as it can adversely affect the rights of children born through surrogacy.¹²⁸ In addition, there was a concern about the interplay between cross-border surrogacy and international adoption, elaborated in the previous section.¹²⁹ Therefore, in 2015, after the Permanent Bureau’s preliminary reports and suggestions, the Council convened an Experts’ Group to inquire into the possibility of adopting an international instrument in the area of legal parentage and surrogacy in particular.

Before examining what the Experts’ Group has done so far, it is important to underline the significant preliminary work carried by the Permanent Bureau, given that they paved the way for the Experts’ Group work.¹³⁰ The preliminary reports analysed meticulously issues of legal parentage and, in particular, the peculiarities of cross-border surrogacy, which in the documents usually figures as international surrogacy arrangements (ISA). In these initial documents, it was made clear that there is a lack of uniform global rules on jurisdiction, applicable law, recognition and enforcement in the field of legal parentage.¹³¹ A special focus was given to cross-border surrogacy, as it raises serious questions on legal parentage and child nationality by putting in danger the child that could become stateless or found in a legal limbo, while considerable concern was given to the vulnerability of the parties involved in

¹²⁷ ‘Parentage / Surrogacy - 2010 and Prior’ <<https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy/surrogacy-2010-and-prior>> accessed 4 December 2019.

¹²⁸ HCCH Council on General Affairs and Policy of the Conference ‘Conclusions and Recommendations Adopted by the Council’ (April 2010).

¹²⁹ HCCH Special Commission on the practical operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ‘Conclusions and Recommendations Adopted by the Special Commission’ (June 2010).

¹³⁰ The Permanent Bureau expressed the idea that if work in the field of cross-border surrogacy and legal parentage would go on, its work will be foundational work for any Experts’ Group which might be formed: HCCH Permanent Bureau ‘The Desirability and Feasibility of Further Work on the Parentage/Surrogacy Project’ (Prel Doc No 3 B, March 2014).

¹³¹ HCCH Permanent Bureau Prel Doc No 11 (n 121).

international surrogacy agreements.¹³² It was also stressed that legal parentage is highly significant, as it determines the status of children, from which further essential rights for children and obligations for adults towards children are derived, e.g. parental responsibility, maintenance, etc.¹³³

It is interesting to note that it was around the time of this preliminary work of the Permanent Bureau in the 2010s when surrogacy started appearing as a ‘booming’ industry,¹³⁴ which also explains why the Permanent Bureau insisted on the surrogacy project. Cases of cross-border surrogacy started reaching the European Court of Human Rights on the establishment of legal parentage, without, however, the Court acknowledging or discussing the work of the HCCH at the time.¹³⁵ Only from the *Paradiso* case onward did the Court start mentioning the work of the HCCH, and in only one paragraph,¹³⁶ which shows that although there is an acknowledgement of the HCCH work, it is not clear whether the Strasbourg Court intends to engage with it. This can be attributed to the distinct nature of the two frameworks, which is reflected upon in the next section.

One of the milestones of the preliminary work of the Permanent Bureau is the annexed glossary included to the documents that helps grasp the basic concepts and categories of surrogacy,¹³⁷ which was updated in 2014.¹³⁸ In this 2014 document, the Permanent Bureau asked two important questions: is it desirable to have an international agreement on the topic and, if so, is it feasible? While it was relatively easy to acknowledge the desirability of international work in cross-border surrogacy, in particular after going through the disparities across national regulations and the problems arising from such disparities, the answer was not that clear-cut with feasibility. The Permanent Bureau insisted on the importance of the project and the need for an Experts’ Group to be convened to work further on this issue, as ‘there is a children’s rights imperative to this work’.¹³⁹ The doubt, however, on the feasibility is crucial,

¹³² *ibid.*

¹³³ *ibid.* 4.

¹³⁴ For instance: Divya Gupta, ‘Inside India’s Surrogacy Industry’ *The Guardian* (6 December 2011) <<https://www.theguardian.com/world/2011/dec/06/surrogate-mothers-india>> accessed 4 December 2019.

¹³⁵ Namely, in the *Mennesson and Labassee* cases: *Mennesson v France* [2014] ECHR 664, *Labassee v France* [2014] ECHR 668.

¹³⁶ *Paradiso and Campanelli v Italy* [2017] ECHR 96, para 80.

¹³⁷ HCCH Permanent Bureau, Prel Doc No 10 (n 37).

¹³⁸ HCCH Permanent Bureau, Prel Doc No 3 B (n 130).

¹³⁹ *ibid.* 18.

as this thesis holds that it does not seem likely for such an international agreement to take place.

Therefore, the task undertaken by the Experts' Group consists on the feasibility of working towards an international agreement on private international law matters regarding the legal status of children, encompassing children born through cross-border surrogacy. Throughout the preliminary documents drawn up by the Permanent Bureau it was repeated that, as the name indicates, the Parentage/Surrogacy Project focuses on issues of legal parentage and the status of children in general terms, where cross-border surrogacy is a subset.¹⁴⁰ In fact, this is repeated in almost every report of the Parentage/Surrogacy Project. Hence, it is clear that the project does not exclusively focus on surrogacy, but instead it is only a special consideration that is given to cross-border surrogacy arrangements. This again is crucial for the purposes of this thesis and, in particular, on how effective such framework would be to address cross-border surrogacy and issues related to this phenomenon.

The Experts' Group has held five meetings since it was first convened in 2016, discussing the feasibility of progress in the field of legal parentage and the best possible way to achieve it. While in previous meetings, the Group did address cross-border surrogacy, with a main focus, however, on legal parentage in broader terms, in the last meeting that took place from January to February 2019, the Group focused almost exclusively on cross-border surrogacy.

Throughout its work, while the Group considered that cross-border surrogacy did call for supplementary safeguards and norms,¹⁴¹ it did not think it was necessary to address cross-border surrogacy separately as a stand-alone topic.¹⁴² However, they did consider having an Optional Protocol for cross-border surrogacy only, as an opt-in and opt-out mechanism to include surrogacy arrangements in the scope of the international instrument on legal parentage.¹⁴³ There was also a concern expressed by the Experts' Group for the new

¹⁴⁰ For example: HCCH Permanent Bureau, Background Note (n 123) 4.

¹⁴¹ HCCH Experts' Group 'Report of the Experts' Group on the Parentage/Surrogacy Project (Meeting of 31 January – 3 February 2017)' (Prel Doc No 2, February 2017).

¹⁴² HCCH Permanent Bureau, Background Note (n 123).

¹⁴³ HCCH Experts' Group 'Report of the Experts' Group on the Parentage/Surrogacy Project (Meeting of 6-9 February 2018)' (Prel Doc No 2, February 2018) 6.

instrument that will be proposed on cross-border surrogacy not to undermine in any way the intercountry adoption by the Hague Adoption Convention.¹⁴⁴

In its last meeting, the Group established the overarching aim of addressing cross-border surrogacy to be the protection of the rights and best interests of the children born through this practice in addition to the human rights of the remaining stakeholders in a surrogacy arrangement.¹⁴⁵ They made clear that including cross-border surrogacy to the legal parentage project did not equal its support and acceptance. Instead, it should be considered as a mechanism that helps tackle ‘limping parentage’ that surrogacy brings about. In addition, they emphasise the special considerations to be made in terms of surrogacy, as there are potential issues of children sale and women trafficking.

The approach the Experts’ Group wishes to take for the potential international consensus on cross-border surrogacy is by adopting uniform private international law rules, while respecting the differences in substantive law, the aim being predictability, certainty and continuity of legal parentage. When examining different methods to achieve this, the Group concluded that feasibility is possible in the recognition of legal parentage regarding cross-border surrogacy through judicial decisions, with a cooperation mechanism and safeguards either as conditions for recognition or for non-recognition. They agreed as well that there needs to be a further discussion on the feasibility of establishing legal parentage in cases of no judicial decision, but operation of law or acts of individuals.

The way forward, therefore, is a binding multilateral instrument of private international law where the focus is placed on the recognition of judicial decisions on legal parentage. However, the idea is that cross-border surrogacy should be addressed in a separate instrument, possibly as a protocol. The starting point for the Experts’ Group would be to prepare proposals on what should be included in the future instruments suggested related to the recognition of judicial decisions on legal parentage, while also holding a meeting prior to the General Council’s meeting in 2020.¹⁴⁶

¹⁴⁴ *ibid* 3.

¹⁴⁵ HCCCH Experts’ Group ‘Report of the Experts’ Group on the Parentage/Surrogacy Project (Meeting of 28 January – 1 February 2019)’ (Prel Doc No 2 B, February 2019).

¹⁴⁶ *ibid* 6.

The reason why the Parentage/Surrogacy Project was presented in such detail was to help understand its nature, goals and possible outcomes. As made clear from the aforementioned, there is still much work lying ahead for the Experts' Group and these are initial findings only. Given that some of the main issues with cross-border surrogacy were identified as the danger of rendering children stateless or parentless, it seems that an agreement at international level on legal parentage deriving from surrogacy is indeed urgent. Nonetheless, emphasis should be placed in the difficulty of unifying private international law rules, which becomes particularly clear when considering the disparity of different regulations on legal parentage, especially when surrogacy is an unlawful practice in numerous States. In addition, the sole focus is exclusively legal parentage with potential safeguards for the arrangement, which calls into question its efficacy to combat other issues around cross-border surrogacy.

In particular, notwithstanding the fact that this thesis welcomes the adoption of a private international law instrument on surrogacy, as envisaged by the Parentage/Surrogacy Project, it argues that focus has been wrongly placed at international level. This focus at international level is flawed as a result of two reasons: one pragmatic and one conceptual limitation. First, it seems highly unlikely that an agreement will be attained on surrogacy at international level. Second, even if it did, the project aims at facilitating cross-border surrogacy rather than eliminating it. This means problems associated with cross-border surrogacy that go beyond legal parentage would remain unsolved, as legal parentage is the exclusive point of focus of the HCCH's project.

For the pragmatic limitation, the discussion above on the work conducted so far in the Surrogacy/Parentage Project by the HCCH has shown that it seems highly unlikely that the project will succeed. This is not to undermine in any way the work of the HCCH's Council or the Experts' Group; instead, it aims at demonstrating the practical difficulties such project entails. It was already highlighted in Chapter 2 that there is a massive disparity of surrogacy policies throughout the world. The fact that many States render surrogacy unlawful further shows the difficulty of aligning such policies. The Experts' Group, as the Council before it, have acknowledged this difficulty and decided that cross-border surrogacy should be addressed in a separate instrument from other issues of legal parentage, possibly as a protocol.¹⁴⁷

¹⁴⁷ *ibid.*

For the conceptual limitation, while the private international law surrogacy agreement is indeed significant in order to combat some of the most ‘burning’ issues raised by surrogacy, such as the establishment of legal parentage, its aim is to facilitate and sooth the negative consequences of cross-border surrogacy. This thesis, however, has argued in favour of lowering, to the possible, the numbers of cross-border surrogacy, rather than facilitating it. The reason lies in the rest repercussions resulting from cross-border surrogacy.

Having regulated its cross-border dimension does not entail the need for a provision regulating lawful domestic surrogacy, which in turn does not alter the current mismatch between the two (domestic versus international surrogacy) and the random inequality created between those who can afford treatment abroad and those who cannot. Also, if domestic surrogacy is prohibited in order to protect women and children from the potential dangers of surrogacy, it seems arbitrary to simply accept its safety abroad. Assuming that a State adopts an international agreement on cross-border surrogacy on the basis that it provides safeguards for surrogates and children involved in the treatment abroad, it seems strange why the same State would not adopt the same safeguards and regulate surrogacy domestically. There are indeed measures and safeguards that could work in one State and would not be efficient in another,¹⁴⁸ but it seems that this argument could not be used by developed States accepting international surrogacy from developing States.

Accepting cross-border surrogacy, without enabling it domestically, causes an additional inconvenience. While uncertainty and being trapped in a legal limbo could be avoided for both intended parents and resulting children, this would not alter the fact that a receiving State would not have any power over the circumstances in which surrogacy takes place abroad beyond certain safeguards. If cross-border surrogacy takes place abroad in accordance with the safeguards provided by this private international law agreement, it was shown through the mapping of the Parentage/Surrogacy Project that these safeguards would not cover the whole spectrum of cross-border surrogacy; hence, they would leave aside some of the most controversial issues in surrogacy, such as the payment of surrogates. There is little a receiving State could do at that point in view of the existence of a resulting child, as it would

¹⁴⁸ See Chapter 4 (4.3).

be in the best interests of the child to have their relation with the intended parents acknowledged in order to be awarded legal parentage and nationality.¹⁴⁹

6.4.2 *The Regional Solution of the ECHR Framework*

Having presented the international framework that is on the making by the Parentage/Surrogacy Project, the ECHR framework proposed by this thesis might seem redundant, as both projects seem to target cross-border surrogacy. While this chapter has already considered why the ECHR framework would not lead to the complete elimination of the cross-border phenomenon, the sole focus of the HCCH's project to legal parentage and cross-border surrogacy was deemed problematic too. Nonetheless, to better judge whether the international framework would suffice or if there is a need for both frameworks, it is useful to briefly compare the two systems and what each could offer to the cross-border surrogacy debate/solution.

Both projects wish to provide a solution to cross-border surrogacy *a priori*. However, their nature is different, as the international framework wishes to ensure prevention of abuses and certainty of the legal status of the resulting child,¹⁵⁰ while the ECHR framework aims at enabling domestic surrogacy by declaring that a blanket prohibition on surrogacy violates the Convention. Accordingly, the result each could achieve is distinct. While the international framework seeks to ensure that legal parentage based on cross-border surrogacy is facilitated and recognised through different jurisdictions, the ECHR framework proposed aims at providing lawful domestic surrogacy to eventually avoid or at least lessen the number of cross-border surrogacy arrangements. Eventually, both frameworks attempt to 'soothe' the repercussions created by cross-border surrogacy. However, the international framework would do so by facilitating international cooperation, while the ECHR framework by eliminating (to the possible) the need for such cross-border surrogacy arrangement.

Furthermore, although the Parentage/Surrogacy Project could seem to be broader in a sense, because it encompasses issues of legal parentage in a variety of situations and not only cross-border surrogacy, it leaves outside of its scope many other problematic areas within the field

¹⁴⁹ *Mutatis mutandis* HCCH Permanent Bureau 'The Parentage/Surrogacy Project: An Updating Note' (Prel Doc No 3A, February 2015) 6.

¹⁵⁰ HCCH Permanent Bureau, Prel Doc No 10 (n 37) 30.

of surrogacy, as mentioned in the previous section.¹⁵¹ While it could provide solutions to a broader range of situations on legal parentage, the fact that, overall, it does not focus solely on cross-border surrogacy and it only addresses part of the complications that international surrogacy entails, could be negative.

For example, there is an agreement in the ongoing project to make the consent of the surrogate a central safeguard.¹⁵² Nonetheless, there seems to be no discussion, at least at this point, on the payment of surrogates and whether scales or categories of payment will be predicted. This is another inconvenience that results from the nature of the proposed private international law framework. It seems impossible to unify substantive law on surrogacy at international level; therefore, it seems more plausible to unify private international law rules on legal parentage, which could apply to cross-border surrogacy. However, this brings with it its own disadvantages, such as ensuring the adoption of the international agreement by a sufficient number of States or avoiding potential abuses (e.g. exploitation and commodification).

In addition, another problematic aspect would be if cross-border surrogacy agreement were to be included through a protocol with the possibility to opt-in or opt-out.¹⁵³ While this makes the prospective international instrument on legal parentage more plausible, as States prohibiting surrogacy and not willing to cooperate with other States would still be part of the otherwise binding instrument, it would not provide any real solution to cross-border surrogacy. Therefore, having an opt-in and opt-out mechanism for cross-border surrogacy could significantly undermine any positive development in the field, in case the Parentage/Surrogacy Project prospers, as it would not lead anywhere in terms of cooperation with those States that would choose to abstain.

In contrast, the advantage of the ECHR framework is that it operates at national level and deals with substantive law, which would essentially need to be changed. It thus relies on domestic surrogacy rather than private international law or State cooperation. The latter has proven to be a daunting task, as becomes apparent from the ongoing international project. An

¹⁵¹ There is an overlap of the arguments here between the previous section and this section of the chapter. The difference is that in the previous section it was discussed why the Parentage/Surrogacy Project is not sufficient to tackle cross-border surrogacy, while here the point underlines its failure to change substantive law.

¹⁵² HCCH Experts' Group, Prel Doc No 2 B (n 145) 4.

¹⁵³ HCCH Experts' Group, Prel Doc No 2 (n 143) 6.

additional benefit is that at domestic level it is easier to control the practice of surrogacy and ensure compliance with the different procedures/safeguards. In this sense, it seems more plausible to address a variety of surrogacy inconveniences through the ECHR framework rather than the Parentage/Surrogacy Project (e.g. exploitation, commodification, etc.).

Answering, therefore, the question of whether an ECHR framework would become redundant given the ongoing international framework, this thesis argues that an ECHR framework is essential with or without a private international law agreement on surrogacy. This results from the combination of the above findings from the comparison between the two frameworks and the fact that the arguments presented in the previous section as to the pragmatic and conceptual limitations of the Parentage/Surrogacy Project do not apply to the ECHR framework. The ECHR framework, as one operating at national level provides for both domestic and cross-border surrogacy, which gives the power to States to control surrogacy domestically in order to avoid abuses and ensure it runs smoothly. Again, in order for such an ECHR framework to be effective, there needs to be an adequate domestic regulation adopted by States to make domestic surrogacy effective, as discussed at the beginning of this chapter.

Notwithstanding the observation that the ECHR framework is essential with or without the Parentage/Surrogacy Project, this does not mean that the latter is not desirable. There is no need to see the two systems separately or as mutually exclusive. If both are materialised, given their different nature, one would not replace the other. Instead, each would regulate a different area, one the national and the other the international. Indeed, materialising both frameworks would be extremely helpful, as the ECHR framework could provide for lawful domestic surrogacy, while for the limited cross-border surrogacy cases, there would be international standards that would help settle questions on legal parentage of the resulting children born abroad.

Finally, in the previous section it was noted that the ECtHR has not yet engaged with the work of the HCCH. In April 2019, the Court did mention that it has indeed acknowledged that the HCCH ‘has been working on a proposal for an international convention’ in order to deal with issues of legal parentage ‘on the basis of principles to be accepted by the States

acceding to that instrument'.¹⁵⁴ Nonetheless, it held that using adoption to establish the legal parentage between an intended mother and the resulting child was an adequate way to avoid a potential violation of the Convention, without mentioning, for example, that the main focus of the Experts' Group is a recognition through a judicial decision.¹⁵⁵ Apart from the different nature of the two frameworks and the fact that in the ECHR system the choice on how to redress a violation rests upon the Contracting State, not engaging with the HCCH work could be also attributed to the fact that at the moment there is only preliminary work done at international level. If an international instrument on surrogacy and legal parentage were to be adopted, then it could be the case that the influence of such instrument would be stronger within the ECHR framework, as stronger would be its status compared to the current preliminary considerations.

6.5 Conclusion

This chapter has addressed the potential outcome of the ECtHR's findings that a blanket prohibition on surrogacy constitutes a violation of Article 8 ECHR. This would entail that domestic surrogacy should be lawful and regulated/provided in the desired form of the respondent State. The benefits of providing a lawful framework for domestic surrogacy are found in its potential solution to problematic aspects of cross-border surrogacy, mainly by limiting its practice.

Nevertheless, it is acknowledged that a domestic framework on its own and a regional solution would not by itself suffice. There is a need for international consensus on at least some of the most troublesome areas of cross-border surrogacy. This need is consolidated by identifying that even in States where domestic surrogacy is lawful, citizens might still opt for cross-border surrogacy. Adding to the above the interplay of cross-border surrogacy with intercountry adoption and how the former undermines the latter, it becomes essential to examine the possibility of reaching international consensus on surrogacy.

So far, the ongoing Parentage/Surrogacy Project convened by the HCCH seems to aim at securing a binding multilateral instrument that would facilitate the recognition of foreign judicial decisions on legal parentage. Nonetheless, it seems that the international framework

¹⁵⁴ Advisory opinion (n 30) para 59.

¹⁵⁵ HCCH Experts' Group, Prel Doc No 2 B (n 145) 5.

put forward would not necessarily tackle the problems created by cross-border surrogacy nor would it necessarily lead to a decrease on the number of cross-border surrogacy arrangements. This is due to the different focus and nature of the international project compared to the regional ECHR framework proposed by this thesis. In particular, the main goal of the ECHR framework is to facilitate domestic surrogacy and decrease cross-border surrogacy. Therefore, even if the Parentage/Surrogacy Project prospers and international agreement is reached, the ECHR framework would still be necessary.

The conclusion reached, however, is that materialising both frameworks would be the ideal, as the ECHR framework attempts to avoid cross-border surrogacy, meanwhile the Parentage/Surrogacy Project tries to ease its effects. This way they could complement each other by limiting the numbers of cross-border surrogacy on the one hand and settling potential questions of legal parentage for the limited cases of international surrogacy on the other.

CHAPTER 7: CONCLUSION

This thesis has sought to demonstrate that there is a greater role for the European Convention on Human Rights in the field of surrogacy than has hitherto been recognised. While the existing literature focuses on mitigating the effects of cross-border surrogacy by applying Article 8 ECHR, this thesis has advocated for an *ex ante* framework, where the Convention is applied to enable domestic surrogacy. Such approach ultimately aims at lessening the numbers of cross-border surrogacy in order to avoid its detrimental repercussions, particularly for the resulting children.

The proposed application of the ECHR framework is examined through a hypothetical referral of States with a blanket ban on surrogacy before the Strasbourg Court by individuals claiming a violation of their right to respect for their private and family life. In this application, the Court would essentially resolve the clash of two interests. First, the individuals' interests, resting upon the claim that the right to respect for the decision to become a parent, acknowledged by the Court through its case law, should be extended to surrogacy. Second, the States' arguments against surrogacy, in an attempt to defend its blanket ban, justified for 'the prevention of disorder/crime, the protection of health or morals and the protection of rights and freedoms of others'. It was argued that the Court should resolve this clash in favour of the individuals' right to respect for their decision to become a parent through surrogacy.

Tilting the balance in favour of the individuals' right is based on the concept of human dignity within the Convention and the correct use of the 'margin of appreciation' doctrine. It was held that the most coherent way to understand dignity within Article 8 ECHR is through an emphasis on autonomy and self-determination, while for the margin of appreciation to have any relevant role in the pondering of different interests, it must be applied alongside a proportionality framework. Finally, while there is a need for an international convention on surrogacy, currently reflected by the ongoing Parentage/Surrogacy Project of the Hague Conference on Private International Law, this thesis argued that for a solution to the cross-border phenomenon of surrogacy, the ECHR framework is necessary with or without the international agreement.

In particular, Chapter 1 provided a brief introduction by outlining the general questions posed by this research and the overall aim for undertaking this investigation. Additionally, it highlighted the novelty of the project, which, in essence, rests on the new understanding it brings to surrogacy within the ECHR framework. In particular: applying the ECHR framework so as to enable domestic surrogacy, rather than mitigate the effects of international surrogacy; coherently interpreting Article 8 ECHR within the human dignity discourse demands a focus on autonomy and self-determination rather than restriction; using the ‘traditional’ tripartite proportionality test. Finally, it acknowledged some of the potential limitations of the thesis.

Chapter 2 defined surrogacy and explained its essential characteristics. It outlined the complications created by its cross-border phenomenon, while demonstrating the disparity of surrogacy regulation within Europe and in six key jurisdictions due to their relevance for cross-border surrogacy. After establishing that imposing a blanket ban on surrogacy is problematic, it was suggested that the ECHR can provide an effective framework to address the above complications by upholding the claim that a blanket prohibition on surrogacy violates Article 8 ECHR, i.e. their right to respect for private and family life.

Chapter 3 unfolded the hypothetical claim presented before the ECtHR, by demonstrating the content of the right to respect for the decision to become a parent. It established that this right, which was recognised by the Strasbourg Court under Article 8 ECHR, can extend to surrogacy. This was further supported by holding that the recognition of the right to respect for the decision to become a parent through surrogacy complies with the nature of the Convention as a living instrument, while it also follows the national and international trends that indicate the recognition of the right to become a parent and reproductive rights in general. This chapter also considered briefly claims regarding Article 12 and Article 14 ECHR that could potentially affect the hypothetical referral on surrogacy to the Court.

Chapter 4 discussed in detail the potential arguments presented by States to justify their blanket ban on surrogacy, presented under Article 8(2) ECHR. The main focus of this chapter was the claim on commodification and exploitation of women and children. The commodification argument was discussed under the light of human dignity, establishing that the most coherent way of interpreting Article 8 ECHR is through an emphasis on autonomy rather than restriction, rejecting, therefore, the claim that surrogacy clashes with human

dignity. The exploitation argument was discussed under both altruistic and commercial surrogacy, where it was argued that given the socio-economic circumstances prevailing in a particular Contracting State, commercial surrogacy could indeed enable the exploitation and even trafficking of humans. While altruistic surrogacy was discussed under the light of emotional exploitation, it was argued that it seems more probable for the Court to accept the justification of a State's ban on commercial surrogacy rather than its altruistic counterpart. This ultimately served the purpose of showing that a blanket ban on surrogacy is not necessary in order to safeguard the interests that States seek to protect through the prohibition of surrogacy.

Chapter 5 advanced an assessment of the clash of interests elaborated in Chapter 3 and Chapter 4. It demonstrated how the current approach of the ECHR framework on assessing whether an interference is necessary in a democratic society is almost polarised by the doctrine of margin of appreciation and European consensus, which, however, were not deemed appropriate to balance the different interests. Instead, Chapter 5 advanced a new framework for the Court to follow, which places the principle of proportionality at the centre of such assessment, while the margin of appreciation could play a secondary role, based on whether the interference affects the essential core of a right or not. The idea behind this reconstructed 'necessary in a democratic society' assessment is that, if applied in the current hypothetical scenario, the blanket prohibition on surrogacy would constitute a violation of Article 8 ECHR.

Finally, Chapter 6 considered the adequacy of the ECHR framework to combat the repercussions of cross-border surrogacy. It was argued that when a violation of the Convention is declared by the Strasbourg Court, it is up to the respondent State to redress the violation by taking the measures it holds to be most adequate. Therefore, even if the proposed ECHR framework were successful, it could be still ineffective if surrogacy was regulated inadequately. In this sense, it was shown that there is a cross-border reproductive treatment phenomenon even where domestic surrogacy is lawful, while in combination with the repercussions of surrogacy to international adoption, they demonstrated that there needs to be an international answer to this problem. Nonetheless, after examining the ongoing Parentage/Surrogacy Project convened by the Council on General Affairs and Policy of the Hague Conference on Private International Law, it was argued that even if an international agreement were to be concluded, there would still be a need for a regional framework that

would lead to lawful domestic surrogacy. Hence, it was concluded that the proposed ECHR framework is essential with or without the international surrogacy agreement.

This thesis, therefore, sheds light on many aspects that have not yet been considered by the European Court of Human Rights. Bringing forward this new approach of the ECHR framework in a way to accommodate and enable domestic surrogacy corresponds to the identified need of creating an *ex ante* surrogacy framework to deal with cross-border surrogacy complications. This also attempts to bridge the gap between the use of Article 8 to alleviate the negative consequences of cross-border surrogacy and its use to potentially put a stop to the cross-border phenomenon by enabling domestic surrogacy, which was identified as a lacuna in the current literature. Finally, the increasing numbers of cross-border surrogacy in Europe (and beyond) demonstrate the urgency of taking measures in the field.

It is not expected that this thesis will cause an immediate change to the Court's current application of the ECHR framework or that the debate on cross-border surrogacy will cease if the proposal by this thesis is followed. After all, this thesis has acknowledged some of its own limitations. Nonetheless, this thesis has sought to take forward the scholarship by carrying out legal research in surrogacy covering the field of human rights, family law and medical law, covering aspects of both public and private international law. In addition, 'Surrogacy and the European Convention on Human Rights' is directed to both the field of study of law and practice of law. Therefore, it aims to reshape legal understanding and at the same time serve as a potential guideline for future surrogacy cases lodged before the Strasbourg Court.

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