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# Enduring politics: the culture of obstacles in legislating for assisted reproduction technologies in Ireland<sup>☆</sup>

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**Abstract** Assisted reproductive technology has become a normalized part of reproductive medicine in many countries around the world. Access, however, is uneven and inconsistent, facilitated and restricted by such factors as affordability, social and moral acceptance or refusal and local cultures of medical practice. In Ireland, assisted reproductive technology has been available since 1987 but remains unregulated by legislation. This creates an uncertain and untenable legal circumstance given the contested issues related to constitutional protection of the right to life of the unborn and the indeterminate legal status of embryos *in vitro*. This paper examines the impact of an enduring political impasse. It explores how clinical assisted reproductive technology services in Ireland operate both inside and outside dominant institutional frameworks, meeting a pronatalist and pro-family social and political agenda, while sometimes contradicting the pro-life politics that has continued to shape women's reproductive lives. The medical approaches to infertility thus intersect with the ongoing debates around abortion, the failure of the government to regulate, and notions of embodied motherhood and responsibility within changing meanings of family and kinship. At the same time women and their partners seek assisted reproductive technology treatment in other countries throughout the European Union where laws differ and availability of services varies. A decade has passed since the Commission on Assisted Human Reproduction in Ireland released its recommendations; the enduring legislative vacuum leaves women, families and practitioners in potential legal limbo.

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## Introduction: assisted reproductive technology on contentious grounds

Technology has provided the means for overcoming a number of physiological challenges to conception and assisted reproductive technology, as medical practice, is now routine, normalized and available in most countries around the world. Availability is not synonymous with equity, however, and access can be either facilitated or restricted by such factors as legislation or regulation, affordability, social and moral acceptance or refusal and local cultures of medical practice. Reproduction is political and people who are not part of a heteronormative nuclear family may, in fact, be more deeply marginalized in many countries by legislative attempts to regulate access to assisted reproductive technology. In the European Union for example, restrictive access to assisted reproductive technology based on marital status and/or sexual orientation is the case in Austria, France, Germany, Latvia, Portugal, Slovakia, Slovenia, Romania and Sweden. A ban on surrogacy in many countries means that homosexual male couples or single men are not able to access services, while lesbian couples are often covered under laws that allow access to IVF and other treatments for single women. (Busardò et al., 2014).

In Ireland, new reproductive technologies have both exposed and shifted the cultural and political meanings associated with reproduction, revealing in particular the continued influence of longstanding institutional and social discourses on morality, motherhood and family. These influences include, the historical strength of a Catholic moral monopoly, Constitutional influences on the politics of gender and family, and the prohibition on abortion and the Constitutional amendment that resulted from referenda on abortion in Ireland. These factors have created a complex political landscape for the regulation of assisted reproduction. This paper examines the impact of an enduring political reticence on the part of Irish legislators to grapple with changing social values and practice as they attempt to develop legislation and regulation of reproductive technologies. The paper discusses Ireland's approach to regulating assisted reproductive technology through which it has fragmented the legal, social and biological aspects into structured institutional frames that fail to address the current context of social change and the need to redefine the politics of reproduction and family. This fragmentation also creates an inconsistent pattern of support and censure for various kinds of assisted technology-based family building. Surrogacy, for example, has revealed the most obstinate challenge in developing regulation, and is thus seemingly constituted as the most deviant from normative ideals of reproduction. Ireland, in fact, is one of the few EU member states without a legislative framework for regulating assisted reproduction.<sup>1</sup> This lack of regulation runs counter to the importance that has been placed on defining and regulating reproduction and family

in Ireland's history. This history speaks to the power and place of motherhood and reproduction in upholding and protecting social structures that are deeply connected to notions of nature and gender. Legislation of assisted reproductive technology requires that states embrace multiple kinds of procreation, motherhood, fatherhood, family formation and even citizenship. What is at stake is the ability of all persons in Ireland to reproduce and become parents.

Assisted reproduction has been available in Ireland since 1987. Over the years there have been as many as nine clinics providing a range of clinical services from basic donor sperm to IVF, embryo freezing and more technical services such as intracytoplasmic sperm injection (ICSI). These clinics operate both inside and outside dominant institutional frameworks; they facilitate a pronatalist and pro-family social and political agenda on one hand, while challenging and even contradicting the ideology that underpins a pro-life and conservative family politics. In other words, assisted reproductive technology in Ireland operates in politically dangerous terrain where the Catholic Church has influenced institutional practices, maintaining that procreation is linked to sex and conception is synonymous with the beginning of life. At the same time, a unique political agenda built on the meaning of family has continued to shape both nationalist identity and women's reproductive lives in Ireland for generations. Medical treatment of infertility thus intersects with the ongoing debates around abortion (which is illegal in Ireland<sup>2</sup>), the meaning of conception, notions of embodied motherhood and responsibility and changing meanings of family and kinship.

## Regulating reproduction

The regulation of sexuality, gender roles and reproduction has been a mechanism for defining Irish political identity (Bradley and Valiulis, 1997; Conrad, 2004; Smyth, 2005). While the Catholic Church has been an influential force in the politics of gender and motherhood, Ireland's post-colonial history has contributed to its constitutional emphasis on embodied motherhood. Much of the critical scholarly attention has focused on the impact of Article 40.3.3 of the Constitution, the Right to Life clause, as an obstacle to both legislation and social reconciliation around the use of assisted reproductive technology in Ireland (Engeli, 2009; McDonnell and Allison, 2006). However, this paper will argue that it is also the significance accorded to the meaning of family as integral to national stability and identity, and as an essentially 'natural' unit, that entrenches a conservative and intractable gender and reproductive politics that cannot easily accommodate new forms of family formation afforded by assisted reproductive technology.

The political space of family and reproduction in Ireland can be located, as Faye Ginsburg and Rayna Rapp argue, as

<sup>1</sup> In Cyprus the National Bioethics Committee has been developing recommendations for legislation of assisted reproductive technology (2007). Poland has the Medical Professions Act which prohibits the use of embryos for scientific research. Luxembourg and Malta have no legislation or regulation. (Busardò et al., 2014).

<sup>2</sup> Abortion is prohibited in Ireland by both legal statute and a Constitutional ban. In 2014 the Protection of Life in Pregnancy Act was passed to clarify that abortion can be performed if the life of the mother is at risk. <http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/pdf>

a site of both continuity and 'terrain for imagining new cultural futures and transformations, through personal struggle, generational mobility, social movements, and the contested claims of powerful religious and political ideologies' (Ginsburg and Rapp, 1995, 2). In Ireland, this imagined cultural transformation is in tension with an enduring inability to realign changing social values around motherhood and family with constitutionally enshrined meanings associated with national identity.

Like many medical technologies, assisted reproductive technology became available in Ireland before the moral, ethical and social implications were fully apparent. Recognizing the emerging challenges that the new technologies created, the Irish government established the Commission on Assisted Human Reproduction (CAHR) in 2000. The CAHR was chaired by Dr Dierdre Madden, a legal scholar with expertise in reproductive technologies, and members included physicians, scientists, academics, policy makers and stakeholders from the general public. Their mandate was to 'report on possible approaches to the regulation of all aspects of assisted human reproduction and the social, ethical and legal factors to be taken into account in determining public policy in this area' (Commission on Assisted Human Reproduction, 2005). In 2005, the CAHR released its long-awaited report and recommendations, the most important of which was that Ireland develop legislation to regulate the practice of assisted reproduction. Some recommendations were not unanimously supported within the Commission, highlighting the divisive nature of assisted reproductive technology politics in the Irish context. Dierdre Madden has described the divisive and potentially intractable debates that were likely to follow the release of the CAHR report (Madden, 2006).

The absence of legislation also creates an uncertain and untenable legal circumstance given the contested issues related to constitutional protection of the right to life of the unborn as it relates to embryos *in vitro*, the issue of reproductive rights (the right to become a parent or not), and the need to establish parenthood in the case of donor-assisted reproduction and surrogacy. The consequences of this absence are evident in a number of cases that have ended up in the Courts, a situation that has been repeatedly criticized by both the court system and practitioners. The impact of these proceedings on families is immeasurable and the loss of privacy, the need for judges to render decisions on medical and bioethical issues and the uncertainty that accompanies the appeal process all highlight the need for some clarity and certainty. However, a legislative framework in Ireland also risks constraining the possibilities and excluding access for some families and individuals who either do not conform to the heteronormative ideal or face complex biological challenges to family formation.

## Materials and methods

This paper employs discourse analysis to explore media and legislative discussions and debates around the use of assisted reproduction and its meaning for the constitution of family, motherhood and political identity in Ireland. Sources include newspapers, court documents and legislative debates. News sources, court decisions and debates in the Irish national parliament (Oireachtas) between 2004 and 2015

were examined for discourse around the incommensurability between attempts to legislate assisted reproductive technology and legal definitions of motherhood, parenthood and the family.

## The constitution of motherhood, family and pro-life politics

The Irish Constitution was a product of its time. Written in 1930s, by men with a patriarchal and paternal vision of the nation state, Articles 41 and 42 state:

- 1.1 The State recognizes the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.
2. The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.
  - 2.1 In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
    - 2.1.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

Under the wording of Article 41 of the Constitution, the family in Ireland is accorded rights described as inalienable and superior to man-made law. The historical traces of Ireland's political use of motherhood and family as nationalist tropes go back to the post-colonial context of the writing of the Constitution. At the same time, the influence of the Catholic Church was evident in its control over many social institutions, particularly education, healthcare and social welfare. Articles 41 and 42 reflect an era when Ireland was distinguishing itself from its British colonizers and its politics and destiny as a nation were heavily influenced by the Catholic Church and Papal encyclicals (O'Sullivan, 2009). The family, motherhood and marriage, until recently defended as heterosexual marriage, consolidate the patriarchal vision of a gendered and heteronormative nation state that both produces and is produced by this vision of Irish national identity. The constitution and its proscriptive politics of reproduction are based on the emphasis of natural law<sup>3</sup> and the importance of the family as defined by its capacity as a heteronormative procreative unit (Allison, 2013; McDonnell and Allison, 2006; Mullally, 2005). The identification of the family as 'the natural primary and fundamental unit group of society' and 'the necessary basis of social order...' locates its fundamental and natural value in maintaining political order in language that seeks to make the claims unimpeachable. Women are identified with a domestic role and motherhood, while the family is named as naturally, and therefore unquestionably, vital to the nation's stability. In spite of ongoing Constitutional review by government committees, the significance and special place of the family endures and shapes the Irish body politic.

<sup>3</sup> Aisling O'Sullivan and Philip Chan argue that the use of natural law has been used to interpret the Irish Constitution as being 'subject to a higher norm' that overrides positive law (O'Sullivan and Chan, 2006:18).

Legislation based on the 'moral monopoly' of the church led to the banning of divorce and contraception, the criminalizing of homosexuality and the persecution of unmarried mothers (Conrad, 2004; Inglis, 1998, 2004; Meaney, 1991). The later entrenching of a pro-life nationalism within the Constitution represents a consolidation of the conservative values (Smyth, 2005) while the importance of the family has been symbolic of a gendered politics of constraint and control (Conrad, 2004). Three socially divisive and politically contentious referendums were held around the constitutional changes enshrined in Article 40.3.3 which outlines the right to life of the unborn. The Eighth Amendment introduced a constitutional ban on abortion in the Republic in 1983. Following the X-case in 1992, where a 14-year-old girl was first denied and then granted access to an abortion, a referendum determined that suicide constituted a real threat to the life of the mother.<sup>4</sup> Two subsequent referendums attempted but failed to restrict a woman's access to abortion by refusing the potential for suicide to be interpreted as a threat to her life. However, no legislation was enacted in the wake of the case in spite of recommendations to ensure equal respect for the life of the mother. While this case is not related to access to assisted reproduction, it is a powerful social and political precursor to the current political conditions in which legislation on assisted reproductive technology languishes. Article 40.3.3 has created a sticking point around the question of when life begins and whether the constitutional protection pertains to embryos *in vitro* (McDonnell and Allison, 2006; Sills and Murphy, 2009).

A number of challenges to Ireland's restrictive abortion law have been taken to the European Court of Human Rights. The case of *A, B and C v Ireland* resulted in a unanimous ruling against Ireland on the grounds that it was in breach of Article 8 of the European Convention on Human Rights in 2010 (Daly, 2015). In response, the Irish government began to examine once again, what might be needed to legislate around the X-case ruling. The failure to create legislation to ensure equal consideration to the right to life of the mother would become animated by the death of Savita Halappanavar in Galway in 2012 (Holland, 2013). In spite of imminent miscarriage and the development of a fatal sepsis, she was denied an abortion that could have saved her life, primarily because medical practitioners felt a lack of legal clarity on the issue. While this case does not link specifically to assisted reproduction, it does illustrate the tension between social values and ideals and the need for clear legislation. As a result

<sup>4</sup> The X-case involved a 14-year-old girl who was raped by an adult acquaintance and sought an abortion in the UK. When her parents contacted the Irish Police Force (Gardai) to ask about procuring evidence for a charge, a court injunction was granted preventing her from having her pregnancy terminated based on the constitutional ban. She miscarried in the midst of legal events and her rapist was convicted and imprisoned. Public protest forced the Supreme Court to overturn the injunction and a new precedent was set for suicide as grounds for seeking an abortion. The referendum that followed sought support to remove risk of suicide as grounds for an abortion and also to restrict the right to travel and the right to information on abortion services. The electorate voted not to remove suicide as grounds for an abortion and voted to support the right to travel and to have access to information on abortion. (See Smyth, 2005).

of the European Court of Human Rights ruling, poignantly highlighted by the Savita Halappanavar case, the new Protection of Life in Pregnancy Bill was passed into law in 2013 (O'Sullivan et al., 2013). However, the Bill is very restrictive and unlikely to benefit many women seeking the right to choose in Ireland.<sup>5</sup> The legislation demonstrates the potential failure of legislation to address the demands of changing Irish society, imposing instead, a retrenched view of the politics of reproduction and meaning of motherhood.

Ireland is changing but long-held cultural values endure, particularly around the notion of family. With regard to assisted reproductive technology, a survey by a group of clinical practitioners in 2013 (Walsh et al., 2013) concurred with earlier findings of the CAHR indicating a widespread acceptance of assisted reproductive technology practices by the general population, even the older generation thought to be more likely to hold conservative views. People view assisted reproductive technology as supporting the value of family formation and clinical practitioners operate within this domain of social ideals.

In another indication of change, in the referendum on Marriage Equality in May 2015, Irish people voted to have a clause added to the Constitution that defines marriage as inclusive of same-sex relationships. While the majority vote in favour points to the movement of social change, arguments against often centred on the importance of two parents in a heterosexual marriage for the well being of children, affirming a narrow view that marginalized not only same-sex couples but single parents as well (MacKinnon, 2015). The desire to preserve a narrow view of ideal family formation was also reflected in a statement to the press by the head of the Referendum Commission with regard to the Marriage Equality referendum, when he noted that reproductive rights were accorded to families but this did not include access to assisted reproduction or to surrogacy (Finn, 2015). This statement, intended to reassure those with the conservative anti same-sex marriage perspective, reflects the view that procreation and family rights are inherently defined by certain kinds of reproduction and motherhood, and family is still seen by many through a heteronormative lens.

### Fragments of regulation and piecemeal legislation

In spite of the CAHR recommendation, 10 years have passed without any legislation regarding the practices of assisted reproductive technology in Ireland. Although promised by governments since the release of the CAHR report in 2005, it is only recently that the Irish government has taken steps to write legislation. Walsh et al. (2011) describe how an alternative network of regulatory processes has been implemented by physician self-regulation through their own professional licensing bodies. The Irish Medical Council (IMC) Guide to Professional Conduct and Ethics for Registered Medical Practitioners was

<sup>5</sup> The Protection of Life in Pregnancy Act states that a physical threat to the life of a woman must be confirmed by two physicians and where the risk is by suicide there must be three physicians, one of whom is a psychiatrist. The case of 'Ms Y' in 2014 for example, resulted in a young, pregnant asylum seeker expressing suicidal thoughts and asking for an abortion, instead being hospitalized and having a caesarean section performed (Quilty et al., 2015).



most recently revised in 2009. Walsh *et al.* note that the guidelines fail to account for the CAHR recommendation, in particular, that IVF be made available regardless of the gender, marital status or sexual orientation of the individuals seeking treatment. They note that without specific provision for an equality approach, there is a risk of discrimination and lack of consistency (2011:4). They also note that while the Irish Medical Council's latest guidelines are silent on the issue of disposition of excess embryos, they have demonstrated a distinctly 'pro-life ethical emphasis' in the past (*ibid*). This indicates the risk that without legislative guidelines, physicians are able to interpret the ethical guidelines in light of their own personal viewpoints on reproductive politics and family formation. Similarly, Sills and Healy (2008) are critical of the silence on surrogacy in practice guidelines noting that in the absence of legislation the courts would turn to the professional body for advice on a case and find no basis for consensus or decision-making (2008:3). This highlights the kind of legal, social and political hinterland in which clinicians operate in Ireland. Rather than a site for pushing the bounds of traditional family relationships, medical practice operates in a kind of institutional silence that enables technological but not necessarily legal and social innovation.

Additional patchwork oversight of assisted reproduction in Ireland has occurred through the regulation of laboratory and tissue management by the Health Products Regulatory Authority (formerly the Irish Medicines Board) and the Commission on Patient Safety and Quality Assurance (CPSQA). In alignment with Directive 2004/23/EC, to which Ireland is a signatory, both of these bodies oversee the technical and clinical safety of IVF, the storage of embryos and the use of gamete donation. However, neither is in a position to influence the significant social questions or statutory issues arising with regard to the status of embryos *in vitro*, for example, or restrictions in access to assisted reproductive technology based on gender, marital status or sexual orientation. The creation of these boards has facilitated the use of preimplantation genetic diagnosis (PGD) at two clinics in Ireland and the use of stem cells for research at Cork University. However, the lack of legislation around the full range of assisted reproductive technology services has also meant that at least one hospital in Dublin has refused to refer its patients for PGD because of its concern that its status in relation to the constitutional protection of the life of the unborn has not been clarified (Cullen, 2014). Such inconsistencies highlight the ways in which services in Ireland operate to meet the pronatalist ideal of enabling family formation while at the same time existing in a politically defined moral grey area in which assisted reproductive technology can be made safe as a technical endeavour but has yet to be reconciled with a wider social and constitutional meanings of rights for both embryos and potential parents.

The most recent piece of the regulatory patchwork has been the new Children and Family Relationships Bill which includes provision for children conceived via donor-assisted reproduction. This piece of legislation was passed in April of 2015, ten years after the CAHR report, and addresses the recommendation for a donor registry. While there have been concerns expressed by clinicians and supporters of assisted reproductive technology that such a donor registry will reduce the number of people willing to become gamete donors, others have argued that the right of children to know their

genetic heritage is paramount. Moreover, the desire for transparency in birth origins is informed by Ireland's history of discrimination against unmarried mothers and the secretive adoptions of their children in the past. This piece of legislation addresses most directly practices related to assisted reproductive technology, its purpose is clearly to fit the practice of donor conception into the predominant reproductive politics and nationalist identity framework. Concerns expressed by medical practitioners and policy makers include lack of consultation with fertility clinics, lack of access to non-anonymous donor gametes through international sperm banks and a reduction in the willingness of future donors to participate, and perhaps most concerning, an increase in the use of 'high-risk' unregulated sperm and increased travel outside the country to procure treatment with donor gametes (Walsh *et al.*, 2013). As a matter of access to care, a reduction in availability of donor gametes will have consequent impact on all aspects of assisted reproductive technology in Ireland. Already a small nation with a concern for its genetic donor pool, state-imposed mandates to link genetics to parenthood and the rights of a child to have information about the donor again highlight the difficulty in defining the social responsibility implied by various familial relationships and the scientific versus social meanings associated with kinship.

It remains to be seen how this Bill affects access to assisted reproductive technology in Ireland in the future. The new regulations are an example of what Charis Thompson calls 'genetic essentialism', giving weight to biological substance and lines of cellular lineage in its privileging of genetic origins while eclipsing the cultural work of shaping kinship as relations (2001: 199). Thus, the emphasis on a child's right to know their genetic origins will insinuate 'mothers' and 'fathers' into families founded on same-sex relationships where no such parental designation has existed. Perhaps more concerning is that the language of the Bill is framed to assert that the State is concerned for the welfare of children and must therefore, exert control over the reproductive processes of people who use donor gametes, reemphasizing its interests in defining the natural family as a cornerstone of national stability.

### Gaps in legislation: results of reticence

In spite of the challenges posed by the proactive, if fragmented, attempts to regulate assisted reproductive technology in various ways in Ireland, the reticence to provide coherent legislation and cohesive regulation is most evident when the lack of clarity has real consequences for people. There have been a number of cases in Ireland in the past decade in which the lack of legislation has had troubling legal and even tragic medical results.

The lack of legislation has also resulted in a high profile legal challenge in 2009, in which a couple who had undergone IVF to conceive in the past subsequently divorced. There were remaining frozen embryos as a result of their treatment cycle and the women requested that she have access to the embryos and that they be transferred to her body in an attempt to conceive. Her ex-husband argued against such a process, stating he did not want to parent any more children with his ex-wife. Roche versus Roche raised a number of issues as the woman argued on the basis of Article 40.3.3 asking that the

embryos be given the right to life. The final judgement of the Supreme Court, after a long and undoubtedly emotionally painful 3-year process, was that the embryos did not enjoy the protection of Article 40.3.3 and that the desire of one party not to be a parent outweighed the interests of the other in wanting to parent (see *Roche versus Roche and ors.*, 2009). Reproductive rights were entwined with the thorny issue of when life is thought to begin and the meaning of the relationship between embryo and the body of the mother. In this case, much was made of the importance of implantation as the deciding factor in the potential to be born. Such judgments also emphasize heavily the responsibility accorded to women as biopolitical vehicles of prolife Irish identity.

The debate around the status of embryos *in vitro* included discursive arguments about science and morality. However, as McGuinness and Ui Chonnachtaig point out, the ruling of the court:

itself assumes a certain moral position, that there is a difference between questions of law and questions of morality, a point that has been criticized by those who emphasize the natural law foundations of the Irish Constitution. Nevertheless, the Courts instead define their task, in the absence of legislation, as a policy question' (McGuinness and Ui Chonnachtaig, 2011:398).

While the courts define the issue of embryo preservation as policy, the Church defines it as a question of scientific morality, and clinicians as one of technical capacity in a discursive battle for authoritative voice (see *Irish Times*, 2006). Such arguments all sidestep the issue of how embryos currently exist within the politics of family formation in Ireland and how legislation can accommodate the changing social context in which families are formed via assisted reproduction in the future.

Another important case where the lack of legislation has created a legal difficulty arose when a woman and her husband commissioned the woman's twin sister as a gestational surrogate. When twins were born as result of assisted reproduction using the commissioning sister's eggs and her husband's sperm, the couple applied to be named on the birth certificate as the children's legal parents. Such a designation is important in Ireland where this assures legal guardianship and the right to make medical and legal decisions for children. The High Court initially agreed, in a ground-breaking ruling that grappled with the challenge of two kinds of biological motherhood – genetic and gestational. An appeal overturned the ruling at the Supreme Court and motherhood was defined solely by birth. The commissioning parents would have to adopt the children, requiring the gestational or birth mother to first relinquish them and subject the commissioning parents to the long and arduous process of approval to be adoptive parents. Once again, the notion of embodied motherhood in the politics of reproduction body link back to the notion of natural law. Although not part of common law, the State built its argument on the principle of *mater semper certa est*, meaning literally 'the mother is always known': The woman who gives birth is the mother of the child (Carolan, 2014; Christiansen, 2015). The Supreme Court also argued that the recognition of a genetic mother over the birth mother put in jeopardy the parental relationships of many women who had egg and embryo donation in order to conceive. As it stands, this excludes women who seek surrogacy as a means of

family formation from being mothers in the eyes in the Irish State. Their social, emotional and financial commitment to parenting a child is eclipsed by the fact of birth and another woman, who may have no social investment in that child will be designated as the mother. At the same time, the rights of gestational mothers of donor-conceived children are assured.

As Christiansen argues, the courts in this case relied on a number of experts who argued for and against the primacy of various elements in determining which biological relationship – linkages by blood or by DNA – held the most compelling scientific and social relevance in Irish definitions of inheritance and kinship (2015: 320). Drawing on the work of Rose and Abi-Rached (2013) Christiansen notes the shifting emphasis of debates about kinship and identity from the realm of psychological, philosophical, social and spiritual toward a genetic and 'molecular lens' (2015: 321). If the debates in this case are reduced to the molecular events in the Petri dish, stripped of their former social and philosophical meanings, the bodies of the women involved are objectified when the surrogate cannot relinquish the role of mother and the genetic mother is effectively marginalized as an artefact of a scientific process. A more nuanced approach to recognizing legal motherhood would put more emphasis on social relations and intention and less on the cellular links to kinship.

The Irish government has defined its concerns around surrogacy as relating to the best interests of the child in determining parentage. In a statement in the *Independent* newspaper (25/02/2015) the Minister of Health, Leo Varadkar, stated that they wished to remove the obstacle of recognizing genetic parenthood, ensuring it would be a simple legal procedure to re-issue a birth certificate in the name of the genetic mother after the fact of birth. However, he also notes that the best interest of the child mandate and that 'those who want to avail of surrogacy would have to be suitable to be parents'.<sup>6</sup> While his statement on one hand suggests that the arduous procedures of adoption will be bypassed, nonetheless a test of suitability is implied for genetic or commissioning parents on the other. Gestational mothers would have the right, according to Varadkar's description, to refuse to relinquish the child at any point up to the transfer of parentage, although no apparent provision is made for their suitability as a parent.

Commercial surrogacy would be criminalized in Ireland, according to the Minister of Health. The decision to criminalize domestic commercial surrogacy, it has been argued, will result in a shift to international surrogacy options in less regulated countries abroad (Wilson, 2015). While Minister Varadkar notes that the government would never take punitive action against a child who was the product of a surrogacy contract abroad, particularly if the child is genetically related to one of the parents, there could be some 'price' to be paid for such undertaking when the child is returned to Ireland. This approach is much like that of New Zealand, the UK and Australia, where, Wilson notes, judges have tended to waive or

<sup>6</sup> *MR v An t-Ard Chlaraitheoir* [2013] IEHC 91, See also, Health Minister Leo Varadkar: 'Commercial surrogacy will be banned in Ireland under new law' *Independent.ie* Newsdesk 25/02/2015 <http://www.independent.ie/irish-news/politics/health-minister-leo-varadkar-commercial-surrogacy-will-be-banned-in-ireland-under-new-law-31020930.html>

ignore commercial arrangements in order to secure the family in the best interests of the child.

In fact, surrogacy was originally part of the Children and Family Relationships Bill. Its removal and promise of more complete legislation covering assisted reproduction suggests that the State finds surrogacy more difficult to reconcile with its definition of natural motherhood and family than the use of donor gametes where the woman who gives birth will also be the parent.

## Discussion

In spite of the fact that the moral monopoly of the church is waning, the influence it has had in shaping the role of mothers and the importance of family in Ireland remains as political fact and artefact. Each new piece of legislation regarding reproductive politics and each change in the Constitution, including the most recent referendum to recognize same-sex marriage, has been carefully worded to uphold the significance of marriage, motherhood and family. Thus even as a new clause that defines marriage as a relationship between two people is inserted into the Article 41 of the Constitution, the importance of marriage and the need to protect it endures. New meanings for key social institutions, and deviations from prevailing normative values historically shaped by dominant institutions such as the Catholic Church, have proven difficult for the Irish state to articulate in regulatory or legislative terms. More than semantics, the challenge for institutions and legislators alike is to ensure that the relationships that are facilitated by assisted reproductive technology align with nationalist tropes of motherhood and family, even as the ways that motherhood and family come into being are dramatically changed.

How will legislation enable or hinder access to assisted reproductive technology in Ireland? There are in fact risks associated with both legislating and not legislating assisted reproductive technology practice in a country like Ireland, where a great deal of social and political identity has been constituted around motherhood, family and reproduction. As the Children and Family Relationships Bill highlights, there is a risk of rigidity and a dominant view of the importance of biology, genetics and nature in determining the meaning of family relations. The risks also highlight what Charis Thompson argues are ways in which assisted reproductive technology can provide either 'innovative ways of breaking free of bondage to old cultural categories of affiliation' or 'part of a hegemonic reification of the same old stultifying ways of classifying and valuing human beings' (Thompson, 2001:199). Assisted reproduction as medical practice in Ireland straddles both realms, clearly shifting the opportunities toward new ways of building family but unable to shift the meanings that family still holds within Irish social life.

The risks in not legislating are that the courts, the Church and the medical profession engage in a discursive battle over whose definition of nature, morality and science should prevail in the provision of services to assist reproduction. While a lack of legislation may well create opportunities for assisted reproductive technology practices to flourish unrestricted in Ireland, there is also a risk of stagnation as practitioners and policy makers refuse to adopt new technologies and expand practices until questions of legality and constitutionality are

settled. The gaps and spaces create opportunities for a kind of biopolitical angst in which uncertainty operates to restrict access rather than enable it. However, it is apparent that similarities pertain when the State attempts to legislate around aspects of assisted reproduction. The concern is that legislation will further enshrine a conservative and narrow view of family and its procreative rights and purpose. People who differ from this idealized norm are at risk of losing access even though assisted reproductive technology is available, should legislation define the terms too narrowly.

## Conclusion

Given the importance of family and reproductive politics to Ireland's distinction as a nation and given the changing social fabric in the country, access to assisted reproductive technology should not be the site for a lingering political hold by conservative values. This is particularly important in light of the recent abortion legislation. In step with the Marriage Equality Act, legislation on the use of assisted reproductive technology will be another opportunity for political acknowledgement of Ireland's new social reality.

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