Chapter 5
Ireland

5.1. Constitutional framework

Articles 40–44 of the Irish Constitution see at fundamental rights. Its Article 40 lays down a number of personal rights, ranging from freedom of expression to inviolability of dwellings and from liberty of the person to equal treatment before the law. No express provision is made for the right to respect for private life, but this right is covered by Article 40.3.1°, which protects more generally the 'personal rights'. Article 40.3.1° provides:

> 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.'

As explained hereafter, this right includes a marital right to procreate. The third paragraph of Article 40.3 has been even more prominent in the Irish debate on reproductive matters, as it provides for a right to life for the unborn. An introduction to this right is given in section 5.1.2 below. Subsequently, the rights of the (future) child and the right to know one's genetic origins are discussed.

5.1.1. The marital right to procreate

Neither the Irish Constitution, nor any other Irish statutory act contains an explicit right to procreate. Such a right was however recognised by the Irish courts as an element of the right to marital privacy. The foundation for the recognition of this right was laid in *McGee* v. *Attorney General* (1973) concerning contraceptives.[1] In this case the Supreme Court recognised that the personal rights of Article 40.3.1° of the Irish Constitution implied a right to marital privacy. The Court held that therefore those provisions of the Criminal Law Amendment Act, 1935, which prohibited the sale or import of contraceptives[2] constituted an unjustified invasion of the woman's personal right to privacy in her marital affairs. The majority of the Court concluded that the impugned provisions were inconsistent with Article 40.3.1° of the Constitution and were therefore no longer in force.[3]

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1 *McGee* v. *Attorney General & Anor* [1973] IESC 2; [1974] IR 284.

2 Section 17(3) of the Criminal Law Amendment Act, 1935.

3 The majority consisted of Judges Budd, Henchy and Griffin. Justice Walsh agreed that the relevant section of the Act was inconsistent with the Constitution, but he relied primarily on Art. 41 (on family rights) of the Constitution. Chief Justice Fitzgerald acknowledged that if the Act prohibited the use of contraceptives, it could have reasonably been held to contravene Art. 40 of the Constitution. As the contested section of the Criminal Law Amendment Act only concerned the sale and import of contraceptives, he did not find any unconstitutionality and proposed to dismiss the appeal. See also

In *Murray* v. *Ireland* (1991) – a case about imprisoned convicted criminals who were deprived of the ability to exercise their conjugal rights – Chief Justice Finlay confirmed the approach adopted by the majority in *McGee* and considered 'the right to beget children or further children of the marriage' a marital right.[4] The fact that a right to procreate has thus been expressly recognised for married couples,[5] does not necessarily *a contrario* mean that unmarried persons would not enjoy any such right. Until today, this has, however, simply not been expressly confirmed by any Irish court, nor in any piece of Irish legislation.[6]

5.1.2. The status of the unborn under Irish law

The unborn life enjoys distinct protection in the Irish Constitution. Following Article 40.3.3° '[t]he State acknowledges the right to life of the unborn and […] guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'[7] When this right was included in the Irish Constitution in 1983 (see section 5.2 below), the term 'unborn'[8] was not defined, rendering its meaning uncertain.[9] It was correspondingly insufficiently clear from which moment in time unborn life begins; conception, implantation in the womb or some other point.[10] *Leitmotiv* in both the Irish abortion law history and the long existing – and at the moment of writing still existing – legal vacuum surrounding assisted human reproduction has been exactly this uncertainty as to the exact protection the Constitution offers to the unborn.

The Irish Constitution Review Group held in 1996 that a definition was needed as to when the 'unborn' acquires the protection of the law. 'Philosophers and scientists may continue to debate when human life begins but the law must define what it intends to protect', the Group's report read.[11] It added that 'unborn' seemed to imply 'on the way to being born' or 'capable of being born''.[12] This made some conclude

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R. O'Connell, 'Natural Law: Alive and Kicking?: a Look at the Constitutional Morality of Sexual Privacy in Ireland', in: L. May, and J. Brown (eds), *Philosophy of law: classic and contemporary readings* (Chichester, Wiley-Blackwell 2010) p. 585 at p. 588.

4 Murray v. *Ireland* [1991] ILRM 465, Finlay CJ at 471–473.

5 See also Ch. 11, section 11.1.2.

6 See also section 5.3.3 below on access to AHR treatment under Irish law.

7 Eight Amendment of the Constitution Act, No. 8 (7 October 1983). This self-executing provision of the Constitution does not require legislation to give it effect.

8 '*Beo gan breith*' in the Irish version.

9 Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction* (April 2005) Appendix III, p. 96, online available at www.dohc.ie/publications/pdf/cahr.pdf?direct=1, visited June 2014.

10 See, *inter alia*, A. Sherlock, 'The Right to life of the unborn and the Irish Constitution', 24 *Irish Jurist* (1989) p. 13 at p. 13; G. Whyte, 'The Moral Status of the Embryo', 12 *Medico-Legal Journal of Ireland* (2006), p. 72 at p. 82 and A. McMahon, 'The Legal Status of Embryos In Vitro in Ireland – A "Precarious" Position', 17 *Medico-Legal Journal of Ireland* (2011) p. 33.

11 The Constitution Review Group (Stationery Office, Dublin 1996), p. 252. The report is online available at www.archive.constitution.ie/publications/default.asp?UserLang=EN, visited 26 May 2014.

12 *Idem*, at p. 275.

that the embryo *in vitro* was not covered by Article 40.3.3°,[13] a reasoning that was later confirmed by the Irish Supreme Court.[14]

For a long time the legislature left the interpretation of the term 'unborn' to the courts.[15] While they gave some initial impetus to this exercise,[16] in respect of the fundamental question as to when life begins, the courts, however, turned the tables on the legislature. In a 2009 ruling the Supreme Court held:

> '[…] there is uncertainty or no consensus as to when human life begins. The choice as to how life before birth can be best protected, and therefore the point which in law that protection should be deemed to commence, is a policy choice for the Oireachtas.'[17]

The legislature eventually gave some further guidance on the matter in the 2013 Protection of life during pregnancy Act (as discussed in section 5.2.8 below). Under this act the term 'unborn' was held to mean '[…] following implantation until such time as it has completely proceeded in a living state from the body of the woman.'[18] Implantation was thus considered the decisive point in time at which the protection of Article 40.3.3° of the Constitution commenced. Whether this protection extends to other rights than the right to life only, such as the right to bodily integrity, is still an undecided matter.[19]

5.1.3. The rights of the (future) child

The rights of the child are not enumerated in the Irish Constitution, but several Articles refer to children. For example, Article 42.5, which permits the State to intervene in the family in certain circumstances, acknowledges the natural and imprescriptible rights of the child. In their case law, the Courts have recognised that children enjoy

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13 D. Madden, 'In Vitro Fertilisation: The Moral and Legal Status of the Human Pre-Embryo', 3 *Medico-Legal Journal of Ireland* (1997) p. 12.

14 *Roche* v. *Roche & ors* [2009] IESC 82, Murray CJ. See also section 5.3.1 below.

15 See C.M. Colvin, 'Society for the Protection of unborn children (Ireland) Ltd v Grogan: Irish abortion law and the free movement of services in the European Community', 15 *Fordham International Law Journal* (1992) p. 476 at pp. 496–497 and S. Koegler, 'Ireland's Abortion Information Act of 1995', 29 *Vanderbilt Journal of Transnational Law* (1996) p. 1117 at p. 1126.

16 In a 1987 ruling, Chief Justice Hamilton held that the right to life of the unborn is afforded statutory protection from the date of its conception. *The Attorney General (Society for the Protection of the Unborn Children (Ireland Ltd)* v. *Open Door Counselling Ltd* [1988] IR 593, 598, [1987] ILRM 477, 480. Dissenting Judge Hederman held in *Attorney General* v. *X* [1992] 1 IR 1 at 12; [1992] ILRM 401 at 442: 'The right of life is guaranteed to every life born or unborn. One cannot make distinctions between individual phases of the unborn life before birth, or between unborn and born life.'

17 *Roche* v. *Roche & ors* [2009] IESC 82, Murray CJ. This judgment is discussed in further detail in section 5.3.1 below.

18 Section 2(1) Protection of life during pregnancy Act 2013.

19 In a ruling of 2009, the High Court suggested that the right to life of the unborn, as laid down in Art. 40.3.3° of the Irish Constitution, could in the future be held to include the inherent right to bodily integrity. *Ugbelese & Ors* v. *The Minister for Justice Equality and Law Reform* [2009] IEHC 598, paras. 65 and 74. See also I. Clissmann and J. Barrett, 'The Embryo in vitro after Roche v Roche: What Protection is Now Offered?', 18 *Medico-Legal Journal of Ireland* (2012) p. 13.

the protection provided by various Articles of the Constitution.[20] In *G.* v. *An Bord Uchtála* (1980)[21] the Supreme Court ruled that children have the right to be fed, to live, to be reared and educated, to have the opportunity of working and realising their full personality and dignity as a human being, and to have their welfare and health guarded and to be guarded against threats directed to their existence.[22] While some judges based the recognition of these rights on the personal rights as protected under Article 40.3.1° of the Constitution, others relied on Article 42.5.[23]

Over the years various calls for greater protection of children's rights in the Constitution were made.[24] In 2007 a Joint Parliamentary Committee on Constitutional Amendment on Children was established. In 2010 this Committee recommended amending the Constitution '[…] to enshrine and enhance the protection of the rights of children'.[25] This was followed up[26] and by referendum of November 2012 the Thirty-first Amendment to the Constitution was put before the people. It proposed to include a new Article 42A.1 in the Constitution, reading:

> 'The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.'

The amendment was adopted by a 58 per cent majority; however, the referendum result became the subject of a legal challenge. This challenge was dismissed by the High Court,[27] but subsequently appealed to the Supreme Court. As the appeal was still pending, the envisaged amendment had not yet been implemented by the time this research was concluded (i.e., 31 July 2014).

While the amendment refers to 'all children', some concerns were expressed that by leaving Article 41 of the Constitution intact, 'the robust protection afforded to the marital family unit' would often 'tilt the balance away from the vindication of the individual children's rights.'[28] Such concerns were largely overcome by the 2014

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20 UCD Constitutional Studies Group, *A Guide to the referendum on the 31st Amendment to the Constitution*, online available at www.ucd.ie/t4cms/Guide_to_the_31st_amendment.pdf, visited 9 July 2014.

21 *G.* v. *An Bord Uchtála* [1980] IR 32.

22 Joint Committee on the Constitutional Amendment on Children, *Third Report. Twenty-eighth Amendment of the Constitution Bill 2007 Proposal for a constitutional amendment to strengthen children's rights. Final Report*, February 2010, p. 35, online available at: www.oireachtas.ie/parliament/media/housesoftheoireachtas/contentassets/documents/JC-Constitutional-Amendment-on-Children-Final-Report.pdf, visited October 2011.

23 *Idem*, at p. 39.

24 As O'Shea has noted '[t]he need to amend the Constitution to provide greater protection for children was first highlighted in 1993 and since then numerous calls for constitutional reform from both the domestic and international levels have fallen on deaf ears.' O'Shea 2012, *supra* n. 11, at p. 87.

25 Joint Committee on the Constitutional Amendment on Children 2010, *supra* n. 22, at p. 14.

26 In September 2012 the Thirty-First Amendment of the Constitution (Children) Bill 2012 was presented.

27 'Challenge to Children's Referendum dismissed by High Court. A Dublin woman had taken a petition with an aim to quash the result in the November 2012 vote', *thejournal.ie* 18 October 2013, www.thejournal.ie/childrens-referendum-challenge-rejected-1135966-Oct2013, visited November 2013.

28 O'Shea 2012, *supra* n. 24, at pp. 92–93. The author observed: 'While the referendum's positive result may have symbolic value for the rights of the Irish child, any practical changes brought about by the

Children and Family Relationships Bill, as introduced in more detail in section 5.3.2 below. In this Bill the best interests of the child were a central focus. They were defined as follows:

> '[…] "best interests", in relation to a child, includes the physical, emotional, psychological, educational and social needs of the child including the child's need for stability having regard to the child's age and stage of development […].'[29]

5.1.3. The right to know one's genetic origins

The right to know one's genetic origins is recognised under Irish law, but it does not enjoy very strong protection. The Supreme Court ruled in *I.O'T.* v. *B* (1998) that a child has an unenumerated constitutional right to know the identity of his or her natural parents.[30] It added, however, that this right is neither absolute nor unqualified; it must be balanced with the parent's constitutional right to privacy. *I.O'T.* v. *B* concerned an adoption case and the ruling was subsequently codified in adoption legislation.[31] As discussed more elaborately in section 5.3.4 below, there was, on the contrary, at the time of conclusion of this research[32] no specific legislation (yet) that regulated under what circumstances children born from a pregnancy involving gamete donation could have access to information about their genetic parents.

5.2. Irish abortion legislation

Abortion is not allowed under Irish law, safe for the exceptional situation that an abortion may save the life of the mother. Under sections 58 and 59 of the Offences Against the Person Act 1861, which was in force until 2014, both the attempt of a pregnant woman to procure a miscarriage and the supply of any poison or instrument to any woman with the intent to procure a miscarriage, were criminalised.[33] The

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referendum are likely to be minimal, particularly as Art. 41 remains unchanged.'

29 Children and Family Relationships Bill, Revised version 26 September 2014, online available at: www.justice.ie/en/JELR/Pages/PB14000256, visited October 2014.

30 *I.O'T.* v. *B., The Rotunda Girls Aid Society & Father Doyle, and M. H.* v. *Father Doyle and The Rotunda Girls Aid Society* [1998] 2 IR 321. See M. Blair, 'Unveiling Our Heritage: A Comparative Examination of Access by Adopted Persons and Their Families to Identifying and Non–identifying Information', 3 *Irish Journal of Family Law* (2000) p. 10.

31 E.g. Art. 86 Adoption Act 2010 provides that the Civil Registry keeps an index '[t]o make traceable the connection between each entry in the Adopted Children Register and the corresponding entry in the register of births'. Information from this index can only be obtained by court order. The Court may not give access if it is not in best interests of any child concerned (Art. 88 Adoption Act 2010).

32 That is 31 July 2014.

33 The Irish Constitution of 1937 incorporated the common law prohibition on abortion and left the Offences Against the Persons Act intact. Both Section 58 and Section 59 of the Offences Against the Person Act 1861 were furthermore expressly upheld in Section 10 of the Health (Family Planning) Act 1979, No. 20/1979. See also Colvin 1992, *supra* n. 15, at pp. 491–92.

woman could in principle even face life imprisonment for an abortion attempt.[34] As explained below (in section 5.2.8), the maximum penalty was considerably lowered when new abortion legislation was adopted in 2013. Nonetheless, today a risk to the life of the mother is still the only ground for a lawful abortion in Ireland.

While the Irish Constitution of 1937 left the Offences Against the Persons Act intact,[35] developments in England and Wales and other Western countries influenced the Irish public debate on abortion. In *R. v. Bourne* (1939) the English Crown Court ruled that abortion to preserve the life of a pregnant woman was not unlawful and held that where a doctor was of the opinion that the probable consequence of a pregnancy was to render a woman a mental and physical wreck, he could properly be said to be operating for the purpose of preserving the life of the mother.[36] As a result of this judgment the Abortion Act 1967 was adopted in England and Wales permitting abortion, *inter alia*, to 'prevent grave permanent injury to the physical or mental health of the pregnant woman'.[37] Although Irish Courts held that the *R.* v. *Bourne* approach could not be adopted in the Irish jurisdiction,[38] these and similar developments in the United States of America[39] and in continental Europe[40] caused considerable concern in Ireland about the adequacy of existing provisions concerning abortion and the possibility of abortion being deemed lawful by judicial interpretation.[41] The Supreme Court decision in *McGee* (1973),[42] holding that the use of contraceptives fell within scope of the mother's private life, further fuelled the fear that abortion would also be legalised in Ireland.[43] Apparently this fear could not

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34 Before 1861 the UK Statute 43 Geo 3, ch 58 (1803) imposed the death penalty on anyone who administered poison with the intent to induce the miscarriage of a pregnant woman. In the 1861 Act this was changed to life imprisonment.

35 J.A. Weinstein, '"An Irish solution to an Irish problem": Ireland's struggle with abortion law', 10 *Arizona Journal of International & Comparative Law* (1993) p. 165 at p. 170 and N. Klashtorny, 'Ireland's abortion law: an abuse of international law', 10 *Temple International & Comparative Law Journal* (1996) p. 419 at p. 421.

36 *R.* v. *Bourne* [1939] 1 KB 687, [1938] 3 All ER 615. See also D. Curtin, 'Case note to ECJ C-159/90', 29 *CML Rev* (1992) p. 585 at pp. 585–586.

37 Section 1(1)(b) Abortion Act 1967.

38 *Society for the Protection of the Unborn Child* v. *Grogan and Others* (Unreported judgment of 6 March 1997) Keane J.

39 *Roe* v. *Wade* 410 US 113 (1973), which had been preceded by *Griswold* v. *Connecticut*, 381 US 479 (1965) and *Eisenstadt* v. *Baird*, 405 US 438 (1972), were two cases similar to *McGee* v. *Attorney General & Anor* [1973] IESC 2; [1974] IR 284.

40 See Colvin 1992, *supra* n. 15, at pp. 493–494 and Weinstein 1993, *supra* n. 35, at p. 171.

41 See, *inter alia*, Colvin 1992, *supra* n. 15, at pp. 492–493; Koegler 1996, *supra* n. 15, at p. 422; L. Hamilton, 'Matters of life and death', 65 *Fordham Law Review* (1996) p. 543 at p. 548; A.-M.E.W. Sterling, 'The European Union and Abortion Tourism: Liberalizing Ireland's Abortion Law', 20 *Boston College International & Comparative Law Review* (1997) p. 385 at p. 388 and A.M. Buckley, 'The primacy of democracy over natural law in Irish abortion law: an examination of the C case' 9 *Duke Journal of Comparative & International law* (1998) p. 275 at p. 281.

42 *McGee* v. *Attorney General & Anor* [1973] IESC 2; [1974] IR 284. See *inter alia* B. Mercurio, 'Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union', 11 *Tulsa Journal of International and Comparative Law* (2003) p. 141 at pp. 145–146.

43 See, *inter alia*, Colvin 1992, *supra* n. 15, at p. 495; A. Thompson, 'International protection of women's rights: an analysis of *Open Door Counselling Ltd. and Dublin Well woman Centre v Ireland*',12 *Boston University International Law Journal* (1994) p. 371 at p. 374; P. Ward, 'Ireland: Abortion: X + Y = ?!', 33 *University of Louisville Journal of Family Law* (1994) p.385 at p. 389; Koegler 1996, *supra*

be remedied by the Court's explicit statement that the recognition of a marital right to privacy did not alter the prohibition on abortion,[44] as anti-abortion campaigners started a lobby to incorporate the right to life of the unborn in the Constitution.[45] This lobby resulted in a referendum held in September 1983 during which the Eighth Amendment of the Constitution was adopted.[46] Justice Finlay later referred to this referendum as '[…] a decision by the people to insert into the Constitution a specific guarantee and protection for a fundamental rights perceived to be threatened by developments in the societies of countries outside Ireland'.[47] The third subsection of Article 40.3, that was at the time newly introduced, is still in force, and reads:

> 'The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.'[48]

Since the inclusion of this Article in the Constitution there have been many calls for the adoption of regulatory legislation. For instance in the *X Case*, which is discussed below in section 5.2.2, Supreme Court Justice McCarthy held that:

> 'The people, when enacting the Eighth Amendment, were entitled to believe that legislation would be introduced to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled.'[49]

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n. 15, at pp. 1122–1123; D.A. MacLean, 'Can the EC kill the Irish unborn?; An investigation of the European Community's ability to impinge on the moral sovereignty of Member States', 28 *Hofstra Law Review* (1999) p. 527 at p. 552; J. Schweppe, 'Mothers, Fathers, Children and the Unborn – Abortion and the Twenty-Fifth Amendment to the Constitution Bill', 9 *Irish Student Law Review* (2001) p. 136 at pp. 138–139; M.C. McBrien, 'Ireland: balancing traditional domestic abortion law with modern reality and international influence', 26 *Suffolk Transnational Law Review* (2002) p. 195 at p. 204 and A.M. Clifford, 'Abortion in International waters off the coast of Ireland: avoiding a collision between Irish moral sovereignty and the European Community', 14 *Pace International Law Review* (2002) p. 385 at pp. 396–397. As Koegler pointed out, the Irish Court expressly relied on the U.S. Supreme Court decisions *Griswold* and *Eisenstadt* (see *supra* n.39).

44 *McGee* v. *Attorney General & Anor* [1973] IESC 2; [1974] IR 284 at. 335. As Hamilton observes, such observations were repeated in *G.* v. *An Bord Uchtála* [1980] IR 32 and *Norris* v. *Attorney General* [1983] IESC 3; [1984] IR 36. Hamilton 1996, *supra* n. 41, at p. 548.

45 In 1981 umbrella organisation *Pro Life Amendment Committee* was founded, which considered a constitutional amendment the best way to prevent the legalisation of abortion in Ireland. See Colvin 1992, *supra* n. 15, at pp. 495–496 and Koegler 1996, *supra* n. 15, at p. 1125.

46 53.67 per cent of the electorate voted with 841,233 votes in favour and 416,136 against.

47 T.A. Finlay, 'The Constitution of Ireland in a Changing Society', in: D. Curtin and D. O'Keeffe (eds.), *Constitutional Adjudication in European Community and National Law – Essays for the Hon. Mr. Justice T.F. O'Higgin* (Dublin, Butterworth 1992) p. 140. See also R.A. Lawson, 'The Irish Abortion Cases: European Limits to National Sovereignty?', 1 *European Journal of Health Law* (1994) p. 167 at p. 167.

48 Eight Amendment of the Constitution Act, No. 8 (7 October 1983). This self-executing provision of the Constitution does not require legislation to give it effect.

49 *Attorney General* v. *X* [1992] 1 IR 1; [1992] ILRM 401 at 451.

The Justice at the time called the legislature's failure to legislate 'inexcusable'.[50] Even though a call for legislation was repeated at many points in time since,[51] it was not until 2013, however, that any implementing legislation was adopted (see section 5.2.8 below).

Because of the strict Irish abortion laws, women and girls from Ireland have been, and are, travelling abroad for abortions (for statistics, see section 5.4 below). This cross-border movement has proven so deeply entrenched in the Irish abortion debate and has been so fundamental for the (development of) standard-setting in this area, that the present section 5.2 in setting out the Irish abortion legislation also addresses some cross-border elements. Section 5.5 below will subsequently single out a number of relevant cross-border issues, such as criminal liability for, public funding for and information about abortions obtained abroad.

5.2.1. The success of pro-life campaigners

After the successful 1983 referendum, the Irish pro-life (and thus anti-abortion) campaigners of the *Society for the Protection of the Unborn Children* (SPUC)[52] sought to stop women in Ireland from travelling abroad for abortions, and initiated a series of proceedings against the Irish counselling agencies *Open Door Counselling* and *Dublin Well Woman Centre*, who provided non-directive counselling about legal abortion services abroad.[53] The Irish Supreme Court granted an injunction restraining the two counselling agencies from assisting pregnant women '[…] to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location and method of communication with a specified clinic or clinics or otherwise.'[54] The Supreme Court held that the agencies had no constitutional right to exercise their freedom of expression, as they were 'assisting in the ultimate destruction of the life of the unborn', whose right to life was expressly guaranteed by the Constitution.[55] The President of the Court, Chief Justice Finlay, held that '[…] no right could constitutionally arise to obtain information the purpose of […] which was to defeat the constitutional right to life of

50 Compare *Roche* v. *Roche* as discussed in section 5.3.1 below.

51 See, *inter alia*, I. Bacik, 'Guest Editorial', 11 *Medico-Legal Journal of Ireland* 1997, p. 1.

52 In the below discussed *Grogan* case, the CJEU described SPUC as 'a company incorporated under Irish law whose purpose is to prevent the decriminalization of abortion and to affirm, defend and promote human life from the moment of conception.'

53 As Sherlock has explained, under the Censorship of Publications Act 1929 (Section 16), the printing, publishing, sell or distribution any book or periodical which advocated abortion was prohibited. Sherlock 1989, *supra* n. 10.

54 *The Attorney General (Society for the Protection of the Unborn Children (Ireland Ltd) v. Open Door Counselling Ltd* [1988] IR 593 at 598, [1987] ILRM 477 at 480. In Ireland injunctions apply to all those who have notice of them. Sterling therefore concludes that this ruling effectively forced abortion counselling to go underground. Sterling 1997, *supra* n. 41, at p. 390 referring to A.M. Hilbert, 'Notes, The Irish Abortion Debate: Substantive Rights and Affecting Commerce Jurisprudential Models', 26 *VanderBilt Journal of Transnational Law* (1994) p. 1117 at p. 1135.

55 *Idem*, at 624–625.

the unborn child'.[56] The counselling agencies, *Open Door Counselling* and *Dublin Well Woman Centre*, subsequently lodged a complaint with the European Court of Human Rights (ECtHR). Before this Court would issue its judgment in the case, the other European Court, the Court of Justice of the European Communities (now CJEU), gave a judgment in another case initiated by the Irish pro-life campaigners.

5.2.1.1. The Grogan case (1991) and its aftermath

SPUC also brought a suit against representatives of three Irish student associations who distributed free handbooks containing information about abortion services available in England. Referring to Articles 59 and 60 of the EEC Treaty (now 56 and 57 TFEU), the student associations – represented by one of their officers, Stephen Grogan – contended that Irish citizens had a right to receive and impart information about services lawfully available in other Member States. The High Court made a reference to the Court of Justice of the European Communities (now CJEU) for a preliminary ruling on three questions: (a) whether abortion was a 'service' within the meaning of the EEC Treaty; (b) if so, whether the prohibition on the distribution of information regarding those services constituted a restriction within the meaning of the Treaty; and (c) if so, whether such a restriction could be justified.[57] As discussed more elaborately in Chapter 3,[58] the Court held in its preliminary ruling that the links between the activities of the student associations and the providers of abortion services in the United Kingdom or elsewhere, were 'too tenuous', for the prohibition on the distribution of information to be regarded as a restriction within the meaning of the Treaty.[59] Accordingly, in August 1992 the High Court granted a permanent injunction.[60]

The Irish government was worried about the effect of the ruling of the Court of Justice in *Grogan*, as it implied that Irish abortion law could potentially conflict with

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56 *Idem*, at 625. For critique of this ruling see also Hilbert 1994, *supra* n. 54, at p. 1134 and Thompson 1994, *supra* n. 43, at p. 382.

57 From *Campus Oil* v. *Minister for Industry* [1983] IESC 2; [1983] IR 82 it follows that under Irish law there is no appeal against a decision to refer a case to the CJEU. When the High Court did not grant an interlocutory injunction against the student associations while the CJEU's opinion was awaited, SPUC appealed to the Supreme Court against this inactivity. The Supreme Court unanimously granted the injunction, asserting that no Community law regarding services could outweigh the right to life of the unborn, as guaranteed by Ireland's Constitution. *The Society for the Protection of Unborn Children (Ireland) Ltd* v. *Grogan* [1989] IR 753 at 765; [1990] ILRM 350. According to Colvin this reflected a view contrary to the jurisprudence of the Court of Justice regarding the supremacy of Community law. Colvin 1992, *supra* n. 15, at p. 502. *Cf.* Case 11–70 *Internationale Handelsgesellschaft* [1970] ECR 1125, ECLI:EU:C:1970:114.

58 Ch. 3, section 3.5.2.1.

59 Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others* [1991] ECR I-4685, ECLI:EU:C:1991:378, paras. 24–27.

60 *SPUC* v. *Grogan and others* [1993] l CMLR 197. Fletcher has explained that '[t]he Court's finding that the students' unions were not protected under EC law in their distribution of abortion information effectively meant that the injunction against their doing so continued to operate until it was lifted in March 1997, after the Abortion Information Act 1995 came into effect.' R. Fletcher, 'National crisis, supranational opportunity: the Irish construction of abortion as a European service', 8 *Reproductive Health Matters* (2000) p. 35 at p. 37.

Community law.[61] If a direct link with the abortion providers could be established in a different case, Community law could potentially override Article 40.3.3° of the Irish Constitution.[62] To avoid that possibility, the Irish government lobbied for a Protocol to the Maastricht Treaty.[63] This resulted in the adoption of Protocol 17 to the Treaty on European Union, which provided:

> 'Nothing in the Treaty on the European Union or in the Treaties establishing the European Communities or in the Treaties or Acts modifying or supplementing those Treaties shall affect the application in Ireland of Article 40.3.3º of the Constitution of Ireland.'[64]

While the Maastricht Treaty was signed by the Irish government on 7 February 1992, its ratification was subject to a referendum by the Irish electorate, which was due to take place in June 1992. This referendum would turn out to be significantly influenced by yet another stage in the Irish abortion debate, initiated by the highly controversial landmark case *Attorney General* v. *X*.[65]

5.2.2. The *X Case* (1992) and its aftermath

Ten days after the signing of the Treaty on European Union, the Irish Court had to interpret the Eighth Amendment in a case involving a 14-year-old girl – referred to as '*X*' – who was pregnant as a result of multiple rape and wished to travel to the United Kingdom (UK) with her parents to have an abortion. The girl claimed that she was suicidal at the thought of carrying her pregnancy to term. Prior to their leaving, the parents of the girl contacted the Irish police to inquire if DNA tests could be carried out on the foetus, in order to provide proof of paternity. The police contacted the Director of Public Prosecutions (DPP), who declared on 5 February 1992 that such evidence would be inadmissible.[66] The following day the family travelled to England to procure an abortion. The DPP in turn contacted the Attorney General who subsequently sought an injunction order seeking the immediate return of the girl and her parents to Ireland. The family returned and put evidence before the High Court that *X* would commit suicide if she were forced to carry her pregnancy to full term. The High Court held that an abortion could only be contemplated if it were established that an inevitable or immediate risk to the life of the mother existed. It balanced the right to life of the girl against that of her unborn child and concluded

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61 Mercurio 2003, *supra* n. 42, at pp. 163 and 174. See also Hamilton 1996, *supra* n. 41, at p. 553.

62 See Sterling 1997, *supra* n. 41, at p. 392 and B. Moriarty and A.-M. Mooney Cotter (eds.), *Human rights law* (Oxford, Oxford University Press 2004) p. 18.

63 Treaty on European Union, signed at Maastricht on 7 February 1992 [1992] OJ C191/1.

64 Protocol Annexed to Treaty on European Union [1992] OJ C191/1, p. 94. As will be discussed below, the Protocol would later be partly revoked by the Irish government, under influence of domestic developments.

65 *Attorney General* v. *X* [1992] 1 IR 1; [1992] ILRM 401. Hogan and Whyte describe it as '[…] what must surely qualify as the most controversial case ever to come before an Irish court'. G. Hogan and G. Whyte, *J.M. Kelly, The Irish Constitution* (Dublin, LexisNexis Butterworths 2003) p. 1503. See also Buckley 1998, *supra* n. 41, at p. 285 and Mercurio 2003, *supra* n. 42, at p. 160.

66 See Ward 1994, *supra* n. 43, at p. 402.

that the risk that *X* would take her own life if an order would be made was 'much less' and 'of a different order of magnitude' than the certainty that the life of the unborn would be terminated if the order was not made.[67] Furthermore, the constitutional right to travel abroad[68] could not be invoked where the purpose of the travelling was to have an abortion.[69] The High Court accordingly granted an injunction preventing the girl from leaving Ireland for a period of nine months.

This judgment provoked unprecedented public reaction.[70] On the strong advice and with the financial support of the government, the family appealed the case to the Supreme Court.[71] In an *ex tempore* ruling of 26 February 1992, a four to one majority of the Supreme Court held that the injunction had to be lifted. Ten days later, on 5 March, the full judgments of the Court were handed down.[72] The majority of the Supreme Court held that the Constitution envisaged abortion being lawful in limited circumstances. Citing *McGee* (1973) Chief Justice Finlay noted that no interpretation of the Constitution was intended to be final for all time. He held this statement to be 'peculiarly appropriate and illuminating' in the interpretation of the Eighth Amendment, which dealt 'with the intimate human problem of the right of the unborn to life and its relationship to the right of the mother of an unborn child to her life.'[73] He recalled that by virtue of the amendment the State had a duty to have 'due regard' for the life of the mother. Chief Justice Finlay decided that the two rights at stake had to be interpreted harmoniously.[74] In Finlay's opinion the proper test to be applied in this case was:

> '[…] if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article 40, s.3, sub-s. 3 of the Constitution.'[75]

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67 *Attorney General* v. *X* [1992] 1 IR 1, at 12; [1992] ILRM 401, at 410.

68 This unenumerated right was recognised for the first time in *State (KM)* v. *Minister for Foreign Affairs* [1979] IR 73, 80–81.

69 *Attorney General* v. *X* [1992] 1 IR 1, at 6–7; [1992] ILRM 401. See also Koegler 1996, *supra* n. 15, at p. 1126.

70 In the Netherlands, for example, parliamentary questions were posed about the *X Case*. *Kamerstukken II* 1991/92, no 398. See furthermore *inter alia* Weinstein 1993, *supra* n. 35, at p. 165 at p. 191; Klashtorny 1996, *supra* n. 35, at p. 419 at p. 428; Hamilton 1996, *supra* n. 41, at p. 554 and Buckley 1998, *supra* n. 41, at p. 286.

71 Sterling 1997, *supra* n. 41, at p. 393; Schweppe 2001, *supra* n. 43, at p. 141; S. Mullally, 'Debating Reproductive Rights in Ireland', in: B. Lockwood (ed.), *Women's Rights, A Human Rights Quarterly Reader* (Baltimore, Johns Hopkins University Press 2006) p. 613 at p. 626.

72 *Attorney General* v. *X* [1992] 1 IR 1; [1992] ILRM 401.

73 *Idem*.

74 Hogan and Whyte have defined the doctrine of harmonious interpretation as 'the principle that constitutional provisions should not be construed in isolation from all the other parts of the Constitution among which they are embedded but should be so construed as to harmonise with the other parts'. The authors held that this doctrine was 'no more than a presumption that the people who enacted the Constitution had a single scale of values, and wished those values to permeate their charter evenly and without internal discordance'. Hogan and Whyte 2003, *supra* n. 65, at p. 8.

75 *Attorney General* v. *X* [1992] 1 IR 1 at 53, [1992] ILRM 401 at 425.

The majority concluded that *in casu* this test was satisfied as it was established, as a matter of probability, that there was a real and substantial risk to the life of the mother by self-destruction which could only be avoided by termination of her pregnancy.[76] The exact standard of proof and the requirements needed to establish a sufficient risk were not, however, clarified in the majority judgment.[77] According to Hamilton no party foresaw the manner in which the Supreme Court interpreted the words of the Eight Amendment in the *X Case*.[78] Dissenting Judge Hederman deemed it possible to guard the mother against self-destruction and preserve the life of the unborn child at the same time. He held that

> '[…] no recognition of a mother's right of self determination can be given priority over the protection of the unborn life. The creation of a new life, involving as it does pregnancy, birth and raising the child, necessarily involves some restriction of a mother's freedom but the alternative is the destruction of the unborn life.'[79]

As Ward indicated, 'the most ironic consequence of the *X Case*' was that the judgment furthermore created an exception providing for lawful abortion to save the life of the mother *within* the Irish jurisdiction.[80] Because three out of five judges held that in this conflict of fundamental rights, the right to life of the unborn trumped the right to travel of the mother,[81] the case was decided on the theoretical basis of whether *X* would be allowed to have an abortion *in* Ireland, because if not, she did not have the right to travel to obtain one.[82] Thereby the Court's decision suggested that in other circumstances than a real and substantial risk to the life of the mother,

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76 This same conclusion was later reached in the similar case of *A. and B.* v. *Eastern Health Board & C.* [1997] IEHC 176; [1998] 1 IR 464; [1998] 1 ILRM 460, often referred to as the *C case*. See also D.A. Cusack, 'Abortion – Conflicting Rights, Duties and Arguments', 3 *Medico-Legal Journal of Ireland* (1997) p. 82. Buckley observed that in the latter case the Court went further by permitting a state agency to fund and facilitate the young girl's abortion. According to the author as a result of this case it was unclear who had a right to an abortion in Ireland and who was able to receive government funding for such an abortion. Mercurio agreed with Buckley that Irish abortion law still failed to address the question of whether a woman who demonstrated a real and substantial risk to her life that qualified for an abortion was eligible to receive state-funded medical treatment. Both authors, furthermore, pointed out that the *C case* suggested that 'very little evidence [was] needed to prove a real and substantial risk of suicide'. Buckley 1998, *supra* n. 41, at pp. 302 and 304–305 and Mercurio 2003, *supra* n. 42, at p. 169.

77 Weinstein 1993, *supra* n. 35, at p. 193; Koegler 1996, *supra* n. 15, at pp. 1133–1134 and Klashtorny 1996, *supra* n. 35, at p. 429.

78 Hamilton 1996, *supra* n. 41, at p. 551.

79 *Attorney General* v. *X* [1992] 1 IR 1, at 72.

80 Ward 1994, *supra* n. 43, at p. 406. See also D. Cole, '"Going to England": Irish Abortion Law and the European Community', 17 *Hastings Int'l & Comp. L. Rev.* (1993–1994) p. 113 at p. 133; Hilbert 1994, *supra* n. 54, at p. 1141; Koegler 1996, *supra* n. 15, at p. 1133; Sterling 1997, *supra* n. 41, at p. 393; Buckley 1998, *supra* n. 41, at pp. 287–288; McBrien 2002, *supra* n. 43, at p. 211; Clifford 2002, *supra* n. 43, at p. 408; S.J. Johansen, 'Clearly Ambiguous: A Visitor's View of the Irish Abortion Referendum of 2002', 25 *Loyola of Los Angeles International & Comparative Law Review* (2003) p. 205 at p. 212 and Mercurio 2003, *supra* n. 42, at pp. 162–163.

81 Chief Justice Finlay, Justice Egan and Justice Hederman. Justice O'Flaherty and McCarthy disagreed. *Attorney General* v. *X* [1992] 1 IR 1 [1992] ILRM 401 at 453 and 456. See Hilbert 1994, *supra* n. 54, at p. 1142.

82 Buckley 1998, *supra* n. 41, at pp. 287–288, referring to Cole 1993–1994, *supra* n. 80, at p. 133; Hogan and Whyte 2003, *supra* n. 65, at p. 803 and Koegler 1996, *supra* n. 15, at p. 1134.

women could be restrained from travelling outside Ireland to procure an abortion.[83] This issue was later solved by the Thirteenth Amendment, that will be discussed in section 5.2.3 below.

Lastly, it should be pointed out that the Supreme Court decided the case – including its travel aspect – on the basis of national law only, thereby avoiding issues of European law.[84] Hilbert thinks that the fact that the Court in *X* characterised the issues raised on appeal as concerning Irish Constitutional law only, and no European Community law, revealed the Irish judiciary's 'overriding concern with defining domestic constitutional rights'.[85]

After the *X Case*, the Irish government feared that Irish voters disagreeing with the *X Case*, also disagreed with Protocol 17 and would therefore reject ratification of the Maastricht Treaty in a referendum which was scheduled for 12 June 1992.[86] The government therefore sought an amendment to Protocol 17, but the other EC Member States refused to reopen the debate on the Protocol. The Irish government subsequently settled for a Solemn Declaration to the effect that Protocol 17 would not '[…] limit freedom either to travel between Member States or […] to obtain or make available in Ireland information relating to services lawfully available in Member States'.[87] In addition to the Declaration, the government promised that a separate referendum would be held regarding the right to travel abroad for an abortion and the right to receive information about foreign abortion clinics.[88] It seems that this promise had the desired effect; in June 1992 the ratification of the Maastricht Treaty was approved by the Irish people. Before the announced new abortion referendum would take place, the ECtHR delivered its judgment in *Open Door Dublin Well Woman* v. *Ireland*.[89] As discussed more in depth in Chapter 2,[90] the ECtHR found a violation of Article 10 in this case. Despite according a wide margin of appreciation in matters of morals '[…] particularly in an area such as the [one at stake] which touche[d] on matters of belief concerning the nature of human life',[91] the ECtHR considered the

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83 Cole 1993–1994, *supra* n. 80, at p. 133. See also Koegler 1996, *supra* n. 15, at p. 1134 and Mercurio 2003, *supra* n. 42, at p. 166.

84 *Attorney General* v. *X* [1992] 1 IR 1, at 305–307. See also P. Fitzmaurice, '*Attorney General v X*: A lost opportunity to examine the limits of European integration', 26 *Brooklyn Journal of International Law* (2001) p. 1723 at p. 1750 and Lawson 1994, *supra* n. 47, at p. 175.

85 Hilbert 1994, *supra* n. 54, at p. 1143.

86 The Maastricht Treaty was signed by the Irish government on 7 February 1992. See Sterling 1997, *supra* n. 41, at pp. 394–95; Lawson 1994, *supra* n. 47, at p. 176; Klashtorny 1996, *supra* n. 35, at pp. 429–30 and Buckley 1998, *supra* n. 41, at p. 288. See F. Murphy, 'Maastricht: implementation in Ireland', 19 *European Law Review* (1994) p. 94.

87 Declaration of the High Contracting Parties to the Treaty on European Union [1992] OJ C191/1, p. 109. See also ch. 3, section 3.5.2.1, footnote 219.

88 See, *inter alia*, Klashtorny 1996, *supra* n. 35, at p. 430; P. Manners, 'Can governmental policy trump the freedom of speech? Access to information about abortion services in Ireland and the United States', 20 *Suffolk Transnational Law Review* (1996) p. 289 at p 295; Sterling 1997, *supra* n. 41, at p. 396 and Buckley 1998, *supra* n. 41, at p. 289.

89 ECtHR 29 October 1992*, Open Door and Dublin Well Woman* v. *Ireland*, nos. 14234/88 and 14235/88.

90 Ch. 2, section 2.4.1.

91 ECtHR 29 October 1992*, Open Door and Dublin Well Woman* v. *Ireland*, nos. 14234/88 and 14235/88, para. 68.

restriction to be disproportionate to the aims pursued. After the judgment from the ECtHR, *Open Door Counselling* and *Dublin Well Woman* applied to the Supreme Court to have the injunction restraining their activities lifted. This Court rejected their appeal,[92] as at the time Ireland was not required to follow the judgment, because rulings of the ECtHR did not override conflicting decisions of the Irish Court.[93]

5.2.3. The 1992 abortion referendum and the 1995 Abortion Information Act

A month after the ECtHR *Open Door* judgment, on 25 November 1992, the next abortion referendum was called. Three constitutional amendments were put before the electorate. The first proposal related to what has been described as the 'substantive' issue of the circumstances in which an abortion would be permissible within Ireland. By means of this proposal, the government tried to limit the effects of the *X Case*.[94] Abortion would be permitted where such was necessary to save the life, as distinct from the health of the mother, where such risk arose from an illness or disorder of the mother, other than a risk of suicide.[95] This proposal (the Twelfth Amendment) was defeated by both sides of the abortion debate and thus rejected in the vote.[96] The other two proposals concerning the freedom to travel abroad to obtain an abortion (the Thirteenth Amendment) and the provision of abortion information (the Fourteenth Amendment) were both adopted.[97] Although the Twelfth Amendment had been primarily intended as a correction of the *X Case*, the adoption of the Thirteenth Amendment also influenced the interpretation of that ruling. Any uncertainty as to whether women were only allowed to travel abroad where the

92 *Attorney General ex rel Society for the Protection of Unborn Children (Ireland) Ltd.* v. *Open Door Counselling & Dublin Well Woman Centre Ltd.* [1994] 1 ILRM 256. See also Ward 1994, *supra* n. 43, at pp. 396–397.

93 Sterling 1997, *supra* n. 41, at p. 398. More elaborately on the incorporation of the ECHR in the Irish jurisdiction, see D. O'Connell, 'Ireland', in: R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe. The ECHR and its Member States 1950–2000* (Oxford: Oxford University Press 2001) pp. 423–474.

94 See, *inter alia*, A. Eggert and B. Rolston, 'Ireland', in: B. Rolston and A. Eggert (eds.), *Abortion in the new Europe, A comparative handbook*, Westport (etc.): Greenwood Press 1994, pp. 157–172 at p. 169 and Ward 1994, *supra* n. 43, at p. 406. At the same time, as Eggert and Rolston observed, a vote in favour of this proposal would have allowed for therapeutic abortions, even within the confines of the Irish State.

95 The proposal read: 'It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.'

96 The proposal was rejected with 1,079, 297 votes to 572,177. See also Buckley 1998, *supra* n. 41, at p. 290.

97 Thirteenth Amendment of the Constitution of Ireland, Act (23 December 1992) and Fourteenth Amendment of the Constitution of Ireland, Act (23 December 1992). The Thirteenth Amendment was adopted with 1,035,308 votes to 624,059. The Fourteenth Amendment was adopted with 992,833 votes to 665,106.

pregnancy posed a substantial risk to the life of the mother (see 5.2.2 above), was now removed.[98] The two new paragraphs to Article 40.3.3º provided:

> 'This subsection shall not limit freedom to travel between the State and another state.
>
> This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.'[99]

For several years the government failed to adopt legislation clarifying the conditions under which information on foreign abortion services could be disseminated.[100] In 1995 the *Regulation of Information (Services outside the State for Termination of Pregnancies)* Bill was enacted.[101] The Act has been referred to as 'the culmination of years of litigation and controversy over abortion rights under Irish and EU law'.[102] It delineates how, and under what circumstances, publishers, organisations offering pregnancy counselling and the like can disseminate information concerning abortion. By virtue of this Act women in Ireland are entitled to receive information about abortion services, provided that such information does not advocate or promote the termination of a pregnancy.[103] Doctors and counsellors who make an appointment or any other arrangement for or on behalf of, a woman with a person who provides services outside Ireland for the termination of pregnancies, are guilty of an offence and can be convicted to a fairly moderate fine.[104]

The 1995 Act was referred by the President to the Supreme Court,[105] which held that the Bill did not constitute an unjust attack on the constitutional rights of the unborn or on the constitutional rights of the mother or any other person or persons, and concluded that a fair and reasonable balance between the various constitutional rights in question had been struck by the legislature.[106] The Supreme Court, *inter*

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98 See Koegler 1996, *supra* n. 15, at p. 1136.

99 These amendments have been referred to as 'badly thought out and badly worded'. See B. McCracken, 'The Irish Constitution – an overview', in: J. Sarkin and W. Binchy (eds.), *Human Rights, the Citizen and the State. South African and Irish Approaches* (Dublin, Round Hall Sweet & Maxwell 2001) p. 52 at p. 60.

100 See Ward 1994, *supra* n. 43, at p. 407; Koegler 1996, *supra* n. 15, at p. 1136; Sterling 1997, *supra* n. 41, at p. 385; Buckley 1998, *supra* n. 41, at p. 290; Mercurio 2003, *supra* n. 42, at p. 166 and Mullally 2006, *supra* n. 71, at p. 629.

101 See Schweppe 2001, *supra* n. 43, at p. 145 and D. O'Connor, 'Limiting "public morality" exceptions to free movement in Europe: Ireland's role in a changing European Union', 22 *Brooklyn Journal of International Law* (1997) p. 695 at p. 708.

102 Sterling 1997, *supra* n. 41, at p. 386.

103 Sections 3 and 5 Regulation of Information (Services outside the State for Termination of Pregnancies) Act. See Schweppe 2001, *supra* n. 43, at p. 145 and Johansen 2003, *supra* n. 80, at p. 215.

104 Section 8 and 10 Regulation of Information (Services outside the State for Termination of Pregnancies) Act.

105 Pursuant to Art. 26 of the Irish Constitution the President may refer any bill to the Supreme Court for a determination of whether the bill is repugnant to any provision of the Constitution.

106 *Article 26 and the Regulation of Information (Services outside the State for Termination of Pregnancies) Bill* (1995) 2 ILRM 81, 107, [1995] 1 IR 1. See Schweppe 2001, *supra* n. 43, at p. 146. As various commentators have observed, this decision is significant, as for the first time the Court held

alia, held that once a woman had made an appointment with a foreign abortion clinic, the Act did not preclude Irish doctors and counsellors from communicating 'in the normal way' with the doctors from the foreign clinics with regard to the condition of their patients. Also, Irish doctors were free to give 'full information to a woman with regard to her state of health, the effect of the pregnancy thereon and the consequences to her health and life if the pregnancy continues', so as to enable her to make an informed decision about a pregnancy termination.

Following this ruling the 1995 Act became immune from future constitutional challenge.[107] A later challenge of (certain sections of) the Act before the ECtHR would prove unsuccessful (see section 5.2.6 below).

5.2.4. (Towards) the 2002 abortion referendum

In April 1995 a Constitution Review Group was established, with the task of establishing those areas where constitutional change could be necessary with a view to assisting the governmental committees in their constitutional review work. In its report of 1996 the Group considered that as a result of the *X Case* and the rejection of the Twelfth Amendment during the 1992 Referendum, the law on abortion in Ireland was unclear.[108] It therefore recommended the introduction of legislation to regulate the application of Article 40.3.3° within the terms of the *X Case*.[109] The report was followed-up by a *Green Paper on Abortion* (1999)[110] which gave seven possible constitutional and legislative solutions: (1) an absolute constitutional ban on abortion; (2) an amendment of the Constitution so as to restrict the application of the *X Case*; (3) the retention of the position applicable at the time; (4) the retention of the constitutional *status quo* with a legislative restatement of the prohibition of abortion; (5) legislation to regulate abortion as defined in the *X Case*; (6) a reversion to the pre-1983 position; and (7) permitting abortion beyond the grounds specified in the *X Case*. The Green Paper was referred to the all-party *Oireachtas* (Parliamentary) Committee on the Constitution. Despite a detailed process of consultation, this committee was unable to achieve consensus on any of the options set out in the paper.[111] In the meantime, the Supreme Court confirmed its ruling in the *X Case* in a very similar case, the so-called *C Case*.[112]

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that amendments to the Constitution that violate natural law are acceptable. The Court considered that natural law was not antecedent and superior to the Constitution. O'Connor 1997, *supra* n. 101, at pp. 708–710; Buckley 1998, *supra* n. 41, at p. 291; Mullally 2006, *supra* n. 71, at p. 630 and A. O'Sullivan, 'Same-sex marriage and the Irish Constitution', 13 *The International Journal of Human Rights* (2009) p. 477 at p. 479.

107 Art. 34.3.3º of the Irish Constitution.

108 Report of the Constitution Review Group (1996, Pn 2632), p. 273–279.

109 *Idem*.

110 Office of the Taoiseach, *Green Paper on Abortion* (1999 Pn 7596), online available at www.taoiseach.gov.ie/upload/publications/251.rtf.

111 All Party Oireachtas Committee on the Constitution, *Fifth Report, Abortion* (2000) online available at www.taoiseach.gov.ie/attached_files/upload/publications/1434.pdf, visited 14 September 2010.

112 *A. and B.* v. *Eastern Health Board & C.* [1997] IEHC 176; [1998] 1 IR 464; [1998] 1 ILRM 460. See *supra* n. 76. See also Bacik 1997, *supra* n. 51.

The Government finally opted for amendment of the Constitution by taking away the threat of suicide as a ground for lawful abortion. It introduced the *Protection of Human Life in Pregnancy* Bill, which would from then on be the law on abortion in the State.[113] The proposed Bill provided for a definition of abortion,[114] and self-destruction was excluded as a ground for lawful abortion. If accepted, the new Act would thus overturn the *X Case*. As adoption of the Act required an amendment of the Constitution, the electorate was invited to a new Referendum, this time on the Twenty-Fifth Amendment of the Constitution. On 6 March 2002, a narrow majority – consisting of both pro-life and pro-choice supporters[115] – defeated the amendment.[116] Consequently the *X Case* remained the applicable abortion law.[117] Before this ruling could be codified in abortion legislation in 2013 (see section 5.2.8 below), its implications were challenged by new applications lodged with the ECtHR, as well as by a domestic procedure.

5.2.5. Abortion in case of lethal foetal abnormality? The cases of *D.* v. *Ireland* and *Miss D.*

In 2002 an application against Ireland was lodged with the ECtHR by a woman referred to as '*D.*' (see also Chapter 2, section 2.2.1). In late 2001 *D.* had become pregnant with twins. In early 2002 it became clear that one foetus had died in the womb and that the second foetus had a lethal abnormality. *D.* therefore decided that she could not carry the pregnancy to term. As she was informed in an Irish hospital that she had no right to an abortion in Ireland, she went to the United Kingdom for an abortion. She subsequently did not undertake any legal action in Ireland but immediately filed a complaint with the ECtHR.

Invoking Articles 3 and 8 ECHR, *D.* complained before the ECtHR about the need to travel abroad to have an abortion in the case of a lethal foetal abnormality. She held that the overall ban on abortion put an unduly harsh burden on women in her situation. She furthermore submitted that her right to receive information under

113 Explanatory Memorandum accompanying the Twenty-fifth Amendment of the Constitution (Protection of Human Life in Pregnancy Act 2002), Bill Number 48 of 2001. See also Schweppe 2001, *supra* n. 43, at pp. 136–162.

114 Section 1 of the Bill defined abortion as 'the intentional destruction by any means of unborn human life after implantation in the womb of a woman'.

115 Mercurio 2003, *supra* n. 42, at pp. 172–173. See also Johansen 2003, *supra* n. 80, at pp. 216–234, who explains that the wording of the Referendum was fraught with ambiguities.

116 50.42 per cent of those who voted, voted against the amendment, 49.58 per cent voted in favour of the amendment. As Mullally observes this proposal differed from the similar 1992 proposal, '[…] in that it protected the fetus' right to life only following implantation in the womb, thereby allowing for the use of contraceptives such as the morning-after pill.' Mullally 2006, *supra* n. 71, at p. 633. See also Johansen 2003, *supra* n. 80, at pp. 216 and 232–234. Schweppe criticised that '[…] putting a piece of technical legislation tot the people for approval [was] confusing'. Schweppe 2001, *supra* n. 43, at p. 156.

117 As confirmed in *Baby O.* v. *Minister for Justice, Equality and Law Reform* [2002] IESC 44; [2002] 2 IR 169. The possibility of termination of pregnancy when there is real and substantial risk to the life of the mother, was also explicitly recognised in Section 24.6 of the 2004 Medical Council's Guide to Ethical Conduct and Behaviour.

Article 10 ECHR had been violated in that the 1995 Abortion Information Act '[…] imposed unnecessary restraints on what a doctor could tell her and prohibited that doctor making proper arrangements, or a full referral, for an abortion abroad'.[118]

As also discussed in Chapter 2, in June 2006 the ECtHR declared the case inadmissible for non-exhaustion of domestic remedies. The government had asserted that a constitutional action had been available to the applicant and claimed that '[in] the absence of a domestic decision, it was impossible to foresee that Article 40.3.3° clearly excluded an abortion in the applicant's situation in Ireland.' They further argued that

> '[…] [if] it had been established that there was no realistic prospect of the foetus being born alive, then there was "at least a tenable" argument which would be seriously considered by the domestic courts to the effect that the foetus was not an "unborn" for the purposes of Article 40.3.3 or that, even if it was an "unborn", its right to life was not actually engaged as it had no prospect of life outside the womb.'

The Court indeed considered it arguable that an exception to the prohibition of abortion in Ireland could be made in cases of fatal foetal abnormality. In the Court's view there was '[…] a feasible argument to be made that the constitutionally enshrined balance between the right to life of the mother and of the foetus could have shifted in favour of the mother when the "unborn" suffered from an abnormality incompatible with life.' The Court accordingly found that at the time when *D.* lodged an application with the ECtHR, a legal constitutional remedy had in principle been available to her to obtain declaratory and mandatory orders with a view to obtaining a lawful abortion in Ireland.[119]

Soon after the ECtHR's inadmissibility decision – which inherently had no consequences for the Irish abortion legislation – a national case put the question of abortion in the case of lethal foetal abnormality back on the agenda.[120] The so-called 'Miss *D.* case' concerned a 17-year-old pregnant girl in the care of the Health Service Executive (HSE), who wished to have an abortion after she discovered that her foetus suffered from a lethal abnormality. When the HSE prevented her from travelling to the UK to obtain an abortion, the girl appealed to the High Court.[121] This Court did not decide the question of whether in situations of fatal foetal abnormality there was a right to abortion in Ireland, but simply ruled that there was no stay or

118 ECtHR 27 June 2006 (dec.), *D.* v. *Ireland*, no. 26499/02, para. 59.

119 *Idem*, para. 92.

120 As Donoghue and Smyth put it, the 'confidence of the European Court in the Irish judicial system […] was soon dashed' by a subsequent national court case. S. Donoghue and C.-M. Smyth, 'Abortion for Foetal Abnormalities in Ireland; The Limited Scope of the Irish Government's Response to the A, B and C Judgment', 20 *European Journal of Health Law* (2013) p. 117 at p. 125.

121 *D (A Minor)* v. *District Judge Brennan, the Health Services Executive, Ireland and the Attorney General*, unreported judgment of the High Court of 9 May 2007. See *inter alia* www.ifpa.ie/node/396, visited June 2014 and B. Hewson, 'Ireland's Miss D: a 'bizarre dispute'', *Bpas Reproductive Review* (2007), online available at www.reproductivereview.org/index.php/rr/article/186, visited June 2014.

constitutional impediment which served to prevent Miss D. from travelling to the UK for terminating her pregnancy if she so wished.[122]

Late 2010, the ECtHR decided another Irish abortion case, a judgment which was highly relevant for cases like those of Miss D. In *A, B and C* v. *Ireland*, the Strasbourg Court addressed exactly the question whether the restrictive Irish abortion laws, implying that pregnant women have to go abroad for abortions on medical and social grounds, violated the Convention.

5.2.6. The ECtHR judgment in *A, B and C* v. *Ireland* (2010) and its follow-up in Ireland

As discussed more elaborately in Chapter 2, the ECtHR ruled in *A, B and C* v. *Ireland* that the Irish prohibition of abortion for health and well-being reasons '[…] based as it [was] on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn', did not exceed the wide margin of appreciation accorded in that respect to Ireland.[123] The Court thereby had regard to 'the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland'.[124] In respect of the complaint of the third applicant, who claimed that she did not have effective access to abortion in Ireland even though her pregnancy had posed a risk to her life, the Court instead found a violation of Article 8 ECHR. It held that Ireland had failed to provide for effective and accessible procedures which allowed her to establish her right to a lawful abortion in Ireland. It noted expressly that – as repeatedly pointed out at national level – the Irish government had failed to implement Article 40.3.3° and had not given any convincing explanations for this failure.[125]

Some called it 'bizarre' that until this ruling '[…] by refusing to enact any legislation concerning abortion successive Irish governments had managed to avoid the gaze of the European Court for a substantial period of time.'[126] Concretely the *A, B and C* judgment implicated that Ireland had to introduce legislation clarifying the circrumstances under which a pregnancy posing a substantial risk to the life of the pregnant woman, could be terminated.[127] This has been qualified as 'more of a subtle change as opposed to a radical overhaul of the *status quo*.'[128] While it was argued by

122 O. Bowcott, 'Irish judge stirs up abortion debate by ruling 17-year-old can travel to UK for termination', *The Guardian* 10 May 2007, online available at www.theguardian.com/society/2007/may/10/health.frontpagenews, visited 29 April 2014.

123 ECtHR [GC] 16 December 2010, *A, B and C* v. *Ireland*, no. 25579/05, para. 226.

124 *Idem*, para. 241.

125 *Idem*, para. 265.

126 Donoghue and Smyth 2013, *supra* n. 120, at p. 140.

127 S. McGuinness, 'Commentary. A, B, and C leads to D (for Delegation!)', 19 *Medical Law Review* (2011) p. 476 at p. 476.

128 See, *inter alia*, J. Schweppe, 'Taking Responsibility for the "Abortion Issue": Some Thoughts on Legislative Reform in the Aftermath of A, B and C', 14 *Irish Journal of Family Law* (2011) p. 50 and B. Daly, '"Braxton Hick's" or the Birth of a New Era? Tracing the Development of Ireland's Abortion Laws in Respect of European Court of Human Rights Jurisprudence', *European Journal of Health*

some that there was no need at all to legislate and that the Irish people were entitled to determine future abortion policy,[129] it was widely acknowledged that as a result of the *A, B and C* ruling, the government could no longer refuse to legislate on the matter. However, some warned that, because of its 'long history of fudging the issue of abortion' no quick or direct response to the ruling could be expected from the Irish government.[130]

The government confirmed that it would study the ruling,[131] but did not act very speedily. Some politicians indicated that other political concerns, such as 'restoring sound political finances' had to be given priority and that a re-run of the abortion debates was not what the country needed at that point in time.[132] Nonetheless, in June 2011 the government submitted an action plan of the implementation of the *A, B and C* judgment to the Committee of Ministers of the Council of Europe. The action plan included the establishment of an expert group by November 2011 to make recommendations on such implementation.[133] There were, moreover, other international bodies at the time calling on Ireland to undertake action. The UN Special Rapporteur on the situation of human rights defenders recommended to implement the *X Case* and the *A, B and C* judgment by introducing the necessary legislation and medical guidelines regarding access to legal abortion.[134] Further, in its report on Ireland of September 2011 the Commissioner for Human Rights of the Council of Europe noted with concern that there was still no legislation in place to set a framework allowing for abortion in limited circumstances where a woman's life was deemed to be in danger because of pregnancy and expressed his hope that a 'coherent legal framework including adequate services' would be put in place without delay. The Commissioner reiterated his position that the lack of legislation adversely affected women who did not have the financial means to seek medical services outside the country and were therefore 'particularly vulnerable.'[135]

Law 18 (2011) pp. 375–395 at p. 394. See also S. Donnelly, 'A, B and C v Ireland: A Commentary', 17 *Medico-Legal Journal of Ireland* (2011) p. 43.

129 Opening statement by William Binchy to the Joint Committee on Health and Children, online available at www.oireachtas.ie/parliament/media/committees/healthandchildren/William-Binchy.pdf, visited June 2014.

130 McGuinness 2011, *supra* n. 127, at p. 488.

131 *Irish Times* 21 December 2010, www.irishtimes.com/newspaper/frontpage/2010/1221/1224285993635.html, visited 21 January 2011.

132 *Irish Times* 28 December 2010, www.irishtimes.com/newspaper/frontpage/2010/1228/1224286367982.html, visited 21 January 2011.

133 *ACTION Plan. A, B, and C v. Ireland, Application no 25579/2005, Grand Chamber judgment 16 December 2010*, Information submitted by the Government of Ireland on 30 November 2012, online available at www.health.gov.ie/wp-content/uploads/2014/03/Action_Plan_ABCvIreland_Nov2012.pdf, visited 2 March 2014.

134 Human Rights Council Twenty-second session Agenda item 3 Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Addendum, Mission to Ireland (19–23 November 2012), p. 21.

135 Report by the Commissioner for Human Rights of the Council of Europe, following his visit to Ireland 1- 2 June 2011, CommDH(2011)27, Strasbourg, 15 September 2011, p. 7. See also Report by the Commissioner for Human Rights on his visit to Ireland 26–30 November 2007, CommDH(2008)9, Strasbourg 30 April 2008, p. 23 ff.

In January 2012, the government submitted an Action Report to the Committee of Ministers in which it indicated that the expert group would complete its report within six months.[136] While in March the Committee of Ministers expressed its concerns and strongly encouraged the Irish authorities to ensure that the expert group completed its work as quickly as possible,[137] the report only came out in November 2012. Its completion may well have been prompted by the controversial death of a pregnant woman in a Galway hospital in October 2012.[138]

5.2.7. Towards abortion legislation

In November 2012 Irish (and subsequently international) media reported about the death of Savita Halappanavar.[139] This 31-year-old woman had been hospitalised in Galway in late October, where she was soon found to be miscarrying. During her hospitalisation Halappanavar repeatedly asked for an abortion, but the doctors refused to terminate the pregnancy as long as the foetus had a heartbeat. After three days in hospital, during which Halappanavar's condition had seriously deteriorated, the foetus' heartbeat stopped. A couple of days later Halappanavar passed away. Her death sparked public protests[140] and refuelled the Irish abortion debate.[141] An investigation into the case by the Health Service Executive revealed that '[t]he interpretation of the law related to lawful termination in Ireland, and particularly the lack of clear clinical guidelines and training [was] considered to have been a material contributory factor' to the death of Halappanavar.[142] The doctors had felt

136 DH-DD (2012)66, online available at www.wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2016427&SecMode=1&DocId=1848792&Usage=2, visited 15 May 2014.

137 DH-DD(2011)480, DH-DD(2012)66E, DH-DD(2011)645 and DH-DD(2011)628E, online available at www.wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/Dec%282012%291136/12&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383, visited 15 May 2014.

138 M.A. Rhinehart, 'Abortions in Ireland: Reconciling a History of Restrictive Abortion Practices with the European Court of Human Rights' Ruling in *A., B. & C.* v. *Ireland*', 117 *Penn State Law Review* (2012–2013) p. 959 at p. 973.

139 E.g. K. Holland, 'Woman 'denied a termination' dies in hospital', *The Irish Times* 14 November 2012, www.irishtimes.com/news/woman-denied-a-termination-dies-in-hospital-1.551412, visited 15 May 2014 and 'Woman dies after abortion request 'refused' at Galway hospital', BBC News 14 November 2012, online available at www.bbc.com/news/uk-northern-ireland-20321741, visited 15 May 2014.

140 'Ireland: Savita Halappanavar tragedy sparks public protests', Bpas reproductive review 19 November 2012, www.abortionreview.org/index.php/rr/article/1258, visited 15 May 2014.

141 See also A.A. Sheikh, 'Medico-Legal Aspects of the Savita Halappanavar Case', 18 *Medico-Legal Journal of Ireland* (2012) p. 58; M. Berer, 'Termination of pregnancy as emergency obstetric care: the interpretation of Catholic health policy and the consequences for pregnant women. An analysis of the death of Savita Halappanavar in Ireland and similar cases', 41 *Reproductive Health Matters* (2013) p. 9 and C. O'Sullivan et al., 'Article 40.3.3 and the Protection of Life During Pregnancy Bill 2013: The Impetus for, and Process of, Legislative Change', 3 *Irish Journal of Legal Studies* (2013) p. 1.

142 Health Service Executive of Ireland, *Investigation of Incident 50278 from time of patient's self referral to hospital on the 21st of October 2012 to the patient's death on the 28th of October, 2012*, *Final report,* June 2013, p. 73, online available at www.hse.ie/eng/services/news/nimtreport50278.pdf, visited 15 May 2014.

that under Irish law their hands were tied so long as there was a foetal heartbeat.[143] The investigation team was '[…] satisfied that concerns about the law, whether clear or not, impacted on the exercise of clinical professional judgement', and noted that there was '[…] an immediate and urgent requirement for a clear statement of the legal context in which clinical professional judgement [could] be exercised in the best medical welfare interests of patients'.[144]

The report on the implementation of *A, B and C* by the government appointed expert group, came out just after the Halappanavar case had become publicly known, which had refuelled the abortion debate.[145] The expert group had explored four options for implementation of the *A, B and C* judgment: (clinical) guidelines; statutory regulations; legislation alone; and legislation in combination with regulation. It was held that the adoption of non-statutory guidelines only, would not be sufficient.[146] After the CoE's Committee of Ministers had once again urged the Irish authorities to expedite the implementation of the *A, B and C* judgment,[147] the government announced in December 2012 the introduction of a combination of legislation and guidelines.[148]

Subsequently a Parliamentary Committee on Health and Children held public hearings with stakeholders on the matter.[149] This resulted in the publication of the *Protection of Life During Pregnancy Bill* 2013 in early May 2013.[150] The Bill prompted a divided response; while the Irish Prime Minister held that the Bill did not amount to a change in the law,[151] the Roman Catholic Church in Ireland reportedly called the legislation 'a dramatically and morally unacceptable change to Irish law'.[152] Some authors were very critical of the floodgate arguments that were voiced in the debates over the Bill, '[…] suggesting (either implicitly or expressly) that the introduction of abortion legislation within [the existing] constitutional boundaries

143 *Idem*, p. 33.

144 Health Service Executive of Ireland, Investigation of Incident 50278 from time of patient's self referral to hospital on the 21st of October 2012 to the patient's death on the 28th of October, 2012, Final report, June 2013, p. 73, online available at www.hse.ie/eng/services/news/nimtreport50278.pdf, visited 15 May 2014, pp. 69 and 74.

145 S. Ryan et al., *Report of the expert group on the judgment in A, B and C v Ireland*, Department of Health and Children, 2012, November 2012. The report is online available at www.ifpa.ie/sites/default/files/judgment_abc.pdf, visited 15 May 2014.

146 *Idem*, p. 45.

147 Council of Europe Committee of Ministers 1157th CDDH meeting, 6 December 2012, case No. 12, Case against Ireland, DH-DD(2011)480 a.o., www.wcd.coe.int/ViewDoc.jsp?id=2010979&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383, visited 2 May 2014.

148 See www.ifpa.ie/Hot-Topics/Abortion/Abortion-in-Ireland-Timeline, visited 15 May 2014.

149 See also O'Sullivan et al. 2013, *supra* n. 141.

150 Bill no. 66 of 2013. By that time two Private Members Bills to implement the *X Case* had been rejected in the Parliament. See the IFPA website www.ifpa.ie/Hot-Topics/Abortion/Abortion-in-Ireland-Timeline, visited 15 May 2014.

151 'Abortion bill 'does not change' Irish law, says Kenny', BBC News 1 May 2013, www.bbc.com/news/world-europe-22363459, visited 15 May 2014.

152 D. Dalby, 'Irish Catholic Church Condemns Abortion Legislation', *The New York Times* 3 May 2013, www.nytimes.com/2013/05/04/world/europe/irish-catholic-church-condemns-abortion-legislation.html?_r=1&, visited 15 May 2014.

would only be a starting point, following which so-called "abortion on demand" would flow.'[153] They warned that the legislative process was in any case bound by the existing constitutional position.[154] As it was standing law since the *X Case* that a risk to the life of the mother could also consist of a suicide risk, '[…] much concern focused on the provision for pregnant women who [were] suicidal.'[155]

After an injunction aimed at preventing the Bill from being voted into law was refused,[156] it was adopted in Parliament ('*Dáil*') by a clear majority mid-July 2013.[157] During the day-long debates, the government had defeated 166 amendments.[158] On 30 July, a few days after the Senate ('*Seanad*') had passed the Bill, President Higgins signed off on the Act, without referring it to the Supreme Court.[159] The first Irish abortion act was thus enacted without a Court ruling and also without the Irish people having had a vote in a referendum.

5.2.8. The Protection of Life during Pregnancy Act (2014)

The Protection of life during Pregnancy Act entered into force 1 January 2014.[160] Following its Explanatory Memorandum, the main purpose of the Act is '[…] to restate the general prohibition on abortion in Ireland while regulating access to lawful termination of pregnancy in accordance with the *X Case* and the judgment of the European Court of Human rights in the *A, B and C* v. *Ireland* case.'[161] It is, furthermore, clarified that its purpose is '[…] to confer procedural rights on a woman who believes she has a life-threatening condition, so that she can have certainty as to whether she requires this treatment or not.'[162]

The Act repealed Sections 58 and 59 of the Offences Against the Person Act 1861.[163] Instead, the new Section 22 makes the intentional destruction of unborn human life an offence, liable on indictment to an unlimited fine or imprisonment for a term of

153 F. de Londras and L. Graham, 'Impossible Floodgates and Unworkable Analogies in the Irish Abortion Debate', 3 *Irish Journal of Legal Studies* (2013), p. 54.

154 *Idem*, at p. 59.

155 L. Smith-Spark and P. Taggart, 'Ireland's government puts forward draft abortion bill', CNN 1 May 2013, www.edition.cnn.com/2013/05/01/world/europe/ireland-abortion, visited 15 May 2014. On this issue, see F. de Londras, 'Suicide and Abortion: Analysing the Legislative Options in Ireland', 19 *Medico-Legal Journal of Ireland* 2013, p. 4.

156 'President of the High Court refuses abortion bill challenge', RTÉ news 17 July 2013, www.rte.ie/news/2013/0711/461938-abortion-court, visited 15 May 2014.

157 'Dáil votes in favour of abortion legislation', RTÉ News 12 July 2013, www.rte.ie/news/2013/0712/462013-abortion-law, visited 16 May 2014.

158 *Idem*.

159 M. O'Halloran, 'Seanad passes abortion legislation by 39 votes to 14', *Irish Times* 23 July 2013, www.irishtimes.com/news/politics/oireachtas/seanad-passes-abortion-legislation-by-39-votes-to-14-1.1472840 and 'President Higgins signs abortion Bill into law', *Irish Times* 30 July 2013, www.irishtimes.com/news/politics/president-higgins-signs-abortion-bill-into-law-1.1479519.

160 Protection of life during Pregnancy Act, No. 35/ 2013.

161 Explanatory Memorandum to the Protection of Life during Pregnancy Bill 2013, pp. 1–2.

162 *Idem*, p. 2.

163 Section 5 Protection of life during Pregnancy Act.

14 years at maximum, or both.[164] This implies that also the woman concerned may herself be prosecuted for having an abortion. Even though it was recognised that the potential criminalisation of a pregnant woman was 'a very difficult and sensitive matter', this provision was held to reflect 'the State's constitutional obligation arising from Article 40.3.3'.[165] The offence also applies to a body corporate.[166]

Interestingly and unprecedented in Ireland, the Act provides for a definition of the term 'unborn' within the meaning of the Act. It is clarified that:

> '[…] "unborn", in relation to a human life, is a reference to such a life during the period of time commencing after implantation in the womb of a woman and ending on the complete emergence of the life from the body of the woman'.[167]

This definition confirms and reflects the *Roche* v. *Roche* judgment of 2006, as discussed below in section 5.3.1, following which the protection of the unborn life is dependent on its presence in the woman's body. Also, this definition clearly excludes the preimplantation phase, implying that the prohibition on the destruction of unborn life does not cover medication like the morning after pill.[168]

The Act strictly defines the circumstances under which an abortion in Ireland may be lawful. Following Section 7 of the Act, this is so when

> '[…] two medical practitioners, having examined the pregnant woman, have jointly certified in good faith that (i) there is a real and substantial risk of loss of the woman's life from a physical illness, and (ii) in their reasonable opinion (being an opinion formed in good faith which has regard to the need to preserve unborn human life as far as practicable) that risk can only be averted by carrying out the medical procedure'.

The abortion must be carried out by an obstetrician at an appropriate institution.[169] In emergency situations a medical practitioner may carry out an abortion without involvement of another practitioner if he or she (1) believes in good faith that there is an immediate risk of loss of the woman's life from a physical illness; and (2) considers the abortion, in his or her 'reasonable opinion',[170] immediately necessary in order to save the life of the woman. In situations where there is a real and substantial risk of loss of the woman's life by way of suicide, three medical practitioners (two psychiatrists and one obstetrician) must give approval. Their decision can be

164 Section 22 Protection of life during Pregnancy Act. See De Londras and Graham 2013, *supra* n. 153, at p. 72.
165 General Scheme of the Protection of Life during Pregnancy Bill 2013, p. 31.
166 Section 23 Protection of life during Pregnancy Act.
167 Section 2(1) Protection of life during Pregnancy Act.
168 See also Schweppe 2001, *supra* n. 43, at p. 154.
169 Section 7(1)(b) Protection of life during Pregnancy Act. A list of 'appropriate institutions' is annexed to the Act.
170 This is described in Section 7(1)(a)(ii) Protection of life during Pregnancy Act as 'an opinion formed in good faith which has regard to the need to preserve unborn human life as far as practicable'.

appealed through a committee which must meet within seven days and give notice of its determination in writing to the woman and the Executive.[171]

Given that the Act only provides for situations where the life of the pregnant woman is at risk, no time limits are laid down in the Act.[172] The protection of medical practitioners, nurses and midwives with conscientious objections is provided for, save in emergency situations.[173] It is, furthermore, once again affirmed 'for the avoidance of doubt'[174] that the Act does not limit the freedom to travel to other States for an abortion and to obtain or make available in Ireland, 'in accordance with conditions for the time being laid down by law', information relating to abortion services lawfully available in another state.[175]

Following the entry into force of the Act, the Medical Council published an updated version of its Guidelines,[176] which, *inter alia*, provide that in exceptional circumstances a therapeutic intervention may be required during pregnancy, '[…] which may result in there being little or no hope of the baby surviving'.[177] Whether there is a real and substantial risk to the life of the pregnant woman which cannot be averted by other means, must be assessed 'in light of current evidence based best practice'.[178]

The new legislation has been criticised by Members of Parliament and campaigners from both sides in the abortion debate.[179]

5.2.9. Criminal prosecutions for abortions in Ireland

There have in the past '[…] been a number of prosecutions in Ireland under the provisions of the 1861 Act'.[180] However, statistics of Ireland's National Police

171 Section 13 Protection of life during Pregnancy Act.

172 See De Londras and Graham 2013, *supra* n. 153, at p. 61.

173 Section 17 Protection of life during Pregnancy Act.

174 General scheme of the Protection of Life during Pregnancy Bill 2013 (30 April 2013), p. 25, online available at www.static.rasset.ie/documents/news/protection-of-life-during-pregancy-bill.pdf, visited 16 May 2014.

175 Section 18 Protection of life during Pregnancy Act.

176 See www.medicalcouncil.ie/News-and-Publications/Publications/Information-for-Doctors/Medical-Council-Guide.html, visited 15 May 2014. The Guidelines are online available at www./bit.ly/RMPGuide. See also F. Gartland, 'Medical Council to bring out new guidelines following commencement of abortion law, *The Irish Times* 1 January 2014, online available at www.irishtimes.com/news/crime-and-law/medical-council-to-bring-out-new-guidelines-following-commencement-of-abortion-law-1.1641663, visited 15 May 2014 and M. Brennan, 'Delay in abortion guidelines not our fault, say medical professionals', *Independente.ie* 2 January 2014, www.independent.ie/irish-news/delay-in-abortion-guidelines-not-our-fault-say-medical-professionals-29882036.html, visited 16 May 2014.

177 *Idem*, Principle 21.2.

178 *Idem*, Principle 21.3.

179 'New abortion guidelines spark condemnation on all sides', *thejournal.ie* 4 July 2014, www.thejournal.ie/abortion-guidelines-ireland-1554267-Jul2014, visited 28 May 2014.

180 Sherlock 1989, *supra* n. 10.

Service show that prosecution practice has historically been very limited, in any case between the late 1940s and the early 1990s.[181] The annual reports that the National Police Service has published on its website for the years since then, only occasionally include statistics. The reports that do, namely those for the years 1998, 2000, 2003 and 2004, show that in those respective years no proceedings for the offence of procuring an abortion were commenced.[182] Further, only four abortion offences were reported to the Police in 2004, but these did not (in that year) result in the commencement of criminal proceedings.[183] Statistics in the annual reports of the Director of Public Prosecutions (DPP) for the past decade,[184] do not expressly provide for the offence of procuring a miscarriage, rendering it difficult to draw conclusions in this respect.[185] All in all, nonetheless, it seems safe to conclude that prosecution practice for abortion has been limited in Ireland. This is confirmed by the submission of the Irish government before the ECtHR in the *A, B and C* case that in respect of abortion '[t]here had been no criminal prosecution of a doctor in living memory'.[186]

5.2.10. Public funding for abortions in Ireland

Because abortion is only legally accessible in Ireland to save the life of the mother, it logically follows that this treatment is also covered by the national statutory health scheme. Abortions on any other ground are not legal in Ireland and are therefore also not reimbursed for under the Public Health Insurance.

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181 The statistics on the website of Ireland's National Police Service go back to 1947. See www.garda.ie/Controller.aspx?Page=8824&Lang=1, visited 28 May 2014. As these statistics show, during the years 1947–1991 no reports of abortion offences were made to the police, with the exception of the years 1949–1951, 1958–1959, 1964 and 1968–1969. The number for these years are as follows: in 1949 two cases were reported and acquitted; in 1950 proceedings were commenced in two cases and in 1951 two cases were reported. In 1958 proceedings were commenced in one case, which resulted in an acquittal in 1958. In 1964 three cases were reported, resulting in one acquittal and two convictions. In 1968 in one reported case proceedings were commenced, which were still pending in 1969. The statistics for the subsequent years show no reports at all for the offence of procuring an abortion, rendering it unclear what the final outcome of the 1968 case was. Further, in 1948 and 1956 respectively a case was reported of a woman who died as the result of an abortion. In those cases charges were brought for murder. Report of the Commissioner of the Gárda Síochána on crime for the year 1948, p. 5, online available at www.garda.ie/Documents/User/2%201948%20Commissioners%20Report.pdf, visited 28 May 2014, and Report of the Commissioner of the Gárda Síochána on crime for the year 1956, p. 6, online available at www.garda.ie/Documents/User/3%201956%20Commissioners%20Report.pdf, visited 28 May 2014.

182 The respective reports are online available at www.garda.ie/Controller.aspx?Page=90&Lang=1, visited 28 May 2014.

183 See 'Year 2004 crime statistics, An Garda Síochána Annual Report 2004, p. 28, online availbale at www.garda.ie/Documents/User/Annual%20Report%202004%20-%20Stats.pdf, visited 28 May 2014.

184 Online available at www.dppireland.ie/publications/category/7/annual-reports/archive, visited 16 May 2014.

185 This also holds for statistics from the Central Statistics Office, as online available at www.cso.ie/Quicktables/GetQuickTables.aspx?FileName=cja01c1.asp&TableName=Homicide+Offences&StatisticalProduct=DB_CJ, visited 2 June 2014.

186 ECtHR [GC] 16 December 2010, *A, B and C* v. *Ireland*, no. 25579/05, para. 189.

5.3. (The absence of) Irish legislation on assisted human reproduction and surrogacy

While assisted reproductive technologies have existed in Ireland since the 1980s,[187] there is no specific legal framework in Ireland that regulates assisted human reproduction.[188] Consequently, procedures like IVF treatment involving gamete donation and surrogacy are not prohibited in Ireland, but are veiled in considerable legal uncertainty. This also holds for the family law implications of such treatment.[189]

The only form of regulation of the area has consisted of regulations transposing the EU Tissue and Cells Directives[190] and of guidelines by the medical profession, such as the Institute of Obstetricians and Gynaecologists (IOG) of the Royal College of Physicians of Ireland,[191] and more profoundly, the Irish Medical Council.[192] The latter's *Guide to professional conduct and ethics for registered medical practitioners* holds that '[…] assisted human reproduction treatments, such as In Vitro Fertilisation (IVF), should only be used after thorough investigation has shown that no other treatment is likely to be effective.'[193] Medical practitioners '[…] should ensure that appropriate counselling has been offered to the patient and that the patient has given informed consent before receiving any treatment.' The principles, furthermore, state that '[…] assisted reproduction services should only be provided by suitably qualified professionals, in appropriate facilities, and according to international best practice.' Thereby 'regular clinical audit and follow-up of outcomes should be the norm.'[194] No further guidance on AHR treatment is given in the guidelines.[195]

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187 H. Coveney, 'Assisted Reproductive Technologies and the Status of the Embryo', 13 *Medico-Legal Journal of Ireland* (2007) p. 14 at p. 14. See also McMahon 2011, *supra* n. 10, at p. 33.

188 State of affairs on 31 July 2014.

189 In 2001 Madden observed the following: 'The vast array of permutations and combinations now possible in the creation of a child makes it extremely difficult to draw any broad principles as to legal parenthood. In Ireland these difficulties are exacerbated by the lack of legislation setting out parental rights and responsibilities in cases where sperm or egg donation is used or where a surrogate mother gives birth to another couple's genetic child.' D. Madden, 'Recent Developments in Assisted Human Reproduction: Legal and Ethical Issues', 7 *Medico-Legal Journal of Ireland* (2001) pp. 53–62.

190 European Communities (Quality and Safety of Human Tissues and Cells) Regulations, Statutory Instrument No. 158 of 2006. See also D. Madden, 'Guest Editorial: Assisted Reproduction in Ireland – Time to Legislate', 17 *Medico-Legal Journal of Ireland* (2011) p. 3. These Regulations are further discussed in section 5.3.4 below. On the Tissue and Cells Directives, see ch. 3, section 3.3.2.

191 See www.rcpi.ie, visited 28 May 2014. See also D. Dooley, 'Assisted Reproduction: the pursuit of consensus?', 5 *Medico-Legal Journal of Ireland* (1999) p. 65. In respect of research the Opinions of the Irish Council for Bioethics are authorative. See also Clissmann and Barrett 2012, *supra* n. 19.

192 By virtue of Section 7(2)(i) of the Medical Practitioners Act 2007 a task of the Medical Council is to give guidance on all matters related to professional conduct and ethics for registered medical practitioners. See www.citizensinformation.ie/categories/health/women-s-health/fertility_treatment, visited 28 May 2014.

193 Irish Medical Council, *Guide to professional conduct and ethics for registered medical practitioners*, 7th edition 2009, principle 20.1, p. 20.

194 *Idem*, Principle 20.2, p. 20.

195 Reportedly in 2011, Guidelines were drawn up in 2011 by the Irish Fertility Society. These Guidelines, which are not publicly available on the website of this Society, reportedly 'mirror most of the guidelines in the […] 2005 Report [of the AHR Commission]'. Submission by Dr. Wingfield to the High Court in *M.R. & Another* v. *An t Ard Chláraitheoir* [2013] IEHC 91. On the report of the AHR Commission, see below.

AHR services are not provided by the public health services, but by private specialists and clinics only.[196] Because not all providers are registered medical practitioners, some '[…] fall outside of the remit of the Medical Council.'[197] In view of the existing legal vacuum, some private clinics set up their own rules. The Human Assisted Reproduction Ireland (HARI),[198] for example, provided on its website for 'rules and regulations', which included criteria that couples had to meet to qualify for an IVF treatment (see also the discussion on eligibility criteria below in section 5.3.3).[199] Other clinics expressly informed their clients about the persistent legal limbo and advised clients to obtain legal advice.[200]

As the (previous editions of the) Medical Council's guidelines were held to be '[…] insufficient because they [did] not have legal standing and many people involved in assisted human reproduction [were] not medical practitioners',[201] Senator Henry initiated a Bill in 1999 that provided for the regulation of providers of assisted human reproduction.[202] For unclear reasons, this Bill was, however, defeated and never made it into law. Soon thereafter, in March 2000, the Minister for Health and Children established a Commission on Assisted Human Reproduction (hereafter 'AHR Commission' or 'Commission'), with the following terms of reference:

> '[…] to prepare a report on the 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 the area.'[203]

One of the questions put before the Commission was whether legislation was necessary to regulate AHR or whether society had to continue to rely on voluntary regulation by the Irish Medical Council. In March 2005 the Commission published a report in which it made 40 recommendations.[204] The principal recommendation of the Commission was the drafting of a new Act to establish a regulatory body to regulate AHR services in Ireland.[205] 'In view of the major social, ethical and legal implications of assisted human reproduction for society in general as well as for the providers and users of services […]', the AHR Commission believed that

196 See the website of the Health Service Executive www.hse.ie/eng/health/az/I/IVF, visited 16 May 2014.

197 B. Scannell, 'Brave New World? The Ethics of Pre-implantation Genetic Diagnosis in Ireland', 13 *Medico-Legal Journal of Ireland* (2007) pp. 27–35.

198 *Human Assisted Reproduction Ireland* (HARI) is based at the Rotunda Hospital campus in Dublin and is one of the largest centres for Assisted Reproductive Technology in Ireland.

199 Such couples are defined by HARI in its online rules and regulations as: 'A couple, aged 18 years and upwards who have been cohabiting on a permanent basis for a minimum of 2 years and who are committed to a long term relationship in which they can raise a child.' See www.hari.ie/index.php?section=hari&page=rules_and_regulations, visited September 2010.

200 See, for example, the website of the Irish *Sims IVF* clinic www.eggdonation.ie/, visited September 2010.

201 Dr Henry, Seanad Éireann – Volume 160 – 07 July, 1999. Regulation of Assisted Human Reproduction Bill, 1999: Second Stage. See also the Explanatory Memorandum to the Bill, p. 1.

202 Regulation of Assisted Human Reproduction Bill, Bill No. 7 of 1999. p. 1.

203 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, pp. 32–33.

204 *Idem*.

205 *Idem*, p XV, Recommendation 1.

the guidelines from the Irish Medical Council on their own did not constitute a sufficient form of regulation.[206] Following the Commission's proposal the regulatory body had to be independent and publicly accountable to the government through the Department of Health and Children. It was to have: (1) the function of advising the government on all matters relating to AHR and associated procedures including research; (2) the authority to issue guidelines in relation to the provision of AHR services and associated procedures including research within the jurisdiction; (3) be authorised to issue licences for AHR procedures; and (4) have power to suspend or revoke a licence for stated reasons.[207]

In May 2005 the Minister for Health and Children referred the AHR Report to the *Oireachtas* Joint Committee on Health and Children for consideration. In November 2009 the Irish Minister for Health and Children informed the *Oireachtas* that her department was developing proposals for an appropriate regulatory framework, including legislation, in respect of AHR.[208] Thereto the approaches to regulation of AHR in other jurisdictions were examined and arising 'complex and profound' ethical, social and legal issues were considered. According to the Minister areas such as legal parentage; access to treatment services; donation of sperm, ova and embryos; and arrangements for consent, were explored and examined.[209] Only in 2014 did all this result in the initiation of a Bill dealing with certain issues pertaining to AHR, such as the establishment of paternity in donation cases (see 5.3.2 below). Until that time, the persisting lack of legislation inevitably resulted in issues concerning AHR being put before the judiciary. The courts, however, turned the tables on the legislature and held in the *Roche* v. *Roche* case that the *Oireachtas* had to be the first to act.[210]

5.3.1. The *Roche* v. *Roche* case (2006 and 2009)

The case of *Roche* v. *Roche* is the Irish equivalent of the *Evans* case which was decided by the ECtHR.[211] In 1994 Mrs. Roche underwent surgery for an ovarian cyst and she lost two thirds of her right ovary. In 2001 she and her husband commenced IVF treatment, which resulted in the creation of six viable embryos. Three were inserted into Mrs. Roche's uterus and the remaining three were frozen. Consequently Mrs. Roche became pregnant and in October 2002 she gave birth to a daughter. Towards the end of her pregnancy, marital difficulties arose between Mr. and Mrs. Roche. An attempt at reconciliation failed and the parties eventually entered into a judicial separation. Subsequently, Mrs. Roche wished to have the three frozen embryos implanted into her uterus, but Mr. Roche opposed. Mrs. Roche claimed to

206 *Idem*, at p.67. The Commission relied on a background research paper prepared by the Department of Foreign Affairs on relevant legislation in other countries of December 2001.

207 *Idem*, at p. 70.

208 Dáil Debate Vol. 693 No. 2 (4 November 2009) Answer of the Minister for Health and Children to question by deputy Liz McManus, question no. 86 [39291/09].

209 *Idem*.

210 *M. R.* v. *T. R. & Ors* [2006] IEHC 359, McGovern J.

211 See ch. 2, section 2.3.2.

be entitled to have the frozen embryos implanted into her womb against the wishes of her estranged husband. She asserted before the High Court that the embryos enjoyed the protection of Article 40.3.3° of the Irish constitution and that this provision required that their right to life would be vindicated by permitting her to have them implanted into her womb.

The High Court first dealt with the private law aspect of the case. In July 2006 Justice McGovern held that there was no agreement, either expressed or implied, as to what was to be done with the frozen embryos in the circumstances that had arisen. Accordingly, Mr. Roche had not entered into an agreement which required him to give his consent to the implantation of the three frozen embryos into Mrs. Roche's uterus.[212] Subsequently, in November 2006, Justice McGovern dealt with the question of whether the frozen embryos were 'unborn' for the purposes of Article 40.3.3° of the Irish Constitution. He held that it was not for the Courts to decide whether the word 'unborn' included embryos *in vitro*; holding it to be '[…] a matter for the Oireachtas, or for the people, in the event that a Constitutional Amendment [was] put before them'. Justice McGovern referred to the findings of the AHR Commission (see above) which had recommended that the embryo formed by IVF was not to attract legal protection until placed in the human body, at which stage it was to attract the same level of protection as the embryo formed *in vivo*.[213] McGovern came to the conclusion that the three frozen embryos were not 'unborn' within the meaning of Article 40.3.3° and were accordingly not given protection by the Irish Constitution. The Justice held it to be a matter for the Oireachtas 'to decide what steps should be taken to establish the legal status of embryos *in vitro*.'[214]

Mrs. Roche's appeal to the Supreme Court was dismissed in December 2009 as the highest judicial body in Ireland also deferred to the legislature. Chief Justice Murray held that the embryo had 'a moral status' and found that the creation and use of the human embryo could not be 'divorced from our concepts of human dignity'.[215] The Chief Justice held the point at which legal protection of the unborn life had to be deemed to commence, to be a policy choice for the Oireachtas:

> 'I do not consider that it is for a court of law, faced with the most divergent if most learned views in the discourses available to it from the disciplines referred to, to pronounce on the truth of when precisely human life begins. Absent a broad consensus or understanding on that truth, it is for legislatures in the exercise of their dispositive powers to resolve such issues on the basis of policy choices.'[216]

212 *R.* v. *R. & Ors* [2006] IEHC 221, McGovern J.
213 *Idem*.
214 *M. R.* v. *T. R. & Ors* [2006] IEHC 359, McGovern J.
215 *Roche* v. *Roche & ors* [2009] IESC 82, Murray CJ.
216 *Idem*.

Justice Fennelly found it 'disturbing' that 'no legislative proposal had even been formulated', some four years after the report of the AHR Commission.[217]

The judgment evoked concerns about the status and legal protection of the embryo *in vitro*.[218] It was held '[…] quite unusual for a constitution to give such strong protection to the in utero embryo while simultaneously giving none to the in vitro embryo'.[219] Many authors underlined that the case demonstrated (once more) the need for legislation in the area and were critical of the persisting legal limbo.[220]

5.3.2. Developments since *Roche* v. *Roche*

After the *Roche* v. *Roche* judgment, the Minister for Health reportedly '[…] accepted that it had a responsibility to introduce legislation in relation to AHR and that a legislative proposal would be brought before the Cabinet as soon as possible.'[221] Even though 'Legal Aspects of Human Reproduction' was one of the 37 projects of the Irish Law Reform Commission for the period 2008–2014,[222] this promise to act without further ado, was not kept. In 2011 Madden observed the following in respect of the Irish situation:

> 'Despite the availability of IVF and associated procedures in Ireland for many years, the clear need for legislative safeguards and oversight has not found its way into the statute books to date. This lacuna leaves Irish families and children, as well as clinicians working in this area, in a position fraught with difficulties and uncertainties. Lack of clarity about issues such as access to treatments, the status and parentage of children, the rights and responsibilities of genetic and birth parents, the legitimacy of payment for reproductive services, and the use of embryos for research purposes has left us in a complicated web of potential legal pitfalls which is the responsibility of Government to untangle.'[223]

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217 *Roche* v. *Roche & ors* [2009] IESC 82, Fennelly J, para. 3. See also McMahon 2011, *supra* n. 10 and C. Hogan, 'JMcD v PL and BM Sperm Donor Fathers and De Facto Families', 13 *Irish Journal of Family Law* (2010) p. 83.

218 See Coveney 2007, *supra* n. 187; Madden 2011, *supra* n. 190 and G. Whyte,' The Moral Status of the Embryo', 12 *Medico-Legal Journal of Ireland* (2006) p. 77. See also A. Mulligan, 'Frozen Embryo Disposition In Ireland After *Roche v Roche*', 46 *The Irish Jurist* (2011) p. 202.

219 S. Mcguinness and S. Uí Chonnachtaigh, 'Implications of Recent Developments in Ireland for the Status of the Embryo, Special Section: Bioethics beyond Borders 2011', 20 *Cambridge Quarterly of Healthcare Ethics* (2011) p. 396 at p. 406.

220 E.g. Coveney 2007, *supra* n. 187, at p. 19; Hogan 2010, *supra* n. 217; McMahon 2011, *supra* n. 10; C. Power and G. Shannon, 'Practice and Procedure, Assisted reproduction in Ireland', 12 *Irish Journal of Family Law* (2009) p. 45 at p. 48 and Mcguinness and Uí Chonnachtaigh 2011, *supra* n. 219, at p. 406. See also C. Shanahan, 'Call to regulate assisted human reproduction', *irishexaminer.ie* 17 November 2010, www.irishexaminer.ie/ireland/call-to-regulate-assisted-human-reproduction-136703.html, visited March 2011.

221 Madden 2011, *supra* n. 190.

222 Law Reform Commission, *Report Third programme of law reform 2008–2014* (LRC 86 – 2007), December 2007, online available at www.lawreform.ie/_fileupload/Reports/ThirdProgramme.pdf, visited September 2010. See also Clissmann and Barrett 2012, *supra* n. 19.

223 Madden 2011, *supra* n. 190, at p. 5.

Some legislative action was finally taken in January 2014 with the publication of the Children and Family Relationship Bill (hereafter referred to as the '2014 Bill') by the then Minister for Justice, Equality and Defence. The Bill aimed to put in place a legal architecture which was intended to offer 'recognition and support to a wide range of different family structures.' The reforms envisaged focused 'more than ever before on the child at the centre of the family'.[224] The Bill – which has been referred to as 'truly historic'[225] and 'the most radical reform of Irish children's law in a century'[226] – was expected to be passed by the end of 2014.[227] For the present case study its parts 3 and 5 are of particular interest as they deal with parentage in cases of assisted reproduction and surrogacy arrangements respectively.

The following subsections of this section on Irish regulation in the field of AHR, discuss the existing (absence of) standard-setting for various types of AHR treatment. Thereby reference is made to both the recommendations of the AHR Commission on the specific matter, as well as (where applicable) to the relevant provisions of the 2014 Bill. First the issue of access to AHR treatment is discussed.

5.3.3. Access to AHR treatment

Access to AHR treatment has not been regulated at State level in Ireland. Certain requirements regarding civil status were, however, set by the medical profession, as well as by individual fertility clinics. Over the years they have softened their initially very strict conditions. For example, the 1994 edition of the Medical Council Guidelines limited the availability of AHR to married couples,[228] but subsequent editions of the Guidelines no longer included this condition.[229] *Human Assisted Reproduction Ireland* (HARI) made clear that it only provided IVF treatment to couples who were married or in a 'deemed stable relationship'.[230] Couples had to be able to demonstrate that 'an appropriate stable infrastructure' was in place which would 'maximise efficacy of therapy and safeguard the bringing up of a child.'[231] The Citizens' Information Board confirmed on its website that fertility services

224 Speech by the Minister for Justice, Equality and Defence, Alan Shatter TD, at the Children's Rights Alliance's Information Seminar on the Children and Family Relationships Bill, 10 April 2014, online available at www.justice.ie/en/JELR/Pages/SP14000104, visited 22 May 2014.

225 P. Duncan, 'New Bill 'won't devalue' traditional marital families', *Irishtimes.com* 10 April 2014, www.irishtimes.com/news/social-affairs/new-bill-won-t-devalue-traditional-marital-families-1.1757969, visited 21 May 2014.

226 F. Kelly, 'Bill to bring 'radical reform'', *Irishtimes.com* 17 April 2014, www.irishtimes.com/sponsored/ombudsman-for-children/bill-to-bring-radical-reform-1.1765188, visited 22 May 2014.

227 *Idem*.

228 See E.S. Sills and C.M. Healy, 'Building Irish families through surrogacy: medical and judicial issues for the advanced reproductive technologies', 5 *Reproductive Health* (2008), online available at www.reproductive-health-journal.com/content/5/1/9, visited September 2010. Reportedly also the guidelines laid down by the Institute of Obstetricians and Gynaecologists contained a similar restriction. Sherlock 1989, *supra* n. 10.

229 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 32.

230 See *supra* n. 199.

231 Www.hari.ie/index.php?section=hari&page=rules_and_regulations, visited September 2010.

were generally available to applicants who were in a 'stable relationship', which was understood as to mean married and cohabiting opposite-sex couples. It was added that '[i]n practice, Irish clinics generally refuse[d] to make assisted reproduction available to cohabiting same-sex couples', while it had not yet been decided by an Irish court whether such a refusal amounted to discrimination on the grounds of sexual orientation under the Equal Status Act 2000 or the Equality Act 2004.[232]

Access to AHR was also discussed by the AHR Commission in its 2005 report. It was observed that practice was diverse. In general, obstetricians and gynaecologists did not discriminate between different-sex married couples and different-sex unmarried couples in a long-term relationship. They were, nevertheless, divided in their approach to single people, as only 53 per cent of the respondents to the survey conducted by the AHR Commission was prepared to offer AHR services to single people and relatively few (one in seven) were prepared to offer AHR services to same-sex couples.[233] The AHR Commission recommended that AHR services had to be available without discrimination on the grounds of gender, marital status or sexual orientation, 'subject to consideration of the best interests of any children that [were] born'.[234] This was '[…] generally viewed as taking a progressive step towards a socially diverse Ireland.'[235]

Requirements in respect of age have generally also been left to the medical profession. Madden observed in 1995 that '40 years would probably be the limit' for IVF treatment. She added that because practices like egg cell donation were not practised in Ireland, the limitations in this respect were primarily biological in character.'[236] As discussed below (see 5.3.9), the 2014 Bill initially set certain age limits for engaging in surrogacy.

5.3.4. Donation of gametes and embryos

Donation of gametes and embryos in the course of AHR treatment has long been, and is still today, mostly unregulated in Irish statutory legislation.[237] The Medical Guidelines are brief as regards the use of donor gametes from third parties in AHR treatment; those who offer donor programmes to patients, must consider the biological difficulties involved and pay particular attention to the source of the donated material. Such donations must be altruistic and non-commercial, and

232 Www.citizensinformation.ie/en/birth_family_relationships/cohabiting_couples/fertility_services_and_unmarried_couples.html, visited September 2010.

233 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at pp. 32–33.

234 *Idem*, at p. 34, Recommendation no. 17.

235 Sills and Healy 2008, *supra* n. 228.

236 D. Madden, 'Medico-Legal Aspects of In Vitro Fertilisation and Related Infertility Treatments', 1 *Medico-Legal Journal of Ireland* (1995) p. 13 ff.

237 This research was concluded on 31 July 2014. See also C. Power and G. Shannon, 'Practice and Procedure, Sperm donors and the legal recognition for same-sex couples', 11 *Irish Journal of Family Law* (2008) p. 44.

practitioners must keep accurate records for future reference.[238] The anonymous donation of gametes in the course of AHR treatment is at present legal in Ireland and it is taking place,[239] rendering it potentially difficult for a child born after such treatment to trace its genetic parents.[240]

The AHR Commission in principle had no objections to the use of donor gametes or embryos in AHR treatment to assist infertile people to conceive, but it recommended that such donation of sperm, ova and embryos was to be subject to regulation by the – to be established – regulatory body.[241] Furthermore, appropriate counselling to all donors of gametes and embryos by suitably qualified professionals was to be a pre-condition for informed consent by donors.[242] The Commission recommended in 2005 that appropriate guidelines were put in place '[…] to govern the selection of donors; to screen for genetic disorders and infectious disease; to set age limits for donors and to set an appropriate limit on the number of children to be born by the use of sperm or ova from a single donor.'[243]

Commercialisation and anonymity of donations were widely discussed within the AHR Commission. The Commission held financial inducements in AHR to be unacceptable. The regulatory body, as proposed by the Commission should therefore have power to prohibit any practice that could be deemed to constitute commercialisation of AHR.[244] It was recommended that donors were not to be paid nor were recipients to be charged for donations per se. Payment of reasonable expenses and payment for AHR services was not, however, precluded.[245]

As regards anonymity, the AHR Commission was receptive to the argument that 'having access to genetic origins is potentially of profound importance for people's understanding of their identity in a psychological, genetic and historical context.'[246] Avoidance of identity confusion could also be an argument in favour of disclosing the identity of the donor. The Commission concluded that the safeguarding of the best interests of the child born through AHR necessitated access for all children to information that would enable them to identify their genetic origins.[247] It recommended that '[…] any child born through use of donated gametes or embryos [had to], on maturity, be able to identify the donor(s) involved in his/her conception,[248] while donors were not be able to access the identity of children born through use of their

238 Irish Medical Council, *Guide to professional conduct and ethics for registered medical practitioners*, 7th edition 2009, Principle 20, p. 20. See also Clissmann and Barrett 2012, *supra* n. 19.
239 For example at the Sims IVF Clinic in Dublin, see www.egg.donation.ie, visited September 2010.
240 E.g. D. Madden, 'Legal Issues in Artificial Insemination', 2 *Medico-Legal Journal of Ireland* (1996) p. 11. See also section 5.1.4 above.
241 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 45, Recommendation no. 19,.
242 *Idem*, at p. 45, Recommendation no. 20,.
243 *Idem*, at p. 45, Recommendation no. 21.
244 *Idem*, at p. 71.
245 *Idem*, at p. 46, Recommendation no. 23. See also 'Reproduction becomes a (baby) booming industry', *The Irish Examiner* 28 July 2005.
246 *Idem*, at p. 46.
247 *Idem*, at p. 46.
248 *Idem*, at p. 46, Recommendation no. 22.

gametes or embryos.'[249] The AHR Commission held that the main argument against the lifting of anonymity in donation centred on the fear that there would be no supply of sperm donors. According to the AHR Commission, however, countries where donor identification was permitted had found that reduced supply did not continue beyond a relatively brief period.[250]

In 2006 Regulations were adopted with a view to implementing the European Tissues and Cells Directives.[251] The Regulations, *inter alia*, set quality and safety standards for clinics who carry out AHR treatment involving the donation of gametes. Gamete donors must undergo certain medical tests and must give their informed consent to the donation.[252] While the Regulations endorse non-commercial donation, they are not very firmly phrased on this point. Following Article 13(1) of the Regulations, the Minister for Health and Children was to draw up national guidelines that would '[…] endeavour to ensure that the procurement of [gametes] is carried out on a non-profit basis', while AHR clinics for their part, must 'make every effort to ensure voluntary and unpaid donations' of gametes. The present author is not aware of the existence of any such guidelines.

AHR clinics must also ensure that all gametes '[…] can be fully identified and traced from donor to end user, or disposal, and vice versa'.[253] It is noted in Article 18(6) of the Regulations that the clinic must '[…] ensure that the identity of the recipient is not disclosed to the donor or his family and vice versa, without prejudice to any national law which may come into force on the conditions for disclosure, notably in the case of gametes donation'. Only in September 2014 such legislation was introduced (see below). Until that time there was only one relevant court case, dealing with the rights of a sperm donor.

In December 2009 in the case of *McD.* v. *L. & Anor*, the Supreme Court granted a sperm donor, who was the genetic father of a child born into a relationship between two women a right of access to his child.[254] The man and the lesbian couple had initially agreed that he would be a 'favourite uncle' in the life of the child, with access to the child at the couple's discretion. But when the child was born he sought a bigger role, including structured access. The lesbian couple refused. The dispute between the parties came to a head in 2007, when the couple wished to relocate to Australia with the child. The sperm donor and thus father requested guardianship

249 *Idem*, at p. 47, Recommendation no. 27.

250 *Idem*, at p. 45. While the report of the Commission on Assisted Human Reproduction based this conclusion exclusively on the Swedish example, developments in the United Kingdom and the Netherlands draw a different picture. See, *inter alia*, I. Turkmendag et al., 'The removal of donor anonymity in the UK: the silencing of claims by would-be parents', 22 *International Journal of Law, Policy and Family* (2008) p. 283.

251 European Communities (Quality and Safety of Human Tissues and Cells) Regulations, Statutory Instrument No. 158 of 2006.

252 Art. 13 and Schedule 3 to European Communities (Quality and Safety of Human Tissues and Cells) Regulations.

253 Art. 15(1) European Communities (Quality and Safety of Human Tissues and Cells) Regulations.

254 *McD* v. *L & Anor* [2009] IESC 81; [2010] 2 IR 199.

and joint custody[255] of his child, as well as an order regulating his access to the child. His claims were initially refused by the High Court after a 14-day long hearing.[256] On appeal he was, however, allowed access.[257] The Supreme Court considered the welfare of the child to be paramount; Justice Denham, *inter alia*, based her ruling on the 'benefit to a child, in general, to have the society of his father'. Contrary to the High Court's ruling, the Supreme Court ruled that there was no institution of a *de facto* family in Ireland. This Court thus held that the respondents were not a family under the Irish Constitution.[258] While the genetic mother of the child, had a natural right guaranteed by the Constitution to his custody and to look after his general care, his nurture, his physical and moral wellbeing and his education, in every respect, her lesbian partner had no legally or constitutionally recognisable family relationship with the child.[259]

The Supreme Court referred the case back to the High Court to determine how the father's access had to be exercised. In April 2010, this Court ruled that there was to be (direct) access, meaning that the father was to have personal contact with the child and the child was to have the society of the father.[260] Because the couple had in the meantime relocated to Australia, such access was to be established during trips of the father to Australia and during trips of the couple to Europe. The couple were, when appropriate, to encourage the child to communicate with his father and to establish friendly relations with him. The Court also ordered the opening up of e-mail contact between the father and the couple. The Court left it to the couple to reveal to the child, when it was age appropriate, that the father was his biological father. These orders were made conditional on the father to play the role of 'favourite uncle', not revealing his biological paternity, seeking no parental role in the child's upbringing and acknowledging and accepting the familial integrity of the couple and the child.

It was observed that the case exposed '[…] the pressing need for legislation to help provide some certainty for the adults and children involved.'[261] The 2014 Children and Family Relationship Bill initially did not provide for any right for the child to know its genetic origins.[262] *Inter alia*, the Irish Ombudsman for Children has been critical in this regard, and recommended in 2014 that provision was made '[…] for the gathering, retention and disclosure of information to people born through assisted reproduction and surrogacy regarding their birth and origins.'[263] This concern was

255 Section 11 of the Guardianship of Infants Act, 1964.
256 *McD.* v. *L. & Anor* [2008] IEHC 96.
257 *McD* v. *L & Anor* [2009] IESC 81; [2010] 2 IR 199. See also Hogan 2010, *supra* n. 217.
258 On this point see also ch. 11, section 11.3.5.1.
259 *McD* v. *L & Anor* [2009] IESC 81; [2010] 2 IR 199, Fenelly J, para. 115.
260 *McD* v. *L & Anor* [2010] IEHC 120.
261 Hogan 2010, *supra* n. 217, at p. 93.
262 The Children's Rights Alliance was concerned that the Bill did not provide for a right to know one's genetic parents. See P. Duncan, 'New Bill 'won't devalue' traditional marital families', *Irishtimes.com* 10 April 2014, www.irishtimes.com/news/social-affairs/new-bill-won-t-devalue-traditional-marital-families-1.1757969, visited 21 May 2014.
263 Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014, May 2014, p. 16, online available at www.oco.ie/

addressed in the revised general scheme of the Children and Family Relationships Bill 2014 that the Minister for Justice and Equality published on 26 September 2014.[264] In the Revised Scheme a new Part was included to preserve a child's right to know its identity.[265] It provided for the creation of a national donor-conceived person register into which hospitals, clinics and medical services would be obliged to provide information. Future use of anonymous donor egg cells or sperm would be prohibited.[266]

The Bill further provided that donating gametes or an embryo, without the intention of using the material or the embryo for one's own reproductive use, would not confer parenthood on the donor.[267] Also, as noted below (see section 5.3.9), the *mater semper certa est* maxim was a basic principle of the Bill. It also applied when the birth mother was not genetically related to the child, for example when the embryo was created using a donor egg cell.[268] The husband, civil partner or cohabitant of the mother would be considered to be the other parent of the child '[…] if he or she had given a consent which remained valid at the time the procedure leading to implantation took place'.[269]

5.3.4.1. Post-mortem reproduction

Post-mortem reproduction is veiled in uncertainty in Ireland. In 1996 Madden observed that while there was '[…] no legislative prohibition in Ireland on a widow gaining access to her deceased husband's frozen sperm in an attempt to become pregnant', the legal status of a child born in such circumstances was uncertain.[270] While the 2014 Bill could have been a good occasion for the legislature to address the matter, it was expressly held not to provide for 'posthumous conception'.[271]

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wp-content/uploads/2014/06/OCOAdviceonChildandFamilyRelBill2014.pdf, visited 21 May 2014. For other critique see B. Tobin, 'Surrogacy and identity: why Ireland needs its own sperm bank', *Irishtimes.com* 27 June 2014, www.irishtimes.com/news/health/surrogacy-and-identity-why-ireland-needs-its-own-sperm-bank-1.1846558, visited July 2014.

264 While this date strictly speaking falls outside the scope of this research (see ch. 1, section 1.2), this development was nonetheless included in the present research, as it proved highly important for various issues addressed in this case study.

265 The revised scheme is online at the website of the Department of Justice and Equality, www.justice.ie/en/JELR/Pages/PB14000256, visited September 2014. The revision was welcomed by the Children's Rights Alliance, see www.childrensrights.ie/resources/government-establish-new-donor-conceived, visited October 2014.

266 General Scheme of the Children and Family Relationships Bill, Summary of Provisions, online available at www.justice.ie/en/JELR/Note%20on%20the%20General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/Note%20on%20the%20General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf, visited October 2014.

267 Art. 8(2) of the Children and Family Relationship Bill in its version of January 2014.

268 Donation of gametes, without the intention of using the material or the embryo for ones own reproductive use, does not establish parenthood under the Children and Family Relationship Bill.

269 General Scheme of the Children and Family Relationship Bill, p. 22 and Art. 10 of the Children and Family Relationship Bill.

270 Madden 1996, *supra* n. 240.

271 General Scheme of the Children and Family Relationship Bill, p. 23.

5.3.5. Gender selection

Under Irish law nothing is provided in respect of gender selection in the course of AHR treatment. While it is correspondingly insufficiently clear if gender selection has taken or takes place in Ireland, there have been incidental reports of Irish couples going abroad for this purpose.[272] The AHR Commission at the time noted that 'public anxieties regarding slippery slopes towards the creation of children 'to order'' indicated 'a general disapproval of such techniques'.[273] The Commission felt that pre-conception sex selection had to be permitted 'only for the reliable prevention of serious sex linked genetic disorders but not for social reasons.'[274] This was not, however, followed-up by the legislature, also not when preimplantation genetic diagnosis (PGD) was introduced in Ireland.

5.3.6. Preimplantation genetic diagnosis (PGD)

Prenatal screening takes place in Ireland, be it unregulated.[275] Gestational age scans at around 18 weeks of pregnancy usually include screening for structural anomalies,[276] but genetic tests are not routinely offered and there is no national screening programme.[277] More importantly, termination of pregnancy for foetal anomaly is not permissible (see also section 5.2 above on Irish abortion laws).

Preimplantation genetic diagnosis (PGD) has long not been available in Ireland, because of the uncertain constitutional status of the embryo (see 5.1.2 above).[278] The question when life begins was qualified as '[…] the most astute ethical dilemma that PGD face[d] in Ireland […].'[279]

The AHR Commission also addressed the issue of PGD in its 2005 report. A principled argument against it was voiced in the following terms:

> 'It could be argued that the application of PGD departs from the goals of preventive medicine and marks the start of the "slippery slope" to more eugenic objectives. There is

272 See, for example, 'Jeff Steinberg: Irish Couples using Gender Selection', *RTÉ.ie* 3 March 2010, www.rte.ie/tv/theafternoonshow/2010/0303/jeffsteinbergirishcouplesusinggenderselection876.html, visited May 2014.

273 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 63.

274 *Idem*, at p. 70, Recommendation no. 38.

275 A. Coverleyn et al., *Pre-implantation Genetic Diagnosis in Europe'* (Joint Research Centre of the European Commission, January 2007) p. 66, online available at www.ftp.jrc.es/EURdoc/eur22764en.pdf, visited 24 July 2014.

276 An example of a prenatal diagnosis concerns a test on sickle cell anaemia by the Irish National Centre for Medical Genetics. See www.genetics.ie/molecular, visited June 2014.

277 Donoghue and Smyth 2013, *supra* n. 120, at pp. 139–140.

278 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 66. See also Coverleyn et al. 2007*, supra* n. 275, at p. 44.

279 Scannell 2007, *supra* n. 197.

> a concern that therapeutic PGD that selects for "clinically" healthy embryos (disease free) may lead to enhancement PGD that selects for "socially" healthy embryos.'[280]

At the same time the AHR Commission was convinced that PGD could reduce the risk of serious genetic disorders. It therefore recommended, with one member dissenting, that PGD had to be allowed in Ireland, if regulated and monitored by the regulatory body.[281] This recommendation was not followed up by the Irish legislature; until today the issue has not been regulated for in law.

Despite the absence of statutory regulation in the field, in 2012, the Irish Medical Board licensed two Irish AHR clinics to offer PGD services.[282] The pro-life campaign qualified this as 'exploiting a gap in Irish laws'[283] and called for 'a detailed ethical debate on the issue of genetic screening'.[284] Such a debate has so far not taken place in Irish Parliament. Further, while clinics also provide for testing for gender related disorders, no express regulation seems to be in place for gender selection in case such a test is positive (see 5.3.5 above).[285]

5.3.7. Vitrification of egg cells

Vitrification of egg cells has not been debated Ireland to the same extent as it has been in the Netherlands, for example (see Chapter 5). The technique is offered by some of the Irish clinics,[286] but there are no particular statutory regulations in place.

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280 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 65.

281 *Idem*, at p. 73, Recommendation no. 40.

282 These are the Beacon CARE Fertility clinic in Dublin and at the Cork Fertility Centre. The clinics cooperate with a specialist genetics laboratory in the UK. See B. Roche, 'Two clinics to offer embryo screening', *Irishtimes.com* 13 November 2012, www.irishtimes.com/news/health/two-clinics-to-offer-embryo-screening-1.551312, visited May 2014 and B. Roche, 'First pregnancy in Ireland using new screening technique', *Irishtimes.com* 3 November 2013, www.irishtimes.com/news/ireland/irish-news/first-pregnancy-in-ireland-using-new-screening-technique-1.1582427, visited May 2014.

283 'IVF Clinics Exploit Gap in Irish Law', www.prolife.ie/prolife/ivf-clinics-exploit-gap-irish-law, visited 15 May 2013.

284 R. Riegel, 'First 'gene screened' Irish baby due in July', *Irish Independent* 4 November 2013, www.independent.ie/irish-news/first-gene-screened-irish-baby-due-in-july-29723997.html, visited 15 May 2014.

285 According to its website the Cork Fertility Centre offers PGD to couples at high risk of producing a child with a genetic disorder. The clinic carries out PGD for single gene disorders including; cystic fibrosis, fragile X syndrome, Duchenne muscular dystrophy and myotonic dystrophy, Tay-Sachs disease, beta-thalassemia, hemophilia A, and sickle cell disease. See www.corkfertilitycentre.com/Treatments, visited 22 May 2014. The list of disorders on the website of the Beacon CARE Fertility clinic is even longer. See www.carefertility.com/genetics-programme-sc2/what-is-pgd-what-is-genetic-diagnosis-sj1/, visited 22 May 2014.

286 See for example www.merrionfertility.ie/embryology/vitrification-.231.html, visited May 2014.

5.3.8. AHR treatment and public funding

As a general rule AHR services are not provided by public health services and their funding therefore primarily has to be carried for privately. For medical expenses, including IVF treatment, income tax relief may be claimed.[287] The Drugs Payment Scheme furthermore covers drugs used as part of fertility treatment.[288]

5.3.9. Surrogacy

Surrogacy is, like many other AHR issues, completely unregulated in the Irish jurisdiction. The matter has never been acknowledged by the Irish Medical Council in its guidelines[289] and statutory legislation was only proposed in 2014 by means of the Children and Family Relationship Bill (see below). However, this part of the Bill was taken out before the Bill could be tabled in Parliament. As a result, there remains today great legal uncertainty regarding surrogacy, particularly regarding the determination of legal parentage in situations involving surrogacy arrangements.

The absence of regulation, and for many years also of any case law on the matter, has left many questions unanswered. Some guidance has been given by the Citizen Information Board, which explained on its official website that '[…] traditionally, the surrogate mother is considered the legal mother of the child and the child's guardian, because she has given birth to the child.'[290] It was explained that if the surrogate mother was married her husband would be presumed by law to be the father of the child, unless the contrary was proven.[291] The intended parents – even if they were the genetic parents – would need to adopt the child in order to establish parental links with the child.[292] However, private adoptions are not allowed in Ireland and if the surrogate mother was married, it would not be possible for her to give up the child for adoption. Also there was no guarantee that the Irish Adoption Authority would place the child of a surrogate mother with the intended parent(s).[293] Further, because it is a criminal offence under Irish law to make or receive any payment or other reward

287 Between 2006 and 2009, tax relief for IVF treatment was provided for at the highest rate which was set at 41 per cent. As of 2009, this was reduced to 20 per cent. If the person or family concerned has taken out private health insurance cover, the insurance will take care of the expenses for AHR services, in which case the question of tax relief does not arise. See www.citizensinformation.ie/categories/money-and-tax/tax/income-tax-credits-and-reliefs/taxation_and_medical_expenses, visited 22 May 2014 and www.revenue.ie/en/tax/it/leaflets/it6.html, visited 22 May 2014.

288 See www.citizensinformation.ie/categories/health/women-s-health/fertility_treatment?printpreview=1, visited 22 May 2014. This webpage was last updated on 11 January 2012.

289 Sills and Healy 2008, *supra* n. 228.

290 See www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/surrogacy.html, visited 22 May 2014. It is thereby explained that '[l]egal maternity is important for birth registration, domicile and citizenship provisions, succession, childcare provisions, adoption, social welfare and educational provisions as many of these services and rights depend on the consent of the legal mother.'

291 Section 46 of the Status of Children Act 1987.

292 C. Palmer, 'Irish couples face an uphill struggle with surrogacy laws', *Independent.ie* 11 May 2009.

293 See www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/surrogacy.html, visited 22 May 2014.

in consideration of an adoption,[294] remuneration in a surrogacy arrangement could also be considered illegal.[295] An intended father who was genetically related to the child could alternatively apply for guardianship of the child under the Guardianship of Infants Act,[296] but his partner would not have such a right.[297]

Because of this lack of legal certainty in Ireland, it was also unclear if, and if so, at what scale, surrogacy took place within Ireland.[298] Reports were made that Irish couples engaged in surrogacy agreements abroad (see also 5.4.3 below).[299] In 2012, the then Minister for Justice, Equality and Defence therefore published a guidance document entitled 'Citizenship, parentage, guardianship and travel document issues in relation to children born as a result of surrogacy arrangements entered into outside the State'.[300] The document gave further guidance on the family law implications of surrogacy under Irish law. It was made clear that under Irish law the woman who gave birth to the child was the legal mother of the child, even if she was not herself the genetic mother of the child. It was furthermore explained that:

> 'Under the Guardianship of Infants Act 1964, the mother of a child born outside marriage is the child's sole guardian. Under Irish law, family relationships and the rights and responsibilities that flow from them cannot be subjected to the ordinary law of contract and cannot, in particular, be transferred to another person, bought, or sold. This means that, under Irish law, the surrogate mother and the child will have a life-long legal relationship with one another. […] If the surrogate mother is married, then under section 46 of the Status of Children Act 1987, the surrogate mother's husband is presumed by law to be the father of the child, unless the contrary is proved on the balance of probabilities. The husband will also, along with the surrogate mother, be the joint guardian of the child. If the commissioning father is the genetic father of the child, it is possible to overcome the presumption of paternity in favour of the surrogate mother's husband, so as to allow the

294 Section 41(1) of the Adoption Act 1952. See also 'You'll have a baby in your arms within a year, NO questions asked.', *Daily Mirror* 16 January 2006 and C. O'Sullivan, 'More couples seeking British surrogate births', *The Irish Examiner* 9 August 2005.

295 Dr. D. Madden in Parliamentary debates Vol. no. 61, 15 September 2005. The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 51. See also Sills and Healy 2008, *supra* n. 228.

296 The AHR Commission pointed out in this respect that, '[…] alternatively, a commissioning man may apply for guardianship of the child under the Status of Children Act 1987 if he is the biological father of the child, but his partner would not have any right to make such an application.' The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p .51. See also Dr. D. Madden in Parliamentary debates Vol. no. 61, 15 September 2005.

297 See www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/surrogacy.html, visited September 2011.

298 R. de Brun, 'I've had eight babies for other people', *Independent.ie* 4 February 2008. See also 'You'll have a baby in your arms within a year, NO questions asked', *Daily Mirror* 16 January 2006 and C. Palmer, 'Irish couples face an uphill struggle with surrogacy laws', *Independent.ie* 11 May 2009.

299 See the submission of Dr. Wingfield to the High Court in *M.R. & Another* v. *An t Ard Chláraitheoir* [2013] IEHC 91 at 28.

300 'The Minister for Justice, Equality and Defence announces the publication of guidance for Irish couples on surrogacy arrangements made abroad', Press release on the website of the Department for Justice and Equality of 21 February 2012, www.justice.ie/en/JELR/Pages/PR12000035, visited 23 May 2014. The guidance document is online available at www.justice.ie, visited 23 May 2014, and is also published on the websites of each relevant Department. See also section 5.5.4 below.

> commissioning father to be recognised as the legal parent of the child. A guardianship order may also be sought by the commissioning father. […] If the surrogate mother is not married, and the commissioning father is the genetic father of the child, then the Irish authorities may recognise his paternity of the child on receipt of reliable DNA evidence.'[301]

Surrogacy was also addressed by the AHR Commission in its 2005 report. The majority of the Commission recommended at the time that surrogacy and all issues pertaining thereto had to be permitted and had to be made subject to regulation by the regulatory body the Commission recommended to be established.[302] The Commission also recommended extending the remit of the Adoption Board to include surrogacy.[303] Acknowledging that both genetics and gestation played 'a necessary and equally important role in bringing the child into existence',[304] it further advised that the child born through surrogacy had to be presumed to be that of the commissioning couple.[305] The AHR Commission was of the view that payment of reasonable and legitimate expenses to the surrogate mother was not to be seen as contravening the Adoption Act.[306] In line with its recommendations as regards the use of donors in AHR procedures, it furthermore recommended that any child born through surrogacy, on reaching maturity, had to be entitled to access the identity of the surrogate mother and, where relevant, the genetic parents.[307]

None of the Commission's recommendations were followed up at the time, leaving the matter completely unregulated. It was therefore observed that:

> 'Until the Oireachtas passes a law specifically addressing surrogacy, Ireland will remain a blank slate leaving it to the judiciary to determine what rights either party in a surrogacy arrangement may have.'[308]

The judiciary indeed turned out to be the first needing to address the issue. The unprecedented, and for many, surprising, ruling of the High Court in *M R & Another* v. *An t Ard Chláraitheoir* (2013)[309] inevitably prompted the legislature to speed up the introduction of legislation, which it finally did in 2014.[310]

Applicants in *M R & Another* v. *An t Ard Chláraitheoir* were a married couple, referred to as '*OR*' and '*CR*'. Because *CR* was unable to give birth the natural way, the couple searched for alternative ways of having a child. The sister of *CR* volunteered

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301 It was, furthermore, explained in the guidance document that in addition to such a declaration of parentage, a guardianship order was required for the genetic father to become also the guardian of the child.

302 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 50, Recommendation No. 30.

303 Sills and Healy 2008, *supra* n. 228.

304 The Commission on Assisted Human Reproduction 2005, *supra* n. 9, at p. 51.

305 *Idem*, at p. 53, Recommendation No. 33.

306 *Idem*, at p. 50, Recommendation No. 31.

307 *Idem*, at p. 51, Recommendation No. 32.

308 Sills and Healy 2008, *supra* n. 228.

309 *M.R. & Another* v. *An t Ard Chláraitheoir* [2013] IEHC 91.

310 As explained below, the relevant part of the relevant Bill was, however, removed from the Bill that very same year.

to participate in a surrogacy arrangement, which progressed throughout 'in a very cooperative atmosphere'.[311] The ovum of *CR* was fertilised *in vitro* by the sperm of *OR* and implanted in the womb of the sister, who became pregnant of twins. After their birth, *CR*'s sister and *OR* attended the Registrar's office and were registered in the birth certificates as the parents of the children. *CR* and *OR* subsequently requested to have the Register corrected, holding that *CR*, being the genetic mother, should be registered as the mother.[312] They accompanied their request with DNA evidence. After this request was refused, the couple applied to the High Court, seeking a declaration that *CR* was the mother of the twins, that she was entitled to be registered as their mother, as well as a declaration that the continued failure to recognise *CR* and *OR* as the parents of the children was unlawful.

Referring to the *mater semper certa est* principle, the Respondents in this case, *An t Ard-Chláraitheoir* (the Chief Officer of the system of civil registration in Ireland) and the Attorney General, submitted that in Irish law, the mother of a child was the birth mother. The respondents claimed this to be a constitutional norm and 'an inherent and fundamental principle' of Irish law that was affirmed by Article 40.3.3° of the Irish Constitution. They further held it possible that the State would at some stage 'legislate to allow surrogacy', but stressed that this engaged 'a whole range of social and political issues', which were matters for the legislature.[313] It was furthermore submitted that if the Court were to accept the applicants' claims and make a declaration of parentage based on, *inter alia*, the DNA testing, it would bring about 'a seismic shift' in the manner in which the issue of motherhood was dealt with in the Irish jurisdiction.[314] Parenthood could not be a matter of intention, it was claimed. In the words of the Respondents:

> 'If we are to begin to look at genetics and not the birth then that raises a complex set of issues that is properly a matter for the legislature to deal with and is not something capable of being dealt with by the Court for the simple complexity of all that is involved.'[315]

High Court Judge Abbott was not convinced by these submissions. He observed that the central legal issue to be addressed in this case was who, in law, was entitled to be treated as the parents of the twins, in particular, who, in law, was to be treated as their mother.[316] Given that positive legislation on surrogacy was 'totally absent' in the Irish jurisdiction, the surrogacy contract in the case under examination was not illegal, it was just not enforceable.[317] Having heard a number of expert witnesses on the science of genetics versus the science of epigenetics, Judge Abbott held it to be 'most unlikely that epigenetics [would] ever trump the deterministic quality of chromosomal DNA'.[318] He was further of the opinion that the word 'mother' in

311 *M.R. & Another* v. *An t Ard Chláraitheoir* [2013] IEHC 91, at 96.
312 The applicants relied on Section 63 of the Civil Registration Act 2004.
313 *M.R. & Another* v. *An t Ard Chláraitheoir* [2013] IEHC 91, at 71.
314 *Idem*, at 91.
315 *Idem*, at 93.
316 *Idem*, at 2.
317 *Idem*, at 105.
318 *Idem*, at 98.

Article 40.3.3° had a meaning specific to the Article itself and that there was nothing in the Irish legislative context that positively affirmed the maxim of *mater semper certa est*. Judge Abbott held that this presumption had not survived the enactment of the Constitution insofar as it applied to the situation post IVF and considered that any alleged historic and European consensus on the *mater semper certa* principle was not to restrain the Court from making conclusions.[319] He accordingly held:

> 'To achieve fairness and constitutional and natural justice, for both the paternal and maternal genetic parents, the feasible inquiry in relation to maternity ought to be made by on a genetic basis and on being proven, the genetic mother should be registered as the mother under the [Civil Registration Act 2004].'[320]

The High Court accordingly granted the declarations sought by the applicants, holding that *CR* was the mother of the twins and that the continued failure to recognise *OR* and *CR* as their parents was unlawful.

As pointed out by many, this case highlighted the urgency with which legislation was required in this area.[321] Because the government was by that time eventually indeed in the process of preparing legislation on the issue, it subsequently appealed the case to the Supreme Court. It wished to ensure that the legislature's scope to legislate was 'absolutely clear' and wished to have 'a number of points of law of exceptional public importance' clarified.[322] After a four-day hearing in February 2014, the Supreme Court reserved judgment in the case.[323]

In the meantime the 2014 Children and Family Relationship Bill (see 5.3.2 above) was introduced. It initially also provided for a section on surrogacy. Had this not been taken out of the Bill at a later stage, it could have resulted in the introduction of the first statutory instrument in Ireland addressing the issue of surrogacy expressly. Even though the relevant provisions have thus not made it into law, they may still be indicative for possible future legislation in this area and that warrants a brief discussion of the relevant parts of the Bill here.

The Bill only focused on so-called gestational surrogacy involving AHR treatment as opposed to 'traditional surrogacy' whereby the surrogate mother is the genetic mother of the child she is carrying.[324] The making or receiving of payments in

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319 *Idem*, at 105.

320 *Idem*, at 104.

321 E.g. A. Caffrey, 'Surrogacy – Genetics v Gestation: The Determination of "Mother" in Irish Law', 19 *Medico-Legal Journal of Ireland* (2013) p. 34 and A. Mulligan, 'Surrogacy in the Courts: The Definition of Motherhood', guest post at *humanrights.ie* of 30 January 2013, www.humanrights.ie/index.php/2013/01/30/surrogacy-in-the-courts-the-definition-of-motherhood, visited 21 May 2014.

322 Department of Social Protection, *Statement in relation to High Court judgment in the case of* MR, DR, OR and CR v An tÁrd Chlaraitheoir [Registrar General], Ireland & the Attorney General, 6 June 2013 online available at www.welfare.ie/en/pressoffice/Pages/pr060613a.aspx, visited 20 May 2014.

323 M. Carolan, 'Supreme Court reserves judgment in surrogacy case', *Irishtimes.com* 6 February 2014, www.irishtimes.com/news/crime-and-law/supreme-court-reserves-judgment-in-surrogacy-case-1.1682158, visited 22 May 2014.

324 General Scheme of the Children and Family Relationship Bill (version January 2014), p. 10.

relation to a surrogacy arrangement and advertisements for entering into a surrogacy arrangement were prohibited under the Bill. Those who engaged in commercial surrogacy could face a fine or imprisonment for a term not exceeding 12 months, or both.[325] Payment for the birth mother's reasonable costs, for legal advice and for AHR procedures involved in surrogacy agreements were not precluded. The Bill also set certain age requirements: the surrogate mother had to have attained the age of 24 years and had to have at least one child of her own, while the intended parents had to be between 21 and 45 years of age.[326]

The Bill set out the rule that the birth mother was always considered the mother whether or not she had a genetic connection to the child.[327] In respect of surrogacy in particular it was explained:

> 'The policy intention is that in a surrogacy case, the birth mother will be recorded as the child's mother. No surrogacy arrangement will be enforceable against her. However, on application to the court by the birth mother or the commissioning parents, or all of them, the court may legally assign parentage to the intending parents. The court may assign parentage on the basis of genetic connection to one of the intending parents and to the spouse, civil partner or cohabiting partner of that person. The consent of any surrogate is essential and she will be the legal mother of the child if she does not consent.'[328]

The Bill thus made it possible for the intending parents to establish parental links with the child, but at the same time reserved a decisive say for the surrogate mother. This was also reflected in the rule that an application to the court could be made no earlier than 30 days after the child's birth.[329] No presumptions as to parenthood in relation to the partner of a surrogate mother applied.[330] Lastly, the condition was set that before entering the arrangement the surrogate mother and the intended parents were to obtain legal advice from separate and independent legal practitioners.[331]

After the Bill had been published, the Children's Ombudsman was critical in respect of some of the proposed provisions on surrogacy. She, *inter alia*, held that provision had to be made for situations in which a surrogate consented to the assignment of legal parentage to the intended mother, but the latter refused to accept legal parentage.[332] The Children's Ombudsman in particular made recommendations in respect of cross-border surrogacy cases (see section 5.5.4 below). As noted above,

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325 Proposed Section 23(1) and (2) in combination with Sections 18 and 19 of the Bill in its version of January 2014.

326 Sections 20 and 21 of the Bill in its version of January 2014. The Government special rapporteur on child protection considered the latter maximum age limit to amount to age discrimination. F. Gartland, 'Parental age limit in surrogacy law could be discrimination', *Irishtimes.com* 19 May 2014, www.irishtimes.com/news/crime-and-law/parental-age-limit-in-surrogacy-law-could-be-discrimination-1.1800599, visited 21 May 2014.

327 General Scheme of the Children and Family Relationship Bill (version January 2014), at p. 22.

328 *Idem*, at p. 31.

329 Art. 13(5) of the Children and Family Relationship Bill.

330 Art. 8(3) Children and Family Relationship Bill.

331 Art. 22(1) and (2) Children and Family Relationship Bill.

332 General Scheme of the Children and Family Relationship Bill (version January 2014), at p. 20.

the revised general scheme of the Children and Family Relationships Bill 2014, as published on 26 September 2014, no longer contained any provisions in relation to surrogacy. The following explanation was given in an accompanying summary of the Revised Bill:

> 'It was considered particularly problematic to finalise provisions on surrogacy in advance of the Supreme Court's ruling on the *MR & Ors – v- An tArd-Chláraitheoir* case given the uncertainty on the balance of constitutional rights between a birth mother and a genetic mother and because there are very critical issues needing to be resolved, relating for example to how the law deals with commercial surrogacies and to the rights of children born through surrogacies.'[333]

5.4. Statistics on cross-border movement

5.4.1. Statistics on cross-border abortions

Traditionally most women in Ireland who wish to have an abortion on medical or social grounds go to the United Kingdom. The UK Department of Health annually releases statistics on abortions carried out in England and Wales. These statistics also show how many women and girls gave addresses in Ireland to these abortion clinics.[334] On the basis of these statistics the Irish Family Planning Association (IFPA) has held that between January 1980 and December 2012, at least 156,076 women travelled from Ireland for abortion services in England and Wales.[335] The IFPA underlined that these numbers are an underestimation '[...] as not all women resident in the Republic of Ireland will provide their Irish addresses for reasons of confidentiality. Furthermore, some Irish women will give addresses in the UK at which they are not resident in order to obtain abortion care paid for by the [National Health Service].'[336]

The number of women giving Irish addresses to UK abortion clinics has been decreasing every year since 2001, from 6,673 to 3,982 in 2012.[337] Still, in 2013 it

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333 General Scheme of the Children and Family Relationships Bill Summary of Provisions, online available at www.justice.ie/en/JELR/Note%20on%20the%20General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf/Files/Note%20on%20the%20General%20Scheme%20of%20the%20Children%20and%20Family%20Relationships%20Bill.pdf, visited October 2014.

334 These statistics are online available at the website of the UK Department of Health www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_099285, visited 22 March 2010.

335 Website of the Irish Family Planning Association (IFPA), www.ifpa.ie/eng/Hot-Topics/Abortion/Statistics, visited 26 May 2014.

336 *Idem*. See also Human Rights Watch, *A State of Isolation, Access to Abortion for Women in Ireland* (New York, Human Rights Watch 2010), www.hrw.org/node/87910, visited 3 June 2010, at p. 14.

337 'Number of Women Giving Irish Addresses at UK Abortion Clinics Decreases for Eleventh Year in a Row According to UK Department of Health', press release of the HSE Crisis Pregnancy Programme of 11 July 2013, www.crisispregnancy.ie/news/number-of-women-giving-irish-addresses-at-uk-abortion-clinics-decreases-for-eleventh-year-in-a-row-according-to-uk-department-of-health, visited 26 May 2014.

was held that at least 11 women left the Irish Republic every day for an abortion in Britain.[338] Also, in 2014, a steady rise was reported in the number of women from Ireland seeking abortion on medical grounds in UK hospitals.[339]

Women from Ireland have also been – and are – accessing safe and legal abortion services in other EU countries, principally the Netherlands,[340] allegedly due to the rise of low budget airline connections. These numbers have also been dropping every year. Statistics from the Dutch Expert Centre on Sexuality, *Rutgers Nisso Group* (now *Rutgers WPF*), for example, show that in 2007 the share of Irish women in the group of non-Dutch resident women obtaining abortions in Dutch clinics was 10 per cent (450 out of 4,469 abortions) in 2007, compared to 4 per cent (177 out of 4,436 abortions) in 2008.[341]

The so-called 'Abortion boat' of the Dutch NGO *Women on Waves* set sail to Ireland in 2001. Reportedly some 300 women from Ireland contacted the ship's hotline at the time, including '[…] women who had been raped, schoolgirls who could not find a feasible excuse to go to England for a couple of days, mothers who could not pay for childcare during their journeys to England, and political refugees who did not have the papers to travel'.[342]

5.4.2. (Insufficient) statistics on cross-border reproductive care

As far as the present author is aware, no governmental body in Ireland keeps any official statistics as regards CBRC. Various news reports and surveys, as well as statistics drawn up by private clinics may, however, give some picture of the actual scale of this phenomenon.

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338 'Ireland: Government publishes draft legislation', *Reproductive Review* 3 May 2013, www.reproductivereview.org/index.php/rr/article/1404, visited 22 May 2014.

339 K. Holland, 'Concern voiced over UK hospital restrictions', *Irishtimes.com* 16 April 2014, www.irishtimes.com/news/social-affairs/concern-voiced-over-uk-hospital-restrictions-1.1764419, visited 26 May 2014.

340 *Supra* n. 337. *Human Rights Watch* also interviewed Irish women who had had abortions in Italy and France. Human Rights Watch 2010, *supra* n. 336, at p. 10.

341 L. van Lee and C. Wijsen, *Landelijke abortusregistratie 2007* [National abortion registration 2007] (Utrecht, Rutgers Nisso Groep 2008) pp. 47–48, online available at www.rng.nl/producten endiensten/onderzoekspublicaties/downloadbare-publicaties-in-pdf, visited 2 June 2010 and H. Kruijer et al., *Landelijke abortusregistratie 2008* [National abortion registration 2008] (Utrecht, Rutgers Nisso Groep 2010) p. 33, online available at www.rng.nl/productenendiensten/onderzoekspublicaties/downloadbare-publicaties-in-pdf, visited 2 June 2010. The Irish Crisis Pregnancy Agency has held that the number of women travelling from Ireland to clinics in the Netherlands was 461 in 2006, 451 in 2007, 351 in 2008, 134 in 2009, 31 in 2010 and 33 in 2011.'Number of Women Giving Irish Addresses at UK Abortion Clinics Decreases for Eleventh Year in a Row According to UK Department of Health', press release of the HSE Crisis Pregnancy Programme of 11 July 2013, www.crisispregnancy.ie/news/number-of-women-giving-irish-addresses-at-uk-abortion-clinics-decreases-for-eleventh-year-in-a-row-according-to-uk-department-of-health, visited 26 May 2014. The latter figures are, however, not verifiable as in the reports of the *Rutgers WPF* for those years, women from Ireland are covered by the more general category 'other' ('overig').

342 R. Gomperts, 'Women on Waves: Where Next for the Abortion Boat?', 19 *Reproductive Health Matters* (2002) p. 180 at p. 181. See also Ch. 6, section 6.4.1.3.

Many reports are made of Irish women and couples travelling to other jurisdictions for AHR treatment including gamete donation. Some news reports speak of 'many women' travelling to Spain and other European countries for ovum donation,[343] others speak of 'hundreds of Irish couples' heading to other European countries for that same purpose[344] and of 'hundreds of children born in Ireland every year' who are conceived using eggs or sperm sourced from Spain and other countries.[345] Certain individual clinics keep their own statistics. It was, for instance, reported that the *Instituto Marques* clinic in Barcelona, treated 50 Irish women in 2007 and had by August 2008 yet treated 70 that year.[346] *Reprofit*, a fertility clinic in the Czech city of Brno, was reported to have treated about six Irish couples a month and the Mediterranean Fertility Centre in Chania, Crete, claimed to have treated about 50 Irish women in 2008.[347]

The Irish private fertility clinic *Sims IVF Clinic* has, furthermore, set up the so-called 'European egg donation programme'. According to the clinic, the number of recipients of egg donation far exceeds the number of donors in Ireland. Because the converse allegedly applies in Eastern Europe, the Irish clinic has developed a partnership with a Ukrainian clinic. The Irish clinic transports frozen sperm to the Ukrainian clinic, where the *in vitro* fertilisation is carried out. The resulting fertilised eggs are then returned to Ireland for couples to proceed with embryo transfer.[348] A doctor of the *Sims* clinic estimated in 2005 that over half of the couples wishing to engage in AHR travelled to Spain and Eastern Europe.[349] In 2004, the clinic completed 120 treatments involving eggs donated from Middle or Eastern Europe, compared with 24 Irish donations.[350]

It has been submitted that particularly the existing non-commercial nature of the donation of gametes caused a shortage in available donor eggs in Ireland. With no financial incentive, Irish women have apparently been reluctant to donate their eggs out of altruism.[351] It has been reported that consequently '[…] hundreds of Irish

343 'We're having an IVF baby', *Sunday Business Post* 19 September 2004.

344 T. McTague, 'Costa del IVF', *Daily Mirror*, 11 August 2008 and G. Monaghan, 'Irish head to Europe for egg donation. More women are turning to fertility clinics abroad', *The Sunday Times* 10 August 2008.

345 C. O'Brien, 'The identity issue: how donated eggs and sperm are redefining parenthood', *Irishtimes.com* 21 November 2011, www.irishtimes.com/newspaper/features/2011/1121/1224307905627.html?via=rel, visited 15 May 2014.

346 T. McTague, 'Costa del IVF', *Daily Mirror*, 11 August 2008 and G. Monaghan, 'Irish head to Europe for egg donation. More women are turning to fertility clinics abroad', *The Sunday Times* 10 August 2008.

347 M. Tsouroupaki, embryologist and laboratory director of the Mediterranean Fertility Centre in Chania, Crete as quoted in G. Monaghan, 'Irish head to Europe for egg donation. More women are turning to fertility clinics abroad', *The Sunday Times* 10 August 2008.

348 Www.eggdonation.ie/Information_about_Donors/Information_about_Donors.710.html, visited 15 May 2014.

349 Dr Walsh of SIMS Clinic in Dublin as quoted in 'Reproduction becomes a (baby) booming industry', *The Irish Examiner* 28 July 2005. According to the news report, Irish women no longer travel to Britain as there is also a severe shortage in the UK after the lifting of anonymity for donors.

350 'Infertile women buy donor eggs abroad for €10k', *Irish Independent* 25 June 2007.

351 As submitted by Dr Aonghus Nolan of the Galway Fertility Clinic as quoted in G. Monaghan, 'Irish head to Europe for egg donation. More women are turning to fertility clinics abroad', *The Sunday Times* 10 August 2008.

women are travelling to clinics across the continent to receive IVF treatment using eggs donated from young European women.'[352] It has, furthermore, been reported that Irish clinics import sperm from a Danish sperm bank.[353]

Further, cross-border movement has been taking place for the purpose of having PGD. The Joint Research Centre of the European Commission held in a report of 2007 that all patients who requested PGD in Ireland were referred to clinics outside Irish jurisdiction, *inter alia*, Belgium and the UK.[354] While the total number of referrals made within Ireland was not known, the number of referrals for PGD made by the National Centre for Medical Genetics was known to be approximately 20 cases in the period 2005–2006, the report stated. Apart from formal referrals, patients could also inform themselves about PGD facilities abroad via the internet.

5.4.3. Statistics on cross-border surrogacy

While no official statistics are available, there is ample incidental evidence showing that individuals and couples in Ireland have entered into surrogacy agreements in other jurisdictions. Outside the EU these mainly concern the USA, Ukraine and India. Inside the EU, the UK has long been a preferred destination.

British surrogacy organisations like *Cots* (Childlessness Overcome Through Surrogacy)[355] have in the past helped various Irish couples in giving babies through surrogacy.[356] It was reported that a 2008 change in UK legislation regarding adoption prevented non-UK residents from adopting a child born in the UK through surrogacy.[357] Consequently, Irish couples had to set up permanent residency in the UK in order to qualify for a surrogacy treatment.[358] Perhaps partly due to this change in the UK law, Irish couples increasingly turned to the USA for surrogacy.[359] In 2006 the *Daily Mirror* reported that three US organisations had arranged babies for 30 Irish couples.[360]

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352 *Idem*.

353 D. O'Donovan, 'UK trade in sperm and eggs', *The Sunday Mirror* 6 May 2007 and G. Pennings, 'The rough guide to insemination: cross-border travelling for donor semen due to different regulations', *Facts, Views and Vision in ObGyn, Monograph* (2010) p. 55, online available at www.fvvo.eu/assets/103/21-Pennings.pdf, visited 15 May 2014. Pennings referred to, *inter alia*, W. Pavia, 'How Danish sperm is conquering the world', *The Times* 27 November 2006.

354 Coverleyn et al. 2007*, supra* n. 275, at p. 41.

355 See www.surrogacy.org.uk/About_COTS.htm, visited 26 May 2014.

356 *Cots* has held to have helped on average five Irish couples a year. 'You'll have a baby in your arms within a year, NO questions asked.', *Daily Mirror* 16 January 2006 and C. O'Sullivan, 'More couples seeking British surrogate births', *The Irish Examiner* 9 August 2005. See also Sills and Healy 2008, *supra* n. 228.

357 See *inter alia* the submission by Dr Wingfield in *M. R. & Another* v. *An t Ard Chláraitheoir* [2013] IEHC 91, para. 28 and the UK Border Agency leaflet on inter-country surrogacy and the immigration rules, online available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/261435/Intercountry-surrogacy-leaflet.pdf, visited 15 May 2014.

358 C. Palmer, 'Irish couples face an uphill struggle with surrogacy laws', *Independent.ie* 11 May 2009.

359 R. de Brun, 'I've had eight babies for other people', *Independent.ie* 4 February 2008.

360 'You'll have a baby in your arms within a year, NO questions asked.', *Daily Mirror* 16 January 2006.

5.5. Irish abortion and AHR legislation and cross-border movement

5.5.1. Criminal liability for abortions and AHR treatment abroad?

In 1980 Findlay held it inconceivable that Irish courts would punish arrangements for an abortion in another State that was lawful under the law of that State.[361] This observation seems confirmed by prosecution practice. There have, of course, in the past been cases where injunctions were sought and granted to prevent girls from travelling to another jurisdiction to have an abortion.[362] Other than that, the present author is not aware of any reports of any criminal prosecution in Ireland for abortions obtained abroad.

The present author is further not aware of any prosecutions in Ireland for involvement in prohibited treatment abroad. This may also have to do with the fact that AHR was for so long unregulated and thus also not expressly criminalised. There have, nonetheless, been reports of fear for prosecutions. For example, in 2007 it was reported that Irish doctors feared potential prosecution for referring patients to PGD clinics in other countries.[363]

5.5.2. Public funding for treatment obtained abroad

Most women who travel from Ireland to another State for an abortion, do so because the abortion is not legally available in Ireland. That implies that these women also have to cover the costs of their abortion themselves.[364]

In respect of AHR treatment, reimbursement depends on the terms of the private health insurer (see 5.5.9 above). The tax relief described in section 5.3.8 above, is also available if the treatment has been obtained abroad.

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361 M.J. Findlay, 'Criminal Liability For Complicity In Abortions Committed Outside Ireland', 15 *The Irish Jurist* (1980) p. 88.

362 See section 5.5.2 above.

363 J. Lawford Davies as quoted in 'IVF test for deformities raises legal concerns', *The Irish Examiner* 10 December 2007.

364 Upon inquiry with the *Dublin Well Woman Centre* in 2006 it appeared that incidentally Irish authorities had reimbursed abortions for minors. The *Dublin Well Woman Centre* furthermore expected that abortions performed on women in state custody would also be paid for by the State, but it underlined that it did not have any statistics to that effect. Women in small communities could sometimes rely on private funding within that community. Other women had to finance their abortions themselves. Statement by Alison Begas, Chief Executive of *Dublin Well Woman* (Personal email correspondence 13 November 2006).

5.5.3. Information about treatment abroad and follow-up treatment

As explained in section 5.2.3 above, the right to information about foreign abortion facilities has been guaranteed under Irish law since 1992. It is laid down in various sources of law such as the Constitution, statutory law and the Guidelines of the Medical Council. In its judgment in the *A, B and C* case of 2010, the ECtHR implicitly approved of these regulations as sufficient to meet the ECHR standards.[365]

There have (in the past) been reports of Irish women who had difficulties in obtaining follow-up care in Ireland after they had abortions abroad.[366] The Guidelines on Crisis Pregnancy of 2004, as developed by the Crisis Pregnancy Agency in association with the Irish College of General Practitioners, have underlined that women are entitled to follow-up care.[367] As summarised in the *A, B and C* judgment, the guidelines note that:

> '[…] "[i]rrespective of what decision a woman makes in the crisis pregnancy situation, follow-up care will be important. This may include antenatal care, counselling, future contraception or medical care after abortion. The […] response [of the General Practitioner (GP)] to the initial consultation will have a profound influence on her willingness to attend for further care." If a woman decides to proceed with an abortion, it is the GP's main concern to ensure that she does so safely, receives proper medical care, and returns for appropriate follow-up. GPs are advised to supplement verbal advice with a written handout. […] A Patient Information Leaflet is attached to the Guidelines. It informs women that, should they choose an abortion, they should plan to visit their GP at least three weeks after the termination to allow the GP to carry out a full check-up and allow the woman to express any questions or concerns she may have.'[368]

Since 2009 the guidelines of the Medical Council recognise the medical profession's responsibility to provide aftercare for women who decide to leave the State for termination of pregnancy.[369] Also, the HSE Crisis Pregnancy Programme[370]

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365 The Court considered in respect of the first and second applicants' submissions that there was a lack of information on the options available to them and that this added to the burden of the impugned restrictions on abortion in Ireland, 'general and unsubstantiated'. In this regard, the Court referred to 1995 Abortion Information Act; the establishment of the Crisis Pregnancy Agency (CPA) in 2001 and 'the Government's clarifications as regards care and counselling provided or facilitated by the CPA', as well as the adoption of the CPA Guidelines and Medical Council Guidelines. ECtHR [GC] 16 December 2010, *A, B and C* v. *Ireland*, no. 25579/05, para. 130.

366 See, for example, the submissions of the three applicants in ECtHR [GC] 16 December 2010, *A, B and C* v. *Ireland*, no. 25579/05.

367 Primary Care Guidelines for the Prevention and Management of Crisis Pregnancy ("CPA Guidelines"), online available at www.crisispregnancy.ie/wp-content/uploads/2012/05/primary-care-guidelines-preventing-crisis-pregnancy.pdf, visited 15 May 2014.

368 ECtHR [GC] 16 December 2010, *A, B and C* v. *Ireland*, no. 25579/05, para. 80.

369 See also A.A. Sheikh, 'The Latest Medical Council Guidelines: New and Improved', 16 *Medico-Legal Journal of Ireland* (2010) p. 62.

370 In 2010 the former functions of the Crisis Pregnancy Agency were transferred to Ireland's Health Service (HSE) under the Health (Miscellaneous Provisions) Act 2009 (Act Number 25 of 2009). See www.crisispregnancy.ie/about-us/overview, visited 15 May 2014.

launched a special campaign to raise awareness about these free services in 2008.[371] The programme since then, *inter alia*, funds '[…] free post-abortion counselling and medical checkups to any woman that is in need of these services'.[372]

Despite these regulations, the applicants in the *A, B and C* case complained about insufficient follow-up care in Ireland after they had had abortions abroad. *Doctors for Choice Ireland* and the British Pregnancy Advisory Service (BPAS), who intervened as third parties in this case, also '[…] suggested that vital post-abortion medical care and counselling in Ireland were randomly available and of poor quality due to a lack of training and the reluctance of women to seek care.'[373] The Irish government disputed these submissions and submitted, *inter alia*, that the Irish College of GPs had reported that 95 per cent of doctors provided medical care after abortion.[374] The ECtHR found no violation of the Convention in respect of follow-up care after an abortion abroad.[375]

In respect of AHR treatment no such provision in respect of information or follow-up care is made. Under the 2014 Bill advertisement for surrogacy was prohibited, however, such a prohibition does not necessarily exclude the provision of neutral information about foreign treatment options. In respect of follow-up treatment for AHR treatment equally no specific provision is made in Irish law, nor in guidelines by the medical profession.

5.5.4. Cross-border surrogacy under Irish law

Irish law does not provide for specific conflict-of-laws rules for cross-border surrogacy cases. Further, although there have been reports of such cases being initiated,[376] there have been very few published court judgments on the matter, as the Circuit Court, generally does not give written judgments. There are reportedly

371 See www.abortionaftercare.ie, visited 22 May 2014.

372 Www.crisispregnancy.ie/about-us/crisis-pregnancy-services, visited 23 May 2014. See also www.abortionaftercare.ie, visited 22 May 2014.

373 ECtHR [GC] 16 December 2010, *A, B and C* v. *Ireland*, no. 25579/05, paras. 121 and 207. *Human Rights Watch* (HRW) held in respect of the Irish situation in a 2010 report: '[…] many women struggle to access timely, accurate, and complete information about legal abortion services abroad. As a result, they experience delays in accessing care, which heightens the possibility of health complications from the intervention. The delays also contribute to the emotional distress that many women experience.' Human Rights Watch 2010, *supra* n. 336, at p. 22. The report refers to 'F. Gary Cunningham, Kenneth L Leveno, Williams Obstetrics (2005) Ch 9', where it is reportedly held that 'Abortion is generally a safe medical procedure if carried out under proper conditions. It is safest when provided within the first eight weeks of the pregnancy. As the pregnancy progresses, "[t]he relative risk of dying as the consequence of abortion approximately doubles for each 2 weeks after 8 weeks' gestation".'

374 ECtHR [GC] 16 December 2010, *A, B and C* v. *Ireland,* no. 25579/05, para. 122.

375 See more elaborately Ch. 2, section 2.2.3.

376 For example, it was reported in 2011 that High Court proceedings were brought by an Irishman and his wife, who was an EU citizen, in an effort to secure an Irish passport for their child who was born as a result of a surrogacy arrangement with a woman in Ukraine. Y. Daly, 'Surrogacy difficulties', *humanrights.ie* 1 March 2011, www.humanrights.ie/children-and-the-law/surrogacy-difficulties/#more-12454, visited 15 May 2014.

numerous Orders of Declaration of Parentage and Guardianship orders but these are not accessible to the public.

Since 2012, some guidance for international surrogacy cases can be found, in the guidance document on cross-border surrogacy cases that the Irish Department for Justice and Equality published in 2012 (see section 5.3.9 above).[377] This document was intended to provide guidance as to the principles that will be applied by the Irish authorities in examining applications for a travel document on behalf of children born outside Ireland as a result of surrogacy arrangements. It was made clear that Irish authorities take a child-centred approach to decision-making in this area. The view was expressed that '[…] best interests and welfare of children [could] most effectively be secured when they [were] in the care of a guardian who [had] legal authority to take decisions, including medical decisions, on their behalf.'

The rule that '[g]enerally speaking, only a parent or guardian of a child may apply for a passport on his or her behalf', can pose serious obstacles for intended parents who wish to acquire an Irish passport for their child if it was born to a foreign surrogate mother. As explained above (see section 5.3.9 above), under Irish law the birth mother – whether she is also the genetic mother or not – is considered the legal mother of the child. As explained in the guidance document:

> 'Under the Guardianship of Infants Act 1964, the mother of a child born outside marriage is the child's sole guardian. Under Irish law, family relationships and the rights and responsibilities that flow from them cannot be subjected to the ordinary law of contract and cannot, in particular, be transferred to another person, bought, or sold. This means that, under Irish law, the surrogate mother and the child will have a life-long legal relationship with one another.'[378]

If the surrogate mother is married, her husband is presumed, by law, to be the father of the child,[379] 'unless the contrary is proved on the balance of probabilities.'[380] The surrogate mother and the father will have joint guardianship over the child.

An intended father who is the genetic father of the child, can be recognised as the legal parent of the child, also if the surrogate mother is married. As explained in the guidance document:

> 'Under domestic Irish law, this requires an application for a declaration of parentage to be made to the Circuit Court under Part VI of the Status of Children Act 1987. The Attorney General must be put on notice of any such application if it is to be binding upon State authorities. Application should also be made by the commissioning father for a guardianship order. The commissioning father will need to provide evidence of paternity

377 Guidance document on cross-border surrogacy cases (version November 2014). The guidance document was published online at www.justice.ie/en/JELR/Pages/Surrogacy, visited 15 May 2014.
378 *Idem*, at p. 2.
379 Art. 46 of the Status of Children Act 1987.
380 Guidance document on cross-border surrogacy cases (version November 2014), p. 2.

> in support of this application. As a rule, the Irish authorities will require DNA evidence from a reliable source […] to support a claim by a commissioning parent that he is a father of a child. Steps will have to be taken to serve any court proceedings issued on the surrogate mother and on her husband.'[381]

If the surrogate mother is unmarried the legal parenthood of the intended father who is also the genetic father of the child, can be recognised by the Irish authorities on the basis of DNA evidence.

The next step for intended parents, is the obtaining of travel documents for the child. In this regard it was noted in the Guidance document:

> 'In the best interests of the child and as a matter of best practice, a passport will be issued only where guardianship has been established but the Irish authorities may issue an Emergency Travel Certificate […] to enable the child to enter the State.'[382]

An application for an Emergency Travel Certificate (ETC) must be made by a parent or guardian on the child's behalf. Only a genetic intended father can do so, after he has proven his genetic paternity on the basis of DNA evidence. The surrogate mother must consent to the granting of the travel document and if she is married, her husband's consent is also required.

The same principles apply to an application for an Irish passport for a child born outside Ireland, whereby, moreover, it must be established that one of the parents (the surrogate mother or the genetic intended father) has Irish nationality.[383] Hence, for non-Irish intended fathers resident in Ireland, it impossible to get an Irish passport for the child. Also, these rules render it impossible for same-sex couples consisting of two women, to obtain legal parenthood over a child born to a surrogate mother in another country, even if one of these women is the genetic mother of the child.

It was stressed in the guidance document that the Irish authorities could give no guarantees, before the birth of any particular child, that the child would be automatically regarded as an Irish citizen, that the intended parents would be regarded as parents or guardians of that child, and therefore that a passport or other travel document could be provided for that child. The document concluded with the strong advice that anybody considering becoming involved in an international surrogacy arrangement had to seek expert legal advice from a lawyer qualified in Ireland. Also, it was noted that the process could '[…] take some time and involve one or more applications to an Irish court.'

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381 *Idem*, p. 3.

382 *Idem*, at p. 4.

383 As provided under the Irish Nationality and Citizenship Act 1956 as amended, and the Passports Act 2008.

The only written judgment in an international surrogacy case was issued by the High Court in March 2013.[384] In this case an Irish couple had concluded a surrogacy agreement in India. It concerned gestational surrogacy; an embryo had been created with the egg cell of an anonymous donor and the sperm of the intended father and had been implanted into the womb of the surrogate mother. Consequently a child was born in September 2010. It becomes clear from the judgment that an Emergency Travel Certificate had been issued in this case, but the subsequent application for an Irish passport for the child had been refused, because the intended father was not guardian over the child. The High Court was satisfied that the genetic paternity of the intended father had been established and that the child had been at all times in the care of both intended parents, who had occupied the role of holders of parental responsibility. The Court also considered it extremely unlikely that the surrogate mother would seek to play any role in relation to parental responsibility in the future. It was therefore 'a matter of considerable urgency and in the best interests of the child' that the child would obtain an Irish passport. The High Court appointed the intended father as guardian over the child and ordered that he be given the liberty to apply in the Circuit Court for a declaration of parentage.

After the family Relationships Bill had been published in January 2014, the Children's Ombudsman warned that by 'categorically ruling out the possibility of granting a declaration of parentage' where intended parents had illegally entered into a commercial surrogacy agreement, the children concerned risked being left stateless.[385] She held:

> 'With regard to non-commercial surrogacy, the proposed legislation does not address the recognition or otherwise of foreign surrogacy arrangements and/or court orders and the consequent parental status conferred on parties. Equally, the legislation does not address parental status under other types of assisted reproduction entered into abroad. These issues raise questions of European Union law and private international law which cannot be ignored. It may be that the legislature could enact regulations in a similar manner to statutory instruments that address the recognition of foreign same-sex relationships. There have been numerous statutory instruments which have recognised that certain classes of foreign relationships are entitled to be recognised in the State as a civil partnership.'[386]

The Children's Ombudsman accordingly recommended that a power was conferred on the Minister for Justice and Equality '[…] to recognise court orders relating to assisted reproduction or surrogacy from other jurisdictions that are compatible with

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384 High Court 5 March 2013, 2011 No. 68 CAF, *unreported*.

385 R. Mac Cormaic, 'Ombudsman warns surrogacy law could leave children stateless', *theirishtimes.com* 24 June 2014, www.irishtimes.com/news/crime-and-law/ombudsman-warns-surrogacy-law-could-leave-children-stateless-1.1843869, visited 5 July 2014.

386 Advice of the Ombudsman for Children on the General Scheme of the Children and Family Relationships Bill 2014, May 2014, pp. 20–21, www.oco.ie/wp-content/uploads/2014/06/OCO AdviceonChildandFamilyRelBill2014.pdf, visited June 2014. In respect of the statutory instruments that address the recognition of foreign same-sex relationships, to which the Ombudsman refers, see ch. 11, section 11.4.4.

Irish law and public policy.'[387] Also, children should not be the victim of any decisions made by the parents in this regard, the Ombudsman held. She recommended:

> 'The General Scheme should retain a criminal sanction for those who engage in commercial surrogacy arrangements. The General Scheme should also provide for the legal consequences that arise for children born as a result of such arrangements; however, the Ombudsman for Children's Office does not believe that declarations of parentage should be denied where this would leave the child born as a result of a commercial surrogacy arrangement in a vulnerable legal position.'[388]

As noted above at various occasions, the Revised Family Relationships Bill of September 2014, no longer made any provision for (cross-border) surrogacy. As a result, couples and individuals who wish to engage in a surrogacy agreement in another country, have to resort to the guidance document referred to above, for any official guidance in this unregulated area.

5.6. Conclusions

While liberalising movements have taken place in most European States – including in the neighbouring UK – in recent decades, Ireland still firmly holds on to its restrictive abortion laws. The ban on abortion on medical and social grounds has not, however, remained unchallenged since its introduction. Pro-choice campaigners and individuals affected by the ban have tried to obtain a lifting or at least relaxation of the Irish abortion laws both at national and European levels. They have had some success, but the effects have been limited. The procedures that have taken place before the ECtHR have led to amendments to the Irish abortion laws to the effect that the necessary preconditions for obtaining an abortion abroad have been enshrined in national law. At the same time, the Irish government has sought further exclusion from the influence of European law on domestic policy decisions in this field, through the adoption of Protocols to various EU Treaties.

The ECtHR's judgment in the case of *A, B and C* v. *Ireland* (2010), prompted the adoption of legislation clarifying the existing restrictive abortion laws. Further action was taken after the tragic case of Mrs. Halappanavar, who died in a Galway hospital after having been refused an abortion. The Protection of Life During Pregnancy Act (2014) aimed to improve the procedural rights of women and has provided for more clarity for medical practitioners, but it has not brought about any material change. An abortion is still only allowed in Ireland if the life of the pregnant woman is endangered by the pregnancy. The ECtHR's finding in *the A, B and C* case that Ireland's ban on abortion for medical and social grounds did not violate the Convention, in combination with the awarding of a very wide margin of appreciation

387 *Idem*, p. 21.
388 *Idem*, p. 25.

to Ireland in this case, render it most likely that the Court would also hold the latest Irish abortion laws to be in conformity with the ECHR.

The Irish abortion laws have been subject to strong criticism. It has been held that the Irish government had regulated abortion services through 'delegation and doubt'.[389] Some observed that the Irish restrictive abortion laws 'merely exported the problem'[390] and that Ireland has taken a '"not in our own back yard" attitude to abortion'.[391] Wicks has spoken of 'the blatant hypocrisy of the Irish solution'. She wondered how the right to travel abroad for an abortion could be tolerated, if the views of the Irish people, and the Irish state, were so profound and fundamental to the continuation of its democratic society.[392] The Irish abortion policy has indeed often been referred to as an Irish solution to an Irish problem. This has annoyed others, who have pointed out that 'if it [was] to be called a problem […] it [was] a world-wide problem'.[393] On the other hand, the Irish legislature has clearly proven itself not ready for any substantive liberalisation of the Irish abortion laws, and the pro-life movement is, next to the pro-choice movement, still very present in the public debate on the issue.[394]

The picture in respect of AHR treatment and surrogacy is somewhat different. Although AHR is a practical reality in Ireland – as is the case in many European States – it was long – and is mostly still – submerged in legal uncertainty. The Irish Courts unequivocally did not consider it the task of the judiciary to resolve this uncertainty (see section 5.3.1 above). It was therefore up to the Irish legislature to fill in the legal vacuum that continued to exist in Ireland as regards AHR and surrogacy. While the AHR Commission identified a need for such action as early as 2005, it was only in 2014 that first steps in this regard were taken.

In the meantime the demand for AHR treatment had not diminished – quite the contrary. AHR services are provided by private specialists and clinics only, and these services must be privately funded, apart from the fact that income tax relief applies. Because Irish fertility clinics and counsellors operated within a legal limbo and acted according to what they considered to be the boundaries of national law, they often referred patients to foreign clinics in jurisdictions where AHR was regulated more clearly, or where waiting lists were simply shorter, treatments were cheaper and/or more donors were available (see section 5.4).

The 2014 Children and Family Relations Bill provided for regulation of a number of AHR related issues. While initially not foreseen, its revised version provided

389 M. Fox and T. Murphy, 'Irish Abortion: Seeking Refuge in a Jurisprudence of Doubt and Delegation', 19 *Journal of Law and Society* (1992) p. 454. See also McGuinness 2011, *supra* n. 127, at p. 476.

390 Sherlock 1989, *supra* n. 10.

391 Schweppe 2001, *supra* n. 43, at p. 155.

392 E. Wicks, '*A, B, C v Ireland*: Abortion Law under the European Convention on Human Rights', 11 *HRLR* (2011) p. 556 at p. 563.

393 Fox and Murphy 1992, *supra* n. 389, at p. 456.

394 'Thousands turn out for Pro-Life vigil in Dublin', 8 June 2014, *thejournal.ie*, www.thejournal.ie/pro-life-vigil-for-life-dublin-942833-Jun2013, visited 24 June 2014.

for a right to know one's genetic origins in gametes donation cases. The proposed surrogacy legislation, on the contrary, was removed from the revised version of the Bill. Other matters, such as PGD, are still unregulated in the Irish jurisdiction.

Couples from Ireland that engage in cross-border surrogacy may encounter serious difficulties in establishing parental links with the child. Some guidance has been given by the Irish Department for Justice and Equality as to the principles that will be applied by the Irish authorities in examining applications for travel documents on behalf of children born outside Ireland as a result of surrogacy arrangements. It is however, uncertain as to how these principles apply if commercial surrogacy is concerned. Moreover, the policy is only helpful in cases where the intended father is the genetic father of the child (see section 5.5.4 above).

The importance that has been attached to genetic parenthood under Irish law has varied. It was because of his genetic parenthood, and the interests of the child in establishing contact with his genetic father, that a sperm donor was granted access to his child in *McD* v. *L & Anor.* In surrogacy cases the genetic parenthood of the intended father may be ground for recognising him as the legal father of the child. The genetic parenthood of an intended mother, on the other hand, does not have any effect in law.

All in all, an interesting picture has emerged from this chapter. While the protection of the unborn life under the Irish Constitution (which commences from the moment of implantation) has been the rationale behind very restrictive abortion laws, the rights of the child, on the other hand, have mainly been ground for regulating certain AHR practices and for the granting of travel documents in cross-border surrogacy cases. Generally, however, a legal limbo regarding AHR and surrogacy still exists.