

# Scientific Knowledge and Legislative Drafting: Focus on Surrogacy Laws\*

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## ABSTRACT

This article discusses how sensitive bioethical issues are addressed in legislation, using as a starting point the analysis of a corpus of normative texts relating to Assisted Reproduction Technologies (ARTs), and in particular surrogacy, enacted in various English-speaking countries. In the investigation, special attention is given to the re-elaboration and presentation of scientific knowledge in legal discourse with a view to detecting any possible slant or changes, and the reasons thereof. Another important object of investigation is the redefinition of certain well established categories of kinship because of the disruptive effects of biomedical advances, and ARTs in particular, on family-based social relations. The analysis will focus on legal definitions, which are crucial in this domain considering that advances in the modern technosciences have brought about the need to categorize and name new medical practices and the situations they contribute to bringing about. The focus will be on how definitions are used in normative texts, functioning as initiators of a dynamic process generating discourses that acquire their meaning in the social and communicative contexts they are embedded in. Special attention will be devoted to the way in which specialised scientific, and especially medical, terminology and concepts, are dealt with in bioethically relevant legal discourse.

*Keywords:* Artificial Reproduction Technologies; bioethics; definitions; legislative drafting; surrogacy.

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## 1. INTRODUCTION

In the last few decades technoscientific research has gathered momentum and broken out of the laboratory into our lives, with important implications in some areas (health, genetics, reproduction, end of life, etc.), often introducing an element of choice in facts that were previously ineluctable (death, the sexual basis of reproduction, congenital malformations, etc.), and in many cases also having an impact on the environment. So the need has arisen to introduce some form of social control: it seems no longer possible for science to stand apart and let scientific research proceed in the free pursuit of knowledge and its applications in full autonomy and independently of the social context where it is embedded. In this respect the law has a most crucial role to play as the instrument through which social control can be exerted, establishing rules, i.e. limitations, if not outright prohibitions, for activities in the biomedical and life sciences and in individuals' behaviour (cf. Mazzoni 2002, 7).

In the past there was little confidence that the law would be a valid instrument to regulate bioethical questions, because of the sheer speed of technological and biomedical progress, and the difficulty unifying largely divergent moral and religious conceptions (Tallacchini 2002, 79). Some people also thought that for many of the issues involved the choice could be left to the single individual, rather than determined by the institutions. But the problems deriving from a lack of rules in the bioethical field were so serious that law-making seemed to be the only possible solution, apart from the contingent (and unsystematic) solutions provided by judgments issued in court cases where disputes often ended up because of lack of clear rules.

Of course, the pace at which the biomedical sciences have progressed has put legal systems under strain to come to terms with progress and regulate the new situations and options. The legislative work done in each community for this purpose has important ideological consequences, as not only does it determine what is prescribed or prohibited, but it also entails the designation and definition of the entities and objects involved. This means it plays a crucial role in the categorization of such entities and objects, and in the establishment of connections amongst them. Knowledge thus categorized is then disseminated through the circulation of the contents of legislative instruments and their application in civil life, and becomes widely accepted in society, thus offering schemes for the social construction of reality.

This study is aimed at discussing how sensitive bioethical issues, and in particular those connected with surrogacy, are addressed in relevant legisla-

tion in English, giving special attention to definition rules (Gunnarsson 1984) on account of their importance for the sake of the conceptualisation of scientific/bioethical knowledge.

## 2. BACKGROUND: SURROGACY AND THE LAW

Among bioethical issues, those regarding Assisted Reproduction Technologies (ARTs) are especially topical.

Various forms of IVF (In Vitro Fertilisation), gamete intrafallopian transfer (GIFT), homologous and heterologous insemination, cloning, have often been objects of debate both on an institutional level and among the general public. In particular, since surrogacy was introduced in the 1980s<sup>1</sup>, in many countries the issue of its admissibility has been especially controversial, well beyond a general reluctance towards techniques that tamper with the mechanisms of human reproduction.

For surrogacy, the sources of concern are manifold. Surrogacy, especially in its gestational form, i.e when the surrogate mother has no genetic connection with the baby<sup>2</sup>, may lead to complex genetic and biological situations in terms of maternity/paternity recognition, which in some cases even DNA testing cannot sort out (as was the case for instance in the famous baby M case, or the *Johnson v. Calvert*, 1993 case, or *Jaycee v. Supreme Court of Orange County*, 1996; cf. Post 2004, 2291-2292)<sup>3</sup> and this often leads to court battles.

How controversial the practice of surrogacy continues to be is proved by the fact that in various jurisdictions where commercial surrogacy was allowed until recently (e.g. India, Thailand, Tabasco), more restrictive laws have now been introduced to prevent non-nationals from having access to

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<sup>1</sup> The first known case of surrogacy with IVF was recorded in 1985 (cf. Utian *et al.* 1985). However, the first surrogacy agreement dates back to 1976 (<http://information-on-surrogacy.com/history-of-surrogacy> [25/08/2017]).

<sup>2</sup> In gestational surrogacy the surrogate mother has no biological link with the baby, as the embryo is created using either the eggs and sperm of the commissioning parents, or a donated egg fertilised with sperm of the commissioning father, or eggs and sperm from donors, while in traditional surrogacy the substitute mother is artificially inseminated with the sperm of the aspiring father, lending her own ovum.

<sup>3</sup> The judgements can be found respectively at <https://law.justia.com/cases/california/supreme-court/4th/5/84.html> and <http://law.justia.com/cases/california/court-of-appeal/4th/42/718.html> [10/02/2017].

it. The resulting picture is one where in an increasing number of countries the practice of commercial surrogacy is either forbidden by law or subject to heavy restrictions. More in general, while certain sectors of public opinion (e.g. LGBT communities) strongly advocate its legalization, surrogacy has come under serious scrutiny in various quarters, e.g. feminist groups, who after initially seeing surrogacy as an expression of women's control of their own bodies now denounce it as a form of exploitation and commodification orchestrated by the human reproduction industry. A case in point is the Charter for the Abolition of Surrogate Motherhood (<http://www.abolition-gpa.org/charte/english/> [24/08/2017]) launched in 2016 by a composite group of feminist associations and subsequently promoted globally through a series of conferences. Noteworthy are also stances taken by institutions, such as the European Parliament (cf. condemnation included in the *2014 Report on Human Rights*)<sup>4</sup>, and the Council of Europe's Social Affairs and Health Committee's rejection of the draft report on surrogacy ('de Sutter report') containing a proposal that called for measures which would have required states to give effect to private surrogacy arrangements (11/10/2017).

At the same time in ever more jurisdictions increasing tolerance is shown, for instance when actual cases end up in court in countries that ban surrogacy, and the judges recognise the baby born abroad from surrogacy as the legitimate offspring of the commissioning couple on the basis of the principle of the best interest of the child. In other countries measures have been passed to legalize altruistic or collaborative surrogacy, also for the purpose of avoiding mispractices and abuses.

A further source of concern is that where commercial surrogacy is actually practiced, being allowed or tolerated, it is often seen to take the form of a real business, being mostly carried out within the framework of organizations or 'centres' that provide services (the surrogate motherhood) and goods (the babies) in addition to a whole range of supplementary goods and services (ova, sperm, embryos, in vitro fertilization services,

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<sup>4</sup> Cf. clause 114 of the *Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter* passed 17/12/2015: "Condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments" (<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0470&language=EN&ring=A8-2015-0344> [24/08/2017]).

etc.), which are specialised in assisting aspiring parents through the whole surrogacy cycle, and offer medical and legal counselling, reproductive technologies, concierge services for pregnant surrogate mothers, etc.

But, whatever one's opinion on the admissibility and/or lawfulness of surrogacy, it cannot be ignored that this practice is part of the unprecedented advances made in the biomedical and genetic sphere that have had an impact on our conceptualisation of the possible interferences in the natural functioning of the body: ARTs, genetic therapies, organ transplant and end of life care are only few examples. These advances have revolutionized our conceptualisation of the body as a non sectionable organism, with a number of consequences, among them the confidence in the possibility of tampering with various body parts and replacing them without interfering with the overall functioning of the organism. This may even give rise to a conceptualisation of body parts as spare parts that can be exchanged, removed, and sold, patently against the principle of non-commercialization of human organs as enshrined in professional statements, such as the Declaration of Istanbul (<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2813140/>) (2008), and international legal instruments, such as the *Council of Europe Convention against Organ Trafficking* (2014).

It is inevitable that such important developments should bring about profound changes in mentality, altering communities' ethical convictions as well as their conceptualisations of some of the basic aspects of human life. In particular, as regards surrogacy, the acceptance of the practice and all the corollaries it brings with it entails a radical re-haul of current conceptions of the fundamental facts of life based on strictly biological laws in their 'natural' course. This is of course especially true for surrogacy, where the new options and their consequences diverge from biologically-based and socially-sanctioned kinship relations.

### 3. AIMS, MATERIALS AND METHOD

This study looks at surrogacy laws in force in some English-speaking countries and aims at understanding how practices and situations made possible by advances in the modern biomedical sciences are categorized and named within legislative texts. The focus is on definitions, which are crucial in this respect, functioning as initiators of a dynamic process generating discourses that acquire their meaning in the social and communicative contexts they are embedded in. Special attention is devoted to

the way in which specialised scientific, and especially medical, terminology and concepts, are dealt with in bioethically relevant legal discourse.

The study has its starting point in the analysis of a corpus of surrogacy laws in force in English speaking countries. As regards corpus collection, it has to be considered that normative texts in English regulating the issue are not numerous, as only some states have actually introduced legislation to control or prohibit surrogacy, either totally or partially, while in other countries the practice is not subject to any control or tolerated, or it is left to the judges to decide on its lawfulness in contingent cases they are required to deliberate on. Therefore, the choice of texts for the corpus was rather limited, and includes statutes in force in the UK, Canada, South Africa, Hong Kong, the United States and Australia. Given that in the USA and in Australia, each state (or territory) has a different surrogacy or ART law, in order to prevent an excessive weight of American and Australian texts in the corpus only a selection has been included, taking care that the statutes selected are characterised by different stances towards the issue. The resulting corpus comprises the laws in force in the UK, Canada, South Africa, Hong Kong, seven statutes in force in US States (California, Florida, Illinois, Louisiana, Michigan, Virginia, Washington), and three statutes from Australian States (New South Wales, Victoria, West Australia). The corpus consists of 65,396 tokens, standardised TTR 24.29 (cf. McEnery and Hardie 2011, 50), and has been analysed mainly qualitatively, devoting special attention to the words or expressions explicitly defined in the legislative texts. Although quantitative data are seldom mentioned in the text, in the research process recourse was also made to corpus linguistics (cf. McEnery and Wilson 2001, 78-79), using the Wordsmith Tools 6.0 suite of software programmes (Scott 2012) to generate frequency lists for the purpose of identifying the presence and 'weight' of the various lexical items and providing an empirical basis for interpretation, and to run concordances to help identify the contexts of usage, collocates and discourse prosody (Sinclair 1991; Stubbs 2001; Baker and McEnery 2015).

The basic methodological framework of this study is discourse analysis (cf. e.g. Brown and Yule 1983; Schiffrin, Tannen, and Hamilton 2001), and in particular Critical Discourse Analysis (e.g. van Dijk 1993; Fairclough 1995, 2014; Wodak and Meyer 2001). Special attention has been devoted to the inevitable ideological implications in discourses dealing with such fundamental, intimate and still unstable issues, based on the assumption that language is never neutral and even the most basic linguistic choices carry with them an element of bias or slant, if not of outright ideology (Kress and Hodge 1979; Fowler 1996; van Dijk 1998; Garzone and Sarangi

2007; Fairclough 2014). Account has also been taken of terminological work shifting emphasis from an objectivistic traditional approach towards a more dynamic and flexible one (cf. Temmerman 2000) and of research on definitions carried out in legal studies (e.g. Hempel 1952; Belvedere, Jori, e Lantella 1979; Scarpelli 1985; Thornton 1987; Jopek-Bosiacka 2011; Breczko 2012; Hernández Ramos and Heydt 2017), and in linguistics, with special regard to a study by Antelmi (2007) looking at definitions and terms in legislative texts drawing on science. Reference to the by now ample literature on surrogacy has also been deemed indispensable, although most works dealing with it take a sociological or gender studies approach (e.g. Ragoné 1994; Markens 2007; Teman 2010; Pande 2011); to my knowledge so far only one discourse analytical study has been published, which focuses on language and communication on surrogacy websites (Garzone 2017).

#### 4. DEFINITIONS

In the regulation of highly sensitive areas of life affected by recent bio-medical advances, there arises the need to deal with notions, situations, processes and procedures that are new and not yet firmly established as part of shared knowledge. Therefore an important role is played by definitions.

Although there is agreement among scholars that in normative texts definitions should be given only when really necessary, there is a general tendency – especially in common law legislation – to provide them also for words or expressions that seem to have a well-defined meaning and are well-known. In particular, when scientific topics are dealt with, definitions of relevant terms are often specified, for the obvious purpose of reminding non expert readers (including law professionals) of the scientific meaning of the expressions used or ensuring that recipients have an accurate knowledge of the notions involved. For instance, in the corpus we find definitions of terms like ‘chimera’, ‘gene’, ‘genome’, ‘hybrid’, etc., which have a specific scientific meaning, and are defined for an obvious explanatory purpose. Besides, although scientific terms have a reputation for being in all cases monoreferential (cf. e.g. Gotti 2003, 33-35) in keeping with the univocity ideal of traditional terminology, this has been shown – with specific regard to the life sciences – to be in many cases only wishful thinking, with many categories/concepts (e.g. denominations of techniques, and of ‘umbrella concepts/categories’) that are more adequately defined in prototypical terms (cf. Temmerman 2000, 63-67), and therefore need to be

defined in each single case. It is interesting that one of the examples given by Temmerman (2000, 77-116) of an umbrella concept meeting all the requirements for intensional and extensional prototypicality as described in cognitive semantics (Geeraerts 1989; Taylor 1989; Kleiber 1990) is 'biotechnology', an inherently bioethically-relevant notion. Another group of terms and expressions that are often defined in biolaw regard the social impact of biomedical advances on social life and the ensuing situations, roles, facts, and relationships.

Before going on to discuss some examples to illustrate what said so far, a few words will now be devoted to introducing the categorization of definitions usually made in the legal field, which is complex and very detailed in the literature (Hempel 1952; Belvedere, Jori, and Lantella 1979; cf. also, among others, Jopek-Bosiacka 2011; Breczko 2012). But here suffice it to make a preliminary distinction, based on traditional logic and dating back to scholasticism and Aristotle, between 'nominal' and 'real' definitions: nominal definitions focus on signs, and abstract the semantic dimension of such signs; real definitions instead focus on things and abstract the distinctive characteristics of such things (Lantella 1979, 10; Hernández Ramos and Heydt 2017, 133). A real definition is defined "as a statement of the 'essential characteristics' of some entity, as when man is defined as a rational animal, or a chair as a separate movable seat for one person. A nominal definition [...] is a convention which merely introduces an alternative [...] notation for a given linguistic expression" (Hempel 1952, 2). Recourse to nominal definitions is prevalent in legislative discourse where it is customary to avoid real definitions, on account of their character as statements of the 'essential nature' or the 'essential attributes' of an entity (Hempel 1952, 6).

Within nominal definitions, a further distinction can be made between stipulative definitions, which "establish a certain meaning for a specific expression" resulting from the drafter's decision "to use a specific term in a certain sense that may go beyond the definitions given in dictionaries and linguistic uses" (Hernández-Ramos and Heydt 2017, 133), and lexical definitions which "attempt to ascertain the meaning of a specific linguistic expression and which are explained on dictionaries concentrating on the linguistic uses of a community of speakers" (*ibidem*). Some authors also distinguish an intermediate category, "re-definitions" (or explanatory definitions: cf. Thornton 1987) which are given when the lexical meaning of a given expression has a degree of vagueness or is non univocous, so that it needs to be re-defined for a given context, selecting among the components of its general meaning (Lantella 1979, 23, 33-34), thus providing "a necessary degree of definiteness" (Thornton 1987, 54).



Definitions have cognitive and ideological effects that go beyond what is necessary in order to assure precision in normative discourse. By defining an entity the drafter selects and imposes a certain view or conceptualisation of it. This is particularly true for definitions *per genus and differentiam specificam*, which in actual fact tend to be less widely used in common law systems, because of their essentialistic character which renders them similar to ‘real definitions’.

But by establishing the meaning of a word or expression as used in a normative text, a definition – be it stipulative or lexical or a re-definition – will contribute to establishing in society a certain view of the entity defined for the only fact of selecting and giving prominence to certain components of its general meaning, with cognitive and ideological implications.

The fact itself of deciding to provide the definition of a certain term in a normative context “amplifies the importance” attributed to the relative entity or phenomenon (Belvedere 1979, 468-469), if only because it has the effect of distinguishing that entity or phenomenon from other similar ones, and making it subject to certain rules, and may also leave the legislative drafter some scope for slant or ideological manipulation.

This is better illustrated by means of an example. In the “Definitions” section of the statute of the Australian State of Victoria that regulates assisted reproduction, the *Assisted Reproduction Treatment Act 2008*, the first two items considered are ‘artificial insemination’ and ‘assisted reproduction’, and they are defined as follows:

### 1. Purposes

In this Act –

**Artificial insemination** means a procedure transferring sperm without also transferring an oocyte into the vagina, cervical canal or uterus of a woman;

**assisted reproductive treatment** means medical treatment of a procedure that procures, or attempts to procure, pregnancy in a woman by means other than sexual intercourse or artificial insemination, and includes –

- (a) in-vitro fertilisation; and
- (b) gamete intrafallopian transfer; and
- (c) any related treatment or procedures prescribed by the regulations;

[...]

### 3. Definitions

[...]

**treatment procedure** means:

- (a) artificial insemination, other than self-insemination; or
- (b) assisted reproductive treatment;

(Victoria, *Assisted Reproduction Treatment Act 2008*, Part 1-3)

Initially the definition distinguishes ‘artificial insemination’ from assisted reproductive treatments, specifying that in the former technique only sperm is transferred “without also transferring an oocyte into the vagina, cervical canal or uterus of a woman”, while the latter refers to techniques involving the transfer of a fertilised egg in the womb.

These definitions are given although in current usage *artificial insemination* is normally considered to be a hyponym of *assisted reproductive treatment*; and this is reflected in dictionary definitions, as in the following example:

**assisted reproductive treatment** n. the use of medical techniques to bring about the conception and birth of a child, including artificial insemination, in vitro fertilization, egg and embryo donation, and drug therapy.<sup>5</sup> (Random House 2016)

It is evident that in the Act under examination the legislator prefers to mention artificial insemination separately to make sure that it is included among the procedures covered, possibly in order to avoid that the difference between the two practices in terms of technical sophistication may lead an interpreter to exclude artificial insemination from measures regarding ARTs. Of course this results in emphasis being laid on the qualitative difference between artificial insemination, less technically manipulative, and other assisted reproductive treatments that involve more complex technical interventions. But subsequently, the definition of *treatment procedure* is given which comprises both ‘Artificial insemination’ and ‘Assisted reproductive treatment’ and is therefore superordinate to both, although this is not immediately evident because the definitions are set out in alphabetical order and 33 items separate the first two terms from the definition of *treatment procedure*.

Whatever the reason why they are given, the provision of these definitions contributes to reinforcing the idea that there is a qualitative difference between self-insemination, artificial insemination and other forms of ARTs, with possible ethical and moral implications. Incidentally, it is interesting that this wording (“artificial insemination, *other than self-insemination*”) explicitly excludes the non-medical practice of self-insemination (the so called “turkey basting”, so popular with feminist lesbians in the 1980s), as also re-iterated in section 2.9 of the Act, which covers

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<sup>5</sup> In lack of an entry in the *Oxford English Dictionary*, Merriam Webster and other standard dictionaries, this definition was taken from *Dictionary.com Unabridged*. Random House, Inc. 2016, <http://www.dictionary.com/browse/assisted-reproduction> [18/12/ 2017].

both “a woman carrying out self-insemination” and “the woman’s partner or a relative or friend of the woman, assisting the woman to carry out self-insemination”. The reason for this exclusion is probably that self-insemination is considered to be a private affair, not falling within the scope of the regulative power of the law. At the same time, the provision of the relevant definition contributes to drawing attention to the existence of the practice and to its exclusion from medical procedures regulated by law.

## 5. DEFINITIONS IN SURROGACY LAWS

In this section attention will be focused on the definitions given in statutes regulating surrogacy, either as such or as part of a set of regulations regarding ARTs in general.

Concordance lines of the verb form ‘means’, which has 212 occurrences in the corpus (0.33%), provide a sufficiently accurate idea of the definitions given in the Acts included in the corpus. For convenience in the analysis, without any claim of scientific validity, such definitions can be grouped as follows:

- (a) definitions of words and expression that refer to the main elements (actors, actions, objects) in the process being regulated, e.g. surrogacy, surrogate mother, artificial insemination, etc.; these definitions are crucial as they are the core of the rules set out in the statute, indeed (following Cairns 1936), they are “rules of law” and “the court merely determines whether or not an event is within the rule” (Cairns 1936, 1103);
- (b) definitions of words or expressions referring to kinship, regarding in particular the new forms of kinship resulting from surrogacy;
- (c) definitions of expressions referring to institutional subjects involved in the process, often indicating a ‘shorthand’ reference (Cairns 1936, 1103) to them, e.g. Authority, court, council, registrar;
- (d) definitions of expressions that in standard English have a general meaning referring to objects or actions, to which a specific meaning is assigned in the case at hand, e.g. health care provider, publish, identifying information, child, etc.

In this article the focus will be on definitions of the (a) and (b) type, as they are peculiar to the topics dealt with in the statutes investigated here, while definitions of the (c) and (d) type tend to be given in any statute, as they are not topic-specific.

5.1. *Definitions of words and expression referring to the main actors, actions and objects in surrogacy*

The discussion will start from definitions in group (a), given their extreme importance for the impact and effects of the relevant statutes. This is especially true for the definitions of ‘surrogacy’, ‘surrogate’, ‘surrogacy arrangement’, etc. as they define the main object of the Act. Therefore, they will be given priority.

5.1.1. UK law

The first definition to be discussed is that given in the *UK Surrogacy Arrangements Act 1985*, which to my knowledge was the earliest Act on surrogacy ever passed, as the UK was one of the first few countries (indeed, probably the first) to regulate surrogacy arrangements in the very infancy of this technique, with all the difficulties involved in regulating ex novo an area of human life that is highly sensitive and touches a moral nerve. The purpose of the Act was to prohibit commercial surrogacy, and at the same time permit altruistic surrogacy. Very few important amendments have been made in the law in the over-30-year period that has elapsed since, apart from providing a mechanism for the transfer of legal parenthood from surrogates to intended parents (cf. sub-section 30 of the 1990 Act) and recognising in 2008 that intended parents may legitimately comprise people other than married heterosexual couples [cf. *Human Fertilisation and Embryology Act 2008* 54(2)].

This is the definition of “surrogacy” given in the current version of the Act with deletions indicated by means of barred text and insertions by underlined text:

- (2) “Surrogate mother” means a woman who carries a child in pursuance of an arrangement –
- (a) made before she began to carry the child, and
  - (b) made with a view to any child carried in pursuance of it being handed over to, and the parental rights being exercised (so far as practicable) by, another person or other persons
- (3) An arrangement is a surrogacy arrangement if, were a woman to whom the arrangement relates to carry a child in pursuance of it, she would be a surrogate mother.
- (4) In determining whether an arrangement is made with such a view as is mentioned in subsection (2) above regard may be had to the circumstances as a whole (and, in particular, where there is a promise or understanding that

any payment will or may be made to the woman or for her benefit in respect of the carrying of any child in pursuance of the arrangement, to that promise or understanding).

(5) An arrangement may be regarded as made with such a view though subject to conditions relating to the handing over of any child.

(6) A woman who carries a child is to be treated for the purposes of subsection (2)(a) above as beginning to carry it at the time of the insemination or, as the case may be, embryo insertion or of the placing in her of an embryo, of an egg in the process of fertilisation or of sperm and eggs, as the case may be that results in her carrying the child.

[UK *Surrogacy Arrangements Act 1985* 1(2)-(6)]

This rather convoluted definition was given at a stage when surrogacy was still a novelty. It was the first time that this meaning of the words ‘surrogate’ and ‘surrogacy’ had been defined in a normative document in English, although they were already relatively established in language use (their first attestation having been in 1978 and 1982 respectively; cf. Merriam-Webster 2016, *ad vocem*).

The wording is not straightforward and consists of a “chain” (Scarpelli 1985, 53) of two main complementary points and some further specifications. It is interesting that the phrase being defined in the first point [ss. 1(2)] does not designate the practice – ‘surrogacy’ –, but rather the status of the woman carrying it out – ‘surrogate mother’ – and does so on the basis of the kind of legal arrangement the woman is in (‘Surrogate mother’ means a woman who carries a child in pursuance of an arrangement – [...]), rather than of the fact that she is the carrier of someone else’s baby. In legal terms, this qualifies as a re-definition of the expression ‘surrogate mother’, as it does not simply ‘capture’ the current meaning of the expression, but rather “aims at giving those expressions a new and precisely determined meaning, so as to render them more suitable for clear and rigorous discourse on the subject matter at hand” (Hempel 1952, 9). The focus is exclusively on the legal aspect of the problem, showing that the legislator is only interested in the surrogacy arrangement in itself, and thus avoids tackling any possible ethical or moral implications. It is also noteworthy that the word ‘arrangement’ is used, rather than ‘agreement’, to include also more informal understandings.

But of course this first definition needs to be completed by a definition of ‘surrogacy arrangement’, which is put forth in the next three points. Ss. (3) states the conditions under which an arrangement qualifies as a surrogacy arrangement, proceeding by *genus proximum et differentia specifica* (“An arrangement is a surrogacy arrangement if [...]”) and distinguishing

the surrogacy arrangement from other kinds of possible arrangements. But in actual fact it is more correct to see it as a form of classification, because it does not actually put forth the meaning of the word, but rather analyses the characteristics of the legal instrument it designates (Belvedere 1979, 370). It is also interesting that this definition is formulated conditionally (“if, were a woman [...]”), thus acquiring an essentially casuistic tone. Ss. (4) deals with the issue of payment being an important element in the determination of the real purpose and character of an arrangement, and ss. (5) asserts the character of the arrangement whatever conditions are added to it.

The sequence of these complementary definitions, with (3) illuminating ss. (2), is in turn qualified by two further points (4) and (5), while ss. (6) is an ancillary point and fixes the beginning of the condition of surrogate mother for the woman involved in it<sup>6</sup>. The latter is the only part of this section where mention is made of the process through which the pregnancy is obtained, with technical specifications that have been added in a relatively recent amendment for the purpose of including both traditional and gestational surrogacy (cf. nr. 2 above), which did not exist at the time of the passing of the original Act as it was first performed in 1986.

The twisted form of this definition given in the British Act can be seen as an obvious consequence of the fact that the topics dealt with in the statute were new for the legislative drafter who tackled them with some uncertainty and took a very indirect approach, trying to avoid moral implications as far as possible, although certainly the verbosity which at that time was still typical of English law may also have played a role. In most of the legislative acts passed in various countries in the subsequent years (in some cases, decades after the pioneering English text) the definition of surrogacy given tends to be much less syntactically complex and intricate.

### 5.1.2. Laws in some (former) Commonwealth countries

The legally-oriented approach of the UK Act, which defines surrogacy on the basis of the arrangement regulating it rather than of its actual distinctive traits as a practice (medical, organisational, etc.) characterises all

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<sup>6</sup> Since the 1990 Act, Point (6) has been amended substituting “or of the placing in her of an embryo, of an egg in the process of fertilisation or of sperm and eggs, as the case may be” for “or, as the case may be, embryo insertion”, thus making the wording more accurate. It is to be noted that the need to establish the beginning of pregnancy with precision is one of other recurrent problems in all bioethically relevant normative instruments, e.g. in abortion laws.

statutes of former Commonwealth countries (Hong Kong, Victoria, New South Wales, West Australia, South Africa), apart from Canada. But in most cases the definition is re-organised in order to avoid the somewhat erratic organisation of the UK statute, with the definition of “surrogacy agreement” given first.

Among the legislative instruments considered the *Hong Kong Human Reproductive Technology Ordinance*, L.N. 327 of 2000 (amended in 2007) is the most similar to the British text. It also reproduces the ancillary specifications set out in ss. 5 and 6 of the British Act (regarding respectively payment, and time of onset of pregnancy), but improves them to obtain a more logically sequential text, with the definition of “surrogacy agreement” given first:

2(1)

“surrogacy arrangement” (代母安排) means an arrangement by virtue of which a woman to whom it relates would be a surrogate mother were she to carry a child pursuant to the arrangement;

“surrogate mother” (代母) means a woman who carries a child-

(a) pursuant to an arrangement

(i) made before she began to carry the child; and

(ii) made with a view to any child carried pursuant to the arrangement being handed over to, and the parental rights being exercised (so far as practicable) by, another person or persons; and

(b) conceived by a reproductive technology procedure.

[...]

(4) For the purposes of this Ordinance-

(a) in determining whether an arrangement is made with such a view as is referred to in paragraph (a)(ii) of the definition of “surrogate mother” regard may be had to the circumstances as a whole (and, in particular, where there is a promise or understanding that any payment will or may be made to the woman or for her benefit in respect of the carrying of any child pursuant to the arrangement, to that promise or understanding);

(b) an arrangement may be regarded as made with such a view though subject to conditions relating to the handing over of any child;

(c) a woman who carries a child is to be treated for the purposes of paragraph (a)(i) of that definition as beginning to carry it at the time of the placing in her of an embryo, of an egg in the process of fertilization or of sperm and eggs, as the case may be, that results in her carrying the child.

It is interesting that here the word ‘agreement’ is substituted for ‘arrangement’, thus clarifying the contractual nature of the kind of arrangement the Act aims to regulate.

Also the three Australian Acts approach the issue from a specifically legal viewpoint, being based on a definition of ‘surrogacy agreement’.

See for instance the first definition given in the *West Australia Surrogacy Act 2008*:

- 1.3. In this Act, unless the contrary intention appears –  
*surrogacy arrangement* means an arrangement for a woman (the *birth mother*) to seek to become pregnant and give birth to a child and for a person or persons other than the birth mother (the *arranged parent* or *arranged parents*) to raise the child, but the term does not include an arrangement entered into after the birth mother becomes pregnant unless it is in variation of a surrogacy arrangement involving the same parties. (emphasis in the original)

It is to be noted that the Act (like the other two Australian statutes included in the corpus) does not provide a definition of ‘surrogacy’ at all, but only of ‘surrogacy agreement’, thus treating the notion of surrogacy as a ‘primitive’, i.e. as “a sign that is used to define and is not defined” (Scarpelli 1985, 53). Evidently, the legislative drafter has decided that the words ‘surrogate’ and ‘surrogacy’ are now so common that they do not need a definition any more. Therefore, what is defined is only the arrangement set out in the surrogacy agreement.

Two of the Acts, those of South Africa and Florida, do not define ‘surrogacy’ nor ‘surrogacy arrangement’, but only prescribe how the arrangement should be stipulated in order to be valid. In the case of South Africa, this is in conformity with the hard-line plain language approach<sup>7</sup> adopted by the country, as is also confirmed by the total absence of the modal ‘shall’ in the text:

#### CHAPTER 19

#### SURROGATE MOTHERHOOD

292. *Surrogate motherhood agreement must be in writing and confirmed by High Court.* – (1) No surrogate motherhood agreement is valid unless –

- (a) the agreement is in writing and is signed by all the parties thereto;
  - (b) the agreement is entered into in the Republic;
- (South Africa, *Children’s Act* nr. 38 of 2005)

All the definitions analysed so far, having evidently been inspired by the original English statute, aim only at providing a legally relevant version of

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<sup>7</sup> In South Africa the plain language concept was definitively established thanks to two Acts, the *National Credit Act 34* of 2005 (NCA) and the *Consumer Protection Act 68* of 2008 (CPA), although the need for legislation to be written in plain language had been recognised since the 1990s. Cf. Cornelius 2015.



the facts involved, whether they actually define ‘surrogacy’ or ‘surrogate motherhood’ or they focus directly on the arrangement regulating the practice.

### 5.1.3. Surrogacy laws in Canada and the US

The specifically legal approach to definitions found in the Acts analysed so far is in contrast with that found in the other Acts examined, those in force in Canada and in the US at state level, which tend not to be framed in specifically legal terms, being general or scientific in kind. In this respect a case in point is Canada’s *Assisted Human Reproduction Act 2004*, which provides a definition that does not even hint at the surrogacy agreement:

*surrogate mother* means a female person who – with the intention of surrendering the child at birth to a donor or another person – carries an embryo or foetus that was conceived by means of an assisted reproduction procedure and derived from the genes of a donor or donors (*mère porteuse*).  
(Ss. 3; Canada, *Assisted Human Reproduction Act 2004*)

This Act actually admits altruistic, but not commercial surrogacy. Also the prohibition on commercial surrogacy is formulated with no reference to any possible legal arrangement or agreement:

Payment for surrogacy

6(1) No person shall pay consideration to a female person to be a surrogate mother, offer to pay such consideration or advertise that it will be paid.  
(*Ibidem*)

What emerges here clearly is the intent of the Canadian legislator to regulate not only formal arrangements for surrogacy, but also any possible informal private pecuniary deal relating to this practice. The reason for this is easily understood if one considers that these rules are embedded in a statute titled *Assisted Human Reproduction Act*, which is not aimed only at regulating surrogacy, but more in general at protecting the health of citizens (and especially of children and women) from the potential excesses of modern reproductive technologies and genetic manipulation. So in the body text many practices are listed which are prohibited, and commercial surrogacy is one of them [cf. 6(1) above]. Thus the focus here is on the need to set limits to practices materially allowed by biomedical progress, but considered to be objectionable, with the implication that in this area the law has the duty and the power to prevent or stop the inconsiderate use of the biomedical sciences.

All the US Acts included in the corpus (California, Florida, Illinois, Louisiana, Michigan, Virginia, Washington DC) feature definitions of ‘surrogacy’/‘surrogate’ in general, or of one of its forms (e.g. ‘gestational surrogacy’ in the case of Louisiana) that do not have a legal focus, but rather define the practices as such.

A good example is the California Act (*Uniform Parentage Act & Surrogacy 2012*), amended in 2017, which not only provides a definition of ‘surrogate’, but also makes a distinction between traditional and gestational surrogacy, and this by necessity involves some technicalities

- (f) “Surrogate” means a woman who bears and carries a child for another through medically assisted reproduction and pursuant to a written agreement, as set forth in Sections 7606 and 7962. Within the definition of surrogate are two different and distinct types:
- (1) “Traditional surrogate” means a woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents.
  - (2) “Gestational carrier” means a woman who is not an intended parent and who agrees to gestate an embryo that is genetically unrelated to her pursuant to an assisted reproduction agreement.

In itself the main definition of ‘surrogate’ combines a general statement based on *genus proximum et differentia specifica* with the indication of an exquisitely legal requisite (“pursuant to a written agreement, as set forth in Sections 7606 and 7962”). It is followed by definitions clarifying the difference between traditional and gestational surrogacy, which are formulated in scientific terms. It is interesting that there is also a differentiation in the designation of the surrogate mother, who is referred to as ‘surrogate’ in the case of the traditional form of surrogacy, where she has a genetic relationship with the baby, and as ‘carrier’ in gestational surrogacy, where she has no genetic connection with the child, therefore she is simply a ‘vessel’ where the embryo grows and matures. This is remindful of metaphors often used in US surrogate mothers’ narratives like *THE SURROGATE IS A BABY MACHINE*, *THE SURROGATE IS AN OVEN* (cf. Teman 2010, 35). Incidentally, this same metaphor recurs in the slogan “their bun, my oven”, which is popular with surrogate mothers and even appears on products sold online, such as tee-shirts and licence plates (*ibidem*).

The word ‘carrier’ occurs 165 times in the corpus (0.26%), but only in three of the files – California, Louisiana and Michigan – and in the overwhelming majority of cases (130) in the collocation ‘gestational carrier’. In this case the use of the word ‘carrier’ instead of ‘mother’ obviously implies

that the gestating woman may not actually be considered the mother of the newborn baby, but only a sort of incubator where the baby grows before birth. It is used in the California statute, one of the most liberal in the world, which permits intended parents to establish parentage prior to the child's birth (and not by means of a parentage order after birth, as in most other legislations): this lexical choice emphasises the idea that the gestational mother, who has no genetic connection with the newborn, is to be considered merely a carrier.

This is true also for the Louisiana text, where in all cases 'carrier' collocates with 'gestational'; of course, the implication is the same, but its predominance is due to the fact that the Act is aimed exclusively at regulating gestational surrogacy contracts (§ 2718), and admits as enforceable only gestational surrogacy agreements where the intended parents are married to each other and create the child using their own gametes.

The third Act that gives preference to the word 'carrier' is the *Michigan Surrogate Parenting Act 1998*, which interestingly is the only one among the texts considered which was passed to introduce a total ban on surrogacy:

- (f) "Surrogate carrier" means the female in whom an embryo is implanted in a surrogate gestation procedure.
  - (g) "Surrogate gestation" means the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female.
  - (h) "Surrogate mother" means a female who is naturally or artificially inseminated and who subsequently gestates a child conceived through the insemination according to a surrogate parentage contract.
- (722.853. *Definitions*, Sec. 3; *Michigan Surrogate Parenting Act 1998*)

In this case the definition is based on the detailed description of the medical procedures with a degree of technicality, and introduces a distinction between 'surrogate carrier', i.e. gestational mother, and 'surrogate mother', which is a more general term and corresponds to 'traditional surrogate'. Again the formulation of the definition without reference to any arrangement or agreement involves the idea that the behaviour being stigmatised is objectionable in general ethical terms, and not under a specifically legal perspective. However, the types of agreements declared illegal are dealt with in a separate, rather detailed sub-section describing all possible forms of surrogacy arrangements which are prohibited:

- (i) "Surrogate parentage contract" means a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation,

and to voluntarily relinquish her parental or custodial rights to the child. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child.

From the analysis of the definitions, there emerge two different textual approaches to the issue. One is based on texts formulated in legal terms, and deals with the problem as a situation that results from a specific kind of arrangement, or agreement, and gives less attention to the biomedical aspects of the process. Broadly speaking, this is the approach that predominates in the UK Act and in statutes in most of the former Commonwealth countries. The other approach is more general and, in giving the main definition of the kind of behaviour to be regulated by the Act, ignores the fact that it may occur as a result of a more or less formal legal arrangement, so the impression is that its focus is more on the moral side than on the legal one.

In the next section, the focus of the discussion will shift to definitions that in the classification given above (cf. § 5) fall within category (b), i.e. definitions of words or expressions referring to new forms of kinship resulting from surrogacy.

## 5.2. *Definitions of words and expressions referring to kinship*

As anticipated above, with the spread of new practices and their social consequences the traditional system of kinship designations has been revolutionized. This has led to new categorizations and new linguistic profiles in the representation of the main actors involved in surrogacy and, more in general, in ARTs, making it more difficult to identify and categorize forms of kinship. Hence the need to define them, even in cases where they have always been self-evident. For instance, when it establishes who may have access to information about a child's origins, the West Australia Act defines even words like 'grandparent' and 'sibling'.

Most of the definitory efforts in the Acts included in the corpus, in addition to those focusing on the main actors, objects and actions analysed in § 5.1.1 and § 5.1.2 above, regard the parental figures, as the new developments have totally disrupted the traditional paradigm. A case in point is the traditional axiom *mater semper certa*, which is not true any more in the case of surrogacy and other situations where ARTs have been applied (Wilder 2002). In some situations, the woman who carries the child is not

considered to be his/her mother even in case of traditional surrogacy where she partly shares the baby's genetic makeup. Nor is kinship defined on the basis of genetic facts. Indeed, because of the 'fragmentation of procreation' allowed by modern reproductive technologies, in the most extreme cases of gestational surrogacy there may be five (or six) persons that could claim parentage: the commissioning parents, the genetic father and mother, the surrogate mother and her partner, if any (presumption of paternity) (Marquardt 2011). In this context of uncertainty, it is up to the law to provide criteria to sort out parental rights and the responsibilities of those involved.

In this respect, it may be illuminating to consider the well-known case of the California Court of Appeal *In re marriage of Buzzanca* [72 Cal. Rptr. 2d 280 (Ct. App. 1998)] which by means of a landmark precedent-setting decision relied on "intent to parent" as the ultimate basis of its decision and held that among the parties involved in surrogacy "the lawful parents could be identified on the basis of their initiating role as the intended parents in [the child's] conception and birth". Of course, this decision only applies to California; nevertheless it sets out explicitly a principle which may inspire any legislation wishing to introduce a statute for the legalization of surrogacy in all of its forms.

Against the backdrop of ARTs and surrogacy, even the word 'mother' does not have a well defined referent any more, nor does the words 'father' and 'parent'. It comes as no surprise that most of the existing laws feature definitions of the word 'mother' accompanied by a pre-modifier, e.g. surrogate mother, which is defined in six of the Acts, while in others preference is given to defining the practice, 'surrogacy' or the contractual arrangement, 'surrogacy arrangement'. In some other cases, an *ad hoc* synonym is preferred, generating a stipulative definition, i.e. one that "establishes a certain meaning for a specific expression [...] that may go beyond the definitions given in dictionaries and linguistic uses" (Hernández-Ramos and Heydt 2017, 133), for expressions like 'birth mother' and 'volunteer mother'; see the following examples:

5. (5) In this Act, a reference to the "birth mother", in relation to a surrogacy arrangement, is a reference to the woman who agrees to become pregnant or to try to become pregnant with a child, or is pregnant with a child, under the surrogacy arrangement.

(New South Wales, *Surrogacy Act 2010*)

6 (i) "Volunteer mother" means a female at least 18 years of age who voluntarily agrees, subject to a right of rescission if it is her biological child, that if she should become pregnant pursuant to a preplanned adoption arrangement, she

will terminate her parental rights and responsibilities to the child in favor of the intended father and intended mother.

(Ch. 63.213, *Florida Statutes*)

Stipulative definitions are given also of ‘commissioning parents/mother/father’ and of “intended parents/mother/father”, the latter being a shorthand (and less brutally commercial) expression to refer to commissioning parents which has been introduced with the increasing popularity of surrogacy. It occurs as many as 288 times in the corpus, with a frequency of 0.44%, against only 61 hits of the more intuitive ‘commissioning’ [parent], which is used in three of the Acts (Florida, South Africa and Victoria), but never defined, evidently being considered self-evident.

It is interesting that two of the Statutes (those of Virginia and Louisiana), which admit surrogacy only for heterosexual married couples, define “intended parents” in the plural. See the Louisiana definition:

(6) “Intended parents” means a married couple who each exclusively contribute their own gametes to create their embryo and who enter into an enforceable gestational carrier contract, as defined in this Chapter, with a gestational carrier pursuant to which the intended parents will be the legal parents of the child resulting from an in utero embryo transfer.

[§ 2718.1(6) Louisiana]

Here reference to “intended parents” to include both parents in a heterosexual couple is connected with the condition, imposed by the measure, that the baby should be generated with the parents’ gametes. This emerges clearly if one compares this definition with that of ‘intended parent’ (in the singular) given, for instance, in the New South Wales statute, where no similar rule exists:

4 (6) In this Act, a reference to an “intended parent” is a reference to a person to whom it is agreed the parentage of a child is to be transferred under a surrogacy arrangement.

(New South Wales, *Surrogacy Act 2010*)

This definition of ‘intended parent’ is obviously formulated in legal terms, making this option available to any person, irrespective of sex, sexual orientation, and marital state. It is interesting to compare this definition, in itself quite liberal in terms, to that given in the California Act:

(c) “Intended parent” means an individual, married or unmarried, who manifests the intent to be legally bound as the parent of a child resulting from assisted reproduction.

(California *Uniform Parentage Act 2012*, Part 7, Sec. 2)

This definition, which incidentally is nearly literally replicated in the Washington DC statute<sup>8</sup>, is the broadest possible in terms and reflects the principles established in the *In re marriage Buzzanca* case referred to above. It expresses a view of parenthood that is totally disconnected from biology, being rather based on persons' intentions and wishes ("an individual [...] who manifests the intent") and therefore inherently psychological and subjective. This a radical break with the past, indeed with the entire history of mankind so far, where to different extents kinship relationships have always been based on biological facts. And it is meaningful that in a situation brought about by biomedical advances categorizations should disregard scientifically observable parameters, giving instead preference to subjective criteria based on the intents, desires and aspirations of the individuals involved. This is part of a paradigm which is rapidly spreading in contemporary society, for instance in individuals' choices in terms of sex and gender.

The analysis of these definitions confirms Cairns' (1936) conceptualisation of definitions as rules of law, because in the preliminary definitions of the main actors involved, criteria and parameters for determining the lawfulness of certain actions and roles are already set out, even before laying down the relevant action rule which follows in a subsequent section of the text. For instance, in restricting the reference of the phrase 'intended parents' to married couples using their own gametes, the Louisiana text contextually excludes all other subjects (single parents, same sex couples) and all other forms of surrogacy (i.e. traditional surrogacy, where the surrogate mother donates her ovum, and totally or partially heterologous gestational surrogacy).

## 6. CONCLUSIONS

The analysis has highlighted the crucial importance of language use in legislative texts regulating bioethical issues, and in particular the fundamental role of definitions. In the case of ARTs, the legislator needs to

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<sup>8</sup> The definition in the Washington DC Act ["Intended parent" means an individual, married or unmarried, who manifests the intent in a written agreement to be legally bound as the parent of a child"; § 16-40185(16)] adds the specification of the written form of the agreement, while it omits the indication that the child would result from assisted reproduction.

define procedures, set rules and establish limits, and necessarily does so by relying on notions elaborated in scientific research and ‘borrowing’ scientific terminology. But at the same time in legal texts the notions defined are categorized for purposes that are peculiar to the law. In this respect a meaningful example is that of the distinction between ‘Artificial insemination’ and ‘Assisted Reproductive Treatments’ and the concomitant exclusion of self-insemination from the scope of the *Victoria Assisted Reproduction Act 2008*. This is an important aspect because, if it is true that legal texts need to rely on inputs from medicine and the technosciences, it is also true that they re-elaborate and re-categorize these inputs, and by applying them in public (legal) discourse they generate relevant discursive frames which are then circulated and therefore will likely become socially accepted, and part of contemporary usage.

In light of these considerations, it can be stated that deliberately provided definitions appearing in legislative texts, stating openly how the meaning of a word or expression is intended, contribute to conveying the drafter’s cognitive and ideological stance by upholding a certain meaning of that word or expression. Thus they often influence the way a word or expression is intended in public debate or in subsequent legislation.

The analysis of a corpus of legislative texts on ARTS, and more specifically on surrogacy, shows that in the definitions of ‘surrogacy’ / ‘surrogate (mother)’ and other notions associated with the surrogacy process the legislative texts examined tend to take two different approaches. In some of the statutes, and in particular in the English statute – the first ever to be introduced at a time when ARTs and surrogacy were a relative novelty – and in other legislative texts that were inspired by it, ‘surrogacy’ and associated notions are defined on the basis of the arrangement entered into by the surrogate mother, taking an exquisitely legal, technical approach. On the other hand, there is another group of statutes (e.g. those of Canada, California and Michigan) that seem to be less concerned with the purely legal aspects as they rather focus on various processes enacted in surrogacy as a practice and the facts and situations this practice generates. The focus is on the legitimacy and ethical admissibility of such processes, facts and situations rather than on their lawfulness, their legal implications or on the concern for the appropriateness of the legal procedures applied. In other words, there seems to be a predominance of general moral concerns over the purely legal aspects.

Another facet of the problem brought to the fore by the analysis of the corpus is the disruptive effect of ARTs on kinship lexicon, which is now no longer – or not entirely – based on biological elements, but on much



more complex, non materially observable facts. Hence the need to define vary basic words like ‘mother’ and ‘father’ in the statutes, with the further implication that in the relevant legislations such definitions will legally replace the traditional ones.

In light of all these considerations, it is obvious that legislative texts also perform an important role, having the inevitable effect of imposing the conceptualisations and the discursive frames they create on contemporary usage and on the general public, contributing to the dissemination of a certain version of relevant technoscientific and social knowledge.

Within the process described here, the law receives inputs from science, but it is impossible for it to transmit them as they are. Rather, it defines them according to its needs, picking and foregrounding the relevant components from their broad general meaning, with inevitable ideological implications. The discourses thus generated on the one hand partly reproduce or reflect pre-existing scientific and/or socially shared notions, and on the other hand play a role in introducing new or different conceptions. In this way they determine how the relevant issues are perceived and represented in society, thus confirming the mutually constitutive nature of law and ethical values as pointed out by Clifford Geertz (1983, 218): “[Law] is constructive of social life, and not reflective, or anyway not just reflective, of it”.

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- South Africa: *Children's Act* nr. 38 of 2005 as amended 2007 and 2008.
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