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**WHEN A SINGLE MAN WANTS TO BE A FATHER – REVEALING THE INVISIBLE
SUBJECTS IN THE LAW REGULATING FERTILITY TREATMENT**

Atina Krajewska¹ and Rachel Cahill-O’Callaghan²

Abstract

This article takes the example of single men who wish to become single fathers, using surrogacy, as a case study to examine the nature of legal subjectivity and the process by which persons acquire social visibility through legal mechanisms. The article investigates the notion of the absent subjects in law and examines the ways in which single men have been rendered invisible in the area of assisted reproduction. It investigates the emergence of legal subjectivity through the acquisition of rights in the context of fertility treatment. In this respect, it analyses the recent jurisprudence of the English courts and the changes in the human rights law that helped construct single men as subjects of law. The article proposes the concept of (in)visibilisation for a number of reasons. It allows us to observe and examine the slow and contingent emergence of legal subjectivity in law. It illuminates ways, in which aspects of the critique of human rights as an inadequate vehicle of social inclusion can be overcome. In both respects, the concept of (in)visibilisation provides a diction, in which we can analyse legally relevant experiences, which have not yet crossed the threshold into the formal system of law.

Key words: single persons, invisible subjects, legal subjectivity, legal inclusion, (in)visibilisation, HFE Act 2008.

INTRODUCTION

Law confers protection upon those privileged by its umbrella who are seen as legal subjects, but it can also maintain patterns of difference and perpetuate inequality (Diduck and Wilson (1997)). This article examines the ways in which the law can cast aside those who sit at the margins of social norms, who are not in the conception of the lawmakers – the invisible subjects. It analyses the mechanisms through which law denies and grants individuals legal visibility and examines the processes by which legal subjectivity is acquired in the area of law regulating assisted

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reproductive technologies (ARTs). The article draws on a case study of single men who wish to become fathers using ARTs who remained invisible for years, but who have recently acquired visibility through human rights litigation before English courts.¹ The analysis of the developments in this controversial area of law, which typically focuses on legal subjectivity on women, provides a particularly apposite case study which serves to identify the social and legal factors underlying the processes of *(in)visibilisation* and subjectivisation.

First, the article sets out a theoretical framework for the analysis of the acquisition of legal subjectivity in the field of assisted reproduction and it addresses the role of rights in this process. It discusses the interrelation between legal personhood, legal subjectivity, and the concept of rights, paying particular attention to the feminist critique of individual rights. The article proposes the concept of *(in)visibilisation* for a number of reasons. It allows us to observe and examine the slow and contingent emergence of legal subjectivity in law. It illuminates ways, in which aspects of the human rights' critique as an inadequate vehicle of social inclusion can be overcome. In both respects, the concept of *(in)visibilisation* provides a diction, in which we can analyse legally relevant experiences, which have not yet crossed the threshold into the formal system of law.

Second, the article examines the causes and consequences of legal exclusion by tracing the ways in which single men have been rendered invisible in the legal framework constituted by statutes regulating assisted reproduction technologies in the UK - the HFE Act 1990 (c. 37) and the HFE Act 2008 (c.22) - and other relevant pieces of legislation. Drawing on historical studies of singleness, the article argues

that the absence of single men in this field of law can be linked to the centuries of marginalisation of single persons in the area of family life. Subsequently, using data collected in 2016-2017 from publicly funded fertility clinics and content analysis of regional NHS fertility policies and Internet websites of fertility clinics, the article demonstrates that exclusion from the law has resulted in the absence of single men from the policies and official statistics concerning fertility treatment in the UK. The *invisibilisation* of single men in this context, inextricably linked with uncertainty in family life, renders them particularly vulnerable in certain socio-legal settings.

Finally, at a more general conceptual level, the article examines the notion of the transformative power of law by tracing the process by which persons obtain visibility through human rights litigation. It analyses the recent jurisprudence of the English courts that contributed to the appearance of single men in the legal realm of fertility treatment. It shows how human rights arguments assume an inclusionary function that helps to bring legal subjects from absence into presence, from obscurity to light, creating new forms of legal subjectivity. In this respect it contributes to the debates seeking to revisit the concept of legal subjectivity and legal personhood, the feminist discourse of exclusion, and the discussions about the inclusive power of law.

THEORETICAL FRAMEWORK

The role of rights in the process of visibilisation and subjectivisation

Legal personhood and legal subjectivity constitute two of the most important and

contested concepts in legal theory and jurisprudence (Norrie, 2000). According to Naffine only legal personhood – defined by Kelsen as ‘the unity of a complex of legal obligations and rights’ (1967: 173-4) – provides us with legal standing and visibility in law (2002: 69). Legal personhood and legal subjectivity are often used interchangeably. However, while legal personhood refers to the presence or absence of subjects in law in general, legal subjectivity focuses on the content of legal personhood, i.e. the rights and obligations attributed to legal persons. While there is only one legal personhood, legal subjectivity may vary in different social spheres, e.g. we can be subjects of rights in the area of family law and at the same time be denied rights in the realm of assisted reproduction or vice versa. The concept of legal subjectivity enables the examination of the dynamic process, in which subjectivity emerges in law in a specific social context.

The rights discourse is inextricably linked to the concept of legal subjectivity, which is defined by rights and obligations (Fletcher, 2003). Yet rights discourses have been subject to powerful critiques by feminist and critical studies scholars, including Minow (1987), Tushnet (1989), Smart (1989), Charlesworth, Chinkin and Wright (1991), Engle (1992), Kingdom (1999), Fredman (1997), Munro (2001) and Naffine, (2002). They have questioned the progressive force of rights, arguing that rights discourse can be ultimately used to justify the oppression of women and other disadvantaged groups in society. Summarising the feminist critique Palmer (2002: 95-97) and Auchmuty (2018: 89-92) emphasised the inability of rights to overcome existing structural inequalities, their limited effectiveness in the private sphere, and the risk that rights may direct attention away from political reform towards legal disputes, which hinder broader debates about justice and the feminisation of

poverty and inequality. Weaknesses of rights litigation, including its social and legal exclusivity and elitism, as well as its limited transformative effects on social and political structures and egalitarian redistribution, have been forcefully emphasised by scholars such as Sen (2006), Rosenberg (1991), Kennedy (1997), or Douzinas (2000).

Nevertheless, rights and the rights discourse cannot and has not been dismissed entirely. Many feminist scholars critical of individual rights have developed sophisticated arguments concerning the power and potential of the collective rights discourse to effect social change. For example, Nedelsky, critical of the liberal individualistic interpretation of legal personhood and human rights claims that a relational conception of autonomy can help interpret rights in a way that promotes equality (Nedelsky, 1989). Rights, she argues, *identify* harms and help claims against the government (Nedelsky, 2011). Similarly, Minow, who argued that rights fail those who cannot satisfy the criteria of rationality and independence (1990: 146), also highlighted the importance of rights when she wrote:

'Framing questions as alleged violations of legal rights which deserve judicial remedies can secure at least enough official attention to make the claim. The courts of course can deny the claim, but in the meantime the judge has to pay attention, and the fact of judicial attention itself can help mobilize concern in other arenas. (...) Litigation allows a chance to challenge dominant perspectives by identifying competing perspectives and by demanding justifications for what has been taken for granted as the way things have to be' (Minow, 1990: 368).

This power to draw attention to a particular problem, to mobilise different actors around it, and to challenge existing – often hidden – assumptions, emerges as one of the most important functions of rights and rights litigation. But rights have a further, closely interconnected function, which has been so pertinently conveyed by Williams. Describing the effects of the Civil Rights movement in the USA, she noted that the concept of ‘rights is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no power. The concept of rights, both positive and negative, is the marker of our citizenship, our participatoriness, our relation to others.’ (1987: 431). Williams’s defence of the symbolic power of rights touches upon the crucial connection between rights and legal subjectivity. Finally, it offers the opportunity to critically examine the process of visibilisation in law and *through* law, which remains an important, often underestimated and understudied, function of rights.

Visibilisation is understood as a process in which subjects absent or excluded from the legal sphere become legally relevant through the recognition of their particular entitlements and obligations. They acquire visibility as subjects of rights, through legal mechanisms. One such mechanism is human rights litigation. In cases where litigation is successful, visibilisation can be equal to the establishment of legal subjectivity. Even in cases where litigation is unsuccessful and does not create new rights, it helps to *shed light* on subjects in the context of particular legal expectations. In these cases, visibilisation constitutes a crucial element in the process of subjectivization and legal inclusion, which can occur through traditional means including legislation and regulation.

The effects of visibilisation can extend beyond the individual subjective claim and recognise a group of subjects or a larger social problem. Discrimination, exclusion, or injustice becomes acknowledged in law, even if not remedied. As such, visibilisation involves a wider process in which legally invisible phenomena are brought back into the public domain. It performs 'fundamental tasks of solidarity in reaching a higher degree of social integration' (Herzog 2018). Finally, the concept of *invisibilisation* offers a device to analyse the state of invisibility, in which actors who are denied presence in law remain outside the common field of vision, taking actions that can potentially have legal consequences without being challenged, as long as they comply with social mores. The following section focuses on the historic and socio-legal factors affecting the invisibilisation of single men in fertility treatment.

Single men in fertility treatment as vulnerable and marginalised subjects

In recent decades, many scholars have highlighted the privileging of heterosexual couples accompanied by persistent ostracisation and stigmatisation of single women and men in the context of family life (Holden, 2002, 2007; Budgeon, 2008, 2016; Lei et al., 2015; Doucet, 2014; Doucet and Lee, 2013, Risman, 1986). Historical studies into 'singleness' have shown that although persons who remained unmarried played an important role in society - often assuming roles as carers, teachers, or nurses - they inhabited the invisible 'edges of family life' (Holden, 2007: 5). The single male, although often portrayed as a virile carefree bachelor, frequently elicited suspicion in the context of a family for his 'unnatural' status (Budgeon, 2008; Holden, 2007). Furthermore, as noted by Doucet (2014), the early studies on single (widowed and divorced) fathers reinforced a broader perception that fathers are more distant, less

nurturing and less involved. There was little social and legal acceptance for unmarried (single) fathers. As men's parental status was linked to marriage, a man could only establish a full legal relationship with a child by marrying the child's mother (Holden, 2007:114). Men who fathered children, but never married were perceived as unworthy, irresponsible and disengaged. In 1975 Barber lamented that an unmarried father only functions in society 'as an absent object of blame', expected to remove himself from the scene (1975: 20). It took years before legal expectations concerning unmarried fathers started to change and the law ceased to be concerned solely with financial responsibilities (Barber 1975; Conway 1996; Fink, 2000; Collier 1995, 2010; Frost, 2016). It was not until 2006 that the 'contingent status' of unmarried fathers changed in the context of naturalisation, and they were able to pass on UK citizenship to their children without an application to the Home Office (Collier and Sheldon 2008: 188).

Feminist and masculinity scholars have observed that in recent decades perceptions and attitudes towards fatherhood have started to change and this change has permeated law and policy (Messner, 1997, 1998; Oakley and Mitchell 1997; Marsiglio and Hutchinson, 2002; Featherstone, 2004; Collier and Sheldon, 2006, 2008). Sheldon and Collier have argued that the image of unmarried fathers as unworthy and irresponsible was increasingly supplemented and eventually replaced by the very different depiction of single fathers as a discriminated, potentially vulnerable group who are often deeply committed to their children yet find themselves denied access to them (2008: 174-5). This shift was reflected for instance in the rules concerning the registration of unmarried fathers on birth certificates. However, Collier and Sheldon have highlighted the complexities, and

contradictions in the conceptualisation of masculinity in law. Collier summarised their argument as follows:

“Normative ideas of fatherhood have been transformed via a complex refiguring of a nexus of assumptions that historically constituted fathers as a desirable presence within families. More specifically, this has involved a fragmentation of beliefs about the father as heterosexual (...), the father as family breadwinner (...), and the father as a figure of masculine authority within the household (...). The result (...) is a contemporary ideal of fatherhood in the law, and a legal policy agenda around “engaging fathers” informed by contrasting, and often contradictory, ideas about men and masculinities, gender, and autonomy.’ (Collier 2010: 449-450).

The concept of ‘fragmented fatherhood’ proposed by Collier and Sheldon helps elucidate the complexities of the current legal status of single men in assisted reproduction in the UK and the underlying reasons for law’s ambiguities. Single men transgress many normative assumptions about masculinity and fatherhood. On the one hand, they assume the role of the head of the family financially providing for their children. They fulfil social expectations, according to which, as observed by Hinton and Miller (2013: 245), becoming a father is a measure of successful and dominant masculinity. On the other hand, single men who become fathers through assisted reproduction are willing to perform carers’ roles traditionally associated with women. While this in itself may be increasingly acceptable, the fact that these single men actively wish to eliminate a female partner and second parent from the equation might be seen to challenge dominant conceptions about singleness, masculinity, fatherhood, and appropriate parenting.

In the context of assisted reproduction, becoming a father through this financially, logistically, and emotionally demanding pathway indicates single men's economic privilege and social capital. As such, men who successfully become fathers through assisted reproduction may be said to take advantage not only of scientific advances, but also of the androcentric legal system. This is because, as extensively argued by feminist scholars, the male subject has been traditionally positioned at its centre of the legal system (Palmer, 2002: 93). 'The very form of the legal subject is male', marked by his assertiveness, self-interest, and essential individualism (Naffine, 2002: 81-82). In that sense, it might be easier for single men in fertility treatment to benefit from the human rights discourse which has been traditionally male dominated (Burrows, 1986: 80). At the same time, single men who wish to become fathers and primary carers of their children destabilise the perception of the male legal subject as 'a self-contained individual (...) alone, singular, withdrawn from the world, and immersed in this privately-constituted thoughts.' (Naffine, 2002:82).

The persisting ambiguities and fragmentation of single men and fathers may explain their absence from the legislation that governs assisted reproduction. Indeed, this article demonstrates perhaps controversially, the lack of visibility in this particular legal framework leads to what Mackenzie, Rogers, and Dodds call 'situational vulnerability', i.e. vulnerability that is context specific and 'may be short term, intermittent, or enduring' (2014: 7). Situational vulnerability of single men in fertility treatment is underpinned by social, political and, more importantly, legal circumstances. In this respect, the subsequent analysis strongly resonates with, and revolves around, the famous commentary on law, expressed by Lacey 20 years ago:

‘The draw [of membership of law’s community] consists in law’s promise of order, of security and of identity for those who are both eligible for and willing to accept membership of its community – those who know where to draw the line. Its hidden face is its power *to silence and exclude those* who insist on reading between its lines or *who live on the wrong side of the tracks*, whilst effecting the discursive alchemy of nonetheless including them in the universal reach of legal subjectivity’ [emphasis added] (Lacey, 1998: 125).

The next sections demonstrate how the ambivalent attitudes towards single men have been translated into law regulating ARTs leading to their invisibility and exclusion. They illuminate and attempt to reconcile the tensions between the feminist discourse of exclusion and the situational vulnerability of single men in fertility treatment.

THE SILENT ABSENTEES OF THE LAW

General rules of assisted reproduction – the ambiguous space between exclusion and inclusion

A man wishing to become a single father by ART will need the help of a surrogate who agrees to carry his child. In a traditional surrogacy agreement, the woman giving birth becomes pregnant using her own ovum and therefore has a genetic and gestational link to the child. In gestational or in-vitro fertilization (IVF) surrogacy, clinical intervention is required, and a donated ovum from a different woman is used. Consequently, the access of single men to fertility treatment is governed by

two main pieces of legislation, i.e. the HFE Act 1990 (as amended by the HFE Act 2008) regulating the process of assisted reproduction and the Surrogacy Arrangements Act 1985 setting the limits of surrogacy arrangements in the UK. These Acts are accompanied by additional legislative and regulatory measures relevant to the assertion of the child's and single father's rights, including the Adoption and Children Act 2002 (c. 38), the British Nationality Act 1981 (c. 61), or the Children Act 1989 (c. 41). The application of each will depend on the specific circumstances in which the child was born. As recent legal developments concern the HFE Acts 1990 and 2008, the Acts will be placed at the centre of the following analysis. Although the problem of the regulation of surrogacy in the UK affects the situation of single men in fertility treatment, due to its breadth and complexity, surrogacy will be discussed only to the extent necessary to advance the present discussion.

The problem of single persons' eligibility for fertility treatment was discussed as early as in 1984 when the Warnock Committee considered the specific question of whether single men should be allowed to access treatment if they wished to become parents. The Committee was reminded that the ability of a single person to provide a suitable environment for a child had already been accepted in law, as the Children Act 1975 (c.72) allowed a *single person* to adopt. Furthermore, as argued by a group of homosexual men, if single women are not totally barred from parenthood, then, as a matter of sex equality, neither should be single men (Warnock Report, 1984: para. 2.10). However, the Committee came to the conclusion that 'as a general rule it is better for children to be born into a two-parent family, with both father and mother' (para. 2.10). While they recognised that it is impossible to predict with any certainty

how lasting such a relationship would be, they reinforced the two-parent heteronormative paradigm (McCandless and Sheldon, 2008). Although they did not rule out completely the possibility of single persons accessing treatment, the Committee left the decision-making power in the hands of the medical profession (paras. 2.9-2.11). A decision taken in 1984 still continues to influence the legislation today.

Neither the HFE Acts 1990 and 2008, nor the Human Fertilisation and Embryology Authority's (HFEA) Codes of Practice (COP) supplementing the Acts, discuss single persons in the context of assisted reproduction. When describing persons accessing treatment they have referred to a 'woman', a 'couple', an 'individual' or more recently, to a 'patient' (HFEA COP, 1991, 2017). As such, the possibility of single men accessing fertility treatment has always remained open but not openly acknowledged. The lack of an explicit prohibition means that single men in the UK are allowed to seek any kind of fertility treatment, including surrogacy. However, the absence of single men from the text of the HFE Acts has created uncertainty concerning their legal status in the context of fertility treatment and has indirectly precluded them from accessing ART services. For instance, the current 8th edition of the HFEA COP stipulates that, in cases of surrogacy, clinics conducting the welfare of the child assessment required by s. 13 (5) HFE Act (as amended by the HFE Act 2008), should assess 'both those commissioning the surrogacy arrangement and the surrogate' (2017: para. 8.4). Most likely, 'those commissioning' will continue to be presumed to be couples in the future (2018: 8:4). The policies concerning legal parenthood following the birth of the child through surrogacy have solidified the exclusion of single men from access to ARTs.

Pushed into obscurity – legal parenthood provisions

Continuous exclusion from parental orders

The HEF Act 2008 confirmed that surrogacy arrangements are legally unenforceable, requiring that the woman giving birth, i.e. the surrogate be treated as the legal mother of the child (s. 33 HFEA 2008). The 2008 Act retains the presumption that a woman's husband is the legal father of any child born through licensed treatment services, unless it can be shown that he did not consent to the procedure (s. 35 HFEA 2008). The legislative framework associates fatherhood with consent, establishing the institution of 'agreed fatherhood'. The case of single men is not specifically addressed in the Act.

A detailed interpretation of the mandatory requirements by the 8th HFEA Code of Practice stipulates that 'if the intended father provides his sperm for the surrogacy arrangement, he will be the legal father at common law when the child is born, if no one else is nominated' (2017: 84). This suggests that the single man can be considered the legal father of his child born via surrogacy. Importantly, however, the HFEA COP also highlights the fact that a person recognised as the legal parent of a child may not automatically have parental responsibility. While parental responsibility is automatically ascribed to the child's legal mother, the position of the father depends on other factors, including the record on the birth certificate and/or an existing court order (2017: 74-75). Consequently, when the child is born as a result of a surrogacy arrangement, the surrogate is automatically treated as the legal mother with parental responsibilities, while the single man (who provided the

sperm) can in certain circumstances be treated as the legal father of the child, but without parental responsibilities. In order to resolve this problem, the Act created the 'parental order' mechanism under which, in certain limited circumstances, legal parenthood may be formally transferred from the surrogate to the intended parents after birth (s 54-55 HFE Act 2008). It is these provisions that made it impossible for single men who wish to become fathers through ART to apply for parental orders and acquire parental rights.

Despite many amendments and reforms of the HFE Act 1990, which aimed at bringing the UK legislation in line with human rights and equality laws, the provisions concerning single persons' parenthood and parental orders remain unchanged (McCandless and Sheldon, 2010; Lee et.al. 2012; Horsey and Biggs, 2007). The issue resurfaced briefly during Parliamentary debates about the HFE Act 2008, which constituted the main reform of the HFE Act 1990 (Pugh, 2008). However, it was quickly dismissed in light of arguments presented by the Secretary of State for Health at the time, who was adamant that rules surrounding parental orders in surrogacy should remain unchanged, because of the complexities and sensitivity of the surrogacy arrangements:

'Surrogacy is such a sensitive issue, fraught with potential complications (...), that the 1990 Act quite specifically limits parental orders to married couples where the gametes of at least one of them are used. That recognises the magnitude of a situation in which a person becomes pregnant with the express intention of handing the child over to someone else, and the responsibility that that places on the people who will receive the child. There is an argument (...) *that such a responsibility is likely*

to be better handled by a couple than a single man or woman' [emphasis added].
(Primarolo, 2008)

Consequently, s. 54(1) HFE Act 2008 makes it clear that a claim for a parental order has to be made by two people whether heterosexual or same-sex. It excludes single men from making an application for the transfer of parental responsibility, in a surrogacy arrangement whether or not the surrogate is in a recognised relationship, or if the birth of the child occurred abroad. This inability to establish legal rights over their biological offspring born as a result of surrogacy, affects both single men and single women. In fact, a single woman in need of surrogacy is more disadvantaged as she will neither have the right to apply for parental orders, nor usually be recognized as the legal mother of the child. As a result of the statutory and policy limitations, a single person using surrogacy, whether a man or a woman, is forced to look for alternative complex pathways to parenthood.² One of such pathways is an application for adoption of their biological children.

On the other side of legal fiction – application for adoption

Section 51 (1) of the Adoption and Children Act (ACA) 2002 accommodates the possibility that a single person may adopt a child born through surrogacy. However, although prima facie single persons are not precluded from adopting their biologically linked children born as a result of a surrogacy arrangement, other provisions of the ACA 2002 may hinder adoption in certain instances (Hutchinson and Rogerson, 2015). For example, in the case of *Re B v C (Surrogacy: Adoption)* [2015]³ the mother of a single man has agreed to act as a surrogate for his child, created from his sperm and a donor egg. The mother (C) was married to the single

man's father (D). When the child was born, C was regarded as the legal mother of child under s. 33(1) HFEA 2008 and D was the child's legal father under s. 35(1) HFE Act 2008. The single man (B), who was the genetic father of the child – unable to apply for parental orders under the HFE Act 2008 – applied for adoption of his son to legalise his parental status. The parties were concerned about a breach of s. 92 of the ACA 2002, which prohibits private adoption, and sought to clarify the law in the courts. Although no breach was identified and all parties agreed on the outcome, the judge decided to deliver a short judgment.

Theis J highlighted that central to B's exoneration of the crime of private adoption was the limitation introduced in s. 144 ACA 2002, which states that the offence is not committed, if the prospective adopters are parents, relatives or guardians of the child. In this case, B was considered the child's legal brother and consequently a 'relative' within s. 144. If B had not been a recognised relative (i.e. brother or uncle) then it was possible that B, C and D would have been guilty of committing an offence under s. 93. It is difficult to imagine many situations of this kind occurring in future, not least because it is a complicated route to acquiring parental rights as a single man over genetically linked children. As Theis J stated: 'The process under which [single parents contemplating parenthood through surrogacy] can achieve this is a legal minefield, they need to ensure that all the appropriate steps are undertaken to secure lifelong legal security regarding their status with the child.' (para. 33)

The current law surrounding surrogacy and adoption predestines single men to a situation of multiple legal fictions, where a man must adopt his own (genetic) child who, in the eyes of the law, might also be treated as his sibling. Although legal fiction

is an important legal device, which helps stabilise the legal system and achieve social goals, the multiplicity of legal fictions can have the opposite effect. By not recognising single men as a separate group of subjects, the statutory framework regulating assisted reproduction perpetuates and reproduces social exclusion. The next section of this article provides evidence of this exclusion and analyses the consequences of their life 'on the wrong side of the tracks' (Lacey, 1998: 125).

SOCIAL EXCLUSION AND THE LIFE 'ON THE WRONG SIDE OF THE TRACKS'

Invisible subjects of fertility treatment – data analysis

One of the consequences of the legal complexities and uncertainties is the absence of single men from the official statistics concerning fertility treatment in the UK. Our research conducted between 2016-2017 confirmed that the HFEA does not hold any data concerning the number of single men seeking or receiving treatment in the UK.⁴ Additionally, out of the six clinics, which provided data concerning single persons (male and female) in response to Freedom of Information (FOI) requests sent in 2016, none reported providing services to single men.⁵ In order to establish whether single men have access to ART services and surrogacy in the UK, a content analysis of the web sites of 74 fertility clinics was conducted.⁶ Clinics offering private and/or public fertility treatment were selected from each region of the UK from a list available on the HFEA website.⁷ The analysis assessed what kinds of treatments were offered by each clinic and to whom (i.e. surrogacy to single men). It is accepted that clinics, which offer surrogacy, may be opening their doors to single men, even if their websites do not specifically identify single men as a sub-class of clients.

Of the 74 clinics analysed, 59 clinics offered both private and NHS treatment, 10 provide only private services and 5 provide only NHS services. All 74 clinics identified heterosexual and female same sex couples as potential clients. Single women could access fertility treatment in thirty clinics, whereas single men were identified as potential clients in four. Twenty of the 59 clinics, which provided both NHS and private treatment, explicitly mentioned surrogacy. Within the 10 exclusively private clinics, only one identified single men as a class of clients, eight offered fertility treatment to single women, and four offered surrogacy as part of their services. Out of 5 clinics offering exclusively NHS-funded treatment only one clinic had advertised treatment for single women and the option of surrogacy.⁸

The provision of reproductive services through the NHS is regulated by the clinical commissioning groups (CCGs). There are 204 CCGs in England from which 144 fertility policies were subjected to content analysis through Nvivo. All of the CCGS recognised heterosexual and same-sex couples as potential clients. Forty four (35%) of CCGs recognised single women as potential clients. In contrast only nine (7%) CCGs explicitly mention single men and only five CCGs explicitly contemplate single men within the context of assisted reproduction.⁹ Four CCGs contemplate single men within the context of surrogacy.¹⁰ Two CCGs use the neutral term 'single individuals' which may include single males.¹¹

The analysis highlights the relative lack of visibility of single men in assisted reproduction policies. One CCG is remarkably different. The Welsh Health Specialised Services Committee (WHSSC) is responsible for the planning of services

for all the Health Boards in Wales. Their policy document clearly identifies single men as patients within NHS-funded fertility treatment, stating that '[a]mendments throughout the policy where single women have been referenced also include single men.' The policy indicates that surrogacy IVF will be provided where no other fertility treatment options are available to the patients, which includes male gay couples and single men.¹² This is the only policy document which explicitly highlights single men as a class of person who may wish to access ART services, and as such renders them visible in the policy, while absent from the law. Indeed, the majority of CCG policies reveals a broader marginalisation of men in ARTs, and provides a unique insight to policy understandings of fatherhood.

When CCG policies were explored using the search term 'men/man', the analysis revealed that the term was only included in 97 policies (67%) of the total number analysed. Within these policies the term only appeared once in 19 of the documents (10%). Two contained the term only in an academic reference.¹³ The maximum number of times the term 'men/man' was used in any policy was 14 times (Wales WHSCC). In contrast, 'women' appeared in every policy document with a minimum of 3 times to a maximum of 37 times. Although the absence of men from these policies is notable, it is also noteworthy that in the majority of these policy documents men are categorised as sperm donors rather than in a paternal or parental role. The term 'father' appears in 16 (11%) of the 144 policy documents analysed. This is in contrast to the term 'mother' which is used in 46 (32%) of all policy documents. What the policy analysis makes absolutely clear is that whether heterosexual or homosexual, married or unmarried, fertile or infertile, men are the 'second sex' in ARTs. This is unsurprising given that the burden of assisted

reproduction falls predominantly on women. However, the reduction of the role of men to sperm donors serves to further marginalize men in terms of both rights and responsibilities in planning and preparing for parenthood.

The policy analysis confirms the findings by other scholars, which revealed that male partners report being viewed as sperm donors, mere ‘onlookers’, ‘bystanders’, or ‘stoic supporters’ at best. They feel ‘side-lined’, ‘overlooked’, and ‘ignored’. (Culley et al., 2013; Hinton and Miller, 2013). Our data analysis reveals that like others who failed to comply with the two-parent paradigm (McCandless and Sheldon, 2010: 188), single men remain ‘unintelligible within the legal norms’ (Naffine, 2002: 80) and invisible to the law and regulators of ART services.

In the realm of interstitial legality – surrogacy and nationality laws

Despite the legal and policy limitations, anecdotal evidence collected by surrogacy agencies, law firms specializing in family law, and interest groups suggests that there are single men who have become single fathers through surrogacy and who live with their families in the UK (Prosser and Gamble, 2016; Gamble, 2009).¹⁴ Some of these families will come into being abroad, as a result of overseas surrogacy arrangements, and some will be created through surrogacy and private co-parenting agreements in the UK. Those single men, who choose to have a child using surrogacy in the UK, unable to apply for parental orders, will face the well-known challenges associated with the UK legal regime governing surrogacy, including the lack of enforceability of surrogacy arrangements, the lack of institutionalized support, the criminalization of commercial surrogacy, and the shortage of surrogates (Brazier et al., 1998; Horsey

and Sheldon, 2012; Prosser and Gamble 2016).

The uncertainties, entrenched in the UK legal and policy framework, have resulted in many single men looking for alternative pathways to parenthood overseas in countries like the USA (e.g. California, Oregon). International surrogacy and the process of bringing the child born abroad to the UK can be very long and complicated (Horsey et al., 2015; Gamble, 2009; Tobin, 2014). The challenge of relocation stems from the intricacies of the British nationality law and from the fact that parenthood and nationality are separate legal institutions governed by different legal fields. With regard to the child's nationality, it will depend on the relationship status of the surrogate. If the surrogate is in a recognised relationship and is not British, the child may not be eligible for British nationality. In that case, before applying for the child's passport, an application needs to be made for Home Office registration of the child as a British citizen. If the surrogate is not in a relationship and the single man is the child's biological father, the child will be born British by descent according to s 2 British Nationality Act 1981 and will be entitled to live permanently in the UK. In order to be issued the child's passport the law again requires the permission of both parents (Foreign Commonwealth Office, 2014).

Furthermore, foreign provisions determining parental rights do not affect the (already fragmented) UK family law.¹⁵ Consequently, even if the legal parenthood of the father is accepted in the country where surrogacy took place and the child's nationality is approved by British authorities, upon return to the UK his parental responsibility for the child will not be recognised. According to s 4(1)(a) Children Act 1989 it is not possible for an unmarried father to acquire parental responsibility

by birth registration if the child is born outside the UK. In order to obtain parental responsibilities the single father would have to apply for parental orders, which, as we know, at the moment is legally impossible. As a result, families continue their lives outside the realm of legality, with their parental status acknowledged in one country, but not recognised in another. This was well exemplified in *A (Foreign Surrogacy- Parental Responsibility)* [2016] EWFC 70, in which Child Arrangements Order had to be made to remedy this lack of legal recognition and protect the child's welfare.

The legal and structural issues surrounding surrogacy for many single men may drive their decision to enter into a co-parenting agreement through online websites (Sainsbury, 2016).¹⁶ In such cases two single persons (regardless of their sexual orientation) can become parents of a child using assisted reproduction. The two single people will attend a fertility clinic, not as separate individuals, but as a couple. The law on assisted reproduction can formally accommodate them, using a legal fiction that the two persons are receiving treatment together. Co-parenting arrangements alleviate many of the problems discussed above. Although these agreements may result in a long-lasting co-parenting relationship, they defeat the purpose of single parenthood. Importantly, such arrangements are not free from challenges. Co-parenting agreements are not legally binding and while they can guide the courts in case of any potential dispute¹⁷, they do not eliminate the uncertainty entirely. Consequently, some co-parenting families never obtain a formal confirmation of their parental status. These families, lacking formal recognition, occupy a space in a legal vacuum, in-between private and public sphere, in-between legal and non-legal normative orders, and/or in-between jurisdictions. Forgotten

and without adequate protection they find themselves in a realm of *interstitial legality*.

The example of Ian Mucklejohn shows that formal recognition of parental status is not essential for a fulfilling and successful life as a single parent (Mucklejohn, 2006). Ian became the first identified single man in the UK to use surrogacy to become a single father. His children were born in the USA in 2001 and he returned to the UK shortly after, without any significant obstacles, albeit with considerable legal assistance. Like many other intended parents (Horseley et al., 2015), he did not have any disputes with the surrogate mother or the egg donor and remained in contact with both of them (Mucklejohn, 2006). Ian's decision to engage in foreign surrogacy has been widely publicised, yet the public authorities never challenged his parental status and his three sons were able to grow up with him without any disruption from public authorities. Although Ian Mucklejohn did not perceive himself as being in a disadvantageous position, it is clear that a significant amount of effort and money was required to minimise the potential risk of losing his children. As observed in his book, as far as the authorities were concerned, as long as there were female nannies caring for his three children, he was 'an irrelevance' (Mucklejohn 2006: 151). Ian Mucklejohn's example suggests that a single man could become a parent through ART and lead a successful and uninterrupted family life, but only as long as he was prepared to lead a conventional life and remain outside the common field of vision.

However, legal recognition becomes crucial in times of crisis. As highlighted by Collier and Sheldon, parental responsibility has a highly symbolic value, which is increasingly recognised by courts in family disputes outside the context of ART

(2008: 192-3). Furthermore, parental rights are essential where there is a risk of disputes between the parent and the educational, health, or social services. This is particularly true, whenever the parent takes a decision that diverges from the commonly accepted parental behaviour. Medical law provides many examples where doctors contest parental decisions falling outside the acceptable social norm.¹⁸

The state of interstitial legality can bring unsettling uncertainty even for successful, educated, and wealthy persons, who are able to benefit from assisted reproduction and surrogacy. The continuous hidden existence may result in a state where the full enjoyment of rights in the most important aspects of social life becomes impossible. Single men who become fathers through ARTs could, thus, be considered 'situationally' vulnerable because of the lack of parental rights (Mackenzie, Rogers, Dodds, 2014: 8). Their vulnerability will depend on the extent to which they decide to conform to social roles and expectations. It may deepen if their parental status is challenged and family life disrupted by public authorities. Even those privileged and empowered, can find themselves sharing the experience of the 'other', the vulnerable, the excluded. It is not entirely surprising that it was the litigation based on the prohibition of discrimination (in family life) – inextricably linked with the concept of difference and exclusion – that triggered the revealing, inclusionary power of law.

**THE REVEALING POWER OF LAW – HUMAN RIGHTS LITIGATION AS A
MECHANISM OF ACQUIRING VISIBILITY**

In September 2015 the court adjudicated the first of two cases involving a single father who wished to establish parental responsibility for his biological child (Z) born through fertility treatment to a surrogate unmarried mother in the USA.¹⁹ The applicant argued that the provisions of the HFE Act 2008 precluding him from applying for a parental order solely because of his status as a single person violated his right to respect for private life (Art 8 ECHR), his right to found a family (Art 12 ECHR), and the prohibition of discrimination (Art 14 ECHR). Furthermore, the applicant highlighted the inconsistencies with the Adoption and Children Act 2002, which allows single persons to adopt children. The judge held that the gestational surrogate who carried the child in the US – who was not a legal parent under US law – was the sole person with parental responsibility in the UK. Recalling his earlier judgment, Munby LJ re-emphasised the importance of parental standing as follows:

'Section 54 goes to the most fundamental aspects of status (...), to the very identity of the child as a human being: who he is and who his parents are... A parental order has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences.'²⁰

However, in *Re Z (A Child)* [2015] Munby LJ rejected the application to read down s. 54(1) HFE Act 2008 to enable single persons to apply for a parental order on the basis that 'the principle that only (...) a couple can apply for a parental order has been a clear and prominent feature of the legislation throughout.'²¹ Although the court noted the distinction between the adoption orders and parental orders, it conceded that the HFE Act 2008 reflected a difference of policy clearly intended by

Parliament.²² The decision not to consider the broader human rights' context was taken in anticipation of an application seeking a declaration of incompatibility with the ECHR, which Z's father submitted the same year.

In *Re Z (A Child) (No 2)* [2016] the father pursued a declaration of incompatibility with Art 14 in conjunction with Art 8 ECHR and the Secretary of State agreed that this was 'in reality, a discrimination case'. Avoiding once again an in-depth discussion of the validity of the human rights' claims the court declared that:

'Sections 54(1) and (2) of the Human Fertilisation and Embryology Act 2008 are incompatible with the rights of the Applicant (...) under Article 14 ECHR taken in conjunction with Article 8 insofar as they prevent the Applicant from obtaining a parental order on the sole ground of his status as a single person as opposed to being part of a couple.'

However, Munby LJ 'absolutely declined' to make any statement as to the merits of Parliamentary review of s. 54 HFE Act 2008, and to 'express any view as to the desirability or necessity for future reform as may be considered appropriate.' He agreed with the Government's observation that this is an area of social policy, related to a controversial matter, i.e. surrogacy, that falls clearly within the constitutional prerogative of legislator and any judicial involvement could be perceived as encroaching on Parliament's powers.²³

Despite the court's self-restraint the litigation has triggered a process of legal inclusion. Following the judgment, the Government announced that it would lay a

remedial order before the UK Parliament to allow single people to apply for parental orders and bring the 2008 Act into compliance with the ECHR. According to the proposed amendments²⁴, only one parental order application in respect of a child can be accepted, however, it can be made either by a couple or a single person. The new proposed section 54A(1) HFE Act (2008) supports the enduring policy position that an applicant for a parental order must be genetically related to the child born through the surrogacy arrangement. This should not pose particular problems for single men. If passed, the remedial order will allow retrospective parental order applications by single people during a one-off six-month period. Despite delays, the law is expected to be passed by Parliament in 2018/2019.

These developments highlight that while rights litigation is limited to those privileged few who can afford legal representation, in some instances, the adjudication can have significant effect on wider policy. Although the point of contention in the cases of *Re Z* was procedural in nature and did not necessitate an in-depth discussion of the legal status of single men in fertility, the litigation brought single men from obscurity into legal light. Even in refusing to read down the law in the first case, the court recognised the legal significance of the applicant, thus granting him visibility. By declaring the s. 54 HFE Act 2008 incompatible with the ECHR in the second case, the court sent a powerful message to the Parliament emphasizing the need for change in the primary legislation. The single man (and his son) acquired legal subjectivity, as subjects whose human rights have been violated and as those entitled to legal protection.

Despite the lack of a detailed human rights analysis, Munby LJ expressly acknowledged the importance of the jurisprudence developed by the European Court of Human Rights (ECtHR), especially in *Mennesson v. France*²⁵ and *Wagner and JM WL v Luxemburg*²⁶. The former case is particularly important. The Court found unanimously that the refusal of French authorities to issue a birth certificate that recognised commissioning parents as legal parents of the children born via surrogacy, violated the children's rights to private life guaranteed by Art. 8 ECHR. *Mennesson* reflects the ECtHR's growing concern with the uncertainties that stem from gaps in the law accompanying transnational processes facilitating family formation. The Court – determined to align legal facts with social reality – found it unacceptable that the 'effective and affective family life [of the whole family] was *'legally clandestine'* (para. 67). By pronouncing that this legal invisibility violated the applicants' right to private life, the court has used Art. 8 as a mechanism of legal visibilisation. Although the English courts have not referred to this particular aspect of the *Mennesson* judgment, these pronouncements demonstrate the revealing potential of legal mechanisms, and human rights litigation in particular.

The litigation highlights the importance of the applicant's recognition of the unacceptable nature of legal invisibility and the uncertainty it brings. It also demonstrates the transformative potential of the experience of marginalisation and exclusion. In order to initiate the adjudicative procedure the applicant must recognise himself/herself as a subject of rights entitled to legal remedy. *Re Z* shows that the process of inclusion requires mobilisation, recognition and active participation of the excluded subjects. One could even say that legal mobilisation and visibilisation is impossible without them. The human rights litigation on grounds of

discrimination in private and family life can serve as a method to acquire visibility that leads to legal inclusion in the 'membership of law's community' (Lacey, 1998: 125).

CONCLUSIONS

This article utilised the concept of (in)visibilisation to critically analyse the emergence of single men as legal subjects in the field of law regulating assisted reproduction. The analysis has shown that for years single men in fertility treatment experienced exclusion from the law, official statistics, policy and any meaningful political discourse. They remained 'unintelligible within the legal norms' (Naffine, 2002: 80). Forced to look for alternative complex pathways to parenthood, they have lived with their families hidden and unnoticed, occupying a realm of *interstitial legality*. Consequently, single men using ARTs to become parents can be seen to both, challenge and reinforce feminist views about the law and legal subjectivity, according to which 'the very form of the legal subject is male in that the legal person is always perceived as unitary, never multiple' (Naffine, 2002: 82). They challenge the existing ART legal framework, in which the legal subject is female, while the man is seen mainly as a means to facilitate reproduction or a supporting parent. Single men in fertility treatment seem to defy many persisting stereotypes when they negotiate multiple identities and navigate between various perceptions of masculinity, fatherhood, and singleness. At the same time, their case confirms feminist views about law's 'power to silence and exclude those who insist on reading between its lines or who live on the wrong side of the tracks' (Lacey: 1998: 125). While some tensions between feminist discourse of exclusion and the position of

single men in fertility treatment discussed in this paper remain, by bringing them to the foreground, the article has opened a new direction of feminist inquiry in a novel area of law.

The article demonstrates the explanatory potential of the concept of (in)visibilisation. When analysed through the lens of visibilisation, the history of the law regulating assisted reproduction can be theorised as a slow process of inclusion of new subjects into the ever-expanding realm of *reproductive legality*. It can be theorised as a continuous process, in which successive groups have fought for and gradually acquired visibility through regulation, litigation, and legislation. The recent developments concerning single persons in fertility treatment constitute a perfect illustration of the process of visibilisation through litigation and the acquisition of legal subjectivity. This happened initially against the political will, but then encompassed all branches of government and will soon lead to legal and policy change. The concept of visibilisation helps to view the process of legal inclusion as a multiple, recursive process, punctuated by iterations of norm making among different branches of government and national and transnational actors, and patterns of engagements between them (Halliday, 2009). Consequently, the article demonstrates that while framing social problems in the language of rights may not always bring expected results, it sets the basis for mobilisation and further inclusion.

Finally, the present analysis demonstrates the clear role of the courts in the path to the acquisition of legal subjectivity and rights by new subjects; a path that in the case of single men in fertility treatment was not achieved through Parliamentary debate alone. The courts in the UK have been the subject of continuous critique by human

rights lawyers and feminist scholars for producing judgments preserving traditional and patriarchal family structures. However, the present study suggests a shift in this regard, observed by scholars in other areas of law (King, 2012; Dickson, 2015).²⁷ Of course, it would be naïve to draw definitive conclusions concerning a progressive turn in jurisprudence on the basis of this one example alone. The realities are complicated and the jurisprudence meandering. However, the effects of litigation should not be underestimated. By granting single men visibility in *Re Z*, the courts limited the legislative flexibility of government. It remains to be seen whether the government will keep its promise and secure the status of single men in fertility treatment thus acknowledging their existence as full subjects of ART and family law. In case of delays it should be recalled that ‘...the practical consequence of non-regulation is the consolidation of the status quo: the de facto support of pre-existing power relations and distributions of goods within the “private” sphere.’ (Lacey, 1998: 77).’

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¹ *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17; *Re A (Foreign Surrogacy- Parental Responsibility)* [2016] EWFC 70; *Re Z (a child) (HFE Act: parental order)* [2015] 3 FCR 586; *Re Z (A child) (No 2)* [2016] EWHC 1191 (Fam).

² *Re Z (a child) (HFE Act: parental order)* [2015] 3 FCR 586 and *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam), as well as *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17.

³ *Re B v C (Surrogacy: Adoption)* [2015] EWFC 17.

⁴ HFEA FOI response [F-2016-00174](#), 25 July 2017.

⁵ Out of 61 clinics offering NHS treatment in England and Wales only 8 responded to FOIs (4.88%). Two were unable to provide information due to Data Protection Act 1998 concerns (Shrewsbury and Telford Hospital NHS Trust (FOI 16-0944) and Homerton University Hospital NHS Foundation Trust (FOI-2653)). The remaining six that provided information were: Abewarte Bro Mogannwg Health Board (Ref. No. 16-H-013), Birmingham Women's Trust NHS (FOI/2867), Derby Teaching Hospital NHS (FOI 16.397), Gateshead Health NHS Foundation Trust (FOI 2016-17.318), Liverpool Women's NHS Foundation Trust (FOI LWH 2016-00020), Sheffield Teaching Hospital NHS (FOI RFI 004706).

⁶ The search was conducted over a period of 6 weeks in June-July 2016. Key words that were searched included "single men", "single women", "same sex couples", "donor insemination", "surrogacy" and "egg donation".

⁷ HFEA website, available at: <https://www.hfea.gov.uk/choose-a-clinic/clinic-search/>

⁸ This is possibly unsurprising in light of the well-known and widely reported funding cuts. (Bhattacharya 2017, Bryon-Dodd 2017).

⁹ CCGs in Islington, Newham, Redbridge, Tower Hamlets, Waltham Forrest stipulate that 'Male same sex couples and single men will be referred for infertility investigation if no pregnancy results following six cycles of IUI for which the man's donated sperm has been used.'

¹⁰ CCGs - CHMS ART, Crawley, Horsham, Mid Sussex, Kent - explicitly state that surrogacy can also be considered an option for single men and male same sex couples.

¹¹ NHS Redditch & Bromsgrove CCG, NHS Saint Helens CCG.

¹² Welsh Health Specialised Services Committee (WHSCC) (para 3.1.2). However, according to the response to the FOI request (Ref. No. 16-H-013) received on the 2/09/2016 from the Abewarte Bro Morgannwg Health Board the Welsh Fertility Institute has not registered any cases of single men receiving treatment up to that date.

¹³ Bexley CCG – men only appeared in a footnote citation of an academic reference!

¹⁴ Also see: Brilliant Beginnings Adoption Agency: <http://www.brilliantbeginnings.co.uk/intended-parents/single-dad> or Natalie Gamble Associates: http://www.nataliegambleassociates.co.uk/knowledge-centre?user_type=single-men&service=surrogacy.

¹⁵ Home Office, Nationality policy: surrogacy, London July 2017, available at: <https://www.gov.uk/government/publications/surrogacy-nationality-policy-guidance>.

¹⁶ E.g. <https://www.co-parentmatch.com/co-parent.aspx>; <https://www.coparents.co.uk>; <https://www.prideangel.com/Get-Started/Co-parenting.aspx>.

¹⁷ E.g. *TT (A Minor)* [2011] EWHC 33 (Fam); *W. and B. v. H. (Child Abduction: Surrogacy)* [2002] 1 FLR 1008; *JP v LP & Others* [2014] EWHC 595 (Fam).

¹⁸ *Birmingham Children's NHS Trust v B & C* [2014] EWHC 531 (Fam) and earlier: *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam. 64; *Re S (A Minor) (Wardship: Medical Treatment)* [1994] 2 FLR 1065; *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386; *Re L (Medical Treatment: Gillick Competence)* [1999] 2 FCR 524, [1998] 2 FLR 810.

¹⁹ *Re Z (a child) (HFE Act: parental order)* [2015] 3 FCR 586.

²⁰ *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam), para. 54.

²¹ *Re Z (a child) (HFE Act: parental order)* [2015] 3 FCR 586, para 36.

²² Lord Munby in *Re Z (A Child)* [2015], para. 16.

²³ *Re Z (A child) (No 2)* [2016] EWHC 1191 (Fam), paras. 27-30.

²⁴ The UK Government's Response to an incompatibility in the Human Fertilisation & Embryology Act 2008: A remedial order to allow a single person to obtain a parental order following a surrogacy arrangement, Cm 9525, November 2017, available at: www.gov.uk/government/publications.

²⁵ *Mennesson v. France*, Application no 65192/11, 26 June 2014.

²⁶ *Wagner and JM WL v Luxemburg* (2007) Application No. 76240/01.

²⁷ For a broadening interpretation of social rights by the UK Supreme Court: *Yemshaw v Hounslow LBC* [2011] UKSC 3, *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2; *Pomiechowski v District Court of Legnica, Poland* [2012] UKSC 20.