

Regulating Assisted Reproduction in Canada, Switzerland, and the USA: Comparing the Judicialization of Policy-making

Abstract: This article analyses the extent to which courts shape policies for assisted reproduction. While the USA is considered to be the most litigious country, Canada has observed a growing involvement of the courts from the 1980's onward, and Switzerland is characterized by a modest degree of judicialization. Based on national patterns, we would expect litigation and court impact to vary across these three countries. As this paper demonstrates, policy-process specific variables such as the structure of policy conflicts, the novelty of regulation, self-regulation by key stakeholders, and the policies in place better explain the variation in the judicialization of policy-making.

Keywords: assisted reproduction; courts and public policy; court impact; Canada; Switzerland; USA

The invention in Britain of in vitro fertilisation in the mid-1980s not only opened the door to a number of new treatments for infertile couples, but also led to new domains of research, such as embryonic stem cell research. These innovations have led to considerable public debate about their regulation. The state is confronted with rapid technological developments that are value-loaded and at the same time, potential health and economic benefits are important, creating considerable tension between the benefits and the risks related to new treatments and research domains. Courts have been confronted with a broad range of issues stemming from these technological developments (e.g. Bonnicksen 2002; Mandel 2005), including questions of parenthood and parentage, decisions about who should have access to in vitro fertilization treatment, and inquiries meant to establish the boundaries for embryo research, to name just a few. In this article, we want to shed light on the influence of courts on policy-making for assisted reproductive technologies in Canada, Switzerland, and the USA.

Various terms have been used to capture a general trend towards courts assuming a more central role in policy-making: Judicialisation (Tate and Vallinder 1995; Hirschl 2004) juridification (Silverstein 2009), juridicisation (Shapiro and Stone Sweet 2002; Comaille, Dumoulin et al. 2010), or the Americanization of law and conflict resolution (Kagan 1995 and 2001; Kelemen 2006). Within this literature about the growing importance of litigation, the number of studies systematically comparing court involvement and litigation in public policy making across polities, hence raising the question of why the mobilisation of courts varies across both polities and time, has remained modest. At the same time, the general trend towards a greater importance of courts, legal mechanisms, or legalistic conflict resolution in public policy making, is accompanied by considerable variation across policy issues (Kelemen 2011: 11). In this article, we examine the idea that besides these general trends, there is variation across both specific issues and time. By comparing assisted reproductive policy-making in Canada, Switzerland, and the USA, our analysis sheds light on the reasons for differences or similarities in litigation, as well as the impact of court decisions on policy-making. It does so by asking: To what extent have courts become the main arena for addressing policy conflicts and influencing policy output? From a comparative perspective, what accounts for any variation or similarities in the importance of courts for assisted reproduction policies?

Because assisted reproductive technology is an issue that raises very similar policy questions in all three countries, all of which are comparable in terms of technological and medical developments, it makes for a particularly interesting policy field to study. In addition, the three countries have been chosen because of their variation in the importance of litigation strategies and courts for policy-making. While the US is considered to be the most litigious country with respect to policy-making (Kagan 2001; Kagan and Axelred 2001), Canada has observed a growing involvement of courts in policy-making from the 1980s onward (Kelly 2006; Smith 2008), and Switzerland is characterized by a modest degree of judicialization (Rothmayr 2001). Hence, from a very general angle, we would expect patterns of litigation and court impact to vary systematically across these three countries. The empirical evidence, however, reveals the limited

explanatory power of general classifications of politics in terms of the importance of judicial decisions for policy making. Political conflict concerning assisted reproductive technologies is differently structured and articulated across the three countries. In addition, medical self-regulation equally influences litigation patterns, and the novelty of regulation accounts for variation in litigation over time.

Theoretical framework: national patterns or issue-specific variation?

Courts have to be solicited in order to render decisions. In other words, legal mobilisation is a necessary but not sufficient condition for court decisions to influence public policies. In this article, we distinguish between litigation, on the one hand, and the impact of the court decision, on the other hand. Court impact studies have generated a vivid discussion about the possible impacts of court decisions, as well as about how they should be conceptualised (Rosenberg 1991; Feeley and Rubin 1998; McCann 1998). Court decisions might influence different dimensions of the policy-making process. Court decisions can affect the content of public policies by declaring laws, regulations, or administrative decisions unconstitutional or unlawful (substantial effect). Judges might also articulate the norms or policies needing to be adopted in order to not violate the constitution or the law. Additionally, court decisions can have an impact on actor constellations (mobilization effect). Court decisions can also contribute to the mobilization and empowerment of certain interest groups in the policy-making processes (McCann 1994). Furthermore, they might influence rules of access to—and participation in—arenas where policy choices are deliberated and decisions are made (procedural effect). Finally, court decisions can play a role in the agenda-setting and framing of an issue, for example by framing an issue as a rights issue (framing and agenda-setting effects). In order to reduce the complexity of the possible dimensions of impact, the analysis will be limited to investigating whether the court decisions examined have an impact on policy output by changing legislation or other legal norms and provisions, i.e. whether they have *direct substantial impacts*. The analysis is fully aware that this does not allow for comparing all possible dimensions of impact, in particular because court decisions need to be implemented by various actors who continue to shape and influence the policy process.

The *national pattern approach* (Vogel 1981; Richardson 1982; Levi-Faur 2004) provides a first avenue for formulating working hypotheses about whether we expect courts to have an impact on public policies or not. The *national pattern approach* assumes that public policy-making is determined by national institutions that are themselves the products of historical circumstances and social characteristics. Scholars interested in courts have also developed concepts such as *adversarial legalism* (Kagan 1995; Kelemen 2006), in order to characterize a national style of policy-making and implementation. Furthermore, the literature on courts and politics discusses which institutional characteristics are favourable to strong judicial review (Stone Sweet 2000; Shapiro 2002). Obvious differences in the jurisdiction of the highest court are a first and basic factor to consider. Within a comparable formal institutional setting, however, courts can be more or less active in judicial policy-making, as they either choose to engage or not. Different legal traditions are also variables to consider, such as common law versus civil law traditions, as well as varying traditions in terms of parliamentary supremacy and court deference. It has also been argued that the decentralization of power through a federal system—or, similarly, the division of power in presidential systems—is more conducive to strong judicial review (Shapiro 2002). In addition, examining how easily legislation can be adopted in a political system, as well as how difficult constitutional changes are to bring about, helps to understand the shift of political conflict to the judicial arena. Systems where adoption of new legislation or constitutional changes are very costly and difficult to achieve tend to show a greater amount of court activism.

By relying on such institutional configurations, we would expect that litigation patterns and court impact vary systematically across countries. In fact, from a national pattern perspective we would expect the US to be the most litigious case, showing patterns of repeat litigation with respect to a number of issues (Kagan 2001). Canada has also observed an increase in the importance of courts for public policy-making (e.g. Epp 1998; Hirschl 2004; Manfredi 2004; Smith 2005). While some authors argue that Canada is catching up with the USA, others contend that public policy-making has remained comparably less litigious in Canada (Howlett 1994). In contrast to the USA and Canada, Switzerland only knows a weak form of judicial review. The

Swiss Federal Tribunal's jurisdiction—as well as the jurisdiction of all other courts—is limited to examining the constitutionality of cantonal laws and federal ordinances, while federal laws are excluded from constitutional review (Kälin and Rothmayr 2007). In order to render our first hypothesis more concrete, we would expect courts to assume a more central role in terms of policy-making in the case of the USA, followed by Canada, and at the same time expect them to be the least important in the case of Switzerland.

Over the last two decades, comparative policy studies have become increasingly interested in explaining patterns of policy diffusion and convergence across countries (e.g. Knill 2005; Dobbin et al. 2007). While these studies do not necessarily focus their attention on litigation and courts, some of their insights can be mobilised in order to discuss whether we might expect similarities in litigation patterns and court impact across countries instead of systematic variation (national pattern). Imposition and the pressure for harmonization are the first explanations regularly evoked in order to explain policy convergence or diffusion. So far no international norms about reproduction policy have been established, with the relative exception of the reproductive cloning ban in the European Union. If international imposition and pressure for harmonization have so far played a very limited role, there might however be other mechanisms at work. It is a well-documented phenomenon that couples will sometimes travel to other countries with less restrictive laws in order to obtain the treatment or surrogate arrangement they seek. By creating a social practice and challenging the legal situation in the home country, such medical tourism might contribute to similar patterns of legal mobilisation across countries. Switzerland has adopted fairly restrictive federal legislationⁱ for assisted reproductive technologies and stem cell research through a number of prohibitions and restrictions. There are several aspects in the current legislation that motivate couples go abroad for treatment, particularly the prohibition of egg and embryo donation, the ban on surrogate motherhood, and the fact that access to many treatments is limited to heterosexual couples (Rothmayr 2007). Canada, also, has adopted comprehensive policies on the federal level (Montpetit 2007). The Canadian Charter protects the right of unmarried and homosexual couples alike to have access to fertility treatments. Furthermore, there are no general prohibitions of specific techniques, such as embryo donation or surrogacy, as is the case in Switzerland. However, some provinces declare surrogacy contracts to be legally invalid, and federal legislation prohibits the commercialization of gamete donation. While Canadian policies are fairly more liberal than their Swiss counterparts, in the USA all attempts to comprehensively address ART (assisted reproductive technologies) on the federal level have failed, and legislation on the state level has remained limited in scope and nature. Few states address questions of assisted reproductive practice. Typically, state regulations address problems of parentage and consent, and some also have policies in place regarding parental rights for surrogacy and gamete donation. None of the states prohibit certain techniques, such as egg or embryo donation, as is the case with Switzerland. However, a number of states outlaw commercial surrogacy, often by declaring commercial surrogacy contracts void or unenforceable.ⁱⁱ Given the very limited regulation of assisted reproduction, there is a flourishing reproductive market in the USA regarding gamete donation and surrogacy, which makes the USA a destination for couples from other countries such as Canada and Switzerland. Given that couples can obtain treatments abroad that are not permitted in their own country, we can assume that courts are confronted with similar cases regarding parenthood and parentage in the three countries, despite their variations in regulation.

In a larger sense, and going beyond reproductive tourism, future parents and patient networks might also contribute to the diffusion of specific ideas (Dobbin et al. 2007; Dolowitz and Marsh 2000), such as for example the right of children perceived through gamete donation to know their origins, or the equal right to have access to treatment for single women and same-sex couples. Since these networks might constitute one possible explanation for similar issues being litigated in court, and given the economic and scientific potential of human biotechnology as well as the increased international competition in R&D activities, interest-driven accounts would make us expect that medical and research interests seek to preserve their regulatory autonomy from strong state intervention. International research competition could therefore also account for similarities in legal mobilization between research and medical interests, in particular around research-related issues such as embryo and stem cell research. In Switzerland, therapeutic and reproductive cloning are both prohibited by federal law, and so is the creation of embryos solely

for research purposes. Embryonic stem cells might only be derived from left-over embryos under specific conditions. Inspections and reporting duties assure conformity in implementation, and the law imposes information and counselling requirements for patients seeking treatment. With respect to stem cell and embryo research, Canadian policies are similar to Swiss policies. Canada prohibits the creation of embryos for both research purposes and for all forms of cloning. Thus, embryonic stem cell research (ESCR) is limited to left-over embryos, and is subject to authorisation and depends on additional conditions such as the consent of the donating couple. Again, the USA is distinct in terms of its lack of federal regulations. In 2001, the Bush government limited federal public funding of ESCR to be applicable only to those stem cells derived before August 2001, and which came from left-over embryos that were created for procreative purposes and were donated with informed consent and without financial compensation by the couple. This measure was revoked by the Obama administration in 2009, a development that in effect lifted the ban on federal financing on ESCR. Differences in current regulations across countries in general—and not just the three included in this study—could explain why we find similar litigation strategies regarding research in order to obtain favorable conditions for research similar to those prevailing in other countries.

Methodological remarks

The following analysis is built on a comparative project analysing biotechnology policies in Europe and North America. The project relied on process tracing and comparative qualitative analysis, and used both interviews with key actors and documentary research in order to analyse the decision-making processes from a comparative perspective. For the present article, the existing analysis has been combined with an analysis of court cases from 1980 to 2015, which have been identified through a combination of literature review, systematic research in the Quicklaw/Lexis-Nexis (USA and Canada) and CanLii (Canada) databasesⁱⁱⁱ, as well as reports in the media.^{iv} For Switzerland, there is no comparable database in which to search for cases. The Swiss Federal Supreme Court has a searchable online database, and SwissLex also provides a searchable database for case law, although with a limited scope that might not include relevant cases of lower, cantonal tribunals. For Switzerland, we also relied on literature review, interviews, and media research.

For Canada, we gathered 89 decisions, touching on issues of parentage, surrogacy, the division of labor between the federal and the provincial level, and public coverage of treatments. In the case of Switzerland, we identified 10 court decisions mainly concerning coverage of treatments and access to services, a few addressing state level regulations and in one case parentage issues. For the USA, we have included 116 decisions in our analysis.^v

[INSERT TABLE 1 HERE]

It is a well-known problem in comparative research on courts that the different types of databases and the specificities of each judicial system render the comparison of actual figures difficult. The above table indicates the issues litigated in court, and the appendix provides the list of cases that have been included in our comparative analysis.

Comparing litigation patterns and court impact

In order to help the understanding of the more detailed analysis, as well as the explanations for the patterns of court impact that follow, Table 2 provides an overview of the main findings in order to address our research questions, which ask *whether courts have become the main arena for addressing policy conflicts and for influencing policy output through their decisions*.

In terms of litigation, the table reveals that there are more differences than similarities. First of all, we notice considerable differences between the three countries. Switzerland and the USA both saw legal mobilization concerning the rules that govern IVF (Switzerland) and stem and embryo research (USA), a factor that cannot be found in any of the other two cases. The issue of the division of power between the federal and provincial levels, in terms of regulating and licensing clinics, has so far not been addressed by the courts in the USA and has remained

marginal in Switzerland, compared to what happened in Canada.^{vi} Another notable difference is the role courts play in addressing parentage and parenthood issues. Most cases in the USA and Canada address parentage and parenthood issues, but with one very recent exception such cases are absent in Switzerland. In terms of similarities between the three cases, we found repeated litigation by patients to obtain coverage of health costs, despite the considerable differences in health care systems.

[INSERT TABLE 2 HERE]

While courts, as we will argue below, have had an impact on public policies in all three countries, they have not become the main arena for addressing policy conflicts with one exception. Courts play an important role in terms of policy implementation for parentage and parenthood issues in the USA, and this is also the case, albeit to a lesser degree, in Canada. This finding indicates the national pattern approach, since courts in the American and Canadian cases play a crucial role regarding such issues as surrogacy, parentage resulting from gamete donation, and same-sex couples turning to assisted reproduction, a phenomenon that is not shared by the Swiss case. In terms of health coverage, there has not been any direct substantial impact on the financing or coverage of ART treatment in all three countries. In Switzerland and Canada, courts played a somewhat important role regarding federal and sub-national legislation: in Canada through clarifying the division of power between the provinces and the federal government in terms of the regulation and licencing of clinics, and in Switzerland by limiting the power to prohibit certain treatments such as IVF on the sub-national level. The impact of courts on the issue of financing embryonic stem-cell research in the USA has been limited, and legal mobilization on this issue is unique to this case.

Becoming a family: courts and assisted reproduction

In Canada and the USA, but not in Switzerland, courts are an important arena for settling disputes over parentage and for recognizing families constituted by assisted reproductive technologies, such as for example through surrogacy.

Concerning the USA, there is an abundant number of cases addressing parentage issues related to assisted reproduction, including such issues as post-mortem use of embryos or sperm and same-sex couples founding families. These cases go well beyond the most publicized cases such as Baby M. In fact, different authors claim that in the absence of legislation and regulations, courts have become the most important venue for policy-making as regards assisted reproduction (see Ackerman 2007). As described above, existing state policies only address a limited number of issues. Reproductive tourism across state lines becomes a reality because disparities between state policies create legal constraints that can in turn lead to sociolegal vulnerabilities for children, surrogates, and/or intended parents. Hence, prospective parents will travel to more liberal states in order to have children through assisted reproduction, and also to get their parentage recognized without limitations. In addition, it needs to be mentioned that self-regulatory measures by the medical community do not considerably limit what physicians and fertilization clinics can be practice in the USA. This scenario constitutes a fundamental difference from Canada and Switzerland, where the medical profession—working, as it does, within a public health care system or with public health care delivery—has been more reluctant to embrace all the possibilities offered by modern technology. This is even the case before the adoption of governmental regulations. For the USA, there is no doubt that courts have become an important venue for addressing issues of parenthood and parentage.

On a regular basis, Canadian provincial courts are confronted with the reconfiguration of the “traditional” family through the means of assisted reproduction and the recognition of same-sex couples. The legal situation concerning these configurations varies somewhat between the provinces (L’Espérance 2013). It goes beyond the scope of the present comparison to discuss the details of family law jurisprudence, but it is important to note that Canadian courts play an important role in recognizing new forms of families based on assisted reproduction, even in places where the legal basis intends to deter from surrogacy practices. Parentage is established on a “case by case” basis by the courts—who can, to a certain extent, justify their decisions based on the good medical and ethical practices self-enforced by clinics and agencies. In

Canada, the lack of legal clarity at the federal level means that there is a de facto surrogacy market, and therefore the courts play a role in determining the “ethics” of surrogacy arrangements. On the other hand, the biggest difference between Canada and the USA is the much lower number of disputes in Canada. In some provinces, clinics will not accept surrogacy arrangements and therefore, the market for such services remains much more limited in Canada compared to the USA.

In Switzerland, finally, the role played by litigation and the courts for these issues is insignificant—at least so far. In our research we only found one case, which had to do with access. In the case of the canton of Vaud, an unmarried couple successfully challenged its non-admission to IVF on the grounds that the competent authority had exceeded its competencies in regulating access. This decision had no effect beyond the policies adopted by the canton, and the respective cantonal policies became obsolete once the federal legislation was adopted. More recently, however, a case involving reproductive tourism led to the Administrative Tribunal of the canton of St. Gallen recognizing the Californian birth certificate of a child conceived through a surrogacy arrangement for a same sex couple, recognizing both to be the fathers of the child. The decision is as of this writing being appealed by the Federal Health Ministry, which only wants the man of the couple who is the actual sperm donor—and hence is biologically related to the child—to be recognized as the legal father.

Why do courts play a more important role in terms of parentage issues in the USA and Canada than they do in Switzerland? Due to restricting medical practice and access, Swiss law promotes a very traditional notion of the family, which both excludes same-sex couples from accessing assisted reproduction and precluded any treatment that would separate gestational, genetic, and social motherhood. The policies in place regarding assisted reproduction are an important explanatory factor, but we also need to take into account self-regulation as well as policies regarding same-sex couples. Canada and Switzerland adopted federal statutes on assisted reproduction rather late (2001, 2004), and we cannot observe any strong court involvement before the legislation was adopted. This leads us to argue that self-regulation by the medical profession plays an important role, and that the universal public health care system in Canada, along with the mandatory public insurance and the important role of the state in the delivery health care in Switzerland, have an impact on medical practice. Even before federal legislation was adopted, medical self-regulation limited what could be practiced. In contrast to the USA in particular, therefore, the market for ART treatments remained limited to techniques that would not divide gestational and genetic motherhood. The lack of comprehensive state and self-regulation in the USA led to the flourishing of an important international reproductive market. In Switzerland, this market is very limited. In Canada, there is a market for private clinics, but given the prohibition of commercializing gamete donation and surrogacy, this market remains more limited. Nevertheless, it remains to be seen whether fertility tourism might not change this situation in the near future, forcing Swiss courts to more frequently address parenthood and parentage issues resulting from surrogacy arrangements abroad.

Federalism, courts, and assisted reproduction

In Switzerland and Canada, the highest court reviewed federal legislation (Canada) and sub-national policies (Switzerland) in terms of both their constitutionality and the division of power between the federal and state level. In the USA, state laws were challenged in court. The political conflict, however, has not evolved around the same policy issues in the three countries. In Canada, it would be fair to say that the principal conflict concerning the federal legislation was structured much more by disagreements to do with federalism than by assisted reproduction per se. In Switzerland and the USA, the conflict centered more on substantial questions regarding regulating assisted reproduction. In Switzerland, the main question was how far total prohibitions can go without violating personal freedom, and in the USA the focus was on how cloning and embryo research might be regulated by legislation on the state level. The following analysis explains these developments in greater detail.

Canada: preserving provincial prerogatives in health care

The Assisted Human Reproduction Act (AHRA), passed in 2004 (see Scala 2003; Montpetit 2007), establishes a number of restrictions and sets up a federal regulatory agency to govern assisted reproduction. Quebec's judicial review of the federal Act of 2004 framed the issue at a broader level, namely in terms of the separation of powers and in order to restate the provinces' prerogative over health care. In 2004, the government of Quebec asked the Court of Appeal to review the federal law so as to determine whether it exceeded the provincial prerogatives over health care in the matter of assisted reproduction. The Court of Appeal sided with the provincial government's arguments that the law intrudes upon provincial prerogatives. The federal government appealed the decision to the Supreme Court. Saskatchewan, New Brunswick, and Alberta supported Quebec's cause as interveners. The Supreme Court allowed the appeal in part, stating that while some provisions impede upon the provincial powers to regulate health care as ruled by the Quebec Court of Appeal, other provisions similarly alleged to do so were in fact constitutional.^{vii} As a direct and immediate consequence of this decision, Canada has a province-by-province approach to the regulation of assisted reproduction. The federal prohibitions against many such activities remain in force, including human cloning, creating in vitro embryos for research purposes, manipulating embryos to increase the probability of a particular sex, and payment for surrogacy or for the purchase of gametes. Hence, each province and territory is free to regulate the delivery of reproductive services and the conduct of related research.^{viii}

Switzerland: litigation against total prohibitions

In the case of Switzerland, the Swiss Federal Supreme Court (along with any other court) has no power to overturn federal laws, but can nullify cantonal laws. In the case of ART, the Supreme Court declared two cantonal laws unconstitutional and thereby indirectly influenced policy-making on the federal level. In Switzerland, the policy-making process started out at the cantonal level. The Swiss health care system is decentralized and characterized by a mixture of public and private health care providers. The cantons play a major role in formulating and implementing health policies. They are also important health care providers, and some of the cantons did not want to wait for federal legislation, choosing instead to adopt their own laws and regulations. The content of cantonal laws and regulations varied strongly. Three cantons, Glarus (in 1988), St. Gallen (in 1988), and Basel-City (in 1991), prohibited most of the known assisted reproductive technologies, including a full prohibition of in vitro fertilization and gamete donation. The cantonal laws of St. Gallen and Basel-City were challenged in the Swiss Federal Supreme Court by patients and physicians. In 1989 the Court ruled on the first case brought before it, concerning the canton of St. Gallen,^{ix} at a time when the issue had not yet been debated in the federal legislature. The Court ruled that general prohibitions of certain techniques in cantonal laws were unconstitutional, and consequently stroke down the majority of the legal provisions in the cantonal law. It confirmed its jurisprudence in 1993 with respect to the restrictive legislation adopted in Basel-City.^x

The Supreme Court's decision in the case of the cantons of St. Gallen and Basel-City led to a policy convergence at the cantonal level towards limiting governmental intervention into ART, and did so by ruling out extremely restrictive solutions. The decision thereby clearly influenced the starting conditions for the debate on the federal level. The arguments of the Federal Supreme Court found a strong resonance with the actors on the federal level. In particular, both the government and opponents of total prohibitions referred to the Court's opinion that general prohibitions violate the right to personal freedom. Furthermore, the Court's jurisprudence strongly contributed to include the right to know your genetic origins in the federal legislation. In the Swiss case, in short, litigation as a strategy to influence policy-making paid off for patients and medical interests.

USA: embryo research legislation on the state level

The case of the USA reveals some similarities to the Swiss case, as state-level laws were similarly challenged in court. With respect to state policies, research and cloning were at the forefront of the cases. Some state policies have been held unconstitutional (Martin and Lagod 1990). In the case of a Louisiana statute concerning the prohibition of experiments and

experimental research on “an unborn child or a child born as a result of an abortion,” a federal appellate court decided that the statute was unconstitutional because of the vague language employed.^{xi} In Illinois, medical interests also challenged a statutory provision banning non-therapeutic fetal experiments successfully.^{xii} As in the Louisiana case, terms such as “experimentation” and “therapeutic” were considered to be vague, resulting in physicians having to make guesses about whether various activities were lawful or not. Similarly to Switzerland, where medical interests have been successful in challenging total prohibitions on the state level, research and medical interests in the US have been successful in challenging vague statutes in the cases of Louisiana and Illinois.^{xiii} In contrast to Switzerland, however, there have been no clear cut agenda-setting effects on the federal level.

The comparison of the three countries, in terms of multi-level governance and provincial prerogatives in health care, reveals that courts have influenced public policies on the federal level in Switzerland and in Canada, but not in the USA. Furthermore, in the USA and in Switzerland—but not in Canada—there have been legislative and regulatory activities with respect to assisted reproductive technology on the sub-national level since early on. All decisions declaring state/cantonal legal provisions unconstitutional date from the 1980s and early 1990s. We argue that there are two interacting factors at work. The first factor is the uncertainty for governments and legislatures about how to address the issue or interpret existing legislation in light of the new technological possibilities. This uncertainty might lead to vague provisions or extreme solutions, as was the case for the Swiss cantons. The second factor is the decisional context for courts, i.e. the fact that political coalitions and opinions are not yet formed, which in combination with a lack of legal precedent likely renders the political environment more inviting to striking down legal provisions (Dahl 1958). The comparison therefore highlights the importance of temporal patterns of court involvement, since highly technical and novel medical issues create considerable uncertainty in terms of legislation.

The struggle surrounding financing stem cell research—the exception of the USA

The United States is mostly characterized by the absence of binding decisions on the federal level. In contrast to Canada and Switzerland, in the USA all attempts to address ART comprehensively on the federal level have failed. In fact, policy debates and policies in the USA have mainly focused on the question of embryo and stem cell research (Bonnicksen 2002; Goggin and Orth 2004). Yet, even for embryo related issues, policies have remained very limited. In 1995, Congress—under a new Republican majority—passed the Dickey-Wicker Amendment to the National Institutes of Health Revitalization Act, which prohibited federal public funding for any embryo research destroying or harming an embryo in vitro. In 2001, President Bush reacted to the breakthroughs in ESCR by permitting the financing of research on stem cell lines originating from leftover embryos (with the consent of the couple) created prior to his decision. In 2010, President Obama issued an executive order that allowed public funding to be used on new stem cell lines. Yet, this decision has been attacked in court by two researchers, on the grounds that the Dickey-Wicker Amendment is still in force.^{xiv} The United States Court of Appeals for the D.C. Circuit ruled in favor of the Obama administration’s policy for funding ESCR in 2012.

Embryonic stem cell policies have, however, already been challenged in court, and also on the state level. First of all, the Bush administration’s policy on financing ESCR has been challenged in court. Religious interests challenged the NIH guidelines for public funding of ESCR.^{xv} Religious interests also unsuccessfully challenged California’s policy of ESCR funding, which was adopted by referendum.^{xvi} Finally, pro stem cell research interests tried to promote their policy preferences in court. Scientists filed a lawsuit against the policy for withholding federal funding.^{xvii} None of these plaintiffs succeeded in influencing the current policies on financing ESCR in the direction of their preferences.

In the USA, the conflict surrounding stem cell research is structured along the fault lines of the abortion debate, with pro-choice and pro-life groups taking sides for respectively against embryo-related research. Furthermore, patient groups and research interests have mobilized in order to support ESCR, in light of its potential future benefits in curing various degenerative and other diseases, such as for example Parkinson’s disease. In Canada and Switzerland, ESCR has

not become an issue litigated in court. Explaining the absence of litigation is a different challenge than the one we have undertaken here, and would involve a distinctive theoretical approach, namely a turn to theories of legal mobilisation and legal opportunity structures. Nevertheless, we can point to two factors that might explain the differences between the three countries. First of all, federal legislation successfully addressed the regulation of embryo and ESCR in Switzerland and Canada, and hence responded to a number of concerns brought forward by pro-life advocates and religious groups. Second, this type of research has not been hampered by federal legislation in Canada, and therefore medical and patient interests had limited reason to litigate. In Switzerland, the limited power of judicial review renders litigation unattractive, and medical and research interests are instead engaged in the legislative arena, where they have successfully influenced the development of research policies towards a less restrictive stance.

The unsuccessful struggle for coverage

We find comparable actor mobilization and similar networks involved in resolving the same type of contentious policy issues across the three countries. Despite the differences in the organization of the health care systems, financing health care is a crucial political issue in all three countries. This explains why all governments have been reluctant to either provide or mandate for coverage. At the same time, the costs for assisted reproduction—in particular if donation of sperm or eggs is needed—can become a heavy financial burden for couples seeking treatment, which motivates them to challenge the lack of coverage. The majority of the court cases having to do with health coverage were brought before the courts by couples that had sought treatment and found coverage refused by their health insurance or the public health plan. In Switzerland and Canada, the attempt to expand coverage through litigation has been unsuccessful and in the USA this type of litigation had no impact on states' mandates for coverage.

In Switzerland, health insurance is compulsory and the federal government decides which treatments are to be covered by the mandatory plans. So far, in vitro fertilization is not part of the list of covered treatments, but this policy has been challenged on several occasions by patients appealing non-coverage decisions by their insurers. The Swiss Federal Tribunal of Insurance had to decide on six cases involving the possible coverage of in vitro fertilization by the mandatory private health insurance. In all of these cases the Court upheld the government's decision not to include IVF in the list of covered treatments. In the case of insurance coverage, litigation did not succeed in inducing any policy change, and in vitro fertilization is still not provided for by the basic health insurance plan.

In Canada, twelve decisions (spread over nine cases) have challenged the resolution of the provincial health plans not to cover fertility treatments. Ontario, Nova Scotia, Alberta, and Quebec all saw cases in front of their provincial and/or administrative courts. In all cases, however, the courts refused the claim of coverage by the provincial health care plan, and thus deferred their decisions to the governmental regulations in force. Only one case^{xviii} was brought by a couple claiming the right to financial support for assisted reproductive care. The couple referred to the right to have a child, and to the medical condition that is infertility. In all other cases, whether couples referred to a discrimination of the formal regulations in place against one of the parties involved in the parental project^{xix} or claimed the benefits of the plan to be extended to their personal situation, they did not have any success in court^{xx}. As was the case in Switzerland, court cases in Canada have so far not initiated any policy change in terms of more coverage. Quebec's decision to cover IVF resulted from political and not legal mobilization.

As is the case in Canada and Switzerland, in the USA an important number of cases address the issue of coverage for in vitro fertilization and related techniques. The cases mainly challenge the decisions of private insurers not to pay for in vitro fertilization and related treatments in states that do not require insurers to offer coverage for such treatment. In the USA, courts contributed to enforcing coverage by private insurers to the extent that the insurance contract covered such treatments, but there is no evidence that this type of litigation impacted state mandates to cover ART treatment. In the case of New York, the court proposed changes to the existing mandate in order to cover treatment, and these changes were implemented in 2002. In Illinois, the court decision also preceded the adoption of a mandate to cover treatments, but we could not find any direct effects. These findings confirm the results of existing research, which

indicate that courts are not the engines of change for adopting mandates of coverage (Barnett 2003).

Conclusions

First of all, the comparative analysis points to the importance of temporal patterns in policy-making. Clearly, early legislation and policies are more likely to be challenged in court because these are adopted at a point in time when scientific knowledge and know-how are less advanced and public debates still in their initial state. While there has been continuous involvement of the courts in settling parentage issues in Canada and the USA, the courts have been solicited only occasionally for other issues. In addition, even though decisions of the highest courts shaped policy-making in Canada and Switzerland, courts have not become the central arena for settling conflicts around governing assisted reproduction and stem-cell research. The same is valid for the USA. Overall, we are confronted with a double-sided phenomenon: while policy-change has mainly been driven through legislative and executive decisions in all three countries, courts are actively shaping parentage policies and therefore are key actors in solving policy issues raised by assisted reproductive technologies in the USA and Canada.

The theoretical chapter proposed that we would expect the strongest judicialisation, in terms of the impact of judicial policy-making on formulating and implementing public policies, in the USA, followed by Canada. We also proposed that we would see the least judicialisation in Switzerland. These propositions hold true for the important role of courts regarding parenthood and parentage. The results highlight some structural and national features that play an important role in understanding the litigation patterns across the three countries in correspondence with the national pattern approach. Fragmented government and a reproductive “economy” that is less regulated (Kagan 2001; Kelemen 2011) from both a formal and self-regulatory point of view—and where service providers are mainly private and not public—explain why litigation and courts are the principal means to solve policy issues regarding parentage and parenthood in the USA but not in Switzerland and to a lesser degree in Canada. Furthermore, we can observe a spill-over effect from pro-creative tourism. This is evident to a certain extent in Canada, but only for a single case in Switzerland. In short, regarding our second hypothesis that national policies are being challenged through a reproductive market that has become global, our findings are more conclusive for Canada than they are for Switzerland.

In terms of challenging policies on embryo and ESCR, our third hypothesis postulated that medical and research interests seek equally favorable conditions across countries. Indeed medical interests have been involved in court cases in all three countries. They concerned different issues, however, and the overall impact on federal policies varied considerably across the three cases. If we look at the impact of court decisions on the overall policy development, we arrive at the conclusion that the national pattern approach is not very helpful for explaining the variation. In Switzerland, two restrictive cantonal laws on assisted reproduction have been struck down as unconstitutional by the Swiss Federal Supreme Court. The striking down of restrictive cantonal laws had a lasting impact on the formulation of federal policies, as argued above. In Canada, courts have played a role in developing informal and formal policies. For formal policies, however, this has only been the case to a modest degree and by clarifying the provincial prerogatives in regulating assisted reproduction. In the case of the USA, court decisions have not had any direct impact on federal policies. This finding contradicts our initially formulated expectation based on the national pattern approach, and highlights the limited explanatory power of a general classifications of countries. At the same time, global competition in research or the emergence of global procreative markets have not led to converging patterns or a similar importance of the courts, with the exception of parentage and parenthood issues in the USA and Canada.

Notes

- ⁱ Federal Constitution, Art 119; Federal Law on Assisted Reproduction, FmedG: SR: 814.90; Federal Law on Stem Cell Research, StFG, SR 810.31.
- ⁱⁱ Indiana, Kentucky, Louisiana, Michigan, New York, Nebraska, Washington.
- ⁱⁱⁱ Decisions of administrative courts are not digitalized and are therefore not included in our analysis.
- ^{iv} Search queries: Cell+modification, clonage, cloning, genetically, genetically engineered, in vitro, in vitro fertilization, IVF, procréation assistée, procréation médicalement assistée, stem cell, regenerative medicine.
- ^v It should be noted that we have excluded cases of medical malpractice and wrongful birth from the comparison.
- ^{vi} The cases concerning IVF raised the question of whether cantons had the power to impose criminal sanctions, a prerogative of the federal level.
- ^{vii} Sections 10, 11, 13, 14–18, 40(2), (3), (3.1), (4), and (5), and sections 44(2) and (3) were struck down. Sections 8, 9, 12, 19, and 60 were upheld. Sections 40(1), (6), and (7), 41–3, 44(1) and (4), 45–53, 61, and 68 were upheld to the extent they related to constitutionally valid provisions.
- ^{viii} Since the Supreme Court's decision, only Quebec has passed legislation regarding assisted reproduction and its multiple issues.
- ^{ix} BGE 115 Ia 234.
- ^x BGE 119 Ia 460.
- ^{xi} *Margaret S. v. Edwards* 794 F.2d 994 U.S. App. LEXIS 27365 Nos. 81-3750, 84-3520 (1986).
- ^{xii} *Lifchez v. Hartigan* 556 F. Supp. 157 U.S. Dist. LEXIS 19483 (1983).
- ^{xiii} Changes for § 40:1299.35.14 and § 1299.35.13 all predate by large the decision of 1986 (1980 and 1981). For Illinois Abortion Law : Ill.Rev.Stat., Ch. 38 para. 81-26, § 6(7) (1989), the change in 2005 is not related to the case.
- ^{xiv} *Shereley v. Sebelius*, 686 F. Supp. 2d 1(D.D.C).
- ^{xv} *Nightlight Christian Adoptions et al. v. Thompson* Civ. No. 1:01CV00502 (D.D.C. March 8, 2001).
- ^{xvi} *People's Advocate v. Independent Citizens' Oversight Committee, Superior Court of California for Alameda County*, HG05-206766, and *California Family Bioethics Council v. California Institute for Regenerative Medicine*, HG05-235177. (most recent decision), in May 2007, the California Supreme Court declined to hear an appeal challenging the constitutionality of the Institute.
- ^{xvii} *Thomson v. Thompson* 344 F. Supp. 1378 U.S. Dist. LEXIS 13097 No. 5651 (1972).
- ^{xviii} *Cameron v. Nova Scotia* (1999), 177 D.L.R. (4th) 611 (N.S.C.A.).
- ^{xix} *D.R. and L.R., B.C. and L.A.C., B.L. and R.F., L.E. and M.E., J.H. and K.H. v. Ontario* 1998. Ontario Health Services Appeal Board; *Terry Buffet v. Canadian Armed Forces*, 2005 TCDP 16; *City of Toronto v. Toronto Professional Fire Fighter's Association* 2009; *Ilha v. Ontario* 2011 HRTO 814.
- ^{xx} *Zieber v. La Reine* 2008 CCI 328 ; *JD v. Quebec (Regie de l'Assurance Maladie)* 2014 QCTAQ 06502.

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Table 1: Number of decisions by policy issue

	Health coverage	IVF and related techniques	Regulation and licensing	Stem cell and embryo research	Parentage and parenthood	Total # of cases included
USA	20	11	1	9	75	116
CANADA	15	11	2	0	61	89
SWITZERLAND	9	0	1	0	1	10

TABLE 2: Comparing litigation and court impact for assisted reproductive technologies in the United-States, Canada, and Switzerland.

	Health coverage	IVF and related techniques	Regulation and licensing	Stem cell and embryo research	Parentage and parenthood
USA	<u>Patients</u>	---	Patients	<u>Pro-life, pro-choice, research and medical interests</u>	<u>Patients, couples, children</u>
CANADA	<u>Patients</u>	---	Provinces	---	<u>Patients, couples</u>
SWITZERLAND	<u>Patients</u>	<u>Physicians, patients</u>	Clinic	---	Patient
SIMILARITIES?	YES	NO	NO	NO	YES FOR USA AND CANADA

Actor = underlined indicates repeated litigation

Actor = bold indicates that litigation had an important impact on policies and policy implementation

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1. B.A.N. v. J.H. 2008 BCSC 808
2. Ontario Birth Registration number 88-05-045846 (Re) [1990] O.J. No. 608
3. M.D. v. L.L. 2008 O.J. No. 907
4. McLeod v. British Columbia Medical Assn. 2004 BCHRT 240
5. J.R. v. L.H. 2002 O.T.C. 764
6. K.G.T. v. P.D. 2005 BCSC 1659
7. Adoption – 09367 2009 QCCQ 16815
8. L.K. v. C.L. 2005 O.T.C. 489
9. L.K. v. C.L [2008] O.J. No. 2882
10. L.O. v. S.J. 2006 QCCS 302
11. Adoption – 09185 2009 QCCQ 8703
12. Adoption – 09184 2009 QCCQ 9058
13. Adoption – 09367 2009 QCCQ 16815
14. Adoption – 07219 2007 QCCQ 21504
15. Zegota v. Zegota-Rzegocinski [1995] O.J. No. 204
16. Johnson-Steeves v. Lee [1997] A.J. No. 512
17. Johnson-Steeves v. Lee [1997] A.J. No. 1057
18. Droit de la famille – 07528 2007 QCCA 361
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20. L.B v. Li.Ba. 2006 QCCS 591
 21. Droit de la famille – 092038 2009 QCCS 3822
 22. J.B. v. D.J. [2004] J.Q. no. 7455
 23. S.G. v. L.C. [2004] Q.J. No. 6915
 24. Droit de la famille – 10190 2010 QCCS 348
 25. K.S. v. S.G. [2004] J.Q. no 7061
 26. Li.B. v. L.Ba. [2003] J.Q. no 9254
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 28. Keeping v. Pacey [1996] O.J. No. 2274
 29. Keeping Pacey 1995 Canlii 9276 (ON C.J.)
 30. G.L. (Re) 2002 Canlii 35969 (QCCQ)
 31. G.S. (Re) 2002 Canlii 40402 (QCCQ)
 32. F.P. v. P.C. 2005 QCCS
 33. Adoption – 10330 2010 QCCQ 17819
 34. Adoption – 10329 2010 QCCQ 18645
 35. D.W.H. v. D.J.R. 2011 ABQB 119
 36. D.W.H. v. D.J.R. 2011 ABQB 608
 37. D.W.H. v D.J.R., 2013 ABCA 240
 38. D.W.H. v. D.J.R., 2011 ABQB 791
 39. Low v. Low 114 DLR (4th) 709
 40. Adoption – 1445 2014 QCCQ 1162
 41. Doe v. Alberta 2005 ABQB 885
 42. Jane Doe v. Alberta 2007 ABCA 50
 43. G.E.S. v. D.L.C. 2006 S.J. No. 419
 44. G.E.S. v. D.L.C. 2005 S.J. No. 354
 45. G.E.S. v. D.L.C. 2004 S.J. No. 277
 46. L.C. v. S.G. [2004] J.Q. no 7060
 47. P.C. v. S.L. 2005 SKQB 502
 48. M.A.C. v. M.K. 2009 ONCJ 18
 49. W.W. v. X.X. and Y.Y., 2013 ONSC 879
 50. W.W. v. X.X. and Y.Y., 2013 ONSC 1509
 51. J.C.M. v. A.N.A., 2012 BCSC 584
 52. K.G.D. v. C.A.P. 2004 O.J. No. 3508 (Sup Ct. J.)
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 55. Adoption – 091 2009 QCCQ 628
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 60. A.A. v. B.B. [2003] O.J. No. 1215
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 83. Zieber v. The Queen 2008 TCC 328
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4. BGE 119 V 21
5. BGE 125 V 21
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8. BGE 2P.138/1992 (non publié)
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2. A.H.W. v. G.H.B. 339 N.J. Super. 495; 772 A.2d 948; 2000 N.J. Super. LEXIS485
3. A.Z. v. B.Z., 725 N.E.2d 1051, 105354 (Mass. 2000)
4. Adoption of Ian O.(Kate F. v. Michelle B.) 2004 Cal. App. Unpub. LEXIS 11727
5. Adoption of Matthew B.(Nancy B. v. Charlotte M.) 232 Cal. App. 3d 1239; 284 Cal. Rptr. 18; 1991 Cal. App. LEXIS 871; 91
6. Alexander v. Am. Airlines, Inc. 2002 U.S. Dist. LEXIS 7089 NO. 4:02-CV-0252-A
7. American Ass'n of Bioanalysts v. Shalala 2000 U.S. Dist. LEXIS 2603
8. Anna J. v. Mark C. 12 Cal. App. 4th 977; 286 Cal. Rptr. 369; 1991 Cal. App. LEXIS 1162
9. Ashby v. Vencor Inc. 2000 U.S. App. LEXIS 21968 No. 99-55045
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11. BERNARD SHERWYN et al. v. DEPARTMENT OF SOCIAL SERVICES et al. 173 Cal. App. 3d 52; 218 Cal. Rptr. 778; 1985 Cal. App. LEXIS 2606
12. California Family Bioethics Council v. California Institute for Regenerative Medicine 147 Cal. App. 4th 1319 (2007)
13. Chaffin v. Frye, 119 Cal. Rptr. 22, 23 (Ct. App. 1975)
14. Christian nightlight adoptions v. Thompson

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15. Culliton, et al. v. Beth Israel Deaconess, et al. 435 Mass. 285 (2001)
 16. Davis v. Davis 1989 Tenn. App. LEXIS 641 No. E-14496
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 31. Ferguson v. McKiernan, 940 A. 2d 1236 - 2007
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 34. Florida Health Science Center v. Rock 2006 U.S. Dist. LEXIS 80512; 39 Employee Benefits Cas. (BNA)2572; 20 Fla. L. Weekly Fed. D 303
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 53. In the Interest of: R.C. 775 P.2d 27; 1989 Colo. LEXIS 210; 13 BTR 709
 54. IN THE MATTER OF BABY M 109 N.J. 396; 537 A.2d 1227; 1988 N.J. LEXIS 1; 77 A.L.R.4th 1
 55. IN THE MATTER OF BABY M 225 N.J. Super. 267; 542 A.2d 52; 1988 N.J. Super. LEXIS 194
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