Abstract

This article investigates the extent to which the South African Legislature and the international community recognise the right to identity of a child born through embryo donation. A distinction is drawn between embryo donation, gamete donation and surrogacy. Thereafter, the article discusses the multiple aspects which the right to identity comprises, namely: personal, biological, family and siblingship identity. An assessment is made of how these various aspects are impacted by national and cross-border embryo donation arrangements. The Children's Act 38 of 2005, the Constitution of the Republic of South Africa, 1996, the National Health Act 61 of 2003 and the Regulations Relating to Artificial Fertilisation of Persons, in addition to the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC) are critically examined to the extent that may be applicable to children born through embryo donation. The article concludes that neither the South African legislative framework, nor the CRC or the ACRWC explicitly upholds the child's right to identity.

Keywords

Assisted reproductive technologies; disclosure; donor-conceived child; embryo donation; gamete donor.
1 Introduction and background

Since the latter part of the 20th century, the development of assisted reproductive technologies (ART) has dramatically changed the structure of the nuclear family unit. As a child can now be conceived through non-coital technologies, ART has given rise to new paradigms of parenthood to include a diversity of family forms which no longer rest on mere biological claims. One such family form is created by means of embryo donation.

Embryo donation refers to “the transfer of an embryo resulting from gametes that did not originate from the recipient and her partner”. In other words, the embryo is transferred into the recipient’s uterus, from which a child could be born from a successful pregnancy. This method of ART provides an alternative for couples where neither the female nor male partner has viable gametes or where one or both partners carry a hereditary disease. Moreover, as the recipient mother is also the gestational carrier, this allows her to form a bond with the child throughout the pregnancy, experience childbirth and have the recipient father present throughout the process. This makes the recipient couple feel more connected to the child born through embryo donation. However, the fact remains that this child will not share any biological link, save for a gestational link, with the woman who carried him or her or with her partner. Additionally, this allows the recipient parents to decide whether or not to disclose this non-genetic relationship to the child. This underscores the reality that despite embryo donation providing relief for infertile couples who have no other option, it is laden with challenges, one of which is that the child born will be reared by two parents with whom they have no genetic link. From a legal perspective a

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1 ART is defined as “all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos for the purpose of initiating a pregnancy”. See Zegers-Hochschild et al 2009 Fertility and Sterility 1521.
2 Golombok and Tasker “Socioemotional Development in Changing Families” 1.
4 Richardson 2015 York Online Undergraduate Research Review 83.
5 Zegers-Hochschild et al 2009 Fertility and Sterility 1522.
6 Walters Embryo Adoption 3.
7 Wanggren, Prag and Skoog Svanberg 2013 Upsala Journal of Medical Sciences 187.
10 Walters Embryo Adoption 3.
12 Widdows and MacCallum 2002 J Med Ethics 140.
number of countries treat embryo donation as gamete donation due to the gestational link, which means that from the point of birth the recipient couple are the sole legal parents. Furthermore, because the ability to access information regarding one’s genetic origins is dependent on one’s awareness of the nature of one’s conception, a child born through embryo donation may never know such details because the decision to disclose the circumstances of the child’s conception is the autonomous decision of the parents.

To date, the sole consideration surrounding embryo donation has been about what the donating couple and receiving couple desire, not what the resulting child’s rights or needs are. The rights of all three parties have not been given sufficient attention in embryo donation, which results in this practice being a legal and ethical grey area. Therefore, for the purpose of this paper, we will focus on the interests of children born through embryo donation, specifically their right to know their biological origins.

This research will unpack and analyse the various components of what the concept of the right to identity encompasses. It will argue that both national and international law do not consider the unintended consequences that life through embryo donation brings. Furthermore, it will argue that it is in the best interests of the child that they are provided with the genetic and identifying information revealing their genetic origins at some point in their life. Moreover, how this right is impacted by the process of embryo donation needs to be examined. But first it is necessary to distinguish embryo donation from surrogacy and gamete donation.

2 Surrogacy and gamete donation versus embryo donation

A distinction can be drawn between surrogacy and embryo donation. Under South African law, surrogacy is regulated by Chapter 19 of the Children’s Act and requires a lawyer to draw up a contract which must be confirmed by the High Court before the surrogacy procedure can commence. However, there are no legislative provisions to govern embryo donation or regulate parental rights over the child who might result. In the case of surrogacy a genetic link is required between at least one of the commissioning parents and the child born, whereas with embryo donation

16 Widdows and MacCallum 2002 J Med Ethics 140.
18 Walters Embryo Adoption 8.
20 AB v Minister of Social Development 2017 3 SA 570 (CC) (hereafter the AB case). para 294.
the child is not genetically linked to either recipient, but has a gestational link with the recipient mother who is able to take prenatal care without relying on a birth mother. The laws of parentage are clearly set out for all parties to the surrogate motherhood agreement,21 but no similar provision is made for parties to an embryo donation contract. In the case of surrogacy the surrogate mother must be properly counselled,22 whereas counselling is not mandatory for the parties to an embryo donation contract. It is particularly worrying that the donor and recipient couples are not compelled to be counselled by medical health professionals with regard to the complexity of such a decision, and effectively this ignores the interests of the child to be born.23

At the same time, embryo donation is also different from gamete donation, where the resulting child has a genetic link to one of the recipients. In the case of egg donation the child born is genetically related to the father but not to the mother24 and in sperm donation, the child born is genetically related to the mother but not to the father who will raise them.25

3 Definition and scope of the concept of identity

The right to know one’s identity is not a novel concept.26 The right to identity is expressly and implicitly mentioned in several international instruments and imposes both positive and negative obligations on States. Nonetheless, the exact content behind these provisions lacks a clear and complete definition.27

The right to identity was first recognised under Article 7 and Article 8 of the Convention on the Rights of the Child (CRC).28 The child’s right to identity is explicitly protected in Article 8(1), which provides that:

States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.29

22 The complexities of creating a child through embryo donation include whether the child would have genetic siblings elsewhere; the long-term impact on both families; feelings of grief and loss; and the challenge of receiving medical information about the donor couple and/or another donor sibling. See Ethics Committee 2021 Fertility and Sterility 1402-1403.
23 Imrie et al 2019 Child Development 1333.
27 Besson 2007 IJLPF 143.
28 Article 8(1) of the UN Convention on the Rights of the Child (1989) (hereafter the CRC).
Article 8 originated in response to the abduction of children under Argentina’s military regime.\textsuperscript{30} The original proposal was: the child’s right to retain a "true and genuine personal, legal, and family identity".\textsuperscript{31} However, this wording was rejected by many countries\textsuperscript{32} as there was concern\textsuperscript{33} that this provision would obstruct closed adoptions and anonymous gamete donor practices.\textsuperscript{34} The drafting history of Article 8 suggests that the CRC drafting committee did not have a thorough understanding and comprehensive definition of identity or identity rights.\textsuperscript{35} But what stands out from the original proposal is that the concept of identity centred on two principles: "true and genuine", in other words, authenticity and "personal, legal, and family" identity – thereby indicating the multi-dimensionality of identity.\textsuperscript{36}

The child’s right to protection of their legal and national identities is provided for under Article 7 of the CRC\textsuperscript{37} and Article 24(2)-(3) of the \textit{International Covenant on Civil and Political Rights} (ICCPR),\textsuperscript{38} which refer to the right to birth registration and the right to acquire nationality.\textsuperscript{39}

\textsuperscript{30} Clark 2012 \textit{Ga J Int’l & Comp L} 626.

\textsuperscript{31} The original proposal was: "The child has the inalienable right to retain his true and genuine personal, legal and family identity. In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood relations to be brought up." Stewart 1992 \textit{Fam L Q} 223.

\textsuperscript{32} Some of these countries include the United Kingdom, the Czech Republic, Luxembourg and Poland. See O’Donovan 2002 \textit{Law and Society Review} 352.

\textsuperscript{33} “Some countries expressed concerns that the right might conflict with developing medical technology regarding artificial insemination and IVF." See Stewart 1992 \textit{Fam L Q} 223.

\textsuperscript{34} SALRC \textit{Issue Paper 32 (Project 140)} para 1.40.


\textsuperscript{37} Article 7(1) of the CRC: "(1) The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. (2) States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

\textsuperscript{38} Article 24(2) of the \textit{International Covenant on Civil and Political Rights} (1966) (hereafter the ICCPR): "Every child shall be registered immediately after birth and shall have a name"; Art 3 of the ICCPR: "Every child has the right to acquire a nationality".

\textsuperscript{39} The Human Rights Committee in its General Comment No 17 on Article 24 of the ICCPR opined that: "this provision … is designed to promote recognition of the child’s legal personality." One of the main reasons behind the importance of birth registration is to decrease the danger of treatment that is irreconcilable with the enjoyment of other rights provided for in the Covenant. See UN Human Rights Committee \textit{CCPR General Comment No 17 on Article 24 (Rights of the Child)} (1989) para 7.
The child's right to biological and familial identities\textsuperscript{40} is also provided for in Article 7 of the CRC to the extent that it stipulates that the child has the "right to know and be cared for by his parents".\textsuperscript{41} While it is assumed that biological and familial parents are referred to, it would then appear to omit or overlook, for example, recipient parents versus donor parents in cases of embryo donation.\textsuperscript{42} Further confusion arises due to the fact that the child's rights to a nationality, name, and family relations are already protected under Article 7 – all of which are mentioned in Article 8. Hence it can be assumed that the latter provision must protect an independent right.\textsuperscript{43}

In short, the provisions of the CRC relating specifically to the child's right to identity raise a number of issues with regard to other human rights, compatibility with ART practices,\textsuperscript{44} and the nature of the obligations imposed on States Parties.\textsuperscript{45} Clearly, one cannot fully understand what the right to identity entails by referring solely to these provisions.\textsuperscript{46}

Identity is characterised as a "subjective sense of an invigorating sameness and continuity".\textsuperscript{47} This sense begins in childhood and stems from a developmental psychosocial process.\textsuperscript{48} Hence, there are several types of identity which tend to develop from birth: personal or individual identity,\textsuperscript{49} family identity,\textsuperscript{50} genetic identity\textsuperscript{51} or biological identity,\textsuperscript{52} gender identity,\textsuperscript{53} ethnic identity,\textsuperscript{54} social identity, cultural identity,\textsuperscript{55} racial identity\textsuperscript{56} and national identity.\textsuperscript{57} In relation to a child born through embryo donation, the child may possibly have difficulty in forming their identity in one or more of these areas. This is due to the practice of anonymity, non-disclosure and

\textsuperscript{40} Stewart 1992 Fam L Q 226.
\textsuperscript{41} Article 7(1) of the CRC.
\textsuperscript{42} Stewart 1992 Fam L Q 224. For the purposes of this article the term "donating couple" refers to the biological parents and the term "recipient couple" refers to the social parents.
\textsuperscript{44} Zegers-Hochschild \textit{et al} 2009 Fertility and Sterility 1520-1521.
\textsuperscript{45} Stewart 1992 Fam L Q 223.
\textsuperscript{46} Ronen 2004 IJLPF 160.
\textsuperscript{47} Schachter 2002 \textit{Human Development} 417.
\textsuperscript{48} Schachter 2002 \textit{Human Development} 417.
\textsuperscript{49} Haydon \textit{Identity Development} 48.
\textsuperscript{50} Haydon \textit{Identity Development} 11.
\textsuperscript{51} Ludlow 2020 \textit{Journal of Law and the Biosciences} 1.
\textsuperscript{52} Clark "Ethical Implications of Embryo Adoption" 220.
\textsuperscript{53} Sandberg 2016 \textit{Nordic Journal of Human Rights} 343.
\textsuperscript{54} Tasker \textit{et al} 2018 \textit{Genealogy} 16.
\textsuperscript{55} Kidd \textit{Culture and Identity} 2.
\textsuperscript{57} Page \textit{Artificial Womb Technology} 5.
secrecy. Additionally, the child may also not have access to identifiable medical information surrounding the circumstances of their birth.

4 Identity in the context of embryo donation

4.1 The child’s right to personal identity

Personal identity, also referred to as self or individual identity, pertains to a child’s subjective feelings about their distinctiveness from others. At some point, whether consciously or unconsciously, a child will ask themselves: "Who am I? What makes me special? Why am I here?" These questions are at the core of a child's self-identity formation. A child's perception of their self is critical for their overall psychological well-being since it allows them to take control of their lives and manage their experiences.

A child's right to personal identity is based on two elements: first, that "genealogical knowledge is central to the development of personal identity" and second, having "access to identifying information about their biological parents". Donor-conceived children have often described themselves as having "a hole that can never be filled [because] part of [me] is missing" or feeling "like there is something that I should know about myself that I don’t". These thoughts and emotions about missing information appear to be linked to a general theme of "loss". Although this sense of "longing to know" or feelings of "missing a piece of one’s identity" may lead to detrimental consequences, it is important to note that this is not definitive for all children born through embryo donation.

Studies conducted on adopted children indicate that they show a strong interest in seeking to discover their personal identities. Similar interests

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58 Widdows and MacCallum 2002 J Med Ethics 140.
59 Rispel Scope and Content of the Child’s Right to Identity 31.
60 A child’s earliest years form the foundation of their personal identity. Raburu 2015 Journal of Educational and Social Research 95. It refers to "self-categories which define the individual as a unique person in terms of their individual differences from other persons". See Turner et al "Personal and Social Identity" 3.
62 It is the way in which children view themselves or wonder what their role in this world is. Ravitsky 2010 Minnesota Journal of Law, Science and Technology 675.
63 Raburu 2015 Journal of Educational and Social Research 95.
64 Turkmen 2012 Journal of Law and Society 70.
65 Turkmen 2012 Journal of Law and Society 70.
69 Adoptive children may ask themselves questions similar to those asked by children born through embryo donation, such as "Where did I come from? Did I grow in [your] tummy? How could [my biological parents] give me away?" By adolescence, questions of personal identity intensify: "Why was I relinquished? Why did it happen to me?" See Billadeau 2014 https://adoption.com/personal-identity-issues-in-adoption.
have been shown in children who are raised by single parents. For example, in the case of Mikulic v Croatia, a child born to unmarried parents claimed that the delays in the determination of a paternity suit had left her in a "state of prolonged uncertainty as to her personal identity". However, one cannot necessarily assume that all children born through embryo donation may display this same strong curiosity. Although adoptees and children born through embryo donation do not share a genetic link to their parents, the circumstances surrounding the latter group differ significantly. And as stated previously, it is different from egg or sperm donation as in those cases, the child retains a genetic link to at least one recipient parent.

Nevertheless, it cannot be assumed that the thoughts and feelings of children born through embryo donation are one-sided. Where such children feel as though their identities are incomplete, it can hardly be in their best interests to withhold information about their origins which would provide them with a more positive sense of identity by helping them to understand their history and where they come from. The importance of forming and understanding one's identity during childhood should not be undermined; in fact, personal identity formation begins in childhood and is particularly vigorous during adolescence. Children are able to conceptualise the meaning and significance of the role of embryo donation in their conception differently at different developmental stages. Hence, identity formation is a continuous process built over time. Thus, the foundational building of a child's identity formation occurs during her/his childhood.

When information about children's origins is withheld, they may be able to pick up "hidden clues" that "things [are] not quite right". This has the potential to seriously affect the child's ability to construct her/his personal identity. Therefore, the hindrance of access to identifying and non-

72 Harrigan et al 2015 Journal of Family Communication 84.
74 Adoptees may have often been exposed to negative experiences, such as institutionalisation and maltreatment. Additionally, children born through embryo donation are carried and birthed by their recipient mothers. See Armuand et al 2019 BMC Pediatrics 7.
75 Samani 2009 Reproductive BioMedicine Online 30.
76 Ravitsky 2010 Minnesota Journal of Law, Science and Technology 675. Also see Frith, Blyth and Lui 2017 Human Reproduction 1095.
77 Sokol 2009 Graduate Journal of Counselling Psychology 1.
78 Dinsmore date unknown https://pved.org/buildingfamily.php.
79 Sokol 2009 Graduate Journal of Counselling Psychology 7.
80 Sokol 2009 Graduate Journal of Counselling Psychology 7.
83 Withholding information about the child's manner of connection affects not only her/his individual identity but also her/his family and parental dynamics. One child
identifying information on the donor couple deprives the child born via embryo donation of a major aspect of her/his individual autonomy: the opportunity to decide what meaning to assign to her/his personal identity.\textsuperscript{84}

### 4.2 The child's right to biological identity

The child's biological identity refers to the identity of the genetic parents who contributed their gametes – the egg and sperm – to form the embryo from which the child was born.\textsuperscript{85} Biological identity is a consequence of one's DNA – one's genes. It demonstrates the child's biological relatedness to another.\textsuperscript{86} Thus, children's right to know their biological lineage would enable them to receive identifying information concerning the donating couples and hence, the circumstances surrounding their conception.\textsuperscript{87}

Conceiving through the use of donated embryos may be as close to an approximation of genetic parenthood as possible as the recipient mother carries and gives birth to the child and the father is present throughout the pregnancy.\textsuperscript{88} Nonetheless, for children who view genetic relatedness as a matter of great importance, this does not constitute an equivalent alternative.\textsuperscript{89} For some children, a genetic link to their biological parents/donating couple is as fundamental (if not more so) as their nurturement by their social parents.\textsuperscript{90} Biological identity should therefore not be overlooked.\textsuperscript{91}

The significance of this aspect of identity was confirmed in \textit{Rose v Secretary of State for Health},\textsuperscript{92} where an adult woman who had been conceived through ART launched an application to discover information about her biological father.\textsuperscript{93} The applicant described the importance of this information to her as follows:

\begin{quote}
said "I felt a considerable amount of regret about how utterly senseless it had been for my parents to keep this information from me for so long." See Turner and Coyle 2000 \textit{Human Reproduction} 2048.
\end{quote}

\textsuperscript{84} Amorós 2015 \textit{Catalan Social Sciences Review} 8-9.

\textsuperscript{85} This should not be confused with the birth mother. O'Brien 2004 https://www.irishtimes.com/opinion-major-problems-involved-in-embryo-donation-1.1138217.

\textsuperscript{86} Moffat "Biological Identity" 61.

\textsuperscript{87} Frith 2001 \textit{Human Reproduction} 821.

\textsuperscript{88} Widdows and MacCallum 2002 \textit{J Med Ethics} 141.

\textsuperscript{89} Turkmenoglu 2012 \textit{Journal of Law and Society} 59.

\textsuperscript{90} Turkmenoglu 2012 \textit{Journal of Law and Society} 59.

\textsuperscript{91} Cherry 2022 https://www.verywellmind.com/what-is-nature-versus-nurture-2795392. "[K]nowledge about genetic links is that it is not mere \textit{information} but it is powerful knowledge that changes relationships regardless of the wishes of those involved." See Turkmenoglu 2012 \textit{Journal of Law and Society} 73.

\textsuperscript{92} \textit{Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority} (2002) 2 Family Law Reports 962 (hereafter the \textit{Rose} case).

\textsuperscript{93} The case concerned the rights of children born through artificial insemination by a donor. See \textit{Rose} case para 1.
I feel that these genetic connections are very important to me, socially, emotionally, medically, and even spiritually. I believe it to be no exaggeration that non-identifying information will assist me in forming a fuller sense of self or identity and answer questions that I have been asking for a long time. I am angry that it has been assumed that this would not be the case...it is believed that if we are created artificially we will not have the natural need to know to whom we are related.94

The European Court of Human Rights found in her favour and interpreted Article 8 of the European Convention on Human Rights (ECHR), which provides for a right to respect for private and family life, to incorporate the concept of personal identity, including the right to obtain information about a biological parent.95 Furthermore, the court emphasised that personal identity is crucial and is connected to one’s genetic origins.96 Such information would help her to understand her childhood better and thus complete her personal identity.97

4.3 The child’s right to family identity

Family is the foundation for identity construction. It shapes who one is, provides a sense of belonging and defines who one is through one’s relationships with one’s family members.98 The processes and development of the individual identity are largely influenced by the distinctive relationships and perceptions built within the family unit.99 There are two aspects which are related to the development of one’s individual identity: first, belonging to a specific family and second, the particular identity role played within different family relations, in this case, the parent-child relationship.100 The first concept deals with the individual's perception and sense of identity within the particular family group.101 The second concept is centred on the complex web of relationships and the way in which family members communicate. Being a child is not independent of being a mother, a father, a parent or sibling.102 Thus, children's family identities are formed through

94 She also expressed the thought of unknowingly passing her genetic siblings in the street. See Rose case para 7.
95 See Rose case para 48.
96 See Rose case para 37.
97 See Rose case para 31.
98 Family identity is largely characterised by "the macro processes that define and distinguish one family from another. Thus, family identity is foundational to the ways in which individuals develop their frameworks for family and choose to continue - or not to continue - those relationships throughout their lives." See Phillips Communication and Family Identity 3.
99 Scabini and Manzi "Family Processes and Identity" 569.
100 Scabini and Manzi "Family Processes and Identity" 575.
101 Scabini and Manzi "Family Processes and Identity" 575.
102 Kreppner 2000 Psicologia 11.
their parental and intergenerational "filial" relationships, in addition to knowledge of their family heritage.  

The family is the most fundamental unit of society and has widespread support in international law. The recognition of the child's right to be cared for by his or her family has typically been directed toward the aim of protecting the child. International instruments have directly addressed situations where children are illegally separated from their parents. However, when a couple relinquishes their rights to an embryo, the resulting child's right to "genuine" or "true" identity is not explicitly recognised. In other words, once a child is born to the recipient parents, the grown child might without directly challenging this relationship claim a right to know the facts of her/his true identity. For non-embryo donated children, the incorporation of their knowledge about their past and family forms part of the process of establishing a coherent sense of family identity.

A child's family identity should thus be thought of in a dynamic way. While the child may maintain a biological connection with and a bond in the womb with her/his recipient mother, one's familial identity extends beyond one's social parents. As much as many recipient parents may not want to be reminded of the lack of genetic relationship between themselves and the child, there will always remain the possibility that the lack of genetic ties may interfere with the parent-child relationship and ultimately the child's perception of family identity. As embryo donation is not regulated by contract in the same way as surrogacy, the child's right to a family identity is essentially left in limbo. Therefore, children born through embryo donation stand to lose the thread of family relationships which form part of their family identities.

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103 The term filial "involves both the relationship between offspring and each individual parent and the relationship between maternal and paternal lineages". Scabini and Manzi “Family Processes and Identity” 575-576.

104 For example, the CRC, African Charter on the Rights and Welfare of the Child (1990) (the ACRWC) and the European Convention for the Protection of Fundamental Rights and Freedoms (1950) (the ECHR).

105 Stewart 1992 Fam L Q 226.

106 Stewart 1992 Fam L Q 226.

107 Stewart 1992 Fam L Q 226.


111 Each family holds a variety of identities: a collective family identity, a parent-child or sibling identity, relational identities, and individual family members’ identities. See Epp and Price 2008 Journal of Consumer Research 50.


113 Golombok et al 1995 Child Development 286.


framework and South African legislature adequately provide protection for the right to identity of a child born through embryo donation.

4.4 The best interests of the child principle

The best interests of the child principle is an intrinsic standard associated with child-related matters.\textsuperscript{116} Its origins in international law lie in Principle 2 of the \textit{Universal Declaration of Human Rights} (UDHR)\textsuperscript{117} which states that:

\begin{quote}
the child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.
\end{quote}

The principle was later codified in Article 3 of the CRC, which is to be applied in all decisions made by all organs of states, i.e. the judiciary, executive and legislature. It is important to note that the concept of paramountcy was reduced to that of primary consideration:

\begin{quote}
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
\end{quote}

In comparison, the ACRWC has a somewhat higher standard of "the primary consideration".\textsuperscript{120} Article 4(1) of the ACRWC states that: "In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".\textsuperscript{121}

In South African law the principle was developed through family law and welfare proceedings in the early 1900s before its inclusion as a right in the Bill of Rights (BOR).\textsuperscript{122} Section 28(2) of the Constitution states that: "A child's best interests are of paramount importance in every matter concerning the child." The term paramount is significant as it suggests a higher standard of consideration.\textsuperscript{123}

Whilst the principle calls for special attention when handling matters which affect children, there is no universally accepted definition of the term "the best interests of the child".\textsuperscript{124} As a result, discussion of the principle

\begin{flushleft}
118 Principle 2 of the \textit{Universal Declaration of Human Rights} (1948) (the UDHR).
119 Article 3(1) of the CRC.
120 Skelton 2019 \textit{De Jure} 558.
121 Article 4(1) of the ACRWC.
122 Section 28(2) of the \textit{Constitution of the Republic of South Africa}, 1996 (the Constitution).
123 Skelton 2019 \textit{De Jure} 558.
\end{flushleft}
frequently entails deliberation on issues of ambiguity and the application thereof.\textsuperscript{125}

5 Safeguarding the child's right to identity

5.1 Safeguarding the child's right to identity at the international level

The protection and promotion of children's rights in the field of ART, specifically of children born through embryo donation, has not been the prime focus of the international human rights agenda.\textsuperscript{126} The right to identity is one of the most complex and contentious issues especially in the age of modern ART.\textsuperscript{127}

International law sets out the rights that States who have signed and ratified human rights instruments are obliged to provide and protect.\textsuperscript{128} Nine major international human rights instruments exist.\textsuperscript{129} Among these, the following instruments will be relevant to the discussion of embryo donation: the UDHR, the ECHR, the ICCPR, the CRC and the ACRWC.

As previously mentioned, South Africa is a State Party to both the CRC and the ACRWC.\textsuperscript{130} South Africa signed and ratified the CRC on 16th June 1995 and signed the ACRWC on 10 October 1997, which was later ratified on 7 January 2000.\textsuperscript{131}

5.1.1 The Convention on the Rights of the Child

Articles 7, 8 and 9 of the CRC respectively guarantee "the child's rights to a name, to citizenship, to know their parents and not to be separated from them".\textsuperscript{132}

Article 7 sets out a child's right to nationality, name and family relations:\textsuperscript{133}

\begin{quote}
The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.\textsuperscript{134}
\end{quote}

\textsuperscript{126} The infringed rights of the recipients and their ability to access ART services has been the primary focus. See Rispel *Scope and Content of the Child's Right to Identity* 23; Paulk 2014 *Journal of Gender, Social Policy and the Law* 782. "[E]xcept for the possible impacts of [ARTs] on children's physical health, there has been an almost total failure to take into account other impacts of them on children." See Somerville 2007 *Journal of Family Studies* 183.
\textsuperscript{127} Brezina and Zhao 2011 *Obstetrics and Gynecology International* 1.
\textsuperscript{128} Paulk 2014 *Journal of Gender, Social Policy and the Law* 785.
\textsuperscript{130} SALRC *Issue Paper 32 (Project 140)* paras 1.12-1.13.
\textsuperscript{131} SALRC *Issue Paper 32 (Project 140)* paras 1.12-1.13.
\textsuperscript{132} Ronen 2004 *IJLPF* 159.
\textsuperscript{134} Article 7(1) of the CRC.
While name and nationality are components of the child's identity, these elements involve only a restricted notion of identity.\textsuperscript{135} Hence, we will focus on the latter element of "the right to know and be cared for by his or her parents ... as far as possible".\textsuperscript{136}

First, embryo donation raises several questions with regard to the right to be "cared for" by one's parents, since the person who raises the child is the same one who gave birth to her/him, and although they may not share a genetic link they share a gestational link.\textsuperscript{137} Furthermore, the term "parents" is not defined by the CRC\textsuperscript{138} and thus it could be construed as the right to be cared for by one's biological parents, i.e. the donating couple, or the gestational parents, i.e. the recipient couple.\textsuperscript{139} It is also important to note that the CRC Committee interprets "family" broadly to include "biological, adoptive or foster parents, or members of the extended family or community".\textsuperscript{140} Therefore, it cannot be said that Article 7(1) of the CRC advocates that children born through embryo donation have the right to be cared for by biological or genetic parents in particular.\textsuperscript{141}

Secondly, in respect of the right to "know one's parents" under Article 7(1) of the CRC, embryo donation once more raises questions such as whether children should know about the method of their conception and the identities of their biological parents.\textsuperscript{142} Some guidance may be found in the CRC Committee's consistent criticism of nations that permit anonymous births. In respect of France,\textsuperscript{143} for example, the Committee has urged the State Party

\textsuperscript{135} Children's nationality generally follows from the issuing of their birth certificates. The CRC Committee and Centre for Civil and Political Rights (CCPR) have regularly urged State Parties to take the necessary measures to ensure all children are registered at birth in accordance with Art 24(3) of the ICCPR. See Doek 2006 \textit{Refugee Survey Quarterly} 26-27. Egypt, for example, linked the "right from birth to know and belong to his parents [with] the right to a name and a nationality for children because it ensures psychological stability and the development of [the child's] personality". This reflects most societies' understanding of the concept of identity.

\textsuperscript{136} Article 7(1) of the CRC.

\textsuperscript{137} Wade 2017 \textit{Child Law Quarterly} 11.

\textsuperscript{138} Wade 2017 \textit{Child Law Quarterly} 11.

\textsuperscript{139} MacCallum 2009 \textit{Human Reproduction} 517.

\textsuperscript{140} UN Committee on the Rights of the Child \textit{General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1) (2013)} para 59.

\textsuperscript{141} Wade 2017 \textit{Child Law Quarterly} 12.

\textsuperscript{142} Wade 2017 \textit{Child Law Quarterly} 12.

\textsuperscript{143} Clark 2012 \textit{Ga J Int'l & Comp L} 626. In France a person's right to know her/his origins versus the right of a woman right to give birth anonymously has become a contentious issue. In 2003 the ECHR dismissed an action brought by Pascale Odievre in which she challenged the rules governing the confidentiality of her birth parents' identities. The Movement Against \textit{Accouchement sous X} (Anonymous Parents): To Show One's Suffering, to Claim One's Right argued that "not knowing the identity of one's birth parents – not knowing where one comes from, whom one looks like, whom one is like causes great moral suffering, prevents the correct
to prevent and eradicate the practice and ensure rather that the information regarding the child's parents be registered and filed as a necessary measure. However, it must be recognised that a child's right to know her/his biological parents potentially conflicts with the rights of privacy of both the donor couple and recipient couple. The words "as far as possible" will always qualify the right to know and to be cared for by one's biological parents.

Article 8 of the CRC stipulates the following:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

It may be debated that the "right to identity" under Article 8 of the CRC is an independent right which aims to safeguard the right to know one's genetic origins. The contrary may also be argued: there is no explicit mention of a right "to know one's origins" in the CRC, and as such it is a moral right, not a legal one. As previously mentioned, this right is not defined. Article 8 creates the impression that the concept of identity is open-ended as it covers nationality, name and family relations.

The phrase "family relations as recognised by law" is unclear, but academics have interpreted children's knowledge of their family relations as extending beyond knowing their social parents to encompassing their biological parents, siblings, grandparents and other relatives – all of whom are important to the children's sense of identity.

There is undoubtedly growing support for the recognition of children's interest in being informed of the truth of their biological origins because it

144 Buia Survey on the CRC Committee's Concluding Observations 17.
146 Clark 2012 Ga J Int'l & Comp L 626; Art 7(1) of the CRC.
149 Rispel Scope and Content of the Child's Right to Identity 17.
150 "Nationality, name and family relations, are mentioned illustratively (implied by the word 'including')." See Ronen 2004 IJLPF 159.
151 SALRC Issue Paper 32 (Project 140) para 1.41.
153 SALRC Issue Paper 32 (Project 140) para 1.42.
gives rise to claims of justice as opposed to the interests of adults, which form the foundation for attempts at exercising power:155

Children have interest in having knowledge of the physical truth because it provides an underlying certainty about the world they have come into, incapable of manipulation by the adults. The children may stake their claims against those who is responsible for their being.156

Thus, efforts must be made to obtain children's viewpoint and caution should be exercised against adopting a paternalistic mindset that views children as individuals with lesser capacity.157

The term "preserve" suggests both the non-interference in identity and the preservation of records pertaining to genealogy and birth registration.158 Moreover, the phrase "appropriate assistance" might possibly include the provision of genetic profiling in order to establish parentage159 and facilitating access to the professional files maintained on the child.160 Arguably, measures should be taken to ensure the maintenance of detailed records of children born through ART practices, particularly in embryo donation.161

Hence, Article 8 implies that State Parties have the positive duty to register and preserve data concerning a child's identity, for that data to be made accessible to the child and for appropriate measures to be implemented in order to re-establish the child's identity.162 However, it is questionable to what extent many State Parties' domestic legislation recognises the fact that children have a remarkable capacity to embrace multiple relationships.163 The recording of data surrounding children born through embryo donation may be beyond the scope of many States.164

Neither Article 7 nor Article 8 resolves the issue of whether children born through embryo donation are guaranteed the right to know their origins, nor do they offer any criteria as to how to balance this right against the rights of

155 Eekelaar Family Law and Personal Life 75-76.
156 Eekelaar Family Law and Personal Life 75-76.
157 Turkmen dag 2008 IJLPF 301.
162 SALRC Issue Paper 32 (Project 140) 8.
privacy of both the social and biological parents.\textsuperscript{165} Therefore, a child's identity is not directly protected by the provisions of the CRC which explicitly relate to the child's identity.\textsuperscript{166}

5.1.2 The African Charter on the Rights and Welfare of the Child

This regional instrument was drafted with the intent to address the CRC's omission of important socio-cultural realities and values which are particular to the African continent.\textsuperscript{167} However, the ACRWC failed to complete its objective in fully protecting the identity of the child as the child's right to preserve her/his identity – which is found in Article 8 of the CRC – is absent in the ACRWC.\textsuperscript{168} Bearing in mind, the right's importance in the African context is conceivably no less relevant globally.\textsuperscript{169} The reason for this omission is not clear as the child's right to identity is no less relevant in the African context.

The African Committee of Experts (the African Children's Charter Committee) views the rights to a name, birth registration and a nationality together as the pillars of a child's identity.\textsuperscript{170} These rights are enshrined by Article 6 of the ACRWC:

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.

State Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has laws.\textsuperscript{171}

The wording of Article 6 of the ACRWC is similar to that of Article 7 of the CRC,\textsuperscript{172} although the ACRWC sets out Article 7(1) of the CRC in three subsections.\textsuperscript{173} Unlike Article 7(1) of the CRC, however, the child's right to know and be cared for by her/his parents is absent from the ACRWC.\textsuperscript{174}

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\textsuperscript{165} SALRC Issue Paper 32 (Project 140) para 1.45.
\textsuperscript{166} SALRC Issue Paper 32 (Project 140) para 1.46.
\textsuperscript{167} Skujyte Rights of African Children 29-30.
\textsuperscript{168} Skujyte Rights of African Children 29-30.
\textsuperscript{171} Article 6 of the ACRWC.
\textsuperscript{172} Article 7(1) of the CRC: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents."
\textsuperscript{173} "This setup highlights the fact that Article 6 of the Charter enshrines three different rights of the child." See Gose African Charter on the Rights and Welfare of the Child 94.
\textsuperscript{174} This exclusion may be justified by the fact that in the African context children are not always cared for by their parents. See Gose African Charter on the Rights and Welfare of the Child 94.
Nevertheless, these rights may be derived from a broad interpretation of Article 19 of the ACRWC, which provides for the child to maintain personal relations and direct contact with her/his parents.\textsuperscript{175}

Article 6(4) of the ACRWC complements Article 7(2) of the CRC.\textsuperscript{176} The ACRWC enshrines the *ius soli* principle, which provides that "a child shall acquire the nationality of the country in which it is born".\textsuperscript{177} The ACRWC obliges a State to grant nationality where no other State has granted nationality to the child.\textsuperscript{178}

Nationality is generally acquired automatically at birth under the law on the basis of either descent or birth in the territory, or a combination of both and parentage.\textsuperscript{179} While birth registration itself does not confer nationality upon a child, it does establish the place of birth and parental affiliation,\textsuperscript{180} and serves as a form of proof of the link between the child and a State.\textsuperscript{181} This is illustrated in the *Kenyan Nubian Children* case, in which the African Children's Charter Committee noted that "there is a strong and direct link between birth registration and nationality".\textsuperscript{182} Thus, birth registration is key

\textsuperscript{175} Article 19 of the ACRWC states that: "(1) Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his/her parents against his/her will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child. (2) Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis."

\textsuperscript{176} Article 7(2) of the CRC: "States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless."

\textsuperscript{177} Gose *African Charter on the Rights and Welfare of the Child* 95.

\textsuperscript{178} Gose *African Charter on the Rights and Welfare of the Child* 95.

\textsuperscript{179} De Groot and Vonk 2018 *NILR* 320.

\textsuperscript{180} Birth registration also plays a crucial role in preserving the child’s identity against illegal changes, such as the falsification of family ties. See African Committee of Experts *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child* (2014) para 23. An example of this would be where children traffickers falsify family ties to traffic children, for example, for illicit intercountry adoption. Implementation of the right to birth registration through the establishment of a strong, integrated and universal birth registration system is one measure to combat this illicit practice. See African Committee of Experts *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child* (2014) para 34.

\textsuperscript{181} De Groot and Vonk 2018 *NILR* 320.

\textsuperscript{182} Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v The Government of Kenya (ACERWC) case number 002/Com/002/2009 of 20 April 2009 para 42.
to ensuring that every child acquires a nationality and to prevent statelessness.\textsuperscript{183}

To summarise, under international law the right to identity is an express and implicit, independent and distinctive right.\textsuperscript{184} Other rights, such as the rights to a name, nationality, family and parentage, are associated with this right.\textsuperscript{185} A lack of consensus as to the scope and meaning of this right exists due to a wide range of diverging interpretations from state practice, for example, granting the child the absolute right to know her/his genetic parents' identities, to simply strengthening practices, such as insisting on the preservation of descent or political identity.\textsuperscript{186} Nevertheless, the CRC and ACRWC frameworks give important guidance to States with the objective of achieving universal civil registration to guarantee the right to identity.\textsuperscript{187} Without a unifying definition of identity, these instruments lack the clarity and particularity needed to effectively protect this right and to balance conflicts between these efforts and other human rights.\textsuperscript{188} Thus, the current international framework does not guarantee the protection of the child's right to identity. The many facets of a child's identity call for the progressive development of international law, although ratification, while not obliging nations to pass domestic law, would provide a basis for the claims that may not otherwise be recognised.\textsuperscript{189}

5.2 Safeguarding the child's right to identity at the national level

5.2.1 Constitutional protection

The rights of children are embodied in the Constitution.\textsuperscript{190} The drafters of the Constitution recognised that children are in need of special protection as they are among the most vulnerable members of society.\textsuperscript{191} As a result,

\textsuperscript{183} The African Committee of Experts General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child (2014) para 23: “A State’s compliance with the obligation to prevent and reduce statelessness starts from taking all necessary measures to ensure that all children born on its territory are registered. These include: children born out of wedlock children born to a parent or parents who are foreigners (including those whose parents are in an irregular immigration status, or who are refugees or asylum seekers), children whose parents are unknown, and all other groups at risk of non-registration.”


\textsuperscript{186} Stewart 1992 \textit{Fam L Q} 233.

\textsuperscript{187} Stewart 1992 \textit{Fam L Q} 233.


\textsuperscript{189} Stewart 1992 \textit{Fam L Q} 233.

\textsuperscript{190} Sloth-Nielsen and Kruuse 2013 \textit{Int’l J Children’s Rts} 646.

\textsuperscript{191} Constitutional Court of South Africa date unknown https://www.concourt.org.za/index.php/children-s-rights.
the drafters of the Constitution, in order to give children’s rights a priority, devoted a special section to the rights of the child in the BOR.\textsuperscript{192}

Section 28(1)(b) of the Constitution states that "a child has a right to family care or parental care".\textsuperscript{193} This section raises the question of whether "family care" would include the right of a child to have a relationship with her/his genetic parents, genetic family and genetic siblings?\textsuperscript{194} Furthermore, does "parental care" encompass the right to be cared for by a biological, social or legal parent?\textsuperscript{195} Hence, it is also not explicitly stated in this provision that a child has a right to know her/his biological parent or origins.\textsuperscript{196} Currently the identities of the donating couple as well as possible genetic siblings may not be disclosed in South Africa.\textsuperscript{197}

However, what is clear from section 28 of the BOR is the importance of a child’s national identity.\textsuperscript{198} Section 28(1)(a) of the Constitution states that all children have a right to nationality from birth;\textsuperscript{199} in other words, the right to a national identity. In several cases South African courts have ruled that it is in the child’s best interests to have both a birth certificate and a nationality.\textsuperscript{200} The reason for the courts’ rulings is that a birth certificate provides a child with an identity of her/his own through the inclusion of important information such as her/his name, date and place of birth, and the names of the parents.\textsuperscript{201} The latter information is essential as it recognises the child’s right to a family identity.\textsuperscript{202}

Thus, a birth certificate serves as a crucial step to establishing a child’s legal identity, which further protects the child’s right to a national identity.\textsuperscript{203} Without proof of the child’s legal identity, her/his existence is essentially invisible to the State, meaning her/his rights are not secured within the State’s jurisdiction.\textsuperscript{204} Without proof of the child’s existence, it is likely that

\textsuperscript{192} One of the most significant aspects of the transition to democracy for South Africa was the adoption of a justiciable Bill of Rights which included an elaborate children’s rights clause, inspired by the CRC. See Sloth-Nielsen and Kruuse 2013 \textit{Int’l J Children’s Rts} 646.

\textsuperscript{193} Section 28(1)(b) of the Constitution. The \textit{Children’s Act} seeks to give effect to all the rights set out in s 28 of the Constitution. See Preamble of the \textit{Children’s Act}.

\textsuperscript{194} SALRC Issue Paper 32 (Project 140) para 1.19.

\textsuperscript{195} SALRC Issue Paper 32 (Project 140) para 1.19.

\textsuperscript{196} SALRC Issue Paper 32 (Project 140) para 1.19.

\textsuperscript{197} Section 41 of the \textit{Children’s Act}; s 19 of the \textit{National Health Act} 61 of 2003.

\textsuperscript{198} Section 28(1)(a) of the Constitution.

\textsuperscript{199} Section 28(1)(a) of the Constitution.


\textsuperscript{201} Page \textit{Artificial Womb Technology} 39.

\textsuperscript{202} Page \textit{Artificial Womb Technology} 39.

\textsuperscript{203} Selim 2019 https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter. The right to a legal identity also encompasses the right to be afforded an identity document or card and a passport. See Page \textit{Artificial Womb Technology} 39.

\textsuperscript{204} Page \textit{Artificial Womb Technology} 39. For example, the child’s right to access key social services such as education, health care and social grants. See SALRC \textit{Issue...}
the child's disappearance may go undetected by national authorities, especially across international borders.\textsuperscript{205} Authorities may as a result be unwilling or unable to pursue the matter due to the child's legal invisibility.\textsuperscript{206} Therefore, the child's right to a legal identity is critical for authorities as it aids them in tracing and reuniting separated children and families.\textsuperscript{207}

5.2.2 Legislation

Assisted reproduction is regulated in South Africa by the \textit{National Health Act} 61 of 2003 (NHA) and the Regulations Relating to Artificial Fertilisation of Persons, 2016.\textsuperscript{208}

The Regulations refer to embryo donation in only a single instance with regard to the establishment of a Central Data Bank:

\begin{quote}
The Director-General shall establish an electronic central data bank into which all information regarding gamete and embryo donations is stored.\textsuperscript{209}
\end{quote}

The effect of the non-disclosure of the identity of the donating couple has been discussed at length in existing publications. Despite the issues raised in connection with the anonymity of the donor couple, the NHA requires that the identities of the donors remain undisclosed.\textsuperscript{210} Section 19 of the NHA prohibits the disclosure of certain facts:

\begin{quote}
No person may disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders.\textsuperscript{211}
\end{quote}


\textsuperscript{207} \textit{SALRC Issue Paper 32 (Project 140)} para 2.9. See GN 251 of GG 44321 of 25 March 2021.

\textsuperscript{208} GN 1165 in GG 40312 of 30 September 2016 para 5.

\textsuperscript{209} Mande \textit{Building Families} 232.

\textsuperscript{210} Section 19 of the \textit{National Health Act} 61 of 2003.
Similarly, the *Children’s Act* further prohibits a child born as a result of artificial fertilisation from having access to the identity of gamete donors.\(^{212}\) Section 41(2) of the *Children’s Act* provides that information pertaining to the child's genetic parent "may not reveal the identity of the person whose … gametes were used for such artificial fertilisation".\(^{213}\) Section 41 results in children born through embryo donation being prohibited from learning of the identities of the donating couple.\(^{214}\) This is problematic as it assumes that genetic origins are less important if a child is born through embryo donation, since there is a gestational link between recipient mother and child.\(^{215}\) Though gestational links are essential for bonding, it does not affect the child's biological identity.\(^{216}\)

It is clear that the above pieces of legislation prohibit the disclosure of the identities of the donating couple. In other words, the donating couple will remain anonymous, and the child born through embryo donation will have no right to learn of the identities of her/his biological parents.\(^{217}\) This suggests that the right of the child born through embryo donation to know her/his origins is not taken into consideration by the South African legislature and the Regulations which pertain to artificial fertilisation.\(^{218}\) It is thus clear that the current legal position in South Africa is that of anonymous donation, which favours an adult-centred approach.

### 5.2.3 Law reform

In May 2017 the South African Law Reform Commission released a project titled "The Right to Know One’s Own Biological Origins" to initiate debate and to stimulate responses which would form the foundation for the investigation into children’s right to know their biological origins.\(^{219}\) The issue paper aimed to investigate whether children should have the legal right to know their biological origins in an age of rapid advances in the field of ART\(^{220}\) and the rise in inter-country medically assisted reproduction.\(^{221}\) The report briefly mentions embryo donation as a method of ART\(^{222}\) and poses the question of whether a child born through embryo donation would have four parents.\(^{223}\) Whether the substantial comments by interested

\(^{212}\) SALRC *Issue Paper 32 (Project 140)* para 1.20.

\(^{213}\) Section 42(1) of the *Children’s Act*.

\(^{214}\) *AB* case para 155.

\(^{215}\) *AB* case para 155.

\(^{216}\) *AB* case para 164.

\(^{217}\) SALRC *Issue Paper 32 (Project 140)* para 2.9.

\(^{218}\) Mande *Building Families* 232.

\(^{219}\) SALRC *Issue Paper 32 (Project 140)* ii.

\(^{220}\) SALRC *Issue Paper 32 (Project 140)* iii.

\(^{221}\) SALRC *Issue Paper 32 (Project 140)* v.

\(^{222}\) SALRC *Issue Paper 32 (Project 140)* 14.

\(^{223}\) SALRC *Issue Paper 32 (Project 140)* 179.
persons and proposed amendments by the Department of Health will be implemented remains to be seen.\textsuperscript{224}

\section{Concluding remarks}

In summation, both the NHA along with its accompanying Regulations, and the \textit{Children's Act} fail to protect the child's right to identity since both prohibit the disclosure of the identities of the donor couple. Moreover, the Constitution's provision on children's rights is unhelpful due to the lack of clarity around the definition of "family care or parental care". However, like international law the Constitution recognises the importance of protecting the child's national identity, and through the initiative of registering its population through the issuing of birth certificates recognises the child’s family identity. Neither the South African legislative framework nor the CRC nor the ACRWC explicitly uphold the child’s right to an identity.\textsuperscript{225} South Africa's legislative framework is inadequate for protecting the identity rights of children born through ART, in particular through embryo donation.\textsuperscript{226} Therefore, this legislation fails to provide for the child's right to personal, biological and sibling identity.

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\item \textsuperscript{224} GN 251 in GG 44321 of 25 March 2021.
\item \textsuperscript{225} Ronen 2004 \textit{IJLPF} 148.
\item \textsuperscript{226} Although an effort has been made in the realm of surrogacy procedures. Mande \textit{Building Families} iv.
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**List of Abbreviations**

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACERWC</td>
<td>African Committee of Experts on the Rights and Welfare of the Child</td>
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<tr>
<td>ACRWC</td>
<td>African Charter on the Rights and Welfare of the Child</td>
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<td>ART</td>
<td>Assisted Reproductive Technologies</td>
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<td>BMC Pediatrics</td>
<td>BioMed Central Pediatrics</td>
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<td>BOR</td>
<td>Bill of Rights</td>
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<td>BYU Scholars Archive</td>
<td>Brigham Young University Scholars Archive</td>
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<td>Case W Res L Rev</td>
<td>Case Western Reserve Law Review</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>CRC Committee</td>
<td>Committee on the Rights of the Child</td>
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<td>ECHR</td>
<td>European Convention on Human Rights / European Convention for the Protection of Fundamental Rights and Freedoms</td>
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<td>Fam L Q</td>
<td>Family Law Quarterly</td>
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<td>Acronym</td>
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<tr>
<td>Ga J Int'l &amp; Comp L</td>
<td>Georgia Journal of International and Comparative Law</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>IJLPF</td>
<td>International Journal of Law, Policy and the Family</td>
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<td>Int'l J Children's Rts</td>
<td>International Journal of Children's Rights</td>
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<td>J Med Ethics</td>
<td>Journal of Medical Ethics</td>
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<td>NHA</td>
<td>National Health Act 61 of 2003</td>
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<td>NILR</td>
<td>Netherlands International Law Review</td>
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<td>SAMJ</td>
<td>South African Medical Journal</td>
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<td>SALRC</td>
<td>South African Law Reform Commission</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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