

A Child's Right to Identity in the Context of Embryo Donation: Part 1

N Bouah* and C Jacobs**

Online ISSN
1727-3781

P·E·R

Pioneer in peer-reviewed,
open access online law publications

Authors

Nicole Bouah
Carmel Jacobs

Affiliation

University Western Cape,
South Africa

Email

3643523@myuwc.ac.za
cajacobs@uwc.ac.za

Date Submitted

8 November 2022

Date Revised

22 February 2024

Date Accepted

22 February 2024

Date Published

5 June 2024

Editor Prof W Erlank

Journal Editor

Prof C Rautenbach

How to cite this contribution

Bouah N and Jacobs C "A Child's Right to Identity in the Context of Embryo Donation: Part 1" *PER/PELJ* 2024(27) - DOI
<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15131>

Copyright



DOI

<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a15131>

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)¹ has dramatically changed the structure of the nuclear family unit.² As a child can now be conceived through non-coital technologies,³ ART has given rise to new paradigms of parenthood to include a diversity of family forms which no longer rest on mere biological claims.⁴ 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".⁵ In other words, the embryo is transferred into the recipient's uterus, from which a child could be born from a successful pregnancy.⁶ 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.⁷ 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.⁸ This makes the recipient couple feel more connected to the child born through embryo donation.⁹ 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.¹⁰ Additionally, this allows the recipient parents to decide whether or not to disclose this non-genetic relationship to the child.¹¹ This underscores the reality that despite embryo donation providing relief for infertile couples who have no other option,¹² 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.¹³ From a legal perspective a

* Nicole Bouah. LLB LLM (UWC). Associate, Apex Fund and Corporate Products SA. Email: 3643523@myuwc.ac.za. ORCID: <https://orcid.org/0000-0003-0447-3916>.

** Carmel Jacobs. LLB (UWC) LLM (UP) PhD (Uni Leiden). Senior Lecturer, Department of Private Law, University of the Western Cape, South Africa. Email: cajacobs@uwc.ac.za. ORCID: <https://orcid.org/0000-0001-5148-4269>.

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.

³ Robertson 2004 *Case W Res L Rev* 324.

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.

⁸ MacCallum and Golombok 2007 *Human Reproduction* 2889.

⁹ MacCallum and Golombok 2007 *Human Reproduction* 2891.

¹⁰ Walters *Embryo Adoption* 3.

¹¹ MacCallum and Golombok 2007 *Human Reproduction* 2888.

¹² Alizadeh and Samani 2014 *Iranian Journal of Reproductive Medicine* 169.

¹³ 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.¹⁴ 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,¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸ 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.¹⁹ 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,²⁰ whereas with embryo donation

¹⁴ MacCallum 2009 https://www.bionews.org.uk/page_92056.

¹⁵ Ravitsky 2017 *Israel Journal of Health Policy Research* 3.

¹⁶ Widdows and MacCallum 2002 *J Med Ethics* 140.

¹⁷ Faust 2019 <https://thefederalist.com/2019/12/04/why-embryo-adoption-damages-childrens-rights>.

¹⁸ Walters *Embryo Adoption* 8.

¹⁹ Van Niekerk 2018 <https://www.golegal.co.za/surrogacy-south-africa-children>.

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

²¹ Section 287 of the *Children's Act* 38 of 2005 (hereafter the *Children's Act*).

²² Nosarka and Kruger 2005 *SAMJ* 944.

²³ 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.

²⁴ Imrie *et al* 2019 *Child Development* 1333.

²⁵ Golombok *et al* 2011 *Journal of Family Psychology* 230.

²⁶ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 5.

²⁷ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 5.

²⁸ Besson 2007 *IJLPF* 143.

²⁹ 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.³⁰ The original proposal was: the child's right to retain a "true and genuine personal, legal, and family identity".³¹ However, this wording was rejected by many countries³² as there was concern³³ that this provision would obstruct closed adoptions and anonymous gamete donor practices.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.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.³⁶

The child's right to protection of their legal and national identities is provided for under Article 7 of the CRC³⁷ and Article 24(2)-(3) of the *International Covenant on Civil and Political Rights* (ICCPR),³⁸ which refer to the right to birth registration and the right to acquire nationality.³⁹

³⁰ Clark 2012 *Ga J Int'l & Comp L* 626.

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 *Fam L Q* 223.

³² Some of these countries include the United Kingdom, the Czech Republic, Luxembourg and Poland. See O'Donovan 2002 *Law and Society Review* 352.

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

³⁴ SALRC *Issue Paper 32 (Project 140)* para 1.40.

³⁵ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 8.

³⁶ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 8.

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."

³⁸ Article 24(2) of the *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".

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 *CCPR General Comment No 17 on Article 24 (Rights of the Child)* (1989) para 7.

The child's right to biological and familial identities⁴⁰ 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".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.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.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,⁴⁴ and the nature of the obligations imposed on States Parties.⁴⁵ Clearly, one cannot fully understand what the right to identity entails by referring solely to these provisions.⁴⁶

Identity is characterised as a "subjective sense of an invigorating sameness and continuity".⁴⁷ This sense begins in childhood and stems from a developmental psychosocial process.⁴⁸ Hence, there are several types of identity which tend to develop from birth: personal or individual identity,⁴⁹ family identity,⁵⁰ genetic identity⁵¹ or biological identity,⁵² gender identity,⁵³ ethnic identity,⁵⁴ social identity, cultural identity,⁵⁵ racial identity⁵⁶ and national identity.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

40 Stewart 1992 *Fam L Q* 226.

41 Article 7(1) of the CRC.

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.

43 McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 7.

44 Zegers-Hochschild *et al* 2009 *Fertility and Sterility* 1520-1521.

45 Stewart 1992 *Fam L Q* 223.

46 Ronen 2004 *IJLPF* 160.

47 Schachter 2002 *Human Development* 417.

48 Schachter 2002 *Human Development* 417.

49 Haydon *Identity Development* 48.

50 Haydon *Identity Development* 11.

51 Ludlow 2020 *Journal of Law and the Biosciences* 1.

52 Clark "Ethical Implications of Embryo Adoption" 220.

53 Sandberg 2016 *Nordic Journal of Human Rights* 343.

54 Tasker *et al* 2018 *Genealogy* 16.

55 Kidd *Culture and Identity* 2.

56 Iruka *et al* 2021 https://equity-coalition.fpg.unc.edu/wp-content/uploads/Iruka-et-al_Ethnic-Racial-Identity-Collaborative-Research-Summary-2021.pdf 1.

57 Page *Artificial Womb Technology* 5.

secrecy.⁵⁸ Additionally, the child may also not have access to identifiable medical information surrounding the circumstances of their birth.⁵⁹

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.⁶⁰ At some point, whether consciously or unconsciously, a child will ask themselves: "Who am I? What makes me special? Why am I here?"⁶¹ These questions are at the core of a child's self-identity formation.⁶² 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.⁶³

A child's right to personal identity is based on two elements: first, that "genealogical knowledge is central to the development of personal identity"⁶⁴ and second, having "access to identifying information about their *biological parents*".⁶⁵ 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".⁶⁶ These thoughts and emotions about missing information appear to be linked to a general theme of "loss".⁶⁷ 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.⁶⁸

Studies conducted on adopted children indicate that they show a strong interest in seeking to discover their personal identities.⁶⁹ Similar interests

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.

⁶¹ Ravitsky 2010 *Minnesota Journal of Law, Science and Technology* 675.

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 Turkmendag 2012 *Journal of Law and Society* 70.

⁶⁵ Turkmendag 2012 *Journal of Law and Society* 70.

⁶⁶ Harrigan *et al* 2015 *Journal of Family Communication* 84.

⁶⁷ Turner and Coyle 2000 *Human Reproduction* 2044.

⁶⁸ Turner and Coyle 2000 *Human Reproduction* 2044.

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.⁷⁰ For example, in the case of *Mikulic v Croatia*,⁷¹ 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".⁷² However, one cannot necessarily assume that all children born through embryo donation may display this same strong curiosity.⁷³ 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.⁷⁴ 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.⁷⁵

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.⁷⁶ 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.⁷⁷ Children are able to conceptualise the meaning and significance of the role of embryo donation in their conception differently at different developmental stages.⁷⁸ Hence, identity formation is a continuous process built over time.⁷⁹ Thus, the foundational building of a child's identity formation occurs during her/his childhood.⁸⁰

When information about children's origins is withheld, they may be able to pick up "hidden clues"⁸¹ that "things [are] not quite right".⁸² This has the potential to seriously affect the child's ability to construct her/his personal identity.⁸³ Therefore, the hindrance of access to identifying and non-

⁷⁰ Golombok *et al* 2016 *Journal of Family Psychology* 415.

⁷¹ *Mikulic v Croatia* (ECtHR) Appl No 53176/99 of 7 February 2002.

⁷² Harrigan *et al* 2015 *Journal of Family Communication* 84.

⁷³ Armuand *et al* 2019 *BMC Pediatrics* 3.

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.

⁸¹ Turner and Coyle 2000 *Human Reproduction* 2049.

⁸² Turner and Coyle 2000 *Human Reproduction* 2049.

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.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.⁸⁵ Biological identity is a consequence of one's DNA – one's genes. It demonstrates the child's biological relatedness to another.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.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.⁸⁸ Nonetheless, for children who view genetic relatedness as a matter of great importance, this does not constitute an equivalent alternative.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.⁹⁰ Biological identity should therefore not be overlooked.⁹¹

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

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 *Human Reproduction* 2048.

⁸⁴ Amorós 2015 *Catalan Social Sciences Review* 8-9.

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>.

⁸⁶ Moffat "Biological Identity" 61.

⁸⁷ Frith 2001 *Human Reproduction* 821.

⁸⁸ Widdows and MacCallum 2002 *J Med Ethics* 141.

⁸⁹ Turkmendag 2012 *Journal of Law and Society* 59.

⁹⁰ Turkmendag 2012 *Journal of Law and Society* 59.

⁹¹ Cherry 2022 <https://www.verywellmind.com/what-is-nature-versus-nuture-2795392>. "[K]nowledge about genetic links is that it is not mere *information* but it is powerful knowledge that changes relationships regardless of the wishes of those involved." See Turkmendag 2012 *Journal of Law and Society* 73.

⁹² *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] 2 Family Law Reports 962 (hereafter the *Rose* case).

⁹³ The case concerned the rights of children born through artificial insemination by a donor. See *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.¹⁰³

The family is the most fundamental unit of society and has widespread support in international law.¹⁰⁴ 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.¹⁰⁵ International instruments have directly addressed situations where children are illegally separated from their parents.¹⁰⁶ However, when a couple relinquishes their rights to an embryo, the resulting child's right to "genuine" or "true" identity is not explicitly recognised.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

A child's family identity should thus be thought of in a dynamic way.¹¹⁰ 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.¹¹¹ As much as many recipient parents may not want to be reminded of the lack of genetic relationship between themselves and the child,¹¹² there will always remain the possibility that the lack of genetic ties may interfere with the parent-child relationship¹¹³ and ultimately the child's perception of family identity. As embryo donation is not regulated by contract in the same way as surrogacy,¹¹⁴ 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.¹¹⁵ The question now arises whether the international legal

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.

¹⁰⁸ Stewart 1992 *Fam L Q* 226.

¹⁰⁹ Von Korff and Grotevant 2011 *Journal of Family Psychology* 393.

¹¹⁰ Teman and Berend 2020 *Journal of Family Issues* 2-3.

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.

¹¹² Golombok *et al* 1995 *Child Development* 296.

¹¹³ Golombok *et al* 1995 *Child Development* 286.

¹¹⁴ Swink 2011 <https://core.ac.uk/download/pdf/217156567.pdf> 17.

¹¹⁵ Child Rights International Network date unknown <https://archive.crin.org/en/home/rights/convention/articles/article-8-preservation-identity.html>.

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.¹¹⁶ Its origins in international law lie in Principle 2 of the *Universal Declaration of Human Rights* (UDHR)¹¹⁷ which states that:

[t]he 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.¹¹⁸

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:

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.¹¹⁹

In comparison, the ACRWC has a somewhat higher standard of "the primary consideration".¹²⁰ Article 4(1) of the ACRWC states that: "[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration".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).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.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".¹²⁴ As a result, discussion of the principle

¹¹⁶ Supaat 2014 *International Journal of Business, Economics and Law* 109.

¹¹⁷ Takács 2021 *Hungarian Journal of Legal Studies* 97.

¹¹⁸ Principle 2 of the *Universal Declaration of Human Rights* (1948) (the UDHR).

¹¹⁹ Article 3(1) of the CRC.

¹²⁰ Skelton 2019 *De Jure* 558.

¹²¹ Article 4(1) of the ACRWC.

¹²² Section 28(2) of the *Constitution of the Republic of South Africa, 1996* (the Constitution).

¹²³ Skelton 2019 *De Jure* 558.

¹²⁴ Supaat 2014 *International Journal of Business, Economics and Law* 109.

frequently entails deliberation on issues of ambiguity and the application thereof.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.¹²⁶ The right to identity is one of the most complex and contentious issues especially in the age of modern ART.¹²⁷

International law sets out the rights that States who have signed and ratified human rights instruments are obliged to provide and protect.¹²⁸ Nine major international human rights instruments exist.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.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 2000.¹³¹

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".¹³²

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

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.¹³⁴

¹²⁵ Supaat 2014 *International Journal of Business, Economics and Law* 109.

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.

¹²⁷ Brezina and Zhao 2011 *Obstetrics and Gynecology International* 1.

¹²⁸ Paulk 2014 *Journal of Gender, Social Policy and the Law* 785.

¹²⁹ United Nations Human Rights Office of the High Commissioner date unknown <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>.

¹³⁰ SALRC *Issue Paper 32 (Project 140)* paras 1.12-1.13.

¹³¹ SALRC *Issue Paper 32 (Project 140)* paras 1.12-1.13.

¹³² Ronen 2004 *IJLPF* 159.

¹³³ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pDF> 6.

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.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".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.¹³⁷ Furthermore, the term "parents" is not defined by the CRC¹³⁸ 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.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".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.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.¹⁴² Some guidance may be found in the CRC Committee's consistent criticism of nations that permit anonymous births. In respect of France,¹⁴³ for example, the Committee has urged the State Party

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 *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. See Page *Artificial Womb Technology* 11.

¹³⁶ Article 7(1) of the CRC.

¹³⁷ Wade 2017 *Child Law Quarterly* 11.

¹³⁸ Wade 2017 *Child Law Quarterly* 11.

¹³⁹ MacCallum 2009 *Human Reproduction* 517.

¹⁴⁰ UN Committee on the Rights of the Child *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.

¹⁴¹ Wade 2017 *Child Law Quarterly* 12.

¹⁴² Wade 2017 *Child Law Quarterly* 12.

¹⁴³ Clark 2012 *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 *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.¹⁴⁴ 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.¹⁴⁵ The words "as far as possible" will always qualify the right to know and to be cared for by one's biological parents.¹⁴⁶

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.¹⁴⁷ 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.¹⁴⁸ As previously mentioned, this right is not defined.¹⁴⁹ Article 8 creates the impression that the concept of identity is open-ended¹⁵⁰ as it covers nationality, name and family relations.¹⁵¹

The phrase "family relations as recognised by law" is unclear,¹⁵² but academics have interpreted children's knowledge of their family relations as extending beyond knowing their social parents to encompassing their biological parents,¹⁵³ siblings, grandparents and other relatives – all of whom are important to the children's sense of identity.¹⁵⁴

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

shaping of one's identity and can even cause some psychological problems for the next generation". These feelings are intensified when the State is in possession of information concerning one's origins and refuses to disclose it. For these reasons, knowing the identity of one's birth parents is arguably a human right and a child's right. See Lefaucheur 2004 *IJLPF* 319, 326, 327.

¹⁴⁴ Buia *Survey on the CRC Committee's Concluding Observations* 17.

¹⁴⁵ Wade 2017 *Child Law Quarterly* 12.

¹⁴⁶ Clark 2012 *Ga J Int'l & Comp L* 626; Art 7(1) of the CRC.

¹⁴⁷ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 13-14.

¹⁴⁸ De Melo-Martin 2014 *Hastings Centre Report* 28.

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.

¹⁵² Hodgkin, Newell and UNICEF *Implementation Handbook* 114.

¹⁵³ SALRC *Issue Paper 32 (Project 140)* para 1.42.

¹⁵⁴ Hodgkin, Newell and UNICEF *Implementation Handbook* 114.

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 Turkmendag 2008 *IJLPF* 301.

¹⁵⁸ Hodgkin, Newell and UNICEF *Implementation Handbook* 115.

¹⁵⁹ Genetic profiling is a technique whereby a sample of DNA is cut into fragments and separated by size in order to make a characteristic profile of DNA bands for individuals. This technique can be used to determine one's biological parents. See Sharma 2007 *Indian Journal of Human Genetics* 88. See also BBC date unknown <https://www.bbc.co.uk/bitesize/guides/z8nxtyc/revision/6>. Access to one's DNA ancestry has been made easy due to the widespread expansion of genetic databases. See Sadeghi 2019 *Journal of Reproduction and Infertility* 119.

¹⁶⁰ Hodgkin, Newell and UNICEF *Implementation Handbook* 117.

¹⁶¹ Hodgkin, Newell and UNICEF *Implementation Handbook* 115.

¹⁶² SALRC *Issue Paper 32 (Project 140)* 8.

¹⁶³ Hodgkin, Newell and UNICEF *Implementation Handbook* 114.

¹⁶⁴ Hodgkin, Newell and UNICEF *Implementation Handbook* 115.

privacy of both the social and biological parents.¹⁶⁵ Therefore, a child's identity is not directly protected by the provisions of the CRC which explicitly relate to the child's identity.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.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.¹⁶⁸ Bearing in mind, the right's importance in the African context is conceivably no less relevant globally.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.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.¹⁷¹

The wording of Article 6 of the ACRWC is similar to that of Article 7 of the CRC,¹⁷² although the ACRWC sets out Article 7(1) of the CRC in three subsections.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.¹⁷⁴

¹⁶⁵ SALRC *Issue Paper 32 (Project 140)* para 1.45.

¹⁶⁶ SALRC *Issue Paper 32 (Project 140)* para 1.46.

¹⁶⁷ Skujyte *Rights of African Children* 29-30.

¹⁶⁸ Skujyte *Rights of African Children* 29-30.

¹⁶⁹ See Gose *African Charter on the Rights and Welfare of the Child* 96.

¹⁷⁰ African Committee of Experts *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child* (2014) para 23.

¹⁷¹ Article 6 of the ACRWC.

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."

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.

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.¹⁷⁵

Article 6(4) of the ACRWC complements Article 7(2) of the CRC.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".¹⁷⁷ The ACRWC obliges a State to grant nationality where no other State has granted nationality to the child.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.¹⁷⁹ While birth registration itself does not confer nationality upon a child, it does establish the place of birth and parental affiliation,¹⁸⁰ and serves as a form of proof of the link between the child and a State.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".¹⁸² Thus, birth registration is key

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."

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."

¹⁷⁷ Gose *African Charter on the Rights and Welfare of the Child* 95.

¹⁷⁸ Gose *African Charter on the Rights and Welfare of the Child* 95.

¹⁷⁹ De Groot and Vonk 2018 *NILR* 320.

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.

¹⁸¹ De Groot and Vonk 2018 *NILR* 320.

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.¹⁸³

To summarise, under international law the right to identity is an express and implicit, independent and distinctive right.¹⁸⁴ Other rights, such as the rights to a name, nationality, family and parentage, are associated with this right.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.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.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.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.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.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.¹⁹¹ As a result,

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.*"

¹⁸⁴ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 1.

¹⁸⁵ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 1.

¹⁸⁶ Stewart 1992 *Fam L Q* 233.

¹⁸⁷ Stewart 1992 *Fam L Q* 233.

¹⁸⁸ McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pdf> 24.

¹⁸⁹ Stewart 1992 *Fam L Q* 233.

¹⁹⁰ Sloth-Nielsen and Kruuse 2013 *Int'l J Children's Rts* 646.

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.¹⁹²

Section 28(1)(b) of the Constitution states that "a child has a right to family care or parental care".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?¹⁹⁴ Furthermore, does "parental care" encompass the right to be cared for by a biological, social or legal parent?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.¹⁹⁶ Currently the identities of the donating couple as well as possible genetic siblings may not be disclosed in South Africa.¹⁹⁷

However, what is clear from section 28 of the BOR is the importance of a child's national identity.¹⁹⁸ Section 28(1)(a) of the Constitution states that all children have a right to nationality from birth;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.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.²⁰¹ The latter information is essential as it recognises the child's right to a family identity.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.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.²⁰⁴ Without proof of the child's existence, it is likely that

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 *Int'l J Children's Rts* 646.

¹⁹³ Section 28(1)(b) of the Constitution. The *Children's Act* seeks to give effect to all the rights set out in s 28 of the Constitution. See Preamble of the *Children's Act*.

¹⁹⁴ SALRC *Issue Paper 32 (Project 140)* para 1.19.

¹⁹⁵ SALRC *Issue Paper 32 (Project 140)* para 1.19.

¹⁹⁶ SALRC *Issue Paper 32 (Project 140)* para 1.19.

¹⁹⁷ Section 41 of the *Children's Act*; s 19 of the *National Health Act* 61 of 2003.

¹⁹⁸ Section 28(1)(a) of the Constitution.

¹⁹⁹ Section 28(1)(a) of the Constitution.

²⁰⁰ Scalabrini 2019 <https://www.scalabrini.org.za/news/birth-registration>.

²⁰¹ Page *Artificial Womb Technology* 39.

²⁰² Page *Artificial Womb Technology* 39.

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 *Artificial Womb Technology* 39.

²⁰⁴ Page *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 *Issue*

the child's disappearance may go undetected by national authorities, especially across international borders.²⁰⁵ Authorities may as a result be unwilling or unable to pursue the matter due to the child's legal invisibility.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.²⁰⁷

5.2.2 Legislation

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

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

The Director-General shall establish an electronic central data bank into which all information regarding gamete and embryo donations is stored.²⁰⁹

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.²¹⁰ Section 19 of the NHA prohibits the disclosure of certain facts:

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.²¹¹

Paper 32 (Project 140) v. Furthermore, without legal identity documents such as a birth certificate, the child would have to travel illegally. See UN Human Rights Council *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law: Report of the Office of the United Nations High Commissioner for Human Rights* UN Doc A/HRC/27/22 (2014) para 30. In addition, there is a host of other consequences of not having a birth certificate. For example, a child may not be able to access health care and other social services. See Scalabrini 2019 <https://www.scalabrini.org.za/news/birth-registration>.

²⁰⁵ UN Human Rights Council *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law: Report of the Office of the United Nations High Commissioner for Human Rights* UN Doc A/HRC/27/22 (2014) para 30.

²⁰⁶ UN Human Rights Council *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law: Report of the Office of the United Nations High Commissioner for Human Rights* UN Doc A/HRC/27/22 (2014) para 30.

²⁰⁷ Page *Artificial Womb Technology* 39.

²⁰⁸ SALRC *Issue Paper 32 (Project 140)* para 2.9. See GN 251 of GG 44321 of 25 March 2021.

²⁰⁹ GN 1165 in GG 40312 of 30 September 2016 para 5.

²¹⁰ Mande *Building Families* 232.

²¹¹ Section 19 of the *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 ART²²⁰ and the rise in inter-country medically assisted reproduction.²²¹ The report briefly mentions embryo donation as a method of ART²²² 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.²²⁴

6 Concluding remarks

In summation, both the NHA along with its accompanying Regulations, and the *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.²²⁵ South Africa's legislative framework is inadequate for protecting the identity rights of children born through ART, in particular through embryo donation.²²⁶ Therefore, this legislation fails to provide for the child's right to personal, biological and sibling identity.

Bibliography

Literature

- Alizadeh and Samani 2014 *Iranian Journal of Reproductive Medicine*
Alizadeh L and Samani R "Using Fertile Couples as Embryo Donors: An Ethical Dilemma" 2014 *Iranian Journal of Reproductive Medicine* 169-174
- Amorós 2015 *Catalan Social Sciences Review*
Amorós E "Donor Anonymity, or the Right to Know One's Origins?" 2015 *Catalan Social Sciences Review* 1-9
- Armund *et al* 2019 *BMC Pediatrics*
Armund G *et al* "Attitudes Towards Embryo Donation Among Healthcare Professionals Working in Child Healthcare: A Survey Study" 2019 *BMC Pediatrics* 1-9
- Besson 2007 *IJLPF*
Besson S "Enforcing the Child's Right to Know her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights" 2007 *IJLPF* 137-159

²²⁴ GN 251 in GG 44321 of 25 March 2021.

²²⁵ Ronen 2004 *IJLPF* 148.

²²⁶ Although an effort has been made in the realm of surrogacy procedures. Mande *Building Families* iv.

Brezina and Zhao 2011 *Obstetrics and Gynecology International*
Brezina P and Zhao Y "The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies" 2011 *Obstetrics and Gynecology International* 1-7

Buia *Survey on the CRC Committee's Concluding Observations*
Buia A *Survey on the CRC Committee's Concluding Observations on the Last EU Countries' Reports* (ChildONEEurope Florence 2006)

Clark 2012 *Ga J Int'l & Comp L*

Clark B "A Balancing Act? The Rights of Donor-Conceived Children to Know their Biological Origins" 2012 *Ga J Int'l & Comp L* 621-661

Clark "Ethical Implications of Embryo Adoption"

Clark P "Ethical Implications of Embryo Adoption" in Atwood CS and Meethal SV (eds) *Pluripotent Stem Cell Biology: Advances in Mechanisms, Methods and Models* (IntechOpen Rijeka 2014) 213-229

De Groot and Vonk 2018 *NILR*

De Groot G and Vonk O "Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding *Ius Sanguinis* and *Ius Soli*" 2018 *NILR* 319-335

De Melo-Martin 2014 *Hastings Centre Report*

De Melo-Martin I "The Ethics of Anonymous Gamete Donation: Is There a Right to Know One's Genetic Origins?" 2014 *The Hastings Centre Report* 28-35

Doek 2006 *Refugee Survey Quarterly*

Doek J "The CRC and the Right to Acquire and to Preserve a Nationality" 2006 *Refugee Survey Quarterly* 26-32

Eekelaar *Family Law and Personal Life*

Eekelaar J *Family Law and Personal Life* 2nd ed (Oxford University Press Oxford 2017)

Epp and Price 2008 *Journal of Consumer Research*

Epp A and Price L "Family Identity: A Framework of Identity Interplay in Consumption Practices" 2008 *Journal of Consumer Research* 50-70

Ethics Committee 2021 *Fertility and Sterility*

Ethics Committee of the American Society for Reproductive Medicine "Guidance Regarding Gamete and Embryo Donation" 2021 *Fertility and Sterility* 1402-1403

Frith 2001 *Human Reproduction*

Frith L "Gamete Donation and Anonymity: The Ethical and Legal Debate" 2001 *Human Reproduction* 818-824

Frith, Blyth and Lui 2017 *Human Reproduction*

Frith L, Blyth E and Lui S "Family Building Using Embryo Adoption: Relationships and Contact Arrangements Between Provider and Recipient Families – A Mixed-Methods Study" 2017 *Human Reproduction* 1092-1099

Golombok and Tasker "Socioemotional Development in Changing Families"
Golombok S and Tasker F "Socioemotional Development in Changing Families" in Lerner R (ed) *Handbook of Child Psychology and Developmental Science* 7th ed (Wiley Hoboken 2015) 1-45

Golombok *et al* 1995 *Child Development*

Golombok S *et al* "Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children" 1995 *Child Development* 285-298

Golombok *et al* 2011 *Journal of Family Psychology*

Golombok S *et al* "Children Conceived by Gamete Donation: Psychological Adjustment and Mother-Child Relationships at Age 7" 2011 *Journal of Family Psychology* 230-239

Golombok *et al* 2016 *Journal of Family Psychology*

Golombok S *et al* "Single Mothers by Choice: Mother-Child Relationships and Children's Psychological Adjustment" 2016 *Journal of Family Psychology* 409-418

Gose *African Charter on the Rights and Welfare of the Child*

Gose M *The African Charter on the Rights and Welfare of the Child: An Assessment of the Legal Value of its Substantive Provisions by Means of a Direct Comparison to the Convention on the Rights of the Child* (Community Law Centre, University of the Western Cape Cape Town 2002)

Haydon *Identity Development*

Haydon C *Identity Development and Its Relationship to Family History Knowledge Among Late Adolescent University Students* (Master of Science thesis Brigham Young University 2010)

Harrigan *et al* 2015 *Journal of Family Communication*

Harrigan M *et al* "It's Just Who I am ... I Have Brown Hair. I Have a Mysterious Father: An Exploration of Donor-Conceived Offspring's Identity Construction" 2015 *Journal of Family Communication* 75-93

Hodgkin, Newell and UNICEF *Implementation Handbook*

Hodgkin R, Newell P and UNICEF *Implementation Handbook for the Convention on the Rights of the Child* 3rd ed (UNICEF New York 2007)

Imrie *et al* 2019 *Child Development*

Imrie S *et al* "Families Created by Egg Donation: Parent-Child Relationship Quality in Infancy" 2019 *Child Development* 1333-1349

Kidd *Culture and Identity*

Kidd W *Culture and Identity* (Palgrave/MacMillan Basingstoke 2002)

Kreppner 2000 *Psicologia*

Kreppner K "The Child and the Family: Interdependence in Developmental Pathways" 2000 *Psicologia: Teoria e Pesquisa* 11-22

Lefaucheur 2004 *IJLPF*

Lefaucheur N "The French 'Tradition' of Anonymous Birth: The Lines of Argument" 2004 *IJLPF* 319-342

Ludlow 2020 *Journal of Law and the Biosciences*

Ludlow K "Genetic Identity Concerns in the Regulation of Novel Reproductive Technologies" 2020 *Journal of Law and the Biosciences* 1-30

MacCallum 2009 *Human Reproduction*

MacCallum F "Embryo Donation Parents' Attitudes Towards Donors: Comparison with Adoption" 2009 *Human Reproduction* 517-523

MacCallum and Golombok 2007 *Human Reproduction*

MacCallum F and Golombok S "Embryo Donation Families: Mothers' Decisions Regarding Disclosure of Donor Conception" 2007 *Human Reproduction* 2888-2895

Mande *Building Families*

Mande N *Building Families Through Assisted Reproductive Technologies in South Africa: A Critical Legal Analysis* (Doctor of Laws-dissertation, University of South Africa 2016)

Moffat "Biological Identity"

Moffat K "Biological Identity" in Monk N *et al* (eds) *Reconstructing Identity* (Palgrave Macmillan Cham 2017) 61-82

Nosarka and Kruger 2005 *SAMJ*

Nosarka S and Kruger T "Surrogate Motherhood" 2005 *SAMJ* 942-945

O'Donovan 2002 *Law and Society Review*

O'Donovan K "'Real' Mothers for Abandoned Children" 2002 *Law and Society Review* 347-378

Page *Artificial Womb Technology*

Page C *Artificial Womb Technology and the Safeguarding of Children's Rights Through an Analysis of the Right to Identity* (LLM-dissertation Leiden University 2017)

Paulk 2014 *Journal of Gender, Social Policy and the Law*

Paulk L "Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law" 2014 *Journal of Gender, Social Policy and the Law* 781-823

Phillips *Communication and Family Identity*

Phillips KE *Communication and Family Identity: Toward a Conceptual Model of Family Identity and Development of the Family Identity Inventory* (PhD-dissertation University of Nebraska 2017)

Raburu 2015 *Journal of Educational and Social Research*

Raburu P "The Self – Who am I?: Children's Identity and Development Through Early Childhood Education" 2015 *Journal of Educational and Social Research* 95-102

Ravitsky 2010 *Minnesota Journal of Law, Science and Technology*

Ravitsky V "Knowing Where You Come From: The Rights of Donor-Conceived Individuals and the Meaning of Genetic Relatedness" 2010 *Minnesota Journal of Law, Science and Technology* 665-684

Ravitsky 2017 *Israel Journal of Health Policy Research*

Ravitsky V "The Right to Know One's Genetic Origins and Cross-Border Medically Assisted Reproduction" 2017 *Israel Journal of Health Policy Research* 1-6

Richardson 2015 *York Online Undergraduate Research Review*

Richardson P "Redefining Motherhood: How Reproductive Technologies Change the Way We Think About Motherhood" 2015 *York Online Undergraduate Research Review* 79-85

Rispel *Scope and Content of the Child's Right to Identity*

Rispel SL *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* (LLM-dissertation University of the Western Cape 2017)

Robertson 2004 *Case W Res L Rev*

Robertson J "Gay and Lesbian Access to Assisted Reproductive Technology" 2004 *Case W Res L Rev* 323-372

Ronen 2004 *IJLPPF*

Ronen Y "Redefining the Child's Right to Identity" 2004 *IJLPPF* 147-177

Sadeghi 2019 *Journal of Reproduction and Infertility*

Sadeghi M "Coming Soon: Disclosing the Identity of Donors by Genealogical Tests of Donor Offspring" 2019 *Journal of Reproduction and Infertility* 119-120

SALRC *Issue Paper 32 (Project 140)*

South African Law Reform Commission *Issue Paper 32 (Project 140): The Right to Know One's Own Biological Origins* (SALRC Pretoria 2017)

- Samani 2009 *Reproductive BioMedicine Online*
Samani R "Debate in Embryo Donation: Embryo Donation or Both – Gamete Donation?" 2009 *Reproductive BioMedicine Online* 29-33
- Sandberg 2016 *Nordic Journal of Human Rights*
Sandberg K "The Rights of LGBTI Children Under the Convention on the Rights of the Child" 2016 *Nordic Journal of Human Rights* 337-352
- Scabini and Manzi "Family Processes and Identity"
Scabini E and Manzi C "Family Processes and Identity" in Schwartz SJ (eds) *Handbook of Identity Theory and Research* (Catholic University of the Sacred Heart Milan 2011) 569-588
- Schachter 2002 *Human Development*
Schachter E "Identity Constraints" 2002 *Human Development* 416-433
- Sharma 2007 *Indian Journal of Human Genetics*
Sharma R "DNA Profiling: Social, Legal, or Biological Parentage" 2007 *Indian Journal of Human Genetics* 88-92
- Skelton 2019 *De Jure*
Skelton A "Too Much of a Good Thing? Best Interests of the Child in South African Jurisprudence" 2019 *De Jure* 557-579
- Skujyte *Rights of African Children*
Skujyte D *Rights of African Children Under the African Charter on the Rights and Welfare of the Child: The Addition to the Universal Protection of a Child* (LLM-dissertation University of Tilburg 2011)
- Sloth-Nielsen and Kruuse 2013 *Int'l J Children's Rts*
Sloth-Nielsen J and Kruuse H "A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007-2012" 2013 *Int'l J Children's Rts* 646-678
- Sokol 2009 *Graduate Journal of Counselling Psychology*
Sokol J "Identity Development Throughout the Lifetime: An Examination of Eriksonian Theory" 2009 *Graduate Journal of Counselling Psychology* 1-11
- Somerville 2007 *Journal of Family Studies*
Somerville M "Children's Human Rights and Unlinking Child–Parent Biological Bonds with Adoption, Same-Sex Marriage and New Reproductive Technologies" 2007 *Journal of Family Studies* 179-201
- Stewart 1992 *Fam L Q*
Stewart G "Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child" 1992 *Fam L Q* 221-233

Supaat 2014 *International Journal of Business, Economics and Law*
Supaat D "Establishing the Best Interests of the Child Rule as an International Custom" 2014 *International Journal of Business, Economics and Law* 109-114

Takàcs 2021 *Hungarian Journal of Legal Studies*
Takàcs N "The Threefold Concept of the Best Interests of the Child in the Immigration Case Law of the ECtHR" 2021 *Hungarian Journal of Legal Studies* 96-114

Tasker *et al* 2018 *Genealogy*
Tasker F *et al* "Receiving, or 'Adopting,' Donated Embryos to Have Children: Parents Narrate and Draw Kinship Boundaries" 2018 *Genealogy* 1-20

Teman and Berend 2020 *Journal of Family Issues*
Teman E and Berend Z "Surrogacy as a Family Project: How Surrogates Articulate Familial Identity and Belonging" 2020 *Journal of Family Issues* 1-23

Turkmendag 2008 *IJLPF*
Turkmendag I "The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-be Parents" 2008 *IJLPF* 283-310

Turkmendag 2012 *Journal of Law and Society*
Turkmendag I "The Donor-Conceived Child's 'Right to Personal Identity': The Public Debate on Donor Anonymity in the United Kingdom" 2012 *Journal of Law and Society* 58-75

Turner and Coyle 2000 *Human Reproduction*
Turner AJ and Coyle A "What Does it Mean to be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy" 2000 *Human Reproduction* 2041-2051

Turner *et al* "Personal and Social Identity"
Turner J *et al* "Personal and Social Identity: Self and Social Context" Unpublished paper presented to the *Conference on "The Self and the Collective"* (7-10 May 1992 Princeton)

Von Korff and Grotevant 2011 *Journal of Family Psychology*
Von Korff L and Grotevant H "Contact in Adoption and Adoptive Identity Formation: The Mediating Role of Family Conversation" 2011 *Journal of Family Psychology* 393-401

Wade 2017 *Child Law Quarterly*
Wade K "The Regulation of Surrogacy: A Children's Rights Perspective" 2017 *Child Law Quarterly* 1-21

Walters *Embryo Adoption*

Walters R *Embryo Adoption as an Ethical Option for Couples Faced with Infertility* (Senior-dissertation Liberty University 2016)

Wanggren, Prag and Skoog Svanberg 2013 *Upsala Journal of Medical Sciences*

Wanggren K, Prag F and Skoog Svanberg A "Attitudes Towards Embryo Donation in Swedish Women and Men of Reproductive Age" 2013 *Upsala Journal of Medical Sciences* 187-195

Widdows and MacCallum 2002 *J Med Ethics*

Widdows H and MacCallum F "Disparities in Parenting Criteria: An Exploration of the Issues, Focusing on Adoption and Embryo Donation" 2002 *J Med Ethics* 139-142

Zegers-Hochschild *et al* 2009 *Fertility and Sterility*

Zegers-Hochschild F *et al* "International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary of ART Terminology, 2009" 2009 *Fertility and Sterility* 1520-1524

Case law

AB v Minister of Social Development 2017 3 SA 570 (CC)

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

Mikulic v Croatia (ECtHR) Appl No 53176/99 of 7 February 2002

Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority [2002] 2 Family Law Reports 962

Legislation

Children's Act 38 of 2005

Constitution of the Republic of South Africa, 1996

National Health Act 61 of 2003

International instruments

African Charter on the Rights and Welfare of the Child (1990)

African Committee of Experts *General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child* (2014)

European Convention for the Protection of Fundamental Rights and Freedoms (1950)

International Covenant on Civil and Political Rights (1966)

UN Committee on the Rights of the Child *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)

UN Convention on the Rights of the Child (1989)

UN Human Rights Committee *CCPR General Comment No 17 on Article 24 (Rights of the Child)* (1989)

UN Human Rights Council *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law: Report of the Office of the United Nations High Commissioner for Human Rights UN Doc A/HRC/27/22* (2014)

Universal Declaration of Human Rights (1948)

Government publications

GN 1165 in GG 40312 of 30 September 2016

GN 251 in GG 44321 of 25 March 2021

Internet sources

BBC date unknown <https://www.bbc.co.uk/bitesize/guides/z8nxtyc/revision/6>

BBC date unknown *DNA and Inheritance* <https://www.bbc.co.uk/bitesize/guides/z8nxtyc/revision/6> accessed 14 March 2021

Billadeau 2014 <https://adoption.com/personal-identity-issues-in-adoption>
Billadeau S 2014 *Personal Identity Issues in Adoption: Tips for Helping your Internationally Adopted Child Find their Personal Identity* <https://adoption.com/personal-identity-issues-in-adoption> accessed 1 December 2020

Cherry 2022 <https://www.verywellmind.com/what-is-nature-versus-nurture-2795392>

Cherry K 2022 *The Nature vs Nurture Debate: Genetic and Environmental Influences and How They Interact* <https://www.verywellmind.com/what-is-nature-versus-nurture-2795392> accessed 1 December 2020

Child Rights International Network date unknown
<https://archive.crin.org/en/home/rights/convention/articles/article-8-preservation-identity.html>

Child Rights International Network date unknown *Article 8: Preservation of Identity* <https://archive.crin.org/en/home/rights/convention/articles/article-8-preservation-identity.html> accessed 22 November 2020

Constitutional Court of South Africa date unknown
<https://www.concourt.org.za/index.php/children-s-rights>

Constitutional Court of South Africa date unknown *Children's Rights* <https://www.concourt.org.za/index.php/children-s-rights> accessed 6 February 2021

Dinsmore date unknown <https://pved.org/buildingfamily.php>

Dinsmore B date unknown *Building Your Family Through Embryo Donation* <https://pved.org/buildingfamily.php> accessed 1 December 2020

Faust 2019 <https://thefederalist.com/2019/12/04/why-embryo-adoption-damages-childrens-rights>

Faust K 2019 *Why Embryo Adoption Damages Children's Rights* <https://thefederalist.com/2019/12/04/why-embryo-adoption-damages-childrens-rights> accessed 30 March 2020

Iruka *et al* 2021 https://equity-coalition.fpg.unc.edu/wp-content/uploads/Iruka-et-al_Ethnic-Racial-Identity-Collaborative-Research-Summary-2021.pdf

Iruka IU *et al* 2021 *Ethnic-Racial Identity Formation in the Early Years* https://equity-coalition.fpg.unc.edu/wp-content/uploads/Iruka-et-al_Ethnic-Racial-Identity-Collaborative-Research-Summary-2021.pdf accessed 17 January 2024

MacCallum 2009 https://www.bionews.org.uk/page_92056

MacCallum F 2009 *Embryo Donation is not like Adoption* https://www.bionews.org.uk/page_92056 accessed 3 May 2020

McCombs and Gonzalez 2007 <https://scm.oas.org/pdfs/2007/cp19277.pDF>

McCombs T and Gonzalez JS 2007 *Right to Identity* <https://scm.oas.org/pdfs/2007/cp19277.pDF> accessed 17 January 2024

O'Brien 2004 <https://www.irishtimes.com/opinion/major-problems-involved-in-embryo-donation-1.1138217>

O'Brien B 2004 *Major Problems Involved in Embryo Donation* <https://www.irishtimes.com/opinion/major-problems-involved-in-embryo-donation-1.1138217> accessed 23 November 2020

Scalabrini 2019 <https://www.scalabrini.org.za/news/birth-registration>
 Scalabrini 2019 *Birth Registration* <https://www.scalabrini.org.za/news/birth-registration> accessed 6 February 2021

Selim 2019 <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter>

Selim L 2019 *What is Birth Registration and Why Does It Matter?* <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter> accessed 21 March 2021

Swink 2011 <https://core.ac.uk/download/pdf/217156567.pdf>

Swink D 2011 *Outsourcing Reproduction: Embryos and Surrogacy Services in the CyberProcreation Era* <https://core.ac.uk/download/pdf/217156567.pdf> accessed 17 January 2024

UN Human Rights Office of the High Commissioner date unknown <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

United Nations Human Rights Office of the High Commissioner date unknown *International Human Rights Law* <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> accessed 6 February 2021

Van Niekerk 2018 <https://www.golegal.co.za/surrogacy-south-africa-children> accessed 8 July 2020

Van Niekerk S 2018 *Modern Families: Surrogacy is an Option* <https://www.golegal.co.za/surrogacy-south-africa-children> accessed 8 July 2020

List of Abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
ART	Assisted Reproductive Technologies
BMC Pediatrics	BioMed Central Pediatrics
BOR	Bill of Rights
BYU Scholars Archive	Brigham Young University Scholars Archive
Case W Res L Rev	Case Western Reserve Law Review
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
ECHR	European Convention on Human Rights / European Convention for the Protection of Fundamental Rights and Freedoms
Fam L Q	Family Law Quarterly

Ga J Int'l & Comp L	Georgia Journal of International and Comparative Law
ICCPR	International Covenant on Civil and Political Rights
IJLPF	International Journal of Law, Policy and the Family
Int'l J Children's Rts	International Journal of Children's Rights
J Med Ethics	Journal of Medical Ethics
NHA	National Health Act 61 of 2003
NILR	Netherlands International Law Review
SAMJ	South African Medical Journal
SALRC	South African Law Reform Commission
UDHR	Universal Declaration of Human Rights