



**UNIVERSITY *of the***  
**WESTERN CAPE**

**The Right to Identity in the context of Embryo Donation**

by

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A Mini-Thesis Proposal submitted in partial fulfillment for the degree  
LL.M in the Faculty of Law of the University of the Western Cape.

Prepared under the Supervisor

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## Declaration


I declare that ‘The Child’s Right to Identity in the Context of Embryo Donation’ is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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## Summary

In this research, I seek to investigate the extent to which the South African Legislature and the international community recognises the right to identity of a child born through embryo donation.

First, I carefully examine the multiple aspects which the right to identity comprises namely: personal, biological, family and siblingship identity. Thereafter, I examine how these various aspects are impacted by national and cross-border embryo donation arrangements.

Second, I explore the implications of recognising the child's right to identity on other parties involved in the embryo donation process, specifically the donor and recipient couples' rights to privacy and private family life. In addition, I briefly consider the impact of the abolition of donor anonymity on the number of available embryos and reduction of profits on stakeholders in the fertility industry.

Third, I critically examine the South African legislation that may be applicable to children born through embryo donation, the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Fourth, I draw comparisons between South Africa's legal position and that of Australia and New Zealand. I conclude that the current level of protection at both the national and international levels are insufficient to uphold the child's right to identity.

Lastly, I suggest recommendations for the appropriate way to regulate international and national embryo donation agreements. At an international level, I submit the following options: a new UN Convention which is centred around Assisted Reproductive Technology (ART), a General Comment drafted by the CRC to cover specific issues and interests of children, ratification of a Convention by the Hague Conference (HCCH), and an investigation into the concerns raised by international embryo donation to be carried out by the International Social Service Network (ISSN).

I conclude that an African based instrument would not be as effective as a UN proposed solution given the cultural and religious concerns in traditional African societies. At a national level, I submit that the birth certificate should indicate the child's true origins. In addition to a register which holds the particulars of the child's donor parents, a separate donor sibling register is also suggested. Moreover, the South African Parliament should amend both the National Health Act 61 of 2003 and Children's Act 38 of 2005 to provide clearer guidelines.

Alternatively, Parliament should draft a new Act with its focus on ART and the rights of children born through such practices.



## Opsomming

Die doel van hierdie navorsing is om ondersoek in te stel tot die mate wat Suid-Afrikaanse wetgewing en die internasionale gemeenskap 'n kind wat deur middel van embrioskenking in die lewe gebring is, se reg tot identiteit erken.

Die beginpunt is om die verskillende aspekte ten aansien van die reg tot identiteit noukeurig te oorweeg naamlik: - persoonlik, biologies en onderling tussen families en familieledede.

Nadat die bogenoemde aspekte uiteengesit en verduidelik is, word daar voortgegaan deur te ondersoek hoe hierdie verskillende aspekte beïnvloed word deur nasionale en internasionale ooreenkomste vir embrioskenking.

Tweedens word daar oorweeg wat die implikasies is van die kind se reg tot identiteit teenoor derde partye wat ook by die proses betrokke is, spesifiek die skenker, maar ook die partye wat die embryo ontvang en hulle regte tot onder andere privaatheid. Die aspek van afskaffing van die se anonimiteit op die aantal beskikbare embrios en die vermindering van winste in die vrugbaarheidsbedryf.

Derdens word die Suid-Afrikaanse wetgewing wat van toepassing is op embrioskenkings, sowel as die *Convention on the Rights of the Child (CRC)* en die *African Charter on the Rights and Welfare of the Child (ACRWC)*, oorweeg.

Hierna word daar 'n vergelykende studie gedoen met Australië en Nieu-Seeland. Die slotsom van die vergelykende studie is dat beide die plaaslike en internasionale wetgewing onvoldende is om die nodige beskerming te bied om die betrokke kind se reg tot identiteit te beskerm.

Ter afsluiting maak ek aanbevelings vir die gepaste manier om internasionale – en nasionale embrioskenkings ooreenkomste te reguleer. Op 'n internasionale vlak word daar voorgestel dat die beste manier is 'n nuwe Verenigde Nasies Konvensie wat gebaseer is op die *Assisted Reproductive Technology (ART)*, algemene kommentaar op die CRC wat spesifiek fokus op die belange van kinders, ratifikasie van 'n Konvensie van *The Hague Conference (HCCH)* en 'n ondersoek in die bekommernisse wat deur die internasionale gemeenskap geopper word wat uiteindelik uitgevoer moet word deur die *International Social Service Network (ISSN)*.

Die slotsom is dat 'n instrument met 'n Afrika fokus nie voldoende sal wees nie, hoofsaaklik as gevolg van kulturele besware en geloofs besware van meeste tradisionele Afrika gemeenskappe. In hierdie verband sal 'n oplossing wat deur die Verenigde Nasies voorgestel word, beter en meer toepaslik wees.

Op 'n nasionale vlak voer ek aan dat die oorsprong van elke kind op sy geboortesertifikaat aangedui word, tesame met 'n register wat die besonderhede van die skenkende ouer en moontlik die registers van enige broer of suster wat ook deur middel van die embrio skenking proses aan die lewe gebring word.

Boonop behoort die Wetgewer die *National Health Act, Act 61 van 2003* en die *Children's Act, Act 38 van 2005* te wysig om duideliker wetgewende riglyne te verksaf ten aansien van die betrokke vraagstuk. In die alternatief behoort 'n nuwe wetsontwerp die lig te sien wat fokus op ART met die fokuspunt spesifiek op die regte van kinders wat deur sulke prosesse gebore word.



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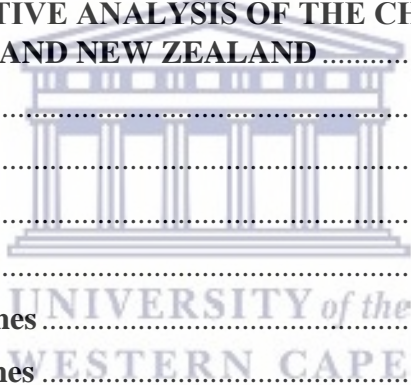
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## **Keywords / Phrases**

Assisted Reproductive Technologies

Best interests

Disclosure

Donor-conceived child

Embryo donation

Gamete donor

International legal framework

Protection of children

Rights to identity

Status of a child



## List of Abbreviations

ACRWC – African Charter on the Rights and Welfare of the Child

ACtHR – American Court on Human Rights

ART – Assisted Reproductive Technologies

CRC – Convention on the Rights of the Child

CRC Committee – Committee on the Rights of the Child

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ICCPR – International Covenant on Civil and Political Rights

SALRC – South Africa Law Reform Commission

UDHR – Universal Declaration of Human Rights



## CHAPTER 1: INTRODUCTION

### 1.1 Introduction and Background

Since the latter part of the 20th century, the development of assisted reproductive technologies (ART)<sup>1</sup> has dramatically changed the structure of the nuclear family unit.<sup>2</sup> As a child can now be conceived through non-coital technologies,<sup>3</sup> ART has given rise to new paradigms of parenthood to include a diversity of family forms which no longer rest on mere biological claims.<sup>4</sup> These new medical technologies have contributed to the change in society's conception of human reproduction, but has also raised new challenges,<sup>5</sup> particularly in the realm of human rights.<sup>6</sup>

The urge to bear a child is one of the most inherent and powerful human desires.<sup>7</sup> In a predominantly fertile world, the inability to have a child is considered a personal failure<sup>8</sup> and a tragedy.<sup>9</sup> While advancements in reproductive science have opened up the possibility of serving as a substitute for natural conception, improved screening for chromosome and gene

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- <sup>1</sup> 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 F, Adamson G, de Mouzon J et al 'International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009' available at [https://www.who.int/reproductivehealth/publications/infertility/art\\_terminology2.pdf?ua=1](https://www.who.int/reproductivehealth/publications/infertility/art_terminology2.pdf?ua=1) (accessed 29 March 2020).
- <sup>2</sup> Golombok S & Tasker F 'Socioemotional Development in Changing Families' in Lerner R (ed) *Handbook of Child Psychology and Developmental Science* 7 ed (2015) 1.
- <sup>3</sup> Robertson J 'Gay and Lesbian Access to Assisted Reproductive Technology' (2004) 55(2) *Case Western Reserve Law Review* 324.
- <sup>4</sup> Richardson P 'Redefining Motherhood' available at <https://yourreview.journals.yorku.ca/index.php/yourreview/article/view/40354/36555> (accessed 26 April 2020).
- <sup>5</sup> Jouannet P 'Evolution of assisted reproductive technologies' (2009) 193(3) *Bulletin de l'Academie nationale de medecine* 537.
- <sup>6</sup> At a national level, it is submitted that the decision to procreate should be included in a constitutional design. See Mutcherson K 'Reproductive Rights without Resources of Recourse' (2017) 47(3) *Reproductive Autonomy: Rights and Access for All* 13. Some commentators argue that the 'right to found a family' contained in the UDHR and the ICCPR encompasses the 'right to procreate,' which is linked to reproductive rights and essentially to making all related childbearing decisions. See Paulk L 'Embryonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law' (2014) 22(4) *Journal of Gender, Social Policy & the Law* 805. Other academics argue that the interpretation of various provisions in the CRC should be interpreted to include a child's right to know the identity of his or her gamete donor, although this human rights document was not drafted with ART in mind. See Frith L 'Gamete Donation, Identity, and the Offspring's Right to Know' (2007) 9(9) *American Medical Association Journal of Ethics* 645.
- <sup>7</sup> Sharma R, Saxena R & Singh R 'Infertility & assisted reproduction: A historical & modern scientific perspective' (2018) 148(1) *The Indian Journal of Medical Research* 10.
- <sup>8</sup> Sharma, Saxena & Singh (2018) 10.
- <sup>9</sup> Bahamondes L & Makuch M 'Infertility care and the introduction of new reproductive technologies in poor resource settings' (2014) 12(87) *Reproductive Biology and Endocrinology* 1.

defects<sup>10</sup> and assisted same-sex couples to conceive biological children,<sup>11</sup> ART is still primarily used to treat infertility.<sup>12</sup>

Infertility is defined as the ‘failure to fall pregnant after at least 12 months of regular and unprotected sexual intercourse.’<sup>13</sup> It is a reproductive health disorder<sup>14</sup> associated with accompanying psychological, economic and medical implications.<sup>15</sup> In 2020, studies concerning the global prevalence of infertility estimated that around 1 out of 4 couples in developing countries, 1 out of 8 couples in developed countries and approximately 8 – 12% of couples worldwide suffer from infertility.<sup>16</sup> Of all infertility cases, approximately 40% is due to female or male infertility and in 20% of cases there is a combination of both or unknown causes which are responsible for infertility.<sup>17</sup> There are a variety of causes of infertility in females such as: the failure to ovulate due to polycystic ovarian syndrome, endometriosis, aging, premature ovarian failure and autoimmune diseases.<sup>18</sup> For males, any one of or a combination of the following may cause infertility: low sperm concentration, poor sperm motility, or abnormal sperm shape.<sup>19</sup> Moreover, the following lifestyle choices and environmental factors may affect the fertility of both sexes including, but not limited to: eating disorders, low nutritional diet, obesity, malnourishment, infections, physical and psychological stress; substance and drug use or abuse.<sup>20</sup>

Since the first baby was conceived with the help of ART in 1978,<sup>21</sup> and the first baby born through embryo donation occurred in 1998,<sup>22</sup> the use of ART to overcome infertility has

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<sup>10</sup> Jouannet (2009) 537.

<sup>11</sup> Robertson (2004) 323.

<sup>12</sup> Bahamondes & Makuch (2014) 2.

<sup>13</sup> Yazdi M, Nasiri R, Jomei M et al ‘Quality of Life and General Health in Pregnant Women Conceived with Assisted Reproduction Technologies: A Case-Control Study’ (2020) 13(4) *International Journal of Fertility and Sterility* 271.

<sup>14</sup> Ginar da Silva S, Bertoldi A, Freitas da Silveira M ‘Assisted reproductive technology: prevalence and associated factors in Southern Brazil’ (2019) 53(13) *Revista de Saude Publica* 1.

<sup>15</sup> Kumar N & Singh A ‘Trends of male factor infertility, an important cause of infertility: A review of literature’ (2015) 8(4) *Journal of Human Reproductive Sciences* 191.

<sup>16</sup> Yazdi, Nasiri, Jomei et al (2020) 271.

<sup>17</sup> Ibid.

<sup>18</sup> Brazier Y ‘Infertility in men and women’ available at <https://www.medicalnewstoday.com/articles/165748> (accessed 23 April 2020).

<sup>19</sup> Kumar & Singh (2015) 191.

<sup>20</sup> NIH ‘What lifestyle and environmental factors may be involved with infertility in females and males?’ available at <https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/causes/lifestyle> (accessed 23 April 2020).

<sup>21</sup> Ginar da Silva, Bertoldi, Freitas da Silveira (2019) 2.

<sup>22</sup> Hoffman S ‘Snowflake’ baby: I feel lucky that I was given the chance at life’ available at <https://www.reporterherald.com/2017/06/24/snowflake-baby-i-feel-lucky-that-i-was-given-the-chance-at-life/> (accessed 02 April 2020).

increased steadily and has enabled many childless couples to achieve their dream of having a child of their own.<sup>23</sup> Improvements in reproductive technologies have allowed these treatments to develop into medical procedures that are safe, efficient and readily accessible.<sup>24</sup> What was once perceived as a controversial medical form of third-party reproduction by many, has drastically changed with the continuous advancements in ART.<sup>25</sup>

There are various forms of ART which are available to persons who suffer from infertility such as 'in vitro fertilization (IVF), gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy.'<sup>26</sup> IVF and cryopreservation are common and effective methods of ART.<sup>27</sup> IVF is the process whereby an egg retrieved from a woman is fertilised with the sperm sample from a man in a medically controlled laboratory under artificial conditions.<sup>28</sup> The embryo is then transferred into the uterus.<sup>29</sup> A successful implantation would result in a pregnancy.<sup>30</sup> Cryopreservation refers to the 'freezing and storage of embryos.'<sup>31</sup> Surplus embryos are stored in this manner to ensure that there are enough viable embryos for on-going implantation attempts.<sup>32</sup> Once the parties have achieved their desired number of children or do not wish to continue further efforts to fall pregnant;<sup>33</sup> many face the dilemma of deciding the fate of the surplus cryopreserved embryos. Three options exist: the embryos may be destroyed; donated for scientific research or donated to an infertile couple or individual.<sup>34</sup> Increasingly, more couples have chosen to donate their embryos for altruistic reasons in order to help others

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<sup>23</sup> Ginar da Silva, Bertoldi, Freitas da Silveira (2019) 2.

<sup>24</sup> Wang J & Sauer M 'In vitro fertilization (IVF): a review of 3 decades of clinical innovation and technological advancement' (2006) 2(4) *Therapeutics and Clinical Risk Management* 355.

<sup>25</sup> Brezina P, Ning N, Mitchell E et al 'Recent Advances in Assisted Reproductive Technology' (2012) 1 *Current Obstetrics Gynaecology Reports* 166.

<sup>26</sup> Zegers – Hochschild, Adamson, de Mouzon et al, *supra* note 1.

<sup>27</sup> Okhovati M, Zare M, Zare F et al 'Trends in Global Assisted Reproductive Technologies Research: a Scientometrics study' (2015) 7(8) *Electronic Physician* 1597.

<sup>28</sup> Badger-Emeka L 'In-vitro Fertilisation' in *Fundamentals, Industrial and Medical Biotechnology* (ed) *Universal Academic Services*: Beijing (2013) 181.

<sup>29</sup> Badger-Emeka (2013) 181.

<sup>30</sup> Saravelos S, Wong A, Chan S et al 'How often does the embryo implant at the location to which it was transferred?' (2016) 48 *Ultrasound Obstet Gynecol* 106.

<sup>31</sup> Cryopreservation includes the storage of gametes, zygotes, embryos, or gonadal tissue, however this mini-thesis will focus on the storage of extra embryos. See Zegers – Hochschild, Adamson, de Mouzon et al, *supra* note 1.

<sup>32</sup> Colman K 'Defending unborn orphans: Embryo adoption' (2009) *CedarEthics Online* 2.

<sup>33</sup> The inability to fall pregnant after several attempts can lead to marital instability and divorce. See Katz K 'Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation' (2003) 18 *Wisconsin Women's Law Journal* 185.

<sup>34</sup> Fuscaldo G, Russell S & Gillam L 'How to facilitate decisions about surplus embryos: patients' views' (2007) 22(12) *Human Reproduction* 3129.



start a family<sup>35</sup> or on the basis of religious beliefs that the other two alternatives would deliberately end a potential life.<sup>36</sup>

‘Embryo donation’ refers to ‘the transfer of an embryo resulting from gametes that did not originate from the recipient and her partner.’<sup>37</sup> In other words, the embryo is transferred into the recipient’s uterus from which a child could be born from a successful pregnancy.<sup>38</sup> This method of ART provides an alternative for couples where neither the female nor male partner have viable gametes or where one or both partners carry a hereditary disease.<sup>39</sup> 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.<sup>40</sup> This makes the recipient couples feel more connected to the child born through embryo donation.<sup>41</sup> However, the fact remains that this child will not share any biological link, save for the gestational link, with the woman who carried him or her or with her partner.<sup>42</sup> Additionally, this allows the recipient parents to decide whether or not to disclose this non-genetic relationship to the child.<sup>43</sup> This underscores the reality that despite embryo donation providing relief for infertile couples who have no other option,<sup>44</sup> 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.<sup>45</sup> From a legal perspective, a 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.<sup>46</sup> Furthermore, because the ability to access information regarding one’s genetic origins is dependent on one’s awareness of the nature of

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<sup>35</sup> Alizadeh L & Samani R ‘Using fertile couples as embryo donors: An ethical dilemma’ (2014) 12(3) *Iranian Journal of Reproductive Medicine* 169.

<sup>36</sup> Different religious groups hold a wide variety of opinions on the issue of excess embryos. For example, many Christian groups believe that life begins at conception and that an embryo’s right to life should be respected. See Kerridge I, Jordens C & Benson R et al ‘Religious perspectives on embryo donation and research’ (2010) *Clinical Ethics* 35.

<sup>37</sup> Zegers – Hochschild, Adamson G, de Mouzon et al, *supra* note 1.

<sup>38</sup> Walters R *Embryo Adoption as an Ethical Option for Couples Faced with Infertility* (unpublished Senior Thesis, Liberty University, 2016) 3.

<sup>39</sup> Wanggren K, Prag F & Skoog Svanberg A ‘Attitudes towards embryo donation in Swedish women and men of reproductive age’ (2013) 118 *Upsala Journal of Medical Sciences* 187.

<sup>40</sup> MacCallum F & Golombok S ‘Embryo donation families: mothers’ decisions regarding disclosure of donor conception’ (2007) 22(11) *Human Reproduction* 2889.

<sup>41</sup> MacCallum F & Golombok S (2007) 2891.

<sup>42</sup> Walters R *supra* note 38, at 3.

<sup>43</sup> MacCallum & Golombok (2007) 2888.

<sup>44</sup> Alizadeh & Samani (2014) 169.

<sup>45</sup> Widdows H & MacCallum F ‘Disparities in parenting criteria: an exploration of the issues, focusing on adoption and embryo donation’ (2002) 28 *J Med Ethics* 140.

<sup>46</sup> MacCallum F ‘Embryo donation is not like adoption’ available at [https://www.bionews.org.uk/page\\_92056](https://www.bionews.org.uk/page_92056) (accessed 3 May 2020).

their conception,<sup>47</sup> a child born through embryo donation may never know such details because the decision to disclose the circumstances of their conception is the autonomous decision of the parents.<sup>48</sup>

The matter of disclosure of the manner of conception in families with children conceived through ART has been substantially debated.<sup>49</sup> In South Africa, the Children's Act 38 of 2005 (the Children's Act) prohibits the disclosure of the gamete donor's identity to the donor conceived child or the child's guardian.<sup>50</sup> The provision of donor anonymity applies equally to children born through embryo donation as it falls within the definition of 'artificial fertilisation' in the Regulations Relating to Artificial Fertilisation of Persons which was promulgated in terms of the National Health Act 61 of 2003.<sup>51</sup> Because the child in embryo donation is not related to either parent, the trust between the donor and the recipient couple is critical as there is no specific legislative provision which regulates the rights of all parties involved, especially the interests of the child to be born.<sup>52</sup> For this reason, embryo donation done anonymously, remains a controversial issue.<sup>53</sup>

In 2016, the South African Law Reform Commission (SALRC) launched an investigation into the right of a child to know their biological origins.<sup>54</sup> The SALRC raised the question whether a child's right to family care or parental care under section 28(1)(b) of the Constitution encompasses a right to know or have a relationship with one's genetic parents, family and siblings who might have also been conceived through ART?<sup>55</sup> There is also a growing body of research which advocates for children conceived through donor gametes to have access to identifying information about their gamete donor as this is fundamental to their identity formation in the same way that there has been a trend among adopted children who desire

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<sup>47</sup> Ravitsky V 'The right to know one's genetic origins and cross-border medically assisted reproduction' (2017) 6(3) *Israel Journal of Health Policy Research* 3.

<sup>48</sup> Widdows & MacCallum (2002) 140.

<sup>49</sup> MacCallum & Golombok (2007) 2888.

<sup>50</sup> The Children's Act 38 of 2005, s41(2).

<sup>51</sup> Artificial fertilisation means 'the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction and includes artificial insemination, in vitro fertilisation, gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection' (Regulations Relating to Artificial Fertilisation of Persons in GN 1165 GG 40312 of 30 September 2016.)

<sup>52</sup> Buckwalter-Poza R 'The Frozen Children: The Rise and Complications of Embryo Adoption in the U.S.' available at <https://psmag.com/news/frozen-children-rise-complications-embryo-adoption-u-s-80754> (accessed 30 March 2020).

<sup>53</sup> Taebi M et al 'Ethical Challenges of Embryo Donation in Embryo Donors and Recipients' (2017) *Iranian Journal of Nursing and Midwifery Research* 36.

<sup>54</sup> South African Law Reform Issue Paper 32 (Project 140) The Right to Know One's Own Biological Origins (2017) available at <http://www.justice.gov.za/salrc/ipapers.htm> (accessed 27 April 2020).

<sup>55</sup> SALRC 32 (Project 140) The Right to Know One's Own Biological Origins 2017 para 1.2.1.



access to information on their biological parents and background.<sup>56</sup> Thus, the complexity of the child's identity development was not fully appreciated and acknowledged.<sup>57</sup>

There are three parties involved in the embryo donation process: the donating couple, the recipient couple, and the child born from the donated embryo.<sup>58</sup> For purposes of clarity, it is important to note that the donating couple is to be understood as the genetic or biological parents.<sup>59</sup> The receiving couple refers to the social parents, who are the legal parents of the child.<sup>60</sup> However, 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.<sup>61</sup>

Each fertility clinic has its own practices. Generally, couples undergoing IVF treatments create more embryos than needed in order to improve their chances of conceiving or to have the opportunity to have more children in future years, however, in many cases these extra embryos are unused and left in storage.<sup>62</sup> Couples who decide to donate their excess embryos must conclude a contract and provide details of their medical history, although this is not necessarily required, but in this case, the recipient couple should be warned about the possibility of any transmission of disease.<sup>63</sup> Many fertility clinics have a waiting list for couples,<sup>64</sup> others may sign up through an agency which uses an online matching service and arrange the transportation for the embryos to a clinic of the recipients' choice.<sup>65</sup> There is also the option of receiving an embryo from a friend or family member.<sup>66</sup> Because in most states, embryos are

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<sup>56</sup> SALRC Issue Paper 32 (2017) para 1.5.

<sup>57</sup> Gurevich R 'Understanding Donor Arrangements: Having a Baby With Third-Party Reproduction' available at <https://www.verywellfamily.com/understanding-donor-arrangements-4176290> (accessed 4 May 2020).

<sup>58</sup> Walters R *supra* note 38, at 8.

<sup>59</sup> MacCallum F 'Embryo donation parents' attitudes towards donors: comparison with adoption' (2009) 24(3) *Human Reproduction* 522.

<sup>60</sup> MacCallum (2009) 522.

<sup>61</sup> Faust K 'Why Embryo Adoption Damages Children's Rights' available at <https://thefederalist.com/2019/12/04/why-embryo-adoption-damages-childrens-rights/> (accessed 30 March 2020).

<sup>62</sup> Boys S & Walsh J 'The Dilemma of Spare Embryos After IVF Success: Social Workers' Role in Helping Clients Consider Disposition Options' (2017) 18(2) *Advances in Social Work* 586.

<sup>63</sup> Katz (2003) 193, 221.

<sup>64</sup> Huggies 'IVF embryo (blastocyst)' available at <https://www.huggies.co.za/conception/ivf/ivf-embryo-blastocyst/> (accessed 7 July 2020).

<sup>65</sup> NRFA 'Six Steps Of The Embryo Adoption Process' available at <https://www.nrfa.org/steps-of-embryo-adoption/> (accessed 8 July 2020).

<sup>66</sup> Gurevich R 'Options for What to Do With Extra Frozen Embryos After IVF' available at <https://www.verywellfamily.com/extra-embryos-after-ivf-what-are-your-options-1960215> (accessed 8 July 2020).

considered ‘property,’<sup>67</sup> the transfer from one party to another after signing a contract is fairly easy.<sup>68</sup> It follows that the child born is legally and socially the child of the receiving couple.

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 before the High Court before the surrogacy procedure can commence.<sup>69</sup> However, there is 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,<sup>70</sup> whereas with embryo donation, 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 clearly set out for all parties to the surrogate motherhood agreement,<sup>71</sup> 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<sup>72</sup> 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 regards to the complexity of such a decision and effectively this ignores the interests of the child to be born.<sup>73</sup>

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

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<sup>67</sup> Under South African law, is it implied that an embryo is a legal object and susceptible to ownership. See Robinson R ‘The Legal Nature of the Embryo: Legal Subject or Legal Object?’ (2018) 21 *PER / PELJ* 15 – 16. See also *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) para 63 where the Tennessee Court concluded pre-embryos are not ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.”

<sup>68</sup> Westbrook C ‘Adoptable Property?: The Problem of Frozen Embryos and Ill-Adapted Adoption Law’ (2016) *Digital Commons at Michigan State University College of Law* 2.

<sup>69</sup> Van Niekerk S ‘Modern families: Surrogacy is an option’ available at <https://www.golegal.co.za/surrogacy-south-africa-children/> (accessed 8 July 2020).

<sup>70</sup> *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC), para 294.

<sup>71</sup> S297 of the Children’s Act 38 of 2005.

<sup>72</sup> Nosarka S & Kruger T ‘Surrogate motherhood’ (2005) 95(12) *SAMJ* 944.

<sup>73</sup> 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; the challenge of receiving medical information about the donor couple and/or another donor sibling. See Ethics Committee of the American Society for Reproductive Medicine ‘Guidance regarding gamete and embryo donation’ (2021) 115(6) *Fertility and Sterility* 1402–1403.

genetically related to the father, but not to the mother<sup>74</sup> and in sperm donation, the child born is genetically related to the mother, but not the father who will raise them.<sup>75</sup>

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.<sup>76</sup> Therefore, for the purpose of this paper, I will focus on the interests of the child 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.

## 1.2 Significance of the research

ART has become a commonplace technology which has successfully treated millions of infertile couples world-wide.<sup>77</sup> This has confronted society with the challenge of reassessing the way offspring are viewed.<sup>78</sup> Previously, maintaining the anonymity of gamete donors and non-disclosure surrounding the method of conception in assisted reproductive procedures was a common practice, but recently there has been increased concerns about the potential detrimental impact on the psychological well-being of the donor-conceived child.<sup>79</sup>

Presently, many countries prohibit embryo donation to infertile women or couples primarily due to the fact that this complex procedure<sup>80</sup> is fraught with numerous emotional, ethical, legal and psychosocial aspects.<sup>81</sup> In countries where embryo donation is permitted, legislation and

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<sup>74</sup> Imrie S, Jadvá V, Fishel S et al 'Families Created by Egg Donation: Parent–Child Relationship Quality in Infancy' (2019) 90(4) *Child Development* 1333.

<sup>75</sup> Golombok S, Readings J, Blake L et al 'Children Conceived by Gamete Donation: Psychological Adjustment and Mother-child Relationships at Age 7' (2011) 25(2) *J Fam Psychol* 1.

<sup>76</sup> Walters R, *supra* note 38, at 8.

<sup>77</sup> Brezina P & Zhao Y 'The Ethical, Legal, and Social Issues Impacted by Modern Assisted Reproductive Technologies' (2011) *Obstetrics and Gynecology International* 1.

<sup>78</sup> Brezina & Zhao (2011) 1.

<sup>79</sup> MacCallum & Golombok (2007) 2888.

<sup>80</sup> Wanggren K, Alden J, Bergh T et al 'Attitudes towards embryo donation among infertile couples with frozen embryos' (2013) 28(9) *Human Reproduction* 2433.

<sup>81</sup> Robertson J 'Ethical and legal issues in human embryo donation' (1996) 64(6) *American Society for Reproductive Medicine* 885.

regulations may vary considerably.<sup>82</sup> The lack of uniformity regarding the position of embryo donation and unclear guidelines for the procedure, have led some couples to seek the procedure in foreign countries where embryo donation is permitted.<sup>83</sup>

As the use of IVF becomes more widespread and the number of spare embryos in cryopreservation increases, so too will the number of donated embryos.<sup>84</sup> As embryo donation provides the opportunity for surplus embryos that would have otherwise remained frozen, to develop and lead full lives,<sup>85</sup> the question remains whether a child's right to identity is protected specifically in the case of embryo donation. This research aims to examine whether this right is sufficiently protected at both national and international level and if not, the ways in which this protection can be enhanced will be considered.

Given the complexity of ART as well as the low extent of disclosure<sup>86</sup> to children born through such reproductive technologies,<sup>87</sup> regulation in combination with serious enforcement, are required to guide ART practices and ensure that the interests of children born through embryo donation are protected.

### 1.3 Research Question(s)

The main research question is to what extent does the current national and international legal framework promote a child's right to identity in the case of embryo donation?

In order to answer this question holistically, the following sub-questions will be discussed:

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<sup>82</sup> Wanggren, Alden, Bergh et al (2013) 2433.

<sup>83</sup> Ibid. Couples from the United Kingdom, France, Germany, and the Balkan countries travel to Greece and Czech Republic where embryo donation is permitted. See Fertility Clinics Abroad 'IVF Greece' available at <https://www.fertilityclinicsabroad.com/ivf-abroad/ivf-greece/> (accessed 21 October 2021) & 'Czechia Fertility Destinations 2022' available at <https://www.fertilityclinicsabroad.com/czechia-fertility-destination-2022/> (accessed 21 October 2021).

<sup>84</sup> Lester C 'Embryo 'Adoption' Is Growing, but It's Getting Tangled in the Abortion Debate' available at <https://www.nytimes.com/2019/02/17/health/embryo-adoption-donated-snowflake.html> (accessed 30 March 2020).

<sup>85</sup> Buckwalter-Poza R 'The Frozen Children: The Rise and Complications of Embryo Adoption in the U.S.' available at <https://psmag.com/news/frozen-children-rise-complications-embryo-adoption-u-s-80754> (accessed 30 March 2020).

<sup>86</sup> In a 2016 study, it was found that from a sample of 2814 responses, only 21% of parents who had resorted to donor insemination (DI) and 23% of parents in embryo donation (ED) cases had disclosed, 36% of DI parents and 48% of ED parents had postponed disclosure; 13% were undecided in both cases whereas 30% of DI and 16% of ED parents chose to not disclose. See Tallandini M, Zanchettin L, Gronchi G et al 'Parental disclosure of assisted reproductive technology (ART) conception to their children: a systematic and meta-analytic review' (2016) 31(6) *Human Reproduction* 1283.

<sup>87</sup> MacCallum & Golombok (2007) 2888.

- i. What does the right to identity entail and how are these aspects impacted by embryo donation?
- ii. What are the implications of realising a child's right to identity on other parties?
- iii. What level of protection is currently afforded to the right to identity under national as well as international law and is this sufficient?
- iv. What lessons, if any, can be learnt from other jurisdictions?
- v. How can the right to identity of a child born through embryo donation be better protected in an international human rights instrument or would national legislation suffice?

#### **1.4 Methodology**

The methodology employed in this research paper will be completed by way of desktop and library research. This research paper relies predominantly on primary and secondary sources. In terms of the primary sources the following will be examined: international and regional conventions, legislation and case law. Secondary sources include, but are not limited to: journal articles, textbooks, books, discussion papers, internet references, research papers and theses.

#### **1.5 Limitations of the Research**

This research acknowledges that the arguments put forth herein may also apply to the children conceived through sperm or egg donation. While sperm and egg donation are more common, embryo donation is becoming increasingly accessible as couples face the growing dilemma of deciding whether to donate their excess embryos.<sup>88</sup> In light of this, a child's identity formation should also be considered in embryo donation.<sup>89</sup> Since knowledge concerning the psychological well-being and parent-child relationship of children born through embryo donation is limited, there is the risk of unsubstantiated views.<sup>90</sup>

This research will not focus on the interests or rights of the donor and recipient parents, but solely on those of the child born through embryo donation. The reason being that the focus in

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<sup>88</sup> Barclay E 'Why more people are trying to get pregnant with donated frozen embryos' available at <https://www.vox.com/2016/5/9/11348726/embryo-sharing-donation> (accessed 9 July 2020).

<sup>89</sup> SALRC Issue Paper 32 (2017) v.

<sup>90</sup> Armuand G et al 'Attitudes towards embryo donation among healthcare professionals working in child healthcare: a survey study' (2019) 19(209) *BMC Pediatrics* 2.



embryo donation has primarily concerned the desires of the donating couple and recipient couples and not the rights or needs of the child.<sup>91</sup>

## 1.6 Chapter Outline

Chapter 2 examines the meaning behind the concept of identity and analyses the various aspects which form part of this notion. The aim will be to show the multifaceted nature of identity.

The second part of chapter two examines/explores the newly emerging kin figure – ‘batch siblings’ – and the role which siblingship plays in building one’s personal narrative. It will argue that children born through embryo donation should not only have access to information regarding their genetic parents and method of conception, but also to information concerning their potential full genetic siblings.

The third part of this chapter explores the issue of embryos which are donated to couples abroad. In these cases, a child is born in a country other than the nationality of his or her genetic parents. What happens in the instances where embryo donation is prohibited in the country of the recipients? How will this impact the right to identity of the child born with regards to their nationality? The potential effect which cross-border embryo donation may have on the transcription of the child’s birth certificate will also be explored.

The issue of information contained on the child’s birth certificate will also be addressed – specifically, the question of whether it is possible to contain reference to specific information concerning the method of conception which an individual born through embryo donation may access later in life.

Additionally, throughout this chapter, the different ways in which the aspects of the right to identity may be impacted as a result of being born through embryo donation will be identified.

Chapter 3 focuses on the rights of the other parties involved, in particular the question of whether the right to identity of a child born through embryo donation should trump the right to family life of the donating couple and the recipient couple. It will also highlight the matter of disclosure, namely should the recipient parents or the state bear this onus? How should the

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<sup>91</sup> Samorinha C & Silva S ‘A patient-centred approach to embryo donation for research’ (2016) 5 *Israel Journal of Health Policy Research* 1 – 2; Baccino G, Salvadores P, Hernández E ‘Disclosing their type of conception to offspring conceived by gamete or embryo donation in Spain’ (2014) 32(1) *Journal of Reproductive and Infant Psychology* 83 – 84; Widdows H & MacCallum F ‘Disparities in parenting criteria: an exploration of the issues, focusing on adoption and embryo donation’ (2002) 28 *J Med Ethics* 140.

disclosure be carried out? What factors should be taken into account when the decision to reveal this information is considered? Should a child born through embryo donation be entitled to the right to disclosure in the same way as an adult born through embryo donation?<sup>92</sup>

Chapter 4 will examine the extent to which the right to identity is protected by national legislation and international children's rights instruments by analysing the national legislative framework, various international conventions in addition to South African and foreign case law. It will also scrutinise whether the current level of protection is adequate.

Chapter 5 will examine the legal position in Australia and New Zealand. The position in these countries will then be compared to South Africa with the aim of determining what lessons can be learnt from these jurisdictions, if any. A comparative analysis will look at the similarities and differences between these three jurisdictions.

Chapter 6 concludes the research. Drawing on the findings in the previous chapter, this chapter makes recommendations for the most effective methods in which a child's right to identity in the context of embryo donation could be protected at an international and national level. The possible obstacles which may inhibit the effectiveness of each method will also be discussed.

This chapter will further put forward recommendations as to how countries can regulate the rights and interests of children born through embryo donation, ensuring that they are able to access information concerning their biological origins in order to safeguard, promote and recognise their right to identity as a whole.

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<sup>92</sup> Studies suggest there is an 'advantage' to disclosure when children are at a young age as opposed to adulthood. See Lampic C, Svanberg A, Sorjonen K et al 'Understanding parents' intention to disclose the donor conception to their child by application of the theory of planned behaviour' (2021) 36(2) *Human Reproduction* 396. See also Ethics Committee of the American Society for Reproductive Medicine 'Informing offspring of their conception by gamete or embryo donation: an Ethics Committee opinion' (2018) 109 *Fertility and Sterility* 602.

## CHAPTER 2: DEFINING THE CHILD'S RIGHT TO IDENTITY

### 2.1 Introduction

The word 'identity' originates from the Medieval Latin term, *identitatem*, which means 'sameness, oneness, state of being the same.'<sup>1</sup> In modern times, the definition has evolved to include 'the distinguishing character of an individual'<sup>2</sup> and 'the relation established by psychological identification.'<sup>3</sup> The first definition relates to 'similarities', the latter connotations relate to 'differences' and one's psychological identity.<sup>4</sup> Arguably, the concept of 'identity' still remains something of a paradox as dictionary definitions do not necessarily capture the full sense of the word.<sup>5</sup> Identity is a constantly changing and complex process which makes it difficult to grasp as it has a variety of meanings to different people.<sup>6</sup> The multi-faceted notion of 'identity,' makes it difficult to continuously expand on the current legal definition both at national and international levels.<sup>7</sup> Only through dismantling the concept of 'identity' and examining all its elements, can it be protected at a legal level.

In the context of embryo donation, there has been a history of elevating the interests of the adult parties above those of the potential (and existing) offspring.<sup>8</sup> While there has been a shift in some states to pay attention to the welfare of the children resulting from ART,<sup>9</sup> the extent of this specifically with regards to genetic heritage and knowledge of children born through embryo donation is still unclear. This chapter will explore the meaning of a child's right to identity with the aim of showing the multi-faceted nature of the concept of identity.

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<sup>1</sup> Online Etymology Dictionary 'Identity (n.)' available at [https://www.etymonline.com/word/identity#:~:text=identity%20\(n.\),%22%20\(see%20idem\),%20%5B](https://www.etymonline.com/word/identity#:~:text=identity%20(n.),%22%20(see%20idem),%20%5B) (accessed 20 November 2020).

<sup>2</sup> Merriam Webster Dictionary 'Definition of identity' available at <https://www.merriam-webster.com/dictionary/identity> (accessed 20 November 2020).

<sup>3</sup> Ibid.

<sup>4</sup> Psychological identity refers to one's self-image, their self-esteem and individuality. See Oyserman D, Elmore K & Smith G 'Self, Self-Concept and Identity' in Leary M & Tangney J (ed) *Handbook of Self and Identity* 2 ed (2012) 69.

<sup>5</sup> Fearon J 'What is Identity (As we now use the word)?' (1999) *Stanford edu* 1.

<sup>6</sup> Fearson (1999) 2.

<sup>7</sup> Ambiguity is inherent in the term *identity*, as it is largely undefined. See Stewart G 'Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child' (1992) 26(3) *Family Law Quarterly* 224.

<sup>8</sup> Goedeke S & Daniels K 'Embryo Donation or Embryo Adoption? Practice and Policy in the New Zealand Context' (2017) 31(1) *International Journal of Law Policy and the Family* 7.

<sup>9</sup> Goedeke S, Daniels K & Thorpe M 'Embryo donation and counselling for the welfare of donors, recipients, their families and children' (2016) 31(2) *Human Reproduction* 415.



## 2.2 Definition and scope of the concept of identity

The right to know one's identity is not a novel concept.<sup>10</sup> In several international instruments, the right to identity is expressly and implicitly mentioned, and imposes both positive and negative obligations on States,<sup>11</sup> nonetheless, the exact content behind these provisions lack clear and complete definition.<sup>12</sup>

The right to identity was first recognised under Article 7 and Article 8 of the Convention on the Rights of the Child, (CRC).<sup>13</sup> 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.<sup>14</sup>

As previously mentioned, Article 8 originated in response to the abduction of children under Argentina's military regime.<sup>15</sup> The original proposal was: the 'child's right to retain a 'true and genuine personal, legal, and family identity.'<sup>16</sup> However, this wording was rejected by many countries<sup>17</sup> as there was concern<sup>18</sup> that this provision would obstruct closed adoptions and anonymous gamete donor practices.<sup>19</sup> 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.<sup>20</sup> But what stands out from the original proposal is that the concept

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<sup>10</sup> McCombs T & Gonzalez JS 'Right to Identity' (2007) *International Human Rights Law Clinic* 5.

<sup>11</sup> McCombs & Gonzalez (2007) 6.

<sup>12</sup> McCombs & Gonzalez (2007) 5.

<sup>13</sup> 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) 21 *International Journal of Law, Policy and the Family* 143.

<sup>14</sup> UN Convention on the Rights of the Child (1989), Article 8(1).

<sup>15</sup> Clark B 'A Balancing Act? The Rights of Donor-Conceived Children to Know Their Biological Origins' (2012) 40(3) *Georgia Journal of International and Comparative Law* 626.

<sup>16</sup> 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.' See Stewart G 'Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child' (1992) 26(3) *Family Law Quarterly* 223.

<sup>17</sup> Some of these countries include: the United Kingdom, the Czech Republic, Luxembourg and Poland. See O'Donovan K '“Real” Mothers for Abandoned Children' (2002) 36(2) *Wiley* 352.

<sup>18</sup> 'Some countries expressed concerns that the right might conflict with developing medical technology regarding artificial insemination and IVF.' See Stewart (1992) 223.

<sup>19</sup> SALRC Issue Paper 32 (2017) para 1.40.

<sup>20</sup> McCombs & Gonzalez (2007) 8.

of identity centred around two principles: ‘true and genuine,’ in other words, authenticity and ‘personal, legal, and family’ identity – thereby indicating the multi-dimensionality of identity.<sup>21</sup>

The child’s right to protection of their legal and national identities are provided for under Article 7 of the CRC<sup>22</sup> and Article 24(2)–(3) of the International Covenant on Civil and Political Rights (ICCPR)<sup>23</sup> which refer to the right to birth registration and the right to acquire nationality.<sup>24</sup>

The child’s right to biological and familial identities<sup>25</sup> are 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.’<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

In short, the provisions of the CRC relating specifically to the child’s right to identity raises a number of issues with regards to other human rights; compatibility with ART practices<sup>29</sup> and the nature of obligations imposed on States Parties.<sup>30</sup> Clearly, one cannot fully understand what the right to identity entails by solely referring to these provisions.<sup>31</sup>

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<sup>21</sup> Ibid.

<sup>22</sup> UN Convention on the Rights of the Child (1989), Article 7 ‘(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.’

<sup>23</sup> International Covenant on Civil and Political Rights, Article 24(2) ‘Every child shall be registered immediately after birth and shall have a name’ and (3) ‘Every child has the right to acquire a nationality.’

<sup>24</sup> The Human Rights Committee (1989) in its General Comment No. 7 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 others rights provided for in the Covenant. See International Covenant on Civil and Political Rights (ICCPR) General Comment No. 17 on Article 24 (Rights of the child) para 7.

<sup>25</sup> Stewart (1992) 226.

<sup>26</sup> UN Convention on the Rights of the Child (1989), Article 7(1).

<sup>27</sup> Stewart (1992) 224. For purposes of this mini-thesis the terms ‘donating couple’ refers to the biological parents and the ‘recipient couple’ refers to the social parents.

<sup>28</sup> McCombs & Gonzalez (2007) 7.

<sup>29</sup> Zegers – Hochschild, Adamson, de Mouzon et al, *supra note* 1.

<sup>30</sup> Stewart (1992) 223.

<sup>31</sup> Ronen Y ‘Redefining the Child’s Right to Identity’ (2004) 18 *International Journal of Law, Policy and the Family* 160.

According to Erik Erikson's identity theory, identity is characterised as a 'subjective sense of an invigorating sameness and continuity.'<sup>32</sup> This sense begins from childhood and stems from a developmental psychosocial process.<sup>33</sup> Hence, there are several types of identities which tend to develop from birth: personal or individual identity,<sup>34</sup> family identity,<sup>35</sup> genetic identity<sup>36</sup> or biological identity,<sup>37</sup> gender identity,<sup>38</sup> ethnic identity,<sup>39</sup> social identity, cultural identity, racial identity and national identity.<sup>40</sup> 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 secrecy.<sup>41</sup> Additionally, the child may also not have access to identifiable medical information surrounding the circumstances of their birth.<sup>42</sup>

## 2.3 Identity in the context of embryo donation

### 2.3.1 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.<sup>43</sup> At some point, whether consciously or unconsciously, a child will ask themselves: 'Who am I? What makes me special? Why am I here?'<sup>44</sup> These questions are at the core of a child's self-identity formation.<sup>45</sup> A child's

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<sup>32</sup> Schachter E 'Identity Constraints' (2002) 45(6) *Human Development* 417.

<sup>33</sup> Jelic M 'Developing a sense of identity in pre-schoolers' (2014) 5(22) *Mediterranean Journal of Social Sciences* 225.

<sup>34</sup> Ibid.

<sup>35</sup> Haydon C 'The Relationship Between Identity Development and Family History Knowledge' *BYU Scholars Archive* (2010) 11.

<sup>36</sup> Ludlow K 'Genetic identity concerns in the regulation of novel reproductive technologies' (2020) *Journal of Law and the Biosciences* 1.

<sup>37</sup> Clark P 'Ethical Implications of Embryo Adoption' in Craig S. Atwood and Sivan Vadakkadath Meethal (ed) *Pluripotent Stem Cell Biology - Advances in Mechanisms, Methods and Models* (2014) 220.

<sup>38</sup> Sandberg K 'The Rights of LGBTI Children under the Convention on the Rights of the Child' (2016) *Nordic Journal of Human Rights* 343.

<sup>39</sup> Tasker F, Gubello A, Clarke V et al 'Receiving, or 'Adopting,' Donated Embryos to Have Children: Parents Narrate and Draw Kinship Boundaries' (2018) *MDPI* 16.

<sup>40</sup> Jelic (2014) 225.

<sup>41</sup> Widdows & MacCallum (2002) 140.

<sup>42</sup> Rispel SL *The Scope and Content of the Child's Right to Identity in the context of Surrogacy* (unpublished LLM thesis, University of the Western Cape, 2017) 31.

<sup>43</sup> A child's earliest years forms the foundation of their personal identity. Raburu P 'The Self-Who Am I?: Children's Identity and Development through Early Childhood Education' (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 J, Oakes P, Haslam et al 'Personal and Social Identity: Self and Social Context' (1992) *Department of Psychology, Princeton University, Princeton, NJ* 3.

<sup>44</sup> Diamond A 'Self-Identity in Children: Theory, Definition & Issues' available at <https://study.com/academy/lesson/self-identity-in-children-theory-definition-issues.html> (accessed 22 November 2020).

<sup>45</sup> It is the way in which the child views themselves or wonder what their role is in this world. Ibid.

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.<sup>46</sup>

A child's right to personal identity is based on two elements: first, that 'genealogical knowledge is central to the development of personal identity'<sup>47</sup> and second, having 'access to identifying information about their *biological parents*.'<sup>48</sup> 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.'<sup>49</sup> These thoughts and emotions about missing information appear to be linked to a general theme of 'loss' – and 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.<sup>50</sup>

Studies conducted on adopted children indicate that they show a strong interest in seeking to discover their personal identity.<sup>51</sup> Similar interests have been shown in children who are raised by a single parent.<sup>52</sup> For example, in the case of *Mikulic v Croatia*,<sup>53</sup> 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.'<sup>54</sup> However, one cannot necessarily assume that all children born through embryo donation may display this same strong curiosity.<sup>55</sup> 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.<sup>56</sup> And as stated

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<sup>46</sup> Raburu (2015) 95.

<sup>47</sup> Turkmendag I 'The Donor-conceived Child's 'Right to Personal Identity': The Public Debate on Donor Anonymity in the United Kingdom' (2012) 39(1) *Wiley* 70.

<sup>48</sup> Ibid.

<sup>49</sup> Harrigan M, Dieter S, Leinwohl J & Marrin L "'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) 15(1) *Journal of Family Communication* 84.

<sup>50</sup> Turner AJ & 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) 15(9) *Human Reproduction* 2044.

<sup>51</sup> Adoptive children may ask themselves similar questions as children born through embryo donation such as 'Where did I come from? Did I grow in [your] tummy? How could [biological parents] give me away?' By adolescence, questions of personal identity intensify: 'Why was I relinquished? Why did it happen to me?' See Billadeau S 'Personal Identity Issues in Adoption' available at <https://adoption.com/personal-identity-issues-in-adoption> (accessed 1 December 2020).

<sup>52</sup> Golombok S, Zadeh S, Imrie s et al 'Single Mothers by Choice: Mother-Child Relationships and Children's Psychological Adjustment' (2016) 30(4) *Journal of Family Psychology* 415.

<sup>53</sup> *Mikulic v Croatia*, Appl No 53176/99, 7 February 2002.

<sup>54</sup> Ibid, at 66.

<sup>55</sup> Armuand (2019) 3.

<sup>56</sup> 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 mother. See Armuand (2019) 7.

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.<sup>57</sup>

Nevertheless, it cannot be assumed that the thoughts and feelings of children born through embryo donation are one sided. Where such a child feels as though their identity is incomplete, it can hardly be in the child's 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.<sup>58</sup> 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.<sup>59</sup> Children are able to conceptualise the meaning and significance of the role of embryo donation in their conception differently at different developmental stages.<sup>60</sup> Hence, identity formation is a continuous process built over time.<sup>61</sup> Thus, the foundational building of a child's identity formation occurs during their childhood.<sup>62</sup>

When information about the child's origins is withheld, children may be able to pick up 'hidden clues'<sup>63</sup> that 'things [are] not quite right.'<sup>64</sup> This has the potential to seriously affect the child's ability to construct his or her personal identity.<sup>65</sup> Therefore, the hinderance of access to identifying and non-identifying information on the donor couple deprives the child born via embryo donation of a major aspect of their individual autonomy: the choice to decide what meaning to assign to their personal identity.<sup>66</sup>

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<sup>57</sup> Samani R 'Debate in embryo donation: embryo donation or both-gamete donation?' (2009) 19(1) *Reproductive BioMedicine Online* 30.

<sup>58</sup> Frith L, Blyth E & Lui S 'Family building using embryo adoption: relationships and contact arrangements between provider and recipient families—a mixed-methods study' (2017) 32(5) *Human Reproduction* 2049.

<sup>59</sup> Sokol J 'Identity Development Throughout the Lifetime: An Examination of Eriksonian Theory' (2009) 1(2) *Graduate Journal of Counselling Psychology* 1.

<sup>60</sup> Dinsmore B 'Building Your Family Through Embryo Donation' available at <https://pved.org/buildingfamily.php> (accessed 1 December 2020).

<sup>61</sup> Sokol J (2009) 192.

<sup>62</sup> Ibid.

<sup>63</sup> Turner & Coyle (2000) 2049.

<sup>64</sup> Ibid.

<sup>65</sup> Withholding of information about the child's manner of connection affected them not only their individual identity, but also in terms of their family and parental dynamics. One child, expressed '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 & Coyle (2000) 2048.

<sup>66</sup> Amorós E 'Donor anonymity, or the right to know one's origins?' (2015) 5 *Catalan Social Sciences Review* 8 – 9.



### 2.3.2 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.<sup>67</sup> Biological identity is a consequence of one's DNA – one's genes – it demonstrates the child's biological relatedness to another.<sup>68</sup> Thus, the child's right to know their biological lineage would enable them to receive identifying information concerning the donating couple and hence, the circumstances surrounding their conception.<sup>69</sup>

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.<sup>70</sup> Nonetheless, for children who view genetic relatedness as a matter of great importance, this does not constitute an equivalent alternative.<sup>71</sup> Knowing and seeking one's genetic relatedness is considered both a natural desire and the social norm in many societies.<sup>72</sup> However, promoting this normative conception risks the 'othering' of families formed through embryo donation as being inferior or subordinate.<sup>73</sup> That is, the child's genetic link to their biological parents / donating couple is more fundamental than their nurturance by their social parents.<sup>74</sup> But even if nurture by the recipient couple plays a significant part in the development of the child's identity, it should not necessarily be implied that nature – that is genes and hereditary factors – should be overlooked.<sup>75</sup>

As these children reach late adolescence, they may revisit the questions of 'Who am I? How have my genetic and social family relationships contributed to who I am?'<sup>76</sup> As children grow,

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<sup>67</sup> This should not be confused with the birth mother. 'Major problems involved in embryo donation' available at <https://www.irishtimes.com/opinion/major-problems-involved-in-embryo-donation-1.1138217> (accessed 23 November 2020).

<sup>68</sup> Moffat K *Biological Identity* in Monk N, Lindgren M, McDonald S, Pasfield-Neofitou S (eds) *Reconstructing Identity* (2017) Palgrave Macmillan, Cham 61.

<sup>69</sup> Frith L 'Gamete donation and anonymity: The ethical and legal debate' (2001) 16(5) *Human Reproduction* 821.

<sup>70</sup> Widdows & MacCallum (2002) 141.

<sup>71</sup> Turkmendag (2012) 59.

<sup>72</sup> *Ibid.*

<sup>73</sup> Maung H 'Ethical problems with ethnic matching in gamete donation' (2018) *Journal of Medical Ethics* 113.

<sup>74</sup> *Ibid.*

<sup>75</sup> Cherry K 'The Age Old Debate of Nature vs Nurture' available at <https://www.verywellmind.com/what-is-nature-versus-nurture-2795392> (accessed 1 December 2020). '[K]nowledge about genetic links is that it is not mere information but it is powerful knowledge that changes relationships regardless of the wishes those involved.' See Turkmendag (2012) 73.

<sup>76</sup> Zweifel J 'Donor conception from the viewpoint of the child: positives, negatives, and promoting the welfare of the child' (2015) 104(3) *American Society for Reproductive Medicine* 514.

they will have more progressive patterns of reasoning and a stronger sense of self.<sup>77</sup> While not all children born through embryo donation may indeed long to know their biological origins<sup>78</sup> and whether or not having access to this information would positively or negatively impact the formulation of their identity, arguably, these children should still have a right to know the truth about their origins.<sup>79</sup> The common strategy of secrecy or information control,<sup>80</sup> deprives these children of their ‘liberty to choose what meaning they assign to the genetic components of their identity and relationships, a choice others in society have.’<sup>81</sup>

Some academics draw parallels between adoption and embryo donation in favour of the importance of knowing one’s genetic origins.<sup>82</sup> Like adoptees who lack genetic relatedness to their social parents, research shows that not having access to information about one’s biological parents can have a detrimental effect on their biological identity development.<sup>83</sup> Studies suggest that open communication with the child about their adoption helps alleviate some of the identity issues.<sup>84</sup> In the same way, children born through embryo donation may have similar feelings regarding their identity development if their parents are unwilling to engage in an open discussion.<sup>85</sup> In both cases the child is relinquished by their existing biological parents, but the difference is that a child born through embryo donation bonds with the recipient mother through gestation.<sup>86</sup> While this research has shown the importance of recognising a child’s biological identity, the process of establishing this coherent sense of identity between adoptees and children born through embryo donation is not necessarily the same.<sup>87</sup>

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<sup>77</sup> ‘Adolescence: Developing Independence and Identity’ available at <https://opentextbc.ca/introductiontopsychology/chapter/6-3-adolescence-developing-independence-and-identity/> (accessed 23 November 2020).

<sup>78</sup> Ravitsky (2017) 2.

<sup>79</sup> Frith (2001) 821.

<sup>80</sup> Turkmendag (2012) 59.

<sup>81</sup> This significantly limits their autonomy. See Ravitsky (2017) 2.

<sup>82</sup> Faust K ‘Why Embryo Adoption Damages Children’s Rights’ available at <https://thefederalist.com/2019/12/04/why-embryo-adoption-damages-childrens-rights/> (accessed 30 March 2020).

<sup>83</sup> MacCallum & Golombok (2007) 2889.

<sup>84</sup> Ibid.

<sup>85</sup> Faust *supra* note 82.

<sup>86</sup> MacCallum & Golombok (2007) 2889.

<sup>87</sup> Ibid.

In *Rose v Secretary of the State for Health*,<sup>88</sup> an adult woman who had been conceived through ART launched an application to discover information about her biological father.<sup>89</sup> The applicant described the importance of this information to her as follows:

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.<sup>90</sup>

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.<sup>91</sup> Furthermore, the court emphasised that personal identity is crucial and is connected to one's genetic origins.<sup>92</sup> Such information would help her to understand her childhood better and thus complete her personal identity.<sup>93</sup> It is important to note that this does not mean that the State is required to 'take every positive step that might possibly promote the emotional wellbeing of some of its citizens,'<sup>94</sup> but rather it is the interest which is generated through sharing a genetic link with one's biological parents i.e. one's donors.<sup>95</sup> In summary, the knowledge about one's biological parenthood forms part of one's personal and biological identity.<sup>96</sup> Although this judgement does not specifically deal with embryo donation, it is not difficult to imagine a similar scenario will play out in future in this context.

Family is not defined by biological relationships alone.<sup>97</sup> But it must be stressed that biology cannot be assumed to be irrelevant.<sup>98</sup> Many children born through embryo donation may feel

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<sup>88</sup> *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] 2 Family Law Reports 962.

<sup>89</sup> The case concerned the rights of children born through artificial insemination by a donor. Ibid, at para 1.

<sup>90</sup> She also expressed the thought of unknowingly passing her genetic siblings in the street. Ibid, at para 7.

<sup>91</sup> Ibid, at para 48.

<sup>92</sup> Ibid, at para 37.

<sup>93</sup> Ibid, at para 31.

<sup>94</sup> There are limits as to what the state can do in order to assist an individual with building up a picture of themselves in order to understand their childhood and complete their identity. Ibid, at para 37.

<sup>95</sup> Ibid, at para 38.

<sup>96</sup> *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] 2 Family Law Reports 962, para 48.

<sup>97</sup> 'Many children are raised by and form strong parental attachments with adults to whom they are not genetically related.' See Power, J 'Why donor-conceived children need to know their origins' available at [https://www.news24.com/parent/fertility/trying\\_to\\_conceive/why-donor-conceived-children-need-to-know-their-origins-20170328](https://www.news24.com/parent/fertility/trying_to_conceive/why-donor-conceived-children-need-to-know-their-origins-20170328) (accessed 2 December 2020).

<sup>98</sup> Ibid.



that their sense of belonging is connected to their biological heritage and thus having knowledge of their biological origins, i.e. access to information about their genetic parents or siblings is an important part of forming and understanding their biological identity.<sup>99</sup> The decision as to whether a child should know their biological history should not be decided on the child's behalf by any person or state entity.<sup>100</sup> It should remain the choice of the child to decide whether nature or nurture is more important to them and furthermore, the importance of their biological origins to them.<sup>101</sup> The child's right to know the truth about their biological origins should not be diminished by fears of the potential harm which they face.<sup>102</sup>

### 2.3.3 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 their relationships with their family members.<sup>103</sup> The processes and development of the individual identity is largely influenced by the distinctive relationships and perceptions built within the family unit.<sup>104</sup> 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.<sup>105</sup> The first concept, deals with the individual's perception and sense of identification within the particular family group.<sup>106</sup> Through personally internalising one's family heritage, the child is able to place themselves uniquely within the family's history.<sup>107</sup> Research suggests that even if one chooses to dissociate from their biological family members, their individual identity with regard to this family membership cannot be 'psychologically cancelled.'<sup>108</sup> The second concept is centred around the complex web of relationships and the

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<sup>99</sup> Ibid.

<sup>100</sup> Rispel (2017) 35.

<sup>101</sup> Cherry K, *supra note 75*.

<sup>102</sup> AB (2017) Amicus Curiae Submissions at para 25.

<sup>103</sup> 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—those relationships throughout their lives.' See Phillips K 'Communication and Family Identity: Toward a Conceptual Model of Family Identity and Development of the Family Identity Inventory' (2017) *Digital Commons* 3.

<sup>104</sup> Scabini E & Manzi C 'Family Processes and Identity' (ed) in Schwartz SJ *Handbook of Identity Theory and Research* (2011) 569.

<sup>105</sup> Scabini & Manzi (2011) 575.

<sup>106</sup> Ibid.

<sup>107</sup> Morton S 'What is Heritage? Discover Your Cultural Identity' available at <https://www.familysearch.org/blog/en/what-is-heritage/#:~:text=Heritage%20is%20a%20person's%20unique,that%20make%20our%20family%20unique.&text=Heritage%20can%20express%20itself%20in%20many%20ways>. (accessed 4 December 2020).

<sup>108</sup> Speer R, Giles H & Denes A 'Investigating Stepparent-Stepchild Interactions: The Role of Communication Accommodation' (2013) *Journal of Family Communication* 220.

way in which family members communicate – being a son or daughter is not independent of being a mother, a father, a parent or sibling.<sup>109</sup> Thus, a child’s family identity is formed through their parental and intergenerational ‘filial’ relationships, in addition to knowledge of their family heritage.<sup>110</sup>

The family is the most fundamental unit of society and has widespread support in international law.<sup>111</sup> 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.<sup>112</sup> International treaties and conventions have directly addressed situations where children are illegally separated from their parents.<sup>113</sup> However, when a couple relinquishes their rights to an embryo, the resulting child’s right to ‘genuine’ or ‘true’ identity is not explicitly recognised.<sup>114</sup> In other words, once a child is born to the recipient parents, without directly challenging this relationship, the child might claim a right to know the facts of their true identity.<sup>115</sup> For non-embryo donated children, the incorporation of one’s knowledge about their past and family form part of the process of establishing a coherent sense of family identity.<sup>116</sup>

Despite the developments and changes to the conventional nuclear family unit, there still remains a societal preference for having a genetically-related child.<sup>117</sup> This societal focus on genetic ties in families might explain why embryo donation is for some couples portrayed as less desirable than other forms of donation that allow at least one partner to share a genetic link with the child.<sup>118</sup> Indeed, embryo donation has been recommended as an alternative to create a family for couples who are unable to use their own gametes.<sup>119</sup> Research on embryo donation

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<sup>109</sup> Kreppner K ‘The Child and the Family: Interdependence in Developmental Pathways (2000) 16(1) *Psicologia: Teoria e Pesquisa* 11.

<sup>110</sup> The term filial ‘involves both the relationship between offspring and each individual parent and the relationship between maternal and paternal lineages.’ Scabini & Manzi, *ibid* at 575-576.

<sup>111</sup> For example, the UN Convention on the Rights of the Child (1989), African Charter on the Rights and Welfare of the Child (1990) and the European Convention for the Protection of Fundamental Rights and Freedoms (1950).

<sup>112</sup> Stewart (1992) 226.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid*.

<sup>115</sup> *Ibid*.

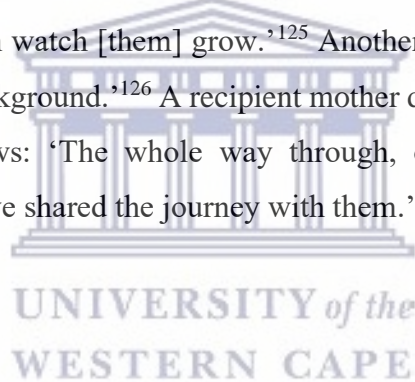
<sup>116</sup> Von Korrff L & Grotevant H ‘Contact in Adoption and Adoptive Identity Formation: The Mediating Role of Family Conversation’ (2011) 25(3) *J Fam Psychol* 393.

<sup>117</sup> Kirman-Brown J & Martins M ‘“Genes versus children”: if the goal is parenthood, are we using the optimal approach?’ (2020) 35(1) *Human Reproduction* 6.

<sup>118</sup> Moller N & Clarke V ‘New frontiers of family’ (2016) 29(3) *The British Psychological Society* 206. The significance of having a child that is genetically one’s own is further emphasised by developments in sperm and egg freezing. See Kirman-Brown & Martins (2020) 5.

<sup>119</sup> Wanggren K, Prag F & Skoog Svanberg A ‘Attitudes towards embryo donation in Swedish women and men of reproductive age’ (2013) 118 *Uppsala Journal of Medical Sciences* 187.

has examined how recipient families and the resulting children understand kinship.<sup>120</sup> These findings suggest that families formed through embryo donation do face challenges since they interrupt the presumption of genetic relatedness between members of the family, and this could require denying the origins of the children born through embryo donation in order to achieve a 'normative' family identity.<sup>121</sup> For example, qualitative studies conducted in 2014 found that, to 'facilitate the experience of *normative nuclear family bonds*, parents tend to *erase* the [donating couple] in their family constellation.'<sup>122</sup> Another study in 2009, where interviews were conducted with embryo donation recipient parents, found that in comparison with adoptive parents, the former parents viewed the donating couple as fairly insignificant to their family life.<sup>123</sup> Research undertaken by Goedeke in 2015 found that both the donating and recipient couples referred to each other by using extended family constructs to make sense of their relations with one another, while simultaneously recognising the significance of genetic links.<sup>124</sup> One donor couple explained that: 'We don't want to be [the child's] parents. We want to be Uncle and Aunty that can watch [them] grow.'<sup>125</sup> Another donor couple described their role as 'godparents... in the background.'<sup>126</sup> A recipient mother described her relationship with the donating couple as follows: 'The whole way through, our donor family were very supportive of us. We felt like we shared the journey with them.'<sup>127</sup>



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<sup>120</sup> Millbank J, Stuhmcke A & Karpin I 'Embryo donation and understanding of kinship: the impact of law and policy' (2016) *Human Reproduction* 1.

<sup>121</sup> Moller & Clarke (2016) 206. Family identity is 'mutually constructed, both internally among family members and externally in relation to the perceptions of outsiders based on observable family behaviour.' See Epp A & Price L 'Family Identity: A Framework of Identity Interplay in Consumption Practices' (2008) 35(1) 52.

<sup>122</sup> Wyverkens E, Van Parys H & Buysse A 'Experiences of Family Relationships Among Donor-Conceived Families: A Meta-Ethnography' (2015) 25(9) *Qualitative Health Research* 1236.

<sup>123</sup> MacCallum (2009) 518.

<sup>124</sup> The donor couples were often referred to as extended family members by terms such as aunts, uncles, god parents and in-laws. See Goedeke S, Daniels K, Thorpe M & Du Preez E 'Building extended families through embryo donation: the experiences of donors and recipients' (2015) *Human Reproduction* 6.

<sup>125</sup> Ibid. New Zealand's legislative framework encourages 'open' embryo donation in order to facilitate open communication and ongoing contact between the donating and recipient families. 'This encourages access to genetic information... with a degree of information-exchange and ability for ongoing contact.' Goedeke S 'Understandings and experiences of 'open' embryo donation in New Zealand (2015)' available at <https://www.rtc.org.au/wp-content/uploads/2016/11/Open-Embryo-Donation-in-New-Zealand-2015.pdf> (accessed 23 November 2020). The donating couple must be prepared to have their identities recorded and disclosed to the resulting offspring. Both couples must receive individual and joint counselling, discussing the implications of embryo donation and expectations of disclosure and contact. See Fertility New Zealand 'Embryo Donation' available at <https://www.fertilitynz.org.nz/information/donation-and-other-options/embryo-donation/> (accessed 23 November 2020).

<sup>126</sup> Goedeke, Daniels, Thorpe & Du Preez (2015) 6.

<sup>127</sup> Ibid.

For these donors and recipients, the relationship was understandably one which they envisaged to be ongoing, but at the same time one of mutual respect and support.<sup>128</sup> The extended family metaphor also allowed for the children in both families to be referred to as full siblings and even retain contact with one another through social media, phone calls or meeting up occasionally.<sup>129</sup> For the children born through embryo donation, there was an understanding that relationships are dynamic.<sup>130</sup>

A child's family identity should thus be thought of in a dynamic way.<sup>131</sup> While the child may maintain a biological connection with and bond in the womb with their recipient mother, one's familial identity extends beyond their social parents.<sup>132</sup> As much as many recipient parents may not want to be reminded of the lack of genetic relationship between themselves and the child,<sup>133</sup> there will always remain the possibility that the lack of genetic ties may interfere with the parent-child relationship<sup>134</sup> and ultimately the child's perception of family identity. As embryo donation is not regulated by contract in the same way as surrogacy,<sup>135</sup> the child's right to family identity is essentially left in limbo. Regardless of the recipient parents' intentions for their child,<sup>136</sup> the child may feel the need - at a minimum - to know the identities of both their biological parents' identities and/or in addition, form a meaningful connection with them and/or their extended biological family such as their genetic siblings.<sup>137</sup> A child's family

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<sup>128</sup> Like in traditional families, extended relatives do not have no particular rights in relation to each other. Such contact arrangements were carefully set up after discussions between both families with most donor couples being especially mindful to respect boundaries. Ibid.

<sup>129</sup> Tasker, Gubello, Clarke et al (2018) 4.

<sup>130</sup> Goedeke, Daniels, Thorpe & Du Preez (2015) 6.

<sup>131</sup> Teman E & Berend Z 'Surrogacy as a Family Project: How Surrogates Articulate Familial Identity and Belonging' (2020) *Journal of Family Issues* 2 – 3.

<sup>132</sup> Each family holds a variety of identities: collective family identity, parent-child or sibling identity, relational identities and individual family members' identities. See Epp & Price (2008) 50.

<sup>133</sup> Golombok S, Cook R, Bish A et al 'Families Created by the New Reproductive Technologies: Quality of Parenting and Social and Emotional Development of the Children' (1995) *Wiley* 296.

<sup>134</sup> Golombok, Cook, Bish et al (1995) 286.

<sup>135</sup> Swink D 'Outsourcing Reproduction: Embryos and Surrogacy Services in the CyberProcreation Era' (2011) *UST Research Online* 17.

<sup>136</sup> The child's family identity is centred around their social parents' teachings and choices they make for them – parents determine right from wrong for their children. See Anishalehal 'Does family shape our identity' available at <https://familyrelationshipblog.wordpress.com/2016/02/25/does-family-shape-our-identity/> (accessed 3 December 2020).

<sup>137</sup> One donor conceived child expressed that without a strong sense of family identity and intentional disconnect with their biological parents, not only did it affect her, but her own children and extended family members. Others expressed the following: 'I [felt] more deprived from my own identity by the fact that I was not told about my donor conception status before 12 years old. Not knowing who is biologically related to me is a big thing, but not knowing from the beginning kept me from identifying myself as a donor conceived person...' and 'Finding out at 23 that not only is my dad who raised me not my biological dad, but that my biological dad is an unknown man who I have no right to know any information about has quite literally sent me into an identity crisis.' See We Are Donor Conceived 'Voices from the Offspring: Identity Formation' available at <https://www.wearedonorconceived.com/personal-stories/voices-from-the-offspring-identity-formation/> (accessed 4 December 2020).



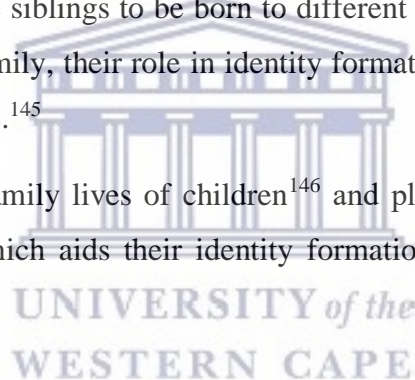
identity becomes more salient at adolescence and even more prominent when they begin to have children during their adulthood.<sup>138</sup> Thus, one's sense of family identity continues over a lifetime.<sup>139</sup> It is not solely a construct which exists in the minds of individuals, but is dependent upon shared interactions among the numerous relations within the family.<sup>140</sup> The recipient parents' essentially make the decision as to whether the child will be allowed to contact or meet their biological parents and siblings without regard to the developing views and opinions of the child.<sup>141</sup> Therefore, children born through embryo donation stand to lose the thread of family relationships which form part of their family identity.<sup>142</sup>

### 2.3.4 The role of siblingship in the child's identity

'Mom, I have this brother and sister, why didn't you let me have a relationship with them?'<sup>143</sup>

Embryo donation has allowed the concept of 'extended family' to take on a new meaning as it is now possible for full genetic siblings to be born to different mothers.<sup>144</sup> Although siblings are the building blocks of a family, their role in identity formation is often overlooked in the larger family structure dynamic.<sup>145</sup>

Siblings are a fixture in the family lives of children<sup>146</sup> and play a key role in each other's psychological development which aids their identity formation.<sup>147</sup> There are two potential



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<sup>138</sup> Ibid.

<sup>139</sup> Epp & Price (2008) 52.

<sup>140</sup> Ibid.

<sup>141</sup> The child's family identity is 'centred around the teachings of their parents and choices which parents make for them.' Parents determine right from wrong for their children. See Anishalehal 'Does family shape our identity' available at <https://familyrelationshipblog.wordpress.com/2016/02/25/does-family-shape-our-identity/> (accessed 3 December 2020).

<sup>142</sup> Child Rights International Network 'Article 8: Preservation of Identity' available at <https://archive.crin.org/en/home/rights/convention/articles/article-8-preservation-identity.html> (accessed 22 November 2020).

<sup>143</sup> Teotonio I 'These kids are genetic siblings and each was born to a different mother' available at <https://www.thestar.com/life/2017/05/13/these-kids-are-genetic-siblings-and-each-was-born-to-a-different-mother.html> (accessed 24 November 2020).

<sup>144</sup> Bossio G 'These Kids Are Genetic Siblings, But They Were Born To Different Mothers' available at <https://www.healthyway.com/content/these-kids-are-genetic-siblings-but-they-were-born-to-different-mothers/> (accessed 24 November 2020). In most cases, couples choose to donate their embryos once they feel that their family is completed, thus, any children born to the recipient couple will be have full genetic siblings in the donor couple's family. Despite the children being born in different families, the sibling relationship can often be the most important relationship for these children. See Krueger A 'Embryo adoption opens up' available at <https://www.bcadoption.com/resources/articles/embryo-adoption-opens> (accessed 24 November 2020).

<sup>145</sup> McHale S, Updegraff A & Whiteman S 'Sibling Relationships and Influences in Childhood and Adolescence' (2012) 74(5) 913.

<sup>146</sup> Siblings serve as social partners and role models. Ibid.

<sup>147</sup> Wong T, Branje S, VanderValk I et al 'The role of siblings in identity development in adolescence and emerging adulthood' (2020) 33 *Journal of Adolescence* 673.

processes in which siblings may influence one another's identities: first, in sibling identification, through interacting with one's siblings, children learn new behaviours and imitate each other; and second, in sibling differentiation, children attempt to differentiate themselves from one another by emphasising their uniqueness.<sup>148</sup> The latter is more relevant for the purposes of this research.

In the case of two families linked by embryo donation, siblingship becomes the core of the family, as it reinforces genetic–biological relatedness.<sup>149</sup> These genetic siblings also form the building blocks for the next generation as their biological offspring will also be genetically related.<sup>150</sup>

The main reason for searching for one's donor siblings was cited as curiosity, to find new family members<sup>151</sup> as well as to gain a better understanding of their genetic identity.<sup>152</sup> Additionally, some simply wanted to know their genetic siblings identities to ensure that they would not form incestuous relationships with them.<sup>153</sup> In some cases, both the donor and recipient couples mutually felt it was important for these children to form a relationship and thus facilitated contact.<sup>154</sup> The opportunity for these children to know their genetic siblings allowed them to know about their origins,<sup>155</sup> but also bond over physical resemblances and shared interests.<sup>156</sup>

Research undertaken by Vasanti Jadva and her colleagues<sup>157</sup> indicates that most donor conceived children were prompted to search for their genetic siblings upon reaching adolescence and many reported a fairly positive or very positive experience.<sup>158</sup> This is similar to previous research by Collard and Kashmeri which identified that 'siblingship is viewed as

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<sup>148</sup> Wong, Branje, VanderValk et al (2020) 674.

<sup>149</sup> Collard & Kashmeri (2011) 308.

<sup>150</sup> 'In this case, siblingship trumps descent... at least for one generation.' Ibid.

<sup>151</sup> The main motives were often described in phrases such as 'Giving the child a better understanding of who he/she is, a sense of identity' and 'Create a family, give my child siblings.' See Janssens PMW 'Colouring the different phases in gamete and embryo donation' (2009) 24(3) *Human Reproduction* 503.

<sup>152</sup> Nelson M, Hertz R & Kramer W 'Making Sense of Donors and Donor Siblings: A Comparison of the Perceptions of Donor-Conceived Offspring in Lesbian-Parent and Heterosexual-Parent Families' (2013) 13 *Contemporary Perspectives in Family Research* 7, 9.

<sup>153</sup> Ibid.

<sup>154</sup> Frith, Blyth & Lui (2017) 1095.

<sup>155</sup> Embryo Donation Network 'Embryo Recipient Stories' available at <http://www.embryodonation.org.au/recipient.aspx> (accessed 24 November 2020).

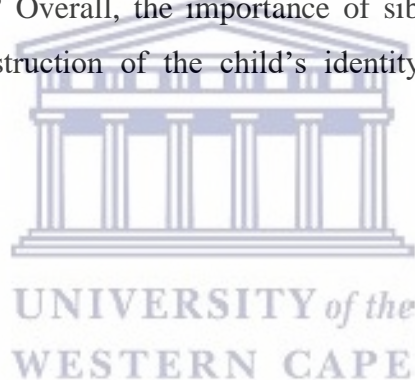
<sup>156</sup> Edwards (2015) 117.

<sup>157</sup> Jadva V, Freeman T, Kramer W & Golombok S 'Experiences of offspring searching for and contacting their donor siblings and donor' (2010) 20 *Reproductive BioMedicine Online* 523 – 532.

<sup>158</sup> Nelson, Hertz & Kramer (2013) 7.

the strongest form of kinship in embryo donor families, due to genetic relatedness.’<sup>159</sup> Although many children may have positive experiences when contacting and meeting their genetic siblings, there remains the risk that ‘contact experiences may lead to disappointment, bitterness and distress, particularly if the expectations of those involved are incompatible’.<sup>160</sup> While relationships among these genetic siblings will vary, they should be allowed the opportunity to decide whether they wish to pursue relationships with one another.<sup>161</sup>

It is crucial that ‘batch siblings’ be incorporated into discussions about the child’s right to identity in cases of embryo donation.<sup>162</sup> Genetic siblingship allows for wider kinship networks to be created and can be described as an ‘extended family.’<sup>163</sup> Some children may even attribute greater importance to knowing the identities of their genetic siblings than that of the donor couple and may form a more significant and ongoing bond.<sup>164</sup> Therefore, the child’s right to know their genetic siblings essentially forms a part of their genetic identity, family identity and even their personal identity.<sup>165</sup> Overall, the importance of sibling relationships in actively contributing towards the construction of the child’s identity as a whole should not be undermined.



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<sup>159</sup> Bartholomaeus C & Riggs D ‘Embryo donation and receipt in Australia: views on the meanings of embryos and kinship relations’ (2019) 38 *New Genetics and Society Critical Studies of Contemporary Biosciences* 8.

Children born through embryos which were donated to a family with a different ethnic background may want to feel connected to their genetic siblings racially. See Cromer R ‘Our family picture is a little hint of heaven’: race, religion and selective reproduction in US ‘embryo adoption’ (2020) 11 *Elsevier* 13.

<sup>160</sup> Huele E, Kool E, Bos E et al ‘The ethics of embryo donation: what are the moral similarities and differences of surplus embryo donation and double gamete donation?’ (2020) 35(10) *Human Reproduction* 2173.

Some recipient parents expressed reluctance for their children to meet their genetic siblings as they feared such contact may unwillingly reveal their method of conception and/or cast doubt on their role as (birth) parents. See Janssens (2009) 503.

<sup>161</sup> Banks SP & Kahn MD ‘The sibling bond’ available at <https://psycnet.apa.org/record/1997-08884-000> (accessed 24 November 2020).

<sup>162</sup> Science News ‘Re-shaping The Family: What Happens When Parents Seek Siblings Of Their Donor-conceived Children’ available at <https://www.sciencedaily.com/releases/2009/02/090223221352.htm> (accessed 5 December 2020).

<sup>163</sup> These genetic siblings often referred to themselves as being members of one big family. See Janssens (2009) 502.

<sup>164</sup> Hertz R, Nelson M & Kramer W ‘Donor Sibling Networks as a Vehicle for Expanding Kinship: A Replication and Extension’ (2017) 38(2) *Journal of Family Issues* 249.

<sup>165</sup> Nelson, Hertz & Kramer (2013) 7.

## 2.4 National and cross-border barriers to the right to identity

The growing phenomenon of couples that travel internationally to access fertility treatments is known as cross border reproductive care.<sup>166</sup> In many countries across the globe, embryo donation is not permitted and the few countries that do allow the treatment vary in its regulations.<sup>167</sup> The complexities of cross-border embryo donation arise because of the potential number of legal systems involved: the country where the embryo donation agreement is entered into; the country where the implantation of the embryo takes place; the donating couples' country of residence; the recipient parents' country of residence and their citizenship; and the country where the birth takes place.<sup>168</sup> These complexities, amongst other, implicate the child's rights to nationality and birth registration.

### 2.4.1 The right to birth registration

For a child to attain nationality, this is largely dependent on their birth registration.<sup>169</sup> International law provides that every child – wherever they are born, and whoever they are born to – has the right to have their birth registered.<sup>170</sup> This is recognised under Article 7(1) of the CRC,<sup>171</sup> Article 6(2) of the ACRWC,<sup>172</sup> Article 6 of the Universal Declaration of Human Rights (UDHR)<sup>173</sup> and Article 24(2) of the ICCPR.<sup>174</sup> This means that the birth must be officially recorded by the state.<sup>175</sup>

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<sup>166</sup> Cross border reproductive care is also known as 'fertility tourism, reproductive tourism, procreative tourism, transnational reproduction, reproductive travel or reproductive exile.' See Salama M, Isachenko V & Isachenko E et al 'Cross border reproductive care (CBRC): a growing global phenomenon with multidimensional implications (a systematic and critical review)' (2018) 35 *Journal of Assisted Reproduction and Genetics* 1277.

<sup>167</sup> Salama, Isachenko & Isachenko (2018) 1279.

<sup>168</sup> Napley K 'International surrogacy laws are not keeping up with changing social patterns' available at <https://www.lexology.com/library/detail.aspx?g=8c17e51c-bace-47ce-874f-2425f40bfd5> (accessed 8 December 2020).

<sup>169</sup> Unicef 'Birth registration' available at <https://www.unicef.org/protection/birth-registration> (accessed 24 November 2020).

<sup>170</sup> Ibid.

<sup>171</sup> UN Convention on the Rights of the Child (1989) Article 7(1).

<sup>172</sup> African Charter on the Rights and Welfare of the Child (1990) Article 6 Name and Nationality: '(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.'

<sup>173</sup> Universal Declaration on Human Rights (1948), Article 15 states that 'everyone has the right to nationality, and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.'

<sup>174</sup> International Covenant on Civil and Political Rights (1996), Article 24(1) states that 'every child' has the right to the protection which his status as a minor grant him 'without any discrimination as to ... national or social origin.'

<sup>175</sup> Sonke Gender Justice 'Birth registration of non-national children in South Africa, explained' available at <https://genderjustice.org.za/card/birth-registration-of-non-national-children-in-south-africa-explained/what-is-birth-registration/> (accessed 29 November 2020).



The lack of a birth certificate can potentially have a negative effect on many aspects of a child's life: a child's nationality cannot be proven without a birth certificate providing their age,<sup>176</sup> the child can be denied access to education, health care services, child protection mechanisms or alternative care as well as other state services.<sup>177</sup> Without a recognised birth certificate, a child will face barriers to accessing other identification documentation such as a national identity card or passport.<sup>178</sup> Thus, it is clear that a birth certificate is key to national identity, but is also vital to access other rights within the country of the child's nationality.<sup>179</sup>

The complications which may arise with having a donated embryo implanted and subsequently born in a foreign country is that there are no internationally recognised laws for embryo donation which leaves these children vulnerable and possibly stateless. What happens in the instance where the birth certificate is issued in the names of the genetic parents i.e. the donating couples' names? Will this affect the legal parentage of the child in his or her recipient parents' national country? Can the birth certificate later be changed to reflect the names of the recipient parents'? Even if the birth certificate reflects the names of the recipient parents, will this still be recognised by their country of origin as the truth? Could the birth certificate list more than two persons – the donor couple and the recipient couples' names? Could the birth certificate indicate that such a child was born as a result of embryo donation and thus indicate his or her origins?

The authorities in the recipient parents' country of nationality or residence may refuse to transcribe and recognise the child's foreign birth certificate in its civil registry.<sup>180</sup> Effectively, the child will not be recognised by the state and is thereby 'legally invisible' – as nationality is intrinsically linked to one's legal identity.<sup>181</sup> Such a child will not have the same nationality as his or her recipient parents' and this further also disregards his or her right to family identity.

Where the child is born in a country which follows the principle of *jus soli* – that is Latin for 'the right of the soil'<sup>182</sup> – by virtue of the child's birth in a state's territory alone, the child will

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<sup>176</sup> Ibid.

<sup>177</sup> Proudlock P *South Africa's progress in realising children's rights: A law review* ed (2014) 2.

<sup>178</sup> Sonke Gender Justice, *supra* note 177.

<sup>179</sup> Mail&Guardian 'Every child needs a birth certificate' available at <https://mg.co.za/special-reports/2020-11-13-every-child-needs-a-birth-certificate/> (accessed 23 January 2021).

<sup>180</sup> 'Birth registration is vital to establishing legal identity and preventing childhood statelessness.' See Stateless Journeys 'Birth Registration and Children's Rights' available at <https://statelessjourneys.org/main-issues/birth-registration-and-the-childs-right-to-nationality/> (accessed 29 November 2020).

<sup>181</sup> Ibid.

<sup>182</sup> Also referred to as 'law of the soil.' See Pryce C 'Surrogacy and Citizenship: A Conjunctive Solution to a Global Problem' (2016) 23(2) *Indiana Journal of Global Legal Studies* 932.

be awarded nationality of that specific state.<sup>183</sup> But where a child is born in a country which follows the *jus sanguinis* – that is Latin for ‘right of blood’– nationality is gained by descent through one or both parents, there is the risk that the child may end up stateless.<sup>184</sup> This is because embryo donation ‘forces states to redefine the notion of descent and to determine the extent to which [nationality] can be transmitted along *artificial* blood lines.’<sup>185</sup>

Therefore, the current birth registration systems of many countries<sup>186</sup> fail to adequately service the interests of children born as a result of embryo donation and thus, these children stand to lose their national identity.<sup>187</sup>

In South Africa, birth registration is viewed as solely a statement of legal parentage and nationality, without consideration as to whether it could serve any further functions, for instance, recording the genetic parents’ details i.e. the donating couple.<sup>188</sup> This conflicts with the increasingly accepted right to know one’s identity which includes the right to know one’s biological and genetic origins and the duty of the State to facilitate this right.<sup>189</sup> Not only may he or she be rendered stateless, but also parentless.<sup>190</sup> Furthermore, the child’s fundamental rights to acquire nationality, preserve their identity, to have their best interests regarded as primary consideration and to not suffer adverse discrimination on the basis of birth or parental status will be affected.<sup>191</sup> The child, however, is not the only one implicated. There are other parties who would be impacted by recognising the child’s right to know their genetic origins. This will be considered later in this paper.

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<sup>183</sup> This is the strongest protection against statelessness. See UNHCR & Ending Stateless Within 10 Years ‘Ensuring that no child is born stateless’ (2014) *Good Practices Paper* 5.

<sup>184</sup> Pryce (2016) 932.

<sup>185</sup> *Ibid.*

<sup>186</sup> For example, the United Kingdom and the United States of America (USA). See Crawshaw M, Blyth E & Feast J ‘Can the UK’s birth registration system better serve the interests of those born following collaborative assisted reproduction?’ (2017) 4 *Elsevier* 1 & Samuels E ‘An Immodest Proposal for Birth Registration in Donor-Assisted Reproduction, In the Interest of Science and Human Rights’ (2018) *New Mexico Law Review* 416 – 417.

<sup>187</sup> Crawshaw, Blyth & Feast (2017) 1.

<sup>188</sup> For medical reasons alone, it is important for the child to have knowledge of his or her genetic parents. Crawsha, Blyth & Feast (2017) 1 – 2.

<sup>189</sup> Crawsha, Blyth & Feast (2017) 1.

<sup>190</sup> The recipient parents would possibly take the child home to their country of citizenship, where the law may not recognise the child as being born to them. See Filander T *The Enforceability of International Surrogacy in South Africa: How would a South African court proceed in determining an International Surrogacy Case?* (unpublished LLM thesis, University of the Western Cape, 2016) 4.

<sup>191</sup> Filander (2016) 5.

## 2.4.2 The right to nationality

Where a couple from a country which prohibits embryo donation travels abroad to receive the donated embryo and later give birth in a foreign country which does not prohibit embryo donation, then such a process may affect the child's national identity and may even result in the child being denied nationality.

Nationality is defined as 'the [legal] status of belonging to a particular nation by origin, birth, or naturalisation.'<sup>192</sup> Generally, nationality is granted based on where one is born or the nationality of one's parents.<sup>193</sup> Article 7 of the CRC requires State Parties to ensure that a child acquires a nationality especially where the child would otherwise be stateless.<sup>194</sup> This means that when a child is born in the territory of a state party and is unable to gain nationality through their parents, then the state in which the child is born should provide the child with access to that country's nationality.<sup>195</sup>

Child statelessness induced by advances in ART is a relatively new phenomenon.<sup>196</sup> The risk of statelessness cases is more common in international arrangements where there is a conflict in the embryo donation regime and the nationality laws of the recipient parent's country of nationality. The consequences of the differences in these respective states' ART regimes is that a child may or may not be attributed nationality in certain circumstances.<sup>197</sup> Additionally, this may also affect the transcription of the child's birth certificate.

International embryo donation is prohibited or actively discouraged in several countries and sometimes across specific countries' states or provinces.<sup>198</sup> The purposes of such restrictive laws are to reduce the possibility for exploitation of vulnerable women and children as well as to prevent trafficking of unborn children.<sup>199</sup> There are concerns that the transfer of embryos by contract leaves potential for the unlawful sale of such embryos for implantation.<sup>200</sup> It is

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<sup>192</sup> Your Dictionary 'Nationality definitions' available at <https://www.yourdictionary.com/nationality> (accessed 24 November 2020).

<sup>193</sup> Child Rights International Network (CRIN) 'Article 7: Name and Nationality' available at <https://archive.crin.org/en/home/rights/convention/articles/article-7-name-and-nationality.html#:~:text=Nationality%20is%20generally%20granted%20either,child%20would%20otherwise%20be%20stateless>. (accessed 28 November 2020).

<sup>194</sup> UN Convention on the Rights of the Child (1989), Article 7.

<sup>195</sup> CRIN, *supra note* 194.

<sup>196</sup> Rajan S 'International surrogacy arrangements and statelessness' available at <http://children.worldstateless.org/3/safeguarding-against-childhood-statelessness/international-surrogacy-arrangements-and-statelessness.html> (accessed 28 November 2020).

<sup>197</sup> Ibid.

<sup>198</sup> Clark (2014) 219.

<sup>199</sup> Rajan S, *supra note* 197.

<sup>200</sup> Westbrook (2016) 21.

important that such international contracts provide for a donation while not constituting a sale.<sup>201</sup> Still there is no uniformity with regard to the requirements that an embryo donation contract should meet. Given the nature and purpose of embryo donation as well as countries' opposing stances on donor anonymity, it seems difficult to ensure the identity rights of the child once born. In such circumstances, the lack of uniformity in laws and regulations surrounding embryo donation may render children born through international embryo donation stateless.

Under South African law, section 28(1)(a) of the Constitution provides that 'every child has the right to a name and nationality from birth.'<sup>202</sup> This right is not restricted to South African citizens: all children are entitled to it regardless of their parents' nationality.<sup>203</sup> However, it is important to note that this does not necessarily mean that every child has the right to a South African nationality, but merely 'a' nationality.<sup>204</sup> Furthermore, this right is closely related to the right to birth registration as without a birth certificate a child's nationality cannot be proven.<sup>205</sup> In other words, the right to nationality can only be realised through the possession of a birth certificate.<sup>206</sup>

## 2.5 Concluding Remarks

The concept of identity is multifaceted as it includes individual, biological, family, sibling and national identity and spans a person's lifetime.<sup>207</sup> Realising this right additionally requires a child to be issued with a birth certificate. This places obligations on parties such as the state. However, there are other entities involved in the embryo donation process. There are individuals who are intimately involved. Realising the child's right to identity therefore has implications for the other parties involved. The next chapter considers this impact and the interplay between the various parties' rights.

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<sup>201</sup> Westbrook (2016) 22.

<sup>202</sup> The Constitution of the Republic of South Africa, s28(1)(a).

<sup>203</sup> Filander (2016) 38.

<sup>204</sup> Filander (2016) 41.

<sup>205</sup> Scalabrini 'Birth Registration in South Africa' available at <https://www.scalabrini.org.za/news/birth-registration/#:~:text=Section%2028%20of%20the%20Constitution%20of%20South%20Africa%20states%20that,possession%20of%20a%20birth%20certificate>. (accessed 5 December 2020).

<sup>206</sup> Ibid.

<sup>207</sup> Wade (2020) 11.

## CHAPTER 3: THE IMPACT OF THE RIGHT TO KNOW ONE'S GENETIC ORIGINS ON OTHER PARTIES

### 3.1 Introduction

The use of ART with surplus embryos creates a complex social 'family' network, which includes the recipient couple and the known or anonymous donating couple.<sup>1</sup> Children born through embryo donation are raised by their recipient parents and may or may not know that other individuals were involved in their conception.<sup>2</sup> The right to identity cannot be realised without the child being aware of the circumstances of their conception and having access to the essential information.<sup>3</sup> The child, but also their recipient parents and extended family may find it difficult to deal with the knowledge of the genetic parents existence and/or that the child's full genetic siblings live in another family and wish to contact them.<sup>4</sup> In order for the child to be aware of the existence of their donor parents and/or potential siblings, they need to have (initial) knowledge regarding the circumstances of their mode of conception.<sup>5</sup> This chapter considers the obligations placed on recipient parents, in particular disclosure, and the implications of realising a child's right to know.

### 3.2 The right to privacy and private family life

A frequent objection to the child's right to know their origins is the argument that this would conflict with the recipient and donating couples' rights to privacy.<sup>6</sup> This right refers to the extent of the information to which others have access:<sup>7</sup> the donating couples' right to remain anonymous and the recipient couples' right to withhold information from their children about the circumstances of their conception.<sup>8</sup>

First, it is argued that the recipient parents' rights to privacy should trump the child's right to know.<sup>9</sup> By keeping information surrounding the child's conception private, this protects the

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<sup>1</sup> Huele E, Kool E, Bos E et al 'The ethics of embryo donation: what are the moral similarities and differences of surplus embryo donation and double gamete donation?' (2020) 35(10) *Human Reproduction* 2173.

<sup>2</sup> Ravitsky (2017) 2.

<sup>3</sup> Ibid.

<sup>4</sup> Freeman T 'Gamete donation, information sharing and the best interests of the child: an overview of the psychosocial evidence' (2016) 33(1) *Monash Bioeth Rev* 2.

<sup>5</sup> Huele, Kool, Bos et al (2020) 2173.

<sup>6</sup> Amorós (2015) 6.

<sup>7</sup> Hallich O 'Sperm Donation and the Right to Privacy' (2017) 23(2) *The New Bioethics* 107.

<sup>8</sup> Ibid.

<sup>9</sup> 'Disclosure would confer lower standard of privacy to infertile couples than to fertile couples.' See MacCallum & Golombok (2007) 2889.



recipient parents from social stigmas surrounding infertility and the use of donor embryos.<sup>10</sup> Moreover, disclosure of such information may reinforce the idea that a family built through donor embryos is not equivalent to a ‘normal family’ built through coital means.<sup>11</sup> Furthermore, the recipient parents do not want interference with how they choose to raise their child.<sup>12</sup> The essence of these arguments is that the recipient parents know what is best for their child and this would enhance the child’s sense of ‘belonging’ in the family.<sup>13</sup> Others desire privacy for the sake of cultural or religious reasons.<sup>14</sup> From this perspective, it is the prerogative of the recipient parents to elect to keep the information private<sup>15</sup> since the rationale for secrecy focuses on the interests of the adults concerned.<sup>16</sup>

Second, it is argued that the donating couples’ right to privacy would be infringed if donor anonymity is not upheld.<sup>17</sup> This is construed as a right to limit the realm of information to which others have access.<sup>18</sup> The donating couple may be concerned with retaining their status as ‘non-parents.’<sup>19</sup>

It is problematic to frame the conflict of interests in terms of the ‘family autonomy’ and ‘parental autonomy,’ since this effectively places the interests of the recipient parents above that of the children.<sup>20</sup> Moreover, the social stigma and familial attitudes towards infertility and ART are not valid reasons to justify secrecy.<sup>21</sup> Furthermore, there are compelling reasons to not uphold donor anonymity, besides the child’s right to identity, the child’s health is at risk in cases of genetic inheritance of disease.<sup>22</sup> As much as the donating couple may not want to be identified, it must be realised that when they donate their embryos, there is the possibility that

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<sup>10</sup> Some view the use of third-party reproductive technology as akin to adultery. See Wade (2020) 10.

<sup>11</sup> Ibid.

<sup>12</sup> Recipient parents may assert the right to have a family without excessive state intervention. See Imrie S, Jadv V & Golombo S “‘Making the Child Mine’: Mothers’ Thoughts and Feelings About the Mother–Infant Relationship in Egg Donation Families’ (2020) 34(4) *Journal of Family Psychology* 472.

<sup>13</sup> Ibid.

<sup>14</sup> For example, embryo donation is not accepted in the Muslim Community in South Africa. See Child K ‘Should sperm or egg donors remain anonymous’ available at <https://www.timeslive.co.za/sunday-times/lifestyle/health-and-sex/2017-08-03-should-sperm-or-egg-donors-remain-anonymous/> (accessed 7 December 2020).

<sup>15</sup> MacCallum & Golombok (2007) 2889.

<sup>16</sup> Wade (2020) 10.

<sup>17</sup> Frith (2001) 822.

<sup>18</sup> Ibid.

<sup>19</sup> In majority of cases, donors are adamant about having no form of parental responsibility to the donor-conceived offspring, in this case – the children born through their donated embryos. See Nelson M, Hertz R & Kramer W ‘Gamete donor anonymity and limits on numbers of offspring: the views of three stakeholders’ (2015) *Journal of Law and the Biosciences* 42.

<sup>20</sup> Wade (2020) 10.

<sup>21</sup> Wade (2020) 15.

<sup>22</sup> De Jonge C ‘Gamete donation: a question of anonymity’ (2006) 85 *American Society for Reproductive Medicine* 500.

children will be born and may seek to contact them.<sup>23</sup> In any case, the idea of embryo donor privacy or anonymity is no longer realistic, due to readily available genetic testing technology.<sup>24</sup>

It would appear that the donating and recipient couples overlook the fact that they are the main protagonist in this issue as the interests of the child born have not been consulted.<sup>25</sup> While these interests will materialise as the child grows, it seems unrealistic to believe that a child will never be interested in knowing further details about their life.<sup>26</sup> This ignores the reality that embryo donations generate.<sup>27</sup>

Everyone talks about donor privacy and rights, but that usually leaves the offspring with the short end of the deal—we should have equal rights to know as much as the donor has rights to anonymity... I believe that many of the donors that participate at a young age, cannot comprehend the future implications of having offspring. Again, offspring should have rights to information about their genetics. It's as if no one anticipated that these impersonal [embryos] would ever be living breathing human beings walking around that want to know who they are and where they come from.<sup>28</sup>

Therefore, allowing donor and recipient couples of embryo donation to enjoy a cloak of anonymity cannot solely be justified based on the rights to privacy and private family life as it ignores the potential life-long interests of these offspring and harms which may be caused from non-disclosure.<sup>29</sup> Arguably, the child's interest in knowing their origins is stronger than the interests of the social and genetic parents in not disclosing the information.<sup>30</sup>

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<sup>23</sup> Horler L 'Sperm donors may want anonymity, but there are real kids out there' available at <https://www.theguardian.com/commentisfree/2015/aug/18/anonymous-sperm-donation-is-flawed-just-ask-donor-conceived-children> (accessed 7 December 2020).

<sup>24</sup> Pearlman A 'Gamete Donor Anonymity is a Myth' available at <https://blog.petrieflom.law.harvard.edu/2019/05/23/gamete-donor-anonymity-is-a-myth-a-qa-with-seema-mohapatra/> (accessed 25 November 2020). Genetic test kits can easily be bought from the internet. These tests are increasingly being taken by people born through gamete donation who wish to know about their ancestry. See Harper J, Kennett D & Reisel D 'The end of donor anonymity: how genetic testing is likely to drive anonymous gamete donation out of business' (2016) 31(6) *Human Reproduction* 1136.

<sup>25</sup> Macpherson I 'Ethical reflections about the anonymity in gamete donation' (2019) 34(9) *Human Reproduction* 1847.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

<sup>28</sup> Some donor offspring strongly oppose anonymity because they view themselves as having a crucial role in the reproduction of the next generation and are curious as to what genes they would pass onto their children. See Nelson, Hertz & Kramer (2015) 58.

<sup>29</sup> This information may be relevant through the offspring's childhood and adulthood. See Wade (2020) 3.

<sup>30</sup> Ibid.

### 3.3 Duty to disclose

‘Truth is always better than deception. No one has the right to erase part of yourself even if it is only a minor part.’<sup>31</sup>

As disclosure of the child’s biological origins is not mandatory in most countries, it thus remains the prerogative of recipient parents.<sup>32</sup> This section considers the impact of disclosure on the recipient parents and will look at the implications for other parties.

The decision to disclose is often difficult for the recipient parents due to the underlying fear that the child’s knowledge of their true mode of conception and existence of having a genetic family and/or siblings may have a detrimental impact on their parent–child relationship.<sup>33</sup> In addition, there is the possibility that such disclosure may have a damaging effect on the child’s psychological and social well-being.<sup>34</sup> Even where the recipients disclose this information, it is often more difficult than not for the child to gain access to information regarding their donor parents and/or siblings due to the widespread practice of anonymity in ART practices.<sup>35</sup>

It has been suggested that because the recipient parents autonomously chose to have a child through embryo donation – knowing that the child would not be genetically related to either one of them,<sup>36</sup> - they have the *procreational responsibility* to tell children about their parentage.<sup>37</sup> Studies report that early disclosure is vital for the child’s well-being and is associated with more positive parent–child relationships.<sup>38</sup> However, there is always the risk that if contact is facilitated with the donating couple and their genetic siblings, ‘contact experiences may lead to disappointment, bitterness and distress, particularly if the expectations of those involved are incompatible.’<sup>39</sup>

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<sup>31</sup> ‘Family therapy practitioners claim that openness and honesty are preferable and that basing family life on deception and secrecy can cause stress and anxiety within the family.’ See Frith (2001) 821.

<sup>32</sup> Ravitsky (2017) 2.

<sup>33</sup> Söderström-Anttila V, Foudila T, Ripatti U et al ‘Embryo donation: outcome and attitudes among embryo donors and recipients’ (2001) 16(6) *Human Reproduction* 1121.

<sup>34</sup> Pennings G ‘Disclosure of donor conception, age of disclosure and the well-being of donor offspring’ (2017) 32(5) 972.

<sup>35</sup> Ravitsky (2017) 2.

<sup>36</sup> Wade K ‘Reconceptualising the interest in knowing one’s Origins: A case for Mandatory Disclosure’ (2020) *Medical Law Review* 13.

<sup>37</sup> Blauwhoff R ‘Tracing down the historical development of the legal concept of the right to know one’s origins Has ‘to know or not to know’ ever been the legal question?’ (2008) *Utrecht Law Review* 103.

<sup>38</sup> Open and honest communication is linked to a good functioning family. See Freeman (2016) 6.

<sup>39</sup> Huele, Kool, Bos et al (2020) 2173.

I cannot argue that children who are told of their origins... are necessarily happier, or better off in any way that can be estimated. But I do believe that if they are not told, they are being wrongly treated.<sup>40</sup>

Parents should not make the decision whether or not such information is significant for the child. The ability to access this information is important for the development of one's identity and even if the child does not attach significance to this information, its potential importance justifies its disclosure.<sup>41</sup> Children should be given the freedom to choose to attach whatever significance they wish to their genetic parenthood.<sup>42</sup> Providing the child with access to information about their origins, 'allows the individual to confront the world as it is on his own terms, and influence solutions according to his perception of his interests given the physical truth'<sup>43</sup> Thus, it allows the child to act on or follow up on this information or to initiate contact with their donor parents or genetic siblings, if they so wish.<sup>44</sup>

Mandatory disclosure would oblige the recipient parents to reveal to the child their true origins, however, the question arises as to what would be the best method of disclosure which is suited to serve the child's best interests.<sup>45</sup> Should the recipient parents' (continue to) bear this responsibility?<sup>46</sup> Should a symbol on the child's birth certificate indicate their means of conception?<sup>47</sup> Should the child's birth certificate indicate the names of their genetic parents?<sup>48</sup> Should the state implement a system whereby an official letter is to be sent to the child's residence at a specific age, notifying them that information about their origins is available?<sup>49</sup> Should the recipient parents receive a warning letter prior to the notification letter?<sup>50</sup> If the child is born abroad, how can it be ensured that they are able to access the relevant birth register? How can it be guaranteed that these relevant protocols will be followed and implemented?<sup>51</sup>

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<sup>40</sup> Philosopher Mary Warnock insisted there was an ethical imperative to disclose. While not all offspring born through embryo donation may feel distressed if they are unable to access information regarding their biological origins, such inaccessibility 'deprives them of the liberty to choose what meaning they assign to the genetic components of their identity and relationships, a choice others in society have.' See Ravitsky (2017) 2.

<sup>41</sup> Wade (2020) 7.

<sup>42</sup> Wade (2020) 8.

<sup>43</sup> Ibid.

<sup>44</sup> Wade (2020) 8.

<sup>45</sup> Crawsha, Blyth & Feast (2017) 2.

<sup>46</sup> Rispel (2017) 14.

<sup>47</sup> Ibid.

<sup>48</sup> Samuels (2018) 417.

<sup>49</sup> Wade (2020) 19.

<sup>50</sup> Ibid.

<sup>51</sup> Patrizio, Mastroianni & Mastroianni L 'Disclosure to children conceived with donor gametes should be optional' (2001) *Human Reproduction* 2036.

While at a national level, it may be easier for the child to gain access to such information, at an international level, there is potential that such a child may face greater obstacles – such as a language barrier.<sup>52</sup>

However, mandating disclosure has implications for other stakeholders.<sup>53</sup> Several conditions need to be considered: (i) the recipient couple willing to reveal to the child their origins; (ii) the donating couple willing to donate their embryo with the knowledge that they may later be identified to the resulting offspring and the implications thereof, for instance, the donor couple will have to update their records and possibly meet their genetic offspring one day; (iii) a reasonable practical system of enforcement should be set in place to guarantee compliance with mandatory disclosure; (iv) assurance that the physician is informed by the recipient couple of the mode of conception in order to complete the birth certificate accordingly.<sup>54</sup>

This list is not exhaustive, making disclosure a relatively complex issue.<sup>55</sup> Implementation of mandatory disclosure may discourage future embryo donors not wanting to be traced by their future offspring.<sup>56</sup> Couples may undergo stress due to the possibility of future financial, legal and emotional predicaments that may result.<sup>57</sup> Donor couples may also be viewed as uninvited interlopers in the recipients' family relationships.<sup>58</sup>

With regard to health care providers, a key consideration is to avoid becoming involved in arbitrary lawsuits.<sup>59</sup> In the absence of uniformity in the gathering of information and records maintenance, the practicality of accessing these particulars from private clinics and banks will be difficult.<sup>60</sup> Compelling health care providers to implement a disclosure condition coupled to the screening criteria may add social factors into the acceptance and prompt some distressed

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<sup>52</sup> Page C *Artificial Womb Technology and the Safeguarding of Children's Rights through an Analysis of the Right to Identity* (unpublished LLM thesis, Leiden University, 2017) 45.

<sup>53</sup> Patrizio, Mastroianni & Mastroianni (2001) 2036.

<sup>54</sup> See Patrizio, Mastroianni & Mastroianni (2001) 2036 – 2037. It also means that both the donating and recipient couples should be counselled and consider ahead of time the implications of open-identity donation and the impact this may have on their family units. See also Ravitsky (2017) 3.

<sup>55</sup> *Ibid.*

<sup>56</sup> Fortescue E 'Gamete donation – where is the evidence that there are benefits in removing the anonymity of donors? A patient's viewpoint' (2003) 7(2) *Reproductive BioMedicine Online* 140.

<sup>57</sup> Pearlman A 'Gamete Donor Anonymity is a Myth' available at <https://blog.petrieflom.law.harvard.edu/2019/05/23/gamete-donor-anonymity-is-a-myth-a-qa-with-seema-mohapatra/> (accessed 25 November 2020). Donors couples have 'a vested interest in avoiding claims of parentage or support that exceed their contractual intention to donate.' See Bharath D *A Legal Analysis of Trade in Personal Information Regarding Human Gamete Donors* (unpublished LLM thesis, University of Kwazulu-Natal, 2018) 29.

<sup>58</sup> Patrizio, Mastroianni & Mastroianni (2001) 2037.

<sup>59</sup> Bharath (2018) 29.

<sup>60</sup> Patrizio, Mastroianni & Mastroianni (2001) 2037.



couples to be dishonest.<sup>61</sup> Moreover, the stipulation that recipients disclose in order to receive a donated embryo contradicts the common understanding of informed consent in the health care context.<sup>62</sup>

The state thus carries a responsibility to appropriately legislate in the area of ART, particularly embryo donation, and the fertility industry must abide by these policies.<sup>63</sup> Thus, while the welfare of the child is an eminent concern, the impact on the other participants in the process — the donating couple, the recipient couple and the health care providers — is significant too.<sup>64</sup>

### 3.4 Timing

Recipient parents have cited numerous factors which contribute towards their decision to disclose the child's origins to them, namely the age of parents,<sup>65</sup> past personal life events,<sup>66</sup> intrapersonal influences,<sup>67</sup> family influences,<sup>68</sup> the offspring's age,<sup>69</sup> gender<sup>70</sup> and appearance,

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<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Ravitsky (2017) 3.

<sup>64</sup> Patrizio, Mastroianni & Mastroianni (2001) 2036 – 2037.

<sup>65</sup> A study undertaken by Baetens in which 144 recipient couples were counselled, showed that 'the intention to disclose was more prevalent among younger than older recipient couples.' See Baetens P, Devroey P, Camus M et al 'Counselling couples and donors for oocyte donation: the decision to use either known or anonymous oocytes' (2000) 15(2) *Human Reproduction* 480.

<sup>66</sup> Recipient couples who chose to disclose cited milestone in their lives—within their family or social interactions with friends — as encouraging disclosure. For example, listening to personal testimonials of donor conceived offspring through support groups strongly influenced recipient parents to be open with their child. See Hershberger P, Klock S & Barnes R 'Disclosure Decisions among Pregnant Women who Received Donor Oocytes: A Phenomenological Study' (2007) 87(2) 8 – 9.

<sup>67</sup> Intrapersonal influences refer to 'processes existing within the individual self or mind, which may influence the [decision to disclose.]' See Indekeu A, Dierickx K, Schotsman P et al 'Factors contributing to parental decision-making in disclosing donor conception: a systematic review' (2013) 19(6) *Human Reproduction* 725. It has been suggested that recipient couples who experience feelings of shame and stigma regarding their use of ART practices, in this case embryo donation, as a result of infertility, may be less likely to disclose to their resulting offspring their origins. See Daniels K, Thorn P & Westerbrooke R 'Confidence in the use of donor insemination: An evaluation of the impact of participating in a group preparation programme' (2007) 10(1) *Human Fertility* 18. Similarly, it has been suggested that the level of disclosure is affected by the recipient parents' own comfort level. Readings J, Blake L, Casey P et al 'Secrecy, disclosure and everything in-between: decisions of parents of children conceived by donor insemination, egg donation and surrogacy' (2011) 22(5) *Reprod Biomed Online* 9.

<sup>68</sup> For some recipient mothers, the experience of pregnancy and childbirth aided them in establishing an identity as a mother and to feel confident enough to be open about their choice to bear children through embryo donation. However, others felt that carrying out the pregnancy meant there was no need to reveal details regarding the embryo donation. See Readings, Blake, Casey et al (2011) 3. However, MacCallum and Golombok have pointed out that recipient couples in embryo donation appear to be even more private due to the lack of genetic ties between themselves and their offspring in comparison to recipients of egg or sperm donations. MacCallum & Golombok (2007) 2893.

<sup>69</sup> Recipient parents who intended to disclose to their child their origins, but had not done so, often felt the child was too young to comprehend the disclosed information. See Readings, Blake, Casey et al (2011) 9.

<sup>70</sup> Girls may ask more about where babies come from and be more interested in baby-stories than boys. See Indekeu, Dierickx, Schotsman et al (2013) 727.

external context and social influences.<sup>71</sup> However, the most common reason given was the age of the child.<sup>72</sup>

Parents who had not disclosed to their child often reported that their main concern was that the child was too young to comprehend the disclosed information.<sup>73</sup> This ‘right-time strategy’,<sup>74</sup> has led to studies making distinctions between different ages in order to define early and late telling:<sup>75</sup> ‘before 12, between 12 and 17 and after 18’,<sup>76</sup> others ‘before 3, between 4 and 6, and between 7 and 14’,<sup>77</sup> and others ‘before and after 18.’<sup>78</sup>

These studies indicate that the earlier the children were told about the mode of their conception, the more accepting and positive responses were given.<sup>79</sup> In comparison to children who are told during their adolescence or adulthood, the studies indicated a more negative picture as many felt negative emotions such as shock, anger and confusion upon learning this information.<sup>80</sup> However, these negative effects were also brought about due to the manner of disclosure such as finding out accidentally or inadvertently by others or after receiving one’s ancestry DNA test results.<sup>81</sup>

These theoretical timeframes may be problematic as every child matures at their own pace and not all may be curious about their origins. It is important to note that disclosure is not necessarily a once-off event, it is a gradual process and on-going conversation.<sup>82</sup> For this reason, it is suggested that in addition to the child’s age, other important factors in the disclosure process should include the child’s personality, maturity and the degree to which the child is ‘socially and academically settled.’<sup>83</sup> The impact of adopting a mandatory disclosure

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<sup>71</sup> Counselling whilst undergoing treatment and the exchange of experiences from couples in the same situation through support groups has been mentioned as an influencing factor in recipient couples’ disclosing decision. In addition, living in a progressive socio-legal-cultural environment where the use of ART is prevalent and accepted, reportedly made the decision to disclose easier, as the children would be more accepted by others. See Indekeu, Dierickx, Schotsman et al (2013) 724 – 730.

<sup>72</sup> Indekeu, Dierickx, Schotsman et al (2013) 726.

<sup>73</sup> Readings, Blake, Casey et al (2011) 9.

<sup>74</sup> Indekeu, Dierickx, Schotsman (2013) 726.

<sup>75</sup> Pennings (2017) 970.

<sup>76</sup> Hammarberg K, Wilson C & McBain J et al ‘Age when learning about mode of conception and well-being among young adults conceived with ART’ (2015) 33(5) *Journal of Reproductive and Infant Psychology* 466.

<sup>77</sup> Ilioi E, Blake L, Jadvá V et al ‘The role of age of disclosure of biological origins in the psychological wellbeing of adolescents conceived by reproductive donation: a longitudinal study from age 1 to age 14’ (2017) 58(3) *Journal of Child Psychology and Psychiatry* 315.

<sup>78</sup> Jadvá V, Freeman T & Kramer W et al ‘The experiences of adolescents and adults conceived by sperm donation: comparisons by age of disclosure and family type’ (2009) 24(8) *Human Reproduction* 1909.

<sup>79</sup> Pennings (2017) 970.

<sup>80</sup> Some felt that their life had been a lie. See Jadvá, Freeman & Kramer et al (2009) 1910.

<sup>81</sup> Pennings (2017) 970.

<sup>82</sup> The extent of disclosure to the child is important. See Readings, Blake, Casey (2011) 5.

<sup>83</sup> Indekeu, Dierickx, Schotsman (2013) 727.

policy raises the concern of whether the number of couples willing to donate their spare embryos will decrease, thereby creating an acute shortage of embryo donors.

### 3.5 Availability of embryos

There is no empirical evidence to support the claim that the abolition of donor anonymity would lower the number of embryo donations.<sup>84</sup> It is also difficult to conceive that there would be a decrease in embryo donations given that in 2017, in the United States of America alone there were 1 million frozen embryos.<sup>85</sup> Movements such as the ‘embryo adoption’ and ‘pro-life’ movements pull at the heartstrings and encourage couples, particularly Christians,<sup>86</sup> to adopt spare embryos from IVF clinics.<sup>87</sup> In countries such as Israel, there is a scarcity of excess embryos which are donated to research, as couples are encouraged to donate their spare embryos to infertile couples.<sup>88</sup>

### 3.6 Decreased profits

Even if stakeholders in the fertility industry – which is a large business – were to argue that banning of donor anonymity would substantially decrease their profits,<sup>89</sup> profit motives should not outweigh a child’s right to identity.<sup>90</sup> Fertility clinics frequently market embryo donation as an altruistic gift, although donors may be compensated – the language of ‘gifting’ softens the stigma associated with this practice.<sup>91</sup> Due to the profit gained from providing embryos, it

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<sup>84</sup> Amorós (2015) 6 – 7.

<sup>85</sup> Strauss E ‘The Leftover Embryo Crisis’ available at <https://www.elle.com/culture/a12445676/the-leftover-embryo-crisis/#:~:text=There%20are%20an%20estimated%201,the%20United%20States%20right%20now.&text=Two%20of%20those%20million%20some,healthy%20child%20earlier%20this%20year.> (accessed 25 November 2020).

<sup>86</sup> From a Christian and pro-life perspective, ‘rescuing’ and providing a ‘life’ for excess embryos, also referred to as ‘unborn children’ is celebrated. Ham K ‘Do Embryo Adoptions “Give Too Much Personhood to the Embryo?”’ available at <https://answersingenesis.org/sanctity-of-life/embryo-adoptions-personhood/> (accessed 25 November 2020). See also Snowflakes ‘A Pro-Life Choice for Remaining Embryos’ available at <https://nightlight.org/testimonial/pro-life-choice-remaining-embryos/> (accessed 25 November 2020).

<sup>87</sup> Ball P ‘Embryos up for adoption’ available at <https://www.nature.com/news/2005/050606/full/050606-16.html> (accessed 25 November 2020).

<sup>88</sup> Raz A, Amer-Alshiek J, Goren-Margalit M et al ‘Donation of surplus frozen pre-embryos to research in Israel: underlying motivations’ (2016) 5(25) *Israel Journal of Health Policy Research* 1. Israel places great importance on having children. The main reason for this is to replace the 6 million who were murdered in the Holocaust. See Kraft D ‘Israel booms with babies as developed world’s birth rates plummet. Here’s why.’ available at <https://www.csmonitor.com/World/Middle-East/2018/1214/Israel-booms-with-babies-as-developed-world-s-birth-rates-plummet.-Here-s-why> (accessed 25 November 2020).

<sup>89</sup> Nelson, Hertz & Kramer (2015) 44.

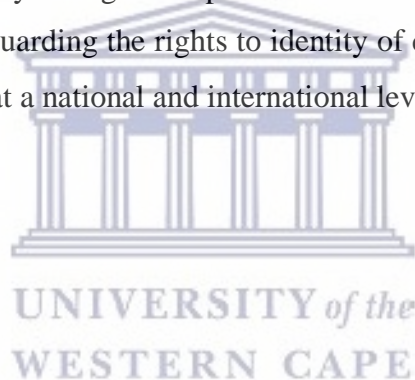
<sup>90</sup> Page (2017) 23.

<sup>91</sup> Halcomb L ‘Who Counts as Family? Gamete donation and the construction of family forms in medical markets’ (2020) 41(6) *Journal of Family Issues* 833.

is unlikely that the fertility industry will advocate for regulations beyond those they presently have.<sup>92</sup> In essence, the fertility industry operates and makes a profit under a false assumption that the resulting children will not face any difficulties with regards to their identity formation.<sup>93</sup>

### 3.7 Concluding Remarks

While the recipient parents strongly desire to build a family through embryo donation and believe that they are protecting the best interests of the child in keeping their origins a secret, it should not be assumed that children's interests in their origins will at all times align with their recipient parents'.<sup>94</sup> Non-disclosure cannot be justified on the basis of the recipient and donor parents' rights to privacy and private family life rather the child should have the right to be told and the freedom of choice as to what significance to attach to such information.<sup>95</sup> Bearing in mind the potential psychological implications of withholding this information and the method of disclosure, safeguarding the rights to identity of children born through embryo donation need to be examined at a national and international level.



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<sup>92</sup> Nelson, Hertz & Kramer (2015) 44.

<sup>93</sup> Newman A 'Should We Ban Donor Anonymity?' available at <https://ifstudies.org/blog/should-we-ban-donor-anonymity> (accessed 23 January 2021).

<sup>94</sup> Ibid.

<sup>95</sup> 'If children are not told, the right to have access to information... is effectively useless to them.' Frith L 'Gamete Donation, Identity, and the Offspring's Right to Know' (2007) 9(9) *American Medical Association Journal of Ethics* 644.

## CHAPTER 4: SAFEGUARDING THE CHILD'S RIGHT TO IDENTITY

### 4.1 Introduction

The impact of embryo donation on the various components of a child's identity, is a common concern as illustrated in Chapter 2. This concern however, has not hindered the continuous regulatory activities and responses to these novel reproductive technologies.<sup>96</sup> It is therefore necessary to examine the extent to which the right to identity of a child who is born through embryo donation, is protected both at a national and international level. By examining the present legislative framework of South Africa and the international community's understanding and responses to the child's right to identity in the context of past and current ART developments, this chapter aims to investigate the current regulatory framework for embryo donation practices.<sup>97</sup>

Historically, children were viewed and treated as property of their parents or the State.<sup>98</sup> Increasingly, in the 21<sup>st</sup> century, 'the child is seen as a human being worthy of the protection of a human rights regime not only by international law, but also by societies at large.'<sup>99</sup> In recent times, children have been portrayed as having the potential for self-actualisation or self-realisation in the legal sphere.<sup>100</sup> This potential does not, however, necessarily guarantee the protection of the child's right to identity.<sup>101</sup> Since a child born through embryo donation is not recognised as possessing the right to identity, he or she cannot claim protection of this right.<sup>102</sup>

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<sup>96</sup> Ludlow K 'Genetic identity concerns in the regulation of novel reproductive technologies' (2020) *Journal of Law and the Biosciences* 1.

<sup>97</sup> Ibid.

<sup>98</sup> Bester J & Kodish E 'Children Are Not the Property of Their Parents: The Need for a Clear Statement of Ethical Obligations and Boundaries' (2017) 17(11) *The American Journal of Bioethics* 17.

<sup>99</sup> Ronen Y 'Redefining the child's right to identity' (2004) 18 *International Journal of Law Policy and the Family* 149.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Tomuschat C, Lagrange E & Oeter S *The Right to Life – Legal and Political Foundations* ed (2010) 3.

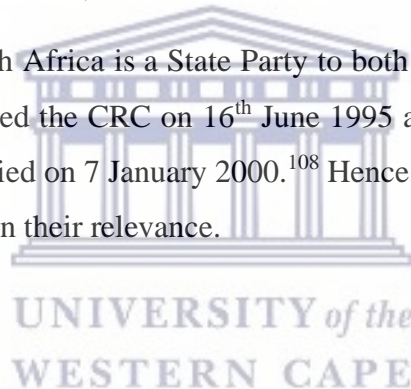


## 4.2 Safeguarding the Child's Right to Identity at the International Level

The protection and promotion of children's rights in the field of ART, specifically a child born through embryo donation, has not been the prime focus of the international human rights agenda.<sup>103</sup> The right to identity is one of the most complex and contentious issues especially in the age of modern ART.<sup>104</sup>

International law sketches the rights that States who have signed and ratified human rights treaties are obligated to provide and protect.<sup>105</sup> Nine major international human rights instruments exist.<sup>106</sup> Among these, the following instruments will be relevant to the discussion of embryo donation: The Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).

As previously mentioned, South Africa is a State Party to both the CRC and the ACRWC.<sup>107</sup> South African signed and ratified the CRC on 16<sup>th</sup> June 1995 and signed the ACRWC on 10 October 1997 while it was ratified on 7 January 2000.<sup>108</sup> Hence, these two instruments will be discussed in greater detail, given their relevance.



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<sup>103</sup> The infringed rights of the recipients and their ability to access ART services has been the primary focus. See Rispel (2017) 23 & Paulk (2014) 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 M 'Children's human rights and unlinking child-parent biological bonds with adoption, same-sex marriage and new reproductive technologies' (2007) 13(2) *Journal of Family Studies* 183.

<sup>104</sup> Brezina & Zhao (2011) 1.

<sup>105</sup> Paulk (2014) 785.

<sup>106</sup> United Nations Human Rights Office of the High Commissioner 'International Human Rights Law' available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (accessed 6 February 2021).

<sup>107</sup> SALRC Issue Paper 32 (2017) para 1.12 – 1.13.

<sup>108</sup> Ibid.

#### 4.2.1 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.’<sup>109</sup>

Article 7 sets out a child’s right to nationality, name and family relations:<sup>110</sup>

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.<sup>111</sup>

While name and nationality are components of the child’s identity, these elements only involve a restricted notion of identity.<sup>112</sup> Hence, I will focus on the latter element of ‘the right to know and be cared for by his or her parents... as far as possible.’<sup>113</sup>

Firstly, with regard to the right to be ‘cared for’ by one’s parents, embryo donation raises several questions, since the person who raises the child is the same one who gave birth to him or her, and although they may not share a genetic link, they share a gestational link.<sup>114</sup> Furthermore, the term ‘parents’ is not defined by the CRC<sup>115</sup> 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.<sup>116</sup> 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.’<sup>117</sup> 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.<sup>118</sup>

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<sup>109</sup> Ronen (2004) 159.

<sup>110</sup> McCombs & Gonzalez (2007) 6.

<sup>111</sup> UN Convention on the Rights of the Child (1989), Article 7(1).

<sup>112</sup> A child’s nationality generally follows from the issuing of their birth certificate. 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 Article 24 (3) of the ICCPR. See Doek J ‘The CRC and the Right to Acquire and to Preserve a Nationality’ (2006) 25(3) *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 (2017) 11.

<sup>113</sup> UN Convention on the Rights of the Child (1989), Article 7(1).

<sup>114</sup> Wade K ‘The regulation of surrogacy: a children’s rights perspective’ (2017) 29(2) *Child Law Quarterly* 11.

<sup>115</sup> Ibid.

<sup>116</sup> MacCallum (2009) 517.

<sup>117</sup> 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), (CRC/C/GC/14) at para 59.

<sup>118</sup> Wade (2017) 12.

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 a child should know about the method of their conception and the identities of their biological parents.<sup>119</sup> Some guidance may be found in the CRC Committee’s consistent criticism of nations that permit anonymous births. In respect of France,<sup>120</sup> the Committee, for example, has urged the State Party to prevent and eradicate the practice and that rather, the information regarding the child’s parents be registered and filed as a necessary measure.<sup>121</sup> However, it must be recognised that a child’s right to know their biological parents potentially conflicts with the rights of privacy of both the donor couple and recipient couple.<sup>122</sup> The words ‘as far as possible’ will always qualify the right to know and to be cared for by one’s biological parents.<sup>123</sup>

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.<sup>124</sup> 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.<sup>125</sup> As previously mentioned, this right is not defined.<sup>126</sup>

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<sup>119</sup> Ibid.

<sup>120</sup> Clark (2012) 626. In France, a person’s right to know their 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 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 N ‘The French ‘Tradition’ of Anonymous Birth: The Lines of Argument’ (2004) 18 *International Journal of Law, Policy and the Family* 319, 326, 327.

<sup>121</sup> Buia A ‘Survey on the CRC Committee’s Concluding Observations on the last EU Countries’ Reports’ (2006) 17.

<sup>122</sup> Wade K (2017) 12.

<sup>123</sup> Clark (2012) 626. UN Convention on the Rights of the Child (1989), Article 7(1).

<sup>124</sup> McCombs & Gonzalez (2007) 13 – 14.

<sup>125</sup> De Melo-Martin I ‘The Ethics of Anonymous Gamete Donation: Is There a Right to Know One’s Genetic Origins?’ (2014) 44(2) *The Hastings Centre Report* 28.

<sup>126</sup> Rispel (2017) 17.

Article 8 creates the impression that the concept of identity is open-ended<sup>127</sup> as it covers nationality, name, and family relations.<sup>128</sup>

The phrase ‘family relations as recognised by law’ is unclear,<sup>129</sup> however, academics have interpreted a child’s knowledge of their family relations as extending beyond knowing one’s social parents to encompass their biological parents,<sup>130</sup> siblings, grandparents and other relatives – all of whom are important to the child’s sense of identity.<sup>131</sup>

A child’s interest in being informed of the truth of their biological origins will always be greater because it gives rise to claims of justice as opposed to the interests of adults which form the foundation for attempts at exercising power:<sup>132</sup>

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.<sup>133</sup>

Thus, efforts must be made to obtain the child’s viewpoint and caution should be exercised against adopting a paternalistic mindset that views children as individuals with lesser capacity.<sup>134</sup>

The term ‘preserve’ suggests both the non-interference in identity and the preservation of records pertaining to genealogy and birth registration.<sup>135</sup> Moreover, the phrase ‘appropriate assistance’ might possibly include the provision of genetic profiling in order to establish parentage<sup>136</sup> and facilitating access to the professional files maintained on the child.<sup>137</sup>

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<sup>127</sup> ‘Nationality, name and family relations, are mentioned illustratively (implied by the word ‘including’).’ See Ronen (2004) 159.

<sup>128</sup> SALRC Issue Paper 32 (2017) para 1.41.

<sup>129</sup> Unicef ‘Implementation Handbook for The Convention on the Rights of the Child’ (2007) 3ed 114.

<sup>130</sup> SALRC Issue Paper 32 (2017) para 1.42.

<sup>131</sup> Unicef ‘Implementation Handbook for The Convention on the Rights of the Child’ (2007) 3ed 114.

<sup>132</sup> Eekelaar J *Family Law and Personal Life* (2010) 75 – 76.

<sup>133</sup> Ibid.

<sup>134</sup> Turkmendag I ‘The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-be Parents’ (2008) 22 *International Journal of Law, Policy and the Family* 301.

<sup>135</sup> Unicef ‘Implementation Handbook for The Convention on the Rights of the Child’ (2007) 3ed 115.

<sup>136</sup> 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 A ‘DNA profiling: Social, legal, or biological parentage’ (2007) 13(3) *Indian Journal of Human Genetics* 88. See also BBC ‘DNA and inheritance’ available at <https://www.bbc.co.uk/bitesize/guides/z8nxtyc/revision/6> (accessed 14 March 2021). Access to one’s DNA ancestry has been made easy due to the widespread expansion of genetic databases. See Sadeghi M ‘Coming Soon: Disclosing the Identity of Donors by Genealogical Tests of Donor Offspring’ (2019) 20(3) *Journal of Reproduction and Infertility* 119.

<sup>137</sup> Unicef ‘Implementation Handbook for The Convention on the Rights of the Child’ (2007) 3ed 117.

Arguably, measures should be taken to ensure the maintenance of detailed records of children born through ART practices, particularly in embryo donation.<sup>138</sup>

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.<sup>139</sup> However, it is questionable to what extent many State Parties' domestic legislation recognise this fact that children have a remarkable capacity to embrace multiple relationships.<sup>140</sup> The recording of data surrounding children born through embryo donation may be beyond the scope of many States.<sup>141</sup>

Neither Article 7 nor Article 8 resolve 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 privacy of both the social and biological parents.<sup>142</sup> Therefore, a child's identity is not directly protected by the provisions of the CRC which explicitly relate to the child's identity.<sup>143</sup>

#### **4.2.2 The African Charter on the Rights and Welfare of the Child**

The child's right to preserve their identity – which is found in Article 8 of the CRC – is absent in the ACRWC, although the right's importance in the African context is conceivably no less relevant globally.<sup>144</sup>

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.<sup>145</sup> 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.

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<sup>138</sup> Unicef 'Implementation Handbook for The Convention on the Rights of the Child' (2007) 3ed 115.

<sup>139</sup> SALRC Issue Paper 32 (2017) 8.

<sup>140</sup> Unicef 'Implementation Handbook for The Convention on the Rights of the Child' (2007) 3ed 114.

<sup>141</sup> Unicef 'Implementation Handbook for The Convention on the Rights of the Child' (2007) 3ed 115.

<sup>142</sup> SALRC Issue Paper 32 (2017) para 1.45.

<sup>143</sup> SALRC Issue Paper 32 (2017) para 1.46.

<sup>144</sup> The reason for this omission is not clear. See 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' in the Children's Rights Project: Community Law Centre (2002) 96.

<sup>145</sup> 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.

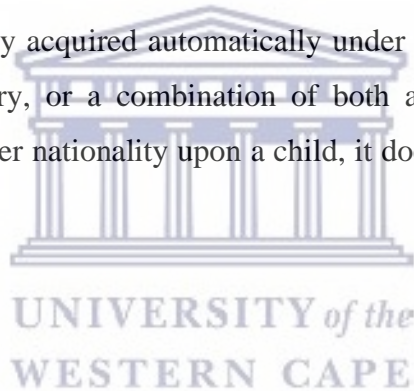


State Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has laws.<sup>146</sup>

The wording of Article 6 of the ACRWC is similar to that of Article 7 of the CRC<sup>147</sup> although the ACRWC sets out Article 7(1) of the CRC in three subsections.<sup>148</sup> Unlike Article 7(1) of the CRC, however, the child's right to know and be cared for by their parents is absent from the ACRWC.<sup>149</sup> Nevertheless, these rights may be derived at a broad interpretation of Article 19 of the ACRWC which provides for the child to maintain personal relations and direct contact with their parents.<sup>150</sup>

Article 6(4) of the ACRWC complements Article 7(2) of the CRC.<sup>151</sup> The ACRWC enshrines the *ius soli* principle which provides that 'a child shall acquire the nationality of the country in which it is born.'<sup>152</sup> The ACRWC obliges a State to grant nationality where no other State has granted nationality to the child.<sup>153</sup>

At birth, nationality is generally acquired automatically under the law on the basis of either descent or birth in the territory, or a combination of both and parentage.<sup>154</sup> While birth registration itself does not confer nationality upon a child, it does establish the place of birth,



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<sup>146</sup> African Charter on the Rights and Welfare of the Child (1990) Article 6 Name and Nationality.

<sup>147</sup> UN Convention on the Rights of the Child (1989), Article 7 (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."

<sup>148</sup> 'This setup highlights the fact that Article 6 of the Charter enshrines three different rights of the child.' See Gose (2002) 94.

<sup>149</sup> This exclusion may be justified by the fact that in the African context children are not always cared for by their parents. Ibid.

<sup>150</sup> African Charter on the Rights and Welfare of the Child (1990) Article 19 Parental Care and Protection: "(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."

<sup>151</sup> UN Convention on the Rights of the Child (1989), Article 7 (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.

<sup>152</sup> Gose (2002) 95.

<sup>153</sup> Ibid.

<sup>154</sup> De Groot G & Vonk O 'Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding Ius Sanguinis and Ius Sol' (2018) 65 *Netherlands International Law Review* 320.

parental affiliation,<sup>155</sup> and serves as a form of proof of the link between the child and a State.<sup>156</sup> 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.'<sup>157</sup> Thus, birth registration is key to ensure that every child acquires a nationality and to prevent statelessness.<sup>158</sup>

To summarise, under international law, the right to identity is an express and implicit, independent and distinctive right.<sup>159</sup> Other rights, such as the rights to a name, nationality, family and parentage are associated with this right.<sup>160</sup> A lack of consensus as to this right's scope and meaning exist due to a wide range of diverging interpretations from state practice, for example, granting the child the absolute right to know their genetic parents' identities, to simply strengthening practices, such as insisting on the preservation of descent or political identity.<sup>161</sup> Nevertheless the CRC and ACRWC frameworks give important guidance to States with the objective to achieve universal civil registration to guarantee the right to identity.<sup>162</sup> 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.<sup>163</sup> 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 calls for the progressive development of international law, although ratification while not obligating nations to pass domestic law, would provide a basis for the claims that may not otherwise be recognised.<sup>164</sup>

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<sup>155</sup> Birth registration also plays a crucial role to preserve the child's identity against illegal changes, such as the falsification of family ties. See 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. 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 The African Committee of Experts General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child (2014) para 34.

<sup>156</sup> De Groot & Vonk (2018) 320.

<sup>157</sup> *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 Decision: No 002/Com/002/2009* para 42.

<sup>158</sup> 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.*' Own emphasis.

<sup>159</sup> McCombs & Gonzalez (2007) 1.

<sup>160</sup> *Ibid.*

<sup>161</sup> Stewart (1992) 233.

<sup>162</sup> *Ibid.*

<sup>163</sup> McCombs & Gonzalez (2007) 24.

<sup>164</sup> Stewart (1992) 233.

## 4.3 Safeguarding the Child's Right to Identity at the National Level:

### 4.3.1 South Africa:

#### 4.3.1.1 Constitutional protection

The rights of children are embodied in the Constitution of the Republic of South Africa, 1996 (Constitution).<sup>165</sup> The drafters of the Constitution recognised that children are in need of special protection as they are among the most vulnerable members of society.<sup>166</sup> As a result, the drafters of the Constitution, in order to give children's rights a priority, devoted a special section on the rights of the child in the Bill of Rights (BOR).<sup>167</sup>

Section 28(1)(b) of the Constitution states that 'a child has a right to family care or parental care.'<sup>168</sup> This section raises the question of whether 'family care' would include the right of a child to have a relationship with their genetic parents, genetic family and genetic siblings?<sup>169</sup> Furthermore, does 'parental care' encompass the right to be cared for by a biological, social or legal parent?<sup>170</sup> Hence, it is also not explicitly stated in this provision that a child has a right to know their biological parent or origins.<sup>171</sup> Clearly, in South Africa, the identities of the donating couple as well as possible genetic siblings may not be disclosed.<sup>172</sup>

However, what is clear from section 28 of the BOR, is the importance of a child's national identity.<sup>173</sup> S28(1)(a) of the Constitution states that all children have a right to nationality from birth;<sup>174</sup> 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.<sup>175</sup> The reason for the courts' rulings is that a birth certificate not only provides a child with an identity of their own through the inclusion of important information such as their

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<sup>165</sup> Sloth-Nielsen J & Kruuse H 'A Maturing Manifesto: The Constitutionalisation of Children's Rights in South African Jurisprudence 2007 – 2012' (2013) 21(4) *International Journal of Children's Rights* 646.

<sup>166</sup> Constitutional Court of South Africa 'Children's Rights?' available at <https://www.concourt.org.za/index.php/children-s-rights> (accessed 6 February 2021).

<sup>167</sup> 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 UN Convention on the Rights of the Child. See Sloth-Nielsen & Kruuse (2013) 646.

<sup>168</sup> The Constitution of the Republic of South Africa, s28(1)(b).

<sup>169</sup> SALRC Issue Paper 32 (2017) para 1.19.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> The Children's Act 38 of 2005 s41 & National Health Act 61 of 2003, s19.

<sup>173</sup> The Constitution of the Republic of South Africa, s28(1)(a).

<sup>174</sup> Ibid.

<sup>175</sup> Scalabrini 'Birth Registration in South Africa' available at <https://www.scalabrini.org.za/news/birth-registration/> (accessed 6 February 2021).

name, date and place of birth and the names of the parents.<sup>176</sup> The latter information is essential as it indicates the persons legally responsible for the child, thereby recognising the child's right to family identity.<sup>177</sup>

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.<sup>178</sup> Without proof of the child's legal identity, their existence is essentially invisible to the State, meaning their rights are not secured within the State's jurisdiction.<sup>179</sup> Without proof of the child's existence, it is likely that the child's disappearance may go undetected by national authorities especially across international borders.<sup>180</sup> Authorities may as a result be unwilling or unable to pursue the matter due to the child's legal invisibility.<sup>181</sup> 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.<sup>182</sup>

#### 4.3.1.2 Legislation

In South Africa, assisted reproduction is regulated by the National Health Act 61 of 2003 (NHA) and the Regulations Relating to Artificial Fertilisation of Persons, 2016.<sup>183</sup>

The Regulations only refer to embryo donation in a single instance with regards 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.<sup>184</sup>

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<sup>176</sup> Page (2017) 39.

<sup>177</sup> Ibid.

<sup>178</sup> Selim L 'What is birth registration and why does it matter?' available at <https://www.unicef.org/stories/what-birth-registration-and-why-does-it-matter> (accessed 21 March 2021). The right to a legal identity also encompasses the right to be afforded an identity document or card and a passport. See Page (2017) 39.

<sup>179</sup> Ibid. For example, the child's to access key social services such as education, health care and social grants. See SALRC Issue Paper 32 (2017) v. Furthermore, without legal identity documents such as a birth certificate, the child would have to travel illegally. See United Nations General Assembly 'Birth registration and the right of everyone to recognition everywhere as a person before the law' (2014) Report of the Office of the United Nations High Commissioner for Human Rights, para 30. In addition, there are 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 'Birth Registration in South Africa' available <https://www.scalabrini.org.za/news/birth-registration/> (accessed 6 February 2021).

<sup>180</sup> Ibid, para 31.

<sup>181</sup> Ibid.

<sup>182</sup> Page (2017) 39.

<sup>183</sup> SALRC Issue Paper 32 (2017) para 2.9. See also Regulations relating to Assisted Conception of Persons in GN 251 of GG 44321 of 25 March 2021.

<sup>184</sup> Regulations Relating to Artificial Fertilisation of Persons in GN 1165 GG 40312 of 30 September 2016, para 5.

The effect of the non-disclosure of the identity of the donating couples has been discussed at length in the previous chapters. Despite the issues raised in connection with anonymity of the donor couple, the NHA requires that the identities of the donors remain undisclosed.<sup>185</sup> 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.<sup>186</sup>

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.<sup>187</sup> Section 41(2) of the Children's Act provides that information pertaining to the child's genetic parent 'may not reveal of the identity of the person whose... gametes were used for such artificial fertilisation.'<sup>188</sup> Section 41 results in children born through embryo donation being prohibited from learning of the identities of the donating couple.<sup>189</sup> 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.<sup>190</sup> Though gestational links are essential for bonding, it does not affect the child's biological identity.<sup>191</sup>

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 their biological parents' identities.<sup>192</sup> This suggests that the right of the child born through embryo donation to know his or her origins is not taken into consideration by the South African legislature and the Regulations which pertain to artificial fertilisation.<sup>193</sup> It is thus clear that the current legal position in South Africa is that of anonymous donation, which favours an adult-centred approach.

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<sup>185</sup> Mande N *Building Families Through Assisted Reproductive Technologies in South Africa: A Critical Legal Analysis* (unpublished Doctor of Laws thesis, University of South Africa, 2016) 232.

<sup>186</sup> National Health Act 61 of 2003, s19.

<sup>187</sup> SALRC Issue Paper 32 (2017) para 1.20.

<sup>188</sup> The Children's Act 38 of 2005, s41(2).

<sup>189</sup> *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC), para 155.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.*, at para 164.

<sup>192</sup> SALRC Issue Paper 32 (2017) para 2.9.

<sup>193</sup> Mande (2016) 232.



### 4.3.1.3 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 to form the foundation for the investigation into the child’s right to know their biological origins.<sup>194</sup> The issue paper aimed to investigate whether a child should have the legal right to know their biological origins in an age of rapid advances in the field of ART<sup>195</sup> and the rise in inter-country medically assisted reproduction.<sup>196</sup> The report briefly mentions embryo donation as a method of ART<sup>197</sup> and poses the question of whether a child born through embryo donation would have four parents.<sup>198</sup> Whether the substantial comments by interested persons and proposed amendments by the Department of Health will be implemented remains to be seen.<sup>199</sup>

### 4.4 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 or the ACRWC explicitly uphold the child’s right to identity<sup>200</sup> as defined in chapter 2 of this thesis. South Africa’s legislative framework is inadequate for protecting the identity rights of children born through ART, in particular embryo donation.<sup>201</sup> Therefore, this legislation fails to provide for the child’s right to personal, biological and sibling identity.

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<sup>194</sup> SALRC Issue Paper 32 (2017) ii.

<sup>195</sup> SALRC Issue Paper 32 (2017) iii.

<sup>196</sup> SALRC Issue Paper 32 (2017) v.

<sup>197</sup> SALRC Issue Paper 32 (2017) 14.

<sup>198</sup> SALRC Issue Paper 32 (2017) 179.

<sup>199</sup> Department of Health ‘Regulations Relating To Assisted Conception of Persons’ available at [https://www.gov.za/sites/default/files/gcis\\_document/202103/44321gon251.pdf](https://www.gov.za/sites/default/files/gcis_document/202103/44321gon251.pdf) (accessed 24 October 2021).

<sup>200</sup> Ronen (2004) 148.

<sup>201</sup> Although an effort has been made in the realm of surrogacy procedures. Mande (2016) iv.

## CHAPTER 5: A COMPARATIVE ANALYSIS OF THE CHILD'S RIGHT TO IDENTITY IN AUSTRALIA AND NEW ZEALAND

### 5.1 Introduction

With the rise of the use of spare embryos as part of ART enterprise, the social and legal acceptability of third-party reproduction varies across countries.<sup>1</sup> Australia and New Zealand have been progressive with regard to their legislation on embryo donation.<sup>2</sup> The aim of this chapter is to describe the social context and regulatory framework and to review the current laws and regulations for third-party reproduction in these countries in order to draw parallels and lessons from which South Africa can learn.

### 5.2 Australia

In Australia, embryo donation is legal in all its states and territories.<sup>3</sup> However, there is no federal legislation that covers ART which includes embryo donation, but there are national Guidelines and a Code of Practice.<sup>4</sup> The Guidelines<sup>5</sup> were produced by National Health and Medical Research Council (NHMRC) and the Code of Practice was developed by the Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia – which encourages recipient couples of embryo donation to disclose to their child information about their genetic origin.<sup>6</sup>

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<sup>1</sup> Hammarberg K, Johnson L & Petrillo T 'Gamete and Embryo Donation and Surrogacy in Australia: The Social Context and Regulatory Framework' (2011) 176. See also Bartholomaeus C & Riggs D 'Embryo donation and receipt in Australia: views on the meanings of embryos and kinship relations' (2019) 38(1) *New Genetics and Society* 1.

<sup>2</sup> Fertility Society of Australia 'Donor Programme' available at <https://www.fertileysociety.com.au/donor-programme-australia-new-zealand/#embryo-donation> (accessed 20 March 2021).

<sup>3</sup> The first babies born through embryo donation were conceived in the 1980s during the 'pre-disclosure era,' a period in which such offspring were not entitled to identifying information about their donors either through held registers or clinic records. See Millbank J, Chandler E, Karpin I & Stuhmcke A 'Embryo donation for reproductive use in Australia' (2017) 20 *Journal of Law and Medicine* 803.

<sup>4</sup> Embryo Donation Network 'Legislation on Embryo Donation' available at <http://www.embryodonation.org.au/legislations.aspx#:~:text=Federal,and%20a%20Code%20of%20Practic e.&text=Clinics%20must%20comply%20with%20the,and%20Guidelines%20to%20be%20accredited.> (accessed 28 February 2021).

<sup>5</sup> In developing these Guidelines, the Australian Health Ethics Committee (AHEC) was conscious of: 'the moral acceptability of ART, the complex biological connections and social relationships that occur in the context of, or as a result of, ART; difficulty in balancing the needs, concerns, and interests of [the donor couple, the recipient couple and the child born] or any child within the family unit who may be affected by that birth.' See Australian Government National Health and Medical Research Council (NHMRC) 'Ethical guidelines on the use of assisted reproductive technology in clinical practice and research' (2017) 19.

<sup>6</sup> These guidelines also recommend counselling and the limitation of the number of families created from donations. See Bartholomaeus & Riggs (2019) 2.

The NHMRC Ethical Guidelines protect the interests of children born through embryo donation.<sup>7</sup> The general principle which governs the practice of third-party reproduction is the right of the donor-conceived individual to be informed of their biological origins.<sup>8</sup> The purpose of this principle is to ensure children born through embryo donation are able to trace their biological parents and siblings.<sup>9</sup>

Paragraph 9.2 of the NHMRC Guidelines, which deals with the maintenance of appropriate records, provides for the following:

9.2.1 Clinics must ensure that all relevant information about parties involved in donor conception programs... are recorded so that this information is available to potential recipients of the donation, any persons born, and/or the gamete or embryo donors.

9.2.2 Information about all parties involved in a donor conception program... must be kept indefinitely (or at least for the expected lifetime of any persons born); in a way that is secure but is accessible to any relevant party.<sup>10</sup>

The RTAC Code of Practice provides that with regard to embryos, clinics must comply with the NHMRC Ethical Guidelines on the use of ART and any applicable state<sup>11</sup> or territory legislation.<sup>12</sup>

Notably, counselling for both the donor and recipient couples is mandatory<sup>13</sup> and must cover the following topics: the lack of a genetic tie to both recipient parents of a child born after the embryo donation procedure; the importance of disclosure – including the appropriate time and manner of disclosure – to the child born as a result of the donor embryo; and possible future interaction between the child and the donor couple.<sup>14</sup>

The NHMRC Ethical Guidelines and the RTAC Code of Practice provide that ART clinics are obligated to maintain detailed records, which includes identifying and non-identifying

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<sup>7</sup> Hammarberg, Johnson & Petrillo (2011) 176.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Australian Government National Health and Medical Research Council (NHMRC) 'Ethical guidelines on the use of assisted reproductive technology in clinical practice and research' (2017) 85.

<sup>11</sup> 'While all states and territories follow the national guidelines, specific legislation mentioning embryo donation is present in four jurisdictions: Victoria, New South Wales, South Australia and Western Australia.' See Bartholomaeus & Riggs (2019) 2.

<sup>12</sup> Reproductive Technology Accreditation Committee (RTAC) of the Fertility Society of Australia 'Code of Practice for Assisted Reproductive Technology Units' (2017) para 2.8 (a) – (b).

<sup>13</sup> Australian Government NHMRC 'Ethical guidelines on the use of assisted reproductive technology in clinical practice and research' (2017) para 4.3 – 4.4. See also RTAC of the Fertility Society of Australia 'Code of Practice for Assisted Reproductive Technology Units' (2017) para 2.2.1(g) & 2.8(d).

<sup>14</sup> In specific states, ART clinics are obligated to record details about donors, recipients and offspring in the central state register. See Hammarberg, Johnson & Petrillo (2011) 178.

information of the donor and recipient couples so that persons born through embryo donation are able to trace their genetic origins.<sup>15</sup>

Although the national Guidelines and Code of Practice offer protection for the right to identity, it must be noted that the capacity for offspring born through embryo donation to apply for information about their biological parents varies from state to state.<sup>16</sup>

For example, in the state of Victoria, in terms of the Victorian Assisted Reproductive Treatment Act of 2008, an addendum is attached to the birth certificates of children born as a result of donor treatment to notify them that additional information about their birth is available.<sup>17</sup> This acts as an incentive for the recipient parents to inform their child about their donors' origins, but would also increase the likelihood of the child finding out about their biological origins, even if their parents do not reveal this to them.<sup>18</sup> In Western Australia, only donor-conceived persons who are of the age 16 and above and who were conceived after December 2004 may apply for identifying information about their donors in accordance with the amendments to the Human Reproductive Technology Act 1991.<sup>19</sup>

In New South Wales, the particulars of donor-conceived children as well as the details about their donor and recipient parents are recorded in a voluntary and central register.<sup>20</sup> The voluntary register allows donor-conceived adults, as well as donor and recipient parents as well as these persons' relatives to submit relevant information.<sup>21</sup> The central register provides an opportunity for donor-conceived adults, their donor and recipient parents to lodge an application to be provided with information about each other.<sup>22</sup> Where a match occurs, the donor-conceived child can exchange information with and elect to meet their donor-conceived siblings, donor parents or relatives.<sup>23</sup> Similarly, in South Australia, the Reproductive

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> This protects the child's right to personal, biological and family identity, but also national identity should the donors' be of a different nationality to that of the recipients. See Allan S 'Donor Identification: Victorian legislation gives rights to all donor-conceived people' (2016) 98 *Family Matters* 52.

<sup>18</sup> Ibid.

<sup>19</sup> Allan S 'The Review of the Western Australian Human Reproductive Technology Act 1991 and the Surrogacy Act 2008' (2019) xxii.

<sup>20</sup> Johnson L 'Regulation of assisted reproductive treatment (ART) in Australia & current ethical issues' (2014) *Indian Journal of Medical Research* 8.

<sup>21</sup> This also allows donor-conceived adults born before the introduction of legislation in 1988 or donor couples to submit information. Ibid.

<sup>22</sup> It was established in 1988. Ibid. The Assisted Reproductive Technology Act 2007 provides for a central register which allows applications for information from persons born through gamete donation. See also Hammarberg, Johnson & Petrillo (2011) 179.

<sup>23</sup> A match occurs through use of the same donor code. Ibid.

Technology Clinical Practices Act 1988 was amended in 2009 to include the establishment of a central register.<sup>24</sup>

Therefore, while subtle legislative differences between states in Australia exist, embryo donation is generally considered a socially acceptable and legally permissible means to form a family.<sup>25</sup> However, the right of donor-conceived offspring to access information about their genetic origins, their donor parents and siblings remains unequal across Australia in the absence of a central register in each state or at a national level.<sup>26</sup> In short, Australia's national framework provides for the protection of the child's right to personal, biological, family and siblingship identity through their detailed record system, central register and the attachment of an addendum to the child's birth certificate.

### 5.3 New Zealand

In New Zealand,<sup>27</sup> embryo donation is strictly regulated under the Human Assisted Reproductive Technology Act 2004 (HART Act)<sup>28</sup> and Guidelines set by the government-appointed Advisory Committee on ART (ACART).<sup>29</sup>

New Zealand's embryo donation policy and practice is an open donation process, allowing offspring to access genetic information.<sup>30</sup> Like Australia, counselling is mandatory for both the donor and recipient couples.<sup>31</sup> At these individual counselling sessions the following topics are explored: 'motivations for, feelings about and expectations of donation; grief and loss around genetic connection; and the needs and rights of children born through embryo donation.'<sup>32</sup>

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<sup>24</sup> Now the Assisted Reproductive Treatment Act 1988. See Hammarberg, Johnson & Petrillo (2011) 179.

<sup>25</sup> Hammarberg, Johnson & Petrillo (2011) 176.

<sup>26</sup> Hammarberg, Johnson & Petrillo (2011) 179. Donor conceived children may also struggle to obtain information about their donors due to laws not being retrospective in their particular state or because the records may have been destroyed. See Power J 'Why donor-conceived children need to know their origins' available at [https://www.news24.com/parent/Fertility/Trying\\_to\\_conceive/why-donor-conceived-children-need-to-know-their-origins-20170328](https://www.news24.com/parent/Fertility/Trying_to_conceive/why-donor-conceived-children-need-to-know-their-origins-20170328) (accessed 21 March 2021).

<sup>27</sup> Embryo donation has only been available in New Zealand since late 2005. See Goedeke S 'Embryo Donation' available at <https://www.fertilitynz.org.nz/information/donation-and-other-options/embryo-donation/#:~:text=ED%20is%20the%20donation%20by,New%20Zealand%20since%20late%202005>. (accessed 28 February 2020).

<sup>28</sup> Wilsdon L 'Embryo Donation in New Zealand: Considerations of the Health and Wellbeing of Children' (2019) 26(3) *Journal of Law and Medicine* 691.

<sup>29</sup> Goedeke & Daniels (2018) 1.

<sup>30</sup> Goedeke S & Daniels K 'The Discourse of Gifting in Embryo Donation: The Understandings of Donors, Recipients, and Counselors' (2017) 27(9) 1402.

<sup>31</sup> Goedeke & Daniels (2018) 2.

<sup>32</sup> Counsellors will note the donor couples' desires concerning the recipient couples' characteristics and assist the prospective recipients to compile profiles from which donors will choose with whom they would like to meet



Furthermore, New Zealand has an additional unique requirement: donors and recipients must meet *prior* to the donation through joint counselling sessions.<sup>33</sup> And unlike conventional donation practices where a recipient couple would select their donors, the choice rests with the donor couple.<sup>34</sup> In the joint counselling sessions, prospective donor and recipient couples become acquainted with one another and discuss the prospects of exchanging information and retaining contact.<sup>35</sup> It is important to clarify these matters because despite the fact that embryo donation guidelines draw on the HART Act which stipulates that offspring should be informed of and have access to information concerning their genetic origins, the decision to disclose rests with the recipient parents<sup>36</sup> since the child's birth certificate only reflects the particulars of the recipients.<sup>37</sup> While addendums to birth certificates in the instance where children are conceived through gamete donation have been suggested,<sup>38</sup> the situation in New Zealand remains unchanged and contested.<sup>39</sup>

The HART Act provides for the recording, storing and sharing of information between donors of donated embryos and donor offspring.<sup>40</sup> Upon reaching the age of 18, the donor-conceived

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face-to-face in joint counselling. Individual counselling helps to make sure that prospective donor and recipient couples have analysed the relevant issues in depth before they are shown each other's profiles. Ibid.

<sup>33</sup> New Zealand is at present the only country in the world with this policy. See Goedeke & Daniels (2018) 1. 'Joint counselling sessions address issues on which the Ethics Committee for Assisted Reproductive Technologies (ECART) requires agreement.' See also Goedeke S & Payne D 'A qualitative study of New Zealand fertility counsellors' roles and practices regarding embryo donation' (2010) 25(11) *Human Reproduction* 2822.

<sup>34</sup> Goedeke, Daniels, Thorpe & Du Preez (2015) 2343. Research suggests that many couples opt not to donate due to the fear of placing their embryos in the 'wrong family.' Concerns about the child's well-being and a sense of ongoing emotional ties is also an influential factor. For these reasons, by allowing prospective donors to select a recipient couple whereby they may specify desired characteristics, for example, "the recipients' age, marital status, ethnicity, socioeconomic class or sexual orientation," will arguably lead to greater ease. These open-identity conditions allow for the prospect of the donors, the recipients and the child born to have varying degrees of ongoing contact. See Goedeke & Daniels (2018) 3.

<sup>35</sup> Goedeke & Daniels (2018) 2.

<sup>36</sup> Ibid.

<sup>37</sup> Gibbs A & Scheman R 'Pathways to parenting in New Zealand: issues in law, policy and practice' (2013) 8(1) – (2) *New Zealand Journal of Social Sciences Online* 16.

<sup>38</sup> New Zealand Ministry of Justice 'Government Response to Law Commission Report on New Issues in Legal Parenthood' (2006) 5.

<sup>39</sup> The Advisory Committee on Assisted Reproductive Technology (ACART) has released a consultation document for comment on 'potential strategies to strengthen offspring access to information about their origins.' See Advisory Committee on Assisted Reproductive Technology (ACART) 'Proposed Donation Guidelines: for family gamete donation, embryo donation, use of donated eggs and donated sperm and surrogacy' (2017) 21. The debate concerning birth certificates is ongoing. See Goedeke & Daniels (2018) 8. See also Allan S 'Submission to the senate committee inquiry into donor conception, access to genetic information and donor identification' available at <http://dro.deakin.edu.au/view/DU:30034784> (accessed 6 March 2021).

<sup>40</sup> Daniels K 'Guidelines for Embryo Donation for Reproductive Purposes in New Zealand: A Child/Family Approach' (2008) *Research Gate* 6.

adult can access information about their donors' identities in addition to identifying information about their siblings, provided the latter have also reached the age of 18.<sup>41</sup>

This alignment towards 'openness' is supported by several studies on embryo donation done in the country.<sup>42</sup> The findings from these studies suggest that the child's genetic connection was significant for both the donor and recipient couples and accordingly bestowed the need for ongoing social ties.<sup>43</sup> The donor and recipient couples also framed embryo donation as 'building new and extended kinship forms.'<sup>44</sup> Moreover, embryo donation under open-identity conditions supports research which links the child's knowledge of their genetic heritage with a healthy identity development.<sup>45</sup>

Therefore, with the awareness of the child's right to have knowledge about his or her genetic origins<sup>46</sup> and the donor couple's ability to not only specify characteristics they desire, but meet and actively select recipients, the practice of embryo donation in New Zealand is thus a transparent and open-identity process.<sup>47</sup> To sum up, New Zealand's legislative framework protects the child's right to personal, biological, family and siblingship identity.

## 5.4 Analysis

### 5.4.1 Similarities in approaches

All three jurisdictions offer embryo donation as a means of combatting infertility. Further, they make provision for the maintenance of appropriate records of information of all parties involved in the embryo donation process, albeit using different systems.

Both Australia and New Zealand's national legislation and guidelines encourage the right of the child to know their biological origins which encapsulates the right to know their genetic

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<sup>41</sup> Additionally, donor offspring who are 18 and above may consent to disclosure of identifying information to their donors. Ibid.

<sup>42</sup> See Goedeke S *Understandings and experiences of embryo donation in New Zealand – a discursive analysis* (unpublished Doctor of Philosophy thesis, Auckland University of Technology, 2014); Goedeke S, Daniels K & Thorpe M 'Embryo donation and counselling for the welfare of donors, recipients, their families and children' (2016) 31(2) *Human Reproduction* 412 – 418; Goedeke, Daniels, Thorpe & Du Preez (2015).

<sup>43</sup> Goedeke & Daniels (2018) 3.

<sup>44</sup> Ibid.

<sup>45</sup> See Allan S 'Submission to the senate committee inquiry into donor conception, access to genetic information and donor identification' available at <http://dro.deakin.edu.au/view/DU:30034784> (accessed 6 March 2021); Blyth E 'Genes r us? Making sense of genetic and non-genetic kinship relationships following anonymous donor insemination (2012) 24(7) *Reproductive Biomedicine Online* 719 – 726; Daniels K, Grace V & Gillett W 'Factors associated with parents' decisions to tell their adult offspring about the offspring's donor conception' (2011) 26(10) *Human Reproduction* 2783–2790.

<sup>46</sup> Goedeke & Payne (2009) 1942.

<sup>47</sup> Goedeke & Daniels (2018) 2.

parents and siblings. Another similarity between these two jurisdictions relates to the provision of mandatory counselling. This has been shown to be an excellent tool for both the donor and recipient couples to thoroughly consider the impact of their decisions on the prospective child to be born. Through discussing the method and timing of disclosure, this will ensure that the child's identity interests as well as their wellbeing are protected.

#### **5.4.2 Differences in approaches**

The main difference between South Africa, Australia and New Zealand is the duty to disclose. In South Africa, the primary focus is the preservation of the anonymity of the donors as the divulgence of the identities of the genetic parents to the embryo-conceived child is prohibited. Effectively, the child's right to their personal, biological, family and siblingship identity is denied. In Australia, the general principle which governs the country's position on third-party reproduction technologies, is the right of the child to know their biological origins later in their lives. New Zealand strongly encourages disclosure; however, the decision to disclose, rests with recipient parents.

Another difference is the method of storing information and purpose of which these records are maintained. Unlike South Africa's method of recording the donors' particulars in a central bank for an undefined period or purpose, Australia's NHMRC Guidelines specifically articulates that the donor's particulars should be stored indefinitely for the expected life duration of the donor-conceived person and made accessible not only to the donor-conceived child themselves, but to their recipient parents or any other relevant party. Moreover, the creation of the voluntary and central register is also an excellent initiative by the state of New South Wales, however, it would make more sense and be of greater convenience to have a single national register. One can imagine the inevitable difficulties that may arise where the donor-conceived child relocates to another state later in life. New Zealand's comprehensive information-keeping regime also aims to ensure that children born from donated embryos can discover about their genetic origins.<sup>48</sup>

In South Africa, although section 28(1)(a) of the Constitution protects the child's right to national identity and entitles a child to a birth certificate, the birth certificate would only reflect the names of the parents legally responsible for the child i.e., the recipients and make no

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<sup>48</sup> Human Assisted Reproductive Technology Act 2004, s3(f).

mention of the identities of the donors or that further information is available regarding the child's biological origins.

In Australia, the protection for children born through embryo donation is not uniform as federal legislation differs from state to state. While children in the State of Victoria will benefit from the addendum to their birth certificates alerting them to additional information surrounding their biological origins, children in other states face greater challenges in attaining this knowledge. Furthermore, the age at which children in their adolescence will be able to access this additional information will also depend on the age restriction of their particular state.

Unlike Australia, New Zealand provides for the uniform age of 18 for donor-conceived persons to access information across the country. Hence, an addendum to the child's birth certificate like that implemented in Australia has been rejected in New Zealand. Furthermore, the meeting prior between both the donor and recipients is a unique aspect.<sup>49</sup>

New Zealand's approach thus seems akin to a middle ground between the child's rights and that of the recipient parents, with South Africa on one end elevating the interests of the donors and recipients and Australia on the opposite end elevating the rights and interests of children born through embryo donation.

## 5.5 Concluding Remarks

The examination of the legal and social contexts in both Australia and New Zealand has shown that while legislative amendments to remove donor anonymity can encourage parental disclosure, the decision not to disclose is an intricate family matter and difficult to regulate by law, but not impossible to regulate at a national level.<sup>50</sup> At the national level, the protection of the child's right to a legal identity would be the most viable solution to safeguard all components of the child's right to identity.<sup>51</sup> For this to function effectively, South Africa could incorporate legislative features from both Australia and New Zealand. At the international level, positive obligations may be placed on States to ensure the protection of the rights of children and emphasise their special status as a vulnerable group.<sup>52</sup> Of course, the special protections afforded to children will depend on whether the instruments or treaties have been

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<sup>49</sup> While counselling should be mandatory for both the donors and recipients, meeting prior to the donation should be made optional. In person meetings may not always be possible and thus it is suggested that virtual meetings should also be an option.

<sup>50</sup> Clark (2012) 623.

<sup>51</sup> Page (2017) 48.

<sup>52</sup> International Justice Resource Centre 'Children's Rights' available at <https://ijrcenter.org/thematic-research-guides/childrens-rights/> (accessed 21 August 2021).

ratified by their State.<sup>53</sup> Hence, national protection is more suitable with international framework to support and reinforce these frameworks. The next chapter concludes the research and makes recommendations on how this can occur in practice.



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<sup>53</sup> Ibid. At a minimum level, all states, except the USA, have ratified the CRC. See Mehta S 'There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US' available at <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens#:~:text=The%20treaty%20has%20been%20ratified,failed%20to%20ratify%20the%20CRC.> (accessed 6 March 2022).



## CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

### 6.1 Introduction

After examining the current level of protection at a national and an international level and raising the various concerns with regard to a child's right to identity who has been born through embryo donation, this chapter concludes the research and makes recommendations.

### 6.2 Conclusions

While embryo donation has given hope to couples suffering from infertility, it has also introduced a myriad of ethical, legal, and social concerns. As this practice becomes increasingly popular, it is likely to exacerbate these concerns, particularly the child's right to identity. This research sought to identify the aspects of the concept of identity that are most relevant to children born through embryo donation and to investigate the impact of such technology on these elements. Furthermore, the research examined the current level of protection that exists in practice and to find solutions to strengthen this.

Chapter 2 concluded that the concept of identity is multifaceted and that embryo donation can impact the child's identity formation in multiple aspects particularly the child's personal, biological, family, sibling and national identity.<sup>1</sup>

Chapter 3 examined the implications of realising the child's right to identity on other parties involved in the process especially with regards to the parent-child relationship between the embryo-donor-conceived child and the recipients, as well as the privacy rights of both the donor and recipient couples.<sup>2</sup> It concluded that donor and recipient anonymity is outdated and cannot solely be justified based on the rights to privacy and private family life as it ignores the child's right to know their biological origins as far as possible.<sup>3</sup>

Chapter 4 concluded that the South African legislature's primary focus is the preservation of the anonymity of the donors as the disclosure of the identities of the embryo donors is prohibited.<sup>4</sup> Hence, the current level of protection is insufficient to uphold the child's right to identity. Furthermore, neither the CRC nor the ACRWC were drafted with ART in mind. At

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<sup>1</sup> See para 2.1 & 2.2 above.

<sup>2</sup> See para 3.2 & 3.3.

<sup>3</sup> See para 3.7 above.

<sup>4</sup> See para 4.3.1 above.

best, the CRC and ACRWC only protect the child's right to identity to the extent of the element of nationality and thus it would be beyond reasonable interpretation to argue that these provisions support the approach that donor-conceived children have a right to know their origins.<sup>5</sup>

Chapter 5 revealed that the South African legal position on the rights of children born through embryo donation runs contrary to countries such as Australia and New Zealand and falls short in comparison to these two jurisdictions which have adopted a position of openness in allowing children to know their origins.<sup>6</sup>

In light of the conclusions reached throughout this mini-thesis, a number of recommendations are made.

## 6.3 Recommendations

### 6.3.1 Safeguarding the Child's Right to Identity at an International Level

International embryo donation is already a reality, and this raises concerns about the present protection of children's rights.<sup>7</sup> An international vacuum exists in relation to international embryo arrangements which leaves the rights of children born through such methods at risk. There are three possibilities in findings to find a global solution. First, a new UN Convention could be created to cover the area of ART.<sup>8</sup> An international convention is an agreement between different countries which is legally binding upon ratification.<sup>9</sup> A monitoring body should be established to evaluate the progress of contracting State parties in implementing the convention through periodic reports submitted by States.<sup>10</sup> A convention would be feasible in the sense that citizens of countries that ban embryo donation seek such arrangements elsewhere.<sup>11</sup> Hence, there is the necessity for a convention to address how to prevent the contravention of the law, without harming children born of such illegal arrangements.<sup>12</sup> Thus,

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<sup>5</sup> See para 4.2.2 above.

<sup>6</sup> See para 5.4.2 above.

<sup>7</sup> Embryo Donation International 'Donate Embryos' available at <https://www.embryodonation.com/donate-your-embryos.php> (accessed 16 May 2021).

<sup>8</sup> With regards to other forms of ART, there have been calls for the adoption of an international convention, for example, in the case of surrogacy. See Mohaparea S 'Adopting an International Convention on Surrogacy— A Lesson from Intercountry Adoption' (2015) 13(1) *Loyola University International Law Review* 25 – 26.

<sup>9</sup> UN Enable 'Frequently Asked Questions regarding the Convention on the Rights of Persons with Disabilities' available at <https://www.un.org/esa/socdev/enable/convinfaq.htm#:~:text=Top-What%20rights%20are%20addressed%20in%20the%20Convention%3F,economic%2C%20political%2C%20and%20social.> (accessed 18 April 2021).

<sup>10</sup> Ibid.

<sup>11</sup> Mohaptra (2015) 55.

<sup>12</sup> Ibid.

the international legal instrument should be signed by country of residence or citizenship of the donating parents.<sup>13</sup>

While international legal instruments would serve as critical tools to convey the necessary concrete change in attitudes around the rights and interests of children born through embryo donation, the endorsement and ratification of international instruments is insufficient to bring substantial change.<sup>14</sup>

Second, the CRC Committee could draft a General Comment<sup>15</sup> to cover specific issues and interests related to children born through embryo donation.<sup>16</sup> A General Comment would provide comprehensive guidance on State obligations, outline measures that should be undertaken to meet treaty provisions and contribute towards the development of domestic regulatory responses to embryo donation in the absence of an international agreement.<sup>17</sup> However, the first step is for the CRC Committee to articulate a uniform definition of the right to identity, to determine the fundamental principles that ought to inform its application and enforceability under international law.<sup>18</sup> Only then can State Parties' obligations to respect, protect and fulfil the child's right to identity in the context of embryo donation be effectively implemented and translated into concrete commitments and meaningful actions.<sup>19</sup>

A General Comment may also be vital to the work of the Permanent Bureau of the Hague Conference on Private International Law (Hague Conference) on the development of a potential private international law agreement, as well as to the efforts of the International Social Service Network (ISSN) on formulating a list of principles with the objective of protecting the

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<sup>13</sup> Page (2017) 45.

<sup>14</sup> Neumayer E 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *The Journal of Conflict Resolution* 925.

<sup>15</sup> Similar calls have also been made in favour of drafting a new General Comment on surrogacy and the adoption of a Hague Convention on donor conceived children. See ISS 'The International Social Service' available at <https://www.iss-ssi.org/index.php/en/> (accessed 21 August 2021).

<sup>16</sup> The CRC is the most widely ratified international human rights instrument which applies to all children under 18 in all contexts. See UNHR Office of the High Commissioner 'Day of General Discussion: "Children's Rights and Alternative Care" 16-17 September 2021' available at <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2020.aspx> (accessed 17 April 2021).

<sup>17</sup> Baird N 'Commercial Surrogacy and the Sale of Children: A Call to Action for the Committee on the Rights of the Child (2019) *Business and Law* 1

<sup>18</sup> This definition should be premised on 'an understanding of identity as a spectrum of significant personal characteristics and social ties.' McCombs & Gonzalez (2007) 1 – 2.

<sup>19</sup> Ibid.

rights of children in the context of international embryo donation.<sup>20</sup> However, a General Comment is disadvantageous in that it would not be legally binding.<sup>21</sup>

Third, a Convention by the Hague Conference (HCCH) may be ratified.<sup>22</sup> In an era of globalisation, cross-border embryo donation raises complex questions of private international law due to the variances in States' national laws.<sup>23</sup> An Experts Group on cross-border recognition and enforcement of embryo donation agreements could be formed in order to develop a distinct protocol on international embryo donation arrangements.<sup>24</sup> Such instrument should address the issue of extra information contained on the child's birth certificate and make provision for an international register since it will be more practical for children born overseas to access.<sup>25</sup> Accessibility should be set at the age of majority which for most countries is at 18 years of age.<sup>26</sup>

Fourth, the ISSN<sup>27</sup> should investigate and undertake research to address the myriad of questions and concerns raised by international embryo donation.<sup>28</sup> Possible steps which the ISSN could take include: studying the present international position, current domestic laws, economic impact and the bonding between the child and the recipient parents.<sup>29</sup> Furthermore, the question of nationality of the child should be addressed.<sup>30</sup> Moreover, the ISSN may advocate in favour

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<sup>20</sup> Ibid.

<sup>21</sup> The views of governments and judges outweigh this. See Geber P, Kyriakakis J & O'Byrne K 'General Comment 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights: What is its Standing, Meaning and Effect?' (2013) *Melbourne Journal of International Law* 7.

<sup>22</sup> Mohaparea (2015) 26, 36, 43.

<sup>23</sup> HCCH 'The Parentage / Surrogacy Project' available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 17 April 2021).

<sup>24</sup> 'The Experts Group is currently focusing on developing a general private international law instrument on legal parentage; and a separate protocol on legal parentage established as a result of international surrogacy arrangements.' Ibid.

<sup>25</sup> Page (2017) 47 – 48.

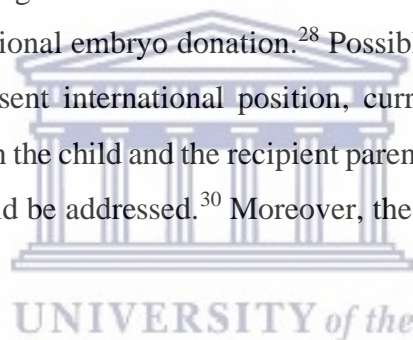
<sup>26</sup> UNICEF 'Age Matters!' (2016) 1.

<sup>27</sup> The ISSN is an international NGO founded in 1924. With its presence in more than 120 countries, the ISSN is a global actor in promoting child protection and welfare through its training projects, awareness campaigns and advocacy work. See ISS 'The International Social Service' available at <https://www.iss-ssi.org/index.php/en/> (accessed 21 August 2021).

<sup>28</sup> The voices of children born through surrogacy have also been elevated through the work of ISSN, that has since 2013 called for urgent regulation of international surrogacy arrangements and in 2016 launched an initiative to draw up the Verona Principles to guide international policy and legislation. These efforts were supported by and contributed towards by the CRC Committee as well as the HCCH in addition to the life experiences of surrogacy born persons. See ISS 'International Social Service works to improve protections for children born through surrogacy' available at <https://www.iss-ssi.org/index.php/en/what-we-do-en/surrogacy> (accessed 22 August 2021).

<sup>29</sup> Childwatch International Research Network 'Call for Action: International surrogacy: a new field of investigation for International Social Service Network' available at <https://www.childwatch.uio.no/news/2013/international-surrogacy%3A-a-new-field-of-investigat.html> (accessed 21 August 2021).

<sup>30</sup> Ibid.



of a new General Comment on embryo donation by the CRC Committee and a Hague Convention on international embryo donation, organise international conferences and gather State representatives to come to an agreement on the necessity of regulating embryo donation at international level.<sup>31</sup>

An African instrument may not gain the support of African nations due to the fact that ART raises some cultural concerns<sup>32</sup> and the question of how religious moral concepts are integrated in the way in which ART is practiced.<sup>33</sup> Studies have shown that the way people in traditional African societies treat infertility is closely linked to their socio-cultural and economic life circumstances and available health care options.<sup>34</sup> Therefore, an African based instrument would not be suitable given that the acceptance of ART still faces some contradictions in African traditional communities.<sup>35</sup> As the local sociocultural context and notions must be taken into account when developing and implementing such a solution,<sup>36</sup> a proposed UN solution would be more effective.



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<sup>31</sup> Ibid.

<sup>32</sup> ART may even be primarily rejected based on traditional values. See Setenane A *Assessing the ethico-cultural implications of Invitro Fertilization (IVF) within the rural Zulu communities in South Africa* (unpublished Master of Arts in Ethics thesis, University of the KwaZulu-Natal, 2020) 3.

<sup>33</sup> Hörbst V 'You cannot do IVF in Africa as in Europe': the making of IVF in Mali and Uganda' (2016) 2 *Reproductive BioMedicine and Society Online* 108.

<sup>34</sup> Gerrits T & Shaw M 'Biomedical infertility care in sub-Saharan Africa: a social science review of current practices, experiences and view points' (2010) 2(3) *F, V & V In ObGYn* 194.

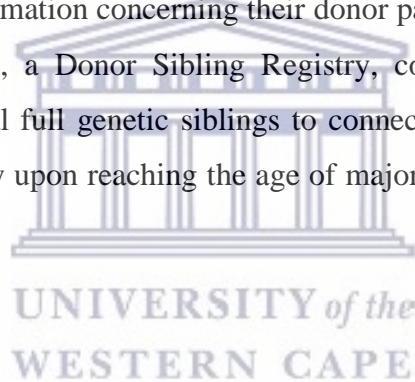
<sup>35</sup> Setenane (2020) 3.

<sup>36</sup> Gerrits & Shaw (2010) 194.



### 6.3.2 Safeguarding the Child's Right to Identity at the National Level

First, the child's right to a legal identity must be safeguarded as it is from this that the right to personal, biological, genetic, family, sibling and national identities stems from.<sup>37</sup> The safeguarding of the child's legal identity begins with the registration of their birth and the issuing of a birth certificate.<sup>38</sup> The birth certificate should serve as a true record of the child's origins, not a deceptive genealogical record.<sup>39</sup> The birth certificate should mention the recipient social parents in order to serve as legal evidence of parentage.<sup>40</sup> An annotation on the child's birth certificate should indicate their mode of conception in the event that third party reproduction method is used and that further information is available about the child's birth.<sup>41</sup> This annotation guarantees the child being able to determine that he or she was born through embryo donation, especially where the social parents have not informed the child.<sup>42</sup> This extra information should also indicate in which specific (national or provincial) register the child can seek and apply for further information concerning their donor parents and/or potential genetic siblings.<sup>43</sup> A separate registry, a Donor Sibling Registry, could be created and updated regularly, in order for potential full genetic siblings to connect.<sup>44</sup> However, the law should make it a requirement that only upon reaching the age of majority i.e. 18 years or when they



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<sup>37</sup> Page (2018) 40 – 41.

<sup>38</sup> Venkov J 'The right start – children and the right to a legal identity' available at <https://www.thetornidentity.org/2018/12/13/children-right-legal-identity/> (accessed 11 April 2021).

<sup>39</sup> 'The nature of our society is such that we are prevented from knowing who we are...' See Smith A 'Meaning, Biology, and Identity: The Rights of Children' (2020) 69(2) *Catholic University Law Review* 371. Today's birth certificates have become method for social parents to withhold the fact from their children that they were conceived through a donated embryo. Mundy L 'The Strange History of the Birth Certificate' available at <https://newrepublic.com/article/112375/birth-certificates-age-adoption-and-egg-donation> (accessed 11 April 2021).

<sup>40</sup> Ibid.

<sup>41</sup> Adams D, Dempsey D, Kelly F et al 'Experts answer your questions on donor conception and IVF' available at [https://www.news24.com/parent/fertility/trying\\_to\\_conceive/experts-answer-your-questions-on-donor-conception-and-ivf-20190625](https://www.news24.com/parent/fertility/trying_to_conceive/experts-answer-your-questions-on-donor-conception-and-ivf-20190625) (accessed 11 April 2021).

<sup>42</sup> Ibid.

<sup>43</sup> Hammarberg, Johnson & Petrillo (2011) 179.

<sup>44</sup> Jolly A 'Donor siblings: do the ties of blood matter?' available at <https://www.theguardian.com/lifeandstyle/2017/jan/21/donor-siblings-do-ties-of-blood-matter> (accessed 11 April 2021).

are ‘sufficiently mature,’<sup>45</sup> may the child be given access to such information.<sup>46</sup> This ‘extra information’ should also provide the particulars of the clinic who assisted with the embryo donation procedure in order to certify that the child has parents biologically different from their legal ones and to the ART method used.<sup>47</sup>

A birth registration form specifically designed to address the practice of embryo donation should accompany the child’s birth registration.<sup>48</sup> The recipient couple must complete it, accompanied by a copy of the child’s birth certificate within 30 days of birth.<sup>49</sup> This information is essential in future where the recipient couple or relatives want to submit extra information to the central data bank.<sup>50</sup> Additionally, once the embryo donation offspring have reached the age of 18 or are ‘sufficiently mature’, they should be required to present a copy of their identity document and birth certificate in order to verify their identity before the identifying information is released.<sup>51</sup> Thus, through recording the child’s legal parents on the birth certificate and indicating that further information is available, in addition to lodging an ‘Embryo Donor-Conceived Offspring Birth Registration Form,’ this will serve to protect not only the child’s dynamic family identity,<sup>52</sup> but their biological and genetic origins.

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<sup>45</sup> ‘Sufficiently mature’ is not defined in law, however Sweden’s National Board of Health and Welfare have clarified that this age is ‘interpreted to mean at attainment of majority’ i.e at the age of 18 years. See Gottlieb C, Lalos O & Lindblad F ‘Disclosure of donor insemination to the child: the impact of Swedish legislation on couples’ attitudes’ (2000) 15(9) *Human Reproduction* 2052. See also *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC), para 23.1. While the recipient parents may argue they are in the best position to determine the child’s level of maturity, in the state of Victoria, the Victorian Assisted Reproductive Treatment Authority (VARTA) will only release the donors’ identifying details to the child before they turn 18 years if a VARTA counsellor considers them sufficiently mature. See VARTA ‘I am a parent of a donor-conceived person’ available at <https://www.varta.org.au/after-donor-conception/i-am-parent-donor-conceived-person> (accessed 27 November 2021).

<sup>46</sup> Broughton T ‘Let children know their genetic origins, says child law expert’ available at <https://www.timeslive.co.za/sunday-times/news/2018-08-11-let-children-know-their-genetic-origins-say---child-law-experts/> (accessed 18 April 2021).

<sup>47</sup> Page (2017) 42.

<sup>48</sup> This ‘Embryo Donor-Conceived Offspring Birth Registration Form’ would require the recipient parents to fill in the following information: the number of children born as a result of the embryo donation; the children’s full names; birth dates; gender; weight at birth. Each recipient would need to attest that this information is accurate and attach their signatures. The doctors who effected the ART procedure and the doctor who delivered the child would also need to arrest their signature. See example: Embryo Donation International ‘Embryo Donor-Conceived Offspring Birth Registration Form’ available at <https://www.embryodonation.com/downloads/Embryo%20Donor-Conceived%20Offspring%20Birth%20Registration%20Form.pdf> (accessed 17 April 2021).

<sup>49</sup> The Births and Deaths Registration Act 51 of 1992 provides that all births must be registered within 30 Days of birth. See Home Affairs ‘Birth Certificates’ available at <http://www.dha.gov.za/index.php/civic-services/birth-certificates#:~:text=All%20children%20born%20in%20South,Deaths%20Registration%20Act%2C%201992> (accessed 17 April 2021).

<sup>50</sup> Ibid.

<sup>51</sup> Embryo Donation International ‘Embryo Recipient Identity Disclosure Program (IDP)’ available at <https://www.embryodonation.com/embryo-recipient-idp.php> (accessed 17 April 2021).

<sup>52</sup> Teman & Berend (2020) 2.

The child's right to a nationality is protected based on the principles of *jus sanguinis* or *jus soli*.<sup>53</sup> Either way of acquiring a nationality is based on information that is recorded in the child's birth certificate;<sup>54</sup> however, this may be complicated at an international level where the child is born abroad in a country different to the nationality of their recipient parents.<sup>55</sup> Where such a child is born to South African recipient parents abroad, a possible solution would be for the parents to register the child at a South African Embassy so as to obtain an official record indicating the child's South African citizenship.<sup>56</sup>

The NHA and Children's Act should be amended accordingly. Firstly, the definition of 'embryo donation' should be inserted in both Acts in order to distinguish it from gamete donation.<sup>57</sup> Secondly, section 19 of the NHA and section 41 of the Children's Act should be amended to provide for children born as a result of embryo donation to apply for and to have access to information stored in the electronic central data bank<sup>58</sup> concerning the identities of the donating couple, once they have reached the age of majority or are deemed 'sufficiently mature.' Thirdly, Guidelines should be promulgated to require clinics to maintain detailed records of all parties involved in donor conception programmes; counselling should be mandatory for both the donor and recipient couples however joint counselling should be suggested, but not obligatory. The donor couple must understand that the potential offspring born as a result of the embryo donation may be curious about the donors themselves and desire to meet the donors and/or their genetic siblings with the donor's families or within other recipients' families.<sup>59</sup> The donor couple should consent to disclosure of their identities in writing, so that their future offspring may access this information, once they have come of age or are 'sufficiently mature.' The central data bank should also make provisions for related parties to lodge further information that may be of assistance to the offspring such as their

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<sup>53</sup> Pryce (2016) 318 & 320.

<sup>54</sup> Page (2017) 43.

<sup>55</sup> With the increase of children born through embryo donation, it is foreseeable that a remarkably large group of children will face the same challenges as children born abroad and conceived through surrogacy, egg donation and sperm donation – who have been denied the nationality of their legal/social parents. See Nichol B 'A Child without a Country: Dissolving the Statelessness of Children Born through Surrogacy' (2016) *Michigan State Law Review* 907.

<sup>56</sup> Tucker C 'The Legalities of IVF Abroad' available at <https://pved.org/thelegalitiesofivf.php> (accessed 11 April 2021).

<sup>57</sup> Zegers – Hochschild, Adamson G, de Mouzon et al, *supra* note 1.

<sup>58</sup> Regulations Relating to Artificial Fertilisation of Persons in GN 1165 GG 40312 of 30 September 2016, para 5.

<sup>59</sup> Embryo Donation International 'Embryo Recipient Identity Disclosure Program (IDP)' available at <https://www.embryodonation.com/embryo-recipient-idp.php> (accessed 17 April 2021).

potential genetic siblings. Alternatively, a new Act with its focus on ART and the rights of children born from such practices should be drafted by Parliament.<sup>60</sup>

#### **6.4 Concluding Remarks**

This mini-thesis has shown that a child born through embryo donation has a legal right to know their identity. While this right is difficult to enforce, it is not impossible to enforce at a national level.

In conclusion, rapid developments in ART have directly challenged countries to re-evaluate the way in which identity formation in children are viewed and have awakened calls to modify existing legislation to accommodate these unique challenges. Embryo donation is still a novel practice in South Africa and without comprehensive national legislation nor international guidelines, the unknown aspects of this practice places children in a position of uncertainty. Clarity is needed on the meaning of identity rights with regard to various forms of ART and legislative reform must reflect the clarified position. Only once this is done, can State Parties permit embryo donation appropriately and translate the requirements of these Conventions into domestic law. Not only should children have the right to know the truth about their origins, but prospective recipient couples considering embryo donation need to be made aware of the social, psychological and legal complexities. Thus, the time has come for the South African legislature and the international community to formalise the realisation of the right to identity of children born through embryo donation.

Word count: 31613

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<sup>60</sup> Lessons should be drawn from the legal positions in Australia and New Zealand.

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