Identity: A (Human) Right to Ancestry and Genetic Origin?[1]

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1. Introduction

The absence of 'ties meaningful' (Ronen, 147) can easily curtail the realization of rights claims that are grounded 'only' in the need for authentic, genetic identity. Often, there is a need to evidence some form of 'remembered relatedness,' for example when seeking permission from jurists or government departments to access one's original birth records or make some form of contact with estranged biological relatives. This paper will argue that a right to avoid origin deprivation—and access truths surrounding our genetic ancestry—can, in theory at least, be found or crafted from a number of relevant human rights provisions, not least those that have long served elsewhere to protect family life, familial contact, and child welfare paramountcy. The first half of the paper outlines how human rights frameworks might be used to underpin and argue the right to original identity (including persuasive Guidance in the form of UN Country Reports). The second half examines recent relevant jurisprudence on this area of law, looking particularly to the recent case law on gamete donation and surrogacy, much of which seems to hold increasing relevance for closed-records adoptees seeking to connect with their genetic relatives, even though its messages are mixed in terms of promoting the rights of relinquished persons. It concludes with a discussion of some of the recent UN initiatives aimed at addressing the various inequities that can arise from depriving people of origin, namely, harsh othering and 'orphanisation.'

2. Conceptualizing access to genetic ancestry as a human right: law and policy frameworks

Limited justiciability attaches to the 'right' to avoid origin deprivation (or, more accurately, genetic non-ancestry). Within human rights law however, certain entitlements to access at least some key aspects of genetic identity can be found. Citizens generally have the right to possess both name[2] and nationality, given that States are duty bound to respect 'cultural integrity'[3] where possible. Other relevant principles and concepts include human dignity, the best interests of the child,[4] equality, and non-discrimination,[5] even if domestic interpretations of these can differ profoundly across jurisdictions. As Sclater and Kaganas have argued, the child welfare paramountcy principle is particularly problematic, given the 'myriad meanings' that often tend to render it quite 'indeterminate' (168). Given also that many socio-economic rights entitlements—such as the right to respect for home, family and private life under Article 8 of the European Convention on Human Rights ('ECHR')—are often heavily resource-dependant, it may be argued that these so-called entitlements seem more akin to non-juridical, finite or rationed privileges.

If we accept however that 'universal protection of relationships with significant others is in fact protection of the distinctness and the uniqueness in the individual' (Ronen, 151), then vetoes on information disclosure and contact become problematic. The Children's Convention clearly aims to protect 'authenticity' and 'self-realization' of individual identity (Ronen, 149). It

1. I am very grateful to the conference organisers for their kind invitation to present this paper. Some sections of it have been published as a book chapter (in Diver, *'A Law of Blood-ties: The 'Right' to Access Genetic Ancestry'* New York: Springer. 2013); some of the material will also appear within a forthcoming journal article entitled 'Monstrous' otherings?' The Gothic nature of origin-tracing and 'non-rights' in law and literature' *Adoption & Culture* (forthcoming, 2021).

2. See for example Articles 16 (1) (a) and 30 (1) of The Hague Convention.

3. See Article 27 of The International Covenant on Civil and Political Rights ('ICCPR') and Anaya (97-103) on the international legal and customary norms of non-discrimination and protection of cultural integrity.

4. See Article 3 (1) of The Children's Convention ('UNCRC') which states that: *"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."*

5. See for example the anti-discrimination provisions of the Universal Declaration on Human Rights (1948) ('UDHR') namely Article 7; Article 2 *('Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.')*; Article 25 (2) *('Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.'* See also Article 6 of The Universal Declaration on the Human Genome and Human Rights (1997) which states that *'No one shall be subjected to discrimination based on genetic characteristics that is intended to infringe or has the effect of infringing human rights, fundamental freedoms and human dignity'.*

is noteworthy however that during its drafting stage several signatory states expressed unease over the inclusion of a clause on the 'biological element' of identity for fear it might conflict with future domestic policies on reproductive technologies.[6] As Detrick, Doek and Cantwell noted, some Working Group members disliked the term 'family identity', preferring instead a much less expansive notion of 'family relations as recognised by law' (294). It seems that, rather than reaffirming a commitment to removing obstacles to 'birth-kin repatriation' (Brower Blair, 642), the Convention's drafters avoided the creation of any positive obligation to actively facilitate information release (Stewart, 224). 'Borderline or unusual conditions' were also not considered, and there was little acknowledgement of the adverse consequences of living with genetic kinlessness (Stewart, 223).

Article 21 of the Children's Convention framed international adoption as akin to the domestic sort, stressing the need for parental consents to relinquishment. Its silence on issues of biogenetic information release has meant however that domestic legislators and jurists must make hard decisions with ambiguous guidance[7] and against a backdrop of an increasingly deep lack of consensus on such matters.[8] Article 20 (1) does at least call out for 'special protection and assistance by the State' to include any children 'temporarily or permanently deprived of … family environment.' Article 20 (3) stresses the 'desirability of continuity' but is silent on more pragmatic issues such as the opportunity for reunion, and access to meaningful information. Arguably, the right to preserve genetic heritage could fall within this provision's requirement that States have 'due regard' for the child's 'ethnic, religious, cultural and linguistic background.'[9] The Convention is not unequivocal however: its Preamble states that families are of 'fundamental importance' and stresses the need for 'full and harmonious development of … personality.'[10] It goes on to highlight 'authenticity' within a 'cultural context (and) personal meaning' (Ronen, 147) but creates no juridical duty to actively protect or realise identity rights for those affected by parental vetoes or genitor anonymity laws. Support for the psychological benefits of knowing familial origin can at least be implied to some extent: Articles 7 and 8 speak to the significance of 'family relations' even if they do avoid defining relatedness.[11] Article 9 (1) allows for kin separation only where the child's best interests require it, whilst Article 9 (3) provides for the maintenance of 'personal relations and direct contact,' again unless best interests demand otherwise.[12] The Convention fails though to define exactly which categories of relatedness might fall within its potentially wide remit of 'family relationships' (McCarthy,12). Article 9 (3) refers only to the need for contact between child and parents, with no mention of siblings or other kinfolk.[13]

The presence of 'ties meaningful' (Ronen, 147) remains a key factor as seen recently in the European Court of Human Rights in Paradiso v Italy (2017), a difficult case involving surrogacy, adoption, and unknown genetic parentage (examined in the next section).[14] Where there is a lack of 'remembered relatedness' any bonds formed by gestation and/or birth may simply be ignored by jurists, or seen as having withered on the vine (for want of a better analogy involving family trees or biological roots).[15] Conversely, the absence of genetic relatedness has also been used to essentially justify the permanent removal of an infant from his parents (as in Paradiso). And yet meaningful psychological bonds are needed it seems to spark rights to respect for family life (under Article 8 of the European Convention). Such reasoning fails to take into account many key socio-cultural aspects of one's identity which will not easily be 'remembered' during infancy if one has been relinquished by birth parents and adopted out into another culture: ethnicity, culture, religion, and nationality can easily be lost or removed, as seen in 'scoop'-led adoption practices of the past century, across a number of jurisdictions.

6. During its drafting, only one signatory state suggested that a 'biological element' of identity ought to be included in the final draft of the Convention. See also the Report of the Working Group on a Draft Convention on the Rights of the Child (1989) E/CN.4/1989/48

7. See also The Hague Convention (1993) Art 31 which (together with Articles 15 and 16) states that any items of information *'shall be used only for the purposes for which they were gathered or transmitted'*.

8. The 'margin of appreciation' is a doctrine referred to by enforcement/judicial bodies (such as the European Court of Human Rights) in determining whether signatory states have acted in breach of their Convention obligations. States are permitted varying degrees of discretion in carrying out certain obligations at the level of domestic compliance, especially where certain rights might be subject to a variety of differing interpretations by member states; factors such as religious or cultural differences will generally be taken into account, as will a lack of consensus over contentious issues. See further *O'Donnell* (1982).

9. Article 21 (a) deals with the issues of parental consent, inter-country adoption and the prohibition of financial gain.

10. See The Preamble to the United Nations Convention on the Rights ('The Children's Convention') of the Child, Para 5

11. See Article 8 of The Children's Convention which states that (1) *'State 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 identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.'*

12. Article 9 (4) covers the provision of information but is clearly aimed at situations involving civil or political rights violations such as *'detention, imprisonment, exile deportation or death'* rather than adoption or assisted conception. See also Articles 20 (1) and 22 (2)

13. Article 9 (3) states that *'State parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.'*

14. European Court of Human Rights, Grand Chamber, (2017) Application no. 25358/12

15. See for example *Keegan v Ireland* (1994) (App no 16969/90) 18 EHRR 342; *Kroon v The Netherlands* (1995) 19 EHRR 263; X v Croatia (app no 12233/04) (17.07.2008); *Johansen v Norway* [1996] EHRR 31 (app no 17383/90) . See however *Marckx v Belgium* (1979) (application no 6833/74) (1979)

The Children's Convention similarly places no legal obligation upon parents to inform their adopted or donor-conceived children of their biological heritage or indeed provide them with any useful information on it.

The apparent tensions between Articles 5, 12 and 13 of the Children's Convention (on the child's right to 'be heard' and to participate in all proceedings affecting them) reflect the problems attaching to child protection and identity formation more generally (Ronen, 162).[16] The issues surrounding legislative and judicial balancing of these competing principles (put bluntly, child protection versus child participation) have been repeatedly raised by The UN Committee on the Rights of the Child.[17] And yet, the rights enshrined in Article 8 of the Children's Convention could easily be referred to—if not expanded upon—in domestic hearings to permit courts to look beyond the usual hard borders of family, nationality, and name. Arguably, they could cite these persuasive principles to include socio-cultural aspects more fully within their analyses of what 'original identity' might be comprised of. Article 10 might prove similarly useful, insofar as it appears to promote the reunification of estranged family members, by highlighting the need for regular contact between children and parents who 'have been separated,' even though its wording is of course much more suggestive of separations brought about by civil or political crises (territorial displacements, conflicts, genocide) or contentious private issues (marital separations, familial breakdown).

The European Convention on Adoption (2008)[18] ('ECA') seemed to embrace the spirit of the Children's Convention by highlighting the importance of the voice of the child. The issue of making information available to adoptees was however tied to a policy of 'age-appropriateness.'[19] Arguably, some 'nuancing of the severing of all links' (Horgan and Martin, 161) now exists in certain circumstances: blood-ties still remain key to parental duties of fiscal support or preventing marriages between genetic relatives. Article 10 of the ECA allows for alternative models of adoption ('simple', customary or de facto) that preserve biological links while Article 22 addresses the issue of balancing the privacy (i.e. 'anonymity') rights of relinquishing parents.[20] And yet a wide degree of discretion is still afforded to domestic authorities: decisions on information release rest largely with national legislators and courts, who are only required to 'bear in mind' the provisions of Article 7 of the Children's Convention, rather than having to actively or usefully embed it within domestic law or policy frameworks. Unlike the 1993 Hague Convention, Article 14 of the ECA does acknowledge that adoptive placements can be revoked,[21] though it seems to assume that full integration (legal, social, psychological) into the substitute family is the preferred outcome: as such, non-disclosure vetoes and wide-ranging adopter discretion (e.g. on issues such as birth family contact) still hold sway. The ECA offers little guidance on how knowable ancestry might actually be achieved, providing merely that, where parentage is in dispute, 'adoption proceedings shall, where appropriate, be suspended to await the results of the parentage proceedings. The competent authorities shall act expeditiously in such parentage proceedings.'[22] Similarly, signatory states are encouraged rather than bound to enact specific, useful legislation that might favour those of us who search for our original kinfolk.

Guidance on the avoidance of origin deprivation and genetic kinlessness within the various UN Committee Documents remains fairly limited too. (Though non-binding in nature, the results of such international scrutiny at least offer some measure of censure for non-compliant signatory states.[23]) The Committee has reiterated the need to preserve links between children and their 'own distinctive communities,' noting how child protection systems should consider 'indigenous culture, values and the child's right to indigenous identity.'[24] There is some disquiet over e.g. information vetoes, and the ways in which some children 'born out of wedlock' will simply never be able to

16. See also Freeman's (1996) comparative analysis of the lack of identity rights of donor gamete-conceived individuals as opposed to those of adult adoptees generally in open records jurisdictions such as the UK.

17. See for example the Committee's Observations on Saint Lucia CRC/C/150 (2005) 10 para 66 which recommended that the views of the child be afforded greater consideration in decisions involving custody after parental separation; Islamic Republic of Iran CRC/C/146 (2005) 88 para 462 which noted that the 'best interests' principle of the child is often completely side-lined in favour of custody decisions based upon the age of the child, and how this often tends to discriminate against mothers.

18. Approved at the 118th Ministerial Session (Strasbourg) March 2008; adopted May 2008, opened for signatures November 2008. Available at http://conventions.coe.int/Treaty/en/Treaties/Html/202.htm accessed 19.07.20 This effectively replaced The 1967 European Convention on Adoption which appeared to support harmonization of domestic laws on international adoption; no means of enforcement was created by the 1967 Convention nor was it included in the *Acquis Communautaire* of EU member states. Sweden formally denounced the 1967 Convention in January 2003, whilst the UK partially renounced its provisions in June 2005.

19. Article 5(a) of the 1967 Convention set out the suggested minimum level of 'essential principles' that signatory states should aim for in respect of domestic adoptions. These permitted but did not require secrecy in relation to the provision of medical information.

20. See Article 22(3) which states that *'The adopted child shall have access to information held by the competent authorities concerning his or her origins. Where his or her parents of origin have a legal right not to disclose their identity, it shall remain open to the competent authority, to the extent permitted by law, to determine whether to override that right and disclose identifying information, having regard to the circumstances and to the respective rights of the child and his or her parents of origin. Appropriate guidance may be given to an adopted child not having reached the age of majority.'*

21. See for example the Irish High Court case A *G v Dow*se [2006] IEHC 65

22. Article 16 (2008 Convention)

23. See https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx (accessed 18.07.20).

24. As the International Reference Centre for the Rights of Children Deprived of Their Family ('IRC') noted in respect of incidences of child abandonment in Islamic states, 'the reasons … are very similar from one country to another; children born out of wedlock are the first victims of abandonment and they remain stigmatised throughout their life.' IRC (2007:2). See further Bargach (2002) and Ishaque (2008).

'know the identity of their father.'[25] Protection against the lingering social stigma of 'illegitimate' birth seems unlikely to be achieved solely via international law principles however, given the wider socio-cultural aspects of this particular form of 'othering.' Much of the jurisprudence on genetic identity rights seems to fall within the realm of 'private law,' not least its usual definitions on parentage, parenthood, and parenting. This is so even though The Hague Convention on Intercountry Adoption (1993)[26] seems to speak to public law principles, by requiring States to compile 'identity' information on the 'adoptable' child, including 'background, social environment, family history, medical history, including that of the child's family.' Although its Article 16 (1) (b) requires that 'due consideration' should be given to the child's 'ethnic, religious and cultural background,' states are equally obliged to take care 'not to reveal the identity of the mother and father, if, in the State of origin, these identities may not be disclosed.'[27] Clearly, 'no substantive norm' (Stark, 68) attaches either to promises of confidentiality made to birth parents or to the practicalities of releasing information to their descendants. It is noteworthy too that the Hague Conference on Private International Law ('HCCH') (in assessing the impacts of Hague 1993 over two decades) recently found that '…some States noted that further work is required to preserve information relating to the origins of children and to allow adoptees to access this information with the necessary counselling and support' (2015, 22).[28] It was seen as significant also that 'the Convention establishes only basic standards in relation to post-adoption services' (2015, 20).

As Anaya has stated, a 'cultural integrity norm … requires diverse applications in diverse settings' (104). It seems unlikely that a usefully detailed template for reparation or repatriation will arise in respect of lost or removed genetic ancestries. As Oren has argued of disputed parentage scenarios

25. See St Vincent and The Grenadines CRC/C/118 (2002) 101 para 437. See also Haiti CRC/124 (2003) 95 para 426, which highlights Article 306 of Haiti's Civil Code, which makes it illegal for children born out of wedlock to learn the identity of their father; Luxembourg CRC/C/146 (2005) 36 paras 184 and 185. See also Austria CRC/C/146 (2005) 47 paras 251, 252; Morocco CRC/C/132 (2003) 100 para 482; Syrian Arab Republic CRC/C/132 (2003) 116 para 554; Pakistan CRC/C/133 (2003) 37 para 210. Concern over the lack of guidance available to providing care for 'parentless' children was evident too. See for example the Day of Discussion (2005) CRC Outline CRC/C/146 Annex II ibid para 4; See also CRC-*'Children Without Parental Care'* (2005) Recommendations [CRC/C/156, Chapter VI]

26. The Hague Convention (1993)

27. Article 16 (2). See also The Convention on Jurisdiction, Applicable Law, Recognition Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996) available at http://hcch.e-vision.nl/index_em.php?act=conventions.text&cid=70 accessed 13.07.20 which contains some guidance on promoting the best interests of the child at domestic level. See Article 4 (b) however which specifically excludes *'decisions on adoptions, measures preparatory to adoption, or the annulment or revocation of adoption.'* Article 6 (1) however does apply to 'refugee children', children who have been 'internationally displaced' and 'children whose habitual residence cannot be established.'

28. https://assets.hcch.net/docs/f9f65ec0-1795-435c-aadf-77617816011c.pdf (accessed 18.07.20) Where non-signatory states are involved, bilateral agreements may be drawn up, which may - or may not - reflect the aims of Hague (1993). (para 12)

(in respect of Argentina's Abuelas atrocity), the rights of the child—and the remit of the best interests principle—may often be determined only after gauging which set of competing adults has the stronger 'parental rights claim' (187). Where a loss of genetic identity has arisen through political upheaval or enforced cultural assimilation it might, hypothetically at least, be regarded as tantamount to rights-violating 'inhuman or degrading treatment' as was argued in connection with the Abuelas. Categorising origin deprivation as a civil or political rights issue (rather than a socio-economic one) would at least align the notion with powerful—often much more juridical—concepts within international human rights law. There is for example a clear duty upon states to actively enable identity protection under Article 24 of The International Covenant on Civil and Political Rights (1966) ('ICCPR')[29] which mirrors those found in Article 15 of The Universal Declaration on Human Rights (1948) (The 'UDHR'),[30] and Articles 9 and 4 (a) of The European Convention on Nationality (1997).[31] Article 9 of The Nationality Convention also refers to the recovery of lost nationality; 'Each State Party shall facilitate, in the cases and under the conditions provided for by its internal law, the recovery of its nationality by former nationals who are lawfully and habitually resident on its territory.' The wording of this provision seems to place a largely aspirational, non-interference obligation on signatory states to 'facilitate' rather than actively enforce or monitor the right to recover lost nationality, however. The right is further qualified by provisos on territorial residence and prolonged habitation, not to mention the inclusion of a reference to national laws. Such limitations are usually more associated with resource-dependant, socio-economic human rights such as the state's duty to promote and protect respect for family life rights.[32] Cultural heritage rights do often also tend to rely upon various 'land-based' property aspects: place of habitation or birth, or tribal status via residence on Native land for example.[33] This perhaps weakens the argument that a right to identity might be best conceptualised—or realiplsed—as a political, rather than socio-cultural entitlement. Where a child has been conceived

29. Articles 24 (2) and (3) of The ICCPR state that; *'2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.'*

30. Article 15 of the UDHR states that '1. *Everyone has the right to a nationality 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'.*

31. Article 4 (a) states that *'everyone has the right to a nationality'*

32. See Article 10 (1) of the International Covenant on Economic and Social Rights (The 'ICESCR') which states that *'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society.'* and Article 16 (3) of the UDHR which describes the family as *'the natural and fundamental group of society and is entitled to protection by society and the State'.*

33. See for example Re Bridget et al (Minors) [1995] BO93520 (The 'Rost twins case') where the question of whether or not the children possessed Pomo ancestry appeared to turn on the issue of paternal residence on tribal lands.

or born in one jurisdiction but adopted in another for example it will be difficult to establish a right to genetic identity information by simply arguing the 'right' to name or nationality. Origin deprivation in such circumstances might result in 'statelessness' (as has occurred in some of the case law referred to in the second half of this paper).

'Identity' rights are far from absolute therefore and will likely remain open to widely varying interpretations across domestic courts. In other words, possessing 'a name' (Article 24 (2) ICCPR) is not necessarily the same as being afforded unfettered access to original onomastic information or accurate, authentic birth/conception records. The right to 'acquire nationality' (Article 24 (3) ICCPR) similarly does not equal those rights which might arise by virtue of birth or knowable, evidenced ancestry. Loss of nationality seems increasingly subject to domestically drafted, rapidly changing sanctions (such as immigration laws).[34] And yet, Article II (e) of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) ('The Genocide Convention') promotes the right to ascertain one's 'national identity.' Genocide included within its definition 'forcibly transferring children of the group to another group.' The wording suggests some degree of acknowledgement that genetic identity matters, both in terms of discovering and preserving it, and providing meaningful redress for rights violations (Stewart, 223).[35] The harms of identity loss have been acknowledged: indigenous adoptees in the United States have suffered 'society··· putting on them an identity which they didn't possess and taking from them an identity that they did possess' (Westermeyer, 1974).[36] Conceptual framings of identity loss should therefore include its socio-cultural and civil or political aspects.

Denials of cultural heritage may affect key rights to occupy or possess land, learn a language, practice religious belief, or hold tribal status. As Article 27 of the ICCPR states: 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.'[37] The duty upon states to preserve 'cultural integrity'—especially in relation to the rights of vulnerable minorities, 'parentless' children, or displaced persons—seems an obvious one. As Anaya has further argued on cultural heritage rights, 'While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historic and continuing vulnerability (102).' The wording of Article 27 (ICCPR) is however such that individual identity rights issues could easily fall outside of its protective remit. It appears to assume that certain groups will always possess essential knowledge as to the original identities—or whereabouts—of their 'lost' members, and that dispossessed adoptees for example might have some useful awareness of what their own cultural persuasion or nationality would have been had they not been relinquished and then affected by origin deprivation. Where individuals are denied truths through the lawful exercise of parental discretion, vetoes, or court decisions on information release or familial contact, provisions such as Article 27 (ICCPR) become ineffective, if not completely irrelevant. Harms in this context can quietly but profoundly affect individuals as private law matters, rather than being regarded as ethno-racial violations of collective, cultural heritage rights.[38] In other words, they can be deemed both 'necessary and proportionate,' given how new bonds of social and familial kinship are meant to bring much-vaunted, protective 'permanence' to those who have been genetically abandoned or relinquished. In any event, it seems that a wider 'rights-based approach to children's issues' is gradually enabling a 'decisive shift' in domestic judicial attitudes towards the notion of children's rights in general (McCarthy, 1) even though the jurisprudence in this area remains inconsistent.

Whether a right to genetic identity should be framed as a 'new' right or not is still open to question. Newer rights may be vulnerable to resource dependency and lack the redressive urgency associated with older, more established rights (Cerda, 115-117).[39]Article 8 of The Children's Convention—perhaps now more of a middle-aged provision rather than an adolescent one, in human rights terms—was aimed at fixing the 'legal void' that can prevent displaced or abducted children from reconnecting with their original families (Stewart, 222). As its Argentinean sponsor presciently observed at the time of drafting, meaningful implementations tend to require considerable willingness on the part of

34. Provided that this has occurred in a 'non-arbitrary' fashion; See Article 15 (2) UDHR

35. This point, coupled with the argument that much harm can flow from loss of identity was central to the arguments of the *Abuelas'* families. Stewart appears to suggest that a right of repatriation should not however be 'absolute' given that it might defeat 'competing interests'. These are not defined but presumably might include conflicting parental rights such as privacy or familial autonomy or perhaps wider public interest, where the use of finite state resources would be involved e.g. in facilitating kin contact.

36. Indian Child Welfare Programme *'Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs'* (1974) 93d Cong 2d Session 46 per Dr Westermeyer J

37. See also Pritchard (1998) on The Human Rights Committee's General Comment No 23 (50) (Art 27) para 6.2 which suggests that Article 27 places a positive obligation on signatory states to actively protect 'the identity of a minority.'

38. See for example the 'traumas and identity conflicts' arising in *Serrano-Cruz Sisters v El Salvador* Inter-American Court of Human Rights (March 1, 2005) Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120 para A (1) at page 13. On the American Convention on Human Rights generally, see Robertson and Merrills (1996)

39. See also Stewart (1992-1993) who suggests that the right to identity under the Children's Convention successfully conforms with Alston's (1984) template for 'new rights'

domestic legal systems to interpret their Convention obligations pro-actively (Cerda, 116). So, while cases involving cultural heritage or national identity losses are likely to involve calls for 'displaced' children to be repatriated, private law cases involving adoption or donor anonymity will not. They are likely to remain subject to tough veneers of political and judicial deference towards the sanctity of family privacy. As Brower-Blair has further noted, 'current practices of the nations of the world regarding release of identifying information are not sufficiently uniform to support an absolute right to information under customary international law or general principles of law' (643). She cites two key factors: a lack of international focus on the issue of disclosure and the use of judicial balancing exercises to determine when parental interests ought to outweigh the rights of the child. Whether the persuasive influence of international law principles might eventually bring about 'the required level of recognition' remains to be seen (660-661). The Council of Europe's Joint Declaration on Intercountry Adoption (2008) appeared to acknowledge the difficulties faced by 'parentless' children: its Preamble stressed the paramountcy of child welfare by declaring that the 'higher interests of the child must take precedence over any other consideration.' It has placed a positive obligation upon signatory states 'to respond to the psychological distress of all their abandoned and orphaned children' (para 4). It called also for consideration to be given 'at European level' to the setting up of an 'adoption procedure based on the exchange of good practice between States.' And yet, errors occurred: by amalgamating international law policies on intercountry adoption with those aimed at preventing child trafficking, for example, many 'abandoned and orphaned children' fell outside the remit of the law and were denied any 'right to a family,' remaining in long-term care.

Such discrimination may occur even where national and regional charters have been 'layered' on top of one another in a bid to better incorporate basic human rights provisions into domestic law and policy (Diver, 2013). Quebec's veto system for example is essentially at odds with the non-discrimination provisions of The Canadian Charter,[40] which require equality of treatment for all Canadian citizens irrespective of birth status. S.3 of The Canadian Human Rights Act (1985) similarly included "family status" as one of the prohibited grounds of discrimination.[41] The Quebec Charter of Human Rights and Freedoms (1976) references socio-economic rights, with s. 10 providing that "every person has a right to full and equal recognition and exercise of his human rights and freedoms without distinction, exclusion or preference."[42] It stresses too that "discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such a right." The Quebec Charter's careful drafting enables balancing exercises to be effected however in favour of preserving parental privacy. Although s. 5 guarantees the "right to respect for …private life" s. 9 clearly prioritises parental interests by proclaiming that "every person has a right to non-disclosure of confidential information."[43] Wording matters: it is difficult to see how an adoptee might successfully plead that an unjustified interference has occurred in respect of either their identity or family life given the veto-friendly nature of the Quebec Charter. Canadian NGOs have noted that the use of the non-disclosure veto does not appear to comply with the requirements of Section 15(1) of the Canadian Charter, Section 3 of The Canadian Human Rights Act or indeed Article 3 of The UN Children's Convention, in preventing discrimination against adoptees.[45] This is ironic given The Supreme Court of Canada's definition of discrimination as:

> *"a distinction, whether intentional or not but based upon grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages on such individuals or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society."* [46]

The concept of genetic identity should not simply be dismissed as an irrelevant issue in court

40. Section 15 (1) for example, guarantees that, *"Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."*

41. Section 3 of the Canadian Human Rights Act (1977) lists the prohibited grounds as *'race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.'*

42. The Charter's Preamble also declares that *'all human beings are equal in worth and dignity and are entitled to equal protection of the law.'* See further Gosselin v Quebec (Att Gen) [2002] 4 SCR 429, 2002 SCC 84 on violations of the Charter's provisions.

43. S 52 also provides for general derogation from The Canadian Charter.

44. Quebec's opposition has been well-documented with the Province's federal government being the only one to avail of the Charter's controversial *'notwithstanding'* clause to effectively achieve a degree of non-compliance in respect of other matters. Arguably, Quebec legislators were perhaps being mindful of France's long-established practice of 'accouchement sous X' (anonymous birth). Though Quebec has recently 'opened' birth records - to an extent - the presence of a maternal veto on disclosure will prevent the release of any information (personal experience, February 2020).

45. See http://www.parentfinders.org accessed 12.07.20. The pressure group lobbies for legislative reforms on closed records and anonymity in reproductive and genetic technologies and drafts Recommendations on how compliance with the various provisions of human rights law might be better achieved.

46. *Andrews v The Law Society of British Columbia* [1989] 1 SCR 143 pp 174-5. See also the Canadian Human Rights Tribunal case of Shirley *(Starrs) McKenna v Dept of the Sec of State* (October 8 1993) T D where it was found that the provisions of the Citizenship Acts 1974-76 had resulted in discrimination against the adopted children of a Canadian citizen (in respect of its bar on *jus sanguinis* transmission of citizenship and 'Canadian heritage') pp 22

proceedings involving the cauterisation of genetic ancestry. As Oren has argued (187) 'competing versions of 'best interest of the child' are also competing versions of children's rights.' Linking genetic identity needs to 'psychological integrity' (Oren, 175) may yet come to be regarded as a particularly important aspect of child welfare paramountcy discourses, in both international and domestic law, given how a number of recent cases involving surrogacy have seen the best interests principles ignored or side-lined.

3. Trends in recent case law: lessons for law and policy makers?

The concept of a 'right to know' is particularly relevant to the prevention of non-ancestry and origin deprivation (Colliver, 1995; Marks, 2006). Many cases involving genetic identity losses appear to turn upon the issue of whether child welfare paramountcy should take precedence over conflicting parental interests such as privacy, or indeed over government policies, on, for example, criminalising commercial surrogacy. Judicial discourses on the right to receive information tend to stress the importance of being able to obtain essential facts and truths. They reinforce the argument that basic legal norms and human rights standards ought to be adhered to and actively implemented at the level of domestic decision-making, even if only as baseline minimal requirements.[47] As Colliver has further argued, 'If national governments and institutions incorporate these standards into their laws or policies, they may be enforced through the national courts and other institutional mechanisms' (43).

As the Family Court for England and Wales recently noted in respect of assisted reproduction, frequently '…the path to parenthood is 'less a journey along a primrose path, more a trek through a thorn forest' (2018).[48] For the children 'commissioned' into existence by closed records adoption, surrogacy or anonymous gamete donation, the voyage towards authentic identity is equally—if not more so—beset with hazardous obstacles. As Cahn has noted, '…the toxicity of internalized family secrets' cannot be ignored, given how often such 'secrecy has an emotional component' (1076). Being met with shame, stigma, or suspicion is a common feature of many searches for genetic relatives. As one international adoptee recently described her experience of trying to trace her original family: *'I even went to one of their houses and begged, literally, on my knees. And they called the police on me.'* [49]

Such harsh 'othering' of origin-deprived persons can also be found within much of the recent jurisprudence on surrogacy and gamete donation. The issue of ascertaining, indeed creating, legal parenthood remains one of the most controversial aspects of family law (Carbone, 1295; Steiner, 2). Cases involving surrogacy seem to repeat the mistakes and varied cruelties of adoption practices from half a century ago, when the so-called 'golden age' served to spark a wide range of injustices.[50] These often relied firmly upon the 'politics of exclusion' (Whitehead, 55) which is still evident where cross-border, commissioned births are involved. Problems continue to arise in terms of law, ethics, and human rights: funding aimed at supporting those who search for their genetic family is increasingly fragile however.[51]

In terms of state responses to the issue of surrogacy, there is a profoundly worrying lack of consensus amongst jurists and decision-makers. Modes of legal regulation range from a total ban, or criminalisation of non-altruistic acts, through to quiet acceptance of the practice, and a quite cheery promotion of profit-making 'fertility tourism' (Van Beers, 103). Academics have tended to highlight the profound human rights difficulties especially associated with surrogacy, arguing that it is harmful, and reminiscent of human slavery, thus meriting criminalisation (Lilienthal et al, 88). Clearly too, certain 'regimes have played a part in creating reproductive black markets which have led to dangerous consequences' for surrogates and children (Kriari and Volongo, 353). Differing domestic approaches have led to a distasteful degree of 'forum shopping' which sees commissioning would-be parents skilfully evading the laws of one's home jurisdiction (Ní Shúilleabháin, 105). Others have noted its similarity to both human trafficking (Lahl, 241) and 'womb-leasing' (Harris, 137), given the existence of what essentially are 'reproductive brothels' (Corea, 276; Vijay, 210) made possible by reliance upon harsh property law models of human commodification and ownership (Field, 1155). Gendered, racial, and socio-economic inequalities

47. See also The Dissenting Opinion of Judge a Cancado Trindade in Serrano-Cruz Sisters v. El Salvador. Merits, Reparations and Costs. Judgment of March 1, 2005. Series C No. 120 ibid para a (1) at page 13, wherein he criticizes the Court for not taking the opportunity to create a useful precedent in respect of the child's right to identity (para 13)

48. *B (Adoption: Surrogacy and Parental Responsibility)* [2018] EWFC 86, Per Theis J, (citing Hedley J in *re X and Y* (Foreign Surrogacy) [2008] EWHC 3131

49. https://www.abc.net.au/news/2020-06-12/womans-search-for-parents-leads-to-landmark-s.korea-ruling/12350896?fbclid=IwAR1kDN7LWbzNITh6zo5a5jMcPRbqPP6Zm5Gm7RewhnhYDEK8yIO3lAk6iuQ (accessed 17.09.20)

50. On surrogacy definitions see further Charrot (39) who frames it as 'an arrangement between a woman who is going to bear the child (the surrogate) and a couple who wish that child to be "theirs" (the intended parents) whereby the surrogate undergoes artificial insemination in order to become pregnant, bears the child and then gives it up to the intended parents. [Where] …the surrogate's own eggs are used ("traditional" or "partial" surrogacy) [occurs] otherwise (if the surrogate's eggs are not used) [then] "gestational", "host" or "full" surrogacy [occurs]…and could involve the gametes of both intended parents, or the gametes (sperm/eggs) of one intended parent, plus those of a donor.'

51. See for example the situation in Australia https://www.abc.net.au/news/2018-06-19/advocates-raise-concerns-about-international-adoptees/9883704 (accessed 10.07.20)

are evident too, (Tobin, 351), where a 'language of property' is invoked to determine questions or complex issues of legal parenthood (Maillard, 226). As Finnerty has further argued, the widespread presence of 'legislative voids' (83) compounds things further, creating an inconsistent 'laissez-faire approach' (Vijay, 201). Often it then falls to domestic courts to decide the fates of genetically relinquished, potentially stateless vulnerable infants.

And yet, human nature being what it is, domestic judges have also heard cases where surrogate mothers have changed their minds and hope to raise the 'commissioned' infant that they have carried.[52] Not dissimilar claims have also been made by gamete donors wanting to have some form of contact with their biological children.[53] As James (178) has observed, domestic jurists often perform complicated 'legal gymnastics'[54] to achieve equitable, compassionate outcomes, though these do not necessarily always result in decisions grounded in child rights principles (Fenton-Glynn, 2015, 37). Ireland's Supreme Court recently highlighted the urgent need for reform of its domestic laws on surrogacy—and birth registration—on the basis that many 'scientific and medical advances have far outpaced the use of existing legal practices and mechanisms.'[55] Here, an altruistic and entirely amicable surrogacy agreement between two sisters sparked a legal challenge to Ireland's birth registration policies. The lower court had originally permitted the child's genetic mother (whose sister had acted as her gestational surrogate) to register herself as the child's parent, which acknowledged the twin truths of the child's genetic background and the 'commissioning' mother's role as legal and biological parent. (In other words, her sister had carried the child for her, but she had used her own egg in the child's conception, and it was always intended that she would be the child's parent). The Irish Supreme Court overturned the lower court's decision on appeal however, stating that any change to the law on surrogacy must come from legislators rather than judges, given how it '…affects the status and rights of persons, especially those of the children; it creates complex relationships, and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas (Irish Parliament)' (para 113).

As the High Court (for England and Wales) stressed in 2014, much 'painful legal confusion …can arise when children are born as a result of unregulated artificial conception.'[56] It was noted here that the need for 'fairness' demanded that the child's circumstances (her conception and neonatal period) should be 'reflected as accurately as possible amidst the adult discord.'[57] The court's primary task was to ensure that any child so conceived might grow into 'a happy and balanced adult …to achieve [her] fullest potential.'[58] Significantly, in re B (Adoption: Surrogacy and Parental Responsibility) [2018],[59] Theis J also noted that a child's lifelong welfare needs are the paramount consideration. Here, the child—conceived abroad via surrogacy and anonymous egg donor—waited 'in limbo,' devoid of legal status. Though the father (both genetic and legal) had relinquished all interest in the child, refusing contact and 'parenthood,' the court still stressed that he was 'part of B's identity and background.' No mention was made however of the anonymous egg donor who was the child's biological ancestor. Making an adoption order to resolve the matter, the court expressed the hope that this outcome might bring some measure of 'lifelong security and stability' to the child. It is perhaps most significant that the court mentioned the mother's own adoptee status, suggesting that she was likely therefore to have a good degree of 'sensitivity and understanding to B's background,' and be very 'aware of the issues that can arise.'

The courts expressed similar understanding of the difficulties of such cases in 2018, in the case of Z (Embryo Adoption: Declaration of Non-Parentage) for example, where, yet again, the commissioning couple's marriage broke down soon after the infant's birth, and the father essentially fled from legal paternity. The judge called upon parents and fertility clinics to avoid 'administrative falsehoods' (arguably, including donor anonymity within this) and to pay heed to the potential legal position of any child who might be so conceived, given the many 'medical,

52. See for example *A v B: re D (A Child) (Habitual Residence: Consent and Acquiescence)* [2015] EWHC 1562 (Fam)

53. See for example *Re Z (A Child) (No 2)* [2016] EWHC 1191 and *re G (A Minor); Re Z (A Minor)* [2013] EWHC 134 (Fam). The Irish Supreme Court's decision in *McD. -v- L. & Anor* [2009] IESC 81 offers a similar perspective, with the sperm donor father being refused a Guardianship Order but still permitted to apply for 'access' (child contact).

54. See also *In the matter of Z (A Child) (No 2)* EWHC 1191 (Fam) (20 May 2016) where the High Court (England and Wales) recently made a significant declaration of incompatibility (with the European Convention on Human Rights) in relation to s. 54 of the Human Fertilisation and Embryology Act 2008 ('HFEA'), under which only couples (rather than single persons) were able to apply for Parental Orders.

55. *M.R. and D.R. -v- An t-Ard-Chláraitheoir* op cit n 8, at para 113. 'Constitutional claims' to a right to parent have been upheld however in controversial contested adoptions. See for example *N & Anor v Health Service Executive & Ors* [2006] IESC 60 (the 'Baby Anne' case) where an adoptive placement was controversially overturned after two years. See also the UK Supreme Court in *Re G (Children)* [2006] UKHL 43 where it was held that courts making a welfare determination must evaluate parental 'contributions' which may be genetic, gestational or social/psychological.

56. *L v C (Applications by non-biological mother)* [2014] EWFC 1 per Jackson J at para 1. See also *M v F and H (Legal Paternity)* [2013] EWHC 1901 (Fam) (on sperm donation) and *JP v LP and Others* [2014] EWHC 595 (Fam) which presented similar issues and difficulties.

57. *L v C* [2014] ibid, at para 55, per Jackson L

58. The court relied upon the test for child welfare established in the Court of Appeal in *Re N (A Child)* [2007] EWCA Civ 1053.

59. EWFC 86

social and emotional reasons' that underpin the very human need to seek out genetic truths.[60] An earlier case involving commercial, cross-border surrogacy (in Nepal, since banned)[61] had similarly stressed the child's long-term needs: only a Parental Order would serve here to 'give him the lifelong security his welfare requires.'[62] It seems fair to argue that even though genetic truths require and merit meaningful acknowledgement in law, policy and practice, they are often overlooked or side-lined in a bid to effect workable outcomes within the limited available domestic legal and conceptual frameworks on 'relatedness.'

The jurisprudence on international surrogacy is particularly problematic, despite an increasing awareness of the need for genetic ancestry and authentic identity (Fenton-Glynn, 2017, 555).[63] Where states suddenly ban the practice of surrogacy, babies conceived and born abroad may suddenly be seen in law as stateless and/or parentless.[64] Such deliberate 'orphanisation'—indeed active 'othering'—can have profound impacts and implications. In Paradiso and Campanelli v Italy (2017)[65] for example, an unmarried Italian couple entered into a gestational surrogacy agreement (with an anonymous egg donor) via a Russian fertility clinic. Because they then used inaccurate paperwork to bring their child back into Italy (where surrogacy is illegal) the authorities declared that the baby had been legally 'abandoned.' There was later found to be no genetic connection between the child and his commissioning parents even though they had argued that the father's sperm had been used. The boy had spent the first eight months of his life with them, but was essentially 'orphanised' by being placed in a children's home and then freed for adoption, with no further contact permitted between him and his parents from the point of his removal from them. The European Court of Human Rights found at first that the applicants had 'acted as parents' towards the boy;[66] the Grand Chamber overturned this on appeal, however. In terms of human rights violations, they found that only the parents' basic right to respect for private life (i.e. their 'decision to become parents')[67] was relevant here. The right to be afforded respect for one's home and family life under Article 8 of the European Convention was not engaged here, given, it seems, the absence of any genetic connection to evidence 'relatedness.'

It is the Court's dismissal of the child's psychological connection to his parents that is perhaps of most concern: it serves to remind adoptees of the abhorrent practice of easy 'rehoming' (a euphemism for re-abandonment) that seems to be becoming more widespread. They deemed it as essentially too brief to be significant, but it may be argued that the 8 months in question were in fact the child's entire life at that point. Much emphasis was also placed upon the illegality of the parents' acts, with the European Court granting the Italian state a wide margin of appreciation (discretion to interpret the Convention's provisions). Clearly, they missed an opportunity to at least pass comment on the reasons behind Italy's ban on commercial surrogacy (Ryan, 202) which surely would have been of interest to adoption scholars, human rights lawyers, and origin-deprived persons. Though the European Court must confine itself to matters of procedure, the 'permeable line between procedure and substance' was evident here. As Illiadou has noted, the Court made a clear 'distinction between legitimate and illegitimate families' which served to stigmatise those who are 'illegitimate.' (154).

As Ní Shúilleabháin further observed, the Court previously seemed loathe to intervene in matters of domestic policy involving such issues as bioethics (122). In the case of Mennesson v France for example, a married French couple successfully brought their commercial surrogacy-conceived children home to France from the United States. The children subsequently suffered discriminatory treatment in terms of being denied nationality rights and liability for inheritance tax. The fact that they had a genetic connection to their father meant however that French law created a 'contradiction between the legal and social reality' and 'undermined the children's identity' within their society (Pluym, 2014). As such, the best interests of the child were not being protected, and the private life element of Article 8 of the European Convention was deemed to have been infringed. It is noteworthy that, again, no interference with the right to respect for family life was declared. It may be argued that the human rights of the donor-commissioned child remain highly vulnerable to side-lining in such scenarios, especially where the 'weightier' interests of parents (privacy, reproductive freedoms) and wider society (Noon, 2020) must be

60. EWFC 68

61. *CH v SM* [2016] EWHC 1068 (Fam) para 17, per Theis J. A key aspect of this case was the Nepalese government's decision to ban surrogacy, and deny exit visas to children so-conceived, shortly before the birth of the child.

62. *Ibid* at para 29 (applying s.1(4) of the Adoption and Children Act 2002

63. See for example *Mennesson v. France* [2014] (Application no. 65192/11) and Labassee v. France (Application no no 65941/11).

64. See for example Re X and Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam) and *Van der Mussele v Belgium* App no 8919/80 [1983] ECHR 13 (23 November 1983)

65. European Court of Human Rights, Grand Chamber, (2017) Application no. 25358/12

66. Para 98

67. Para 163

protected.[68] Vetoes on birth information, together with the practice of 'anonymous births,' do not sit well with Article 7 of the Children's Convention (UNCRC) which was drafted to promote, if not protect, the right to know one's parents. The best interests of the child principle (in Article 3 of the UNCRC) cannot it seems require jurists, legislators, or parents to provide the vulnerable child with genetic identity or ancestral truths. This is so even though the loss of familial contact should only be deemed 'necessary' (under Article 8(2) of the European Convention) where 'compelling reasons' are found to exist (Doughty, 22). It seems fair to conclude that where blood-ties are absent—and the law is silent, equivocal, or inconsistent—domestic jurists will generally fall back upon common law rules of property ownership for guidance. Human rights principles (such as human dignity, equality of treatment and opportunity) are perhaps simply too vague or resource dependent to offer much scope for meaningful realisation of the right to (genetic) identity. This is so even though certain adoptee-relevant rights and interests (birth information, kin contact) are gradually becoming more juridical in nature.[69] A 'law of surrogacy' seems unlikely however to coalesce any time soon into an articulate, child-centric rights framework, either at the level of domestic or international law.

As Cahn has argued, '...the law's tight focus on the parent-child relationship has left out legal questions relating to donor-conceived adults' (1078). Similarly, the predominant 'free market approach to reproductive questions' suggests that economic laws and considerations will likely govern global reproductive markets for the foreseeable future (Van Beers, 133). In the absence of profound infringements of fundamental rights, the Strasbourg court seems unlikely to make calls on—or even highlight the need for—a more coherent regulation of surrogacy law across Europe. All of this is relevant to those who are affected by closed records adoptions (or parental vetoes on information): if there is no consensus over the notion of a right to knowable genetic ancestry within gamete donation, it is unlikely that adoptees will be able to argue a fundamental right to access their own information.

That said, there have been increasingly vocal calls for the establishment of 'a human rights based system of international governance ···based on three regulatory models: public health monitoring, inter-country adoption, and trafficking in human beings, organs and tissues (Shalev et al., 9). Malta IV for example declared that 'legal parentage is an issue of international concern ···a gateway through which many of the obligations owed by adults to children flow' (para 5).[70] The concept of harmful, 'limping parentage' referred to in UN Documents is an entirely apt one, where children's parentage is unknown—or rendered deliberately unknowable—and legal parenthood is slow to be allocated, confirmed, or created. The image of a wounded or otherwise incapable legal 'creature,' symbolises law's struggle to keep up with the realities of a child's situation: those of us who are origin deprived clearly all have genitors somewhere even where the law has held that we are not legally related to them, or permitted to know their identities or make contact. The law can be said to similarly trail behind scientific advances, especially where DNA serves daily to reunite separated kinfolk and focus public attention on our innate need to know our origins and make connections with those we resemble. At the risk of stretching the analogy too far, human rights may also be said to be shambling along in this area, given the lack of consensus amongst drafters and signatory states on pretty much all things to do with genetic relatedness and the need for open, accurate birth records. That said, the consequences of human exploitation (in terms of child trafficking or enslaving birth mothers and surrogates) are at least more widely recognised.[71] The Hague Conference on Private International Law ('HCCH') for example recently noted the

> *'significant diversity in national approaches··· [which] can lead to conflicting legal statuses across borders and can create significant problems for children and families, e.g., uncertain paternity or maternity, limping parental statuses, uncertain identity of the child, immigration problems, uncertain nationality or statelessness of the child, abandonment including the lack of maintenance' (para 4, emphasis added).*[72]

In 2019, the HCCH stressed its commitment to a new Convention which would at least recognise the legality of foreign court decisions (on legal parentage), while a separate protocol would seek to govern international surrogacy. It is noteworthy that the practice of surrogacy

68. Adding that the UK is apparently still obsessed with adoption, 'regardless of whether it is the solution which best meets the needs of the child.' (2020) *Seen and Heard* (NAGALRO) available at https://www.nagalro.com/blog/20/nagalro_joins_campaign_to_revoke_si_no_445 (accessed 10.06.20)

69. See for example *Anayo v Germany* [2010] ECHR 2083 and *Neulinger v Sweden* [2010] 54 EHRR 1087. See further Diver (2013).

70. The 2016 Declaration of the Fourth Malta Conference ("Malta IV") on Cross-Frontier Child Protection and Family Law, avoided addressing the difficulties of surrogacy directly but still at least highlighted the need for the 1996 Child Protection Convention (and its international co-operation mechanisms) to be better utilised.

71. HCCH para 45 [https://assets.hcch.net/docs/0510f196-073a-4a29-a2a1-2742c95312a2.pdf]

72. Report of The February 2016 Meeting of The Experts' Group on Parentage / Surrogacy. HCCH. Online, para 4 (accessed 31.04.20)

was neither denounced nor endorsed; intercountry adoptions were specifically excluded from its scope given that various human rights protections already (apparently) attach to it.[73] Significant also was the fact that sensitive terminologies are being discussed: 'surrogate mother' is too emotive, and might be better replaced by the phrase 'surrogate woman' or 'surrogate.' Such thinking does to an extent mirror those legal processes that similarly seek to remove or deny the importance or input of those with whom we share genetic material, wider ancestry, and living relations. Encouragingly for those of us affected by rights-denying, archaic rules on parental vetoes, there seems to be growing recognition of how domestic adoption policy often similarly 'raises many important issues and challenges.' Though this was not framed as a priority for the HCCH at present, the issue seems likely to be revisited later (2).

There is some hope to be found also in how the stories of the origin deprived are finally being heard: in 2019 the UN took direct testimony from an NGO/support group for donor-conceived and surrogacy-born persons (Donorkinderen). Their formal recommendations stressed an acute 'need for urgent national and international measures' including legal frameworks enabling a 'right …to access information about their identity and origins … [and] preserve relations with their biological, social, and gestational families' (2019). Such calls for meaningful domestic law reform are relevant to those of us who were relinquished, adopted, denied by birth relatives, or prevented from accessing our own birth-right information. They clearly highlight how harmful intergenerational impacts can easily attach to non-origin. The Recommendations specifically ask that 'comprehensive and complete records of all parties involved in the conception of the child be held by the State in perpetuity for future generations.'[74]

Given that 'tens of thousands of children' (not to mention generations of adoptees, domestic and international) are still having 'their rights denied' (Allan et al, 2020), such calls for reform need to heeded by those jurists who hold the power to make or sever our ties of legal relatedness and links to genetic ancestry. For adoptees, it may yet be the case that some much needed guidance on the opening of sealed records—and the removal of vetoes—will flow from surrogacy reforms, if some level of consensus can be achieved e.g. on the nature of the harms arising from origin deprivation. The concept of adoption is clearly 'no longer seen as a one

73. See further the 1993 Intercountry (Hague) Adoption Convention

74. https://www.donorkinderen.com/united-nations-2019 (accessed 12.06.20) Legal frameworks should also

dimensional triangulation of interests, but as a constellation of interests which can often span different countries' with the child remaining as a fixed point, a 'vulnerable party in a process conducted by adults' (Horgan and Martin, 157). The same can be said of surrogacy and gamete donation, where deprivation of genetic origin can easily serve to entrench a lifelong sense of otherness and loss.

4. Conclusion

It seems fair to conclude that 'the social landscape has shifted considerably' since assisted reproduction first became possible (Wilmot, 232). As Storrow has argued, 'a new illegitimacy' (38) can easily serve to continue stigmatising new generations of children, by denying them accurate genetic information and any opportunity for contact with birth relatives. As Carbone suggests (in respect of surrogacy), parental actions, rather than those of the lawmakers, are perhaps the true key to achieving meaningful change: 'Shortly after the child's birth, the parent or parents committing themselves to the child's future should join in establishing a permanent identity' (1344). A similar rule could serve to protect origin-denied adoptees, if framed as a key element of the best interests principle. As Bauer has argued too, genetically relinquished children may be tied to wider society—and their parents—by a sort of 'existential debt.' Their existence is underpinned by unfair, perhaps illicit, processes that have rendered their fundamental human rights subordinate to those of other 'triad' members (2020) when it comes to accessing their own truths. Such blatant—and at times quite cruel— 'othering' surely amounts to unlawful discrimination, particularly when evaluated against a backdrop of human rights principles that are presumed to be grounded in fairness, equity, protection of the vulnerable, and the prevention of harms.

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