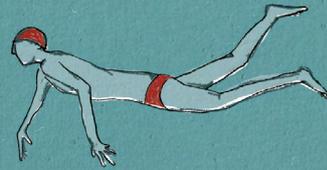
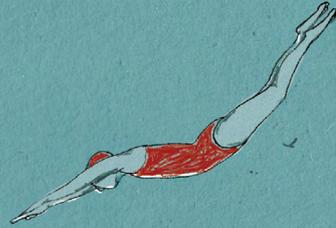


CRIN CHILD RIGHTS INTERNATIONAL NETWORK

A Children's Rights Approach to Assisted Reproduction



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# A CHILDREN'S RIGHTS APPROACH TO ASSISTED REPRODUCTION

## Executive summary

### Background

The rapid advance and use of assisted reproductive technologies (ARTs) has proliferating and underexplored implications for children. CRIN wants to encourage discussion on the impact of assisted reproduction on the rights of children; this consultation paper is an initial contribution and feedback is welcomed.

### Current approaches to regulation

States have yet to settle the complex ethical questions involved in assisted reproduction. In jurisdictions that allow the practice, policy and legislation have tended historically towards a singular focus on the rights of adults to found a family, overlooking the rights of children. In recent years, courts have begun to recognise the best interests of children as the most vulnerable party. Nonetheless, many of the disputes they have settled could have been avoided had governments embedded the rights of children into policy at the outset.

As matters stand, national approaches diverge markedly. Some governments have widely legalised commercial arrangements, whereas others have imposed blanket bans in defence of cultural tradition. In States with an underdeveloped legal framework, the use of ARTs is subject to market forces alone. All three contexts can create more problems than solutions for children born as a result, as well as for children whose long-term fertility may benefit from well-regulated access to certain ARTs at a young age.

In approaching legislation, governments often have a limited awareness of, and commitment to, children's rights in their particulars. In the context of assisted

reproduction, the issues are indeed complex, and its implications for children have yet to be worked through by either governments or children's rights advocates.

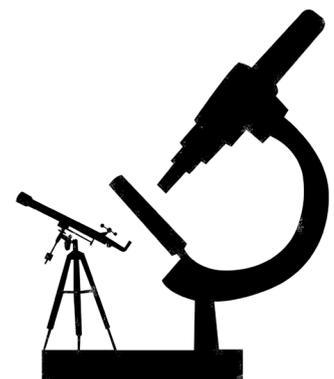
### Scope

This paper explores three groups of ARTs, each of which has a bearing on the rights of children between birth and age 18:

- Prenatal screening for genetic health (including the testing of embryos carried out as part of in-vitro fertilisation, IVF)
- Third-party reproduction (surrogacy and gamete donation); and
- Cryopreservation (freezing gametes for later use).

### Prenatal testing

Preimplantation genetic testing removes a cell sample from an embryo to screen it for genetic traits before implanting it into the womb.



The procedure is routine in IVF, where it is used to screen for debilitating genetic disorders such as cystic fibrosis. A few fertility clinics have begun to use the same process to create ‘designer babies’ by selecting an embryo for its sex, or for aesthetic features unrelated to health status. Other forms of prenatal testing, such as screening for Down’s syndrome, are carried out during gestation.

*The right to health.* By screening out embryos with serious genetic disorders, the suffering of the children who would be born with them is effectively avoided, in line with their right to the highest attainable standard of health. Conversely, in-vitro testing stresses the embryo and carries some risks to foetal health, and thus to the health of the child after birth.

*The right to be protected from discrimination.* Prenatal testing is controversial. Many children with Down’s syndrome, for example, live happy and healthy lives, but Down’s pregnancies are commonly terminated, which has been criticised as disability discrimination. This practice, alongside the prospect of ‘designer babies’, raise challenging questions about which children are deemed to be acceptable members of society, and which are not.

## Third-party reproduction

Third-party reproduction is sexual reproduction with the aid of one or more persons in addition to the intending parent(s). It routinely makes use of donated genetic material and/or surrogacy arrangements, usually in order to offer an infertile heterosexual couple, or a same-sex couple, the prospect of parenting a child.

Regulation varies widely internationally. In most countries with a developed legal framework, commercial arrangements are now unlawful, and in some countries, such as France and Germany, non-commercial surrogacy is also unlawful. Other states, including Russia and some states of the US, have fully commercialised surrogacy, while in others, such as China, the legal framework is being ignored. The provision of sperm or eggs is lawful on a non-commercial basis in most countries, yet operates commercially in many others. These gaping inconsistencies encourage ‘fertility tourism’ as intending parents look for a favourable jurisdiction. This adds additional complexity to the process, leading in turn to additional risks for children.

A further complicating factor is that there may be as many as six adults involved in reproduction through surrogacy, if additional donors of genetic material are included. This increases the probability of disputes between the parties; uncertainty about who the legal parents are; and, if the parties are of differing nationalities, the risk that a child is left stateless after birth for an extended period. All these problems occur frequently, and all jeopardise the well-being of the child after birth.

Among the implications of third-party reproduction, particularly commercial surrogacy, are risks to the fundamental rights of children, including:

*The right not to be sold or trafficked.* A commercial surrogacy agreement sought abroad could amount to the sale and trafficking of children once the family returns home. Conversely, anti-trafficking laws have often prevented parents from leaving the surrogate’s country with their new baby, or entering their own country, which has jeopardised the well-being of the child during the developmentally critical first weeks of life.

*The right to know one’s parents.* Typically, States restrict the right of a child born of third-party reproduction to know his or her biological origins, and courts have often found in favour of the adult’s right to anonymity. Since Sweden removed donor anonymity in 1984, the international trend is towards recognising the right of children to know their biological origins. The international legal framework is clear that, outside of highly exceptional circumstances, children have the rights, without age restrictions to know whether they were born of third-party reproduction; to know and contact their donors, any half-siblings, and other biological relatives; and to know whether their genitors carry heritable diseases.

*The right to a nationality.* States have a legal duty to ensure that every child is assigned a nationality when born, thereby identifying the jurisdiction responsible for guaranteeing his or her fundamental rights. The nationality of some countries is automatically accorded to anyone born there, whereas in others it depends on the nationality of parents. These discrepancies risk leaving some children stateless after intending parents have commissioned surrogacy abroad, particularly in jurisdictions that will only recognise the woman who gives birth as the legal mother. The assignment of nationality should be in the best interests of the child, rather than for the convenience of the parents or the State. National laws should adopt an inclusive

definition of parents reflecting the fact that children's experience of 'family' and 'parents' varies.

#### *The right to have and be cared for by one's parents.*

By involving more than two adults with a potential claim to parenthood, and often involving individuals from different jurisdictions with differing cultural expectations, third-party reproduction increases the risk of disputes over parentage. Disputes arise, often bitterly, and particularly in surrogacy arrangements. These disputes may easily be compounded by ambiguities in legislation; for example, on the question of whether a surrogate mother is entitled to keep the baby she gave birth to. Any difficulties in establishing legal parentage, if not settled quickly, are highly likely to have an impact on the critical early months of a child's life. National legislation should therefore be clear and not encourage, by omission, conflict between the people involved. States should also be clear on the principles by which such conflicts should be settled after they arise. The child's rights must always be enforced and their best interests must always be a primary consideration, such that the resolution should favour the best developmental environment for the child.

## Use of cryopreservation and related technologies by children themselves

*The right to found a family.* Since many children are affected by medical procedures that degrade their fertility, cryopreservation and related technologies can sometimes offer them the means to have a child when they are ready to do so.

*The right to health.* Cryopreservation and other ARTs entail invasive medical procedures, which may be particularly unsettling for children. Side-effects are another risk, and can be far-reaching. States therefore have a duty to ensure that the use of ARTs by children is always subject to their fully informed consent.

*The right to be protected from exploitation.* A risk of allowing children to use cryopreservation is that they are exploited as compliant donors of eggs and sperm for use by others, which amounts to the commodification of children's bodies.

In cases where a child's use of ARTs is intended to benefit the fertility or commercial interests of others, rather than the health of the child, the principles of the CRC point clearly to prohibition. In other cases,

where ARTs such as cryopreservation could preserve a child's health, including their fertility, children's rights principles appear to point clearly to the child's right to make use of them.

## Conclusion

Without ARTs, many children alive today would not have been born, yet the technologies' increasing prominence and rapid development is adding layers of complexity to the process of founding a family, with multiple implications for the rights of children. Children's rights advocates, the courts, governments, and international institutions are struggling to keep pace, and to respond appropriately in the best interests of children.

Clearly, in every case without exception, children's rights must be recognised alongside those of adults in the context of assisted reproduction. Their best interests must always be a primary consideration in all matters affecting them. What this should mean in practice remains a matter for urgent discussion and debate.



*Article 3 of the CRC. Best interests of the child: Children's interests should be at the forefront of all decisions that affect them in every situation: adoption, disputes between parents - everything.*

## Introduction

States have yet to settle the complex and sensitive ethical questions raised by medical advances in the field of human reproduction, and some have shied away from the issues altogether.

In some States, the absence of a developed legal framework has allowed such risky practices as unregulated surrogacy, while elsewhere blanket bans on certain reproductive technologies have penalised the desire to have children. Both approaches have created more problems than solutions for children themselves. On the one hand, unregulated settings risk the commodification and sale of children, confusion over rightful parentage and often also nationality, and the denial of other fundamental rights. On the other hand, highly restrictive regulation provokes intending parents to seek solutions abroad and/or on the black market, with many of the same damaging consequences for children born as a result.

Similarly, making certain assisted reproductive technologies (ARTs) available to children carries potential benefits and risks. One benefit is that extracting and preserving sperm or eggs prior to medical procedures that destroy fertility can enable children to found a family later. A blanket ban on these technologies precludes this benefit, while a lack of regulation leaves children vulnerable to commercial exploitation for their genetic material.

For these reasons, the only way to assure children their rights is to regulate ARTs carefully with due regard to their human rights, in conjunction with the rights of the adults involved. To date, many States have taken a conservative approach. Wary of the effects of ARTs on cultural norms, lawmakers have resorted to rhetoric about preserving traditional forms of family and concepts of public morality that are often vague. In some other, more liberal jurisdictions, a right of adults to have children has been recognised, but without due regard for the rights of children born as a result. And in other countries, the open market decides.

The Convention on the Rights of the Child (CRC) is clear that “[in] all actions concerning children... the best interests of the child shall be a primary consideration” (Art. 3). Accordingly, although the rights of children are not the only necessary consideration when regulating the technological assistance of adult fertility, in CRIN’s view they ought to be the very first; children are the most vulnerable party and have the least influence - none in fact. Indeed, the regulation of assisted reproduction has far-reaching implications for children’s rights, including

the rights to health, to information, to nationality, and to know one’s parents, among others.

CRIN wants to encourage a debate on children’s rights in the context of assisted reproduction. This paper, which begins to explore ARTs from a child rights perspective, is an initial contribution, focusing on ARTs most likely to have an impact on children. Adults’ access to reproductive assistance and the implications for children born as a result have been the subject of a surge of court cases in recent years, but jurisprudence remains underdeveloped, as does the legal framework as a whole in many countries. This offers an opportunity to ensure that children’s rights are built into standards from the outset, avoiding legal advocacy later, in a field that is set to grow and develop rapidly as the 21st century progresses.

## Scope

### Definition of ‘child’

For the purposes of this paper, the term ‘child’ is used as defined in international law, specifically by article 1 of the UN Convention on the Rights of the Child (CRC): “every human being below the age of 18 years”. This avoids, but must acknowledge, one of the major controversies of some reproductive technologies: the destruction of viable embryos. Certain ARTs create more than one viable embryo per child conceived; the remainder are destroyed in the lab; or an embryo may be implanted into the womb but later terminated, such as when conception leads to unintended twins, triplets and so on. This has attracted criticism from groups who believe that the right to life begins before birth.

CRIN recognises that the moral rights of the developing foetus are contested and uncertain. The CRC is clear that a child needs “special safeguards and care... *before* as well as after birth” (emphasis added), but the *travaux préparatoires* (the official record of negotiations) show that this was not intended to extend the scope of article 1 to a child’s development prior to birth, since that view did not have the consensus of the negotiating parties.<sup>1</sup> Accordingly, the CRC does not appear to confer rights on a developing foetus.

The only multilateral human rights instrument to explicitly recognise rights from the moment of conception is the American Convention on Human

<sup>1</sup> Cf. UN Doc. E/CN.4/1542, paras. 28 to 31 (1980). Available at: <http://hr-travaux.law.virginia.edu/document/crc/ecn411542/nid-175>

Rights, negotiated by countries with some of the world's most restrictive laws on access to abortion. Article 4(1) states: "Every person has the right to have his [sic] life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."<sup>2</sup> The Inter-American Commission on Human Rights (IACHR), which oversees States' compliance with the Convention, has adopted a "gradual approach" to this right,<sup>3</sup> indicating that, as gestation proceeds, it becomes progressively less permissible to alter or destroy the foetus. The Commission has stopped short of supporting a blanket ban on IVF, on the grounds that the Convention supports the countervailing right to found a family.<sup>4</sup>

### Box 1: In the courts - Embryo research

Embryo research, which typically also involves the destruction of viable embryos, may be supportive of children's rights if it enhances the health of children born using ARTs.

However, when **Italy's** ban on donating embryos to science was challenged under the European Convention on Human Rights on grounds that it breached the right to family life (Art. 8), the Court found in favour of the State. It ruled that the State should have a wide margin of appreciation on this topic which is of a sensitive and controversial nature and one on which there is no European consensus.<sup>5</sup>

Where embryo research is lawful, a 14-day rule has been widely adopted, whereby no human IVF embryo is allowed to live beyond this point outside a woman's body. This rule is currently under discussion in light of recent scientific studies.<sup>6</sup>

### Assisted reproductive technologies (ARTs)

This paper explores the potential impact on the rights of children of three types of ARTs, which may be used either separately or in conjunction:

1. *Pre-implantation genetic testing*: examining the DNA of developing embryos and then selecting (and selecting out) one or more embryos for use.
2. *Third-party reproduction*: the participation of one or more third parties in conception (i.e. as donors of eggs or sperm) and/or in gestation (i.e. as surrogates: women commissioned to carry an embryo to term, and give birth).
3. *Cryopreservation*: removing sperm or eggs and freezing them for later use.

Before turning to the implications of each of these ARTs on the rights of children born as a result, we discuss their collective potential impact on children's health.



<sup>2</sup> Despite the Convention text stating that the right to life begins with conception, a ruling by the Inter-American Court clarified the definition of the child's right to life in relation to IVF as beginning from the moment of implantation. See CRIN's case summary of *Artavia Murillo et al v. Costa Rica*, 28 November 2012. Available at [www.crin.org/en/node/42441](http://www.crin.org/en/node/42441).

<sup>3</sup> Petersen, N., *The Legal Status of the Human Embryo in vitro: General Human Rights Instruments*, 2005, p. 457. Available at [http://www.zaoerv.de/65\\_2005/65\\_2005\\_2\\_a\\_447\\_466.pdf](http://www.zaoerv.de/65_2005/65_2005_2_a_447_466.pdf).

<sup>4</sup> The Inter-American Court ruled against Costa Rica in 2012 for a blanket ban on IVF introduced to '[protect] children before birth'. The Court held that Costa Rica had failed to take into account the competing right to found a family, according to the American Convention, and had also violated the right to privacy and to non-discrimination. The President subsequently issued a decree to reinstate IVF in the country. See CRIN's case summary of *Artavia Murillo et al v. Costa Rica*, 28 November 2012. Available at [www.crin.org/en/node/42441](http://www.crin.org/en/node/42441).

<sup>5</sup> *Parrillo v. Italy* [2015] Application No. 46470/11. Available at <http://hudoc.echr.coe.int/eng?i=001-157263>.

<sup>6</sup> Connor, S., 'Inside the 'black box' of human development', *Guardian*, 5 June 2016. Available at: <https://www.theguardian.com/science/2016/jun/05/human-development-ivf-embryos-14-day-legal-limit-extend-inside-black-box>.

*Article 6 of the CRC. Survival and development: Every child has the inherent right to life, and States have an obligation to ensure the child's survival and development. States should put measures in place to allow children to survive into adulthood in conditions optimal for their development.*

## The health impacts of ARTs

### The issue

Millions of healthy children have been born of ARTs, including more than six million children born through IVF since the technology was developed in the 1970s.<sup>7</sup> Without ARTs, these children would not have been born.

Nonetheless, ARTs can carry risks to foetal health, and thus to the health of the born child. Some recent research indicates that an in-vitro environment stresses the embryo, which may have epigenetic effects.<sup>8</sup> It is also yet to be shown that the removal of cellular samples from an embryo is safe;<sup>9</sup> the procedure may increase the risk of premature birth and related neonatal problems, according to other recent research.<sup>10</sup>

Conversely, genetic testing can screen out embryos that test positive for certain serious disorders before they are implanted. This is likely to result in fewer children born with certain debilitating health conditions, although genetic testing is also controversial for reasons explained later.

### Children's rights: legal standards

Although the CRC appears only to confer rights on children from the point of birth, the treatment of a pregnant woman and her care of her foetus can have an impact on the child's right to health once he or she is born.

With this in view, the Committee on the Rights of the Child has stated:

“The care that women receive before, during and after their pregnancy has profound implications for the health and development of their children. Fulfilling the obligation to ensure universal access to a comprehensive package of sexual and reproductive

health interventions should be based on the concept of a continuum of care from pre-pregnancy, through pregnancy, childbirth and throughout the post-partum period. *Timely and good-quality care throughout these periods provides important opportunities to prevent the intergenerational transmission of ill-health and has a high impact on the health of the child throughout the life course* [emphasis added].”<sup>11</sup>

The Committee has further explained:

“States have three types of obligations relating to human rights, including children's right to health: to respect freedoms and entitlements, *to protect both freedoms and entitlements from third parties or from social or environmental threats*, and to fulfil the entitlements through facilitation or direct provision [emphasis added].”<sup>12</sup>

The principle is therefore clear that a born child's right to health confers a duty on States (and by extension, on parents and third parties such as IVF clinics) to ensure prospectively the health of the developing embryo and foetus. As well as a duty, it is also a right to have due regard for the health and quality of life of one's children. For example, the European Court on Human Rights ruled against **Italy's** ban on pre-implantation genetic diagnosis (PGD) after an Italian couple were prevented from screening their second child for cystic fibrosis, from which their firstborn child was suffering.<sup>13</sup>

### Provisional conclusions and queries

The CRC has confirmed the legal duty to have due regard for children's rights in the context of prenatal interventions in cases where the foetus is expected to be born. At the least, States have an obligation to ensure that only safe technologies are approved, so as to protect children's right to the highest attainable standard of health in line with CRC article 24.

7 Roberts, G, 'On the 40th anniversary of IVF, we asked 40 people what it means to them personally', 3 November 2017. Available at <https://inews.co.uk/news/health/ivf-40-mean>.

8 Here, epigenetic effects refers to the effects of environmental conditions on gene expression. Cagnone, G and Sirard, M A. 2016. 'The embryonic stress response to in vitro culture: insight from genomic analysis', *Reproduction*, 152(6).

9 Zillén, K; Garland, J; and Slokenberga, S, 'The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties' (Strasbourg: Council of Europe, 2017). Available at <https://rm.coe.int/16806d8e2f>.

10 Borini, A; Tarozzi, N; and Lagalla, C, 'Preimplantation genetic diagnosis: why are obstetric and neonatal risks increased? The need for more data', *Fertility and Sterility*, 106(6). Available at [http://www.fertstert.org/article/S0015-0282\(16\)62722-X/fulltext](http://www.fertstert.org/article/S0015-0282(16)62722-X/fulltext).

11 Committee on the Rights of the Child, General Comment no. 15 (2013), 'The right of the child to the enjoyment of the highest attainable standard of health', CRC/C/GC/15, para. 53. Available at [http://www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-15\\_en.doc](http://www2.ohchr.org/english/bodies/crc/docs/GC/CRC-C-GC-15_en.doc).

12 Ibid. para. 71.

13 The Court ruled that the ban violated the right to respect for private and family life. *Costa and Pavan v. Italy* [2013] Application no. 54270/1. Extracts available in English at <http://hudoc.echr.coe.int/eng?i=001-112993>; full judgment available in French at <http://hudoc.echr.coe.int/eng?i=001-112992>.

## Prenatal genetic testing and selection

### Overview

Pre-implantation genetic diagnosis (PGD) is a prenatal test used as part of IVF to assess a developing embryo for health and scan for any of 400 genetic disorders,<sup>14</sup> as well as susceptibility to cancer and late-life conditions such as Alzheimer's disease.<sup>15</sup> The procedure involves removing one or several cells from the embryo at a specific stage of development to examine its DNA.<sup>16</sup> If a disorder is discovered, the expectant mother may opt to discontinue the IVF process.

It is technically possible to use the same procedure to scan for and choose other traits, such biological sex, and potential athletic ability. For example, IVF clinics in some countries, such as **Cyprus** and the **US**, offer parents the option of choosing the sex of their child.<sup>17</sup> A **US** clinic has begun to offer intending parents the opportunity to select embryos for aesthetic characteristics at a cost of \$18,000.<sup>18</sup>

Currently, while IVF procedures remain relatively onerous and unreliable, the prospect of such 'designer babies' is marginal, but this could change. Some, but not all, countries have banned selection for sex or aesthetic characteristics.<sup>19</sup> Potentially, in the future parents may be able to use prenatal genetic testing to exercise some choice over the traits of their baby that are unrelated to health.

Other forms of prenatal testing are carried out during gestation, and so are not specific to IVF. It is now routine in some countries to offer all pregnant women a test

to assess whether their foetus is likely to have Down's syndrome and related conditions, for example.<sup>20</sup>

### *The right to be protected from discrimination*

#### The issue

##### Screening for health: the risk of disability discrimination

All forms of prenatal screening, including ultrasound scans, carry the risk of reinforcing discrimination against people born with disabilities. Screening for Down's syndrome is normally carried out between the 10th and 14th week of pregnancy, or any time until the end of the second trimester.<sup>21</sup> This offers intending parents the opportunity to abort a pregnancy if the foetus tests positive, despite the evidence that children with the condition can live healthy and happy lives. According to one report, testing embryos for Down's syndrome in **Iceland** has reduced the number of babies born with the condition to just one or two per year, as almost all women whose foetus test positive opt to terminate their pregnancies.<sup>22</sup>

Prenatal genetic testing and similar technological advances are likely to increase the risk of disability discrimination. For example, many parents might opt to terminate a pregnancy if they knew their baby would be affected by a condition that attracts lifelong persecution, as does albinism in some countries.<sup>23</sup>

For these reasons, genetic screening technologies raise challenging questions about what constitutes a 'healthy' child, and whom we are prepared to accept as members of society.

##### Sex selection and gender discrimination

Although selecting for a child's sex may be justified in highly exceptional circumstances for medical reasons only (such as preventing the birth of children

14 UK, Human Fertilisation and Embryology Authority, 'Pre-implantation Genetic Diagnosis (PGD)', 2018. Available at <https://www.hfea.gov.uk/treatments/embryo-testing-and-treatments-for-disease/pre-implantation-genetic-diagnosis-pgd>.

15 Zillén, K; Garland, J; and Slokenberga, S, 'The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties.' p. 23 (Strasbourg: Council of Europe, 2017). Available at <https://rm.coe.int/16806d8e2f>.

16 Advanced Fertility Center of Chicago, 'PGD and IVF - Preimplantation Genetic Diagnosis and In Vitro Fertilization, Pros and Cons About PGD and PGS', n.d. Available at <https://www.advancedfertility.com/preimplantation-genetic-diagnosis.htm>.

17 British Cyprus IVF Hospital, 'Gender Determination', n.d. Available at <http://www.cyprusivf.com/gender-determination>.

18 Sherwell, P, 'Designer baby row over clinic that offers eye, skin and hair colour', Telegraph, 28 February 2009. Available at <https://www.telegraph.co.uk/news/worldnews/north-america/usa/4885836/Designer-baby-row-over-clinic-that-offers-eye-skin-and-hair-colour.html>.

19 For example, prenatal selection for sex or aesthetic characteristics is banned by the 29 states parties to the Convention of the Council of Europe on Human Rights and Biomedicine. Council of Europe, 'Chart of signatures and ratifications of Treaty 164', 2018. Available at [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164/signatures?p\\_auth=Igr6NPmq](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164/signatures?p_auth=Igr6NPmq).

20 US, National Down Syndrome Society, 'Understanding a Diagnosis of Down Syndrome', 2018. Available at <https://www.ndss.org/resources/understanding-a-diagnosis-of-down-syndrome>.

21 UK, NHS Choices, 'Screening for Down's, Edwards' and Patau's syndromes', 2018. Available at <https://www.nhs.uk/conditions/pregnancy-and-baby/screening-amniocentesis-downs-syndrome>; US, National Down Syndrome Society, 'Understanding a Diagnosis of Down Syndrome', 2017. Available at <https://www.ndss.org/resources/understanding-a-diagnosis-of-down-syndrome>.

22 CBS News, "'What kind of society do you want to live in?': Inside the country where Down syndrome is disappearing", 14 August 2017. Available at <https://www.cbsnews.com/news/down-syndrome-iceland/?linkId=40953194>.

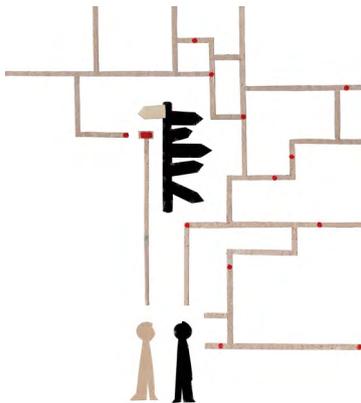
23 Albinism affects the production of melanin, the pigment that colours skin, hair and eyes and it is also associated with a number of eye conditions. Read more at <https://www.nhs.uk/conditions/albinism>.

affected or at risk of X-linked disorders),<sup>24 25</sup> it also risks reinforcing discriminatory gender norms about the relative value of boys and girls.<sup>26</sup> On the other hand, bans on sex selection risk pushing the practice underground and undermining access to abortion.

Some recent researches also suggest that prenatal genetic testing could lead to discrimination in regards to sexual orientation. Although this is not yet possible, some authors defend the (possibly future) right of parents to choose for an embryo that will give rise to a heterosexual individual.<sup>27</sup>

### Selection for aesthetic characteristics

Also controversial is the prospect of genetically selecting a child's aesthetic characteristics (hair, eye colour, etc.), which risks reinforcing cultural stereotypes and discrimination. While human aesthetic characteristics may have oblique benefits (e.g. lower rates of skin cancer among people with darker skin), they are not determinants of health. On the other hand, they may not directly harm the future child either.



*Article 2 of the CRC. Non-discrimination: All rights apply to all children without exception. It is States' obligation to protect children from any form of discrimination and to take positive action to promote their rights. Some children also suffer particular types of discrimination based on their gender, disability, poverty and social status, all of which can divide society's 'haves' and 'have nots' from a very early age.*

24 Some genetic conditions are caused by mutations in a single gene. These conditions are generally inherited in one of several patterns, depending of the gene involved; the X-linked disorders are caused by mutation in genes on the X chromosome, one of the two sex chromosomes (read more at: <https://ghr.nlm.nih.gov/primer/inheritance/inheritancepatterns>).

25 Article 14 of the Convention of the Council of Europe on Human Rights and Biomedicine provides: 'The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided'. Available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/164>.

26 World Health Organization, 'Gender and genetics: Sex selection and discrimination', 2018. Available at <http://www.who.int/genomics/gender/en/index4.html>; UN Women and UNFPA, 'Sex Ratios and Gender Biased Sex Selection: History, Debates and Future Directions'. Available at: <http://asiapacific.unfpa.org/sites/default/files/pub-pdf/Sex-Ratios-and-Gender-Biased-Sex-Selection.pdf>

27 Dahl E., 'Ethical issues in new uses of preimplantation genetic diagnosis: should parents be allowed to use preimplantation genetic diagnosis to choose the sexual orientation of their children?' Available at: <https://www.ncbi.nlm.nih.gov/pubmed/12832358>

### Children's rights: legal standards

Since the CRC confers rights to a born child, but not to an embryo or foetus, it appears not to constrain interventions affecting the health of a foetus which is to be terminated. As such, the CRC appears to have no bearing on the destruction of embryos that screen positive for genetic disorders, or on the termination of pregnancies where the foetus has a high probability of being born with a genetic condition, such as Down's syndrome or albinism.

The Committee on the Rights of Persons with Disabilities, however, has expressed concerns about the stigmatisation of persons with disabilities as living a life of diminished value. It criticised the **UK** for allowing pregnancy termination (at any stage) on grounds of foetal impairment: "[W]omen's rights to reproductive and sexual autonomy should be respected without legalising selective abortion on the ground of fetal deficiency."<sup>28</sup>

In Europe, the Convention on Human Rights and Biomedicine, known as the Oviedo Convention, ratified by 29 states, establishes that predictive genetic tests may only be justified on grounds of the future child's health. Employing the human rights principles of health and nondiscrimination, articles 11-14 of the Convention prohibit "discrimination against a person on grounds of his or her genetic heritage"; prenatal genetic screening when not expressly for reasons of health; and sex selection except to avoid "serious hereditary sex-related disease"; it also generally prohibits the editing of genes unless for preventive diagnostic or therapeutic purposes and only if its aim is not to introduce any modification in the genome of any descendants.<sup>29</sup>

### Provisional findings and queries

The CRC is clear that, in matters of prenatal testing, screening and selection, the future child's best interests must be a primary consideration. This must be weighed in conjunction with the rights of people with disabilities to be free from discrimination, and of women to access abortion.

28 Committee on the Rights of Persons with Disabilities, Concluding observations to the UK, CRPD/C/GBR/CO/1, paras. 12-13. Available at [http://tbinternet.ohchr.org/\\_layouts/treaty-bodyexternal/Download.aspx?symbolno=CRPD/C/GBR/CO/1&Lang=En](http://tbinternet.ohchr.org/_layouts/treaty-bodyexternal/Download.aspx?symbolno=CRPD/C/GBR/CO/1&Lang=En).

29 Council of Europe, 'Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (1997); Article 12. Available at <https://rm.coe.int/168007cf98>; The explanatory report clearly states that Article 12 does not imply any limitation of the right to carry out diagnostic interventions at the embryonic stage to find out whether an embryo carries hereditary traits that will lead to serious diseases in the future child.

The Committee on the Rights of Persons with Disabilities has indicated that the termination of pregnancies on grounds of “foetal deficiency” alone amounts to disability discrimination. In addition, the Council of Europe Convention on Human Rights and Biomedicine combines the principles of health and nondiscrimination to prohibit most prenatal testing and screening selection when the purpose is not to safeguard the health of the child. This approach could usefully be taken elsewhere.

To help avoid discrimination, regulations concerning embryonic screening technologies such as PGD should take account of the views of people living with serious health conditions. Expectant parents also have the right to informed consent, nondiscrimination, and privacy, which must be recognised in conjunction with the rights of their children-to-be.

A further argument from a children’s rights perspective is that nonessential prenatal interventions that alter a prospective child’s gender or physical characteristics amount to an intrusion on the future integrity or dignity of the child. An intervention of this kind, understood as such an intrusion, would require the child’s consent, which is self-evidently impossible to obtain, and so it should not take place.

Rather than basing a decision about whether to use an embryo only on the prospective child’s health, expected quality of life also matters (and should be regarded as an aspect of health, broadly understood). This could help to avoid poorly conceived assumptions about the life experiences of children living with certain conditions, and about their worth as people. Where prenatal testing reveals such conditions, the State should ensure that a quality of life assessment is made, and to make provision for this “to the maximum extent of [its] available resources”, as per CRC article 4.



*Article 23 of the CRC. Disabilities: Up to 200 million children globally have a disability, but it is not their impairments that are disabling as such, but rather the attitudes and environments around them. A child with disabilities has the right to special care, education and training to help them enjoy a full and decent life in dignity and achieve the greatest degree of self-reliance and social integration possible.*

## Third-party reproduction

### Overview

#### The technology

Third-party reproduction is sexual reproduction with the aid of one or more persons in addition to the intending parent(s). It routinely makes use of donated genetic material and/or surrogacy arrangements, usually in order to offer an infertile heterosexual couple, or a same-sex couple, the prospect of parenting a child.

Third-party reproduction is becoming more common, particularly as part of IVF in cases where the intending mother’s eggs and/or the intending father’s sperm are not viable. The use of surrogacy is more unusual, but growing; in the **UK**, for example, 400 surrogate births were recorded in 2015.<sup>30</sup> Both procedures are now becoming more accessible as the technology develops and costs come down.

#### Use of third party genetic material

In cases where a couple is unable to conceive (and unable to provide viable eggs or sperm for an IVF process), the necessary genetic material may be provided by a third party. The donated material is then used to create a viable zygote from which an embryo develops. In such cases, the third party is genetically related to a child but will not normally parent; conversely, one (or rarely, both) of the commissioning parents are not genetically related to the child.

#### Surrogacy arrangements

Surrogacy has ancient origins: a woman (the ‘surrogate’) is commissioned to carry a pregnancy for another person or persons, who will then parent the child after birth.<sup>31</sup> In economically developed countries, surrogacy is increasingly preferred to adoption because of the high demand for adoptees.<sup>32</sup>

Two methods of surrogacy are practised today. In ‘traditional surrogacy’, the surrogate is inseminated in

30 Roberts, G, ‘Number of children born through surrogacy triples in the past five years’, *inews.com*, 27 January 2017. Available at <https://inews.co.uk/news/health/number-children-born-surrogacy-triples-past-five-years>.

31 St Mary’s Hospital (Department of Reproductive Medicine), ‘What is Surrogacy? Information for patients considering surrogacy’, 2018. Available at <http://www.cmft.nhs.uk/media/1531644/16%2009%20what%20is%20surrogacy%20feb%202016.pdf>.

32 Childlessness Overcome Through Surrogacy, ‘About surrogacy’, 2015. Available at <https://www.surrogacy.org.uk/aboutsurrogacy>.

utero, becoming the baby's genetic mother. Another method, called 'host surrogacy', was pioneered in the 1980s and is carried out as part of IVF: a commissioning mother's eggs, or a third-party donor's, are fertilised with sperm in vitro and inserted as an embryo into the surrogate's womb. In host surrogacy, therefore, a woman who commissions a surrogate becomes the baby's genetic mother (if her own eggs were used). As the latest technology has become more widely available, host surrogacy is now more common than the traditional method.<sup>33</sup>

The sperm used in surrogacy is usually that of an intending father, or it may be provided by a third party; as with egg donation, the donor may be anonymous. In theory, therefore, up to five individuals could have a role akin to parenthood in the surrogacy process: the commissioning couple, the surrogate, a third-party sperm donor and a third-party egg donor. The number of parties could be extended to six if a donor of mitochondrial DNA is also involved.<sup>34</sup>

### Current approaches to regulation

The regulation of pregnancies involving third parties varies widely across the world. In most countries with a developed legal framework for ARTs, the commercial provision of genetic material and of surrogacy services is unlawful, although there are exceptions, including **Russia** and several states of the **US**.<sup>35</sup> Globally, the trend has been towards prohibition, particularly of commercial surrogacy.

The Council of Europe's Oviedo Convention stipulates that "the human body and its parts shall not, as such, give rise to financial gain, although it does not prevent from receiving compensation" (Article 21).

In a 2015 resolution, the European Parliament took a position against the practice of surrogacy. However it is important to note that this provision was added by amendment to a resolution which was not primarily about surrogacy. It states that surrogacy "undermines the human dignity of the woman since

her body and its reproductive functions are used as a commodity". It also considers "that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments".<sup>36</sup> In many countries, non-commercial surrogacy is also unlawful; examples are **France**, **Germany**,<sup>37</sup> and most **Sunni Islamic countries**, which object to introducing the sperm of a man into a woman to whom he is not married. Shiite **Iran** has taken a different approach: scholars have issued fatwas allowing surrogacy as a treatment for infertility for married couples.<sup>38</sup> Other States have also taken a more permissive approach to surrogacy. **Canada** and the **UK**, for example, allow non-commercial arrangements, prohibiting payment but allowing the surrogate's "reasonable expenses" to be reimbursed.<sup>39</sup>

Relative to surrogacy, the non-commercial donation of sperm or eggs is less tightly regulated. In the **European Union**, for example, donation is lawful if no more than reasonable compensation is paid.<sup>40</sup> EU States have interpreted this variously, however. For example, in the **UK** egg donors may not be compensated more than £750 (\$1,060) per donation cycle;<sup>41</sup> in **France**, no compensation at all may be paid.<sup>42</sup>

Many countries have yet to develop a legal framework for ARTs, including much of **Africa**. In other States, laws are in place but not enforced; **China** has banned surrogacy in law, for example, but the industry is booming.<sup>43</sup>

36 European Parliament, Resolution on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter, 17 December 2015, para. 115. Available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0470&format=XML&language=EN>

37 Brunet, L; Curruthers, J; Davaki, K et al., A Comparative Study on the Regime of Surrogacy in EU Member States, European Parliament, 2013. Available at [http://www.europarl.europa.eu/thinktank/en/document.html?reference=I-POL-JURI\\_ET\(2013\)474403](http://www.europarl.europa.eu/thinktank/en/document.html?reference=I-POL-JURI_ET(2013)474403).

38 Scholars in Iran have taken the view that introducing a fertilised embryo into the womb is distinct from introducing sperm from a man to whom she is not married.

39 Sensible Surrogacy, 'Surrogacy in Canada', 2014. Available at <http://www.sensiblesurrogacy.com/surrogacy-in-canada>. UK, Human Fertilisation and Embryology Authority, 'Surrogacy', 2018. Available at <https://www.hfea.gov.uk/treatments/explore-all-treatments/surrogacy>.

40 European Union, 'Directive 2004/23/EC of the European Parliament and of the Council', Official Journal of the European Union, 2004. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0023&from=EN>.

41 UK, Human Fertilisation and Embryology Authority, 'Donating your eggs', 2018. Available at <https://www.hfea.gov.uk/donation/donors/donating-your-eggs>.

42 Code de la santé publique, art. L. 1244-7.

43 Yan, A, 'Why China keeps surrogacy a grey area', South China Morning Post, 3 April, 2017. Available at <http://www.scmp.com/news/china/society/article/2083072/why-china-keeps-surrogacy-grey-area>.

33 St Mary's Hospital (Department of Reproductive Medicine), 'What is Surrogacy? Information for patients considering surrogacy', 2018. Available at <http://www.cmft.nhs.uk/media/1531644/16%2009%20what%20is%20surrogacy%20feb%202016.pdf>.

34 The donation of mitochondrial DNA can prevent certain genetic mutations leading to certain serious and incurable diseases in children whose mothers carry the susceptibility. Zillén, K; Garland, J; and Slokenberga, S, 'The Rights of Children in Biomedicine: Challenges posed by scientific advances and uncertainties', (Strasbourg: Council of Europe, 2017). Available at <https://rm.coe.int/16806d8e2f>.

35 Svitnev, K, 'Legal regulation of assisted reproduction treatment in Russia' Reproductive Biomedicine Online, 2010, 20(7); The Economist, 'Buying babies, bit by bit', 19 December 2006. Available at <http://www.economist.com/node/834513>.

International expert discussions are now taking place on the need for national and international child-focused responses to surrogacy arrangements, with a view to drafting 'Principles for better protection of children's rights in the context of surrogacy'.<sup>44</sup> The principles could result in new UN guidelines, a resolution agreed at the Human Rights Council, or even a Treaty. As matters stand, the marked inconsistencies in approach between States encourages intending parents in countries where ARTs are restricted or risky to travel abroad for solutions to infertility.<sup>45</sup> By involving individuals in more than one country, and sometimes several, 'fertility tourism' adds risks to several CRC rights, for reasons explained below.

### Implications for children

The ethics of surrogacy and egg/sperm donation are the subject of intense debate, particularly in the context of women's rights, as discussed elsewhere.<sup>46 47</sup> The purpose of this paper is to explore the impact on children. Third-party reproduction is widely seen from the perspective of the rights of intending parents, but the rights of children born of the process also matter, as the CRC makes clear, and which States have a legal obligation to heed.



*Article 35 of the CRC. Sale, trafficking and abduction: It is States' obligation to make every effort to prevent the sale, trafficking and abduction of children in whatever capacity and context this may occur.*

<sup>44</sup> For more about the drafting of these principles, see <https://www.crin.org/en/library/news-archive/international-surrogacy-arrangements-and-drafting-principles-better-protection>

<sup>45</sup> The Economist, 'Buying babies, bit by bit', 19 December 2006. Available at <http://www.economist.com/node/8345513>.

<sup>46</sup> The Swedish Women's Lobby, 'Policy paper on Surrogacy motherhood: a global trade with women's bodies', 2013. Available at <http://sverigeskvinnolobby.se/wp-content/uploads/2013/08/POLICY-PAPER-SURROGACY-MOTHERHOOD.pdf>.

<sup>47</sup> Circle Surrogacy and Egg Donation, '10 Reasons Being a Surrogate is Amazing', 9 January 2018. Available at <http://www.circlesurrogacy.com/blog/circle-surrogacy/10-reasons-surrogate-amazing>.

On the one hand, many children today would not have been born without the assistance of third parties. On the other, there are several possible risks from a child rights perspective:

- The risk that payments made to surrogate mothers amount to the sale and/or trafficking of children;
- Legal barriers preventing the child from discovering their genetic donors and/or surrogate mother, who may have been guaranteed anonymity;
- Possible deception of the child by hiding the role that surrogacy or genetic donation played in their birth;
- The risk that children are not assigned a nationality or citizenship due to the differing jurisdictions of their parents' and third parties' own nationalities;
- Possible confusion over who is/are the rightful parent(s) in law, and who the child may identify as 'mums' or 'dads'.

The following sections discuss these issues in turn.

### *The right not to be sold or trafficked*

#### The issue

Transfer of genetic material and, in the case of surrogacy, of a child, may amount to the sale and trafficking of children in some circumstances. For example, if a surrogate living in one country is paid at a commercial rate by intending parents in another, the arrangement could be a form of trafficking.<sup>48</sup>

#### Children's rights: legal standards

Article 35 of the CRC provides that: "States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form." Article 2 of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (OPSC) elaborates:

*"Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration."*

<sup>48</sup> Barker, A, "Desperate" Australian couples unable to leave Cambodia with surrogate babies, 22 February 2017. Available at <http://www.abc.net.au/news/2017-02-23/australian-couples-with-surrogate-babies-stuck-in-cambodia/8294810>.

The OPSC directs States to criminalise any activity falling within this definition. In addition, the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) includes as a form of trafficking the “transfer of persons” when payment is made “to achieve the consent of a person having control over another person”.

In her report to the Human Rights Council, the UN Special Rapporteur (SR) on the sale and sexual exploitation of children stated that commercial surrogacy, as currently practised in some countries, usually amounts to the sale of children.

*“Commercial surrogacy could only be conducted in a way that does not constitute sale of children, if it were clear that the surrogate mother was only being paid for gestational services and not for the transfer of the child.”*

She further recommends that:

*“States create safeguards to prevent the sale of children which should include either the prohibition of commercial surrogacy until and unless properly regulated systems are put in place to ensure that the prohibition on sale of children is upheld, or strict regulation of commercial surrogacy [...]”*

According to the report, the following conditions would then be necessary:

*“First the surrogate mother must be accorded the status of mother at birth, and at birth must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. [...] Second, all payments must be made to the surrogate mother prior to the post-birth legal or physical transfer of the child, and all payments made must be non-reimbursable, even if the surrogate mother chooses to maintain parentage and parental responsibility, and these conditions should be expressly stipulated in the contract.”*

The SR further explains that if the surrogate mother decides (which she would usually do<sup>49</sup>) after birth to physically transfer the child to the intending parents, this “must be a gratuitous act, based on own post-birth intentions, rather than on any legal or contractual obligations”. The report also

recommends to regulate properly altruistic surrogacy to avoid the sale of children.<sup>50</sup>

From 2013, the Committee on the Rights of the Child also started to raise concerns with regards to the unregulated nature of surrogacy arrangements. It said several times that surrogacy may amount to the “sale of children” where it is not “clearly regulated”, but however has not called genuinely altruistic surrogacy into question.<sup>51</sup>

## Provisional findings and queries

### Prosecuting caregivers

Individuals who use surrogacy to exploit others for commercial gain may usually be prosecuted. A woman was convicted of fraud in the **UK**, for example, for faking pregnancies to obtain money from commissioning parents.<sup>52</sup> Also, authorities in **Thailand** have threatened charges against surrogate mothers because of payments received in contravention of the country’s trafficking laws.<sup>53</sup>

When a prosecution targets caregivers, the matter may be less straightforward, if it jeopardises a child’s best interests. In **Australia**, for example, a judge ordered the Office of the Director of Public Prosecutions in Queensland to consider prosecuting a couple for entering into a commercial surrogacy agreement, which in that State carried a maximum three-year prison sentence. The couple were, however, granted parental responsibility in a decision based on the child’s best interests.<sup>54</sup> For the same reason, it could unduly jeopardise the rights of the child to prosecute his or her legal parents for entering into a surrogacy arrangement, particularly where there is no evidence of exploitation.

50 UN Special Rapporteur on the sale and sexual exploitation of children, Report to the Human Rights Council, A/HRC/37/60, 15 January 2018, paras. 72, 76, 77(c) and (d). Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/60](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60)

51 See for instance Committee on the Rights of the Child, Concluding Observations to the USA, CRC/C/OPSC/USA/CO/2, 2013, paras. 29-30: Furthermore, the Committee is particularly concerned that: [...] (b) The absence of federal legislation with regard to surrogacy, which if not clearly regulated, amounts to sale of children; [...] The Committee strongly recommends that the State party: [...] (b) Define, regulate, monitor and criminalize the sale of children at federal level and in all States in accordance with the Optional Protocol, [...]; including issues such as, surrogacy and payments before birth and the definition of what amounts to “reasonable costs”. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FOPSC%2FUSA%2FCO%2F2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FOPSC%2FUSA%2FCO%2F2&Lang=en).

52 Morris, S, ‘Surrogate mother jailed for faking pregnancies’, Guardian, 16 June 2014. Available at <http://www.theguardian.com/uk-news/2014/jun/16/surrogate-mother-louise-pollard-jailed>.

53 9news.com.au, ‘Gammy’s birth mum faces trafficking charges’, 6 August 2014. Available at <http://www.9news.com.au/world/2014/08/06/04/42/gammy-mum-facing-trafficking-charges>.

54 Hall, L, ‘Surrogacy couple win right to babies but face prosecution’, Sydney Morning Herald, 28 July 2011. Available at <http://www.smh.com.au/national/surrogacy-couple-win-right-to-babies-but-face-prosecution-20110728-1i155.html#ixzz4AJn8YsJr>.

49 The Special Rapporteur on the sale and sexual exploitation of children found that intending parents change their minds significantly more often than surrogate mothers: Report to the Human Rights Council, A/HRC/37/60, 15 January 2018, paras. 74. Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/60](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60)

Courts in the **UK** have reflected this principle in judgements, deciding not to punish surrogacy payments exceeding reasonable compensation when ruling against the defendant would have undermined the best interests of their child.<sup>55</sup>

**Q.** *Is there a risk of encouraging unlawful behaviour by choosing not to punish caregivers for entering into unlawful third-party reproduction arrangements, when there is no exploitation or sale of children?*

### Third-party compensation: distinguishing altruistic from commercial

Insofar as non-commercial third-party reproduction arrangements are genuinely altruistic and carefully implemented, they do not appear to conflict with the CRC or OPSC, but the distinction between commercial and non-commercial is vexed.<sup>56</sup> The UN Special Rapporteur on the sale and exploitation of children noted in her report the development of organised surrogacy systems labelled “altruistic”, which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries. She further stated that this labelling does not automatically avoid the application of the Optional Protocol on the sale of children and that it was necessary to appropriately regulate altruistic surrogacy to avoid the sale of children.<sup>57</sup>

Leaving third-party reproduction to market forces, unregulated, would lead to the commodification of children, child trafficking, and the exploitation of economically deprived women. (In this regard, the CRC has called on the US to define and regulate “issues such as, surrogacy and payments before birth and the definition of what amounts to ‘reasonable costs’”.<sup>58</sup>) Therefore it seems clear that the same reasons for prohibiting commercial gain from adoption should apply to surrogacy and the donation of genetic material. Nonetheless, the ‘altruism’ principle also establishes

a double-standard, whereby women must not be paid but men who sell their sperm commercially may, and the doctors and lawyers who facilitate third-party reproduction, are all paid at a professional rate. A court in **Argentina** made similar arguments, ruling that a surrogate mother should have been paid for her service, and not simply been offered expenses, because everyone else involved in the child’s birth had been paid.<sup>59</sup>

The risk that the payment of women to be surrogates incentivises the exploitation of vulnerable women in commercial surrogacy has been used to justify the difference in treatment of men and women with regards to financial compensation. The argument is made that the consequences of women being exploited through the use of financial incentives exists in a way that it does not for men and that banning of payments for surrogates overcomes this risk.

However, voluntarily becoming a surrogate may affect the financial interests and career progression of women who take time out from work to be a surrogate. This process could in turn widen the gender pay gap, justifying financial support and employment protections for women who become surrogates.

**Q.** *How is it possible to prevent the commercialisation of third-party reproduction and also avoid ‘pay gap’ gender discrimination against the women involved?*

### The right to know one’s parents

#### The issue

Many States restrict the right of a child born of third-party reproduction to know his or her origins, and set a minimum age at which the child can access the information, if at all. This may be because the anonymity of donors or surrogates has been guaranteed in law, or because a system for recording their identities simply does not exist. As with the parallel disputes over adoption, as well as with third-party reproduction, the conflict between a child’s right to know and an adult’s right to anonymity has typically been resolved in favour of the adult.

In recent years, for example, in **Canada** a British Columbian court found that legislation discriminated

55 For example, in *J v G* [2013] EWHC 1432 the court approved the highest payments for overseas surrogacy ever authorised in the UK, which is only supposed to permit altruistic surrogacy. Available at <http://www.nataliegambleassociates.co.uk/uploads/Leading%20Cases/1%20v%20G%20%282013%29.pdf>.

56 For example, see the Economist, ‘Carrying a child for someone else should be celebrated - and paid’, 13 May 2017. Available at <https://www.economist.com/news/leaders/21721914-restrictive-rules-are-neither-surrogates-interests-nor-babys-carrying-child>.

57 UN Special Rapporteur on the sale and sexual exploitation of children, Report to the Human Rights Council, A/HRC/37/60, 15 January 2018, paras. 69. Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/60](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60)

58 Committee on the Rights of the Child, Concluding Observations to the USA, CRC/C/OPSC/USA/CO/2, 2013, paras. 29-30. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FOPSC%2FUSA%2FCO%2F2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FOPSC%2FUSA%2FCO%2F2&Lang=en).

59 Clarín, ‘Fallo polémico: para un juez está bien pagar por un alquiler de vientre’ (in Spanish), 1 August 2015. Available at: [http://www.clarin.com/sociedad/Fallo-polemico-pagar-alquiler-vientre\\_0\\_1404459720.html](http://www.clarin.com/sociedad/Fallo-polemico-pagar-alquiler-vientre_0_1404459720.html).

against donor offspring by denying them access to information about their origins,<sup>60</sup> but this decision was overturned by the court of appeal on grounds of the right of donors to anonymity.<sup>61</sup> Similarly in France, a claim brought to a tribunal by a donor-conceived adult woman seeking further information about the sperm donor was thrown out on the grounds of protecting the “life of the legal family of the child” and the “private life of the donor”.<sup>62</sup>

Despite these rulings, an international trend towards recognising the right of children to know their origins has been displacing the right of donors to remain anonymous. The first country to remove donor anonymity was **Sweden** in 1984.<sup>63</sup> The Swedish model was then followed by a number of jurisdictions including **Austria, Germany, Switzerland, the Australian** states of Victoria and Western Australia, the **Netherlands, Norway, the UK, and New Zealand**.<sup>64</sup>



*Article 8 of the CRC. Preservation of identity: States' have an obligation to protect, and if necessary, re-establish basic aspects of the child's identity. This includes name, nationality and family ties. In essence, this right protects the personal characteristics, relationships and histories that make children who they are.*

When the **UK** abolished donor anonymity, past donors were given the option to ‘re-register’ to enable children conceived with their donated material, on reaching the age of 18, to discover their parentage and make contact.<sup>65</sup> More controversially, the **Australian** state of Victoria has passed a new law lifting anonymity retrospectively, irrespective of the donor’s consent or when they donated.<sup>66</sup>

The child’s right to know their origins is realised to varying degrees according to jurisdiction, and the issue remains contentious.<sup>67</sup> Do children have a right to know whether they were born of third-party reproduction? If so, do they have a right to know whether their genetic donor carry heritable diseases? Do they have a right to know the identity of their genitor, and any related family? Do they have a right to contact them? And if they have any or all of these rights, at what age should they be able to realise them? Conversely, do donors and surrogates have countervailing rights, in conflict with those of the child?

### Box 2. In the courts: The right to know one’s parents

In a case of two sisters, aged 12 and 17, both fathered from donor sperm, the Supreme Court of **Germany** clarified the country’s law on the right of donor-conceived children to know the identities of their genetic donors. The case was brought after the reproductive clinic refused to disclose the sperm donor’s identity, because the girls’ legal parents had initially waived the sisters’ right to know the donor’s identity.

The Court reasoned that the contract between the intending parents and the doctor constituted a third-party beneficiary contract for the benefit of the child, which could legitimately be recognised as the basis of the right of the child to know the donor’s identity.<sup>68</sup> A lower court’s argument that a minimum age of 16 should apply to the right to information was rejected. The Court held that the right to know one’s parents does not require any

60 Motluk, A, ‘Canadian court bans anonymous sperm and egg donation’, *Nature*, 27 May 2011. Available at [http://www.nature.com/news/2011/110527/full/news.2011.329.html?message=remove&WT.ec\\_id=NEWS-20110531](http://www.nature.com/news/2011/110527/full/news.2011.329.html?message=remove&WT.ec_id=NEWS-20110531).

61 Bio News, ‘British Columbia Court of Appeal reverses decision on sperm donor anonymity’, 03 December 2012. Available at [http://www.bionews.org.uk/page\\_221579.asp](http://www.bionews.org.uk/page_221579.asp).

62 BioNews, ‘France: donor anonymity holds firm in court case’, 18 June 2012. Available at [http://www.bionews.org.uk/page\\_151392.asp](http://www.bionews.org.uk/page_151392.asp).

63 Law No. 1140 allowed the child, when sufficiently mature, to find out the identity of their sperm donor (Sweden did not allow oocyte donation). See Daniels, K and Lalos, O, ‘The Swedish Insemination Act and the availability of donors’, 1995, *Human Reproduction*, 7, 1871–4.

64 Cohen, G, Coan, T, Ottey, M and Boyd, C, ‘Sperm donor anonymity and compensation: an experiment with American sperm donors’, *Journal of Law and the Biosciences*, 3(3), December 2016, pp. 468–488. Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5570712>.

65 UK, Human Fertilisation & Embryology Authority, Re-register as an identifiable donor. Available at <http://www.hfea.gov.uk/1973.html>.

66 The amendment to the Assisted Reproductive Treatment Act 2015 entered into force in March 2017. It means that all donor-conceived people are now able to apply for identifying information, regardless of when the donations were made or whether the donor consents. See Bio News, ‘New law in Australian State ends donor anonymity’, 29 February 2016. Available at [http://www.bionews.org.uk/page\\_621467.asp](http://www.bionews.org.uk/page_621467.asp).

67 Clark, B, ‘A balancing act? The rights of donors-conceived children to know their biological origins’, *Georgia Journal of International and Comparative Law*, 2002, 40(3), pp. 619–661. Available at <http://digitalcommons.law.uva.edu/cgi/viewcontent.cgi?article=1001&context=gjicl>.

68 Supreme Court of Germany decision XII ZR 201/13. Summary and link to full judgment available at [www.crin.org/en/node/41319](http://www.crin.org/en/node/41319).

minimum age of the child: children of all ages have the right to know the identity of their donor. However, the judges acknowledged that the potential negative impact on the private life of the donor must also be taken into account. Therefore, they asserted that the decision whether to require doctors to disclose information about the identity of a donor must be made on a case-by-case basis, after a comprehensive assessment of the rights of all parties concerned. In this regard the Court found that the right of the child to know bears “generally greater weight” than the donor’s right to remain anonymous.

### Children’s rights: legal standards

Article 7 of the CRC recognises a child’s right, “as far as possible... to know his or her parents”. Accordingly, the Committee on the Rights of the Child has been clear that children born of third-party reproduction have a right to know their origins.<sup>69</sup> It has further stated that “due consideration of the child’s best interests implies that children have [...] the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country”.<sup>70</sup>

The Committee has not determined what kind of information should be disclosed or when/ how this should be made available to the child, but it has expressed concern about jurisdictions where the identities of “biological parents” are withheld from children. Citing CRC articles 3 (best interest of the child) and 7 (the right to know one’s parents), the Committee has recommended several times that states

*“...take all necessary measures to allow all children, irrespective of the circumstances of their birth, (...) to obtain information on the identity of their parents, to the extent possible.”<sup>71</sup>*

In addition, Article 8 of the CRC protects children’s right to preserve their identity, including their nationality, name and “family relations as recognised

in law”, without unlawful interference. In specifying a right to “family relations” the article appears to include a right to know the identities of the wider family of a child’s “biological parents”, including any half-siblings and other genetic relatives.

Article 8 further states that, “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”. Therefore States have a duty not only to allow, but to assist, children in establishing their own identity and wider family relations.

Since Article 24 of the CRC recognises the child’s right to the highest attainable standard of health, this could imply a corresponding right to know whether the medical history of biological or genetic parents indicates a risk of genetically transferable disease. If it does, then a child’s right to health implies a right to know whether he or she was born of third-party reproduction and, if so, what the risks of heritable disease may be, but not necessarily the identity of any third parties.

The Committee has said that, when the best interests of a child are in conflict with the rights of other people, relevant authorities must weigh the rights of all those concerned while bearing in mind their obligations to make the child’s best interests a primary consideration.<sup>72</sup> For instance, in the context of adoption, the Committee called on **France** to remove the requirement of the biological mother’s consent to reveal her identity and to increase its efforts to address the conditions that lead parents to use confidential birth.<sup>73</sup>

### Provisional findings and queries

CRIN’s view is that authorities should presume in favour of children when there are conflicts between their rights and those of adults, and that where a compromise is unavoidable, it must still uphold children’s best interests.

### Donor-conceived children

A children’s rights position clearly recognises a child’s right to know their “biological origins” and any half-

69 For example, the Committee recommended that Ireland ensure that children born through assisted reproduction technologies have access to information about their origins. See CRC/C/IRL/Co/3-4, 1/03/2016, paras. 33-34. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/IRL/CO/3-4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/IRL/CO/3-4&Lang=en). In the context of adoption, the Committee also recommended that France put in place the necessary measures for all information about parent(s) to be registered, in order to allow the child to know, to the extent possible and at the appropriate time, his or her parents; see CRC/FRA/CO/5, 23/02/2016, para. 33. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/FRA/CO/5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/FRA/CO/5).

70 Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her interests taken as a primary consideration, CRC/C/GC/14, para. 56. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/GC/14&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/GC/14&Lang=en).

71 Committee on the Rights of the Child, Concluding Observations to the UK, CRC/C/15/Add.188, 2002, para. 32. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/15/Add.188&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/15/Add.188&Lang=en). See also Concluding Observations to France, CRC/C/FRA/CO/5, 2016, para. 33. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/FRA/CO/5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/FRA/CO/5).

72 UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), at para. 39. Available at [http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf).

73 Committee on the Rights of the Child, Concluding Observations to France, CRC/FRA/CO/5, 2016, para. 33. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/FRA/CO/5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CR/C/FRA/CO/5).

siblings. No conditions such as 'legitimate interest' should be applied, and the information should be available as and when a child requests it, without any minimum age requirement, in line with their evolving capacities as per CRC Article 5.<sup>74</sup>

To this end, states must ensure that complete records are properly archived. Decisions concerning requests for information should be taken on a case-by-case basis by an independent body, with consideration for the full range of children's rights. For example, a civil servant may be authorised to make the initial decision, subject to a right of appeal to an information commissioner (or similar) and eventually to the courts if necessary. A rejected request should also be subject to periodic review.

Furthermore, some information should be made available to descendants of people conceived with donor gametes to help them to re-establish elements of their identity which have been lost. Non-identifying medical information should always be made available to descendants in support of their right to health. This is already happening in the adoption context,<sup>75</sup> but there are no known cases brought by children conceived with donor gametes.

**Q. Is the child's right to find out about their extended biological family unlimited?**

### Surrogacy

For the same reasons given above, children born of surrogacy should have the right to know the identity of their gestational mother, and to make contact with her, if she is genetically related (i.e. if her own eggs were used in the conception).

In cases where there is no genetic relationship between a child and a surrogate (because the eggs used were provided by another woman), the child's right to health demands that at least some information about her be made available. During pregnancy, the exchange of maternal-foetal cells, epigenetic processes,<sup>76</sup> and

other factors can have a long-term effect on the health of both the mother and the child. Therefore, children should, as a minimum, have access to non-identifying medical information about the surrogate and contextual information about their environment during the period of the pregnancy. Even irrespective of the child's right to health, identifying information should also be made available in accordance with the child's right to establish their family identity.

**Q. Is the child's right to find out about a surrogate unlimited?**

### Countervailing rights of parents

Occasionally, a donor or surrogate risks being ostracised by their community if their identity is made public. In cases where a child's right to know their parents could put them at serious risk, it may be that some information could be made available and some withheld.

**Q. What kinds of information could safely be made available? Are there any circumstances which would justify withholding identifying information about a donor or surrogate from a child, whether temporarily or permanently?**

### Box 3. In the courts: Reconciling competing interests

An adoption case brought against **Italy** at the European Court of Human Rights illustrates one court's attempt to reconcile the rights of a child (since grown into adult) and those of her birth mother. The plaintiff was a woman who had been abandoned at birth and then adopted, and who was seeking information about her birth mother. In such cases, Italian law gives blind preference to the party who wishes to remain anonymous, and so the plaintiff's request had been denied automatically.

The Court sought to take into account the competing rights of the adopted child to know her origins and of the birth mother to remain anonymous, recognising that both parties had the right to a private life, and also that their interests were competing.

The judges ruled that the Italian authorities had violated article 8 of the European Convention on Human Rights by automatically denying the applicant's request to know her birth mother. The

<sup>74</sup> See CRIN's discussion paper, 'Age is Arbitrary: setting minimum ages', at p. 12. Available at: [www.crin.org/en/node/42535](http://www.crin.org/en/node/42535).

<sup>75</sup> See Children in Court CRINmail, September 2014, available at: <https://www.crin.org/en/home/what-we-do/crinmail/children-court-crinmail-39-0#H>; and Constitutionality of Article 139 of the Family Code of Russian Federation and Article 47 of the Federal Law 'On the Acts of Civil Status' on account of complaint lodged by the citizens G. F. Grubich and T. G. Guschina, CRIN summary available at: <https://www.crin.org/en/library/legal-database/constitutionality-article-139-family-code-russian-federation-and-article-47>

<sup>76</sup> Loike, J.D. & Fischbach, R., 'Gestational surrogacy: medical and bioethical implications of bidirectional maternal-fetal cell exchange and epigenetics' in Science-Based Bioethics: A Scientific Approach to Bioethical Decision-Making, 2014, Center for Bioethics, Columbia University; BBC Radio 4, 'All in the womb', 25 April 2016, available at: <http://www.bbc.co.uk/programmes/b077gd58>.

authorities' response had failed to balance the competing interests and to apply the principle of proportionality.<sup>77</sup>

### *The right to a nationality*

#### **The issue**

Citizenship laws differ between States. The nationality of some countries is automatically accorded to anyone born there, whereas in others it depends on the nationality of parents. These discrepancies risk leaving some children stateless jeopardising access to their fundamental rights.<sup>78</sup>

Several factors associated with third-party reproduction increase the risk that a child will be born with indeterminate nationality:

- The larger number of adults contributing to third-party reproduction (up to six in some cases - as we saw earlier) increases the probability that a child will be born of parents of differing nationalities;
- Absent or inadequate regulation in some countries may fail to clarify the child's nationality adequately in national law;
- The relative ease with which intending parents may travel across borders in search of a jurisdiction favourable to third-party reproduction may lead to uncertainty about which jurisdiction should determine the child's citizenship.

The status of many children born of third-party reproduction is left unclear, and in some cases they may not be recognised as citizens of any of the countries with which they have a connection.<sup>79</sup> The problem is compounded where the laws of a State prohibit children born of third-party reproduction from discovering their parentage. Such difficulties can leave a child and their parents stranded in the child's country of birth, without the right to return as a family to their home country. In 2017, intending parents from **Australia** who had

commissioned surrogates in Cambodia were prevented from returning home until **Cambodia** had drafted new surrogacy laws.<sup>80</sup>

#### **Children's rights: legal standards**

Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) recognises: "Every child has the right to acquire a nationality." The UN Human Rights Committee has clarified that this does not mean that States must grant citizenship to every child born on their territory, but that 'States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he [sic] is born'.<sup>81 82</sup>



*Article 7 of the CRC. Name and nationality: Registering each child and making sure they have a name and a nationality is the first step to recognising each individual as a human being with rights. These are core elements of all individuals' identity. Without them, children remain invisible: they have no legal identity, no voice and are at greater risk of other rights abuses.*

77 Godelli v. Italy [2012] Application No. 33783/09. CRIN summary and link to full decision available at <https://www.crin.org/en/library/legal-database/godelli-v-italy>.

78 For example, a child born abroad to an American citizen using donated gametes will not be granted American citizenship unless one of the donors is an American. See, for example, USA Today, 'In vitro babies denied U.S. citizenship', 19 March 2012. Available at: <http://usatoday30.usatoday.com/news/world/story/2012-03-19/in-vitro-citizenship/53656616/1>.

79 An estimated 2,000 children in France were lacking French birth certificates and nationality because they were born through surrogacy, a practice that is not legal in the country. In January 2013, the Ministry of Justice issued a circular to facilitate the delivery of birth certificates confirming filiations recognised abroad in cases of children born abroad from a surrogate mother. For details, see [http://www.textes.justice.gouv.fr/art\\_pix/JUSC1301528C.pdf](http://www.textes.justice.gouv.fr/art_pix/JUSC1301528C.pdf) (in French).

80 Barker, A, "Desperate" Australian couples unable to leave Cambodia with surrogate babies', 22 February 2017. Available at <http://www.abc.net.au/news/2017-02-23/australian-couples-with-surrogate-babies-stuck-in-cambodia/8294810>.

81 Human Rights Committee, General comment No. 17: Article 24 (Rights of the child), 1989. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=NT%2fCCPR%2fGEC%2f623&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=NT%2fCCPR%2fGEC%2f623&Lang=en).

82 The same right is recognised in the African Charter on the Rights and Welfare of the Child, art 6.

Article 7 of the CRC and article 24 of the ICCPR also require States to register all children soon after birth. Additionally, the Committee on the Rights of the Child has confirmed that decisions about nationality fall within the scope of CRC article 3, which requires States to ensure that the best interests of children be a “primary consideration” in “all actions” concerning them.<sup>83</sup> In particular, the best interests of the child clearly lie in ensuring that a newborn child acquires a nationality as soon as possible and is not left stateless for an extended period.

Nonetheless, courts have allowed States latitude in the time taken to make essential checks to prevent trafficking. In *D v. Belgium*, the European Court of Human Rights held that the **Belgian** immigration authorities were justified in carrying out checks on a child born through surrogacy abroad, before allowing the family to enter the country.<sup>84</sup> The Court ruled that the delay did not violate the right to family life, despite the child and the parents being separated for over four months.

Article 1 of the UN Convention on the Reduction of Statelessness (1961), ratified by 70 States, sets a higher standard, requiring States to grant their nationality to any child born on their territory if he or she “would otherwise be stateless”.

Provisions of the CRC ought also to safeguard the right of a family to stay together. Article 9 requires that the child “shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child”.

In the context of surrogacy, in the case where a child conceived abroad is brought to a country where surrogacy is prohibited, the UN Special Rapporteur on the sale and sexual exploitation of children has stated that the State is nonetheless responsible for determining the best interests of the child returning with their intending parents and for ensuring statelessness does not occur.<sup>85</sup>

## Provisional findings and queries

The existence of children’s rights does not depend on the choices of their parents. Therefore, neither the method of conception used by a child’s parents, nor the legality of the procedure used, should impede the child’s enjoyment of his or her rights, including the right to a nationality.<sup>86</sup>

National laws should adopt an inclusive definition of parents reflecting the fact that children’s experience of ‘family’ and ‘parents’ varies between cultural, political and social systems. Examples include households with a single parent, same-sex parents, adoptive families, extended families, and children born from ARTs.

Where a child is born through a surrogate abroad but will be living with the intending parents in their own country, the best interests of the child would typically lie in sharing their nationality. Where single citizenship may not be secure (in **Australia** and in the **US**, for example, citizenship can be revoked and individuals sent back to their country of origin) then dual citizenship may be preferable.<sup>87</sup>

A legislative proposal in **India** offers one possible solution to preventing problems related to establishing a child’s nationality and parentage. It would require citizens of other countries seeking a surrogacy arrangement in India to establish first that the child would be granted citizenship in their own country and that they would be recognised there as the legal parents.<sup>88</sup>

*Q. Would granting dual citizenship to a child born to a surrogate in another country always be in his or her best interests? Could this be seen as a benefit of surrogacy arrangements and encourage ‘fertility tourism’?*

83 UN Committee on the Rights of the Child, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), CRC/C/GC/14, para. 30. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14\\_&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f14_&Lang=en).

84 *D and others v. Belgium* [2014] Application No. 29176/13, CRIN summary available at: <https://www.crin.org/en/library/legal-database/d-v-belgium>.

85 UN Special Rapporteur on the sale and sexual exploitation of children, Report to the Human Rights Council, A/HRC/37/60, 15 January 2018, paras. 70. Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/60](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60).

86 In the context of surrogacy, SR on the sale and exploitation of children States that ‘The child must not be punished or discriminated against due to the circumstances of his or her birth, and the rights of surrogate-born children must be protected’. See UN Special Rapporteur on the sale and sexual exploitation of children, Report to the Human Rights Council, A/HRC/37/60, 15 January 2018, paras. 70. Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/60](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60).

87 Sang-Hun, C, ‘Deportation a “Death Sentence” to Adoptees After a Lifetime in the U.S.’, New York Times, 2 July 2017. Available at <https://www.nytimes.com/2017/07/02/world/asia/south-korea-adoptions-phillip-clay-adam-crapser.html?mcubz=0>.

88 Wells-Greco, M., The status of children arising from inter-country surrogacy arrangements: the past, present and future, p. 441. See also India’s draft Assisted Reproductive Technologies (Regulation) Bill 2010 at <http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>. However, in Thailand an Australian couple was required without prior notification to produce a court order proving them to be the child’s legal guardian before being allowed to leave the country with their surrogate-born baby. Hodal, K and Davey, M, ‘Surrogate children’s parents must prove custody when they leave Thailand’, Guardian, 15 August 2014. Available at <http://www.theguardian.com/lifeandstyle/2014/aug/15/surrogate-children-parents-prove-custody-leave-thailand>.

**Q.** *When a family returns to their own country with a surrogate child, how can the impact on the child of regulations intended to prevent trafficking be minimised?*

### **The right to have parents and be cared for by them**

#### **The issue**

Establishing clarity of parentage in law can be a difficulty irrespective of how a child has been conceived. Third-party reproduction is likely to increase this risk for the same reasons discussed earlier. That is, relative to unassisted reproduction, third-party reproduction increases the number of individuals with a potential claim to parenthood, often crosses national borders and involves individuals of differing nationalities, and may be inconsistently regulated between State jurisdictions.<sup>89</sup> Any difficulties in establishing lawful parentage, if not settled quickly, are highly likely to have an impact on the critical early weeks and months of a child's life.

Men and women stand in very different positions in seeking to prove their parentage of a child born of a surrogate, even when their own genetic material was used. Unless a third-party sperm donor was involved, a man's claim to genetic parentage can be settled with a paternity test, after which his right to parent his child is (usually) recognised.



*Article 18 of the CRC. Parental responsibilities: Parents play a central guiding role in a child's life, having the primary duty to care and provide for their children.*

<sup>89</sup> The Hague Conference on Private International Law, 'A study of legal parentage and the issue arising from international surrogacy arrangements', 2014. Available at <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf>.

In contrast, many States only recognise the woman who gives birth as the legal mother.<sup>90</sup> A woman who commissions a surrogate, whether or not she provides her own eggs, may not be able to establish her right in law to parent the child.<sup>91</sup> In the **UK**, for example, non-commercial surrogacy is legal but surrogacy contracts are not enforceable in law; the surrogate remains the legal mother and has the right to parent the child herself, but may agree in writing to allow the woman who commissioned her to be the parent instead.<sup>92</sup> In other jurisdictions, the surrogate has no right over the child. The **US** state of California is an example, where the surrogate normally does not have the right to keep the baby she carries.<sup>93</sup>

An additional risk is that the experience of carrying a pregnancy, which may be transformative, can severely strain the surrogate's commitment to hand over the baby when born. As a judge in the **UK** put it:

*"In particular, the natural process of carrying and giving birth to a baby creates an attachment which may be so strong that the surrogate mother finds herself unable to give up the child."<sup>94</sup>*

Frequently, the relationship between the commissioning adults and the surrogate (and possibly her partner) break down, leading to disputes and uncertainty about where the duty of care lies, much to the detriment of the child(ren) after birth.<sup>95</sup> The issue is further complicated when the genetic material used for conception is obtained from individuals other than a surrogate or the intending parents.

When parents return from abroad with a baby born to a surrogate, States have refused to recognise them as the rightful parents. In such cases, the legal status of the child can sometimes be regularised through adoption, but this involves delays and often complications. Such 'red tape' can help to prevent trafficking and so safeguard a child's rights, but it can also jeopardise

<sup>90</sup> Carolan, M, 'Supreme Court rules genetic mother of twins is not their legal mother', Irish Times, 8 November 2014. Available at <http://www.irishtimes.com/news/crime-and-law/supreme-court-rules-genetic-mother-of-twins-is-not-their-legal-mother-1.1992112>.

<sup>91</sup> The same uncertainties may also have an impact on access for same-sex couples to third-party reproduction in some countries.

<sup>92</sup> UK Government, 'Surrogacy: legal rights of parents and surrogates', n.d. Available at <https://www.gov.uk/legal-rights-when-using-surrogates-and-donors>.

<sup>93</sup> The Economist, 'Buying babies, bit by bit', 19 December 2006. Available at <http://www.economist.com/node/8345513>.

<sup>94</sup> Adetunji, J, 'Surrogate mother who changed her mind can keep the baby', Guardian, 21 January 2011. Available at <https://www.theguardian.com/uk/2011/jan/21/surrogate-mother-keep-baby-court>.

<sup>95</sup> For example, see Blake Morgan, 'A sobering surrogacy judgment', 2016. Available at <https://www.blakemorgan.co.uk/news-events/blog/sobering-surrogacy-judgment>.

them. For instance, in 2014 the European Court of Human Rights ruled that **France's** refusal to issue a birth certificate in relation to two children carried by a US surrogate violated the children's right to family life.<sup>96</sup>

A related problem is the effect of changing laws on existing surrogacy arrangements. For example, when laws in **Thailand** were changed in 2014, pregnant surrogates and their foreign commissioning parents were left uncertain about who would be entitled/required to parent the children after birth.<sup>97</sup>

For these and other reasons, surrogacy carries many risks to the right of a child to know and be cared for by their parents, particularly when surrogacy is inadequately or inconsistently regulated.

### Children's rights: legal standards

The CRC recognises that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding". Article 7 is clear that a child "shall have... as far as possible, the right to know and be cared for by his or her parents". In view of these requirements, it is in the best interests of the child to establish in law, as early as possible, the rightful parentage of the child.



*Article 9 of the CRC. Separation from parents: Children should be able to maintain relationships with their family unless this is deemed to be incompatible with the child's best interests. The child also has the right to maintain contact with their parents if they become separated.*

<sup>96</sup> *Mennesson v. France*, CRIN summary available at <https://www.crin.org/en/library/legal-database/mennesson-v-france>; *Labassee v. France*, CRIN summary available at: <https://www.crin.org/en/library/legal-database/labassee-v-france>.

<sup>97</sup> Alford, P and Taylor, P, 'Thai crackdown strands surrogacy couples', *Australian*, 8 August 2014. Available at <https://www.theaustralian.com.au/national-affairs/foreign-affairs/thai-crackdown-strands-surrogacy-couples/news-story/7ed2880b88494f6aafdd4d33c379b43a>.

In the context of surrogacy, to avoid the sale of children, the Special Rapporteur on the sale and sexual exploitation of children has recommended that the surrogate mother be accorded the status of mother at birth, and at that stage must be under no contractual or legal obligation to participate in the legal or physical transfer of the child. If the surrogate chooses to maintain parentage and parental responsibility, she may however be legally obligated to share parentage and parental responsibility with others, including the intending parents. The report further states that where the surrogate mother, after birth, does not wish to retain parentage or parental responsibility, the best interests of the child require that there be a legal mechanism for transfer of the child and that all States are responsible for establishing such a mechanism in surrogacy arrangements.

States should also ensure that a court or competent authority makes a post-birth determination of the child's best interests, as well as conducts an appropriate and non-discriminatory suitability review of the intending parents, either prior or after the birth or both.<sup>98</sup>

Given the lack of international consensus in determining the parentage of children born of third-party reproduction, the Hague Conference on Private International Law is conducting research with the aim of finding a global consensus on how to establish legal parentage in these circumstances.<sup>99</sup>

#### Box 4. In the courts: Who are the legal parents?

##### *Heterosexual couple commissioning a surrogate*

In 2011, a court in **Italy** ordered that a boy born of a surrogacy arrangement in **Russia** should be removed from the care of the commissioning parents on the grounds that the child, after testing, turned out to be genetically unrelated to them. In 2017, the Grand Chamber of the ECtHR held that while the decision to remove the boy from the couple's care interfered with their right to private life, this interference was proportionate. The Court placed emphasis on the best interest of the child, finding that: the "Italian courts, having assessed that the child would not suffer grave or irreparable harm from the separation, struck a fair balance between the different interests at stake, while remaining within the wide margin of appreciation available to them in this case".<sup>100</sup>

<sup>98</sup> UN Special Rapporteur on the sale and sexual exploitation of children, Report to the Human Rights Council, A/HRC/37/60, 15 January 2018, paras. 54-59, 71-72, 77(e) and (f). Available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/37/60](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/60).

<sup>99</sup> More information available at <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

<sup>100</sup> *Paradiso and Campanelli v. Italy*, ECtHR, Grand chamber no. 25358/12, 2017. Available at <http://hudoc.echr.coe.int/eng/?i=001-170359>.

In November 2014 the Supreme Court of **Ireland** ruled that a woman who commissioned her sister as an altruistic surrogate and provided her own eggs for the process could not be recognised as the legal parent on the children's birth certificates. This overturned a High Court decision that recognised the genetic mother as the legal parent. According to the Supreme Court's judgment, there was no common law or legislation in place to determine the issue, and such a "lacuna in the law... should be addressed in legislation and not by... [the] Court. There is clearly merit in the legislature addressing this lacuna, and providing for retrospective situations of surrogacy."<sup>101</sup>

In 2011, the High Court in **England and Wales** upheld the right of a surrogate mother to keep her baby girl, after she decided not to hand her over to the commissioning couple. The relationship between the three had broken down during the pregnancy. The judge ruled that the baby (by then six months old) had bonded with the surrogate who showed commitment to her, and that removing her would not be in the child's best interests.<sup>102</sup>

In 2016, a court in **Australia** applied the same principle in the baby Gammy case, albeit controversially and with the opposite outcome. After a surrogate in **Thailand** gave birth to twins, one of whom (Gammy) had Down's syndrome, the intending parents refused to take him, taking only his twin sister Pipah. This was against the will of the surrogate, who wanted to keep both children. The judge held that, while he was convinced that the surrogate would have cared for both children, Pipah had bonded with the commissioning family and it would not be in her interests to remove her.<sup>103</sup>

### ***Same-sex couple commissioning a surrogate***

A number of judgements have concerned the right of same-sex couples to have their parentage of a surrogate child recognised in law.

In a landmark ruling for dual paternity, a Court of Appeal in **Italy** ordered in 2017 that two men who commissioned an American surrogate to have two children should be recognised as the children's

parents.<sup>104</sup> No Italian court had previously recognised that a child could have two fathers.

In the same year, the Constitutional Court of the **Czech Republic** dealt with a similar dual-paternity case in the same way. It ruled that two men living in the US who commissioned a surrogate to have a child, and who had been recognised in the US as the child's fathers, should also be recognised as the child's parents when the family travelled to the Czech Republic.<sup>105</sup> The judge cited the right to family life under Czech law and said that the ruling was in the best interests of the child.

In 2017, the highest court in **France** ruled that same-sex partners may adopt their partner's children when the child has been conceived through a surrogacy carried out abroad.<sup>106</sup> The judgement fell short of automatically recognising same-sex parents identified on a foreign birth certificate. Nonetheless, French courts had previously refused to recognise children born of a surrogacy arrangement as citizens until an ECtHR judgment in 2014.<sup>107</sup>

### ***Gamete donors claiming parentage***

Generally donors of gametes (sperm or eggs) are discharged of parental responsibilities for the children they help to conceive. However, it is not always clear what constitutes a donation. In a **US** case, a man successfully claimed parentage of child who was born after an informal agreement in which he agreed to "donate" sperm to a friend to inseminate herself using a turkey baster.<sup>108</sup> The Court decided in the man's favour, arguing that his act was not a "donation" because no "medical technology" was used.

### **Provisional findings and queries**

Since a child has a legal right to a family environment and a loving atmosphere, which is especially critical for health and well-being in the early weeks and months of his or her life, legal confusion over rightful parentage

101 Bionews, 'Irish Supreme Court denies genetic mother birth certificate right', 10 November 2014. Available at [http://www.bionews.org.uk/page\\_468439.asp](http://www.bionews.org.uk/page_468439.asp).

102 CW v. NT and another [2011] EWHC 33. Available at: <http://www.familylawweek.co.uk/site.aspx?i=ed79071>.

103 Pearlman, J, "Baby Gammy" was not abandoned in Thailand, court rules, Telegraph, 14 April 2016. Available at <http://www.telegraph.co.uk/news/2016/04/14/baby-gammy-was-not-abandoned-in-thailand-court-rules>.

104 The Local IT, 'In landmark ruling, Italy recognizes gay couple as dads to surrogate babies', 28 February 2017. Available at <https://www.thelocal.it/20170228/gay-couple-officially-dads-of-surrogate-child-after-landmark-ruling>.

105 Prague Daily Monitor, 'Constitutional Court recognises two men as child's parents', 24 July 2017. Available at <http://praguemonitor.com/2017/07/25/constitutional-court-recognises-two-men-childs-parents>.

106 France, Cour de cassation, Chambre civile 1, 16-16455, 2017. Available at <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJurijudi&idTexte=JURITEXT000035146562&fastReqId=736135142&fastPos=5> (in French)

107 See *Mennesson v. France*, CRIN summary available at <https://www.crin.org/en/library/legal-database/mennesson-v-france>.

108 Bionews, 'Medical intervention should not define legal parenthood', 11 May 2015. Available at [http://www.bionews.org.uk/page.asp?obj\\_id=523229&PPID=523190&sid=282](http://www.bionews.org.uk/page.asp?obj_id=523229&PPID=523190&sid=282).

and interpersonal conflict between contending parents must be prevented, if at all possible. Well-established processes, and a clear, written understanding between intending parents and third parties, may help to prevent conflicts from arising later.

Clearly, whenever conflict or confusion arises, resolution must be as swift and fair as possible, and accord with the best interests of the child. To this end, States should set out, in law or policy, the principles according to which such conflicts may be settled.

This must include a systematic impact assessment on the child's rights and interests, which must always be a primary consideration. For example, this consideration would favour a resolution that results in the best developmental environment for the child.

*Q. Which principles should apply to avoid (or settle) disputes between intending parents, surrogates and others, when the well-being of the child is at stake?*

## Use of cryopreservation and related technologies by children themselves

### Overview

Most of this paper has explored the potential impact of prenatal genetic testing and third-party reproduction on the rights of children born as a result. An additional category of assisted reproductive technology could be of use to children themselves: procedures designed to preserve a person's fertility by repairing reproductive organs or freezing genetic material for later use.

These cryopreservation techniques are frequently used when a person has a reduced ability to conceive, for example as a result of damage caused to reproductive organs by diseases such as cancer or by certain cancer treatments.<sup>109</sup>

### *The right to reproductive health, the right to found a family, and the right to be protected from exploitation*

109 For more about freezing gametes, see <https://www.doctorabel.us/in-vitro-fertilisation/freezing-gametes-and-embryos.html>.

### The issue

Since many children are affected by medical procedures that jeopardise or destroy their fertility, cryopreservation and related technologies can sometimes offer them the means to have a child when they are ready to do so. Indeed, such children are more likely to be reliant on cryopreservation to become parents because of the possibility that they might need to undergo treatment that will destroy their reproductive function before they become old enough to conceive.

According to one doctor, 90 percent of girls who experience childhood cancer and require chemotherapy are unable to conceive children later, and cryopreservation is the only means of preserving their fertility.<sup>110</sup>

Sperm and egg retrieval is already an option for post-pubertal children in these circumstances in many countries. Even pre-pubertal children could benefit from experimental treatments, such as reproductive tissue cryopreservation and the harvesting of isolated stem cells, although this might raise serious ethical issues that are not directly related to children's rights (for example using stem cell banking for human cloning).<sup>111</sup>

On the other hand, cryopreservation and other ARTs entail invasive medical procedures, which may be particularly unsettling for children. Side-effects are another risk, and can be far-reaching. A third serious risk is that children are exploited as compliant donors of eggs and sperm, or as surrogate mothers, which amounts to the commodification of children's bodies. This could take place on the black market, or even on the licit market in the minority of countries that have not set a legal minimum age of 18 for donation.<sup>112</sup> The common perception that a younger donor is a healthier one only exacerbates this risk.<sup>113</sup>

In responsible practice, written consent by a donor of genetic material is required before it can be accepted; clinics allow the donor to change or withdraw their consent at any time before the donation is used.

110 Kelland, K, 'Woman Hopes To Become First To Get Pregnant Using Reimplanted Ovary', Tech Times, 21 March 2016. Available at <http://www.techtimes.com/articles/142678/20160321/woman-hopes-to-become-first-to-get-pregnant-using-reimplanted-ovary.htm>.

111 Picton, H M et al. on behalf of the ESHRE Task Force on Fertility Preservation in Severe Diseases, 'A European perspective on testicular tissue cryopreservation for fertility preservation in prepubertal and adolescent boys', Human Reproduction, 2015, 30(11), pp. 2463–2475. Available at <http://humrep.oxfordjournals.org/content/30/11/2463.full.pdf+html>.

112 In some countries the minimum age is 21 for egg donation and 19 or 20 for sperm donation.

113 Chan, M, 'Schoolgirls in China paid large sums to donate eggs to infertile couples on black market', South China Morning Post, 11 January 2016. Available at <http://www.scmp.com/news/china/article/1678335/illegal-egg-donors-run-big-risks>.

**Q.** *Should it be possible to commission children as surrogate mothers in any circumstances? Is a minimum age needed to protect them? How would a minimum age safeguard the child's best interests? See box 6.*

### Children's rights: legal standards

Article 23 of the ICCPR recognises the right of men and women "to found a family". Article 24 of the CRC recognises children's right to the "highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health". Since children have the prospective right as men and women to found a family, and since the ability to reproduce is an aspect of good health, the CRC and ICCPR both imply that children have the right to access reproductive technologies if they need them (provided that their health would not be harmed as a result).

At the same time, articles 19, 32 and 36 of the CRC recognise the child's right to be protected, respectively, from "maltreatment or exploitation", specifically from "economic exploitation", and from "all other forms of exploitation prejudicial to any aspects of the child's welfare". Article 32 also forbids the use of children for "work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development." In addition to children's right to health already mentioned, these provisions of the CRC appear to rule out, at least in general, approaching children as potential donors of genetic material to third-party reproduction processes that are not their own.

The principle of bodily integrity applies here: the right of each human being, including children, to autonomy and self-determination over their own body, such that physical intrusion without consent is a human rights violation. It follows that, in situations where the CRC appears to encourage, rather than prohibit, a post-pubescent child's access to ARTs, this remains conditional on his or her informed consent. Indeed, this is implied by CRC articles 5 and 12. To this end, children must first be provided with comprehensive and comprehensible information in accordance with article 17 of the CRC:

*"States Parties [...] shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her [...] physical and mental health."*

The Committee on the Rights of the Child has elaborated that "access to appropriate information is crucial if

*States parties are to promote cost effective measures, including through laws, policies and programmes, with regard to numerous health related situations".<sup>114</sup>*

### Provisional findings and queries

Clearly, careful regulation of all ART services is essential to ensure that children's rights are preserved.

In cases where a child's use of ARTs is intended to benefit the fertility or commercial interests of others, rather than the health of the child, the principles of the CRC appear to point clearly to prohibition, based on a minimum age for participation of 18, in order to safeguard children's fundamental rights.

In other cases, where ARTs such as cryopreservation could preserve a child's health, including their fertility, into adolescence and adulthood, the principles of the CRC and ICCPR appear to point clearly to the child's right to make use of them. This principle applies with equal force to children with disabilities.



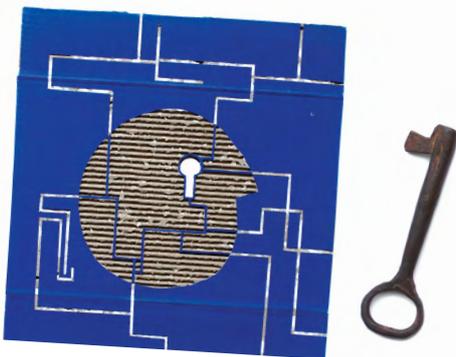
*Article 24 of the CRC. Right to health: Children's right to health means more than just surviving, and also goes beyond questions of malnourishment and vaccinations. This right also concerns the right to access information including related to one's health, respect for privacy and confidentiality, and the importance of informed consent. It must not be forgotten that these principles also apply to children.*

<sup>114</sup> Committee on the Rights of the Child, General comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child, CRC/GC/2003/4, para. 10. Available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11%20](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11%20).

Where access to ARTs is warranted, treatment must remain subject to the child's informed consent, based on 1) an appropriately comprehensible briefing setting out his or her options, and their benefits and risks; and 2) a case-by-case assessment of their capacity to understand the consequences of treatment, according to the child's evolving maturity. The decision should be the genuinely voluntary choice of the child, and not left to parents alone. Further, informed consent implies the freedom to alter or withdraw that consent later.

The right to information also concerns children's right to education (CRC articles 28 and 29), as it relates to school curricula. Sex and relationships education in schools should be comprehensive and cover diversity, as well as the subject of fertility and the risks of infertility. ARTs should form part of the curriculum to raise awareness of the services among young people, as well as to foster social acceptance of diverse family forms.

**Q.** *What is the best way to ensure that allowing children to access cryopreservation technology avoids the risk of their exploitation by others, including commercial exploitation?*



*Article 17 of the CRC. Access to information: Children have a right to access information. This includes information that may positively impact children's other rights, including to health, to know their origins, and to establish their background and identity. Such basic information should not be withheld from children, as it goes against their best interests.*

### Box 5. The benefits and risks of children's access to ARTs

In 2014, a **Belgian** woman became the world's first to give birth to a baby using ovarian tissue frozen when she was 13 years old, and then transplanted back into her ovaries after more than a decade.<sup>115</sup> As a child she had required chemotherapy as part of a bone marrow transplant to treat sickle-cell anaemia. Doctors removed an ovary and froze tissue fragments. At age 15, her remaining ovary failed as a result of the treatment for her sickle-cell condition.

In 2015, a nine-year-old boy diagnosed with a brain tumour, for which the only available treatment risked permanent infertility, became the first in the **UK** to have his testicular tissue frozen to enable its future re-implantation.<sup>116</sup> The procedure extracted a sample of sperm stem cells and used slow-freezing technology to preserve its fertility.

In both these cases, the children's right to health (including reproductive health) would have been violated had they been denied access to ARTs, and there was no evidence of any exploitation. But this is not universally the case. In 2015 a media report alleged that girls and young women in **China** were being paid to donate eggs to infertile couples on the black market, based on information that downplayed the risks, including lifelong infertility.<sup>117</sup>

The industry is a profitable one, with some agencies in Guangzhou charging infertile couples up to 1.2 million yuan (US\$190,000) for a boy. The package covers the cost of the eggs, surrogacy services and abortions if the foetus is a girl.

115 Kelland, K, 'Woman gives birth after childhood ovarian tissue transplant', Reuters, 10 June 2014. Available at <http://www.reuters.com/article/health-transplant-ovarian-idUSL5N0Y-V40T20150609>.

116 Pascual, K, '9-year-old boy with brain tumor has testicular tissue frozen to restore fertility in the future', TechTimes, 23 December 2015. Available at <http://www.techtimes.com/articles/118917/20151223/9-year-old-boy-with-brain-tumor-has-testicular-tissue-frozen-to-restore-fertility-in-the-future.htm>.

117 Chan, M, 'Schoolgirls in China paid large sums to donate eggs to infertile couples on black market', South China Morning Post, 11 January 2016. Available at <http://www.scmp.com/news/china/article/1678335/illegal-egg-donors-run-big-risks>.

### Box 6. Setting minimum ages in ARTs

The justification for donation requirements (e.g. STI screening, medical history, etc.) centres on the need to protect the health of potential mothers and newborn babies. But there is no explicit justification for age thresholds. Maximum age limits could be justified on the viability of a donation.

With regards to minimum age thresholds, could the absence of such lower age limits undermine children's rights, in particular the right to autonomy and self-determination over their own body? Could it create a market, as the absence of a minimum age could encourage couples to aim for the youngest possible donors? Would a minimum age be in the best interests of the child?

Can children become surrogate mothers? Is a minimum age needed to protect them? Would a minimum age be in the child's best interests? And if so, how?

CRIN believes that there are two justifications for setting minimum ages for specific purposes: first, to provide children with a demonstrated need for protection from significant harm; and second, to provide a benchmark for presumed psychological capacity (maturity).

CRIN has explored the issue of setting minimum ages in depth and proposed criteria that can be used as a starting point for developing an approach for a specific policy context.<sup>118</sup>

In determining whether a minimum age is needed, the following considerations may be made:

- Would a minimum age protect children or ensure their recognition as rights holders?
- What other ways exist to achieve that purpose without resorting to age thresholds?
- What is the level of risk associated with the activity at hand?
- If protection is the objective, how effective is an age limit in achieving that protection?
- What is the potential for abuse of power by parents or others of not having an age threshold?
- Is a capacity assessment an option? If so, how and by whom could such an assessment be administered?
- What are the adverse consequences of not having a minimum age?

In the case of surrogacy, a minimum age is needed on the basis of protection, either as a blanket ban, or admitting rare exceptions subject to an assessment of capacity.

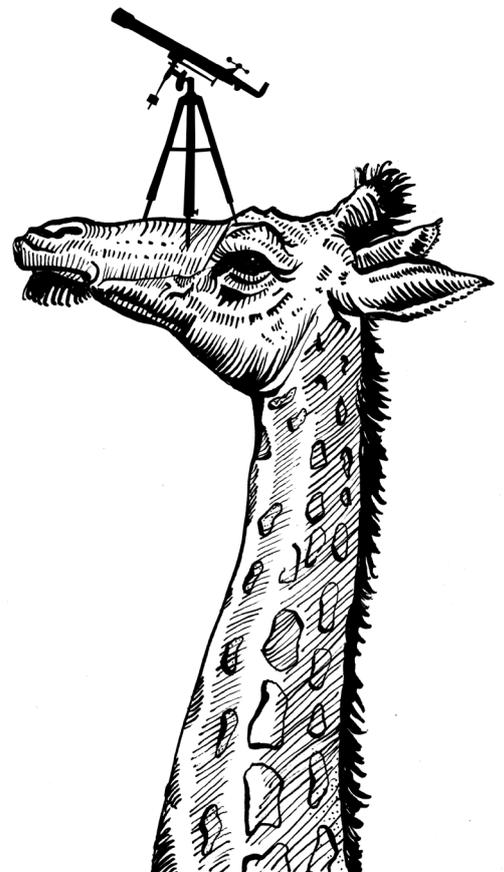
118 For more details, see CRIN, *Age is arbitrary: setting minimum ages*, 2016. Available at <https://www.crin.org/en/home/what-we-do/policy/minimum-ages>.

## Into the future

Advances in ARTs are likely to further complicate questions about the challenges raised in this paper, including preventing the commodification of children, establishing parentage and nationality after third-party reproduction, and governing children's access to ARTs in their best interests. Embryo manipulation techniques, for example, now make possible the transfer of a cell nucleus from one woman's egg to the egg of another, which means that the resulting child will have three genetic parents.

In the future, gametes may be created by modifying other types of human cells. This could benefit prepubescent children who have been rendered infertile because of cancer treatment, women whose eggs are exhausted after the menopause, single women, and same-sex couples.<sup>119</sup>

Equally, as with the prospect of 'designer babies', technologies like these introduce new concerns about potential abuse and 'reproductive crime', including the prospect of creating embryos from an opportunistic DNA sample, even from the rim of a coffee cup. Whatever the future holds, ARTs are likely to make questions about parental and State responsibility to children more important, and more complicated.



<sup>119</sup> Bio Edge, 'Preparing for medicine with artificial gametes', 6 February 2016. Available at: <http://www.bioedge.org/bioethics/preparing-for-medicine-with-artificial-gametes/11744#sthash.zRVbloGh.dpuf>

## Conclusion and questions

As part of CRIN's work to encourage a debate about the effects of assisted reproduction on children, this paper has begun to explore the impact of the technology on their fundamental legal rights. The advent of ARTs adds layers of complexity to the process of founding a family, with multiple implications for the rights of children to health, to be heard, not to be sold or trafficked, to know one's parents and to be cared for by them, to a nationality, to found their own family in the future, and to freedom from discrimination, among others.

In many cases, the complexity of assisted reproduction introduces additional risks to children born as a result. When relationships between the adults involved break down, when the parties involved are based in different countries and jurisdictions, and when States fail to legislate carefully (and most do fail), the rights of children are put in jeopardy. On the other hand, many people alive today would not have been born if assisted reproduction were unavailable, and children may also benefit from procedures that preserve their fertility in advance of medical treatments that normally degrade or destroy it.

Children have a legal right to have their best interests recognised in all matters affecting them, including assisted reproduction that leads to their birth. In every case without exception, the child's best interests should be recognised alongside the rights of adults, which should not displace the child's rights. Where there are tensions between the best interests of a child and the rights of other parties involved, according to the Committee on the Rights of the Child, relevant authorities must weigh the rights of all those concerned while bearing in mind their obligations to make the child's best interests a primary consideration.

It is encouraging that the international trend in jurisprudence is to recognise the rights of children in assisted reproduction. This is a step forward from a singular focus of some States on the rights of adults to found a family, and of others on the prohibition of all forms of assisted reproduction; neither approach serves children well. Nonetheless, there remain gaping inconsistencies between jurisdictions. This encourages 'fertility tourism', particularly in pursuit of commercial arrangements that are unlawful at home but legal abroad, adding unacceptable additional risks to children and often to others, particularly women at risk of exploitation as surrogates or egg donors.

***Given the complexities of the issue, CRIN is seeking feedback on this paper before producing a more comprehensive report.***

***We welcome your input on any aspect of the paper, including — but not limited to — the queries set out in each section. In addition, the following general queries remain open questions for CRIN:***

- In general, the major principles of the international child rights framework, particularly as represented by the CRC and OPSC, and also the ICCPR and CRPD,<sup>120</sup> appear to offer an imperfect but largely robust set of principles for safeguarding the wellbeing of children in the context of assisted reproduction. This is despite the early date of these treaties relative to the growing use of the technology. Do you agree? Are there unacceptable gaps in these (and other) treaties that must be filled in order to protect the rights of children? If so, what are they?
- This paper has asserted that courts should presume in favour of the child where there are tensions between the best interests of the adults involved. Do you agree? Should there ever be exceptions and, if so, under what circumstances?
- What practical steps could ensure that 'fertility tourism' does not add risks to children? For example, are there procedural or policy solutions that could prevent or settle disputes over legal parentage, and avoid entirely the risk that children are left stateless?
- Assisted reproductive technologies are advancing rapidly and, as costs come down, more intending parents are making use of them. How is this likely to jeopardise or benefit children in the future?

<sup>120</sup> International Covenant on Civil and Political Rights; Convention on the Rights of Persons with Disabilities; Convention on the Rights of the Child; Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

## About CRIN

Our goal: A world where children's rights are recognised, respected and enforced, and where every rights violation has a remedy.

Our organisation: CRIN is a global research, policy and advocacy organisation. Our work is grounded in the United Nations Convention on the Rights of the Child.

Our work is based on five core values:

- We believe in rights, not charity
- We are stronger when we work together
- Information is power and it should be free and accessible
- Societies, organisations and institutions should be open, transparent and accountable
- We believe in promoting children's rights, not ourselves.

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