



Leiden University

Faculty of Law

2023-24

Master of Law: Advanced Studies in International Children's Rights

## **Legal Recognition of Parenthood – its role in upholding the right to identity of children with same-sex parents**

Supervisor: 

Thesis submitted by **Paul Benedict Lee** for the final examination of the Advanced LL.M. in International Children's Rights



Date: 1 July 2024


Location: Leiden, The Netherlands

### **Declaration Statement**

I further hereby certify that this is an original work, that this thesis does not contain any materials from other sources unless these sources have been clearly identified in footnotes, and any and all quotations have been properly marked as such and full attribution made to the author('s) thereof.

I further authorise Leiden University, the Faculty of Law, the Master of Laws: Advanced Studies in International Children's Rights, its Programme Board and Director, and/or any authorised agents of the Institution, and persons named here in and above, to place my thesis in a library or other repository including but not limited to associated websites, for the use of the visitors to or personnel of said library or other repository. Access shall include but not be limited to hard copy or electronic media.

Name Typed: Paul Benedict Lee

Student ID Number: 

Signature: 

## Table of Contents

<b>Acknowledgments</b> .....	<b>i</b>
<b>Executive Summary</b> .....	<b>ii</b>
<b>Keywords</b> .....	<b>iii</b>
<b>Overview of Main Findings</b> .....	<b>iv</b>
<b>List of Abbreviations</b> .....	<b>v</b>
<b>1. Introduction</b> .....	<b>1</b>
<b>1.1. Background</b> .....	<b>1</b>
<b>1.2. Recent difficulties and challenges faced by LGBTI people</b> .....	<b>1</b>
<b>1.3. Same-sex couples’ options for becoming a parent</b> .....	<b>3</b>
1.3.1. Adoption.....	3
1.3.2. Assisted Reproductive Technology .....	3
<b>1.4. Relevance of parenthood</b> .....	<b>4</b>
<b>1.5. Research Question and Methodology</b> .....	<b>5</b>
<b>2. Impact of legal parenthood to right to identity of children of same-sex parents</b> .....	<b>6</b>
<b>2.1. Definition of right to identity</b> .....	<b>6</b>
<b>2.2. Right to birth registration</b> .....	<b>8</b>
<b>2.3. Right to acquire a nationality</b> .....	<b>10</b>
<b>2.4. Right to preserve family relations</b> .....	<b>12</b>
<b>2.5. Overarching principles of the CRC: non-discrimination, best interests, right to be heard, right to development</b> .....	<b>13</b>
<b>2.6. Concluding comments</b> .....	<b>15</b>
<b>3. Jurisprudence on legal recognition of parenthood and children’s identity rights</b> .....	<b>16</b>
<b>3.1 Introduction</b> .....	<b>16</b>
<b>3.2 International and regional jurisprudence</b> .....	<b>16</b>
3.2.1 UNCRC Communications.....	16
3.2.2 European Court of Human Rights .....	17
3.2.2.1 <i>Mennesson v France and the advisory opinion</i> .....	17
3.2.2.2 <i>K.K. and others v Denmark</i> .....	19
3.2.2.3 <i>Gaskin v the UK and Mandet v France</i> .....	20
3.2.3 Court of Justice of the EU .....	22
<b>3.3 Domestic jurisprudence</b> .....	<b>23</b>
3.3.1 Hong Kong.....	23
3.3.2 Namibia.....	25
<b>4. Future directions</b> .....	<b>26</b>
<b>4.1 Introduction</b> .....	<b>26</b>

<b>4.2</b>	<b>Cross-border recognition of parentage</b> .....	<b>26</b>
4.2.1	Analysis of the HCCH Parentage/Surrogacy Project .....	26
4.2.1.1	<i>Convention on legal parentage in general</i> .....	27
4.2.1.2	<i>Protocol on legal parentage arising out of an ISA</i> .....	28
4.2.2	Analysis of the European Commission’s proposal for a European Certificate of Parenthood.....	30
<b>4.3</b>	<b>Domestic measures</b> .....	<b>31</b>
<b>5.</b>	<b>Conclusion</b> .....	<b>33</b>
	<b>Bibliography</b> .....	<b>36</b>

## **Acknowledgments**

I would like to thank [REDACTED] for supervising my thesis, from offering me insightful perspectives to shape the direction of my research, providing me with invaluable advice, to editing my thesis.

I would also like to thank the professors, children's rights practitioners and legal professionals who have agreed to discuss aspects of my thesis with me. They are, in the order of the discussions conducted, Prof. Kees Waaldijk, Prof. Benjamin Moron-Puech, Ms. Mia Dambach and Mr. Azan Marwah.

Last but not the least, I am grateful for and would like to thank all the professors of the Advanced LL.M. in International Children's Rights, and all my classmates.

I would like to dedicate this thesis to rainbow families and their children.

## Executive Summary

There has been an increasing trend for countries to recognise the legal parenthood of children with same-sex parents, and there has also been an overall increase in the level of acceptance of LGBTI people. However, there is still a global divide in issues concerning LGBTI rights, with factors such as the rise of right-wing nationalist parties in Europe and religion which influence acceptability.

As a result, rainbow families – families with parents who are lesbian, gay, bisexual, transgender or intersex – continue to face a lack of representation and societal understanding. The difficulties and challenges faced by LGBTI people globally affect children in rainbow families, who are often adopted or born out of assisted reproductive technology arrangements.

This thesis sets out to explore the following research question: to what extent does legal recognition of parenthood play a role in ensuring and safeguarding the right to identity of children of same-sex couples? Specifically, this thesis will focus on the following aspects of children's right to identity as stipulated under CRC Articles 7 and 8: (i) the right to birth registration, (ii) the right to acquire a nationality and (iii) the right to preserve family relations.

This thesis will examine each topic through review of international, regional, domestic instruments and jurisprudence, academic literature, government sources and non-governmental reports. Discussions with academics, children's rights practitioners and legal professionals have also been carried out to provide insight on the selected topics.

Chapter 1 will provide an overview of recent difficulties and challenges faced by LGBTI people and ways in which same-sex couples may become a parent, namely through adoption and assisted reproductive technology. It will then explain the relevance of parenthood in relation to same-sex parents, before setting out the research question and methodology.

Chapter 2 will provide a definition of the right to identity by analysing CRC Articles 7 and 8. It will explain why this thesis chose to focus on the aspects of the right to birth registration, acquisition of a nationality and preservation of family relations due to their close relationship with legal parenthood of same-sex parents. It will hold that the right to identity is particularly important for children as they often lack visibility in society and face consequential risks. The right to an identity for children born to same-sex parents will also be analysed against the four overarching principles of the CRC, namely non-discrimination, best interests of the child as a primary consideration, the right to be heard and the right to life, survival and development.

It will then highlight the limitations of legal parenthood in ensuring all identity rights of children discussed in this thesis. It notes that while legal parenthood of same-sex parents is an important step towards realising children's right to birth registration and nationality, legal parenthood itself is not sufficient to ensure the right to preservation of family relations.

Chapter 3 will analyse the international, regional and domestic jurisprudence on legal recognition of parenthood and analyse its relationship with children's identity rights. It will first consider international and regional jurisprudence by examining the views of the CRC Committee, followed by two sets of cases in the European Court of Human Rights concerning the right to birth registration, acquisition of nationality and the right to preserve family relations. It will then consider the Court of Justice of the European Union judgment of *VMA* on the right to birth registration and to acquire a nationality. Lastly, it will consider domestic jurisprudence in Hong Kong and Namibia, regarding the right to birth registration and acquisition of citizenship respectively.

Chapter 4 will examine future directions, by analysing findings of the HCCH Parentage/Surrogacy Expert Group and the European Commission's proposed regulation in relation to the creation of a European Certificate of Parenthood regarding cross-border recognition of parenthood. While such developments pertain to children and families generally, the analysis in this chapter will specify their specific application to children of same-sex families. It will also propose suggestions for measures at a domestic level.

Chapter 5 will conclude with overall findings and concluding remarks. It holds that legal parenthood of same-sex parents plays a key role in safeguarding children's identity rights, particularly in relation to the right to birth registration and acquisition of a nationality. However, there are its limitations due to challenges with cross-border recognition of parenthood. Further, regarding preservation of family relations, legal parenthood in itself is not sufficient to protect this aspect of the child's identity, as states' implementation of measures to preserve historical information is also required.

## **Keywords**

Assisted reproductive technology – Adoption – Birth registration – Citizenship – LGBTI – Preservation of family relations – Rainbow families – Right to identity – Nationality – Surrogacy

## Overview of Main Findings

This thesis sets out to examine the extent to which legal recognition of parenthood plays a role in ensuring and safeguarding the right to identity of children of same-sex couples. Specifically, the thesis focuses on the following aspects of the right to identity under CRC Articles 7 and 8: (i) the right to birth registration, (ii) the right to acquire a nationality and (iii) the right to preserve family relations. This thesis offers three main findings and conclusions.

First, it is argued that legal parenthood of same-sex parents is an important step towards ensuring children's identity rights in relation to their right to birth registration and acquisition of a nationality. However, there are its limitations, particularly in relation to cross-border recognition of parenthood. This is seen as certain states have shown reluctance in allowing children to acquire the nationality of same-sex parents or register their birth records showing same-sex parents. This is particularly if their parenthood was established in a foreign jurisdiction and same-sex marriage or parenthood is not recognised domestically. As there are currently no international or regional instruments requiring cross-border recognition of parenthood, states may not readily allow for children to acquire their parents' nationality or citizenship if same-sex parenthood was recognised in a foreign jurisdiction, but not its own. Regarding the right to preservation of family relations, it is found that legal parenthood in itself is not sufficient to safeguard this right, as it must be coupled with states' implementation of measures to preserve historical information.

Second, in examining international, regional and domestic jurisprudence, it is found that all individuals including children should be able to establish their identity, which includes the legal parent-child relationship. It has also been found that a child's knowledge of their origins is essential to their identity. However, it is argued that in the context of children with same-sex parents, establishing legal parenthood does not necessarily always protect the child's right to preserve family relations. Rather, there should be an individual assessment of the child's best interests and respect for their right to be heard. Further, it is found that legal parenthood is key in safeguarding right to birth registration and acquiring a nationality for children with same-sex parents, and that the child's best interests must be considered.

Third, the potential HCCH Parentage/Surrogacy instruments and the European Certificate of Parenthood proposed regulations are welcome developments which advance identity rights of children with same-sex parents. However, since they are still under negotiation and are limited to covering cross-border situations, it is important for states to strengthen their efforts domestically to protect identity rights of children with same-sex parents. Domestically, it is recommended that states conduct a review of domestic legislation to allow for same-sex parenthood, which should happen in parallel with advocacy efforts to improve social acceptance of rainbow families. Regarding surrogacy arrangements, it is recommended for states where surrogacy is legalised to implement domestic legislation containing safeguards which protect children's identity rights. Lastly, since legal parenthood itself is not sufficient to safeguard the right to preserve a child's family relations, it is recommended that states establish domestic practices to preserve information related to the child's origins in a centralised register.



## List of Abbreviations

<b>ART</b>	Assisted reproductive technology
<b>CJEU</b>	Court of Justice of the European Union
<b>CRC</b>	Convention on the Rights of the Child
<b>CRIN</b>	Child Rights International Network
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>HCCH</b>	Hague Conference on Private International Law
<b>HRC</b>	Human Rights Committee
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ILGA</b>	International Lesbian, Gay, Bisexual, Trans and Intersex Association
<b>ISA</b>	International surrogacy agreement
<b>OHCHR</b>	The Office of the United Nations High Commissioner for Human Rights
<b>PCO</b>	Parent and Child Ordinance (Cap. 429 of the Laws of Hong Kong)
<b>UN</b>	United Nations

# Legal Recognition of Parenthood – its role in upholding the right to identity of children with same-sex parents

## 1. Introduction

### 1.1. Background

An increasing number of countries are recognising the legal parenthood of children of same-sex couples. Such families are sometimes referred to as ‘rainbow families’. This term originated from the United States gay rights movement, where it referred to families “headed by lesbian, gay, bisexual, transgender or intersex parents”.<sup>1</sup> Challenges faced by rainbow families include a lack of societal understanding, isolation and lack of representation.<sup>2</sup> They are referred to as an “invisible stigmatised” group, where they may choose to “not disclose their sexual identity or may even re-closet themselves to avoid bias”.<sup>3</sup> Rainbow families fall under “alternative families” that do not fit the “nuclear family model”,<sup>4</sup> which is the category of families that often face difficulties with non-recognition of parenthood.

### 1.2. Recent difficulties and challenges faced by LGBTI people

Before delving into an analysis on legal recognition of parenthood from a children’s rights perspective, this paper will discuss recent difficulties and challenges faced by lesbian, gay, bisexual, transgender and intersex people – which will be referred to in this thesis using the acronym ‘LGBTI’.<sup>5</sup>

The overall level of acceptance of LGBTI people have increased from 1980 to 2020, with 56 out of 175 countries experiencing an increase in acceptance, according to a study published in 2021 by the UCLA Williams Institute. This is particularly so for countries that are most accepting, such as Iceland and the Netherlands. Meanwhile, the same study has found that the least accepting countries such as Moldova and Azerbaijan have “experienced decreased levels of acceptance”.<sup>6</sup> On an international level, the Human Rights Council has adopted resolutions expressing its concern on violence and discrimination based on sexual orientation and gender identity, and against intersex persons.<sup>7</sup>

---

<sup>1</sup> S. Cherrington *et al.*, Beyond Invisibility: Early Childhood Teachers’ Inclusion of Rainbow Families, 49 *Early Childhood Education Journal* 1099 (2021)

<sup>2</sup> J. Tomlins, Rainbow families: The challenges, Rainbow Families Council, 1 (2015)

<sup>3</sup> V. Michaels and G. Tamm, Global rainbow families, in Y. Kallane *et al.* (eds.) *Research Handbook of Global Families: Implications for Theory and Practice*, 311 (2023)

<sup>4</sup> European Parliament, Cross-Border Legal Recognition of Parenthood in the EU, 15 (2023)

<sup>5</sup> This acronym is used by both the Office of the UN High Commissioner for Human Rights (“OHCHR”) and ILGA-Europe. See OHCHR, *Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law* (2<sup>nd</sup> Edition), UN Doc No. HR/PUB/12/06/Rev.1, 2 (2019); ILGA-Europe, *Our Glossary*, <https://www.ilga-europe.org/about-us/who-we-are/glossary/>, last visited (30-06-2024)

<sup>6</sup> UCLA Williams Institute, *Social Acceptance of LGBTI People in 175 Countries and Locations, 1981 to 2020*, 3 (2021)

<sup>7</sup> UN Human Rights Council (“HRC”), Twenty-seventh session, Human rights, sexual orientation and gender identity, UN Doc. No. A/HRC/27/L.27/Rev.1 (2014); UN HRC, Fifty-fifth session, Combating discrimination, violence and harmful practices against intersex persons, UN Doc. No. A/HRC/55/L.9 (2024)

In relation to acceptance of homosexuality, the Pew Research Center found in 2020 that while there has been increasing acceptance over the past 20 years, the divide globally still persists.<sup>8</sup> It has found that, for example, Central and Eastern Europeans are divided on levels of acceptability with a median of acceptance of 46%; acceptance in sub-Saharan African countries, the Middle East and Russia remains low; and there is a lack of consensus in the Asia-Pacific region.<sup>9</sup> The study has also pointed to factors such as education levels, the rise of right-wing nationalist parties in Europe and religion which influence levels of acceptability.<sup>10</sup>

The lack of acceptance and negative beliefs can lead to stigma against LGBTI people, characterising them as being “sick, immature, unskilled, sinful or generally undesirable”.<sup>11</sup> This stigma leads to undesirable consequences such as violence and discrimination, health deterioration, bullying and lack of civic participation.<sup>12</sup>

There have been welcome developments in jurisprudence globally on the rights of LGBTI people. The Hong Kong Court of Final Appeal has ruled that same-sex couples have a right to form registered partnerships by virtue of the right to privacy under the International Covenant on Civil and Political Rights.<sup>13</sup> In Namibia, the Windhoek High Court has ruled that colonial-era laws which criminalises same-sex activities are unconstitutional.<sup>14</sup> Meanwhile, the Supreme Court of Kenya has allowed the registration of rights group National Gay and Lesbian Human Rights Commission as a non-governmental organisation.<sup>15</sup> However, there have also been some less encouraging developments. While the Hong Kong Court of Final Appeal ruled that the government policy requiring transgender individuals to undergo full sex assignment surgery before changing one’s gender on identity cards was unconstitutional, the government’s revised policy still required “removal of breasts for transgender men, and removal of penis and testes for transgender women” and undergoing “continuous hormonal treatment for at least two years”.<sup>16</sup> Meanwhile, the Ugandan Constitutional Court has upheld the Anti-Homosexuality Act, which includes imposing a death penalty in certain cases.<sup>17</sup> The European Court of Human Rights (“**ECtHR**”) has also ruled that German authorities’ refusal to record a transgender parent as a mother on a child’s birth certificate did not violate the European Convention on Human Rights.<sup>18</sup>

---

<sup>8</sup> Pew Research Center, *The Global Divide on Homosexuality Persists*, 3 (2020)

<sup>9</sup> *Id.*, 7

<sup>10</sup> *Id.*, 12-25

<sup>11</sup> See UCLA Williams Institute, *supra* note 6, at 4

<sup>12</sup> *Id.*

<sup>13</sup> *Sham Tsz Kit v Secretary for Justice* [2023] HKCFA 28

<sup>14</sup> *Dausab v The Minister of Justice* [2024] NAHCMD 331. It is noted that this judgment was delivered on 21 June 2024, and the Namibian government can appeal within 21 days: see N. Nyaungwa, *Namibian court declares laws banning gay sex unconstitutional*, Reuters, <https://www.reuters.com/world/africa/namibian-court-declares-laws-banning-gay-sex-unconstitutional-2024-06-21/>, last visited (23-06-2024). As of the date of this thesis, an appeal has not been lodged.

<sup>15</sup> *George Peter Kaluma v NGO Co-Ordination Board and others* (Application No. E011 of 2023)

<sup>16</sup> J. Pang and D. Kam, *Hong Kong LGBTQ activists upset at revised ID card gender rules*, Reuters <https://www.reuters.com/world/china/hong-kong-lgbtq-activists-upset-revised-id-card-gender-rules-2024-04-03/>, last visited (06-04-2024)

<sup>17</sup> *Hon. Fox Odoi & 21 Others v Attorney General & 3 Others* [2024] UGCC 10

<sup>18</sup> *ECtHR, A.H. and Others v. Germany* (application no. 7246/20) (4 April 2023)

The difficulties and challenges faced by LGBTI people globally affect children in rainbow families, who are often adopted or born out of assisted reproductive technology arrangements. This thesis will focus on legal parenthood of same-sex parents, meaning both gay and lesbian couples. While there is growing acceptance in granting equal parental rights to same-sex parents globally, the issue of legal recognition of parenthood is lesser explored through the perspective of children's rights. The rights of children with same-sex parents are often violated if the legal status of their parents is not recognised. The following sub-section will set out the different examples in which same-sex couples may become a parent.

### 1.3. Same-sex couples' options for becoming a parent

#### 1.3.1. Adoption

First, same-sex couples may become a parent through adoption. Adoption is a process which "terminates the parental responsibilities and rights of the birth parents" by transferring the parental rights to adoptive parents.<sup>19</sup> Article 21 of the UN Convention on the Rights of the Child ("CRC") stipulates that states which recognise the adoption system "shall ensure that the best interests of the child shall be the paramount consideration".

While adoption may be a process allowing "orphaned or abandoned children to benefit" from a legal family, it has increasingly been used to give legal effect to "existing family relationships", such as through step-parent adoption.<sup>20</sup> Step-child or second-parent adoption is an adoption which allows the new partner or spouse of a parent to adopt that parent's child in a way which "does not affect the parental rights and responsibilities" of that parent.<sup>21</sup> On the other hand, joint adoption is where a same-sex couple adopt a child jointly, where "neither parent will be the biological parent"<sup>22</sup> and typically, the "rights and responsibilities"<sup>23</sup> of existing parents are extinguished.

Compared to step-parent adoption, less countries have allowed joint adoption due to policy considerations related to "conferring the right to build a family"<sup>24</sup> where both parents are biologically unrelated to the child.

#### 1.3.2. Assisted Reproductive Technology

Same-sex couples may also become a parent through assisted reproductive technology ("ART"). ART encompasses all types of fertility treatments which handle eggs or embryos, and generally involves "surgically removing eggs from a woman's ovaries, combining them with sperm in the laboratory, and

---

<sup>19</sup> L. Bracken, *Same-Sex Parenting and the Best Interests Principle*, Cambridge University Press, 114 (2020)

<sup>20</sup> *Id.*, 115

<sup>21</sup> *Id.*

<sup>22</sup> T. Amos and J. Rainer, *Parenthood for Same-Sex Couples in the European Union: Key Challenges*, in K. Boele-Woelki and A. Fuchs (ed.) *Same-Sex Relationships and Beyond: Gender Matters in the EU*, 84 (2018)

<sup>23</sup> See Bracken, *supra* note 19, 116

<sup>24</sup> *Id.*, 118

returning them to the woman's body or donating them to another woman".<sup>25</sup> This section will focus on two examples of ART.

First, a child may be conceived through donor conception, which is more common for female couples.<sup>26</sup> This may take place through "the injection of semen" of a donor "into the vaginal tract in time with one partner's ovulation".<sup>27</sup> Another method of donor conception is reciprocal *in vitro* fertilisation, where "the eggs of one partner are inseminated in vitro with donor sperm and the resultant embryo is carried by the other partner".<sup>28</sup>

Second, surrogacy is an example of ART which is common for male couples as it "requires the assistance of a surrogate"<sup>29</sup> to become a parent by way of conception. Surrogacy is where a surrogate mother is "impregnated often via an [in vitro fertilisation] procedure" using the sperm of one of the commissioning parents, and "carries the child for the commissioning parents".<sup>30</sup> The surrogate mother typically does not play a parental role in relation to the child.<sup>31</sup> Recognition of the intended or commissioning parents' legal parenthood differs among states, with recognition of commercial surrogacy arrangements being a controversial issue.<sup>32</sup>

#### 1.4. Relevance of parenthood

Parenthood refers to those "who by law are declared to be the parents of a child and with whom legal kinship is established",<sup>33</sup> which is relevant to a child's identity from which key rights are derived. This is in contrast to parentage, which refers to those "genetically or biologically related to the child".<sup>34</sup> While the two terms are occasionally used interchangeably, this thesis will use the term 'parenthood' to refer to legal recognition of parent-child relationships, which does not require genetic or biological relations. This is with the exception of the discussion in sub-section 4.2.1 below regarding findings by the Hague Conference on Private International Law, which uses the term 'parentage' to refer broadly to all "parent-child relationships established in law" that are relevant to an individual's identity from which key "rights and obligations are derived".<sup>35</sup>

As opposed to parenthood, parentage has historically been associated with heterosexual marriages where a husband and wife used their sperm and egg to conceive a child: by carrying the child, the wife

---

<sup>25</sup> Centers for Disease Control and Prevention, What is ART, <https://www.cdc.gov/art/whatis.html>, last visited (23-04-2024)

<sup>26</sup> See Bracken, *supra* note 19, 147

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> See Amos and Rainer, *supra* note 22, at 84

<sup>31</sup> *Id.*

<sup>32</sup> See Bracken, *supra* note 19, 193

<sup>33</sup> J.M. Scherpe, Comparative Family Law, in M. Reimann and R. Zimmermann (eds.) *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> Edition) 1102 (2019)

<sup>34</sup> *Id.*

<sup>35</sup> Hague Conference on Private International Law, Parentage / Surrogacy Experts' Group: Final Report "The feasibility of one or more private international law instruments on legal parentage", Prel. Doc. 1 of November 2022, 9 (2022)

is the gestational and genetic mother, while the father is the genetic father.<sup>36</sup> The determination of legal parenthood of children for same-sex couples has evolved in two aspects. First, same-sex couples are also able to acquire legal parenthood through adoptions. In a study by the UCLA Williams Institute, same-sex couples have been found to be four times more likely than heterosexual couples to raise an adopted child, with an estimate of 16,000 same-sex couples raising over 22,000 adopted children in the United States in 2013.<sup>37</sup> Second, with the development of ART methods, both unmarried and married same-sex couples may be able to acquire legal parenthood of a child.

The recognition of legal parenthood for same-sex couples complies with the principle of the right to recognition in the Yogyakarta Principles – a set of principles adopted by a group of human rights experts on applying international human rights law regarding sexual orientation and gender identity – which acknowledges that persons of all sexual orientations “shall enjoy legal capacity in all aspects of life”.<sup>38</sup> However, not all same-sex couples successfully acquire parenthood, which may affect aspects of their child’s identity, such as not being able to register their births in a manner which adequately reflects the family structure accurately. Children of same-sex parents without parenthood may also face difficulties in acquiring a nationality, particularly if it involves cross-border recognition of parenthood. Parenthood may also play a role in protecting the child’s right to access their birth origins. This thesis will explore the extent to which parenthood plays a role in each of these aspects of identity rights concerning children with same-sex parents.

### 1.5. Research Question and Methodology

This thesis sets out to explore the following research question: to what extent does legal recognition of parenthood play a role in ensuring and safeguarding the right to identity of children of same-sex couples? Specifically, this thesis will focus on the following aspects of children’s right to identity as stipulated under CRC Articles 7 and 8: (i) the right to birth registration, (ii) the right to acquire a nationality and (iii) the right to preserve family relations. This thesis will examine each topic through review of international, regional, domestic instruments and jurisprudence, academic literature, government sources and non-governmental reports. Discussions with academics, children’s rights practitioners and legal professionals have also been carried out to provide insight on the selected topics.

Chapter 2 will provide a definition of the right to identity and explain why this thesis chooses to focus on the abovementioned aspects. The right to an identity for children born to same-sex parents will also be analysed against the four overarching principles of the CRC, namely non-discrimination, best interests of the child as a primary consideration, the right to be heard and the right to life, survival and development.<sup>39</sup> Chapter 3 will analyse the international, regional and domestic jurisprudence on legal recognition of parenthood and analyse its relationship with children’s identity rights. Chapter 4 will examine future directions, by analysing findings of (i) the HCCH Parentage/Surrogacy Expert Group and (ii) the European Commission’s proposal for a European Certificate of Parenthood regarding cross-border recognition of parenthood, and (iii) proposing suggestions for measures at a domestic level. Chapter 5 will conclude with overall findings and concluding remarks.

---

<sup>36</sup> N. Cahn, *The ART of Parentage* in J. G. Dwyer (ed.), *The Oxford Handbook of Children and the Law*, 191 (2019)

<sup>37</sup> G. J. Gates, *LGBT Parenting in the United States: Executive Summary*, UCLA Williams Institute, 1 (2013)

<sup>38</sup> Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2006), Principle 3

<sup>39</sup> CRC Articles 2, 3(1), 6 and 12

## 2. Impact of legal parenthood to right to identity of children of same-sex parents

### 2.1. Definition of right to identity

Identity has been noted to be “essential”<sup>40</sup> for relationships between an individual and society. A child’s identity can be understood as a cluster of “historical and evolving characteristics”<sup>41</sup> that can be attributed to an individual. It contributes to what makes an individual “visible” by transforming a “biological entity into a legal being” that is capable of holding rights and duties.<sup>42</sup> As one of its targets, the United Nations (“UN”) Sustainable Development Goals have aimed to provide “legal identity for all, including birth registration”.<sup>43</sup>

The right to identity is particularly important for children as they often lack visibility in society and face consequential risks.<sup>44</sup> In fact, the CRC is the first human rights treaty that included a right to preserve one’s identity.<sup>45</sup> The International Covenant on Civil and Political Rights (“ICCPR”), which entered into force in 1976, stipulates that everyone has “the right to recognition everywhere as a person before the law”.<sup>46</sup> The Declaration of Fundamental Rights and Freedoms, adopted by the European Parliament in 1989, specifies that everyone has “the right to respect and protection for their identity”.<sup>47</sup> However, the CRC goes further to recognise the right to create, establish and preserve a child’s identity.

The concept of children’s right to identity can be found in CRC Articles 7 and 8. CRC Article 7 creates various aspects of a child’s identity, which “in turn must be preserved by a state” under CRC Article 8.<sup>48</sup> There are five rights created under CRC Article 7(1): (i) the right to immediate registration after birth, (ii) the right to a name, (iii) the right to acquire a nationality, (iv) the right to know their parents, and (v) the right to be cared for by their parents.<sup>49</sup> States parties have the obligation to ensure the implementation of such rights.<sup>50</sup>

Pursuant to CRC Article 8(1), states parties have an obligation to “preserve [the child’s] identity, including nationality, name and family relations as recognised by law without unlawful interference”. If a child is “illegally deprived” of elements of their identity, states parties have the obligation to provide

---

<sup>40</sup> A. Macdonald, *The Rights of the Child: Law and Practice*, 393 (2011)

<sup>41</sup> J. Tobin and J. Todres, *Article 8: The Right to Preservation of a Child’s Identity* in J. Tobin (ed.) *The UN Convention on the Rights of the Child: A Commentary* (2019), 285

<sup>42</sup> G. Van Bueren, *The International Law on the Rights of the Child*, 117 (1995)

<sup>43</sup> UN, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. No. A/RES/70/1, Target 16.9 (2015)

<sup>44</sup> See Macdonald, *supra* note 40

<sup>45</sup> See Tobin and Todres, *supra* note 41, 283

<sup>46</sup> UN General Assembly, ICCPR, United Nations Treaty Series (1966) 171, Article 16

<sup>47</sup> European Parliament, *Declaration of Fundamental Rights and Freedoms*, Doc No. A2-3/89 (1989), Article 6(1)

<sup>48</sup> J. Tobin and F. Seow, *Article 7: The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents* in J. Tobin (ed.) *The UN Convention on the Rights of the Child: A Commentary* (2019), 239

<sup>49</sup> *Id.*, 238

<sup>50</sup> CRC Article 7(2)

appropriate assistance to “speedily”<sup>51</sup> re-establish their identity. There are positive obligations on states to take steps to ensure that children do not lose elements of their identity through states’ neglect.<sup>52</sup> It should be noted that this list of three elements contributing to a child’s identity in CRC Article 8(1), namely nationality, name and family relations, is non-exhaustive and that ‘identity’ is not defined elsewhere in the CRC.<sup>53</sup> While not explicitly stipulated in the CRC, a child’s identity also includes their “race, culture, religion and language”, appearance, sexual orientation and gender identity.<sup>54</sup>

Likewise, the abovementioned five rights created under CRC Article 7(1) do not exhaustively define the scope of a child’s right to preserve their identity under CRC Article 8(1).<sup>55</sup> Nevertheless, the five rights created under CRC Article 7(1) correspond to the three elements contributing to a child’s identity in CRC Article 8(1). The reference to preservation of “family relations”<sup>56</sup> encompasses, but is wider than, the right “to know and be cared for”<sup>57</sup> by a child’s parents. While CRC Article 8(1) focuses on preservation, it should be noted that the existence of an identity is a precondition to its preservation, and hence this provision “must encompass a right to create and establish an identity”.<sup>58</sup> Considering CRC Articles 7(1) and 8(1) together, it is argued that children have a standalone right to establish and recognise their family relations, which forms part of their identity that must be preserved.<sup>59</sup>

A child’s right to identity under CRC Articles 7 and 8 is inextricably linked to several other rights and state obligations enshrined in the CRC.<sup>60</sup> This includes the right to survival and development;<sup>61</sup> the right not to be separated from their parents against their will;<sup>62</sup> the right not to be subjected to “arbitrary or unlawful interference”<sup>63</sup> against their privacy, family home and correspondence; states’ obligations to pay due regard to the child’s “ethnic, religious, cultural and linguistic background”<sup>64</sup> for alternative care arrangements such as adoption and foster placement, and to ensure that the child’s best interests are the paramount consideration for adoptions.<sup>65</sup>

As mentioned in sub-section 1.5, this thesis will focus on the following aspects of children’s right to identity: (i) the right to birth registration, (ii) the right to acquire a nationality and (iii) the right to

---

<sup>51</sup> CRC Article 8(2)

<sup>52</sup> See Tobin and Todres, *supra* note 41, 295

<sup>53</sup> See Van Bueren, *supra* note 42, 119

<sup>54</sup> See A. Macdonald, *supra* note 40, 394

<sup>55</sup> See Tobin and Seow, *supra* note 48

<sup>56</sup> CRC Article 8(1)

<sup>57</sup> CRC Article 7(1)

<sup>58</sup> See Tobin and Todres, *supra* note 41, 295

<sup>59</sup> C. Baglietto *et al.*, Preserving “family relations”: an essential feature of the child’s right to identity, *Child Identity Protection* 8 (2022)

<sup>60</sup> See Tobin and Todres, *supra* note 41, 283

<sup>61</sup> CRC Article 6(2)

<sup>62</sup> CRC Article 9(1)

<sup>63</sup> CRC Article 16(1)

<sup>64</sup> CRC Article 20(3)

<sup>65</sup> CRC Article 21



preserve family relations. The choice to focus on the same, as opposed to elements relating to children's social and cultural identity, the right to a name and to be cared for by their parents, is because of the close relationship that legal parenthood of same-sex parents has with children's acquisition of such elements of their identity. Such elements of identity also relate to children's civil rights. The Committee on the Rights of the Child (the "**CRC Committee**") has stated that a child's civil rights "begin with the family".<sup>66</sup> Referring to CRC Articles 7 and 8, the CRC Committee also noted the family's key role as to the child's right to be registered, to a nationality, to know their parenthood "as far as possible", and to preserve their identity.<sup>67</sup>

However, it is important to highlight the limitations of legal parenthood in ensuring all identity rights of children discussed in this thesis. During discussions, Ms. Mia Dambach noted that "there are limits to legal parenthood in addressing all the terms of identity", and that while legal parenthood is a "gateway to other rights", it does not complete all aspects of children's identity rights.<sup>68</sup> Such limitations will be examined under each aspect of identity rights below. In particular, Ms. Dambach highlighted that identity rights of children "include family relations and information about biological and gestational origins", and that "certainty in legal parenthood should not trump all other rights in the CRC",<sup>69</sup> such as those in relation to preservation of family relations and the right not to be sold.<sup>70</sup>

Lastly, the Special Rapporteur on the sale and sexual exploitation of children also noted that the rights of the child – including identity rights in relation to birth registration, nationality and to know one's parents – should not be impacted by the method of their birth.<sup>71</sup> The importance of such aspects of children's right to identity in families with same-sex parents are elaborated below.

## **2.2. Right to birth registration**

The CRC Committee has emphasised that the absence of birth registration may pose detrimental impacts on children's rights.<sup>72</sup> In its Concluding Observations, the CRC Committee has urged states to take appropriate measures to make sure that birth registration is available for all children, "regardless of their parents' legal status and/or origin".<sup>73</sup> Thus far, the CRC Committee has not specifically highlighted children of same-sex parents as a vulnerable group where states are "required to take special measures"<sup>74</sup> to ensure their birth registration. However, it is argued that due to the lack of

---

<sup>66</sup> CRC Committee, *The Role of the Family in the Promotion of the Rights of the Child*, excerpted from CRC/C/24, 7<sup>th</sup> Session, 10 October 1994, at para 2.2 (1994)

<sup>67</sup> *Id.*

<sup>68</sup> These discussions took place on 21 May 2024 and 27 June 2024, between the author and Ms. Mia Dambach, Executive Director of Child Identity Protection.

<sup>69</sup> *Id.*

<sup>70</sup> CRC Article 8(1), Article 35; *see also* C. Baglietto *et al.*, *supra* note 59, at 43, 55

<sup>71</sup> UN HRC, Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Note by the Secretariat, UN Doc No. A/74/162, at paras 23 and 32 (2016)

<sup>72</sup> Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and CRC Committee, Joint general comment No. 4 (2017) of the CMW and No. 23 (2017) of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc No. CMW/C/GC/4 - CRC/C/GC/23, at para 20 (2017)

<sup>73</sup> CRC Committee, Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc No. CRC/C/DEU/CO/3-4, at para 29 (2014)

<sup>74</sup> *See* Tobin and Seow, *supra* note 48, at 243

recognition of same-sex parenthood, such children's right to birth registration may be jeopardised. This ultimately makes this group of children a vulnerable one that should require special measures to ensure their birth registration.

The right to birth registration is particularly relevant for children of same-sex parents who are conceived through ART, either by donor conception or surrogacy arrangements. While neither the CRC nor its *travaux préparatoires* (preparatory documents) sets out the information that must be recorded in birth registrations, it has been noted that the following must be included as a minimum: the child's name at birth, sex, date of birth, place of birth; the parents' names, addresses and nationality.<sup>75</sup> This interpretation is based on the explicit reference to such categories of information in CRC Article 7(1).<sup>76</sup> Further, the Verona Principles – a set of principles developed to protect the rights of children born through surrogacy – provide that birth records should be revised when there is a change in legal parenthood, while original records and historical changes should be preserved.<sup>77</sup>

It is argued that the definition of a child's parents must not be limited to a "traditional conception" and should extend to registering the gestational, genetic and social parents if such information is available.<sup>78</sup> Taking the example of a child born to a surrogacy arrangement commissioned by a same-sex couple, the gestational parent may be the surrogate birth mother, while the genetic parents are those whose ovum and sperm were provided, and social parents are those who have the responsibility of caring for the child.<sup>79</sup> In this example, the social parents are often the ones commissioning the surrogacy arrangement (the "**commissioning parents**").

Countries differ in their recognition of legal parenthood arising out of cross-border arrangements, which may affect a child's right to register information regarding their parents upon birth. There are two aspects to examine in this respect. First, certain states have refused to issue birth certificates recording details of both same-sex parents due to its domestic legislation not recognising same-sex parenthood. This was seen in the cases of Bulgaria in *VMA*,<sup>80</sup> and in Hong Kong in *NF v R*.<sup>81</sup> These cases will be discussed in Chapter 3 below. It is argued that this violates the child's right to non-discrimination regardless of their parents' status under CRC Article 2(1). This lack of parenthood recognition due to discrimination against same-sex couples negatively affects the child's right to birth registration, which also affects their right to preserve their family relations as discussed in sub-section 2.4 below.

The second aspect relates to states' differing attitudes to cross-border surrogacy arrangements, and therefore different positions on birth registration of children with same-sex parents. Domestically, states have varying positions on recognising surrogacy arrangements. To illustrate this, the domestic practices of Greece, California and Hong Kong are referred to. In Greece, subject to court approval,

---

<sup>75</sup> UNICEF, Implementation Handbook for the Convention on the Rights of the Child (3rd Edition), 101 (2007)

<sup>76</sup> *Id.*

<sup>77</sup> International Social Service, Principles for the protection of the rights of the child born through surrogacy (Verona Principles) (2021), Principle 12.7

<sup>78</sup> See Tobin and Seow, *supra* note 48, at 247

<sup>79</sup> *Id.*, 259

<sup>80</sup> Administrative case No. 6746/2022, The Supreme Administrative Court of the Republic of Bulgaria – Third Chamber (1 March 2023); Case C-490/20, *V.M.A. v Stolichna obshtina*, Judgment of the Court (Grand Chamber), ECLI:EU:C:2021:1008 ("**VMA**")

<sup>81</sup> *NF v R (Secretary for Justice, Intervener)* [2023] 6 HKC

altruistic surrogacy arrangements are legal and parenthood is conferred on the commissioning parents, as reflected on the birth certificate.<sup>82</sup> However, commissioning parents must be heterosexual couples or single women.<sup>83</sup> In contrast, California allows commercial surrogacy arrangements and the commissioning parent reflected on the birth certificate as the parent can be “an individual, married or unmarried”,<sup>84</sup> which effectively recognises same-sex legal parenthood.

Meanwhile, Hong Kong prohibits commercial surrogacy arrangements and only grants legal parenthood to married heterosexual couples for surrogacy arrangements carried out abroad, provided that certain pre-conditions are met.<sup>85</sup> These pre-conditions include genetic linkage, consent to the granting of legal parenthood and the requirement that only reasonable expenses were incurred.<sup>86</sup> It is only when such pre-conditions are met that legal parenthood is granted by way of a parental order, and thereafter the Registrar of Births and Deaths is informed.<sup>87</sup> Such pre-conditions are in line with states’ obligation in the CRC to prevent the sale of children “for any purpose or in any form”.<sup>88</sup> They are also consistent with the Verona Principles’ safeguards to ensure the rights of children, through measures to prevent and prohibit the sale, exploitation and trafficking in children<sup>89</sup> and the requirement to prevent “improper financial or other gain”.<sup>90</sup> However, the requirement that only married heterosexual couples can obtain legal parenthood for children born out of surrogacy arrangements clearly violates the principle of non-discrimination under CRC Article 2(1). Children of same-sex parents conceived through surrogacy arrangements, even if satisfying pre-conditions in line with the CRC and the Verona Principles, are unable to have their birth registered in a manner which accurately reflects their family relations.

It is argued that the recognition of same-sex legal parenthood will allow children to exercise their right to birth registration fully. However, legal parenthood has its limitations when children move across borders and require mutual recognition of parenthood before registering their birth records in the destination country. This issue is explored further in the case of *VMA* (see Chapter 3 below) and potential instruments allowing for cross-border recognition of parenthood (see Chapter 4 below).

### 2.3. Right to acquire a nationality

CRC Article 7(1) provides the right for children to “acquire” a nationality. This was also the wording in ICCPR Article 24(3), which is considered to have a diminished “level of protection”<sup>91</sup> as compared to Article 15 of the Universal Declaration of Human Rights, where it gives everyone the right to a nationality that should not be arbitrarily deprived of. The wording of CRC Article 7(1) was arrived at to allow states to apply either the principle of *jus sanguinis* – where nationality is determined by the

---

<sup>82</sup> Greek Civil Code, Articles 1458 and 1464

<sup>83</sup> *Id.*

<sup>84</sup> California Family Code, FAM § 7960

<sup>85</sup> Human Reproductive Technology Ordinance (Cap 561 of the Laws of Hong Kong), Section 16(1)

<sup>86</sup> Parent and Child Ordinance (Cap 429 of the Laws of Hong Kong), section 12(1) to 12(8)

<sup>87</sup> *Id.*, section 12(9)

<sup>88</sup> CRC Article 35

<sup>89</sup> Verona Principles, Principle 14

<sup>90</sup> Verona Principles, Principle 15.1

<sup>91</sup> S. Detrick, A Commentary on the United Nations Convention on the Rights of the Child, 150 (1999)

nationality of their parents, or *jus soli*, where nationality is determined by the child's place of birth.<sup>92</sup> Meanwhile, states have to ensure that their implementation measures must meet their obligations under "relevant international instruments" and consider the consequences if the "child would otherwise be stateless".<sup>93</sup> This is reflected in the CRC Committee's remark that while states are not required to grant its nationality to all children born in its territory, they are "required to adopt every appropriate measure...to ensure that every child has a nationality"<sup>94</sup> when they are born.

Same-sex parents may not be granted legal parenthood in their home country after giving birth to their child abroad. This was the case in *VMA*, where the child was born in Spain to two mothers, who are British and Bulgarian nationals respectively.<sup>95</sup> While the Spanish authorities issued a birth certificate indicating the two mothers as parents, the birth certificate did not indicate who the biological mother was.<sup>96</sup> The Bulgarian authorities refused the Bulgarian mother's application for a birth certificate for the child, which was necessary for the issuance of a Bulgarian identity document.<sup>97</sup> Its rationale for the refusal was that there was insufficient information regarding the identity of the biological mother, and that having two mothers on a birth certificate "was contrary to the public policy" of Bulgaria as it does not permit same-sex marriage.<sup>98</sup> Meanwhile, since the British mother acquired her British citizenship by descent, she is also unable to pass on her citizenship, leaving the child stateless at the time.<sup>99</sup> While the Administrative Court of Sofia ultimately refused to follow the judgment of the Court of Justice of the European Union ("**CJEU**") (discussed in Chapter 3 below), the CJEU judgment was followed by legislative discussions in the European Parliament on the adoption of a European Certificate of Parenthood (discussed in Chapter 4 below).

In a discussion, Prof. Benjamin Moron-Puech noted that there is a close connection between legal parenthood and the right to acquire a nationality. Prof. Moron-Puech noted that the inability to acquire a nationality of one's parents due to the lack of legal parenthood can create a "fear when crossing borders", which will impact the child's "mental health and identity".<sup>100</sup> While there is certainly a stronger basis to acquire a nationality from one's parents with recognition of parenthood, it is acknowledged that there are limitations particularly concerning cross-border recognition of parenthood. There are currently no international or regional instruments requiring cross-border recognition of parenthood, and states may not readily allow for children to acquire their parents' nationality or citizenship if same-sex parenthood was recognised in a foreign jurisdiction, but not its own. This is explored further in the case discussions of *VMA* and *Minister of Home Affairs and Immigration v PL* in Chapter 3 below.

---

<sup>92</sup> Office of the United Nations High Commissioner for Human Rights ("**OHCHR**"), Legislative History of the Convention on the Rights of the Child: Volume 1, 372-374 (2007)

<sup>93</sup> CRC Article 7(2)

<sup>94</sup> CMW Committee and CRC Committee, *supra* note 72, at para 24

<sup>95</sup> See *VMA*, *supra* note 80, at para 18

<sup>96</sup> *Id.*, at para 19

<sup>97</sup> *Id.*, at para 20

<sup>98</sup> *Id.*, at para 23

<sup>99</sup> N. Kelly, Children born outside UK to British parents in same-sex couples left 'stateless', *The Guardian* (21 December 2022); but see also Opinion of Advocate General Kokott delivered on 15 April 2021, *VMA*, at para 53 (2021), which states that the Spanish government clarified at the CJEU hearing that "in the event that the child could not acquire either UK or Bulgarian nationality, she would be entitled to claim Spanish nationality".

<sup>100</sup> This discussion took place on 14 May 2024, between the author and Prof. Benjamin Moron-Puech, Professor of Law at Université Lumière Lyon 2.

## 2.4. Right to preserve family relations

The right to preserve “family relations”<sup>101</sup> encompasses the right to know one’s parents under CRC Article 7(1). It is easy to understand the need to know one’s biological and genetic parents, as the child will have inherited different characteristics, both physical and personal.<sup>102</sup> However, as mentioned in Chapter 2.2 above, the definition of parents should not be limited to those with biological and genetic linkage. The Special Rapporteur on the sale of children, child prostitution and child pornography has indicated that from the child’s perspective, “genetics, gestation and the exercise of parental authority”<sup>103</sup> all constitute elements of identity. This is especially relevant to children of same-sex parents, as rainbow families are often formed through adoption and ART, where the genetic, gestational and social parents may be different.

Under a surrogacy arrangement, this means that children should have the right to know their gestational – the birth parent; genetic – the parent(s) whose gametes were provided; and social – the parent(s) who have daily care. Meanwhile, for adoptions, children should have the right to know both their genetic and gestational – who are typically the biological parents - and their social parents, who are the adoptive parents.

It is highlighted that the right to preserve family relations goes further than the right to know one’s parents. CRC Article 8 was proposed during negotiations by Argentina in the 1980s, where members of the military junta detained and interrogated individuals, and altered children’s identities after illegally adopting them.<sup>104</sup> Against this historical background, Argentina proposed to include a provision to preserve the “personal, legal and family identity”<sup>105</sup> of children, which after modifications became CRC Article 8. In preserving children’s family relations under the context of ART arrangements and adoption, states should grant access to information about children’s origins. This is reflected in the CRC Committee’s Concluding Observations, which recommended state parties to allow “access to information about their origins”<sup>106</sup> in ART regulations and, for adoptions, to ensure that information regarding “the identity and medical history”<sup>107</sup> of biological parents are preserved and available for children to access “at the appropriate age and level of development”.<sup>108</sup> The right to know one’s family origins has also been considered by the ECtHR to be related to one’s right to privacy, which is also enshrined in CRC Article 16. In *Jäggi v Switzerland*, the ECtHR considered that the right to an identity included “the right to know one’s parentage”, which in itself is an “integral part of the notion of private life”.<sup>109</sup>

---

<sup>101</sup> CRC Article 8(1)

<sup>102</sup> J. Eekelaar, Family Law and Identity, 38 *Oxford Journal of Legal Studies*, 827 (2018)

<sup>103</sup> See HRC, *supra* note 71, at para 32

<sup>104</sup> F. Lessa, Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina between 1976 and 2010, 3 *Journal of Human Rights Practice* (2011) at 32

<sup>105</sup> OHCHR, *supra* note 92, 383

<sup>106</sup> CRC Committee, Concluding observations on the second to fourth periodic reports of Israel, adopted by the Committee at its sixty-third session (27 May – 14 June 2013), UN Doc. No. CRC/C/ISR/CO/2-4, para 34 (2013)

<sup>107</sup> CRC Committee, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Azerbaijan, UN Doc. No. CRC/C/AZE/CO/3-4, at para 55 (2012)

<sup>108</sup> *Id.*

<sup>109</sup> ECtHR, *Jäggi v. Switzerland* (Application no. 58757/00), at para 37 (13 October 2006)

In the context of children with same-sex parents, it is argued that legal parenthood plays an important role in preserving the family relations of the social parents. This is illustrated through the following three examples. First, in a male same-sex couple surrogacy arrangement, the male couple (“**Couple M**”) are the commissioning parents and social parents who take care of the child. One of Couple M may be one of the genetic parents, but neither of Couple M will be the gestational parent. The surrogate birth mother will be the gestational parent, and an egg donor will be the second genetic parent. Second, for a female same-sex couple (“**Couple F**”) donor conception arrangement by way of reciprocal IVF, one of Couple F will be the first genetic parent while the other of Couple F will be the gestational parent. A sperm donor will be the second genetic parent. Couple F also acts as the social parents of the child. Lastly, either Couple M or F may adopt a child born to biological parents – who are both the gestational and genetic parents, upon which Couple M or F become the social parents. In each of these scenarios, granting legal parenthood to the social parents is a way of formalising the relationship with the child, which forms part of their identity.

However, it is argued that legal parenthood itself is insufficient to preserve the family relations of the child’s gestational and genetic parents, as well as their medical history related to the child. In fact, certain countries fail to preserve medical history records of the gestational and/or genetic parents once they transfer their legal parenthood to the social parents. In this connection, the Special Rapporteur on the sale of children, child prostitution and child pornography has criticised “blanket enforcement of anonymity”<sup>110</sup> for gamete donors and surrogates – including practices of only recording commissioning parents on birth certificates – noting that it prevents children from having access to their origins. In the context of surrogacy arrangements, states should take measures to ensure that a collection and storage protocol is in place “to preserve in perpetuity identity information relating to all surrogacy arrangements”.<sup>111</sup> Similarly for adoptions, states should have in place an adoption register which records historical details of the birth parents and adoptive parents.

## **2.5. Overarching principles of the CRC: non-discrimination, best interests, right to be heard, right to development**

The importance of acquiring such aspects of identity is also highlighted by the overarching principles in the CRC, which are non-discrimination (Article 2), best interests of the child (Article 3), the right to life, survival and development (Article 6) and the right to be heard (Article 12).<sup>112</sup>

First and foremost, the principle of non-discrimination obliges states to respect and ensure rights of each child “without discrimination of any kind”, irrespective of their parents’ race, language or “other status”, which is a non-exhaustive category and includes parents’ sexual orientation and gender identity.<sup>113</sup> States must prohibit all forms of discrimination and takes measures to ensure that all children have “effective equal opportunities”.<sup>114</sup>

---

<sup>110</sup> See HRC, *supra* note 71, para 38

<sup>111</sup> Verona Principles, Principle 11.6

<sup>112</sup> CRC Committee, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc No. CRC/GC/2003/5, at para 12 (2003)

<sup>113</sup> CRC Committee, General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc No. CRC/C/GC/15, at para 8 (2013)

<sup>114</sup> CMW Committee and CRC Committee, Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration: General principles, at para 26 (2017)

It is also important to note that the CRC Committee has commented that the concept of 'family' within the CRC reflects varying family structures, including single-parent, common-law, adoptive families and nuclear families.<sup>115</sup> This reflects the view that the definition of 'parents' under the CRC are not restricted to heterosexual couples.<sup>116</sup> A similar rationale has been applied by the ECtHR in *X and Others v Austria*,<sup>117</sup> a case concerning same-sex second-parent adoption. The first and third applicants are in a same-sex relationship, while the second applicant is the son of the third applicant and the third applicant has sole custody of the second applicant.<sup>118</sup> The second applicant was born outside of marriage and the third applicant has sole custody of him, while the first and second applicants jointly cared for him.<sup>119</sup> The application concerns Austria's refusal to allow the first applicant to adopt the second applicant as a second parent, due to the Austrian Civil Code stipulating that "any person who adopts replaces the biological parent of the same sex".<sup>120</sup> Due to this provision, the first applicant cannot adopt the second applicant as it would sever the child's relationship with the third applicant.<sup>121</sup> This bar towards second-parent adoption did not apply to couples of the opposite sex. In arriving at its decision, the ECtHR found that there was a violation of the prohibition against discrimination<sup>122</sup> and the right to respect for private and family life.<sup>123</sup> The Court found that Austria has failed to provide a legitimate and proportionate reason as to its refusal to extend the right to same-sex couples, where the difference in treatment was based on the couples' sexual orientation.

Second, the best interests of the child shall be a primary consideration for all actions concerning children.<sup>124</sup> This principle is three-fold: it is a substantive right, interpretative principle and a procedural rule.<sup>125</sup> An example of applying the best interests principle as an interpretative principle is to interpret whether it is in the child's best interests to know the information that is preserved in relation to their family relations. Ms. Mia Dambach noted in a discussion that an individual best interests assessment is helpful when there are "conflicting interests and/or views about the child's family relations", such as those between granting legal parenthood and preserving information regarding the child's biological and gestational origins.<sup>126</sup> Ms. Dambach noted that the long-term best interests of the child must be considered together with all other rights, such as the right not to be sold, not to be discriminated and

---

<sup>115</sup> See CRC Committee, *supra* note 66, at para 2.1

<sup>116</sup> J. Tobin and R. McNair, Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?, 23 *International Journal of Law, Policy and the Family* 113 (2009)

<sup>117</sup> ECtHR, *X and Others v Austria* (Application No. 19010/07) (29 February 2013)

<sup>118</sup> *Id.*, para 10

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*, para 114; see Austrian Civil Code, Article 182 para 2

<sup>121</sup> *Id.*

<sup>122</sup> ECHR Article 14

<sup>123</sup> ECHR Article 8

<sup>124</sup> CRC Article 3(1)

<sup>125</sup> CRC Committee, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc No. CRC/C/GC/14, para 6 (2013)

<sup>126</sup> See discussions on 21 May 2024 and 27 June 2024, *supra* note 68

identity rights.<sup>127</sup> Ms. Dambach noted that an individual best interests assessment could be helpful for same-sex parenthood cases, “where there may be uncertainties and/or conflicting interests.”<sup>128</sup>

Third, children have the right to be heard in matters concerning them, with due weight given to their age and maturity.<sup>129</sup> It has been argued that the right to be heard plays a key role in children’s development and enables them to play an active role in constructing their own identity.<sup>130</sup> Fourth, children have an inherent right to life and states must ensure children’s survival and development “to the maximum extent possible”.<sup>131</sup> It has been argued that situating the right to identity under CRC Articles 7 and 8 immediately after the right to life, survival and development under CRC Article 6 highlights the significance of the right to identity “as a prerequisite for the enjoyment”<sup>132</sup> of other rights under the CRC. The right to development encompasses all stages of childhood, but also requires “changing developmental priorities”<sup>133</sup> of different age groups. In particular, early childhood is a “critical period” as these early years form the “foundation” for their personal identity.<sup>134</sup> This is particularly relevant to the right to preservation of identity including family relations, since younger children will require assistance from the state to exercise this right.<sup>135</sup> By failing to preserve medical records in the case of ART arrangements and information regarding the child’s biological origins for adoptions, it is argued that this also violates children of same sex parents’ right to development, since it affects their ability to form the foundation of their identity.

## 2.6. Concluding comments

To conclude this chapter, it is argued that legal parenthood of same-sex parents is an important step towards ensuring children’s identity rights in relation to their right to birth registration. In relation to acquisition of a nationality, while there is a stronger basis to acquire a nationality from one’s parents with recognition of parenthood, it is acknowledged that there are limitations particularly in relation to cross-border recognition of parenthood. Certain states have shown reluctance in allowing children to acquire the nationality and citizenship of their same-sex parents, should their parenthood be established in a foreign jurisdiction and not domestically. Further, legal parenthood itself is not sufficient to ensure the right to preservation of family relations, which must be coupled with states’ implementation of measures to preserve historical information. Lastly, the issue of utilising legal parenthood in furthering children’s identity rights must be considered in light of the overarching principles of the CRC. The following section will examine jurisprudence on legal recognition of parenthood and its relationship with children’s identity rights.

---

<sup>127</sup> *Id.*; CRC Articles 2, 7, 8, 35

<sup>128</sup> See discussions on 21 May 2024 and 27 June 2024, *supra* note 68

<sup>129</sup> CRC Article 12(1)

<sup>130</sup> L. Lundy *et al.*, Article 12: The Right to Respect for the Views of the Child, in J. Tobin (ed.) *The UN Convention on the Rights of the Child: A Commentary*, 399 (2019)

<sup>131</sup> CRC Article 6

<sup>132</sup> See Tobin and Todres, *supra* note 41, 282

<sup>133</sup> CRC Committee, General Comment No. 7: Implementing child rights in early childhood, UN Doc No. CRC/C/GC/7/Rev.1, at para 23 (2005)

<sup>134</sup> *Id.*, para 6

<sup>135</sup> See Tobin and Todres, *supra* note 41, 291



### 3. Jurisprudence on legal recognition of parenthood and children's identity rights

#### 3.1 Introduction

This chapter will examine jurisprudence on the legal parenthood of same-sex parents and analyse its relationship with children's identity rights, in two parts. First, sub-section 3.2 will consider international and regional jurisprudence by examining the views of the CRC Committee in a case concerning Finland, followed by two sets of cases in the European Court of Human Rights concerning the right to birth registration and acquisition of nationality (*Mennesson v France* and *K.K. and others v Denmark*) and the right to preserve family relations (*Gaskin v the UK* and *Mandet v France*). It will then consider the Court of Justice of the European Union judgment of *VMA* on the right to birth registration and to acquire a nationality. Second, sub-section 3.3 will consider domestic jurisprudence in Hong Kong (*NF v R*) and Namibia (*Minister of Home Affairs and Immigration v PL*), regarding the right to birth registration and acquisition of citizenship respectively. Hong Kong and Namibia are chosen to reflect the varying practices across different continents.

Since case law developments in this area are fact-specific, key facts of landmark cases are referred to where relevant. As jurisprudence in this area is still developing, some cases below do not involve same-sex couples and discussion is made as to how the principles from those cases are applicable to children of same-sex couples. Critique of the case reasoning will also be made where relevant.

#### 3.2 International and regional jurisprudence

##### 3.2.1 UNCRC Communications

In *A.B. v Finland*,<sup>136</sup> the CRC Committee found a violation of the child's best interests in Finland's rejection of the family's asylum claim. While this case does not concern legal parenthood, it is the first and currently only decision by the CRC Committee regarding rights of children of same-sex parents. It is therefore important to consider this decision, particularly in its application of the overarching principles of the CRC.

The communication was brought by the child, A.B., aged 8 years old at the time, before the CRC Committee under the Optional Protocol to the CRC on a communications procedure. A.B. was born and raised in Russia until he was 5 years old. A.B.'s biological mother, V.B., is a lesbian and has been in a relationship and cohabiting with her female partner, A.S.<sup>137</sup> Facing a hostile environment for the LGBTI community in Russia including aggressive attitudes from the school staff towards A.B., the family moved to Finland in 2015 when A.B. was 5 years old.<sup>138</sup> The family applied for asylum to the Finnish authorities based on "persecution and discrimination"<sup>139</sup> as a result of A.B. and V.B.'s sexual orientation. The Finnish authorities rejected the family's asylum claims, concluding that the family could be deported to Russia "without a risk of being subject to persecution".<sup>140</sup>

---

<sup>136</sup> *A.B. v Finland*, Views adopted by the CRC Committee under the Optional Protocol to the CRC on a communications procedure, concerning communications No. 51/2018, UN Doc No. CRC/C/86/D/51/2018 ("A.B.")

<sup>137</sup> *Id.*, at para 2.1

<sup>138</sup> *Id.*, at para 2.2 to 2.3

<sup>139</sup> *Id.*, at para 2.3

<sup>140</sup> *Id.*, at para 2.6

The CRC Committee found that Finland failed to undertake a “proper assessment of the best interests of the child”<sup>141</sup> in considering A.B.’s asylum application. The CRC Committee took a “procedural approach” to CRC Article 3 here, by examining the “quality of reasoning” of state authorities.<sup>142</sup> It found that a best interests assessment must be conducted in an “age-sensitive and gender-sensitive manner”, include respect for the child’s right to be heard, and that due weight must be given to the child’s views.<sup>143</sup> It is important to consider such principles in examining the relationship between legal parenthood and identity rights in cases below.

### 3.2.2 European Court of Human Rights

#### 3.2.2.1 *Menesson v France and the advisory opinion*

*Menesson v France*<sup>144</sup> concerns France’s refusal to recognise the legal parenthood of intended parents regarding twins born through cross-border surrogacy arrangements. The ECtHR found that French authorities’ refusal to recognise this legal parenthood amounted to a violation of the children’s right to respect for their private life under Article 8 of the ECHR.<sup>145</sup> While this case concerns heterosexual parents, it “established important principles”<sup>146</sup> on cross-border surrogacy which affects recognition of legal parenthood for children of same-sex parents.

The first and second applicants are husband and wife who live in France and entered into a gestational surrogacy agreement in California where it is legal.<sup>147</sup> The gametes of the first applicant were used together with a donor egg, where the fertilised embryos were implanted in the uterus of the surrogate mother.<sup>148</sup> The applicants noted that the surrogate mother “was not remunerated but merely received expenses”, in accordance with the law in California.<sup>149</sup> In March 2000, the surrogate mother was found to be carrying twins.<sup>150</sup> The Supreme Court of California ruled on 14 July 2000 that the first applicant will be the “genetic father” and the second applicant the “legal mother”, and that the first and

---

<sup>141</sup> *Id.*, at para 12.2

<sup>142</sup> M. Sormunen, The risk of a child being subjected to irreparable (psychological) harm when returned to an environment hostile to LGBTI families and a deficient best interests consideration in asylum proceedings, Leiden Children’s Rights Observatory (2021)

<sup>143</sup> See *A.B.*, *supra* note 141

<sup>144</sup> European Court of Human Rights, *Menesson v France* (Application no. 65192/11) (“*Menesson*”) (26 June 2014, revised 26 September 2014)

<sup>145</sup> *Id.*, para 101. Article 8 of the ECHR states that: “(1) Everyone has the right to respect for his private and family life, his home and his correspondence”, and “(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country [...]”

<sup>146</sup> L. Bracken, Accommodations of private and family life and non-traditional families: the limits of deference in cases of cross-border surrogacy before the European Court of Human Rights, 32 *Medical Law Review*, 146 (2024)

<sup>147</sup> See *Menesson*, *supra* note 144, at paras 6, 8

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*, at para 9

second applicants should be recorded as father and mother in the children's birth certificates.<sup>151</sup> The surrogate mother gave birth to the children, who were the third and fourth applicants, in October 2000 and the children's birth certificates were issued in California in accordance with the directions of the Supreme Court of California.<sup>152</sup> However, the family's request to register the particulars of the Californian birth certificate in France, including the legal parenthood of the first and second applicants, were rejected by French authorities.<sup>153</sup> The applicants' appeals in French domestic courts over several years were dismissed in April 2011, after which they brought the case to the ECtHR in October 2011.<sup>154</sup>

There are two aspects which are relevant to the relationship between legal parenthood and safeguarding of children's identity rights, particularly in relation to ART arrangements carried out by same-sex families. The first aspect concerns the refusal of French authorities to recognise the Californian court judgment and record details of the Californian birth certificates. The ECtHR found that this affects the children, as the right to respect for private life means that all individuals should be able to "establish the substance of his or her identity", which includes the "legal parent-child relationship".<sup>155</sup> Further, the ECtHR found that it is against the children's interests to be deprived of their legal relationship with the first applicant, since the biological relationship has already been established.<sup>156</sup> It has been observed that the ECtHR took a "child-centred approach" which considered "precisely" the best interests of the child.<sup>157</sup>

The second aspect relates to the child's right to acquisition of nationality. The ECtHR held that while ECHR Article 8 "does not guarantee a right to acquire a particular nationality, the fact remains that nationality is an element of a person's identity".<sup>158</sup> However, there was uncertainty towards the children's acquisition of the French nationality, since at least one parent must be French for a child to acquire French nationality according to the French Civil Code and that France has failed to recognise the legal parenthood.<sup>159</sup> This uncertainty is present as, while the first applicant is French and biologically related to the children, he is not recognised as the legal parent in France. The ECtHR found that this uncertainty will lead to "negative repercussions on the definition of [the children's] personal identity".<sup>160</sup>

The ECtHR issued its advisory opinion which explores the legal parenthood of a genetically unrelated intended mother<sup>161</sup> in a surrogacy arrangement (the "**Advisory Opinion**"), five years after the *Menesson* judgment. The advisory opinion found that the non-recognition of this mother-child

---

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*, at para 10

<sup>153</sup> *Id.*, at para 12

<sup>154</sup> *Id.*, at para 27

<sup>155</sup> *Id.*, at para 99

<sup>156</sup> *Id.*, at para 100

<sup>157</sup> K. Lemmens, Cross-border surrogacy and the European Convention on Human Rights: The Strasbourg Court caught between "*fait accompli*", "*ordre public*", and the best interest of the child, 42 *Netherlands Quarterly of Human Rights*, 179 (2024)

<sup>158</sup> *Id.*, para 97

<sup>159</sup> French Civil Code, Article 18

<sup>160</sup> See *Menesson*, *supra* note 144, at para 97

<sup>161</sup> In *Menesson*, this refers to the second applicant.

relationship negatively impacts on children's right to respect for private life, including being placed in a "position of legal uncertainty regarding his or her identity".<sup>162</sup> It found that states should provide a "possibility" of recognising the legal parent-child relationship, as an "absolute impossibility"<sup>163</sup> is against the child's best interests. States are given a "margin of appreciation"<sup>164</sup> on the means of recognition, but must produce "similar effects to registration"<sup>165</sup> of foreign birth particulars. The Advisory Opinion is important for ART arrangements carried out by rainbow families, as often only one member of a couple provide their gametes.<sup>166</sup> The Advisory Opinion clearly states that legal parenthood of the genetically unrelated parent – regardless of the means of recognition – is important towards realising the child's identity rights, in particular their right to birth registration. The Advisory Opinion and the *Menesson* judgment were both referred to in *K.K. and others v Denmark* below.

### 3.2.2.2 *K.K. and others v Denmark*

*K.K. and others v Denmark*<sup>167</sup> ("**KK**") concerns Denmark's refusal to allow step-parent adoption by the first applicant, the intended mother of children – the second and third applicants – born through a surrogacy arrangement in Ukraine.<sup>168</sup> The surrogacy arrangement was commissioned by the first applicant together with her husband.<sup>169</sup> The husband was the biological father, while the first applicant was not genetically related to the children.<sup>170</sup> Both the first applicant and her husband were named as the parents of the children on the Ukrainian birth certificates.<sup>171</sup> The children were granted Danish nationality because the father's parenthood was recognised in Denmark.<sup>172</sup> However, despite the Ukrainian birth certificate, the first applicant's parenthood was not recognised in the Denmark as only the birth mother is regarded as the legal parent under Danish law.<sup>173</sup> The first applicant and her husband were granted joint custody in Denmark.<sup>174</sup> However, the first applicant's application for step-parent adoption was refused since the surrogate mother "had been paid to consent to adoption", which was contrary to Danish domestic adoption laws.<sup>175</sup>

The ECtHR found, by a vote of 4 to 3, that there was a violation of the children's right to respect for private life under ECHR Article 8. The judgment reiterated the finding in *Menesson's* Advisory Opinion that the non-recognition of the children's parent-child relationship with the first applicant

---

<sup>162</sup> ECtHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Request no. P16-2018-001 (the "**Advisory Opinion**"), at para 40 (10 April 2019)

<sup>163</sup> *Id.*, at para 42

<sup>164</sup> See Bracken, *supra* note 146, at 147

<sup>165</sup> See *Menesson*, *supra* note 144, at para 53

<sup>166</sup> See *supra* sub-section 1.3

<sup>167</sup> ECtHR, *K.K. and others v Denmark* (Application no. 25212/21) (6 December 2022, revised 6 March 2023)

<sup>168</sup> *Id.*, at para 1

<sup>169</sup> *Id.*, at para 5

<sup>170</sup> *Id.*, at para 6

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*, at para 8

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*, at para 11

placed the children “in a position of legal uncertainty regarding their identity within society”.<sup>176</sup> The court found that it was “clearly”<sup>177</sup> in the children’s best interests to obtain the same parenthood status with the first applicant as with their father. It is clear that this judgment affirms the principle in *Menesson* and the Advisory Opinion that legal parenthood safeguards aspects of the child’s identity. The facts of the case are relevant to same-sex couples, as often only one member is biologically related to the child in surrogacy arrangements and legal parenthood – in any mechanism which produced “similar effects to registration”<sup>178</sup> of foreign birth particulars, may be necessary for the child’s birth registration or acquisition of a nationality.

However, the decision of *KK* has been criticised. It has been noted that the ECtHR has misinterpreted the best interests of the child principle in its judgment.<sup>179</sup> It has been criticised that the majority judgment failed to consider the best interests principle in light of the child’s right not to be sold and right to preservation of their identity.<sup>180</sup> It has also been noted that the ECtHR’s approach reduces the best interests assessment in domestic adoptions to a “tokenistic gesture”.<sup>181</sup> Nevertheless, it should be highlighted that *KK* – by citing the reasoning in the Advisory Opinion – held that states are only required to have in place a mechanism which produces “similar effects to registration”<sup>182</sup> of foreign birth particulars,<sup>183</sup> thereby highlighting the importance of legal parenthood in safeguarding identity rights of children.

### 3.2.2.3 *Gaskin v the UK and Mandet v France*

*Gaskin v the UK*<sup>184</sup> (“**Gaskin**”) and *Mandet v France*<sup>185</sup> (“**Mandet**”) are key judgments which relate to the right to preserve the child’s family relations. The applicant in *Gaskin* was placed with various foster parents during his childhood. At the age of 18, the applicant contended that he was “ill-treated” in foster care and applied to local authorities to access his care records to find out “where he was kept...by whom and in what conditions”.<sup>186</sup> The applicant was not granted access to his full case records by the state as consent has not been provided by all contributors to the applicant’s case records.<sup>187</sup> Ultimately, the ECtHR found that the state’s refusal to provide the case records violated ECHR Article 8. It agreed with the European Commission’s finding that the respect for private life

---

<sup>176</sup> *Id.*, at para 72, citing Advisory Opinion, *supra* note 162

<sup>177</sup> *Id.*, at para 74

<sup>178</sup> See *Menesson*, *supra* note 144, at para 53

<sup>179</sup> K. Trimmings *et al.*, ECtHR and cross-border surrogacy arrangements: *K.K. and others v. Denmark* – Legal memorandum, Child Identity Protection, 1 (2023)

<sup>180</sup> *Id.*; CRC Articles 8 and 35

<sup>181</sup> See Bracken, *supra* note 146, at 152

<sup>182</sup> See *Menesson*, *supra* note 144, at para 53

<sup>183</sup> See Bracken, *supra* note 146, at 153. See also ECtHR, *Case of Valdís Fjölnisdóttir and Others v Iceland* (Application no. 71552/17) (18 May 2021, revised 18 August 2021), where the court found no violation of ECHR Article 8 when Iceland recognised the parent-child relationships by a foster care arrangement.

<sup>184</sup> ECtHR, *Gaskin v the UK* (Application No. 10454/83) (7 July 1989)

<sup>185</sup> ECtHR, *Mandet v France* (Application no. 30955/12) (14 January 2016)

<sup>186</sup> See *Gaskin*, *supra* note 184, at paras 10, 11

<sup>187</sup> *Id.*, at para 7

means that all individuals “should be able to establish details of their identity”<sup>188</sup> and authorities should not obstruct the obtaining of the requested information without specific reason. It established the principle that individuals in a similar situation have a strong interest in obtaining the “information necessary to know and to understand their childhood and early development”, and are protected by the ECHR.<sup>189</sup>

A similar line of reasoning followed in *Mandet*, albeit with vastly different circumstances and results. The first two applicants, Mr. and Mrs. Mandet, had a 10-year marriage before their divorce.<sup>190</sup> During their divorce, Mrs. Mandet gave birth to the third applicant.<sup>191</sup> Mr. and Mrs. Mandet later continued their relationship and the legal parenthood between Mr. Mandet and the third applicant was recognised on the third applicant’s birth certificate.<sup>192</sup> A few years later, a Mr. Glouzmann applied to the Nanterre High Court to quash the recognition of legal parenthood in favour of Mr. Mandet based on Mr. Glouzmann’s genetic link with the third applicant.<sup>193</sup> The Nanterre High Court appointed an ad hoc guardian to act on behalf of the third applicant in the proceedings, however they never met each other as the third applicant was not in France.<sup>194</sup> While the third applicant wrote letters to the trial judge expressing his wishes to maintain the parental status quo with Mr. Mandet, the Nanterre High Court ultimately ordered that Mr. Glouzmann be entered as the legal father on the third applicant’s birth certificate and quashed Mr. Mandet’s legal parenthood.<sup>195</sup> The third applicant was around 9 years old by the time the Nanterre High Court delivered its judgment.<sup>196</sup>

The ECtHR found that France did not violate ECHR Article 8. The French government argued that a child’s knowledge of their origins is “essential”<sup>197</sup> to constructing their identity. The ECtHR noted that the Nanterre High Court had given sufficient weight to the best interests of the child, which was to “know the truth about its origins”<sup>198</sup> despite the child expressing his wishes to maintain the parental status quo with Mr. Mandet. While the ECtHR acknowledged that the alteration of the parent-child relationship caused an interference to the third applicant, it found that the interference was proportionate.<sup>199</sup>

However, it is argued that in the context of children with same-sex parents, establishing legal parenthood similar to the manner in *Mandet* does not necessarily protect the child’s right to preserve family relations. Same-sex couples may not necessarily be genetically related to children, and introducing the child to their origins through a change in legal parenthood may not be in the child’s best interests. The Child Rights International Network (“**CRIN**”) has criticised the *Mandet* decision for

---

<sup>188</sup> *Id.*, at para 39

<sup>189</sup> *Id.*, at para 49

<sup>190</sup> See *Mandet*, *supra* note 185, at para 8

<sup>191</sup> *Id.*, at para 9

<sup>192</sup> *Id.*, at para 10

<sup>193</sup> *Id.*, at para 12

<sup>194</sup> *Id.*, at para 55

<sup>195</sup> *Id.*, at paras 14, 55

<sup>196</sup> *Id.*, at paras 9, 13

<sup>197</sup> *Id.*, at para 38. Note: This is an English translation from the original judgment delivered in French.

<sup>198</sup> *Id.*, at para 56.

<sup>199</sup> *Id.*, at paras 45, 58

being “inconsistent”<sup>200</sup> with the CRC, noting that the child’s right to know their parents must be interpreted in accordance with the overarching principles of the CRC. CRIN specifically highlighted that, in assessing a child’s best interests, there must be respect for the child’s right to express their views freely, with “due weight given”<sup>201</sup> in accordance with the child’s evolving capacities. At the age of 9, the third applicant in *Mandet* is clearly able to express his views to “maintain his paternal affiliation”<sup>202</sup> with Mr. Mandet. It is argued that, in this case, the child’s right to know his parents can be exercised by other methods which respect the child’s views. This could be, for example, arranging a meeting between the child and the biological father.

### 3.2.3 Court of Justice of the EU

This sub-section discusses the CJEU decision of *V.M.A. v Stolichna obshtina (“VMA”)*,<sup>203</sup> which explores both the rights of birth registration and acquisition of nationality for children with same-sex parents. The key facts of the case in the domestic context have been explained in sub-section 2.3 above. The case was referred to the CJEU by the Sofia Administrative Court to – among other reasons – seek clarity on whether Bulgaria must issue the birth certificate indicating two females as the legal mothers, which was certified in the child’s Spanish birth certificate.<sup>204</sup> This issue was posed in light of the fact that one of the mothers was a Bulgarian national and the public policy in Bulgaria which does not allow for same-sex marriages.<sup>205</sup> The refusal to issue a birth certificate meant that the child faced challenges in obtaining a Bulgarian identity document, which hindered the “child’s exercise of the right of free movement”.<sup>206</sup>

There are three aspects which are relevant to the present analysis. First, the CJEU found that the child has Bulgarian nationality by operation of domestic law, therefore the state’s refusal to issue a birth certificate did not mean that the child was “denied Bulgarian nationality”.<sup>207</sup> Second, the CJEU held that, since Spain had established the parent-child relationship and acknowledged it in the child’s birth certificate, Bulgaria is required to recognise the parent-child relationship for the purposes of allowing the child to exercise “her right to move and reside freely” within the EU,<sup>208</sup> “with each of her two parents”.<sup>209</sup> It noted that this “does not undermine the national identity” nor is a threat to the public policy of Bulgaria. Third, the CJEU noted that Bulgaria is obliged to issue to the child “an identity card or a passport” without requiring a birth certificate to be issued beforehand.<sup>210</sup>

It is argued that this decision highlights the importance of legal parenthood in safeguarding the right to birth registration and acquiring a nationality for children with same-sex parents. In arriving at its

---

<sup>200</sup> Child Rights International Network, *Mandet v France*, <https://archive.crin.org/en/library/legal-database/mandet-v-france.html>, last visited (12-06-2024)

<sup>201</sup> See CRC Committee, General Comment No. 14, *supra* note 125

<sup>202</sup> See *Mandet*, *supra* note 185, at para 55

<sup>203</sup> See *VMA*, *supra* note 80

<sup>204</sup> *Id.*, at para 32

<sup>205</sup> *Id.*, at para 23

<sup>206</sup> *Id.*, at para 26

<sup>207</sup> *Id.*, at para 25

<sup>208</sup> As guaranteed by the Treaty on the Functioning of the European Union, Article 21.

<sup>209</sup> See *VMA*, *supra* note 80, at para 49

<sup>210</sup> *Id.*, at para 69

decision, the CJEU specifically referred to CRC Article 7 regarding the right to birth registration and acquisition of a nationality without discrimination, “including discrimination on the basis of the sexual orientation of the child’s parents”<sup>211</sup> and the best interests of the child.<sup>212</sup> However, it must be noted that this decision requiring cross-border recognition of parenthood is only limited to one aspect of rainbow families, which is free movement within the European Union.<sup>213</sup> Further, it is argued that Bulgaria’s refusal to issue a birth certificate does affect the child’s right to acquire a nationality. While the CJEU interpreted the Bulgarian law to conclude that the child has Bulgarian nationality, in practice, the child is unable to exercise her identity rights as a national without an identity document.

Additionally, following the CJEU decision, the Supreme Administrative Court of Bulgaria delivered its final judgment noting that the child is not a Bulgarian citizen as the biological link between the child and the Bulgarian national mother cannot be established.<sup>214</sup> Ultimately, a Bulgarian birth certificate was not issued for the child.<sup>215</sup> It is contended that, since the recognition of the parent-child relationship was still a matter of national law for Bulgaria which discriminated against same-sex couples, it is still “incredibly difficult”<sup>216</sup> for the child to access “local services, benefits, rights and duties”<sup>217</sup> due to the child’s inability to fully exercise her rights of birth registration and acquisition of nationality. In a study on cross-border recognition of parenthood in the EU, it has been recommended that the European Commission should “take enforcement action” against Bulgaria for failing to comply with its obligations.<sup>218</sup>

### 3.3 Domestic jurisprudence

#### 3.3.1 Hong Kong

*NF v R*<sup>219</sup> is a landmark case in Hong Kong concerning legal parenthood of same-sex parents and its connection with the child’s right to birth registration. It is the first case where a Hong Kong court granted a declaration that a genetic mother in a reciprocal IVF arrangement carried out by a lesbian couple was a “parent”<sup>220</sup> at common law. The case concerns B and R, a female same-sex couple who are both Hong Kong permanent residents. B and R got married in South Africa in 2019, and underwent a reciprocal IVF procedure in South Africa in 2020.<sup>221</sup> R’s egg was fertilised with sperm from an anonymous donor and the resultant embryo was implanted in B’s uterus.<sup>222</sup> In 2021, B gave

---

<sup>211</sup> *Id.*, at para 64

<sup>212</sup> *Id.*, at para 59

<sup>213</sup> L. Bracken, Recognition of LGBTQI+ parent families across European borders, 29 *Maastricht Journal of European and Comparative Law*, 403 (2022)

<sup>214</sup> Administrative case No. 6746/2022, *supra* note 80

<sup>215</sup> *Id.*

<sup>216</sup> See Bracken, *supra* note 213, 404

<sup>217</sup> *Id.*

<sup>218</sup> A. Tryfonidou, Cross Border Legal recognition of Parenthood in the EU, European Parliament Policy Department for Citizens’ Right and Constitutional Affairs, 12 (2023)

<sup>219</sup> *NF v R (Secretary for Justice, Intervener)* [2023] 6 HKC

<sup>220</sup> *Id.*, at para 161

<sup>221</sup> *Id.*, at paras 2, 3

<sup>222</sup> *Id.*, at para 4



birth to the child, K, in Hong Kong.<sup>223</sup> On the child's birth certificate issued by the Births and Deaths Registry, only B was identified as the 'mother' of K with details of the 'father' marked with asterisks.<sup>224</sup> The court application, brought by B as K's next friend, sought a declaration that R is the child's parent.<sup>225</sup>

There are three aspects relevant for discussion. First, the court did not grant the declaration sought due to constraints in the wording of legislation. In the relevant domestic legislation regulating parenthood relating to births from medical treatment,<sup>226</sup> all references to parents used the "gender specific terms" of "father and mother",<sup>227</sup> which reflects the position in Hong Kong where only heterosexual couples have the right to marriage.<sup>228</sup> The Parent and Child Ordinance ("PCO") also makes it clear that only the gestational mother "is to be regarded as the mother for all purposes".<sup>229</sup> Second, the court acknowledged that K is discriminated as he lacks a co-parent simply because of R's gender and B and R's sexual orientation.<sup>230</sup> The gender-specific language in the PCO fails to uphold its legislative intent to ensure "legal equality for all children, regardless of the marital status of their parents".<sup>231</sup> The court noted that there was a "lacuna in the legislation"<sup>232</sup> which should be rectified by the legislature. Third, since the court could not grant a declaration under statute, the learned judge noted that "doing the best I can", made a declaration that R was "a parent of K at common law".<sup>233</sup> The court did not elaborate on the consequential effect on the common law declaration, such as including R's name in K's birth registration records.

In a discussion, Mr. Azan Marwah commented that the declaration that R was a parent at common law in itself is insufficient to safeguard K's identity rights.<sup>234</sup> However, Mr. Marwah noted that this declaration "is a starting point", but the substance "must come from other aspects of the law including birth registration, identity documents and nationality".<sup>235</sup> While it does not automatically lead to an inclusion of R's name in K's birth registration records, it is argued here that the parental declaration in common law is a step forward in the Hong Kong context to ensure that particulars of the child's both parents are registered. This finding is made considering that the definition of parents should not be limited to a "traditional conception" and should include the genetic parent.<sup>236</sup>

---

<sup>223</sup> *Id.*, at para 5

<sup>224</sup> *Id.*, at para 6

<sup>225</sup> *Id.*, at para 10

<sup>226</sup> Part V of Parent and Child Ordinance (Cap 429 of the Laws of Hong Kong) ("PCO")

<sup>227</sup> See *NF v R*, *supra* note 219, at para 101

<sup>228</sup> Hong Kong Bill of Rights, Article 19(2)

<sup>229</sup> See PCO, *supra* note 226, section 9(1)

<sup>230</sup> See *NF v R*, *supra* note 219, at para 124

<sup>231</sup> The Law Reform Commission of Hong Kong, Report on Illegitimacy, para 6.1 (1991), cited in *NF v R*, *supra* note 219, para 120

<sup>232</sup> See *NF v R*, *supra* note 219, at para 145

<sup>233</sup> *Id.*, at para 161

<sup>234</sup> This discussion took place on 11 June 2024, between the author and Mr. Azan Marwah, a barrister practising in Hong Kong who represented R in *NF v R*.

<sup>235</sup> *Id.*

<sup>236</sup> See Tobin and Seow, *supra* note 71

### 3.3.2 Namibia

*Minister of Home Affairs and Immigration v PL*<sup>237</sup> (“**PL**”) was heard in the Supreme Court of Namibia and deals with the acquisition of citizenship by descent for a child born through a surrogacy arrangement. The CRC Committee has discussed the right to confer citizenship in close connection with the preservation of children’s identity, including nationality.<sup>238</sup> The case concerned a surrogacy arrangement commissioned by a male same-sex married couple, who are a Namibian citizen, PL, and Mexican national respectively.<sup>239</sup> The surrogacy arrangement was endorsed by the Western Cape High Court, and the child was issued a birth certificate by South African authorities.<sup>240</sup> However, the Namibian Minister of Home Affairs and Immigration (the “**Minister**”) refused to approve the application for the child’s Namibian citizenship as PL did not respond to the minister’s request to provide proof that he is biologically related to the child.<sup>241</sup> The Minister made this request after learning that PL is in a same-sex marriage.<sup>242</sup>

PL succeeded in the Windhoek High Court, where the court ordered the Minister to issue a certificate of citizenship, noting that it is in the child’s best interests to take up such citizenship. The High Court was satisfied with PL’s parenthood, in light of the child’s South African birth certificate and court-sanctioned surrogacy agreement.<sup>243</sup> However, the Supreme Court overturned the High Court decision on a technicality. The Supreme Court accepted the Minister’s point that citizenship cannot be granted to the child as the prerequisite to register the birth in accordance with the Namibian Citizenship Act “at a Namibian diplomatic mission or a trade representative abroad”, or in Namibia within one year or an otherwise approved period has not been met.<sup>244</sup> Ultimately, the Supreme Court set aside the High Court order.<sup>245</sup>

It is argued that by adopting a technical approach that strictly follows the procedural prerequisites, the Supreme Court judgment fails to consider the child’s identity rights by failing to grant his citizenship by descent and discriminates against the parents’ sexual orientation. Speaking to journalists after the judgment was delivered, PL noted that the judgment was a way of frustrating individuals who did not have “full access to equality” with “bureaucratic procedural matters”.<sup>246</sup> LGBTI activist Linda Baumann

---

<sup>237</sup> *Minister of Home Affairs and Immigration v PL*, Case No. SA 96/2021, Supreme Court of Namibia (20 March 2023)

<sup>238</sup> CRC Committee, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Oman, UN Doc. No. CRC/C/OMN/CO/2, at para 31 (2006)

<sup>239</sup> See *PL*, *supra* note 237, at para 1

<sup>240</sup> *Id.*, at para 4

<sup>241</sup> *Id.*, at para 18

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*, at para 22

<sup>244</sup> Namibian Citizenship Act 14 of 1990, section 2; See *PL*, *supra* note 237, at para 46

<sup>245</sup> *Id.*, at para 49

<sup>246</sup> Rédaction Africanews and AFP, Son of Namibian gay couple in citizenship limbo after court ruling, Africanews, <https://www.africanews.com/2023/03/21/son-of-namibian-gay-couple-in-citizenship-limbo-after-court-ruling/>, last visited (28-06-2024)

saw the judgment as taking “ten steps back”<sup>247</sup> for the Namibian LGBTI community, while PL’s lawyer Uno Katjipuka commented that the Supreme Court only referred to technicalities and chose not to deal with the merits, although the court had an opportunity to.<sup>248</sup> It is hoped that the Supreme Court can in the future affirm the principles in the High Court judgment, which in essence emphasises the importance of legal parenthood in preserving the child’s identity in connection to his citizenship.

## 4. Future directions

### 4.1 Introduction

This chapter sets out to examine future directions to ensure that children’s identity rights are safeguarded through legal parenthood and other ancillary measures. First, sub-section 4.2 will focus on current developments of potential instruments to regulate cross-border recognition of parenthood internationally and regionally. This issue is relevant to all three aspects of children with same sex parents’ identity discussed above. Internationally, this will involve examining the Parentage/Surrogacy Project of the Hague Conference on Private International Law (“**HCCH**”), which discusses the potential development of international instruments on legal parentage. Regionally, the European Commission’s proposal for a European Certificate of Parenthood to allow for cross-border recognition of parenthood across the EU will be examined. While such developments pertain to children and families generally, the analysis below will specify their specific application to children of same-sex families. Second, sub-section 4.3 will examine recommendations for domestic measures for realising identity rights of children with same-sex parents.

### 4.2 Cross-border recognition of parentage

#### 4.2.1 Analysis of the HCCH Parentage/Surrogacy Project

The HCCH Parentage/Surrogacy Project grew out of a study on private international law issues surrounding children, particularly on the issue of recognising parent-child relationships.<sup>249</sup> As mentioned in sub-section 1.4 above, the HCCH uses the term ‘parentage’ to refer broadly to all “parent-child relationship established in law”, from which key “rights and obligations are derived”.<sup>250</sup> For consistency, this sub-section will use the term ‘parentage’ to refer to the same.

The HCCH Experts’ Group on Parentage/Surrogacy (the “**Experts’ Group**”) explored the feasibility of creating two international instruments regarding legal parentage, including one convention on “legal parentage in general” and one protocol on legal parentage specifically arising out of an “international surrogacy arrangement”.<sup>251</sup> If successfully concluded, this would be the first international instruments

---

<sup>247</sup> V. Angula, Namibia Supreme Court Rules Against Same-Sex Couple in Citizenship Case, Voice of America, <https://www.voanews.com/a/namibia-supreme-court-rules-against-same-sex-couple/7014699.html> (21 March 2023, retrieved 28 June 2024)

<sup>248</sup> *Id.*

<sup>249</sup> See HCCH, *supra* note 35, at para 7

<sup>250</sup> *Id.*, at para 15

<sup>251</sup> *Id.*, at para 2. Note: A Working Group has been formed in 2023, which has been mandated to explore the possibility of exploring the provisions under one instrument, and later the possibility of two instruments if necessary. See HCCH, Working Group on Parentage / Surrogacy: Report of the first meeting (from 13 to 17

regulating cross-border parentage and surrogacy. While it has been noted that the creation of such instruments is still “a long way off” due to “polarised views”<sup>252</sup> regarding surrogacy among different jurisdictions, this sub-section will provide an analysis of the current discussions.

The Experts’ Group worked with the aim to provide “greater predictability, certainty and continuity of legal parentage” for all individuals including the human rights of children as enshrined in the CRC, particularly to have children’s best interests to be taken as a primary consideration.<sup>253</sup> The project aims at harmonising rules on legal parentage to avoid “limping parentage across borders”, which creates consequential problems for children.<sup>254</sup> Mr. Azan Marwah commented in a discussion that it is “absolutely useful”<sup>255</sup> to have a compatible instrument on parentage and surrogacy to achieve certainty. However, Mr. Marwah also noted that because parentage and surrogacy has a “significant relationship with sexual orientation, it is a big political football”<sup>256</sup> making it difficult for states to come to an agreement. He noted that it is important for UN human rights bodies to “deal with sexual orientation discrimination”; and alternatively, the HCCH Parentage/Surrogacy conventions have to be “as neutral as possible” on sexual orientation for states to come to an agreement.

The Experts’ Group agreed on certain common elements across the two instruments, of which two aspects are relevant here. First, the Experts’ Group agreed that, to be feasible, both instruments should only include rules regarding legal parentage and exclude rights and obligations that flow from it, such as nationality rights.<sup>257</sup> Considering states’ varying attitudes towards rights and obligations flowing from legal parentage,<sup>258</sup> it is agreed that the exclusion of such rights and obligations would increase the likelihood of states’ agreement to the instruments. Second, the Experts’ Group agreed that legal parentage for a child should be recognised regardless of whether the parents are married.<sup>259</sup> Considering that currently only 36 countries have legalised same-sex marriage,<sup>260</sup> this measure can increase the likelihood of granting legal parentage to children of same-sex parents globally, without requiring states to endorse same-sex marriage. Ultimately, this safeguards the identity rights of such children, particularly in the aspects of birth registration and acquisition of a nationality.

#### 4.2.1.1 *Convention on legal parentage in general*

Regarding the possible convention on legal parentage in general, there are three relevant aspects. First, regarding the scope of the convention, most members of the Experts’ Group agreed that the

---

November 2023), para 2 (2023). To identify the issues highlighted by the Experts’ Group, this sub-section will analyse the findings of the Experts’ Group under the two separate instruments.

<sup>252</sup> See Bracken, *supra* note 19, 234

<sup>253</sup> See HCCH, *supra* note 35, at para 5

<sup>254</sup> HCCH, Report of the Experts’ Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019), at para 4 (2019)

<sup>255</sup> See discussion on 11 June 2024, *supra* note 234

<sup>256</sup> *Id.*

<sup>257</sup> See HCCH, *supra* note 35, at para 23

<sup>258</sup> As exemplified in the decisions of *VMA* (*supra* sub-section 3.2.3) and *PL* (*supra* sub-section 3.3.2) regarding birth registration, nationality and citizenship.

<sup>259</sup> See HCCH, *supra* note 35, at para 28

<sup>260</sup> ILGA World Database, Legal Frameworks: Same-Sex Marriage and Civil Unions, <https://database.ilga.org/same-sex-marriage-civil-unions>, last visited (30-06-2024)

convention should cover domestic adoptions, since it is a method of establishing legal parentage.<sup>261</sup> The HCCH 1993 Intercountry Adoption Convention only covers intercountry adoptions where a child habitually resident in a state of origin is adopted by adoptive parents habitually resident in the receiving state and moves to the receiving state.<sup>262</sup> Currently, there is no international instrument that regulates domestic adoptions, meaning that there is no guarantee that an adoption order granted by one jurisdiction – including its legal consequences – will be recognised in another jurisdiction.<sup>263</sup> By covering domestic adoptions, the convention can ensure that legal parentage of children with same-sex parents formalised through domestic adoptions can be mutually recognised by states when families move across borders.

Second, the Expert Group has suggested establishing rules providing for recognition of legal parentage (i) with or without a judicial decision and (ii) from a public document. The above measures protect children against losing legal parentage – and their consequential identity rights – as a result of the destination jurisdiction not granting legal parentage due to any public policies that discriminate against the marital status or sexual orientation of children’s parents. Third, the Expert Group briefly discussed whether or not to include a provision obliging states to preserve and access information, in a similar manner to Article 30 of the 1993 Intercountry Adoption Convention.<sup>264</sup> However, only some experts considered that it should be included, and the Expert Group did not arrive at a conclusion on its inclusion. It is argued here that this provision should be included, as the granting and recognition of legal parentage by itself is insufficient to comprehensively preserve family relations of children with same-sex parents.

#### 4.2.1.2 Protocol on legal parentage arising out of an ISA

Regarding the potential protocol on legal parentage arising out of an international surrogacy arrangement (“ISA”), the Expert Group has observed that it would only be useful for states if it “affirmatively addressed human rights”<sup>265</sup> and included uniform safeguards. The Expert Group has identified two possible approaches to address legal parentage in this context: the *a priori* and *a posteriori* approaches.<sup>266</sup>

The *a priori* approach requires involvement from respective authorities where the surrogate mother and commissioning parents are habitually resident from before the ISA is concluded, until legal parentage is recognised.<sup>267</sup> This approach would include a “cooperation mechanism” to ensure compliance with uniform safeguards before legal parentage can be established from the ISA.<sup>268</sup> Meanwhile, the *a posteriori* approach allows for recognition of legal parentage arising out of an ISA by

---

<sup>261</sup> See HCCH, *supra* note 35, at para 35

<sup>262</sup> HCCH Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption, Article 2(1)

<sup>263</sup> C. Ragni, Cross-Border Recognition of Adoption: Rethinking Private International Law from a Human Rights Perspective, in E. Bergamini and C. Ragni (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families*, 211 (2019)

<sup>264</sup> See HCCH, *supra* note 35, para 74

<sup>265</sup> *Id.*, at para 83

<sup>266</sup> *Id.*, at paras 87 to 92

<sup>267</sup> *Id.*, at para 87

<sup>268</sup> *Id.*

operation of law, without a mechanism for cooperation of state authorities.<sup>269</sup> This approach recognises legal parentage upon the satisfaction of elements, including rule of recognition and uniform safeguards.<sup>270</sup>

It is contended that a protocol adopting the *a priori* approach is most suited to safeguarding the identity rights of children with same-sex parents, while mitigating the risks of surrogacy related to the sale, exploitation and trafficking in children. It is acknowledged by many in the Expert Group that this approach would “likely best protect the human rights of all involved”.<sup>271</sup> By involving state authorities before the conclusion of the ISA until legal parentage is granted, states can verify the satisfaction of uniform safeguards including consent, eligibility and suitability of the surrogate mother and commissioning parents, while ensuring preservation and access of information related to the child’s origins.<sup>272</sup> These safeguards are necessary to prevent surrogacy practices amounting to sale of children, while respecting that children’s identity rights should not be impacted by their method of birth. It is also consistent with the Verona Principles – in particular principles 6, 7, 8, 10 and 11 – and CRC Article 8(1) on preservation of the child’s family relations.

By applying the *a priori* approach, states can avoid the situation where the assessment of compliance with uniform safeguards only take place after the child is born, when the parents seek a declaration of legal parentage.<sup>273</sup> This also avoids the circumstances where states have to refuse the child’s legal parentage only after they are born, which may violate the child’s identity rights, in particular their right to birth registration and acquisition of a nationality.

However, it is recognised that the *a priori* approach would pose “feasibility challenges” for a multilateral instrument based on consensus, as highlighted by the Expert Group.<sup>274</sup> In particular, governments will have to invest substantial resources to allow for cross-border cooperation.<sup>275</sup> More importantly, states which expressly prohibit surrogacy will most likely refuse to ratify the protocol as it implies that those states allow and admit surrogacy practices.<sup>276</sup> The Expert Group has therefore concluded that the *a posteriori* approach is more feasible. It is argued here that if the *a posteriori* approach is taken, children’s identity rights are best protected if the protocol allows for states to have the flexibility “to recognise legal parentage in the best interests of a child...despite allegations of non-compliance with uniform safeguards”<sup>277</sup>. This allows states to address the child’s best interests in light of the individual circumstances of the case, which require a balance of safeguarding the child’s identity rights and ensuring that surrogacy practices amounting to sale of children are not endorsed.

---

<sup>269</sup> *Id.*, at para 90

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*, at para 88

<sup>272</sup> *Id.*, at paras 101 to 112

<sup>273</sup> *Id.*, at para 88

<sup>274</sup> *Id.*, at para 89

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*, at para 94

#### 4.2.2 Analysis of the European Commission's proposal for a European Certificate of Parenthood

The European Commission's proposal for a Council Regulation regarding the creation of a European Certificate of Parenthood (the "**EC Proposed Regulation**") aims to harmonise EU member states' private international law rules regarding "the establishment of parenthood in cross-border situations"<sup>278</sup> and its recognition. The proposal was preceded by the European Commission's adoption of the LGBTIQ Equality Strategy 2020-2025, where it was noted that when children in rainbow families "travel or move to" other EU member states, there may be a risk of "children's link to their LGBTIQ parent(s) being severed", which may impact on the rights of children.<sup>279</sup> It was also noted that the lack of mutual recognition of parenthood may result in "children being denied citizenship, a name or inheritance rights".<sup>280</sup> Against this background, the European Commission noted that it will propose a legislative initiative to support "mutual recognition of parenthood"<sup>281</sup> across EU member states.

Further, a study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs noted the importance of the EC Proposed Regulation, of which two aspects are relevant. First, it noted that the HCCH Parentage/Surrogacy Project (see sub-section 4.2.1 above) is still in "its preparatory phase and may take some time"<sup>282</sup> before the instrument is prepared, agreed and ratified by states. Second, it noted that while VMA simplified the formality requirements regarding public documents relating to parenthood, it did not require "cross border recognition of the *content* of those documents",<sup>283</sup> which the EC Proposed Regulation sets out to do.

This sub-section will examine four aspects of the EC Proposed Regulation relevant to identity rights of children with same-sex parents. The first aspect relates to the scope of the EC Proposed Regulation. Recital 21 clearly states that the proposed regulation covers recognition "irrespective of how the child was conceived or born and irrespective of the child's type of family", and includes cross-border recognition of domestic adoptions.<sup>284</sup> The broad scope of the EC Proposed Regulation has drawn criticism from several groups, such as the Ordo Iuris Institute, a Polish conservative thinktank which suggested that the acceptance of adoptions conducted overseas by same-sex couples exceeds the powers of the European Union.<sup>285</sup> The organisation has also criticised the EC Proposed Regulation by noting that it "normalise[s] surrogacy", and allows same-sex parents to circumvent Polish law, which only allows for parenthood by two members of the opposite sex.<sup>286</sup> However, it is argued that the

---

<sup>278</sup> European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood ("**EC Proposed Regulation**"), 7 (2022)

<sup>279</sup> European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) 698, para 3.2 (2020)

<sup>280</sup> *Id.*, at footnote 64 therein

<sup>281</sup> *Id.*, at para 3.2

<sup>282</sup> Tryfonidou, *supra* note 218, 57

<sup>283</sup> *Id.*

<sup>284</sup> EC Proposed Regulation, *supra* note 278, Recital 21

<sup>285</sup> Ordo Iuris Institute, A step towards compulsory recognition of homo-adoption and surrogacy <https://en.ordoiuris.pl/family-and-marriage/step-towards-compulsory-recognition-homo-adoption-and-surrogacy-draft-eu>, last visited (16-06-2024)

<sup>286</sup> *Id.*

broad scope of the EC Proposed Regulation recognises the principle of non-discrimination under CRC Article 2, particularly regarding the sexual orientation of children's parents. Further, the EC Proposed Regulation only requires cross-border recognition of parenthood "for the purposes of exercising rights derived from EU law", and does not interfere with the freedom of member states to determine their national laws regarding same-sex couples' right to marriage and right to be "established as the joint legal parents".<sup>287</sup>

Second, the EC Proposed Regulation allows for cross-border recognition of documents indicating parenthood, including court decisions and authentic instruments.<sup>288</sup> The EC Proposed Regulation also creates a European Certificate of Parenthood, which can be used to "invoke the child's parenthood status", although the use of the certificate is not mandatory.<sup>289</sup> Third, a state may refuse the recognition of a court decision or an authentic instrument establishing parenthood if it is "manifestly contrary to the public policy" of the state, "taking into account the child's interests".<sup>290</sup>

With regard to the public policy exception, Recital 14 specifically states that member states cannot use this as a reason to refuse to recognise "a parent-child relationship between children and their same-sex parents"<sup>291</sup> to exercise rights derived from EU law. Bearing in mind that certain member states do not allow for surrogacy practices, it is expected that states may rely on the public policy exception not to recognise parenthood. It is contended that there should be an adequate balance of protecting the child's identity rights while ensuring that surrogacy practices amounting to sale of children are not endorsed. There should be similar uniform safeguards as those discussed in the HCCH Parentage/Surrogacy Project in sub-section 4.2.1 above – including consent, eligibility and suitability of the surrogate mother and commissioning parents, and preservation and access of information related to the child's origins (discussed in more detail below). This allows member states to consider the individual circumstances of the surrogacy arrangement, rather than introduce the public policy argument whenever a surrogacy arrangement arises.

Fourth, the EC Proposed Regulation does not contain safeguards which ensure that children have the right to access information relating to their origins. It is argued that provisions should be included to give effect to the same, particularly as the EC Proposed Regulation aims to protect the rights of children regarding parenthood in cross-border contexts, "including their right to an identity".<sup>292</sup> Further, it has been contended that the inclusion of such a provision could persuade some member states to agree to the EC Proposed Regulation, since it would emphasise the aim of the regulation to "protect the rights of the child" than those of the parents.<sup>293</sup>

### 4.3 Domestic measures

This sub-section focuses on three recommendations in domestic contexts for realising identity rights of children with same-sex parents. While the potential international and regional instruments discussed above are a welcome development which advances identity rights of children with same-sex parents,

---

<sup>287</sup> Tryfonidou, *supra* note 218, at 93

<sup>288</sup> EC Proposed Regulation, *supra* note 278, Articles 26, 36, 37

<sup>289</sup> *Id.*, Articles 46, 47

<sup>290</sup> *Id.*, Articles 31(1)(a), 39(1)(a)

<sup>291</sup> *Id.*, Recital 14

<sup>292</sup> EC Proposed Regulation, *supra* note 278, Recital 2; Tryfonidou, *supra* note 218, at 101

<sup>293</sup> Tryfonidou, *supra* note 218, at 99



they are still under negotiation and only cover cross-border situations. It is therefore necessary for there to be advancements in domestic contexts. First, it is recommended that states conduct a review of domestic legislation to allow for same-sex parenthood, which aligns with the principle of non-discrimination in CRC Article 2. It is also a direct avenue to ensure children's identity rights, including the right to birth registration, acquisition of a nationality and preservation of family relations.

In a discussion, Mr. Azan Marwah commented that the "best way forward" to protect the identity rights of children with same-sex parents is by legislative amendment, noting that there should be a "wholesale reform of this area to ensure that we don't have these problems going forward".<sup>294</sup> Mr. Marwah noted that, unfortunately, the current legislative proposal in relation to responsibilities of parents in Hong Kong does not make any accommodation for LGBTI families.<sup>295</sup> The National Council of Namibia has approved a law banning same-sex marriage,<sup>296</sup> and Poland has introduced a bill to ban same-sex couples from adopting children, even as a single parent.<sup>297</sup> During discussions, Prof. Kees Waaldijk noted that apart from recognition of parenthood, "social acceptance by the families would be needed too, because rainbow families might understandably be reluctant to avail themselves of the legal possibilities for recognition when large sections of society would still be hostile".<sup>298</sup> It is therefore recommended that, in parallel with legislative change, advocacy efforts to effect social acceptance of rainbow families should continue. Meanwhile, it is also important to consider other measures to safeguard children's identity rights as detailed below.

The second recommendation relates to regulation of surrogacy arrangements, which affects children of same-sex parents. It has been suggested that states which permit surrogacy should implement domestic legislation which prohibit international surrogacy arrangements that involve "foreign intending parents from States that prohibit such arrangements".<sup>299</sup>

Using California and Hong Kong as examples following on the discussion in sub-section 2.2 above, this means that California – as a state that permits commercial surrogacy – should implement legislation which bans international commercial surrogacy arrangements where compensation goes beyond reasonable expenses, if the intending parents are from Hong Kong. This is because parenthood is not granted in Hong Kong to surrogacy arrangements conducted overseas if the financial compensation goes beyond "expenses reasonably incurred".<sup>300</sup> This is to ensure that children

---

<sup>294</sup> See discussion on 11 June 2024, *supra* note 234

<sup>295</sup> *Id.*; see the proposed Children Proceedings (Parental Responsibility) Bill, annexed to the Labour and Welfare Bureau, The Proposed Legislation to Implement the Recommendations of The Law Reform Commission Report on Child Custody and Access: Public Consultation (2015)

<sup>296</sup> CIVICUS Global Alliance, NAMIBIA: 'We have seen some progress on LGBTQI+ rights, but there is a lot of work still to be done', <https://www.civicus.org/index.php/media-resources/news/interviews/6561-namibia-we-have-seen-some-progress-on-lgbtqi-rights-but-there-is-a-lot-of-work-still-to-be-done#:~:text=In%20July%202023%2C%20the%20National.same%2Dsex%20unions%20contracted%20abroad,> last visited (16-06-2024)

<sup>297</sup> G. Baczynska and A. Wlodarczak-Semczuk, Poland to ban gays from adopting, even as single parents, Reuters, <https://www.reuters.com/article/idUSKBN2B32MO/>, last visited (16-06-2024)

<sup>298</sup> These discussions took place on 15 May 2024 and 18 June 2024, between the author and Prof. Kees Waaldijk, Professor of Comparative Sexual Orientation Law at Leiden University.

<sup>299</sup> Child Identity Protection and UNICEF, Key Considerations: Children's Rights & Surrogacy – Briefing Note, 3 (2022)

<sup>300</sup> See PCO, *supra* note 226, section 12(7)

born through surrogacy “can enjoy their rights from birth”,<sup>301</sup> and “maximise the child’s opportunities to access all their rights”,<sup>302</sup> including their identity rights. Ultimately, this prevents the situation where children born through surrogacy are denied parenthood upon returning to the intending parents’ home state.

However, in practice, it may be difficult for domestic states to keep abreast of the latest legal position of the intending parents’ state. It is therefore suggested that domestic states require an undertaking from the intending parents’ state authorities that such a surrogacy arrangement is allowed in their home state, that parenthood will be granted to the intending parents upon returning to their home state, and that the child will be granted nationality of the intending parents’ home state. These suggested measures are similar to former guidelines issued in India in 2015, which required a letter signed by the embassy of the foreign country stating that it recognises surrogacy and that the child will be permitted to enter its country “as a biological child...of the couple commissioning surrogacy”.<sup>303</sup> Further, countries which allow surrogacy arrangements should have a protocol with enforcement and monitoring measures to ensure strict compliance with the Verona Principles to ensure that its practices do not amount to sale of children. Nevertheless, it is acknowledged that currently, it is characteristic of the surrogacy industry that countries of origin have “no oversight”<sup>304</sup> of the surrogacy arrangements and cannot guarantee that safeguards are in place.

Lastly, the third recommendation relates to preservation of records for children with same-sex parents. As established in sub-section 2.4 above, legal parenthood itself is not sufficient to safeguard the right to preserve a child’s family relations. It is therefore important for states to establish domestic practices to preserve information related to the child’s origins in a centralised register – this includes information relating to the child’s gestational and genetic parents, as well as their medical history related to the child for ART arrangements; while historical details of birth parents and adoptive parents should be kept for adoptions.

## 5. Conclusion

There is an increasing trend for countries to recognise the legal parenthood of children with same-sex parents, and there has also been an overall increase in the level of acceptance of LGBTI people over the past four decades. However, there is still a global divide in issues concerning LGBTI rights, with factors such as the rise of right-wing nationalist parties in Europe and religion which influence acceptability. As a result, rainbow families continue to face lack of representation and societal understanding. This thesis set out to examine the extent to which legal recognition of parenthood plays a role in ensuring and safeguarding the right to identity of children of same-sex couples. Specifically, the thesis focused on the following aspects of the right to identity under CRC Articles 7 and 8: (i) the right to birth registration, (ii) the right to acquire a nationality and (iii) the right to preserve family relations.

---

<sup>301</sup> *Id.*

<sup>302</sup> M. Dambach and N. Cantwell, Child’s right to identity in surrogacy, in K. Trimmings *et al.* (eds.), *Research Handbook on Surrogacy* 116 (2024)

<sup>303</sup> Press Information Bureau, Government of India Ministry of Home Affairs, *Citizenship to Children Born to a Surrogate Indian Mother*, at para 2 (18 March 2015)

<sup>304</sup> See Bracken, *supra* note 19, 233

In the second chapter, this thesis explored the impact of legal parenthood to the right to identity of children with same-sex parents. An analysis was conducted on the definition of the right to identity under CRC Articles 7 and 8, where the former creates various aspects of a child's identity which must be preserved by a state under the latter. This thesis chose to focus on the aspects of identity on birth registration, acquisition of a nationality and preservation of family relations due to its close relationship with legal parenthood of same-sex parents.

It is argued that legal parenthood of same-sex parents is an important step towards ensuring children's identity rights in relation to their right to birth registration and acquisition of a nationality. However, there are its limitations, particularly in relation to cross-border recognition of parenthood. This is seen as certain states have shown reluctance in allowing children to acquire the nationality of same-sex parents or register their birth records showing same-sex parents. This is particularly if their parenthood was established in a foreign jurisdiction and same-sex marriage or parenthood is not recognised domestically. As there are currently no international or regional instruments requiring cross-border recognition of parenthood, states may not readily allow for children to acquire their parents' nationality or citizenship if same-sex parenthood was recognised in a foreign jurisdiction, but not its own. Regarding the right to preservation of family relations, it is concluded that legal parenthood in itself is not sufficient to safeguard this right, as it must be coupled with states' implementation of measures to preserve historical information. Lastly, the issue of utilising legal parenthood in furthering children's identity rights must be assessed and considered against the overarching principles of the CRC.

The third chapter of this thesis examined jurisprudence on the legal parenthood of same-sex parents and analysed its relationship with children's identity rights. First, it considered *AB v Finland*, where the CRC Committee stressed the importance of the overarching principles of the CRC regarding an asylum claim involving a child with same-sex parents.

Second, it considered jurisprudence arising from the ECtHR. In *Menesson v France*, the ECtHR found that the right to respect for private life means that all individuals should be able to establish one's identity, which includes the legal parent-child relationship. It also established an important principle in its the Advisory Opinion, that legal parenthood of a genetically unrelated parent is important towards realising the child's identity rights, in particular their right to birth registration. The principles in *Menesson v France* and its Advisory Opinion were affirmed in the subsequent case of *K.K. and Others v Denmark*.

Third, it then considered *Gaskin v the UK and Mandet v France*, which established the principle that a child's knowledge of their origins is essential to their identity. However, it is argued that in the context of children with same-sex parents, establishing legal parenthood similar to the manner in *Mandet* does not necessarily protect the child's right to preserve family relations. Rather, there should be an individual assessment of the child's best interests and respect for their right to be heard. Third, the CJEU decision of *VMA* was discussed, which highlights the importance of legal parenthood in safeguarding the right to birth registration and acquiring a nationality for children with same-sex parents.

Fourth, domestic jurisprudence in Hong Kong was discussed, where a common law declaration of parentage was a positive development and a starting point towards the child's right to birth registration. Lastly, the case of *PL* heard in the Supreme Court of Namibia was examined, noting that the court's strict technical approach fails to consider the child's best interests and identity rights.

The fourth chapter examine future directions to ensure that children's identity rights are safeguarded through legal parenthood and other ancillary measures. It first analysed current developments regarding possible instruments to provide for cross-border recognition of parentage both internationally and regionally in the EU, under the HCCH Parentage/Surrogacy Project and the European Certificate of Parenthood respectively. This section of the thesis also emphasised on the importance of balancing the safeguarding of children's identity rights and ensuring that surrogacy practices amounting to sale of children are not endorsed.

Further, recommendations were made for realising identity rights of children with same-sex parents in domestic contexts. First, it is recommended that states conduct a review of domestic legislation to allow for same-sex parenthood, which should happen in parallel with advocacy efforts to improve social acceptance of rainbow families. Second, regarding surrogacy arrangements, it is recommended that states where surrogacy is legal should implement domestic legislation which require an undertaking from the intending parents' state authorities confirming that such a surrogacy arrangement is allowed in their home state, that parenthood will be granted to the intending parents upon their return, and that the child will be granted nationality of the home state. Third, since legal parenthood itself is not sufficient to safeguard the right to preserve a child's family relations, it is recommended for states to establish domestic practices to preserve information related to the child's origins in a centralised register.

In conclusion, while legal parenthood of same-sex parents does play a key role in safeguarding children's identity rights, there are its limitations. While it is a key step towards birth registration and acquisition of nationality, there are limitations due to challenges with cross-border recognition of parenthood. As for preservation of family relations, legal parenthood in itself is not sufficient to protect this aspect of the child's identity. It also requires states' implementation of measures to preserve historical information in a centralised manner. Lastly, in relation to future directions, it is noted that the potential HCCH Parentage/Surrogacy instrument and the European Certificate of Parenthood proposal discussed above are welcome developments which advance identity rights of children with same-sex parents. However, since they are still under negotiation and are limited to covering cross-border situations, it is important for states to strengthen their efforts domestically to protect identity rights of children with same-sex parents.

## Bibliography

### Books

- A. Macdonald, *The Rights of the Child: Law and Practice* (2011)
- G. Van Bueren, *The International Law on the Rights of the Child* (1995)
- L. Bracken, *Same-Sex Parenting and the Best Interests Principle*, Cambridge University Press (2020)
- M. Dambach and N. Cantwell, *Child's right to identity in surrogacy*, in K. Trimmings *et al.* (eds.), *Research Handbook on Surrogacy* (2024)
- S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (1999)

### Contributions to Edited Volumes

- C. Ragni, *Cross-Border Recognition of Adoption: Rethinking Private International Law from a Human Rights Perspective*, in E. Bergamini and C. Ragni (eds.), *Fundamental Rights and Best Interests of the Child in Transnational Families* (2019)
- J. Tobin and F. Seow, *Article 7: The Rights to Birth Registration, a Name, Nationality, and to Know and Be Cared for by Parents* in J. Tobin (ed.) *The UN Convention on the Rights of the Child: A Commentary* (2019)
- J. Tobin and J. Todres, *Article 8: The Right to Preservation of a Child's Identity* in J. Tobin (ed.) *The UN Convention on the Rights of the Child: A Commentary* (2019)
- J.M. Scherpe, *Comparative Family Law*, in M. Reimann and R. Zimmermann (eds.) *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> Edition) (2019)
- L. Lundy *et al.*, *Article 12: The Right to Respect for the Views of the Child*, in J. Tobin (ed.) *The UN Convention on the Rights of the Child: A Commentary* (2019)
- N. Cahn, *The ART of Parentage* in J. G. Dwyer (ed.), *The Oxford Handbook of Children and the Law* (2019)
- T. Amos and J. Rainer, *Parenthood for Same-Sex Couples in the European Union: Key Challenges*, in K. Boele-Woelki and A. Fuchs (ed.) *Same-Sex Relationships and Beyond: Gender Matters in the EU* (2018)
- V. Michaels and G. Tamm, *Global rainbow families*, in Y. Kallane *et al.* (eds.) *Research Handbook of Global Families: Implications for Theory and Practice* (2023)

### Journal and academic articles

- F. Lessa, *Beyond Transitional Justice: Exploring Continuities in Human Rights Abuses in Argentina between 1976 and 2010*, 3 *Journal of Human Rights Practice*, 25-84 (2011)
- J. Eekelaar, *Family Law and Identity*, 38 *Oxford Journal of Legal Studies*, 822-840 (2018)
- J. Tobin and R. McNair, *Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to Allow Gay and Lesbian Couples to Adopt?*, 23 *International Journal of Law, Policy and the Family*, 110-131 (2009)
- K. Lemmens, *Cross-border surrogacy and the European Convention on Human Rights: The Strasbourg Court caught between "fait accompli", "ordre public", and the best interest of the child*, 42 *Netherlands Quarterly of Human Rights*, 174-194 (2024)
- L. Bracken, *Accommodations of private and family life and non-traditional families: the limits of deference in cases of cross-border surrogacy before the European Court of Human Rights*, 32 *Medical Law Review*, 141-157 (2024)
- L. Bracken, *Recognition of LGBTIQ+ parent families across European borders*, 29 *Maastricht Journal of European and Comparative Law*, 399-406 (2022)

M. Sormunen, The risk of a child being subjected to irreparable (psychological) harm when returned to an environment hostile to LGBTI families and a deficient best interests consideration in asylum proceedings, Leiden Children's Rights Observatory (2021)

S. Cherrington *et al.*, Beyond Invisibility: Early Childhood Teachers' Inclusion of Rainbow Families, 49 *Early Childhood Education Journal*, 1099–1111 (2021)

### **International and Regional instruments**

Hague Convention of 29 May 1993 on Protection of Children and Co-Operation in Respect of Intercountry Adoption

Treaty on the Functioning of the European Union

UN Convention on the Rights of the Child, UN General Assembly Resolution 44/25, 44th Session, UN Doc. A/RES/44/25 (1989)

UN General Assembly, ICCPR, United Nations Treaty Series (1966)

Yogyakarta Principles: Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (2006)

### **Documents of International and Regional Bodies**

A. Tryfonidou, Cross Border Legal recognition of Parenthood in the EU, European Parliament Policy Department for Citizens' Right and Constitutional Affairs (2023)

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and CRC Committee, Joint General Comment No. 3 of the CMW and No. 22 of the CRC in the context of International Migration: General principles, UN Doc. No. CRC/C/GC/22 - CMW/C/GC/3 (2017)

Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and CRC Committee, Joint general comment No. 4 of the CMW and No. 23 of the CRC on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc No. CMW/C/GC/4 - CRC/C/GC/23 (2017)

CRC Committee, Concluding observations on the combined third and fourth periodic reports of Germany, UN Doc No. CRC/C/DEU/CO/3-4 (2014)

CRC Committee, Concluding observations on the second to fourth periodic reports of Israel, adopted by the Committee at its sixty-third session (27 May – 14 June 2013), UN Doc. No. CRC/C/ISR/CO/2-4 (2013)

CRC Committee, Consideration of reports submitted by States parties under article 44 of the Convention, Concluding observations: Azerbaijan, UN Doc. No. CRC/C/AZE/CO/3-4 (2012)

CRC Committee, Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Oman, UN Doc. No. CRC/C/OMN/CO/2 (2006)

CRC Committee, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc No. CRC/C/GC/14 (2013)

CRC Committee, General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), UN Doc No. CRC/C/GC/15 (2013)

CRC Committee, General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), UN Doc No. CRC/GC/2003/5 (2003)

CRC Committee, General Comment No. 7: Implementing child rights in early childhood, UN Doc No. CRC/C/GC/7/Rev.1 (2005)

CRC Committee, The Role of the Family in the Promotion of the Rights of the Child, excerpted from CRC/C/24, 7<sup>th</sup> Session, 10 October 1994 (1994)

European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020-2025, COM(2020) (2020)

European Commission, Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (2022)

European Parliament, Cross-Border Legal Recognition of Parenthood in the EU (2023)

European Parliament, Declaration of Fundamental Rights and Freedoms, Doc No. A2-3/89 (1989)

Hague Conference on Private International Law, Parentage / Surrogacy Experts' Group: Final Report "The feasibility of one or more private international law instruments on legal parentage", Prel. Doc. 1 of November 2022 (2022)

Hague Conference on Private International Law, Report of the Experts' Group on the Parentage / Surrogacy Project (meeting of 29 January – 1 February 2019) (2019)

Hague Conference on Private International Law, Working Group on Parentage / Surrogacy: Report of the first meeting (from 13 to 17 November 2023) (2023)

International Social Service, Principles for the protection of the rights of the child born through surrogacy (Verona Principles) (2021)

Office of the United Nations High Commissioner for Human Rights, Born Free and Equal: Sexual Orientation, Gender Identity and Sex Characteristics in International Human Rights Law (2<sup>nd</sup> Edition), UN Doc No. HR/PUB/12/06/Rev.1 (2019)

Office of the United Nations High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child: Volume 1 (2007)

UNICEF, Implementation Handbook for the Convention on the Rights of the Child (3rd Edition) (2007)

United Nations Human Rights Council, Fifty-fifth session, Combating discrimination, violence and harmful practices against intersex persons, UN Doc. No. A/HRC/55/L.9 (2024)

United Nations Human Rights Council, Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Note by the Secretariat, UN Doc. No. A/74/162 (2016)

United Nations Human Rights Council, Twenty-seventh session, Human rights, sexual orientation and gender identity, UN Doc. No. A/HRC/27/L.27/Rev.1 (2014)

United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. No. A/RES/70/1 (2015)

### **International and regional jurisprudence**

*A.B. v Finland*, Views adopted by the CRC Committee under the Optional Protocol to the CRC on a communications procedure, concerning communications No. 51/2018, UN Doc No. CRC/C/86/D/51/2018

Case C-490/20, *V.M.A. v Stolichna obshtina*, Judgment of the Court (Grand Chamber), ECLI:EU:C:2021:1008

ECtHR, *A.H. and Others v. Germany* (Application no. 7246/20) (4 April 2023)

ECtHR, Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, Request no. P16-2018-001 (10 April 2019)

ECtHR, *Case of Valdís Fjölnisdóttir and Others v Iceland* (Application no. 71552/17) (18 May 2021, revised 18 August 2021)

ECtHR, *Gaskin v the UK* (Application No. 10454/83) (7 July 1989)

ECtHR, *Jäggi v. Switzerland* (Application no. 58757/00) (13 October 2006)

ECtHR, *K.K. and others v Denmark* (Application no. 25212/21) (6 December 2022, revised 6 March 2023)

ECtHR, *Mandet v France* (Application no. 30955/12) (14 January 2016)

ECtHR, *Mennesson v France* (Application no. 65192/11) (26 June 2014, revised 26 September 2014)

ECtHR, *X and Others v Austria* (Application No. 19010/07) (29 February 2013)

Opinion of Advocate General Kokott delivered on 15 April 2021, in *V.M.A. v Stolichna obshtina*

*V.M.A. v Stolichna obshtina* (“VMA”), Judgment of the Court (Grand Chamber), C-490/20, Court of Justice of the European Union (14 December 2021)

### **Domestic jurisprudence**

Administrative case No. 6746/2022, The Supreme Administrative Court of the Republic of Bulgaria – Third Chamber (1 March 2023)

*Dausab v The Minister of Justice* [2024] NAHCMD 331

*George Peter Kaluma v NGO Co-Ordination Board and others* (Application No. E011 of 2023)

*Hon. Fox Odoi & 21 Others v Attorney General & 3 Others* [2024] UGCC 10

*Minister of Home Affairs and Immigration v PL*, Case No. SA 96/2021, Supreme Court of Namibia (20 March 2023)

*NF v R (Secretary for Justice, Intervener)* [2023] 6 HKC

*Sham Tsz Kit v Secretary for Justice* [2023] HKCFA 28

### **Domestic Legislation**

Austrian Civil Code

California Family Code

French Civil Code

Greek Civil Code

Hong Kong Bill of Rights

Human Reproductive Technology Ordinance (Cap 561 of the Laws of Hong Kong)

Namibian Citizenship Act 14 of 1990

Parent and Child Ordinance (Cap 429 of the Laws of Hong Kong)

### **Government Publications**

Centers for Disease Control and Prevention, What is ART, <https://www.cdc.gov/art/whatis.html>, last visited (23-04-2024)

Labour and Welfare Bureau, The Proposed Legislation to Implement the Recommendations of The Law Reform Commission Report on Child Custody and Access: Public Consultation (2015)

Press Information Bureau, Government of India Ministry of Home Affairs, Citizenship to Children Born to a Surrogate Indian Mother (18 March 2015)

The Law Reform Commission of Hong Kong, Report on Illegitimacy (1991)



### **Non-governmental Reports**

C. Baglietto *et al.*, Preserving “family relations”: an essential feature of the child's right to identity, Child Identity Protection (2022)

Child Identity Protection and UNICEF, Key Considerations: Children's Rights & Surrogacy – Briefing Note (2022)

Child Rights International Network, Mandet v France, <https://archive.crin.org/en/library/legal-database/mandet-v-france.html>, last visited (12-06-2024)

CIVICUS Global Alliance, NAMIBIA: ‘We have seen some progress on LGBTQI+ rights, but there is a lot of work still to be done’ <https://www.civicus.org/index.php/media-resources/news/interviews/6561-namibia-we-have-seen-some-progress-on-lgbtqi-rights-but-there-is-a-lot-of-work-still-to-be-done#:~:text=In%20July%202023%2C%20the%20National,same%2Dsex%20unions%20contracted%20abroad,> last visited (16-06-2024)

G. J. Gates, LGBT Parenting in the United States: Executive Summary, UCLA Williams Institute (2013)

ILGA World Database, Legal Frameworks: Same-Sex Marriage and Civil Unions, <https://database.ilga.org/same-sex-marriage-civil-unions>, last visited (30-06-2024)

ILGA-Europe, Our Glossary, <https://www.ilga-europe.org/about-us/who-we-are/glossary/>, last visited (30-06-2024)

J. Tomlins, Rainbow families: The challenges, Rainbow Families Council (2015)

K. Trimmings *et al.*, ECtHR and cross-border surrogacy arrangements: *K.K. and others v. Denmark* – Legal memorandum, Child Identity Protection (2023)

Ordo iuris Institute, A step towards compulsory recognition of homo adoption and surrogacy <https://en.ordoiuris.pl/family-and-marriage/step-towards-compulsory-recognition-homo-adoption-and-surrogacy-draft-eu>, last visited (16-06-2024)

Pew Research Center, The Global Divide on Homosexuality Persists (2020)

UCLA Williams Institute, Social Acceptance of LGBTI People in 175 Countries and Locations, 1981 to 2020 (2021)

### **News Reports**

G. Baczyńska and A. Włodarczak-Semczuk, Poland to ban gays from adopting, even as single parents, Reuters, <https://www.reuters.com/article/idUSKBN2B32MO/>, last visited (16-06-2024)

J. Pang and D. Kam, Hong Kong LGBTQ activists upset at revised ID card gender rules, Reuters <https://www.reuters.com/world/china/hong-kong-lgbtq-activists-upset-revised-id-card-gender-rules-2024-04-03/>, last visited (06-04-2024)

N. Nyaungwa, Namibian court declares laws banning gay sex unconstitutional, Reuters, <https://www.reuters.com/world/africa/namibian-court-declares-laws-banning-gay-sex-unconstitutional-2024-06-21/>, last visited (23-06-2024)

Rédaction Africanews and AFP, Son of Namibian gay couple in citizenship limbo after court ruling, Africanews, <https://www.africanews.com/2023/03/21/son-of-namibian-gay-couple-in-citizenship-limbo-after-court-ruling/>, last visited (28-06-2024)