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THE FAMILY RECONSTRUCTED: BALANCING ADULT AUTONOMY AND CHILDREN'S RIGHTS IN MODERN FAMILY LAW*

ABSTRACT

This study critically examines the evolution of family law and its transformation in response to contemporary societal shifts. Once anchored in principles that prioritized stability, intergenerational continuity, and the protection of children, modern family law increasingly emphasizes adult autonomy, equality, and personal fulfillment. Legal reforms such as the liberalization of divorce, the recognition of diverse family forms, and the rise of assisted reproductive technologies have redefined marriage and filiation, often prioritizing individual rights over relational responsibilities. The growing trend of "adult-centrism" in family law challenges the ability of legal systems to fulfill their protective role. This paper calls for a recalibration of legal doctrines to balance adult rights with those of children. This analysis contributes to the ongoing dialogue on how family law can navigate the intersection of legal pluralism, technological advancement, and cultural change without compromising its foundational commitment to protect the most vulnerable our children.

Keywords: family law, children's rights, adult autonomy, best interests of the child, marriage, divorce, parentage, UN Convention on the Rights of the Child, legal recognition of family structures, reproductive rights, child commodification.

1. INTRODUCTION

Family law has undergone seismic shifts in the past half-century, evolving from a framework centered on the stability of the familial unit and protection of children to one that increasingly emphasizes individual choice, adult autonomy, and equality. Traditionally, the legal regulation of family life was grounded in the notion that the family is a fundamental social institution requiring stability and

continuity for the benefit of all its members – especially children. National laws and international declarations alike affirmed that the family *"is the natural and fundamental group unit of society and is entitled to the full protection by society and the State"*.¹ In practice, this meant marriage was supported as a lifelong union, divorce was restricted, and the parent-child relationship was guarded to ensure children's upbringing in a secure environment. The main concern was the welfare of children and the intergenerational continuity of family lines.

In contemporary society, however, conceptions of family and the aims of family law have radically transformed. The latter 20th and early 21st centuries witnessed the liberalization of divorce laws, the legal recognition of non-traditional family structures (such as cohabiting couples, single-parent families, and same-sex parent families), and the proliferation of assisted reproductive technologies (ART), enabling new modes of procreation. These changes were driven by a growing emphasis on adult rights – the right to personal fulfillment, equality, and reproductive self-determination. Modern legal frameworks place considerable weight on adult autonomy, sometimes appearing to prioritize adults' desires to marry (or not), divorce, and have children by various means over the older ethic of duty and responsibility within family relationships.

This article critically examines how family law's evolution has tilted the balance between adult-centric rights and children's rights, applying a child-focused lens to ask whether contemporary legal regimes adequately serve the best interests of the child. While acknowledging the gains of modern reforms – greater gender equality, freedom from forced unions, and recognition of diverse loving families – the analysis probes the potential costs to children's welfare when adult prerogatives take center stage.

2. HISTORICAL FOUNDATIONS OF FAMILY LAW AND ITS PURPOSE

For much of history, family law was designed as a protective and regulatory framework to uphold the stability of the family as an institution. In many societies, marriage was not merely a private contract between individuals but a cornerstone of social order, seen as vital for rearing children and transmitting property and values across generations. The law's intended purpose was to buttress this stable

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¹ UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, Article 16(3).

unit: ensuring that children were born and raised within a recognized family structure, that parental responsibilities were clear, and that continuity between generations was maintained. The Universal Declaration of Human Rights of 1948 captured this traditional view by declaring the family to be society's natural foundation deserving maximal support. Under this paradigm, individual desires were often subordinate to family cohesion and duty. Spouses were expected to remain married except in the most dire circumstances, and parents were expected to fulfill their roles for the sake of their children and the broader family lineage.

Historically, family law doctrines heavily favored paternal authority and marital unity. In many legal systems of the 19th and early 20th centuries, fathers were deemed the natural guardians of children with superior custody rights, reflecting a patriarchal model of the family. Children were often seen almost as paternal property or at least under the exclusive stewardship of parents. Over time, this absolute paternal right was moderated by emerging notions of child welfare – for example, the tender years doctrine that arose in the late 19th century gave preference to mothers as nurturers for custody of young children, presuming that during a child's tender years, the mother has the superior skills to care for the child and she should have custody of the child.² Nonetheless, the overarching principle was that parents knew what was best for their children, and the state should not interfere except in extreme cases of abuse or neglect. This concept of family autonomy or privacy meant that the internal affairs of the family – including child-rearing practices – were largely shielded from outside scrutiny, on the presumption that keeping the family intact was in children's best interests.

Law and social policy strongly encouraged that children be born within marriage to promote what was considered a stable environment. In many jurisdictions, children born outside of wedlock historically suffered legal disadvantages (labeled illegitimate, with restricted inheritance rights and social stigma). Such rules, while punitive to children by today's standards, were justified historically as upholding the sanctity of marriage and the ideal of a two-parent upbringing. Reformers concerned with social order even supported restrictive marriage and divorce laws as a form of social engineering to prevent marital instability. By making marriage the gateway to family life and making exit difficult, the law sought to guarantee continuity: adults were expected to commit to the long haul for the sake of family unity. When separations did occur, continuity was pursued by preferring one stable custodian rather than any disruptive joint arrangements. Stability and continuity in

² Hartenstein, J., *Tender Years Doctrine*, in The Wiley Blackwell Encyclopedia of Family Studies, Wiley Blackwell, 2016, <https://doi.org/10.1002/9781119085621.wbef5449>.

caretaking were seen as crucial for a child's development.³ Thus, even as custody standards gradually evolved toward focusing on the child, the emphasis was on providing a stable, continuous home life after divorce, reflecting family law's protective ethos.

Another foundational purpose of traditional family law was the protection of those seen as vulnerable dependents – namely wives (in eras when women had fewer rights and were economically dependent) and children. The law imposed reciprocal duties on family members: husbands were obliged to support wives and children; in return, wives owed duties like fidelity and homemaking, and children owed obedience. The state enforced child support from fathers and could intervene via doctrines like *parens patriae* (allowing state guardianship of children) if parents utterly failed in their duties. However, such intervention was relatively rare and often came only when the family unit had already broken down (for instance, in orphanage or child cruelty cases). By and large, the legal system presumed that preserving the family unit was the best way to protect children. This is epitomized in the best interests of the child standard that began to surface in the early 20th century – initially in custody disputes, where courts proclaimed that the child's welfare was "the first and paramount consideration." In practice, that principle is often aligned with keeping children in a familiar, stable family environment.

It was only in the later 20th century that children began to be seen as individual rights-holders under the law rather than merely passive beneficiaries of adult protection. The 1989 Convention on the Rights of the Child (CRC) crystallized this shift. It requires that "*in all actions concerning children, ... the best interests of the child shall be a primary consideration.*"⁴, signaling that a child's welfare is not just a societal interest but a right. The CRC also affirms children's rights to preservation of identity, to be cared for by parents, and not to be discriminated against based on birth or family status. These developments, however, came at a time when family law was already in flux. Thus, historical family law set the stage with its focus on stability and protection, but it would soon collide with powerful social changes that redefined what family, marriage, and parenthood mean.

³ Huntington, C., *The Empirical Turn in Family Law*, Columbia Law Review, vol. 118, 2018, p. 227.

⁴ UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

3. LIBERALIZATION OF DIVORCE: IMPLICATIONS FOR FAMILY STABILITY AND CHILDREN'S WELL-BEING

One of the most dramatic transformations in modern family law has been the liberalization of divorce. In the decades after World War II – particularly from the 1960s through the 1980s – jurisdictions around the world moved away from restrictive, fault-based divorce regimes to much more permissive systems, often featuring no-fault divorce. Under fault-based divorce (the historical norm), a marriage could only be dissolved if one spouse proved the other guilty of a serious marital wrong (such as adultery, cruelty, or abandonment). This standard reflected the view that marriage should be indissoluble except for grave causes, reinforcing family stability by making divorce difficult. Starting in the late 20th century, however, societal attitudes shifted in favor of treating marital breakdown as a private matter and a relief for unhappy partners rather than a wrongdoing to be penalized. Spurred by changing gender roles, the sexual revolution, and a growing emphasis on personal happiness, states began to allow divorce by mutual consent or unilateral no-fault grounds (e.g., irretrievable breakdown of the marriage) with minimal hurdles.

The consequences for family stability – and for children – have been huge. The introduction of no-fault divorce correlated with a sharp rise in divorce rates in many countries, especially in the 1970s and 1980s. For example, the United States divorce rate roughly doubled in the 15 years following California's pioneering no-fault law of 1970.⁵ Across Europe, divorce became increasingly common once laws were reformed: Italy legalized divorce in 1970 (after having been forbidden), Spain in 1981 after the end of Franco's regime, and even historically Catholic Ireland removed its constitutional ban on divorce via referendum in 1996.⁶ These changes reflected a societal pivot towards adult freedom – the freedom to exit a marriage that no longer meets one's needs – but they also meant that more children experienced parental separation than ever before. By the 2000s, a substantial proportion of children in Western countries would see their parents divorce or separate during childhood. This reality raises the question: Did the legal system's newfound solicitude for adult autonomy in divorce pay sufficient regard to children's well-being?

Critics of no-fault divorce argue that in making divorce easier, the law became wholly adult-centered, with the welfare of children subservient to adult interest.

⁵ Schoenfeld, E., *Drumbeats for Divorce Reform*, Policy Review: The Journal of American Citizenship, vol. 77, May-June 1996.

⁶ García-Fernández, M., *From National Catholicism to Romantic Love: The Politics of Love and Divorce in Franco's Spain*, Contemporary European History, 2021.

Donald Moir, writing in the midst of the early 1990s divorce debates, described no-fault divorce as a "remarkable aspect" of legal reform precisely because it prioritized the desires of adults to dissolve marriages without regard to fault.⁷

Indeed, traditional divorce law – for all its flaws – at least formally took the breach of familial obligations seriously (e.g., a guilty spouse might be penalized in property division or custody as a way to uphold the norm that abandoning one's family is harmful). No-fault schemes, by contrast, treat the continuation or termination of marriage as a matter of personal choice, not duty. The fundamental change was from a law that strove to uphold and sustain the institution of the family to a law that facilitates its dissolution. In practical terms, this meant that a parent could unilaterally decide to end a marriage without needing to demonstrate justification, and the legal system would simply move on to sorting out the aftermath (property, custody, etc.), rather than attempting to preserve the family. From a child's perspective, the rise of easy divorce has been double-edged. On one hand, high-conflict or violent marriages can be ended more swiftly, potentially rescuing children from exposure to toxic home environments. Studies have found, for instance, that allowing no-fault divorce has led to declines in domestic violence rates⁸ and even a reduction in spousal homicide. No-fault divorce enables an abused or desperate parent to leave without proving fault in court – a process that, under fault regimes, could be lengthy, humiliating, or even dangerous if it enraged the abusive spouse. In this sense, adult autonomy to divorce aligns with children's interests: few would argue a child is better served by living in a household torn by violence or severe conflict for the sake of nominal "stability." The best interests of the child may well favor an amicable separation over a hostile union.

On the other hand, the normalization of divorce has undeniably introduced new instabilities into many children's lives. Even in the absence of abuse, the dissolution of a family unit is a major stressor for children. They may suffer emotional confusion, loss of daily contact with one parent, economic hardship (if the divorce results in lower combined family income), and dislocation (moving homes or schools). Decades of social science research have debated the magnitude of divorce's impact on children. While a majority of children adapt adequately in the long run, a substantial minority experience negative outcomes – such as academic difficulties, behavioral problems, or trust issues in relationships – that can often be traced to the conflict and disruptions associated with divorce. The key

⁷ Moir, D. S., *No Fault Divorce and the Best Interests of Children*, Denver University Law Review, vol. 69, 1992, p. 663.

⁸ Stevenson, B.; Wolfers, J., *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, The Quarterly Journal of Economics, vol. 121, no. 1, February 2006, pp. 267–288, <https://doi.org/10.1093/qje/121.1.267>.

mediating factor is not divorce per se but how it is handled: low-conflict divorces with cooperative co-parenting and adequate support cause far less harm than high-conflict, litigious divorces or situations where one parent effectively disappears. Family law has responded to these challenges by developing child-focused measures within the divorce process, even as the threshold for divorce remains low. For example, custody law has evolved toward an explicit best-interests-of-the-child standard in virtually all jurisdictions. Rather than automatically awarding custody to fathers (as was common centuries ago) or to mothers under a "tender years" presumption (common until the mid-20th century), courts now weigh factors like each parent's caregiving capacity, the child's attachment and stability, and in many places the child's own wishes, to determine post-divorce arrangements. The outcome should serve the child's welfare, even if that means, for instance, awarding primary custody to a father when he has been the child's primary caregiver (something nearly unheard of a hundred years ago). Additionally, there is a trend toward joint custody or shared parenting, aiming to keep both parents involved in the child's life. This trend acknowledges that children generally benefit from the continued love and support of both parents and that divorce should not mean the collapse of one parent-child relationship. In many places, joint custody (legal, physical, or both) is either encouraged or presumed, provided the parents can cooperate.

Furthermore, to mitigate the harm of divorce on children, some jurisdictions have implemented procedural safeguards. For instance, a number of U.S. states require divorcing parents of minors to attend parent education programs that teach about the effects of divorce on children and encourage co-parenting strategies.⁹ These classes remind parents that while their marriage may be ending, their responsibilities as co-parents continue and that minimizing conflict is crucial for the child. Some countries impose a cooling-off period or require mediation before a divorce is finalized, partly in hopes that parents may reconcile or at least settle issues amicably with children's needs in mind.

Despite these adaptations, a persistent critique is that divorce law itself does not require consideration of a child's best interests at the point of deciding to dissolve the family unit. In other words, when a court grants a divorce, it typically does not ask, "Is this divorce in the best interests of the children?" Doing so would arguably undermine the very premise of no-fault divorce by reintroducing a barrier – the need to justify the divorce in terms beyond the adult's wishes. No-fault statutes

⁹ Parent Education Class in Divorce, DivorceWriter, <https://www.divorcewriter.com/parent-education-class-divorce#:~:text=DivorceWriter,form%20of%20parent%20education%20class,> 10 February, 2025.

deliberately frame dissolution as a matter of personal autonomy. Thus, the tension remains: the family law system will apply the best interest standard to determine how children will live after the divorce, but it will not question whether the divorce should occur in light of the children's interests. This can be seen as a legal acknowledgment that forcing parents to stay together for the sake of the children may often backfire or intrude on fundamental rights to liberty and privacy. Yet it leaves a gap where children's voices or interests are largely absent in the decision that deeply alters their family structure.

The liberalization of divorce has been a story of expanding adult freedoms with mixed implications for children. It ended many loveless or harmful marriages (a clear benefit in cases of abuse or deep conflict), but it also contributed to a culture in which marital permanence is less assured, eroding the sense of security for many children. The challenge for modern family law is how to balance these outcomes – protecting children's need for stability without trapping family members in unhealthy relationships.

4. RECOGNIZING DIVERSE FAMILY STRUCTURE

Concurrent with the revolution in divorce law, the late 20th and early 21st centuries have witnessed a pluralization of family forms and a corresponding transformation in the law of filiation (parent-child legal relationships). The traditional nuclear family model – married husband and wife raising their biologically related children – is no longer the sole or even dominant setting in which children grow up in many societies. As social attitudes evolved, laws have been reformed to recognize and protect families that diverge from this model, including single-parent families, cohabiting (unmarried) parents, same-sex couples with children, blended families (step-parents and step-children), and in a few cases, multi-parent arrangements. These reforms were largely driven by principles of adult equality and anti-discrimination: for example, the push for same-sex marriage and parenting rights was rooted in the idea that LGBTQ+ individuals should have the same family life opportunities and recognition as heterosexual individuals. Similarly, ending the stigma of illegitimacy for children born outside marriage was motivated by a sense of fairness and the reality of rising nonmarital births. Here, too, we need to explore the effects on children's rights and welfare: Do these expanded definitions of family benefit children by giving them secure legal ties to their caregivers, or do they sometimes prioritize adult validations at children's expense?

One of the earliest shifts was the increasing prevalence of children born to unmarried parents. In the mid-20th century, unmarried parenthood was heavily stigmatized and often led to legal disadvantages for the child. Over the last few decades, however, births outside marriage have become common. In the European Union, for instance, 42.2% of all births in 2022 were to unmarried mothers – a stunning rise from 17% in 1993.¹⁰ Several countries (France, Sweden, etc.) now see the majority of births outside of wedlock. In Latin America, the percentages are even higher. This societal shift pressed legal systems to abolish the concept of illegitimacy. Most jurisdictions enacted laws to ensure that a child's rights – to paternal support, to inheritance, to the parents' care – do not depend on the marital status of the parents.¹¹ For example, the UN Convention on the Rights of the Child explicitly requires that children not suffer discrimination on the basis of "birth or other status".¹² Equal protection for children born out of wedlock is now a widely accepted norm. This is clearly a child-centric improvement: the law no longer punishes children for a status they have no control over and ensures they have equal opportunities in life.

Some jurisdictions, while not giving cohabitation the same legal status as marriage, provide mechanisms for cohabiting parents to have the same rights and duties as married ones toward their children. The removal of legal stigmas has allowed children in single-parent or cohabiting households to enjoy more secure relationships with both parents. From the child's perspective, what matters is having responsible, loving caregivers and legal clarity about who is responsible for them – whether or not the parents are married. In this respect, the modernization of filiation law to accommodate nonmarital families has largely been a win for children's rights.

Among the most transformative (and sometimes contentious) changes has been the legal recognition of same-sex couples as families, including the right to marry and to raise children. In the span of a few decades, many countries moved from criminalizing homosexual relationships to allowing gay and lesbian couples to marry or enter civil partnerships and to be legal parents through adoption, donor conception, or surrogacy. This shift was driven by adult autonomy and equality – the idea that the ability to form a family and have it recognized is a fundamental human right that should not be denied on the basis of sexual orientation. The U.S.

¹⁰ Eurostat, 2022.

¹¹ Barzó, T., *From Marital Property Law to Family Property Law: Theoretical and Practical Aspects of Property Law Regulations Protecting Families*, Law, Identity and Values, vol. 1, 2021, p. 23, <https://doi.org/10.55073/2021.1.23-39>.

¹² UN General Assembly, Convention on the Rights of the Child, United Nations, Treaty Series, vol. 1577, p. 3, 20 November 1989.

Supreme Court's landmark *Obergefell v. Hodges* decision in 2015, for example, held that same-sex couples have a fundamental right to marry.¹³ According to the ruling, allowing same-sex parents to marry was seen as beneficial to the children being raised in those families by placing them on an equal footing with peers from married heterosexual households. Landmark cases in Europe, such as *E.B. v. France* (2008), forced countries to drop blanket bans on adoption by homosexual individuals, reasoning that decisions should focus on the individual child's welfare rather than categorical exclusion based on sexual orientation.¹⁴ By now, numerous countries (across Europe, the Americas, and elsewhere) permit same-sex couples to adopt children jointly, and 34 countries worldwide have marriage equality.¹⁵ From a child-centric perspective, the recognition of diverse family structures has had positive protective effects when implemented carefully. Children in families that don't fit the old mold are less likely to fall through legal cracks. For instance, several jurisdictions now recognize psychological parents or *de facto* parents – adults who have acted as a parent to the child – even if they are not biological or adoptive parents. This can protect children in cases where a long-term carer or a relative has raised the child.

However, some challenges remain in this area, particularly where social change outpaces legal change or where the interests of adults and children may diverge. One debate is over the intentional creation of families that deviate from the two-parent model. For example, some single individuals choose to have children via ART or surrogacy, knowing the child will effectively have one primary parent. Some scholars question whether intentionally bringing a child into a single-parent situation (when two-parent care might have been possible through adoption by a couple, for instance) is optimal for the child, or whether it prioritizes the adult's desire to have a child on their own terms. The law generally permits single parenthood by choice – many countries allow single people to adopt, and fertility clinics serve single women – based on the principle that individuals have a right to procreate or to family life regardless of marital status. The countervailing view is that a child ideally deserves the material and emotional support of two caregivers, but importantly, no law actually prevents single people from having children (short of antiquated rules in a few places). The CRC's stance is neutral here: it says children have the right "to be cared for by his or her parents", but does not mandate two parents if one can provide adequate care.

¹³ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

¹⁴ *E.B. v. France*, Application No. 43546/02, ECtHR, Judgment of 22 January 2008.

¹⁵ Gulati, S.; Kaur, N., *Marriage Equality Around the World: A Myth or Reality*, International Journal for Research in Applied Science and Engineering Technology, 12, 2024. 1086-1094. 10.22214/ijraset.2024.59007.

Another challenge arises with polygamous or polyamorous family structures, which some cultures or subcultures practice. Globally, a number of countries (mostly with Islamic law influence) legally allow polygamy, and children may grow up in polygynous households (one father, multiple mothers). International human rights bodies have generally been critical of polygamy due to concerns about women's and children's welfare, and most Western jurisdictions do not recognize plural marriage. In terms of children's rights, the key issues are often inheritance and support – ensuring that fathers in polygamous unions support all their children adequately and that co-wives' children are treated equally. Where polygamy is illegal but practiced (e.g., in some immigrant communities), children might not have legal recognition of one of their parents' unions.

In sum, the recognition of non-traditional family structures in law has largely been about expanding adult rights – the right to marry whom one loves, the right not to marry at all and still have children, and the right to form families according to one's values. Yet most of these changes, when implemented with care, also promote children's rights. They eradicate unjust discrimination against children and they provide many children with more secure, loving homes. A child who is loved and cared for by two mothers or two fathers is undoubtedly better off if both those adults can be legal parents rather than one being treated as a legal stranger. Likewise, a child with unmarried parents benefits from laws that ensure they have the same support and inheritance rights as any other child. The law's child protection function is thus served by adapting to social reality – by recognizing that the best interests of children can be met in a variety of family configurations, so long as there is commitment, stability, and care.

5. ASSISTED REPRODUCTIVE TECHNOLOGIES AND SURROGACY: CHALLENGES FOR CHILDREN'S RIGHTS

Few areas illustrate the conflict between adult desires and children's interests as starkly as the realm of assisted reproductive technologies (ART) and surrogacy. Advances in medicine and technology – from in vitro fertilization (IVF) and sperm/egg donation to gestational surrogacy – have made it possible to create families in ways that were not imagined a century ago. These technologies offer hope and fulfillment to many would-be parents: infertile heterosexual couples, same-sex couples, and single individuals can now have biologically related children with the help of donors or surrogates. From the standpoint of adult autonomy, the rise of ART embodies the idea that individuals have a right to reproductive self-determination – to overcome nature's limitations and have a

child if they so choose, often phrased as a right to found a family using modern methods. However, this brave new world of reproduction raises intricate questions about children's rights, identity, and welfare. When a child is conceived with the genetic contribution of someone outside the rearing family (a donor) or carried to birth by someone other than the intending parent (a surrogate), the straightforward link between biological parentage and social parentage is broken. Law and policy must grapple with issues such as: Who are the legal parents? Should the child have a right to know their genetic origins? What if the adults' agreements (e.g., a surrogacy contract) conflict with what later seems best for the child? How do we prevent the buying and selling of children, or exploitation of women's bodies, while respecting the wishes of adults to have children?

The CRC in Article 7 proclaims that from birth, a child has "as far as possible, the right to know and be cared for by his or her parents". In the context of donor conception (sperm, egg, or embryo donation), this right comes into play because a donor-conceived child has genetic parents who are not the ones raising them. For much of the history of sperm donation (since the mid-20th century), anonymity was the norm; donors and recipient parents were often promised secrecy, and children were not told of their origins. The practice aimed to protect the adults: donors might not donate if they feared later responsibility or contact, and infertile couples might not use donors if they feared stigma or confusion. The child was assumed to be fine not knowing, especially if never told they were donor-conceived. Contemporary viewpoints have shifted dramatically on this issue in many jurisdictions. Sweden was a pioneer, enacting in 1985 a law that banned anonymous sperm donation and gave children the right to obtain the donor's identity when they reach maturity.¹⁶ The United Kingdom followed suit: as of 1 April 2005, donors in the UK lose the right to anonymity once any child conceived from their donation turns 18, meaning the child can request identifying information. Other nations in Western Europe, Australia, New Zealand, and parts of Canada have implemented similar policies eliminating donor anonymity in favor of children's rights to know their genetic parents. Even France, long committed to donor anonymity, reformed its bioethics law in 2021 to allow children conceived with donor gametes to learn the donor's identity at adulthood, reflecting a significant shift in values.¹⁷ However, not all jurisdictions agree – notably, the United States and many other countries – many countries of Central

¹⁶ Diduck, A.; Peleg, N.; Reece, H. (eds.), *Law in Society: Reflections on Children, Family, Culture and Philosophy*, Koninklijke Brill NV, The Netherlands, 2015, p. 551.

¹⁷ Committee on Social Affairs, Health and Sustainable Development, Report by Rapporteur Ms. Petra De Sutter (Belgium, SOC), Origin - Reference to Committee: Doc. 14419, Reference 4349, 22 January 2018.

and Eastern Europe - still permit anonymous donation, leaving it to the parents whether to tell the child.

Of course, identity rights must be balanced with other rights, like the right to privacy of donors or parents. Some argue that forcing disclosure could infringe donors' privacy or lead to fewer donors, thereby limiting adults' access to ART (and thus indirectly limiting some children's chance to be born at all). Courts like the European Court of Human Rights have wrestled with this balance: in *Odièvre v. France* (2003),¹⁸ for example, the ECHR upheld France's system of anonymous childbirth (allowing mothers to give birth under secrecy and give up the child, to avoid infanticide/abortion alternatives) – essentially prioritizing the mother's privacy and public policy over the adoptee's right to know origin. But that case was closely divided. In general, the trend is toward greater openness.

Surrogacy causes additional legal debates regarding parentage. Surrogacy – an arrangement where a woman (the surrogate) carries a pregnancy for intending parent(s) – raises an even more complex web of rights. There are two main types: traditional surrogacy (the surrogate's own egg is used, making her the genetic mother) and gestational surrogacy (the surrogate is not genetically related to the child; an embryo created via IVF, using either the intended mother's egg or a donor egg, is implanted in her).¹⁹ Surrogacy can be altruistic (unpaid beyond expenses) or commercial (with a fee). Jurisdictions' approaches vary widely: some ban all forms of surrogacy (e.g., France, Germany, many countries in Europe and Asia) on the grounds that it commodifies women and children, and contradicts public policy; some permit only altruistic surrogacy under strict conditions (e.g., Canada, UK, Australia state laws); others have more open commercial surrogacy markets (certain U.S. states, Ukraine, Georgia, etc., though this is changing). For the child, the foremost issues are legal parentage and citizenship, and the preservation of identity and relationships. Ideally, the law should ensure that from the moment of birth, the baby has clear legal parents who will care for them – without ambiguity or litigation. In practice, achieving this is tricky. Surrogacy agreements try to pre-arrange that the intending adults will be the legal parents and the surrogate (and her spouse, if any) will relinquish any parental rights. Many places (like several U.S. states and India in the past) enforce such contracts, making the intended parents the legal parents as long as procedures were followed. In contrast, other legal systems view surrogacy contracts as unenforceable or void. For instance, in Italy, a child born via surrogacy could not be registered as the child of the

¹⁸ *Odièvre v. France*, Application No. 42326/98, ECtHR, Judgment of 13 February 2003.

¹⁹ Erdősová, A., *Náhradné materstvo ako bioetický problém z pohľadu ochrany základných práv a slobôd (Surrogacy as a Bioethical Problem from the Perspective of the Protection of Fundamental Rights and Freedoms)*, *Justičná revue*, vol. 72, no. 4, 2020, pp. 471-480.

intending parents, because the law refused to recognize the surrogate's consent to give up the child. Even in places that allow surrogacy, thorny situations can arise: What if the surrogate refuses to relinquish the baby after birth? What if the intended parents abandon the child (e.g., upon discovering a disability or in a dispute between the commissioning couple)?

A child-centric critique of some ART practices is that they risk treating children as objects to be procured rather than individuals with rights. In commercial surrogacy, especially cross-border arrangements, money changes hands for the production of a baby – raising the specter of child-selling, which is prohibited by international law (the CRC's Optional Protocol on the Sale of Children, for example). Reputable surrogacy programs try to frame the payment as for the surrogate's services and inconvenience, not buying the child. Nonetheless, where large sums are paid, the arrangement starts to resemble a market transaction.

Recognizing the need to protect children in these new circumstances, some international initiatives have started. The Hague Conference on Private International Law is working toward a convention on international surrogacy, akin to the Hague Adoption Convention, to set standards and resolve cross-border parentage issues. Likewise, there are calls to explicitly affirm in international law a child's right to identity that covers donor and surrogate situations. The concept of "origins" has been explored in some scholarship and even court decisions. For example, some have argued that multiple aspects of identity rights (name, nationality, parentage) in instruments like the CRC and other human rights treaties together support the "child's right to know their origins".

In terms of law and policy, some countries have begun to incorporate child-focused measures in ART and surrogacy regulation. For instance, the UK, in regulating surrogacy, still insists that the surrogate is the legal mother at birth (reflecting caution and the birth-mother principle), and only transfers parentage by court order after birth with the surrogate's consent – this is intended to ensure no child is handed over without the birth mother's fully informed, postnatal consent, theoretically a protection for the child and surrogate. British law also requires that at least one intending parent be genetically related to the child in surrogacy, to avoid situations of a child born with no genetic tie to any commissioning parent. In contrast, some U.S. jurisdictions allow contracts even without genetic ties (gestational surrogacy with donor egg and donor sperm), which maximizes adult autonomy but raises the question of the child's complete genetic disconnect from the commissioning parents.

ART and surrogacy embody the tension between adults' powerful desire to have a child and the imperative to safeguard children's rights and dignity. Modern

family law is increasingly called upon to mediate this tension. Where successful, it finds ways to allow the creation of these much-wanted children while building in protections: preserving their knowledge of origins, ensuring they have stable legal parentage and citizenship, and preventing their treatment as commodities. Where regulation is absent or solely adult-oriented, the risk is that children become the products of other people's projects – a notion incompatible with the idea of the child as a rights-bearing individual.

6. TOWARD A CHILD-CENTRIC FAMILY LAW: POLICY RECOMMENDATIONS

Having examined modern family law and its evolution, it becomes clear that further adjustments are needed to restore equilibrium between adult autonomy and children's rights. The goal of these policy recommendations is to realign family law with its original protective purpose – safeguarding the welfare of children and the stability of their upbringing – while still honoring the legitimate gains of contemporary reforms, such as gender equality and personal freedom. In essence, the aim is a family law framework that puts children first without unduly infringing on adult rights.

1. Integrate Child Impact Assessments into Family Law Reforms:

Whenever new family law legislation or policy is proposed, a formal Child Impact Assessment should be conducted. This means carefully evaluating how the change will affect children's well-being and rights, and not just considering the benefits for adults. For example, if a jurisdiction considers legalizing a new form of adult partnership or a novel reproductive technology, the assessment would examine potential outcomes for any resulting children (in terms of stability, identity, emotional health, etc.).

2. Fortify the Best Interests of the Child Principle in All Proceedings:

The best interests standard should explicitly extend to all legal proceedings that substantially affect children, even if children are not the primary litigants. Currently, best interests are central in custody and adoption cases, but they could be given greater weight in, say, divorce proceedings or relocation disputes. One approach could be requiring that in any divorce involving minor children, courts verify that arrangements have been made that consider the children's welfare (housing, schooling, parenting time).

3. Enhance Post-Divorce Co-Parenting Enforcement:

One of the greatest harms to children from divorce or nonmarital breakups is the loss of contact with a parent. To counter this, parenting time orders (visitation) should be taken seriously by courts; consistent failure to honor a child's time with the other parent without good cause should have legal consequences. Programs that

facilitate cooperative parenting, such as parenting coordination or mediation for post-divorce disputes, can reduce the conflict children experience.

4. Guarantee Children's Right to Identity in ART and Adoption:

Laws concerning adoption, donor conception, and surrogacy should be reformed to prioritize the child's right to know their origins, as far as possible consistent with their best interests. Creating confidential registries for donor conception and surrogacy where information about the biological/genetic and birth origins of the child is recorded. Upon reaching a suitable age of maturity (typically 18, or earlier with court approval in special cases), the child should have the right to access identifying information about their donor(s) or surrogate, if they wish. In adoption, move toward open adoption arrangements where safe and appropriate – meaning the child or adoptive family maintains some level of contact or at least knowledge of the birth family. Even where full contact is not feasible, non-identifying information and a channel for later contact can help fulfill identity needs. The days of entirely secret adoptions with sealed records should be left behind.

5. Regulate surrogacy with an International and Child-Centric Approach:

Given the global nature of surrogacy today, there is a pressing need for international cooperation. Nations should work through frameworks like the Hague Conference to establish common minimum standards for surrogacy that include the prohibition of surrogacy arrangements that amount to sale of children. Any compensation should be strictly for reasonable expenses or service, not a price for the baby. Every child born via surrogacy should have clear legal parent(s) responsible for them immediately. This may mean pre-birth orders or expedited post-birth procedures to transfer parentage, depending on each country's method, but leaving a baby in limbo is unacceptable.

6. Reaffirm that Parenting is a Responsibility, Not Just a Right:

Family law should consciously project the message that while adults have rights to form a family, these rights come coupled with responsibilities. One practical step: incorporate statements of principles in family legislation (or even constitutions) that underscore parents' duties toward their children. For example, a provision could state, "Every parent has the responsibility to ensure, to the best of their ability, the conditions of care, protection, and development necessary for their child, and the state shall support parents in fulfilling this responsibility."

7. Child-Centered Training for Judges and Lawyers:

To implement the above reforms effectively, those who work in the family justice system should be trained to think in a child-centric way. Judges handling family cases should be well-versed in child development, psychology of family dynamics, and the relevant human rights standards (like the CRC). Lawyers too should aim to counsel clients (the parents) with an eye toward the children's welfare, not just the parent's wishes.

In proposing these recommendations, the emphasis is on balance: not a rollback to archaic rules that denied adults freedom and often harmed women and children in different ways, but not a laissez-faire approach either that treats children as mere appendages to adult lives. It calls for a renewed commitment to children's welfare as the touchstone of family law. In a world where the notion of family is fluid, such a commitment can be the steady compass.

7. CONCLUSION

The evolution of family law in the modern era is a mixture of progress and challenge. On one hand, we have witnessed the emancipation of individuals within the family: women's equality in marriage, freedom from loveless or abusive unions, recognition of diverse love and parenting, and the marvels of technology enabling parenthood against biological odds. These changes have enriched the lives of countless adults – and by extension, benefited many children who are now raised in homes built on love and choice rather than coercion or social convention. On the other hand, the speed and scope of these transformations have at times outpaced our legal and social systems' ability to ensure that no child's well-being is compromised. The family, in all its new forms, remains the primary environment in which children grow. It is therefore imperative that as we reconstruct the legal definition and incidents of "family," we do so in a way that keeps sight of the child.

Historically, family law's north star was the protection of the next generation – sometimes expressed in rigid, paternalistic ways, yet fundamentally about providing children with stable families. Contemporary law, enamored with adult rights, must not lose that inheritance. The challenge moving forward is to harmonize the two paradigms: to assert that adult autonomy in family life finds its limit where it would seriously undermine a child's fundamental interests, and conversely that children's welfare is usually best secured by supporting loving caregivers – who themselves need rights and freedoms. As the UN Convention on the Rights of the Child encapsulates, children have the right to be raised by their parents (biological or adoptive) whenever possible, the right to express their views, and the right to have their best interests be a primary consideration in all matters affecting them. These principles offer guidance for every hard question, from divorce to donor conception.

A truly child-centric family law would not see itself as antithetical to adult happiness; rather, it recognizes that in the long term, the flourishing of society's children and the fulfillment of its adults go hand in hand. Adults who grow up safe, loved, and secure as children are far more likely to become happy and

autonomous individuals who form healthy families of their own. Thus, investing in children's rights within family law is essentially investing in the next generation's autonomy and well-being. The policy recommendations outlined – from integrating child impact assessments into lawmaking to enforcing identity rights – are practical steps toward this investment. They aim to ensure that in the joyful exercise of personal freedoms that characterize our age, we do not inadvertently short-change our youngest and most vulnerable. Keeping this insight at heart will help ensure that the soul of family law remains firmly oriented toward nurturing each child, even as the family itself takes new forms.

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