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The Constitution as an Instrument of Prejudice: A Critique of *AB v Minister of Social Development*

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ABSTRACT: In *AB v Minister of Social Development*, the applicants challenged extant law that requires surrogacy commissioning parents to use their own gametes for the conception of a child, rather than donor gametes. The majority of the Constitutional Court rejected the challenge on the basis that a child has the right to know his/her genetic origins. The basic premise for this was that knowing one's genetic origins is important to a child's development of a positive self-identity. However, the psychological expert opinions before the Court cast doubt on this premise. Why did the majority of the Court disregard the expert evidence and accept the premise? I suggest that the likely reason is that the premise is supported by traditional black South African cultural precepts about kinship formation, which continues to be influential in contemporary South Africa. In this cultural tradition, belonging to a clan is foundational to one's identity. Belonging, in turn, depends on blood ties with the clan, or, in less rigid varieties of this tradition, depends on at least knowing the child's genetic origins. Therefore, in this cultural tradition, if a child was conceived using male and female anonymous donor gametes, then belonging to a clan would be impossible, and the child would lack a foundational element of his/her identity. The fact that these traditional cultural precepts about kinship formation continue to be influential in contemporary South Africa cannot support the majority judgment in *AB*, as these cultural precepts constitute prejudice against children based on their social origins. While such prejudice may be beyond the control of the law, the law should never give effect to prejudice. By interpreting constitutional rights such as dignity and the best interests of the child through a lens of prejudice, the Court rendered the Constitution an instrument of prejudice.

KEYWORDS: Best interests of the child, dignity, genetic origins, tradition, culture, social origins

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I A LONG TIME AGO, IN A LAND FAR, FAR AWAY…

Shortly before the Interim Constitution entered into force, the case of *Van Rooyen v Van Rooyen*[1] was heard by the then Witwatersrand Local Division of the Supreme Court. The case concerned the revision of the visitation rights of a divorced mother. Subsequent to her divorce from her husband (and father of their children), she entered into a lesbian relationship. The father perceived the children being exposed to the mother's homosexual relationship as risking psychological harm to the children. The court took specific note of the Bill of Rights that was soon to enter force, and held that it respected the mother's homosexuality. However, the court also held that should the mother's lesbian partner share the mother's bedroom during a visit by the children, it would expose the children to 'confusing signals' regarding sexuality that would be 'detrimental' to the children.[2] As such, the court framed the case as a balancing exercise between conflicting rights: on the one hand, the right of the mother not to be discriminated against based on her sexual orientation, and on the other hand, the best interests of the children. The court held that the best interests of the children should be paramount, and consequently that (a) the mother's lesbian partner may not share the mother's bedroom during the children's weekend visits, and (b) the mother's lesbian partner may not live in the same house as the mother during the children's holiday visits. However, was this court order really in the best interests of the children?[3]

Since the time of the *Van Rooyen* judgment, dramatic progress has been made regarding the legal and social equality of homosexual persons. For the contemporary legal analyst, it should be apparent that the *Van Rooyen* court's reasoning entailed a false dichotomy between the parent's open homosexual lifestyle, and the best interests of the child. From our current vantage point, it is clear that the *Van Rooyen* court used the best interests of the child as a smokescreen for prejudice.

Our present time may however also be burdened by social and cultural attitudes that may in future – or even presently by more forward-thinking members of society – be regarded as prejudice. What are our contemporary prejudices? Or, stated with more exactness, what are the prevailing social norms that entail inter alia dislike toward an idea or group of persons, but which are not evidence-based? Similar to what happened in the *Van Rooyen* judgment, our courts and lawyers may – consciously or unconsciously – fall prey to prevailing prejudice when interpreting the best interests of the child. This is not only a hypothetical proposition. I suggest that, indeed, it happened in a recent Constitutional Court case, which I introduce next.

II NOT SO LONG AGO, IN A LAND FAR, FAR AWAY…

The case of *AB v Minister of Social Development*[4] (hereafter *AB*) centred on how the best interests of the child should be interpreted in a rather unconventional reproductive context, namely surrogate motherhood and the conception of the child by using anonymous donor gametes. AB, the first applicant, had a sad history of failed attempts to become a mother: first by undergoing in vitro fertilisation (IVF) using embryos created from her own eggs and her husband's sperm; then, given that she was entering menopause and her own eggs were

1 1994 (2) SA 325 (W)('*Van Rooyen*').

2 Ibid at 328J–330A.

3 D Jordaan 'Homoseksuele Ouerskap: 'n Grondwetlike Analise' (1998) *De Jure* 302.

4 [2015] ZAGPPHC 580, 2016 (2) SA 27 (GP)('*AB HC*'); [2016] ZACC 43, 2017 (3) SA 570 (CC)('*AB CC*').

of insufficient quality, using embryos created from donor eggs and her husband's sperm; and lastly, following a divorce, using embryos created from donor eggs and donor sperm.[5] Altogether, AB underwent eighteen failed IVF attempts. When IVF proved to be a cul-de-sac, AB started to explore surrogate motherhood as a reproductive avenue. This avenue, she soon discovered, was however legally closed to her: The Children's Act 38 of 2005, which regulates surrogate motherhood, requires in s 294 that, as a single commissioning parent, she had to use her *own* eggs for the conception of a surrogacy child. Apart from the fact that it was medically impossible for her to comply with this requirement of the Children's Act, the bigger normative question was: why is using one's own genes so important? (Not to mention several legal questions, such as why could AB use donor gametes for self-gestation, but not for surrogate gestation?)

AB challenged the constitutionality of s 294 as being arbitrary,[6] and as infringing six rights in the Bill of Rights: human dignity,[7] equality before the law,[8] non-discrimination,[9] the right to make decisions regarding reproduction,[10] privacy,[11] and access to healthcare.[12] She was joined by the Surrogacy Advisory Group, a non-profit company, as second applicant. The Minister of Social Development, supported by the Centre for Child Law (CCL) as *amicus curiae*, opposed the application. The best interests of the (future) child took centre stage from the onset: while the applicants argued that the best interests of the child do not require a commissioning parent's own gametes to be used for the conception of the child, the Minister and the CCL argued the opposite. Importantly, the applicants' position was informed and supported by extensive evidence provided by child psychology.[13] This included two expert opinions by academics at the University of Cambridge in the United Kingdom who specialise in the psychology of children who were brought into the world using new reproductive technologies, such as donor conception and surrogacy.[14] These experts presented the court with overviews of numerous empirical studies on the psychological well-being of such children.[15] The results consistently showed that a parent–child genetic link is not required for the psychological

[5] It is interesting to note that women who undergo in vitro fertilisation themselves can *elect* to use donor gametes for the conception of their children. This choice is not limited to women who cannot, for a medical reason, use their own eggs; this choice is also not limited to just using donor eggs, but can also include donor sperm. Therefore, a woman can choose to be impregnated with an embryo that was created using eggs and sperm from donors of her choice. See *AB CC* (note 4 above) at para 100. Note, however, that the minority judgment is incorrect in holding that the Regulations Relating to Artificial Fertilisation of Persons of 2012 have been repealed by new Regulations Relating to Artificial Fertilisation of Persons in 2016. The 2016 Regulations were only *draft* regulations published for public comment, and did not repeal the 2012 Regulations at the time the case was heard.

[6] Constitution of the Republic of South Africa 1996('Constitution') s 1.

[7] Constitution s 10.

[8] Constitution s 9(1).

[9] Constitution s 9(3).

[10] Constitution s 12(2)*(a)*.

[11] Constitution s 14.

[12] Constitution s 27(1)*(a)*.

[13] *AB HC* (note 4 above) at para 86.

[14] Ibid. See also Golombok expert opinion at para 5 (*AB* record at 738–739); Jadva expert opinion at para 4 (*AB* record at 1796).

[15] *AB HC* (note 4 above) at para 86; Golombok expert opinion (*AB* record at 737–745); Jadva expert opinion (*AB* record at 1794–1824).

well-being of the child.[16] The applicants further filed an expert opinion by a local South African clinical psychologist who specialises in the field of new reproductive technologies, and who agreed with the opinions of the Cambridge experts.[17] In contrast, the Minister filed an opinion by a bioethicist who presented an argument that a parent–child genetic link is essential for the psychological well-being of the child.[18] This bioethics opinion suffered from numerous demerits, chief among them being that a bioethicist is not qualified to present an expert opinion in the field of psychology.[19] Eventually, the Minister abandoned her own expert (with good reason) and did not place any reliance on the bioethics opinion.[20] The CCL did not file any expert opinion. Accordingly, from an evidentiary perspective, the interpretation of the best interests of the child, in the context of the case, should have been clear-cut.

How did the courts decide? Although the Pretoria High Court found in favour of the applicants, a majority of the Constitutional Court found in favour of the Minister and the CCL – disregarding the evidence before it without analysis or good reason. I have previously analysed the *AB* legal saga from an evidentiary perspective, and highlighted this disconcerting snub of the rule of law.[21] What ideas regarding the best interests of the child were so deeply ingrained in the judicial minds of those deciding the *AB* case, so as to mentally block out the evidence?

In this article, I explore the social normative context of the *AB* decision, identify the social norms that were reinforced by the decision, and consider the constitutional tenability of such social norms and their judicial reinforcement. But first, I familiarise the reader with the interesting argument about the best interests of the child that was the central issue of debate between the parties.

III THE CHILD'S RIGHT TO KNOW HIS/HER GENETIC ORIGINS

If the evidence is against you, invent a new right. This appears to have been the litigation tactic employed by the Minister in the High Court[22] and then by the CCL in the Constitutional Court[23] – and that ultimately secured a majority of the Constitutional Court justices' votes for its cause. For the purposes of analysis, the right-inventing argument can be formulated as two interconnected syllogisms:

- Knowing one's genetic origins is important to a child's development of a positive self-identity (Premise 1a)
- Having a positive self-identity is in the best interest of a child (Premise 1b)
- Therefore: Knowing one's genetic origins is in the best interest of a child (Conclusion 1/Premise 2a)

[16] Ibid.

[17] Rodrigues expert opinion II at para 9 (*AB* record at 2561).

[18] *AB HC* (note 4 above) at para 85; Van Bogaert expert opinion, part II (revised version)(*AB* record 2577–2595).

[19] Ibid fn 54; Pretorius expert opinion (*AB* record 2443–2452).

[20] *AB CC* (note 4 above) at para 202.

[21] DW Thaldar 'Post-truth Jurisprudence: The Case of *AB v Minister of Social development*' (2018) 34 *South African Journal on Human Rights* 231.

[22] Minister's answering affidavit I, paras 3.7.5, 6.11, 8.14.1. (*AB* record at 1390, 1402, 1419).

[23] The CCL's submissions in the High Court focused on comparative law, and did not mention the child's proposed right to know his/her genetic origins. However, subsequent to the High Court judgment specifically rejecting the proposed right of a child to know his/her genetic origins, the Minister and CCL appear to have each reconsidered their positions. In the Constitutional Court, the Minister abandoned this argument, while the CCL eagerly took up the banner of this argument. See *AB HC* (note 4 above) at para 187.

- The paramountcy of the best interests of a child is a constitutional right (Premise 2b)
- Therefore: A child has the right to know his/her genetic origins (Conclusion 2).

The applicants took issue with the first premise (1a), namely that knowing one's genetic origins is important to a child's development of a positive self-identity, and hence rejected the conclusions of the argument.[24] The applicants argued that the first premise is a factual statement within the proper province of child psychology, and that there was no psychological expert opinion presented to the court to support this statement.[25] In fact, the psychological expert opinions filed by the applicants cast doubt on the first premise. Dr Jadva, one of the Cambridge experts, addressed the question: is not knowing one's genetic origins likely to impact negatively on one's psychological well-being (by causing identity problems or otherwise)?[26] Dr Jadva started her answer by pointing out that studies show that *disclosure* of donor-conception elicit a range of positive and negative emotions, depending on the circumstances.[27] Finding out that one was donor-conceived earlier in childhood is associated with less negative emotions.[28] Dr Jadva offered the following explanation:

> If a child grows up knowing about his/her anonymous donor-conception, it appears that such knowledge is incorporated into his/her identity. In contrast, if a person grows up under the false impression that his/her social parents are also his/her genetic parents, the identity that such person has built during childhood and adolescence is challenged in the event of late disclosure. As such, it is understandable that late disclosure causes more negative feelings than disclosure during childhood.[29]

However, the argument in favour of recognising the child's right to know his/her genetic origins does not focus on a child's experience of the event of disclosure (of donor-conception), but rather on the broader effect on a child's self-identity of not knowing his/her genetic origins. Dr Jadva opined as follows in this regard:

> Identity formation happens gradually throughout childhood and especially during adolescence. Multiple factors in a child's environment impact on this process. Some factors may complicate this process to a greater or lesser degree, but do not necessarily diminish a child's psychological well-being. Being anonymous-donor-conceived (and hence not knowing one's genetic origin) seems to be one such factor.[30]

The applicants also filed two opinions by Professor Metz, an ethics expert, whose opinions dovetail with Dr Jadva's opinion.[31] Professor Metz argued that:

> Being a 'coloured' child in a society that is overwhelmingly either black or white, or being the product of a marriage between a Westernised, Jewish father from an urban metropolis and a sub-Saharan woman from a rural village who believes in African traditional religion, would be 'ambiguous' or 'complicated' in no qualitatively different a sense than being a child who lacks a genetic relationship with its parents, and yet the state would surely be unjust to prohibit the creation of such children for that reason.[32]

[24] SAG replying affidavit I at paras 303–309.3 (*AB* record at 1648–1650); SAG replying affidavit II at paras 50–59 (*AB* record at 2359–2363).

[25] Ibid.

[26] Jadva expert opinion at para 8 (*AB* record at 1799).

[27] Ibid at para 17 (*AB* record at 1803).

[28] Ibid.

[29] Ibid at para 30 (*AB* record at 1808).

[30] Ibid at para 29 (*AB* record at 1808).

[31] Metz expert opinion I (*AB* record at 1950–1967); Metz expert opinion II (*AB* record at 2563–2576).

[32] Metz expert opinion II at para 14.2 (*AB* record at 2571).

Professor Metz pointed out that the logic of the right-inventing argument would entail that the state would be justified in forbidding interracial marital procreation and procreation between people from radically different cultural backgrounds.[33] One can easily expand on this list by thinking of any factor that may complicate a child's identity formation. Consider the *Van Rooyen* case: If a child's mother and father get divorced and the mother enters into an open, intimate homosexual relationship with another woman, is this likely to *complicate* a young child's self-identity? And if so, does it constitute a sufficient legal ground to shield the child from being confronted with such a *complicating* factor? The applicants argued that it does not – it is clear from Dr Jadva's opinion that psychological *complication* should not be confused with psychological *harm*.

Dr Jadva did not confine her opinion to the effect of not knowing one's genetic origins on self-identity alone (the sole focus of the argument for recognising a child's right to know his/her genetic origins), but devoted a significant part of her expert opinion to the effect of not knowing one's genetic origins on children's psychological well-being in general (including, but not limited to a positive self-identity).[34] With reference to empirical studies, she showed that (a) there is no difference in the psychological well-being of donor-conceived children and naturally conceived children, and that (b) there is no difference in the psychological well-being of donor-conceived children who know the identity of their donors, and donor-conceived children where anonymous donors were used.[35] Accordingly, Dr Jadva answered the question posed to her as follows: Not knowing one's genetic origins does not appear likely to impact negatively on one's psychological well-being.[36]

Dr Jadva's conclusion, which was based on quantitative empirical studies, was confirmed[37] from a clinical perspective by Ms Rodrigues, a South African clinical psychologist who works with surrogacy, infertility, and gamete donor selection.[38] Ms Rodrigues elaborated as follows:

> In my observation, donor-conceived children have not manifested any discernable higher incidence of psychological problems than children in the general population. […] It should be considered that IVF using donor gametes has been practised in South Africa for over a generation, and has become generally accepted medical practice in South Africa. During all this time, I am not aware of any report in the literature or at psychology conferences or workshops that contradicts my observation […] above.[39]

These expert opinions – one would think – should have convincingly countered the argument for recognising a child's right to know his/her genetic origins. However, the Constitutional Court majority disregarded this evidence.[40] The proffered reason was that the Court, and not experts, is the ultimate authority on questions regarding the validity of legislation, and that the Court should arrive at its own independent evaluation of the issues before it.[41] What these legal rules *do* support is not blindly accepting experts' conclusions, but critically engaging with the evidence, evaluating its credibility and reliability, and then applying it to the legal question

[33] Ibid.
[34] Jadva expert opinion at paras 20–27 (*AB* record at 1804–1807).
[35] Ibid.
[36] Jadva expert opinion at para 27 (*AB* record at 1807).
[37] Rodrigues expert opinion II at para 9 (*AB* record at 2561).
[38] Rodrigues expert opinion I at para 4 (*AB* record at 853).
[39] Rodrigues expert opinion II at paras 8.1-8.2 (*AB* record at 2560–2561).
[40] *AB CC* (note 4 above) at para 269.
[41] Ibid.

before the Court.[42] But clearly being the ultimate authority and engaging in independent evaluation do *not* support just disregarding expert evidence properly before the Court.[43]

Yet, in an indirect and deeply perverse way, the expert evidence did influence the majority judgment. This is how: the conclusions in the expert opinions filed by the applicants are general statements that point to probability, not certainty. In typical scientific fashion, the Cambridge experts used cautious language and qualified their opinions with words such as 'likely', 'not necessarily', and 'may'. Similarly, Ms Rodrigues also carefully avoided absolute statements. Consider for instance the following core statement in the expert opinion by Ms Rodrigues: 'In my observation, donor-conceived children have not manifested any discernible higher incidence of psychological problems than children in the general population'.[44] This means that donor-conceived children *generally* do not manifest more psychological problems than children in the general population. It does not mean that donor-conceived children *never* manifest psychological problems; there is a possibility, however slight, that some donor-conceived children may indeed suffer from psychological problems.

These probabilistic, non-absolute statements formed the basis of the applicants' argument in court – the applicants' position was that where a child does not know his/her genetic origin, it is *unlikely* to impact negatively on a child's self-identity or psychological well-being. The majority of the Constitutional Court pounced on the non-absolute nature of the applicants' argument as a weakness in the applicants' case:

> The applicants did not dispute that the clarity of origin *may* be important to a self-identity and self-respect of the child. […] The *risk* to children's self-identity and self-respect (their dignity and best interests) is, unquestionably, *all important*.[45]

This is a confounding development in our law: instead of requiring the state party to show that there is a rational nexus between the impugned provision and a legitimate government purpose, the fact that the party that challenges the impugned provision cannot with absolute certainty prove that there is no such nexus, is perceived as establishing such a nexus. In more general terms: if you cannot disprove a proposition with absolute certainty, it proves the proposition. Thus, although not explicitly but certainly implicitly, the child's purported right to know his/her genetic origins was recognised by South Africa's highest court.[46] But what deeply rooted beliefs could have caused the majority of the Constitutional Court to negate the rules of evidence and logic in such obvious and extreme ways when it came to the issue of a child's blood ties with his/her parents?

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[42] See, for instance, *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* [2013] ZACC 35, 2014 (2) SA 168 (CC), where the Constitutional Court analysed the psychological expert opinion at length, and explicitly based its decision on such evidence. An overview of our law regarding expert evidence is presented in *Twine v Naidoo* [2017] ZAGPJHC 288, [2018] 1 All SA 297 (GJ) at para 18.

[43] I analyse this issue in more detail in Thaldar (note 21 above).

[44] Rodrigues expert opinion II at para 8.1 (*AB* record at 2560).

[45] *AB CC* (note 4 above) at para 290 (emphasis added).

[46] Ibid at para 294 ('[T]the substance below the surface is the need for a genetic link between a child and at least one parent […] clarity regarding the origin of a child is important to the self-identity and self-respect of the child.')

IV THE UNARTICULATED DEEPEST PREMISES

In a recent lecture, Cameron J (part of the *AB* minority) observed as follows:

> [T]he duty of constitutional guardianship and exposition cannot and does not stop at securing democratic political processes. More is entailed. For in applying any form of law judges are called on to do more than only determine the outcome of disputes before them. They are required to explain the normative framework that impels the answers they give, and sometimes to expound its deepest premises.[47]

Perhaps the 'deepest premises' of the 'normative framework' that impelled the answers given by the majority of the Constitutional Court in *AB* are reasonable, convincing, and aligned with the values of the Constitution – and the majority of the Constitutional Court just failed to articulate such premises sufficiently? There are several clues pointing to such premises. First, the majority, relying on the Children's Act, held that 'keeping the connection with extended family, culture and tradition is indeed part of the factors showing where the best interests of the child lie'.[48] This statement in isolation does not assist the current analysis (nor the majority's position), given that the Children's Act also provides that a surrogacy child is the child of the commissioning parents,[49] not the gamete donors;[50] accordingly, a hypothetical surrogacy child who was conceived using male and female anonymous donor gametes *will* have an extended family, culture and tradition – the extended family, culture and tradition of his/her commissioning parents (and *not* the extended family, culture and tradition of his/her gamete donors). However, this statement by the majority must be seen in the light of the other clues: during oral argument, Moseneke DCJ (who was part of the majority) remarked that a parent-child *genetic* link is of vital importance in 'certain cultures', and twice referred to a 'Zulu man' as a supposed example of someone for whom such a *genetic* link would carry such importance. In the same vein as Moseneke DCJ's remarks, the minority judgment refers to 'the African custom that requires that a boy must know the genetic origin of his father to form a part of the community'.[51] From a reading of the majority judgment as a whole, it is clear that what the majority had in mind was, in fact, the child's connection with the extended family, culture and tradition of his/her *genetic* parents (contra the provisions of the Children's Act).

It would appear that the deepest premises underlying the majority judgment are certain cultural norms that emphasise the importance of genetic origins in the conception of what constitutes a child's family, culture and tradition. These cultural norms deserve analysis. There is a growing body of research on public perceptions in South Africa about the adoption of

[47] E Cameron 'Judges, Justice, and Public Power: The Constitution and the Rule of Law in South Africa' (2018) 18 *Oxford University Commonwealth Law Journal* 73.

[48] *AB CC* (note 4 above) at para 300.

[49] Children's Act s 297(1)(a) ('The effect of a valid surrogate motherhood agreement is that— (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned.')

[50] Children's Act s 1 ('"[P]arent", in relation to a child, […] excludes— (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.')

[51] *AB CC* (note 4 above) at para 197.

genetically unrelated children[52] – often abandoned babies whose genetic origins are unknown.[53] The results of this research illuminate the cultural norms regarding kinship formation are prevalent in contemporary South Africa. In the following paragraphs, I present an overview of these cultural norms, based on this research.

In traditional black South African culture, ancestral spirits play an important role. One particular area where belief in ancestral spirits features prominently is in kinship formation. When a child is born, tradition demands that the child must be ritually introduced not only to living clan members, but also to the clan ancestors, in order to secure the ancestors' acceptance of the child into the clan.[54] As a child grows up, the importance of belonging to the clan, which is perceived as including the living clan members and their ancestors, is inculcated in the child's psyche; belonging to the clan – one's social and spiritual roots – becomes foundational to a child's identity. Accordingly, the knowledge that one has been accepted by the clan's ancestors and that one therefore belongs to the clan are critical factors for a child to develop a positive self-identity.

The ancestors' acceptance of a child into the clan is not only a matter of performing a ritual, but pertinently requires that the child must have blood ties with the clan; without such blood ties, the ancestors will not accept a child as a member of the clan.[55] Upsetting the continuity of blood ties between the ancestors and the next generation is perceived as improper

[52] Z Mokomane & T Rochat 'Study Report on the Perceptions, Understanding and Beliefs of People Regarding Adoption and Blockages that Prevent Communities from Adopting Children in South Africa' (Commissioned by the Department of Social Development 2010).(This report was discovered by the Minister subsequent to a court order obtained by the applicants in *AB*); P Martin & B Mbambo 'An Exploratory Study on the Interplay between African Customary Law and Practices and Children's Protection Rights in South Africa' (Commissioned by Save the Children Sweden Southern Africa Regional Office 2011), available at http://www.childlinesa.org.za/wp-content/uploads/customary-law-study-south-africa-report-nov-2011.pdf; Z Mokomane & T Rochat 'Adoption in South Africa: Trends and Patterns in Social Work Practice' (2012) 17 *Child & Family Social Work* 347; D Blackie 'Sad, Bad and Mad: Exploring Child Abandonment in South Africa' (Master's dissertation, University of the Witwatersrand, 2014), available at http://wiredspace.wits.ac.za/handle/10539/17064; P Gerrand & M Nathane-Taulela 'Developing a Culturally Relevant Adoption Model in South Africa: The Way Forward' (2015) 58 *International Social Work* 55; T Rochat, Z Mokomane & J Mitchell 'Public Perceptions, Beliefs and Experiences of Fostering and Adoption: A National Qualitative Study in South Africa' (2016) 30 *Children & Society* 120; P Gerrand 'The Legal Adoption of Unrelated Children: A Grounded Theory Approach to the Decision-Making Processes of Black South Africans' (Doctoral thesis, University of the Witwatersrand, 2017), available at http://wiredspace.wits.ac.za/handle/10539/24554.

[53] Blackie (note 52 above).

[54] Gerrand & Nathane-Taulela (note 52 above) at 58 (Most black South African families still practise ceremonies to introduce the biological child to living relatives and ancestral spirits, so that the child can develop a sense of belonging and identity.) Gerrand (note 52 above) at 69 (If rituals like '*imbeleko*' – introducing the new-born baby to the ancestors – are not performed according to the customs of the paternal clan, misfortune and bad luck are said to follow the child for the rest of his/her life.)

[55] Gerrand (note 52 above) at 142. (Observes that 'in terms of ancestral beliefs, family systems have rigid boundaries based on blood ties'.) Gerrand's view is echoed by the KwaZulu-Natal Commissioner for Traditional Leadership Disputes and Crimes, Professor Jabulani Mphalala, who has stated that 'it would take years before there was a flexibility of mind about adoption among most South Africans. […] Ancestral spirits look after their relatives and no-one else. In our religion, in our culture, this thing is ring-fenced'. C Dardagan 'Red Tape Slowing down Adoptions' *IOL* (21 February 2014), available at https://www.iol.co.za/lifestyle/family/parenting/red-tape-slowing-down-adoptions-1650829.

and offensive[56] – and can invoke retribution by the ancestors.[57] At most, an unrelated child can be taken into foster care, subject to preference being given to other children who are blood family.[58] This belief in the rigid demarcation of the family as a social structure through blood ties is clearly irreconcilable with the adoption of unrelated children and surrogacy using male and female anonymous donor gametes. Such practices would expose the adoptive or commissioning parents – and even the unrelated adoptive or surrogacy child – to the wrath of the ancestors.

Accordingly, the situation of a hypothetical surrogacy child who is conceived using male and female anonymous donor gametes (and who is therefore unrelated to the commissioning parents) would indeed be bleak. Apart from being the embodiment of an offence against the ancestors and an entire cultural tradition, the child could never truly become part of the clan, and given that clan membership is emphasised as a foundational element of a person's identity, the child irredeemably lacks a foundational element of his/her identity. Moreover, on a spiritual level, such a child can never know his/her genetic ancestors, with unpleasant and even punitive consequences for the future happiness of the child. Clearly, in traditional black South African culture, intentionally wanting to create such a child is *evil*. Note that this is exactly what AB wished to do, and what the applicants in *AB* intended to legalise.

A less rigid version of this belief entails that a child without blood ties *can* be accepted by the ancestors *provided* that the child's ancestry is known, and provided that the ancestors are informed of the child's ancestry during the ritual introduction of the child to the ancestors.[59] However, this less rigid version is still problematic from the perspective of adoption of unrelated children whose genetic origins are unknown, such as abandoned babies and surrogacy using male and female anonymous donor gametes. In instances like these, where a child's genetic origins are unknown, only a very relaxed version of the belief in ancestors would allow for the child to be introduced to the ancestors and accepted in the clan.[60]

[56] Mokomane & Rochat (2010)(note 52 above) at ix; Rochat, Mokomane & Mitchell (note 52 above) at 124 (A study participant remarked: 'When you are born, there are certain things that ancestors require of us. They know who our child is and where he is. Just imagine if you adopt a Biyela child and join the child to the Mthembus. There will be war between the Biyela and Mthembu ancestors, both ancestors will fight over who owns the child.')

[57] Blackie (note 52 above) at 6 (Observes, in the context of the adoption of abandoned children, the common belief that an adopted child's lack of connection with his/her genetic ancestors will result in a troubled and unfulfilled life for the child, and that the adoption would also cause problems with their ancestors for the adoptive parents.) Rochat, Mokomane & Mitchell (note 52 above) at 124 (Observe that 'children deprived of their roots would lose contact with their ancestors, with unpleasant, punitive consequences for the future happiness of the child'); Gerrand (note 52 above) at 208 (Cautions that unrelated adoption would 'probably expose the adopted child to risk'; study participants emphasised that in traditional African culture, trying to integrate a 'foreign' child into a kin system can invoke retribution by the ancestors.)

[58] Gerrand (note 52 above) at 140–141.

[59] Martin & Mbambo (note 52 above) at 43 (Quote traditional leaders who participated in their study as remarking that: 'It is not possible to adopt a child whose surname you don't know. How can you slaughter a goat for that child? Whose ancestors are you going to call when you do not know his/her source?') See Rochat (note 52 above) at 124 (Ritualistic practices to appease ancestors and allow non-kin placement of children require information on the child's genetic origins.) See also Gerrand (note 52 above) at 131.

[60] Gerrand (note 52 above) at 133 (Some study participants – all participants were black South Africans – regarded denying adoptable children the opportunity to enter a loving family because of staunch ancestral beliefs as 'ridiculous'.)

How prevalent is the belief in ancestors among black South Africans in contemporary South Africa? Similar to the way in which certain pre-modern Western cultural elements, most notably Christianity, continue (one could argue anachronistically) to exercise influence on the modern Western world, certain traditional black South African cultural elements also continue to exercise influence among contemporary black South Africans.[61] Although many black South Africans have adopted a modern lifestyle, this does not mean they have abandoned their traditional beliefs. The traditional construct of kinship formation in particular is something that many black South Africans continue to strongly identify with.[62] This is vividly illustrated by the stark difference in adoption rates between South Africa's white and black populations. A black person is about nine times less likely to be an adoptive parent than a white person[63] – despite the high number of black children waiting to be adopted.[64]

Given these insights into the deepest premises of the normative framework of contemporary black South Africans, the question must be asked: was the finding by the majority of the Constitutional Court in *AB* not, after all, reasonable and ultimately correct? These insights can be fertile soil for an argument against the applicability of the psychological expert opinions presented by the applicants, and in support of the constitutionality of s 294 (the impugned provision). Such an argument that could have provided support for the position taken by the majority of the Constitutional Court in *AB*, can be systematically constructed as follows ('the tradition-based argument'):

- In traditional black South African culture (Value A), belonging to a clan is foundational for one's identity, and (Value B) belonging to a clan depends on blood ties with the clan, or (in less rigid varieties of tradition) depends on knowing the child's genetic origins. (Premise 1)
- Therefore (because of Premise 1), in traditional black South African culture, if a child was conceived using anonymous male and female donor gametes, (because of Value B) belonging to a clan would be impossible, and (because of Value A) the child will lack a foundational element of his/her identity. (Conclusion 1/Premise 2)
- Traditional black South African cultural precepts about kinship formation are influential in contemporary South African society. (Premise 3)
- Therefore (because of Premise 3), children in contemporary South Africa are likely to grow up in a community where traditional black South African cultural precepts about kinship formation are influential. (Conclusion 2/Premise 4)
- Therefore (because of Premises 1 and 4), children in contemporary South Africa are likely to internalise Values A and B. (Conclusion 3/Premise 5)
- Therefore (because of Premises 2 and 5), children in contemporary South Africa, if conceived using anonymous male and female donor gametes, are likely to feel that they lack a foundational element of their *identity*. (And since identity is part of one's dignity, it also follows that such children will also feel that their *dignity* has been violated). (Conclusion 4/Premise 6)

[61] Ibid at 131 (A study participant remarked: 'Ninety-nine per cent of people in our culture, they believe in ancestors.')

[62] Ibid at 208 ('[M]any well-educated, black South Africans identify with a traditional African cultural construct of kinship.')

[63] Mokomane & Rochat (note 52 above) at 353.

[64] Blackie (note 52 above) at 8 (In November 2013, the Registry of Adoptable Children and Parents (RACAP), showed that of the unmatched children, 398 were black, 3 were white, and 9 were termed 'mixed' race.)

- Section 294 was designed to avoid a situation where surrogacy children can be conceived using anonymous male and female donor gametes. (Premise 7)
- Therefore (because of Premises 6 and 7), s 294 protects the best interests of the child (including the child's dignity). (Conclusion 5/Premise 8)
- The paramountcy of the best interests of a child is a constitutional right; dignity is a constitutional right (Premise 9)
- Therefore (because of Premise 8 and 9), s 294 is aligned with the Constitution. (Conclusion 6)

If this argument is accepted, an attack on the constitutionality of s 294 is therefore a *balancing* exercise between the rights of commissioning parents, like AB, who wish to use male and female anonymous donor gametes, and the best interests of the future child. But there is a special moral and legal relationship between these supposed opposing parties: parents are morally and legally expected to care for their children, and unselfishly act in their children's best interests. Accordingly, the balancing scale must tilt in favour of the best interests of the future child. The attack on the constitutionality of s 294 must fail.

Does this settle the matter? Was the majority judgment in *AB* correct to reject the attack on the constitutionality of s 294? In the following sections, I analyse four potential counter-arguments to the tradition-based argument. While there are degrees of similarity between the first three counter-arguments and the arguments contained in the *AB* minority judgment, the fourth counter-argument – which I suggest is the most profound argument against the tradition-based argument – was not canvassed in any of the *AB* judgments and presents a new way of thinking about the issues in *AB*.

V COMMONSENSE PROBABILITIES

Consider the 'Zulu man' referred to by Moseneke DCJ as the stereotype of a staunch adherent of traditional black South African culture. It strikes one as counter-intuitive that the 'Zulu man' – if he is such a staunch adherent to traditional black South African culture – will ever contemplate using anonymous male and female donor gametes to beget a child. Stated in terms of probability, the *probability* of a surrogacy child conceived using male and female anonymous donor gametes being born to parents who adhere to traditional black South African cultural precepts about kinship formation is extremely *unlikely*.[65]

Also, just as an intended parent who is an adherent of traditional black South African cultural precepts about kinship formation is unlikely to, in the first place, conceive a child using male and female anonymous donor gametes, so an intended parent who elects to conceive a child using male and female anonymous donor gametes is *likely* to be an adherent of modern precepts about kinship formation that do not emphasise or require blood ties, and are likely to raise the child in a like-minded fashion. In short: *AB is not a Zulu man* – at least not the stereotypical 'Zulu man' intended by Moseneke DCJ.

[65] The *AB* minority observed that parents who are adherents to traditional black South African cultural precepts of kinship formation are *not compelled* to use male and female anonymous donor gametes to beget a child against their cultural beliefs. See *AB CC* (note 4 above) at para 197. However, the *AB* minority does not take this observation further into the context of balance of probabilities – the civil standard of proof. The *AB* minority's point of departure is that there should be a case-by-case approach, and that diversity should be respected. As such, the *AB* minority's position corresponds most closely with the counter-arguments analysed under the headings 'VI The Case-by-Case Approach' and 'VII The Value of Diversity' below.

Now consider Conclusion 2/Premise 4 of the tradition-based argument. Children in contemporary South Africa are *likely* to grow up in a community where traditional black South African cultural precepts about kinship formation are influential. This may hold true for children in general, but not for the subgroup of children that are relevant for purposes of the tradition-based argument, namely children conceived using anonymous male and female donor gametes. For this relevant subgroup of children, the exact opposite of Conclusion 2/Premise 4 holds true: children conceived using male and female anonymous donor gametes are extremely *unlikely* to grow up in a community where traditional black South African cultural precepts about kinship formation are influential, and are far more *likely* to grow up in a community that values modern, inclusive precepts about kinship formation. Accordingly, the tradition-based argument collapses.

VI THE CASE-BY-CASE APPROACH

One could also argue that even the *slightest possibility* of a child conceived using male and female anonymous donor gametes growing up in a community where traditional black South African cultural precepts about kinship formation are influential is still unacceptable, given the *devastating impact* that it would have on a child's self-identity and dignity. This calls for a precautionary approach that would entail the following reformulation of the tradition-based argument:

- Premise 1 and Conclusion 1/Premise 2 remain unchanged from the original formulation of the tradition-based argument.
- There is a *possibility*, however slight, that a child conceived using male and female anonymous donor gametes may find himself/herself growing up in a community that adheres to traditional black South African cultural precepts about kinship formation. (Premise 3, reformulated)
- Therefore (because of Premise 1), children who grow up in a community that adheres to traditional black South African cultural precepts about kinship formation are likely to internalise Values A and B. (Conclusion 2/Premise 4, reformulated)
- Therefore (because of Premises 2, 3 and 4), children who grow up in a community that adheres to traditional black South African cultural precepts about kinship formation, if conceived using anonymous male and female donor gametes, are likely to feel that they lack a foundational element of their identity. And, since identity is part of one's dignity, it also follows that such children will also feel that their dignity has been violated. (Conclusion 3/Premise 5, reformulated)
- Section 294 was designed to avoid a situation where surrogacy children can be conceived using anonymous male and female donor gametes – hence *eliminating* the *possibility* contemplated in Premise 4. (Premise 6, reformulated)
- Therefore (because of Premises 5 and 6), s 294 protects the best interests of the child, including the child's dignity, by eliminating the possibility contemplated in Premise 3, and hence eliminating the negative consequences contemplated in Premise 5. (Conclusion 4/Premise 7, reformulated)
- The paramountcy of the best interests of a child is a constitutional right; dignity is a constitutional right (Premise 8)
- Therefore (because of Premise 7 and 8), s 294 is aligned with the Constitution. (Conclusion 5, unchanged from the final conclusion of the original version of the tradition-based argument)

This reformulated version of the tradition-based argument, based on the precautionary principle, successfully addresses the commonsense probabilities counter-argument. However, consider the following question: can the possibility that some exceptional cases may occur where commissioning parents, who adhere to traditional black South African cultural precepts about kinship formation, counter-intuitively want to have a surrogacy child using male and female anonymous donor gametes, serve as basis for a *blanket ban* on all commissioning parents using male and female anonymous donor gametes? Such a blanket ban would be overly broad and disproportionate to the object that it wants to achieve. If one accepts the precautionary principle in the present context, it can serve as a basis to require commissioning parents in *individual* surrogacy agreement confirmation applications where the intention is that the surrogacy child will be conceived using male and female anonymous donor gametes, *not* to bring up the child in traditional black South African culture or any other culture that places similar emphasis on genetic lineage as being determinative for a person's identity. This examination of the best interests of a child on an *individual* basis would be aligned with Constitutional Court precedent,[66] and would adhere to the Constitution's proportionality principle. Conversely, accepting the precautionary principle cannot serve as a basis for a blanket ban, particularly where the rationale for the ban does not exist.[67]

This identifies the logical mistake in the reformulated version of the tradition-based argument based on the precautionary principle, namely that Conclusion 4/Premise 7 is an overly broad conclusion from its premises. The blanket ban on using male and female anonymous donor gametes embodied in s 294 cannot be said to protect the best interests of the child in all or even most cases, but only in some exceptional, counter-intuitive cases. In all but the most exceptional, counter-intuitive cases, such a ban does not contribute to its objective of protecting the best interests of the child, and simply limits the autonomy of commissioning parents. Accordingly, even the reformulated version of the tradition-based argument that is based on the precautionary principle fails to justify s 294.

Note that the examination of the best interests of a child on an individual basis with relation to the impact of being conceived using male and female anonymous donor gametes would not require any new legislation or complex reformulation of s 294. Chapter 19 of the Children's Act already contains a general provision, s 295(e), which allows for any issue that may impact on the best interests of the child to be considered by the court.[68]

VII THE VALUE OF DIVERSITY

The arguments against the tradition-based argument (in both its original and reformulated versions) have thus far focused on *actual* cultural diversity, logic, and the principle of proportionality. These arguments can be amplified by considering diversity as *value*. The preamble of the Constitution states that 'South Africa belongs to all who live in it, united in

[66] *AD v DW* [2007] ZACC 27, 2008 (3) SA 183 (CC) at para 55 (Child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case.)

[67] *AB CC* (note 4 above) at para 193 (What is in a child's best interests is a flexible inquiry which must be determined on the facts of each particular case.)

[68] Ibid at para 192 (Section 295(e) of the Children's Act mandates the High Court on every occasion it decides whether to confirm an agreement to engage with the value judgement of whether the agreement would be in the best interests of the child to be born.)

our diversity'. A rich body of human rights jurisprudence embraces South Africa's cultural diversity and supports the idea of a 'right to be different'.[69] This nostrum suggests that persons should not be forced to subordinate themselves to the cultural and religious norms of others.[70] This orientation is particularly applicable to kinship formation. In *Du Toit v Minister for Welfare and Population Development*,[71] the Constitutional Court held that: '[f]amily life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.'[72] Similarly, in *Minister of Home Affairs v Fourie*,[73] the Constitutional Court held that 'South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.'[74]

The tradition-based argument fails to provide for evolving concepts of family formation as contemplated in *Du Toit* and *Fourie*, but rather does the opposite: it legally entrenches genetic lineage as a condition for surrogacy family formation. On the issue of a genetic lineage (or rather the lack thereof), the Constitutional Court held as follows in *Fourie*: 'It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children.'[75]

Clearly, a family with genetically unrelated children should be entitled to the same respect and concern as any family with naturally conceived children. Instead of fixating only on cultural contexts where such a novel type of family formation would be frowned upon and where the child may suffer as a result, our constitutional commitment to diversity compels us to *acknowledge* that there are other cultural contexts within broader South African society that will allow an anonymous-donor-conceived surrogacy child to flourish, and the nature and suitability of any given cultural context can be assessed on a case-by-case basis. Moreover, if we take the value of diversity seriously, we should *celebrate* the creation of novel types of family formation, like families formed by using a surrogate mother and where the child is conceived using male and female anonymous donor gametes.[76]

In contrast, the tradition-based argument adopts a hegemonic approach that is anathema to the value of diversity.[77] The tradition-based argument effectively seeks to enforce one set of cultural norms (in this case traditional black South African cultural norms) on all people of our country, hence abrogating the 'right to be different'.

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[69] *Christian Education South Africa v Minister of Education* [2000] ZACC 11, 2000 (4) SA 757 (CC)('*Christian Education*') at para 24. The development of the 'right to be different' is analysed in the following articles: P Leneghan 'The Right to be Different: A Retrospective Analysis of the Constitutional Court Jurisprudence of Justice Albie Sachs – Weaving the Voice of Difference' (2010) 25 *Southern African Public Law* 169; S Woolman '"I am Large": Sachs, Whitman and Democracy' (2010) 25 *Southern African Public Law* 59.

[70] *Christian Education* (note 69 above) at para 24.

[71] [2002] ZACC 20, 2003 (2) SA 198 (CC).

[72] Ibid at para 19.

[73] [2005] ZACC 19, 2006 (1) SA 524 (CC)('*Fourie*').

[74] Ibid at para 59.

[75] Ibid at para 86.

[76] The *AB* minority was alive to the value of diversity, and came to a conclusion about the family similar to the one I set out in this paragraph. See *AB CC* (note 4 above) at para 119 (It is constitutionally impermissible to say that families with children who are not genetically connected to their parents are significantly worse off. The Constitution instead celebrates this difference.)

[77] Ibid at para 196 (Section 294 privileges one factor to the exclusion of all others.)

VIII THE LAW SHOULD NOT GIVE EFFECT TO PREJUDICE

The final argument against the tradition-based argument that I propose is based on the idea that the law should not give effect to prejudice. This argument presents a paradigm shift away from the previous three counter-arguments. It is best introduced by recalling the case of *Van Rooyen*. It is safe to assume that homophobia existed in the white (likely Afrikaans) community in which the lesbian mother lived in the mid-1990s. As a result, her children could have been socially stigmatised and harassed because of her open homosexuality. Should this social reality have informed the court's inquiry into the best interests of the child?

Although this question was not considered in *Van Rooyen*, it was answered in the affirmative in the American case of *Jacobson v Jacobson*[78] – a case that predates *Van Rooyen* by about a decade. Similar to *Van Rooyen*, *Jacobson* was also a custody dispute between two divorced parents that centred on the mother's new lesbian relationship. In *Jacobson*, the North Dakota Supreme Court awarded custody to the father, because it held that the children would 'suffer from the slings and arrows of a disapproving society' to a much greater extent than if they were to stay with the mother and her lesbian lover.[79] The principle established by the *Jacobson* decision was that the court can consider prevailing societal prejudice when interpreting the content of the best interests of the child. If this principle were to be adopted in South African jurisprudence, how many children would be placed in the care of homosexual parents? If, in a specific case, it can be proven that the child is likely to be socially stigmatised and harassed if placed in the care of a homosexual parent, should this not require a balancing between the best interests of the child and the right to non-discrimination of the homosexual parent? Although South African case law has dealt with other aspects of homosexual parenthood, it has not yet dealt with this specific question.

In American case law, the *Jacobson* judgment was not the end of the road. Three years after the *Jacobson* judgment, the principle underlying this judgment, namely that it is acceptable to consider prevailing societal prejudice when interpreting the content of the best interests of the child, was rejected by the United States Supreme Court in *Palmore v Sidoti*.[80] *Palmore* dealt with another type of societal prejudice different than that contemplated in *Jacobson*: racial prejudice. The facts were as follows: the mother and the father, both white, were divorced. Their child was placed in the custody of the mother. However, the following year the father filed suit to modify the custody order based on changed circumstances, being that the mother moved in with and subsequently married a black man. The Florida trial court ordered the child to be removed from the mother's custody for the following reason:

> This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie [the child] will, if allowed to remain in her present situation and attains school age, and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.[81]

The Florida trial court's judgment was affirmed by the Florida District Court of Appeal but was eventually reversed by the United States Supreme Court. The Supreme Court acknowledged the reality of racial prejudice in society, and that there was therefore a risk that the child may

[78] 314 NW 2d 78 (ND 1981).
[79] Ibid at paras 81–82.
[80] 466 US 429 (1984).
[81] Ibid at 431.

suffer a variety of 'pressures and stresses' if she stayed with her mother and black stepfather. However, it held as follows in a unanimous ruling:

> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty in concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. *Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect*.[82]

The principle that the law should never give effect to prejudice has also crystallised in South African constitutional jurisprudence – although in another context, namely employment discrimination against persons with HIV. In *Hoffmann v South African Airways*,[83] the Constitutional Court held that:

> The constitutional right of the appellant not to be unfairly discriminated against cannot be determined by ill-informed public perception of persons with HIV. […] Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era – it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly.[84]

This principle can find fruitful application to the tradition-based argument: first, the South African Constitution lists *social origin*, which includes clan or family membership,[85] as a prohibited ground of discrimination.[86] Second, the 'slings and arrows of a disapproving society' need not only be in the form of harassment or social stigmatising, but can also be through inculcating in the child's psyche from a tender age the cultural precepts that are likely to cause the child to experience negative feelings about himself/herself based on his/her social origin. It may be subtler, but no less insidious. In this way, a child's social environment uses the child's own psyche as a weapon against the child's self-identity and self-respect.

In this light, consider the first two premises of the tradition-based argument:

- In traditional black South African culture, (Value A), belonging to a clan is foundational for one's identity, and (Value B) belonging to a clan depends on blood ties with the clan, or (in less rigid varieties of tradition) depends on knowing the child's genetic origins. (Premise 1)
- Therefore (because of Premise 1), in traditional black South African culture, if a child was conceived using anonymous male and female donor gametes, (because of Value B) belonging to a clan would be impossible, and (because of Value A), the child will lack a foundational element of his/her identity. (Conclusion 1/Premise 2)

This constitutes *prejudice* against children based on their *social origins* – similar to prejudice based on inter alia race, sex, sexual orientation, and HIV status. Such prejudice may be beyond the reach of the law to control, but, as held in *Hoffmann*, in our constitutional dispensation

[82] Ibid at 433 (emphasis added).

[83] *Hoffmann v South African Airways* [2000] ZACC 17, 2001 (1) SA 1 (CC)('*Hoffmann*').

[84] Ibid at paras 36–37, fn reference omitted.

[85] C Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 96.

[86] Constitution s 9.

'we must never tolerate prejudice'.[87] By accepting societal prejudice as its very first premise, the tradition-based argument violates the principle that the law should never give effect to prejudice. Accordingly, the tradition-based argument is untenable in our constitutional dispensation. The tradition-based argument is in principle no different from arguing – based on the best interests and dignity of the child – that homosexual persons should not be allowed to have children based on persisting homophobia in certain parts of society, and that mixed-race couples should not be allowed to have children based on persisting racism in certain parts of society. Clearly, the law should not give effect to such prejudice.

The fact that social-origin prejudice is deeply rooted in cultural tradition offers no immunity for such prejudice. While s 31 of the Constitution protects the right of cultural communities to enjoy their culture, this right cannot be used to shield cultural practices that are inconsistent with the Bill of Rights;[88] furthermore, as held in *Fourie*, 'the antiquity of a prejudice is no reason for its survival'.[89] It is worth remembering that the Constitution envisions South Africa to be an *open society*. Sachs J once remarked that '[t]he concept of an open society must indeed be regarded as one of the central features of the bill of rights'.[90] The idea that tradition can never be sacrosanct is part of the very definition of an open society proposed by Popper, the philosopher who is most closely associated with the concept. He defined an open society as a society that 'rejects the absolute authority of the merely established and the merely traditional while trying to preserve, to develop, and to establish traditions, old or new, that measure up to [the] standards of freedom, of humaneness, and of rational criticism'.[91]

IX CONCLUSION

Earlier in this article, I posed the question: What deeply rooted beliefs could have caused the majority of the Constitutional Court in *AB* to negate the rule of law – by ignoring and even perverting the evidence – when it came to the issue of children's blood ties with their parents? The likely answer, I suggest, is found in the sociological fact that traditional black South African cultural precepts about kinship formation, which place great emphasis on blood ties, continue to be influential in contemporary South African society. This fact can be used as the basis for a superficially convincing argument in support of the *AB* majority judgment – the tradition-based argument. Especially for people who themselves have been brought up and identify with traditional black South African cultural precepts about kinship formation, the tradition-based argument and its conclusion may seem self-evident. However, in this article I have endeavoured to show that when the tradition-based argument is subjected to careful analysis, it fails to convince. The most strident counter-argument is that the tradition-based argument relies on and fortifies cultural precepts that are discriminatory in nature, hence violating our Constitution's commitment to equality. While the first three counter-arguments implicitly accept that it is constitutionally permissible to consider social prejudice when determining the best interests of the child, the fourth counter-argument strikes at the heart of the tradition-based argument by unmasking and confronting its basic assumption. In this light, the first three counter-arguments can be regarded as betrayals of the Constitution for implicitly accepting and

[87] *Hoffmann* (note 83 above) at para 37.

[88] *Christian Education* (note 69 above) at para 26.

[89] *Fourie* (note 73 above) at para 74.

[90] *S v Lawrence; S v Negal; S v Solberg* [1997] ZACC 11, 1997 (4) SA 1176 (Sachs J, concurring) at para 146.

[91] KR Popper *The Open Society and its Enemies* Vol I (1950) Preface ix.

hence legitimising the prejudiced basis of the tradition-based argument. The fourth counter-argument – the law should not give effect to prejudice – calls for a paradigm shift away from the way that both the *AB* majority and minority judgments approached the interpretation of the best interests of the child and dignity.

AB is a reminder that constitutional rights, in this case the best interests of the child and dignity, acquire their *meaning* through interpretation by the courts. Determining the meaning of a right inevitably requires value judgements that are informed by prevailing societal and cultural norms. This can be problematic, especially in contexts that are unconventional. Cultural norms may be deep-seated in society (or a section thereof), but not necessarily aligned with the values that the Constitution aspires to. The power of convention to subvert litigants and the courts from exercising proper (self-)scrutiny should not be underestimated. As a result of the blinding power of convention, rights that were intended to protect *against* prejudice, can paradoxically become *instruments* of prejudice.